

Tangled Title & Dealing with Probate Issues

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Introduction

Ownership in a property can become very complicated and confusing when one owner passes away, gets divorced, or moves out. People who remain in the home may believe they now own the home. But if the remaining resident's name is not on the deed, they are not an official owner of the property. This creates what is known as “tangled title.” If the remaining resident's name is not on the deed, they will be unable to obtain loans or grants for the home, get homeowner's insurance, or access utility or property tax assistance programs. If they fall behind on payments on the mortgage, they could also face difficulty trying to get help to bring the loan current and avoid foreclosure. Homes with tangled titles are also at a higher risk of deed theft and foreclosure. Addressing tangled titles before there is an emergency like a foreclosure, utility shutoff, or structural damage, is an important part of protecting homes for generations to come. This Chapter Summary discusses the issue of tangled title and what residents can do to untangle and clear up title to a property, as well as access assistance with retaining a property when the mortgage is in default.

How Does Title Get Tangled?

When a home is bought, a deed transfers the ownership of the home from the seller to the buyer. Likewise, when a homeowner passes away or a spouse is awarded the house in a divorce, the deed must pass from the homeowner to the heir or ex-spouse for that person to obtain legal ownership— sometimes called “title”— to the property. Titles can often get tangled in the transfer of homeownership when a person dies or leaves the home. A tangled title most commonly occurs when the owner of the home passes away or leaves the home and a remaining relative continues to live in the home without having their name on the deed.

Example:

An adult son is living with his father, the father passes away, and the son remains living in the home. Even if the father told the family repeatedly that he wanted his son to inherit the house, steps still must be taken to put ownership of the house in the son's name, including working with any other heirs who may also have a partial ownership interest in the house. The house is not legally the son's until his name is on the deed. The title is “tangled” until this happens. The son may face difficulty/inability with the following:

- setting up utilities and negotiating past due utility bills
- obtaining homeowner's insurance
- selling the property, refinancing a mortgage, or taking out a home equity loan
- qualifying for financial assistance to fund repairs
- transferring the property to a child or spouse
- negotiating with a mortgage company
- negotiating a property tax bill

Most property that only has a deceased homeowner's name on the title must go through the probate process. Ownership in a home or any other property cannot happen before probate is complete. In some states, if a homeowner has set up a certain kind of trust called a revocable or living trust, the heirs can secure ownership of a property without having to go through the probate process, however that kind of arrangement requires advance planning.

Homeownership is an important way to build wealth, particularly across multiple generations. In areas with increasing property values, the home can capture years of appreciated value. For many multi-generational households, a lot of wealth is tied up in the home. Until a tangled title is resolved, access to that wealth is restricted, and residents cannot take full advantage of the home's value or protect that value for future generations. Without a deed, they cannot sell the home, nor can they create an estate plan to pass it on to other generations.

The Probate Process

Probate is a legal process for the heir(s) of a deceased person to take legal ownership of the property in that person's estate. This includes homes, vehicles, bank accounts, etc. The probate process determines whether a will is valid and should be carried out, or, if there is no will, who should be granted which asset from the estate. The probate court in each county oversees what happens to a person's assets and debts after they die.

When a person passes away, their property usually must go through probate. Some assets do not need to go through probate, however, such as property that is owned as joint tenants with rights of survivorship.

A number of things can complicate the probate process: the lack of a will, the existence of multiple heirs claiming ownership of the same asset, intrafamily conflicts, and shared ownership of the property. There are several forms that will need to be filled out to probate an estate. The forms will depend on whether the decedent died with or without a will. A person can ask the probate court in their county for assistance on where to find information on forms that need to be submitted and where to submit them. However, the Court cannot provide legal advice and it is recommended that an heir seek help from a probate attorney.

After probate is complete, a new deed is drafted and must be recorded on the local registry of deeds. A lawyer, title company, or other real estate professional can help to add, remove, or change a name on a deed before it is recorded.

Probate can take a year or more, and there are a number of fees involved, such as administrative costs and attorney's fees. Every estate and every inheritance situation is different. States and counties have different procedures for probating an estate. Untangling a tangled title is often a complicated legal process that requires attorney assistance. Lower-income surviving relatives can go to LawHelp.org or use the [Eldercare Locator](#) to locate the nearest local legal services to see if they would be able to help.

The best way to prevent a tangled title is to create an estate plan and keep it updated over the years. An estate plan includes a will and, in certain states, can also include a revocable or living trust. Ensure the family knows about the wishes of the homeowner and where important documents are kept (will, trust, deed, mortgage, etc.).

Dealing with a Mortgage in Default

Can the remaining family member get a loan modification?

If a remaining family member inherited a home or was awarded it in a divorce and the mortgage is in default, it can be particularly challenging to prevent a foreclosure. Often, these residents were not the original borrower on the mortgage loan but have lived in the house for years or even decades. They are called "successors in interest" or "successors" because they succeeded to ownership of the home after a death or family breakup. Federal law prevents the creditor from invoking a "due on sale" clause based on such a transfer. Most mortgages

have a due-on-sale clause that allows the mortgage lender to cancel the mortgage contract and demand all of the amounts due under the loan if the ownership of the property is transferred to another person. If the transfer is in connection with the death of the borrower, a divorce, or a deed to a spouse or child of the borrower, however, the lender cannot enforce a due-on-sale clause.¹ However, successors in interest can still face numerous problems when dealing with mortgage servicers. These include: communication issues; unreasonable documentation requirements; the inability to obtain workouts with assumptions; limited access for domestic violence survivors; limited foreclosure protections; and fewer enforceable rights.

The first challenge typically encountered by a successor is simply obtaining information from the loan servicer, the entity that collects the monthly payments on the mortgage. Many servicers will refuse to talk to successors or will provide only limited information until the successor has provided certain documentation. Under the Real Estate Settlement Procedures Act (RESPA), a servicer has the right to ask a successor to provide documentation showing that they own the house and that they became the owner of the house through an intra-family transfer that enables them to continue paying on the mortgage.² However, servicers often request proof of ownership that is difficult or impossible to obtain, refuse to accept a document that is legally sufficient to prove ownership, or request the same documents over and over again. Advocates must be persistent in clarifying in writing everything the servicer requires for documentation and providing the specific documents requested. A Request for Information under RESPA can be used to pin down the specific documents required by a servicer.³

Many times, the transfer of ownership through a death or family breakup coincides with a loss of income that causes the successor to fall behind on the mortgage payments. Often, the successor needs a loan modification to bring the loan current and adjust the payment to an affordable level, and could qualify for one under existing modification programs. These modifications not only benefit the homeowner but also provide community stability through reduced foreclosures and vacancies, as well as financial benefits to lenders provided by performing loans. Yet a substantial number of these successors face foreclosure due to widespread confusion about their rights and options.

Successors are often told by servicers that, as a non-borrower, it is not possible for them to obtain a loan modification. Typically, this is not true. The loan modification rules that apply to the vast majority of residential mortgages, including 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. If they qualify for the modification based on documented household income, the servicer should approve the successor for a simultaneous loan modification and assumption.⁴

Sometimes a successor in interest progresses in the modification process so as to actually receive a trial period plan and make payments pursuant to that plan, only to then receive a modification agreement in the name of the absent (or deceased) borrower. Regulations under the Real Estate Settlement Procedures Act, (RESPA) provide guidance on how servicers should treat successors in interest.⁵ These regulations require confirmed successors in interest to be treated as borrowers for purposes of RESPA's loss mitigation provisions.⁶ There are legal claims an attorney familiar with consumer law and mortgage servicing could bring to provide successors in interest certain rights and remedies against mortgage servicers.⁷

1 See The Garn-St. Germain Act, 12 U.S.C. § 1701j-3.

2 See 12 U.S.C. § 1701j-3(d).

3 See 12 C.F.R. § 1024.36; NCLC Making the Most of NOEs and RFIs, library.nclc.org/sites/default/files/Fore_Appx_I-2-1.pdf.

4 See Table: Rules Requiring Servicers to Evaluate Successors for Simultaneous Loan Modification and Assumption *infra*

5 See Reg. X § 1024.30(d); National Consumer Law Center, Mortgage Servicing and Loan Modifications §3.2.3 (2019), updated at nclc.org/library.

6 *Id.*

7 See National Consumer Law Center, Mortgage Servicing and Loan Modifications §4.8 (2019), updated at nclc.org/library.

When a co-borrower is absent or unavailable to sign a loan modification due to military service, mental incapacity, or domestic violence, servicers sometimes refuse to honor the modification without the co-borrower's signature. Freddie Mac allows servicers to "evaluate requests on a case-by-case basis when the Borrower is unable to sign due to circumstances such as mental incapacity, military deployment, etc,"⁸ while Fannie Mae allows a servicer to provide an exception when a co-borrower's signature is not obtainable for a modification.⁹ FHA allows the waiver of certain signatories in the event of "divorce, legal separation, domestic violence, mental incapacity, military deployment, or abandonment..."¹⁰

Can the successor assume the mortgage loan?

A mortgage assumption happens when the terms and balance of an existing mortgage are transferred to another person to take on the liability and requirements of the mortgage. The person assuming the loan obtains all the rights of a borrower.

To assume a mortgage, there are no formal words required. Any language evidencing an agreement to take on liability for the debt will suffice. Signing a loan modification can show an assumption. Most existing mortgage contracts contemplate the possibility of an assignment of rights and assumption of responsibilities by providing that the contract shall bind the borrower's "successors and assigns." It's best if the person assuming the loan can point to a specific communication saying "I hereby assume and promise to pay this debt." Simply making the payments on the loan is not enough.

Assumption of the loan by the successor does not relieve the original borrower of liability for the debt unless the creditor agrees.¹¹ A creditor may condition the release of the original borrower on the creditworthiness of the assuming party.

As discussed above, most mortgage loan contracts do contain a restriction on assumptions in the form of a due-on-sale clause that permits the lender to cancel the mortgage contract and demand all of the amounts due under the loan if the property is transferred. This is the contract language that lenders use to prevent the transfer of a home to a third party and assumption of the loan by that third party.¹² However, the federal Garn-St. Germain Depository Institutions Act bars enforcement of a due-on-sale clause based on transfers that occur in connection with the death of the borrower, a divorce, or a deed to a spouse or child of the borrower.¹³ Mortgage lenders cannot use a due-on-sale clause to refuse to honor an assumption after one of these types of transfers.

Under state contract law, generally a contract, such as a mortgage, is assumable unless it is a contract for personal services, against public policy, or the contract itself has an assumption restriction.

Unfortunately, servicers do not typically recognize or understand the interplay between the Garn-St Germain Act with state contract law and they attempt to impose unauthorized restrictions and creditworthiness requirements on assumptions. Servicers sometimes take the illogical and convoluted position that a successor cannot obtain a loan modification because they are not the borrower, but they cannot become the borrower through an assumption because they cannot afford the loan (which, of course, is why they are seeking a modification).

8 Freddie Mac Single-Family Seller Servicer Guide 9206.13.

9 Fannie Mae F-1-27: Processing a Fannie Mae Flex Modification (06/09/2021).

10 FHA Single Family Housing Policy Handbook 4000.1 p. 960 (9/26/2022).

11 See National Consumer Law Center, Mortgage Servicing and Loan Modifications §3.2.3 (2019), updated at nclc.org/library.

12 Sarah Bolling Mancini and Alys Cohen, *Surviving the Borrower: Assumption, Modification, and Access to Mortgage Information After a Death or Divorce*, 43 Pepp. L. Rev. 345 (2016), available at digitalcommons.pepperdine.edu/plr/.

13 See The Garn-St. Germain Act, 12 U.S.C. § 1701j-3 *et seq.*

Advocates faced with a conflict over a successor loan modification case may wish to have the client execute an assumption agreement and send it to the servicer, thus setting up legal claims for breach of contract and breach of the duty of good faith and fair dealing implied in the contract when the servicer refuses to recognize the assumption and deal with the successor as a borrower. Usually, these cases are more easily resolved by citing to the applicable program rules requiring servicers to evaluate the successor for a simultaneous loan modification and assumption. Government agency insurers and the government sponsored enterprises, Fannie Mae and Freddie Mac, require servicers to evaluate successor homeowners for loan modifications before they have assumed liability on the debt.¹⁴ This allows successors to determine if they can afford the loan with a modification before assuming the payment obligations of the loan.

Rules Requiring Servicers to Evaluate Successors for Simultaneous Loan Modification and Assumption

Applicable Rules	Non-borrower simultaneous loan mod and assumption
FHA	FHA Servicing Handbook § III.A.2.j.ii(B)(4) (Dec. 30, 2016) (locate this section by searching the PDF for “Non-Borrowers who acquired title through an exempted transfer”).
Freddie Mac	Freddie Mac Single Family/Seller Servicer Guide § 9207.2 (eff. Oct. 1, 2017) (simultaneous loan modification and assumption after borrower’s death or an eligible hardship, if the transfer is an exempt transfer listed in § 8406, which includes Garn-exempt transfers).
Fannie Mae	Fannie Mae Single Family 2015 Servicing Guide, at D1-4.1-02 (eff. Nov. 12, 2014) (simultaneous loan modification and assumption after death, divorce, and other Garn-St Germain-exempt transfers).

Advocates can also help clients send a Notice of Error (NOE) under RESPA if the loan servicer fails to properly communicate with a successor in interest and evaluate them for available loss mitigation options¹⁵ or a Request for Information (RFI) asking the loan servicer what additional information they need to either confirm the person as a successor in interest and/or evaluate them for a loan modification. Advocates and their clients can also [send a complaint](#) to the Consumer Financial Protection Bureau (CFPB).

¹⁴ See National Consumer Law Center, Mortgage Servicing and Loan Modifications §4.8 (2019), updated at nclc.org/library.

¹⁵ See 12 C.F.R. § 1024.35; 12 C.F.R. § 1024.36; NCLC Making the Most of NOEs and RFIs, library.nclc.org/sites/default/files/Fore_Appx_I-2-1.pdf.

Other Options

During the COVID-19 pandemic, the federal government created the [Homeowner Assistance Fund \(HAF\)](#). 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. Individual states, territories, and tribes have designed their own HAF programs under guidance from the U.S. Treasury Department. 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](#).

For successors facing foreclosure, filing a chapter 13 bankruptcy provides another option. The vast majority of bankruptcy courts have held that a successor homeowner may treat the mortgage secured by their home in a chapter 13 plan, even if they are not the borrower on the note and has no personal liability on the debt. A successor then may use a Chapter 13 bankruptcy to cure the arrears, even if they have not assumed the debt. There is a basic principle in bankruptcy that a "claim" includes a debt secured by the debtor's home, even if the debtor has no personal liability on the note. Non-borrowers that are protected under Garn St. Germain must be allowed to de-accelerate the note and cure arrearage in a chapter 13 plan.

Reverse Mortgages

For reverse mortgages, the loan becomes due and payable when all borrowers on the loan have passed away. Heirs generally cannot assume the loan. However, in many cases, a non-borrowing spouse can stay in the home even after the borrower-spouse has passed away. If the remaining member is not a spouse, heirs generally have up to 12 months to pay off the loan and can satisfy the loan for 95% of the market value of the property.

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

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