

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

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October 8, 2019

The Honorable Victor S. Lopez  
District Judge, Division XXVII  
State of New Mexico  
Second Judicial District  
P. O. Box 488  
Albuquerque, NM 87103

Re: Opinion Request – Disposition of remaining estate funds under the Probate Code

Dear Judge Lopez,

You have requested an Attorney General opinion regarding where to send estate funds under the Probate Code if a potential heir cannot be located. Specifically, you asked if the remaining funds should be deposited with the Taxation and Revenue Department and held indefinitely pending efforts to locate the potential heirs. In the alternative, you asked if the funds should instead be deposited with the New Mexico Department of Finance and Administration. In your request you assert that these options do not comply with the requirement to deposit escheated proceeds from estates into the “current school fund” under the New Mexico Constitution Art. XII, Section 4. Ultimately, you requested the Attorney General’s opinion regarding the conflict and whether the funds should be sent to the New Mexico Treasurer, the Department of Finance and Administration,<sup>1</sup> Taxation and Revenue Department (“TRD”), or some other agency “for the benefit of the current school fund or otherwise.”

**Analysis**

**Potential Conflict between Statutes**

We begin our analysis by turning first to the rules of statutory construction because in its May 6, 2019 *Order Requiring Deposit of Estate Funds into Court Registry and Request for N.M. Attorney General Option* (the “Order”), the Court suggests that a statutory ambiguity or conflict exists between Section 45-2-105 and Section 45-3-914 of the Probate Code. “In construing a particular statute, a reviewing court’s central concern is to determine and give effect to the intent of the legislature” by looking primarily at the language of the statute. *State ex rel. Kline v. Blackhurst*, 1988-NMSC-015, ¶ 12, 106. N.M. 732, 735, 749 P.2d 1111, 1114. The court should

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<sup>1</sup> There appears to be no statutory authority that would direct remaining funds to the Department of Finance and Administration in this case and the Court cited none in its order requesting this opinion.

“not depart from the plain wording of a statute, unless it is necessary to resolve an ambiguity, correct a mistake or an absurdity that the Legislature could not have intended, or to deal with an irreconcilable conflict among statutory provisions.” *Regents of Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998–NMSC–020, ¶ 28, 125 N.M. 401, 411, 962 P.2d 1236, 1246; *see also*, *Albuquerque Commons P'ship v. City Council*, 2011–NMSC–002, ¶ 13, 248 P.3d 856, 860; *Uniform Statute and Rule Construction Act*, NMSA 1978, § 12-2A-18(A) (1997) (statute is construed to “give effect to its objective and purpose” and “avoid an unconstitutional, absurd or unachievable result”), § 12-2A-19 (text of a statute is “the primary, essential source of its meaning”). “Whenever possible, [the court] must read different legislative enactments as harmonious instead of as contradicting one another.” *State v. Smith*, 2004–NMSC–032, ¶ 10, 136 N.M. 372, 376, 98 P.3d 1022, 1026; *see also* *State v. Muniz*, 2003–NMSC–021, ¶ 14, 134 N.M. 152, 156, 74 P.3d 86, 90; NMSA 1978, § 12-2A-10(A) (1997) (“If statutes appear to conflict, they must be construed, if possible, to give effect to each”). The court should “not read any provision of the statute in a way that would render another provision of the statute ‘null or superfluous.’” *Fowler v. Vista Care*, 2014–NMSC–019, ¶ 7, 329 P.3d 630, 632 (quoting *State v. Rivera*, 2004–NMSC–001, ¶ 18, 134 N.M. 768, 773, 82 P.3d 939, 944).

Section 45-2-105 appears under Article 2 of the Uniform Probate Code, governing intestate succession and wills. NMSA 1978, § 45-2-105 (1975, as amended through 1993). In its entirety it reads: “[i]f there is no taker under the provisions of Chapter 45, Article 2 NMSA 1978, the intestate estate passes to the state.” *Id.* In other words, when a decedent dies without a will, this provision provides that remaining estate property will escheat to the State when a court determines that no heir to the decedent exists. Pursuant to Article XII, Section 4 of the New Mexico Constitution, funds that escheat to the State shall be deposited into the Current School Fund. *See also* NMSA 1978, § 22-8-32 (1976) (requiring the state treasurer deposit into the Current School Fund net proceeds of property acquired through escheat); N.M. Att’y Gen. Op. No. 37-1795 (1937).<sup>2</sup> Therefore, a plain reading of this statute in conjunction with the constitutional provision requires a court to order that any remaining estate property or funds escheat to the State and that the funds be deposited into the Current School Fund.

In contrast, Section 45-3-914 appears under Article 3 of the Uniform Probate Code, governing the probate of wills and their administration. NMSA 1978, § 45-3-914 (1975, as amended through 1993). It provides: “[i]f an heir, devisee or claimant cannot be found, the personal representative shall distribute the share of the missing person to his conservator, if any. Otherwise, the personal representative shall sell the share of the missing person and distribute the proceeds to the state treasurer as prescribed by the Uniform Unclaimed Property Act (“UUPA”).” *Id.* The UUPA generally requires that unclaimed property, including currency, be sold and the proceeds be deposited into the Unclaimed Property Fund administered by the TRD for use by the state until such property is claimed by a lawful owner. *See Uniform Unclaimed Property Act*, NMSA 1978 § 7-8A-1 to -31(1997). To be clear, the requirement that proceeds from unclaimed property be deposited into the Unclaimed Property Fund is not akin to escheat as the proceeds are not owned by the State and can be claimed by a lawful heir at any time.

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<sup>2</sup> The constitutional provision does not indicate when property escheats to the State, but only that escheated property shall be deposited into the Current School Fund. Whether property escheats to the State is a function of statute.

Although, the two provisions are generally triggered under different circumstances, namely the existence of a valid will, a conflict potentially exists between the two statutes because they require different outcomes if a known beneficiary of an estate cannot be found. One statute requires that the State take full ownership of the remaining funds while the other provides a possessory interest to the State, allowing the State to utilize the funds until a lawful owner comes forward to claim the funds. Without additional guidance, these statutes cannot be read harmoniously and potentially invalidate one another.

### Guidance from the Uniform Probate Code

The New Mexico state legislature adopted Sections 45-2-105 and 45-3-914 from the Uniform Probate Code (“UPC”) with some modifications to the original language. *See* Unif. Probate Code §§ 2-105 & 3-914 (1969, amended 2010).<sup>3</sup> The Court of Appeals has determined that it may look to a uniform act for guidance in interpreting legislation, and the court may also look at the comments to the uniform act even if New Mexico has not adopted the comment. *State ex rel. Dep't of Pub. Safety, State Police Div. v. One 1990 Chevrolet Pickup, Model Z-71, Four Wheel Drive, White, Bearing Texas License No. 3003VR, VIN: IGCDK14K62204458*, 1993-NMCA-068, ¶ 15, 115 N.M. 644, 649, 857 P.2d 44, 49; *Matter of Estate of Newalla*, 1992-NMCA-084, 114 N.M. 290, 837 p.2d 1373 (utilizing UPC official commentary to clarify New Mexico probate statutes).<sup>4</sup>

The official comments to Section 3-914 of the UPC specifies that, “[t]his section applies when it is believed that a claimant, heir or distributee exists but he cannot be located. *See* Section 2-105.” Comment, Unif. Probate Code § 3-914. This UPC comment’s reference to the “No Taker” provision of Section 2-105 indicates that the UPC contemplates a potential conflict, but intended the “No Taker” provision to be triggered during testate proceedings when a court determined that no potential beneficiaries identified in the will, or otherwise, exist. Notably, there is no reciprocal comment in Section 2-105 that references the provision of Section 3-914 implying that Section 3-914 should not be utilized when a decedent dies intestate. The use of the comment in Section 3-914 as guidance avoids a conflicting result and promotes a harmonious coexistence between the statutory provisions such that neither provision is null or superfluous.

Notably, despite the potential conflict, remaining estate funds should be directed to the State Treasurer when applying both Sections 45-2-105 and 45-3-914. A court’s determination based on the guidance from the UPC comment will govern the subsequent actions of the Treasurer. If a decedent leaves a valid will and a court determines that potential beneficiaries identified in the will or other potential heirs exist but cannot be located, the funds should be sent to the treasurer with direction to distribute the funds to the TRD in accordance with the UUPA. The TRD should then deposit the funds into the Unclaimed Property Fund to allow potential beneficiaries an opportunity to make a claim to the funds. If, however, the court ultimately determines, through

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<sup>3</sup> The New Mexico state legislature adopted Section 45-3-914 from the Uniform Probate Code but modified the language to exclude section (b) of 3-914 in favor of the UUPA. The UUPA, as applied in the New Mexico Probate Code functions similarly to subsection b of the UPC in that it requires the State hold the funds so that a beneficiary can be located.

<sup>4</sup> The compilation annotations associated with NMSA Section 45-3-914 suggest that a court utilize the comments for Section 3-914 of the UPC for guidance. The annotations state, in relevant part: “Official comments. — See Commission on Uniform State Law official comment to 3-914 UPC.”

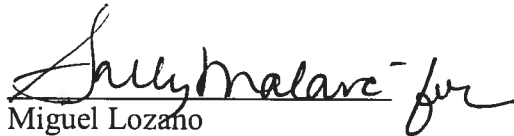
either intestate or testate proceedings, that no beneficiaries exist, the funds will escheat to the state. The court should deposit the escheated funds with the treasurer with direction to divert the funds to the Current School Fund.

### Conclusion

It is the opinion of the Office of the Attorney General that if a decedent dies intestate and no heirs can be found, the remaining estate funds escheat to the State and should be sent to the Treasurer to be deposited into the Current School Fund. However, if a decedent dies with a will, the remaining estate funds should ultimately be sent to the TRD, through the Treasurer, to be placed in the Unclaimed Property Fund unless the Court ultimately determines that no potential beneficiaries named in the will, or otherwise, exist. If the Court makes this determination, the funds will escheat to the state and should be sent to the Treasurer to be deposited in the Current School Fund.

Your request was for a formal Attorney General's opinion on the matters discussed above. Such an opinion is a public document. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document subject to the attorney-client privilege. Therefore we may make copies of this letter available to the general public.

Sincerely,



Miguel Lozano  
Assistant Attorney General

Gabriel Gabaldon, Legal Intern  
Open Government Division