



First American

# The Oklahoma Terrain

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## TAX DEEDS UNWRAPPED AND SIMPLIFIED

**Take time to understand the result of not paying your property taxes!**

### A. TAX DEEDS IN GENERAL

Acquiring properties by tax deed has become very popular with many investors over the last twenty (20) years. It seems that everyone is looking for a good deal. With tax deeds, however, this paper will illustrate that our search for a “pearl in an oyster” may very well turn into a “pig in a poke” if proper steps are not followed and good legal counsel is not obtained. The purposes of this paper are to explain the tax deed process and to reveal some of the pitfalls and risks.

The primary goal of Ad Valorem taxes is to raise revenue.<sup>1</sup> “Ad valorem” literally means “according to value”. With the power to tax real property according to its value, comes the power to employ effective coercions and inducements to insure collection.<sup>2</sup> The sale of real property for delinquent taxes is a collection device, which is intended as a sufficient consequence to coerce the owner into paying the taxes.<sup>3</sup> “One of the burdens of owning property is the payment of taxes, and it is but natural and normal that one who cannot or will not pay his proper taxes cannot continue to own the property.”<sup>4</sup>

Oklahoma has a full and comprehensive system to sell real property for taxes that is authorized in OKLA. STAT. tit. 68 § 3106 et seq (2001). These are forfeiture statutes, which divest the owner of title. The county treasurer is the entity that does the collection for the Ad Valorem taxes. They are also charged with the duty to sell the real property for taxes, special assessments and costs, including personal property taxes.

Ad Valorem taxes for 2006 become delinquent on the first day of January 2007. If half the taxes are paid by this date then the remaining half become delinquent April 1, 2007. If the taxes are not paid by these times then the county treasurer begins the process enabling them to sell the property.<sup>5</sup> The end result of the process will be one of three types of deeds issued by the county: (1) Certificate Deed; (2) Resale Deed; or a (3) Commissioners Deed.

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<sup>1</sup> N. COLVER KENYON, STATUS OF OKLAHOMA TAX TITLES (1954).

<sup>2</sup> Id. at 286.

<sup>3</sup> Id.

<sup>4</sup> Welch, J., dissenting in *Lind v. McKinley*, 196 Okla 4, 9, 161 P.2d 1016, 1021 (1945).

<sup>5</sup> OKLA. STAT. tit. 68 §3107 (2001).

## B. CERTIFICATE SALE

The **certificate sale** is conducted on the first Monday in each October at the treasurer's office.<sup>6</sup> In order to sell the real property for failure to pay the Ad Valorem taxes the county treasurer has to give proper notice to the proper parties of the sale. The purpose of the notice is to warn property owners that they may lose their property and to provide information to prospective bidders.<sup>7</sup> Section 3106 sets out the requirements of the notice. The county treasurer has to give notice by publication two times for two consecutive weeks.<sup>8</sup> The notice must state the time and place of sale, list of the real property to be sold, the names of the last record owner as reflected by the county treasurer's records, and amount of taxes due.<sup>9</sup> The notice must contain the language that "The sale hereby advertised is conditional and subject to a two-year right of redemption by the record owner...."<sup>10</sup> The notice must further contain language informing the taxpayer of the provisions of Section 3104. This Section was amended November 1, 2003 and it sets out an exemption from the tax sale if certain conditions are met.<sup>11</sup> Counties with a population in excess of One hundred thousand (100,000) shall not conduct a tax sale if five conditions are met: 1) property is a single-family residential dwelling; 2) resident is sixty-five (65) years of age or older or is disabled; 3) property is not currently used as a rental property; 4) resident's annual income does not exceed the HHS Poverty Guidelines; and 5) fair market value does not exceed One Hundred Twenty-five Thousand Dollars (\$125, 000).<sup>12</sup> Lastly the county treasurer must give notice by certified mail to the record owner as shown by the last tax rolls.<sup>13</sup>

On the day of the sale the first person that offers to pay the full amount due is considered the successful purchaser.<sup>14</sup> The person who owes the taxes cannot be a purchaser, directly or indirectly.<sup>15</sup> The treasurer then has to file a return on or before the last day of October following the sale.<sup>16</sup>

## C. TAX CERTIFICATES

At the time of the sale the purchaser does not obtain a deed from the county but a **tax certificate**. Section 3111 sets out the form for the certificate. The certificate describes the property purchased, the amount paid and the date when the purchaser is entitled to a deed.<sup>17</sup> The purchaser has a lien on the

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<sup>6</sup> Id.

<sup>7</sup> *Schuman v. Moses*, 193 Okla. 694, 146 P.2d 290 (1944).

<sup>8</sup> OKLA. STAT. tit. 68 §3106 (2001).

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id. at §3105.

<sup>12</sup> Id.

<sup>13</sup> Id. at §3106.

<sup>14</sup> Id. at §3108.

<sup>15</sup> *Akin v. Loudder*, 201 Okla. 47, 200 P.2d 763 (1949).

<sup>16</sup> OKLA. STAT. tit. 68 §3109 (2001).

<sup>17</sup> Id. at §3111.

property for the delinquent taxes and any subsequent taxes he pays plus interest.<sup>18</sup> The certificate does not pass legal title and the purchaser cannot go into possession of the property.<sup>19</sup> However, the purchaser does have an equitable interest<sup>20</sup> and the certificate is assignable.<sup>21</sup>

The person holding a tax certificate must wait two years from the date of the original certificate sale before a deed can be acquired. The certificate holder should pay the taxes due in this two-year period. During this time period "[t]he owner of any real estate sold for taxes, or any person having a legal or equitable interest therein, may redeem the same from the lien from the tax sale at any time before the execution of the deed...."<sup>22</sup> Having a legal or equitable interest means that any mortgagee or lien holder, is included in this two year right of redemption. If the owner or mortgagee pays the taxes due during the two year redemption period, then the certificate is **redeemed**. The individual certificate holder is then entitled to the amount of redemption, which is the sum paid to the county treasurer for the certificate, plus any taxes paid and endorsed, together with 8% interest from the date of the sale.<sup>23</sup>

#### **D. CERTIFICATE TAX DEEDS**

If the real property has not been redeemed within the two year time period then the certificate holder must serve a written notice on the owner, either by process server, by the sheriff or by restricted certified mail with return receipt requested. If the owner is within the state, upon the person in possession and all mortgagees and lien holders of record and a return made before a certificate tax deed can be issued.<sup>24</sup> The notice "shall recite the sale of the said lands, specifying the date of such sale and notifying such person that unless redemption is made from such sale within sixty (60) days after the date of the service of such notice, a tax deed will be demanded...."<sup>25</sup> This notice gives the owner and mortgagee one more chance to redeem the property.

If the owner or any mortgagee or lien holder are nonresidents or residence or place of business is not know to the certificate holder and cannot be ascertained with the exercise of reasonable diligence, then service can be made by publication.<sup>26</sup> The notice must be published for three consecutive weeks in the county where the property is located.<sup>27</sup> If the property is homestead, then the certificate holder must cause notice of sale to be posted on the front door of the property by the county sheriff at least

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<sup>18</sup> Id.

<sup>19</sup> *Allis-Chambers Mfg. Co. v. George*, 369 P.2d (Okla. 1962).

<sup>20</sup> *Eager v. Pugh*, 123 Okla. 207, 253 P. 41 (1927).

<sup>21</sup> OKLA. STAT. tit. 68 §3111, 3112 (2001).

<sup>22</sup> Id. at §3113.

<sup>23</sup> Id.

<sup>24</sup> Id. at §3118.

<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> Id.

thirty (30) days prior to such deed being issued.<sup>28</sup> The owner or mortgagee has sixty (60) days from the date of first publication to redeem.<sup>29</sup> If the property is not redeemed within the sixty (60) days, then a certificate tax deed will be issued to the certificate holder.<sup>30</sup> Section 3120 sets out the form for the certificate tax deed.

This prescribed manner of service of notice is mandatory and not discretionary.<sup>31</sup> Giving notice to the owner is a prerequisite to the right to demand a tax deed.<sup>32</sup> "The deed shall vest in the grantee an absolute estate in fee simple in said lands,... and shall extinguish the rights of any mortgagee of record of said lands to whom notice was sent..."<sup>33</sup> If proper notice is given to all the required parties then their rights are extinguished.<sup>34</sup> If improper notice is given to the mortgagee then the lien is not extinguished.<sup>35</sup> However the improper notice to the mortgagee does not invalidate the certificate tax deed; the tax deed is still valid, but is subject to the outstanding mortgage.<sup>36</sup> There is a statute of limitation of seven (7) years for a certificate holder to have a tax deed issued.<sup>37</sup>

## **E. RESALE TAX DEEDS**

If there is not a purchaser at the certificate sale in October then the county treasurer is authorized to purchase the property.<sup>38</sup> This maintains the lien on the real property and while the county treasurer holds the certificate the taxes are still unpaid.<sup>39</sup> The owner or mortgagee has the same two year right of redemption as when the certificate is sold to an individual. When the county treasurer is the holder of the certificate and the property is redeemed then the sum paid is the amount the property sold and 12% penalty and any additional cost that may accrue.<sup>40</sup> If the property is not redeemed within the two year period, then the county treasurer will sell the property at a resale, which is held the second Monday of June each year.<sup>41</sup>

The county treasurer has to give notice of this resale. The notice must state the time and place of sale, the real property to be sold, names of the last record owners as reflected by the county treasurer's records, a statement of the date on which the property was sold to the county and that the property has

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<sup>28</sup> Id.

<sup>29</sup> Id.

<sup>30</sup> Id.

<sup>31</sup> *Farmers' Nat'l Bank of Oklahoma City v. Gillis*, 155 Okla. 290, 9 P.2d 47 (1932); *Martin v. Bastion*, 424 P.2d 1 (Okla. 1967); *Wells Fargo Credit Corp. v. Selby*, 26 P.3d 774 (Okla. 2001).

<sup>32</sup> *Webster V. Skinner*, 200 Okla. 553, 198 P.2d 213 (1948).

<sup>33</sup> OKLA. STAT. tit. 68 §3118 (2001).

<sup>34</sup> *Schulman v. Jones*, 192 Okla. 65, 133 P.2d 747 (1943).

<sup>35</sup> OKLA. STAT. tit. 68 §3118 (2001); *Adams v. Rogers*, 158 Okla. 163, 13 P.2d 170 (1932).

<sup>36</sup> Id.

<sup>37</sup> Id. At §3117.

<sup>38</sup> Id. at §3108.

<sup>39</sup> *Muskogee Times Democrat v. Board of Comm'rs of Muskogee County*, 76 Okla. 188, 184 P. 591 (1919).

<sup>40</sup> OKLA. STAT. tit. 68 §3113 (2001).

<sup>41</sup> Id. at §3125.

not been redeemed in the two (2) year period since the date of the sale.<sup>42</sup> Further the notice must state the amount of taxes, costs, penalties and interest accrued and a statement that the property will be sold to the highest bidder.<sup>43</sup> Notice must be given by certified mail to the owner and all mortgagees of record.<sup>44</sup> The notice must also be published four (4) consecutive weeks in the county.<sup>45</sup>

"If the county treasurer does not know and cannot, by the exercise of reasonable diligence, ascertain the address of any mortgagee of record..." then an affidavit must be filed stating these facts.<sup>46</sup> This affidavit along with the publication shall suffice to give any mortgagee of record notice of the resale.<sup>47</sup> If the property is homestead then notice must be posted on the front door of the property by the county sheriff at least thirty (30) days prior to the resale.<sup>48</sup> If improper notice is given to the mortgagee then the lien is not extinguished.<sup>49</sup> However the improper notice to the mortgagee does not invalidate the certificate tax deed.<sup>50</sup> Within thirty (30) days after the resale the county treasurer must file a return and deliver to the purchaser a **resale tax deed**.<sup>51</sup> Section 3132 sets out the form for the resale tax deed

## F. COMMISSIONERS DEED

If there is not a purchaser at the resale in June then the county treasurer will bid in the name of the county.<sup>52</sup> The county treasurer will then issue a deed to the Board of County Commissioners.<sup>53</sup> If anyone would like to purchase the property from the county then he must file a written bid with the county treasurer. Once a bid is received then the county treasurer will have a notice published three (3) consecutive weeks in the county where the property is located.<sup>54</sup> The notice shall contain the legal description, amount of bid, name of bidder, and the sale date.<sup>55</sup> On the day of the sale the property will be sold to the highest bidder.<sup>56</sup> Upon approval of the board of county commissioners a **Commissioners Deed** will be issued to the purchaser of the property.<sup>57</sup> A Commissioners Deed can be executed immediately after the commissioners' approval.

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<sup>42</sup> Id. at §3127.

<sup>43</sup> Id.

<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> Id.

<sup>48</sup> Id. at §3127.1.

<sup>49</sup> Id. at §3127.

<sup>50</sup> Id.

<sup>51</sup> Id. at § 3131.

<sup>52</sup> Id. at §3129.

<sup>53</sup> Id.

<sup>54</sup> Id. at §3135.

<sup>55</sup> Id.

<sup>56</sup> Id.

<sup>57</sup> Id.

## G. PRIORITY LIENS

Sections 3118 and 3142 provide that state liens are not extinguished by tax deeds. The tax deed vests the grantee with a fee simple estate "subject however, to all claims which the state may have on said lands for taxes or other liens or encumbrances...."<sup>58</sup> The purpose behind this is that the state should not have to pay taxes to itself to protect its interest in the property.<sup>59</sup> Examples of state liens include mortgages to the Commissioners of the Land Office and Oklahoma Tax Commission liens. Federal Tax liens are also not extinguished by tax deeds.<sup>60</sup>

Special assessment liens are not canceled by sale and re-sale of assessed property for delinquent Ad Valorem taxes unless such liens are included in notices of tax sales.<sup>61</sup> This is also true of city liens such as cleaning and mowing liens and dilapidated structure liens. The liens must be included in the amount of the delinquent taxes or they will not be extinguished.<sup>62</sup>

## H. THE REQUIREMENT FOR QUIET TITLE ACTIONS AND RECENT CASES

When examining an abstract an attorney will usually only see the tax deed. The abstract will not contain any evidence of the statutory notices discussed above. This fact, and the fact that state liens are not extinguished by the sale and special assessments may not be included in the sale, is what leads to a requirement for a quiet title action.

An action to "quiet tile" is a proceeding in court to establish the plaintiff's title to land by bringing into court all possible adverse claimants and thereby compelling such claimants to establish their claims or to be forever estopped from asserting it.

"[T]he road to a valid tax deed is like walking through a mine field, with all sorts of potential 'defects' lurking about...."<sup>63</sup> Another strong factor is the Oklahoma case law within the last several years that have declared certificate and resale tax deeds void because of defective notice.<sup>64</sup> The cases have held that by setting aside the tax deed as void the legal redemption period is reinstated.<sup>65</sup> Also, the Oklahoma Appeals Court has held without proper notice the county treasure is without jurisdiction to sell or resale the property and the tax deed is void, further the taxpayer is not barred from attacking the deed by any statute of limitations, including the one (1) year set out in Section 3141.<sup>66</sup> This holding suggests that the five (5) year statute of limitations set out in Section 93 may not be available either.<sup>67</sup>

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<sup>58</sup> Id. at §3118.

<sup>59</sup> *Comm'rs of Land Office v. Board of Com'rs of Nowata County*, 166 Okla. 78, 25 P.2d 1074 (1933).

<sup>60</sup> 26 U.S.C. §6323.

<sup>61</sup> *Holloway v. Davis*, 261 P. 2d 217 (Okla. 1953).

<sup>62</sup> OKLA. STAT. tit. 68 §3105 (1992); *Bradford v. Schmucker*, 135 F.2d 991 (Okla. 1943); *Holloway v. Davis*, 261 P. 2d 217 (Okla. 1953).

<sup>63</sup> Tinney, *Certificate Tax Deeds: Title Examination and Problems Affecting Validity*, 59 OKLAHOMA BAR JOURNAL 1408 (1988).

<sup>64</sup> *Stottlemire v. Haworth*, 957P.2d 131 (Okla. 1997); *Berkeley Federal Bank & Trust v. Selby*, 969 P.2d 369 (Okla. 1998); *Kester v. Ives*, 960 P.2d 865, (Okla. 1998); *Wholesale Petroleum Co. v. Chartin*, 972 P.2d 1184 (Okla. 1998); *Shamblin v. Beasley*, 967 P.2d 1200 (Okla. 1998); *Decker v. James*, 176 P.3d 1131 (Okla. 2000); *Wells Fargo Credit Corp. v. Selby*, 26 P.3d 774 (Okla. 2001).

<sup>65</sup> Id.

<sup>66</sup> *Wholesale Petroleum Co. v. Chartin*, 972 P.2d 1184 (Okla. 1998); Moershel, *Marketable Title and the Resale Tax Deed*, Oklahoma City Real

Based upon these factors, most attorneys will not pass title without a quiet title action. There is no way to guarantee that all the statutory notices and requirements were met from looking at the abstract. The facts must be proved in court and the parties affected be given notice and an opportunity to be heard.

Most title insurance companies, however, will “insure” a title derived from tax sale proceedings if the tax deed has been of record for more than ten years, based upon the Oklahoma Land Simplification of Titles Act and the Oklahoma Title Examination Standards. Standard 29-1 states:

The Simplification of Land Titles Act, 16 O.S.A. §§61-63, 66, protects any purchaser for value, with or without actual or constructive notice, from one claiming under a conveyance or decree recorded or entered for ten (10) years or more in the county, as against adverse claims arising out of

D. \* \* \* (5) certificate tax deeds or resale tax deeds executed by the county treasurer, as against . . . . owners or claimants of land subject to tax deeds.

The United States Supreme Court recently ruled in a case involving a tax deed in Arkansas that has had many real property lawyers talking. The case is Jones v. Flowers, 126 S.C. 1708, decided April 26, 2006. Mr. Jones continued to pay the mortgage on his Arkansas home after separating from his wife and moving elsewhere in the same city. Once the mortgage was paid off, the property taxes — which had been paid by the mortgage company — went unpaid, and the property was certified as delinquent.

The Commissioner of State Lands mailed Jones a certified letter at the property's address, stating that unless he redeemed the property, it would be subject to public sale in two years. Nobody was home to sign for the letter and nobody retrieved it from the post office within 15 days, so it was returned to the Commissioner, marked "unclaimed."

Two years later, the Commissioner published a notice of public sale in a local newspaper. No bids were submitted, so the State sold the property to Flowers. Before selling the house, the Commissioner mailed another certified letter to Jones, which was also returned unclaimed. Flowers purchased the house and had an unlawful detainer notice delivered to the property. It was served on Jones' daughter, who notified him of the sale. Jones then filed a quiet title suit, alleging that the Commissioner's failure to provide adequate notice resulted in the taking of his property without due process.

Jones lost his battle in state court and appealed to the U.S. Supreme Court. The question was whether the Due Process Clause of the U.S. Constitution requires the government to take additional reasonable steps to notify a property owner when notice of a tax sale is returned as undeliverable.

The U.S. Supreme Court commented that Mr. Jones should have been more diligent with respect to his property “no question. People must pay their taxes, and the government may hold citizens accountable for tax delinquency by taking their property. But before forcing a citizen to satisfy the debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking.” The Supreme Court finally reversed the ruling of the state court, concluding that the Commissioner’s efforts to provide notice to Jones of the impending tax sale of his house was insufficient to satisfy due process given the circumstances of this case.

The Oklahoma Court of Appeals also recent weighed in on the subject of tax deeds in a case decided in August 2006. In the case of Clark v. Fragomeni, 2006 OK CIV APP 111, Clark purchased the property in question at a Sheriff’s Sale on May 27, 2004, in a foreclosure action filed by U.S. Bank, N.A. against Amber Swinford, the then owner of the property. Prior to the foreclosure action, the ad valorem taxes were unpaid and, as Oklahoma law provides, the property was sold at Sheriff’s Sale subject to the unpaid ad valorem taxes.

Fragomeni purchased the tax certificate for the property on May 20, 2003. A Certificate Tax Deed was issued to Fragomeni on April 27, 2005.

On July 1, 2005, Clark filed an action to quiet title in himself as against Fragomeni, based upon the Sheriff’s Deed that he purchased. Fragomeni counterclaimed with an action to quiet title in himself as against Clark based upon the Tax Deed.

Neither Fragomeni nor the County was named as a defendant in the foreclosure action. Similarly, Clark was not given notice by Fragomeni in the Notice for Application for Tax Deed. The question then became, who wins as between these two competing “owners” of the property.

The Oklahoma Court of Appeals stated:

. . . failure to give proper notice of a tax resale to a mortgagee of record render(s) the tax deed ineffective to extinguish the mortgage . . . neither the failure to send notice to any mortgagee of record of said real estate, nor failure to receive notice as provided . . . shall invalidate the resale.”

In other words, the tax deed is valid, but is subject to the mortgage. Because the Bank (Clark’s predecessor in interest) was not given notice of the tax resale, the Tax Deed failed to extinguish the Bank’s mortgage and therefore, Fragomeni took title subject to the Bank’s interest.

A party who buys land at sheriff’s sale buys at his peril and takes no better title than that passed by the foreclosure judgment. Clark, who purchased the property at the foreclosure sale,



could only receive the residuum of title held by the Bank, i.e. Clark received all the estate, right, title and interest which the judgment debtor, Bank, had in the mortgage (the unpaid balance), and nothing else.

The Court of Appeals affirmed the lower court to quiet title in Fragomeni, subject to the outstanding balance of the mortgage (the interest held by Clark).

## I. CONCLUSION

Because the bulk of the administrative proceedings leading up to the forfeiture of property for non-payment of ad valorem taxes are hidden from public review and examination, titles to these properties are not considered “marketable” until one final step is taken to assure that the property owner’s rights to due process have not been violated. That one final step is usually the proper prosecution and completion of a suit to “quiet” the title in the tax deed holder, based upon proper due process – notice and opportunity to be heard – being provided to the prior owner and lienholders.<sup>68</sup>

This past month, the Oklahoma Bar Association adopted the following standard:

### **Standard 29.2.1. Reliance on Certificate Tax Deed or Resale Tax Deed:**

A title examiner may rely, without further requirement, on a certificate tax deed or resale tax deed as a conveyance of the real property described in such deed, provided:

- A. title to such real property is, or has been, held of record by a purchaser for value who acquired such title from and through the grantee in such tax deed; and,
- B. such certificate tax deed or resale tax deed has been of record in the county in which the land is situated for a period of not less than ten years.

*Authority: 16 O.S. Section 62(d).*

*Caveat: The title acquired via a certificate tax deed or resale tax deed may be subject to the interest of any person in possession of the land claiming title adversely to the title acquired through such deed. 16 O.S. Section 62(d). Also see the following unpublished case: Johnson v. Augusts, 2005 OK CIV APP 97.*

### **Publication**

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