



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 90- 129

Laurence A. Taylor
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P.O. Box 509
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Re: Taxation--Judicial Foreclosure and Sale of Real Estate by County--Disposition of Money Received in Excess of Lien

Synopsis: If a tract of real estate is sold at a tax foreclosure sale for more than the judgment lien and its share of the costs of the proceedings and sale, the excess proceeds shall be paid to the "owner or party entitled thereto" as determined by the court. In our opinion, the quoted phrase refers to the owner or party interested in the property prior to the sale rather than the person who acquired the property at the sale. Cited herein: K.S.A. 79-2801; 79-2802; 79-2803; 79-2804; 79-2804a; 79-2804c; 79-2804f; 79-2804h; 79-2805.

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Dear Mr. Taylor:

You request our opinion regarding distribution of the proceeds received in a tax foreclosure sale conducted pursuant to K.S.A. 79-2801 et seq. Specifically, the facts and question you present are as follows:

"Thomas County Kansas had a Tax Foreclosure Sheriff's Sale and received considerably more from the sale of a certain tract of real estate than the taxes, interest, penalties and costs

which were assessed against that tract of real estate. The whereabouts of the previous owners of the real estate are unknown or they have died without heirs at law.

"My question to you is whether the current owner who purchased the real estate at a tax foreclosure Sheriff Sale would be the 'owner or party entitled thereto' under the terms of K.S.A. 79-2803 or if the intent of that statute is that the excess funds go to the previous owner or his or her heirs at law or beneficiaries under a will."

K.S.A. 79-2803 states in part:

"If any lot, tract or piece of real estate sells for more than the judgment lien for the taxes, interest, penalty, and charges plus its share of the costs, charges and expenses of the proceedings and sale, such excess shall be ordered by the court paid upon due proof to the owner or party entitled thereto."

K.S.A. 79-2805 provides for the apportionment of the proceeds of a tax foreclosure sale held pursuant to K.S.A. 79-2804, or a subsequent sale held pursuant to K.S.A. 79-2804f, respectively:

"The balance equitably apportioned to each tract, lot or piece of real estate as provided in K.S.A. 79-2803, and amendments thereto, shall be paid by the clerk of the district court to the county treasurer, who shall prorate to each fund, if practicable, its proportionate interest in the entire lien for taxes and interest included in the foreclosure action. . . . If the proceeds of the sale of any particular tract, lot or piece of real estate sold by the board of county commissioners after the county has bid the same in at the tax foreclosure sale shall not equal or shall exceed the amount necessary to pay the entire lien for taxes, interest and costs which were included in the foreclosure action plus any and all subsequent taxes and special assessments and interest on said real estate due and unpaid at the time of such

sale, the amount collected shall be apportioned as follows:

"(a) First in the payment of the advertising, commission and other costs incident to the sale;

"(b) the balance prorated, if practicable to each fund, in proportion to its interest in the entire lien for taxes and interest which were included in the foreclosure action."

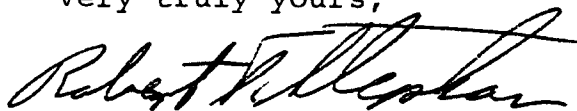
Pursuant to these two statutes, if property is sold at the tax foreclosure sale for an amount in excess of the judgment and costs of the proceedings and sale, the excess proceeds are to be paid "to the owner or party entitled thereto." If the property is bid in by the county at the tax foreclosure sale and later sold pursuant to K.S.A. 79-2804f, any excess proceeds are to be prorated, after payment of costs incident to the sale, to each taxing district fund in proportion to its interest in the tax lien which was the subject of the foreclosure action. Your question focuses on the situation where the property is sold at the tax foreclosure sale.

We note first that K.S.A. 79-2803 appears to contemplate the court making the determination as to who is "the owner or party entitled" to any excess proceeds from the sale. However, we believe the court may be assisted in its determination by other provisions of article 28 which support the position that it is the person who owned the property, or an interest therein, immediately prior to its sale who would be entitled to any excess proceeds under K.S.A. 79-2803. K.S.A. 79-2801 provides that the "parties" to an action initiated thereunder shall be the board of county commissioners and "the owners or supposed owners of the real estate and all persons having or claiming to have any interest therein or thereto." The petition filed pursuant to K.S.A. 79-2801 "shall request that the court determine . . . the name of the owner or party having any interest therein." See also K.S.A. 79-2802; 79-2804. All these determinations are made prior to the sale. In contrast, the statutes consistently refer to the person or entity acquiring the property at the tax foreclosure sale as "the purchaser." See K.S.A. 79-2804; 79-2804a; 79-2804c; 79-2804h. Thus, the statutes use the terms owner or interested party when referring to those persons having an interest in the real estate before it is sold, and the term purchaser to describe


the person acquiring the property at the sale. K.S.A. 79-2803 speaks to the former. This position is supported by general tax sale principles in other jurisdictions as well. See 85 C.J.S. Taxation § 817 ("As a general rule the surplus remaining after the sale of property and the payment of taxes, interest, and costs, belongs to the owner of the property at the time of the sale, subject to such claims as may be allowed to mortgagees and lienees. . . . [However,] on a resale of property, purchased by the state or county at a tax sale, to an individual purchaser, the former owner is not entitled to any surplus above the taxes and charges due on the land, but such surplus is to be distributed in the manner provided by statute, and each taxing authority is entitled to receive its proportionate share of the profit or surplus." (West 1990).

In conclusion, if a piece of real estate is sold at a tax foreclosure sale for more than the judgment lien and its share of the costs of the proceedings and sale, the excess proceeds shall be paid to the "owner or party entitled thereto" as determined by the court. In our opinion, the quoted phrase refers to the owner or party interested in the property prior to the sale rather than the person who acquired the property at the sale.

Very truly yours,



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Julene L. Miller
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RTS:JLM:jm