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Death of a Mortgagor

INTRODUCTION

The following is a brief synopsis, which explores the different methods, laws and costs undertaken and considered by mortgagees when the death of a mortgagor occurs. The various states to be touched upon are: [Alabama](#), [Arizona](#), [Arkansas](#), [California](#), [Colorado](#), [Connecticut](#), [Delaware](#), [Florida](#), [Georgia](#), [Illinois](#), [Indiana](#), [Iowa](#), [Kansas](#), [Kentucky](#), [Louisiana](#), [Maine](#), [Maryland](#), [Massachusetts](#), [Mississippi](#), [Missouri](#), [Nebraska](#), [Nevada](#), [New Hampshire](#), [New Jersey](#), [New York](#), [North Carolina](#), [Ohio](#), [Oklahoma](#), [Oregon](#), [Pennsylvania](#), [Puerto Rico](#), [Rhode Island](#), [South Carolina](#), [Tennessee](#), [Texas](#), [Washington](#) and [West Virginia](#).

The issues which are reviewed are (1) whether the state is a judicial, non-judicial or trust state, (2) when the death of a mortgagor affects foreclosure proceedings, (3) when property rights are vested upon death, (4) who is vested of property rights upon death, (5) what if a newly interested party is a minor or incompetent, and (6) what is the extent of the delay and how do the investors assess cost and culpability.

ALABAMA

Alabama is a non-judicial state. Death of a mortgagor does not necessarily trigger specific performance on the part of mortgagees in a foreclosure action. This is because Alabama law does not contain special notice requirements for heirs or beneficiaries of a decedent's estate. However, a fair debt letter must be sent to the administrator of an estate at that stage in the proceedings. Pursuant to Alabama Code, Sec. 35-10-13, once a foreclosure is at the sale stage, notice of the sale must be published in the county in which the property is located. The notice must run for three (3) consecutive weeks. However, notice requirements for a Power of Sale contains no additional hurdles where that property is part of a decedent's estate. The code does assign heirs the right to redeem.

If during the course of a title search relative to the foreclosure, it is discovered that an estate is being probated, it would be best to serve all pleadings and notices upon the executor, or administrator, of the estate, as well as all other interested parties. The interest of these parties passes upon operation of law.

Clearly, the delays and additional costs are minimal, if any, when a death occurs.

ARIZONA

Arizona is a non-judicial state. In Arizona, a notice of a trustee sale must be recorded. After the expiration of ninety (90) days from the recording, a sale may take place. Once a death of a mortgagor or trustor occurs, it is incumbent upon the newly interested parties to file a request for notice of a sale with the county where the property is located. Such a request for notification must be filed between the time the deed of trust is recorded up to the time that the notice of sale is recorded. Pursuant to Arizona Revised Statute 33-809, all persons making such a request must be served with notice of the sale. The additional delays and cost are minimal to the mortgagee or trustee because it would, in any event, have to see whether such a request is on file.

ARKANSAS

Arkansas is both a judicial and non-judicial state. When a mortgagor dies prior to default in a judicial proceeding, the mortgagee is required to name the executor of the estate if one exists or obtain a warning order on any unknown heirs if there is no estate. In a non-judicial proceeding, if the death occurs prior to the filing of a lis pendens, there is no effect on the proceeding. If the death occurs after a complaint has been filed, then it is necessary to re-serve the defendants in the action with a new summons and complaint. These documents can be re-served by certified mail rather than personal service.

When there is a death, property rights are vested upon operation of law, unless there is a will, which provides otherwise. Generally the newly vested persons are the heirs at law. If one of the newly vested persons is a minor or incompetent then it is necessary to appoint a guardian ad litem.

The extent of delay and costs depend upon whether the proceeding is judicial or non-judicial and also when the death occurs. Generally, if a warning order is to be published in a judicial proceeding there is a 30 day delay with a cost of approximately \$200.00 to \$300.00 which is born by the plaintiff.

CALIFORNIA

In California, a trust state, when a trustor has died, the successors in interest are entitled to receive notice of default under certain circumstances. Essentially, proof of interest must be filed in the county where the property is located. It must provide constructive notice to the trustee prior to the recording of the notice of default. Further, it must provide an address to which notices may be mailed.

Failure of successors in interest to properly record their interest is not, however, necessarily the death knell of their rights. Pursuant to case law, if a trustee is even vaguely aware of the death of the trustor, it should attempt to locate any successor in interest even though there is no legal duty to do so. See, Estate of Yates, 25 Cal. App. 4th, 511 (1994).

Also in California, a successor in interest is entitled to notice of a sale at least twenty (20) days prior and can cure a default five (5) days prior to the sale.

Due to the additional hurdles created by case law, there are delays and costs incurred by trustees when successors in interest do not properly put the trustee on notice of the death. While there is no duty to discover the death, any knowledge of it will lead to additional measures to be taken by the trustee.

COLORADO

Colorado, a trust state as well, has no special requirements to adhere to in the event of the death of a trustor. Even when death is known, notice of the foreclosure continues upon the deceased party as though still alive. The estate need only be served, if its interest is recorded in the real estate records. Accordingly, the delays in Colorado caused by death of the trustor are minimal at best.

CONNECTICUT

In Connecticut there is little if any delay in a foreclosure action when the death of a borrower is known prior to the commencement of the action. If the death occurs after the commencement of the action, there is still no delay. However, if the action is commenced and it is later discovered that the mortgagor previously died, then the complaint must be amended to give notice to the heirs and to the State of Connecticut. Further, if a new party in interest is a minor, then becomes necessary to appoint a guardian ad litem. The delay in the appointment of a guardian or service to the heirs is approximately two to three months.

DELAWARE

Delaware is a judicial state. If the death of a mortgagor occurs prior to the commencement of the action and the property is held as tenants by entirety, then the other party is simply named in the action as a defendant. It is necessary, however, to confirm this by obtaining a copy of the death

certificate. Prior to entry of judgment, any filed complaint should be amended to include heirs where there is tenancy in common. Thus, it may also be necessary for the mortgagee to open an estate in probate for the purpose of service. When a new party in interest is a minor or incompetent, then their legal guardian should be served. If there is no legal guardian, then it may be necessary to appoint a guardian ad litem. The delays associated with this scenario can be up to a month or so. The delay is often caused by the necessity of obtaining a death certificate or locating the state or county of death when it is different from the situs of the property.

FLORIDA

Florida is both a judicial and non-judicial state. The death of a mortgagor has little effect on the foreclosure process when property is owned as tenants by the entirety. In this case, property passes by operation of law. A copy of the death certificate is filed by the mortgagee who then removes the decedent defendant from the action and proceeds in due course.

When property is not owned as tenants by the entirety, then heirs must be located and joined as defendants. A Guardian Ad Litem must be appointed to represent any unknown heirs who must also be published upon. In these scenarios, delay and cost can be considerable.

GEORGIA

Georgia is a non-judicial state. Where there is a power of sale foreclosure, the death of a mortgagor does not create additional obligations for the mortgagee. Identification of heirs may be necessary, though, for eventual title purposes. Delay and costs in Georgia are minimal when a mortgagor dies in a power of sale foreclosure.

ILLINOIS

Illinois is a judicial state and its procedure is somewhat similar to those of Florida. Where property is held as joint-tenants or tenants by the entirety, then no action need be taken. The remaining party would become the sole owner by operation of law. However, if property is held as tenants in common, or by the mortgagor alone, then a probate case search must be performed. If a probate case exists, then all heirs, executors, unknown heirs and legatees would have to be named as defendants. However, if the mortgagor dies after the filing of the action and recording of the lis pendens, then no additional steps are necessary and the interested parties simply take subject to the foreclosure action. When minors or incompetents are involved, it is necessary to appoint a Guardian Ad Litem.

The costs and delay depend upon when the death occurs and the assessment of the type of tenancy. The bulk of delay and cost arises when there is tenancy in common or only one owner of the property.

INDIANA

The Indiana Lis Pendens statute requires notice to all persons who are or may become interested in the real estate at issue. Thus, prior to entry of judgment, the personal representative of the decedent, if an estate has been opened, is substituted in the action as a defendant. In cases where no estate is opened, then the heirs are added into the foreclosure action. Death of a mortgagor after the entry of judgment has no bearing on the validity of the judgment.

The mortgagee may, however, opt to assert the lien as a claim in the estate. Such a lien would become a first priority claim above all others, including administrative or burial expenses. This is an option to proceeding with an in rem foreclosure.

IOWA

In Iowa the death of a mortgagor does not hinder the proceedings unless a deficiency is sought. If a deficiency is sought then it is necessary for the plaintiff to file a claim with the probate court, which will delay the foreclosure. Otherwise, the plaintiff need only serve by publication to all persons interested in the estate of the deceased without specifying the individuals by name.

KANSAS

Kansas is a judicial state. When a borrower dies prior to commencement of a foreclosure action, first, a death certificate must be obtained. Then any executor or administrator of the estate must be named in the action as a defendant. If no such proof is available, or if no executor or administrator is appointed, then a plaintiff would simply state that the borrower may be deceased and a notice of suit must be published which would include the heirs. Further, the heirs must be notified of any pending sale. If the death occurs after the action is filed, then it is simply good practice to publish as against unknown heirs.

Property rights are vested upon death by operation of law where there is a joint tenancy with survivorship rights. Where minors, incompetents or unknown heirs are involved, then the plaintiff would appoint an attorney to act as a guardian ad litem for those parties. The guardian ad litem would then be noticed.

The ensuing delays and costs range from two months when it is necessary to publish, the cost of which is about \$100.00 to \$250.00, to four months when a guardian ad litem must be appointed, that cost being about \$300.00.

KENTUCKY

Kentucky is a judicial state. When a borrower dies after the commencement of a foreclosure action, then it is not necessary to amend to add the heirs or estate as additional party-defendants. This is true, however, only if the lis pendens was filed and the borrower was previously served. If the borrower was not served, or if a lis pendens was not filed, then the heirs and estate must be included in the action and they must be served, as well.

Amending the complaint can cause a delay of approximately thirty to sixty days plus time for service. If there are unknown heirs then a Warning Order Attorney (WOA) must be appointed by the Court. Defendants served by a WOA will have fifty (50) days from the date of appointment to file an answer. If minor children are new parties in interest then the appointment of a guardian ad litem is also necessary.

LOUISIANA

Louisiana is a judicial state. Deeds of Trust do not exist in this state. The death of a mortgagor triggers the undertaken of special proceedings which are either executory or ordinary. An executory procedure is a streamline, which can be used when all original documents, such as the mortgage and note, are available and can be readily produced and attached to a petition, which is then filed in court. Once the court reviews the petition, Writ of Seizure and Sale may be issued. This Writ allows the property to be seized and sold by the Sheriff's Office. A copy of the Writ must be served upon the defendants. The petition does not have to be served upon the defendants. The defendant may file and request a Writ of Injunction if valid objections exist which would enjoin the sale. A hearing would then be held to determine the validity of the objection. The court is not apt to consider frivolous objections or dilatory answers.

When the original mortgage note, or other necessary document, not available then the mortgage can be enforced by ordinary proceeding. An ordinary proceeding requires the filing of a petition, citation, and service thereof upon the defendants who are then given the opportunity to object or answer. An ordinary procedure is more time consuming and more costly than an executory procedure.

In an executory procedure, if the mortgaged property was community property and one of the spouses dies, then the proceedings are commenced or continued only against the surviving spouse. It is not necessary, in this scenario, for any of the heirs or decedents to be served upon.

When the property is not community property, or if both spouses are deceased, then it may be

necessary to appoint a curator ad hoc to represent the interests of the defendants if a succession has not been opened. This matter can be done via an ex-parte hearing and costs approximately \$300.00 to \$400.00 per defendant. If, however, a succession is opened, then it is necessary to serve the known heirs with the notice of seizure. Where one such heir is an absentee, then a court appointed curator may be served on behalf of the absentee. The definition of an absentee ranges from a non-resident of the state to a missing or deceased party.

Heirs are vested with ownership of property by operation of law upon the death of the mortgagor. However, their actual ownership is not recognized until the completion of the succession and entry of a judgment of possession. Until then, the ownership of the heirs is considered suspended. If a curator is appointed and one of the heirs is a minor, the matter can continue in due course.

MAINE

Maine is a judicial state. When a death of a mortgagor occurs, property rights are vested by either operation-of law or legal proceedings depending upon the parties and circumstances. Pursuant to Rule 80A. (e) of the Maine Rules of Civil Procedure, no real action shall be abated by the death of a party after it has been commenced. However, upon order of the court, notices will be sent to all persons interested in the estate. If a new party in interest is a minor or an incompetent then it may be necessary to appoint a guardian ad litem. Overall, the extent of delay is dependent on the court's schedule and when the notification of the death is received.

MARYLAND

When a death of a mortgagor occurs and it is known by the mortgagee prior to the commencement of the foreclosure, then from the beginning the appropriate parties would be added as parties to the action. When the mortgage is held as tenants in common then the trustee of the estate of the decedent would have to be notified of the foreclosure proceeding. The onus is on the trustee to halt the proceedings or attempt to reinstate the mortgage.

MASSACHUSETTS

Massachusetts is a quasi-judicial state. This is because an action is required in Land Court solely to determine the applicability of the Soldiers and Sailors Civil Relief Act of 1940. When a death occurs there is no effect on the foreclosure if the death occurs prior to the default. However, if the death occurs before judgment is entered, then it becomes necessary to amend the Land Court complaint to reflect the new parties in interest and the estate. If the death occurs after judgment is entered, but before the sale, then a new complaint must be filed in Land Court and statutory notices must be served upon the estate of the decedent, the legal representative and all heirs.

In Massachusetts, property rights are vested upon death by operation of law for lienholders with recorded interests and for heirs whose rights are subject to claims against the estate. Fiduciaries may also be granted property rights by legal proceedings the extent of the rights is dependent upon the terms of the will or order of the court. Residual beneficiaries and devisees are limited to the rights granted within the will. Heirs at law, the United States and the State of Massachusetts are vested of property rights upon death.

It is not necessary to appoint a guardian ad litem where a new party in interest is a minor or incompetent. However, if the party has been legally declared incompetent then the guardian for such incompetent would be named in the Land Court action.

The ensuing delay, when a death occurs, is minimal unless the action has been substantially completed without knowledge of the death which occurred early in the action, or, if the heirs cannot be readily located. Generally, any steps taken without notice to heirs or fiduciaries will have to be redone.

MISSISSIPPI

Mississippi is a non-judicial state. When a death occurs, at any stage of the proceedings, the only change is the person(s) to be served with the Notice of Foreclosure, if such person is known. Property rights are vested upon the new parties in interest by operation of law. The heirs at law who become vested will become joint tenants, assuming the property was held as joint tenants.

Where a new party in interest is a minor or incompetent, it is best to appoint a guardian ad litem. When a guardian is appointed, there is often a time lag in the proceedings of a few months. Generally, when there is a death, counsel for the plaintiff treats the matter as contested and bills it hourly.

MISSOURI

Missouri is a non-judicial, or, deed of trust state. The death of a mortgagor has minimal effect upon the foreclosure proceeding. If however, there is only one owner of the property, then the foreclosure is put on hold for six months from the date of the death. This does not apply if there is more than one owner of the property.

The vesting of property rights upon the death of the mortgagor is dependent upon how the property is titled at the time of death. Property rights will be determined either by probate proceedings or by operation of law depending on the titling. If a new party in interest is a minor or incompetent it is not necessary to appoint a guardian ad litem unless the action is commenced as a judicial proceeding. If it is a judicial proceeding, then a guardian should be appointed.

The delays caused by a death can be six (6) months, if, as mentioned above, the decedent was the only person in title. Otherwise the delays are minimal at most.

NEBRASKA

Nebraska is, for the most part, a non-judicial state. However, a plaintiff can elect to foreclose judicially. During a judicial foreclosure, it is necessary to revive the action, regardless of the stage of the foreclosure, to name the personal representative of the decedent or to name a fictitious party or parties as unknown heirs. In a non-judicial proceeding, there are no changes and the action may proceed in, due course regardless of the death.

Property rights are vested upon operation of law at the time of death. If a newly interested party is a minor, then, during a judicial foreclosure, that minor is simply included as all other parties. However, in cases of defense of a minor, it is necessary to appoint a guardian ad litem. The delays are minimal in that most foreclosures are non-judicial. However, even with judicial foreclosures, the delay may be a mere ten days to two weeks in Nebraska.

NEVADA

Nevada is a trust state and is in some ways similar to California. In Nevada, any known successor in interests to the trustor must be notified of the default, ninety (90) day reinstatement period and sale date. Such a successor must record his interest in the Office of the County Recorder where the property is located. Delays come into play when there are no recordings of successors in interest, but the trustee is aware of the death. In these cases, the trustee should take it upon himself to do a diligent inquiry in order to notify heirs or other successors in interest.

NEW HAMPSHIRE

New Hampshire is a non-judicial state. The effect of the death of a mortgagor varies depending on the stage of the foreclosure proceeding. If the mortgagor dies prior to the default of the loan, then notice of default is sent to the administrator or executor of the estate. If the mortgagor dies prior to the sale but after the statutorily prescribed notices have been sent, then no specific steps need be taken by the mortgagee.

Property rights are vested upon death by operation of law if the property is held as tenants by the entirety or joint tenants and one of the parties is deceased. In such a case, the interest vests in the remaining owners. Property rights are vested by legal proceedings, namely probate proceedings, when no other owners are alive or when the property is owned by tenants in common. In this scenario, the Probate Court establishes the interests and rights of heirs.

If a new party in interest is a minor or an incompetent there is actually no need to appoint a guardian ad litem or take any special action as long as the proper notices have been provided. Overall, the delays caused by the death of a mortgagor are minimal unless the death is not timely discovered and proper notices are not distributed. In the worst of cases the delay could be approximately four (4) weeks.

NEW JERSEY

New Jersey is a judicial state. When a mortgagor dies prior to default, then pursuant to the New Jersey Fair Foreclosure Act, a notice of intention to commence foreclosure is to be sent to all obligated parties which would include those known personal representatives or heirs at law of the decedent on the record of the lender. The death of the mortgagor does not effect the filing of a lis pendens. When a mortgagor dies prior to judgment, the complaint for foreclosure must be amended to reflect the death and to include executors, administrators, heirs at law, devisees, State of New Jersey and U.S.A. (It is important to recall that the U.S.A. has a 1 year right of redemption in all fifty states.) It is also good practice to serve known representatives or heirs with the required Right to Cure letter.

When death occurs before a Sheriff's Sale, the final judgment remains valid. However, it is best to serve the personal representatives with notices of the sale date. The death of a mortgagor after the sale has no effect at that point in the proceedings.

The property rights of the decedent are controlled by the status of legal title. If the property is held in joint tenancy, then it would revert to the surviving joint tenant. If the property is held as tenants in common, or individually, then the property reverts back to the estate. The current practice in New Jersey is to analyze the filed estate. If a will is probated and a specific devisee for the property is named, that party would be an appropriate party to name. If there is no specific devisee, then the executor should be named, rather than the residual beneficiaries. In the event of intestacy, the property remains in the estate until conveyed by an administrator. Heirs -at law are listed on application to appoint an administrator. The administrator and unknown heirs may be necessary defendants in the foreclosure action.

When a new party in interest is a minor or incompetent, then a motion for appointment of a Guardian Ad Litem must be filed.

The time delays caused by death are consistent with those where a mortgagor files a bankruptcy. The trick is to be aware and catch these issues timely.

NEW YORK

New York and New Jersey are both judicial states and are similar to each other in many ways. In New York, if a mortgagor dies prior to entry of Final Judgment, and dies testate, only the executor need be served. Service of process upon the Executor encompasses the estate and legatees. In cases of intestacy, all parties claiming an interest must be served. The Court generally decides upon the method of service, however, service by publication is predominant.

When the death occurs after judgment is entered, no special steps need be taken. Thus, the delays and costs exist in those cases where death occurs prior to judgment as the attorney for the mortgagee is charged with the responsibility of (1) assessing whether the mortgagor died testate or intestate, (2) determining who needs to be served and (3) arranging and paying for publication, to name a few things.

Further, estate taxes, both state and federal, become liens against the real property. However, when there is a surviving spouse, there is no estate tax as there are unlimited spousal estate tax deductions under both New York and federal law. Of course, in foreclosure actions, it is rare that there will be sufficient proceeds of the estate, which would trigger an estate tax issue.

NORTH CAROLINA

North Carolina is a non-judicial state. There is little, if any, affect upon the process when a death occurs - regardless of the stage of the action. When a death occurs, property rights are vested by operation of law upon the heirs at law. If one of the new parties in interest is a minor, an incompetent or an unknown heir, then it is necessary to appoint a guardian ad litem. Death of a defendant result in little or no delay in this power of sale state unless the appointment of a guardian ad litem becomes necessary.

OHIO

Ohio is a judicial state. In Ohio the death of a mortgagor affects the foreclosure process differently at different stages of the action. If the death occurs prior to the entry of final judgment, then it is necessary to file an amended complaint. The amended complaint must name additional defendants including all known and unknown heirs. Further, it is necessary to perfect service of the summons upon these parties before a valid judgment can be entered.

When the mortgagor dies after the entry of the foreclosure judgment, the judgment remains valid. The action may then proceed unabated to a Sheriff's Sale without the necessity of joining the heirs in the action.

OKLAHOMA

In Oklahoma if the death of the mortgagor is known prior to the commencement of the action, then it is necessary to-allege in the complaint that the borrower is deceased and to join the unknown heirs and the Oklahoma Tax Commission in the action. Service in this instance is by publication. If, however, the death is not known, then the complaint would have to be amended to join the unknown heirs and the Tax Commission. Service must then be published for forty-one (41) days after the amendment is filed.

The next step is for the plaintiff to determine whether the borrower died testate or intestate. If an active probate is pending, then only the personal representative of the deceased need be served as opposed to the forty-one day publishing requirement mentioned above. If there is no probate pending, then the forty-one day publishing requirement is triggered.

If there are minors in interest to the property, then each minor must be joined in the complaint and application to appoint a guardian ad litem must be filed. This will cause a further delay of approximately, forty-five (45) days. The guardian will have twenty (20) days, to file an answer to the complaint.

OREGON

In Oregon the lender may proceed in either a judicial or non-judicial manner. If a borrower dies prior to the recording of a notice of default, which is similar to a lis pendens, and there is no probate then the lender has two options. First, it can bring a judicial foreclosure where all known and unknown heirs are named and served by publication. This method is costly and time consuming. Or, second, it can open a probate for the decedent, which is also expensive and time consuming, but less so than proceeding judicially. If, however, the title insurance company will agree to rely upon an affidavit of heirship, which must be signed by all heirs, then it would be easiest to do so and proceed with a non-judicial action. Unfortunately, title agencies are not so eager to agree to this course of action.

When a borrower dies after the recording of the notice of default, then the death is irrelevant regardless of whether the proceeding is judicial or non-judicial. In fact, the heirs or personal representative need not even be served with the notice of sale date. These parties do, however, retain

the right to redeem within six months from a judicial sale.

PENNSYLVANIA

Pennsylvania is a judicial state. When a mortgagor dies prior to entry of judgment, it is the responsibility of the plaintiff to join as a defendant to the action the personal representative, heirs, or devisees of the decedent, if known. The plaintiff has the option of naming either the personal representative or all of the heirs, or devisees of the decedent. If the plaintiff opts to name the heirs, then all of the heirs must be named in order to properly foreclose upon the interests of that group. Death of a mortgagor after entry of judgment, however, has no bearing on the validity of the judgment. This is because the judgment remains as a lien against the real property.

Legal title to real estate passes by operation of law to the decedent's heirs or devisees. However, this is subject to the powers held by the personal representative by will or by order of court.

PUERTO RICO

In Puerto Rico when the plaintiff finds out about the death, regardless of the means of the notification, it has thirty (30) days to notify the court of substitution of the deceased party. Thereafter, a substitution order must be obtained in order to serve the heirs. Service upon the heirs can be either by publication or personal service. The heirs will then have thirty (30) days in which to answer if by publication or twenty (20) days if by personal service. If a new party in interest is a minor, it is also necessary to appoint a guardian.

RHODE ISLAND

Rhode Island is a non-judicial state. The death of a mortgagor has no effect at any time prior to the default. If the death occurs prior to the sale, then statutory notices must be served upon the estate of the decedent and the legal representative of the decedent.

In Rhode Island, property rights are vested upon death by operation of law for lien holders with recorded interests and for heirs whose rights are subject to claims against the estate. Fiduciaries may also be granted property rights by legal proceedings the extent of the rights is dependent upon the terms of the will or order of the court. Residual beneficiaries and devisees are limited to the rights granted within the will. Heirs at law, the United States and the State of Rhode Island are vested of property rights upon death.

In Rhode Island the status of heirs has no effect upon the foreclosure process. Thus, where in many other states it is necessary to appoint a guardian ad litem when a minor or incompetent becomes a party in interest, it is not necessary to do so in Rhode Island.

The delay and costs when a death occurs is minimal depending on the timeliness of the notification of the borrower's death. If, however, there is an open estate and the estate and executor were not included in the demand, then a delay of about thirty (30) days may result due to the requirement to include these parties in the demand.

SOUTH CAROLINA

South Carolina is also a judicial state. When a mortgagor dies, his attorney must report the death and provide the names and addresses of the parties to be substituted into the foreclosure action. When the death occurs after commencement of the case, but prior to an Order for Publication or Final Judgment being obtained, then the complaint must be amended to include known and unknown heirs.

In cases where the heirs are also discovered to be deceased, the complaint must again be amended to include the heirs of the heirs. Such cases are exasperatingly costly and time consuming. Amendments to the complaint after the first amendment require a motion to be filed which again causes unbearable delays.

If it is known, prior to commencement of a foreclosure action, that a mortgagor is deceased, an all-encompassing caption may be the best course of action. Such a caption should include inter heirs, their heirs, administrators, successors, assignees, a class of minors, John Doe, etc. If a party in interest is a minor or incompetent, there are special rules for service which must be adhered to. Also, a motion must be filed in order to continue the action against an incompetent. [See South Carolina R.C.P. 4(d) and 25(b)].

In cases where the death occurs after an Order for Publication or Judgment of Foreclosure is filed, no further amendments or other delaying actions need be undertaken.

TENNESSEE

Tennessee and Texas are both trust states. Once a death occurs in Tennessee, the personal representative of the decedent's estate is charged with the responsibility of publishing notice to creditors and setting a time period for filing of claims. A foreclosure cannot be commenced unless the trustee first files a claim with the Probate Court in the county of administration, which may not necessarily be the county where the property is located. Such a claim must include a copy of the Deed of Trust and Note. The ten (10) year statute of limitations for enforcing liens against real property is tolled until either the full administration of the estate or distribution of the property of the estate. Once that occurs, the foreclosure can proceed in due cause as if the borrower were alive.

At the sale stage, all known heirs or other interested parties must be named in the published notice. While they do not have to be served with a copy of the notice, it is good form to do so in any regard. These parties hold the same rights of redemption, as did the borrower. If the borrower waived his right of redemption in the Deed of Trust, then that waiver also binds any heirs or devisees.

TEXAS

As stated above, Texas, like Tennessee, is a trust state. Pursuant to Texas law, upon the death of a mortgagor, if an administration of estate is opened within four (4) years of the death, then the jurisdiction of the Probate Court can not be impeded upon by the exercise of a power of sale. Texas case law has created four (4) distinct scenarios, which affect foreclosure. When a will is probated and an independent executor is First, appointed, a foreclosure sale will be deemed as valid if the independent representative is duly notified. In this first scenario, notification of the representative is the only additional step that a mortgagee must take. Second, any sale held during the pendency of a dependant administration will be valid if, and only if, an Order of the Probate Court allowing the sale is obtained. Third, when no administration is pending any sale held within four (4) years of the death of the mortgagor is voidable if a party in interest moves to set aside the sale within that four (4) year period. Fourth, once four (4) years has elapsed since the date of death, and no administration has been opened, any sale held is valid.

Obviously, in Texas, the delays can be up to four (4) years depending on the type of probate administration. Further, many costs and risks may be associated with that four (4) year wait such as depreciation or damage to the real property.

WASHINGTON

Washington is similar to Oregon in that it is both a judicial and non-judicial state. Washington is a community property state and upon death, real property is transferred by operation of law. During judicial foreclosures delays can be considerable. There is eight to twelve month redemption period for judicial sales. If a deficiency is waived then the redemption period is eight months, otherwise it is twelve months. The non-judicial process is approximately 120 days from beginning to end.

WEST VIRGINIA

West Virginia is a non-judicial state. If during a title update, the death is discovered and heirs are known, then, those heirs must be noticed of the sale date. If death is known, but the heirs are unknown, then notice is sent to the property location and is addressed to the estate of the decedent. The entire process from beginning to end is approximately thirty to forty-five days. There is little if any delay when a death occurs during an action. However, if one of the newly interested parties is a minor or incompetent then it may be necessary to appoint a guardian ad litem.

CONCLUSION

The above sampling portrays many similarities and differences in the way states deal with the death of a borrower time delay range from the minimal to the absurd. The costs and for the most part, it seems as though the heirs, beneficiaries or other successors in interest are afforded fair and ample opportunity to, remedy or address the attendant issues of the foreclosure.

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