

**COPY**

**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.**

**REPLY BRIEF**

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COURT OF APPEALS OF NEW MEXICO  
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Wendy F Jones

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**CERTIFICATION OF WORD COUNT**

Pursuant to Rule 12-213F(3) counsel signing this Reply Brief certifies that the word count of the Reply Brief totals 1640 words using the word count function of Microsoft Word 2010, is in 14 point and is proportionately spaced.

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## ARGUMENT

The Appellant files this reply brief. Failure to readdress an argument made in the original appellate brief, should not be seen as a waiver of that argument.

### 1. FORMAL SERVICE OF PROCESS WAS REQUIRED

The Personal Representative in this cause sought and obtained an *ex parte* attachment order from the probate court against the Taxation and Revenue Department, for approximately \$70,000 held in the tax administration suspense fund. The attachment order was for unclaimed property in the name of Edward L. McElveny M.D., who died in 1991. The state refused to honor the *ex parte* order. The personal representative then tried to enforce the *ex parte* order. The personal representative moved for enforcement and sanctions against the state. The personal representative made service by merely sending the motion by mail and e-mail to the Taxation and Revenue Department attorneys. The Department in turn moved to dismiss the request for failure to make service of process, under Rule 1-012 (B) (4) and (5), and for lack of due process notice, citing *Pennoyer v. Neff* 95 U.S. 714 (1878). As stated in the brief-in-chief, the state has a cognizable property interest in the unclaimed property, as under the Uniform

Unclaimed Property Act, it may use the property for state purposes until the true owner appears and claims the property. NMSA 1978 § 7-8A-13 (A). The Department also has the obligation to administratively process claims for unclaimed property, including assessing the propriety of heir-finder contracts, through the Uniform Unclaimed Property Act . NMSA 1978 § 7-8A-15; 7-8A-25. Accordingly, the Department is entitled to formal service of process. *Jones v. Flowers*, 547 U.S. 220 (2006).

The District Court found the Department was not a party to the probate. 1-21-14 1CD 3:12:13. Nevertheless, the District Court upheld the informal service of process by mail stating, that “Rule 5” applied, (Rule 1-005 NMRA) (allowing service of pleadings on parties by mail) rather than Rule 1-004 NMRA et. seq. (Requiring formal service of process as a way of instigating proceedings against a non-party). 1-21-14 1CD 3:10:05.

Simply, the court and the litigants agree that the Department is not a party to the probate, yet the District Court held as a matter of *ipse dixit* that formal service of process was not necessary, so long as the personal representative mailed or e-mailed the copy of the *ex parte* probate court order and its demand for enforcement and sanctions against the Department to its lawyers. This is not the law in New Mexico. In *Edmonds v. Martinez*, 2009-NMCA-072, a personal

representative similarly tried to enforce an order of replevy in the Taos county sheriff by informally delivering a copy of the order with the Sheriff's office. As the court stated: "New Mexico has long recognized that 'a court lacks jurisdiction to pronounce judgment over a defendant or respondent unless that defendant or respondent has been properly summoned into court.'" *Id.* at ¶ 9. *Edmonds* is directly on point. The implicit assumption by the personal representative in *Edmonds*, like the assumption of the personal representative here, that a probate proceeding somehow excused compliance with Rule 1-004 NMRA, was rejected, *Id.*

Like the personal representative on *Edmonds* seeking return of property from the sheriff, the personal representative must formally serve process against the state to get this relief. Although it is an older case, *Holtzman v. Martinez*, 1882-NMSC-011, is still good law. In *Holtzman*, the Plaintiff resorted to an *ex parte* attachment order from the probate court to initiate a lawsuit against Holtzman. The Supreme Court even in the time of Billy the Kid recognized the illegitimacy of this use of probate process as a short cut around civil process. *Id.*

The district court and the personal representative justify this approach by stating that the probate proceeding is *in rem*. This is a statement, not an argument. The United States Supreme Court directly repudiated the idea that

there was any distinction in due process analysis between in *personam*, *in rem* or *quasi-in rem* proceedings. *Shaffer v. Heitner*, 433 U.S. 186 (1977). This is in keeping with long-standing New Mexico precedent in both the *Holtzman* and *Edmonds* cases.

## **2. THE DISTRICT COURT LACKED SUBJECT-MATTER JURISDICTION**

The District Court rejected the Rule 1-012 (B)(1) motion of the Defendants to dismiss the proceedings for lack of subject-matter jurisdiction. The court lacked subject-matter jurisdiction for two reasons: Property within the custody of the state in its capacity as unclaimed property administrator is subject to the administrative proceedings of the agency. The act plainly contemplates that, depending on circumstances, either the personal representative or the substantive heirs apparent may submit a claim for property. NMSA 1978 § 7-8A-1 (11) (12). If the unclaimed property administrator rejects the claim, the claimant may seek review on the record in District Court. NMSA 1978 § 7-8A-16 (A). If the Unclaimed Property Administrator fails to act within ninety days, the claimant may seek review on the record in District Court anyway. NMSA 1978 § 7-8A-16 (B).



If the legislature included estates and trusts within the ambit of the Uniform Unclaimed Property Act, it is unlikely that they really meant to excuse estates and trusts from complying with the substance of the act, by allowing claimants to proceed *ex parte* in probate court, by means of heirship proceedings filed decades after death. Such an interpretation of the statutory arrangement is implausible. It would mean that a putative heir appearing twenty or more years after death would be able to obtain thousands of dollars from the tax administration suspense fund with no more than a written assertion of self-entitlement, whereas Dr. McElveny, had he survived, would unquestionably have been required to comply with the administrative claims procedure of the Department. The Department, like all unclaimed property administrators, has several larger amounts of unclaimed property from decedents without obvious heirs, on deposit in the tax administration suspense fund. Naturally these larger sums are target for heirfinders and others. Not all of the claims made by these people are justified. The parties and the court all agree that the Department is not a proper party to a probate. If Appellee is correct, there would be nothing to prevent the unscrupulous from appearing before the probate court purporting to be a long-lost heir to the estate and collecting the money, with little more than a completely untested written assertion of right, made in the probate court.

### 3. THE APPEAL WAS PERFECTED

The District Court carefully made a finality finding in NMSA 1978 § 39-3-2 in its order. R.P. 000066. The court loses substantive jurisdiction over the case once the notice of appeal is filed. *Wagner Land & Inv. Co. v. Halderman*, 1972-NMSC-019 ¶ 10; *Forman v. Myers*, 1968-NMSC-138 ¶ 15 (Only post-Notice of Appeal adjustments to order in furtherance of perfecting an appeal not forbidden). The Appellant filed both an interlocutory notice of appeal and a notice of appeal by right in the District Court, on February 25, 2014, fifteen days after the court issued the order appealed from in this case. The document was denominated as a “NOTICE OF APPEAL; APPLICATION FOR INTERLOCUTORY APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT, Hon. RAYMOND Z. ORTIZ, PURSUANT TO NMSA 1978 SECTION 39-3-2; NMSA 1978 SECTION 39-3-4 (B)” The body of the notice stated, “This appeal is made pursuant to NMRA 12-201 (A) (2) and NMSA 1978 Section 39-3-2; NMSA and alternatively 1978 39-3-4 (B). This appeal encompasses all previous oral and written orders leading to the judgment.” While it is true there is briefing attached to the document in keeping with the rules for an interlocutory appeal, this does not detract from the validity of the “Notice of Appeal”.

The Appellant has achieved considerable success and litigational benefit by proceeding either *ex parte* or with informal notice only, at all levels of this litigation. See, for example, the probate court's *ex parte* attachment order for \$70,000 from the tax suspense fund, R.P. 000009, ("The New Mexico Department of Taxation and Revenue shall release the unclaimed property of the Decedent to Applicant as the Personal Representative of the Estate of Decedent."), followed by the district court "Motion to Enforce Order and Assess Sanctions", R.P. 000023, filed and ruled on by the District Court without formal service of process, R.P. 000030, the post-appeal March 25, 2014 "Order Granting Personal Representative's Motion to Enforce order and Assess Sanctions" R.P. ----- (subject to a motion to correct Record Proper), which was submitted without a pending motion and without consultation with opposing counsel, "Notice of Objection to Form of Order; Request for Presentment Hearing" March 27 2014) R.P. ----- (subject to a motion to correct the Record Proper) and most recently in the Court of Appeals, "Petitioner – Appellee's Emergency Motion To Supplement the Record Proper" (9/10/2014).

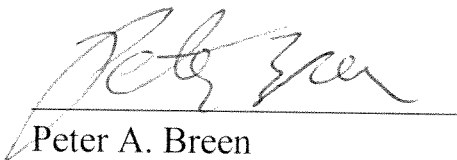
The Appellee would probably like to continue his remarkable streak of finding courts willing to provide one-sided relief with minimal or no notice or participation by the other side. However, the Court of Appeals should eschew

Appellee's invitation to create a gloss on the rules relating to the perfection of appeals that applies only once, to unclaimed property administrators. See, *Wilson v. Massachusetts Mutual Life Insurance Co.*, 2004-NMCA-051 (Appellant Texas Comptroller strictly liable for delay of carrier in delivering Notice of Appeal to District Court.) overruled, *Schultz, ex. rel. Schultz, v. Pojoaque Tribal Police Dep't*, 2010-NMSC-034 ¶ 23 ( Late-filed appeal caused by mail delay not a reason for dismissing appeal).

### CONCLUSION

The court should reverse both the Probate court and the District Court as to the issues of subject-matter and personal jurisdiction.

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 Reply Brief on the 14 day of October, 2014 to:

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