

Thoughts on H.599 - Jim Dean, NMLS# 404697

What is the problem this legislation seeks to address?

When only one spouse is a borrower on a (reverse) mortgage, and that borrower dies, the non-borrowing spouse is unable to pay off or refinance the mortgage, which has come due and payable, and thus faces foreclosure. There appears to be a perception that unscrupulous mortgage originators persuade younger spouses to quitclaim off the deed in order for the older spouse to qualify, or perhaps qualify for more money.

To the extent that this problem might exist, is it specific to reverse mortgages?

No, it can occur with any mortgage. This report in the New York Times in December 2012 <http://www.nytimes.com/2012/12/02/business/widows-pushed-into-foreclosure-by-mortgage-fine-print.html?src=xps> describes one population, "widows over the age of 50 whose husbands alone were holders of the mortgage" who are unable to qualify for mortgage modifications. Another population at risk is a spouse whose lower credit score precludes the couple from jointly qualifying for a mortgage, and who quitclaims off the deed in order to allow the spouse with the stronger credit history to obtain the mortgage.

The common element here is that, in order to qualify for the mortgage in question, the couple pursued the benefit (the mortgage, reverse or not) and, perhaps, disregarded the risk - the inability to pay off the mortgage should it become due if the borrowing spouse were to die.

Note that the couple did derive the benefit - the mortgage. The question is whether they were misled into disregarding the risk. Further, how could couples facing this issue be best protected?

Because my experience as a Vermont mortgage loan originator since 1999 is limited to reverse mortgages, and since H.599 relates to reverse mortgages, I will focus on that product, though the issues, and the safeguards, apply to any mortgage where all homeowners are not the mortgage borrowers.

Under Vermont law, effective July 1, 2009, only the federally-insured HUD reverse mortgage programs can offered in Vermont (<http://www.dfr.vermont.gov/banking/consumer-resources/reverse-mortgage-information#RM#2>). That means that this issue is not one caused by mortgage lenders or originators; rather it is a matter of federal government policy. Specifically, if the federal government will not insure a reverse mortgage, the lender cannot make it in Vermont.

The status of the non-borrowing spouse is currently before the federal courts. On September 30, 2013, in Bennett V. Donovan, Civil Action No. 11-0498 (ESH), US District Judge ELLEN SEGAL HUVELLE of the District of Columbia, issued an Order and Memorandum Opinion

<http://stopforeclosurefraud.com/2013/10/02/bennett-et-al-v-donovan-secretary-hud-hud-violated-12-u-s-c-%C2%A7-1715z-20j-when-it-insured-the-reverse-mortgages-of-plaintiffs-spouses-pursuant-to-agency-regulation-which-permitted-t/>) finding that HUD had violated the statute when it permitted loan obligations to become due upon the death of the borrowing spouse, regardless of whether their spouse was still alive (Page 14 of Opinion). The Court remanded the matter to "...the Department of Housing and Urban Development for further proceedings consistent with the Opinion of this Court."

Thus, legislative action is unnecessary. HUD is under Court Order to resolve this issue consistent with the Court's findings on the applicable statute. The Legislature should not second-guess HUD in this matter. To do so would invite the possibility that the Federal Housing Administration would refuse to insure reverse mortgages in Vermont. Further, if a news item in the trade press newsletter Reverse Mortgage Daily ([http://reversemortgagedaily.com/2014/01/24/hud-makes-headway-on-reverse-mortgage-fa-non-borrowing-spouses/?utm\\_source=Reverse+Mortgage+Daily&utm\\_campaign=81aa68d125-rmd-daily\\_email\\_1\\_27\\_141\\_26\\_2014&utm\\_medium=email&utm\\_term=0\\_48b4357284-81aa68d125-5717](http://reversemortgagedaily.com/2014/01/24/hud-makes-headway-on-reverse-mortgage-fa-non-borrowing-spouses/?utm_source=Reverse+Mortgage+Daily&utm_campaign=81aa68d125-rmd-daily_email_1_27_141_26_2014&utm_medium=email&utm_term=0_48b4357284-81aa68d125-5717)) is correct, HUD will be addressing the non borrowing spouse issue very soon.

The risk to the non-borrowing spouse is clear. What is the benefit?

Here are two instances I have been personally involved in, where borrowers concluded that the benefit outweighed the risk of removing a spouse from the deed, in order to obtain the benefits of a reverse mortgage.

In 2008 I was contacted by a couple who were facing a threat of foreclosure on their mortgage. They had tried, unsuccessfully, to sell the house. Although the younger spouse was 70, and thus eligible to be a joint borrower, the mortgage debt exceeded the funds available to them as joint borrowers. The older spouse, if the sole borrower, did qualify for funds sufficient to pay off the mortgage and eliminate the threat of foreclosure. To further complicate the matter, the younger spouse had recently been given a diagnosis of terminal cancer, yet had had to continue working, as the income was their only hope of hanging on.

After consulting their attorney, the couple decided to remove the younger spouse from the deed, and proceed with the reverse mortgage with the older spouse as the sole borrower. They did receive the benefit of paying off the mortgage, lifting the foreclosure threat. However, in a cruel twist of fate, the younger spouse went into remission, and in 2011 the older spouse died. In 2008, the couple reaped the benefit; in 2011 the non-borrowing spouse reaped the risk. Would it have been better for them to have lost the house to foreclosure in 2008, or to have endured the financial stress of the threat, during the terminal illness of the younger spouse?

The second instance was in 2009. A couple, age 62 and 55, were in foreclosure, and unable to sell their house. The 62 year old was receiving hospice care, which requires a prognosis of 6 months or less to live. The stress of foreclosure while dying was crushing for both spouses.

Because one spouse was 55, they were not eligible for a reverse mortgage. I asked the younger spouse what plans they had after their spouse died, and was informed that they intended to return to Connecticut, where they had children from a prior marriage. Under those circumstances, the benefits of quitclaiming off the deed greatly outweighed the risks. They went to their attorney, the younger spouse quitclaimed off the deed, the older spouse obtained a reverse mortgage, extinguishing the foreclosure threat, and was able to live out their dying days free of the financial stress that had been weighing on the couple for a long time.

What is the solution? What would best serve the interests of potential (reverse) mortgage borrowers?

Life (and death) pose many financial challenges to homeowners. Many times, it is essential to weigh the risks and the benefits of different courses of action. We can and should build in reasonable protections for people, but we cannot protect everyone from all risks. Preventing the two younger spouses, above, from quitclaiming off their deeds so that their older spouses could receive the benefits of reverse mortgages would likely have resulted in foreclosure proceedings during terminal illnesses.

The federal insurance program must operate with the statutory framework set by Congress, as ordered by the court. It is not yet clear how the federal department will resolve that issue, though the proposed Mortgagee Letter solution would diminish the benefit by basing it on the younger spouse, even if non-borrowing and/or under the current minimum age of 62. But it seems inappropriate for the state legislature to insert itself into that legal conflict. The state is neither willing nor able to insure its own reverse mortgage program, and it has decreed that only the federal program will be allowed here. It should defer to that federal program.

However, there are important safeguards that the state can provide to any spouse who is considering not being joined on a mortgage. First, it may be appropriate to require that both spouses obtain legal counsel before proceeding, to ensure that the rights of the non-borrowing spouse are protected, and that the risks are clearly explained and understood.

Second, Vermont already provides that spouses, whether on the deed/mortgage or not, retain their homestead interest in the property in which they reside with their spouse. This homestead right must be waived before a mortgage can be in first lien position. If it is not waived and the loan is made, the lender has taken a defective claim on the title. That will lead to a claim on the lender's title insurance policy, should the matter be litigated. Title insurance companies have an interest in not issuing lenders' title policies unless the non-borrowing spouse has properly waived their homestead rights. It would perhaps be prudent for the legislature or the insurance regulator to decree that a waiver of homestead rights is not valid unless the non borrowing spouse has had independent legal counsel. That would ensure that they were making a reasonably informed evaluation of the risks and benefits of doing so,

In summary, the solution that H.599 proposes both goes too far and does not go far enough. To the extent that this is an issue of consumer protection, it should apply to all mortgages, not just reverse mortgages; to the extent that it is an attempt force the Federal Housing Administration insurance program to adopt a policy, it is inappropriate, especially given the pending litigation and the impending Mortgagee Letter. There are better ways to protect all mortgage applicants, while allowing potential borrowers the flexibility to evaluate the risks and benefits in their own situations.