

# Foreclosures and Probate

Unique Issues in Foreclosure, Guardianship, and Decedent's Estate  
Cases with Focus on Reverse Mortgages

Matt Hulstein, April 30, 2020 (via Zoom)



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# Introduction

- CVLS
  - Chicago's oldest and largest *pro bono* organization
  - We help low income Chicagoans with a variety of everyday legal problems, including foreclosure, guardianships, and decedent's estates
  - Most of our clients are represented by quality, volunteer attorneys
- Matt Hulstein
  - Staff attorney with CVLS for past eight years
  - Oversee our Chancery Court Appointment Program
  - Handle a collection of housing and consumer issues
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# Why This Work is Important

- Cook County's homeowner population is aging
  - People aged 65+ is Cook County's fastest growing demographic. Many of these people are homeowners.
- Older Americans are having more trouble affording housing
- With a COVID-19 recession, another wave of foreclosures is coming

Age	Housing Type	Number
50-64	Rent	311,391
	Own	1,091,306
65+	Rent	200,896
	Own	861,357
50+	Rent	512,287
	Own	1,952,663



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# Learning Objective

By end of today's training, you will be able to help a family identify their best options in foreclosure and to secure those options.



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# Agenda

Part 1: Foreclosure overview

Part 2: Guardianship

Part 3: Decedents' Estates

Part 4: Reverse Mortgages



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# Part I

## Foreclosure Overview



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# Basic Concepts

- A foreclosure is a debt collection lawsuit
- Two documents at play:
  - Note (debt)
  - Mortgage (security)
- Practice
  - Foreclosures are heard in Chancery before specialized foreclosure judges
  - Most foreclosures are handled by large, foreclosure mill forms (Codilis, Pierce, Nevel, etc.)
  - The entire process is a conveyer belt, run by computers



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# Foreclosure Process

- Foreclosures are governed by the Illinois Mortgage Foreclosure Law (IMFL). (735 ILCS 5/15-1101 et seq.) Anything not covered by the IMFL falls under general Code of Civ Pro.
- Foreclosure is a *quasi-in-rem* proceeding, and homeowner is a necessary party (ABN AMRO v. McGahan, 237 Ill. 2d 526 (Ill. 2010); 1501(a)).
- Steps:
  - Complaint (1504)
  - Service and case management (Cir. Ct. R. 7.3; 2009/10 GAOs)
  - Discovery (traditional discovery and CFPB requests for information)
  - Judgment (1506, SCR 191(a) / 113 and 114)
  - Redemption (3 months btw judgment and sale)
  - Sale
  - Order approving sale (1508)
  - Judicial deed (1509)



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# Foreclosure Jurisdiction and Judgment Quirks

- Within 60 days of filing appearance or participating in a hearing, defendant must file motion to quash or she consents to personal jurisdiction of court (1505.6)
- There are few trials in foreclosure. Everything ends at summary judgment / judgment of foreclosure (JOF)
- A JOF is not a final judgment. OAS is final judgment. So...
  - Have entire redemption period to file motion to vacate / reconsider (1301)
  - BUT once sale hits, limited to four factors in 1508 (*MERS v. Barnes*, 406 Ill. App. 3d 1 (1st Dist. 2010)). Once deed issued, all claims / defenses barred (1509)
- Unless jurisdictional problem is apparent on face of record, cannot vacate the judgment and deed

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# Loss Mitigation

- From the 2008 financial crisis to date, loss mit has moved to center of foreclosure lawsuit
- Two types:
  - Home Retention
    - Reinstatement
    - Repayment plan
    - Forbearance
    - Loan modification
  - Non-retention (Dignified/Negotiated Exit)
    - Short sale
    - Deed-in-lieu
    - Consent judgment
- Loss mit authorities:
  - CFPB Regulations (don't apply to reverse mortgages!): 12 CFR 1024.41
  - SCR 114
  - Servicing requirements (Fannie, Freddie, FHA, etc.)



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# Loss Mit Process

- Home retention:
  - Complete forms and include bank statements and income statements (pay stubs, rent receipts, contributions, SSA award letters, etc.)
  - If modification approved, borrower must usually complete a three month trial payment plan (TPP)
  - Once borrower completes TPP, servicer will send permanent modification. Borrower signs, bank signs, then case is dismissed
- Dignified Exit
  - Short sale: Need executed sales contract
  - DIL: Need to market property for 90+ days
  - Consent judgment: Just email opposing counsel
- Best practices:
  - Get attorney's permission and third party authorization to speak directly with the bank
  - Use bank's own application
  - Submit to servicer and bank's attorneys
  - Follow up weekly



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# Part II

## Foreclosure and Guardianship for Disabled Adults



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# Due Process Protections

- A bank cannot sue an incompetent person
  - Matter of due process, not jurisdiction (*Kirkland v. Kirkland*, 38 Ill.App. 2d 280 (1<sup>st</sup> Dist. 1962))
- If defendant is incompetent, representative must be named (2-1008)
  - If Plaintiff is aware of an open guardianship, must name the guardian.
  - If no guardianship open, Court can appoint a GAL in the foreclosure to protect the homeowner's rights in that proceeding only
    - Must be by motion, with evidence and a chance to object (*J.H. v. Ada S. McKinley Cmty. Servs.*, 369 Ill. App. 3d 803 (Ill. 2006))
- The homeowner's POA cannot appear in the foreclosure *pro se*, but she can hire a lawyer to represent the homeowner (*People v. Bowens*, 2012 IL App (1st) 100674-U)



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## Well, we're not sure if incompetent...

- If the homeowner's competency is unclear, CVLS asks the family to get a CCP-211 physician's report
  - If competent → Durable POA
  - If not competent → either appoint GAL in foreclosure or petition for guardianship
- Court should continue case for a while to give the parties the chance to sort this out. If CCP-211 cannot be obtained, either OPG or someone else will be appointed as GAL to move the case forward.



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# Considerations in Guardianship Court

- Because there is a house, there must be guardianship over person and estate. The family must have an attorney to open an estate. (*In re Estate of Mattson*, 2019 IL App (1st) 180805 (decided April 30, 2019))
- Should you consolidate foreclosure into guardianship? (5/2-1006, GO 12.1)
- What is best for the homeowner?
  - Home retention?
  - Selling the home?
  - Dignified exit?
    - Are they judgment proof?
- If going to apply for a loan modification, prepare the budget and account
- Any loss mitigation option must be approved by the probate court

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# Part III

## Decedents' Estates



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# General Principals

- Bank cannot refuse payments just because borrower died
- Servicer must also identify “confirmed successors in interest” and communicate with them about the loan. (12 CFR 1024.38)
- The Bank cannot sue a dead person, so the estate must be named (*ABN AMRO Mortgage Group, Inc. v. McGahan*, 237 Ill. 2d 526, 931 N.E.2d 1190 (2010); 5/13-209(c); SCR 113(i))
  - If estate opened, must name the estate
  - If no estate, must name a special representative
- Because mortgage is a secured claim, falls outside 18-10’s definition of a claim that has to be filed in probate



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# When probate is not required...

- This confuses the Hell out of banks!
- Instances:
  - Right of survivorship
  - TODI
  - Trusts
  - Conveyed before death
- Way through...
  - Be in close contact with OC and be ready to submit a brief memo/letter
  - Record death certificate and death of JT/TE affidavit
  - Small estate affidavit for mortgage account



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# Loss Mitigation When Borrower Is Dead

- Heirs of deceased borrower are eligible for loss mitigation
- Non-retention
  - Think about whether there is equity in the house and worth selling
  - Dignified exists (short-sale, DIL, consent judgment) doesn't make sense since heirs are not personally liable
- Home retention
  - Will require consolidation of title into one person
  - Forward mortgages, two options:
    - Loan modification and assumption
    - Refinance
  - Reverse mortgages, one sec!



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# Part IV

## Reverse Mortgages



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# Basics of a Reverse Mortgage

- Most reverse mortgages are FHA-insured Home Equity Conversion Mortgages (HECMs)
- Reserved for homeowners 62+ with majority equity in home.
- Borrower gets paid, and repayment is deferred until borrower's death. Meanwhile, interest, insurance premiums, and any advances are added onto the principal balance.
- Lender and FHA bets homeowner will be dead before principal balance rises above value of property. If they bet wrong, FHA insurance covers the loss to the bank.
- Can be helpful (and complicated) tool



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# Reverse Mortgage Defaults

- While borrower is alive:
  - Pay property taxes and hazard insurance (T&I)
  - Live in property
  - Maintain property
  - Not transfer title
- When Borrower (and spouse of borrower for newer loans) is dead, loan is due.



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# Loss Mitigation and Reverse Mortgages

- Borrower still alive:
  - Borrower has the right to cure default (24 CFR 206.125).
    - T&I defaults:
      - Reinstatement or repayment plans
      - Repayment plans are discretionary (check HUD HECM Mortgagee Letters)
      - Ch 13 BK
    - Occupancy: Move back in
    - Maintenance: Repair property
  - Other options:
    - Pay off: Always have right to pay off loan at either A) current balance or B) 95% FMV
    - Ch 13 BK
    - At risk extension (82+ with chronic health issue)
- Borrower dead:
  - Spouse: MOE assignment
  - Other heirs: Pay off



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# Questions?

- Email: [mhulstein@cvs.org](mailto:mhulstein@cvs.org)
- Phone: 312-332-8217 (office); 712-441-6267 (cell)
- Please take a case!
  - Matt for foreclosure
  - Peter for probate ([pashmore@cvs.org](mailto:pashmore@cvs.org))



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