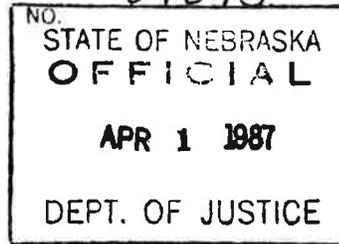


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509

# 87043



ROBERT M. SPIRE  
Attorney General  
A. EUGENE CRUMP  
Deputy Attorney General

DATE: March 27, 1987

SUBJECT: Exemption of Trustee's Deed From Imposition of  
Documentary Stamp Tax Under Neb.Rev.Stat.  
§76-902(3) (Reissue 1986)

REQUESTED BY: Donald S. Leuenberger  
State Tax Commissioner

WRITTEN BY: Robert M. Spire, Attorney General  
L. Jay Bartel, Assistant Attorney General

You have requested our opinion regarding whether a deed issued by a trustee after exercising the power of sale contained in a trust deed upon default of the trustor is exempt from the imposition of documentary stamp tax under Neb.Rev.Stat. §76-902(3) (Reissue 1986).

In Nebraska, deeds of trust have historically been considered to be the same as mortgages, with the only difference being the provision of a power of sale in the trust deed. Comstock v. Michael, 17 Neb. 288, 22 N.W. 549 (1885); Fiske v. Mayhew, 90 Neb. 196, 133 N.W. 195 (1911). In 1965, the Nebraska Legislature enacted the Nebraska Trust Deeds Act. Laws 1965, c. 451, p. 1423 (codified at Neb.Rev.Stat. §§76-1001 to 77-1018 (Reissue 1986)). In Blair Co. v. American Savings Co., 184 Neb. 557, 169 N.W.2d 292 (1969), the Nebraska Supreme Court, in upholding the constitutionality of the Nebraska Trust Deeds Act, stated the Act effected a change in prior law by authorizing a form of financing not previously available, noting that trust deeds had been considered to be subject to the same rules and restrictions as mortgages prior to passage of the Act.

Subsection (3) of §76-1001 defines "trust deed" to mean "a deed executed in conformity with sections 76-1001 to 76-1018 and conveying real property to a trustee in a trust to secure the performance of an obligation of the grantor or other person named in the deed to a beneficiary." The "trustor" is defined as "the person conveying real property by a trust deed as security for

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the performance of an obligation." Neb.Rev.Stat. §76-1001(2) (Reissue 1986). The "trustee," in turn, is defined as "a person to whom title to real property is conveyed by trust deed, or his successor in interest." Neb.Rev.Stat. §76-1001(4) (Reissue 1986). Section 76-1010(2), relating to the effect of delivery of a trustee's deed following sale of the trust property, provides:

The trustee's deed shall operate to convey to the purchaser, without right of redemption, the trustee's title and all right, title, interest and claim of the trustor and his successors in interest and of all persons claiming by, through or under them, in and to the property sold, including all such right, title, interest and claim in and to such property acquired by the trustor or his successors in interest subsequent to the execution of the trust deed.

With this background in mind, we will endeavor to answer your specific question concerning whether a trustee's deed issued following the exercise of a power of sale is exempt from documentary stamp tax under Neb.Rev.Stat. §76-902(3) (Reissue 1986). Section 76-902(3) provides the documentary stamp tax imposed pursuant to §76-901 shall not apply to "Deeds which secure or release a debt or other obligation. . . ." Obviously, there is no question that the execution of a trust deed conveying property to a trustee as security for the performance of an obligation is exempt under this provision. The question that remains, however, is whether a deed executed by the trustee upon sale of the property following the trustor's default qualifies for exemption under the language in §76-902(3) referring to deeds which "release" the debt or obligation.

In construing the meaning of this particular statutory provision, certain basic rules of statutory construction should be considered. It is a fundamental principle of statutory interpretation that, in considering the meaning of a statute, courts will strive to determine legislative intent from the language of the act. Mitchell v. Douglas County, 213 Neb. 355, 329 N.W.2d 112 (1983). A statute must be construed in light of the object sought to be accomplished, or the purpose to be served, and interpreted in such a manner as to effectuate such object or purpose. Seldin Development and Management Co. v. Chizek, 208 Neb. 315, 303 N.W.2d 300 (1981). Furthermore, the words of a statute are generally to be given their ordinary meaning. Douglas County v. Board of Regents of the University of Nebraska, 210 Neb. 573, 316 N.W.2d 62 (1982). Finally, it must be remembered that statutes granting exemption from taxation are to be strictly construed, and the right to exemption must be

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clearly granted. United Way of the Midlands v. Douglas County Board of Equalization, 215 Neb. 1, 337 N.W.2d 103 (1983).

Applying these principles to interpret the meaning of §76-902(3) in relation to the issue presented herein, we believe that the exemption for deeds which "release" a debt or obligation cannot properly be interpreted to exempt a trustee's deed issued following the exercise of a power of sale. Initially, it is apparent that the Legislature intended the documentary stamp tax imposed under §76-901 to apply to all transfers of real estate not specifically exempted under §76-902. Furthermore, the execution of a deed operating as a release has a generally accepted and commonly understood meaning in relation to property law. The term "deed of release" is defined in Black's Law Dictionary, 1159 (5th Ed. 1979) as follows:

A deed operating by way of release; but more specifically, in those states where deeds of trust are in use instead of common-law mortgages, as a means of pledging real property as security for the payment of a debt, a "deed of release" is a conveyance in fee, executed by the trustee or trustees, to the grantor in the deed of trust, which conveys back to him the legal title to the estate, and which is to be given on satisfactory proof that he has paid the secured debt in full or otherwise complied with the terms of the deed of trust.

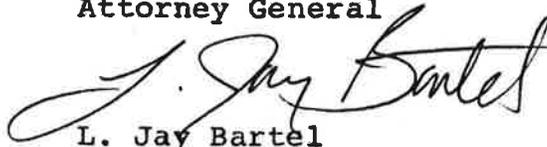
Based on the foregoing, it is our opinion that the exemption granted under §76-902(3) relating to deeds which "release" a debt or other obligation should be strictly construed to apply only to deeds executed to convey real property back to a grantor upon payment of the debt or compliance with the terms of the underlying security agreement. Accordingly, a trustee's deed executed following the exercise of a power of sale after default by the trustor would not, in our view, qualify for exemption under this provision, as it does not fall within the apparent intent and purpose of the Legislature in providing exemption for deeds releasing a debt or obligation. In fact, pursuant to Neb.Rev.Stat. §76-1013 (Reissue 1986), the trustee may bring an action to recover from the trustor any deficiency resulting from the sale of the trust property. Under these circumstances, it cannot be said that the execution and delivery of a trustee's deed constitutes a deed operating as a "release" within the plain intent and meaning of this term as used in §76-902(3). We wish to point out, however, that our opinion is limited solely to the question of whether a trustee's deed issued under these circumstances would qualify for exemption under §76-902(3).

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Accordingly, our conclusion should not be interpreted as addressing any question as to the potential application of another exemption provision contained in §76-902 with respect to any particular transfer by trustee's deed.

Very truly yours,

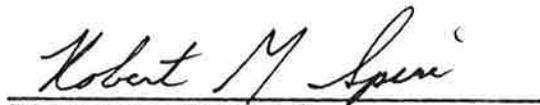
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APPROVED BY:



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