



Dealing with Property of Elderly and Deceased Mortgagors

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Agenda

- ▶ Planning for death or incapacity of the mortgagor
- ▶ Transfer of property at death
 - ▶ Joint tenancy vs. tenancy in common vs. tenancy by the entirety
 - ▶ Probate process
- ▶ Strategies for heirs to assume mortgage loans and keep homes
 - ▶ *Garn St. Germain* protections
 - ▶ Heirs of reverse mortgage borrowers



Planning for Death or Incapacity

- ▶ TODI (Transfer on Death Instrument)
 - ▶ Won't need probate
 - ▶ Transfer occurs at death
 - ▶ Needs to be recorded (~\$98 in Cook County)
 - ▶ Available in Arizona, Arkansas, Colorado, Hawaii, Illinois, Indiana, Kansas, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, and Oregon, and Wisconsin.



Planning for Death or Incapacity

- ▶ Power of Attorney for Finance
 - ▶ Real estate transactions (sell property)
 - ▶ Financial institutions transactions
 - ▶ Social Security, unemployment, VA benefits
 - ▶ Tax matters (apply for tax exemptions)
 - ▶ Claims and litigation
 - ▶ Borrowing transactions
- ▶ Limited help as far as working with mortgage companies/saving homes
 - ▶ Defend foreclosures; get info from mortgage companies
- ▶ **Watch out for abusive/exploitative heirs**



Transfer of Property at Death



Types of Ownership

- ▶ **Joint tenancy**

- ▶ Deed must say “as joint tenants and not as tenants in common”
- ▶ Right of survivorship: One joint tenant dies, the entire interest in the property passes to the other joint tenant
- ▶ Is not an asset of the decedent's estate
- ▶ Is not governed by will
- ▶ No need for probate
- ▶ BUT, joint tenancy ends if one joint tenant conveys their interest
 - ▶ Look at the title – most county recorders of deeds are online



Types of Ownership

- ▶ **Tenancy by the Entirety**


- ▶ Only available to spouses
- ▶ Deed must specify “Not as tenants in common but as tenants by the entirety”
- ▶ Right of survivorship as in joint tenancy
- ▶ Additional protection: ***creditors of only one spouse may not recover against the home.***




Types of Ownership

- ▶ **Tenants in common**

- ▶ The default type if none other is specified
- ▶ Simultaneous ownership
- ▶ No right of survivorship
 - ▶ If one owner dies, that owner's share passes to their heirs by will or intestacy.

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- Husband and Wife are **joint tenants/tenants by the entirety**
 - Husband has 2 sons from prior to marriage; Wife has 2 daughters from prior marriage
 - Husband passes away
 - Wife takes full ownership
 - Wife eventually passes away
 - Wife's daughters take full ownership
 - Husband's sons get nothing

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- ▶ Husband and Wife are **tenants in common**
 - ▶ Husband has 2 sons from prior to marriage; Wife has 2 daughters from prior marriage
 - ▶ Husband passes away
 - ▶ Wife still owns 50%; Husband's 50% passes to his heirs
 - ▶ Wife eventually passes away
 - ▶ Wife's daughters split her 50%
 - ▶ End result – husband's sons and wife's daughters all get a share



Wills and Intestacy

- ▶ Applies to tenants in common
- ▶ Applies where joint tenancy has been severed.
 - ▶ Unilateral transfer severs
 - ▶ Once joint tenancy is severed, tenancy in common is created
- ▶ If one tenant in common passes away with a will, that person's share passes to their legatees under the will.
- ▶ If one tenant in common passes away without a will, the laws of intestacy apply.



Intestacy 101

- ▶ See your state's Probate Act (In Illinois, 755 ILCS 5/2-1)
- ▶ 50% to spouse and 50% to children
- ▶ If not married, then 100% to children
- ▶ If married with no children, then 100% to spouse
- ▶ If unmarried and no children, then property passes to the parents and siblings of the decedent in equal parts.
 - ▶ Double portion to surviving parent if there is only one
 - ▶ Share passes to descendants of sibling if one of the siblings has passed



Hypothetical # 1

- ▶ Wendy and Tom are joint tenants of their home. They are married with three adult children. Wendy passes away. What is their children's share?
 - ▶ Nothing. Tom has the right of survivorship and takes full title.



Hypothetical #2

- ▶ Wendy and Tom are married with three children. They are both on title to their home, but the deed does not specify joint tenants or tenants by the entirety. Wendy passes away. What share do her children have?
 - ▶ Each child has a 8.33% share.
 - ▶ Wendy and Tom each own 50% separately.
 - ▶ Wendy's 50% ownership interest passes to her heirs – $\frac{1}{2}$ to her husband and $\frac{1}{2}$ to her children. Her children divide the 25% interest giving them each an 8.33% share.

Hypothetical #3

- ▶ Wendy and Tom are married and are on title to their home as joint tenants. They have 3 children. Unbeknownst to Tom, Wendy adds her sister on title by executing and recording a quit-claim deed transferring title to “Wendy, Tom, and Sister as joint tenants.” Wendy passes away. What share does Tom have?
 - ▶ Wendy severed the joint tenancy by adding her sister unilaterally.
 - ▶ Tom and Wendy became tenants-in-common with equal parts, but Wendy transferred her part to “Tom, Wendy and Sister.”
 - ▶ Tom has $\frac{1}{2}$, plus $\frac{1}{6}$ ($\frac{1}{3}$ of what Wendy transferred), plus what he inherits from Wendy ($\frac{1}{2}$ of her $\frac{1}{6}$, or $\frac{1}{12}$). $\frac{1}{2} + \frac{1}{6} + \frac{1}{12} = \frac{9}{12}$
 - ▶ **Take away:** If you see a quit claim deed not signed by both joint tenants, there is no longer a joint tenancy.



Probate

- ▶ Needed for wills and intestacy
- ▶ Not needed for joint tenancy or tenancy by the entirety
 - ▶ But make sure tenancy isn't severed!
- ▶ Not needed if there is a TODI
- ▶ Takes at least 6 months or more
 - ▶ But, as far as working with mortgage servicers, generally getting the Letters of Office is sufficient




Probate of wills

- ▶ File the original will
- ▶ File a petition for probate
- ▶ Send 30 days' notice
- ▶ Go to court and get appointed Executor of the estate
 - ▶ **“Letters of Office”**
- ▶ Send notice to all heirs and legatees of appointment
- ▶ If less than 2 years have passed, publish notice so as to notify any creditors
- ▶ Record “Release of Estate’s Interest” to show title of property passed according to the will
 - ▶ Can take 6 months or longer
 - ▶ But, title vests at death



Probate without a will

- File petition for probate
 - Mail to all heirs
 - Get appointed Independent Administrator of Estate
 - **“Letters of Office”**
 - Send notice to all heirs
 - Publish notice to creditors if less than 2 years after death
 - Record “Release of Estate’s Interest” to show property passed by intestacy
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Who should get “Letters of Office?”

- The surviving spouse
 - The legatees, with preference to legatees who are children.
 - The children
 - The grandchildren
 - The parents
 - The brothers and sisters
 - The nearest kindred
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- Or, a person nominated by the above
 - See 755 ILCS 5/9-3



What if my client is not the only heir or legatee?

- ▶ Are the other heirs or legatees willing to sign a quit-claim deed to relinquish their interest?
- ▶ Are the other heirs or legatees willing to also assume responsibility for the mortgage?
 - ▶ Sign a loan modification
 - ▶ Provide any income documentation requested to get a loan modification



Transfer of Property at Death

No Probate

- ▶ **TODI**
 - ▶ record notice of death
- ▶ **Joint Tenancy/Tenancy by the Entirety**
 - ▶ Make sure it's not severed
- ▶ **Trust**
 - ▶ need deed removing from trust in order to get loan mod or assumption

Probate needed

- ▶ **Will**
- ▶ **Nothing in place**
 - ▶ Intestacy applies



Strategies and Protections for Heirs



Assuming the Mortgage

- ▶ Can be dangerous!
 - ▶ Gives the heir personal liability
- ▶ If heir does not assume:
 - ▶ No personal liability
 - ▶ Loan stays in name of deceased borrower
 - ▶ Once there is a default, servicer may not work with the heir
 - ▶ Unless heir applies to assume




Is there a right to assume?

- ▶ General rule is that contracts are freely assignable
- ▶ Mortgage lenders will want to see credit worthiness of the new borrower before they agree
- ▶ A **due-on-sale clause** in a mortgage allows the mortgagee to accelerate the mortgage and demand payment in full at such time as the property is transferred (ie, when the borrower dies).



Garn St. Germain

- ▶ Protects lenders by allowing due-on-sale clauses, but with a few exceptions:
- ▶ Lender may not exercise due-on-sale clause in four cases (*12 U.S.C. 1702j-3*):
 - ▶ **(d)(3) transfer upon death to a joint tenant or tenant by entirety**
 - ▶ **(d)(5) transfer to a relative resulting from death of borrower**
 - ▶ **(d)(6) transfer where a spouse or child(ren) take ownership**
 - ▶ **(d)(7) transfer as part of legal separation or divorce**



If *Garn St. Germain* applies, then the due-on-sale clause may not be invoked

Mortgagee may not accelerate the loan and must allow an assumption if one of the exceptions applies.

Why?

- Because not allowing an assumption in these circumstances would be inequitable and unfair.



CFPB Rules

- ▶ 2014 Rule:
 - ▶ “Because an heir has already acquired the title to the home, adding the heir as a borrower on the mortgage does not trigger the Ability-to-Repay requirements.”
- ▶ 2018 Rule
 - ▶ “Borrower” under RESPA and “Consumer” under TILA include confirmed successor-in-interest. 12 CFR 1024.31
 - ▶ Same categories as Garn St. Germain
 - ▶ Mortgage servicers have a duty to confirm the status of a successor-in-interest
 - ▶ If they fall under one of the exceptions set out in *Garn*, the federal regulations of RESPA and TILA apply
 - ▶ This includes Loss Mitigation rules!
 - ▶ Also right to Request for Information or Notice of Error



More support for *Garn*-protected persons

- ▶ Freddie Mac Single Family Servicing Guidelines
 - ▶ Section 8406 – prohibits acceleration where transfer falls within *Garn St. Germain*
 - ▶ Section 9207 – requires servicer to consider simultaneous application for assumption of loan and loan modification
 - ▶ Even if applicant is not protected by *Garn*, servicer must “explore all available relief options”
- ▶ Fannie Mae Single Family Servicing Guidelines
 - ▶ Section D1-4.1-02 recognizes *Garn* – “Servicer must process the transaction without reviewing or approving terms of the transfer”
- ▶ FHA Loans - HUD 4155.1, Chapter 7



Take-Away

- ▶ If your client falls within one of the categories protected by *Garn St. Germain*, he or she should have the right to assume the mortgage if he or she chooses.
- ▶ BUT, your client needs to take necessary steps to get on title
 - ▶ (ie probate if not a joint tenant and no TODI or Trust)
- ▶ Bankruptcy may be an option if *Garn* doesn't apply – Chapter 13 payment plan to pay off the balance due if client cannot modify and assume.



Heirs of Reverse Mortgage Borrowers

- ▶ **Surviving spouse allowed to remain in the home**
 - ▶ As long as taxes and insurance are paid
 - ▶ Even if surviving spouse is not on title
 - ▶ If surviving spouse is in foreclosure, refer him or her to legal aid!
- ▶ **Heirs afforded option to purchase house at FMV (95% appraised value) if less than balance of mortgage**
 - ▶ If heir has the means to come up with the funds, refer him or her to legal aid!




Steps to helping heirs save property

- ▶ Check deed to see if client is joint tenant or tenant by the entirety
- ▶ If not, did they record a TODI?
- ▶ If not, advise to file probate
 - ▶ Help desks – CL16 at Daley Center
 - ▶ Will need names and addresses of all other heirs and legatees
- ▶ Apply for loan modification and assumption, simultaneously
 - ▶ With Letters of Office and deeds from other heirs
- ▶ Or, in case of reverse mortgage, surviving spouse rights, or heirs need funds to pay value of home. Get an appraisal.
- ▶ Problems? Denied? Call LAF or your local Legal Aid



Divorced/divorcing spouses

- ▶ Also protected by *Garn St. Germain*, Fannie Mae, Freddie Mac, and FHA rules
 - ▶ Refer to Legal Aid or other attorney
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CONTACT INFORMATION



We are available to review cases where an heir wants to save a property and has income to be able to do so, or where a spouse in the process of divorce is struggling to get a loan modification/save the property

- ▶ Michelle A. Weinberg mweinberg@legalaidchicago.org
- ▶ Dan Lindsey dlindsey@legalaidchicago.org
- ▶ Or for Powers of Attorney or TODI's: Call (312)229-6080

THANK YOU!