

**JULY 2017 MICHIGAN BAR EXAMINATION  
EXAMINERS' ANALYSES**

**EXAMINERS' ANALYSIS OF QUESTION NO. 1**

1. Foreclosure of mortgages by advertisement is governed by statute in Michigan. MCL 600.3201 et seq. A creditor on a note secured by a mortgage on real estate may, pursuant to a power of sale clause, foreclose on that mortgage by advertisement. MCL 600.3201 states in part that "[e]very mortgage of real estate, which contains a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement, in the cases and in the manner specified in this chapter." The following four requirements must be satisfied before a party may foreclose on a mortgage by advertisement:

- (a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.
- (b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage or, if an action or proceeding has been instituted, either the action or proceeding has been discontinued or an execution on a judgment rendered in the action or proceeding has been returned unsatisfied, in whole or in part.
- (c) The mortgage containing the power of sale has been properly recorded.
- (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.

MCL 600.3204(1). According to the facts presented, all of the preliminary criteria are met to allow Better Bank to foreclose on the Clarks' mortgage in this manner.

To proceed, notice of the impending foreclosure sale of the property must be published at least once per week for four consecutive weeks in a newspaper published in the county where the property is situated. Additionally, notice of the sale must be posted in a "conspicuous place" on the property within 15 days from the first published notice. MCL 600.3208. A public sale of the property would be held in the circuit court for the county where the property is located, and be conducted either by a specifically appointed person as designated by the mortgage document, or by the county sheriff, with the property sold to the "highest bidder." MCL 600.3216. As mortgagee, the Bank would be entitled to bid on the Clarks' property at the sale, and would only be responsible for paying in cash any portion of the sale amount that exceeded the mortgage balance due if it bought the property as the highest bidder. MCL 600.3228. See *Bank of America v First American Title Ins Co*, 499 Mich 74, 88 (2016).

The person conducting the sale would issue a deed (commonly known as a sheriff's deed) to the highest bidder (including the Bank if it successfully bid), conveying to any such purchaser only voidable equitable title in the property. MCL 600.3232. Before the foreclosure sale was complete, the Clarks would have an equitable right to redeem their mortgage and save their home from foreclosure. *Blackwell Ford, Inc v Calhoun*, 219 Mich App 203, 208-209 (1996) (acknowledging the equity of redemption that permits the mortgagor to redeem the property from the lien of the mortgage by making payment on the debt owed under the mortgage). The Clarks would also have the statutory right to redeem the property within 6 months from the sale date by paying the noticed and specified redemption amount. MCL 600.3240(1) and (8). If the Clarks redeem the property timely, the sheriff's deed to the Bank (assuming it successfully bids) would be destroyed. If there is no redemption, the sheriff's deed would become "operative" reflecting full legal title in the Bank. MCL 600.3232.

2. If the Bank (or whomever) is the highest bidder, it may institute a summary proceedings action, but only if and until the six-month redemption period has expired for the Clarks to regain their full property interests. The Michigan summary proceedings act allows a person entitled to possession of premises to file a summary proceedings action to recover that possession in certain

instances including "[w]hen a person continues in possession of premises sold by virtue of a mortgage or execution, after the time limited by law for redemption of the premises." MCL 600.5714(1)(g).