

Opinion No. 63-101

August 15, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Honorable Bernice G. Hall Probate Judge Eddy County Court House Carlsbad, New Mexico

QUESTION

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When does the property of a person who dies without a will and without heirs (as far as is known) escheat to the State of New Mexico?

CONCLUSION

See Analysis.

OPINION

{*218} ANALYSIS

As a preface to answering your question, we would point out that there are a number of statutes involving the matter of escheat, most of them old, and most not entirely satisfactory.

Section 29-1-21, N.M.S.A., 1953 Compilation, simply provides that "If there be property remaining uninherit, it shall be escheat to the state." As our Supreme Court noted in the case of **Schmitz v. New Mexico State Tax Commission**, 55 N.M. 320, 232 P. 2d 986, this statute does not require "the state to do anything affirmative, judicial, or otherwise." Accordingly, the Court held that the title to **real estate** "passes by escheat to the State automatically and immediately upon the death {*219} of the person, without heirs."

While this is true as a matter of law, it certainly does not aid insofar as the practicalities are concerned, particularly in view of Section 31-12-22, N.M.S.A., 1953 Compilation, which provides in part as follows:

"In all cases where any person shall have been dead for more than six (6) years, who at the time of his or her death owned real property in the state of New Mexico, and upon whose estate no administration has been had, any person claiming title to or interest in said property, whether by descent or purchase, may file a petition. . . praying for an order of said court determining the heirs of the deceased person. . . ."

Unfortunately, the above statute provides no time limitation period for filing such a petition. However, it will be noted that the above statute applies only in cases where "no administration has been had."

Under Section 31-1-9, N.M.S.A., 1953 Compilation, "If the deceased person makes no will, the estate shall be administered by the surviving conjugal partner, if married, and in the absence of such person, by the nearest relation of the deceased, or other person having an interest in the distribution of the property, be it an executor, legatee or creditor." Section 31-1-10, N.M.S.A., 1953 Compilation, a companion measure, provides that "If there should be no such person, or if such person should not take out letters of administration, within twenty days after the death of the testator, or of having notice thereof, the probate judge shall appoint a person of sufficient capacity to administer said estate wherever it may be situated."

Thus if the deceased dies intestate and no one eligible to serve as administrator pursuant to Section 31-1-9, supra, applies for letters testamentary within the 20 days, the probate judge should appoint an administrator of the estate, if for no other reason than to insure that the State will receive any succession taxes due it. Further, the court's determination that there are no heirs puts the State on notice that unless the decree is successfully challenged within the statutory period, the property has escheated to it. Otherwise, while it may be that legally "the state does not have to do anything affirmative, judicial or otherwise," the State will, in all probability, never know that property has escheated to it.

What we have said up to this point relative to escheat has been in connection with **real property**. **Schmitz v. New Mexico State Tax Commission**, supra. (Except that Sections 31-1-9, and 31-1-10 are applicable whether the estate consists of real property, personal property, or both). In the case of personal property there is a statute requiring affirmative action on the part of the State.

Section 31-15-1, N.M.S.A., 1953 Compilation, provides as follows:

"When any person shall die within the limits of any county of the state of New Mexico, having in said county, or in any other county of said state, any effects or property belonging to such deceased, the probate judge of the county where such person may have died, when he shall know of his own knowledge **or be informed** that such effects or property are abandoned, and that there is no {*220} heir to take charge of the same, or that no person has made application for letters of administration, and that no person desires to administer on said estate, he shall order the sheriff of the county to take possession of such effects or property, and keep the same in his custody and care, and to make out and return an inventory of each and all articles thereof, which inventory shall be recorded by the county clerk as in any other case." (Emphasis added.)

Section 31-15-2, N.M.S.A., 1953 Compilation, provides that:

"When the probate judge shall have ordered the effects or property to be taken possession of as required in the cases referred to in the foregoing section, after the expiration of thirty days from the date of such order, if no person shall appear who desires or shall make application for letters of administration upon such estate or property, he shall order the sheriff who shall have taken charge of such effects, to sell the same at public auction. . ."

The next statute in this series, Section 31-15-3, N.M.S.A., 1953 Compilation, provides that the probate judge may approve and order to be paid all just debts owed by the estate of the decedent.

Section 31-15-4, N.M.S.A., 1953 Compilation, provides that the residue of the money from the public sale shall be turned over to the county treasurer.

Under Section 31-15-6, N.M.S.A., 1953 Compilation, the county treasurer is to hold the money for one year. After the one year period has elapsed, claims against the money are barred and it should be remitted to the state treasurer for credit to the school fund as prescribed by Article XII, Section 4, Constitution of New Mexico.

If you have questions regarding any particular case or situation we will be glad to advise you on the matter.

By: Oliver E. Payne

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