

# Equity “Theft” - Can I Lose the Equity in My Farm for Failure to Pay Property Taxes?

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March 2023

Agricultural Law and Taxation Blog, by Roger McEowen: <https://lawprofessors.typepad.com/agriculturallaw/>  
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## Overview

In January, the U.S. Supreme Court agreed to hear a case from the U.S. Court of Appeals for the Eighth Circuit involving a Minnesota homeowner that failed to keep current on the payment of her property taxes. Ultimately, title to her home was forfeited to the State under the Minnesota statutory forfeiture procedure. The county cancelled her tax debt of \$15,000 and then sold the home (a condominium) to a private party for \$40,000, but did not remit the \$25,000 surplus back to her.

The case highlights the issue of “home equity theft” that is possible in some states and raises concerns among farmers and ranchers as to whether it is possible that the same principle could apply

Home equity “theft” and the potential application to farms and ranches – it’s the topic of today’s post

## Background

Equity in a home or a farm is the difference between the value of the home or farm and the remaining mortgage balance. Equity is a primary source of wealth for many owners. Indeed, the largest asset value for a farm or ranch family is in the equity wrapped up in the land. In the non-farm sector, primary residences account for 26 percent of the average household’s assets. Equity is a valuable asset. It can be borrowed against or converted into cash and invested in other assets or used to pay debts. Home equity, however, is also subject to seizure to settle tax debt – within the confines of the constitution. Certainly, the government has the constitutional power to tax property and seize property to pay delinquent taxes on that property. But, is it constitutional for the government to retain the proceeds of the sale of seized (forfeited) property after the tax debt has been paid? That’s the question presently before the U.S. Supreme Court.

## The Minnesota Case

Presently, 12 states allow the government to keep the surplus equity proceeds of a sale. Minnesota is one of those, along with Alabama, Arizona, Colorado, Illinois, Maine, Massachusetts, Nebraska, New Jersey, New York, South Dakota, and Oregon. The Minnesota case, *Tyler v. Hennepin County*, 26 F. 4th 789 (8th Cir. 2022), cert. granted, 143 S. Ct. 644 (2023), involved the Minnesota statutory forfeiture procedure that applies when property taxes remain unpaid. Property taxes are a perpetual lien against the property. *Minn. Stat. §272.31* Property taxes that the not paid during the year they are due become delinquent on January 1 of the following year. *Minn. Stat. §279.03, subdiv. 1*. Each year the county must file a delinquent tax list. Once a property is listed, a lawsuit is brought against the properties on which the delinquent taxes are owed. *Id. §279.05*. Property owners with outstanding



taxes receive multiple notices of both the delinquent tax list and the legal action. *Id.* §279.06, 279.09, 279.091. If the owner fails to respond, a judgment is entered against the property. *Id.* §279.16. The county then buys the property for the amount of the unpaid taxes (plus penalties, costs and interest). At that point, title to the property vests in the State subject to statutory redemption rights. *Id.* §280.41. During the statutory redemption period (typically three years) the former owner may redeem the property for the amount of the delinquent taxes, penalties, costs and interest. During the redemption period, the county must notify the taxpayer of the right to redeem. If *Id.* §§281.01, 281.02 and 281.17. the redemption right is not exercised, a final forfeiture occurs which vests “absolute title” in the State and cancels all taxes, penalties, costs, interest, and special assessments against the property. *Id.* §§281.18, 282.07. Even after the “final forfeiture” the owner has six months to apply to buy the forfeited property. *Id.* §282.41. But, Minnesota law specifies that if the county ultimately sells the property the former owner cannot recover any proceeds of the sale that exceed the tax debt. In other words, the State takes the former owner’s equity in the property.

This is precisely what happened in *Tyler*. Hennepin County followed the statutory forfeiture procedure, the homeowner didn’t redeem her condominium within the allotted timeframe and the state ultimately sold the property and bagged the proceeds – including the homeowner’s equity in the property.

The homeowner sued, claiming that Hennepin County violated the Constitution’s Takings Clause (federal and state) by failing to remit the equity she had in her home. She also claimed that the county’s actions amounted to an unconstitutional excessive fine, violated her due process and constituted an unjust enrichment under state law. The trial court dismissed the case and the Eighth Circuit affirmed finding that she lacked any recognizable property interest in the surplus equity in her home. In so holding, the appellate court noted the detailed statutory forfeiture procedure under Minnesota law. The appellate court also affirmed the trial court’s conclusion that the retention of the surplus equity by the state did not constitute an excessive fine under either the federal or state Constitutions.

## Other States

**Wisconsin.** The result in *Tyler* could have also happened in Wisconsin but in 2022 state law changed to bar the state from retaining equity obtained in forfeiture proceedings. *Wis. Act. 216 (2022)*. In 2020, the Michigan Supreme Court determined that the state’s retention of equity in a forfeiture action was an unconstitutional taking of private property. *Rafaelli, LLC v. Oakland Cty.*, 505 Mich. 429, 952 N.W.2d 434 (2020). The case involved an 83-year-old man who failed to pay \$8.41 in property taxes and the county sold his home for \$24,500 to pay the debt and kept the balance.

**Massachusetts.** A small alpaca farmer in Massachusetts filed a claim on January 10, 2023, to argue that the local town unconstitutionally took a \$310,000 profit from the sale of his farm to pay a \$60,000 property tax debt. A study by Ralph D. Clifford at the University of Massachusetts School of Law at Dartmouth found that Massachusetts “steals” almost \$60,000,000 in equity from taxpayers annually. ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3086247](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3086247)).



**Note:** In some instances, a private company will buy a property that has a delinquent tax debt and attach interest to it at the statutory rate – 16 percent in Massachusetts. The company then lets the interest accrue for three years (the statutory redemption timeframe) and then notifies the real homeowner one last time what they can pay to get their home back – including the interest charge.

**Nebraska.** In 2018, the Nebraska Supreme Court determined that 480-acre farm near North Platte worth \$1.1 million had been properly acquired for \$50,000 in delinquent taxes. *Wisner v. Vandelay Invs., L.L.C.*, 300 Neb. 825, 916 N.W.2d 698 (2018). The owner was a 94-year-old woman in a nursing home with arguable reduced mental capacity. One of her sons was named as an agent under a power of attorney who then assigned his duties to a trust officer at a local bank. The son assumed that the bank was paying the property taxes on the farm, but the bank never received any property tax notices and, thus, didn't pay any property taxes. The taxes became delinquent, and a private company ultimately acquired the tax certificate for the farm and, after the required three-year redemption period, sent notice of intent to foreclose to the address where the owner had previously received her property tax statements. The notice was unclaimed which led the company to publish notice in a local newspaper for three consecutive weeks. Ultimately, the firm acquired the tax deed to the property.

The son sought to void the tax deed, claiming that the company didn't comply with the statutory notice requirements (the paper wasn't circulated in the entire county) and that the three-year redemption period should have been extended to five years on account of the owner's mental condition. However, the Nebraska Supreme Court disagreed, holding that the son failed to overcome the presumption that the publication of notice was sufficient or that his mother had a mental condition sufficient to extend the statutory redemption period. A dissenting judge classified the majority's opinion as a "windfall that borders on the obscene."

**Note:** In the wake of the Wisner decision, the Nebraska Unicameral changed the requirements for service of notice when applying for a tax deed. Neb. Rev. Stat. §77-1832 was amended to provide that service of the notice is to be by personal or residential service on a person in actual possession of the property *and* on the person whose name the title to the real property appears of record who can be found in Nebraska. If personal or residential service is not possible, certified mail or designated delivery service can be used. In addition, the amendment specifies that certified mail or designated delivery service must be provided to every encumbrancer of record found by the title search. Only if a "diligent inquiry" fails to find the person(s) entitled to notice can notice then be by publication in the newspaper of general circulation designated by the county board.

Application can be made with the county treasurer for a tax deed if redemption has not been made. The county treasurer will issue the tax deed if, among other things, an affidavit proving service of notice is provided. If service of notice was by publication an affidavit of the publisher, manager, or newspaper employees is required. Also required to be provided is a copy of the notice and an affidavit of the purchaser (or the purchaser's assignee) of the tax certificate.



## Conclusion

Home (and farm) equity theft tends to bear more heavily on those that can least afford to hire legal assistance or qualify for legal aid (because they own a home or a farm). So, the lack of cases on the matter may underrepresent the extent of the problem. Also, each state bars a lender from keeping the proceeds of a forfeiture sale but, as noted above, not every state bars the government or a private company (that is not a lender), from keeping the surplus equity from a forfeiture sale.

Will the Supreme Court block the state and local governments (and private companies) from keeping surplus equity. We will soon find out.

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