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are performed on medical students and on prisoners. The desire to please a professor or a parole board might preclude these individuals from giving truly voluntary consent. Likewise, the special relationship of trust between a patient and his physician may induce many patients to consent to any medical practices their doctors propose.²⁹

Requiring the informed consent of every experimental subject raises problems for investigators. Disclosure of enough facts to enable the subject to make an informed decision may, in some cases, hinder legitimate scientific inquiry. Investigators face an additional problem when they must use minors as subjects. In general, the consent of the legally incompetent is no defense to civil tort liability. Some courts have made an exception so that the consent of a mature minor capable of understanding the consequences of his act will protect a physician from liability not based on negligence; but this exception has been held to be inapplicable where the operation is non-therapeutic. The researcher should be required to obtain the consent of the minor's guardian, which would usually be sufficient to protect the minor's interests. Whenever the minor is old enough to be capable of intelligent consideration of the issues involved, his consent should be obtained as an additional precaution.³⁰

The inherent limitations in and impediments to informed consent raise certain significant questions to which there are no ready, apparent answers. How and to what extent would the dynamics of the inner and outer world, inherent in the nature of man, be considered in defining his capacity for self-determination and informed consent? How are these dynamics affected by the nature and extent of the information given to the subject? To what extent can and should the investigator ascertain from the subject that informed consent has been obtained? The answers to these questions most certainly have implications for the formulation, administration, and review of the human experimentation process.³¹

LAWRENCE EMMA

Deed Absolute in Lieu of Foreclosure— A Cost and Delay Internalizer

A deed absolute in lieu of foreclosure¹ may be defined as a "mortgagor/debtor's" reconveyance of his equity of redemption in the defaulted property to the "mortgagee/creditor" in consideration for the creditor's prom-

²⁹ Mulford, *supra* note 3, at 106.

³⁰ *Id.* at 107, 108.

³¹ KATZ, *supra* note 1, at 610.

¹ BLACK'S LAW DICTIONARY 775 (4th ed. 1951). Foreclosure is a termination of all rights of the mortgagor or his grantee in the property covered by the mortgage, thus the definition covers court foreclosure, strict foreclosure and the power of sale.

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ise to forbear from suing on the debt or foreclosing the security. An example of such an arrangement may be illustrated by the following:

C owns Blackacre in fee and desires to sell said property to D for \$2000.00 on terms. D purchases Blackacre from C giving him a \$200 cash downpayment and a note for the \$1800 balance, the note to be secured by a Deed of Trust on Blackacre. C subsequently recorded the Deed of Trust. Several months later, D defaults on his note and upon inquiry, C ascertains that D has suffered financial set backs and can no longer meet his obligation on the note. C sympathizing with D's position, seeks to settle the problem extrajudicially, by recommending that D reconvey Blackacre to C in fee. In consideration of this reconveyance C agrees to forbear suing on the note² and/or foreclosing the security. In essence, C is attempting to obtain D's equity of redemption³ without going through the legal process of foreclosure or a power of sale, both of which entail a great deal of time and expense to both parties.

The general view is that a conveyance of a mortgagor's equity of redemption to the mortgagee is suspect, and there is a presumption of fraud which must be rebutted by the mortgagee, or the deed absolute will be deemed a mere mortgage which the debtor may redeem.⁴ However, despite the above presumption of fraud against the mortgagee, North Carolina has a different rule which applies to the deed of trust—deed of trust note relationship. In short, the courts hold that:

“there is no presumption of fraud but a presumption of regularity in a transfer of the trustor's equity of redemption to the beneficiary's because there is no fiduciary relationship between the trustor and the beneficiary which is not lacking between the mortgagor and the mortgagee.”⁵

The later presumption of regularity is clearly the better. The benefits of two evidentiary tests for essentially the same substantive law are illusory. The same general conclusion is drawn by other writers who have reviewed the subject.⁶ Inasmuch as most of the mortgages in this state are secured via deeds of trust and the accompanying note, the trust problem is academic at best. In relation to the above hypothetical example, there would be a presumption of a valid conveyance⁷ which could be rebutted if the mortgagor alleged and proved that the exclusion of a defeasance clause from

² N.C. GEN. STAT. ch. 45, § 21-38 (1967) provides that if the mortgagee forecloses his security, and if it was based on a purchase money mortgage he cannot obtain a deficiency judgment against the mortgagor/debtor for any deficiency arising from the foreclosure sale.

³ BLACK'S LAW DICTIONARY 636 (4th ed. 1951). Equity of redemption is “the right of the mortgagor of an estate to redeem the same after it has been forfeited at law, by a breach of the condition of the mortgage, upon paying the amount of the debts interest and cost.”

⁴ Brown v. Holland 221 N.C. 135 (1942).

⁵ Murphy v. Taylor 214 N.C. 393 (1938).

⁶ 6 N.C.L. REV. 340 (1928); 13 N.C.L. REV. 334 (1935).

⁷ 214 N.C. at 393.

an otherwise deed absolute, resulted from ignorance, mistake, fraud or undue advantage and this exclusion dehors the deed.⁸

It should be pointed out that there is a line of cases in North Carolina dealing with the question of setting aside a prior deed of reconveyance for fraud, undue pressure, etc.⁹ These cases are cited when appropriate.

However, the scope of this paper deals with reviewing those instances when a deed taken in lieu of foreclosure may be regarded by the courts as a mortgage rather than an absolute conveyance and minimizing those factors which would support a court to hold one way or the other.

WHY A DEED IN LIEU OF FORECLOSURE

Generally, foreclosure is a negative method of barring a mortgagor's equity of redemption. It involves undue delays and costs to both the creditor and debtor.¹⁰ Given a relevant fact situation, and the absence of legal impediments to the transaction, a deed absolute could be a positive alternative to foreclosure. The mortgagor may consider the transaction as a virtual "life-saver", by viewing the deed as a method to:

1. Default without incurring personal liability on the note (debt);
2. Terminate his obligation to pay taxes and assessments on the property;
3. Eliminate the possibility of having foreclosure cost taxed against him;¹¹
4. Protect his credit;
5. Settle the matter extra-judicially and with a minimum of adverse publicity.

While the creditor may be irritated that the debtor decided not to honor his obligation, he too must be realistic and determine if his interests would be better served by foreclosing the property or taking a deed absolute instead. In making these determinations the creditor may:

1. Desire to internalize the delays which accompany foreclosure;¹²
2. Desire to be recognized as the owner of record for tax and assessment purposes;
3. Desire to avoid the foreclosure costs;
4. Desire to assist a distraught mortgagor who has fallen on financial hard times.

THE PROBLEMS IN TAKING A DEED¹³

The basic difficulty revolves around the problem of conveyance and whether or not upon a future suit by the mortgagor, the court will find the deed to be an absolute conveyance or a mere security interest in the prop-

⁸ *Isley v. Brown* 253 N.C. 791 (1960).

⁹ *Correll v. Hartness* 261 N.C. 89 (1964).

¹⁰ G. OSBORNE, *HANDBOOK ON THE LAW OF MORTGAGES* 155 (2d ed. 1970).

¹¹ N.C. GEN. STAT. ch. 45, § 21-38 (1967).

¹² See N.C. GEN. STAT. ch. 45, § 21-27 (Upset Bid on Real Property) which illustrates the delay factors involved in statutory foreclosure proceedings.

¹³ See generally, 36 MICH. L. REV. 3 (1937); 31 MO. L. REV. 312 (1966); 8 DRAKE L. REV. 199 (1969) for a discussion of the pitfalls.

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erty. In considering whether or not the deed should be decreed an absolute conveyance or a mortgage the courts generally look to the question of consideration,¹⁴ the bargaining power of the parties,¹⁵ who has possession, and other acts of ownership by the involved parties.¹⁶

In addition the mortgagee should ascertain if there are any encumbrances which will cloud the reconveyed deed. If any, the mortgagee would probably be safer to foreclose the property and cut off the junior encumbrances. The mortgagee should also determine if the mortgagor is bankrupt. If so, the conveyance may be for naught because the court could void any conveyance made within four months of the date the mortgagor filed bankruptcy.¹⁷

THE PROCEDURE

As indicated in the premises, a deed absolute in lieu of foreclosure would generally be given and subsequently accepted by parties who desire to internalize their costs and delays. Yet, it has been shown that there are inherent problems with this method of conveyance, and in order to minimize pitfalls the parties should codify their intentions. The mortgagor should realize that a sale and conveyance of the property to the mortgagee, without a defeasance clause in the deed, is absolute and cannot be attacked at a later date merely because the mortgagee finds himself in a better financial situation.¹⁸ The mortgagee in turn should realize that any improprieties on his part may give the court an excuse to decree the deed a mortgage rather than an absolute deed.

In view of the foregoing, the following suggestions may prove illuminating:

The mortgagor should:

1. Obtain an initial written statement from the mortgagor expressing his willingness to reconvey the property in exchange for a release from the debt.
2. Obtain an abstract of the title and determine if there are any junior mortgages or other encumbrances which would be a cloud on the title.

¹⁴ Compare 129 A.L.R. 1504 which holds inadequacy of consideration has some tendency to show that a sale was not intended; with *Davis v. Davis*, 256 N.C. 473 (1962) which held that adequacy of consideration is to be decided by the parties and the court will not reform their intentions, unless fraud, undue influence or oppression are present.

¹⁵ See *McLead v. Bullard* 84 N.C. 515 (1881) holding that the courts will scrutinize the transactions to determine if it is free from undue influence and oppression; *But see Isley v. Brown* 253 N.C. 791 (1960) holding that a court will not convert a deed absolute on its face into a security instrument, if the maker of the note was negligent in his behavior.

¹⁶ The fact that a party has possession or exercises some semblance of control over the property may be considered by the court in determining if a sale absolute was intended by the parties.

¹⁷ U.S.C. § 96 (a) and § 60 (a) states; if the debtor goes into bankruptcy within four months of the recording of the mortgage, a bankruptcy court can set the mortgage aside as a preference. Implied therein is that an absolute deed conveyed without sufficient consideration is in fact a mortgage which fall within 60 (a).

¹⁸ 253 N.C. 791.

3. Determine with the mortgagor an agreed upon consideration to be given for his equity of redemption.¹⁹
4. Require that the mortgagor obtain independent counsel to explain the legal ramifications of the various instruments.
5. On law day, require the mortgagor to convey the property via a general warranty deed, rather than a mere quit claim deed which contains no warranties. The mortgagee may desire to have a clause inserted in the deed stating that the deed is absolute in form and not a mortgage, however, this clause is of questionable value because it may cause a title researcher to view the deed with skepticism.²⁰
6. In addition to the deed, require an affidavit from the mortgagor stating the basis of the transaction, that the consideration is sufficient, that the property is not encumbered (other than the note), and that independent inquiry had been made into the transaction.²¹
7. Promptly record the deed.

¹⁹ A CORBIN, CORBIN ON CONTRACTS § 135 and § 137 (1952 ed.) suggests that the mortgagees forbearance to foreclose the security or sue on the note may be sufficient consideration in those cases where the property has been held only a short while or where the property has depreciated in value. However, where the mortgagor's equity is substantial, the courts may set a higher value on his equity of redemption than mere forbearance. But most North Carolina courts are reluctant to void or remake an otherwise valid agreement because of nominal consideration. See 253 N.C. at 691.

²⁰ R. Kratovil, MODERN MORTGAGE LAW AND PRACTICE 38 (2d ed. 1972). This deed is an absolute conveyance of title in effect as well as in form and is not intended as a mortgage, trust conveyance, or a security of any kind. The consideration therefore is full release of all debts, notes, obligations, costs and charges heretofore subsisting on account and by the terms of that certain mortgage (or trust deed) heretofore existing on the property herein conveyed, executed by _____-to _____ recorded in Book _____, page _____ of the official Records of _____ County _____ this conveyance completely satisfying said obligation and terminating said mortgage (or trust deed) and the notes of bonds secured thereby and any effect thereof in all respects.

²¹ *Affidavit (Mortgagor/Debtor)*—(husband and wife) being sworn severally each for himself, on his oath deposes and says: that a deed of reconveyance on Lot 16 Block 7, Laurel Acres, Durham, N.C., and dated _____ was so made, executed, and delivered freely and voluntarily and that affiants intended to convey absolutely to the grantees named in said deed all of the right, title, interest, claim or demand in and to said real property, and that your affiants did not and do not now intend that said deed shall operate as a mortgage, as a trust conveyance, or as a security of any kind. That at the time said deed was so made, executed and delivered affiants believed and understood, and now believe and understand that the said real property was not and is not worth more than the amount of money due and payable and to become due under the terms of that certain note and deed of trust heretofore given by your affiants to (mortgagee/creditor) _____ that affiants believed and continue to believe that their release from personal liability upon said note and deed of trust constitutes a fair and adequate consideration for said deed. That this affidavit is made for the protection and benefit of the grantees named in said deed, his successors and assigns, and shall be binding upon the heirs, executors, administrators, and assigns of your affiants. Your affiants further state and promise that they have not encumbered the above described property subsequent to the making of a certain Deed of Trust Note and

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8. Cancel the note and deed of trust and deliver the same to the mortgagor thereby releasing the mortgagor of personal liability thereon.

CONCLUSION

The deed in lieu of foreclosure could be a practical and realistic method of internalizing many of the costs and delays of foreclosure. But the paucity of recent North Carolina cases in this area leads this writer to draw the conclusion that when the deed is used in lieu of foreclosure, the parties truly desire the consequences of their acts, and subsequent litigation in relation to the total number of transactions will be inconsequential.

LEONARD T. KELLEY

Deed of Trust dated August 24, 1971 and recorded in the official records of Durham, N.C., in Book 767, page 514.

State of N. C.)
Third Judicial Division) ss.

(affiants), having been first duly sworn, depose and say:

- 1. That they are the persons who executed the foregoing instrument.
2. That they have read the same and know the contents thereof.
3. That the matters stated therein are true to their knowledge except such matters as are stated upon information and belief, and as to those matters, they believe them to be true.

(Mortgagor/Debtor)—Husband

(Mortgagor/Debtor)—Wife

Severally, subscribed and sworn to before me this ___ day of ___, 19___.

NOTARY PUBLIC
My commission expires _____.