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September 30, 2014

ATTORNEY GENERAL OPINION NO. 2014- 15

Steven W. Hirsch
Decatur County Attorney
P.O. Box 296
Oberlin, KS 67749

Re: Taxation–Judicial Foreclosure and Sale of Real Estate by County–Order
of Sale

Synopsis: A clerk of a district court is authorized to sign orders of sale issued
pursuant to K.S.A. 79-2804. Cited herein: K.S.A. 79-2803 and 79-2804.

* * *

Dear Mr. Hirsch:

As County Attorney for Decatur County, you ask our opinion on the following provision of K.S.A. 79-2804: “[a]fter the rendition of such judgment there shall be issued by the clerk of the district court to the sheriff of the county an execution or order of sale” You ask whether this language authorizes the clerk of the district court to sign the order of sale, or whether such order must be signed by the district judge.

K.S.A. 79-2803 assigns the district court the duty to decide actions brought by a county to foreclose on real estate for delinquent taxes, “and to render judgment therefor.” It is this judgment to which the prefatory language in K.S.A. 79-2804 refers. Once the district court renders a judgment in such a foreclosure action, the clerk of the district court is directed by statute to issue an execution or order of sale for the real estate described in the judgment.

Whether the district court clerk is authorized to sign and issue the order of sale is dependent on whether this act is a judicial function or a ministerial function.¹

An act in the performance of a ministerial duty is imperative; it is done in obedience to some legal mandate; it involves no official discretion and of no judgment as to the propriety of the act. In these respects it is wholly unlike an act in the performance of judicial duties.²

By contrast, the judicial function involves “the exercise of judgment, discretion, discernment, or discrimination.”³ Based upon these distinctions, K.S.A. 79-2804 authorizes the clerk of the district court to sign the order of sale because “issuing” the order is a ministerial function, not a judicial function. It is clear from the language of K.S.A. 79-2804 that the clerk of the district court has no discretion or judgment as to whether it is proper to issue the order of sale.

In conclusion, the issuance of an order of sale pursuant to K.S.A. 79-2804 is a ministerial act that is executed by the clerk, a ministerial officer.

Sincerely,

Derek Schmidt
Attorney General

Sarah Fertig
Assistant Attorney General

DS:AA:SF:sb

¹ “A clerk of a court is a ministerial officer, and without statutory authority cannot exercise judicial functions.” *Cook v. City of Topeka*, 232 Kan. 334, 338 (1982).

² 232 Kan. at 337 (quoting *Hamma v. People*, 42 Colo. 401, 407 (1908)).

³ *Ferguson v. Smith & Dunham*, 10 Kan. 396, 404-405 (1872).