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SENATE BILL DRS45092-MQ-13

Short Title: Real Property-Tenancy in Common Changes. (Public)

Sponsors: Senators Galey, Daniel, and Overcash (Primary Sponsors).

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO CODIFY THE LAW OF TENANCY IN COMMON IN THIS STATE, AS
3 RECOMMENDED BY THE NORTH CAROLINA BAR ASSOCIATION.

4 The General Assembly of North Carolina enacts:

5 SECTION 1. Chapter 41 of the General Statutes is amended by adding a new Article
6 to read:

7 "Article 7.

8 "Tenancy in Common.

9 **"§ 41-80. Definitions; construction.**

10 (a) The following definitions apply in this Article:

11 (1) Actual ouster. – An entry onto or possession of the property by a tenant in
12 common that is a clear, positive, and unequivocal act, equivalent to an open
13 denial of the cotenant's rights or title in the property and putting the cotenant
14 out of seizin.

15 (2) Constructive ouster. – A presumption of ouster when a tenant in common has
16 sole possession of the property for 20 years and all of the following criteria
17 are met:

18 a. No acknowledgement on the part of that tenant in common of the
19 rights or title of the cotenant in the property.

20 b. No demand or claim on the part of the cotenant for rents, profits, or
21 possession.

22 c. The cotenant has no disability to act at the time the possession
23 commenced.

24 (3) Conveyance. – A transfer of title to real property by deed, devise, or other
25 means of transferring title.

26 (b) The following rules of construction apply in this Article, unless the context requires
27 otherwise:

28 (1) References to "property" mean the real property held in a tenancy in common
29 as a whole.

30 (2) References to "cotenant" mean the cotenant of a tenant in common, and
31 references to the singular "cotenant" of a tenant in common mean the plural
32 "cotenants" if there is more than one cotenant of a tenant in common.

33 **"§ 41-81. Nature of tenancy in common, in general.**

34 Tenancy in common ownership includes the following characteristics:

35 (1) Two or more persons hold separate undivided interests in the property.



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- 1 (2) The interests of the tenants in common in the property may be equal or unequal
2 percentages. The interests are deemed to be equal unless otherwise specified
3 in the instrument of conveyance. The percentage of interests acquired by
4 intestacy are determined under Chapter 29 of the General Statutes.
5 (3) The tenants in common hold by several and distinct titles with each tenant in
6 common having a right to possession of the property.
7 (4) The tenants in common need not take from the same instrument or at the same
8 time.
9 (5) The tenants in common do not have a right of survivorship.

10 **"§ 41-82. Creation of a tenancy in common.**

11 (a) A tenancy in common is created by a conveyance that meets one of the following
12 criteria:

- 13 (1) The conveyance is to two or more grantees that expresses an intent that the
14 grantees hold separate undivided interests in the property.
15 (2) The conveyance is to one or more grantees that expresses an intent that the
16 grantor and the grantee or grantees hold separate undivided interests in the
17 property.
18 (3) The conveyance does not express an intent described in subdivision (1) or (2)
19 of this subsection and, with nothing else appearing, does not under the
20 circumstances create an estate in property other than a tenancy in common.

21 (b) The following terms in an instrument of conveyance shall be deemed to express an
22 intent to create a tenancy in common unless the instrument provides otherwise:

- 23 (1) Equal portions.
24 (2) Equally divided.
25 (3) Share and share alike.
26 (4) Share equally.
27 (5) Their respective portions.

28 (c) An interest in property held by tenants in common who subsequently marry each other
29 remains held as tenancy in common unless by separate instrument the spouses convey the interest
30 to themselves to create a tenancy by the entirety or a joint tenancy with right of survivorship.

31 (d) Unless otherwise provided in the instrument of conveyance, a tenancy in common
32 interest conveyed to grantees married to each other shall be held in a tenancy by the entirety and
33 the married grantees shall be treated as a single tenant in common, including where any of the
34 following occur:

- 35 (1) The tenancy in common interest is conveyed to the married grantees and to
36 one or more other grantees as tenants in common in the same instrument.
37 (2) A tenant in common's interest in the property is conveyed by that tenant in
38 common to the married grantees.

39 (e) A tenancy in common may be created by operation of law, including the following:

- 40 (1) When two or more individuals take undivided interests in real property upon
41 intestate succession.
42 (2) Upon termination of a joint tenancy with right of survivorship as provided in
43 G.S. 41-73.
44 (3) Upon termination of a tenancy by the entirety by voluntary sale or
45 conveyance, voluntary partition, or divorce as provided in G.S. 41-63(1), (2),
46 and (5).

47 **"§ 41-83. Possession of property held as tenants in common.**

48 (a) Each tenant in common has a right to enter upon the property and to occupy and use
49 it subject to the rights of the cotenant.

1 (b) The possession of one tenant in common is the possession of the cotenant. Unless an
2 actual ouster occurs, one tenant in common cannot bring an action against a cotenant for taking
3 possession of property to which each has a right as a cotenant.

4 **"§ 41-84. Authority of a tenant in common to bind cotenant.**

5 An act by a tenant in common in relation to the property (i) cannot bind a cotenant with
6 respect to a third party unless it was previously authorized or subsequently ratified by the
7 cotenant and (ii) is presumed to have been done by authority and for the benefit of the cotenant.

8 **"§ 41-85. Rents and profits from property held as tenants in common.**

9 (a) Tenants in common share proportionally in the rents and profits of the property
10 received from third parties according to their interests in the property.

11 (b) If a tenant in common has received more than that tenant in common's share of the
12 rents and profits from the property, a cotenant may bring an action for an accounting to recover
13 the cotenant's share of the rents and profits.

14 **"§ 41-86. Reimbursement of a tenant in common.**

15 (a) A tenant in common who makes necessary repairs to the property is entitled to
16 contribution from the cotenant for those repairs unless one of the following applies:

17 (1) Exclusive possession. – The tenant in common is not entitled to contribution
18 from the cotenant for necessary repairs made during a period of exclusive
19 possession.

20 (2) Income producing property. – The tenant in common is entitled to a credit for
21 necessary repairs in an action or partition where the cotenant seeks an
22 accounting of rents and profits from the property.

23 (b) A tenant in common who makes improvements to the property is not entitled to
24 contribution from a cotenant or a credit in an action where the cotenant seeks an accounting of
25 rents and profits from the property for those improvements; except that, in an action for partition,
26 the tenant in common is entitled to contribution from the cotenant in one of the following forms:

27 (1) The lesser of the (i) value added to the property or (ii) costs of the
28 improvements, in accordance with G.S. 46A-27.

29 (2) The right to have the improved part of the property allocated to the tenant in
30 common if the allocation can be done without prejudice to the cotenant.

31 (c) A tenant in common who pays taxes due or interest on an existing encumbrance of
32 the property is entitled to reimbursement from the cotenant for the amount paid; except that no
33 entitlement to reimbursement exists for interest paid on an existing encumbrance for any period
34 where the tenant in common is in exclusive possession of the property. Payment by any tenant in
35 common of unpaid taxes, including any associated interest and costs, constituting a lien upon the
36 property, is governed by G.S. 105-363.

37 **"§ 41-87. Modification by agreement.**

38 Nothing in this Article shall be deemed to prohibit tenants in common from entering into an
39 agreement with respect to the property, including possession, sharing rents and profits,
40 reimbursement related to the property, and the authority of a tenant in common to bind a cotenant.

41 **"§ 41-88. Actual ouster; action for ejectment.**

42 A tenant in common claiming ouster by a cotenant may bring an action for ejectment, but not
43 for partition, seeking to compel the cotenant in possession to admit the ousted tenant in common
44 into possession.

45 **"§ 41-89. Adverse possession by a tenant in common.**

46 (a) A tenant in common without color of title may acquire title to the cotenant's interest
47 in the property by 20 years' adverse possession as provided by G.S. 1-40, subject to the following:

48 (1) Possession of the property is not considered adverse until there is an actual
49 ouster or constructive ouster of the cotenant by the tenant in common.

50 (2) If a tenant in common purports to convey the whole estate, all of the following
51 apply:

- 1 a. The grantee receives only the grantor's interest.
2 b. The instrument of conveyance is not color of title as against the
3 grantor's cotenant.
4 c. Adverse possession by the grantee for 20 years is required to bar entry
5 of the grantor's cotenant.
6 (b) A tenant in common with color of title may acquire title to the cotenant's interest in
7 the property by seven years' adverse possession as provided by G.S. 1-38, subject to the
8 following:
9 (1) Possession of the property is not considered adverse until there is an actual
10 ouster of the cotenant by the tenant in common.
11 (2) If a tenant in common purports to convey the whole estate, all of the following
12 apply:
13 a. The grantee receives only the grantor's interest.
14 b. The instrument of conveyance is not color of title against the grantor's
15 cotenant.
16 c. Seven years' possession by the grantee under the deed will not ripen
17 into title to the whole estate.
18 (3) If a grantee receives a deed purporting to convey the whole estate in a judicial
19 proceeding to sell the interest of a tenant in common, including a sale for
20 partition, a tax foreclosure, or a sale to pay debts, the deed is deemed color of
21 title and the grantee can acquire title as against all tenants in common by seven
22 years' adverse possession.

23 **"§ 41-90. Alienation of tenant in common's undivided interest in the property.**

- 24 (a) Each tenant in common may convey, lease, mortgage, place a deed of trust, or place
25 a lien on property on that tenant in common's undivided interest in the property to a cotenant or
26 a third party without the joinder of any other cotenant.
27 (b) The grantee of an interest in the property from a tenant in common acquires only the
28 interest of the grantor and becomes a tenant in common with the cotenant, even if the instrument
29 of conveyance purports to convey the whole estate.

30 **"§ 41-91. Obligations among tenants in common; fiduciary relationship.**

- 31 (a) Tenants in common occupy a relationship of trust and confidence to each other as to
32 the property that obligates all the tenants in common to put forth their best efforts to protect and
33 secure the common interest.
34 (b) Tenancy in common does not create a fiduciary relationship among the tenants in
35 common unless a tenant in common undertakes to act for the benefit of a cotenant or otherwise
36 engages in conduct creating a fiduciary relationship.

37 **"§ 41-92. Acquisition of title by one tenant in common.**

- 38 (a) If a tenant in common acquires title to the property upon a sale of the property to pay
39 the debt for which (i) a tenant in common is partially liable as a cotenant or (ii) all of the tenants
40 in common are liable, the title inures to the benefit of all of the tenants in common.
41 (b) If a third party, with collusion, acting as agent of one of the tenants in common,
42 acquires title to property upon a sale of the property to pay the debt for which all of the tenants
43 in common are liable and subsequently conveys that title to that tenant in common, the title inures
44 to the benefit of all of the tenants in common.
45 (c) If a third party, without collusion, acquires title to the property upon a sale of the
46 property to pay a debt for which all of the tenants in common are liable and subsequently conveys
47 that title to one of the tenants in common, that tenant in common takes title to the property in that
48 tenant in common's own right, valid as against the cotenants of that tenant in common.
49 (d) A tenant in common who receives an interest in the property because of the death of
50 an ancestor holding an interest in the property may acquire the ancestor's interest in the property

1 upon a sale to pay the debt of the deceased ancestor secured by the ancestor's interest in the
2 property.

3 (e) A tenant in common may acquire title to a cotenant's interest in the property upon a
4 sale of the cotenant's interest in the property to pay the debt of the cotenant.

5 **"§ 41-93. Rights of creditors in a tenancy in common property.**

6 (a) The interest of a tenant in common in the property may be sold pursuant to a
7 proceeding for satisfaction of a debt to a creditor, including the following:

8 (1) In an execution sale where the creditor has obtained a judgment lien against
9 the tenant in common.

10 (2) Under a power of sale in a mortgage or deed of trust against the tenant in
11 common's interest in the property.

12 (3) In a judicial sale where the tenant in common's interest in the property is
13 ordered to be sold.

14 (b) A sale of an interest of a tenant in common described in subsection (a) of this section
15 does not affect the title of a cotenant's interest in the property.

16 **"§ 41-94. Action against third party by tenant in common.**

17 (a) A tenant in common may recover possession of the property for the benefit of all of
18 the tenants in common as against a third party claiming adversely to the tenants in common.

19 (b) A tenant in common may recover only for that tenant in common's proportional part
20 of the damages recovered in an action against a third party for trespass.

21 **"§ 41-95. Termination of a tenancy in common.**

22 Events terminating a tenancy in common include the following:

23 (1) Partition of the property under Chapter 46A of the General Statutes.

24 (2) Voluntary partition of the property among tenants in common executing one
25 or more instruments conveying the property held as tenants in common to
26 themselves in separate tracts.

27 (3) Conveyance of all interests in the property to one owner.

28 (4) Acquisition by one tenant in common of the ownership of the property by
29 adverse possession.

30 **"§ 41-96. Inapplicability of Article.**

31 Except as otherwise explicitly provided, this Article does not apply to the following:

32 (1) Property in a general partnership covered by Chapter 59 of the General
33 Statutes.

34 (2) An action for partition and its effect under Chapter 46A of the General
35 Statutes.

36 (3) Tenancy in common in personal property.

37 **"§ 41-97. Common law of tenancy in common; equitable principles.**

38 The common law of tenancy in common and principles of equity supplement this Article,
39 except to the extent that they conflict or are inconsistent with the provisions of this Article or the
40 laws of this State."

41 **SECTION 2.** This act is effective when it becomes law.