

# WHEN DISABLED HOMEOWNERS LOSE THEIR HOMES FOR A PITTANCE IN UNPAID PROPERTY TAXES: SOME LESSONS FROM *IN RE MARY LOWE*

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“[N]or shall any State deprive any person of life, liberty, or property, without due process of law ....”

—U.S. Constitution Amendment XIV, Sec. 1

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## I. INTRODUCTION

Mary Lowe suffered from chronic schizophrenic disorder for most of her adult life. Over the years, she was hospitalized repeatedly. Nonetheless, Ms. Lowe was able to own and maintain her own home for 20 years until, at age 68, she lost her home at a forced tax sale triggered by an unpaid property tax bill in the amount of \$347. It was because of her disabilities that Ms. Lowe failed to pay the tax bill and failed to receive notice of the tax deed proceeding. In fact, Ms. Lowe was hospitalized at a psychiatric facility when a deputy sheriff and letter carrier each attempted service at her home. Actual service was not effectuated. However, the letter carrier knew where Ms. Lowe was hospitalized and made an appropriate notation at the post office and on the notice returned to sender. According to medical experts, Ms. Lowe's medical condition would have prevented her from understanding the significance of the notices even if she had received them.

This article describes the lengthy, complex, and ultimately unsuccessful litigation that sought recovery of Ms. Lowe's home.<sup>1</sup> Ms. Lowe's case was litigated through the Illinois state court system; it was briefed and argued twice before the Illinois Supreme Court; and it was the subject of two petitions for writs of certiorari to the Supreme Court of the United States. One of those petitions was successful and resulted in a remand to the Illinois Supreme Court. Ms. Lowe (and, after her death, her estate) was represented by the Public Guardian of Cook County. The Public Guardian was eventually joined in the representation by the law firm of Jenner & Block, which provided assistance on a *pro bono publico* basis.

The facts of Ms. Lowe's case suggest three distinct due process issues that may

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The authors wish to acknowledge the contributions of the other attorneys from the Public Guardian's Office and Jenner & Block who worked on the *Mary Lowe* case. The attorneys from the Public Guardian's Office are Patrick T. Murphy, immediate past Public Guardian and current judge of the Circuit Court of Cook County; Dan Belko, senior trial attorney and training supervisor for the Adult Guardianship Division; Kass A. Plain, head of the Appeals Division; Mary Hayes, senior attorney in the Appeals Division; and Kenneth J. Hogan, former attorney in the Appeals Division. The attorneys from Jenner & Block, who worked on the case on a *pro bono publico* basis, are Jerold S. Solovy, Chairman Emeritus of Jenner & Block; Hon. Benjamin K. Miller, counsel to the firm and former Chief Justice of Illinois; current associate Kyle A. Palazzolo; and former associates Denise Kirkowski Bowler, Benjamin K. Vetter, and Anders C. Wick. The authors also wish to acknowledge Grant Folland, Daniel Koen and Justin Seccombe, who provided invaluable research assistance for this article. Mr. Folland is an associate at Jenner & Block; Mr. Koen and Mr. Seccombe are former law student interns at the Public Guardian's Office.

1 *In re Application of County Collector*, 838 N.E.2d 907 (Ill. 2005) [hereinafter *Mary Lowe I*], *cert. granted, judgment vacated, case remanded*, 547 U.S. 1145 (2006), *opinion on remand*, 867 N.E.2d 941 (Ill. 2007) [hereinafter *Mary Lowe II*], *cert. denied*, 128 S. Ct. 253 (2007).

come into play when a homeowner stands to lose her home at a tax lien sale. First, when actual notice has been attempted, without success, at the person's home, and there are strong clues as to the person's whereabouts, does the Due Process Clause require that the party responsible for giving notice take reasonable steps to follow up on those clues? Second, when physical service is actually made, but the homeowner's cognitive disability prevents her from understanding the significance of the notice, and the party required to give notice knows about the homeowner's disability, is the physical act of service on the disabled homeowner sufficient to satisfy due process standards? Finally, what if the homeowner is disabled in a way that prevents her from appreciating the significance of the notice, but her disabilities are not known to the person responsible for giving notice?<sup>2</sup>

Section II will provide factual background and context to illustrate the nature and extent of the problems surrounding disabled homeowners. This section will discuss the cases of other disabled wards of the Public Guardian, in addition to Ms. Lowe, who lost their longtime homes at tax lien sales occasioned by their failure to pay very small property tax bills. Section III will discuss the factual circumstances of Mary Lowe's case leading up to the litigation that sought recovery of her home.

Section IV will discuss the delinquent property tax sale procedures in Illinois and other jurisdictions.<sup>3</sup> This section will suggest that the relevant state notice provisions may be sufficient in most cases to advise a homeowner that title to his home is in jeopardy, and that certain procedures must be followed if his property is to be redeemed, but that these notice provisions are of little value to a homeowner who does not receive the notice (despite the fact that his actual whereabouts are known or easily ascertainable) or who cannot understand or act on the notice due to a cognitive disability. In such circumstances, due process requires more. In addition, this section will argue that tax scavengers, who bid on and buy property at tax sales — but who are also charged with attempting to locate and provide notice to the homeowner — operate under an inherent conflict of interest. The scavenger's interest is in obtaining title to the delinquent property at a windfall price, not in locating the homeowner and giving her notice of the proceeding or informing her about how to redeem her property.

Section V will analyze the applicable due process jurisprudence as it existed when Ms. Lowe's case was at trial and on appeal in the Illinois state courts. This section will discuss the seminal cases from the United States Supreme Court addressing notice and due process, namely *Mullane v. Central Hanover Bank and Trust Co.*<sup>4</sup> and its progeny,<sup>5</sup> as well as *Covey v. Town of Somers*,<sup>6</sup> which deals with the adequacy of notice given to

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2 When this article discusses disabled homeowners, it refers to persons with a cognitive disability, such as Alzheimer's disease or other dementia, which renders the person unable to take care of financial or legal matters, to understand the significance of legal notices, or to take meaningful action with respect to such notices. The term is not used in this article to include persons with strictly physical disabilities. Of course, many persons with a cognitive disability, especially elderly persons, may also have physical disabilities.

3 The Illinois tax sale procedures are found in articles 21 and 22 of the Property Tax Code, 35 ILL. COMP. STAT. 200/21-5 and 22-5(2009).

4 *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

5 *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983); *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988).

6 *Covey v. Town of Somers*, 351 U.S. 141 (1956).

persons with known disabilities. This section will then analyze the leading cases from Illinois<sup>7</sup> and other jurisdictions<sup>8</sup> that specifically address the kind of notice necessary to satisfy due process when the property interests of a disabled homeowner are at stake.

With this factual and legal background in place, Sections VI–VIII will discuss the litigation seeking recovery of Ms. Lowe’s home, as it proceeded through the Illinois trial and appellate courts, through the Supreme Court of Illinois and the Supreme Court of the United States, back again to the Supreme Court of Illinois, and finally culminating in the filing of a second, unsuccessful, petition for a writ of certiorari in the United States Supreme Court. These sections also will discuss *Jones v. Flowers*,<sup>9</sup> an Arkansas tax sale case addressing the notice requirements of the Due Process Clause, in which the United States Supreme Court granted certiorari three weeks before the Illinois Supreme Court issued its decision in *Mary Lowe I*.<sup>10</sup>

Section IX will discuss the inadequacy of alternative remedies, such as indemnity funds,<sup>11</sup> for disabled homeowners who, due to lack of proper notice, have lost the homes in which they have lived for years, raised their families, and formed deep bonds. Section X will discuss legislative initiatives that the Public Guardian has proposed to ameliorate the circumstances of disabled homeowners who stand to lose their homes because of minimal unpaid property taxes and insufficient notice. In Section XI, the authors offer some concluding thoughts, including a call for remedial legislation.

## II. BACKGROUND TO PROBLEM

The problem of homeowners with cognitive disabilities who stand to lose their homes because of the failure to pay a very small property tax bill is one that the Public Guardian’s Office sees with some frequency. The fact patterns tend to be similar. The delinquent taxpayer typically has owned his home for 20 to 30 years and has paid off all or most of the mortgage; the homeowner has substantial equity in the home with no liens or encumbrances; and the homeowner has regularly paid his taxes for decades. As the homeowner ages, he develops Alzheimer’s disease or some other infirmity that affects mental cognition. The normally diligent homeowner misses paying a small tax bill and faces the loss of her house at a forced tax lien sale.

Typically, the person’s home is her largest asset by far, and the value of the house greatly exceeds the paltry amount owed in unpaid taxes. For that reason, many of the stories have the same unhappy ending: a private scavenger buys the right to pursue the tax deed, makes the perfunctory efforts at giving notice that the relevant statute requires, and

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7 *In re Application of County Collector v. Otsus*, 545 N.E.2d 145 (Ill. App. Ct. 1989) [hereinafter *In re Otsus*].

8 *In re Consolidated Return of Tax Claim Bureau of County of Del.*, 461 A.2d 1329 (Pa. Commw. Ct. 1983); *Blum v. Stone*, 127 A.D.2d 549 (N.Y. App. Div. 1987); *Vance v. Federal Nat’l Mortgage Ass’n*, 988 P.2d 1275 (Okla. 1999); *Stubbs v. Cummings*, 336 So. 2d 412 (Fla. App. 1976).

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

10 The Supreme Court of the United States granted certiorari in *Jones* on September 27, 2005. *See* 545 U.S. 1165 (2005). The Supreme Court of Illinois rendered its decision in *Mary Lowe I* on October 20, 2005. *See* 838 N.E.2d 907 (Ill. 2005).

11 *See* 35 ILL. COMP. STAT. 200/21-295.

eventually exercises the right to redeem the property.<sup>12</sup> As in Ms. Lowe's case, there are often red flags suggesting that the homeowner is disabled, or that the homeowner did not receive or understand the significance of the notice. The law generally allows the scavenger to take the person's home anyway.

The number of homes lost at tax sales is substantial. In Cook County, Illinois, 13,758 tax deeds were issued during the period from January 1, 2003, through July 31, 2007, for an annual average exceeding 3,000. In each case, title was conveyed to the scavenger.<sup>13</sup>

This section will recount the stories of additional disabled wards of the Public Guardian's Office who lost their longtime homes at tax lien sales due to small amounts of unpaid property taxes.

#### A. *Konstantina T.*

Konstantina T. lost her home of 15 years, valued at \$470,000 to \$490,000, at a tax lien sale. Ms. T., who had unpaid property taxes in the amount of \$1,926, had immigrated to the United States from Greece in 1987, when she was 63 years old. She cannot speak or read English, and she cannot read or write Greek. Ms. T.'s husband died in January 2002, when he was 78 years old. Until he died, Ms. T.'s husband paid the bills and took care of the family's financial matters. By the time of Mr. T.'s death, Ms. T. was suffering from mental illness, including delusional disorder.

Shortly before Ms. T.'s husband passed away, property taxes on the home became delinquent in the amount of \$1,926. At a tax lien sale, BCS Services, Inc., a private tax scavenger, purchased the taxes and obtained a certificate of purchase for Ms. T.'s home. That certificate granted BCS the right to move the court for issuance of a tax deed following service of certain notices and the expiration of the statutory redemption period.

On January 7, 2004 — eight days after the expiration of the redemption period — the Probate Division of the Circuit Court of Cook County, Ill., appointed the Public Guardian as temporary guardian of Ms. T.'s estate, based on evidence of her disabilities and resultant inability to manage her financial affairs. Five days later, on January 12, 2004, the scavenger moved the court for issuance of a tax deed to Ms. T.'s home, and the Public Guardian filed objections. The Public Guardian was later appointed to serve as plenary guardian for Ms. T.

After lengthy, costly, and contentious litigation, the trial judge mediated a settlement. Although Ms. T. did not recover her home, BCS paid her a substantial monetary sum that the Public Guardian has used to provide for her care and comfort.<sup>14</sup>

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12 The tax sale procedures in Illinois, including the role of scavengers, are discussed in Section IVA, *infra*.

13 This number was calculated by three advocacy organizations that moved for leave to file an *amicus* brief in the Supreme Court of the United States in support of Mary Lowe: The Sargent Shriver National Center on Poverty Law, The Legal Assistance Foundation of Metropolitan Chicago, and The Lincoln Legal Foundation. The number is based on records obtained from the Office of the Cook County Clerk pursuant to a Freedom of Information Act request. The statistics are found on page 5 of the *amicus* brief, which the advocates moved to file on August 17, 2007. The supporting documents are reproduced as an exhibit to the brief. The amount of money involved is also substantial. In the Chicago metropolitan area, the median home sale price was \$262,500 during the third quarter of 2007. Mary Schaefer & Ann Londrigan, Illinois Home Sales, Illinois Association of Realtors, Nov. 17, 2008, <http://www.illinoisrealtor.org/iar/newsreleases/3Q08.html> (last visited Dec. 26, 2008).

14 Estate of Konstantina T. v. Topalidis, No. 04 P 0118 (Cir. Ct. Cook County, Ill.), consolidated with *In re*

*B. Elizabeth S.*

Elizabeth S. is a former nun. After developing dementia and a seizure disorder, she lost her home of 26 years, valued at approximately \$350,000, to a tax scavenger. She had unpaid taxes in the amount of \$29.54. After accounting for a mortgage balance of approximately \$100,000, Ms. S. had equity of approximately \$250,000 in her home. The \$29.54 in unpaid taxes was sold at a tax lien sale to a scavenger on April 3, 2000, when Ms. S. was 77. The time period for Ms. S. to redeem her taxes expired on January 21, 2003.

Ms. S. became disabled during the redemption period. In December 2002, Ms. S. was hospitalized after Fire Department officials observed her speaking incoherently; the diagnosis was viral encephalitis. A psychiatrist determined that Ms. S. could not make medical or financial decisions or take care of herself. Ms. S.'s condition worsened and she became more confused. Hospital staff determined that Ms. S. had a brain hemorrhage in the area of a previous cerebrovascular accident and diagnosed her condition as vascular dementia with psychosis.

Because Ms. S. could not manage her affairs, her case was referred to the Public Guardian, who filed a guardianship petition in the Probate Division of the Circuit Court of Cook County. The court appointed the Public Guardian as temporary guardian of Ms. S.'s estate on February 20, 2003, and as temporary guardian of her person on March 7, 2003. The Public Guardian was appointed plenary guardian on March 23, 2003.<sup>15</sup>

The scavenger filed a petition for a tax deed to secure title to Ms. S.'s home, and the Public Guardian filed objections. The case proceeded to a contested trial. Finding that the scavenger had complied with all of the requirements of the statute, the court denied the Public Guardian's objections and granted the scavenger's petition. On August 5, 2005, the Cook County Clerk issued a tax deed conveying title to Ms. S.'s home to the scavenger.<sup>16</sup>

The Public Guardian filed an indemnity lawsuit to recover the fair monetary value of Ms. S.'s home.<sup>17</sup> The county treasurer filed objections. After lengthy litigation, the parties reached a settlement and a monetary sum was made available for Ms. S.'s care and comfort.<sup>18</sup>

The cases of Konstatina T. and Elizabeth S. are typical of the cases in which the Public Guardian becomes involved — cases of elderly people with substantial property who become disabled and have few human resources upon which to rely. Whether anything can be done to prevent the unjust loss of their homes often depends on how early in the process help can be made available to these elderly and infirm homeowners.

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Application of the County Treasurer, 03 COTD 2231 (Cir. Ct. Cook County, Ill.).

15 Estate of Elizabeth S., No. 03 P 1442 (Cir. Ct. Cook County, Ill.).

16 Application of County Collector, No. 02 CD 4266 (Cir. Ct. Cook County, Ill.).

17 Illinois has an indemnity fund to compensate homeowners who wrongfully lose their homes through tax sale proceedings. See 35 ILL. COMP. STAT. 200/21-295. Claims against the fund are defended by the county treasurer, represented by the county state's attorney, in adversarial proceedings. The subject of indemnity proceedings, including their inherent limitations as a means of making a disabled homeowner whole, is discussed in Section IX, *infra*.

18 *Robert F. Harris as Guardian of the Estate of Elizabeth S. v. Papas*, No. 05 COIN 000030 (Cir. Ct. Cook County, Ill.).

III. FACTUAL BACKGROUND OF THE *MARY LOWE CASE*<sup>19</sup>

Mary Lowe was born on November 12, 1926. In the early 1960s, Ms. Lowe began experiencing symptoms of mental illness, including auditory hallucinations and delusional thinking. She was diagnosed with chronic schizophrenic disorder, and she was hospitalized for psychiatric care and treatment 27 times between 1964 and 1995.<sup>20</sup> Ms. Lowe's 26th hospitalization occurred in January 1995, after the Chicago police found her roaming naked in the streets on a cold winter night. When the police attempted to take Ms. Lowe home, they discovered the decomposing body of her companion, William Austin, who had died of natural causes some time previously, but who Ms. Lowe thought was still alive.<sup>21</sup> In what was to be her final hospitalization, Ms. Lowe spent 16 months at the Tinley Park Mental Health Center, from August 26, 1995, until December 16, 1996, when she was released to the care of her son. Ms. Lowe died on November 15, 1998, two days after her 72d birthday.<sup>22</sup>

In 1977, Ms. Lowe had purchased a single-family, split-level townhouse on the south side of Chicago. In 1993, she conveyed a partial interest in the property to her long-time companion, William Austin, and they held the property as joint tenants. When Mr. Austin died in 1994, Ms. Lowe became the sole owner.<sup>23</sup>

Ms. Lowe's mental illness was well-known in her neighborhood, and her schizophrenia became worse after periods of stress, such as that brought on by Mr. Austin's death.<sup>24</sup> Ms. Lowe frequently exhibited a variety of strange behaviors, including coming outside without clothing, shouting names and obscenities, moving her furniture to the curb, and screaming at passersby. She was often hospitalized at psychiatric facilities after such episodes.<sup>25</sup>

Due to her disability, Ms. Lowe neglected to pay a property tax bill of \$347. That failure led to a tax lien sale at which her home was sold. On March 3, 1993, Apex Tax Investments paid the outstanding tax bill (together with interest and fees) and obtained a certificate of purchase for Ms. Lowe's home. On October 5, 1995, while Ms. Lowe was being treated at the Tinley Park Mental Health Center, Apex filed a petition for issuance of a tax deed. Ms. Lowe could redeem the property by paying the unpaid taxes, plus certain expenses, before the expiration of the redemption period on February 21, 1996.<sup>26</sup>

Ms. Lowe remained hospitalized during the period in which a deputy sheriff and a letter carrier attempted service at her home. Personal service was attempted on Ms. Lowe, on Mr. Austin (her deceased companion), and on "occupant," at the home. The deputy

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19 The facts regarding Mary Lowe's case come primarily from the Illinois Supreme Court's published opinions: the original opinion in *Mary Lowe I* and the opinion on remand from the United States Supreme Court, *Mary Lowe II*. Where appropriate, this article supplements the facts found in those opinions with facts from the consolidated record. In such instances, a citation to the consolidated record on appeal is provided. The consolidated record is available from the Clerk of the Circuit Court of Cook County.

20 SR11 25-26, EX 100, 130, 269.

21 SR11 23-25, 29, 31, 43-44, EX 95-96.

22 *Mary Lowe I* at 914-15.

23 *Mary Lowe II* at 942.

24 *Mary Lowe I* at 914-15, SR11 26, 32, EX 261.

25 SR11 54-62, 82-87.

26 *Mary Lowe I* at 909-10.

sheriff was unable to effectuate service, and the notices were returned unserved. On each of the returns of service, the deputy sheriff wrote "House vacant per neighbors." The deputy sheriff also placed a mark next to the word "MOVED" on the preprinted form to indicate why the notice was not served.<sup>27</sup>

Service was then attempted by Certified U.S. Mail. The letter carrier, Jewel Hightower, became concerned when she saw letters from the Sheriff that appeared to contain tax statements addressed to Ms. Lowe and Mr. Austin. Ms. Hightower knew that Mr. Austin had died; she therefore wrote "deceased" on the envelopes addressed to him. Ms. Hightower was also aware of Ms. Lowe's mental illness, and she knew from a neighbor that Ms. Lowe was hospitalized at Tinley Park Mental Health Center. She noted this fact on a card maintained at the branch post office, and she wrote "person is hospitalized" on the envelopes addressed to Ms. Lowe. Ms. Hightower also wrote her initials (JHT) and route number (2719) on the envelopes. The envelopes were all returned to the clerk of the court, stamped "return to sender."<sup>28</sup>

Apex thus had knowledge that Ms. Lowe did not receive the notices. As returned, the notices also provided strong clues for anyone interested in determining Ms. Lowe's whereabouts. The notices disclosed that Ms. Lowe was hospitalized, and they bore the initials and route number of a letter carrier who knew that fact and who might well have known (as she did) where Ms. Lowe was hospitalized. Moreover, the information was available, not just from Ms. Hightower, but also from the branch post office, where Ms. Hightower had made a note of it. Apex also knew that the matter was not inconsequential. The hospitalized homeowner faced the permanent loss of her valuable home for non-payment of \$347 in taxes. Nonetheless, Apex made no further attempts to serve Ms. Lowe or to follow up on the letter carrier's notations.

Apex's petition for a tax deed proceeded to an *ex parte* prove-up, which occurred on May 20, 1996. At the hearing, Apex's president, Fred Berke, testified in response to a series of questions put to him by Apex's lawyer. Mr. Berke testified that he had visited the property. He received no response when he knocked on the door. He looked in the living-room window and saw no furniture. He spoke to the next-door neighbor, who told him that "the Lowes" owned the home but that no one was then living there.<sup>29</sup> There is no indication from Mr. Berke's testimony that he asked any obvious follow-up questions: "Do you know where Ms. Lowe is? Do you know how she can be reached?"<sup>30</sup> Nor is there any indication that Mr. Berke disclosed the reason for his interest in Ms. Lowe or the purpose of his visit, or that he inquired as to whether anyone else might know about Ms. Lowe's whereabouts or how to contact her.<sup>31</sup> Likewise, there is no indication that Mr. Berke talked with anyone else in the neighborhood other than the next-door neighbor.<sup>32</sup> The transcript of the entire prove-up consists of barely nine pages, including the title page.<sup>33</sup>

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27 Mary Lowe I at 910.

28 *Id.* at 910-11, 915, SR11 64-65, 72, 79-84.

29 *Id.* at 911.

30 R5-9.

31 *Id.*

32 *Id.*

33 R2-11.

Following the *ex parte* prove-up, the court granted Apex's petition and entered an order directing the County Clerk to issue a deed vesting Apex with title to Ms. Lowe's home. The Clerk issued the tax deed to Apex later that day.<sup>34</sup>

The returned envelopes containing the notations made by Jewel Hightower, the letter carrier, were included in the court file, but they were not called to the court's attention. After retiring from judicial service, the judge who presided over the prove-up gave an affidavit stating that he would not have granted Apex's application if he had been aware of those notations.<sup>35</sup>

On September 5, 1997, Bruce Lowe, a son living in California, filed a *pro se* petition seeking restoration of his mother's title to the property. The court appointed the Public Guardian as Ms. Lowe's attorney and *guardian ad litem*, and the Public Guardian subsequently filed original and amended petitions to set aside the tax deed.<sup>36</sup> Ms. Lowe died on November 15, 1998, and the court substituted the Public Guardian, in his capacity as administrator for Ms. Lowe's estate, as the plaintiff.<sup>37</sup>

#### IV. TAX SALE PROCEDURES

##### A. Illinois

Articles 21 and 22 of the Property Tax Code<sup>38</sup> provide that the county may apply to the court for a judgment and order of sale when a homeowner has become delinquent in the payment of his property taxes. The county must provide publication notice at least 10 days before the application is filed.<sup>39</sup> The county also must serve notice by certified or registered mail at least 15 days before the date of the application.<sup>40</sup> The property owner may pay the delinquent taxes and costs at any time prior to the entry of judgment.<sup>41</sup>

If a judgment is entered against the property, the county may offer the property for sale to a private tax purchaser, known as a tax scavenger.<sup>42</sup> The scavenger does not obtain title to the property at this time, but receives a certificate of purchase.<sup>43</sup> The homeowner has the right to redeem the property by payment of the tax arrearage, penalties, and interest, until the expiration of a 30-month redemption period.<sup>44</sup>

Following his receipt of the certificate of purchase, the scavenger must deliver an initial notice to the county clerk for service on the homeowner. The notice must make clear that the property has been sold for delinquent taxes, that redemption may be made until a specified date, and that a petition for a tax deed will be filed if the property is not redeemed. The scavenger must deliver the notice to the county clerk within four months

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34 Mary Lowe I at 912.

35 C541-42.

36 Mary Lowe I at 912-13.

37 *Id.* at 914.

38 35 ILL. COMP. STAT. 200/21-5 and 22-5.

39 35 ILL. COMP. STAT. 200/21-110, 21-115.

40 35 ILL. COMP. STAT. 200/21-135.

41 35 ILL. COMP. STAT. 200/21-165.

42 35 ILL. COMP. STAT. 200/21-190.

43 35 ILL. COMP. STAT. 200/21-250.

44 Mary Lowe I at 909; 35 ILL. COMP. STAT. 200/21-345-21-355.

and 15 days after the tax sale, and the clerk must serve the notice by registered or certified mail within 10 days thereafter.<sup>45</sup>

The scavenger must provide a second notice of the sale, which is to be served on the homeowner, occupants and interested parties not less than three months nor more than six months prior to the expiration of the redemption period. This second notice must include the redemption deadline.<sup>46</sup> Unlike the initial notice, the second notice must provide the time and place at which the petition for a tax deed will be heard, so that the homeowner may appear and object at the proceeding.<sup>47</sup> The scavenger must arrange for the sheriff to effect personal service, for the clerk of the court to make service by registered or certified mail return receipt requested, and for notice to be published three times in a newspaper.<sup>48</sup>

During the same period — not less than three months nor more than six months prior to the expiration of the redemption period — the scavenger may file a petition for a tax deed to the property.<sup>49</sup> The court may grant the petition if the scavenger demonstrates that the redemption period has expired without redemption taking place, and that the scavenger has complied with the statutory notice requirements, including the requirement that the scavenger make “diligent inquiry and effort” to locate and serve the homeowner.<sup>50</sup>

There are several problems with the statutory scheme in Illinois and other jurisdictions. First, while the scheme may appear to require a number of acts on the part of the party responsible for giving notice, the scheme does not actually require any follow-up on the steps that are required. If letters are returned with any sort of notation, the statute does not require that any specific additional steps be taken. Moreover, the notices are of little value to disabled homeowners — such as Mary Lowe, Konstantina T. or Elizabeth S. — who cannot understand or act on them due to cognitive impairments; and the statute does not specifically require any special steps to be taken with respect to such persons, even if their cognitive disabilities are well known to the party required to give notice.

Most important, by making private tax scavengers responsible for locating and providing notice to an affected homeowner, the statutory scheme places legal responsibility for the giving of notice in the hands of actors with an inherent conflict of interest. In many cases, the homeowner’s whereabouts will be easy to verify: he will be living in the home that the scavenger is seeking to buy. In such cases, the homeowner will be easily located if the private scavenger minimally complies with his statutory obligations. When more is required, however, the scavenger’s inherent conflict of interest will come into play. The scavenger’s primary interest does not rest in locating the homeowner, but in obtaining the property at a bargain-basement price. His interest in locating the homeowner may be tepid at best. The Seventh Circuit has observed that property acquired at tax lien sales in Illinois “can often be sold at a significant profit over the amount paid for the lien.”<sup>51</sup> Similarly, the Illinois Supreme Court has noted that tax purchasers frequently “gain title

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45 35 ILL. COMP. STAT. 200/22-5.

46 35 ILL. COMP. STAT. 200/22-10.

47 *Id.*; Mary Lowe I at 923.

48 35 ILL. COMP. STAT. 200/22-15, 22-20, 22-25.

49 35 ILL. COMP. STAT. 200/22-30.

50 35 ILL. COMP. STAT. 200/22-40, 22-15.

51 *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2135 (2008).

to real estate for a fraction of its value.<sup>52</sup> Of course, the scavengers in the cases of *Mary Lowe*, *Konstantina T.* and *Elizabeth S.* all stood to acquire the properties for sums far below market value.

In the case of a missing homeowner, a scavenger is required by statute to exercise diligent inquiry and effort to locate the homeowner. The profit that a scavenger stands to gain from buying a home for a pittance and selling it at market value obviously provides an alternative incentive. Of course, the United States Constitution may require more than the statute, but even then, the real question is a practical one: what, really, does the law require of the scavenger, and how closely will an impartial third party inquire to see whether that has been done? In the absence of an effective adversarial proceeding, a hard look by an independent party is critical. But such a hard look will not occur if the statute does not require it and if the courts are too busy to provide it.

### *B. Other Jurisdictions*

To provide context, this subsection will describe the tax lien procedures in several additional jurisdictions.

#### 1. Arkansas

The Arkansas tax sale procedures were at issue in *Jones v. Flowers*,<sup>53</sup> in which the United States Supreme Court granted certiorari three weeks before the Illinois Supreme Court released its decision in *Mary Lowe I.*

In Arkansas, property is forfeited to the state if taxes are past due for one year. The county collector transfers ownership of such property to the state by certifying that the taxes are past due. This certification vests title in the state in care of the Arkansas Commissioner of State Lands.<sup>54</sup> Not less than 30 nor more than 40 days prior to the entry of the certification, the county collector is required to give publication notice to the owner of record that the land will be forfeited to the state unless redeemed within the prescribed period.<sup>55</sup> The county collector also maintains a public record of delinquent lands, which is published annually.<sup>56</sup>

Once the county collector has provided the certification to the state, the homeowner has two years in which to redeem his property. At the beginning of this period, the Commissioner must notify the homeowner and interested parties by both certified mail and publication that the property will be sold if it is not redeemed.<sup>57</sup> At the end of the redemp-

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52 *Rosewell v. Chicago Title & Trust Co.*, 459 N.E.2d 966, 968 (Ill. 1984).

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

54 ARK. CODE ANN. § 26-37-101 (2009).

55 *Id.* § 26-37-102.

56 *Id.* §§ 26-37-106, 26-37-107.

57 *Id.* §§ 26-37-301, 26-37-201. In 2007, § 26-37-301 was amended to reduce the redemption period to one year. In addition, the amendment requires the Commissioner to provide service by regular mail if the certified mail is returned unclaimed. If the certified mail is returned for any other reason, the Commissioner must send a second notice to the owner or interested party at any additional address reasonably identifiable through examination of the property records at the office of the county clerk. If the Commissioner fails to receive proof that the notice sent by certified mail was received by the owner of a homestead, the Commissioner is required to provide actual notice by personal service at least 50 days before the date of

tion period, the property may be sold. However, the homeowner has an additional 30 days in which to redeem the property, and an additional notice to that effect must be served on the owner and interested parties by regular mail.<sup>58</sup> This notice, like the prior notice, must be given by the Commissioner, rather than by the party purchasing the property.<sup>59</sup> If the property is not redeemed within this 30-day period, the Commissioner will issue a tax deed.<sup>60</sup>

Arkansas has special provisions addressing homeowners under disabilities. Property belonging to a minor, an insane person, or a person in confinement may be redeemed at any time within two years after the removal of the disability.<sup>61</sup>

## 2. New York

Property taxes in New York are levied on December 31 of each year. The taxes become a lien against real property the next day (January 1), which is called the lien date.<sup>62</sup> Ten months after the lien date, or as soon as practicable thereafter, the enforcing officer of the tax district will execute a list of all property with delinquent tax liens in that district.<sup>63</sup> The list is maintained on file with the county clerk.<sup>64</sup>

Twenty-one months after the lien date, or as soon thereafter as practicable, the enforcing officer may file a petition of foreclosure against those properties that still have delinquent tax liens.<sup>65</sup> Notice of the petition is published for three non-consecutive weeks during a two-month period in at least two newspapers.<sup>66</sup> The notice includes a description of the rights of redemption and the redemption deadline, which must be fixed at least three months after the first publication.<sup>67</sup> The notice is also posted in the office of the enforcing officer and in the county court house.<sup>68</sup>

On or before the date of the first publication notice, the enforcing officer serves notice on the owner and interested parties by certified and regular mail.<sup>69</sup> If both mail notices are returned, the enforcing officer must attempt to obtain an alternative mailing address from the post office. If an alternative mailing address is secured, notice must be given at that address by certified and regular mail.<sup>70</sup> If no alternative mailing address is found, the enforcing officer must post notice on the property.<sup>71</sup>

If the owner does not redeem the property within the relevant period, the court con-

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the sale. Jones was decided under the pre-amendment version of the statute.

58 ARK. CODE ANN. § 26-37-202(e) (2009).

59 *Id.*

60 *Id.* § 26-37-203.

61 *Id.* §§ 26-37-305, 26-37-306, 26-37-203(b).

62 N.Y. REAL PROP. LAW §§ 900, 902, 1102 (2008).

63 *Id.* § 1122.

64 *Id.*

65 *Id.* § 1123.

66 *Id.* § 1124.

67 *Id.*

68 *Id.*

69 *Id.* § 1125.

70 *Id.*

71 *Id.*

ducts a hearing and may award possession and title to the property to the tax district.<sup>72</sup> The tax district is then able to sell or convey the property, with or without advertising for bids. However, the sale must be approved by a majority vote of the governing body of the tax district.<sup>73</sup>

### 3. Florida

Property taxes in Florida are due on November 1 of each year and become delinquent on April 1 of the following year.<sup>74</sup> The tax collecting authority mails a notice to delinquent homeowners by April 30.<sup>75</sup> The notice includes a description of the property and informs the homeowner that a tax certificate will be sold for the unpaid taxes, with the property, itself, subject to sale at a future date. The notice advises the homeowner to “contact the tax collector’s office at once.”<sup>76</sup>

On or before June 1, the tax collector is required to give publication notice once a week for a three-week period that it will sell tax certificates on all property with delinquent taxes.<sup>77</sup> If the taxes are not redeemed, the tax collector will commence the sale of tax certificates by means of a bidding process.<sup>78</sup> The successful bidder who obtains a tax certificate may not initiate contact with the owner of the property until two years have elapsed from April 1 of the year in which the tax certificate was issued.<sup>79</sup>

After that two-year period has elapsed, the holder of the tax certificate may apply to the tax collector for issuance of a tax deed.<sup>80</sup> The tax collector will then initiate an application in the county court.<sup>81</sup> The clerk of the county court will give publication notice once a week for four consecutive weeks.<sup>82</sup> The clerk also will give notice by certified mail return receipt requested to the owner and interested parties.<sup>83</sup> Notice to the homeowner is also served personally by the sheriff. If the sheriff is unable to effectuate personal service, the sheriff will post the notice at the homeowner’s last known address.<sup>84</sup> If the last known address is in a county other than the county in which the tax delinquent property is located, notice will be posted on the property to be sold. Those notices will indicate that the land will be sold at public auction unless the property is redeemed and will also include the date of the sale.<sup>85</sup>

If the property is not redeemed, the clerk of the county court will offer the property to the highest bidder for cash at public outcry.<sup>86</sup> If no bids exceed the amount needed to

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72 *Id.* §§ 1130-1136.

73 *Id.* § 1166.

74 FLA. STAT. § 197.333 (2009).

75 *Id.* § 197.343.

76 *Id.*

77 *Id.* § 197.402.

78 *Id.* § 197.432.

79 *Id.*

80 *Id.* § 197.502.

81 *Id.*

82 *Id.* § 197.512.

83 *Id.* § 197.522.

84 *Id.*

85 *Id.*

86 *Id.* § 197.542.

redeem the tax certificate and reimburse the certificate holder for all costs and interest incurred, a tax deed will be issued to the certificate holder.<sup>87</sup> Otherwise, the property will be sold to the highest bidder.<sup>88</sup> In such cases, the excess will be retained by the clerk for the benefit of the homeowner, lienholders, and certain interested parties.<sup>89</sup>

#### V. THE FIRST ROUND OF ILLINOIS LITIGATION: CONTEMPORANEOUS LEGAL BACKGROUND

When the Public Guardian was litigating his petition to set aside the tax deed to Ms. Lowe's home in the Illinois courts, he relied not only on the relevant Illinois statutory requirements but also on the United States Supreme Court case law addressing notice requirements under the Due Process Clause of the Fourteenth Amendment. The landmark cases are *Mullane v. Central Hanover Bank and Trust Co.*<sup>90</sup> and *Covey v. Town of Somers*.<sup>91</sup> In *Mullane*, which addresses the adequacy of publication notice, the Supreme Court articulated its classic statement as to the type of notice that due process demands. The Court held that mere publication notice cannot satisfy constitutional due process when the names and addresses of interested parties are actually known or are available upon reasonable investigation. In later cases, the Supreme Court has reiterated that principle in various contexts.<sup>92</sup> In *Covey*, for example, the Court applied the principle articulated in *Mullane* to vacate a tax lien sale because the responsible town officials knew that the homeowner was disabled.<sup>93</sup> The Supreme Court's due process jurisprudence, as it had developed at the time of the original state court litigation in Lowe, is discussed in subsection A, *infra*.

The Illinois Appellate Court also had decided a seminal case applying *Mullane* and *Covey* to a tax lien sale when the tax purchaser knew that the homeowner was disabled. In that case, *In re Otsus*,<sup>94</sup> the court invalidated the tax sale on due process grounds even though all of the statutory notice requirements had been followed. *In re Otsus* is discussed in subsection B, *infra*.

*Covey* and *In re Otsus* both involved situations in which the homeowner's disabilities were known to the party responsible for providing notice. As discussed below, the Illinois trial court in *Mary Lowe* found that Ms. Lowe's mental illness was immaterial because Apex did not know that she suffered from mental illness. Of course, Apex easily could have discovered that fact if it had followed up on Ms. Hightower's notations or contacted the post office for a new address. Moreover, courts in three other states – Pennsylvania, New York, and Oklahoma — have reached the opposite conclusion. In those states, courts have applied the *Mullane* and *Covey* standards to invalidate tax liens when the party responsible for giving notice did not know the homeowner was disabled.<sup>95</sup> The

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87 *Id.*

88 *Id.*

89 *Id.* §§ 197.582, 197.502(4), 197.473.

90 *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

91 *Covey v. Town of Somers*, 351 U.S. 141 (1956).

92 *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983); *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988).

93 *Covey* at 141.

94 *In re Otsus*.

95 *In re Consolidated Return of Tax Claim Bureau of County of Del.*, 461 A.2d 1329 (Pa. Commw. Ct.

issue also was raised in a fourth state, Florida, which held that *Mullane* and *Covey* did not require the setting aside of a lien or sale when the party responsible for giving notice was not aware of the disability.<sup>96</sup> These cases are discussed in subsection C, *infra*.

#### A. The Supreme Court's Due Process Jurisprudence

##### 1. *Mullane v. Central Hanover Bank and Trust Co.* and its Progeny — Publication Notice Violates Due Process When Person's Location is Known or Ascertainable through Reasonable Inquiry

In 1950, the United States Supreme Court decided *Mullane v. Central Hanover Bank and Trust Co.*<sup>97</sup> In *Mullane*, the Court considered what type of notice was constitutionally required to advise known trust beneficiaries of a proposed judicial settlement of accounts. Under New York law, only publication notice was required, even when the names and addresses of the beneficiaries were known. A court-appointed special guardian argued that publication notice was not constitutionally sufficient to afford due process to the known trust beneficiaries under the Fourteenth Amendment. The trial court held that publication notice was sufficient, overruled the special guardian's objections, and entered a final decree settling the accounts.<sup>98</sup> The appellate division of the New York Supreme Court, New York's intermediate reviewing court, affirmed that decision without opinion, with one justice dissenting.<sup>99</sup> The New York Court of Appeals, the state's highest court, likewise affirmed.<sup>100</sup>

The United States Supreme Court reversed, holding that mere publication notice did not satisfy constitutional requirements in the case of known trust beneficiaries. In so holding, the Court articulated its now-classic statement of what due process requires:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.... [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.<sup>101</sup>

Over the years, the United States Supreme Court has reaffirmed the *Mullane* principle in various cases, including one in which the Court specifically addressed forced tax lien sales. In *Mennonite Board of Missions v. Adams*,<sup>102</sup> the Court held that publication

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1983); *Blum v. Stone*, 127 A.D.2d 549 (N.Y. App. Div. 1987); *Vance v. Federal Nat'l Mortgage Ass'n*, 988 P.2d 1275 (Okla. 1999).

96 *Stubbs v. Cummings*, 336 So. 2d 412 (Fla. App. 1976).

97 *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

98 *Id.* at 307-311.

99 *In re Central Hanover Bank & Trust Co.*, 88 N.Y.S.2d 907 (App. Div. 1949).

100 *In re Central Hanover Bank & Trust Co.*, 87 N.E.2d 73 (N.Y. 1949).

101 *Mullane*, 339 U.S. at 314-15 (citations omitted).

102 *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983).

notice in a tax lien case will not satisfy due process if the interested party is reasonably identifiable. In *Menonite Board*, notice of a tax sale was provided in accordance with an Indiana statute that required only posting in the county courthouse and publication once a week for three consecutive weeks.<sup>103</sup> Finding that method of providing notice insufficient to satisfy due process, the Court explained:

Because they are designed primarily to attract prospective purchasers to the tax sale, publication and posting are unlikely to reach those who, although they have an interest in the property, do not make special efforts to keep abreast of such notices.<sup>104</sup>

In *Tulsa Professional Collection Services, Inc. v. Pope*,<sup>105</sup> the Court further emphasized the limitations inherent in publication notice and the constitutional importance of efforts to provide actual notice. The issue in *Tulsa* was whether Oklahoma's probate code, which allowed only publication notice to estate creditors and cut off most creditors' claims not brought within two months of the publication, complied with the Due Process Clause.<sup>106</sup> The Supreme Court held that it did not.<sup>107</sup> Although Oklahoma had an interest in the expeditious conclusion of probate proceedings, the Court held that "a requirement of actual notice to known or reasonably ascertainable creditors is not so cumbersome as to unduly hinder the dispatch with which probate proceedings are conducted."<sup>108</sup>

## 2. *Covey v. Town of Somers* — Tax Lien Notice Was Constitutionally Inadequate When City Officials Knew Homeowner Was Disabled

Six years after *Mullane*, the Supreme Court applied the principles articulated in that case to invalidate a tax lien sale because town officials knew that the homeowner, Nora Brainard, was disabled. The Town of Somers, following the applicable New York statute, served Ms. Brainard by mail, by posting notice at the post office, and by publication in two local newspapers. When Ms. Brainard failed to respond, the court entered a judgment of foreclosure on September 8, 1952, and the deed to Ms. Brainard's home was delivered to the town on October 24, 1952. Five days later, on October 29, 1952, the county court certified Ms. Brainard as a person of unsound mind in a separate proceeding, and she was committed to a state mental health hospital one week later.<sup>109</sup>

The town later sought to sell the property for a minimum bid of \$6,500. Ms. Brainard's guardian, who was appointed only after the town had already obtained the deed to Ms. Brainard's home, offered to pay the town \$480, which represented the unpaid taxes, interest, penalties, costs of foreclosure, attorneys fees and maintenance costs on Ms. Brainard's home. The town declined the offer.<sup>110</sup>

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103 *Id.* at 791.

104 *Id.* at 799.

105 *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988).

106 *Id.* at 480-81.

107 *Id.*

108 *Id.* at 490.

109 *Covey v. Town of Somers*, 351 U.S. 141, 144 (1956).

110 *Id.* at 144-45.

Ms. Brainard's guardian then moved to set aside the default judgment and deed as repugnant to the Due Process Clause. The trial court denied the motion.<sup>111</sup> The appellate division of the New York Supreme Court and the New York Court of Appeals both affirmed.<sup>112</sup>

The United States Supreme Court reversed, holding that when a homeowner had no guardian, and was known by municipal officials to lack the mental capacity to handle her affairs or understand the notice, service on the homeowner did not satisfy the requirements of due process. Referring to *Mullane*, the Court held:

Notice to a person known to be an incompetent who is without the protection of a guardian does not measure up to this requirement. . . . [Where] the taxpayer Nora Brainard was wholly unable to understand the nature of the proceedings against her property . . . and the town authorities knew her to be an unprotected incompetent, we must hold that compliance with the statute would not afford notice to the incompetent and that a taking under such circumstances would be without due process of law.<sup>113</sup>

*B. In re Otsus – Seminal Illinois Case Addressing Notice to Known Incompetent Homeowner*

In Illinois, *In re Otsus*<sup>114</sup> is the seminal state case applying *Covey* and *Mullane* and addressing the adequacy of notice given in a tax deed proceeding to a disabled homeowner. Eleanor Otsus, whose mental illness was well known in her community, lost her home at a tax sale because she had not paid \$8,600 in taxes. National Indemnity Corporation purchased Ms. Otsus's delinquent taxes. Pursuant to the Illinois statute, National served Ms. Otsus personally and by publication. The return of service indicated that the deputy sheriff believed that Ms. Otsus did not speak English, when in fact she did.<sup>115</sup> Significantly, National also provided notice to PLOWS Council on Aging.<sup>116</sup> Ms. Otsus's right to redeem the property expired on July 6, 1987, and she did not redeem before that date.<sup>117</sup>

On July 21, 1987, 15 days after the end of the redemption period, the Public Guardian of Cook County was appointed to act as Ms. Otsus's guardian. The Public Guardian filed a petition for a declaratory judgment. The petition averred that the property was worth at least \$100,000 and it set forth extensive facts about Ms. Otsus's disability, confusion, paranoia, inability to care for herself, and inability to understand or act on any notices that were sent.<sup>118</sup> The Public Guardian argued that the notice provisions of the

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111 *Id.* at 145.

112 *Town of Somers v. Covey*, 129 N.Y.S.2d 537 (App. Div. 1954), *aff'd*, 125 N.E.2d 862 (N.Y. 1955).

113 *Covey*, 351 U.S. at 146-47.

114 *In re Application of County Collector v. Otsus*, 545 N.E.2d 145 (Ill. App. Ct. 1989) [hereinafter *In re Otsus*].

115 *Id.* at 145-46.

116 *Id.* at 146. Although the *In re Otsus* opinion contains no more information about PLOWS Council on Aging than its name and some excerpts from a PLOWS report concerning Ms. Otsus, it is apparent from context that PLOWS is an agency providing social services for elderly persons.

117 *Id.*

118 *Id.*

tax code were constitutionally insufficient, as applied to Ms. Otsus, because they “fail to take into account that persons living in a unique situation of disability cannot tell the difference between a piece of paper claiming to serve legal notice for the loss of property and a pizza advertisement.”<sup>119</sup> The Public Guardian also argued that due process, in such circumstances, requires more than “mailing a notice to an incompetent, publishing notice to an incompetent in the Law Bulletin<sup>120</sup> and having an untrained sheriff stick a piece of paper into the face of an incompetent woman.”<sup>121</sup>

The trial court, finding compliance with all of the statutory requirements, including those relating to notice, dismissed the Public Guardian’s action.<sup>122</sup> The Illinois Appellate Court reversed, finding that *Covey* was controlling and that the notice National gave to Ms. Otsus failed to comport with the Due Process Clause, even though it complied with Illinois statutory requirements:

We find that *Covey* controls our decision.... As in that case, Mrs. Otsus was known in her community as one lacking in competency, yet neither the authorities nor National made an attempt to have a guardian appointed to look after her interests. The record indicates that National became aware of PLOWS’ involvement with Mrs. Otsus as a result of its, National’s, conversations with the Village...; therefore, we can reasonably conclude that both National and the village knew of Mrs. Otsus’ diminished capacity....

By serving PLOWS, National demonstrated that it was aware that Mrs. Otsus was in need of assistance and that its purchase of her property was neither routine nor of the ordinary sort. It now argues that technical compliance with the statutory notice requirements was sufficient to give her notice that her property had been sold; however, National knew or should have known that such notice was inadequate to inform Mrs. Otsus that her interest in her property was at risk.<sup>123</sup>

*C. State Tax Sale Cases Addressing Notice to Disabled Homeowner When Party Required to Give Notice was Unaware of Homeowner’s Disability*

In *Covey* and *In re Otsus*, the homeowner’s disability was known to the party required to give notice. As discussed below, the trial court in Mary Lowe’s case found that Apex was unaware of Ms. Lowe’s disability, and that *In re Otsus* was applicable only to cases in which the homeowner’s disability was known.

Three state appellate courts and one state supreme court have addressed the validity of tax lien sales in circumstances in which it was not shown that the tax purchaser knew of the homeowner’s infirmities. In three of those cases, the courts applied *Mullane*

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119 *Id.* at 147.

120 The Chicago Daily Law Bulletin is a legal trade publication.

121 *In re Otsus* at 147.

122 *Id.* at 146-47.

123 *Id.* at 150.

and *Covey* to invalidate the tax sale for want of due process.<sup>124</sup> In the fourth case, a court reached the opposite result.<sup>125</sup>

1. *Consolidated Return of Tax Claim Bureau of County of Delaware* (Pa. Commw. Ct. 1983)

In *In re Consolidated Return of the Tax Claim Bureau of the County of Delaware*,<sup>126</sup> the Commonwealth Court of Pennsylvania, an intermediate reviewing court, held that a tax sale could not be justified under the Due Process Clause when the tax deed petitioner had complied with all statutory notice requirements and was unaware that the homeowner was mentally incompetent. A tax scavenger, Glyder Realty Corporation, was the highest bidder at the tax sale. The sale was confirmed and a tax deed was issued to Glyder. When Glyder attempted to evict the homeowner, the homeowner's competency was raised for the first time.<sup>127</sup>

After an evidentiary hearing, the trial court found that the homeowner was incompetent, that she was incapable of understanding the meaning or significance of the notices of the tax sale, and that she was, therefore, incapable of taking action to prevent her home from being sold. The trial court ordered the tax sale to be set aside.<sup>128</sup>

The appellate court affirmed. The court acknowledged that *Covey* was factually distinguishable because Glyder, unlike the town officials in *Covey*, was not aware of the homeowner's disabilities. The court nonetheless applied *Covey*'s analysis, holding: "To give notice to a person who cannot comprehend it through no fault of that person is a 'mere gesture' which [does] not afford the notice required to satisfy the requirements of the United States Constitution, thus rendering a tax sale pursuant to such defective notice invalid."<sup>129</sup>

If the tax sale could be vacated due to the homeowner's incompetence, the scavenger argued on appeal, all tax sales would be vulnerable to disruption and that would jeopardize the integrity of land titles.<sup>130</sup> The appellate court rejected the scavenger's position, and concluded with this observation: "We are here dealing not only with the integrity of real estate title but also with concepts of fundamental due process. In such a context... the rights of the individual to whom process is due must prevail."<sup>131</sup>

2. *Blum v. Stone* (N.Y. App. Div. 1987)

In *Blum v. Stone*,<sup>132</sup> the appellate division of the New York Supreme Court reversed the trial court's determination that a disabled homeowner had failed to prove a due process violation because the homeowner could not establish that the tax deed petitioner

124 *In re Consolidated Return of Tax Claim Bureau of County of Del.*, 461 A.2d 1329 (Pa. Commw. Ct. 1983); *Blum v. Stone*, 127 A.D.2d 549 (N.Y. App. Div. 1987); *Vance v. Federal Nat'l Mortgage Ass'n*, 988 P.2d 1275 (Okla. 1999).

125 *Stubbs v. Cummings*, 336 So. 2d 412 (Fla. App. 1976).

126 *In re Consolidated*, 461 A.2d 1329.

127 *Id.* at 1330.

128 *Id.*

129 *Id.* at 1332.

130 *Id.* at 1332-33.

131 *Id.* at 1333.

132 *Blum v. Stone*, 127 A.D.2d 549 (N.Y. App. Div. 1987).

knew that the homeowner was mentally incompetent. The homeowner, Naomi Blum, purchased her home in 1947. She regularly paid all the real estate taxes and other obligations for 32 years, until 1979, when she developed senile dementia. In 1980, when Ms. Blum was 93 years old, her taxes were sold to Shirley Stone. Ms. Blum did not redeem within the permissible time period, and Ms. Stone received a tax deed to Ms. Blum's home.<sup>133</sup>

Ms. Blum died shortly thereafter and her son, Walter Blum, moved to invalidate the tax sale. Following an evidentiary hearing, the trial court found that Ms. Stone did not have actual or constructive notice of Ms. Blum's reputed incompetency. Holding that *Covey* would warrant vacating a tax sale only if Ms. Stone or the county treasurer knew or should have known that Ms. Blum was incompetent, the trial court declined to receive evidence of Ms. Blum's actual incompetence and rejected Mr. Blum's due process challenge.<sup>134</sup>

The appellate court reversed, finding that Mr. Blum should have been permitted to present testimony regarding his mother's lack of competency.<sup>135</sup> The court expressly rejected the purchaser's interpretation of *Covey* as requiring that the notifying party have actual or constructive knowledge of a homeowner's incompetence: "Nowhere in the *Covey* case is there mention of a requirement that there must be proof that the party serving the notice...knew or should have known that the owner of [the] property was an unprotected incompetent."<sup>136</sup>

### 3. *Vance v. Federal National Mortgage Ass'n* (Oklahoma 1999)

In *Vance v. Federal National Mortgage Ass'n*,<sup>137</sup> the Federal National Mortgage Association (FNMA) initiated a foreclosure action against Susan and Gary Vance, a married couple who jointly owned a home. Service was attempted on both owners, but personal service was made successfully only upon the wife. When Ms. Vance did not appear, FNMA secured a default judgment.<sup>138</sup>

The Vances initiated an action for vacatur. They alleged that Ms. Vance suffered from paranoid schizophrenia and was incapable of understanding the significance of the process served on her. That issue was not adjudicated, however. There were conflicting allegations as to whether FNMA knew of Ms. Vance's schizophrenia, and that issue was likewise not adjudicated. FNMA moved for summary judgment only against Ms. Vance, which the trial court granted. The Oklahoma Court of Civil Appeals affirmed.<sup>139</sup>

The Oklahoma Supreme Court reversed the summary judgment due to unresolved issues of material fact. The Court held that the Due Process Clause requires more than mere compliance with procedural formalities; it guarantees that the procedure be fair in fact.<sup>140</sup> The Court adopted a "totality of the circumstances" test to determine whether service is sufficient to impart the kind of notice that is constitutionally prescribed: "The

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133 *Id.* at 550-51.

134 *Id.* at 551, 552-53.

135 *Id.* at 551-52.

136 *Id.* at 553.

137 *Vance v. Federal Nat'l Mortgage Ass'n*, 988 P.2d 1275 (Okla. 1999).

138 *Id.* at 1277.

139 *Id.* at 1278-79.

140 *Id.* at 1280.

adopted test requires that under *all the circumstances present in a case* there be a *reasonable probability* the service of process employed apprises its recipient of the plaintiff's pressed demands and the result attendant to default."<sup>141</sup>

Not only was there no factual determination as to Ms. Vance's level of capacity, there was no adjudication of FNMA's knowledge of it. Under *Covey*, the *Vance* court held, FNMA's knowledge of Ms. Vance's incapacity is a material consideration. However, while the lender's knowledge of Ms. Vance's incompetence "can be a factor in deciding whether to vacate, proper analysis still requires the trial court's primary focus in its 'due process' assessment to be on Susan's capacity to understand the service of process."<sup>142</sup> The Court held that "if under the totality of the circumstances the trial court determines that Susan was so mentally challenged that she did not appreciate the notice imparted by service of process, the summary judgment...will be invalid...and subject to vacation."<sup>143</sup>

#### 4. *Stubbs v. Cummings* (Fla. App. 1976) — Contrary Result: Homeowner Must Demonstrate Purchaser's Knowledge of Her Disability

While the *In re Consolidated Return, Blum*, and *Vance* cases teach that a forced sale may be vacated for want of due process even if the party required to give notice was not aware of the homeowner's disability, a Florida appellate court reached the opposite result in *Stubbs v Cummings*.<sup>144</sup> Bella Hicks inherited a home in 1958, but the property remained on the tax rolls under the name of a deceased relative, Nellie Reeves. Although the tax statements continued to be sent to the attention of Ms. Reeves, Ms. Hicks paid the taxes each year until 1968, when no payment was made. Edsel and Virginia McNeil purchased the taxes in 1970, and a tax deed issued to them in 1972.<sup>145</sup>

In 1968, Ms. Hicks was declared legally incompetent, but no guardian was appointed. Ms. Hicks died in 1972, and an executrix was appointed to administer Ms. Hicks's estate. The tax deed issued after Ms. Hicks's death but before the appointment of her executrix. Moreover, all notices relating to the delinquent taxes and the issuance of the tax deed had been addressed to Ms. Reeves, not Ms. Hicks. At the time, Ms. Reeves had been dead for more than 14 years. It was not shown that any of the officials involved in the tax deed proceeding had knowledge that the home belonged to Ms. Hicks or that Ms. Hicks had been adjudged incompetent.<sup>146</sup>

The executrix moved to set aside the tax deed based on Ms. Hicks's adjudicated incapacity at all applicable times, and because the tax deed issued after her death and at a time when her estate was not yet represented. The trial court dismissed the complaint.<sup>147</sup>

The Florida district court of appeals affirmed. The court interpreted *Covey* as holding that due process is offended only if the party serving notice knows of the homeowner's disability.<sup>148</sup>

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141 *Id.* (emphasis in original).

142 *Id.* at 1281.

143 *Id.*

144 *Stubbs v. Cummings*, 336 So. 2d 412 (Fla. App. 1976).

145 *Id.* at 413.

146 *Id.*

147 *Id.*

148 *Id.* at 415.

*Stubbs* was decided before *Blum* and *Vance*, but neither case mentioned *Stubbs*. Only *In re Consolidated Return* addressed *Stubbs*, and that court declined to follow the holding in *Stubbs*.<sup>149</sup>

## VI. ILLINOIS TRIAL AND APPELLATE LITIGATION

This article will now discuss the litigation in the Illinois trial and appellate courts seeking recovery of Ms. Lowe's home.

### A. Trial Court Litigation

On November 10, 1997, shortly after the trial court appointed the Public Guardian as attorney and *guardian ad litem* for Ms. Lowe, the Public Guardian filed a petition to set aside the tax deed.<sup>150</sup>

#### 1. Bona Fide Purchaser Issue

On August 12, 1998, John Herndon moved to dismiss the Public Guardian's amended petition, claiming that he was a *bona fide* purchaser by virtue of a December 6, 1996, installment contract with Apex to purchase the property for \$10,000. In April 1999, the Public Guardian moved for partial summary judgment, asking the court to find that Mr. Herndon was not a *bona fide* purchaser.<sup>151</sup> The court granted the Public Guardian's motion and denied Mr. Herndon's. In doing so, the court charged Apex and Mr. Herndon with actual or constructive knowledge that Ms. Lowe was hospitalized and did not receive the notices:

Tax purchaser Apex 'knew' or 'should have known' that [Ms. Lowe] was in the hospital. It has either actual or constructive notice of the circumstances. Actual if it had exercised due diligence in reviewing the court file before prove-up, or constructive notice if it failed to exercise due diligence. Apex should have or would have noted the Post Office notation on the return envelope — and likely would not have filed an affidavit of complying with due diligence in its inquiry and service of notice as required by [the] Property Tax Code.<sup>152</sup>

#### 2. Evidentiary Hearing

The Public Guardian's amended petition proceeded to an evidentiary hearing on the remaining issues on February 20, 2002. The trial judge who had ruled on the *bona fide* purchaser issue had retired from the bench in July 1999, and a different judge therefore presided over the hearing.<sup>153</sup> The Public Guardian presented evidence, but no other party chose to do so.<sup>154</sup>

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149 *In re Consolidated Return of Tax Claim Bureau of County of Del.*, 461 A.2d 1329, 1331 (Pa. Commw. Ct. 1983).

150 *Mary Lowe I* at 912-13.

151 *Mary Lowe I* at 912, 913.

152 C340.

153 C541.

154 *Mary Lowe I* at 914.

The Public Guardian called Bernard Rubin, M.D., a practicing psychiatrist with 47 years' experience who was stipulated as an expert. Dr. Rubin described Ms. Lowe's chronic schizophrenic disorder and her 27 psychiatric hospitalizations from 1964 through 1996. Based on his review of the records, Dr. Rubin concluded that, from January 1995 to October 1996, Ms. Lowe was incompetent, unfit to handle any social or business necessities that arose in her life, and in need of a guardian. She would have been unable to understand or respond to legal documents served on her during this time. The court admitted Dr. Rubin's expert report and the medical records from several of Ms. Lowe's psychiatric hospitalizations.<sup>155</sup>

The Public Guardian then called Jewel Hightower, the letter carrier who had made notations on the envelopes that were sent to Ms. Lowe and returned to their sender. Ms. Hightower described Ms. Lowe's strange behaviors, based on her own observations and those related to her by Ms. Lowe's neighbors.<sup>156</sup> Those behaviors included coming outside without dressing, shouting obscenities, moving furniture to the curb, and screaming at passersby.<sup>157</sup> In August 1995, Ms. Hightower learned from one of Ms. Lowe's neighbors that Ms. Lowe was hospitalized at Tinley Park Mental Health Center. Ms. Hightower noted this fact on a card maintained at the branch post office. She also testified as to how she marked and returned the letters addressed to Ms. Lowe, Mr. Austin, and "occupant."<sup>158</sup> According to Ms. Hightower, no one ever contacted her or anyone at the branch post office concerning the letters. If anyone had asked her, Ms. Hightower would have told them that Ms. Lowe was hospitalized at Tinley Park Mental Health Center. In addition, anyone could have discovered Ms. Lowe's whereabouts by filling out a form at the branch post office. The returned certified letters were admitted in evidence.<sup>159</sup>

The Public Guardian rested. Apex and Mr. Herndon rested without presenting any evidence.<sup>160</sup>

### 3. Trial Court's Ruling

On April 9, 2003, the trial court denied the Public Guardian's petition to set aside the tax deed. The court found that Dr. Rubin was correct in his expert opinion that Ms. Lowe was incompetent.<sup>161</sup> The court also found that, "given Ms. Lowe's capacity, even if she had received notice, she wouldn't have been able, in all likelihood, to understand or act upon it."<sup>162</sup>

The court did not overturn the prior judge's finding that Apex had actual or constructive knowledge that Ms. Lowe was hospitalized and failed to receive notice of the tax deed proceeding. However, the court found that Ms. Hightower's notations were not sufficient to charge Apex with knowledge that Ms. Lowe was mentally ill. The court reasoned that Apex may have known that Ms. Lowe was hospitalized, but there was no

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155 Mary Lowe I at 914-15, SRII 17-50, EX93-460.

156 Mary Lowe I at 915, SRII 57-61.

157 SRII 54-62, 82-87.

158 Mary Lowe I at 915, SRII 64-66, 70, 72, 76, 82-83.

159 Mary Lowe I at 915, SRII 80, 84.

160 SRII 145, 157-59.

161 Mary Lowe I at 915.

162 *Id.*

reason for Apex to have known that Ms. Lowe was hospitalized for psychiatric reasons. Although the Public Guardian argued that the most rudimentary investigation of Ms. Hightower's notations would have led to Apex's actual knowledge of Ms. Lowe's mental illness, the court found that Apex had no duty to do anything to follow up on the notations. In the trial court's view, therefore, Ms. Lowe had not been denied due process.<sup>163</sup>

### B. Illinois Appellate Court Affirms

A panel of the Illinois Appellate Court affirmed in an unpublished opinion.<sup>164</sup> Like the trial court, the appellate court concluded that Apex's knowledge of Ms. Lowe's hospitalization was not a sufficient basis for presuming that Apex had knowledge of her mental illness. The court distinguished *Covey* and *In re Otsus* based on the trial court's finding that Apex had not actually known that Ms. Lowe was mentally incompetent when it provided notice to her, whereas the fact of mental incompetence was actually known by the party required to give notice in *Covey* and *In re Otsus*.<sup>165</sup> The appellate court did not consider whether Apex was required — based on its knowledge of Ms. Lowe's hospitalization and the clues that Apex had as to Ms. Lowe's actual whereabouts — to undertake any additional investigation.

The court declined to follow *Consolidated Return* and *Blum*, finding them inapplicable in light of *In re Otsus*.<sup>166</sup> Since *Consolidated Return* and *Blum* were both decided before *In re Otsus*, but were not mentioned in the opinion in *In re Otsus*, the Illinois Appellate Court treated the rule stated in the two cases as having been implicitly rejected by the *In re Otsus* court.<sup>167</sup> Of course, there was no need for the *In re Otsus* court to refer to these cases because the same issue was not presented in *In re Otsus*; it was uncontested that the party giving notice was aware of the homeowner's disabilities. The appellate court also distinguished *Vance* on the ground that it "focused primarily on the propriety of summary judgment."<sup>168</sup> Finally, the court rejected the Public Guardian's arguments that Apex had failed to exercise "due diligence" in locating and serving Ms. Lowe, or that its conduct constituted fraud or deception, under state law.<sup>169</sup>

### C. Round One in the Illinois Supreme Court, Which Affirms the Decision of the Appellate Court

The Public Guardian filed a petition for leave to appeal, which the Illinois Supreme Court granted.<sup>170</sup> After full briefing and oral argument, the Illinois Supreme Court affirmed the decisions of the trial and appellate courts on October 20, 2005.<sup>171</sup> The Illinois Supreme Court's decision was unanimous, with one Justice not participating.

The Illinois Supreme Court began by rejecting the Public Guardian's state law argu-

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163 *Id.* at 915-16.

164 Because the appellate court's opinion is unpublished, citations are to the court's slip opinion.

165 1-02-1101 slip op. at 10-11, 13 (Ill. App. Ct. Sept. 12, 2003).

166 *Id.* at 13.

167 *Id.*

168 *Id.*

169 *Id.* at 14-20.

170 Petition of Apex Tax Invs., Inc. v. Lowe, 807 N.E.2d 975 (Ill. 2004).

171 Mary Lowe I.

ments that Apex had failed to show “due diligence” in its attempt to locate and serve Ms. Lowe and that its conduct constituted fraud or deception.<sup>172</sup> The Court then addressed the Public Guardian’s federal due process claims. The Court observed that Ms. Lowe was hospitalized and received no notices from January 1995 through October 1996. According to the Court, however, it was significant that the record contained no information concerning Ms. Lowe’s mental competence in 1993, when the county collector filed an application for judgment and order of sale in the state trial court. At that stage, the collector was required to give notice to the homeowner by certified or registered mail and by publication. In addition, after the state trial court entered the order of sale, the statute required Apex to arrange for the county clerk to send a notice by registered or certified mail.<sup>173</sup> The record was silent as to whether these earlier notices were sent or received. Significantly, the statute requires the giving of notice, but it does not require that the homeowner be advised of the time and place of the hearing on the petition for the tax deed, so that the homeowner can appear and object.<sup>174</sup>

The relevance of the earlier notices (and Ms. Lowe’s mental competence at the time they were required to be given) was not an issue raised by Apex or Mr. Herndon, but the Illinois Supreme Court, itself, raised the question of whether these notices should be considered as part of the due process analysis.<sup>175</sup> In any event, the Court concluded that it need not address the constitutional adequacy of the earlier notices because the notices challenged by the Public Guardian — *i.e.*, the notices of Apex’s petition for a tax deed and Ms. Lowe’s redemption rights that were returned unserved due to Ms. Lowe’s hospitalization — were, themselves, sufficient to satisfy the requirements of the Due Process Clause.<sup>176</sup>

After summarizing the standards articulated in *Mullane, Mennonite Board* and *Tulsa Professional Collection*, the Court emphasized that the test is not whether the notice procedure actually succeeds in notifying the individual, but whether the procedure is reasonably calculated to do so.<sup>177</sup> The Court found that that test was satisfied in Ms. Lowe’s case.

The Illinois Supreme Court agreed with the appellate court that the *Covey* decision was not controlling because its holding was limited to cases in which the party responsible for giving notice was aware of the homeowner’s disabilities.<sup>178</sup> The Illinois Supreme Court rejected reliance on *Covey* for the additional reason that “the argument rests on the assertion that Apex did not conduct a diligent inquiry into ascertaining Mary Lowe’s whereabouts.... In this case, the circuit court... held that Apex had made a diligent inquiry to locate Mary Lowe.”<sup>179</sup> The Court held, *sua sponte*, that any federal constitutional challenge to the adequacy of the notice given to Ms. Lowe was barred by the trial court’s finding of diligent inquiry, even though that finding was based on Illinois state statutory and

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172 *Id.* at 919-23.

173 *Id.* at 923-24.

174 *Id.* at 924.

175 *Id.*

176 *Id.*

177 *Id.* at 928.

178 *Id.* at 927.

179 *Id.*

constitutional standards (rather than on federal constitutional standards) and was entered following an *ex parte* hearing that was held without notice to Ms. Lowe.<sup>180</sup>

Finally, the Illinois Supreme Court addressed *In re Consolidated Return, Blum and Vance* in one paragraph. The Court noted that the appellate court had distinguished these cases on their facts, but, to the extent that these decisions supported the Public Guardian's position and were not distinguishable, they were "not persuasive" because they rested on the assumption that due process requires actual notification, rather than reasonable notice procedures.<sup>181</sup> The Court also observed that Ms. Lowe did not lack a remedy, because she could seek relief from the indemnity fund.<sup>182</sup>

VII. UNITED STATES SUPREME COURT DECIDES *JONES v. FLOWERS*,  
GRANTS CERTIORARI IN *LOWE*, AND VACATES THE ILLINOIS SUPREME COURT'S JUDGMENT

A. *Public Guardian's Petition for Certiorari*

On September 27, 2005, approximately three weeks before the Illinois Supreme Court ruled in *Mary Lowe I*, the United States Supreme Court granted certiorari in *Jones v. Flowers*.<sup>183</sup> In *Jones*, which is discussed in more detail in subsection B, *infra*, the Arkansas Supreme Court had affirmed the issuance of a tax deed when the party responsible for giving notice knew that the homeowner did not receive actual notice. The notices were sent via certified mail and returned with the notation "unclaimed." One of the questions on which the United States Supreme Court granted certiorari was the following:

When mailed notice of a tax sale or property forfeiture is returned undelivered, does due process require the government to make any additional effort to locate the owner before taking the property?

While *Jones* was being briefed in the United States Supreme Court, the Public Guardian filed a petition for a writ of certiorari on behalf of Ms. Lowe's estate. In his petition, the Public Guardian presented three questions, the first of which was the same as that on which the Court granted certiorari in *Jones*. A second question, however, was predicated on a significant factual difference between the two cases: Whereas the *Jones* notices were returned with no clues or comments, the notations made by Ms. Hightower showed that Ms. Lowe was hospitalized and, by including Ms. Hightower's initials and route number, indicated a source of additional information. Thus, the Public Guardian asked the Court to grant certiorari to determine whether the Due Process Clause, even absent a general duty to make additional efforts to locate a homeowner before her property is taken, nonetheless imposes such a duty when the returned, unserved notices contain information that is reasonably likely to lead to the discovery of the homeowner's whereabouts or disability. Finally, the Public Guardian asked the Court to grant certiorari to de-

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180 *Id.*

181 *Id.*

182 *Id.* at 922-23. Indemnity fund proceedings, and the inherent limitations of such proceedings in making a disabled homeowner whole, are discussed in Section IX, *infra*.

183 *Jones v. Flowers*, 545 U.S. 1165 (2005).

termine whether, consistent with the Due Process Clause, a finding of due diligence made as a matter of state law in an *ex parte* proceeding can foreclose a homeowner who did not receive notice of the proceeding from challenging, on federal constitutional grounds, the adequacy of the efforts made to determine her whereabouts.

*B. United States Supreme Court Decides Jones and Holds That When Officials Know Homeowner Did Not Receive Notice, They Must Take Additional Reasonable Steps*

The United States Supreme Court announced its decision in *Jones v. Flowers*<sup>184</sup> on April 26, 2006. Speaking through the Chief Justice, a majority of the Court held that, when the state knows that a homeowner did not receive notice of a tax sale proceeding, the state must take reasonable additional steps to provide notice.

Gary Jones purchased his home in 1967. He lived there with his wife until they separated in 1993. Mr. Jones moved elsewhere and his wife continued to live in the family home. Mr. Jones paid the mortgage every month for 30 years, and the mortgage company paid the property taxes during that period. After Mr. Jones paid off the mortgage in 1997, the property taxes went unpaid and the property was certified as delinquent.<sup>185</sup> In April 2000, the Commissioner of State Lands gave notice of the tax delinquency and redemption rights by certified mail sent to the address of the family home. Nobody was home to sign for the letter, and nobody appeared at the post office to claim the letter within 15 days. Thereafter, the letter was marked “unclaimed” and returned to the Commissioner. The Commissioner also gave publication notice. Linda Flowers submitted an offer to buy the property, and the Commissioner sent another notice to Mr. Jones by certified mail. That letter was likewise marked “unclaimed” and returned to the Commissioner. Ms. Flowers purchased the home, valued at \$80,000, for \$21,042.<sup>186</sup>

Mr. Jones sued the Commissioner and Ms. Flowers in state court, alleging that notice was not sufficient under the Due Process Clause. The trial court granted summary judgment in favor of the Commissioner and Ms. Flowers, finding that the statutory procedures had been followed and that those procedures complied with due process.<sup>187</sup> The Arkansas Supreme Court affirmed.<sup>188</sup>

The United States Supreme Court granted certiorari and reversed.<sup>189</sup> In the Supreme Court, the Commissioner argued that due process was satisfied once he provided notice reasonably calculated to apprise Mr. Jones of the impending tax sale by mailing him a certified letter.<sup>190</sup> The Supreme Court held to the contrary. Although the notice sent to Mr. Jones was reasonably calculated to give notice to him at the time it was sent, the Court held that the Commissioner was obligated, when the notice was returned unclaimed, to take additional reasonable steps to attempt to provide actual notice to the homeowner, if practicable to do so.<sup>191</sup> Citing *Mullane*, the Court observed that it did “not think that a

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184 *Jones v. Flowers*, 547 U.S. 200 (2006).

185 *Id.* at 223.

186 *Id.* at 223-24.

187 *Id.* at 224.

188 *Jones v. Flowers*, 198 S.W.3d 520 (Ark. 2004).

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

190 *Id.* at 226.

191 *Id.* at 225.

person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed.”<sup>192</sup> On the contrary, the Court concluded that “such a person would take further reasonable steps if any were available.”<sup>193</sup>

The Court analogized the facts presented in *Jones* to a situation in which the Commissioner would hand a stack of notices to the letter carrier and then watch as the carrier accidentally dropped the letters down a storm drain. In such circumstances, “one would certainly expect the Commissioner’s office to prepare a new stack of letters and send them again.”<sup>194</sup> The Court held that the Commissioner’s failure to follow up would be unreasonable in such circumstances, even though the letters were reasonably calculated to reach the recipients when delivered to the letter carrier.<sup>195</sup>

Finally, the Court identified several additional steps that the Commissioner reasonably could have taken to provide notice to Mr. Jones. Such steps included the use of regular mail so that the letter would be received at the address without the requirement of a signature, and the posting of notice on the front door of the home.<sup>196</sup> On the other hand, the Court held that the Commissioner was not obligated to engage in an “open-ended search” such as phonebooks or governmental records such as income tax rolls.<sup>197</sup> The Court concluded by observing that, “In this case, the State is exerting extraordinary power against a property owner — taking and selling a house he owns. It is not too much to insist that the State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed.”<sup>198</sup>

### *C. United States Supreme Court Grants Certiorari in Mary Lowe and Vacates Illinois Supreme Court’s Judgment*

On May 22, 2006, less than a month after it released its opinion in *Jones*, the United States Supreme Court entered an order granting Ms. Lowe’s petition for a writ of certiorari, vacating the judgment of the Illinois Supreme Court, and remanding the case for further consideration in light of *Jones*.<sup>199</sup>

## VIII. ROUND TWO IN THE ILLINOIS AND UNITED STATES SUPREME COURTS

### *A. Illinois Supreme Court Affirms for Second Time*

On remand, following supplemental briefing and oral argument, a divided Illinois Supreme Court, with only five of seven justices participating, again affirmed the trial court’s denial of Ms. Lowe’s petition to set aside the tax deed.<sup>200</sup> The Court distinguished *Jones* on the ground that the notice requirements under Illinois law are more comprehen-

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192 *Id.* at 229.

193 *Id.*

194 *Id.*

195 *Id.*

196 *Id.* at 235.

197 *Id.* at 235-36.

198 *Id.* at 239.

199 *Mary Lowe*, 547 U.S. 1145 (2006).

200 *Mary Lowe II*.

sive than those contained in the Arkansas statute.<sup>201</sup> The Court also distinguished *Jones* on the ground that *Jones* concerned the notice required *before* taking the property, whereas in *Lowe* the notice at issue that Apex was required to give was after it had received a certificate of sale entitling it to petition for a tax deed, and after the redemption period had expired.<sup>202</sup>

According to the Illinois Supreme Court, *Jones* did not charge Apex with any duty to undertake further action or investigation based on the notations concerning Ms. Lowe's hospitalization and Ms. Hightower's initials and route number. According to the Court, requiring Apex to follow up on those notations would be akin to the "open-search" that *Jones* found not to be required by the Due Process Clause.<sup>203</sup>

Finally, the Court declined to revisit its previous holding that Ms. Lowe's federal constitutional challenge was barred by the due diligence finding that the trial court made as a matter of state law in the *ex parte* prove-up proceeding. The court reasoned that its "reconsideration of this case is limited to... whether Apex's notice to Lowe satisfied due process under *Jones*."<sup>204</sup>

Justice Kilbride dissented. He agreed that *Jones* involved notice at an earlier stage of the process leading to the ultimate loss of a home, but found that this difference actually cut in favor of Ms. Lowe. In Justice Kilbride's view, the need for muscular due process protections was even more acute when the proceeding was not the first step in the deprivation of a person's property, but the last. As Justice Kilbride recognized, the proceeding at issue in Ms. Lowe's case represented her last clear chance to protect her property interests from final and irrevocable extinction. "Due to the magnitude and imminence of the risk of complete forfeiture, I believe that due process mandates even more stringent notice requirements than those required *before* the sale of the property."<sup>205</sup> Justice Kilbride also found it "difficult to imagine" that someone who actually wished to inform Ms. Lowe of the impending loss of her home would find it unreasonable or impracticable to call the post office to inquire about the notations.<sup>206</sup>

### B. United States Supreme Court Denies Certiorari

The Public Guardian filed a second petition for a writ of certiorari in the United States Supreme Court. Consistent with Justice Kilbride's dissent, the Public Guardian asked the Court to grant certiorari to consider whether the Due Process Clause requires that a homeowner receive constitutionally-sufficient notice of the hearing at which title to her home may be fully and finally extinguished, rather than simply at the time that the certificate is granted. The Public Guardian also asked the Court to consider whether the

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201 *Id.* at 225.

202 *Id.* at 226-27. The substantive difference between the statutory schemes is minimal and, in the view of the authors, immaterial. In Illinois, the taking of a homeowner's property for delinquent taxes happens in two distinct steps: the tax sale, and the issuance of the tax deed. These steps are separated by a 30-month redemption period. In Arkansas, these steps are consolidated in a single event at the end of a two-year redemption period. See Section IV, *supra*.

203 *Mary Lowe II* at 227-30, citing *Jones*, 547 U.S. at 236.

204 *Mary Lowe II* at 232.

205 *Id.* at 234 (emphasis in original).

206 *Id.* at 235.

party required to provide constitutionally-sufficient notice may ignore an undelivered, returned notice that contains new information simply because that party took some reasonable steps to provide notice before the new information came to its attention. Finally, the Public Guardian asked the Court to decide whether a state statute may preclude a homeowner, who did not receive actual notice of the tax deed proceeding at which her property rights were extinguished, from challenging the sufficiency of the notice of that proceeding on federal constitutional grounds. The United States Supreme Court denied Ms. Lowe's second petition for certiorari.<sup>207</sup>

#### IX. ALTERNATIVE REMEDIES

In affirming the Illinois trial and appellate courts' denial of Ms. Lowe's petition to set aside the tax deed, the Illinois Supreme Court opined that Ms. Lowe had a remedy in the form of recovery from an indemnity fund.<sup>208</sup> This fund is financed from a nominal fee scavengers pay when they purchase a property at a tax sale.<sup>209</sup> Recovery against the fund is by means of an action against the county treasurer, as trustee of the fund, brought in the court that ordered issuance of the tax deed.<sup>210</sup>

A homeowner who "sustains loss or damage by reason of issuance of a tax deed... and who is barred or...precluded from bringing an action for recovery of the property" may seek recovery of the loss sustained.<sup>211</sup> Recovery is limited to the fair cash value of the property on the date the tax deed issued, less the value of any mortgages and liens.<sup>212</sup> The homeowner must demonstrate exhaustion of remedies.<sup>213</sup> In addition, the indemnity award may not exceed \$99,000 unless the homeowner demonstrates that the loss was "without fault or negligence" on her part and that she "exercised ordinary reasonable diligence under all of the circumstances."<sup>214</sup>

Recovery from the indemnity fund provides an incomplete remedy for several reasons. First, because the fund is financed by fees paid by scavengers, the level of available funds varies from year to year, and claims against the fund sometime exceed its resources. When that happens (or appears likely to happen), homeowners may not receive the full market value of their homes. Moreover, the amount of the award is left to the "broad discretion" of the court, which must take into account equitable principles, including the level of available funds.<sup>215</sup> Such discretionary and uncertain relief clearly is not an adequate substitute for the property right extinguished with the forced sale of someone's home.

Most important, perhaps, is the fact that the scheme takes no account of the "hedonic"

207 *Mary Lowe*, 128 S. Ct. 253 (2007).

208 *Mary Lowe I* at 922-23. The indemnity fund is governed by §§ 200/21-295 of the Property Tax Code, 35 ILL. COMP. STAT. 200/21-295.

209 35 ILL. COMP. STAT. 200/21-295. The fee for properties purchased in Cook County, which includes Chicago and the surrounding suburbs, is \$80 plus 5 percent of the amount of the taxes, interest and penalties. The fee for properties purchased in other counties is \$20. *Id.*

210 35 ILL. COMP. STAT. 200/21-305.

211 *Id.*

212 *Id.*

213 *In re Application of County Collector (In re Watson)*, 692 N.E.2d 1290, 1293-94 (Ill. App. Ct. 1998).

214 35 ILL. COMP. STAT. 200/21-305.

215 *Hedrick v. Bathon*, 747 N.E.2d 917, 923-25 (Ill. App. Ct. 2001); 35 ILL. COMP. STAT. 200/21-305.

value that the home has for its owners. Most people who have lost their homes because of faulty notice and a small amount of unpaid taxes do not want to be “made whole” in a purely financial sense. They do not want a sum of money. What they want is to continue to live in their homes, where they have lived their lives and raised their families.

#### X. LEGISLATIVE EFFORTS

Over the years, the Public Guardian has proposed to the Illinois General Assembly various remedial measures designed to address the problem of homeowners with cognitive disabilities who stand to lose their homes because of small amounts of unpaid taxes. Unfortunately, the forces opposed to such reform are well organized and influential. To date, all efforts to pass remedial legislation in Illinois have been unsuccessful.

##### A. SB 2409 (2004)

In 2004, the Public Guardian proposed legislation that would have required the tax purchaser to serve notice on the county public guardian or other designated person in all cases in which the homeowner has not redeemed the taxes within the redemption period.<sup>216</sup> The Public Guardian would be required to make a determination as to the homeowner’s capacity within 60 days of receiving notice, with the possibility of securing one 60-day extension based upon a showing of good cause.<sup>217</sup> If the Public Guardian concluded that the homeowner might be disabled and in need of a guardian, the Public Guardian would petition for guardianship. Notice would be served on the tax purchaser, who would be entitled to appear to object to a finding that the homeowner was disabled during any portion of the redemption period. Upon the filing of a guardianship petition, the tax deed proceeding would be stayed.<sup>218</sup> If the court in the guardianship proceeding were to find that the homeowner was disabled and unable to manage her estate during any portion of the redemption period, redemption would be allowed for a period of six months after the entry of that finding.<sup>219</sup>

SB 2409 received the support of many groups, including the editorial board of the *Chicago Tribune*.<sup>220</sup> However, the bill was opposed by the scavenger lobby. The bill passed the Illinois Senate but died in committee in the House of Representatives.

##### B. SB 2007 (2007)

In 2007, the Public Guardian proposed an alternative approach. This legislation would have required that notices of tax sale proceedings be served by first-class mail in addition to certified or registered mail.<sup>221</sup> In addition, the legislation would have altered the grounds on which a tax deed is contestable. Under current state law, a tax deed is contestable on only four narrow grounds: (1) showing that the taxes were paid prior to the sale; (2) showing that the property was exempt from taxation; (3) proving that the tax

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216 ILL. SENATE BILL 2409 §§ (a) and (b) (2004).

217 *Id.* § (c).

218 *Id.* § (d).

219 *Id.*

220 Seizing Homes from the Infirm, *Chi. Trib.*, Jan. 26, 2004, at 12.

221 ILL. SENATE BILL 2007 (2007).

deed was procured by fraud or deception, which must be shown by clear and convincing evidence; or (4) showing that the homeowner was not named in the publication notice and the tax purchaser did not make diligent effort to serve the homeowner.<sup>222</sup> The bill proposed by the Public Guardian would have eliminated this limitation, allowing homeowners to seek vacation of a tax deed based on the same grounds provided by law for the vacating of any judgment.<sup>223</sup> SB 2007 died in committee in the Illinois Senate.

### C. Current Efforts

The Public Guardian is currently preparing language for a new legislative effort. This legislation would provide that a tax deed shall not issue for property in which a person with cognitive disabilities has an ownership interest, and that any order issuing such a tax deed will be void *ab initio*.<sup>224</sup> The legislation also would provide that it is to be construed in light of equitable principles, particularly the public policy in favor of protecting the rights of the disabled.

## XI. CONCLUSION

Ms. Lowe's case suggests three distinct scenarios for analysis under the Due Process Clause: (1) where actual notice has been attempted without success at the person's home, and there are strong clues as to the person's actual whereabouts; (2) where physical service is made on the homeowner, but her cognitive disabilities prevent her from understanding the significance of the notice, and the party required to give notice knows about the homeowner's disabilities; and (3) where physical service is made on a cognitively impaired homeowner, but the party required to give notice does not have reason to know or suspect of the homeowner's disabilities.

As for the first situation, there is an excellent argument that the Due Process Clause requires the party serving notice to follow up on the clues. The argument is based on *Jones*, as well as the Supreme Court's due process jurisprudence leading up to *Jones*. As Ms. Lowe's case demonstrates, however, scavengers can attempt to distinguish *Jones* based on differences in the particular state statutory scheme at issue.

The United States Constitution is less likely than legislation to provide sure and certain relief in this area. For this reason, the authors believe that there is a strong need for remedial legislation along the following lines. First, the party charged with locating and serving the homeowner should be an impartial public official, not a private party with an interest in obtaining the property. In addition, remedial legislation should provide explicitly that the party responsible for giving notice must make reasonable efforts to follow up on information he or she gains that might reasonably lead to the whereabouts of the homeowner. The test for reasonableness should be simple: If a private party were owed the amount of equity in the homeowner's house, would he or she think that additional steps reasonably should be taken before giving up on collecting the debt? The legislation

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222 See 35 ILL. COMP. STAT. 200/22-45.

223 ILL. SENATE BILL 2007 (2007).

224 Making the order void *ab initio*, as opposed to voidable, would avoid the problem of a tax scavenger quickly turning around and selling the disabled person's home to a subsequent buyer who then claims to be a *bona fide* purchaser, as occurred in Ms. Lowe's case.

should also provide that the party required to give notice is charged with knowledge of readily available matters of public record containing information about the homeowner's whereabouts, and that the party required to give notice must make reasonable efforts to follow up on such information. The same test of reasonableness would apply. If the party serving notice fails to undertake such efforts, he or she will be charged with knowledge of the facts that he or she would have discovered upon reasonable inquiry.

As for the second scenario, it is clear that notice to a known disabled homeowner is no notice at all, but a violation of the Due Process Clause. That has been clear since the Supreme Court's decision in *Covey v. Town of Somers*, and state tax sale cases addressing disabled homeowners have consistently followed that precedent.

Finally, it is unclear, as a constitutional matter, whether service on a homeowner who is cognitively disabled and unable to understand the meaning and significance of the notice is sufficient when the party providing notice has no reason to know or suspect that the homeowner is disabled. The United States Supreme Court has not addressed that issue. So far, of the five states that have ruled on this question, three — Pennsylvania, New York and Oklahoma — have held that such a taking violates the Due Process Clause. The remaining two states — Florida and Illinois — hold that the property may be taken in such circumstances consistent with due process standards.

Given the law's uncertainty with respect to the protection afforded by the Due Process Clause to cognitively impaired homeowners whose impairments may be unknown to those charged with giving notice, the need for remedial legislation is clear. One approach is that taken by Arkansas, which provides for equitable redemption. In Arkansas, property belonging to a minor, insane person or person in confinement may be redeemed up until two years after removal of the disability.<sup>225</sup> Notably, two jurisdictions, New Jersey and the District of Columbia, allow the disabled homeowner a right of equitable redemption pursuant to case law.<sup>226</sup>

Other possible approaches include those proposed by the Public Guardian and discussed above. In particular, the authors favor the Illinois SB 2409 (2004) approach involving appointment of an impartial public official, as opposed to a private scavenger operating under a conflict of interest, to investigate cases of non-redemption. This approach also allows for equitable redemption if it turns out that the homeowner is disabled. Also of value would be legislation along the lines of the Public Guardian's current effort, providing that a tax deed issued for property in which a disabled person has an ownership interest would be void *ab initio*. If that proposal were to be adopted, scavengers would have a strong interest in making sure that non-redemption was not the result of a disabled homeowner's failure to receive or understand the notice. By taking the additional steps that were not taken in Mary Lowe's case, the scavenger would minimize any possibility that its title might later be held invalid.

Remedial legislation to protect cognitively disabled homeowners from loss of their homes at forced tax sales is consistent with the protections that disabled persons already enjoy in other areas of the law. For example, in Illinois, as in most states, statutes of limi-

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225 ARK. CODE ANN. §§ 26-37-305, 26-37-306, 26-37-203(b) (2009).

226 *Bergen-Eastern Corp. v. Koss*, 427 A.2d 1132 (N.J. Super. Ct. App. Div. 1981); *Bynes v. Scheve*, 435 A.2d 1058 (D.C. 1981).

tations are tolled while a person is under a disability,<sup>227</sup> and a contract or note entered into by a disabled person is void as against that person.<sup>228</sup> These special rules are consistent with the strong public policy in favor of protecting our most vulnerable citizens. Certainly, such protections are no less warranted when a cognitively disabled person stands to lose her home – probably the most valuable asset that she has, from both a financial and an emotional viewpoint.

The State has a legitimate and important interest in collecting property taxes and in attaching the property of property owners who could, but choose not to pay their taxes. The State also has a legitimate and important interest in encouraging persons to purchase properties when such property owners have chosen not to pay their taxes. But if homeowners have not paid their taxes or responded to notices because they did not receive them, or could not understand what they did receive because of a cognitive disability, the State has no legitimate interest in taking their homes, or in encouraging others to buy them. In such circumstances, equitable redemption or other protection should be afforded the homeowners before they lose their homes forever. That can be done, as the Public Guardian's legislative proposals show, without causing harm to the State or to those with a legitimate interest in purchasing properties owned by deadbeat taxpayers. It can be done, and fundamental fairness requires that it be done.

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227 735 ILL. COMP. STAT. 5/13-211.

228 755 ILL. COMP. STAT. 5/11a-22.