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What Happens to the Mortgage when Property is Transferred to Beneficiaries at Death?

November 14, 2011 by [Deirdre Wheatley-Liss](#)



Generally speaking, if you transfer a piece of real property subject to a mortgage to another person, that transfer violates the "due on sale" clause in your mortgage, essentially making the mortgage immediately due in full. In the course of buying or selling property, you would pay off the mortgage upon the sale of the property. **However, what happens when the property is transferred due to the death of the owner?**

Federal law provides some exceptions to the "due on sale" clause when the property subject to a mortgage (other than a reverse mortgage) is being transferred as a result of the person's death. While a full list of the exceptions to the "due on sale" rule can be found in [The Garn St. Germain Depository Institutions Act](#)

[of 1982, \(U.S.C.\) 1701j-3\(d\)\(8\)](#), for estate planning purposes, property owners should be aware that the "due on sale" clause will not apply to:

- a transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;
- a transfer to a relative resulting from the death of a borrower

So, if you own property jointly as (1) joint tenants with rights of survivorship, or (2) tenants by the entirety (for married persons only), with any person (relative, friend, business partner, life partner) and that person dies, you get full ownership of the property by operation of law (i.e.: the property does not pass through the person's Will, but instead passes directly to you as the joint owner), AND the mortgage continues, with no alteration to its terms.

If you give the mortgaged property to a person through your Will, a Trust, or intestacy if you don't have a Will, AND the person is your relative, then the mortgage can continue upon the transfer of the property to the new owners.

Some planning notes:

- The exception applies to properties with no more than 4 units (i.e.: a multi-unit property with 5 or more units would not qualify for the exception)
- The exception includes a transfer of stock in a co-op
- Same sex couples should beware that they may not be deemed a "relative" for purposes of inheriting property subject to a mortgage; it may be better planning to hold title as joint tenants with rights of survivorship during both partners lifetimes



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- Just because a person inherits the property and the mortgage won't be called, doesn't mean that the beneficiary can afford the mortgage.
- In doing estate planning you should consider if the beneficiary can in fact maintain the property you are leaving them.
- When inheriting mortgaged property, you should consider if you can afford the current mortgage.

Two questions that I couldn't find quick answers to and I would appreciate feedback on:

1. Who is a "relative" for purposes of the Garn St. Germain Act?
2. Does a transfer upon death to a trust for the benefit of a relative come within the exemption?

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