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9272/9822

August 25, 2014

The Honorable J. Munford Scott, Jr.
Probate Court Judge for Florence County
180 N. Irby St., MSC-L
Florence, S.C. 29501-3456

Dear Judge Scott:

Thank you for your letter dated August 20, 2014 requesting an opinion of this Office regarding the appropriate procedure for disposition of funds held by a personal representative of an estate upon the determination that no heir exists "to take" pursuant to the laws of intestate succession. Specifically, you indicate your question stems from an estate before Your Honor where the decedent died intestate leaving no heirs; the estate was subsequently opened by a creditor who was appointed to serve as the personal representative, as permitted by S.C. Code Ann. § 62-3-203(a)(6) (Supp. 2013); real property in the estate was liquidated; and upon payment of all creditors' claims and administration expenses from the proceeds of the sale of real estate, approximately $7,000.00 of funds remain.

As the pertinent law governing your question, you reference S.C. Code Ann. § 27-18-130(A) (2007) of the Uniform Unclaimed Property Act dealing with abandoned intangible property and income derived therefrom being held in a fiduciary capacity for the benefit of another as well as S.C. Code Ann. § 27-19-210 (2007), pertaining to the necessary procedure for the State's receipt of money or personal property as a result of an escheat.

Upon analysis of relevant statutes, former opinions of this Office, and case law, it is our belief that the funds in the estate at issue should pass to the State pursuant to the laws of intestate succession and escheat and must be distributed in accordance with the statutory provisions pertaining directly thereto. Prior to specific analysis of the procedure for disposition of funds pursuant to the statutory authority governing an escheat of personal property, we will discuss how we arrived at this conclusion by distinguishing between an escheat proceeding and disposition of funds subject to the Uniform Unclaimed Property Act.

Law / Analysis

1. Escheat v. Uniform Unclaimed Property Act

American laws of escheat and unclaimed property are rooted in the feudal English common law doctrines of escheat and bona vacantia. Sean M. Diamond, Unwrapping Escheat: Unclaimed Property Laws and Gift Cards, 60 Emory L.J. 971, 978 (2011) (hereinafter Unwrapping Escheat). Under the common law, the doctrine of escheat applied to a tenant of real property passing without heirs and established that the property would revert back to the feudal lord or Crown based on its status as the ultimate owner of all real property. Id. Similarly, the doctrine of bona vacantia set forth the same procedure for abandoned personal property on the principle that the Crown had a greater claim to personal property than all others except for the rightful owner. Id. Although both doctrines were initially adopted

in the United States from English common law, over time they have merged into the single doctrine of escheat, which encompasses both real and personal property. Id. In an escheat proceeding, absolute title in property vests to the state after the determination that an individual who died intestate has no living heirs in the line of intestate succession to take. Id. at 979. Declarations of an escheat are disfavored in the law; thus, statutory provisions are construed in favor of known heirs. 4 Tiffany Real Prop., Escheat § 1237 (3d ed. 2013).

While application of the doctrine of escheat is rare due to the probability that an individual will be survived by an heir who will take in accordance with the laws of intestate succession, the Uniform Unclaimed Property Act is more commonly applied as it covers various categories of abandoned intangible personal property. See Unwrapping Escheat, supra at 980. As states realized the economic potential in unclaimed property, legislation increased to capture unclaimed property as a form of nontax revenue. Id. In 1954, the National Conference of Commissioners drafted the Uniform Disposition of Unclaimed Property Act in attempt to unify differing unclaimed property laws among states. Id. at 980. The Act has since been amended various times, including the 1981 enactment of the Uniform Unclaimed Property Act. Id. Today, the majority of states, including South Carolina, have adopted some version of the Uniform Unclaimed Property Act. Id. at 981; see S.C. Code Ann. § 27-18-10 *et seq.* (2007). Disposition of property under the Uniform Unclaimed Property Act differs from an escheat proceeding as it is based on abandonment rather than intestate succession and applies primarily to intangible personal property. Unwrapping Escheat, supra at 979. In other words, such disposition is "custodial in nature" meaning the state merely holds the unclaimed property in perpetuity if and until the rightful owner asserts a claim to it. Id.

The Uniform Unclaimed Property Act specifically applies when property is "presumed abandoned." See S.C. Code Ann. § 27-18-30. To elaborate, the Act divides various types of property into categories each of which has a specific dormancy period for when it will be "presumed abandoned." See S.C. Code Ann. §§ 27-18-50 – 27-18-175 (2007). The "holder" of the property, or the entity that is obliged to hold the property on account of the owner, must file a report with the state administrator listing the type of property and specific information about the owner, if recorded. See S.C. Code Ann. 27-18-180 (2007). The state takes possession of the property after the expiration of the dormancy period and thereafter must take affirmative steps to notify the owner of its possession of the property. See S.C. Code Ann. §§ 27-18-190, 27-18-200 (2007). After three years, the state is permitted to sell the abandoned property, if necessary, and transfer the proceeds into its general fund. See S.C. Code Ann. §§ 27-18-230, 27-18-240. However, the rightful owners, including heirs and devisees, may claim the funds at any future point. See S.C. Code Ann. § 27-18-250 (2007).

This analysis attempts to illustrate the differences between an escheat and disposition of property under the Uniform Unclaimed Property Act. Property passing to the state by way of an escheat results in the state's outright ownership in an individual's property should that individual die intestate without heirs. Alternatively, distribution of property under the Uniform Unclaimed Property Act pertains to abandoned property and permits the state to hold and use "presumed abandoned" funds subject to the rights of the property's true owner.

2. Prior Attorney General Advisory Opinion & South Carolina Precedent

Prior opinions of this Office and applicable case law provide further clarity to the classification of property subject to an escheat and property subject to the Uniform Unclaimed Property Act. In response to an opinion request regarding the proper disposition of a $611.31 refund of personal funds of a decedent sent to the Sumter County Probate Court by the State Department of Mental Health, we summarized the legislative history of South Carolina's escheat laws. See Op. S.C. Att'y Gen., 1974 WL 21395 (Dec. 4,

1974). Specifically, we noted that when the Disposition of Unclaimed Property Act was enacted in South Carolina, it repealed the then existing escheat law. Id. at *1. Furthermore, referencing the precursor to S.C. Code Ann. § 27-19-390 (2007), we explained that the provisions for escheat were subsequently reenacted with clarification by the Legislature that the laws of escheat are complementary to and not in derogation of the Unclaimed Property Act. Id. (citing S.C. Code § 57-220.9 (1962)). S.C. Code Ann. § 27-19-390 (2007) currently states:

> [t]he provisions of this chapter are complementary to and not in derogation of the 'Uniform Disposition of Unclaimed Property Act' as contained in the permanent provisions of Chapter 18 of this title. All personal property for which provision is made in that chapter shall be disposed of as therein provided and the Secretary of State is relieved of all responsibility assigned to him in this chapter for such property.

Despite the Legislature's intent that the escheat doctrine compliment and not derogate from the Uniform Unclaimed Property Act, it is our opinion that a distinction between the two can be made. In our December 4, 1974 opinion, we looked to former case law for clarity on how to make this distinction. Op. S.C. Att'y Gen., 1974 WL 21395 (Dec. 4, 1974). Referencing Gill v. Douglass, 2 Bailey 387, Book 8, S.C. Reports, 180 (Law), we concluded that central to this determination is whether an estate has been opened and administered on behalf of the decedent. Id. at *1. In regards to the $611.31 at issue before the Sumter County Probate Court, we opined that "[t]he funds are [ ] not in the hands of an administrator and until they are, no suit can be maintained for their escheat. The case of Gill v. Douglass, 2 Bailey 387, Book 8, S.C. Reports, 180 (Law), specifically so holds." Id. Thus, because no estate had been opened for the decedent and no personal representative appointed, we concluded that while "not free from doubt," "an escheat action would be premature" and "the funds in question should be covered by the Unclaimed Property Act." Id.

Also helpful to our analysis is Gibson v. Rikard, 143 S.C. 402, 141 S.E. 726 (1928), involving the administration of an estate, through the appointment of a personal representative, of a decedent who died intestate leaving personal property. Upon confirmation of the Probate Court's finding that the decedent died without heirs, the Supreme Court clarified that while it was correct to determine that "property must escheat" it was "not within the jurisdiction of the court in [that] proceeding" to "declare" an escheat. Id. at 731. Specifically, the Court stated that

> the *declaration of an escheat is regulated by statute*. . . and does not take place until the procedure therein prescribed shall have been complied with. The title to the property does not, by the express terms of the statute, become vested in the state until after the expiration of two years, when no claim is set up. Not until then can there be a declaration of escheat.

Id. Gibson further illustrates that an escheat proceeding is appropriate when an estate has been opened and the personal representative has personal property in his possession. Furthermore, this case clarifies that while it can be determined that property must escheat as soon as personal property is in the hands of the personal representative, "declaration" of an escheat, or the vesting of property to the state, cannot occur until the expiration of two years, as specified by statute.

3. Statutory Guidelines for Bringing an Escheat Proceeding & "Declaring" an Escheat

As in Gibson, in the case before Your Honor, an estate has been opened, a personal representative has been appointed, and the personal representative has funds in his possession pursuant to the administration of the estate. Due to the absence of heirs to take under the laws of intestate succession,

statute defines that these funds pass to the State by way of escheat. Thus, it is our opinion that statutory authority governing escheat, as opposed to the Uniform Unclaimed Property Act, should be applied. Making this determination, we will now focus on the procedure the Legislature has established for an escheat proceeding.

The laws of intestate succession are codified in S.C. Code Ann. § 62-2-101 *et seq.* (Supp. 2013). S.C. Code Ann. § 62-2-105 (Supp. 2013) sets forth the proper disposition of an estate if a person dies without heirs, stating that "[i]f there is no taker under the provisions of this article [Sections 62-2-101 et seq.], the intestate estate passes to the State of South Carolina." The Reporter's Comment to § 62-2-105 (Supp. 2013) provides a cross-reference to Sections 27-19-10, *et seq.* which governs the law of escheat, the relevant sections to this opinion being S.C. Code Ann. §§ 27-19-210 and 27-19-220 relating to an escheat of personal property.

S.C. Code Ann. § 27-19-210 (2007) dictates when an action for an escheat of personal property can be brought and by whom:

> [w]hen any moneys or other personal estate shall be found in the hands of an executor or administrator, being the property of any person deceased leaving no person entitled to claim and without making disposition of them, the Secretary of State or the Attorney General, on behalf of the State, shall sue for and recover and pay any moneys so recovered into the State Treasury.

Since the personal representative before Your Honor currently has in his hands $7,000.00 in funds pursuant to the administration of the decedent's estate, it is our opinion that the Attorney General or Secretary of State can now "sue for and recover and pay any moneys so recovered into the State Treasury." It is also our belief that when the State initiates the escheat proceedings, such proceeding will likely result in a determination that the property must escheat, however the escheat cannot be "declared" at that time, as was clarified by Gibson v. Rikard, 143 S.C. 402, 141 S.E. 726, 731 (1928).

Next, S.C. Code Ann. § 27-19-220 (2007) sets forth the appropriate steps that must be taken after an escheat proceeding has been brought, the personal property has been recovered by the State, and the funds have been deposited with the State Treasury. S.C. Code Ann. § 27-19-220 (2007) states:

> [t]he State Treasurer shall advertise such moneys or other personal property in some newspaper once in every month for six months in like manner as lands are herein directed to be advertised, and if no person shall appear and make good title to such personal estate within two years thereafter other than as executor or administrator or their legal representatives, then such moneys or other personal estate shall become vested in and applied to the use of the State.

We interpret this section as directing the State Treasury to provide notice through publication once a month for six months. If, after two years subsequent to the last date of publication, no claims have been presented regarding the personal property, it is our opinion that at that point the escheat should be "declared" and the personal property will vest to the State to be applied for use.

Thus, although S.C. Code Ann. § 62-2-105 (Supp. 2013) provides that title to property due to lack of heirs in an intestate proceeding escheats to the State, the State must initiate proceedings to establish its rights in the property pursuant to S.C. Code Ann. § 27-19-210 (2007). See also 30A C.J.S. Escheat § 16 (2014) (noting that "in some jurisdictions, property, the title to which fails for lack of a proper claimant or for defect of heirs or devisees, escheats by operation of law without any judicial proceeding, although

some form of action may be necessary to reduce the property to possession," while "in other jurisdictions, escheat is not automatic, and the state must institute proceedings to establish rights in the property"). Once the State's rights to the property are established through an action for escheat, the guidelines set forth in S.C. Code Ann. § 27-19-220 (2007) must be followed prior to the "declaration" of the escheat.

We note briefly that while our courts have not spoken to the issue, the Superior Court of New Jersey determined that there was no requirement to bring an action for an escheat when it was not financially beneficial to do so. Specifically, the Court held:

> [w]here it appears that the expenses of bringing escheat proceedings would exceed the value of the property involved, there is no obligation on the State, under the statute . . . to either commence or complete escheat proceedings.

State v. National State Bank of Newark, 44 N.J. Super. 501, 503, 130 A.2d 901, 902 (N.J. Super. Ct. Ch. Div. 1957). We presume Courts within our own jurisdiction would rule the same way if presented with an identical issue to prevent the State from incurring an expense from what the Legislature clearly intended to serve as a benefit. Nonetheless, this scenario does not appear to be apply to the case at hand since the value of the property in the estate will presumably exceed the expense of the escheat proceedings.

Last, for purposes of jurisdiction, we mention that while the Legislature has indicated that escheat actions concerning real property should be brought in the circuit court[1] and "a court of competent jurisdiction" should hear actions brought under the Uniform Unclaimed Property Act,[2] it has not spoken to the jurisdiction over an escheat proceeding concerning personal property. In the absence of a specific statutory designation, venue for escheat proceedings is in the county where the personal representative was appointed, or in the county where the land is located. 27A Am. Jur. 2d Escheat § 31. Furthermore, where an escheat is determined on the basis that no heirs exist to take, a probate court with the power to determine the interests of the heirs also has the power to determine whether there are heirs, and, if it finds that there are none, to decree an escheat. Id. We also note that an escheat proceeding is considered "an action in rem, or at least quasi in rem." 27A Am. Jur. 2d Escheat § 29 (2014). Therefore, pursuant to S.C. Code Ann. §. 62-1-302(a)(1) (Supp. 2013) granting "probate courts exclusive original jurisdiction over all subject matter related to: (1) . . . determination of property in which the estate of a decedent . . . has an interest . . . [as well as the] determination of heirs and successors of decedents" we conclude the probate court maintains jurisdiction over the escheat proceeding concerning. In addition, because the personal representative of the estate was appointed by the Florence County Probate Court, it is our opinion that venue is appropriate in Florence County.

Conclusion

While South Carolina's escheat doctrine is "complementary" to and not "in derogation of" the Uniform Unclaimed Property Act, it is our opinion that the personal property in the estate before Your Honor should be distributed in accordance to the legislation specific to an escheat of personal property. We reach this conclusion on the basis that an estate was opened for the decedent, a personal representative was appointed, and funds currently lie in the personal representative's hands. Due to the absence of heirs to take, under the laws of intestate succession, the funds in the decedent's estate pass to the State. Nevertheless, the State is required, through the Attorney General or Secretary of State, to bring an action to perfect its interest in the property. An action can be brought subsequent to the personal representative taking possession of the funds, which will likely result in establishing the "status" of an

[1] See S.C. Code Ann. §§ 27-19-10 – 27-19-20 (2007).
[2] See S.C. Code Ann. § 27-18-330 (2007).

escheat. Upon the State's receipt of the funds, the Attorney General or Secretary of State must pay the recovered money into the State Treasury. Thereafter, the parameters set forth in S.C. Code Ann. § 27-19-220 (2007) must be followed prior to the "declaration" of the escheat, or in other words, before the personal property vests to the State for its use.

If we can answer any further questions regarding this opinion, please do not hesitate to contact our office.

Sincerely yours,

Anne Marie Crosswell

Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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