

Proposed Rule Changes
Colorado Rules of Civil Procedure
(changes marked version – see below for clean version)

Rule 120. Orders Authorizing Foreclosure Sales Under Powers in a Deed of Trust to the Public Trustee

(a) **Motion for Order Authorizing Sale; ~~Contents~~**. Whenever an order of court is desired authorizing a foreclosure sale under a power of sale contained in ~~an instrument~~ a deed of trust to a public trustee, any interested person entitled to enforce the deed of trust ~~or someone on such person's behalf~~ may file a verified motion in a district court seeking such order. The motion shall be captioned: "Verified Motion for Order Authorizing a Foreclosure Sale under C.R.C.P. 120," and shall be verified by a person with direct knowledge who is competent to testify regarding the facts stated in the motion.

(1) Contents of Motion. The motion shall include a copy of the evidence of debt, the deed of trust containing the power of sale, and any subsequent modifications of these documents. ~~The motion accompanied by a copy of the instrument containing the power of sale,~~ shall describe the property to be sold, ~~and~~ shall specify the ~~default or other~~ facts giving rise to the default, and may include documents relevant to the claim of a default ~~claimed by the moving party to justify invocation of the power of sale.~~

(A) When the property to be sold is personal property, the motion shall state the names and last known addresses, as shown by the records of the moving party, of all persons known or believed by the moving party to have an interest in such property which may be materially affected or extinguished by such sale.

(B) When the property to be sold is real property and the power of sale is contained in a deed of trust to a public trustee, the motion shall state the name and last known address, as shown by the real property records of the clerk and recorder and the records of the moving party, of:

(i) the grantor of ~~such the~~ deed of trust;~~;~~

(ii) ~~of~~ the current record owner of the property to be sold;~~;~~ ~~and of~~

(iii) ~~all~~ ny persons known or believed by the moving party to be personally liable ~~upon the indebtedness for the debt~~ secured by the deed of trust;~~;~~ and

(iv) ~~as well as the names and addresses of~~ those persons who appear to have an acquired a record interest in such real property that is evidenced by a document recorded after, subsequent to the recording of ~~the such~~ deed of trust and before prior ~~to~~ the recording of the notice of election and demand for sale, or that is otherwise subordinate to the lien of the deed of trust ~~whether by deed, mortgage, judgment or any other instrument of record.~~

(C) In describing and giving notice to persons who appear to have acquired a record interest in real property, the address of each such person shall be the address which that is given in the recorded instrument evidencing such person's interest. ~~;~~ ~~except that if~~ If such recorded instrument does not give an address or if only the county and state are given as the address of such person, no address need be stated for such person in the motion.

(2) Setting of Response Deadline; Hearing Date. On receipt of the motion, ~~t~~The clerk shall set a deadline by which any response to the motion must be filed. The deadline shall be fix a time not less than 21 nor more than 35 days after the filing of the motion ~~and a place for the hearing of such motion.~~ For purposes of any statutory reference to the date of a hearing under C.R.C.P. 120, the response deadline set by the clerk shall be regarded as the scheduled hearing date unless a later hearing date is set by the court pursuant to section (c)(2) below.

(b) Notice of Response Deadline; Contents; Service of Notice. The moving party shall issue a notice stating:

(1) a description ~~ing~~ of the deed of trust ~~the instrument~~ containing the power of sale, the property sought to be sold ~~thereunder~~ at foreclosure, and the ~~default or other~~ facts asserted in the motion to support the claim of a default;

(2) ~~upon which the power of sale is invoked. The notice shall also state the time and place set for the hearing and shall refer to~~ the right of any interested person to file and serve a responses as provided in section (c), including a reference to the last day for filing such responses and the addresses at which such responses must be filed and served and the deadline set by the clerk for filing a response.

(3) ~~The notice shall contain~~ the following advisement: “If this case is not filed in the county where your property or a substantial part of your property is located, you have the right to ask the court to move the case to that county. If you file a response and the court sets a hearing date, your request to move the case must be filed ~~Your request may be made as a part of your response or any paper you file~~ with the court at least 7 days before the date of the hearing unless the request was included in your response.”; and

(4) ~~The notice shall contain~~ the mailing return address of the moving party and, if different, the name and address of any authorized servicer for the loan secured by the deed of trust. If the moving party or authorized servicer, if different, is not authorized to modify the evidence of the debt, the notice shall state in addition the name, mailing address, and telephone number of the person authorized to modify the evidence of debt. A copy of C.R.C.P. 120 shall be included with or attached to the notice. The ~~Such~~ notice shall be served by the moving party not less than 14 days prior to the response deadline set by the clerk, ~~date set for the hearing,~~ by:

(A1) mailing a true copy thereof of the notice to each person named in the motion (other than any persons for whom no address is stated) at that the person’s address or addresses stated in the motion;

(B2) ~~and by~~ filing a copy with the clerk ~~and by delivering a second copy to the clerk~~ for posting by the clerk in the courthouse in which the motion is pending; and

~~(C3)~~ if the property to be sold is a residential property as defined by statute, by posting a true copy of the notice in a conspicuous place on the subject property as required by statute. Proof of ~~Such~~-mailing and delivery of the notice to the clerk for posting in the courthouse, and proof of posting of the notice on the residential property, ~~posting~~ shall be evidenced by set forth in the certificate of the moving party or moving party's agent. For the purpose of this section, posting by the clerk may be electronic on the court's public website so long as the electronic address for the posting is displayed conspicuously at the courthouse.

(c) Response Stating Objection to Motion for Order Authorizing Sale; ~~Contents~~; Filing and Service.

(1) Any interested person who disputes, on grounds within the scope of the hearing provided for in section (d), the moving party's right entitlement to an order authorizing sale may file and serve a response to the motion, ~~verified by the oath of such person, setting forth t~~ The response must describe the facts the respondent relies upon in objecting to the issuance of an order authorizing sale, and may include which he relies and attaching copies of ~~all~~ documents which support ~~his~~ the respondent's position. The response shall be filed and served not ~~less~~ later than the response deadline set by the clerk. The response shall include contact information for the respondent including name, mailing address, telephone number, and, if applicable, an e-mail address. ~~7 days prior to the date set for the hearing, said interval including intermediate Saturdays, Sundays, and legal holidays, C.R.C.P. 6(a) notwithstanding, unless the last day of the period so computed is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next succeeding day which is not a Saturday, Sunday or a legal holiday.~~ Service of ~~the such~~ response upon the moving party shall be made in accordance with C.R.C.P. 5(b). ~~C.R.C.P. 6(e) shall not apply to computation of time periods under this section (e).~~

(2) If a response is filed stating grounds for opposition to the motion within the scope of this Rule as provided for in section (d), the court shall set the matter for hearing at a later date. The clerk shall clear available hearing dates with the parties and counsel, if practical, and shall give notice to counsel and any self-represented parties who have appeared in the matter, in accordance with the rules applicable to e-filing, no less than 14 days prior the new hearing date.

(d) ~~Hearing~~; Scope of Issues at the Hearing; Order Authorizing Foreclosure Sale; Effect of Order. ~~At the time and place set for the hearing or to which the hearing may have been continued,~~ The court shall examine the motion and ~~the responses, if any~~ responses.

(1) If the matter is set for hearing, ~~t~~ The scope of inquiry at ~~the such~~ hearing shall not extend beyond

(A) the existence of a default ~~or other circumstances~~ authorizing exercise of a power of sale; under the terms of the ~~instrument~~ deed of trust described in the motion; ~~;~~

(B) consideration by the court of the requirements of exercise of a power of sale contained therein, and such other issues required by the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. A.P.P. § 521520, as amended;

(C) whether the moving party is the real party in interest; and

(D) whether the status of any request for a loan modification agreement bars a foreclosure sale as a matter of law.

The court shall determine whether there is a reasonable probability that a such default justifying the sale or other circumstance has occurred, ~~and~~ whether an order authorizing sale is otherwise proper under the Servicemembers said Service Member Civil Relief Act, whether the moving party is the real party in interest, and, if each of those matters is determined in favor of the moving party, whether evidence presented in support of defenses raised by the respondent and within the scope of this Rule prevents the court from finding that there is a reasonable probability that the moving party is entitled to an order authorizing a foreclosure sale. The court ~~shall summarily~~ grant or deny the motion in accordance with such determination. For good cause shown, the court may continue a hearing.

(2) If no response has been filed by the response deadline set by the clerk, and if the court is satisfied that venue is proper and the moving party is entitled to an order authorizing sale, the court shall forthwith enter an order authorizing sale.

(3) Any order authorizing sale shall recite the date the hearing was completed, if a hearing was held, or, if no response was filed and no hearing was held, shall recite the response deadline set by the clerk as the date a hearing was scheduled, but that no hearing occurred.

(4) Neither the granting nor the denial of a motion An order granting or denying a motion filed under this Rule shall not constitute an appealable order or final judgment. The granting of any such a motion authorizing a foreclosure shall be without prejudice to the right of any person aggrieved to seek injunctive or other relief in any court of competent jurisdiction, and the denial of any such motion shall be without prejudice to any other right or remedy of the moving party.

(e) The court shall not require the appointment of an attorney to represent any interested person as a condition of granting such motion, unless it appears from the motion or other papers filed with the court that there is a reasonable probability that the interested person is in the military service.

~~(e) Hearing Dispensed with if no Response Filed. If no response has been filed within the time permitted by section (c), the court shall examine the motion and, if satisfied that venue is proper and the moving party is entitled to an order authorizing sale upon the facts stated therein, the court shall dispense with the hearing and forthwith enter an order authorizing sale.~~

(f) Venue. For the purposes of this section, a consumer obligation is any obligation

(1i) as to which the obligor is a natural person, and

(2ii) is incurred primarily for a personal, family, or household purpose.

Any proceeding under this Rule involving a consumer obligation shall be brought in and heard in the county in which such consumer signed the obligation or in which the property or a substantial part ~~of the property thereof~~ is located. Any proceeding under this Rule ~~which that~~ does not involve a consumer obligation or an instrument securing a consumer obligation may be brought and heard in any county. However, in any proceeding under this Rule, if a response is timely filed, and if in the response or in any other writing filed with the court, the responding party requests a change of venue to the county in which the encumbered property or a substantial part thereof is situated, the court shall order transfer of the proceeding to such county.

(g) Return of Sale. The court shall require a return of ~~such~~ sale to be made to the court, ~~and if~~ it appears ~~therefrom~~ the return that ~~such the~~ sale was conducted in conformity with the order authorizing the sale, the court shall ~~thereupon~~ enter an order approving the sale. This order shall not have preclusive effect on the parties in any action for a deficiency judgment or in a civil action challenging the right of the moving party to foreclosure or seeking to set aside the foreclosure sale.

(h) Docket Fee. A docket fee in the amount specified by law shall be paid by the person filing ~~the such~~ motion. Unless the court shall otherwise order, any person filing a response to the motion shall pay, at the time of the filing of such response, a docket fee in the amount specified by law for a defendant or respondent in a civil action under section 13-32-101(1)(d), C.R.S.

COMMITTEE COMMENTS

1989

[1] The 1989 amendment to C.R.C.P. 120 (Sales Under Powers) is a composite of changes necessary to update the Rule and make it more workable. The amendment was developed by a special committee made up of practitioners and judges having expertise in that area of practice, with both creditor and debtor interests represented.

[2] The changes are in three categories. There are changes that permit court clerks to perform many of the tasks that were previously required to be accomplished by the Court and thus save valuable Court time. There are changes to venue provisions of the Rule for compliance with the Federal Fair Debt Collection Practices Act. There are also a number of editorial changes to improve the language of the Rule.

[3] There was considerable debate concerning whether the Federal “Fair Debt Collection Practices Act” is applicable to a C.R.C.P. 120 proceeding. Rather than attempting to mandate compliance with that federal statute by specific rule provision, the Committee recommends that a person acting as a debt collector in a matter covered by the provisions of the Federal “Fair Debt Collection Practices Act” be aware of the potential applicability of the Act and comply with it, notwithstanding any provision of this Rule.

Proposed Rule Changes

Colorado Rules of Civil Procedure (clean version)

Rule 120. Orders Authorizing Foreclosure Sale Under Power in a Deed of Trust to the Public Trustee

(a) Motion for Order Authorizing Sale. When an order of court is desired authorizing a foreclosure sale under a power of sale contained in a deed of trust to a public trustee, any person entitled to enforce the deed of trust may file a verified motion in a district court seeking such order. The motion shall be captioned: “Verified Motion for Order Authorizing a Foreclosure Sale under C.R.C.P. 120,” and shall be verified by a person with direct knowledge who is competent to testify regarding the facts stated in the motion.

(1) Contents of Motion. The motion shall include a copy of the evidence of debt, the deed of trust containing the power of sale, and any subsequent modifications of these documents. The motion shall describe the property to be sold, shall specify the facts giving rise to the default, and may include documents relevant to the claim of a default.

(A) When the property to be sold is personal property, the motion shall state the names and last known addresses, as shown by the records of the moving party, of all persons known or believed by the moving party to have an interest in such property which may be materially affected or extinguished by such sale.

(B) When the property to be sold is real property and the power of sale is contained in a deed of trust to a public trustee, the motion shall state the name and last known address, as shown by the real property records of the clerk and recorder and the records of the moving party, of:

(i) the grantor of the deed of trust;

(ii) the current record owner of the property to be sold;

(iii) all persons known or believed by the moving party to be personally liable for the debt secured by the deed of trust; and

(iv) those persons who appear to have an interest in such real property that is evidenced by a document recorded after the recording of the deed of trust and before the recording of the notice of election and demand for sale, or that is otherwise subordinate to the lien of the deed of trust.

(C) In describing and giving notice to persons who appear to have acquired a record interest in real property, the address of each such person shall be the address that is given in the recorded instrument evidencing such person's interest. If such recorded instrument does not give an address or if only the county and state are given as the address of such person, no address need be stated for such person in the motion.

(2) Setting of Response Deadline; Hearing Date. On receipt of the motion, the clerk shall set a deadline by which any response to the motion must be filed. The deadline shall be not less than 21 nor more than 35 days after the filing of the motion. For purposes of any statutory reference to the date of a hearing under C.R.C.P. 120, the response deadline set by the clerk shall be regarded as the scheduled hearing date unless a later hearing date is set by the court pursuant to section (c)(2) below.

(b) Notice of Response Deadline; Service of Notice. The moving party shall issue a notice stating:

(1) a description of the deed of trust containing the power of sale, the property sought to be sold at foreclosure, and the facts asserted in the motion to support the claim of a default;

(2) the right of any interested person to file and serve a response as provided in section (c), including the addresses at which such response must be filed and served and the deadline set by the clerk for filing a response.

(3) the following advisement: “If this case is not filed in the county where your property or a substantial part of your property is located, you have the right to ask the court to move the case to that county. If you file a response and the court sets a hearing date, your request to move the case must be filed with the court at least 7 days before the date of the hearing unless the request was included in your response.”; and

(4) the mailing address of the moving party and, if different, the name and address of any authorized servicer for the loan secured by the deed of trust. If the moving party or authorized servicer, if different, is not authorized to modify the evidence of the debt, the notice shall state in addition the name, mailing address, and telephone number of the person authorized to modify the evidence of debt. A copy of C.R.C.P. 120 shall be included with or attached to the notice. The notice shall be served by the moving party not less than 14 days prior to the response deadline set by the clerk, by:

(A) mailing a true copy of the notice to each person named in the motion (other than any person for whom no address is stated) at that person’s address or addresses stated in the motion;

(B) filing a copy with the clerk for posting by the clerk in the courthouse in which the motion is pending; and

(C) if the property to be sold is a residential property as defined by statute, by posting a true copy of the notice in a conspicuous place on the subject property as required by statute. Proof of mailing and delivery of the notice to the clerk for posting in the courthouse, and proof of posting of the notice on the residential property, shall be set forth in the certificate of the moving party or moving party's agent. For the purpose of this section, posting by the clerk may be electronic on the court’s public website so long as the electronic address for the posting is displayed conspicuously at the courthouse.

(c) Response Stating Objection to Motion for Order Authorizing Sale; Filing and Service.

(1) Any interested person who disputes, on grounds within the scope of the hearing provided for in section (d), the moving party's right to an order authorizing sale may file and serve a response to the motion. The response must describe the facts the respondent relies on in objecting to the issuance of an order authorizing sale, and may include copies of documents which support the respondent's position. The response shall be filed and served not later than the response deadline set by the clerk. The response shall include contact information for the respondent including name, mailing address, telephone number, and, if applicable, an e-mail address. Service of the response on the moving party shall be made in accordance with C.R.C.P. 5(b).

(2) If a response is filed stating grounds for opposition to the motion within the scope of this Rule as provided for in section (d), the court shall set the matter for hearing at a later date. The clerk shall clear available hearing dates with the parties and counsel, if practical, and shall give notice to counsel and any self-represented parties who have appeared in the matter, in accordance with the rules applicable to e-filing, no less than 14 days prior the new hearing date.

(d) Scope of Issues at the Hearing; Order Authorizing Foreclosure Sale; Effect of Order.

The court shall examine the motion and any responses.

(1) If the matter is set for hearing, the scope of inquiry at the hearing shall not extend beyond

(A) the existence of a default authorizing exercise of a power of sale under the terms of the deed of trust described in the motion;

(B) consideration by the court of the requirements of the Servicemembers Civil Relief Act, 50 U.S.C. A.P.P. § 521, as amended;

(C) whether the moving party is the real party in interest; and

(D) whether the status of any request for a loan modification agreement bars a foreclosure sale as a matter of law.

The court shall determine whether there is a reasonable probability that a default justifying the sale has occurred, whether an order authorizing sale is otherwise proper under the Servicemembers Civil Relief Act, whether the moving party is the real party in interest, and, if each of those matters is determined in favor of the moving party, whether evidence presented in support of defenses raised by the respondent and within the scope of this Rule prevents the court from finding that there is a reasonable probability that the moving party is entitled to an order authorizing a foreclosure sale. The court shall grant or deny the motion in accordance with such determination. For good cause shown, the court may continue a hearing.

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(4) An order granting or denying a motion filed under this Rule shall not constitute an appealable order or final judgment. The granting of a motion authorizing a foreclosure shall be without prejudice to the right of any person aggrieved to seek injunctive or other relief in any court of competent jurisdiction, and the denial of any such motion shall be without prejudice to any other right or remedy of the moving party.

(e) The court shall not require the appointment of an attorney to represent any interested person as a condition of granting such motion, unless it appears from the motion or other papers filed with the court that there is a reasonable probability that the interested person is in the military service.

(f) **Venue.** For the purposes of this section, a consumer obligation is any obligation

(1) as to which the obligor is a natural person, and

(2) is incurred primarily for a personal, family, or household purpose.

Any proceeding under this Rule involving a consumer obligation shall be brought in and heard in the county in which such consumer signed the obligation or in which the property or a substantial part of the property is located. Any proceeding under this Rule that does not involve a consumer obligation or an instrument securing a consumer obligation may be brought and heard in any county. However, in any proceeding under this Rule, if a response is timely filed, and if in the response or in any other writing filed with the court, the responding party requests a change of venue to the county in which the encumbered property or a substantial part thereof is situated, the court shall order transfer of the proceeding to such county.

(g) **Return of Sale.** The court shall require a return of sale to be made to the court. If it appears from the return that the sale was conducted in conformity with the order authorizing the sale, the court shall enter an order approving the sale. This order shall not have preclusive effect on the parties in any action for a deficiency judgment or in a civil action challenging the right of the moving party to foreclosure or seeking to set aside the foreclosure sale.

(h) **Docket Fee.** A docket fee in the amount specified by law shall be paid by the person filing the motion. Unless the court shall otherwise order, any person filing a response to the motion shall pay, at the time of the filing of such response, a docket fee in the amount specified by law for a defendant or respondent in a civil action under section 13-32-101(1)(d), C.R.S.

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