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Legislative Remedies for the Injustice of D.C.'s Real Property Tax Sale System

BY ROCHELLE BOBROFF

Even legal punishments lose all appearance of justice, when too strictly inflicted on men compelled by the last extremity of distress to incur them.

—Junius [pseudonym, possibly of Sir Philip Francis], The Letters of Junius (2 vols.) (1772)

Most states recoup arrearages in real property taxes by selling the property through a tax lien foreclosure process that extinguishes the homeowner's equity.[1] Tax sale procedures vary across states and in some states also fluctuate by locality.[2] In general, the state places a lien on the home for the amount of taxes owed and sells the tax lien to a private purchaser. Homeowners can redeem their property by paying the tax lien purchaser the purchase price plus interest, penalties, and costs, within a time frame. At the conclusion of that grace period, the purchaser can file a foreclosure action to obtain the title to the home. Then the homeowner must also pay attorney fees to prevent foreclosure. Following foreclosure, the tax lien purchaser repays the government the outstanding tax, acquires the title to the home, expels the prior homeowner, and reaps the balance of the accumulated equity. While loss of homes due to tax foreclosure has long been a problem for low-income homeowners, the revision of overly punitive state laws is an emerging area of focus for consumer advocates.

In some cases, states have subjected properties to a tax sale without effective notice to owners, who may not even be aware that they are deemed in default. The U.S. Supreme Court has held federal due process requirements to be applicable; for example, the Court invalidated an Arkansas procedure of relying on publication of a tax sale in a newspaper when certified mail was returned unclaimed.[3]

However, many courts have held that the Constitution is not offended when states wipe out an entire lifetime of savings to recover a small tax debt. While several judges have acknowledged the ruthlessness of state procedures, the judiciary has concluded that responsibility for a remedy lies with state legislatures. For example, in a case rejecting a constitutional challenge to an Illinois statute, the federal district court stated: "The total forfeiture seems extremely harsh when overdue taxes amount to only two or three percent of the property's value. But oppressive statutes must be tempered by the legislature, not the courts."[4]

For low-income older individuals who are retired, rising property taxes are often a financial challenge, especially in urban areas where property values are skyrocketing. The rate of increase in property taxes can far outstrip inflation for multiple consecutive years.[5] Working individuals are more likely to be able to afford these increases, especially when wages rise faster than inflation, as they did in 2014.[6] Yet social security cost-of-living adjustments are calculated to keep pace with, not exceed, inflation.[7] Over half of low-income

1 According to the National Consumer Law Center, only a few states have procedures protecting owners' equity interests (John Rao, National Consumer Law Center, The Other Foreclosure Crisis: Property Tax Sale Liens 4 (July 2012)).

2 One scholar notes that "there are over 150 different systems in the United States for collecting the property tax," with many states having at least two different procedures available to localities, and other states permitting each city or county to use its own system (Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Indiana Law Journal 747, 748 (2000)).

3 *Jones v. Flowers,* 547 U.S. 220, 234 (2006).

4 *Balthazar v. Mari Limited*, 301 F. Supp. 103, 106 (N.D. Ill. 1969). See also *Nelson v. New York City*, 352 U.S. 103, 110–11 (1956) ; *Catoor v. Blair*, 358 F. Supp. 815, 817 (N.D. Ill. 1973), aff'd, 414 U.S. 990 (1973); *Auburn v. Mandarelli*, 320 A.2d 22, 33 (Maine 1974).

5 For instance, a comparison of property taxes and inflation between 1990 and 2004 showed that property tax rates rose at more than twice the rate of inflation during that period (Andrew Kochera, AARP Public Policy Institute, State Housing Profiles: A Special Analysis of the Census Bureau's American Community Survey 7 (2006)).

6 The Bureau of Labor Statistics reported a 3 percent increase in wages from 2013 to 2014, compared to a 1.4 percent increase in inflation (see Peter Coy, *Good News: Wages Are Rising, and Inflation Is Still Low*, Bloomberg Businessweek (April 23, 2014)).

7 Social Security Administration, Cost-of-Living Adjustment (COLA) Information for 2015 (n.d.).

older persons rely upon social security for 90 percent or more of their family income.[8] Spiraling property taxes can be unmanageable for low-income individuals depending entirely upon social security income.

Health problems arise with greater frequency among low-income older persons and can be a contributing factor leading to debt.[9] For instance, a senior with dementia might forget to make a property tax payment. Similarly an extended hospitalization following a fall could result in a senior neglecting to pay property taxes. And unexpectedly high medical costs can drain the resources of older individuals on a fixed income.

When a homeowner falls behind in payments, many state statutes levy immediate penalties and impose high interest rate charges on the delinquent balance. Once the purchaser sues to foreclose the right to redeem and to obtain the title to the property, the owner must also pay the purchaser's attorney fees and other expenses relating to the lawsuit. These legal fees ratchet up the amount owed and make redeeming the property even harder for the homeowner.

Here I showcase the legislative reform—led by AARP Legal Counsel for the Elderly—of the District of Columbia tax sale statute.[10] Legal Counsel for the Elderly offers free legal services to Washington, D.C., residents 60 and older. The organization's Consumer Fraud and Financial Abuse Unit devoted the phenomenal efforts of supervising attorney Amy Mix and senior attorney Joanne Savage.[11] A key protagonist for change, the *Washington Post* printed front-page news stories featuring Legal Counsel for the Elderly's clients and quoting the organization's attorneys. When the blistering publicity spurred the D.C. Council to revise the statute, Legal Counsel for the Elderly was involved in drafting new provisions. The tax sale law adopted by the D.C. Council in April 2014 could be a valuable model for others.

Spiraling property taxes can be unmanageable for low-income individuals depending entirely upon social security income.

D.C.'s Problematic Tax Sale System

Legal Counsel for the Elderly became involved in the representation of clients at risk for tax sale beginning in 2009, when we secured a fellowship for an attorney focused on property tax problems. The fellow assisted seniors at risk of losing their homes and advocated on their behalf in the courts and with the local Office of Tax Revenue. The representation kept numerous seniors in their homes, and, with this track record, we were able to obtain ongoing funding for a staff attorney dedicated to tax sale work.

Yearly we offer representation in some 50 cases involving property tax foreclosure and the loss of real property tax credits. We are in the courthouse on the day that tax foreclosure sales are scheduled, and judges refer cases to us. If a senior does not appear, Legal Counsel for the Elderly is appointed as a "friend of the court" to help locate the senior and explore whether legal representation is feasible. The judges also require employees of the Office of Tax Revenue and their legal representative to be present in court on those days to facilitate immediate negotiations.

Legal Counsel for the Elderly has found that many homes were subjected to tax sale due to errors by the Office of Tax Revenue. For instance, the organization has represented clients for whom the Office of Tax Revenue issued inaccurate property tax bills. When the amount of the bill was erroneously too low, the client's home could be threatened with tax sale despite the client fully paying the bill. When the bill charged an amount too high, and a mortgage company paid that incorrect amount, clients were improperly charged for an escrow shortage; thus clients expended funds that would otherwise have been available to pay future property taxes. The Office of Tax Revenue failed to process payments made close to a deadline—a failure resulting in late fees and interest being assessed for timely payments and thus wrongly inflating the amount owed.

Even when the Office of Tax Revenue did not make errors, we observed that D.C.'s property tax sale system was flawed. First, the attorney fees charged to the homeowner were out of proportion to both the work done by the purchasers' attorneys and the amount of the debt. The bills charged by the attorneys were five to ten times the amount of the base tax debt. These bills averaged $5,000 for a formulaic debt collection case needing only minimal attorney work. In one case, a client was

8 Selena Caldera, AARP Public Policy Institute, Social Security, Who's Counting on It? 3 (March 2012).

9 According to the Centers for Disease Control and Prevention, not only are chronic illnesses more prevalent in adults over 65 but also chronic illnesses are more numerous in older individuals whose incomes are at or below the poverty level (Virginia M. Freid et al., National Center for Health Statistics, Multiple Chronic Conditions Among Adults Aged 45 and Over: Trends Over the Past 10 Years 3 (July 2012)).

10 For a complete recounting of the efforts of AARP Legal Counsel for the Elderly before passage of the legislation, see Amy Mix, *Saving Homes from Real Property Tax Foreclosure: Direct Services, Systemic Advocacy and the Power of the Press*, 28 Management Information Exchange Journal 37 (Spring 2014).

11 Amy Mix can be reached at amix@aarp.org; Joanne Savage at jsavage@aarp.org.

After a lifetime or several generations of fully paying property taxes, residents could lose all the equity in their homes when they fell behind by a few hundred dollars.

billed a whopping $14,000 for a routine tax sale matter. While our representation frequently succeeded in obtaining settlements to reduce these outrageous fees, those homeowners who did not qualify for our services (or obtain other legal representation) were likely to lose their homes as a result of unmerited attorney fees.

The attorney fees were also inflated by D.C.'s procedure of selling multiple tax liens in consecutive years for a single property. If the homeowner did not redeem the property within a year, D.C. would auction off the second year's taxes in the next year's annual sale. This process was unnecessary since either the foreclosing purchaser or the redeeming homeowner must pay all outstanding property taxes (including the subsequent year's taxes) in order to resolve the tax delinquency. By conducting multiple foreclosure sales on the same property, D.C. subjected homeowners to thousands of dollars in additional charges for attorney fees with virtually no benefit for the city.[12]

Moreover, D.C.'s notice failed to inform residents adequately of their rights and the procedures for redeeming their property. The pretax lien sale notice to owners was written in legalese, incomprehensible to individuals with a limited education. The notice failed to offer any suggestions of resources to assist the homeowner in navigating the legal process. Since there was no post-tax-lien-sale notice, the owners frequently would not know that the tax liens on their homes had indeed been sold until the purchasers' attorney served them with a foreclosure complaint, usually nine months or more after the presale notice. As a result, homeowners were unlikely to avail themselves of the six-month "grace period" following the sale of the tax lien, during which the owner could redeem the property without incurring substantial attorney fees. And the law offered no legal recourse if the required notices were not sent.

Worst of all, the statute extinguished the homeowner's equity and provided a huge and unfair windfall to purchasers. The injustice of this equity stripping was especially pronounced in cases involving minimal debts. After a lifetime or several generations of fully paying property taxes, residents could lose all the equity in their homes when they fell behind by a few hundred dollars.

Building Momentum for Change

Property taxes are the predominant tax source of funding for local governments.[13] Yet the collection of delinquent property taxes is an onerous task that many local governments prefer to pass onto private third parties.[14] States benefit financially by creating an easy and profitable system for private purchasers to recoup unpaid property taxes, such as D.C.'s system of allowing purchasers to gain all the equity in a home over the amount of outstanding property tax debt and fees.

To counter this financial incentive, Legal Counsel for the Elderly sought to build a coalition advocating legislative reform. The organization began by forming a pro bono partnership with a law firm, Crowell and Moring LLP, which had been staffing a court resource center giving information to homeowners about the foreclosure procedures. Together we formed a wider coalition, named AT HOME, the Alliance to Help Owners Maintain Equity. This coalition included other local legal aid providers, law firms, and nonprofit organizations. The coalition drafted legislation to remedy the problems with the tax sale system. The legislative proposal was introduced in the D.C. Council in late 2012 and reintroduced for the new session in January 2013. Before the D.C. Council during agency hearings open to public comment, Legal Counsel for the Elderly testified on the need for the legislative reform.[15] However, the D.C. Council took no action on the proposed bill for nine months.

Washington Post reporters attended the 2012 hearing in which Legal Counsel for the Elderly testified on the problems with the D.C. tax sale system. The intrigued journalists became interested in writing a feature story. They interviewed Legal Counsel for the Elderly attorneys and clients as part of their ten-month investigation.

For three days in September 2013, the front page of the *Washington Post* trumpeted the injustices of D.C.'s tax sale process. The series opened with the story of a 76-year-old whose belongings, including his

12 By selling the debt from subsequent years, Washington, D.C., did obtain the minimal benefit of collecting the outstanding tax debt slightly earlier. But that negligible public benefit is vastly outweighed by the burden imposed on the struggling homeowners, who would see already-daunting legal fees double and even triple when the taxes were sold in successive years.

13 U.S. Census Bureau, Quarterly Summary of State and Local Government Tax Revenue for 2012: Q4 (March 26, 2013).

14 Alexander, *supra* note 2, at 748.

15 In October 2012 Legal Counsel for the Elderly testified in a public oversight hearing on the problems with the Washington, D.C., tax sale system (Public Oversight Hearing: Real Property Tax Administration Before the Washington, D.C., Council Committee on Finance and Revenue (D.C. 2012) (statement of Amy R. Mix, Supervising Attorney, AARP Legal Counsel for the Elderly)).

The tax lien purchaser repays the government the outstanding tax, acquires the title to the home, expels the prior homeowner, and reaps the balance of the accumulated equity.

"Marine Corps medals and photographs of his dead wife," were "hauled to the curb" by "armed U.S. marshals, ... all because he didn't pay a $134 property tax bill."[16] The *Post* described D.C.'s tax sale system as a "predatory system of debt collection" and blasted "local leaders" for permitting "well-financed, out-of-town companies" to turn "$500 delinquencies into $5,000 debts" and then foreclose on homes.[17] In a subsequent article the *Post* chastised the Office of Tax Revenue for its multiple errors that "imperiled" homeowners: "one in every five liens has been sold by mistake, forcing the tax office to later cancel the sales—and pay hundreds of thousands of dollars to compensate the investors who bought them."[18]

The D.C. Council was propelled into action. Within a week of the *Washington Post* series, the Washington, D.C., mayor canceled the recently completed annual tax sale for all owner-occupant homeowners, and the council passed emergency legislation, freezing the sale of homes belonging to seniors, veterans, and the disabled.[19] The Council turned to Legal Counsel for the Elderly and its pro bono partners at Crowell and Moring for expert advice in drafting revised legislation. Legal Counsel for the Elderly recommended best practices from other states and the report from the National Consumer Law Center to protect homes from being unjustly taken.[20] Legal Counsel for the Elderly also proposed an innovative approach to protecting homeowners' equity.[21]

D.C.'s New Tax Sale Statute

The D.C. Council unanimously adopted Bill 20-23, the Residential Real Property Equity and Transparency Amendment Act of 2013, on April 8, 2014.[22] The bill contained virtually all the provisions suggested by Legal Counsel for the Elderly.

The most groundbreaking aspect of the bill is its protection of homeowners' equity. The bill eliminates the equity windfall to purchasers. After the owners' right to redeem the property is foreclosed, the superior court conducts a trustee sale of the property. When the home is sold, D.C. collects its past-due taxes. The purchaser of the tax lien recoups its interest, fees, and expenses as well as a reasonable return on investment. But all excess proceeds are returned to the homeowner, thus giving the homeowner the accumulated equity.[23]

The new statute safeguards homes from being sold to repay tax debts. No residential home may be sold unless the tax liability exceeds $2,500. The law caps attorney fees at $1,500 plus expenses. If the matter is unusually complex or prolonged, then the superior court has discretion to award additional attorney fees. The statute bars the sale in consecutive years of multiple liens on a single home, thereby further curbing attorney fees charged to the homeowner. The law also places restrictions on purchasers and excludes those who are delinquent in their own property taxes or have been convicted of criminal behavior involving fraud, deceit, moral turpitude, or anticompetitive behavior in D.C. or elsewhere.[24]

Procedures for notifying homeowners are greatly enhanced. The new law requires two presale notices that explain the ramifications of the tax sale in plain terms and list resources that can help the owner prevent the sale of the property. A postsale notice is required to be mailed within 30 days of the sale. A further safeguard is that purchasers are required to post a copy of the postsale notice on the property at least 45 days before a foreclosure suit is filed. The mayor is required to cancel the sale of an owner-occupied property if *any one* of the three required notices has not been sent. The mayor is also granted broad discretion to cancel sales of any other properties if D.C. does not mail the required notices to the correct address.[25]

The new statute has several measures intended to help property owners avoid the sale of their homes. It permits homeowners to apply for a one-year forbearance from sale; the forbearance must be granted to properties owing less than $7,500 when the application is made at least 30 days before the sale. The mayor has

16 See Michael Sallah et al., *Left with Nothing*, Washington Post, Sept. 8, 2013. See also Debbie Cenziper et al., *The Elderly at Risk*, Washington Post, Sept. 8, 2013. The complete series is available on the *Washington Post*'s website (see Homes for the Taking: Liens, Losses and Profiteers, Washington Post, Sept. 8–10, 2013).

17 Sallah et al., *supra* note 16.

18 Debbie Cenziper et al., *Mistakes Put Homes in Peril*, Washington Post (Sept. 10, 2013).

19 See Mike DeBonis, *Emergency Tax Sale Reforms Pass D.C. Council*, Washington Post (Sept. 17, 2013).

20 See Rao, *supra* note 1.

21 See Public Hearing on Proposals to Amend the Real Property Tax Sale Process in the District of Columbia Before the D.C. Council Committee on Finance and Revenue (D.C. 2013) (testimony of Amy Mix, Supervising Attorney, AARP Legal Counsel for the Elderly).

22 Residential Real Property Equity and Transparency Act of 2013, 61/32 D.C. Reg. 7763 (Aug. 1, 2014).

23 The statute provides that the "remainder" of the proceeds from the sale are distributed to the "person or persons entitled to the balance, in proper proportion as determined by the court" (*id.* (to be codified at D.C. Code § 47-1382.01(d)(4)(B))). In most cases the homeowner will receive the balance of the sale proceeds.

24 The second day of the *Washington Post* series exposed the corruption of many bidders (Debbie Cenziper et al., *Suspicious Bidding*, Washington Post (Sept. 9, 2013)).

25 Prior law gave the mayor discretion to cancel sales to prevent injustice (D.C. Code § 47-1366 (2014)).

discretion to grant a forbearance in any other case. The law expands access to the preexisting tax deferral program for senior citizens; for the first time seniors are permitted to defer previous years' taxes even after they have fallen behind on payments.

The law creates the office of a Real Property Tax Ombudsman within the Office of the Mayor. The ombudsman has extensive powers to assist homeowners facing foreclosure by working with legal aid providers, housing counseling services, and other D.C. agencies to corral all available resources to prevent sale.

The new statute had a sweeping impact on the tax sale conducted in July 2014. Legal Counsel for the Elderly analyzed data from the Office of Tax Revenue and found fewer homes that were subjected to tax sales.[26] The number of tax sales of properties coded as "senior" (meaning the Office of Tax Revenue records indicated that an individual 65 or older was occupying the property) fell more than 70 percent—from 26 in 2013 to just 7 in 2014. While seniors clearly benefited from the changes, other homeowners were helped as well. The sale of all "homestead" properties, owned by all age groups, was reduced by over half, from 81 in 2013 to 37 in 2014.

Holistic Advocacy to Reduce Tax Burdens

Besides representing seniors on the brink of losing their homes in tax foreclosure sales, Legal Counsel for the Elderly engages in preventive efforts by educating clients about the tax sale system and assisting seniors in reducing their tax bills through tax credits. We regularly visit senior centers and churches to talk about Legal Counsel for the Elderly's services, the tax foreclosure process, and local tax credits.

D.C. has a homestead property tax exemption for all homeowners and a separate senior reduction for people over 65.[27] Many of our clients who are having difficulty paying their tax bills have not been benefiting from these tax credits. In some cases they simply did not know of the availability of these credits or were discouraged by the need to complete the forms. In other cases the title to the property may have had a problem, such as the need to probate the property and obtain a new deed listing the client as the owner. We assist clients in filling out and filing forms needed to obtain the property tax credits, and, within our resources, we work to overcome any obstacles to obtaining the credits.

Moreover, D.C. has an income tax credit that is available only to low-income residents paying a significant portion of their income on housing costs.[28] D.C.'s tax credit, known as "Schedule H," will provide a tax rebate in 2014—or if no taxes are owed, then a cash payout—of up to $1,000.[29] The Schedule H credit is available to both homeowners and renters, utilizing the statutory presumption that 15 percent of rent is attributable to the landlord's property taxes. We have identified 22 other states with similar programs, offering varying amounts of a tax credit to low-income individuals paying a substantial proportion of their income on housing costs.[30]

D.C.'s Schedule H program is underutilized largely because individuals do not know about it.[31] Many of our clients are retired individuals whose only source of income is social security, and these low-income seniors do not need to file income tax returns. The Schedule H form is an attachment to the income tax return. People who do not need to file income taxes may not realize that they can get a check from D.C. for an income tax credit even though they do not pay any D.C. income taxes.

Legal Counsel for the Elderly screens clients for Schedule H eligibility. Case handlers check their cases to determine whether clients might be eligible for the Schedule H credit. Our hotline reviews the financial information of individuals who call about unrelated problems to see whether they could possibly qualify for Schedule H. Hotline attorneys refer to a chart that graphs income and either rent or property taxes, and the chart lets the hotline attorneys know whether the client might qualify for Schedule H. Using law school students supervised by a senior attorney, we contact clients to explain the

26 The data are on file at AARP Legal Counsel for the Elderly.

27 D.C. Code §§ 47-850; 47-850.01 (2014) (homestead); 47-863 (2014) (senior). The National Consumer Law Center reports that all states have some form of tax relief for older homeowners (Rao, *supra* note 1, at 19).

28 D.C. Code § 47-1806.06 (2014).

29 For more information about the efforts of AARP Legal Counsel for the Elderly to help clients obtain the Schedule H benefits and the organization's legislative advocacy to improve our Schedule H tax program, see Jennifer Berger & Rochelle Bobroff, *Helping Clients Afford High Housing Costs Through Real Property Tax Benefits*, 28 Management Information Exchange Journal 40 (Spring 2014).

30 Arizona, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, and Wisconsin provide a tax credit or tax rebate similar to the D.C. Schedule H Credit (see Ariz. Rev. Stat. Ann. § 43-1072 (2014); 320 Ill. Comp. Stat. 25/2 (2014); Iowa Code § 425.16 (2014); Kan. Stat. Ann. § 79-32,263 (2014); Me. Rev. Stat. tit. 36, § 6206 (program was terminated on Aug. 1, 2013); Md. Code Ann., Tax-Prop. § 9-104 (2006); Mass. Gen. Laws ch. 62, § 6 (2014); Mich. Comp. Laws § 206.522 (2014); Minn. Stat. § 290A.04 (2014); Mo. Rev. Stat. § 135.030 (2013); Mont. Code Ann. § 15-30-2338 (2014); N.J. Stat. Ann. § 54:4-8.59 (2007); N.M. Stat. Ann. § 7-2-18 (2003); N.Y. Tax Law § 606(e) (2014); Okla. Stat. tit. 68, § 2906 (1992); Or. Rev. Stat. § 310.635 (2003); 72 Pa. Stat. Ann. § 4751-24 (1996); R.I. Gen. Laws § 44-33-9 (2003); Utah Code Ann. § 59-2-1208 (2014); Vt. Stat. Ann. tit. 32, § 6066 (2014); W. Va. Code § 11-25-3 (2014); Wis. Stat. § 71.54 (2013)).

31 See Lindsay C. Clark, D.C. Fiscal Policy Institute, Property Tax Relief for D.C.'s Low-Income Residents: Improvements Needed in D.C.'s "Schedule H" Credit 7 (April 8, 2007).

Schedule H benefit, assess eligibility, and assist in filling out the tax form. We follow up with clients several weeks later to check whether the credit was received, and we advocate with the Office of Tax Revenue, as needed, if the credit is denied or unduly delayed. The Schedule H income tax credit not only helps homeowners afford property taxes but also helps renters avoid eviction for nonpayment of rent and generally assists low-income individuals in paying and preventing consumer debts.

In national surveys conducted in the past decade, Americans ranked the local property tax as the most unfair and most disliked tax.[32] Seniors losing their family homestead for failing to pay a small amount in property taxes and a large amount of attorney fees are highly sympathetic. We hope that our success in D.C. with a broad advocacy coalition and the power of the press can inspire others to advocate legislation that will reduce the tax burden on low-income seniors and improve unjust tax sale systems.

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32 Karlyn Bowman & Andrew Rugg, American Enterprise Institute for Public Policy Research, Public Opinion on Taxes: 1937 to Today 17–18 (April 2012).

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