# The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL


**Testimony of Jessie Agatstein**
**in Support of Senate Bill 170**

Good morning Senator Winfield, Representative Lesser, and other members of the Committee. Thank you for the opportunity to speak today. My name is Jessie Agatstein and I am a third-year law student in the Mortgage Foreclosure Litigation Clinic at Yale Law School. The Clinic has represented homeowners who cannot afford private counsel in foreclosure proceedings since 2008. I am here today to express the Clinic's conditional support of Senate Bill 170, An Act Concerning The Foreclosure Mediation Program, which we support as long as the Committee makes a few amendments that would better protect homeowners.

The Foreclosure Mediation Program is an unabashed success. More than thirty thousand Connecticut residents have participated the program since its inception in 2008.[1] Once homeowners and banks enter the program, they overwhelmingly come to agreements that benefit both parties: 85% of mediated cases settle.[2] These settlements also last—less than 10% of homeowners reenter mediation once they have reached a settlement.[3] In our Clinic, we see the successes of the Foreclosure Mediation Program every week. The program helps our clients stay in their homes and helps banks end foreclosure cases in everyone's best interest.

But the Foreclosure Mediation Program needs some tweaks to better serve homeowners. This bill would accomplish those tweaks. It would (i) give homeowners effective notice about the program, (ii) allow mediators more flexibility to mediate cases made more complicated by divorce settlements, and (when appropriately amended) (iii) ensure that homeowners who cannot make a settlement through the program at least have enough time and notice to pack up their homes before they're kicked out.

First, homeowners receive a gigantic bundle of notices at when a foreclosure starts. Many of our clients are confused by these notices, and can't decipher if the many described programs are available or appropriate for their family. This bill would shorten that bundle of notices by removing notice obligations relating to a little-used and, frankly, usually useless program called the protection from unemployment statute. As a result, it would increase the visibility of programs that *actually* work for homeowners and banks, including the Foreclosure Mediation Program and the Emergency Mortgage Assistance Program.

Second, the mediation statutes currently require attendance from people who really don't need to be at mediation. For example, divorced spouses often have to show up to mediation, even though one ex-spouse quitclaimed the property to their other ex-spouse years ago and no longer has any interest in the mortgage or property. This bill would allow mediators to excuse ex-spouses from attendance at mediation, speeding along the process of mediation and granting our hard-working mediators the flexibility they need to get their job done well.

Third, in the unfortunate situations in which mediation does not result in a settlement, the foreclosure statutes are written so vaguely that homeowners occasionally have only a single day's notice to pack up their belongings and leave their homes before a marshal officially ejects them. This is very hard on children and families, and it often prevents families bringing their real, legitimate issues to the court before they are kicked out of their homes.

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[1] Gloria Gong & Carl Brinton, "Connecticut Judicial Branch Mortgage Foreclosure Mediation Program Evaluation," State Justice Institute (October 2014), p.33, available at http://jud.ct.gov/statistics/fmp/sji_eval.pdf.
[2] "Foreclosure Mediation Program Outcomes, July 1, 2008 to December 31, 2015," available at http://jud.ct.gov/statistics/fmp/FMP_pie.pdf.
[3] Gong & Binton, p.33.


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We are *very concerned* that this bill does not address this fourth problem and does not appropriately tweak the ejectment statutes. The bill appears to *require* marshals to eject families within five days' time. This moves the ejection statutes in the wrong direction, making them even *less* protective of families than they were before. We encourage the committee to amend the bill to move the ejection statutes in the right direction, requiring marshals to *wait* at least five business days before ejecting families from their home. This would give families a bare minimum amount of time to pack up their belongings and bring any last issues they have to a judge. We have attached our suggested amendments, which would accomplish this objective, to this testimony.

Because we support the Foreclosure Mediation Program and want to ensure that it keeps succeeding for all homeowners, we support an amended version of this bill. I want to thank you again for the opportunity to testify today.

Attachment to Testimony of Jessie Agatstein : Suggested Amendments

General Assembly

**Raised Bill No. 170**

*February Session, 2016*

LCO No. **1481**

Referred to Committee on BANKING

Introduced by:
(BA)

***AN ACT CONCERNING THE FORECLOSURE MEDIATION PROGRAM.***

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 49-31e of the general statutes is repealed and the following is substituted in lieu thereof (*Effective from passage*):

[(a)] In an action by a lender for the foreclosure of a mortgage of residential real property, [such lender shall give notice to the homeowner of the availability of the provisions of sections 49-31d to 49-31i, inclusive, at the time the action is commenced.

(b) A homeowner who is given notice of the availability of the provisions of sections 49-31d to 49-31i, inclusive, must] the homeowner shall make application for protection from foreclosure, [within] under the provisions of sections 49-31d to 49-31i, inclusive, not later than twenty-five days [of] after the return day.

[(c) No judgment foreclosing the title to real property by strict foreclosure or by a decree of sale shall be entered unless the court is satisfied from pleadings or affidavits on file with the court that notice

has been given to the homeowner against whom the foreclosure action is commenced of the availability of the provisions of sections 49-31d to 49-31i, inclusive.

(d) If a homeowner against whom the foreclosure action is commenced was not given notice of the availability of the provisions of sections 49-31d to 49-31i, inclusive, at the time the action was commenced, and such homeowner was eligible to apply for protection from foreclosure at such time, the court, upon its own motion or upon the written motion of such homeowner, may issue an order staying the foreclosure action for fifteen days during which period the homeowner may apply to the court for protection from foreclosure by submitting an application together with a financial affidavit as required by subsection (a) of section 49-31f.]

Sec. 2. Section 49-22 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective from passage*):

(a) In any action brought for the foreclosure of a mortgage or lien upon land, or for any equitable relief in relation to land, the plaintiff may, in his complaint, demand possession of the land, and the court may, if it renders judgment in his favor and finds that he is entitled to the possession of the land, issue execution of ejectment, commanding the officer to eject the person or persons in possession of the land ~~not later~~ no fewer than five business days after the date of service of such execution and to put in possession thereof the plaintiff or the party to the foreclosure entitled to the possession by the provisions of the decree of said court, provided no execution shall issue against any person in possession who is not a party to the action except a transferee or lienor who is bound by the judgment by virtue of a lis pendens. The officer shall eject the person or persons in possession and may remove such person's possessions and personal effects and deliver such possessions and effects to the place of storage designated by the chief executive officer of the town for such purposes.

(b) Before any such removal, the state marshal charged with executing upon the ejectment shall give the chief executive officer of the town twenty-four hours notice of the ejectment, stating the date, time and location of such ejectment as well as a general description, if known, of the types and amount of property to be removed from the land and delivered to the designated place of storage. [Before] Not later than [~~four~~ five] business days before giving such notice to the chief executive officer of the town, the state marshal shall use reasonable efforts to locate and notify the person or persons in possession of the date and time such ejectment is to take place and of the possibility of a sale pursuant to subsection (c) of this section and shall provide clear instructions as to how and where such person or persons may reclaim any possessions and personal effects removed and stored pursuant to this section, including a telephone number that such person or persons may call to arrange release of such possessions and personal effects.

(c) Whenever a mortgage or lien upon land has been foreclosed and execution of ejectment issued, and the possessions and personal effects of the person in possession thereof are removed by a state marshal under this section, such possessions and effects shall be delivered by such marshal to the designated place of storage. Such removal, delivery and storage shall be at the expense of such person. If the possessions and effects are not reclaimed by such person and the expense of the storage is not paid to the chief executive officer within fifteen days after such ejectment, the chief executive officer shall sell the same at public auction, after using reasonable efforts to locate and notify such person of the sale and after posting notice of the sale for one week on the public signpost nearest to the place where the ejectment was made, if any, or at some exterior place near the office of the town clerk. The chief executive officer shall deliver to such person the net proceeds of the sale, if any, after deducting a reasonable charge for storage of such possessions and effects. If such person does not demand the net proceeds within thirty days after the sale, the chief executive officer shall turn over the net proceeds of the sale to the town

For the purposes of subsections (a) and (b), a business day shall be defined as a day the Superior Court is open to the public.

treasury.

Sec. 3. Subsection (b) of section 49-24b of the general statutes is repealed and the following is substituted in lieu thereof (*Effective July 1, 2016*):

(b) At any time after the date provided in the notice required under subsection (a) of this section, the foreclosure of the mortgagor's mortgage may continue without any further restriction or requirement. [, provided the] The mortgagee [files] shall file an affidavit with the court [stating] not earlier than thirty days, but not later than ten days, before any motion for judgment of foreclosure [~~by market sale~~] is heard. Such affidavit shall state that the notice provisions of said subsection have been complied with and that either the mortgagor failed to confirm his or her election in accordance with said subsection by the date disclosed in the notice or that discussions were initiated, but (1) the mortgagee and mortgagor were unable to reach a mutually acceptable agreement to proceed; (2) based on the appraisal obtained pursuant to section 49-24c, the property does not appear to be subject to a mortgage that is eligible for foreclosure by market sale; (3) the mortgagor did not grant reasonable interior access for the appraisal required by section 49-24c; (4) the mortgagee and mortgagor were unable to reach an agreement as to a mutually acceptable listing agreement pursuant to section 49-24d; (5) a listing agreement was executed, but no offers to purchase were received; (6) an offer or offers were received, but were unacceptable to either or both the mortgagee and mortgagor; or (7) other circumstances exist that would allow the mortgagee or mortgagor to elect not to proceed with a foreclosure by market sale pursuant to sections 49-24 to 49-24g, inclusive, 49-26 to 49-28, inclusive, and 49-31t, or that would otherwise make the mortgage ineligible for foreclosure by market sale. The affidavit required by this subsection may be combined with the affidavit required by subsection (b) of section 8-265ee.

Sec. 4. (NEW) (*Effective July 1, 2016*) Any loss mitigation affidavit

required under the general statutes, court rule or other applicable law shall be filed not more than thirty days, but not less than ten days, before any motion for judgment of foreclosure is heard.

Sec. 5. Subdivision (4) of subsection (c) of section 49-31*l* of the 2016 supplement to the general statutes is repealed and the following is substituted in lieu thereof (*Effective from passage*):

(4) Upon receipt of the mortgagor's appearance and foreclosure mediation certificate forms, and provided the court confirms the defendant in the foreclosure action is a mortgagor and that said mortgagor has sent a copy of the mediation certificate form to the plaintiff, the court shall assign the case to mediation and issue notice of such assignment to all appearing parties, which notice shall include an electronic mail address for all communications related to the mediation. The court shall issue such notice not earlier than the date five business days after the return date or by the date three business days after the date on which the court receives the mortgagor's appearance and foreclosure mediation certificate forms, whichever is later, except that if the court does not receive the appearance and foreclosure mediation certificate forms from the mortgagor by the date fifteen days after the return date for the foreclosure action, the court shall not assign the case to mediation. Promptly upon receipt of the notice of assignment, but not later than the thirty-fifth day following the return date, the mortgagee or its counsel shall deliver to the mediator, via the electronic mail address provided for communications related to the mediation, and to the mortgagor, via first class, priority or overnight mail, (A) an account history identifying all credits and debits assessed to the loan account and any related escrow account in the immediately preceding twelve-month period and an itemized statement of the amount required to reinstate the mortgage loan with accompanying information, written in plain language, to explain any codes used in the history and statement which are not otherwise self-explanatory, (B) the name, business mailing address, electronic mail address, facsimile number and direct telephone number of an

individual able to respond with reasonable adequacy and promptness to questions relative to the information submitted to the mediator pursuant to this subdivision, and any subsequent updates to such contact information, which shall be provided reasonably promptly to the mediator via the electronic mail address provided for communication related to the mediation, (C) current versions of all reasonably necessary forms and a list of all documentation reasonably necessary for the mortgagee to evaluate the mortgagor for common alternatives to foreclosure that are available through the mortgagee, if any, (D) a copy of the note and mortgage, including any agreements modifying such documents, (E) summary information regarding the status of any pending foreclosure avoidance efforts being undertaken by the mortgagee, and (F) [a copy of any loss mitigation affidavit filed with the court, and (G)] at the mortgagee's option, (i) the history of foreclosure avoidance efforts with respect to the mortgagor, (ii) information regarding the condition of mortgaged property, and (iii) such other information as the mortgagee may determine is relevant to meeting the objectives of the mediation program. Following the mediator's receipt of such information, the court shall assign a mediator to the mediation and schedule a meeting with the mediator and [the mortgagor] all relevant mortgagors and shall endeavor to hold such meeting on or prior to the forty-ninth day following the return date. The notice of such meeting shall instruct the mortgagor to complete the forms prior to the meeting and to furnish such forms together with the documentation contained in the list, as provided by the mortgagee following the filing of the foreclosure mediation certificate, at the meeting. At such meeting, the mediator shall review such forms and documentation with the mortgagor, along with the information supplied by the mortgagee, in order to discuss the options that may be available to the mortgagor, including any community-based resources, and assist the mortgagor in completing the forms and furnishing the documentation necessary for the mortgagee to evaluate the mortgagor for alternatives to foreclosure. The mediator may elect to schedule subsequent meetings with the mortgagor and determine

whether any mortgagor may be excused from an in-person appearance at such subsequent meeting. The mediator may excuse any mortgagor from attending such meeting or any subsequent meetings, provided the mortgagor shows cause for nonattendance. Such cause may include, but is not limited to, the mortgagor no longer owning the home pursuant to a judgment of marital dissolution or no longer residing in the home. As soon as practicable, but in no case later than the eighty-fourth day following the return date, or the extended deadline if such an extended deadline is established pursuant to this subdivision, the mediator shall facilitate and confirm the submission by the mortgagor of the forms and documentation to the mortgagee's counsel via electronic means and, at the mortgagee's election, directly to the mortgagee per the mortgagee's instruction, and determine, based on the ~~relevant~~ participating mortgagor's attendance at the meetings and the extent the mortgagor completed the forms and furnished the documentation contemplated in this subdivision, or failed to perform such tasks through no material fault of the mortgagee, and file a report with the court indicating, (I) whether mediation shall be scheduled with the mortgagee, (II) whether the mortgagor attended scheduled meetings with the mediator, (III) whether the mortgagor fully or substantially completed the forms and furnished the documentation requested by the mortgagee, (IV) the date on which the mortgagee supplied the forms and documentation, and (V) any other information the mediator determines to be relevant to the objectives of the mediation program. The mediator may file, and the court may grant, a motion for extension of the premediation period beyond the eighty-fourth day following the return date if good cause can be shown for such an extension. Any such motion shall be filed, with a copy simultaneously sent to the mortgagee and as soon as practicable to the mortgagor, not later than the eighty-fourth day following the return date. The mortgagee and mortgagor shall each have five business days from the day the motion was filed to file an objection or supplemental papers, and the court shall issue its ruling, without a hearing, not later than ten business days from the date the motion was filed. If the court

determines that good cause exists for an extension, the court shall therewith establish an extended deadline so that the premediation period shall end as soon thereafter as may be practicable, but not later than thirty-five days from the date of the ruling, taking into account the complexity of the mortgagor's financial circumstances, the mortgagee's documentation requirements, and the timeliness of the mortgagee's and mortgagor's compliance with their respective premediation obligations. If the court denies the mediator's motion, the extended deadline for purposes of this subdivision shall be three days after the court rules on the motion. No meeting or communication between the mediator and mortgagor under this subdivision shall be treated as an impermissible ex parte communication. If the mediator determines that the mortgagee shall participate in mediation, the court shall promptly issue notice to all parties of such determination and schedule a mediation session between the mortgagee and [mortgagor] relevant mortgagors in accordance with subsection (c) of section 49-31n to be held not later than five weeks following the submission to the mortgagee of the forms and documentation contemplated in this subdivision. The mediator may excuse any mortgagor from attending the mediation session or subsequent meetings, provided ~~the mortgagor shows cause~~ cause is shown for nonattendance. Such cause may include, but is not limited to, the mortgagor no longer owning the home pursuant to a judgment of marital dissolution and related transfer via deed or no longer residing in the home. If the mediator determines that no sessions between the mortgagee and mortgagor shall be scheduled, the court shall promptly issue notice to all parties regarding such determination and mediation shall be terminated. Any mortgagor wishing to contest such determination shall petition the court and show good cause for reinclusion in the mediation program, including, but not limited to, a material change in financial circumstances or a mistake or misunderstanding of the facts by the mediator.

Sec. 6. Subdivision (2) of subsection (b) of section 49-31n of the 2016 supplement to the general statutes is repealed and the following is

substituted in lieu thereof (*Effective from passage*):

(2) The first mediation session shall be held not later than fifteen business days after the court sends notice to all parties that a foreclosure mediation request form has been submitted to the court. The mortgagor and mortgagee shall appear in person at each mediation session and shall have the ability to mediate, except that (A) if a party is represented by counsel, the party's counsel may appear in lieu of the party to represent the party's interests at the mediation, provided the party has the ability to mediate, [the mortgagor attends the first mediation session in person,] and the party is available (i) during the mediation session by telephone, and (ii) to participate in the mediation session by speakerphone, provided an opportunity is afforded for confidential discussions between the party and party's counsel, (B) following the initial mediation session, if there are two or more mortgagors who are self-represented, only one mortgagor shall be required to appear in person at each subsequent mediation session unless good cause is shown, provided the other mortgagors are available (i) during the mediation session, and (ii) to participate in the mediation session by speakerphone, [and] (C) if a party suffers from a disability or other significant hardship that imposes an undue burden on such party to appear in person, the mediator may grant permission to such party to participate in the mediation session by telephone, and (D) a mortgagor may be excused from appearing at the mediation session if cause is shown that the presence of such mortgagor is not needed to further the interests of mediation because the mortgagor no longer owns the home pursuant to a judgment of marital dissolution or no longer resides in the home. A mortgagor's spouse, who is not a mortgagor but who lives in the subject property, may appear at each mediation session, provided all appearing mortgagors consent, in writing, to such spouse's appearance or such spouse shows good cause for his or her appearance and the mortgagors consent in writing to the disclosure of nonpublic personal information to such spouse. If the mortgagor has submitted a complete package of financial

Such cause may include, but is not limited to,

documentation in connection with a request for a particular foreclosure alternative, the mortgagee shall have thirty-five days from the receipt of the completed package to respond with a decision and, if the decision is a denial of the request, provide the reasons for such denial. If the mortgagor has, in connection with a request for a foreclosure alternative, submitted a financial package that is not complete, or if the mortgagee's evaluation of a complete package reveals that additional information is necessary to underwrite the request, the mortgagee shall request the missing or additional information within a reasonable period of time of such evaluation. If the mortgagee's evaluation of a complete package reveals that additional information is necessary to underwrite the request, the thirty-five-day deadline for a response shall be extended but only for so long as is reasonable given the timing of the mortgagor's submission of such additional information and the nature and context of the required underwriting. Not later than the third business day after each mediation session held on or after June 18, 2013, the mediator shall file with the court a report indicating, to the extent applicable, (i) the extent to which each of the parties complied with the requirements set forth in this subdivision, including the requirement to engage in conduct that is consistent with the objectives of the mediation program and to possess the ability to mediate, (ii) whether the mortgagor submitted a complete package of financial documentation to the mortgagee, (iii) a general description of the foreclosure alternative being requested by the mortgagor, (iv) whether the mortgagor has previously been evaluated for similar requests, whether prior to mediation or in mediation, and, if so, whether there has been any apparent change in circumstances since a decision was made with respect to that prior evaluation, (v) whether the mortgagee has responded to the mortgagor's request for a foreclosure alternative and, if so, a description of the response and whether the mediator is aware of any material reason not to agree with the response, (vi) whether the mortgagor has responded to an offer made by the mortgagee on a reasonably timely basis, and if so, an explanation of the response, (vii)

whether the mortgagee has requested additional information from the mortgagor and, if so, the stated reasons for the request and the date by which such additional information shall be submitted so that information previously submitted by the mortgagor, to the extent possible, may still be used by the mortgagee in conducting its review, (viii) whether the mortgagor has supplied, on a reasonably timely basis, any additional information that was reasonably requested by the mortgagee, and, if not, the stated reason for not doing so, (ix) if information provided by the mortgagor is no longer current for purposes of evaluating a foreclosure alternative, a description of the out-of-date information and an explanation as to how and why such information is no longer current, (x) whether the mortgagee has provided a reasonable explanation of the basis for a decision to deny a request for a loss mitigation option or foreclosure alternative and whether the mediator is aware of any material reason not to agree with that decision, (xi) whether the mortgagee has complied with the time frames set forth in this subdivision for responding to requests for decisions, (xii) if a subsequent mediation session is expected to occur, a general description of the expectations for such subsequent session and for the parties prior to such subsequent session and, if not otherwise addressed in the report, whether the parties satisfied the expectations set forth in previous reports, and (xiii) a determination of whether the parties will benefit from further mediation. The mediator shall deliver a copy of such report to each party to the mediation when the mediator files the report. The parties shall have the opportunity to submit their own supplemental information following the filing of the report, provided such supplemental information shall be submitted not later than five business days following the receipt of the mediator's report. Any request by the mortgagee to the mortgagor for additional or updated financial documentation shall be made in writing. The court may impose sanctions on any party or on counsel to a party if such party or such counsel engages in intentional or a pattern or practice of conduct during the mediation process that is contrary to the objectives of the mediation program. Any sanction that is imposed

shall be proportional to the conduct and consistent with the objectives of the mediation program. Available sanctions shall include, but not be limited to, terminating mediation, ordering the mortgagor or mortgagee to mediate in person, forbidding the mortgagee from charging the mortgagor for the mortgagee's attorney's fees, awarding attorney's fees, and imposing fines. In the case of egregious misconduct, the sanctions shall be heightened. The court shall not award attorney's fees to any mortgagee for time spent in any mediation session if the court finds that such mortgagee has failed to comply with this subdivision, unless the court finds reasonable cause for such failure.

| This act shall take effect as follows and shall amend the following sections: | | |
|---|---|---|
| Section 1 | *from passage* | 49-31e |
| Sec. 2 | *from passage* | 49-22 |
| Sec. 3 | *July 1, 2016* | 49-24b(b) |
| Sec. 4 | *July 1, 2016* | New section |
| Sec. 5 | *from passage* | 49-31l(c)(4) |
| Sec. 6 | *from passage* | 49-31n(b)(2) |

***Statement of Purpose:***

To make certain improvements to the foreclosure mediation program, to emphasize Connecticut's public policy commitment to establishing a coherent state foreclosure policy through the foreclosure mediation program, and to encourage the federal courts to abstain under the *Burford* doctrine from hearing and deciding foreclosure cases that would be best served by the foreclosure mediation program.

***[Proposed deletions are enclosed in brackets. Proposed additions are indicated by underline, except that when the entire text of a bill or resolution or a section of a bill or resolution is new, it is not underlined.]***