

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
20TH JUDICIAL DISTRICT
AT NASHVILLE
PART III

STATE OF TENNESSEE,)
ex rel. HODGEN MAINDA, solely in his)
official capacity as Commissioner of)
Commerce & Insurance,)
)
Plaintiff,)
)
v.)
)
GALILEE MEMORIAL GARDENS,)
JM&M SERVICES, INC.,)
LAMBERT MEMORIAL CO., aka)
LAMBERT MEMORIALS, INC.)
LAMBERT & SONS, INC.)
JEMAR LAMBERT, MARJE LAMBERT,)
and MARY H. LAMBERT, and ALL)
PERSONS ACTING IN CONCERT)
WITH THEM,)
)
Defendants.)

No. 14-102-III

COMMISSIONER’S SUPPLEMENTAL MEMORANDUM OF LAW
ADDRESSING ESCHEATMENT ISSUES AND POST-RECEIVERSHIP
OWNERSHIP OF GALILEE MEMORIAL GARDENS

Hodgen Mainda, Commissioner of the Department of Commerce & Insurance (“Commissioner”), as Receiver for Galilee Memorial Gardens (the “Cemetery” or “Galilee”), through his appointed Special Deputy Receiver, Receivership Management, Inc., submits the following supplemental memorandum of law responding to certain legal arguments made by Shelby County, Tennessee in its brief filed on May 6, 2020. Shelby County argues that Galilee will escheat to the State of Tennessee upon termination of the Galilee receivership and that the Court must decide the ownership question in this proceeding. Contrary to Shelby County’s

positions, the Cemetery will not escheat to the State of Tennessee upon termination of the receivership. Further, the question of who specifically holds legal title to Galilee after the receivership is terminated and the Commissioner is discharged as Receiver is not an issue that should be decided by the Court in this proceeding.

ANALYSIS AND ARGUMENT

I. ESCHEATMENT OF GALILEE IS NOT AUTHORIZED BY TENNESSEE'S COMMON LAW.

In support of its escheatment argument, Shelby County contends that escheatment is a legal doctrine recognized under Tennessee's common law and cites various Tennessee case decisions applying the common law doctrine of escheatment. Although common law escheatment was once followed by the Tennessee courts, the common law doctrine is no longer in effect as it was abrogated by subsequent legislative enactments of the Tennessee General Assembly. But even if common law escheatment were still a valid legal doctrine in Tennessee, the scope of common law escheatment is quite narrow and would not apply to Galilee.

In Tennessee, common law escheatment was not favored by the Tennessee courts and was limited to decedents' estates cases in which the owners of real property died without heirs. *See Rippeth v. Connelly*, 447 S.W.2d 380, 382 (Tenn. Ct. App. 1969) (recognizing that common law escheatment is not favored in Tennessee). In *Hinkle's Lessee v. Shadden*, 32 Tenn. 46 (Tenn. 1852), the Tennessee Supreme Court summarized the common law doctrine of escheatment as follows:

[I]t is a well established principle of American jurisprudence, that when the title to land fails from defect of heirs, “the State steps in the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction. And whenever the owner dies intestate, without leaving any inheritable blood; or if the relations he leaves are aliens, there is a failure of competent heirs, and the lands vest immediately in the State by operation of law; and no inquest of office is requisite in such cases.” (citations omitted).

32 Tenn. at 48-49; *accord State v. Lancaster*, 105 S.W. 858, 860 (Tenn. 1907).

Since the uncertainties over the post-receivership title/ownership of Galilee do not arise from a “failure of heirs” following the death of any owner of the cemetery, common law escheatment would not apply to Galilee even if the doctrine were still in force today.¹ Further, the disfavored nature of common law escheatment would militate against any attempt to expand the doctrine (as Shelby County is apparently advocating) to include real property that purportedly has title defects or whose owners were legally divested of title (such as Galilee’s former owners).

In the modern era, the Tennessee legislature has enacted many laws governing the inheritance, descent, distribution and escheatment of real and personal property. Most of those statutes are found in Title 30 (Administration of Estates), Title 31 (Descent and Distribution—Decedents’ Estates), and Title 66 (Abandoned and Unclaimed Property) of the Tennessee Code. Such legislative enactments are controlling and derogate any common law principles that might otherwise apply in the absence of an applicable statute. *See generally Rippeth*, 447 S.W.2d at 382

¹ Contrary to Shelby County’s characterizations, common law escheatment is not an iron-clad doctrine that unilaterally imposes ownership of real property on state governments without any redress. Instead, state governments have wide discretion in deciding whether to accept ownership of real property or disclaim any interest in the subject property. A state government’s right to disclaim all interest in real property that would otherwise escheat to the state by statute or under the common law is well established. *See W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 78-79, 82 S. Ct. 199, 203, 7 L. Ed. 2d 139, 144 (1961) (recognizing State of Pennsylvania’s right to disclaim any interest in escheated property being claimed by another state); *Marathon Petroleum Corp. v. Sec’y of Fin. for Delaware*, 876 F.3d 481, 484 and 496 (3rd Cir. 2017) (recognizing right of individual state governments to disclaim interest in escheated property); *Yee v. ClubCorp Holdings, Inc.*, 2019 U.S. Dist. LEXIS 172253 *10 (N.D. Cal. 2019) (discussing federal common law rules governing competing claims of state governments to escheated property and legal consequences of an individual state’s disclaimer of interest in disputed property); *New Jersey v. Engle*, 21 N.J.L. 347, 363 (N.J. Sup. Ct. 1848) (recognizing state government’s disclaimer of all interest in real property that would otherwise escheat to the state).

(holding that Tennessee’s inheritance statutes are “in derogation of the common law”). Consequently, Tennessee’s common law does not support Shelby County’s escheatment argument.

II. ESCHEATMENT OF GALILEE IS NOT AUTHORIZED BY THE TENNESSEE CODE.

Despite its persistent reference to “escheatment” as the appropriate legal vehicle for deciding Galilee’s post-receivership ownership question, Shelby County has failed to cite any provision of the Tennessee Code that expressly authorize the escheatment of cemeteries. As previously discussed, Title 46 of the Tennessee Code, which governs the regulation, management, and operation of cemeteries located in the State, does not authorize the escheatment of entire cemeteries to the State or any other governmental authority. Tenn Code Ann. § 46-2-103 provides for the escheatment of “vacant cemetery lots and grave spaces” to cemetery owners (not to the State of Tennessee) under certain circumstances but does not authorize escheatment of occupied grave spaces or cemetery grounds in general. Although Shelby County attempts to gloss over the limited scope of Tenn. Code Ann. § 46-2-103 by arguing that the statute does not expressly **prohibit** the escheatment of entire cemeteries, the exclusion of entire cemeteries and occupied grave spaces from the coverage of the statute and the designation of persons/entities other than the State of Tennessee as the recipients of the escheated property clearly evidence, at a minimum, a legislative intent to exclude cemeteries from the normal rules of escheatment found in the Tennessee Code.

Even if the Court were to accept Shelby County’s argument that Tennessee’s general escheatment statutes apply to cemeteries in general, those laws do not authorize the escheatment of Galilee to the State of Tennessee. Specifically, Shelby County’s reliance on Tenn. Code Ann.

§§ 31-6-101 and -102 as authority supporting the escheatment of Galilee is totally misplaced.²

The statutes provide as follows:

31-6-101. Escheat generally.

(a) If a decedent, whether or not domiciled in this state, leaves no one to take the decedent's estate or any portion of the estate by the decedent's will and no one other than a government or governmental subdivision or agency to take the decedent's estate or a portion of the estate by intestate succession, under the laws of this state or any other jurisdiction, the estate escheats as of the time of the decedent's death in accordance with this chapter.

(b) Property passing to the state under this chapter, whether held by the state or its officers, is subject to the same liens, charges and trusts to which it would have been subject if it had passed by will or intestate succession.

31-6-102. Escheat of real property.

Real property located in this state escheats to this state in accordance with § 31-6-101.

Those two statutes, which codify the common law rule of escheatment and authorize the escheatment of real property to the State of Tennessee under certain limited circumstances, only apply in cases involving the laws of descent and distribution in which an owner of real property dies without any surviving heirs.

Moreover, in those cases covered by the statutes, a report of the purported escheatment must be made to the Tennessee Treasurer (Tenn. Code Ann. § 31-6-107), the Treasurer must be joined as a party in any action in which the escheatment of real property is at issue (Tenn. Code Ann. § 31-6-114), and the provisions of Tennessee's Uniform Unclaimed Property Act (codified at Tenn. Code Ann. §§ 66-29-101 to -184) govern the disposition of the escheated real property and the processing of any claims asserted by purported owners against the escheated property (Tenn. Code Ann. §§ 31-6-116 and -119).

² Those statutes are found in Title 31 (Descent and Distribution), Chapter 6 (Escheat of Decedents' Estates), of the Tennessee Code.

Likewise, under Title 30 of the Tennessee Code, whenever a devisee/distributee entitled to receive property from a trust or estate cannot be located by the administrator or fiduciary administering the trust/estate, a report of the unclaimed property must be made to the Treasurer, and the disposition of such property is also governed by the Unclaimed Property Act. Tenn. Code Ann. § 30-2-702.³

As discussed in the Department's prior memorandum of law, Tennessee's Unclaimed Property Act authorizes the Treasurer to take custody of abandoned and unclaimed "property." Pursuant to Tenn. Code Ann. §66-29-102(24), the Act's definition of "property" is expressly limited to certain intangible property and those items of "tangible property described in" Tenn. Code Ann. §§ 66-29-109 (contents of safety deposit boxes reported to the Treasurer), 30-2-702 (property reported to the Treasurer whose devisee/distributee cannot be located by an estate fiduciary), and 31-6-107 (property from a decedent's estate reported to the Treasurer that is subject to escheatment).⁴ Thus, Tennessee's Unclaimed Property Act does not apply to Galilee because the Cemetery does not fall within the Act's limited definition of "tangible property" covered by

³ Another erroneous legal position taken by Shelby County in this case is that the escheatment provisions of Tenn. Code Ann. §§ 31-6-101 and -102 operate independently of Tennessee's Unclaimed Property Act. As mentioned above, all property that may be subject to escheatment/recovery by the State of Tennessee under Titles 30 and 31 of the Tennessee Code must be reported to the Tennessee Treasurer, and the Unclaimed Property Act governs the disposition of all such escheated and unclaimed property.

⁴ In its brief, Shelby County cites *Cerajeski v. Zoeller*, 735 F.3d 577 (7th Cir. 2013), as authority for the proposition that (1) the terms "unclaimed property" and "presumptively abandoned property" used in the Uniform Unclaimed Property Act are not synonymous with the term "abandoned property" as used in the common law, and (2) the Unclaimed Property Act is not an escheatment statute in the traditional sense because title to the property does not actually vest in the state government under the Act. While the Department does not dispute the County's position on such matters, the proposition is irrelevant for deciding the escheatment issue currently before the Court because Tennessee's Unclaimed Property Act applies to all three types of property in certain circumstances, including property that is reported to the Treasurer as unclaimed, property that is statutorily presumed to be abandoned under the Act, and property that has purportedly escheated to the State of Tennessee under Title 31 of the Tennessee Code.

the Act. Accordingly, none of the statutes cited above apply to Galilee, and there is no legal authority supporting Shelby County's escheatment argument.⁵

III. THE QUESTION OF WHO HOLDS LEGAL TITLE TO THE CEMETERY AFTER THE RECEIVERSHIP IS TERMINATED IS NOT AN ISSUE THAT SHOULD BE DECIDED BY THE COURT IN THIS PROCEEDING.

In its brief, Shelby County contends that the post-receivership ownership question is a vital issue that must be decided by the Court. The County bases its contention on the erroneous supposition that Galilee's improvement care trust fund ("ICTF") will one day be totally depleted and that the Court must determine who will be financially responsible for maintaining the cemetery in the future after all funds in the ICTF are exhausted.

Contrary to the County's contention, any fear or concern that Galilee's ICTF will become depleted in the future as a consequence of the Cemetery having no owner or operator is totally unfounded. Although Tenn. Code Ann. § 46-1-204(e)(2) and (3) authorizes the expenditure of earnings generated by the ICTF to pay for "improvement care" at the Cemetery when no operator exists, the corpus of the trust may not be used to pay for such services. Accordingly, some level of income will always be available to the ICTF trustee in the future to fund maintenance work at Galilee. Moreover, if the income generated from the ICTF in future years becomes insufficient to fund maintenance and upkeep at the Cemetery at a level that is acceptable to the County, the

⁵ Even when real property escheats to the State of Tennessee, the State may decline to accept the property. Under Tennessee's Unclaimed Property Act, the State of Tennessee, acting through the State Treasurer, has wide discretion in accepting and/or rejecting any property that would otherwise escheat to the State. Specifically, pursuant to Tenn. Code Ann. § 66-29-138(a)(1), the Treasurer may decline to accept property that "has a value less than the estimated expenses of notice and sale of the property." Further, Tenn. Code Ann. § 66-29-139 authorizes the Treasurer to refuse or return any property that "has no substantial commercial value or that the cost of disposing of the property will exceed the value of the property." Also, under Tennessee's Disclaimer of Property Interests Act, codified at Tenn. Code Ann. §§ 31-7-101 to -112, the State of Tennessee may disclaim any interest in real property it may receive by operation of law, conveyance, or other means. *See* Tenn. Code Ann. § 31-7-103 (Act applies to "disclaimers of any interest in property, whenever created."); Tenn. Code Ann. § 31-7-105(a) (any "**person** may disclaim, in whole or in part, any interest in or power over property."); and Tenn. Code Ann. § 31-7-102(6) (the Act's definition of "**person**" includes a "government, governmental subdivision, agency, or instrumentality.")

County or other local government may elect to provide financial assistance to Galilee pursuant to Tenn. Code Ann. § 46-2-107.⁶

Since escheatment to the State is not legally permissible and with no financial resources available to be recovered from the prior owners/operators of the Cemetery, a decision on the ownership question at this time will provide no practical benefit to the Cemetery. Accordingly, it is not necessary for the Court to decide the question who holds legal title to the Cemetery after the Receivership is terminated and the Commissioner, in his role as Receiver, is divested of all interests in Galilee.

CONCLUSION

For the reasons stated above, the Court should grant the Commissioner's Motion to Terminate the Galilee Receivership and further should rule that Galilee Memorial Gardens will not escheat to the State of Tennessee upon termination of Galilee's receivership.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter
State of Tennessee

s/Sarah Ann Hiestand

Sarah Ann Hiestand (BPR #014217)
Senior Ass't Attorney General, Financial Division
Timothy R. Simonds (BPR #013952)
Senior Ass't Attorney General, Financial Division
Tennessee Attorney General's Office
P.O. Box 20207
Nashville, TN 37202
(615) 741-6035; 615-532-8223 (fax)
e-mail: Sarah.Hiestand@ag.tn.gov;
Timothy.Simonds@ag.tn.gov

⁶ As acknowledged in its brief, the County is providing financial support to four other cemeteries located within its jurisdiction.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Supplemental Memorandum of Law has been transmitted via email to the following interested parties and attorneys requesting notice, or mailed First Class Postage prepaid where indicated, this 22nd day of May, 2020:

Robert E. Moore, Jr.
President, Receivership Management, Inc.
510 Hospital Drive, Suite 490
Madison, TN 37115
Via email to rmoore@receivermgmt.com
Special Deputy Receiver of Galilee Memorial Gardens

Jef Feibelman
Burch, Porter and Johnson
130 North Court Avenue
Memphis, TN 38103
Via email to jfeibelman@BPJLAW.com
Special Counsel to the Receiver

Robert D. Meyers AND VIA MAIL
Danielle Rassoul
Glankler Brown, PLLC
6000 Poplar Avenue, Suite 400
Memphis, TN 38119
Ph: 901-525-1322 fax 901-525-2389
Via email to rmeyers@glankler.com; drassoul@glankler.com
Attorneys for Intervenor, Shelby County, Tennessee

Emily Walker, CTFA, VP & Trust Officer AND VIA MAIL
Commercial Bank & Trust Company
Trust Division
P.O. Box 1090
Paris, TN 38242
Via email to Ewalker@cbtnet.com
Trustee of Trusts for Galilee Memorial Gardens

Douglas Berry
Miller & Martin
401 Commerce Street, Suite 720
Nashville, TN 37219
615 744-8620; via email to Doug.Berry@millermartin.com
For City of Bartlett, requesting notice of proceedings

Jemar Lambert VIA MAIL TO LAMBERTS
3174 Ruby Cove
Memphis, TN 38111

Marje Lambert
3174 Ruby Cove

Memphis, TN 38111

Mary H. Lambert
3174 Ruby Cove
Memphis, TN 38111

Individual Defendants in Receivership case, pro se

Handel R. Durham, Jr.
Jonathan Mosley
22 North Front Street, Ste. 760
Memphis, TN 38103
ph: 901.543.0866 fax: 901.543.0865
Via email to hdurham@durhamslaw.com; jonathan.mosley@jtmosleylaw.com

Coleman Garrett
295 Washington Av, Suite 2
Memphis, TN 38103
Via email to cwgarrett@bellsouth.net

Counsel for Lamberts in Shelby County cases

Courtesy Copy to:

Kathryn E. Barnett
MORGAN & MORGAN-NASHVILLE, PLLC
810 Broadway Suite 105
Nashville, TN 37203
Phone: (615) 490-0943
Via email to kbarnett@forthepeople.com

Howard B. Manis
THE COCHRAN FIRM
One Commerce Square
40 South Main Ste. 1700
Memphis, TN 38103
Phone: (901) 523-1222
Via email to hmanis@cochranfirm-midsouth.com

Class Counsel (Plaintiffs Wofford case-Shelby County)

John R. Branson
Jacob A. Dickerson
Baker, Donelson, Bearman, Caldwell & Berkowitz
First Tennessee Building
165 Madison Avenue, Suite 2000
Memphis, TN 38103
(901) 526-2000
Via email to jbranson@bakerdonelson.com
Defense Liaison for Funeral Homes in Shelby County Class cases

Brent M. Hays, Esq.

VIA MAIL

MerrittWebb

315 Centerview Drive, Suite 263,

Brentwood, TN 37027

Person requesting notice of proceedings.

s/Sarah Ann Hiestand

Sarah Ann Hiestand