

Saving the Family Home After Death or Divorce

Arizona Foundation for
LEGAL SERVICES
& EDUCATION
THE ARIZONA BAR FOUNDATION

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December 4, 2014

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Presenter – Tara Twomey

- Tara Twomey is currently Of Counsel to the National Consumer Law Center and the Project Director for the National Consumer Bankruptcy Rights Center.
- She has previously lectured at Stanford, Harvard and Boston College Law Schools.
- She is a contributing author of several books published by the National Consumer Law Center, including [Foreclosures](#) and [Bankruptcy Basics](#).

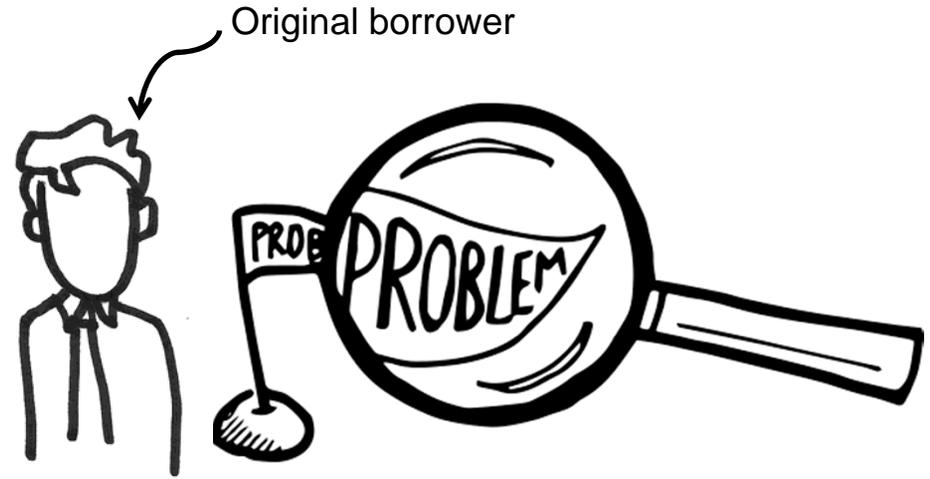


Saving the Family Home After Death or Divorce



Tara Twomey
December 2014
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Divorce
Death



Permanent Relocation



Your client is a remaining
co-borrower or a non-borrower,
owner of the property

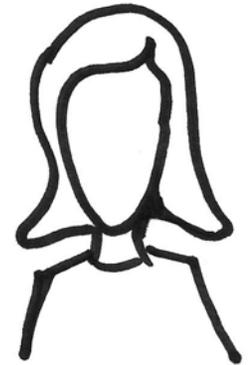
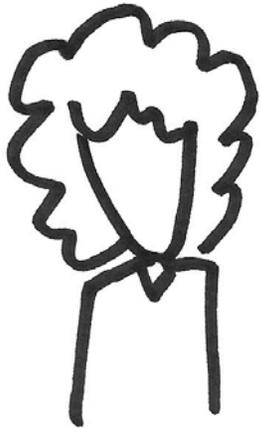
Interest in the property?



Is the interest subject
to the DOT?



Co-Borrower



On the NOTE

On the DOT, but
not the NOTE



+





Co-Borrower

On the NOTE



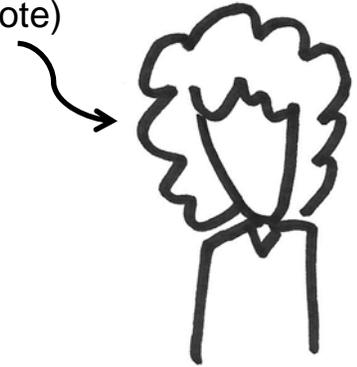
John Hancock

Which Rules
Apply?



Fannie & Freddie

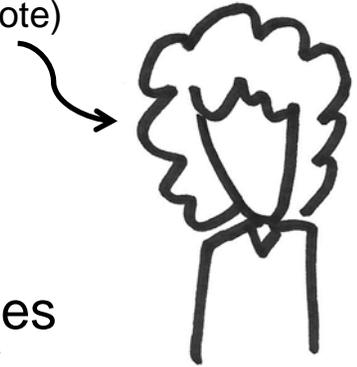
Co-borrower (on note)



- Proof of income and signature on loan mod documents by all original borrowers on the loan, unless a divorce decree or legal separation agreement can be provided.
- Servicers have discretion not to require the signature of a co-borrower in situations of contested divorce
- Fannie Mae Servicing Guide, Sec. 609.03.06
- Freddie Guide at Chapter C65.7

HAMP

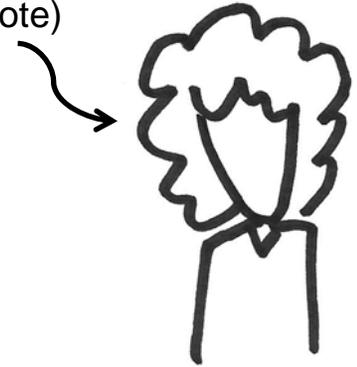
Co-borrower (on note)



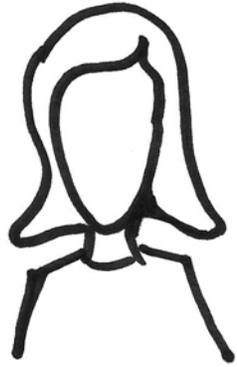
- “Unless a borrower is deceased or divorced, all parties who signed the original loan documents or their duly authorized representatives should sign HAMP documents.” (MHA Handbook V 4.4, Ch II, Sec. 5.7)
- Servicer can waive signature requirement for “mental incapacity, military deployment or contested divorce.” (Sec. 5.7)
- Servicers should use “good business judgment” on when to waive signatures. (Sec. 5.7)
- Occupying co-borrower may be considered for HAMP if a quitclaim deed has been recorded showing that non-occupying co-borrower has relinquished all rights in the property. (Sec. 1.2)
- Death or Divorce during a TPP (Sec. 8.9.1)

Practice Tips

Co-borrower (on note)



- Death certificate showing the other co-borrower is deceased
- Divorce decree showing that your client was awarded the home
- Recorded quitclaim deed showing that your client is the sole owner of the home
- Letter from the other co-borrower stating that (s)he is not living in the house, has no interest in the house, and is not contributing financially to mortgage payments

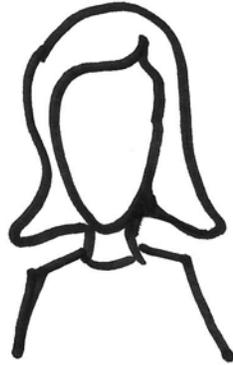


Co-Borrower

On DOT, but
not on NOTE

Non-Borrower





Co-Borrower

On DOT, but not on NOTE

Weighing the
options



Getting
Information

Total owed
Monthly payment
Current or default

Non-Borrower





Right to Information



Gramm-Leach-Bliley Act

prohibits covered financial institutions from disclosing
“nonpublic personal information” to a “nonaffiliated
third party.” 15 U.S.C. § 6802(a).



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Right to Information



Gramm-Leach-Bliley Act

Exceptions

- With the consumer's consent or at the consumer's direction
- In connection with servicing the consumer's account
- To the consumer's representative (e.g., an estate representative)
- To someone with a beneficial interest "relating to the consumer" (e.g., successor owner of the home)
- To comply with Federal, State, or local laws, rules, and other applicable legal requirements
- 15 U.S.C. § 6802 (e)(1), (2), (3), (8).



Right to Information



CFPB Regulation

“A servicer shall maintain policies and procedures...reasonably designed to...

(iv) Upon notification of the death of a borrower, promptly identify and facilitate communication with the successor in interest of the deceased borrower with respect to the property secured by the deceased borrower’s mortgage loan.” 12 C.F.R. § 1024.38(b)(1)(iv)



Right to Information



CFPB Bulletin

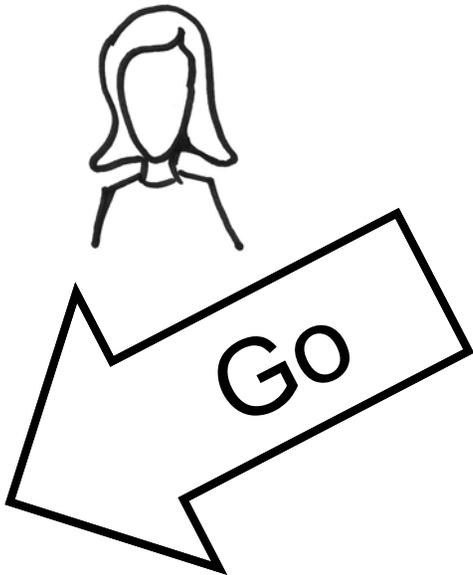
- Servicers must let successors in interest know what documents they need to provide for communication & assumption
- Servicers must let successors in interest know what their options are
- Servicers must develop policies for suspending foreclosure and processing assumption and loan modifications simultaneously
- CFPB Bulletin 2013-12 (Oct. 15, 2013).



What does the client
want?



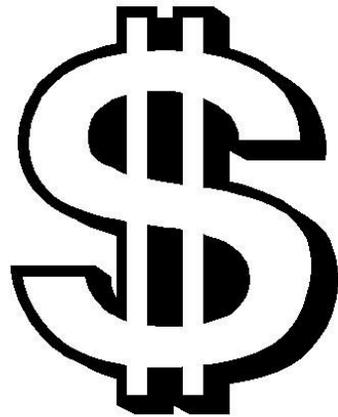
What does the client want?



Stay



Can the client
afford to stay?



To assume or not to
assume, that is the
question.



Assumption will subject the client to personal liability on the note, will give the client all rights of a borrower, but will not relieve the original borrower of personal liability unless the creditor agrees.

Generally, contractual rights can be freely assigned unless the assignment is clearly restricted.

Due on Sale Clauses

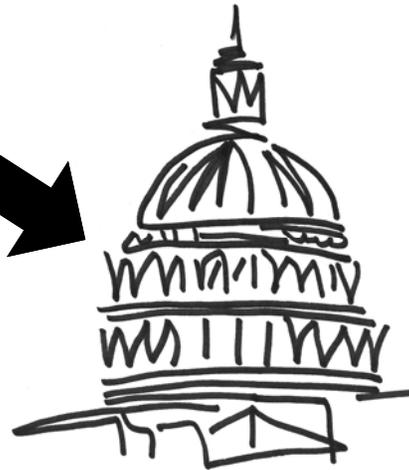
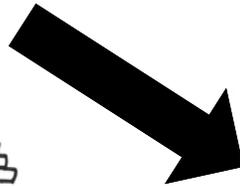
“If all or any part of the Property or any interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender’s prior written consent, Lender may require immediate payment in full of all sums secured by the Security Instrument.”



Due on Sale Clauses



Patton v. First Fed. Sav. & Loan
Ass'n, 118 Ariz. 473 (1978)



Garn St. Germain Depository Institutions Act



Preempts state law and permits lenders to enter into and enforce due-on-sale clauses with respect to real property loans.

12 U.S.C. § 1701j-3 (1982).

Garn St. Germain Depository Institutions Act



A due-on-sale clause cannot be enforced when an interest in real property is transferred:

- Via devise, descent, or operation of law upon the death of a joint tenant or TBE
- To a spouse or child of the borrower
- To a spouse pursuant to a divorce decree or separation agreement
- And others
- 12 USC § 1701j-3(d)

What does Garn
really mean?



Servicer can't foreclose based solely on a protected transfer.

Servicer can't use due-on-sale clause to refuse to honor an assumption by protected class member.

Right to assume the loan under Garn applies even in the loan is in default and without a credit screening or underwriting.

Once non-borrower assumes the loan, that person becomes a borrower and has a right to apply for a loan modification under existing programs

HAMP



- Non-borrowers who inherit or are awarded sole title following a death or divorce may apply for a HAMP mod; “servicers should collect an initial package from the non-borrower who now owns the property” and evaluate it “as if he or she was the borrower.” (MHA Handbook, Ch II, Sec. 8.8)
- Surviving homeowner remains eligible for new TPP, even if gets booted out of existing TPP (8.9.2)
- Requires servicer to stay foreclosure for non-borrower while assumption process chugs forward (8.9.2)
- Simultaneous assumption and modification IF “applicable law” and “investor guidelines” permit assumption (8.8)

Fannie Mae



- References “exempt” transactions—basically the Garn-St Germain exceptions
- Requires communication with new owners in exempt transactions
- Loan mod requests for new owners in exempt transactions have to be evaluated as if they came from borrowers
- See Fannie Mae Lender Letter LL-2013-04, and Fannie Mae Servicing Guide Announcement SVC-2013-17; Fannie Guide Sec. 408.02

Freddie Mac



- Provides for simultaneous modifications and assumptions, after borrower's death, by someone, "like a surviving spouse," with an ownership interest in the property
 - B65.12, B65.28 in the Single Family Seller Servicer Guide
 - Freddie Mac Bulletin 2013-3 (Feb. 15, 2013)
- Points of concern:
 - What happens in divorce?
 - Language not entirely clear that assumption can't involve new credit screening

FHA



- HUD has a general policy of free assumability
- With a credit review
- Unless the new owner is via “devise or descent”
- HUD Handbook 4330.1 Rev-5 Chapter 6
- Not quite clear where that leaves divorcees

Practice Tip



Things you may hear from servicers

- The house is in an estate. Properties in an estate cannot qualify for HAMP.
- The property is not owner-occupied.
- Ms. Smith is not the borrower. Non-borrowers cannot be considered for HAMP.
- Ms. Smith does not qualify to assume the loan because the DTI is 50%.
- Ms. Smith can only assume the loan if it's current.
- This investor does not allow for LAMP (our “loan assumption and modification program”).

Practice Tip



Divorce or family breakup

- Work with the family law attorneys
- Get disposition of debts in family law court:
 - Who is responsible for mortgage?
 - Order assigning rights and responsibilities/ acknowledging assumption of mortgage by remaining spouse?
- Get disposition of title in family law court
 - Divorce decree should clearly award the property
 - And/or quit claim deed to remaining spouse
- Consider consolidating the foreclosure into the divorce proceeding

Practice Tip



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Practice Tip



After death

- Property passes automatically upon death to heirs
 - True whether intestate succession or via a will
- Trick is getting the servicer to recognize
 - Right of survivorship deed + death certificate
 - Open an estate?
 - Title company opinion?
- Documents to have ready: Death certificate (unaltered – some clients black out SS# of the deceased); proof your client owns the home; proof your client is the representative of the estate (if you open an estate); proof of the homeowner's insurance in your client's name (start this early – it can slow you down)

Practice Tip



Inform the servicer

- Tell the servicer in writing that your client is a the successor owner of the home
- Request information about the loan and available loss mitigation options
- Cite 12 C.F.R. § 1024.38(b)(1)(iv)

Practice Tip

Get the PSA



- “If it becomes aware of a transfer of the property, the Master Servicer will exercise its rights to accelerate the maturity of such Mortgage Loan under the ‘due-on-sale’ clause.”
- “But the Servicer shall not exercise any such rights if prohibited by law from doing so.”
- “If unable to enforce the ‘due-on-sale’ clause, the Master Servicer will enter into an assumption and modification agreement with the new person to whom the property was conveyed.”

Practice Tip

Get the PSA



- "Notwithstanding the foregoing paragraph... the Master Servicer shall not be deemed to be in default, breach or any other violation of its obligations hereunder by reason of any assumption of a Mortgage Loan by operation of law or by the terms of the Mortgage Note or any assumption which the Master Servicer may be restricted by law from preventing, for any reason whatever."

Practice Tip

Servicer Non-compliance

- Send a Notice of Error under RESPA, 12 CFR § 1024.35.
 - Set up a private right of action for servicer's failure to correct the error
 - Actual damages, costs, attorney's fees
 - Statutory damages if pattern and practice
- Tell the CFPB!
 - Send an email to: CFPB_servicingrules@cfpb.gov.
 - File a complaint: www.consumerfinance.gov



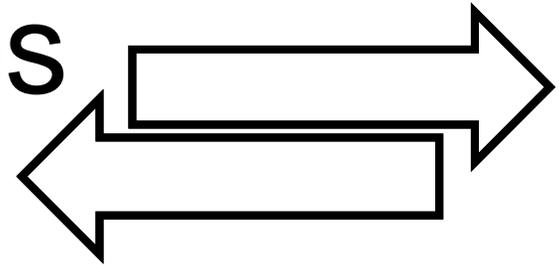
The Case of

Reverse

Mortgages



Reverse Mortgages



(1) Non-borrowing spouses



(2) 95% Rule

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Next Series of Webinars



- Keep your eye out for next webinar which will be on **January 22, 2015: Who Owns the Loan: A Primer on Mortgage Securitization**



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- Please fill out the evaluation when you sign-out
- I will email you the PowerPoint and recording in a few days
- Thank you to our speaker!



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