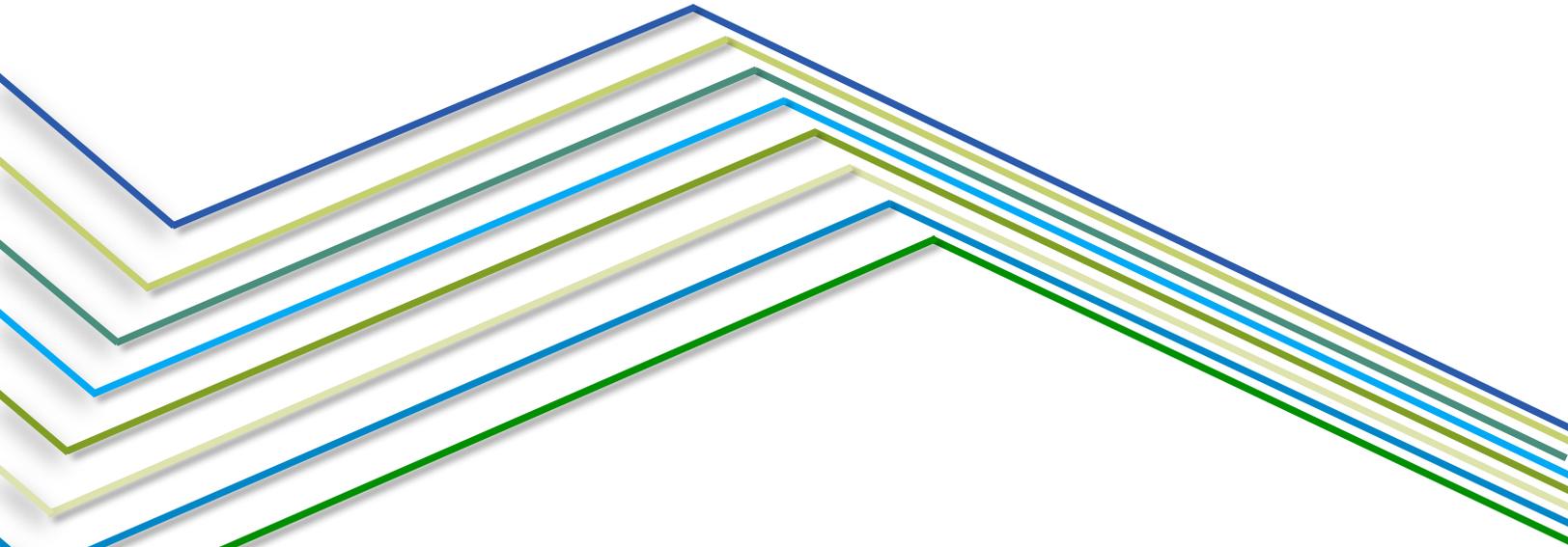


# GUIDEBOOK ON CONSUMER & ECONOMIC CIVIL LEGAL ADVOCACY FOR SURVIVORS

A COMPREHENSIVE AND SURVIVOR-CENTERED GUIDE FOR  
DOMESTIC VIOLENCE ATTORNEYS AND LEGAL ADVOCATES



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DOMESTIC VIOLENCE ATTORNEYS & LEGAL ADVOCATES

**With contributing authors:**

Katie VonDeLinde, Washington University, KMCV Consulting  
Diane Johnston, The Legal Aid Society  
Amy Cao, The Financial Clinic  
Persis Yu, The National Consumer Law Center  
Karen Merrill Tjapkes, Legal Aid of Western Michigan  
Sarah Bolling Mancini, The National Consumer Law Center  
Jamie Andree, Indiana Legal Services, Inc.  
Laura Russell, The Legal Aid Society  
Jenna Smith, Center for Court Innovation  
Nida Abbasi, Center for Court Innovation  
Karlo Ng, National Housing Law Project  
Lisalyn Jacobs, Center for Survivor Agency & Justice  
Erika Sussman, Center for Survivor Agency & Justice

**The Center for Survivor Agency and Justice** is a national organization dedicated to enhancing advocacy for survivors of intimate partner violence. CSAJ envisions a world where all people have equal access to physical safety, economic security, and human dignity. CSAJ develops and promotes advocacy approaches that remove systemic barriers, enhance organizational responses, and improve professional practices to meet the self-defined needs of domestic and sexual violence survivors.

**The Consumer Rights for Domestic and Sexual Violence Survivors Initiative** (Consumer Rights Initiative) is a national project of CSAJ that seeks to enhance consumer rights for domestic and sexual violence survivors by enhancing the capacity of and partnerships between domestic/sexual violence and consumer law and advocacy. Consumer and other economic civil legal remedies have the potential to provide survivors with the legal tools to address issues such as debt collection, credit discrimination, bankruptcy, damaged credit, tax liability, and foreclosure. To achieve survivors' joint goals of physical and economic safety also requires purposeful cross-training, networking, and sustained partnership building on the local and national levels. Therefore, CSAJ's Consumer Rights Initiative offers technical assistance to lawyers, advocates, programs, and communities across the nation through: advocacy tools and resources, webinar trainings, national conferences, individual technical assistance, and Building Partnerships Demonstration Sites.

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# Eight



## Foreclosure Defense for Survivors

PROCESS, DEFENSES & ALTERNATIVES

**By Karen Merrill Tjapkes & Sarah Bolling Mancini**

### Introduction

Foreclosure is the means by which a mortgage creditor takes the property securing the mortgage loan when a borrower is not able to make the payments. In recent years, a significant percent of homeowners have struggled to make their mortgage payments at one time or another and faced the risk of foreclosure. Survivors of domestic violence who own a home and have separated from an abusive partner face particular risks due to the reduction in household income, job insecurity, and grappling with other debts or financial needs that typically follow a separation. More often than not, a recently separated survivor will be attempting to make ends meet with reduced monthly income, which may cause them to fall behind on mortgage payments. Avoiding foreclosure involves specific challenges when a survivor remains in a home that was (fully or partly) owned by an abusive partner who has now left, especially if the abusive partner was the sole borrower on the mortgage. Survivors who are still in the home with an abusive partner may also be struggling to make a mortgage payment if the household is under financial strain.

This chapter covers the players involved in the mortgage market, how foreclosures take place, and the critical information advocates need to advise a survivor about options to avoid foreclosure. We will also address different foreclosure avoidance, or "loss mitigation," options, issues that arise when the survivor is not the original borrower on the loan, and ways that the family law court can help keep foreclosure at bay.

## Patricia's Story

Patricia's story is intended to demonstrate the way a survivor might deal with the risk of foreclosure.

*Patricia, a 39-year-old woman, has a mobility disability. After an attack by her ex-husband, she was hospitalized and later diagnosed with partial paralysis. She now uses a wheelchair.*

*After the attack, Patricia left and filed for divorce. The Court awarded Patricia the house, but the divorce process was financially exhausting. Even though she has a full-time job at a call center, she can no longer rely on her ex-husband for transportation, running errands, or assisting with her health needs, so now much of her income is consumed by these new expenses. She relies solely on her personal employment income, which is much less than the joint income they once had as a married couple. To make matters worse, her ex is not paying the child support he was ordered to pay for their two children. Patricia hasn't been able to make mortgage payments in months and is getting letters that say that her loan is about to be referred for foreclosure.*

*Patricia has tried to ask her mortgage company for help or a way to get caught up on the payments, but they have been giving her the run-around and won't tell her anything. The last time she called, they told Patricia that they couldn't talk with her without her ex-husband's permission because he was the only borrower on the loan. Patricia comes to you confused and scared at the prospect of losing her home. She tells you that she knows that when they bought the house ten years ago, she went to the closing and had to sign certain documents. Patricia's name is on the deed, along with her ex-husband's name. "No one is telling me anything. What if they take my home?" she asks you.*

*As you try to help Patricia calm herself, you make a note of the issues you need to unpack to advise her. How far behind is the mortgage? How long is the foreclosure timeline in your state? Is her income alone enough to afford a loan modification on the mortgage? And is it safe for Patricia to stay in the house? These are a few of the facts you will need to explore as you help Patricia decide on her next steps.*

### Think About It

How do you plan on accommodating Patricia's disability in meeting with her and asking her to provide information and documents? How might Patricia's disability influence her feelings about keeping her home? When communicating with her, how can you use proper language etiquette to ensure that she is comfortable and that you are not perpetuating harmful stereotypes or re-enforcing outdated attitudes?

## Foreclosure and Domestic Violence

Unfortunately, often domestic violence and foreclosure go hand in hand. The domestic violence may initiate the foreclosure problem as the abusive partner cuts off financial support, the division into two households may dramatically reduce the income available to make the mortgage payments, or other debts created by the abusive partner may come into the light. Conversely, a pending foreclosure may escalate an abusive situation with this additional, significant financial stressor.

The intersection of foreclosure and domestic violence brings additional issues to the forefront: is there a way to require the abusive partner to make payments? Is there a way

to make the situation affordable for the survivor to sustain the mortgage on their own? Is there a way for the survivor to communicate with a mortgage servicer that insists they must have the abusive partner's cooperation and consent?

## Assessing foreclosure options

Because of the complicated experiences and feelings surrounding homeownership for many survivors, foreclosure advocacy requires an open, honest, and sensitive assessment. The screening and assessment questions presented here are for issue spotting (often called "intake questions"), are not meant to be prescriptive, and conversations around foreclosure should not be limited to these questions. For a fuller description of a survivor centered approach to economic assessment, see the **Introductory** chapter in this Guidebook (pg. 11).

Foreclosures additionally present the problem of long-term, protracted financial negotiation, dissolution of assets, strain on changing income, communication and cooperation with an abusive partner, each posing unique privacy and safety risks. To begin a discussion with survivors about their housing and foreclosure concerns, some screening questions may include, but are not limited to:

- What is your goal – to stay in the home or to transition safely to another housing option? What factors are important to you in making that decision?
- What concerns do you have about safety and stability that might impact your decision about whether to stay in the house?
- What is your current monthly income? Is there any way to increase your income, such as by enforcing a child support order?
- Are you facing a permanent reduction in income or a temporary hardship?
- What information do you have about the mortgage, such as monthly payment amount and how far behind the payments are?
- What have been the most recent communications from the mortgage servicer?

## The impact of foreclosure

Maintaining stable housing is extremely critical for survivors of domestic violence recovering from trauma and abuse. For survivors who own a home, the risk of foreclosure jeopardizes their financial wellbeing as well as their ability to stay in a neighborhood where they may have networks of support, a job, and their children's school. Finding affordable housing after a foreclosure can be tremendously difficult due to the impact on a survivor's credit. Therefore, it can make a huge difference when an advocate helps a survivor find options to avoid foreclosure and obtain an affordable mortgage payment.

## Key Legal Concepts and Players

### What are the key legal concepts involved in foreclosure?

An individual obtaining a mortgage loan to buy a home or refinance their existing loan signs two critical documents for the financing: a **note** and a **mortgage** (or **deed of trust**). A **note** is a borrower's legally binding written promise to repay a debt to a lender by a certain date and under certain terms. A **mortgage** (or deed of trust—the term and precise nature of the transaction may vary depending on state law) gives an interest in a property to secure an obligation, usually the repayment of a loan evidenced by a note. Many times,

the mortgage or deed of trust imposes other responsibilities on the homeowner, in addition to making payments on the note, such as paying real estate taxes and maintaining homeowner's insurance.

If the party giving the mortgage, **the mortgagor**, defaults on the obligation, then the party given the interest, **the mortgagee**, can proceed with foreclosure. **Foreclosure** is the process by which a mortgagee forces the sale of the property because of a default, usually a failure to make payments but it may also be an inability to perform other requirements. Depending on the state law, the foreclosure process can require judicial action or be a non-judicial sale by advertisement without any significant court oversight. In states that use a deed of trust, the sale may be conducted by a trustee.

Homeowners who are having problems paying their mortgage loan may want to try to have their loan modified to lower their payment or sell the house through a short sale to avoid foreclosure. These options to avoid foreclosure are often referred to as **loss mitigation** because they mitigate the potential loss to the mortgage investor from a foreclosure.

## Who are the players in a mortgage foreclosure situation?

Survivors may find there are multiple people or entities involved in their mortgage loan—some they may be very familiar with, others they may not. It is important to get familiar with the different players to best understand the survivor's legal position and options moving forward. For example, in Patricia's story above, she knows she signed documents with Bank of America, but then a few years ago she started getting monthly statements from Nationstar Mortgage. How can you help her begin sorting out who is who and what is their role?

Most individuals begin the mortgage loan process by taking a loan from a financial institution, the **originating lender**. Some individuals may work directly with the originating lender to set up the mortgage loan; other times individuals work with a mortgage broker who chooses the originating lender (often based upon the loan terms and the commissions offered to the mortgage broker). While the originating lender may loan the initial funds, rarely does the homeowner repay the originating lender. Instead, the originating lender nearly always sells the mortgage loan to an **investor**.<sup>1</sup> The investor may be one of the two mortgage giants, Freddie Mac or Fannie Mae, or (as was commonplace during the subprime mortgage explosion in the 2000's) the loan may be sold to a trustee as a part of a securitization process. Many of these mortgage transfers are tracked through a computer database known as the Mortgage Electronic Registration System, or MERS. In many states, MERS is appointed as the "nominee" or the mortgagee and may pursue foreclosure in its own name. Homeowners have some access to the MERS database and can use it to learn more about their mortgage loan if they have a MERS mortgage.<sup>2</sup>

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<sup>1</sup> Federal law requires that the homeowner be notified when their mortgage loan is sold to a new investor. See 15 U.S.C. § 1641(g).

<sup>2</sup> MERS Servicer ID website, available at: <https://www.mers-servicerid.org/sis/index.jsp>.

## Key Terms

**Note:** A borrower's legally binding written promise to repay a debt to a lender by a certain date and under certain terms.

**Mortgage:** Gives an interest in a property to secure an obligation, usually the repayment of a loan evidenced by a note (also called a deed of trust).

**The mortgagor:** The party giving the mortgage.

**The mortgagee:** The party given the interest.

**Foreclosure:** The process by which a mortgagee forces the sale of the property because of a default, usually a failure to make payments.

**Originating lender:** The entity providing the loan (usually a financial institution).

**Mortgage servicer:** The financial institution to whom the homeowner makes their payments and with whom the homeowner communicates, especially if there are problems with payments.

**Investor:** The entity to whom the originating lender sold the mortgage loan to. The investor may be the mortgage giants, Freddie Mac or Fannie Mae, or the loan may be sold to a trustee as a part of a securitization process.

**Mortgage insurance:** Different than homeowner insurance, it is designed to cover any shortfall if there is a default and foreclosure of the loan.

**Judicial foreclosure:** A lawsuit must be filed to initiate a foreclosure.

**Non-judicial foreclosure:** States where a foreclosure can occur without court oversight. In those states, the mortgage or deed of trust will contain a power of sale clause that permits a non-judicial foreclosure.

**Successor in interest:** Someone who became the owner of a home after a transfer, such as a divorce or death.

The player that all homeowners know is their **mortgage servicer**—this is the financial institution to whom the homeowner makes their payments and with whom the homeowner communicates, especially if there are problems with payments. Often, the mortgage servicer does not own the mortgage loan but collects the payments on behalf of that owner, which may be Fannie Mae, Freddie Mac, a private trust or another bank. Servicers include large national banks as well as non-bank financial institutions.

#### Practice Tip

Homeowners may find that their mortgage servicer will change throughout their repayment term. Under federal law, mortgage servicers are supposed to notify the homeowner regarding such a servicing transfer, including providing information regarding where to make payments.<sup>3</sup> Talk with survivors about whether they have received these notices, or if they haven't, the servicer's name and contact information should be on the monthly mortgage statement. For survivors who have been denied basic information about the mortgage loan by an abusive partner, and may not have access to the mortgage statements or other letters about the mortgage, they should be able to ask the servicer for basic information by phone if they at least know the servicer's name.<sup>4</sup>

Some mortgage loans may also have **mortgage insurance**. Distinct from homeowner's insurance (which most homeowners will also have), mortgage insurance is designed to cover any shortfall if there is a default and foreclosure of the loan. The most popular mortgage insurance program is through the Federal Housing Administration, FHA, (run by the Department of Housing and Urban Development, HUD)<sup>5</sup>; other government programs include VA insurance program and the direct and guaranteed mortgage loan programs through the United States Department of Agriculture. There is also private mortgage insurance, often identified as PMI for short. It is important to identify if there is mortgage insurance involved in the mortgage loan as the insurance program may have its own requirements and guidelines for servicing, loss mitigation, and foreclosure.

**Case Scenario:** In researching Patricia's situation, you can help her identify the players in her mortgage loan transaction. You learn that she has been making her monthly payments to Nationstar Mortgage – that is her mortgage servicer. The FHA and the VA do not insure her loan. However, you find out that Fannie Mae owns the loan.<sup>6</sup>

## Foreclosure Basics

### What is foreclosure and how does a foreclosure happen?

As discussed above, foreclosure is the process by which a mortgagee (creditor) forces the sale of the property because of a default, usually a failure to make payments, although it may also be a failure to perform other obligations. Depending on the state law, the foreclosure process can require **judicial action** or allow a **nonjudicial sale** process.

<sup>3</sup> See 12 U.S.C. § 2605(b)-(d); 12 C.F.R. § 1024.33 (b) and (c).

<sup>4</sup> This should be the case if the survivor is a borrower on the mortgage loan. If the survivor is not an original borrower on the loan, communicating with the servicer may prove difficult. We discuss strategies for dealing with this problem later in this chapter.

<sup>5</sup> The HUD FHA insurance program includes both traditional mortgages as well as a special product for senior citizens, the Home Equity Conversion Mortgage (HECM) program, commonly referred to as a "reverse mortgage."

<sup>6</sup> Fannie Mae and Freddie Mac both have websites that a homeowner can use to find out if Fannie or Freddie (respectively) owns their loan: <https://www.knowyouroptions.com/loanlookup> and <https://w3.freddie.com/loanlookup/>.

In states that require foreclosure be by judicial action, a lawsuit must be filed. The investor or current owner of the mortgage loan usually files the lawsuit, although some states allow the mortgage servicer or MERS to file the court action. If the court finds that the mortgage loan is in default, the court will enter a judgment for the amount owed plus the court costs and, often, attorneys' fees. The court will then order that the house be sold, and the proceeds of the sale will be applied to the judgment amount. If there is still a balance due, some states will permit a deficiency judgment to be entered against the individual and some will not.

In non-judicial foreclosure states, a foreclosure can occur without court oversight. In those states, the mortgage or deed of trust will contain a power of sale clause that permits a non-judicial foreclosure. Some states use a trustee to handle the sale process; in other states, the foreclosure attorneys conduct the foreclosure sale. In these states, the lender may be required to record a notice of default or mail a notice to the borrower before conducting the sale. If the homeowner does not cure the default, then the trustee or foreclosure attorneys may initiate the sale of the home; in most states, this requires the

publication of notices advertising the sale and a public auction where the home is sold to the highest bidder. It is common for the servicer or owner of the mortgage to be the highest (and only) bidder and end up with the house. If the sale of the house does not satisfy the amount owed, the lender may or may not be able to seek a deficiency against the borrower, depending on state law.

Most states, whether the foreclosure process is judicial or non-judicial, require an eviction action after the foreclosure whereby the foreclosure sale purchaser evicts the person(s) residing in the home. In some states, the eviction may not take place until the end of a redemption period, during which the homeowner can try to buy back the house by tendering the full loan amount. The eviction process and timeline will vary depending on state law; the process is the same as that used to evict a tenant since the former owner is now a tenant without a lease.

### Practice Tips

→ Because there are such stark differences in the foreclosure process from state to state, it is important that domestic violence advocates learn the foreclosure process in their own area. To do so, you should check with a local attorney who practices in this area of law or consult the National Consumer Law Center's *Foreclosures and Mortgage Servicing* manual, which contains the citations to every state's foreclosure statute.<sup>7</sup> Attorneys with expertise in foreclosure matters may be found at local legal services offices or by using the attorney search function at the National Association of Consumer Advocates website, [www.consumeradvocate.org](http://www.consumeradvocate.org).

→ If the survivor knows a foreclosure will take place and intends to move out rather than fighting to save the home, the survivor may want to sign a lease for an apartment before the foreclosure is completed. The survivor may also want to negotiate a move-out agreement (sometimes called a "cash for keys" agreement) in order to prevent an eviction lawsuit from being filed. Foreclosure and eviction are typically reported on the borrower's credit report, and can make finding a new apartment more difficult.<sup>8</sup>

## What is the critical information advocates and survivors need to understand the options in a mortgage foreclosure situation?

One of the most important things that an advocate can help a survivor do is gather the information necessary to assess the options. Some of the information may be difficult to

<sup>7</sup> National Consumer Law Center, *Foreclosures and Mortgage Servicing* (5th ed. 2014), updated at [www.nclc.org/library](http://www.nclc.org/library).

<sup>8</sup> See Chapter 2 on credit reporting.

access, especially if the abusive partner is controlling the situation. However, there may be some tools that the survivor can use to help gather that information.

First, the survivor will need to gather information regarding the mortgage loan itself. This information is found in the following documents:

- the original documents from when they first took out the mortgage loan, sometimes called the closing packet;
- current monthly statements; and
- any other notices from the mortgage servicer.

#### Practice Tip

Some of this information, such as the mortgage itself, may be available from the local land records office. It may also be possible to contact the title office that helped process or “close” the loan to see if they still have copies of documents available.

The survivor will also need to know the amount of the monthly payment, how much is owed if the loan is in default, and whether the loan has been referred to foreclosure. The monthly mortgage statement should contain most of this information. This is important because once a mortgage is at least 120 days past due, the lender may begin the foreclosure process.<sup>9</sup>

If the survivor does not have this information, they can send the mortgage servicer a “**request for information.**” Under federal law, the mortgage servicer is required to acknowledge a request for information within five days and provide a full response within 30 business days.<sup>10</sup> The period may be lengthened by an additional 15 days in some situations, but a request only for the identity of the loan owner be answered within ten business days. However, if the survivor did not sign the note, they may be unable to access information about the loan through a request for information, at least initially. We discuss this later in the chapter.

Second, it is important to gather the information regarding the survivor’s current financial status. This should include evaluating their current sources of income, potential changes in income, and expenses.

#### Practice Tip

It is important to work with the survivor to evaluate their full financial situation. Due to the social value placed on homeownership, many homeowners perceive losing or giving up a home as a failure. It’s important to explain to the survivor that they are not their foreclosure, that they have options after a foreclosure, and it’s important to discuss what their other financial priorities are and how they may influence choices about their home.

*How might you get a complete picture of Patricia’s expenses and ability to sustain the home? If letting the house go appears the best option to you, how can you frame that conversation? What concerns does Patricia have that are important to acknowledge and consider?*

With this information, the survivor can begin to review the various options and begin to formulate a plan for how to proceed. Some questions to consider include:

- Does the survivor want to remain in the house?

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<sup>9</sup> 12 C.F.R. § 1024.41(f)

<sup>10</sup> 12 C.F.R. § 1024.36

- Does the survivor feel they can remain in the house safely?
- What is survivor's short-term as well as long-term financial capacity to afford the home (the mortgage loan as well as other costs of homeownership and utilities)?
- What other options are available to prevent foreclosure?
- What other housing options are available?

Reviewed below are many of the options for preventing the foreclosure of a mortgage loan.

**Case Scenario:** *In the example above, Patricia has some information from the mail she has received but is having difficulty getting everything she needs. A request for information could be a useful tool to try to gather more information for her. Additionally, she has identified that she had a significant decrease in income after her separation and divorce. It will be useful to review her income and expenses to determine where adjustments can be made to free up income for her housing payments. Most importantly, Patricia needs to know that you understand and empathize with her fear of losing the home, but you want her to know her rights and be able to review her options. This may include providing the timeline for foreclosure and a realistic assessment of whether saving the home is a possibility or whether Patricia needs to look at other options such as a transition into other housing.*

## Alternatives to Foreclosure

### **What is loss mitigation, what are the loss mitigation options, and how does that process work?**

Loss mitigation is the process by which a mortgage servicer (often using the guidelines established by and with the approval of the investor and/or insurer of the loan) reviews a mortgage loan for possible options to avoid a foreclosure, thereby mitigating the loss to the mortgage investor. There are several loss mitigation options available to homeowners, and federal law sets forth a process that nearly all mortgage servicers must follow regarding how the servicer must handle a request for assistance with a mortgage loan.

There are loss mitigation options that allow a homeowner to keep the home and loss mitigation options that require the homeowner to leave the home, but still avoid foreclosure. Avoiding foreclosure may be important to some homeowners, especially those who are concerned about their credit score and ability to get a new mortgage loan in the future.

In evaluating loss mitigation options, the mortgage company will want to evaluate the survivor's "hardship," or reason why the homeowner fell behind or is about to fall behind on their payments. Additionally, the mortgage company will want to know whether the hardship is a short term or long term hardship. For example, one short-term hardship would be a pregnancy where a homeowner is off work for several months but will be able to return to their prior income. A long-term hardship, for example, would include when a homeowner becomes disabled and is unable to return to full-time work or has permanently lost a spouse's income due to divorce or separation.

Loss mitigation options vary somewhat depending on the type of loan and the players involved, for example, if Fannie Mae or Freddie Mac owns the loan or if there is FHA insurance. Fannie Mae, Freddie Mac, and FHA have their servicing and loss mitigation instructions easily available on their web pages. Possible options include the following:

Forbearance: Allows for a suspension or reduction of payments for a set period so the homeowner may recover from a short-term crisis. The delinquent amount is not forgiven, so the borrower must make arrangements to become current on the mortgage loan when the forbearance ends (usually after 6 or 12 months), often through a repayment plan or a loan modification.

Repayment plan: The amount that the homeowner is delinquent is spread out over a set period of time (usually 3-12 months) and added to the regular monthly payment. This may be a good option for someone who suffered a temporary loss or reduction in income, but whose income has now reached a level where they can afford the regular payment plus a little extra.

Loan modification: Involves adjusting the terms of the note so that the borrower will start fresh, typically by adding the missed payments to the balance owed on the loan, and usually making the monthly payment more affordable. Adjustments may include lowering the interest rate or reamortizing the loan over a longer period, such as a new 30 or 40 years from the date of the modification. Most loan modification programs seek to target a modified mortgage payment somewhere between 31% and 40% of the borrower's gross monthly income. Loan modification evaluations also typically consider whether the investor will lose more money by foreclosing or by offering the loan modification; if the modification is financially beneficial to the investor, it should be offered.

Short sale: Option to sell the home for less than the amount owed on the mortgage loan with the approval of the mortgage service and other parties. This is most likely to be available if the home is "underwater," meaning the borrower owes more than the house is worth.

Deed in lieu of foreclosure:

The homeowner executes a deed conveying the home to the mortgage lender or servicer without a foreclosure sale. When sustained efforts to market the property for sale or short sale have failed, this option is the last resort. Typically the home is worth less than the amount owed on the mortgage, and again, it will be important to ensure that the lender is waiving any deficiency (and to get advice about the tax consequences).

**Practice Tip**

It is important in a short sale or deed in lieu to make sure that the lender is waiving the deficiency (the difference between the sale price and the amount owed) and advise the survivor that this may have income tax consequences, and they should seek advice from a tax professional.

State hardest hit funds program: The federal government designated eighteen states (and the District of Columbia) as "hardest hit" by the foreclosure and unemployment crises. Survivors in these states may be able to qualify for special assistance from their state Hardest Hit Funds program, particularly if they have experienced a hardship arising from job loss, divorce, medical problem, or disability. These programs may provide temporary payment assistance, money to bring the loan current, or a large payment to reduce the principal balance on the loan.<sup>11</sup> Most Hardest Hit Fund programs are set to expire in 2020.

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<sup>11</sup> For a map of the states designated as hardest hit, and links to each state's program, check out this website: <https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/hhf/Pages/default.aspx>.

**Case Scenario:** *In Patricia's situation, she has likely experienced a longer-term decrease in income due to the separation and divorce. You explain all the options but determine together that a forbearance or repayment plan are unlikely to be appropriate options for her. Instead, you discuss ways to help evaluate her budget to see whether she can afford the mortgage loan with a modified payment amount. There are on-line calculators that she can use to try to check her eligibility for a loan modification, such as [www.checkmynpv.com](http://www.checkmynpv.com). The terms of a possible loan modification will depend on whether Fannie Mae or Freddie Mac own the loan, whether the loan is insured by the FHA or the VA, or whether any other modification program applies to the loan. For Patricia, since you know Fannie Mae owns her loan, you help her research Fannie Mae's current loan modification rules to see how much the servicer might be able to reduce her payment. You also talk with Patricia about researching whether the state Hardest Hit Fund program can offer assistance based on her disability or the divorce. If Patricia is unable to afford a mortgage payment even with a modification or has decided keeping the home is not the best option for her, she can look at selling the home (with a short sale if necessary). Her timeline for these options—and how quickly she must pursue them—will depend on where she is in the foreclosure process and how quickly a foreclosure sale can occur under state law.*

To apply for a loss mitigation option such as a loan modification, the homeowner must submit a financial packet for review to the servicer. Often, the homeowner can begin the process with a telephone call to the mortgage servicer, who will then send the necessary application and a list of required documents.

#### Practice Tips

→ The required documents to submit in the financial packet will typically include proof of income, bank account statements, and a hardship letter outlining the reasons why the homeowner is having financial difficulty with the mortgage payments.

→ When you are helping a homeowner apply for a loan modification to reduce the principal and interest payment on the mortgage, it is a good idea to help the homeowner investigate whether the portion of the payment going to pay property taxes and homeowner's insurance (called the "**escrow payment**," because these monthly amounts are held in escrow until costs come due once a year) can be reduced. For example, does the survivor need to apply for the basic property tax **homestead exemption** (allowed for an owner-occupant) or a special property tax exemption? For example, because Patricia has a disability, she may qualify for an additional exemption for elderly homeowners or homeowners with disabilities in some states. Or, can the survivor find cheaper homeowner's insurance? If the escrow payment can be reduced, it will help with the overall affordability of the mortgage.

Federal regulations promulgated by the Consumer Financial Protection Bureau (CFPB) under the Real Estate Settlement Procedures Act (RESPA) outline the process by which mortgage servicers must process loss mitigation requests. When a mortgage loan becomes past due, the mortgage servicer must make a good faith effort to establish contact with the borrower and inform the borrower of their loss mitigation options.<sup>12</sup> The servicer must also send a written notice to the borrower with the servicer's contact information, information regarding loss mitigation options, and HUD approved housing counselor information for assistance.<sup>13</sup>

If a borrower submits a loss mitigation application, and if the packet is submitted more than 45 days before a foreclosure sale, the

<sup>12</sup> 12 C.F.R. § 1024.39(a)

<sup>13</sup> 12 C.F.R. § 1024.39(b).

servicer must review the packet within five business days and either notify the borrower that the packet is complete or inform the borrower what information is required to complete the application.<sup>15</sup> Once the application is complete, if the complete application is submitted at least 37 days before a foreclosure sale, then the servicer must evaluate the application for all available loss mitigation options and provide a written decision to the borrower within 30 days of the date the complete application was received by the servicer.<sup>16</sup> Importantly, if the application is submitted and completed more than 37 days before the foreclosure sale, the mortgage servicer may not proceed with the sale until they have fully evaluated the loss mitigation application for all options.<sup>17</sup>

Depending on when the complete application was received, the borrower may have the option to appeal a denial for a loss mitigation option.<sup>18</sup>

#### **Practice Tip**

Make sure to explain to survivors that although federal regulations appear to require a quick consideration process, the reality is that most mortgage servicers take far longer to evaluate a loss mitigation request. Supporting documents "expire" after a certain number of days and will need to be updated on a regular basis. Survivors may want to consider contacting a HUD-certified housing counselor to assist them with this process as it can be quite overwhelming for a homeowner to handle themselves.<sup>14</sup>

#### **Practice Tip**

In their attempts to find qualified assistance, survivors should be wary of private companies offering to help. While some of these companies may be legitimate, many are scams that will just take the homeowner's money without providing any actual assistance. Even those companies that may be helpful will charge a fee, which a survivor, who is already in financial distress, can ill afford to spend. Because there is a network of free housing counselors available in most areas, survivors do not need to hire a private company to assist them in most situations.

**Case Scenario:** *Patricia tells you that she has received solicitations by mail from companies who claim they can "guarantee" a loan modification and "stop foreclosure in its tracks." She tells you that when she called one of these companies, HomeSaverUSA, they told her that for \$3,000, they would get her a loan modification. You talk with Patricia about the fact that no company can honestly "guarantee" any particular outcome when seeking a loan modification, and explain that she can get help applying for a modification for free from a HUD-certified housing counselor. Patricia decides she will not call HomeSaverUSA back.*

<sup>14</sup> Homeowners can find certified, non-profit housing counselors through HUD at <http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm>.

<sup>15</sup> 12 C.F.R. § 1024.41(b).

<sup>16</sup> 12 C.F.R. § 1024.41(c).

<sup>17</sup> 12 C.F.R. § 1024.41(g).

<sup>18</sup> 12 C.F.R. § 1024.41(c) and (e).

## Assuming the Mortgage: Issues in Loan Servicer Communication

### What do you do if the mortgage servicer won't talk to the survivor without the abusive partner's permission because they claim the survivor is not the borrower?

In assisting survivors of domestic violence, you may come across quite a few survivors who are living in the home and have (or likely will) become the sole owner of the home through a divorce decree, property settlement agreement, or separation agreement, but who were not the original borrower on the mortgage loan. It is possible that the ex-spouse was the only borrower on the note, even if the survivor jointly owned the home and had to sign certain documents at closing. This can lead to a very difficult situation where the mortgage servicer refuses to let the survivor apply for a loan modification or refuses even to provide any information about the mortgage.<sup>19</sup>

In general, if a survivor needs a modification to make the mortgage payment affordable, they will likely need to "assume" the debt. An **assumption** is a legal agreement by which someone takes on personal liability and becomes obligated on the debt. By assuming the loan, the survivor steps into the shoes of the borrower, and should then be entitled to loan information and modification options, just like the original borrower. The question, then, is whether a survivor can assume the mortgage.

Most survivors in this situation will have acquired their ownership interest in the home because of a transfer. That transfer of the home could have been effectuated through a quitclaim deed signed by the ex-spouse or through a divorce decree or separation agreement awarding the house to the survivor. Even if a survivor owned a half-interest in the home since it was purchased, they may have received a transfer of the other one-half interest through a divorce decree.

Most mortgage contracts are drafted to restrict transfers; they contain a clause called a "due-on-sale" or "due-on-transfer" clause that says that if the borrower transfers the home without the lender's approval, the lender may accelerate the loan and foreclose. Due-on-sale clauses allow the servicer to accelerate the mortgage loan, and then to foreclose, after an unauthorized transfer. In 1982 Congress passed the Garn-St Germain Act, which preempted state laws limiting the enforcement of due-on-sale clauses, but also carved out important exceptions for certain kinds of transfers. If a transfer falls within a Garn-St Germain exception, the mortgagee may **not** enforce the due-on-sale clause.<sup>20</sup> Successors who receive an interest through this kind of transfer are sometimes referred to as Garn-exempt or Garn-protected transferees.

Garn-St. Germain carves out several kinds of protected transfers wherein a creditor may not enforce a due-on-sale clause, including:

- a transfer to a relative resulting from the death of a borrower;
- a transfer to a spouse or child of the borrower; or
- a transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property.<sup>21</sup>

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<sup>19</sup> See [Surviving the Borrower: Assumption, Modification, and Access to Mortgage Information after a Death or Divorce](#), by Sarah Bolling Mancini and Alys Cohen, *Pepperdine Law Review*, Vol 43: 2, February 2016. Additional background on these issues is available here: <https://www.nclc.org/other-webinars/saving-the-family-home-after-death-or-divorce.html>; <http://www.nclc.org/issues/snapshots-of-struggle.html>.

<sup>20</sup> 12 U.S.C. § 1701j-3(d).

<sup>21</sup> 12 U.S.C. § 1701j-3(d)(3), (5), (6), (7).

Because the due-on-sale clause is the only mechanism a servicer has to block an assumption of the mortgage by a new owner, servicers must allow a survivor to assume the loan if he or she falls within one of the Garn exceptions, even if there is an otherwise valid due-on-sale clause in the loan contract.<sup>22</sup> Without an enforceable due-on-sale clause, contracts are freely assumable and assignable under state contract law.<sup>23</sup>

#### Practice Tip

Unfortunately, many servicers do not understand this and tell people who have become the owners of the home through a divorce that they cannot assume the mortgage if the payments are in default, or that they cannot assume the mortgage unless they meet creditworthiness standards. So how do you deal with this problem?

The first step is usually to provide the servicer with the appropriate documentation proving that your client is a **successor in interest**—someone who became the owner of a home through a Garn-exempt transfer – and ask the servicer to communicate with your client regarding the loan and available loss mitigation.<sup>24</sup>

If the borrower has died, a survivor can point to a regulation issued by CFPB under RESPA, which took effect January 10, 2014. Under this regulation, servicers are required to have policies and procedures reasonably designed to "[u]pon notification of the death of a borrower, promptly identify and facilitate communication with the successor in interest of the deceased borrower concerning the property secured by the deceased borrower's mortgage loan."<sup>25</sup> The CFPB issued a helpful bulletin clarifying how servicers

#### Practice Tip

Although this regulation and the compliance bulletin do not explicitly apply after a divorce or separation, it may be helpful to point to these sources to explain that the servicer can and should communicate with the survivor.

## New Regulations Effective 2018 Protect Non-Borrower Homeowners

The CFPB issued new a regulation under RESPA in August 2016, which will take effect on April 19, 2018, giving much broader protections to successors in interest.<sup>1</sup> This regulation requires servicers to communicate with all successors covered by the Garn-St Germain Act and allows a potential successor to send a request for information for the purpose of asking how to prove his or her successor status. The regulation requires servicers to respond to this kind of request in the manner required for other “requests for information,” discussed above. In addition, once it has been confirmed that a homeowner is a successor protected by the Garn-St Germain Act, the new rule makes the confirmed successor a borrower under RESPA, meaning that all of the protections of RESPA discussed in the prior section – the right to send requests for information and notices of error, specific loss mitigation procedures and timelines, and restrictions on foreclosing when a complete loan modification application has been submitted – now apply.

<sup>22</sup> See, e.g., Fannie Mae, Single Family Servicing Guide § 408.02 (Jan. 31, 2003) (“Generally, the servicer must process these exempt transactions without reviewing or approving the terms of the transfer.”).

<sup>23</sup> See Restatement 2<sup>nd</sup> of Contracts § 323 Comment a (“The assent of the obligor is not ordinarily necessary to make an assignment valid.”); *Brush v. Wells Fargo Bank, N.A.*, 911 F.Supp.2d 445, 460 (S.D. Tex. 2012) (finding daughter, who inherited property from her father, had right to assume the mortgage despite existence of due-on-sale clause); *Olson v. Etheridge*, 686 N.E.2d 563 (Ill. 1997) (contracting parties can modify who has primary responsibility for payment of a debt, without reference to the wishes of the creditor of that debt); *Andrews v. Holloway*, 231 S.E.2d 548, 549 (Ga. Ct. App. 1976) (holding that lender’s consent to assumption was not required where mortgage contract provided it was binding on the borrower’s “assigns”).

<sup>24</sup> If the transfer to your client did not fall within one of the Garn-St Germain protected transfer categories, you still may be able to obtain a loan modification. Particularly if the loan is governed by Fannie Mae or Freddie Mac rules, there is an argument that Fannie and Freddie allow for a simultaneous loan modification and assumption after any “exempt transaction,” which includes some transfers beyond those covered by Garn-St Germain. See Fannie Mae Servicing Guide § D1-4.1-02, Freddie Mac Servicing Guide Ch. 60.5.

<sup>25</sup> 12 C.F.R. § 1024.38(b)(i)(vi).

should comply with the regulation.<sup>26</sup>

Also, if Fannie Mae or Freddie Mac owns the loan or if the loan is FHA insured, there are specific rules that require the servicer to evaluate a successor in interest for a simultaneous loan modification and assumption.<sup>27</sup> If you find out that the survivor's loan falls into one of these categories, it is important to cite to the appropriate guidebook and, if necessary, to escalate the case to Fannie, Freddie, or the FHA National Servicing Center.<sup>28</sup>

### Practice Tips

Here are a few practice tips for helping a survivor who was not the original borrower on the mortgage loan:

- Send the servicer a letter explaining that the survivor became the owner of a home through a transfer covered by the Garn-St. Germain Act. Attach proof of the survivor's ownership of the house, such as a divorce decree or legal separation agreement conveying the house to your client<sup>29</sup> or a quitclaim deed from the borrower to your client.
- You can opt to send this letter and proof of ownership before sending a loan modification application or along with the loan modification package. As always, keep a copy of what you send and proof that the documents were received.
- If the loan is owned by Fannie Mae or Freddie Mac or insured by the FHA, cite to the appropriate handbook or guidance requiring the servicer to evaluate the survivor for a simultaneous modification and assumption.

**Case Scenario:** *Since Fannie Mae owns Patricia's mortgage, you draft a letter explaining to the servicer, Nationstar, that it is required to consider her application for a simultaneous loan modification and assumption. You attach the divorce decree and an application for a loan modification with all required supporting documents. When Nationstar still refuses to process the application, you help Patricia contact the Fannie Mae escalations department. Fannie Mae intervenes, and Nationstar agrees to review the application. Patricia tells you that she finally feels she is making progress towards saving her home.*

## Safety Planning and Privacy Concerns

While working with a survivor, it is especially important to develop an appropriate safety plan and address privacy concerns. The mortgage foreclosure context is no different, and these factors need to be addressed with the survivor.

<sup>26</sup> CFPB Bulletin 2013-12 (October 15, 2013).

<sup>27</sup> See Fannie Mae Lender Letter LL-2013-04, Fannie Mae Servicing Guide Announcement SVC-2013-17; Fannie Mae Single Family Servicing Guide § D1-4.1-02; Freddie Mac Bulletin 2013-3 (Feb. 15, 2013); Freddie Mac Single Family Servicing Guide § 9207.2; FHA Servicing Handbook Handbook Section III. A. 2. j. ii (B) (4) (search for "non-borrowers who acquired title through an exempted transfer").

<sup>28</sup> To escalate a wrongful denial by a servicer, you can contact [resource\\_center@fanniemae.com](mailto:resource_center@fanniemae.com), [FMBH@freddiemac.com](mailto:FMBH@freddiemac.com), or for FHA loans, call the National Servicing Center at 1-877-622-8525.

<sup>29</sup> Remember that if the divorce decree or separation agreement does not clearly award ownership of the house, you will likely also need a quitclaim deed signed by the non-resident ex-spouse.

First, it is important to partner with the survivor to know the abusive partner and identify potential risks, especially the potential for retaliation. The survivor is the expert in gauging how the abusive ex may react to their intentions regarding the home and foreclosure. For example, how will the ex react to a request to assist with the loss mitigation process; will they be willing to sign required documents? Some abusive former partners may place conditions on their participation in the loss mitigation process, such as requiring in-person meetings that may place the survivor at risk.

Second, plans for how to proceed with the foreclosure and potential loss mitigation options should be based upon that risk assessment. In some cases, the safety risks may be so great that the survivor should not attempt to keep the home because they need to keep their location secret. In those situations, and other situations where keeping the home is not appropriate or possible, advocates should discuss with the survivor that it is ok to leave the house and that a foreclosure may be preferable to a course of action that may compromise their safety.

**Case Scenario:** *At one point, Nationstar demands that Patricia gets a form signed by her ex-husband consenting for Nationstar to pull his credit report in connection with Patricia's application for a loan modification. You talk with Patricia about whether it would be safe for her to communicate with her ex and ask him to sign the form. She tells you she is very concerned about how he would react to this request, based on his heated reaction the last time they talked about the mortgage. You discuss with Patricia the option to push back on Nationstar's request since she has already provided the bank with a copy of the divorce decree giving her sole ownership of the house. Finally, Nationstar is convinced that Patricia's ex-husband does not have to sign any documents for the modification.*

It is also important to remember that, while financial institutions do have obligations to protect personal information, this obligation may not stop the disclosure of the survivor's information. This is especially true if the abusive partner is also on the mortgage loan. Accordingly, if the survivor has concerns regarding the release of their information they may want to weigh the benefits of loss mitigation versus the potential risks.

## Using the Family Court Proceeding to Address Mortgage Foreclosure

It may be possible to use the family court to better position survivors in the mortgage foreclosure context, especially to address some of the roadblocks that the abusive partner may attempt to construct for the survivor.

### Family court strategies for keeping the property

Possible family court strategies for keeping the property may include:

- Obtain orders requiring the payment of child support and/or alimony, to increase the survivor's financial resources to make payments or use as a base for loss mitigation options.
- Consider requiring the family court to order mortgage payments by the abusive partner as a part of or in lieu of spousal support if that is appropriate for the circumstance. Among other factors, the motivation to preserve the asset and a credit history may be more effective than the motivation to pay support.

- See if the court will provide that the survivor remain in the home and pay the mortgage (perhaps with a modification) for several years until the children are adults and/or real estate markets improve to allow a more profitable sale. It may be appropriate to require the abusive partner to assist with maintaining the payments.
- While some states permit the transfer of real property by a judgment or decree or divorce, the title insurance and mortgage industries do not always recognize the transfer. Many mortgage servicers will require this to work with the survivor but not the abusive partner for loss mitigation purposes. Accordingly, it is always best to have a deed signed when there is a property transfer in a domestic relations case.

Also, see the **Family Law** chapter of this Guidebook for strategies to enhance economic security or provide financial relief through family law cases.

## Family law strategies for selling the property

Possible strategies to review for selling the property or permitting the foreclosure to go through may include:

- Requesting a court order to permit the sale of the property without the abusive partner's consent or involvement, if he will not cooperate with the survivor to sell the property.
- If the sale or foreclosure does not pay the balance due on the mortgage, using the family court to allocate responsibility for the deficiency. Whether the abusive partner was cooperative with efforts to modify the loan or sell the house may be a factor the family court judge can consider in deciding how to allocate the responsibility for the deficiency.<sup>30</sup> To the extent the survivor is required to pay something, then work with the survivor to develop strategies for how the deficiency will be paid.

## Other strategies

There are also other creative strategies that advocates may consider to use the family court proceedings to assist the survivor with the mortgage loan and possible foreclosure. These options may include:

- **Motion for Joinder of Third Parties.** In some states, the family court may be willing to assert jurisdiction over the property and make determinations that would then bind third parties related to the property.<sup>31</sup>
- **Consolidation of foreclosure proceedings and divorce proceedings.** In states where foreclosures are judicial, it may be possible to request that the cases be consolidated. This may allow the family court to be informed by the foreclosure court

**Case Scenario:** *In Patricia's situation, she may need to try to reopen her divorce case to accomplish her goals. If the divorce decree does not clearly award the house to her, she may need to request that the divorce decree be amended, if possible, to resolve the ownership situation. She may need to request that the judge order her ex-husband to cooperate with her efforts to discuss the situation with the mortgage company, submit documentation for loss mitigation, or cooperate with efforts to sell the property. If her ex-husband refuses to cooperate with the court's orders, Patricia may want to consider moving forward with requesting that the court hold her ex-husband in contempt and award her appropriate relief. Discuss with Patricia her safety plan in relation to these possible courses of action, so that she can assess whether pursuing these options fits with her priorities and goals.*

<sup>30</sup> See e.g. *Lawson v. Lawson*, 228 S.W.3d 18 (Ky Ct. App. 2007) (assigning deficiency after mortgage foreclosure to husband where his own misconduct caused him to cease making payments); *Porath v. Porath*, 855 N.E.2d 511 (Oh. Ct. App. 2006) (finding equal distribution of assets inequitable where wife thwarted husband's attempts to avoid foreclosure of marital home); *In re Marriage of Cook*, 453 N.E.2d 1357 (Ill. App. Ct. 1983) (awarding substantial marital assets to wife where husband failed to keep up the mortgage payments on the family home).

<sup>31</sup> See e.g. *Glade v Glade*, 45 Cal. Repr. 2d 695 (Cal. Ct. App. 1995) (family law court acquired jurisdiction over community property in the hands of third parties and could properly order their joinder).

and vice versa and make better decisions regarding the disposition of the property.<sup>32</sup>

- **Motions to compel signatures or other cooperation with the mortgage servicer and loss mitigation process.** May be considered at times when the mortgage servicer is requiring the abusive partner to cooperate with the process, such as providing documentation or sign applications. Additionally, may be necessary to have such an order to move forward with the sale of a property if the abusive partner refuses to participate in the sale process. The survivor may consider a motion requiring the abusive partner to sign an authorization allowing the mortgage servicer to release information to the survivor if efforts to require the mortgage servicer to do so without the authorization have failed.

## Conclusion

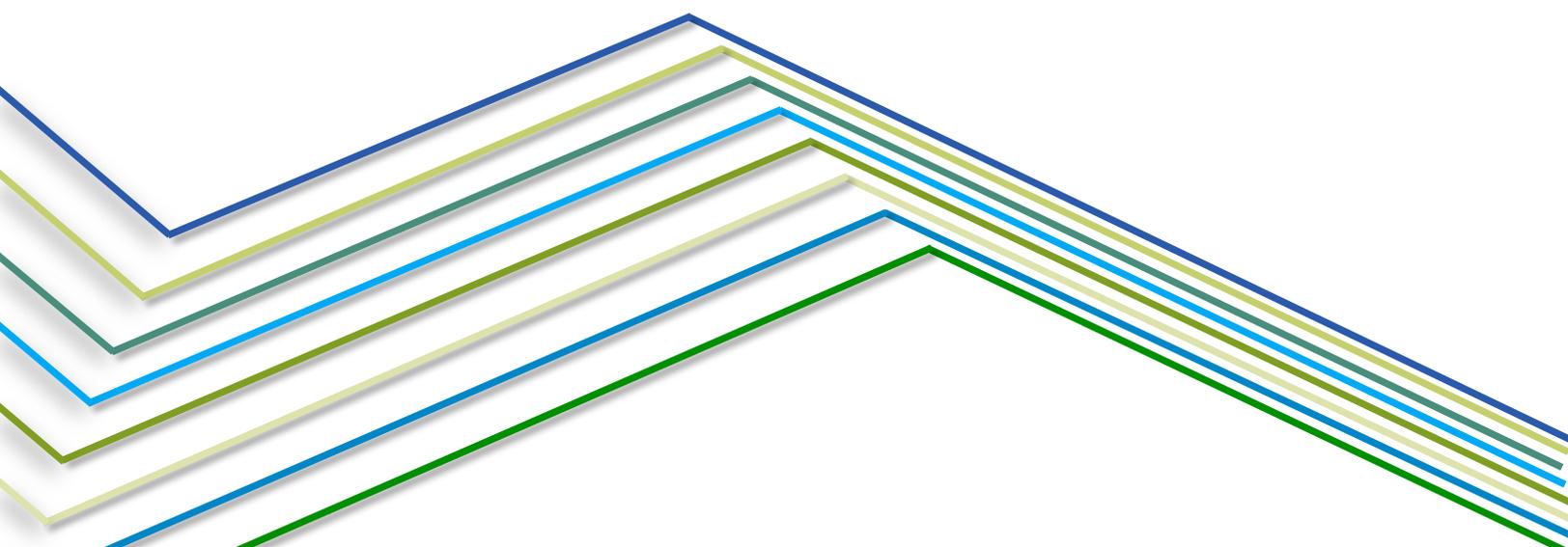
All too often, survivors of domestic violence must grapple with the risk of foreclosure, either while living with abusive partner under financial strain or after leaving, while attempting to save a home with a reduced household income. Advocates can help survivors feel empowered to address the problem, rather than shutting down when faced with the prospect of a foreclosure. With the tools discussed in this chapter, advocates and survivors can work together to find alternatives to foreclosure, understand the legal protections available, and make a plan that protects the survivor's safety and pursues their goals.

## Additional Resources

- National Consumer Law Center, *Foreclosures and Mortgage Servicing* (5th ed. 2014), updated at [www.nclc.org/library](http://www.nclc.org/library).
- [“Surviving the Borrower: Assumption, Modification, and Access to Mortgage Information after a Death or Divorce,”](#) by Sarah Bolling Mancini and Alys Cohen, *Pepperdine Law Review*, Vol 43: 2, February 2016 available at [pepperdinelawreview.com/wp-content/uploads/.../CohenMancini\\_Final-no-ICR.pdf](http://pepperdinelawreview.com/wp-content/uploads/.../CohenMancini_Final-no-ICR.pdf).
- Additional background successors in interest: <https://www.nclc.org/other-webinars/saving-the-family-home-after-death-or-divorce.html>; <http://www.nclc.org/issues/snapshots-of-struggle.html>.
- <http://www.nclc.org/issues/foreclosures-and-mortgages.html>
- Find certified, HUD-certified nonprofit housing counselors at <http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm>.
- <http://www.consumerfinance.gov/mortgagehelp/>
- For information about state Hardest Hit Funds Programs: <https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/hhf/Pages/default.aspx>.
- CSAJ webinar featuring Karen Tjapkes, [Domestic Violence in Foreclosure: The Foreclosure Process, Defenses & Alternatives for Survivors](#)
- [CSAJ Comments to CFPB on Amendments to the 2013 Mortgage Rules](#)

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<sup>32</sup> *In re Marriage of Schweihs*, 584 N.E.2d 472 (Ill. App. Ct. 1991); *In re Marriage of Elliott*, 638 N.E.2d 1172 (Ill. App. Ct. 1994).



# GUIDEBOOK ON CONSUMER & ECONOMIC CIVIL LEGAL ADVOCACY FOR SURVIVORS

A COMPREHENSIVE AND SURVIVOR-CENTERED GUIDE FOR  
DOMESTIC VIOLENCE ATTORNEYS AND LEGAL ADVOCATES



**CENTER FOR SURVIVOR  
AGENCY & JUSTICE**

**Contributing Authors:** Katie VonDeLinde, Diane Johnston, Amy Cao, Persis Yu, Karen Merrill Tjapkes, Sarah Bolling Mancini, Jamie Andree, Laura Russell, Jenna Smith, Nida Abbasi, Karlo Ng, Lisalyn Jacobs, and Erika Sussman,

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