

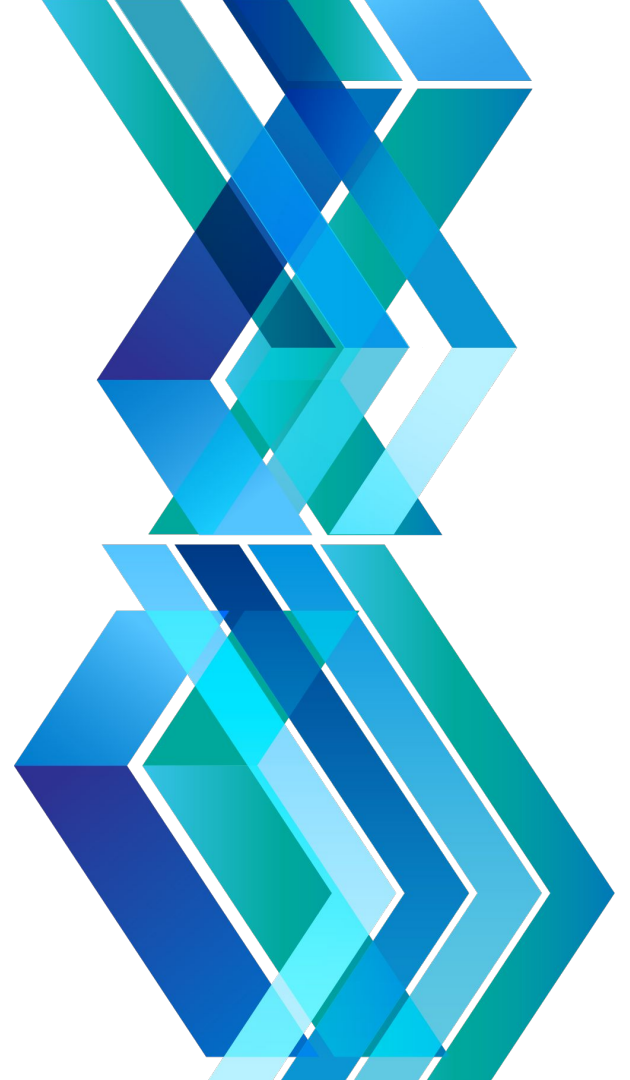


TRENDING TOPICS

TEXAS HOME EQUITY FORECLOSURE PROCESS



PLG Client Training Webinar



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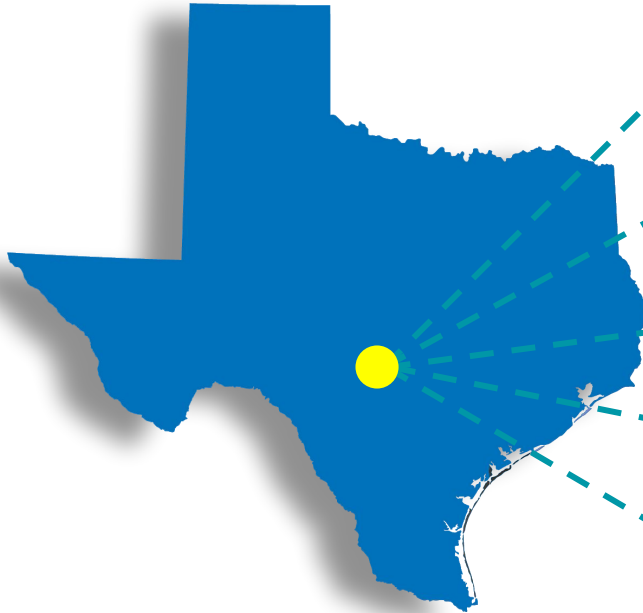
DALLAS, TX

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BACKGROUND



Dating back to its days as an independent republic, Texas has long restricted the forced sale of a homestead property, with only a few exemptions

In fact, the 1876 Texas Constitution prohibited homeowners from borrowing against the equity in their home for any purpose other than home improvements

In 1997, Texas voters passed an amendment to permit closed-end home equity loans

In 2003, Texas voters passed an amendment to permit open-end home equity loans (**HELOCs**)

HELOC loans can now be enforced against the homestead as long as specific requirements re origination and foreclosure are met

TEXAS HOME EQUITY FORECLOSURE PROCESS



In Texas, any Deed of Trust that grants the trustee the power of sale can also be foreclosed judicially

- A judicial foreclosure is a lawsuit against the borrowers where the relief granted is a sheriff's sale of the property



While, Texas Home Equity foreclosures are governed instead by Rule 736 of the Texas Rules of Civil Procedure (Expedited Foreclosure Process)

- The Rule mandates a “quasi-judicial” foreclosure process for home equity loans
- The purpose of this process to ensure that homeowners are provided adequate notice and opportunity to cure the default prior to sale
- The end result of the process is a court order authorizing a non-judicial sale of the property

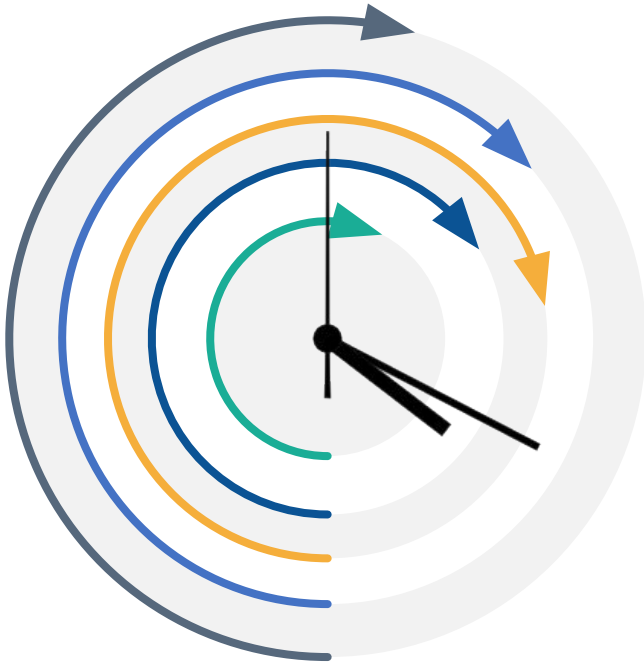


TIMELINES

TEXAS HOME EQUITY FORECLOSURE PROCESS

Unlike in a typical judicial foreclosure, notice requirements are less burdensome and the claims that can be raised by the borrowers are strictly limited.

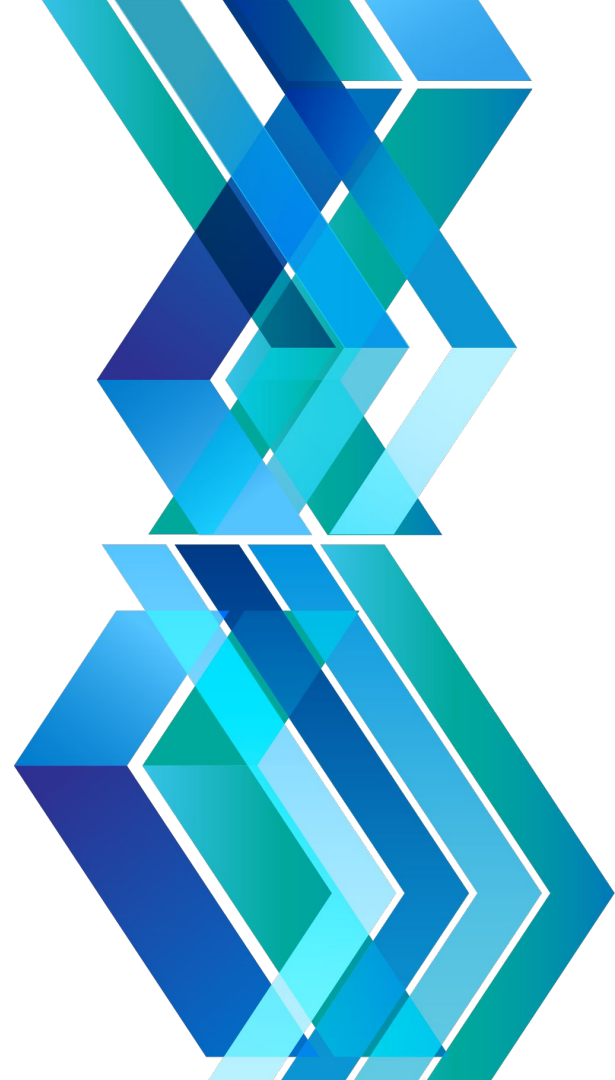
As a result, the petitioner should typically obtain their foreclosure order within **60 – 90 days** of filing, or **120 days** when an answer is filed.

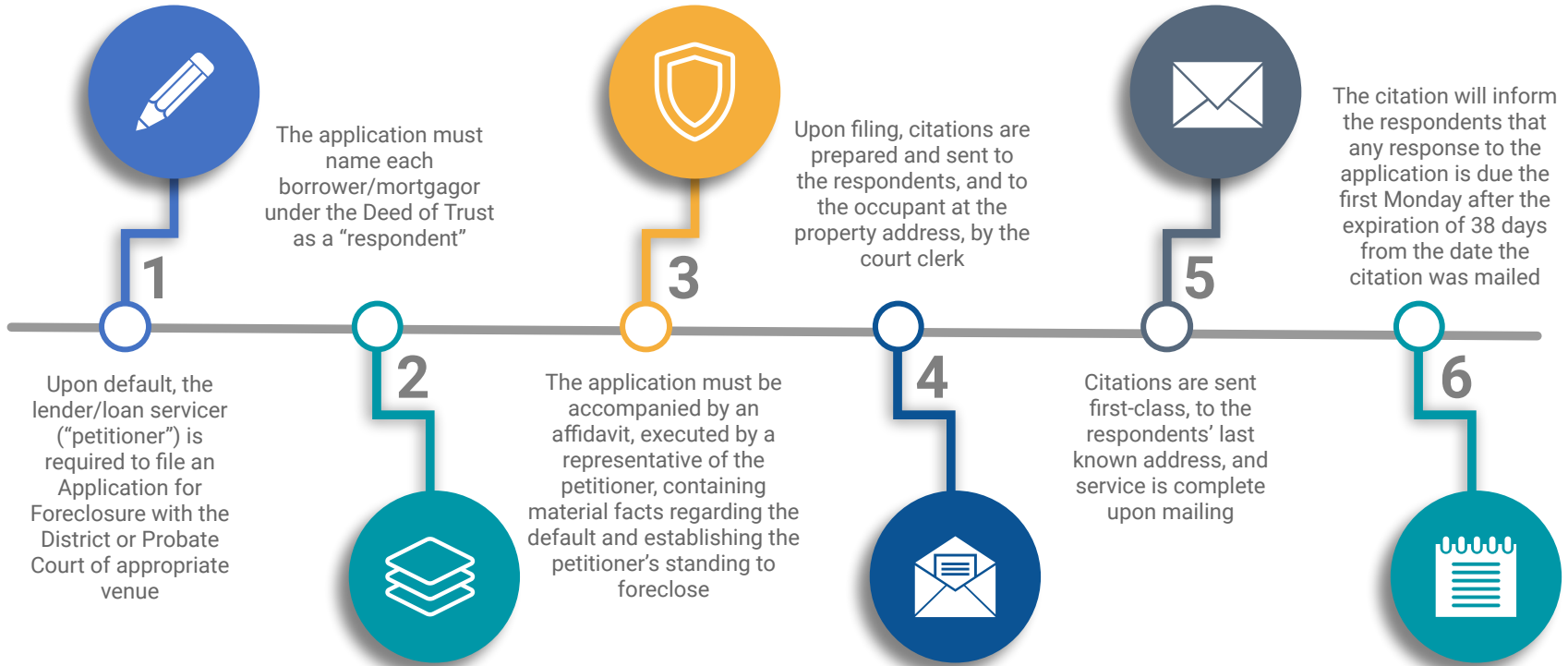


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NOTE: The affidavit must be accompanied by a copy of the note, deed of trust, assignments (if any), and copies of the demand letters with proof of mailing



TEXAS HOME EQUITY FORECLOSURE PROCESS



NO ANSWER FILED:

1. The Petitioner should move for default following the expiration of the answer period as soon as practicable
2. Per the Rule, the Court must grant the application by default order no later than **30 days** after filing of the motion, but no earlier than **10 days** after the return of service is filed

PRACTICE NOTE : (The rule states that no hearing is required on the motion, but it is not uncommon for Texas courts to schedule a hearing regardless)



TEXAS HOME EQUITY FORECLOSURE PROCESS



ANSWER FILED:

1. Any response that is filed must be in the form of a general denial, with limited grounds for what the respondent can affirmatively plead: mistaken identity, non-obligation on loan, errors in reinstatement/payoff amount, faulty documentation, or proof of payment
2. Any other claim for relief can only be brought in an independent lawsuit
3. A hearing is required when a response is filed



TEXAS HOME EQUITY FORECLOSURE PROCESS



INDEPENDENT LAWSUIT:

1. An independent lawsuit acts as stay on the home equity foreclosure proceeding
2. Within 10 days of suit filing respondent must file a motion and proposed order to dismiss the home equity proceeding. If a foreclosure order was previously the Court must vacate that order

Practice Tip: Litigious borrowers will attempt to delay the foreclosure process by filing multiple lawsuits, even after their claims were previously dismissed on the merits. One option is for the petitioner to counterclaim for judicial foreclosure in the lawsuit, to control the proceeding all the way to sheriff's sale

- Upon receipt of the order petitioner may sell the property using the same procedures as with any non-judicial foreclosure.
- Per the Rule, a conformed copy of the order must be attached to the recorded foreclosure deed



VALUE AND EQUITY

TEXAS HOME EQUITY FORECLOSURE PROCESS

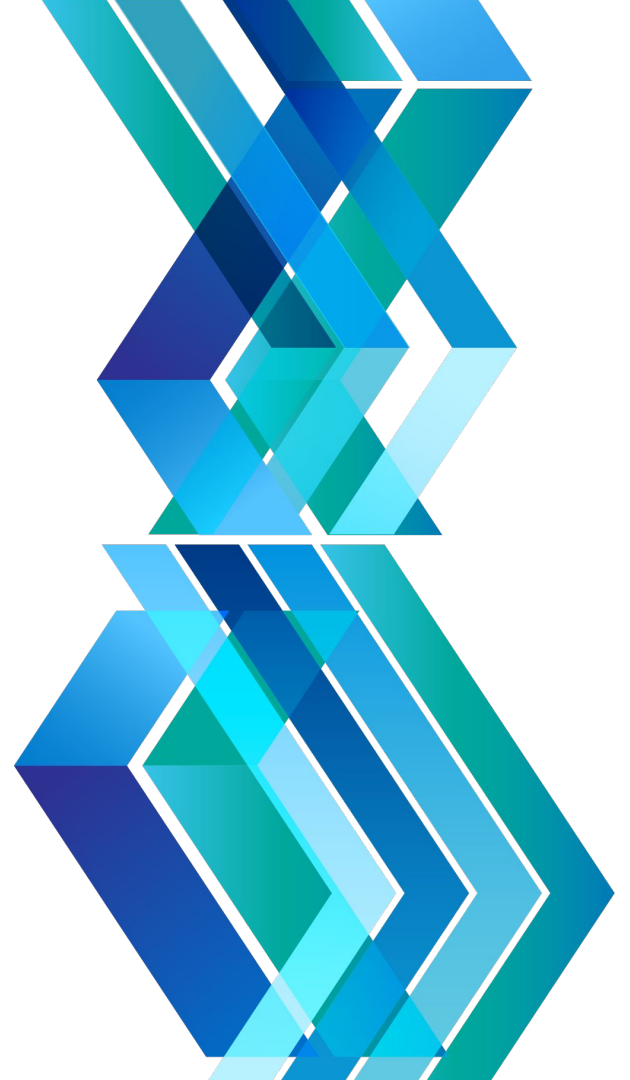


The value of homestead property, but also the desire of Texas homeowners to take advantage of the equity in their homes, Texas legislators crafted a process that intends to strike a balance between the desire to protect borrowers' homes from foreclosure but protect the lender's interest in leveraged property.

TEXAS DECEASED BORROWER PROCESS



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DECEASED BORROWERS



A DECEASED BORROWER CREATES A LEGAL AND TITLE IMPEDIMENT TO NON-JUDICIAL FORECLOSURE:

1. **A decedent's property vests in his/her heirs upon death; who are these parties and to what notice are they entitled?**
 - a. A foreclosure sale held without notice to a personal representative of the borrower's estate is invalid.
 - b. Note: notice to the heirs is not required, but title insurers are often uncomfortable insuring a property where foreclosure took place without notice to the heirs
2. **Is the borrower's estate being probated?**
 - a. Any foreclosure sale held during the four years after the death of the borrower can be overturned in a subsequent administration of the estate.

DECEASED BORROWERS OPTIONS FOR RESOLVING THE ISSUE



Creditor's Administration

A court-supervised administration of the estate opened by the lender

Pros:

Lowest legal risk; process is codified in the Texas Estates code; will often result in sale of property and full payoff



Declaratory Action

A suit against the heirs that terminates their interest in property via non-judicial sale

Pros:

Less expensive; avoids delays caused by probate court requirements



DECEASED BORROWERS

OPTIONS FOR RESOLVING THE ISSUE



Expedited Foreclosure under Rule 736: where the loan is home equity, the lender has the option to file an application for foreclosure. (In fact, the rule specifically permits lenders to file their applications in the probate courts.)

Pros: Shorter timelines than either the declaratory action or creditor's administration; no requirements of notice to heirs



DECEASED BORROWERS

OPTIONS FOR RESOLVING THE ISSUE



HEIR-PROBATED ESTATES:

1. **Independent administration:** where a will has been probated, the lender may not foreclose before six months after the date of appointment, and notice must be provided to the independent administrator
2. **Dependent administration:** the lender is required to petition the probate court for an order allowing foreclosure, via the claim and application to foreclose process



DECEASED BORROWERS

OPTIONS FOR RESOLVING THE ISSUE



Wait: The borrower's estate must be probated within the four years following the borrower's death. Where no estate has been opened, the lender always has the option to simply wait for the four year period to run and then proceed. This option should be considered whenever expiration of this period is a year or less from the date of default

Pros: Avoid the expense of legal action; avoid the possibility of delay *beyond* the four years as a result of legal action being taken; avoid risk that heirs may contest or court may deny order



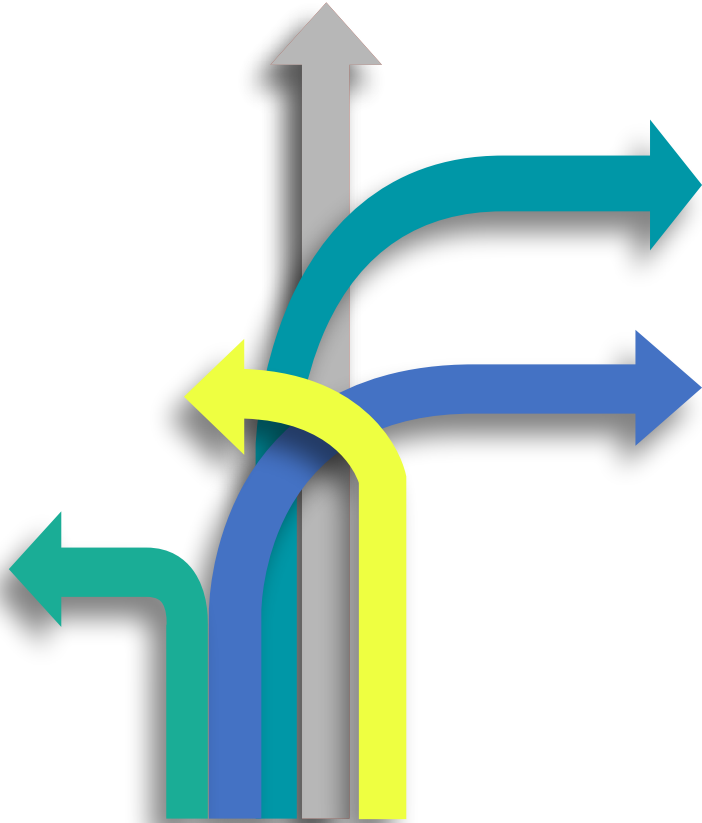
SUMMARY

DECEASED BORROWERS

There exists multiple options for proceeding when a borrower is deceased because the Texas legislature has never codified a single process that is to be used in every circumstance

In recent sessions legislation has been introduced that would provide clarity to the process:

- **HB 2795 (2013):** Would have required lenders to obtain a court order allowing foreclosure under Rule 736 concurrent with obtaining an heirship determination in the probate court
- **HB 2069 (2019):** Would have permitted lenders to proceed without an order allowing foreclosure in the four years following the borrower's death so long as certain notice requirements are met both bills failed to obtain Texas Senate approval

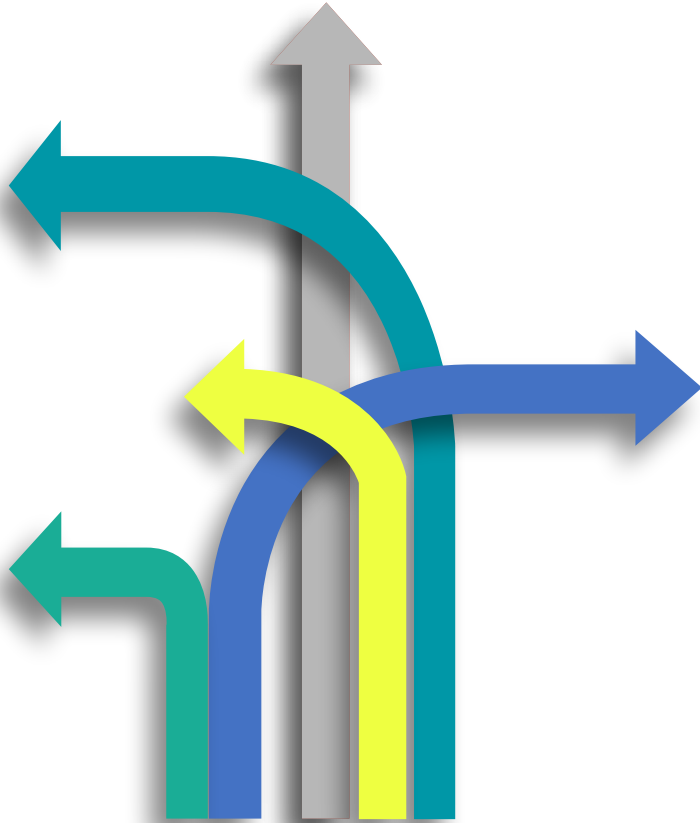




SUMMARY

DECEASED BORROWERS

One size does *not* fit all: There is no one process that lenders should utilize in every circumstance to resolve issues created by a deceased borrower. It behooves lenders (and their law firms) to consider the circumstances of each loan and weigh factors such as cost, timelines and legal risk to determine which option is the right one before proceeding.



QUESTIONS & ANSWERS



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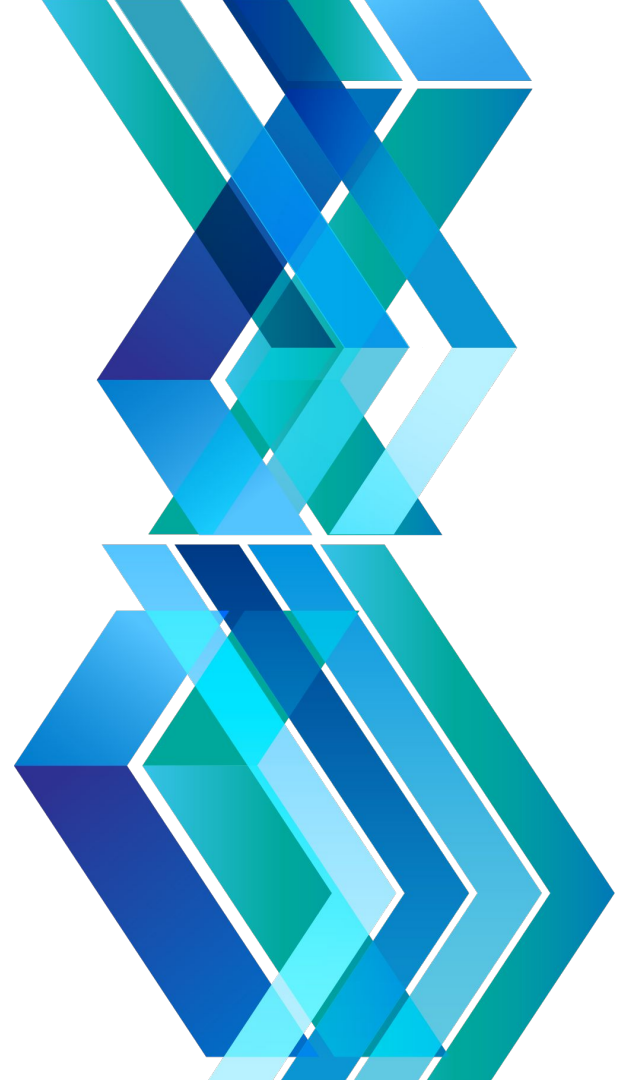
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THANK YOU



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