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FEATURE ARTICLE

**TRYING TO PROTECT
ELDERLY AND MENTALLY
INCOMPETENT
HOMEOWNERS: ONE TAX
DEED CASE AT A TIME**

by DANIEL KOEN

When Judge Robert Bertucci sustained the Public Guardian's objections and denied the tax scavenger's application and petition for a tax deed to Essie J's home,¹ the tax scavenger's attorney looked as though she had just swallowed a rotten egg whole.²

But the Public Guardian's attorney looked equally surprised. Tax deed cases are notoriously difficult to win—particularly when the redemption period has ended,³ and the home owner no longer lives in her own home, according to Daniel Belko, attorney with the Office of the Cook County Public Guardian (OPG).⁴

“Unfortunately, in many cases the Public Guardian has encountered in the tax deed forum, the redemption period has expired or the tax deed is already issued, and [we are] left in the ominous position of having to wage a legal battle within the parameters of a tax deed system that is predicated on the notion that all taxpayers are mentally competent and able to transact their affairs. There is no consideration for the disabled . . . it is as if they do not exist as property owners,” said Belko.⁵ “That’s just the way it usually goes.”

At the time her case was argued, Essie J was a 90-year-old woman with dementia and had been living in a nursing home since 2000.⁶ She had no idea her home was in jeopardy. In fact, she still doesn't know what happened, but that is not why the case is important.

In Illinois, if a homeowner is delinquent on paying her property taxes, a tax scavenger can purchase the taxes and begin a process that could lead to the homeowner losing the property.⁷ In Essie J's situation, her home was appraised for approximately \$70,000, but her taxes were sold for \$1,191.07.⁸

Yet, while the OPG was able to help Essie J, there may be thousands of other cases that go unrepresented simply because no one ever knows about them.

“There's no way to truly know how many cases there are of elderly people losing their homes because [advocates] are only aware of the cases that get reported,” said Judge Patrick Murphy, who was the Cook County Public Guardian for more than 25 years.⁹

JUST HOW BIG (OR SMALL) OF A PROBLEM IS IT?

In Cook County, Illinois, there are hundreds of thousands of elderly homeowners and millions of dollars in unpaid property taxes, but it's not at all clear how many elderly homeowners are at risk. Demographic data show that there are more than 450,000 two-person households where the owners are over the

age of 65.¹⁰ And there are more than 178,000 one-person households where the owner is over 65.

“This is a major concern,” said Becky Lerfelt, Assistant Director of PLOWS Council on Aging, an advocacy organization serving older adults in 19 municipalities across Illinois.¹¹

Lerfelt said that PLOWS tries to help older adults understand their options to defer their taxes or apply for other Illinois programs that could provide financial assistance, but they often do not understand or know what options are available.¹² And because of the worsening economy, according to Lerfelt, “I think we are probably going to see an increase in the number of older adults losing their homes [due to non-payment of taxes].”¹³

Elder rights advocates work to keep older adults in their homes because “owning a home is where you have control, where you have familiarities,” said Diane Slezak, Chief Operating Officer at Age Options in Cook County.¹⁴ “Many people are unwilling to leave their homes because of those connections and comforts.”¹⁵

But if homeowners fail to pay their taxes, the county does what it feels is necessary to recoup the lost revenue. As of July 24, 2008, approximately 43,000 property owners owed \$127 million in delinquent taxes in Cook County.¹⁶ In recent years, the number of delinquent taxpayers has ranged from 35,000 to more than 50,000.¹⁷

With so many potential situations for loss, it might be surprising that Murphy says that in his tenure as Public Guardian, there were only 20 or 30 tax deed cases that went to court.¹⁸ The primary reason for this, as pointed out by Murphy, Belko and others, is because once the redemption period has run, there is often little that can be done.¹⁹

Private attorney Matt Flamm, a two-time Chair of the Chicago Bar Association Real Estate Tax Committee who has represented both tax buyers and homeowners for more than 30 years, takes a different view and is not surprised there are so few cases.²⁰ He believes that the homeowners losing their homes to tax deeds “are few and far between” because the system has achieved “the proper balance over the years [between protecting] the rights of the homeowner and having an effective tax collection system.”²¹

Yet, when homeowners do lose their homes and want to fight, the advocates sometimes find themselves arguing before the U.S. Supreme Court.

TAKE NOTICE: ADVOCATES LITIGATING TO PROTECT THE RIGHTS OF HOMEOWNERS

One of the first tax deed cases Murphy litigated involved Mrs. Otsus, an 80-year-old woman who was suffering from mental illness and lived alone and in relative seclusion after her husband died.²² Mrs. Otsus lost her home for non-payment of approximately \$8,600 in unpaid taxes.²³ The home was worth more than \$100,000.²⁴

Judge Murphy emphasized two important aspects of *Otsus*. First, he said it was the kind of case that highlights the need for greater awareness among courts and advocates of the needs of the elderly who might have a mental illness.²⁵ “We can only litigate the cases that come through our door,” said Murphy.²⁶ And on a more visceral level, Murphy explained that “if someone is incompetent and has the resources like Mrs. Otsus to pay her taxes, it is inherently unfair to take her home away.”²⁷

But it is completely legal. Under the Illinois Property Tax Code, the tax deed sale, petition and deed process has a number of specific steps someone must complete before obtaining a tax deed in Illinois.²⁸

The Illinois Constitution provides that “real property shall not be sold for the nonpayment of taxes or special assessments without judicial proceedings.”²⁹ If the taxes are sold, the owner has two years to redeem the property.³⁰

Despite the various provisions and protections set out in the Illinois Constitution and the Property Tax Code, advocates say they’re not enough, and point to decisions by the U.S. and Illinois Supreme Courts to make their cases.

In *Jones v. Flowers*, a home was sold for unpaid taxes, and the sale was upheld in the Arkansas courts because the sale occurred in accordance with statute, including notice by certified mail and publication in a local newspaper.³¹ Jones argued that he never received the notices sent by certified mail because they were sent to the wrong address, and consequently he could not sign for the mail.³²

The U.S. Supreme Court agreed with Jones that the notice was insufficient, and it overturned the Arkansas Supreme Court in a 5-3 decision, saying that “when mailed notice of a tax sale is returned unclaimed . . . additional reasonable steps to attempt to provide notice to the property owner” must be made if practicable.³³

“It is fundamental that if Mr. Jones was informed that his taxes were delinquent, and he was going to lose his house, he would have paid his taxes,” said Michael Kirkpatrick, an attorney at Public Citizen’s Litigation Group, who argued *Jones* before the U.S. Supreme Court.³⁴

Kirkpatrick, however, suggests there’s a larger issue at stake: “Why don’t we require actual notice when it’s something as important as someone’s home? We require actual notice in many other contexts—even in small claims court—yet we don’t require more when someone’s house is going to be lost.”³⁵

What is “more” when it comes to satisfying notice? In Essie J’s situation, the tax deed petitioner claimed that she followed all statutory procedures, which included providing multiple forms of required notice to Essie J.³⁶ Ironically, the “notice” the tax deed petitioner relied on was the reason that she lost.

During proceedings where the tax deed petitioner had to “prove up” that she met the statutory notice and other requirements, the judge asked about the fact that one of the returned—and undeliverable—notices to Essie J said, “Defendant in long-term care facility suffering from dementia.”³⁷ Unable to come up with a satisfactory answer, the tax deed petitioner’s counsel was instructed to contact the OPG,³⁸ which eventually led to the OPG taking the case and representing Essie J. While it is not clear whether the judge’s decision was based on *Jones*, it seems clear that he was uncomfortable depriving a homeowner of her property when there was evidence of a mental illness.

SATISFYING NOTICE IS NOT ALWAYS SO SATISFYING

Given the fact that a tax deed purchaser can obtain a home for pennies on the dollar, advocates like Kirkpatrick are not surprised by a tax deed petitioner who does not go out of his way to try and learn whether a home owner who is about to lose her house might be suffering from a mental illness. He emphasized that “when it’s the actual tax deed purchaser charged with providing

notice . . . that purchaser really has no incentive to do more than the absolute minimum to satisfy the statute.”³⁹

In fact, it is this ability to satisfy minimum requirements that wins many tax deed cases for the petitioners. The “minimum” argument ultimately swayed the Illinois Supreme Court in *Apex v. Mary Lowe*, where the court upheld the tax deed petitioner’s deed despite the fact that Mary Lowe was incompetent and had no notice of the sale.⁴⁰ Lowe lost her home of 20 years for an unpaid \$347 bill.⁴¹

The OPG, which represented Lowe, pointed to the fact that the notice was returned undeliverable and with a notation indicating Lowe was hospitalized.⁴² Underscoring the difficulty of the case, the OPG lost at trial and on appeal to the Illinois Supreme Court.⁴³ The OPG was determined, however, to continue to fight, so it approached seasoned U.S. Supreme Court litigators to assist with a certiorari petition to the U.S. Supreme Court.

“We have a lot of experience in the Illinois trial and appellate courts,” said OPG Deputy Public Guardian Charles Golbert.⁴⁴ “We thought the case would benefit from fresh eyes and maybe a fresh approach [for the U.S. Supreme Court].”

Jenner and Block’s Barry Sullivan, who has argued many cases before the U.S., Illinois and other state supreme courts, argued the case with the OPG, and said that he “kept making the point that due process requires that [Mary Lowe] be given effective notice at the last step before property is taken, and that last step is when the tax deed petition is granted.”⁴⁵

Sullivan also relied on the bedrock U.S. Supreme Court decisions *Mullane v. Hanover* and *Covey v. Town of Somers* in arguing that notice to a known incompetent wholly defeats and frustrates the constitutionally required elements of notice and due process.⁴⁶

Sullivan and the OPG pointed out that the notation “person is hospitalized” was printed on each of the envelopes.⁴⁷ In a post-*Jones v. Flowers* world, they argued, shouldn’t the tax deed petitioner have done more than ignore the markings on the envelope?⁴⁸

The U.S. Supreme Court remanded the case to the Illinois Supreme Court to answer the question.⁴⁹

The Illinois Supreme Court, however, disagreed (again), saying that the tax deed petitioner's additional efforts of a title search, certified mail and personal visit to the property "exceeded" what was required by *Jones v. Flowers* and were "sufficient to satisfy due process under *Jones*."⁵⁰

From Flamm's point of view, *Lowe* was correctly decided because "there was no practical way for the tax buyer to know that she was in the hospital."⁵¹ In fact, Flamm said the OPG should have sought other forms of relief rather than continuing to stubbornly fight the case through the courts.⁵²

LOSING THE HOME DOESN'T MEAN THE FIGHT IS OVER, OR DOES IT?

When he was Public Guardian, Murphy supported legislation to prohibit a tax deed petitioner from taking possession of a home if the delinquent taxpayer had a mental illness.⁵³ Other legislative efforts to assist older homeowners who might be at risk included an effort to require the tax deed petitioner to serve notice to the OPG during the redemption period and an effort to enhance the notice requirements.⁵⁴ Those efforts have largely been unsuccessful, making litigation all the more important.

According to Golbert, cases like Essie J's represent a fight to enforce the law as much as they do to fight for justice and equity.⁵⁵ Even though Essie J had been living in a nursing home for nearly eight years, Golbert believes the fight to protect her rights was well worth the effort.⁵⁶

Sullivan agreed, saying that "as a matter of constitutional due process, it's just wrong that someone like Mary Lowe should lose her home."⁵⁷

In Illinois, however, the Supreme Court saw things differently, and without legislative, administrative or any other changes to protect elderly and incompetent homeowners, the balance will likely continue to be tipped in the tax deed petitioner's favor.

NOTES

- 1 Order Sustaining Public Guardian's Objections, Aug. 12, 2005. In the matter of the application of the County Collector (Sabre Group, LLC for Tax Deed, Pet'r; Robert F. Harris, Cook County Public Guardian as Plenary Guardian of the Estate and Person of Essie J, a Disabled Person, Resp't).
- 2 As a summer clerk with the Cook County Office of the Public Guardian, I had the opportunity to argue the Essie J case and see firsthand how the tax deed petitioner attempted to cast aside any meaningful responsibility for providing adequate notice. In large part, the attorney's arguments were based on a "hear no evil, see no evil, speak no evil" theory—a line of argument soundly rejected by the court.
- 3 When a homeowner in Illinois fails to pay her taxes, the County Collector can "sell" the taxes at auction. See 35 ILCS 200/21-260 *et seq.* Following the sale, the homeowner has two years to "redeem" the property, i.e. pay the outstanding taxes along with a penalty depending on the amount of time that has lapsed between the sale of the taxes and the redemption. See 35 ILCS 200/21-260(f).
- 4 Telephone interview with Daniel Belko, Supervising Attorney in Adult Guardianship Division, Cook County Office of the Public Guardian. (Oct. 24, 2008). The interview was supplemented by an e-mail conversation with Belko on October 30, 2008. Copy on file with author.
- 5 *Id.*
- 6 In the matter of the application of the County Collector (Sabre Group, LLC for Tax Deed, Pet'r; Robert F. Harris, Cook County Public Guardian as Plenary Guardian of the Estate and Person of Essie J, a Disabled Person, Resp't) at 4. (Filed Aug. 8, 2008)
- 7 See generally, 35 ILCS 200/22-5 *et seq.*
- 8 Belko interview, *supra* note 4.
- 9 Telephone interview with Judge Patrick Murphy (Oct. 15, 2008).
- 10 Table 2-9 "Household Composition—Occupied Units." American Housing Survey for the Chicago Metropolitan Area in 2003. U.S. Dept. of Housing and Urban Development and U.S. Census Bureau.
- 11 Telephone interview with Becky Lerflet, Assistant Director, PLOWS Council on Aging. Nov. 10, 2008. Also see www.plows.org
- 12 *Id.*
- 13 *Id.*
- 14 Telephone interview with Diane Slezak, Chief Operating Officer, Age Options. Sept. 26, 2008.
- 15 *Id.*
- 16 Press release, Maria Pappas, Cook County Treasurer. "43,000 Property Owners Face Auction of \$127 million in Unpaid Taxes in August." (July 24, 2008). Available at <http://www.cookcountytreasurer.com/NewsDetail.aspx?ntopicid=395>
- 17 Press release, Maria Pappas, Cook County Treasurer. "Pappas Says Fewer Property Owners Face Tax Sale." (June 27, 2005). Available at <http://www.cookcountytreasurer.com/NewsDetail.aspx?ntopicid=276>
- 18 Murphy interview, *supra* note 9.
- 19 *Id.* Also, see Belko interview, *supra* note 4.
- 20 Telephone interview with Matt Flamm (Nov. 17, 2008)
- 21 *Id.* Part of the "balance" Flamm highlighted is the Illinois indemnity fund, which provides that a homeowner who loses her home through the tax deed process may be entitled to equitable relief up to \$99,000, or more if the homeowner was without "fault or negligence." See 35 ILCS

- 200/21-305. Attorneys with the Cook County Public Guardian's office also pointed to the indemnity fund as a source of potential relief.
- 22 *In re Orsus*, 188 Ill. App. 3d 1068, 1069 (1st Dist. 1989).
- 23 *Id.* at 1069-70.
- 24 *Id.* at 1070.
- 25 Murphy interview, *supra* note 9.
- 26 *Id.*
- 27 *Id.*
- 28 *See generally*, 35 ILCS 200/22-5 *et seq.*
- 29 IL Const. Art. IX, §8(a).
- 30 IL Const. Art. IX, §8(b).
- 31 *Jones v. Flowers*, 359 Ark. 443, 454 (2004).
- 32 Press release, Public Citizen. "U.S. Supreme Court Ruling Is Major Victory for Due Process Rights; State Did Nothing to Notify Owner of Tax Sale After Mail Was Returned Undelivered." (April 26, 2006).
- 33 *Jones v. Flowers*, 547 U.S. 220, 225 (2006)
- 34 Telephone interview with Michael Kirkpatrick, attorney with Public Citizen Litigation Group (Sept. 26, 2008).
- 35 *Id.*
- 36 *See* In the matter of the application of the County Collector (Sabre Group, LLC for Tax Deed, Pet'r; Robert F. Harris, Cook County Public Guardian as Plenary Guardian of the Estate and Person of Essie J, a Disabled Person, Resp't) (Filed March 21, 2008).
- 37 *Id.* Exhibit B.
- 38 *Id.* Exhibit A at 9.
- 39 Kirkpatrick interview, *supra* note 34.
- 40 *See generally*, *Apex v. Lowe*, 225 Ill. 2d 208 (2007).
- 41 In the matter of the application of the County Collector (Apex Tax Investments, Inc., Pet'r; Patrick T. Murphy, Cook County Public Guardian and Supervised Administrator of the Estate of Mary Lowe, Resp't), Resp't Br. at 1.
- 42 *Id.*
- 43 *See generally*, *Apex v. Lowe*, 217 Ill. 2d 1 (2005).
- 44 Telephone interview with Charles Golbert, Deputy Public Guardian (Sept. 24, 2008).
- 45 Interview with Barry Sullivan, attorney, Jenner and Block, Chicago, IL (Oct. 8, 2008).
- 46 *Id.* Also see APEX brief at 14.
- 47 *Supra* note 39 at 2.
- 48 Sullivan interview, *supra* note 45.
- 49 *See Estate of Mary Lowe v. Apex*, 547 U.S. 1145 (2006).
- 50 *Supra* note 40 at 229.
- 51 *Supra* note 20.
- 52 *Id.*
- 53 Terry Stephen, "An Unreasonable Man." *Northwestern Magazine*. Fall 2004. Available at <http://www.northwestern.edu/magazine/northwestern/fall2004/features/murphy/index.htm>
- 54 Golbert interview, *supra* note 44.
- 55 *Id.* Also see Belko interview, *supra* note 4. Both Golbert and Belko emphasized that while Essie J "won" her case, the fact that she had been living in a skilled nursing facility for nearly eight years meant that she had public aid liens of more than \$100,000 on her home. Yet, they both firmly believed it was important to litigate the case not only for the principles involved, but because Essie J deserved their best efforts.

56 Golbert interview, *supra* note 44.

57 Sullivan interview, *supra* note 45.