

# Attorney General of New Mexico



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OPINION  
OF  
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Opinion No. 87-26

To: Maurice Hobson  
State Representative  
Otero, Lincoln & Sierra Counties

By: Alicia Mason  
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## FACTS<sup>1</sup>

During the escape of William Bonney, a/k/a Billy the Kid, from Lincoln County jail on April 28, 1881, he shot and killed Deputy Robert Olinger, who apparently died intestate without any heirs. Sheriff Pat F. Garrett, administrator of the deceased's estate, inventoried the property from the estate on May 22, 1881. The inventory listed: one wallet with papers of no value; one broken shotgun of no value; one Elgin watch valued at one dollar; and one set of clothes of no value.

Garrett had an \$84.00 claim against the estate, which was valued at fifty dollars--the amount that the County Commissioners owed the deceased for work he had done. On April 2, 1883, Garrett asked the Probate Court to discharge him from further administrative responsibility. The wallet, which was listed as a valueless asset of the estate, has been filed with the probate record in the Lincoln County Clerk's office apparently ever since the estate was

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1 These facts are derived from Robert Olinger's probate file in the Lincoln County Clerk's office.

settled and has increased in value because of its historical significance. Fran Siddens, Lincoln County Clerk, stated in a press release dated March 25, 1987 that she has preserved the wallet with the probate file as a public record.

#### QUESTIONS

1. Is the "Olinger Wallet" a public record and if so,
2. What is the responsibility of the County Clerk for the wallet's protection and preservation?

#### CONCLUSION

1. No.
2. See analysis.

#### ANALYSIS

Olinger died intestate without heirs in 1881. The wallet was one of four personal effects that comprised the inventory of Olinger's estate. Probate law in effect at the time of death controls distribution of a deceased's property. Douglas v. Newell, 719 P.2d 971, 980 (Wyo. 1986). Accord, In the Matter of the Estate of Caisson, 710 S.W.2d 211 (Ark. 1986). Changes in the law subsequent to the death of the intestate cannot disturb the rights of distribution, because these rights vest upon death. Rowlett v. Moore, 96 N.W. 835 (Ill. 1911); accord, In Re Moynahan's Estate, 287 N.Y.S. 106 (S. Ct. 1936). In 1881, New Mexico was a United States Territory governed by territorial law as codified in the 1880 General Laws of New Mexico (hereinafter "Laws of 1880"). Consequently, the Laws of 1880 and not the Probate Code, §§45-1-101 to 45-7-401, NMSA 1978, currently in effect determines the wallet's status.

According to the Laws of 1880, article II, chapter II §6, if no heir applies to the probate court for letters of administration of a deceased's estate, any creditor may do so. Further, according to chapter III §19, if a deceased leaves no will, then whoever has an interest in the property's distribution should administer the estate. As administrator, Garrett was charged with preparing the estate's testamentary inventory, defined by statute as "the instrument containing a list of the property and other articles belonging to the estate of the deceased making a will or dying intestate, made with regularity and order." Article II, chapter VI §6. Garrett indicated on the inventory that the wallet had no value.

Had the wallet been valuable in 1881, whatever value it may have had would have been applied to satisfy Garrett's claim against the estate, upon approval of the probate judge. Chapter VI A, Act of January 26, 1866 §3, §5. According to the Laws of 1880, a deceased's personal effects could be sold at a sheriff's sale and any sums realized would be used to pay off debts owed by the estate. The Laws of 1880 required Garrett to serve as administrator for one year whereupon he was to pay pro rata on all accounts approved by the probate judge. Article II, chapter VI A §5. On April 13, 1883, Garrett petitioned the probate court to settle the estate and to be relieved of further responsibility as administrator. Consequently, any claim to the wallet was extinguished upon Garrett's termination as administrator and upon the settlement of the estate. The wallet became the deceased's abandoned, unclaimed personal effect.

"Public records," as defined by §14-3-2 NMSA 1978, includes "documentary materials, regardless of physical form or characteristics, made by or received by an agency in pursuance of law or in connection with the transaction of public business and preserved, or appropriate for preservation, by the agency...as evidence of the organization, functions, decisions, procedures, operations or other activities of the government, or because of the informational and historical data contained therein."<sup>2</sup> The wallet that was filed away in the probate file would no more be a public document than the deceased's clothing or shotgun. The clothes and gun that were inventoried with the wallet as effects of the deceased were not filed with the probate record, apparently because they were not physically susceptible to being so stored and because they contained no historical papers.

Despite the breadth of Section 14-3-2, it is clear that not all materials which an agency receives are public records. Public records are reserved as "evidence" of certain governmental activities or because of the information the materials contain. Here, the wallet is not itself evidence of the probate, but an asset of

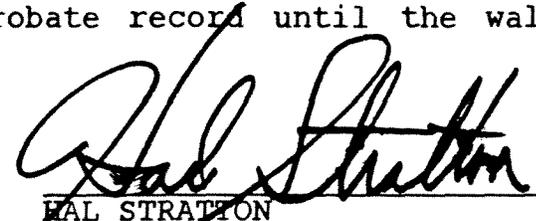
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2 According to B. Michael Miller, State Archivist and Records Administrator, territorial public documents occasionally were recorded on pieces of leather in lieu of paper and were filed. This practice may have confused the status of the wallet and caused the wallet to be regarded as a public record. According to the Lincoln County Clerk's office, however, no probate notations or writing appear on the wallet, and the papers contained therein do not concern Olinger's probate.

the estate; and it was not kept for the information it contained, but because of its historical value. The relevant distinction is between documents that the County Clerk generates or receives in the process of probating an estate and the items that actually constitute the estate, though the items or effects may be appropriate for preservation and may have historical value. The difference is that the effect or personalty was the deceased's private property; the County Clerk has no rights to private property, whether in an estate or otherwise, by operation of law merely because the property has historical value. Cf. Douglas v. Newell, supra (right to make testamentary disposition is neither natural nor constitutional right but right derived from positive law). Thus, the wallet is not a public record, and the County Clerk therefore is not responsible for its protection and preservation as a public document.

The abandoned wallet is without buyer, claimant, or heir. According to the Laws of 1880, in the absence of heirs, property escheated to the territorial treasury. Laws of 1880, article II, chapter IV §7. The Supreme Court of the United States upheld the validity of territorial escheat statutes in Christianson v. King County, 239 U.S. 356 (1915). At common law, escheat applied only to real estate or to an interest therein, but by statute, personal property expressly was made subject to escheat. The generally recognized rule became that "all property and every right of property of whatever nature is subject to escheat." State v. Kearns, 257 P. 1002, 1005 (Mont. 1927).

Statutes of descent should be liberally construed. In re Gussett's Estate, 46 N.M. 344, 129 P.2d 56 (1942). Consequently, the Laws of 1880's provision for escheat of a deceased's abandoned property to the Territory should include personal effects. Territorial property became state property upon New Mexico's admission into the union as a state. N.M. Const. art. XXII, §1, §6. Thus, the wallet now belongs to the state treasury by reason of the wallet's escheat to the territorial treasury. The state treasurer has custody of the state treasury. §8-6-3, N.M.S.A. 1978 (Repl. Pamp. 1983). The state treasurer, therefore, should decide how best to dispose of the wallet. The wallet should continue to remain with the probate record until the wallet's final disposition is determined.

  
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