

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

FIRST JUDICIAL DISTRICT COURT  
STATE OF NEW MEXICO  
COUNTY OF SANTA FE

COURT OF APPEALS OF NEW MEXICO  
ALBUQUERQUE  
FILED

COPY

SEP 22 2014

No. D-101-PB-2013-00150

COA No. 33,568 *Wendy Flores*

IN THE MATTER OF THE ESTATE OF  
EDWARD K. McELVENY, Deceased,

Petitioner/Appellee,

vs.

STATE OF NEW MEXICO ex. rel.  
DEPARTMENT OF TAXATION  
AND REVENUE,

Respondent/Appellant

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PETITIONER-APPELLEE'S ANSWER BRIEF

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Oral Argument is Requested

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## **STATEMENT OF COMPLIANCE**

Pursuant to Rule 12-213(G) NMRA, this Answer Brief complies with the applicable type-volume limitations of Rule 12-213(F)(3) in that the body of the Answer Brief contain 9109 words as indicted by the word count total of Microsoft Word 2010, which was used to prepare the same.

## **STATEMENT REGARDING CITATION**

For purposes of this Answer Brief, “R.P.” means Record Proper, “S.R.P.” means Supplemental Record Proper, and “BIC” means Brief in Chief.

## **I. SUMMARY OF PROCEEDINGS**

### **A. Nature of the Case**

This is a probate matter brought pursuant to the provisions of the Uniform Probate Code, NMSA 1978, §§ 45-1-101 to 9A-13 (1975, as amended through 2009) (“Probate Code”). Appellant, New Mexico Department of Taxation and Revenue Unclaimed Property Office (“Unclaimed Property Office”), is the custodian of property belonging to the Estate of Edward K. McElveny (“Estate”). A dispute has arisen between the Personal Representative of the Estate and the Unclaimed Property Office as to whether the Personal Representative may use a Probate Order to marshal Estate assets held by the Unclaimed Property Office.

The material facts are not in dispute. Both Appellant and the Estate agree that the Unclaimed Property Office is holding approximately \$70,000 that belonged to Edward McElveny, who died in interstate in 1991. (R.P. 38, 120). But a legal question has arisen regarding the method by which the heirs may collect Estate assets in the custody of the Unclaimed Property Office.

The issues raised on appeal are jurisdictional in nature. Appellant believes that the district court does not have jurisdiction over estate property held by the Unclaimed Property Office based on its interpretation of the

Unclaimed Property Act, NMSA 1978, §§ 7-8A-1 to -31 (1975, as amended through 2007) (“Unclaimed Property Act”). According to the Appellant, that “Unclaimed Property Act trumps probate.” (R.P. 59).

The Estate contends that NMSA 1978, § 45-1-302 (2011) of the Probate Code gives the district court jurisdiction over all subject matter relating to estate proceedings, including jurisdiction to determine title of property as between an estate and any adverse interested person, as well as full power to make and enforce orders. There is no exception in the Probate Code with regard to estate assets that are in the custody of the Unclaimed Property Office.

**B. A Supplemental Summary of Proceedings is Necessary**

A supplemental summary of proceedings is necessary because Appellant’s Course of Proceedings and Summary of Facts (BIC 1-3) contains factual errors and arguments of counsel and fails to comply with Rule 12-213(A)(3) NMRA. Many citations do not support the statements made. Other citations for factual allegations are made to the Unclaimed Property Office’s own arguments within the moving papers and not to the factual evidence in the record.

Without correct citation to the record, the onus of substantiating what is fact versus argument falls on this Court. But “[t]he Court of Appeals is

not obligated to search the record on a party's behalf to locate support for propositions a party advances or representations of counsel as to what occurred in the proceedings.” *Muse v. Muse*, 2009-NMCA-003, ¶ 42, 145 N.M. 451. In fact, the Court may decline to consider an argument based on improper citation. See *Murken v. Solv-Ex Corp.*, 2005-NMCA-137, ¶ 14, 138 N.M. 653 (“[W]e decline to review [appellant’s] arguments to the extent that we would have to comb the record to do so.”); *In re Estate of Heeter*, 1992-NMCA-032, ¶ 15, 113 N.M. 691 (“This [C]ourt will not search the record to find evidence to support an appellant's claims.”) Furthermore, without proper citation, unsupported facts are arguments of counsel. See *Murken*, ¶ 14. Arguments of counsel are not evidence. *Muse*, ¶ 51. Thus, the summary of facts in Appellant’s Brief in Chief should be read cautiously, if not disregarded. The Estate respectfully submits a supplemental Course of Proceedings and Summary of Facts for the Court’s consideration.

### **C. Course of Proceedings and Summary of Facts**

#### *The Estate of Edward K. McElveny*

1. Edward K. McElveny (“Decedent”) died intestate leaving unclaimed property in New Mexico, which was transferred to the Unclaimed

Property Office. (R.P. 8).<sup>1</sup>

2. The Decedent's only living heirs are his seven grandchildren and at least one great grandchild. (R.P. 7, 8, 17-22).
3. Each of the grandchildren have equal priority to serve as personal representative under NMSA 1978, § 45-3-203 (2011) but renounced their right to be appointed and nominated Michael Phillips instead. (R.P. 17-22).
4. Michael Phillips is the grandson of Decedent and petitioned to open an informal probate for his grandfather on April 4, 2013 in the Santa Fe County Probate Court, No. 2013-0051. (R.P. 3).
5. The Probate Judge, the Honorable Mark A Basham, issued an *Order of Informal Probate and Appointment of Personal Representative* ("Probate Order") on April 4, 2013. (R.P. 8-9).<sup>2</sup>
6. The Probate Order appoints Michael Phillips as Personal Representative ("PR") of the Estate. (R.P. 9).

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<sup>1</sup> The Unclaimed Property Office states that Edward McElveny was a "prominent medical doctor in Santa Fe" and cites to page 3 of the Record Proper to support thereof. (BIC 1). In fact, Mr. McElveny was not a medical doctor, prominent or otherwise, and did not live in Santa Fe. Page 3 of the Record Proper supports no such allegations. Although not material, these are the first of many factual errors and erroneous citations in the Brief.

<sup>2</sup> The Unclaimed Property Office refers to the Probate Order as an "ex-parte order" throughout its Brief and cites to the Order itself to substantiate this fact. (BIC 2-3). But whether the Probate Order is an "ex-parte" order is not a fact; instead it is a legal question on appeal to be decided by this Court.

7. The Probate Order directs the Unclaimed Property Office to “release the unclaimed property of the Decedent to ... the Personal Representative of the Estate of the Decedent.” (R.P. 9).
8. The PR delivered the Probate Order to the Unclaimed Property Office on April 11, 2013 through postal mail with a claim form provided by the Unclaimed Property Office.<sup>3</sup> (R.P. 31, 32, 65).
9. The docket shows that, after receiving the Probate Order in April 2013, the Unclaimed Property Office did not appeal the Probate Order or seek to intervene or enter an appearance as an interested person in the probate.
10. Instead, sixty one days later on June 12, 2013, the Unclaimed Property Office sent a letter to the PR the claim was incomplete. (“Notice of Incompletion”). (R.P. 31).
11. In the Notice of Incompletion, the Unclaimed Property Office did not dispute that the unclaimed property had belonged to the Decedent, or that the PR was the Decedent’s grandson and legal representative, only that the claim did “not have the appropriate documentation showing that the

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<sup>3</sup> Appellant erroneously states that the PR proceeded to seek the unclaimed property through probate *after* he made an unsuccessful administrative claim with the Unclaimed Property Office. (BIC 1). This statement is not true and the citations do not support it. The Record Proper clearly shows that the PR opened the probate for his grandfather first and only then, after his appointment as Personal Representative on April 4, 2013, did he contact the Unclaimed Property Office on April 11, 2013 to obtain the property of the Estate. (R.P. 3, 8-9, 31-34.)

property in question would dissolve to Mr. Phillips alone under the applicable laws of heirship.” (R.P. 31).

12. At that time, the Unclaimed Property Office stated that “rather than probate” Mr. Phillips should apply “directly to New Mexico Taxation and Revenue as unclaimed property custodian.” (R.P. 31).

13. Nowhere in the Notice of Incompletion does the Unclaimed Property Office state that the claim is denied or that a final decision has been made; instead the Notice of Incompletion simply states the claim is “incomplete”. (R.P. 31).

14. The Estate responded to the Notice of Incompletion on July 8, 2013 to provide the information necessary to complete the claim. (R.P. 32-34).

15. In the July 8, 2013 letter, Estate explained that probate had been necessary because the decedent died intestate with several heirs at different generational levels amongst whom the property must be distributed in differing amounts per stirpes and because of this, a personal representative was needed to represent them collectively. (R.P. 33).

16. Although the deadline for the Unclaimed Property Office to approve or deny the claim was to be July 15, 2013, the Estate requested that the Unclaimed Property Office respond to its letter by July 28, 2013 – extending the ninety day deadline by one week.

17. The Estate informed the Unclaimed Property Office if it did not respond within the proscribed time period, the PR would seek court intervention as well as punitive sanctions. (R.P. 33).

18. The Unclaimed Property Office did not respond to the letter, did not issue a formal denial of the re-submitted claim, and did not release the property to the PR; to date the Unclaimed Property Office remains custodian of the Estate property. (R.P. 38, 120).

*Course of Proceedings in District Court Leading to Appeal*

19. On August 20, 2013, the Probate Court issued a *Transfer Order* stating it had lost jurisdiction due to a dispute; the matter was transferred to the District Court of Santa Fe as D-101-PB-2013-00150, the Honorable Raymond Z. Ortiz presiding. (R.P. 1).

20. On September 12, 2013, the PR filed a *Motion to Enforce Order and Assess Sanctions* (“Motion to Enforce”) in the probate. (R.P. 23-37).

21. The gravamen of the Motion to Enforce is that the “Unclaimed Property Office refuses to relinquish the property of decedent Edward K. McElveny to his Estate thus violating the [Probate Order].” (R.P. 23).

22. Also in the Motion to Enforce, the Personal Representative requested that the Court order the Unclaimed Property Office to reimburse the Estate’s legal fees incurred to file the Motion to Enforce. (R.P. 28).



23. The Unclaimed Property Office did not file a response brief to the Motion to Enforce and instead, on September 13, 2013 filed a *Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to Make Service of Process* (“Motion to Dismiss”). (R.P. 38-41).
24. The Unclaimed Property Office’s Motion to Dismiss was filed five months after it received the Probate Order. (R.P. 38, 65).
25. The Motion to Dismiss argued that the district court lacked subject matter jurisdiction over the entire probate “proceeding” because: 1) the PR had not exhausted his administrative remedies under the Unclaimed Property Act; 2) the Probate Order was issued ex-parte; and 3) the PR had failed to make service of process to the Unclaimed Property Office. (R.P. 38-41).
26. On February 10, 2014, the district court denied the Unclaimed Property Office’s Motion to Dismiss (“Order Denying Motion to Dismiss”) and granted the PR’s Motion to Enforce (“Order Granting Motion to Enforce”). (R.P. 65-66, S.R.P. 200-204).<sup>4</sup>

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<sup>4</sup> Appellant incorrectly states that the district court *did not* rule on the Unclaimed Property Office’s Motion to Dismiss and *did not* make an explicit ruling on its “lack of service” argument. (BIC 3, 15). Actually, the district court held a hearing, at which Appellant made oral argument, and then issued an Order Denying the Motion to Dismiss, which explicitly addressed the service issue, entered *nunc pro tunc* to February 10, 2014. (S.R.P. 203). Counsel for the Unclaimed Property Office approved the Order after a presentment hearing on April 18, 2014. (S.R.P. 204).

27. With regard to the Unclaimed Property Office's lack of jurisdiction argument, the district court found that it had subject matter jurisdiction pursuant to Section 45-1-302 (2011). (R.P. 66, S.R.P. 201).
28. With regard to the Unclaimed Property Office's exhaustion argument, the district court found that exhaustion of administrative remedies is not a prerequisite for court intervention where a movant is trying to enforce an existing court order under the Probate Code. (S.R.P. 200).
29. With regard to the allegation that the Probate Order was *ex parte*, the district court held that probate proceedings in New Mexico are *in rem* matters and that no causes of action were alleged against the Unclaimed Property Office; rather the Unclaimed Property Office was the custodian of property that belongs to the Estate and the court had jurisdiction over Estate property. (S.R.P. 202).
30. With regard to the allegation that the PR had failed to properly serve the Unclaimed Property Office, the district court held that the PR was not required to make service under Rule 1-004 to deliver the Probate Order or the Motion to Enforce because Rule 1-004 governs service of process to defendants in new civil actions. (S.R.P. 201-202).
31. The district court ordered that the Probate Order was to be given full effect and the Unclaimed Property Office was to act in accordance with

the Probate Order. (R.P. 66).

32. On February 24, 2014, the Unclaimed Property Office filed in the district court a ten page document entitled *Notice of Appeal; Application For Interlocutory Appeal Pursuant to NMSA 1978 Section 12-203 and NMSA 1978 Section 39-3-2 and NMSA 1978 Section 39-3-4 (B)* (sic), which rather than simply attach the order appealed, contained an additional forty (40) pages of exhibits. (R.P. 68-117).

## **II. ARGUMENT**

### **A. Summary of the Argument**

Appellant's argument that the district court does not have subject matter jurisdiction fails because it is based on several flawed assertions. Primarily, the Brief in Chief posits that a probate court automatically forfeits subject matter jurisdiction over estate assets when the assets are in the custody of the Unclaimed Property Office. (R.P. 5-6). "Unclaimed Property Act trumps probate," says Appellant. (R.P. 59).

But Appellant fails to recognize that the Unclaimed Property Act does not exist in a vacuum and was never intended to function as a barrier to a personal representative attempting to marshal estate assets held by the Unclaimed Property Office. It was never intended to "trump" the Uniform Probate Code. Rather, the plain language of the Unclaimed Property Act

demonstrates that our Legislature intended for the Unclaimed Property Act and the Uniform Probate Code to co-exist and compliment each other. While it is true that the Unclaimed Property Act provides a method to claim property and then appeal if said claim is denied, it is also true that the district court has jurisdiction over property that could be claimed by a decedent's estate under the Probate Code.

### **B. Standard of Review**

In reviewing an appeal from an order granting or denying a motion to dismiss for lack of subject matter jurisdiction, the determination of whether jurisdiction exists is a question of law, which an appellate court reviews de novo when the relevant facts are undisputed. *Piedra, Inc. v. N.M. Transportation Commission*, 2008-NMCA-089, ¶ 34, 144 N.M. 382.<sup>5</sup> Additionally, the Brief in Chief raises issues concerning the interpretation of both the Probate Code and the Unclaimed Property Act. The meaning of language used in a statute is also a question of law reviewed de novo. *Cooper v. Chevron U.S.A., Inc.*, 2002-NMSC-020, ¶ 16, 132 N.M. 382.

The jurisdictional issues must be addressed first because if this Court

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<sup>5</sup> Appellant incorrectly cites *Harrell v. Hayes*, 1998-NMCA-122, ¶ 11, 125 N.M. 814 (BIC 3) in its Standard of Review. *Harrell*, however, discusses the standard of review for personal jurisdiction rulings, not subject matter jurisdiction. There are no issues concerning personal jurisdiction in this appeal.

determines that the lower court did not have subject matter jurisdiction, than the rest of the issues raised on appeal are moot. “Appeals from courts or agencies that lack subject matter jurisdiction will confer no jurisdiction on this [appellate] Court.” *State Human Rights Com'n v. Accurate Machine & Tool Co., Inc.*, 2010-NMCA-107, ¶ 4, 149 N.M. 119.

### **C. Issues and Discussion**

Appellant’s jurisdictional argument is based on several legal assumptions including 1) the district court does not have jurisdiction over assets held by the Unclaimed Property Office; 2) the PR cannot seek judicial relief because he did not exhaust his administrative remedies; 3) the Probate Order is an ex-parte order; and 4) the PR failed to properly serve the Probate Order and Motion to Enforce in accordance with Rule 1-004. This Answer Brief shall address each sub issue separately.

#### **ISSUE 1: THE DISTRICT COURT HAS SUBJECT MATTER JURISDICTION OVER PROPERTY OF AN ESTATE IN PROBATE**

*1. The Legislature intended for the Probate Code to control the distribution and settlement of estates.*

The jurisdiction enjoyed by district courts sitting in probate is set forth in the New Mexico Uniform Probate Code. Section 45-1-302 defines the district courts' jurisdiction in probate proceedings, and invests district courts with exclusive original jurisdiction over formal probate proceedings.

Section 45-1-302 states in relevant part:

A. The district court has exclusive original jurisdiction over all subject matter relating to:

(1) formal proceedings with respect to the estates of decedents, including determinations of testacy, appointment of personal representatives, constructions of wills, administration and expenditure of funds of estates, determination of heirs and successors of decedents and distribution and closing of estates;

...

B. The district court in formal proceedings shall have jurisdiction to determine title to and value of real or personal property as between the estate and any interested person, including strangers to the estate claiming adversely thereto. The district court has full power to make orders, judgments and decrees and to take all other action necessary and proper to administer justice in matters which come before it.

The New Mexico Court of Appeals was given opportunity to examine Section 45-1-302 at length in *In re Estate of Harrington*, 2000–NMCA–058, 129 N.M. 266. In that case, the question was whether the district court sitting in probate had the authority to liquidate a business to obtain estate assets. *Id.* ¶ 1. The Court concluded that the district court did have such jurisdiction based on construction of the language of Section 45-1-302 (B), which gives the district court power to, among other things, “make orders, judgments and decrees and to take all other action necessary and proper to administer justice in matters that come before it.” *Harrington*, 2000–NMCA–058, ¶ 16. The Court also found that the Probate Code’s intent to “promote a speedy and efficient system for the settlement of the estate of the

decedent” is facilitated by vesting general civil jurisdiction in the district court in formal probate proceedings. *Id.* ¶¶ 19-20 (stating “the *Legislature's clear and express purpose* for adopting the Uniform Probate Code *would be frustrated* if we gave Section 45-1-302 a *narrower* interpretation than we have here today.”) (emphasis added).

Just as in *Harrington*, where the lower court’s authority to liquidate a business to obtain estate assets based on Section 45-1-302 (B) was affirmed, so too does the district court in this matter have the jurisdiction and authority to order the custodian of Estate assets to turn the property over to the PR. There is no statutory exception that excludes estate property held by the Unclaimed Property Office from a district court’s jurisdiction under Section 45-1-302.

Conversely, our Legislature has clearly stated that the Probate Code is to be “liberally construed and applied to promote its underlying purposes and policies.” NMSA 1978, § 45-1-102(A) (1975). “Liberal Construction” means “to give substance to the phrase, to generously ascertain, or expand, the language in the provisions of the code by inference to accomplish the underlying purposes and policies of the Probate Code.” *Matter of Ferrill*, 1981-NMCA-074, ¶ 56, 97 N.M. 383. Our Legislature has also stated that “the primary purpose of the Probate Code is to control the distribution and

settlement of decedents' estates.” *Matter of Guardianship Petition of Lupe C.*, 1991-NMCA-050, ¶ 14, 112 N.M. 116; see also NMSA 1978, § 45-1-102(B) (2011). Thus, there is no legal basis upon which to dispute the district court’s jurisdiction to “make orders” regarding estate assets, even if the assets are held by the Unclaimed Property Office.

2. *The Legislature intended for the Probate Code to vest the district court with the power to determine heirship and protect the interest of a decedent.*

In spite of the clear legislative intent to the contrary as stated *supra*, Appellant argues that the Legislature did not intend for the Probate Code to confer jurisdiction to the district court when estate assets are held by the Unclaimed Property Office. This is because when it comes to unclaimed property, according to Appellant, the district court is inferior to the Unclaimed Property Office in making determinations of a claimant’s identity and his entitlement to unclaimed property. (BIC 4). Appellant represents to this Court that where the Unclaimed Property Office would have required a “preponderance of evidence” in this matter, the Probate court simply allowed “the Appellee here [to have] himself appointed personal representative.” *Id.* He claims that the district court resorted to its own “internal procedures of probate and treated the [Unclaimed Property Office] as if it were a savings account subject to turn-over to the Personal Representative on presentation of letters of administration.” (BIC 6).



Appellant then argues that the Unclaimed Property Act was enacted by our Legislature in part to prevent “insubstantial and fraudulent claims of heirship” as an expression of its strong interest in “protecting the dead.” (BIC 5). Appellant goes so far as to compare the district court’s handling of the McElveny Estate to a convicted criminal’s indecent handling of dead woman’s body by relying on *State v. Hartzler*, 1967-NMCA-22, 78 N.M. 514. (BIC 5). Finally, Appellant demonstrates that he has completely confused the purposes of the Probate Code and the Unclaimed Property Act by stating, “In the absence of close friends and family who may be able to stand up for the decedent years after his death, the duty to vet claims of entitlement falls to the state [under the Unclaimed Property Act] Section 7-8A-15.” (BIC 5).

Setting aside Appellant’s disrespect in suggesting that a district court is incompetent or inferior at protecting the dead from “insubstantial and fraudulent claims of heirship”, Appellant’s arguments demonstrate for this Court the Unclaimed Property Office’s insistent willful blindness to the authority and jurisdiction conferred on a district court through the Probate Code.

Our Legislature clearly indicated that the primary purpose of the Probate Code is to control the distribution and settlement of decedents'

estates. Section 45–1–102(B). In other words, the Probate Code exists to empower district courts to do exactly what the Appellant argues should be the province of the Unclaimed Property Office. (BIC 4-6). This Court should construe the Probate Code in light of its purpose and interpret it “to mean what the Legislature intended it to mean, and to accomplish the ends sought to be accomplished by it.” *In re Estate of Vigil*, 2012-NMCA-121, ¶ 10, \_\_\_\_ N.M. \_\_\_\_.

3. *The Legislature intended for the Probate Code to vest a personal representative with a fiduciary duty to the estate and its heirs.*

The Brief in Chief is riddled with insinuations that Mr. Phillips opened a probate to have himself appointed as PR for a nefarious purposes. (B.I.C. 4, 5, 6, 7, 9). Mr. Phillips wants to “side set” rules. (BIC 6). Ignoring that the other heirs submitted affidavits nominating Mr. Phillips to be the personal representative, (R.P. 17-22), the Unclaimed Property Office portrays the PR as working to the detriment of other heirs. (R.P. 31). As a special assistant attorney general, however, counsel for the Unclaimed Property Office should be well aware that the Probate Code assigns PR Mr. Phillips a level of duty far more serious than his Brief in Chief portrays.

Under the Probate Code, a personal representative is under a duty to settle and distribute the estate in accordance with the Probate Code for the best interest of the estate and the successors of the estate. Section 45-1-101.

The personal representative is under a duty to administer the estate in accordance with the rights of the heirs. *Id.* Contrary to the Appellant's suggestions otherwise, a personal representative may only possess estate property for purposes of administration, not for personal use. *Trujillo v. Lopez*, 1987-NMCA-087, ¶ 21, 106 N.M. 157. The personal representative has a continuing fiduciary duty to protect the assets of the estate and to properly account therefore. *Bowman v. Butler*, 1982-NMCA-108, ¶ 18, 98 N.M. 357. The personal representative is entrusted to use and apply the property only for the benefit of creditors and others interested in the estate. Section 45-3-711.

Where Appellant represents the PR as using probate to “circumvent” the Unclaimed Property Office, the Probate Code actually makes a personal representative liable to interested persons for damage or loss resulting from a breach of his fiduciary duty. Section 45-3-712. Also, a personal representative is not authorized to transfer property in a manner inconsistent to the heirs interest and must distribute the estate as provided in the Probate Code. Section 45-3-715. In sum, the Probate Code takes significant precautions to ensure that someone doesn't just show up to “get himself appointed personal representative” and then use estate assets as a “savings account”. (BIC 4, 6).

*4. The Probate Code does not offer procedural advantages over the Unclaimed Property Act to a person seeking to obtain property from the Unclaimed Property Office.*

Ignoring the above statutes and law, Appellant states that the PR deliberately avoided going to the Unclaimed Property Office because he was “cognizant of the advantages of proceeding in probate instead of unclaimed property.” (BIC 7). But arguments that the PR “sidestepped inconvenient features of the [Unclaimed Property Act] in favor of probate”, (BIC 7), simply fall apart when the Appellant is pressed to present an example of an “inconvenient feature”.

First, as an example of an inconvenient feature of the Unclaimed Property Act, Appellant explains in detail how the Unclaimed Property Act is more demanding of heir-finders than the Probate Code. (BIC 7-8). But Appellant also admits that “there was no heir-finder involved in this particular case.” (BIC 7). As such, Appellant spends almost two pages presenting arguments that literally have no bearing on the issues in this case. (BIC 7-8). It is nonsensical to argue that a personal representative could want to circumvent the Unclaimed Property Act to avoid harsher treatment of heir-finders when there are no heir-finder issues in the instant matter.

Next, Appellant argues that the PR used the Probate Code to obtain an order so as to “overcome a statutory presumption that *title* should be held in

the state.” (BIC 8) (emphasis added). But the Unclaimed Property Act does not give title of unclaimed property to the state and the state does not have title to the Decedent’s property. Under the Unclaimed Property Act, the state is the “administrator” and “custodian” of unclaimed property, but not its “owner”. See Section 7-8A-1. Appellant does not cite a statute to support any argument to the contrary.

The heir-finder argument, along with misstatement of law that the Unclaimed Property Office has title to the unclaimed property, and reliance on cases such as *State v. Hartzler*, as well as the portrayal of a district court as inferior to the Unclaimed Property Office when it comes to making determinations about heirship all combine to demonstrate that Appellant’s attempt to deny the district court of its subject matter jurisdiction must fail.

**ISSUE 2: THE PERSONAL REPRESENTATIVE’S MOTION TO ENFORCE PROBATE ORDER IS NOT BARRED BY A FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES**

*1. The Legislature did not intend for the Unclaimed Property Act to result in a single mandatory administrative procedure to the exclusion of obtaining unclaimed property in other ways.*

Through the Unclaimed Property Act, the Legislature provides an administrative service by which an owner may reclaim lost property. The Act is fairly simple. Its rules determine when property is unclaimed. NMSA 1978, § 7-8A-2 (2007). Once property is identified as unclaimed,

the property is transferred to the administrator. NMSA 1978, § 7-8A-8 (1997). The administrator attempts notice to owners. NMSA 1978, § 7-8A-9 (1997). Cash goes into the state general fund. NMSA 1978, § 7-8A-13 (2013). The administrator maintains a fund from which to pay claims. *Id.* A claims procedure is provided for owners. NMSA 1978, § 7-8A-15(a) (1997) (stating that a “person... claiming property ...**may** file a claim on a form prescribed by the administrator and verified by the claimant.”) The administrator is required to allow or deny the claim within ninety days. Section 7-8A-15(b) (stating “Within ninety days after a claim is filed, the administrator **shall** allow or deny the claim and give written notice of the decision to the claimant.”)

Appellant argues that an owner of unclaimed property is “required” to claim property by a method provided by the Unclaimed Property Office under Section 7-8A-15 (a). (BIC 4). Importantly, though, subsection (a) of Section 7-8A-15 uses permissive language allowing that claimants “**may**” file a claim on a form proscribed by the administrator.” Meanwhile, subsection (b) of Section 7-8A-15 uses mandatory language “**shall**” in directing the that Unclaimed Property Office give written notice of a denial to a claimant within ninety days.

A fundamental rule of statutory construction states that in interpreting

statutes the words “shall” and “may” should not be used interchangeably but should be given their ordinary meaning. *Thriftway Mktg. Corp. v. State*, 1992-NMCA-092, ¶¶ 9-10, 114 N.M. 578 (finding that the word “may” was intended by the legislature to indicate discretionary standard as opposed to the mandatory standard indicated by the word “shall”). Where the terms “shall” and “may” have been juxtaposed in the same statute, it must be concluded that the Legislature was aware of it and intended different meanings. *Johnston v. Board of Educ.*, 1958 -NMSC- 141, ¶ 7, 65 N.M. 147 (finding that the difference of language in two sections of constitution placed in juxtaposition is suggestive of an intention of drafters that language has different meanings).

Thus, based on the rules of construction, it is clear that the Legislature, which used the permissive language in subsection (a) that a claimant “may file a claim on a form prescribed by the administrator” but mandatory language in subsection (b) of the same statute, contemplated that there would be other ways in which a claimant would be able to collect lost property.

Furthermore, the Legislature also referred to estates and representatives in the Unclaimed Property Act. See Section 7-8A-1 (which includes “estate” in its definition of a “person” and includes a person's (i.e.

estate's) "legal representative" in the definition of "owner"). This indicates that probate was one of the ways the Legislature contemplated that an owner would claim property under the Unclaimed Property Act.

Based on all of this Appellee respectfully submits that Court should find that the Unclaimed Property Office may not maintain any jurisdictional arguments based on the reasoning that the Legislature intended the Unclaimed Property Office's administrative procedure to be the sole method of collecting unclaimed property.

*2. The Unclaimed Property Office failed to comply with a mandatory provision of the Unclaimed Property Act when it failed to issue a written denial to the Personal Representative.*

In this case, the Unclaimed Property Office failed to follow its own procedures by refusing to either approve or deny the PR's claim within the proscribed ninety day period. Section 7-8A-15(b). This failure to follow its own mandatory tenets was based on the Unclaimed Property Office's arbitrary opinion that it did not have to engage with a court appointed representative because the court did not have jurisdiction.

The Unclaimed Property Office has gone so far as to recently change the instruction for claiming a decedent's property on its state website. Based on the website, the Unclaimed Property Office will only allow claims for a decedent's property where "the estate was **not previously subject to**



**probate** or where probate was **previously closed.**” But the instructions also require that, to make a claim for a decedent’s property, the claimant be the decedent’s “legal representative.” See [tax.newmexico.gov/Individuals/file-a-claim.aspx](http://tax.newmexico.gov/Individuals/file-a-claim.aspx).<sup>6</sup>

Jointly, these two ad hoc instructions implemented by the Unclaimed Property Office, which are not connected to any statutory provision in the Unclaimed Property Act, are illogical. Read together the instructions actually makes it impossible for a legal representative to make a claim for a decedent’s property. First, a probate is almost always required to appoint a legal representative for a decedent, so it is highly unlikely that an “estate would not have been **previously subject to probate.**” Second, once opened, a probate cannot be closed until after the assets of the estate are collected and distributed and so it is impossible for the estate to have been “**previously closed.**” Therefore, there is no way for a court appointed representative to make a claim because the probate must stay open until the assets are collected and disbursed; there is no way to comply with a new

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<sup>6</sup> Although not part of the record proper, courts take judicial notice of facts which are generally known and accepted. *Spillway Marina, Inc. v. United States*, 445 F.2d 876, 878 (10th Cir. 1971). Content of government websites may be considered under judicial notice. See *Moehring v. Thomas*, 126 Cal. App. 4th 1515, 1524, 25 Cal. Rptr. 3d 118, 124 (2005) (taking judicial notice of the a plan outlined on the United States Department of Agriculture Forest Service's website.)

requirement that the probate be previously closed.

It is clear from the new “instructions” on the website, and the record in this case, that the Unclaimed Property Office is determined not to work with legal representatives for estates even though its own statutory provisions dictate that it must. Section 7-8A-1. In appealing the district court’s decision, the Unclaimed Property Office is now looking to this Court for confirmation that it does not have to cooperate with state statutes or judiciary orders. Appellee respectfully submits, however, that the Unclaimed Property Office has overstepped the intentions of the Legislature as stated in the Unclaimed Property Act, and requests that the Court affirm the district court’s Order Granting the Motion to Enforce.

*3. The Unclaimed Property Office uses the Personal Representative’s failure to appeal a denial as grounds for its lack of jurisdiction, but the Unclaimed Property Office never issued a denial, thus making it impossible for the Personal Representative to seek administrative appeal.*

The Record Proper demonstrates that the PR attempted to follow the Unclaimed Property Office’s procedures to the extent possible but that the Unclaimed Property Office was unresponsive. The PR opened a probate to have himself appointed “legal representative” so as to qualify as a claimant under Section 7-8A-1. (R.P. 3) He submitted the claim form provided by the Unclaimed Property Office under Section 7-8A-15, with supporting documentation as well as his order of appointment, to the Unclaimed

Property Office on April 11, 2013. (R.P. 31). Upon being informed that his claim was “incomplete” by the Unclaimed Property Office, (R.P. 31), the PR’s attorney attempted to provide the information necessary to “complete” the claim. (R.P. 32-34).

By its own statutory provisions, the Unclaimed Property Office was mandated to allow or deny the claim within ninety days of the April 11, 2013 submission. Section 7-8A-15(b). But the Unclaimed Property Office never responded to the PR’s attempts to complete his claim. In failing to either allow the claim or issue a formal denial, it was the Unclaimed Property Office that failed to follow the strictures of the Unclaimed Property Act, not the PR.

Now, the Unclaimed Property Office argues that the PR must exhaust administrative remedies before the district court can have jurisdiction. (R.P. 38). But the Unclaimed Property Office has never issued a denial upon which the PR could have based on appeal. After issuing its Notice of Incompletion, the Unclaimed Property Office stopped communicating with the PR. Despite attempts to complete the claim, the PR never heard from the Unclaimed Property Office again.

The Unclaimed Property Office’s logic resembles an M. C. Escher staircase in that it is confusing, misleading, and ultimately goes nowhere.

First the Unclaimed Property Office states it will not release the Estate property to the PR because Mr. Phillips is not the sole heir to the property. (R.P. 31). Next the Unclaimed Property Office states it will not release the property to the PR through probate. (R.P. 31, 38-41, 57-60). It will not release it to Mr. Phillips alone as a claimant to his grandfather's property because there are other heirs entitled to a share of the property "under the applicable laws of heirship" (i.e. the Probate Code). (R.P. 31). But it will not release the property to Mr. Phillips alone as the *representative* of the estate because it believes the probate court does not have jurisdiction. (R.P. 38). As such, the Unclaimed Property Office has positioned itself so that it will never have to release the property to anyone.

Importantly, in responding to the Notice of Incompletion, the PR confirmed for the Unclaimed Property Office that he indeed is *not* the sole heir to the property. (R.P. 32). There are at least seven other heirs to Decedent's property at different generational levels. (R.P. 15, 17-22). As the Decedent passed intestate and was not survived by his spouse or children, the distribution of the Estate is subject to NMSA 1978 § 45-2-103 (3) (2011), which provides that where there is no surviving spouse and no surviving descendant or parent, the entire intestate estate passes ... to the descendants of the decedent's parents or either of them by representation.

And so when the Unclaimed Property Office states the PR cannot make an administrative claim because there are other heirs who might have competing claims, the question becomes, how exactly is anyone supposed to claim this property?

On a practical level, the Unclaimed Property Office seems to be suggesting that, rather than collect and distribute the Estate assets through probate, Mr. Phillips and the other heirs (whom are spread over several states including Utah, Washington and Kansas (R.P. 30)), figure out amongst themselves how much each person is entitled to based on the amount of children in each family of the Decedent's siblings and in consideration of the respective generational levels according to Section 45-2-103 (3) and then submit seven separate administrative claim forms at the same time to the Unclaimed Property Office for each heir with the specific amount each gets.

Could this possibly be the result the Legislature intended by enacting the Unclaimed Property Act? The very language of the Act indicates otherwise. It is clear that the Legislature anticipated that estates, personal representatives and the legal representatives of deceased owners would collect unclaimed property. Sections 7-8A-1 (11), (12). Furthermore, the form provided by the Unclaimed Property Office under Section 7-8A-15(a)

actual contains a check box for a legal representative or executor. As the district court stated, the Unclaimed Property Office's own form "contemplates that an executor of an estate will collect a decedent's property for administration." (S.R.P. 201).

Appellant's refusal to recognize the PR or work with the Estate is confounding. It is unclear exactly what Appellant wants. But what is clear is that the Unclaimed Property Office should not be allowed to disregard its Legislative mandate by preventing a claimant from making an administrative appeal and then arguing that the district court did not have subject matter jurisdiction because that same claimant failed to exhaust his administrative remedies.

*4. Cases presented by the Unclaimed Property Office in support of its failure to exhaust administrative remedies argument are not applicable to the instant facts.*

Appellant attempts to support his argument that the PR did not exhaust his administrative remedies by relying on *U.S. Xpress, Inc. v. New Mexico Taxation and Revenue Dept.*, 2006-NMSC-017, 139 N.M. 589. In that case, a group of taxpayers sought to file a class action lawsuit against the Taxation Department. The issue on appeal was whether the court should recognize the doctrine of "vicarious" exhaustion of remedies to allow the class action to proceed when only a few members of the proposed class had

exhausted their administrative remedies. *Id.* ¶ 1.

The case has little to no bearing on the instant matter. First, in *U.S. Xpress, Inc.*, a class was seeking certification for a tort claim whereas this is a probate matter where Appellant is not even a party. Next, in *U.S. Xpress, Inc.*, the class sought to **state a claim** for civil rights violations **against** the Taxation Department. But in the instant matter, the PR is not suing the Unclaimed Property Office or attempting to state a claim against it.

Third, the issue on review in *U.S. Xpress* is whether, when exhaustion of remedies is required, can members of a class who have not exhausted the administrative process rely on other class members who have. As such, *U.S. Xpress* begins with the premise that exhaustion is possible because a claim was denied.<sup>7</sup> Here, the Unclaimed Property Office refused to issue a decision either way within the proscribed ninety day period, therefore making it so that there was nothing for the PR to appeal. Unable to get a response by using the method proscribed by the Unclaimed Property Act, the PR attempted to fulfill his fiduciary duty to marshal the assets of his

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<sup>7</sup> The same is true of the other case upon which Appellant relies, *Grand Lodge of Ancient & Accepted Masons of New Mexico v. Taxation & Revenue Dept. of State of N.M.*, 1987-NMCA-081, 106 N.M. 179, which holds that the district court does not have jurisdiction over a declaratory judgment action unless the parties have first exhausted any administrative remedies.

grandfather's Estate by seeking judicial intervention where the Unclaimed Property Office refused to act. None of the cases cited by Appellant contemplate this scenario and therefore they are not helpful.

### **ISSUE 3: THE UNCLAIMED PROPERTY OFFICE'S REMAINING JURISDICTIONAL ARGUMENTS FAIL**

#### *1. Service in accordance with Rule 1-004 NMRA is not required to deliver orders or motions.*

The Unclaimed Property Office seeks to have the probate dismissed because it claims it was not properly served under Rule 1-004(H). The reason this argument fails is because Rule 1-004 dictates the procedure for service of process for *complaints*. *Id.*(A)(1) (stating Rule 1-004 “governs the issuance and service of process in all civil actions.”) In filing his Motion to Enforce Order in the instant matter, the PR followed Rule 1-005(A) NMRA, which governs the delivery of “every pleading subsequent to the original complaint.” Both orders and motions are subsequent filings on a docket. In this case, both the Probate Order and the Motion to Enforce were delivered to the Unclaimed Property Office the same day they were filed, as required by Rule 1-005 (E). (R.P. 30, 32, 65).

The Unclaimed Property Office's reliance on *Pennoyer v. Neff*, 95 U.S. 714 (1878) and *Shaffer v. Heitner*, 433 U.S. 186 (1977) to support its service argument is misplaced. In *Pennoyer*, the U.S. Supreme Court was



asked to determine whether a state court had *personal jurisdiction* over a non-resident defendant in a lawsuit when the non-resident was not personally served process and did not hold property within the state. Such facts are not analogous here and have nothing to do with *subject matter jurisdiction*. The PR is not suing the Unclaimed Property Office or attempting to execute a judgment over property owned by the Unclaimed Property Office to settle a debt. The Unclaimed Property Office cannot be analogized to the non-resident individual defendant in *Pennoyer*.

The same is true for *Shaffer*, a case in which the Supreme Court established that a defendant's ownership of stock in a corporation incorporated within a state, without more, is insufficient to allow that state courts to exercise *personal jurisdiction* over the defendant.

It is unclear how or why Appellant thinks these federal personal jurisdiction cases concerning out of state defendants have any bearing here. Regardless, the Personal Representative respectfully requests that the Court disregard the off point arguments concerning service and find that the district court had subject matter jurisdiction over Estate property held by the Unclaimed Property Office.

*2. The Probate Order is not an ex parte order.*

Appellant states that one of the issues on appeal is whether the

Appellee may obtain “an *ex parte* order” against the Unclaimed Property Office. (BIC 12). But the Appellant’s issue presented is based on the incorrect legal conclusion that the Probate Order is *ex parte* order. As demonstrated below, however, nothing issued by the district court was *ex parte* because the Unclaimed Property Office never entered itself as a party in the probate. Thus any *ex parte* argument fails.

Appellant relies on *Holzman v. Martinez*, 1882-NMSC-011, 2 N.M. 271 to support its *ex parte* argument. But *Holzman* is both factually and legally inapplicable to the instant matter. That case concerns the issuance of a writ of attachment between individuals for a debt almost a quarter of a century ago. A plaintiff sued a defendant based on an action of assumpsit, which is a common law action for damages caused by the breach of contract. The writ of attachment, which was issued in Spanish, was deemed improper. *Id.* ¶ 15 (stating “the bond has no particular date... and there is no acknowledgment by its makers, or any justification of sureties indorsed thereon, and it does not show that the sureties thereon are residents of the territory of New Mexico.”)

Conversely, the underlying matter on appeal here was opened as a probate proceeding. There are no allegations that the Probate Order contains errors or omissions as the writ of attachment in *Holzman*. The Unclaimed

Property Office is not being sued and is not a defendant as the appellant was in *Holzman*. But perhaps most importantly, no one has filed as an interested person in this *in rem* proceeding and as such there are no parties.

Probate proceedings in New Mexico are *in rem* proceedings to which there are no parties unless some interested person voluntarily enters an appearance. *In re Towndrow's Will*, 1943-NMSC-021, ¶ 25, 47 N.M. 173 (holding that there is nothing to indicate that the failure to serve statutory notice deprives the probate courts of jurisdiction.) Once an interested person voluntarily enters an appearance to contest a probate ruling, “he in effect became the plaintiff in a new action.” *In re Owens' Estate*, 1957-NMSC-088, ¶ 6, 63 N.M. 263.

The PR recognized that the Unclaimed Property Office was a potential interested person under the Probate Code. An “interested person” for purposes of the Probate Code includes “any others having a property right in or claim against ... the estate of a decedent.” NMSA 1978, § 45-1-201(A)(19) (2011). In sending the Probate Order to the Unclaimed Property Office, the PR apprised the Unclaimed Property Office, as a potential interested person, of the probate so that it could pursue any course open to it if it disputed the probate or the probate court’s rulings.

But the Unclaimed Property Office never responded to the delivery of

the Probate Order. It did not seek to enter an appearance as an interested person to contest the Probate Order as it was entitled to do. It did not file a motion for reconsideration or a request to set aside a judgment. It did not file an appeal of the Probate Order, which was a final order and could have been appealed as a matter of right. Instead the Unclaimed Property Office simply took no action, either on the administrative side or in the probate, until the PR was left with no choice but to pursue court enforcement.

The Unclaimed Property Office should not be allowed to make an argument based on a claim that anything in this matter was done *ex parte*, when Appellant slept on its rights as a possible interested person and failed to enter an appearance. Its jurisdiction argument should be denied.

#### **ISSUE 4: THE UNCLAIMED PROPERTY OFFICE DID NOT PROPERLY PRESERVE ANY ISSUES FOR APPEAL**

*1. The Unclaimed Property Office did not properly preserve any issues through its motion to dismiss.*

Appellant states that the jurisdictional issues on appeal were “preserved though a written motion to dismiss for lack of subject matter jurisdiction.” (BIC 3). The motion to dismiss to which Appellant refers was filed by the Unclaimed Property Office pursuant to NMRA 1-012 (B). (R.P. 38). The motion sought to dismiss the entire probate proceeding. (R.P. 38). However, it is most unlikely that the Unclaimed Property Office’s motion

was properly before the district court.

The purpose of Rule 1-012(B) NMRA is to allow a defendant or counterclaimant the option to raise certain enumerated defenses by motion before having to file its answer to a complaint or counter-claim. *Ortiz v. Shaw*, 2008-NMCA-136, ¶ 22, 145 N.M. 58; see also Rule 1-012(B) (enumerating specific defenses that may “at the option of the pleader” be made by motion.) Rule 1-012 provides a party with a way to test the legal sufficiency of a complaint before filing a responsive pleading. *Humphries v. Pay and Save, Inc.*, 2011-NMCA-035, ¶ 6, 150 N.M. 444.

But in this case, the Unclaimed Property Office is neither a defendant nor counterclaimant. No causes of action have been alleged against the Unclaimed Property Office and it has not entered an appearance as an interested person. Rather, the Unclaimed Property Office is merely the custodian of property that belongs to the Estate in a probate matter. As a non-party custodian against whom no claims are stated, it seems unlikely that the Unclaimed Property Office has standing to file a motion to dismiss the entire probate proceeding. Furthermore, where the purpose of Rule 1-012(B) is to test the legal sufficiency of the complaint, and no complaint is filed, it stands to reason that the Unclaimed Property Office erred procedurally by attempting to dismiss probate matter D-101-PB-2013-00150

using that mechanism.

2. *The Unclaimed Property Office did not properly preserve any issues where it failed to respond to the Probate order in a timely manner and waived its right to seek relief.*

Alternatively, the Court should not consider any substantive arguments made in the Motion to Dismiss because the Unclaimed Property Office waived its right to make such arguments by failing to appeal the Probate Order within a reasonable time frame. State law allows a window of thirty days from the entry of any final order that affects substantial rights in any civil action in the district court. See NMSA 1978, § 39-3-2 (1966). The Probate Order ordering the Unclaimed Property Office to release the Decedent's property to the PR was issued on April 11, 2013 and the Notice of Appeal was not filed until February 24, 2014 – over ten months later.<sup>8</sup>

Our Supreme Court has repeatedly stated that the time requirement for filing for appeal or review must be strictly adhered to absent unusual circumstances. For example, in *Bransford-Wakefield v. State Taxation & Revenue Dep't.*, 2012-NMCA-025, \_\_\_ N.M. \_\_\_, a plaintiff sought to appeal

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<sup>8</sup> For purposes of Section 39-3-2, the Probate Order in this matter was a final order. See NMSA 1978, § 45-3-412 (1995) (stating “a formal testacy order ... including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered.”); see also NMSA 1978, § 45-3-107 (1975) (implying that an order appointing a personal representative is final by stating “A proceeding for appointment of a personal representative is concluded by an order making or declining the appointment.”)

the Taxation and Revenue Department's revocation of her driver's license. *Id.* ¶ 2. The plaintiff was required to file her petition for writ of certiorari within thirty days after the district court's order, but missed the deadline by one business day. *Id.* ¶ 8. She asked the court to consider her petition timely because her attorney had been ill. *Id.* The Court denied to allow the appeal stating that “[w]hen a petition is not filed in this Court within thirty days of the district court's final order, this Court will not excuse the untimely filing absent a showing of unusual circumstances that would justify the untimeliness.” *Id.* ¶ 9; see also *Gulf Oil Corp. v. Rota-Cone Field Operating Co.*, 1973-NMSC-107, 85 N.M. 636 (quashing a writ of certiorari submitted two days after deadline to file.)

Both *Bransford-Wakefield v. State Taxation & Revenue Dep't.* and *Gulf Oil Corp. v. Rota-Cone Field Operating Co.*, demonstrate how strictly this Court construes deadlines for appeal or reconsideration. In both cases, the appellants were within days of the deadline to file and still the reviewing courts refused to consider the substantive issues raised in the delayed filings. In this case, the Unclaimed Property Office did not just miss the deadline by a few days. Rather, even presuming the Unclaimed Property Office was not aware of the Court's Order until the April 11, 2013 delivery, the statutorily recommended thirty-day window (plus three day service) expired on May

14, 2013. But the Unclaimed Property Office took no action to protest the Probate Order or the Probate Court's jurisdiction until September 13, 2013 when it filed its procedurally defective Motion to Dismiss in response to the Probate Order.

The Unclaimed Property Office did not seek appeal on the Probate Order's holding that the Unclaimed Property Office had to release Estate property until February 24, 2014. Any reasonable or even lenient window to object to the Probate Order, which was a final order, expired while the Unclaimed Property Office slept on its rights to enter appearance and request reconsideration, or appeal the order or take any action to demonstrate why Decedent's property should not be released to the PR of his Estate. As such, the issues raised by the Probate Order regarding jurisdiction over the unclaimed property are not properly before this Court for appeal.

*3. The Unclaimed Property Office did not follow procedure in filing his notice of appeal and application for interlocutory appeal.*

*Appellant's Notice of Appeal; Application For Interlocutory Appeal Pursuant to NMSA 1978 Section 12-203. (sic) and NMSA 1978 Section 39-3-2 and NMSA 1978 Section 39-3-4 (B) ("Notice of Appeal and Application for Interlocutory Appeal") (R.P. 68-117) did not properly preserve any issues for appeal because the document was fatally flawed and defective on its face. Counsel for the Unclaimed Property Office filed the Application for*



Interlocutory Appeal in the wrong court, failed to cite language that the judge certified an issue for interlocutory appeal, and failed to follow the correct procedure in accordance with State's Appellate Rules by combining a Rule 12-202 NMRA "notice of appeal" with a Rule 12-203 NMRA "application for interlocutory appeal". Additionally, final orders are not reviewed on interlocutory appeal, but as a Rule 12-201 NMRA appeal as of right.

In this case, the District Court did not certify any issue for immediate appeal. The Unclaimed Property Office's Application for an Interlocutory Appeal fails because it does not cite to the language required by NMSA 1978, § 39-3-4A – namely that the judge "believes the order or decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order or decision may materially advance the ultimate termination of the litigation." Indeed, there is no such language in the Order attached to the Application because Judge Ortiz did not certify any issues for interlocutory appeal and the Unclaimed Property Office never requested language be included to do so. Without Judge Ortiz's certification, the Unclaimed Property Office cannot seek interlocutory appeal. The Application is fatally defective and should not be considered as preserving any issues for appeal.

Additionally, the Unclaimed Property Office filed the Application in the wrong court. An appeal from an interlocutory order must be initiated by filing an application for interlocutory appeal **in the Court of Appeals** within fifteen (15) days after the entry of such order in the district court. See Rule 12-203 NMRA. In this case, the Unclaimed Property Office incorrectly filed its Application with **the District Court**.

Also, the Notice of Appeal is fatally flawed because it combines two discreet pleadings into one. In filing a “Notice of Appeal; Application for Interlocutory Appeal” the Unclaimed Property Office combined two distinct pleadings meant to go to two different courts into one. An “application for interlocutory appeal” is a separate entity from “a notice of appeal.” A notice of appeal is filed in the district court and served it in accordance with Rule 12-201. The form for the notice of appeal is one page long and even available on line. The Unclaimed Property Office did not use these resources that a pro se appellant knows to use but rather filed the way in which it wanted.

But just because the Unclaimed Property Office is a state entity doesn't mean it can ignore the Rules and statutes that others are bound to follow. Taxpayers deserve to be represented by state attorneys who understand the basic Rules of Civil and Appellate Procedure. In this case,

the Unclaimed Property Office has failed to follow the Rules, as well as its own statutory provisions, and therefore, it has failed to properly preserve any issues for appeal.

### **III. STATEMENT REGARDING ORAL ARGUMENT**

The Personal Representative believes the briefing demonstrates that the Unclaimed Property Office must comply with the District Court's Order Granting Motion to Enforce and release the Decedent's property to the Personal Representative of the Estate. He requests oral argument in the event the Court has any questions directed to the issues raised by the appeal.

### **IV. CONCLUSION**

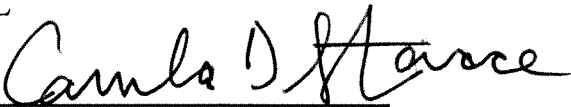
The Unclaimed Property Office has misinterpreted the provisions of the statutes under which it operates. It appeals to this Court to sanctify actions that violate and exceed the scope of the Unclaimed Property Act. A correct interpretation of the Unclaimed Property Act demonstrates that our Legislature meant for it to work in tandem with the Probate Code, not trump or supersede it. In this case, the Personal Representative opened a probate under the Probate Code so as to be appointed the "legal representative" of the Decedent. The Unclaimed Property Office should have complied with its own Act and the Probate Order, which taken together work to effect the

Legislature's intended method for collecting a decedent's assets from the Unclaimed Property Office.

WHEREFORE, Michael Phillips, in his capacity as Personal Representative for the Estate of Edward K. Melvin, respectfully requests that the Court affirm the district court's Order Granting Motion to Enforce and order the Unclaimed Property Office to release Decedent's property to the Personal Representative of the Estate, and award the Estate its legal fees incurred beginning September 12, 2013 through this Answer Brief and for any other relief the Court deems proper.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I sent via U.S. postal mail a copy of the foregoing *Answer Brief* to the following counsel of record on the 22nd day of September 2014:

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