

OPINION NO. 85-083**Syllabus:**

A transfer of real property resulting from a conveyance by way of a deed in lieu of foreclosure, wherein the mortgagor conveys mortgaged property to the mortgagee in exchange for which the mortgagee cancels the underlying debt and absolves the mortgagor of personal liability thereon, is exempt, pursuant to R.C. 319.54(F)(3)(m), from the real property transfer fee imposed by R.C. 319.54(F)(3).

To: Anthony G. Pizza, Lucas County Prosecuting Attorney, Toledo, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 26, 1985

I have before me your request for my opinion whether a particular real estate transaction is exempt from the real

property transfer fee imposed by R.C. 319.54(F)(3). Specifically you ask whether a transfer resulting from a conveyance of real property by way of a deed in lieu of foreclosure is exempt from the real property transfer fee under R.C. 319.54(F)(3)(b), (1), or (m).

The series of events that results in a conveyance by way of a deed in lieu of foreclosure commences with a loan made for the purpose of purchasing real estate. When the land is purchased the buyer executes a mortgage in favor of the lender to secure the repayment of the loan. If, after the mortgagor has paid a portion of the outstanding indebtedness, he defaults, the mortgagee may initiate a foreclosure action to collect the debt, whereby a sale of the property is ordered by the court. See R.C. 2323.07 (sale of real property upon foreclosure); R.C. 2329.01 (lands and tenements, not exempt by law, shall be subject to the payment of debts, and liable to be taken on execution and sold). As an alternative to a foreclosure action, the mortgagee may simply agree to a cancellation of the outstanding debt in return for which the mortgagor conveys his entire interest in the mortgaged property to the mortgagee by way of a quitclaim or general warranty deed.¹

I turn now to an examination of R.C. 319.54(F). R.C. 319.54(F) authorizes the county auditor to charge and receive certain fees for services he performs with respect to the transfer of land titles. R.C. 319.54(F) thus provides in pertinent part as follows:

The county auditor shall charge and receive fees as follows:

. . . .

(3) For receiving statements of value and administering section 319.202 of the Revised

¹ A mortgagor has a common law right to redeem mortgaged property from forfeiture following default, prior to the decree of foreclosure and sale. Shaw v. Walbridge, 33 Ohio St. 1 (1877); Wayne Savings & Loan Co. v. Young, 49 Ohio App. 2d 35, 358 N.E.2d 1380 (Wayne County 1976); Dawes v. Murphy, 119 Ohio App. 201, 197 N.E.2d 818 (Franklin County 1963). A statutory right of redemption, which the mortgagor has after the sale but before confirmation thereof, now exists under R.C. 2329.33. Prior to a decree of foreclosure, the common law equity of redemption is a specie of alienable property; the statutory right of redemption created by R.C. 2329.33, however, is a personal privilege rather than a property right and thus is nontransferable and limited by its terms. Wayne Savings & Loan Co., 49 Ohio App. 2d at 37, 358 N.E.2d at 1381-82. By conveying mortgaged property to the mortgagee by way of a deed in lieu of foreclosure, the mortgagor parts with his right of redemption, and although such a transaction is permissible, "[c]ourts will scrutinize such a transaction, and will not allow the mortgagee to take any undue advantage; he will not be allowed to use his position as creditor to oppress, or to drive an unconscionable bargain." Shaw v. Walbridge, 33 Ohio St. at 6.

Code, one dollar, or ten cents per hundred dollars for each one hundred dollars or fraction thereof of the value of real property transferred, whichever is greater

R.C. 319.54(F)(3) further provides that the fee imposed thereunder shall not be charged in the case of certain enumerated transfers. In your request you ask whether a transfer resulting from a conveyance by way of a deed in lieu of foreclosure is exempt from the transfer fee imposed by R.C. 319.54(F) under R.C. 319.54(F)(3)(b), (l), or (m). In this regard, R.C. 319.54(F)(3) provides in pertinent part that no fee shall be charged when the transfer is made:

(b) Solely in order to provide or release security for a debt or obligation;

(l) To a grantee other than a dealer in real property, solely for the purpose of, and as a step in, the prompt sale thereof to others;

(m) To or from a person when no money or other valuable and tangible consideration readily convertible into money is paid or to be paid for the real estate and the transaction is not a gift.

See R.C. 319.20; R.C. 319.202. See also R.C. 322.01(B); R.C. 322.02.

I begin my inquiry by noting the well-settled principle that the exemptions provided in R.C. 319.54(F)(3) are to be strictly, but reasonably, construed in favor of the transfer fee and against the exemption. 1982 Op. Att'y Gen. No. 82-102; 1980 Op. Att'y Gen. No. 80-029; 1970 Op. Att'y Gen. No. 70-126; 1970 Op. Att'y Gen. No. 70-124; 1968 Op. Att'y Gen. No. 68-165 (syllabus, paragraph one). See also National Tube Co. v. Glander, 157 Ohio St. 407, 105 N.E.2d 648 (1952)(syllabus, paragraph two); State ex rel. Keller v. Forney, 108 Ohio St. 463, 141 N.E. 16 (1923) (syllabus, paragraph one).

I consider first whether a transfer resulting from a conveyance by way of a deed in lieu of foreclosure is exempt from the transfer fee imposed by R.C. 319.54(F) under R.C. 319.54(F)(3)(m), which states that a transfer is exempt from the real property transfer fee if the transfer is made "[t]o or from a person when no money or other valuable and tangible consideration readily convertible into money is paid or to be paid for the real estate and the transaction is not a gift." Prior to its amendment in 1978, see 1977-1978 Ohio Laws, Part II, 3721, 3725 (Sub. H.B. 1024, eff. Oct. 9, 1978), R.C. 319.54(F)(3)(m) provided an exemption from the real property transfer fee when the transfer was made "[t]o or from a person when no consideration is paid or to be paid for the real estate and the transaction is not a gift." 1967-1968 Ohio Laws, Part I, 290, 292 (Am. Sub. S.B. 511, eff. March 10, 1968). In amending R.C. 319.54(F)(3)(m), the General Assembly evidently intended to expand the scope of the exemption provided therein, and to establish that real estate transactions that are not gifts, but for which consideration other than "valuable and tangible consideration readily convertible into money" is paid or to be paid, are exempt from the real property transfer fee. 1981 Op. Att'y Gen. No. 81-016 at 2-61.

I consider first whether the transaction in question is a gift. In City National Bank v. Kelly, 19 Ohio Op. 231, 235 (P. Ct. Franklin County 1939) a "gift" is defined as follows:

A gift inter vivos is a transfer of property to a donee during the life of the donor, for no consideration, with the intention on the part of the donor to divest himself of control or dominion over the subject of the gift, and with no conditions imposed thereon to be met by the donee.

See also In Re Bell & Beckwith, 44 Bankr. 656, 658 (N.D. Ohio 1984) ("[i]t is also well settled that a gift is a transfer of property for which the transferor receives no consideration"). A valuable consideration may consist of some legal right, interest, profit or benefit accruing to a party. City Trust & Savings Bank v. Schwartz, 68 Ohio App. 80, 93, 39 N.E.2d 548, 555 (Mahoning County 1940) (holding that the cancellation of one party's indebtedness, and surrender of a note evidencing such indebtedness is sufficient consideration to support a promissory note made by another for the accommodation of the original maker); In Re Estate of Knisely, 27 Ohio Op. 216, 219 (P. Ct. Tuscarawas County 1943). In exchange for transferring mortgaged property to a mortgagee by way of a deed in lieu of foreclosure, the mortgagor receives a valuable consideration or benefit in the form of a discharge of his liability upon, and a cancellation of, the underlying debt. The receipt of such valuable consideration by the mortgagor indicates that such a transaction is not a gift. See generally Estate of Bishop, 209 Cal. App. 2d 48, 55, 25 Cal. Rptr. 763, 767 (1962)(a valuable consideration may consist of the cancellation of a debt or arise out of a waiver of rights, and a transfer for such consideration is not a gift).

I consider next whether money or other valuable and tangible consideration readily convertible into money is paid for real estate conveyed by way of a deed in lieu of foreclosure. As discussed above, the mortgagor does receive valuable consideration for the real estate he conveys to the mortgagee. Unless the consideration received for the real estate is also "tangible" and "readily convertible into money," however, the transfer will be exempt under R.C. 319.54(F)(3)(m).

Black's Law Dictionary 1305 (5th ed. 1979) defines "tangible" as "[h]aving or possessing physical form. Capable of being touched and seen; perceptible to the touch; tactile; palpable; capable of being possessed or realized; readily apprehensible by the mind; real; substantial." Applying this definition in the case of a conveyance by way of a deed in lieu of foreclosure, I must conclude that the consideration received by the mortgagor from the mortgagee is in no sense of the word "tangible" consideration. The cancellation of a debt for which he is personally liable,² although a valuable benefit to the mortgagor, does not "have or possess physical form"; neither is it "capable of being touched or seen," nor is it "perceptible to the touch." Instead, the valuable consideration received by the mortgagor is intangible, similar to a copyright, stock certificate, franchise, or chose in action. See 1981 Op. Att'y

² It is a general principle that the taking of collateral security for the payment of a debt does not afford any implication that the creditor is to look to the security only for the payment of the debt, and the right of the mortgagee to sue on the debt secured by the mortgage and to take a personal judgment against the mortgagor, in addition to maintaining an action to foreclose, is fully recognized. Carr v. Home Owners Loan Corp., 148 Ohio St. 533, 76 N.E.2d 389 (1947); Simon v. Union Trust Co., 126 Ohio St. 346, 185 N.E. 425 (1933).

Gen. No. 81-016 at 2-62 (concluding that a partnership interest received by a party in exchange for transferring certain real property to the partnership is not tangible consideration for purposes of R.C. 319.54(F)(3)(m)).

In addition, the cancellation of the mortgagor's debt, accompanied by a discharge of his personal liability thereon, is not "readily convertible into money." Although such consideration obviously has a certain value to the mortgagor and benefits him personally, as a practical matter it would be difficult to place a monetary value on such consideration, and it is unlikely that the mortgagor would be able to convert such consideration into money, even if a monetary value could be assigned to it.³

Thus, a transfer of real property resulting from a conveyance by way of a deed in lieu of foreclosure, wherein the mortgagor conveys mortgaged property to the mortgagee in exchange for which the mortgagor cancels the underlying debt and absolves the mortgagor of personal liability thereon, is exempt from the real property transfer fee under R.C. 319.54(F)(3)(m).

In light of my conclusion that the transfer in question is exempt from the transfer fee under R.C. 319.54(F)(3)(m), it is

³ In an original action in mandamus an Ohio court of appeals recently held that real property itself is not "readily convertible into money" as understood by R.C. 319.54(F)(3)(m). State ex rel. Biery v. Bowman, No. CA5630 (Stark County Ct. App. June 9, 1981). The case addressed a particular real estate transaction referred to by the court as a "real estate swap." Apparently the transaction involved a simple exchange of different parcels of real property between two different parties, with one party's property serving as the consideration for the other party's property. The relators asserted that the transfers resulting from such exchanges were exempt from the real property transfer fee under R.C. 319.54(F)(3)(m) because the real property that served as the consideration for each exchange was not "readily convertible into money." In adopting this position, the court of appeals stated:

We consider it to be beyond reasonable debate that real estate is not "readily convertible into money."

It has been suggested by counsel for the government that real estate is always readily convertible into money whenever "the price is right."

We think the argument lacks merit. Legislation is not to be construed to contemplate the absurd, such as readily convertible at "give-away" prices. Such a strained construction raises the practical question of how to administer the tax by such a yardstick when the tax is imposed in relation to the value of the property transferred.

It is axiomatic that "fair market price" assumes exposure of the subject property to the market place for a reasonable length of time.

We consider the concepts of waiting a reasonable length of time and "readily convertible into money" to be mutually exclusive.

unnecessary for me to determine whether the transfer is also exempt under R.C. 319.54(F)(3)(b)⁴ or R.C. 319.54(F)(3)(l).

In conclusion, it is my opinion, and you are hereby advised, that a transfer of real property resulting from a conveyance by way of a deed in lieu of foreclosure, wherein the mortgagor conveys mortgaged property to the mortgagee in exchange for which the mortgagee cancels the underlying debt and absolves the mortgagor of personal liability thereon, is exempt, pursuant to R.C. 319.54(F)(3)(m), from the real property transfer fee imposed by R.C. 319.54(F)(3).

⁴ As you note in your request, 1982 Op. Att'y Gen. No. 82-102 described a transfer resulting from a conveyance of real property by way of a deed in lieu of foreclosure as an example of a transfer exempt from the transfer fee under R.C. 319.54(F)(3)(b), which exempts a transfer made "[s]olely in order to provide or release security for a debt or obligation." The opinion did not elaborate on why a transfer resulting from a conveyance by way of a deed in lieu of foreclosure would be exempt under R.C. 319.54(F)(3)(b), and this statement was unnecessary to the analysis and conclusion of Op. No. 82-102, since the opinion addressed the question whether a transfer resulting from a mortgagee's purchase of mortgaged property at a sheriff's sale would be exempt from the transfer fee under R.C. 319.54(F)(3)(b) or (l).

I hesitate to adopt my predecessor's conclusion that a transfer resulting from a conveyance by way of a deed in lieu of foreclosure is exempt from the transfer fee pursuant to R.C. 319.54(F)(3)(b). This exemption applies to a transfer of real property wherein the exclusive purpose of the transfer is either to make the real property available to a creditor so that he may levy upon the property in the event that the debtor defaults on his obligation to repay money loaned to him by the creditor, or, conversely, to free the real property transferred from the burden of serving as such a resource. In the latter circumstance the reasonable implication is that the debt for which the real property has served as security has been fully repaid or otherwise satisfied in such a fashion so as to again entitle the debtor to the use and enjoyment of the property free and clear of all liens and encumbrances of the creditor.

Clearly, when the mortgagor conveys his interest in the mortgaged property to the mortgagee by way of a deed in lieu of foreclosure, he does not do so in order to furnish the mortgagee with security for the debt. By conveying his interest in the mortgaged property to the mortgagee, furthermore, the mortgagor does not transfer the property in order to release it as security for the debt. Strictly construed, a transfer made to release security for a debt has as its purpose the vesting of title to the property, free and clear of all liens and encumbrances, in either the debtor or in a third party who had previously transferred the property to the debtor for use as collateral. A transfer resulting from a conveyance by way of a deed in lieu of foreclosure, on the other hand, has as its purpose the avoidance of a formal foreclosure proceeding, the cancellation of the mortgagor's debt, and the vesting of title in the mortgagee.