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**Loophole in Ga. law leads to fast foreclosure after owner's death**

*Cobb County jury sides against survivors who tried to inquire about mortgage payments*

By Katheryn Hayes Tucker, Daily Report

Plaintiffs' lawyers said a recent trial in Cobb County Superior Court exposed problems in Georgia law concerning when lenders can foreclose on a home after its owner dies.

At issue was a jury verdict favoring a lender over six adult children whose family home was sold on the courthouse steps for a fraction of its value five months after their mother died. The home loan went into default when the mother's death triggered the end of her automatic payments to the lender.

The children claimed that the lender shouldn't have been able to foreclose before an executor could be named for the mother's estate.

"You would think there would be some breathing space to allow people to collect their thoughts and sort out circumstances of an estate," said Morgan Robertson, who represented the children in the weeklong trial and who was reluctant to talk about it afterward.

William Loeffler, Teah Glenn and John Lynch of Troutman Sanders, who represented the defendants, GMAC Mortgage and Mortgage Electronic Registration Systems Inc., couldn't be reached.

Richard Alembik, who has represented plaintiffs similar to those in the Cobb case, said Georgia's non-judicial foreclosure law made sense in an earlier era, when local banks made mortgage loans and knew their customers. Now, with the originating banks selling the loans to processors, the climate is completely different.

"You'd think the Legislature would realize this is not Mayberry," he said, "although it's attractive to lenders because it's so cheap to foreclose."

"It was a grave injustice," said Matthew Flournoy, another uninvolved plaintiffs attorney. "The law needs to be changed."

Flournoy said he heard about the trial through the Marietta lawyers' grapevine and not from his brother, Judge Robert Flournoy III, who presided over the case.

David Oliver, senior vice president of the Georgia Bankers Association, said some states that require judicial foreclosure—such as Florida and New York—have a "tremendous backlog of those cases," he said.

"The advantage of being a non-judicial foreclosure state is it's an efficient process," Oliver said. Also, even in a non-judicial foreclosure state, the process is not overnight, and it typically takes months, he said.

"Foreclosure is always a measure of last resort."

Mark Barrett Krause, as executor of the estate of Judith Mary Krause and her son, sued the lenders in 2009 for wrongful foreclosure, fraud, breach of contract and slander of title against GMAC, Mortgage Electronic

Registration and Opteum Financial Services. Opteum, which transferred the loan to GMAC, was dismissed.

In December of 2006, Judith Krause took out a \$54,500 loan from Opteum on the home she had owned for 30 years, where she had raised her six children, according to the suit and plaintiffs briefs. She executed a security deed to Mortgage Electronic Registration Systems. The loan payments of \$436.32 per month were drawn automatically from her Wachovia Bank checking account, where her Social Security checks were also automatically deposited. After she died in February 2009, the Social Security deposits stopped and her account overdrafted. The home was valued by the Cobb County tax assessor at \$171,580.

The suit said the children tried contacting GMAC to find out how much their mother owed on the loan and how to pay it, but they were told that because of confidentiality rules, the lender couldn't communicate with them about the loan until an executor was named and letters testamentary were received. There was a delay on qualifying an executor because the family friend who was named as executor declined. The necessary letters came too late—just a few days after the house was sold, according to court records from both sides.

The foreclosure sale was held in July, 2009. Printz Properties purchased the house for \$60,900, according to the judge's order denying the defense motion for summary judgment. A month later, Printz Properties sold the house to New Palm Real Estate for \$125,000.

Such a case typically would settle when the motion for summary judgment was denied, according to Alembik, who said he has probably settled 100 similar wrongful foreclosure claims at that point. But the bank proceeded to trial and prevailed.

"The loan was undisputedly in default," a defense brief stated. "The foreclosure was completely in accord with Georgia's foreclosure statutes."

The plaintiffs lawyers crying foul point to O.C.G.A. § 53-7-42, which says that executors "shall not be required to pay the debts of the estate, wholly or in part, until six months from the date of qualification of the first personal representative to serve.

Flournoy—the plaintiffs lawyer, not the judge—said many attorneys don't understand the gap in this law that caught the Krause estate, in which lenders can move against a deceased borrower before an executor is qualified.

"The law needs to be changed to six months from the date of death of the decedent, not just qualification" of the executor, Flournoy said.

In hindsight, Alembik said, the family's lawyer might have tried to seek a temporary restraining order preventing the sale of the home until the estate could be settled. Also, Georgia law allows for recovery if a home is sold at a price "outrageously below" its value, he said.

The case is *Krause v. Mortgage Electronic Registration Systems*, No. 09-1-11403-40.