

# Preserving Homeownership Series Part 2: Tangled Title and Associated Probate Issues

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# Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to [NCLER@acl.hhs.gov](mailto:NCLER@acl.hhs.gov).
- Written materials and a recording will be available at [NCLER.acl.gov](http://NCLER.acl.gov). See also the chat box for this web address.

# About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

# About NCLC

Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S.

NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitative practices, help financially stressed families build and retain wealth, and advance economic fairness.

# About NHLP

National Housing Law Project (NHLP) is a legal advocacy center focused on increasing, preserving, and improving affordable housing; expanding and enforcing rights of low-income residents and homeowners; and increasing housing opportunities for underserved communities. Our organization provides technical assistance and policy support on a range of housing issues to legal services and other advocates nationwide.

# About Community Legal Services of Philadelphia

- **Our mission is to fight poverty, challenge systems that perpetuate injustice, and change lives through cutting-edge advocacy and exceptional legal representation.**
- Founded in 1966 by the Philadelphia Bar Association, **Community Legal Services** (CLS) has provided free civil legal assistance to more than one million low-income Philadelphians. Approximately 10,000 clients were represented by CLS in the past year. CLS assists clients when they face the threat of losing their homes, incomes, health care, and even their families.
- CLS attorneys and other staff provide a full range of legal services, from individual representation to administrative advocacy to class action litigation, as well as community education and social work.

# Key Lessons

- Basic knowledge of how tangled title occurs after death or divorce
- Problems caused by tangled title
- Probate and the process of probating an estate
- How to deal with a mortgage in default when the borrower passes away or there is a divorce
  - Successor-in-interest: how & why to become one
  - Assumption of the mortgage: when, why, & how to assume the loan
  - Homeownership Assistance Fund (HAF): how to access funds as a successor

# Older Homeowners Need Help With Tangled Titles

# Disparate Impact

- 2021 Pew Report- Philadelphia
  - Over 10,000 tangled titles; 2% of all property
  - \$1.1 BILLION
  - Affects Black neighborhoods at higher rates
- Nationally
  - In 13 Southern states (Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia, and West Virginia) there are 1.4M acres of heirs property valued at \$15.48B
    - (Unpublished manuscript “Quantifying Heirs Property Across the Deep South: A Geospatial Approach” by Dr. Ryan Thomson, Auburn University)

# Where to Get Help

- Legal assistance for low-income clients through:
  - [LawHelp](#)
  - [Eldercare Locator](#)
  - [Legal Services Corporation](#)
- Find an attorney through the [National Association of Consumer Advocates](#)
- A [HUD-certified housing counselor](#)

# What is a Tangled Title?

- If someone lives in a house that they think they own, that they treat and pay for as their own, or that they may have inherited, but their name is not on the deed, they may have a tangled title.
- This often happens if:
  - One of their relatives owned the house in which they live and had their name on the deed, but that relative has passed away.
  - They are the only person who has any interest in living in the house, but their name is not on the deed to the house, and the owner has moved or passed away.
  - They entered into a rent-to-own agreement (also called lease/purchase agreements or installment land contracts) to buy the house and have paid all or some of the purchase price for the house, but their name is not on the deed to the house.

# Why Does it Matter?

- Residents might run into issues if:
  - They try to take out a mortgage or a loan;
  - They try to negotiate with the city or a utility company about past taxes or bills that have not been paid;
  - They try to get a grant from the city to make repairs to your house;
  - They try to obtain homeowners insurance on the property;
  - They want to give the property to family or friends should something happen to them; or
  - The person whose name is still on the deed, or one of their relatives, tries to take the house from them.
  - They try to sell the house.

# What Happens to a Property When Someone Dies?

- If they had a will, they died ***testate***.
  - Typically, the will dictates who is to inherit the property
- If there is a “living trust” (also called a “revocable trust”), that document dictates who will inherit the property
- If they did not have a will, they died ***intestate***.
  - You must follow the laws of intestacy

# Case Evaluation

- Is there a will and/or a living trust?
- Draw a family tree and determine heirs
- Determine whether estate recovery is at issue
- Are there past due real estate taxes, mortgages, utility bills, habitability issues?
- Are there creditors/judgments/debts?
- What documents exist?
  - Death certificates, birth certificates, marriage certificates, divorce decrees

# Probate

- Probate is the procedure by which a will is proved to be valid or invalid according to the law.
  - Obtain Letters of Administration/Letters Testamentary
  - Administrator/Executor of the estate is responsible for handling all estate assets.
    - Assess and pay creditors
  - These letters often help in establishing successor-in-interest status, so having them can start the process of resolving a mortgage default/foreclosure

# Estate Recovery

- If decedent meets below criteria, you must inquire w with the Department of Human Services (DHS) to see if there is an estate recovery claim
  - Received nursing home or home-based care funded by MA
  - Received care after age 55
  - AND the care was received after 1994
- DHS has to respond within 45 days with their claim or it's considered waived
- Determine whether waiver options exist
- You should not transfer ownership until this is resolved to avoid personal liability

# Types of Deed

- Tenants in Common
  - When one person dies, ownership transfers to the heirs of the decedent
- Joint Tenants with Rights of Survivorship
  - When one person dies, their ownership interest transfers automatically to the other owner(s)
- Tenants by the Entireties
  - For couples who are married, when one person dies, ownership transfers to the other person.

# Deed Transfer

- Once Letters are granted by the probate court, the executor/administrator has legal authority to distribute the estate assets.
  - Now you can execute a deed transfer
  - In cases where there is a will setting forth who the new owner is, the executor can transfer the deed from the estate to the person named in the will. If this is not your client, you will need cooperation from the named heir to the property.
  - If there is no will, you will need all heirs to sign over their interest in the property to transfer title.

# How to Deal with a Mortgage in Default in a Tangled Title Situation

# Is Your Client a Borrower on the Loan?

- They may not know; says they were at the closing and signed some of the papers
- Their name may be on the security instrument (publicly recorded mortgage or deed of trust) but not on the promissory note (loan agreement that is not recorded)
- Good rules of thumb:
  - Is their name on the mortgage statement?
  - Is the mortgage company talking with them?

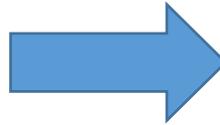
# Does Your Client Own the Home?

- Your client was awarded the home in a divorce decree or inherited through a will or intestate law or as the beneficiary of a living trust
- Harder situations:
  - Not yet divorced; spouse has abandoned and is unreachable
  - Never married and partner unwilling to sign a quitclaim deed

# Considerations

## Probate

- Are heirs cooperative?
- Is there an estate recovery claim?
- How quickly can you get the estate probated and a new deed recorded?
- Would the lender accept a quitclaim deed?
- What's the value of the house?



## Assumption & Modification

- Can you establish Client as Successor in Interest?
- Is the loan assumable?
- Can Client afford the mortgage?

# Related Issue: Client is a Borrower (Dealing with Absent Co-Borrowers)

- Generally easier to deal with
- The trick: showing the servicer that the other borrower (divorced or separated and out of the picture) does not need to sign docs or participate in the process
  - Fannie Mae, Freddie Mac, and FHA all allow their servicers to waive the requirement for certain circumstances ie: mental incapacity, military deployment, etc.
    - See Freddie Mac Single-Family Seller Servicer Guide 9206.13; Fannie Mae F-1-27: Processing a Fannie Mae Flex Modification (06/09/2021); FHA Single Family Housing Policy Handbook 4000.1 p. 960 (9/26/2022)(now lists domestic violence as exception)

# What Rules Apply?

- Identify what rules apply:
  - FHA/VA/USDA loan?
  - Fannie or Freddie owned?
  - Neither of these...?
- FHA insured (HUD mortgagee letters)
  - FHA loan # on monthly statements and on the security instrument
- Fannie Mae owned (Fannie Servicing Guide)
- Freddie Mac owned (Freddie Servicing Guide)

# Non-Borrower Clients

- Can your client “assume” (become a borrower on) the loan?

# What is an Assumption?

- Makes client personal liable (responsible) for the loan
- Gives assuming party all rights of a borrower
- Does not relieve original homeowner of personal liability unless lender agrees

# Starting Point: *The Client* gets to decide whether or not to assume the mortgage

- After a **death or divorce**, the new owner can assume the mortgage if they wish
- This is a “non-qualifying” assumption
- Does not involve a release of the original borrower
- They don’t have to assume the loan in order to simply keep making the payments
- *Important note: not all transfers of title allow an assumption—see accompanying chapter*

# How Do You Get An Assumption?

- No necessary formal words
  - “Any words indicating the transferee’s intent to undertake personal liability for the obligation will suffice.”
  - Signing a loan modification can show an assumption
- Best if you can point to a specific communication saying “I hereby assume and promise to pay this debt.”
- Simply making the payments is not enough

# CFPB Successor Rules Under RESPA

*Rules that took effect April 19, 2018*

# § 1024.31 Definitions

- A Successor in interest: receives an ownership interest in a property for certain transfers including a transfer:
  1. Upon death of a joint tenant or tenant by the entirety;
  2. Upon death of a borrower;
  3. where the spouse or children of the borrower become an owner of the property;
  4. resulting from a divorce or separation decree of a dissolution of marriage, or
  5. By an inter vivos trust where the borrower is and remains a beneficiary

# Successor In Interest Rule Under the Real Estate Settlement Procedures Act (RESPA): How Does it Help?

- Servicer must provide eligible non-borrower *information* about the loan to make decision about modifying or assuming the loan
- Servicer must treat a confirmed successor in interest as a borrower to apply for a loan modification.

# Definitions

- A “**Confirmed successor in interest (SII):**” means a successor in interest “once a servicer has confirmed the successor in interest’s identity and ownership interest in a property that secures a mortgage loan subject to this subpart.”
- Two things to confirm: (1) The **successor’s identity**; and (2) **their ownership interest**.
  - \* No requirement that the successor *assume* the mortgage.
    - Cite: 12 CFR § 1024.31

# Why It's Important to Be a Confirmed SII

- For purposes of RESPA – A confirmed successor in interest shall be considered a borrower and is entitled to protections of a borrower regardless of whether assumes loan
- If a servicer gets a loan mod app from a confirmed SII whose principal residence is the subject property, servicer has to review and evaluate for all loss mit options
  - Cite: 12 USC 1024.30

# How to Become a Confirmed SII (1 of 2)

- A. Upon receiving notice of the death of a borrower or of any transfer of the property securing a mortgage loan, communicate with any potential or confirmed successors in interest regarding the property;
- B. Upon receiving notice of the existence of a potential successor in interest
  - Determine the documents the servicer **reasonably requires** to confirm that person's identity and ownership interest in the property
  - **Promptly provide** a description of those documents and how the person may submit a written request

# How to Become a Confirmed SII (2 of 2)

- C. Upon the receipt of such documents, promptly make a confirmation determination and promptly notify the person, as applicable, that the servicer
- has confirmed the person's status,
  - has determined that additional documents are required (and what those documents are), or
  - has determined that the person is not a successor in interest.
  - Cite: 1024.38(b)(1)(vi)

# How to Communicate with Servicer If Not a Confirmed SII Yet

- Servicer has to respond to a written request of a person who indicates they might be a successor in interest by providing them with:
  - a written description of the documents the servicer reasonably requires to confirm the person's identity and ownership interest in the property; **and**
  - contact information, including a telephone number, for further assistance.
  - Cite:12 CFR 1024.36(i)

# What if the Servicer Won't Confirm SII?

- Escalate internally; explain they are violating federal law
- Send a Notice of Error under RESPA, 12 CFR § 1024.35.
  - Set up a possible legal claim for servicer's failure to correct the error
- Tell the CFPB!
  - Send an email to: [CFPB\\_servicingrules@cfpb.gov](mailto:CFPB_servicingrules@cfpb.gov).
  - File a complaint: [www.consumerfinance.gov](http://www.consumerfinance.gov)
- GSE or FHA escalation

# Options For A Successor Who Wants To Get A Mortgage Out Of Default

# Modification and Assumption

- SII may be told not possible to get loan mod
- Look at loan mod rules if federally backed loan:
  - Fannie Mae, Freddie Mac, and FHA loans require a successor in interest after a death or divorce to be evaluated for a modification under the same rules that apply to the borrower.
  - They require servicers to evaluate successor homeowners for loan modifications before they have assumed liability on the debt
- If SII qualifies for mod based on the household income, should approve for a simultaneous loan modification and assumption

# What if the Modification Documents are in the Name of the Absent (Or Deceased) Borrower or Co-borrower?

- For deceased or absent borrower—remember: confirmed successors in interest to be treated as borrowers for purposes of RESPA’s loss mitigation provisions
- When a co-borrower is absent or unavailable to sign a loan modification due to military service, mental incapacity, domestic violence, etc., Freddie Mac, Fannie Mae, and FHA should allow waiver if signature

# Homeowner's Assistance Fund: HAF

- The [Homeowner Assistance Fund \(HAF\)](#) provides money to states, territories, and tribes to help homeowners who are at risk of home loss due to a pandemic-related financial hardship.
- In most of these programs, successors should be eligible for assistance with mortgage delinquencies and certain other housing-related expenses.
- For more details and to locate information about a specific jurisdiction's HAF program, advocates can visit the [CFPB's HAF webpage](#).

# Referral to Bankruptcy?

- A successor may use a Chapter 13 bankruptcy to cure the arrears, even if they have not assumed the debt
- Basic principle in bankruptcy that a “claim” includes a debt secured by the debtor’s home, even if debtor has no personal liability on the note
- Certain transactions must be allowed to de-accelerate the note and cure arrearage in a Chapter 13 plan

# Reverse Mortgages

- After all borrowers have died, the loan becomes “due and payable”
- Heirs may not generally stay and keep paying; cannot assume the loan
- But, there are options:
  - Non-borrowing spouse can stay in the home in many cases
  - If not a spouse, heirs have up to 12 months to pay off the loan
  - May satisfy the loan for 95% of market value

# Questions?

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