IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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

MICHAEL PHILLIPS, As Personal Representative of the Estate of Edward K. McElveny,

Petitioner-Appellee,

vs.

No. 33,568
Santa Fe County
PB-2013-00150

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

Respondent-Appellant.

BRIEF-IN-CHIEF

(Oral Argument Requested)

Appellant requests oral argument pursuant to Rule 12-213(A)(c) NMRAP because the appeal concerns fundamental issues of notice and jurisdiction.

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 12-213F(3) counsel signing this Brief-In-Chief certifies that the word count of the Brief-In-Chief totals 3481 words using the word count function of Microsoft Word 2010, is in 14 point and is proportionately spaced.

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I. SUMMARY OF PROCEEDINGS

A. Nature of the Case

This is an appeal from the First Judicial District Court of the State of New Mexico, Santa Fe, New Mexico. The controversy first arose in the probate court which transferred the controversy to the district court pursuant to NM Const. Art. VI § 23.

B. Course of Proceedings and Summary of Facts and Disposition Below

Edward McElveny, M.D. was a prominent medical doctor in Santa Fe who died in 1991. [R.P. 000003]. The Department has roughly $70,000 of unclaimed property in its custody held in the Tax Administration Suspense Fund which colorably belonged to the late Edward McElveny. [R.P. 000057]. The Appellee, first filed a claim with the Department's Unclaimed Property Office. (*Motion to Enforce Order and Assess Sanctions*,) "[T]he Personal Representative submitted a claim packet for the estate of Edward K. McElveny to the Unclaimed Property Office." [R.P. 000023, R.P. 000031]. The Personal Representative did not await an administrative determination with the Department. Instead, the Appellee proceeded to seek the money through an heirship proceeding in the probate court. [R.P. 000003].

The lawyer for the personal representative, as part of her application for a probate court order appointing her client personal representative, included in the

order provided to the probate court a provision obtained *ex parte* to the Department, that "The New Mexico Department of Taxation and Review [sic] shall release the unclaimed property of the Decedent to Applicant as the Personal Representative of the Estate of Decedent." The probate court signed the *ex parte* order. [R.P. 000009]. Armed with the *ex parte* probate court order against the Department, the lawyer for the Personal Representative, again without the benefit of formal service of process against the state, contacted the Department and demanded payment to her of the $70,000. Unclaimed Property is held in the Tax Administration Suspense fund. NMSA 1978 Section. 7-8A-13 (A). When the Department declined to pay Appellee $70,000, based on the *ex parte* court order, Appellee filed a written request for sanctions against the Department and its officials. [R.P. 000023]. Once again, there is no showing in the record that the Appellee attempted formal service of process against the state. The Department in turn filed a motion to dismiss for lack of subject-matter jurisdiction, and for a dismissal for failure to make service of process. [R.P. 000038]. In keeping with the requirements of Rule 1-012 (G) NMRA, the Rule 12 (B) (1) motion was combined with the Rule 12 (B) (4) and (5) motions. The Department argued in its written motion to dismiss that the claims should be processed through the administrative claims procedure of the Uniform Unclaimed Property Act, pursuant to Rule 1-012 (B) (1) NMRA. [R.P. 000038]. The court denied the motion for

sanctions, but enforced the *ex parte* order from the probate court, [R.P. 000065], and thereby impliedly overruled the motion to dismiss for failure to make effective service of process. [R.P. 000065]. The Court included NMSA 1978 Section 39-3-2 language in its February 10, order allowing an immediate appeal. *Id.* On February 24 and 25, the Appellant filed a notice of appeal. [R.P.000063, 000118]. These were styled as both appeals by right and interlocutory appeals. *Id.*

II. ARGUMENT

A. MAY A CLAIMANT TO UNCLAIMED PROPERTY DISPENSE WITH THE ADMINISTRATIVE CLAIMS PROCEDURES OF THE DEPARTMENT IN FAVOR OF *EX PARTE* PROBATE PROCEEDINGS IN THE PROBATE COURT OVER TWENTY YEARS AFTER THE DEATH OF THE APPARENT OWNER?

1. Standard of Review and How the Issue was Preserved for Appellate Review

A motion to dismiss for lack of subject-matter jurisdiction is reviewed de novo for legal error. *Human Rights Comm'n v. Accurate Mach. & Tool Co.* 2010-NMCA-107 ¶ 4. The issue was preserved through a written motion to dismiss for lack of subject-matter jurisdiction [R.P.00038] with oral argument. *See, Harrell v. Hayes*, 1998-NMCA-122, ¶ 11, 125 N.M. 814, 817, 965 P.2d 933, 936 ("In reviewing an appeal from an order granting or denying a motion to dismiss for lack of personal jurisdiction, the determination of whether personal jurisdiction exists is

a question of law, which an appellate court reviews *de novo* when the relevant facts are undisputed.")

a. Estates Are Required by the Terms of the Uniform Act to Utilize the Procedures of the Department.

If the Appellee's theories are correct, Edward McElveny M.D., had he survived, would be at a considerable procedural disadvantage as compared to his putative heirs who now claim the money almost twenty-five years later. Unquestionably, Dr. McElveny, unlike the Appellants here, would be required to apply to the Department and prove up, by a preponderance of the evidence, his identity, and entitlement to the money. NMSA 1978 Section 7-8A-15 (a). If he did not like the result, his recourse would be to appeal on the record to the District court. NMSA 1978 Section 7-8A-16 (A). In contrast, the Appellee here, simply had himself appointed personal representative. With that application to be appointed personal representative, Appellee also made in probate court an untested declaration of his entitlement to the funds. At Appellee's request he also obtained from the probate court, in the same order appointing him personal representative, an *ex parte* probate court order that the Department write him a $70,000 check from the Tax Administration Suspense Fund. [R.P. 000009 ¶ "D"]. This was followed by written motions by the Appellee for enforcement and sanctions against the Department, (all without benefit of formal service of process), for not following the *ex parte* probate court order. [R.P. 000023].

The Uniform Unclaimed Property Act, in contrast to the posture of the Appellee however, prescribes a dual role for the state: The state serves as the guardian of the property until such time as its true owner appears and proves entitlement. NMSA 1978 Section 7-8A-15 (a);7-8A-10 (b). Until that time, the state may use the property for state expenses, so long as it stands ready to pay out claims from owners as they appear. NMSA 1978 Section 7-8A-13. This state traditionally recognizes that there is an extraordinarily strong state interest in protecting the dead. *State v. Hartzler,* 1967-NMCA-022. (Mishandling of dead body common law misdemeanor without specific criminal law enactment from Legislature). This strong interest in protecting the dead extends by legislation through the Uniform Unclaimed Property Act, to depredations by those who may have insubstantial or even fraudulent claims of heirship. In the absence of close friends or family who may be able to stand up for the decedent years after death, this duty to vet claims of entitlement falls to the state. NMSA 1978 Section 7-8A-15.

The Uniform Unclaimed Property Act plainly provides that such unclaimed property is presumptively abandoned and therefore properly in the custody of the Unclaimed Property Office pursuant to NMSA 1978 Section 7-8A-2 (A). ("Property is presumed abandoned if it is unclaimed by the apparent owner during the time set forth below...."). More to the point, the legislature explicitly declared

that the act applies to probate estates. NMSA 1978 Section 7-8A-1 (12). " 'person' means.....estate....". Such "persons" may file administrative claims. NMSA 1978 Section 7-8A-15 (a).

If the legislature said one thing then it did not mean something else. A legislative declaration that estates could file claims for unclaimed property on an equal footing with other claimants does not mean that estates may ignore this explicit direction from the legislature, resort to their internal procedures of probate and treat the Tax Administration Suspense Fund as if it were a savings account subject to turn-over to the Personal Representative on presentation of letters of administration; otherwise there would be no point to the legislature writing legislation that plainly brought estates within the ambit of the Act.

The only statutory deviation for making payment outside of the Department's claims procedure does not apply here. That is the circumstance where the owner appears and seeks payment from the holder who has made delivery of the unclaimed property to the state. The holder in that circumstance may make payment to the apparent owner and seek reimbursement from the state. NMSA 1978 Section 7-8A-10 (c). The fact that this comprehensive uniform act lists one exception to this procedure - that a holder may be reimbursed if the owner belatedly appears and gets his money back from the holder, *id,* is strong evidence that there are no other implied exceptions to the terms of the Act.

Appellant and his lawyer would be cognizant of the other unwarranted advantages of proceeding in probate instead of unclaimed property. Doing so creates the opportunity for them to sidestep other inconvenient features of the Uniform Act in favor of probate. Although there was no heir-finder involved in this particular case, an heir-finder working a contingent fee has strong incentive to resort to probate instead of pursuing an administrative claim. He might have himself appointed personal representative, for example. [R.P. 000115]. The Probate Code provides simply that the Personal Representative may employ and pay agents and attorneys at the expense of the estate without prior court approval. NMSA 1978 Section 45-3-715 (A) (21). The Uniform Unclaimed Property Code by way of contrast, is much more demanding on heir-finders. NMSA 1978 Section 7-8A-25 (A), (B) and (D) respectively, provide that heir-finder agreements entered into less than forty-eight months after delivery of the property to the Department are void, there must be signed agreements with the apparent owner or owners, and that these written agreements not be unconscionable. *Id.* An heir-finder who wants to skip the forty-eight month waiting period before his heir-finder contract can be validly signed, would instead resort to probate. An heir-finder or lawyer who wants to bind many heirs-apparent to a contingent fee contract merely has to sign up one heir-apparent to a contingent fee, have that heir-apparent appointed personal representative and then impose the fee on the others without separate

signed agreements, in compliance with NMSA 1978 Section 45-3-715 (A) (21), but in violation of NMSA 1978 Section 7-8A-25 (B) requiring a contract in writing as to each owner. The legislature did not intend for probate to be a short-cut to unclaimed property. The legislature did not intend for probate to be a way to sidestep the protections for heirs and other claimants contained in the Uniform Act.

b. The Unilateral Claim of Right by the Appellee is Insufficient to Overcome the Statutory Presumption That the Property is Abandoned

Leave aside for a moment the explicit inclusion of estates within the ambit of the Uniform Act. The obtaining of an *ex parte* probate court order based on a unilateral claim of right by the Appellee, does not overcome the presumption contained within the statute that the property is abandoned and should be in the custody of the state until the owner comes forward and proves ownership of the unclaimed property. NMSA 1978 Section 7-8A-2 (A); 7-8A-4. While the conflict between administrative procedures and competing judicial procedures has been a fertile source of litigation, it has never been suggested by the courts of this state that a unilateral declaration of entitlement made in a judicial proceeding is sufficient to overcome a statutory presumption that title and possession should be held in the state.

c. The Appellee Failed to Exhaust Administrative Remedies.

As explained above, jurisdiction is exclusively within the Taxation and Revenue Department with an administrative appeal on the record to the District

court. The District court should have granted the Rule 1-012 (B) (1) NMRA motion to dismiss for lack of subject-matter jurisdiction, as argued in the *"Motion To Dismiss For Lack Of Subject-Matter Jurisdiction And For Failure To Make Service Of Process Pursuant To Rule 1-012 (B) 1,4 And 5 NMRA."* submitted by the Department. [R.P. 000038]. The District court lacked jurisdiction except on administrative appeal from the Department. *U.S. Xpress, Inc. v. N.M. Taxation & Revenue Dep't,* 2006-NMSC-17 (Claim that "cab-card" fee on over-the-road truckers violated commerce clause must be processed by the Department under Tax Administration Act, notwithstanding claim of facial invalidity under the commerce clause). *See also, Grand Lodge of Ancient and Accepted Masons of N.M. v. Taxation and Revenue Dep't.* 1987-NMCA-081 ¶ 11-22. (Where imposition of property tax on Masonic Lodge was at issue, administrative fact finding committed to administrative proceedings of the Taxation and Revenue Department must be followed in lieu of original action in district court).

It would be illogical to suppose that the legislature meant to require strict use of the administrative tax refund and tax protest procedures utilized by the Department on the one hand, but on the other hand, meant to make use of the claims procedures of the Uniform Unclaimed Property Act, also administered by the Department, to be optional. The legislature meant for unclaimed property to be administered by the Department.

The legislature included estates as potential claimants within the Act and required exhaustion of administrative remedies for good reason. An heirship proceeding brought decades after the death of the apparent owner for money that is in the custody of the Department's Unclaimed Property Office is effectively *ex parte*. Years after death there is no creditor ready to challenge the assertion of heirship. Given the desolation of human mortality, others such as close friends or in-laws, who are not necessarily competing with the claimants but who might have been in a position to challenge insubstantial claims of heirship out of a sense of duty, are themselves likely to be dead. Yet, the Personal Representative here is poised to take full advantage of the probate provisions that Appellee may "....proceed expeditiously with the settlement and distribution of a decedent's estate... without adjudication, order or direction of the district court." NMSA 1978 Section 45-3-704. In other words, as a practical matter the Personal Representative who appears years after death could clean out the account with little more than a death certificate and a declaration of entitlement.

The parties and the district court agree that the Department is not a proper party to a probate, and in such circumstance, there is no entity or person ready to test the claimant/personal representative's claim of right or challenge a claim of entitlement, no matter how flimsy. Even if one were to overlook the *ex parte* nature of heirship proceedings held so long after death, it is plainly inappropriate to

allow a claimant to bypass administrative procedures and go straight to district court, where in doing so the Appellee circumvents established administrative procedures, including administrative fact-finding. *Headen v. D'Antonio* 2011-NMCA-58 ¶ 14. (Where fact-finding takes place, declaratory judgment against agency action unavailable.)

Rather than the improbable procedure posited in the courts below, where tens of thousands of dollars are turned over to claimants based on their *ex parte* and untested exhortations to the probate court that they are truly entitled to the money, the state legislature in accordance with its strong state interest in protecting the property of the dead, eschewed this "honor system" for claims against the state in favor of the Uniform Unclaimed Property Act. NMSA 1978 Section 7-8A-15. The Act provides for an administrative claims procedure and determination by the Department. This administrative determination is followed by a judicial review on the record through NMSA 1978 Section 7-8A-16 (A) which states that, "A person aggrieved by a decision of the administrator may file an appeal pursuant to the provisions of Section 39-3-1.1 NMSA 1978". This would be no different than the position Dr. McElveny himself would have been in had he attempted to reclaim the property before his death. Therefore, the procedure advocated by the Department is not prejudicial to the heirs apparent. In fact, since the Uniform Act protects them against contingent fees agreed to by only one heir, it is beneficial to them if

their claims are processed through the administrative proceedings of the Department.

B. MAY THE APPELLEE OBTAIN AN *EX PARTE* SEQUESTRATION ORDER AGAINST THE TAX ADMINISTRATION SUSPENSE FUND? IF THE SEQUESTRATION ORDER AGAINST THE DEPARTMENT IS VALID, MAY IT BE ENFORCED AGAINST THE DEPARTMENT WITHOUT FORMAL SERVICE OF PROCESS?

1. Standard of Review and How the Issue Was Preserved for Appellate Review

A motion to dismiss for failure to make service of process is reviewed de novo for legal error. *Edmonds v. Martinez* 2009-NMCA-072 ¶ 8, (Informal notice of court proceeding by dropping off copy of documents in lieu of formal service is insufficient). Laws pertaining to service of process limit court's ability to render judgment against a party. *Derringer v. Turney* 2001-NMCA-075 ¶15. The issue was preserved through a written motion to dismiss for failure to make service of process under Rules 1-012 (B) (4) and (5) NMRA together with oral argument. [R.P. 000038].

The state is not a mere disinterested party, nor is it's interest purely altruistic. It has its own proprietary interest in the money. Until the owner appears and proves entitlement, it may use the money to pay expenses of the state, so long as it maintains sufficient funds to pay claims as they arise. NMSA 1978 Section 7-8A-13 (A).

The question of the legitimacy of *ex parte* attachment orders through probate court was answered by the New Mexico Supreme Court in 1881 in *Holtzman v. Martinez*, 1882-NMSC-011. In that case, the plaintiff, like the plaintiff here, resorted to a sequestration order by the probate court as a way of instituting an action for debt. *Holtzman* ¶ 1. The Supreme Court of the Territory pointed out that as in this case, a summons had not been served on the alleged debtor, as would be required by the rules of the district court and reversed the probate court on this basis alone. *Holtzman* ¶ 35-36. The court also suggested that the probate clerks had no power to issue writs of attachment without bond, which power the district court clerks did not have. *Holtzman* ¶ 32-33. Here, it is unquestioned but that the practice of initiating a lawsuit against the state for debt, for example a tax refund, must follow a conventional, formal procedure, of either a district court appeal on an administrative record, or a formal complaint for debt, rather than *ex parte* attachment order followed by the State's attempts to get the money back. *Holtzman* shows that even during the heyday of Billy the Kid, the Supreme Court recognized that the probate court was not meant to be a shortcut around the procedures and protections of district court review that a litigant might find inconvenient.

More recently, the United States Supreme Court had occasion to consider the issue in *Shaffer v. Heitner* 433 U.S. 186 (1977). In that case, litigants in a

securities case, instituted litigation against the officers of a publicly traded corporation by obtaining a sequestration order for their corporate stock from the Delaware Chancery Court, which state otherwise had no contact with the defendants. This was so-called "quasi-en rem" jurisdiction. The Supreme Court rejected this approach, holding that the due process analysis of a court undertaking jurisdiction was unaffected by whether the jurisdiction was *in personam*, *in rem* or *quasi in rem*. *Id.* at 206. The implicit assumption of the Appellee, that that nineteenth-century-style *ex parte* sequestration order against the state is itself constructive notice excusing formal service of process, was repudiated by the United Sates Supreme Court in *Pennoyer v. Neff,* 95-U.S. 714, 726-727 (1878). (Constructive notice of institution of lawsuit by seizure of property violative of due process). As stated there by Justice Field writing for the majority, "Judgments for all sorts of claims upon contracts and for torts, real or pretended would be thus obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished." *Id.* Justice Field's observation is precisely apposite here. No reported case anywhere from this century or the last, seems to endorse the Personal Representative's dubious argument that he may proceed against the state to obtain the money from the Tax Administration Suspense Fund through the mechanism of

an *ex parte* attachment order and then leave it to the state to try and get the money back.

a. The action to enforce the ex parte probate court order through a motion for sanctions in advance of the service of process pursuant to Rule 1-004 NMRA was error.

The district court did not separately consider the Department's argument that e-mailed notice of a request for sanctions against a non-party to litigation was sufficient, but ruled against the request on the merits. [R.P. 000065]. Therefore, the District court impliedly overruled the motion to dismiss for lack of service of process and the controversy is still live on appeal. Under Rule 1-004 (H) (1) NMRA, service may be made one of nine ways. None of these methods entail e-mail or mailed service. The Appellees never formally instituted service of process against the state but merely attached approximately $70,000 from the Tax Administration Suspense Fund. Simply attaching property is itself an improper method of instituting service of process. *Pennoyer, id.*

III. CONCLUSION

This case should be reversed with instructions to dismiss proceedings against the state.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed by first class U.S. Mail, postage prepaid, a true and correct copy of the foregoing Brief-in-Chief on the 8th day of August, 2014 to:

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