FORECLOSURE UNDER POWER OF SALE

I. Introduction

A. In general.

1. Foreclosure is a method of enforcing payment of a debt secured by a mortgage or deed of trust upon real property by selling the real property and applying the proceeds of the sale towards the satisfaction of the debt.

2. Reference will be made in this outline to deeds of trust, by far the most common real property security instrument in North Carolina, but the same principles are equally applicable to mortgages with powers of sale and other analogous documents.

a) Deeds of trust (three-party instruments), rather than mortgages (two-party instruments), are used almost exclusively in North Carolina. By using a third party as trustee, the lender is allowed to purchase the secured real property at the foreclosure sale and thus protect its interest.

b) If the lender in a two-party mortgage (or the trustee in a three-party deed of trust) bids in and purchases the property at foreclosure, the sale is voidable by the debtor not because there is, but because there may be, fraud. [*Lockridge v. Smith*, 206 N.C. 174, 173 S.E. 36 (1934).] Note: It is common for the trustee to put in a bid on behalf of the lender, which does not violate the prohibition against purchase by the trustee.

3. In North Carolina, foreclosure must be either by a civil action, with the sale held pursuant to the judicial sale provisions in G.S. § 1-339.1 through 1-339.40, or, if expressly provided in the deed of trust or mortgage, by power of sale pursuant to G.S. § 45-4 through 45-21.33. Foreclosure by civil action is extremely rare; almost always the foreclosure is done under a power of sale. This chapter covers foreclosure by power of sale. (For sale after a civil action, see chapter in this manual entitled Judicial Sales, Civil Procedures, Chapter 43.)

4. Provisions regarding foreclosure by power of sale do not affect any right to foreclosure by judicial sale. [G.S. § 45-21.2]

5. The power of sale is created in the instrument itself, usually a deed of trust, which is security for an obligation or debt, usually evidenced by a promissory note.

B. Parties.

1. The debtor or borrower (property owner) may be referred to as the trustor or mortgagor.

2. The lender or creditor or holder of a deed of trust or mortgage may be referred to as the mortgagee.

3. The third party between the debtor and lender created by a deed of trust is known as the trustee.

4. In a deed of trust, the debtor (the party of the first part) conveys legal title of the real property to the trustee (the party of the second part), which the trustee holds in trust for both the debtor and the lender (the party of the third part).

C. Power of sale.

1. The terms of the instrument may give the trustee power to sell the real property by foreclosure on behalf of the lender if the debtor defaults on the loan secured by the deed of trust.

2. Upon default on the loan by the debtor, the lender may request that the trustee proceed to foreclose on the secured real property, according to the terms of the deed of trust.

3. The debtor has the right to terminate the power of sale by curing the default, which may mean paying the full amount due under the note, plus costs.

D. Procedure.

1. Since the procedure to enforce rights under G.S. § 45-21.1 et seq. is instituted by filing a notice of hearing instead of a complaint and summons, it is characterized as a "special proceeding." [*Phil Mechanic Constr. Co. v. Haywood*, 72 N.C. App. 318, 325 S.E.2d 1 (1985).]

2. Although a foreclosure is characterized as a special proceeding, the clerk does not issue a special proceeding summons. The procedure for foreclosures is strictly regulated by G.S. § 45-21.1 et seq. [*Id.*] (Foreclosures not governed by G.S. Chapter 1, Article 33, Special Proceedings.)

3. Any notice, order or other papers required by G.S. Chapter 45, Article 2A to be filed must be filed in the same manner as a special proceeding. [G.S. § 45-21.16(g)]

E. Set out below is the order of proceedings in a foreclosure; each stage of the process is discussed in detail later in the outline.

1. Notice by trustee

2. Hearing by clerk

3. Sale by trustee

4. Report of sale

5. Upset bid periods

6. If there is a defaulting bidder, resale followed by upset bid periods

7. Final report of sale and account by trustee

8. Audit by clerk

9. Order of possession, if needed

10. Clerk's receipt of surplus proceeds in certain cases

II. Trustee

A. Role of trustee.

1. In general.

a) Trustee (usually an attorney) initiates the foreclosure process upon request of the lender.

b) Trustee is a fiduciary to both the lender and debtor, and does not advocate for either at a foreclosure hearing. [*Mills v. Mutual Bldg. & Loan Ass'n*., 216 N.C. 664, 6 S.E.2d 549 (1940).]

c) Trustee has a fiduciary duty to use diligence and fairness in conducting the sale. [*Sloop v. London*, 27 N.C. App. 516, 219 S.E.2d 502 (1975).]

d) Trustee (or agent) cannot bid on or purchase the property at the sale. [*Lockridge v. Smith*, 206 N.C. 174, 173 S.E.2d 36 (1934).] Note: It is common for the trustee to put in a bid on behalf of the lender, which does not violate this prohibition.

2. Special considerations for a trustee who is an attorney:

a) Trustee who is also an attorney is subject to the Rules of Professional Conduct governing lawyers. (See 2003 Amended Revised Rules of Professional Conduct; 27 N.C. Admin. Code (2003)).

b) The responsibilities of an attorney in the role of trustee primarily arise from that trustee's fiduciary relationship with the lender and debtor as opposed to an attorney-client relationship with either party. This fiduciary relationship requires impartiality toward trustor and beneficiary at a foreclosure hearing.

c) For guidance as to the role of a trustee in the context of contested matters during the foreclosure hearing and in proceedings subsequent to and related to the foreclosure, see Rule 1.7, Amended Revised Rules of Professional Conduct; RPC 82; and RPC 90.

3. A trustee who is not an attorney is not bound by ethics rules and ethics opinions governing lawyers, but he or she still has a fiduciary responsibility to both debtor and lender.

B. Substitute trustee.

1. There can be, and usually is, a substitution of the originally named trustee before initiating a foreclosure.

2. Holders or owners of a majority of the amount of the indebtedness secured by the deed of trust may, in their discretion, substitute the trustee by executing a written document properly recorded pursuant to G.S. Chapter 47, Probate and Registration. [G.S. § 45-10(a); 45-16]

3. A substitute trustee succeeds to all the rights, title and duties of the original trustee and has the power to foreclose the instrument according to its terms upon default. [G.S. § 45-10(b), (c); *Pearce v. Watkins*, 219 N.C. 636, 14 S.E.2d 653 (1941).] The original trustee's powers cease upon the recording of the assignment to the successor trustee.

4. **Before proceeding in a foreclosure hearing where there is a substitute trustee, the clerk should check the time and date of the recording of the substitution instrument to make sure that the trustee initiating foreclosure has the authority to exercise the power of sale at the time of filing.** If the notice of hearing was filed before the recording of the substitution instrument, the trustee must dismiss the case and reinstitute it by filing a new notice of hearing. [See *In re Foreclosure of Gilmore*, 206 N.C. App. 596, 698 S.E.2d 768 (2010) (unpublished opinion).]

C. Successor trustee.

1. The substitute trustee provision of G.S. § 45-10(a), discussed above, is almost always the provision invoked when a change in trustee is desired. Other special circumstances, however, can also arise in which the clerk may be asked to appoint a successor trustee pursuant to other statutory provisions.

2. Examples: G.S. § 45-6 (appointment of successor when executor or administrator of deceased trustee renounces trust); G.S. § 45-9 (appointment of successor to incompetent trustee); and G.S. § 45-11 (appointment of successor upon application of subsequent or prior lienholder).

D. Trustee compensation.

1. The trustee conducting sale is entitled to compensation as provided in the deed of trust. [G.S. § 45-21.15(a)]

a) If no sale is held, see special provisions for "partial" compensation in G.S. § 45-21.15(b).

b) Trustees may not be granted a commission pursuant to G.S. § 32-54, which sets out a statutory compensation amount for trustees, because that statute applies to trusts covered under G.S. Chapter 36C, which excludes trustees under a deed of trust. [G.S. §§ 32-53(4); 36C-1-103(22)]

2. Attorney fees to trustee's attorney. Although not specifically listed in G.S. § 45-21.31(a)(1), the fees a trustee must pay to an attorney representing the trustee in a foreclosure proceeding are costs and expenses of the sale, and therefore must be paid to the trustee. [*In re Vogler Realty, Inc.*, 722 S.E.2d 459 (N.C. 2012); *Merritt v. Edwards Ridge*, 323 N.C. 330, 372 S.E.2d 559 (1988).]

E. Attorney fees to the trustee.

1. Except in unusual circumstances, there is no authority to justify receipt by a trustee/attorney of both a trustee's fee and a separate attorney fee for a foreclosure under power of sale contained in a deed of trust.

a) A trustee/attorney cannot ethically assume the role of an advocate for one party against the other. Therefore, G.S. § 6-21.2 (authorizing enforcement of obligation to collect attorney fees in notes) should not be read to permit trustee/attorney to collect additional attorney fee in foreclosure under power of sale contained in deed of trust since that statute deals with attorney fees of the lender's attorney. [*In re Vogler Realty, Inc.*, 722 S.E.2d 459 (N.C. 2012).]

(1) Lender may be able to bring separate civil action to enforce obligation in note to pay attorney fees pursuant to G.S. § 6-21.2, except where note secured by purchase money mortgage or deed of trust (seller extends credit to buyer to purchase the property). [See *Merritt v. Edwards Ridge*, 323 N.C. 330, 372 S.E.2d 559 (1988); *Colson & Colson Constr. Co. v. Maultsby*, 103 N.C. App. 424, 405 S.E.2d 779 (1991).] G.S. § 45-28.38, which prohibits deficiency judgments, applies only to purchase money mortgages and deeds of trust. [See *Childers v. Parker's, Inc.*, 274 N.C. 256, 162 S.E.2d 481 (1968).]

(2) See also *Coastal Prod. Credit v. Goodson Farms*, 70 N.C. App. 221, 319 S.E.2d 650 (1984) (attorney fees for time spent in bankruptcy, foreclosure and receivership actions reasonably related to collection of underlying promissory note allowed under G.S. § 6-21.2.)

2. **Clerk's audit. However, the clerk does not have authority to review for reasonableness a trustee-attorney's payment of attorney fees to himself or herself in the context of an audit of the final sale of the property.** The Supreme Court has held that this action would involve an improper exercise of the clerk's judicial discretion. [*In re Vogler Realty, Inc.*, 722 S.E.2d 459 (N.C. 2012) (majority holding that clerk was not authorized to reduce an attorney

fee to trustee who had, contrary to law, paid himself 15% of the underlying debt pursuant to G.S. § 6-21.2).]

III. Foreclosure Hearing

A. Basis for hearing.

1. A trustee seeking to exercise a power of sale upon a default must schedule a hearing with the clerk and serve a notice of hearing pursuant to the requirements of G.S. § 45-21.16 and any requirements in instrument itself. (See section III.B below for notice of hearing requirements.)

a) A hearing is required, by statute and due process, to give debtor opportunity to be heard before his or her property is foreclosed and sold. [*Fleet Nat'l Bank v. Raleigh Oaks Joint Venture*, 117 N.C. App. 387, 451 S.E.2d 325 (1994); *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975).]

b) Historically, foreclosure under power of sale has been a private contractual remedy; the purpose of the notice and hearing provisions of G.S. § 45-21.16 is to satisfy minimum due process requirements, not alter the essentially contractual nature of the remedy. [*In re Burgess*, 47 N.C. App. 599, 267 S.E.2d 915 (1980).]

c) Hearing under G.S. § 45-21.16 is designed to provide a less time-consuming and less expensive procedure than foreclosure by action and is not intended to settle all matters in controversy. [*In re Foreclosure of Helms*, 55 N.C. App. 68, 284 S.E.2d 553 (1981).]

2. Doubts as to interpretation of the statutes should be resolved not in favor of the unrestricted power of the trustee, but in favor of preserving the equitable title of the mortgagor. [*Spain v. Hines*, 214 N.C. 432, 200 S.E. 25 (1938); *Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 344 S.E.2d 555 (1986).]

B. Notice of hearing. [G.S. § 45-21.16]

1. Foreclosure is initiated by the filing of a notice of hearing by the trustee, which is the equivalent of filing a petition and issuance of a summons in a special proceeding.

a) Generally, the trustee contacts the clerk's office to get a date for the hearing, then files a notice of hearing with the clerk and serves copies on all parties.

b) The clerk sets up the special proceeding case file and collects the costs under G.S. § 7A-308(a)(1) at the time of the filing of the notice of hearing.

2. Notice of hearing must be filed with the clerk and then served on all proper persons. [G.S. § 45-21.16(a)]

3. Although not a statutory requirement, the notice of hearing may be accompanied by a separate document, usually a petition or motion seeking an order to serve and/or authorization to sell.

4. If property is located in more than one county, only one hearing is necessary but the trustee must file a notice of hearing in all counties where a portion of the property is located.

    a) Since notices required to be filed in the foreclosure must be filed in the clerk's office in the same manner as special proceedings, the clerk in each county where a notice of hearing is filed should create a special proceedings case file, collect the costs, and index the case.

5. Who must be served.

    a) Any person to whom the deed of trust itself directs notice be sent in case of default. [G.S. § 45-21.16(b)(1)]

    b) Any person obligated to pay indebtedness against whom the holder intends to assert liability. [G.S. § 45-21.16(b)(2)]

        (1) A person obligated to pay indebtedness who fails to receive proper notice of foreclosure hearing not liable for any deficiency remaining after the sale. [G.S. § 45-21.16(b)(2)]

        (2) **Example.** A, B, and C are primarily obligated on the note. D is obligated as a guarantor. However, the trustee serves notice of hearing on A, B, and C only. Trustee does not have to give notice to D unless the trustee intends to assert liability against D for any unpaid portion of indebtedness after foreclosure.

        (3) If a person obligated to pay the indebtedness has not been given notice, the clerk may, but has no obligation to, inquire whether trustee intends to assert liability against that person.

    c) Every record owner of the real estate whose interest is of record in the county where the real property is located at the time the notice of hearing is filed in that county. [G.S. § 45-21.16(b)(3)]

        (1) "Record owner" means any person owning a present or future interest in the real property, which interest is of record at the time that the notice of hearing is filed and would be affected by the foreclosure proceeding.

            (a) "Record owner" is intended to refer to either the original mortgagor of the property or a present owner who has purchased the property subject to a mortgage. [*Seashore Properties, Inc. v. East Federal Savings and*

Loan Association, 47 N.C. App. 675, 267 S.E.2d 693 (1980) (recording with the register of deeds of management agreement that specified management company was to receive 50% interest in real and personal property as compensation for its services did not entitle management company to notice of foreclosure).]

(2) A tenant in possession under an unrecorded lease or rental agreement is not a record owner. (Note, however, that tenants must be served with a notice of sale of the property. [G.S. § 45-21.17(4)])

(3) The trustee in a deed of trust or the owner or holder of a mortgage, deed of trust, judgment, mechanics or materialman's lien or other security interest in real property is not included in the definition of record owner.

(4) Persons taking as heirs or devisees are not record owners unless a personal representative has qualified in the county where the real estate is located or a will has been probated in that county. However, because G.S. § 28A-15-2(b) provides that title to real property is vested in the heirs/devisees as of the time of death and upon probate of a will, title is vested in the heirs/devisees and relates back to decedent's death, a trustee who does not give notice to heirs or devisees is creating a situation where the foreclosure could be set aside later when heirs/devisees discover the foreclosure or where the prospective purchaser who discovers the death will refuse to purchase because the current owners were not given notice. [*Collins v. R.L. Coleman & Co*., 262 N.C. 478, 137 S.E.2d 803 (1964) (attempted foreclosure of tax lien on property listed in name of dead person, when neither notice of the listing nor of the foreclosure has been given to heirs who are the true owners, is void; in that case taxes being foreclosed had accrued on property after death of owner; and heirs had not complied with requirement to list property for taxes).]

d) Decedents' estates. Although not "a record owner" unless the decedent's will is probated and devises real property to the estate, the personal representative of a decedent's estate should be made a party because he or she is a potential record owner with the right to bring a special proceeding under G.S. § 28A-15-1(c) and § 28A-17-1 to sell the property to pay debts of the estate.

6. Time for service. Notice of hearing must be served at least 10 days prior to the date of the hearing. However, if the trustee is relying on posting for service, the notice must be posted at least 20 days prior to the date of the hearing. [G.S. § 45-21.16(a)]

7. Manner of service.

   a) Debtor must be given personal notice of foreclosure hearing in the manner prescribed by G.S. § 45-21.16(a). Actual notice to debtor does not substitute for proper service upon debtor. [*PMB, Inc. v. Rosenfeld*, 48 N.C. App. 736, 269 S.E.2d 748 (1980) (mortgagee sent letter and telephoned mortgagor); *but see Fleet Nat'l Bank v. Raleigh Oaks Joint Venture*, 117 N.C. App. 387, 451 S.E.2d 325 (1994) (court refused to allow defense of improper service by publication when party had actual notice and did not attend foreclosure hearing, did not appeal clerk's order, and waited 22 months after hearing to object to service).]

   b) Notice may be served:

      (1) In any manner provided by Rules of Civil Procedure for service of summons. [G.S. § 45-21.16(a)] Rule 4(j)(1) of the Rules of Civil Procedure (G.S. § 1A-1, Rule 4) permits service on a natural person in the following manner:

         (a) By delivering a copy to the person.

         (b) By leaving the notice at the person's dwelling house or usual place of abode with a person of suitable age and discretion who also resides in the dwelling.

         (c) By delivering a copy to an agent authorized by appointment or by law to be served or to accept service of process on the person.

         (d) By mailing a copy by registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

         (e) By depositing with a designated delivery service authorized by 26 U.S.C. § 7502(f)(2), addressed to the party to be served, delivery to the addressee, and obtaining a delivery receipt. ("Delivery receipt" can include an electronic or facsimile receipt.)

(f) By mailing a copy by signature confirmation as provided by the United States Postal Service, addressed to the party to be served, and delivering to the addressee.

(2) By posting notice on the property in a conspicuous place and manner not less than 20 days prior to the date of the hearing, in those instances in which service by publication would be authorized under the Rules of Civil Procedure. See subsection c) below. [G.S. § 45-21.16(a)] Rule 4(j1) of the Rules of Civil Procedure governs service by publication.

c) Service by posting.

(1) A party who cannot be served by personal delivery, registered or certified mail, or designated delivery service after a reasonable and diligent effort may be served by posting. [G.S. §§ 45-21.16(a); 1A-1, Rule 4(j1)]

(a) Due diligence requires the plaintiff to use all resources reasonably available to attempt to locate a party. [*Williamson v. Savage,* 104 N.C. App. 188, 408 S.E.2d 754 (1991); *Fountain v. Patrick*, 44 N.C. App. 584, 261 S.E.2d 514 (1980).] "Reasonableness" does not, however, require a party to explore every possibility of ascertaining the person's location. [*Jones v. Wallis*, 712 S.E.2d 180 (N.C. App. 2011).]

(b) Where the information necessary for proper service is either known or can with due diligence be ascertained, service by publication (posting in foreclosures) is improper. [*Jones v. Wallis*, 712 S.E.2d 180 (N.C. App. 2011); *Agbemavor v. Keteku*, 177 N.C. App. 546, 629 S.E.2d 337 (2006).]

(c) The trustee must check public records to determine the whereabouts of a party to be served. [*Jones v. Wallis*, 712 S.E.2d 180 (N.C. App. 2011); *Williamson v. Savage*, 104 N.C. App. 188, 408 S. E.2d 754 (1991).]

(d) But the trustee need not undertake other means of service before posting when it would be futile to do so. [*Cf. County of Wayne ex rel. Williams v. Whitley*, 72 N.C. App. 155, 323 S.E.2d 458 (1984); *McCoy v.*

McCoy, 29 N.C. App. 109, 223 S.E.2d 513 (1976).]

(e) A sole attempt at personal service by sending certified letter to business address does not constitute a reasonable and diligent search. [*Barclays Am. Mortgage Corp. v. BECA Enter.*, 116 N.C. App. 100, 446 S.E.2d 883 (1994).]

(2) Notice by posting on property will suffice only when supplemented by notice mailed to party's last known address. Notice by posting on property without also mailing notice is sufficient only in instances where the party's name and address are not reasonably ascertainable. [*Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 77 L. Ed.2d 180, 103 S. Ct. 2706 (1983); *Federal Land Bank v. Lackey*, 94 N.C. App. 553, 380 S.E.2d 538 (1989), *aff'd*, 326 N.C. 478, 390 S.E. 2d 138 (1990).]

(3) Posting must be done by the sheriff, not the trustee. [G.S. § 45-21.16(a)]

(4) The trustee proves service by filing an affidavit showing posting, the circumstances warranting service by posting and the efforts made to obtain actual service as well as information, if any, regarding the location of the party served. [G.S. § 1A-1, Rule 4(j1); G.S. § 1-75.10(a)(2); *see also* 45-21.33(c)(2)(requirements for final report of sale)]

d) The twenty-day period for posting may run concurrently with any other effort to effect service. [G.S. § 45-21.16(a)]

(1) The trustee may desire to post and mail notice to last known address at same time as attempting other forms of service, and to schedule hearing accordingly.

(2) Although this provision would seem to conflict with the requirement to make a reasonable and diligent effort before posting is authorized, the diligent effort may be made at the same time as the posting. [*McArdle Corp. v. Patterson*, 115 N.C. App. 528, 445 S.E.2d 604 (1994), *aff'd per curiam*, 340 N.C. 356, 457 S.E.2d 596 (1995).]

(3) However, there is some question as to whether service by posting is valid if the address is ascertainable and the trustee does not make more than one attempt to serve the party under Rule 4(j).

[*Barclays Am. Mortgage Corp. v. BECA Enter.*, 116 N.C. App. 100, 446 S.E.2d 883 (1994).]

e) Whether due diligence has been exercised when a party has been served by posting is an important judicial determination that the clerk must make before authorizing the foreclosure to proceed.

(1) There is no set formula that can be applied to make that determination. The clerk must look at the circumstances in each case and apply the law regarding due and diligent effort to that case. [*Jones v. Wallis*, 712 S.E.2d 180 (N.C. App. 2011); *Barnes v. Wells*, 165 N.C. App. 575, 599 S.E.2d 585 (2004); *Emanuel v. Fellows*, 47 N.C. App. 340, 267 S.E.2d 368 (1980) ("There is no "restrictive, mandatory checklist for what constitutes due diligence.…Rather, a case-by-case analysis is more appropriate.")

(2) Although the safest practice for the trustee would be to attempt every type of service—have the sheriff attempt to serve the parties personally; mail a certified letter, return receipt requested, or by designated delivery service or signature confirmation to the parties; have the sheriff post the notice on the premises; and mail a copy to the party at his or her last known address by first class mail—that is not an absolute requirement.

(3) It is important that the trustee indicate the steps taken to locate the respondent.

8. Contents of notice. [G.S. § 45-21.16(c), (c2)]

a) Notice of hearing is required by G.S. § 45-21.16 to be in writing and contain the following information:

(1) Description of the property, which identifies the secured real estate, including date of execution of security agreement, original amount of debt, original holder of note, and book and page of security instrument.

(2) Name and address of the holder of the security instrument at time notice of hearing is filed.

(3) Nature of the claimed default.

(4) Fact that secured creditor has accelerated the maturity of the debt (if appropriate).

(5) Any right of debtor to pay the indebtedness or cure default.

(6) That the holder has confirmed in writing to the person giving the notice (or if holder is giving notice confirms in the notice) that within 30 days of the date of the notice, debtor was sent by first-class mail to debtor's last known address a detailed written statement of amount of principal, interest, and any other fees, expenses, and disbursements that the holder in good faith is claiming to be due as of the date of the written statement, and the daily rate of interest based on contract rate. (The person giving notice, if other than holder, can rely on written confirmation and is not liable for inaccuracies. [G.S. § 45-21.16(c1)].)

(7) To the knowledge of the holder or servicer acting for the holder, whether any requests for information about the home loan pursuant to G.S. § 45-93 have been made by the borrower within two years preceding the date of the statement, and, if so, whether they have been complied with. (The person giving notice, if other than holder, can rely on written confirmation and is not liable for inaccuracies. [G.S. § 45-21.16(c1)].)

(8) The right of the debtor (or other party served) to appear before clerk at hearing (time and date specified) and be given an opportunity to show cause why foreclosure should not be allowed. This notice must state that:

(a) That debtor who does not contest creditor's allegations need not appear at hearing, but debtor's rights to pay indebtedness (to prevent sale) or to attend sale is not affected by not attending hearing.

(b) The trustee is a neutral party and may not advocate for the secured creditor or for the debtor in the foreclosure proceeding.

(c) The debtor has the right to apply to a judge of superior court pursuant to G.S. § 45-21.34 to enjoin the sale on any legal or equitable ground prior to the time that the rights of the parties to the sale become fixed.

(d) The debtor has the right to appear at the foreclosure hearing and contest the evidence that the clerk is to consider under G.S. 45-21.16(d), and that to authorize the foreclosure, the clerk must find the existence

of (i) a valid debt of which the party seeking to foreclose is the holder; (ii) default; (iii) right to foreclose under the instrument; and (iv) notice to those entitled to notice.

(e) If the debtor fails to appear at the hearing, the trustee will ask the clerk for an order to sell the property being foreclosed.

(f) The debtor has a right to seek the advice of an attorney and that free legal services may be available to the debtor by contacting Legal Aid of North Carolina or other legal services organizations.

(9) If foreclosure sale is consummated, the purchaser will be entitled to possession of the real estate as of the date the deed is delivered, and debtor can be evicted (order for possession) if debtor is still in possession.

(10) Name, address, and telephone number of trustee or mortgagee.

(11) Debtor should notify trustee or mortgagee in writing of debtor's current address to receive notice of all proceedings related to the foreclosure.

(12) If the notice of hearing is intended to serve also as a notice of sale, such additional information as is set forth in G.S. § 45-21.16A.

(Notice of hearing may also include information required in notice of sale. Although usually separate, the notice of hearing and notice of sale may be combined, but the additional information required for the notice of sale must be included in the notice of hearing. [G.S. § 45-21.16(c)(10)].)

(13) The party will be notified of any change in hearing date. [G.S. § 45-21.16(c)]

(14) That if the debtor is currently on military duty the foreclosure may be prohibited by G.S. § 45-21.12A.

(15) **Home loan notification. Currently set to expire May 31, 2013:** A certification that the loan in question is not a home loan (loan to natural person for personal or family dwelling) or if a home loan, a certification by the filing party that the pre-foreclosure notice and information (required by G.S. §§ 45-102 and -103) were provided in all material respects and that periods of time established under Emergency Program to Reduce Home Foreclosures

Act (G.S. Chapter 45, Article 11) have elapsed. [G.S. § 45-21.16(c2)]

b) If any of the required information listed above is set forth in a petition, notice of sale, or motion seeking an order to serve or authorization to sell rather than in the notice of hearing, it should be incorporated by reference into that petition, notice of sale or motion attached and served along with the notice of hearing in order to comply with G.S. § 45-21.16(c).

c) Posted notice is notice to world and need not contain the names of the parties entitled to notice. [*McArdle Corp. v. Patterson*, 115 N.C. App. 528, 532, 445 S.E.2d 604 (1994).]

C. Waiver of notice and waiver of hearing. [G.S. § 45-21.16(f)]

1. Waiver may not be made by an instrument signed at the time of the loan.

2. In case of secured indebtedness of $100,000 or more, any person entitled to notice and hearing may waive after default the right to notice and hearing by a signed and acknowledged written instrument.

3. In all other cases, the clerk has discretion to dispense with a hearing and issue an order authorizing sale if **all** of the following conditions of waiver have been met:

a) Parties must be served with notice of hearing; and

b) After service, at the request of the trustee or mortgagee, the clerk must mail to all parties entitled to notice and hearing a form prepared by the trustee by which party may waive rights to hearing; and

c) The parties must sign the forms, each witnessed by a person who is not an agent or employee of the trustee or mortgagee, and return them to the clerk.

The clerk's recital and findings authorizing foreclosure should indicate the parties' waiver of the hearing.

4. A party does not waive the right to a hearing by not appearing.

5. Party's presence and willing participation at hearing constitutes waiver of notice. [*In re Norton*, 41 N.C. App. 529, 255 S.E. 2d 287 (1979).]

a) This is consistent with personal jurisdiction statute G.S. § 1-75.7, which codified long-standing rule in North Carolina that person making a voluntary appearance is subject to the court's jurisdiction irrespective of whether he or she has been properly served unless an objection to service is raised at the outset.

b) Virtually any action other than a motion to dismiss for lack of jurisdiction will constitute a general appearance in a court

having subject matter jurisdiction. [*Jerson v. Jerson*, 68 N.C. App. 738, 315 S.E.2d 522 (1984).]

6. Consent judgment allowed only under circumstances authorizing waiver of notice and/or hearing as described above.

D. Continuance of hearing. [G.S. § 45-21.16(a)]

1. Clerk must continue the hearing if any of the parties has not been served at least 10 days before the hearing (or if served by posting at least 20 days before the hearing). A person who appears at the hearing without objecting to the service waives the right to have 10 days' notice.

2. The continuance must be made to a date and time certain, not less than 10 days from the date of the original (or last) hearing date.

3. Clerk may also grant a continuance of hearing "for good cause" like any other proceeding before the clerk.

a) If there is a reasonable opportunity to resolve the foreclosure, the clerk must grant a continuance. See section III.F at page 130.18.

b) The trustee is likely to object to a request for a continuance by the debtor because a continuance may require rescheduling of the date of sale and readvertising. However, the clerk may disregard that concern when there is good cause to grant a continuance.

c) Nonetheless, the clerk should keep in mind that, unlike many other cases, in a foreclosure the lender's damages continue to increase until the foreclosure sale is held.

4. Notices already timely served remain effective. Each party already timely served must be given notice of the date of the hearing by first-class mail to his or her last known address.

E. Hearing procedure. [G.S. § 45-21.16(d)]

1. The hearing must be held before the clerk in a county where the land (or any part thereof) is situated. Only one hearing is held when the property is located in more than one county. However, trustee must file the notice of hearing in all counties where the land is also situated.

2. Hearing is limited to determination of the specific issues upon which the clerk must base an order. [*In re Carter*, 725 S.E.2d 22 (N.C. App. 2012); *Phil Mechanic Constr. Co. v. Haywood*, 72 N.C. App. 318, 325 S.E.2d 1 (1985).] The trustee must present sufficient evidence on all of the issues **even if the debtor does not appear**: As of August 2012, the following six determinations were required:

a) Notice—proper notice of the hearing given to those entitled to it. (See subsections III.B at page 130.6 and III.H.1 at page 130.19 regarding notice requirements.)

b) Right to foreclose—created by express power of sale in the instrument itself. (See subsection III.H.2 at page 130.20.)

c) Valid debt—held by party seeking foreclosure through trustee. (See subsection III.H.3 at page 130.21.)

d) Default—by debtor/trustor. (See subsection III.H.4 at page 130.26.)

e) Military service—debtor is not in active duty military service. (See section III.H.5 at page 130.26.)

f) Home loan status—not a home loan or requirements related to a home loan have been met. (See section III.H.6 at page 130.27.) **This provision is set to expire May 31, 2013.**

3. Generally, it is a good practice for clerk at the beginning of a hearing to indicate to the debtor that the purpose of the hearing is only to determine the issues set forth above; that the clerk can consider only evidence about these issues; and if the debtor wishes to raise issues of equity or fairness or to raise other legal issues, the debtor can do so by filing a lawsuit in superior court to enjoin the foreclosure pursuant to G.S. § 45-21.34.

4. A trustee may not assume an advocacy role for either side in a contested hearing.

   a) In an uncontested hearing, the trustee may introduce evidence for the lender.

   b) If the trustee has anticipated an uncontested hearing and the debtor raises defenses to the issues before the clerk, the clerk must continue the hearing until an attorney for the lender appears.

5. Clerk must swear in any witnesses who testify at the hearing.

6. Clerk may consider evidence presented by parties, affidavits, and certified copies of documents.

   a) Evidence typically includes affidavits from the holder and owner of the deed of trust, loan officer and trustee, and the original note and deed of trust.

   b) A photocopy of the original note and deed of trust is acceptable where there is no dispute, supported by competent evidence, that the copy is a true and accurate representation of the original. [*Dobson v. Substitute Trustee Svcs, Inc.*, 711 S.E.2d 728 (N.C. App. 2011), *aff'd per curiam*, 365 N.C. 304, 716 S.E.2d 849 (2011); *In re Adams*, 204 N.C. App. 318, 693 S.E.2d 705 (2010); *In re Helms*, 55 N.C. App. 68, 284 S.E.2d 553 (1981).]

   c) In a contested hearing, if an objection (hearsay) is made to an affidavit, the clerk may continue the hearing and, upon

request, issue a subpoena for a witness to be available for cross-examination.

7. Waiver of notice of hearing and waiver of hearing are not authorized except as permitted by G.S. § 45-21.16(f). (See subsection III.C at page 130.15.)

F. Opportunity to resolve foreclosure. [G.S. § 45-21.16C]

1. At the beginning of the hearing, the clerk must inquire as to whether the debtor occupies the real property as his or her principal residence. If so, the clerk must inquire about efforts the mortgagee, trustee, or loan servicer has made to communicate with the debtor and attempt to resolve the matter. However the clerk need not inquire if the mortgagee or trustee has submitted an affidavit describing any efforts taken to resolve the default and the results of those efforts.

2. The clerk must order the hearing continued if the clerk finds that there is good cause to believe that additional time or measures have a reasonable likelihood of resolving the delinquency without foreclosure.

3. In making the determination, the clerk may consider whether:

a) The mortgagee, trustee or loan servicer has offered the opportunity to resolve the foreclosure through a commonly accepted resolution plan;

b) The mortgagee, trustee or loan servicer has engaged in actual responsive communication with the debtor;

c) The debtor has indicated that he or she has the intent and ability to resolve the delinquency by making future payments under a resolution plan; and

d) The initiation or continuance of good faith voluntary resolution efforts may resolve the issue without foreclosure.

4. If the clerk finds that good cause exists, the clerk must continue the hearing to a date not more than 60 days from the date scheduled for the original hearing.

G. Clerk to suspend proceedings upon notification by Commissioner of Banks.

1. If the Commissioner of Banks has evidence that a material violation of law has occurred in the origination or servicing of a loan then being foreclosed or then delinquent and in threat of foreclosure, and that the putative violation would be sufficient in law or equity to base a claim or affirmative defense that would affect the validity or enforceability of the underlying contract or the right to foreclose, then the Commissioner may notify the clerk of superior court. [G.S. § 53-244.117, which replaced G.S. § 53-243.12(n) by S.L. 2009-374.]

2. The clerk must suspend the foreclosure proceeding for 60 days from the date of notice. [G.S. § 45-21.16B]

3. If the suspension order is entered before the hearing, the trustee may proceed to hearing after the 60-day suspension period by providing at least 10 days' written notice of the hearing to all parties.

4. If the suspension of proceedings is ordered after entry of order authorizing foreclosure but before expiration of 10-day upset bid period, when the 60-day period expires the trustee does not have to have a new hearing and foreclosure order, but must give a notice of sale as required by G.S. §§ 45-16A, -21.17, and -21.17A.

H. Issues determined at hearing. [G.S. § 45-21.16(d)]

1. Notice properly given to those persons entitled to receive it.

a) The notice must comply with G.S. § 45-21.16(c). (See subsection III.B at page 130.6 for notice requirements.)

b) The trustee must also comply with additional notice requirement of the instrument. The clerk should check the deed of trust for such terms, especially with regard to any additional persons entitled to notice and any required notice of acceleration.

c) The clerk should make sure that all of the parties have been served at least 10 days prior to the date of hearing, or, if served by posting, at least 20 days prior to the date of hearing.

(1) A party who was given notice less than 10 days before the hearing, but who is present at the hearing waives the right to 10 days' notice by not objecting. [*In re Norton*, 41 N.C. App. 529, 255 S.E.2d 287 (1979) (party's presence and willing participation at hearing constitutes waiver of notice).]

d) If all parties have not been served in time to hold the hearing, the clerk shall order it continued to date and time certain not less than 10 days from the date scheduled for original hearing. [G.S. § 45-21.16(a)]

(1) All notices already timely served remain effective. [G.S. § 45-21.16(a)]

(2) Trustee must satisfy notice requirements with respect to those not served or not timely served with respect to the original hearing. [G.S. § 45-21.16(a)]

(a) In addition to giving notice of the continued hearing pursuant to Rule 4 to those not served before the original hearing, the trustee must also give notice of the continued hearing pursuant to Rule 4 to those not timely served before the original hearing; in other words, to persons served by a method other than posting less than 10

days before the original hearing or by posting less than 20 days before the hearing date.

(b) **Example.** A foreclosure is initiated against A, B, C, D, and E. The notice of hearing sets the date of hearing for February 15. The sheriff serves A personally on February 1 and B on the same date by leaving a copy of the notice at B's dwelling with a person of suitable age and discretion who also resides there. The sheriff serves C by posting a copy of the notice on the premises on February 1 (i.e., less than 20 days before the hearing date). The sheriff serves D personally on February 10 and does not serve E. Neither C nor D waives the requirement for 10-day notice. The clerk continues the hearing until March 1. The trustee must give notice of the March 1 hearing pursuant to Rule 4 to C and D as well as to E.

(3) Any party timely served who has not received actual notice of the date to which hearing has been continued must be notified of the continuance order by first class mail to last known address. [G.S. § 45-21.16(a)] In practice, the trustee sends the notice.

e) Clerk erred in permitting foreclosure sale where debtor was not given notice as prescribed by G.S. § 45-21.16(a); debtor's actual knowledge of hearing was irrelevant. [*PMB, Inc. v. Rosenfeld*, 48 N.C. App. 736, 269 S.E.2d 748 (1980) (letter to and telephone conversation with debtor insufficient).]

f) Notice dated December 8, 1978 not fatally defective, even though indicated date of hearing was January 3, 1978 rather than 1979. [*Lovell v. Rowan Mut. Fire Ins. Co.*, 46 N.C. App. 150, 264 S.E. 2d 743, *rev'd on other grounds*, 302 N.C. 150, 274 S.E.2d 170 (1981).]

2. Right to foreclose under deed of trust.

a) This right is evidenced by terms of instrument itself.

b) Clerk should make sure that substituted trustee initiating foreclosure has authority to exercise the power of sale. (See section II.B at page 130.4 regarding substitution of trustee.) There must be a written document recorded with the register of deeds **before or contemporaneously with** the initiation of the proceeding, in other words before the filing of the notice of hearing.

c) Clerk can find right to foreclose if there is competent evidence that the terms of the deed of trust permit the exercise of the power of sale under the circumstances of the particular case. [*In re Burgess*, 47 N.C. App. 599, 267 S.E.2d 915 (1980).]

d) Release of part of the total property secured upon the making of certain payments as provided in deed of trust is a defense to the right to foreclose those portions of property released. [*In re Michael Weinman Assoc*., 333 N.C. 221, 424 S.E.2d 385 (1993).]

e) Where a deed of trust was in the name of only one of the joint tenants with right of survivorship, lender had right to foreclose only ½ of the property secured by the loan. The filing of the deed of trust (with register of deeds) in the name of only one joint tenant was a conveyance, and thus severed the right of survivorship, creating a tenancy-in-common in which only half the property was encumbered. [*Countrywide Home Loans, Inc. v. Reed*, 725 S.E.2d 667 (N.C. App. 2012).]

f) Where a condition precedent to the lender's right to foreclose (contained in the instrument) had not been met, the clerk could not properly find a right to foreclosure. [*In re Deed of Trust by Goforth Properties*, Inc. 334 N.C. 369, 432 S.E.2d 855 (1993).]

3. Valid debt held by party seeking foreclosure.

a) Two questions must be answered to satisfy this requirement: (i) Is there sufficient competent evidence of a valid debt; and (ii) is there sufficient competent evidence that the party seeking to foreclose is the holder of the notes that evidence the debt? [*In re Adams*, 204 N.C. App. 318, 693 S.E.2d 705 (2010) (citing *Connolly v. Potts*, 63 N.C. App. 547, 306 S.E.2d 123 (1983)).]

b) Valid debt.

(1) Usually the evidence of indebtedness is a promissory note, but it may be other instrument of indebtedness such as a criminal appearance bond.

(2) Clerk should examine the evidence of indebtedness.

(3) Introduction of the note along with evidence of its execution and delivery, without probative evidence to the contrary, will support a finding of valid debt. [*In re Cooke*, 37 N.C. App. 575, 246 S.E.2d 801 (1978).]

(4) Photocopies. Certified photocopies of the note and deed of trust are admissible as evidence of indebtedness and are acceptable where there is no

dispute, supported by competent evidence, that the copies are not true and accurate reproductions of the originals. [*Dobson v. Substitute Trustee Svcs, Inc.*, 711 S.E.2d 728 (N.C. App. 2011), *aff'd per curiam*, 365 N.C. 304, 716 S.E.2d 849 (2011); *In re Adams*, 204 N.C. App. 318, 693 S.E.2d 705 (2010); *In re Helms*, 55 N.C. App. 68, 284 S.E.2d 553 (1981).]

(a) Even though a copy is admissible, the opposing party can object to its authenticity. [G.S. § 45-21.16(d); G.S. § 8-45.1; G.S. §§ 8C-1, Rules 1002-1004; *In re Helms*, 55 N.C. App. 68, 284 S.E.2d 553 (1981).]

(b) The clerk should permit the opposing party to cross-examine such evidence and to introduce contrary evidence.

(5) The fact that some amount of money is owed is sufficient to show default; the amount of debt outstanding is irrelevant and the clerk can find a valid debt even if the amount is in dispute. [*In re Burgess*, 47 N.C. App. 599, 267 S.E.2d 915 (1980).] **Example.** Debtor's argument that he only owes $3,000 rather than the $4,000 does not stop clerk's finding of valid debt.

(6) Where property lies in two counties, payment of the debt from a foreclosure sale in one county will preclude a finding of valid debt in a foreclosure proceeding subsequently brought in second county. [*In re Rollins*, 75 N.C. App. 656, 331 S.E.2d 303 (1985).]

(7) Failure of consideration is a defense to valid debt. [*In re Aal-Anubiaimhotepokorohamz*, 123 N.C. App. 133, 472 S.E.2d 369 (1996) (failure to execute assignment of equipment that was the consideration for the note)*; In re Kitchens*, 113 N.C. App. 175, 437 S.E.2d 511 (1993) (criminal prosecution for embezzlement when promise not to prosecute was the consideration).]

c) Valid holder.

(1) Evidence must show that party seeking to foreclose is holder of valid debt. [*In re Adams*, 204 N.C. App. 318, 693 S.E.2d 705 (2010); *Connolly v. Potts*, 63 N.C. App. 547, 306 S.E.2d 123 (1983).]

(2) Definition of "holder" in Uniform Commercial Code (UCC) is applicable to term as it is used in foreclosures under power of sale. [*In re Adams*, 204

N.C. App. 318, 322, 693 S.E.2d 705, 709 (2010); *Connolly v. Potts*, 63 N.C. App. 547, 306 S.E.2d 123 (1983).]

(a) The Uniform Commercial Code (UCC) defines "holder" as "the person in possession of a negotiable instrument that is payable to the bearer or to an identified person…in possession." [G.S. § 25-1-201(b)(21)(a)]

(3) Evidence of "valid holder."

(a) Possession of note.

(i) Possession of the note and deed of trust is significant in determining holder of valid debt, and absence of possession defeats that status. [*Connolly v. Potts*, 63 N.C. App. 547, 306 S.E.2d 123 (1983).]

(ii) Where note lost, destroyed, or stolen, party seeking recovery based on it must "prove the terms of the instrument and the person's right to enforce the instrument." [G.S. § 25-3-309(b)]

(b) Evidence of transfer (chain of ownership).

(i) However, mere possession of note by a party to whom the note has neither been indorsed nor made payable does not suffice to prove ownership or holder status. [*In re Simpson*, 711 S.E.2d 165 (N.C. App. 2011); *In re Adams*, 204 N.C. App. 318, 693 S.E.2d 705 (2010); *Econo-Travel Motor Hotel Corp v. Taylor*, 301 N.C. 200, 271 S.E.2d 54 (1980).]

(ii) The petitioner **must** present competent evidence of transfer of title by assignment, indorsement, merger, or otherwise.

(a) In *In re Simpson*, 711 S.E.2d 165 (N.C. App. 2011), the court held that

the petitioner bank failed to demonstrate it was the current holder when it introduced a note not indorsed either to the petitioner bank or to bearer.

(b) In *In re Adams*, 204 N.C. App. 318, 693 S.E.2d 705 (2010), the court held evidence not sufficient to show bank was holder when photocopies of note and deed of trust introduced into evidence indicated original holder but did not indicate that original holder indorsed or transferred the note to company alleged to be current holder and no other evidence was offered to show the transfer.

(c) Statement of "holder" in affidavit **not** sufficient. In *In re Simpson*, 711 S.E.2d 165 (N.C. App. 2011) and *In re Yopp*, 720 S.E.2d 769 (N.C. App. 2011), the court held that a statement in a bank's affidavit that it was the "owner and holder" of a note was not sufficient competent evidence of valid holder. The statement in the affidavit was merely a statement of the ultimate legal conclusion, not actual evidence to support that conclusion.

(d) Merger. Competent evidence that a bank has merged with the prior valid holder typically is sufficient to show that that party is the current valid holder. The new holder succeeds by operation of law (G.S. 55-11-06(a)(2)) to the prior

holder's status. [*In re Carver Pond*, 719 S.E.2d 207 (N.C. App. 2011).]

(i) Where a bank put forth an affidavit testifying to the merger; a certified statement from the bank's assistant secretary as to the merger; and a letter by the Comptroller of the Currency certifying the merger had occurred, the bank proffered sufficient competent evidence of merger. [*In re Carver Pond*, 719 S.E.2d 207 (N.C. App. 2011).]

(ii) Printouts from the Web sites of the FDIC, Federal Reserve, and US National Information Center showing merger were *not* competent evidence of merger. Merely printing information from the internet does not endow it with "any authentication whatsoever." [*In re Yopp*, 720 S.E.2d 769 (N.C. App. 2011).]

(iii) For a further discussion of the need for evidence of assignments or indorsements, see Appendix II at page 130.58.

4. Default by debtor on obligation.

a) Default on the underlying obligation most frequently occurs when there is a failure to pay installments as they become due.

(1) Where modification agreement provided that lender could accelerate debt if payments became delinquent, court properly found delinquency where payment was one day late. [*In re Fortescue*, 75 N.C. App. 127, 330 S.E.2d 219 (1985).]

b) Default can also arise from failure to provide insurance, failure to pay taxes, or any other default in an obligation created by the instrument.

(1) Conveyance of secured property without lender's consent as provided by deed of trust that contained due-on-sale clause constituted default. [*In re Bonder*, 55 N.C. App. 373, 285 S.E.2d 615, *aff'd*, 306 N.C. 451, 293 S.E.2d 798 (1982).]

c) Demand letter may be required by terms of deed of trust before default can occur. Clerk may need to review deed of trust to see if demand letter is required before default can be found.

d) Default is usually shown by affidavit or testimony of holder or owner of deed of trust (typically loan officer), together with copies of the note and deed of trust. (See section II.A at page 130.3 regarding role of trustee.)

(1) If deed of trust requires demand letter or specific notice, affidavit should indicate that proper letter was sent or notice given.

(2) Sometimes the trustee will provide a copy of the note and deed of trust for the file although this is not required.

5. Military service. [G.S. § 45-21.12A]

a) The power of sale is barred during a debtor's period of military service or within 90 days after the completion of military service for deeds of trust that originated **before** the debtor's period of military service. [G.S. § 45-21.12A(a)] In entering an order of sale, the clerk must make a written finding that the power of sale is not barred by respondent's military service.

b) Definitions

(1) "Military service"

(a) For members of the Army, Navy, Air Force, Marine Corps, or Coast Guard, active duty. For National Guard, service under a call to

active service by the President or Secretary of Defense for a period of more than 30 consecutive days for the purposes of responding to a national emergency declared by the President and supported by federal funds.

(b) For servicemembers who are commissioned officers of the Public Health Service or National Oceanic and Atmospheric Administration, active service.

(c) Any period during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause. [G.S. § 45-21.12A(d)(1)]

(2) "Period of military service." The period beginning on the date on which a service member enters military service and ending on the date on which the service member is released from or dies while in military service. [G.S. § 45-21.12A(d)(1)]

c) The clerk cannot hold a foreclosure hearing unless the trustee or other creditor seeking to exercise a power of sale files with the clerk a certification that the hearing will take place at a time that is not during, or within 90 days after, a period of military service for the debtor. [G.S. § 45-21.12A(a)]

d) The debtor may waive his or her rights under this statute by written instrument, separate from the note to which the waiver applies, executed during or after period of military service. The waiver must be in at least 12-point type and must specify the debt instrument. [G.S. § 45-21.12A(b)]

e) G.S. § 45-21.12A supplements and complements the Servicemembers Civil Relief Act, 50 U.S.C. App. § 501 et seq. ("SCRA"). [G.S. § 45-21.12A(c)] Compliance with the North Carolina statute does not, however, necessarily constitute compliance with the SCRA. For more resources on the SCRA, see the North Carolina State Bar Web site (Clerks' and Workers' Guide to the SCRA and Military Support Enforcement, http://www.ncbar.com/lamp/other_publications.asp.)

6. Home loan status. **Set to expire May 31, 2013**.

a) The clerk must find that the underlying debt is:

(1) not for a home loan; or,

(2) if it is for a home loan, that the pre-foreclosure notice required by G.S. § 45-102 has been provided

in all material respects and the periods for extension of the foreclosure process have passed. [G.S. § 45-21.16(d)]

b) "Home loan" is a loan where the borrower is a natural person, the debt is incurred primarily for personal, family or household purpose, and the loan is to purchase a dwelling or construct a dwelling for the borrower to occupy as his or her principal dwelling. It does not include an equity line of credit, a reverse mortgage, a construction loan, or specified bridge loan. [G.S. § 45-101(1b)]

I. Defenses.

1. **Only legal defenses** that relate directly to negating the clerk's findings necessary to enter an order authorizing sale—(i) valid debt, (ii) default, (iii) right to foreclose, (iv) notice, (v) military service, and (vi) (until May 31, 2013) home loan status—are properly considered by the clerk at the hearing.

a) A debtor who asserts that he or she is not in default because he or she has timely made all payments and otherwise met all obligations under the note has asserted a legal defense which **must** be considered by the clerk at the hearing.

b) Legal defenses that negate any of the requisite findings are properly considered at the hearing, otherwise hearing would be "purposeless formality." [*In re Bonder*, 55 N.C. App. 373, *aff'd*, 306 N.C. 451, 293 S.E.2d 798 (1982) (validating "due-on-sale" clauses in deeds of trust on residential property).]

c) Amount outstanding on debt is not relevant to foreclosure proceeding, but will be relevant to equitable action to enjoin sale. [*In re Burgess*, 47 N.C. App. 599, 267 S.E.2d 915 (1980).]

d) Defense that property has been released as security under provision in deed of trust is legal defense. [*In re Foreclosure of Michael Weinman Assoc*., 333 N.C. 221, 424 S.E.2d 385 (1993).]

2. **Equitable defenses** as well as other legal arguments not related to the findings necessary to enter an order authorizing sale **must not** be considered by the clerk at the hearing (or by the judge on appeal).

a) If debtor asserts, for example, that he or she was not aware that he or she was in default, or that there is good cause for not making timely payments, the debtor has asserted an equitable defense which cannot be considered by the clerk. Or if the debtor is angry with the lender for its debt collection practices, the debtor has asserted an equitable defense. Such defense may only be considered by a judge in a separate action or proceeding brought to enjoin the sale

pursuant to G.S. § 45-21.34. (See section XIII.A at page 130.52.)

(1) If debtor raises an equitable defense, the clerk may want to explain that such defense is not an issue for the foreclosure hearing but can be raised in an action to enjoin the foreclosure pursuant to G.S. § 45-21.34.

b) To invoke equity jurisdiction to enjoin foreclosure for any reason, parties must initiate a separate civil action in superior court [CVS case] under G.S. § 45-21.34. [*In re Carter*, 725 S.E.2d 22 (N.C. App. 2012); *Golf Vistas, Inc. v. Mortgage Investors*, 39 N.C. App. 230, 249 S.E.2d 815 (1978).]

c) Finding by the court that the debtors were unaware of significance and importance of making payments on time was beyond scope of hearing [before clerk] under G.S. § 45-21.16. [*In re Watts*, 38 N.C. App. 90, 247 S.E.2d 427 (1978).]

d) It was improper for the trial court to consider the equitable doctrine of merger of title in an appeal of the clerk's order of sale. [*Mosler ex rel. Druid Hills Land Co. Inc.*, 199 N.C. App. 293, 681 S.E.2d 456 (2009).]

e) Whether lender had waived its right to prompt payment is an equitable defense and should not be considered at hearing (before clerk) under G.S. § 45-21.16. [*In re Fortescue*, 75 N.C. App. 127, 330 S.E.2d 219 (1985).] Where holder of note repeatedly accepts monthly installment payments after their due dates, the holder waived the right to insist on punctual payment unless before late payment noteholder notified payor that prompt payment is again required. [*Meehan v. Cable*, 135 N.C. App. 715, 523 S.E.2d 419 (1999) (G.S. § 45-21.34 proceeding); *Driftwood Manor Investors v. City Fed. Sav. & Loan*, 63 N.C. App. 459, 305 S.E.2d 204 (1983).]

f) Whether portion of the property sought to be foreclosed had been released from the deed of trust by lender may also be raised in action to enjoin foreclosure under G.S. § 45-21.34 as well as a defense in the foreclosure action. [*Golf Vistas, Inc. v. Mortgage Investors*, 39 N.C. App. 230, 249 S.E.2d 815 (1978); *In re Michael Weinman Assoc.*, 333 N.C. 221, 424 S.E.2d 385 (1993).]

g) Whether borrower was competent to execute a deed of trust is an equitable defense. [*In re Foreclosure of Godwin*, 121 N.C. App. 703, 468 S.E.2d 811 (1996).]

IV. Clerk's Findings and Order of Sale

A. If the clerk finds the existence of requisite issues set forth in G.S. § 45-21.16(d) from the evidence presented, the clerk makes findings to that effect and by order authorizes the trustee to proceed with a foreclosure sale under the statute and deed of trust. [G.S. § 45-21.16(d)]

1. The clerk should make sure the findings address all the necessary issues.

2. It is a good practice to make a statement of record as to whether the debtor was present and whether there was a waiver of the hearing.

3. It is **not** good practice to make a finding as to any amount of money that is owed, as that issue is not before the clerk.

B. If the clerk fails to find the existence of the requisite issues, the clerk makes findings to that effect and by order denies the request to proceed with a foreclosure sale.

C. If the clerk finds the existence of the necessary issues, the trustee usually prepares an order of sale reciting that the clerk has made the requisite findings and that trustee is authorized to proceed with foreclosure. If the clerk fails to find the necessary issues, the clerk may ask the trustee to prepare an order denying a request to proceed with foreclosure sale.

D. Following entry of the order of sale, the trustee can give notice of sale and conduct a foreclosure sale under the statute and deed of trust. [G.S. § 45-21.16(d)]

E. Trustee must file a certified copy of clerk's order of sale in any other county where a portion of the property is located before trustee may proceed with sale of property located in that county.

V. Appeal From Order of Sale

A. Clerk's order of sale is a judicial act and may be appealed within 10 days of entry of the order of sale district or superior court judge having jurisdiction. [G.S. § 45-21.16(d1)]

1. The clerk should ask the appellant to which court he or she is appealing.

2. Under G.S. § 7A-243 the district court is the proper division for cases in which the amount in controversy is $10,000 or less, and the superior court is the proper division if the amount in controversy exceeds $10,000, but either court can hear any appeal because the amount is not jurisdictional.

B. Appeal is heard de novo. [G.S. § 45-21.16(d1)] The judge's jurisdiction is limited to determining the same issues as were before the clerk; equitable defenses (and other legal issues) may not be considered. [*Mosler ex rel. Druid Hills Land Co. Inc.*, 199 N.C. App. 293, 681 S.E.2d 456 (2009); *In re*

Foreclosure of Helms, 55 N.C. App. 68, 284 S.E.2d 553 (1981); *In re Watts*, 38 N.C. App. 90, 247 S.E.2d 427 (1978).]

1. However, the appellant can file a civil action for equitable relief under G.S. § 45-21.34 in superior court and that action can be consolidated with an appeal from the clerk to superior court. [See *Driftwood Manor Investors v. City Fed. Sav. & Loan*, 63 N.C. App. 459, 305 S.E.2d 204 (1983).]

C. Bond. [G.S. § 45-21.16(d1)] Clerk must set appeal bond to protect opposing party from probable loss by reason of delay in the foreclosure.

1. Purpose. The purpose of bond is to protect the lender's security interest in the property until a judge hears the appeal. If bond is posted, the clerk shall stay the foreclosure. If the lender appeals, the purpose of the bond is to protect the debtor's interest. **Example.** Lender appeals; debtor had a contract to sell the land, and the contract is cancelled because of foreclosure proceeding.

   a) Courts have greater latitude in measuring damages under G.S. § 45-21.16 than under G.S. § 45-21.34 or G.S. § 1-292. [*In re Simon*, 36 N.C. App. 51, 243 S.E.2d 163 (1978).]

   b) Length of appeal is time from appeal of clerk's order to hearing before judge. [*Id.*]

2. Amount of bond.

   a) If the appealing party owns and occupies the property to be sold as his or her principal residence, the bond shall be set in the amount of 1% of the principal balance due on the note. The clerk may, however, require a lesser amount in cases of undue hardship or for other good cause shown. The clerk may require a higher bond if there is a likelihood of waste or damage to the property during the pendency of appeal or for other good cause shown. [G.S. § 45-21.16(d1)]

   b) In cases of foreclosure of property that is not debtor's principal residence or when setting a bond other than 1% in foreclosure of debtor's principal residence, the clerk must consider different factors in setting the bond based on the particular facts of the case.

      (1) Examples of factors to consider when setting amount for bond to stay foreclosure include: equity in property; length of appeal; daily interest accruing on note; lack of adequate hazard insurance; weather conditions affecting partial construction; lack of occupancy; or physical security of property.

      (2) If in the particular case the amount of debt is considerably lower than the fair market value of the property and there is little risk of physical damage, the clerk might set a minimal bond. **Example.**

Debtor defaults on a purchase money deed of trust covering a vacation home with a fair market value of $285,000 and no other liens against it. The amount owed on the note is $58,000. Only a small bond is necessary because the equity in the property ($227,000) is sufficient to cover the default and interest until the appeal is heard.

(3) On the other hand, if there is a large debt outstanding or the property is subject to vandalism or other damage, the clerk may want to consider a higher bond. **Example.** Debtor defaults on a loan secured by a deed of trust covering a commercial building that has a market value of $200,000. The amount owed on the note is $180,000 and the property is located in an area that has deteriorated in the last few years. It is vacant and is subject to frequent break-ins. In this case, the clerk would want to consider the interest accruing on the indebtedness during the pendency of the appeal and the likelihood of vandalism in setting a more substantial bond since the property itself is not likely to bring the full amount owed. [*In re Simon*, above (either interest on value of the land or interest accruing on indebtedness during pendency of stay would be a proper measure of damages under a bond to stay foreclosure sale).]

D. Stay. When the bond is posted, the clerk must stay the foreclosure pending appeal. [G.S. § 45-21.16(d1)]

1. If bond is not posted, trustee may proceed with foreclosure. [*In re Foreclosure of Coley Properties, Inc*., 50 N.C. App. 413, 273 S.E.2d 738 (1981).]

2. Bond is not a condition of appeal; clerk may not dismiss the appeal for failure to post bond. [*In re Foreclosure of Coley Properties, Inc*., 50 N.C. App. 413, 273 S.E.2d 738 (1981); *see also Radisi v. HSBC Bank USA Nat'l Ass'n*, 2012 WL 21555052, *4 (W.D.N.C. 2012) (citing *Coley Properties*).]

3. The appeal itself is perfected by giving notice of appeal within 10 days after entry of the clerk's order, and no additional costs are assessed for appeal. [G.S. § 45-21.16(d1)] The bond is to stay the execution of the clerk's decision while the case is on appeal.

E. Time for hearing. Parties have a right to have the appeal heard promptly. Either party may demand the matter be heard at the next succeeding term of court convening 10 or more days after clerk's hearing. [G.S. § 45-21.16(e)]

F. Trustee **must** file a certified copy of any order entered as result of appeal in all counties where notice of hearing was filed. [G.S. § 45-21.16(e)]

VI. Procedure For Sale

A. Notice of sale.

1. Upon entry of order of sale, the trustee can give notice of sale and proceed under the deed of trust. [G.S. § 45-21.16(d)]

2. The notice of sale must contain following information [G.S. § 45-21.16A]:

a) Description of the instrument, by identifying the original mortgagor(s), recording data, and the record owner (as reflected on register of deeds records within 10 days prior to posting notice), if different from the mortgagor;

b) Date, hour, and place of sale, which must be consistent with the instrument and G.S. Chapter 45, Article 2A;

c) Description of the real property and improvements to be sold;

d) Terms of the sale provided for by deed of trust, including amount of cash deposit required of the highest bidder, if any;

e) Any other provisions required by the deed of trust;

f) Statement that the property will be sold subject to taxes or special assessments, if applicable; and

g) Statement whether the property will be sold subject to or together with identified subordinate interests.

3. In addition, if the **sale is of residential property with less than 15 rental units**, the notice of sale must also include the following statements:

a) The clerk may issue an order for possession in favor of the purchaser against the parties in possession, and

b) Any tenant occupying the premises, after receiving the notice of sale, may terminate the lease upon 10 days' written notice to the landlord. Any tenant is liable, after termination, for rent due, prorated to the date of termination.

4. The notice must be posted and published as required by the deed of trust and according to G.S. § 45-21.17.

a) Notice of sale must be posted in the area designated by the clerk for posting publications in the county in which the property is situated, at least 20 days immediately preceding sale. [G.S. § 45-21.17(1)a.]

b) Notice of sale must be published in a newspaper that is published in and qualified for legal advertising in the county in which the property is located, or, if none, in one having general circulation in the county, once a week for two successive weeks, at least 7 days apart (including Sundays)

and completed no more than 10 days preceding date of sale. [G.S. § 45-21.17(1)b.]

(1) G.S. § 1-597 defines when a newspaper is qualified for legal advertising and the statute must be applied to G.S. § 45-21.17. [*Haas v. Warren*, 341 N.C. 148, 459 S.E.2d 254 (1995).]

(2) Legal notice is of no force and effect unless published in a newspaper with a general circulation to actual paid subscribers which newspaper was admitted to the United States mail in the Periodicals class in the county or political subdivision where the land in question is situated. [G.S. § 1-597]

c) Clerk may, in the clerk's discretion or on application of any interested party, authorize additional advertising which in the opinion of the clerk will serve the interest of the parties, with costs paid as part of the cost of foreclosure. [G.S. § 45-21.17(1)b.3.]

5. If the property is situated in more than one county, the trustee must comply with notice of sale provisions above in each county in which any part of property situated. [G.S. § 45-21.17(3)]

6. Trustee must mail a notice of sale by first class mail at least 20 days before date of sale to all parties entitled to notice of the foreclosure hearing whose address the trustee or mortgagee knows, and to any party who has properly filed a request to receive notice of sale in compliance with G.S. § 45-21.17A. [G.S. § 45-21.17(4)]

a) The owners at the time of giving notice of sale may be different from those at the time of giving notice of the hearing. If an owner has died since the notice of hearing, the trustee should notify the heirs. The purpose of the notice of sale is to promote as many potential bidders as possible to protect all interests. A trustee who narrows the list of persons to whom a notice of sale is provided risks having the foreclosure set aside.

7. If the property is residential and contains less than 15 rental units, the trustee must also mail a notice of sale to any person who occupies the property under a lease. The notice must be addressed to the person by name, if known, or, if not known, to "occupant" at the address of the property to be sold. [G.S. § 45-21.17(4)] (If the tenant has been sent notice of the foreclosure hearing containing the information required by G.S. § 45-21.16A, notice of sale is not required.)

8. If the deed of trust specifies a time period for giving the notice of hearing or the notice of sale, those time periods may commence with and run concurrently with the time periods for those notices specified in the statute. [G.S. § 45-21.17(6)] However, the notice must run for

the longer period of time, whether that is the statutory time or the time specified in the deed of trust.

B. Time and place of sale.

1. The sale must be conducted at the courthouse door of county in which land is situated, except as follows:

a) When a single tract (with continuous boundary) is located in two or more counties, the sale may be held in any one of the counties in which tract is situated. [G.S. § 45-21.4(b)]

b) If the deed of trust designates a place of sale within county, the sale is held at the designated place. [G.S. § 45-21.4(c)]

c) If the trustee is given the power in the deed of trust to designate a place of sale, the place shall be either on the premises to be sold or at the courthouse door in a county where the property situated. [G.S. § 45-21.4(d)]

2. The sale must take place between 10:00 A.M. and 4:00 P.M. on any day except Sunday or a legal holiday when the courthouse is closed for transactions. [G.S. § 45-21.23]

3. The sale must begin at the designated time and place except that a delay of up to one hour, or a delay caused by other sales at same place, is permitted. [G.S. § 45-21.23]

C. Postponement of sale. [G.S. § 45-21.21]

1. A sale may be postponed by the person exercising the power of sale to a date certain not later than 90 days (exclusive of Sunday) after the original date of sale, when:

a) There are no bidders;

b) Number of prospective bidders is substantially decreased by inclement weather or any casualty;

c) So many other sales are scheduled as to make it inexpedient or impracticable to hold the sale;

d) Trustee is unable to hold sale because of illness or other good reason; or

e) Other good cause exists. [G.S. § 45-21.21]

f) Sale may be postponed more than once provided final postponed date is not later than 90 days after original sale date. If the 90th day is a Sunday or a legal holiday when the courthouse is closed for transactions the sale may be postponed to the next business day. [G.S. § 45-21.21(a), (e)] (Note that G.S. § 45-21.21(a) provides that the sale cannot be postponed to a Sunday while subsection (e) prohibits postponement to a legal holiday as well as a Sunday.)

2. Procedure for postponement

a) Trustee (or the trustee's agent or attorney) must publicly announce the postponement at the time and place advertised for sale. [G.S. § 45-21.21(b)(1)]

b) On the same day, the trustee (or the trustee's agent or attorney) must attach a notice of postponement to the original notice of sale posted at the courthouse bulletin board or note the postponement directly on the original notice. [G.S. § 45-21.21(b)(2)]

(1) Posted notice of postponement must state that the sale is postponed, the hour and date to which it is postponed, the reason for postponement, and be signed by a person authorized to hold the sale or that person's attorney or agent. [G.S. § 45-21.21(c)]

c) Trustee must also give notice of postponement (written or oral) to each person entitled to notice of the sale under G.S. § 45-21.17. [G.S. § 45-21.21(b)(3)]

3. If the sale is not held at the time fixed and is not postponed as required, or a postponed sale is not held at the time fixed or within 90 days of date originally fixed for sale, the trustee must comply again with the provisions of notice of sale in G.S. § 45-21.16A, 45-21.17, and 45-21.17A but need not comply with the provisions for notice of hearing and hearing in G.S. § 45-21.16. [G.S. § 45-21.21(d)]

a) Same requirements for re-notice apply if there is an appeal and the appellate court orders the sale to be held.

b) Procedural protections for postponement are only for the benefit of the debtor; a purchaser at an improperly postponed sale cannot later claim that the sale was invalid. [*Gore v. Hill*, 52 N.C. App. 620, 279 S.E.2d 102 (1981).]

D. Termination of power of sale.

1. The debtor has the right to terminate the power of sale by curing the default under the terms of the instrument **or** by paying the total obligation plus expenses under the statute. [G.S. § 45-21.20] Expenses incurred with respect to sale or proposed sale include attorney fees. [*In re Newcomb*, 112 N.C. App. 67, 434 S.E.2d 648 (1993).]

2. Debtor frequently is given the right to cure the default in the instrument itself. This may or may not include the right to pay the arrearage only and reinstate the loan without accelerating the full balance of the loan.

a) Right to cure may require that the debtor pay the full balance of the loan, rather than the arrearage amount only. This is known as "acceleration".

b) Acceleration limits the debtor's right to cure the default by requiring that the entire loan balance be paid in full.

3. Clerk may need to review the requirements for acceleration in the promissory note to determine whether the lender has complied with the requirements for acceleration, which may affect how default can be cured.

4. Debtor can terminate the power of sale before the sale (or before expiration of time for submitting upset bid) by tendering payment of the obligation secured (whatever that amount, accelerated or not) along with all expenses incurred, including the trustee's fee, if any. [G.S. § 45-21.20] (See G.S. § 45-21.15 regarding trustee's compensation.)

E. Sale procedure.

1. Trustee may appoint an agent or attorney to conduct the sale; the appointment may be oral. [G.S. § 45-7]

2. Person conducting the sale invites offers from those attending and accepts the bid of highest bidder.

a) Trustee (or agent) may not personally bid on or purchase the property at the foreclosure sale. [*Davis v. Doggett*, 212 N.C. 589, 194 S.E. 288 (1937).] (See section II.A at page 130.3 regarding role of trustee.) But the common practice of a trustee placing a bid on behalf of the lender does not violate this rule because the lender is the bidder, not the trustee.

b) Lender may bid on property secured by deed of trust. [*DeBruhl v. L. Harvey & Son Co*., 250 N.C. 161, 108 S.E.2d 469 (1959); *Elks v. Interstate Trustor Corp.*, 209 N.C. 832, 184 S.E. 826 (1936).] (See section I.A.2 at page 130.1 regarding lender in two-party mortgage.)

(1) In the vast majority of foreclosure sales, the bidder is the lender and the amount bid will be the total of the principal and interest on the indebtedness and costs of the foreclosure.

c) Debtor may bid on the property at the foreclosure sale. [*In re Sale of Land of Sharpe*, 230 N.C. 412, 53 S.E.2d 302 (1949).]

3. Purchaser must be able to pay a cash deposit, if required.

a) Trustee must comply with any provisions in the deed of trust requiring a cash deposit. [G.S. § 45-21.10(a)]

b) If there is no provision in the deed of trust, the trustee may, in his or her discretion, require the highest bidder to make an immediate cash deposit, not to exceed the greater of 5% of the bid or $750. [G.S. § 45-21.10(b)]

4. Property may be re-offered immediately if the highest bidder fails to make the required deposit. [G.S. §§ 45-21.30; 45-21.10(c)]

5. A bidder on property is bound from the moment the bid is accepted. (See section VIII.C at page 130.43 regarding liability of defaulting bidder).

F. Continuance of sale.

1. If a sale has begun but is not completed by 4:00 p.m., the person holding the sale must continue it until a designated time between 10:00 a.m. and 4:00 p.m. the following day, other than Sunday or legal holiday when the courthouse is closed for transactions. [G.S. § 45-21.24]

2. If such a continuance is necessary, the person holding the sale must publicly announce the time to which the sale is continued. [G.S. § 45-21.24]

G. Preliminary report of sale.

1. Within 5 days following the sale to the highest bidder, the person exercising power of sale must file a preliminary report of sale with the clerk of county where sale took place. [G.S. § 45-21.26]

2. The form is REPORT OF FORECLOSURE SALE/RESALE (AOC-SP-400).

3. Upon trustee's failure to file the required report of sale, the clerk may order the trustee to file a correct and complete report within 20 days after service of the order on him or her. [G.S. § 45-21.14]

a) There is no form for ordering the filing of a correct and complete report, but the clerk can modify ORDER TO FILE ACCOUNT (AOC-SP-915M).

b) Some clerks prefer to precede an order to file the report of sale with a notice to file the report. The clerk may modify NOTICE (AOC-SP-404).

c) If the trustee fails to comply with the order, the clerk may initiate civil contempt proceedings against trustee and commit the trustee to jail until he or she complies. [G.S. § 45-21.14] See G.S. § Chapter 5A, Article 2, for requirements of civil contempt hearing and imprisonment for civil contempt and **proceed with care**.

H. When rights of parties fixed.

1. No confirmation of sale is required. [G.S. § 45-21.29A]

2. Rights of the parties to sale become fixed if no upset deposit is filed with the clerk by the close of normal business hours on the 10th day after filing preliminary report of sale. [G.S. § 45-21.27(a); G.S. § 45-21.29A]

a) Debtor loses the right to equity of redemption at the expiration of the 10-day period if no upset bid is filed. [*In re Smith*, 24 B.R. 19 (Bankr. W.D.N.C. 1982).]

b) Bidder's contractual right to delivery of the deed upon tender of the purchase price is fixed upon expiration of the 10-day period if no upset bid is filed. [*Sprouse v. North River Ins. Co*., 81 N.C. App. 311, 344 S.E.2d 555 (1986).] The period expires at the close of business on the tenth day.

c) Trustee's contractual right to hold the bidder liable for the purchase price is fixed at the expiration of the 10-day period if no upset bid is filed. [*Id.*]

d) Debtor's right to possession is not affected by the expiration of the 10-day period; debtor retains an insurable interest and the right to possession until the purchase price is paid and the deed delivered. [*Id.*]

VII. Upset Bids [G.S. § 45-21.27]

A. An "upset bid" is a bid or offer to buy real property for a higher price than the property sold for at the original sale or prior upset bid.

B. There is no resale after an upset bid; rather each upset bid is followed by period of 10 days for a further upset bid.

C. Requirements of upset bid.

1. Determine whether the upset bid was filed in proper time.

a) The upset bid must be deposited with the clerk within 10 days after the report of sale or the last notice of upset bid is filed. [G.S. § 45-21.27(a)]

(1) The ten-day period begins after the filing of the report of sale, not after the date of the sale.

b) In counting the ten-day period, the following rules apply.

(1) Day one is the day **after** the report of sale is received by the clerk. [G.S. § 1A-1, Rule 6]

(2) If the tenth day falls on a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions, the bid must be filed by the close of normal business hours on the next day that the office is open for business. [G.S. § 45-21.27(a)]

c) Deposit must be filed by the close of normal business hours on the 10th day after filing of report of sale. Deposit means to be in the actual possession of the clerk's office by the end of the 10th day. [G.S. § 45-21.27(a)]

2. Determine whether the amount of the upset bid is adequate.

a) An upset bid must exceed the reported sales price by at least 5%, but in any event the minimum increase is $750. [G.S. § 45-21.27(a)]

(1) Clerk cannot require an upset bid in excess of the amount required by statute. [*In re Sale of Land of Sharpe*, 230 N.C. 412, 53 S.E. 2d 302 (1949).] (The clerk can require the bidder to file a compliance bond as well as the deposit. See Section VII.E at page 130.42)

(2) However, there is nothing to prevent a bidder from making an upset bid higher than the minimum required by statute.

3. Determine whether the upset bidder made a proper deposit.

a) The upset bidder must make a deposit with the clerk of an amount equal to 5% of the amount of the upset bid, but at least $750.

b) Deposit must be made in cash, certified check, or cashier's check satisfactory to the clerk. [G.S. § 45-21.27(a)]

c) **There is no authority which would allow clerk to accept a check that is not a certified or cashier's check**.

4. Determining the minimum amount of the upset bid and the amount of the upset deposit is a two-step process.

a) Bid. First, the clerk must determine the amount of the upset bid. Multiply the last highest bid by 5%; if that number is higher than $750, add the number to the last bid to get the minimum amount of the upset bid. If the number is less than $750, add $750 to the last bid to get the minimum amount for the upset bid.

b) Deposit. Second, the clerk must determine the amount required to be deposited by the upset bidder. Multiply the amount of the qualifying upset bid by 5%; if that number is more than $750, the number is the amount of the upset deposit. If the number is $750 or less, the upset deposit is $750.

c) **Example 1.** The high bid at the sale (or last upset bid) is $25,000. The minimum increase is $1,250 (5% of the last bid); so the upset bid is $26,250 ($25,000 + $1,250). The upset deposit would be $1,312.50 (5% of the upset bid of $26,250).

d) **Example 2.** The high bid is $10,000. The minimum increase for an upset bid is $750 because 5% of $10,000 is less than $750. Therefore, the minimum upset bid is $10,750. The upset deposit is $750 (because 5% of $10,750 is less than $750).

e) **Example 3.** The high bid is $14,500. Since 5% of $14,500 is $725, the minimum increase would be $750. Therefore the minimum upset bid would be $15,250. The upset deposit would be $762.50, which is 5% of $15,250 upset bid. (In this case, the $750 floor would be greater than 5% of the previous bid so the upset bid would be the previous bid plus $750; but 5% of the upset bid would be greater amount than $750, so the upset deposit would be 5% of the upset bid.)

f) **Example 4.** In Example 1 the minimum upset bid is $26,250, but the bidder may make a higher upset bid. Suppose the bidder enters an upset bid of $30,000. In that case, the amount to be deposited would be $1,500 (5% of the $30,000).

5. The clerk should not accept a bid filed after the close of business hours on the tenth day. The high bidder's right to purchase at the price bid is fixed at the end of the tenth day after the report of sale is filed, if no upset bid has been filed.

6. Debtor has the right to pay off the indebtedness plus all expenses of sale, including trustee's fee, if any, before the time for upset bids has expired and terminate the power of sale. [G.S. § 45-21.20]

D. Notice of upset bid.

1. At the same time that an upset deposit is filed, the upset bidder must also file a notice of upset bid. [G.S. § 45-21.27(e)]

2. The form is NOTICE OF UPSET BID NOTICE TO TRUSTEE OR MORTGAGEE (AOC-SP-403).

3. Contents of notice of upset bid. [G.S. § 45-21.27(e)]

a) Name, address, and telephone number of upset bidder;

b) Amount of the upset bid;

c) State that the sale will remain open for a period of 10 days after date on which notice of upset bid is filed for the filing of further upset bids; and

d) Be signed by the upset bidder or the upset bidder's attorney or agent.

4. Clerk must notify the trustee when a notice of upset bid is filed. [G.S. § 45-21.27(e)]

5. Trustee must give written notice of upset bid to the last prior bidder and current record owners of property. [G.S. § 45-21.27(e)]

a) Notice must be given by first class mail to last known address. [G.S. § 45-21.27(e)]

b) If the trustee fails to notify the proper parties, upon motion of the trustee, the clerk may extend the time for filing upset bids under the clerk's authority to make all orders as may be

just and necessary to safeguard the interests of all parties. [G.S. § 45-21.27(h)]

E. Compliance bonds.

1. Upon motion of the trustee, the clerk may require an upset bidder to deposit a cash bond (or surety bond, at the option of the bidder, approved by the clerk) in an amount not to exceed the total amount of the upset bid less the amount of required deposit. [G.S. § 45-21.27(b)]

a) **Example.** Bidder files an upset bid of $26,250 and deposits $1312.50. Clerk may require bidder also to deposit a cash bond or surety bond of $24,937.50 ($26,250 minus 1312.50)

2. Practical issues in requiring compliance bond.

a) Some clerks give notice to everyone who has bid before that a compliance bond will be required to be filed along with an upset deposit.

b) Some clerks will not impose a compliance bond until there has been a default by a bidder and the notice of resale includes as a term of the sale that the bidder must post a compliance bid.

c) One factor for the clerk to consider in requiring a compliance bond is whether it will have the effect of chilling the bidding.

d) Under the current law, it may not be as necessary to require the posting of a compliance bond in a foreclosure case as it was under prior law when the filing of an upset bid required readvertising and reselling the property.

3. The clerk must approve a surety bond. [G.S. § 45-21.27(b)]

4. Clerk is not bound by the initial approval of a surety bond if the clerk subsequently finds it to be defective. [*In re Miller*, 72 N.C. App. 494, 325 S.E.2d 490 (1985).]

5. Compliance bonds are payable to the State of North Carolina for the use of the parties in interest and are conditioned on the principal obligor's compliance with the bid. [G.S. § 45-21.27(b)]

6. An upset bid that does not meet the compliance bond requirement is void and has no effect. [*In re Miller*, 72 N.C. App. 494, 325 S.E.2d 490 (1985).]

F. Upset bidder is subject to the terms of the original notice of sale unless it has been modified by court order. [G.S. § 45-21.27(g)]

G. Release of prior bidder. When an upset bid is filed that complies with the statute, the last prior bidder is released from any further obligation on account of his or her bid, and the clerk must release any deposit or bond provided by bidder on the prior upset bid. (Likewise, the trustee must release

the deposit on the original sale when an upset bid is filed.) [G.S. § 45-21.27(f)]

VIII. Defaulting Bidders [G.S. § 45-21.30]

A. If the terms of the order of sale require the highest bidder to make a cash deposit at the sale and the bidder fails to do so, the person holding the sale must again offer the property for sale at the same time and place. [G.S. § 45-21.30(a)]

B. When the highest bidder at sale or resale or an upset bidder fails to comply with the bid after tender or a bona fide attempt to tender a deed for the property, the clerk, upon motion, may enter an order authorizing a resale. The procedure for the resale is the same as the procedure for the original sale, except that the notice of hearing and hearing requirements of G.S. § 45-21.16 are not applicable. [G.S. § 45-21.30(c); *In re Foreclosure of Earl L. Pickett Enter.*, 114 N.C. App. 489, 442 S.E.2d 101 (1994) (holding a new foreclosure hearing after default by bidder is improper).]

C. A defaulting bidder is liable on the bid to the extent that the final sales price is less than defaulting bid, plus all costs of resale. [G.S. § 45-21.30(d).; see *In re Foreclosure of Deed of Trust of Allan & Warmbold Constr. Co*., 88 N.C. App. 693, 364 S.E.2d 723 (1988).]

1. Trustee is the real party in interest in an action against a defaulting bidder. [*Union Grove Milling & Mfg. Co. v. Faw*, 109 N.C. App. 248, 426 S.E.2d 476, *aff'd per curiam,* 335 N.C. 165, 436 S.E.2d 131 (1993).]

2. Judgment creditor has no right to sue a defaulting bidder in order to increase the surplus funds. [*Id.*]

D. The clerk must hold the deposit or compliance bond made by a defaulting bidder because the deposit and bond secure payment of the amount for which the defaulting bidder remains liable. [G.S. § 45-21.30(d)]

E. Procedure for claiming deposit/determining defaulting bidder's liability.

1. Upon motion, clerk may give deposit to trustee to apply to default damages. [*Cf. Gilliam v. Sanders*, 198 N.C. 635, 152 S.E. 888 (1930).]

a) Before giving deposit to trustee clerk should give notice to the defaulting bidder to appear and show cause why the money should not be turned over to the trustee to apply to the default.

b) Trustee then accounts for deposit in the final report of sale.

2. It is not clear whether a clerk has the authority, upon motion, to determine the full amount of the deficiency because of the default when it is more than the deposit. Some cases seem to indicate that the clerk has authority to determine the deficiency. [See *In re Foreclosure of Deed of Trust of Allan & Warmbold Constr. Co.,* 88

N.C. App. 693, 364 S.E.2d 723 (1988) (appeal challenging the confirmation of a resale after setting aside bid of defaulting bidder; appellate court remanded to superior court for entry of judgment establishing defaulting bidder's indebtedness to trustee); *Marsh v. Nimocks*, 122 N.C. 478, 29 S.E. 840 (1898) (proper remedy for bid against defaulting bidder in judicial sale is motion in cause, not independent action); *Gilliam v. Sanders*, 198 N.C. 635, 152 S.E. 888 (1930).] However, many clerks require the trustee to bring a civil action to determine the deficiency if the trustee seeks more damages than the defaulting bidder's deposit.

F. Defaulting bidder is entitled to a refund of his or her deposit after the property is resold for amount in excess of the bid of defaulting bidder plus expenses of resale. [*Harris v. American Bank & Trust Co*., 198 N.C. 605, 152 S.E. 802 (1930).]

NOTE: Procedure for defaulting bidder in foreclosure under power of sale is similar to that of judicial sale. (See Judicial Sales, Civil Procedures, Chapter 43.)

G. Judge has power under equity to relieve the purchaser at sale when there is an irregularity in the sale combined with a grossly inadequate or grossly inflated bid. [*Pittsburgh Plate Glass Co. v. Forbes*, 258 N.C. 426, 128 S.E. 2d 875 (1963).]

1. Appellate court has not decided whether the clerk would have the power to relieve the purchaser at the sale for irregularity. In *Pittsburgh Plate Glass Co. v. Forbes*, the court said, "it is unnecessary to inquire whether the clerk lacked authority to act" because in that case the clerk had transferred the motion to set aside the bid to the judge.

IX. Disposition of Proceeds of Sale [G.S. § 45-21.31]

A. The person making the sale is required to apply the proceeds in the following order:

1. Costs and expenses of sale, trustee's commission, if any, and reasonable auctioneer's fee, if any. [G.S. § 45-21.31(a)(1)] These costs and expenses should also include advertising fees, fees to the trustee's office, etc.

a) When a sale is held, the trustee is entitled to compensation, if any, as stipulated in the deed of trust. [G.S. § 45-21.15]

b) Although this statute does not specifically provide for the payment of attorney fees, a non-lawyer trustee might require legal advice and assistance and sums paid would properly constitute an expense incurred by the trustee. [*In re Foreclosure of Newcomb*, 112 N.C. App. 67, 434 S.E.2d 648 (1993).]

c) See sections II.D and II.E at pages 130.4 and 130.5 regarding compensation of trustee and issue of attorney fees.

2. Taxes due and unpaid, unless the property was sold subject to taxes as per the notice of sale. [G.S. § 45-21.31(a)(2)]

3. Any special assessments against the property, unless the property was sold subject to assessments as per the notice of sale. [G.S. § 45-21.31(a)(3)]

   NOTE: In almost all cases, property will be sold subject to taxes and special assessments, but the notice of sale must so state.

4. Obligation secured by deed of trust, including interest and any other expenditures paid by the holder as a result of the default, such as insurance or taxes. [G.S. § 45-21.31(a)(4)]

   a) If an attorney is hired to represent the lender at the foreclosure hearing in a case in which the deed of trust has an attorney fees provision, the attorney fees for the lender are part of the obligation secured by deed of trust, and the trustee may pay the attorney fees to the lender's attorney under this section. [*In re Foreclosure of Ferrell Bros. Farm, Inc.*, 118 N.C. App. 458, 455 S.E. 2d 676 (1995).]

B. Surplus. If there is any surplus remaining after the application of proceeds as set forth above, it is to be paid to the persons entitled to it, if known, or, if not known, to the clerk. [G.S. § 45-21.31(b)]

1. Surplus must be paid to clerk in all cases where:

   a) Owner of sold property is dead and has no acting personal representative;

   b) Trustee or vendor is unable to locate persons entitled to surplus;

   c) Trustee or vendor is in doubt as to who is entitled to surplus money; **or**

   d) Adverse claims are asserted. [G.S. § 45-21.31(b)]

2. It is a good practice for the clerk to require an affidavit from the trustee indicating that the trustee is unable to determine who is entitled to the proceeds and setting out the facts as to why one of the four conditions allowing transfer to the clerk exist. **The clerk may refuse to accept the surplus proceeds if the trustee does not establish a proper basis for submitting them to the clerk**.

3. Payment to the clerk discharges the trustee or vendor from liability to extent of amount paid. [G.S. § 45-21.31(c)]

   a) Clerk must give a receipt for the money received. [G.S. § 45-21.31(d)]

   b) Clerk is liable on official bond for the safekeeping of money received until paid to parties entitled to it, or until it is paid out under an order of a court of competent jurisdiction. [G.S. § 45-21.31(e)]

4. Clerk holds the surplus money for safekeeping and has no interest in it other than protection from liability on official bond. [*Koob v. Koob*, 283 N.C. 129, 195 S.E.2d 552 (1973) (clerk challenged authority of district court in alimony action to determine how surplus funds from foreclosure should be distributed).]

5. There is no limit on the amount of surplus funds that may be paid over to the clerk under the provisions of G.S. § 45-21.31. [*Lenoir County v. Outlaw*, 241 N.C. 97, 84 S.E.2d 330 (1954).]

C. Disposition of surplus funds.

1. Any person making a claim on the surplus funds may institute a special proceeding to determine ownership of the funds. [G.S. § 45-21.32] See Proceeding to Determine Ownership of Surplus Proceeds from Foreclosure Sale, Special Proceedings, Chapter 131.

X. Final Report of Sale of Real Property [G.S. § 45-21.33]

A. Clerk has no authority to preapprove costs and expenses of sale including trustee's commission and auctioneer's fee. Those are within sole province of trustee. [*In re Foreclosure of Deed of Trust from Webber,* 148 N.C. App. 158, 557 S.E.2d 645 (2001).]

1. Remedy for a trustee who seeks guidance as to application of payments is to institute a declaratory judgment action.

2. Remedy for party wishing to challenge payments is to bring separate lawsuit against trustee for breach of fiduciary duty once payments made.

B. Person who holds a sale of real property pursuant to a power of sale must file a final report and account of receipts and disbursements with the clerk.

1. Report must be filed within 30 days after receipt of the proceeds of sale.

2. Form is FINAL REPORT AND ACCOUNT OF FORECLOSURE SALE (AOC-SP-402).

3. Report must show whether property was sold as a whole or in parts, whether all the property was sold, and whether all or only part of the obligation was satisfied. [G.S. § 45-21.33(a)]

C. Clerk audits the account and records it. [G.S. § 45-21.33(b)]

1. The clerk audits the account but does not approve it.

2. In conducting the audit, the clerk is merely authorized to determine whether entries in the report reflect the actual receipts and disbursements made by the trustee. [*In re Vogler Realty, Inc.*, 722 S.E.2d 459 (N.C. 2012) (holding that clerk does not have authority to review for reasonableness a trustee-attorney's payment of attorney fees to himself or herself in the context of an audit of final sale); *In re Foreclosure of Ferrell Bros.*, 118 N.C. App. 458, 455 S.E.2d 676 (1995).]

3. In auditing the final account, clerk should make sure that there are proper vouchers or documentation for each receipt or disbursement entered on final report and account when possible.

a) Check to see that all disbursements have been made as indicated. Methods of determining whether disbursement has been made are:

(1) Cancelled checks, vouchers, or receipts.

(2) When the noteholder is the purchaser, there won't be a check to document the transaction but there should not be a problem with accepting the report of the trustee.

(2) When the purchaser is not the noteholder and the check has not had time to clear, the clerk might require the trustee to include an affidavit from the noteholder indicating payment.

b) Much of the time it is impossible to properly audit the account because of a "Catch 22" situation. The trustee may have given the deed to the purchaser's attorney, but it has not been recorded and the trustee has not received and disbursed the funds at the point of filing the final report of sale. The purchaser's attorney will not record the deed nor release the purchase funds until the clerk has audited the account and filed it because there may be some irregularity that would require an additional action in the foreclosure. Therefore, the trustee cannot show the clerk any cancelled check because one has not yet been delivered. In that case, the best that the clerk may be able to do is require the trustee to show the clerk the check prepared but not delivered to disburse the funds. Even that might be a problem because the attorney/trustee should not write a check on the trust account before the sale proceeds are deposited in the account.

D. Fees which should appear on the final account (in addition to those set forth in G.S. § 45-21.31 and section IX.A at page 130.44) include:

1. Fee for foreclosure under power of sale in deed of trust as per G.S. § 7A-308(a)(1).

2. Additional fee of $0.45 per $100.00 of final sale price, with a minimum fee of $10 and a maximum of $500. [G.S. § 7A-308(a)(1)] Note: Check the statute to determine if the additional fee has been changed since this chapter was published.

a) If a federal agency is named as payee on the note and named beneficiary under the deed of trust **and** if final sales price is **less** than the entire balance due on loan (including principal, interest, fees, etc.) plus all costs of sale, including the additional fee, then the additional fee should not be assessed or collected. The fee is not collectable where the ultimate

burden of paying the fee falls upon the federal government. [See *Whitley v. Griffin*, 737 F. Supp. 345 (E.D.N.C. 1990).]

b) In **all** other cases (including where a federal agency guaranteed the loan, was the highest bidder at the sale, was assigned the bid by another bidder, or where the final sales price **equals or exceeds** the entire balance due on the loan plus all costs of sale including the additional fee), the additional fee must be assessed and collected.

c) Federal agencies which commonly make loans or guarantee loans of private lending institutions include Farmers Home Administration (FHA), Federal National Mortgage Association (FNMA), Government National Mortgage Association (GNMA), Federal Home Loan Mortgage Corporation (FHLMC), Housing and Urban Development (HUD), Federal Home Loan Bank, Federal Savings and Loan Associations, Federal Credit Unions, Federal Land Bank, Small Business Administration, Federal Financing Bank, and Federal Reserve Banks.

3. Recordation fee for Trustee's Deed (clerk may want to require trustee to provide Book and Page number on account).

4. Recordation fee for Notice of Foreclosure as per G.S. §§ 45-38 and 161-10.

E. Person who holds the sale must also file with clerk the following:

1. Copy of notices of sale and resale, if any, which were posted;

2. Copy of notices of sale and resale, if any, which were published, with affidavit of publication; and

3. Proof as required by the clerk that notices of hearing, sale and resale were served on all parties entitled to notice. [G.S. § 45-21.33(c)]

a) The way a clerk requires proof is by certification on the form itself, although a clerk could require some other method of proof.

4. In the absence of an affidavit to the contrary, an affidavit by the person holding the sale that notice of sale was posted in area designated by clerk for posting public notices in proper county 20 days before sale is proof of compliance with requirements of G.S. § 45-21.17(1)(a). [G.S. § 45-21.33(c)]

F. Clerk may issue an order to compel the filing of a correct and complete report or account as required by statutes within 20 days, and upon a failure to comply may initiate civil contempt proceedings against person. [G.S. § 45-21.14]

1. See ORDER (AOC-SP-915M). And if the clerk wishes to precede the order with a notice to file a correct and complete report, use NOTICE (AOC-SP-404).

2. See G.S. § Chapter 5A, Article 2, for requirements of imprisonment for civil contempt and **proceed with care**.

XI. Orders of Possession [G.S. § 45-21.29]

A. Clerk may issue an order for possession of real property sold in favor of the purchaser and against any party in possession when:

1. Property is sold in exercise of the power of sale;

2. Statutory provisions have been complied with;

3. Sale has been consummated and purchase price has been paid;

4. Purchaser has acquired title to and is entitled to possession;

a) The purchaser is not entitled to possession if the occupant is a bona fide tenant. [Protecting Tenants at Foreclosure Law, P.L. 111-22; 16 STAT. 1633. **This law is set to expire December 31, 2012.]** Therefore, person seeking order of possession must demonstrate that occupant of residential property is not a bona fide tenant.

b) Federal law overrides state foreclosure law which has held that upon foreclosure, tenant has no right to continued possession of the premises. Under the Protecting Tenants at Foreclosure Law the purchaser at foreclosure sale of residential property must honor any lease on the property, whether oral or written. The purchaser of the property takes the property subject to the lease and becomes the landlord of the tenant.

c) A person is a bona fide tenant if all of the following are true:

(1) The occupant is not the former owner, or the spouse, child, or parent of the former owner;

(2) The lease agreement is the product of an arms-length transaction; and

(3) The rent required by the lease is not substantially less than the fair rental value of the property, or if it is, the rent is reduced by a government subsidy.

5. Ten days' notice has been given to party who remains in possession or in the case of residential property with 15 or more rental units, 30 days' notice has been given to parties who remain in possession; and

6. Application is made by petition to the clerk by the trustee, the mortgagee (lender), the purchaser of the property, or an authorized representative of any of the three. [G.S. § 45-21.29(k)]

B. Clerk must make sure the trustee has complied with the six requirements for issuance of the order and may require an affidavit by the trustee indicating compliance. [G.S. § 45-21.29(k)]

C. Order of possession must be directed to the sheriff and must authorize the sheriff to remove all occupants in possession and their personal property from premises and to put the purchaser in possession.

1. Order is executed in the same manner as a writ of possession in a summary ejectment proceeding under G.S. § 42-36.2. [G.S. § 45-21.29(l)] (See Writs of Possession for Real Property, Civil Procedures, Chapter 39.)

2. Purchaser has the same rights and remedies in connection with execution of the order as does a landlord under North Carolina law including Chapters 42 and 44A of the General Statutes, which means that the purchaser can choose to have the sheriff padlock the premises and can dispose of personal property left by the possessor as provided by Chapters 42 and 44A.

3. When real property sold is located in more than one county, orders of possession must be issued for each county in which property located. [G.S. § 45-21.29(m)]

D. Purchaser is not entitled to possession until the purchase price is paid and the deed has been delivered; the debtor may remain in possession pending the closing. [*Sprouse v. North River Ins. Co*., 81 N.C. App. 311, 344 S.E.2d 555 (1986).]

XII. Effect of Bankruptcy on Foreclosure

A. Automatic stay.

1. The federal bankruptcy law provides that the filing of a bankruptcy petition operates as a stay, applicable to all entities, of

a) The commencement or continuation, including the issuance or employment of process, of a judicial proceeding that was or could have been commenced before the filing of the petition or to recover a claim against the debtor that arose before the filing of the petition.

b) The enforcement against the debtor or against property of the debtor of a judgment obtained before the filing of the petition.

c) Any act to obtain possession of debtor's property.

d) Any act to create, perfect, or enforce any lien against debtor's property.

e) Any act to create, perfect, or enforce against property of the debtor any lien to the extent the lien secures a claim that arose before the filing of the petition. [11 U.S.C. § 362]

2. The stay is automatic upon the filing of the petition, and the debtor does not have to file any paper with the clerk to make it effective. **A clerk may subject himself or herself to contempt by ignoring an undocumented claim by the debtor that he or she has filed bankruptcy.**

3. However, if the debtor claims he or she has filed a bankruptcy petition and the trustee is not aware of the filing, the clerk may take a recess in the proceeding to allow the trustee to contact the bankruptcy clerk to determine if a petition has been filed.

B. If the stay applies, the filing of the petition stops any further action in the state court regarding the foreclosure unless the bankruptcy court lifts the stay.

1. If the bankruptcy petition is filed before the foreclosure hearing is held, the clerk may not hold the hearing.

2. If it is filed after the hearing but before the sale, no sale may be held.

3. If it is filed after the sale but before the time for the filing of an upset bid, the clerk cannot accept an upset bid. [*In re DiCello*, 80 B.R. 769 (Bankr. E.D.N.C. 1987); *see also In re Adams*, 86 B.R. 867 (Bankr. E.D.N.C. 1988).]

4. Return of deposit. If the foreclosure sale is stayed before the upset bid period expires:

a) The clerk who received the deposit shall release the deposit to the upset bidder upon receipt of a certified copy of an order or notice from the bankruptcy court indicating that the debtor has filed a bankruptcy petition; or

b) The trustee who received a cash deposit from the high bidder at the foreclosure sale, upon notification of the stay, shall release any deposit to the high bidder. [G.S. § 45-21.22(d)]

5. If the petition is filed after the foreclosure is complete (the 10-day period for filing upset bids has run without an upset bid being filed), the stay does not affect the foreclosure because the property is not property of the estate of the bankrupt. [*In re Barham*, 193 B.R. 229 (Bankr. E.D.N.C. 1996); *In re Sarver*, 2010 WL 3501795 (M.D.N.C. 2010) (finding that debtor had no redemption right where bankruptcy petition filed at 5:01 p.m. on last day of upset bid period, thus creditor could obtain and record deed and recover possession); *cf. In re Hollar*, 184 B.R. 243 (Bankr. M.D.N.C. 1995).]

a) Transfer of the deed after the filing of the petition does not violate the automatic stay. [*In re Cooke*, 127 B.R. 784 (Bankr. W.D.N.C. 1991).]

b) Clerk could enter an order of possession to remove defendant, upon proper motion by trustee or purchaser.

C. Lifting the stay.

1. There are several grounds under which a trustee may proceed with the foreclosure after a bankruptcy petition has been filed:

a) The stay is lifted with regard to the foreclosure procedure.

b) The bankruptcy court allows an abandonment of the property that is the subject of the foreclosure.

c) The bankruptcy is dismissed.

2. In order for the clerk to proceed with the foreclosure, the trustee must file with the clerk a copy of the bankruptcy court's order lifting the stay with regard to the foreclosure proceeding, abandoning the property that is the subject of the foreclosure, dismissing the petition, or discharging the debts.

D. When bankruptcy stay lifted.

1. If the bankruptcy petition is filed after the notice of hearing is filed with the clerk but before the hearing is held, and thereafter the stay is lifted, the trustee files a new notice of hearing and serves copies on all parties.

2. If the bankruptcy petition is filed after the clerk has authorized foreclosure but before the expiration of the upset bid period, and thereafter the stay is lifted, terminated, or dissolved, the trustee must readvertise the sale and hold a new sale but need not comply again with the notice of hearing and hearing provisions of G.S. § 45-21.16. [G.S. § 45-21.22(c)]

E. Setting aside foreclosure because of bankruptcy.

1. Occasionally an attorney for the lender or trustee will seek to have the clerk issue an order setting aside the foreclosure and order of sale after the sale has already occurred because the debtor had filed bankruptcy before the sale or issuance of the order of sale. On some occasions a deed has already been given and the lender will ask the clerk to set aside the deed as well.

2. The effect of the bankruptcy on the foreclosure proceeding is a federal bankruptcy question, and therefore, any orders should be issued by the bankruptcy judge not the clerk of superior court.

3. However, some clerks will set aside the sale if no final report has been filed, no deed has been given to the purchaser, and notice is given to third-party purchaser who does not object. If there is any controversy, those clerks will require the parties to go to the bankruptcy court for resolution. Other clerks will not set aside the sale and will require the parties to settle the matter in the bankruptcy court.

XIII. Miscellaneous

A. Action to enjoin foreclosure sale.

1. Equitable defenses (and legal issues outside the issues listed in G.S. § 45-21.16(d)) may not be raised in a foreclosure hearing pursuant to G.S. § 45-21.1 et seq., but must instead be asserted in an action to enjoin the foreclosure sale under G.S. § 45-21.34. See Section III.I.2 at page 130.28.

2. An action to enjoin a sale filed pursuant to G.S. § 45-21.34 must be commenced before the time that rights of parties are fixed under G.S.

§ 45-21.29A. [*Swindell v. Overton*, 310 N.C. 707, 314 S.E.2d 512 (1984) (decided under former law when confirmation was time rights became fixed).]

3. If a judge dissolves an order restraining or enjoining a sale **before** the date fixed for the sale, then the judge may either order that the sale be held as previously noticed, or by order fix the time and place for sale and notice requirements. [G.S. § 45-21.22(a)]

4. If a judge dissolves an order restraining or enjoining the sale **after** the date fixed for the sale, then the judge must by order fix the time and place for sale and notice requirements. [G.S. § 45-21.22(b)]

B. Motion to set aside defective sale.

1. Sometimes when there is a significant defect in the sale, the trustee may seek an order to set the sale aside and begin again.

2. Be careful about setting aside a sale to cure a defect. If the final report has been filed and the deed has been given to the purchaser, **it is too late for the clerk to set aside the sale**. [*In re Hackley*, 713 S.E.2d 119 (N.C. App. 2011) (dismissing as moot the appeal of a foreclosure order where sale had been completed and deed had been transferred).]

C. Sale of separate tracts in different counties.

1. As indicated, when one tract of land is located in two or more counties, the sale may be held in any county in which the land is located; the hearing must be held in one of the counties in which the land is located (not necessarily same county where sale is held); and the notice of sale provisions must be complied with in each county in which property is located. [G.S. §§ 45-21.4; -21.16, -21.17]

2. When separate tracts are located in different counties there must be separate advertisement, sale, and report of sale in each county. [G.S. § 45-21.7]

a) Each county in which a sale will occur sets up a special proceeding case file.

b) The report of sale of property in any one county shall be filed with the clerk in that county. (If the place of hearing is different from the place of sale, it may be good practice to also file a copy of the report in the county where the hearing is conducted and court file is located.)

c) Sale of each tract is subject to a separate upset bid.

d) The clerk has jurisdiction over upset bids for the tracts of property situated in his or her county.

e) To the extent the clerk deems it necessary, the sale of each separate tract within a county with respect to which an upset bid is received shall be treated as a separate sale for determining the applicable procedure.

f) Exercise of power of sale with respect to separate tract in one county does not extinguish the right to exercise the power of sale with respect to other tracts in other counties to satisfy the obligation secured by the deed of trust.

D. Sale as a whole or in parts. [G.S. § 45-21.8, -21.9]

1. If the deed of trust provides that the property must be sold as whole or in parts, those terms must be complied with. [G.S. § 45-21.8(a)]

2. If there is no specific provision, trustee may, in his or her discretion, sell the property as a whole, sell it in parts or parcels as described in the instrument, or offer by each method and sell by method which produces the highest price. [G.S. § 45-21.8(b)]

3. If selling in parts, the sale of each part is subject to a separate upset bid, and the clerk may thereafter treat the sale of each part as a separate sale. [G.S. § 45-21.8(b)]

a) If tracts are sold separately, the trustee should report each separately. There should be one report of sale for each tract of land.

b) If an upset bid is received on one tract, but not all, the trustee may file a final report of sale for the tracts sold before the final sale on the tract for which an upset bid is filed. In determining when the maximum is reached in assessing costs based on the value of the property sold, the costs should be assessed on each report of sale.

4. If selling in parts, the trustee should sell as many parcels as seems necessary to satisfy the obligation, plus costs and expenses. [G.S. § 45-21.9(a)]

a) If the proceeds from only part are insufficient, the trustee may readvertise the unsold property and sell as many additional parcels as are necessary to satisfy the debt. [G.S. § 45-21.9(b)]

b) A trustee who sells additional parcels must give notice of sale pursuant to G.S. § 45-21.17, but need not comply with hearing requirements of G.S. § 45-21.16. [G.S. § 45-21.9(b)]

E. Simultaneous foreclosure of two or more instruments. [G.S. § 45-21.9A]

1. If the same property secures in whole or in part two or more deeds of trust held by the same person and there are no intervening liens except for taxes, the trustee can combine obligations secured by the deeds of trust and sell the property once to satisfy the combined obligations if:

a) Each deed of trust contains a power of sale;

b) No deed of trust contains a provision preventing simultaneous foreclosure;

c) Trustee can comply with the terms governing foreclosure sales in each deed of trust; and

d) Trustee can comply with the statutory requirements of foreclosure sale for each deed of trust. [G.S. § 45-21.9A]

e) Proceeds of sale applied as per statutes, with the proceeds of combined obligations being applied in order of priority of the deeds of trust securing them and any deficiencies determined accordingly. [G.S. § 45-21.9A]

F. Statute of limitations.

1. Power of sale cannot be exercised when a civil action to foreclose would be barred by the statute of limitations. [G.S. § 45-21.12(a)]

a) Sale commenced within the time allowed by the statute of limitations may be completed even though effected after the time when commencement of the action would be barred. [G.S. § 45-21.12(b)]

b) Sale is commenced when the notice of hearing or notice of sale is first filed, given, served, posted or published, whichever occurs first. [G.S. § 45-21.12(b)]

2. Statute of limitations for foreclosure by power of sale contained in deed in trust is 10 years after default or the last payment is made. [G.S. § 1-47(3)]

a) The right to exercise any power of sale contained in a deed of trust is barred after 10 years from the maturity of any notes secured by the deed of trust, where no payments have been made extending the statute. [*Lowe v. Jackson*, 263 N.C. 634, 140 S.E.2d 1 (1965).]

b) The power of sale must be exercised within the 10-year period following maturity of note or from the last payment thereon. [*Lowe v. Jackson*, above.]

3. Fact that one note in a series is barred by the statute of limitations does not bar the exercise of a power of sale for satisfaction or indebtedness represented by other notes in the series. [G.S. § 45-21.11]

XIV. Related Provisions

A. Judicial sales. [G.S. §§ 1-339.1 through 1-339.40]

1. Judicial sale procedures are applicable when the instrument is so defective that proper foreclosure procedure must be resolved by district or superior court action.

2. See Judicial Sales, Civil Procedures, Chapter 43.

B. Proceeding to determine ownership of surplus funds. [G.S. § 45-21.32]

1. See Proceeding to Determine Ownership of Surplus Proceeds from Foreclosure Sale, Special Proceedings, Chapter 131.

C. Deficiency lawsuits. [G.S. § 45-21.36; 45-21.38]

1. Debtor may defend against a deficiency suit brought by the lender by proving reasonable value of property. [See G.S. § 45-21.36]

2. Debtor may not be liable for deficiency where the indebtedness represents a portion of the purchase price (purchase money mortgage or deed of trust). [See G.S. § 45-21.38]

D. Renunciation of trusteeship by personal representative of deceased mortgagee or trustee. [G.S. § Chapter 45, Article 2]

APPENDIX I

File No. _____

CHECK LIST FOR CLERKS BEFORE ENTERING ORDER OF SALE IN FORECLOSURE CASES

☐ 1. Check deed of trust (and any substitution instruments) to make sure trustee (or substitute trustee) has power of sale.

☐ 2. Check Notice of Hearing to make sure it contains all information required by statute.

☐ 3. Check statute and deed of trust to make sure that all necessary parties have been served with Notice of Hearing.

☐ 4. Check all returns of service by Sheriff (or return receipts attached to affidavits of service by certified or registered mail) to make sure Notice of Hearing properly served.

☐ 5. Make sure all parties were served at least 10 days before hearing, or if served by posting, notice is posted at least 20 days before hearing.

☐ 6. If Notice of Hearing served by posting, make sure appropriate affidavit(s) filed showing how and where posted as well as diligent efforts justifying posting.

☐ 7. Check deed of trust for additional notice requirements.

☐ 8. Make sure party requesting foreclosure is holder of valid debt, which may require production of original note and deed of trust (or, in many cases, accurate copies) and, depending on the circumstances, competent evidence demonstrating the chain of transfer from holder to holder. Copies should be in court file.

☐ 9. Review note and/or deed of trust for acceleration clause, demand letter, or other requirements which may affect default.

☐ 10. Remember that trustee is fiduciary to both debtor and creditor. If case is contested, trustee/attorney should not introduce evidence or assume advocacy role for either side. If debtor contests findings or objects to use of affidavits, creditor will need to be present to testify as to debt and default.

☐ 11. Be sure to swear in any witnesses who testify at hearing.

APPENDIX II

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MEMORANDUM

TO: Clerks of Superior Court (Please share with your SP staff)

FROM: Peter E. Powell, Legal Counsel

SUBJECT: Foreclosures Involving Mortgage Electronic Registration Systems, Inc. (MERS)

This memorandum addresses recent questions regarding the status of Mortgage Electronic Registration Systems, Inc. ("MERS") in foreclosure proceedings in North Carolina. MERS is a company founded by various mortgage lenders and secondary market participants to hold title to mortgage liens on behalf of lenders. MERS is often named as a "nominee" on deeds of trust securing home loans made in North Carolina. However, its nominee status does not make any difference with regards to whether it is the holder of the note and has the right to foreclose.

MERS should be treated like any other note-holder seeking to foreclose in North Carolina. As such, MERS may foreclose on a deed of trust when it satisfies the requirements of N.C.G.S. § 45-21.16(d) by presenting evidence to the Clerk that: (1) it is the holder of the promissory note; (2) the loan is in default; (3) the deed of trust provides for the foreclosure remedy; and (4) notice has been given to borrower and others entitled to notice. The questions that have arisen revolve around how the foreclosing party shows that it is the holder of the note. In determining whether MERS is the holder, the Clerks should apply the same standards as would be applied to any note holder.

Obviously, the original lender or a subsequent lender (assignee) may foreclose a deed of trust in a power of sale proceeding. There is no need or requirement that an assignment of a deed of trust be recorded. See G.S. § 47-17.2. Under North Carolina law, when the note is duly assigned or transferred, the rights under the deed of trust follow the note. As a result, whichever party is holder of the note is entitled to foreclose under the deed of trust.

Any note holder, including the original lender (payee), may assign the note by endorsement. This is typically done by an endorsement on the reverse side of the note (just the way a check is endorsed) or on the face of the note. If the note is properly assigned/endorsed, the deed of trust follows the indebtedness and the holder of the note is entitled to foreclose under power of sale. An endorsement may be either "in blank" or to a specified person or entity, as follows:

"Pay to the order of:

/s/ Joe Mortgage Mann
President, First National Bank" (This is a blank endorsement.)

OR

"Pay to the order of:

Mortgage Electronic Registration Systems, Inc.

/s/ Joe Mortgage Mann
President, First National Bank" (This is an endorsement to a specific assignee.)

If the endorsement is in blank, then whoever has possession of the note is the holder. In the specific endorsement example above, Mortgage Electronic Registration Systems, Inc. is the holder. A note also may be endorsed by an "allonge." This is separate document that contains the endorsement and is attached to the note. Whether by endorsement on the note or on the allonge, MERS can be the holder, and may foreclose if it establishes the three other evidentiary issues: that the loan is in default, the deed of trust provides for the foreclosure remedy, and notice has been provided to the borrower and all other parties entitled to notice.

To summarize how Clerks should proceed in confirming whether the foreclosing entity is entitled to foreclose on a Deed of Trust:

1. Original Lender is Foreclosing. When the original lender is the foreclosing entity, foreclosure counsel or the trustee need to produce, as evidence: (i) the original or a copy of the recorded Deed of Trust; (ii) the original or a copy of the note; (iii) an affidavit that the indebtedness is outstanding; and (iv) proof that notice has been provided to the borrower and all other parties entitled to notice.

2. MERS is Foreclosing. When MERS is the foreclosing entity, they must proceed as a subsequent lender, and foreclosure counsel or the trustee need to produce, as evidence: (i)

the original or a copy of the recorded Deed of Trust; (ii) the original or copy of the note endorsed in blank or specifically endorsed or assigned to MERS; (iii) an affidavit reciting that MERS is the holder and that the debt is outstanding; and (iv) proof that notice has been provided to the borrower and all other parties entitled to notice.

If the original note, as endorsed, is produced, the affidavit need not recite that MERS is the holder, as they are obviously in possession of the note. If the original note is not produced, and the endorsement is in blank, then the affidavit should recite that the foreclosing party is the holder.

3. Other Entity is Foreclosing. When any subsequent lender or servicer other than MERS is the foreclosing entity, foreclosure counsel or the trustee need to produce, as evidence: (i) the original or a copy of the recorded Deed of Trust; (ii) the original or a copy of the note endorsed in blank or specifically endorsed or assigned to the foreclosing lender or servicer; (iii) an affidavit reciting that the subsequent lender is the holder and that the indebtedness is outstanding; and (iv) proof that notice has been provided to the borrower and all other parties entitled to notice.

If the original note, as endorsed, is produced, the affidavit need not recite that the subsequent lender is the holder, as they are obviously in possession of the note. If the original note is not produced, and the endorsement is in blank, then the affidavit should recite that the foreclosing party is the holder.

In conclusion, the above suggested procedures are applicable to all foreclosures, no matter who brings the proceeding. MERS should be treated exactly as any other holder of indebtedness would be under the North Carolina foreclosure statutes. However, without a proper assignment or endorsement as described above, MERS or any subsequent lender, cannot be established as the holder of a note in which the original lender is the proper party. Merely being named as a "nominee" in the original deed of trust is not sufficient. If you should have any further questions concerning this matter please feel free to call me at 919-715-4907 or Pamela Best at 919-715-4849.