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IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

THE STATE OF OKLAHOMA, ex rel. ADAM PANTER, DISTRICT ATTORNEY,

Plaintiff/Appellee,

vs.

SHERRAL McVEA,

Defendant/Appellant.

Case No. 121,868

APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY, OKLAHOMA

HONORABLE JOHN CANAVAN, DISTRICT JUDGE

REVERSED AND REMANDED

Stacy S. Bateman-Woods
ASSISTANT DISTRICT ATTORNEY
Shawnee, Oklahoma — For Plaintiff/Appellee

Greg Wilson
WILSON LAW FIRM
Shawnee, Oklahoma — For Defendant/Appellant

OPINION BY GREGORY C. BLACKWELL, JUDGE:

¶1 Sherral McVea[1], in her capacity as personal representative of the estate of Larry McVey, appeals the district court's denial of her motion to vacate a default judgment of forfeiture against the property of the late Larry McVey. On review

[1] Per the probate filings, this spelling is used by all Larry's children, including Sherral. Larry and Sherida both use "McVey."

we find that a personal representative was the only proper party to receive notice and an opportunity to raise claims and defenses that the deceased could have raised. No personal representative had been appointed at the time of notice, and the state did not use the 12 O.S. § 2025 procedure to substitute a personal representative for the deceased. As such, we reverse the decision of the district court and remand for additional proceedings consistent with this opinion.

BACKGROUND

¶2 On May 20, 2020, law enforcement executed search warrants and seized $275,791 and numerous vehicles as part of an investigation into the allegations that Larry McVey and others were involved in the illegal distribution of prescription medication. Approximately two months later, on July 21, 2020, Larry McVey died. That same day, the state filed the underlying civil action—Case No. CV-2020-84—and a notice of seizure and forfeiture against Larry McVey, Larry's wife Sherida McVey, Larry McVey dba McVey Used Cars, and three other individuals. On February 23, 2021, some seven months after Larry McVey's death, the state filed a motion for default against Larry, Sherida, and McVey Used Cars.

¶3 The record shows that, with the default motion, the state filed a return of service on Larry McVey made on November 3, 2020, several months after his death. The return was sent to one Pam Snider, at a post office box in Tecumseh, Oklahoma, and the certificate of service had a handwritten notation reading "estate" next to McVey's name and another stating that service was "c/o Attorney Pam Snider." The default motion stated that Pam Snider had agreed to accept

service on behalf of "the estate of Larry McVey." It also stated that another attorney who shared the same office, David McKenzie, had in turn agreed to accept service on behalf of Sherida McVey. No reply was received and neither attorney entered an appearance in this case.

¶4 The court set a hearing on the default motion for April 29, 2021, which was continued to July 27. By this time the state evidently recognized that Pam Snider was not representing the estate and notice of this new hearing date was sent to wife Sherida McVey and the "Larry McVey estate c/o Sherida McVey." On July 27, 2021, the court granted a decree of forfeiture, noting that no party had appeared and neither of the named attorneys was currently representing the parties.[2] It also held that Sherida McVey was an "heir" to the estate of Larry McVey, but did not identify or name any personal representative of the estate or any other presumed heirs of the estate.

¶5 In November 2021, a probate of McVey's estate was opened and Larry's daughter, Sherral McVea, was appointed personal representative. As personal representative, Sherral McVea filed a motion to vacate the default as to the interest of Larry McVey on the grounds that a personal representative was the only party authorized by law to represent the interests of the deceased Larry McVey, and no personal representative was ever appointed or had been served

[2] Examining the docket sheet, we find that no attorney ever entered an appearance for any McVey party or entity in this case until after the court granted forfeiture by default, although Snider and McKenzie did make an entry of appearance in what the district court described as a "companion" case, CV-2020-57, which concerned the forfeiture of certain real property.

with notice in this case. The court denied this motion, and the personal representative now appeals.

STANDARD OF REVIEW

¶6 The correct standard of review employed upon a motion to vacate is whether sound discretion was exercised to vacate the earlier decision. *See Schepp v. Hess*, 1989 OK 28, 770 P.2d 34. The reviewing court does not look to the original judgment, but rather the correctness of the trial court's response to the motion to vacate. *Yery v. Yery*, 1981 OK 46, 629 P.2d 357. As such, we apply the abuse of discretion standard.

ANALYSIS

¶7 The appellant's prime argument is that it was mandatory for a personal representative to receive notice and an opportunity to contest the forfeiture because defenses that might have been available to the deceased can only be raised by a representative. No personal representative was appointed or noticed in this case. The state argues that attorney Pam Snider "represented the estate" at the time the default forfeiture motion was filed, that she was served with a copy of the motion, and that it also gave attorney Greg Wilson notice of the hearing. The state also noticed wife Sherida McVey of the hearing as an individual and as a purported heir of the estate "out of precaution." Hence, the state argues notice was given to all necessary parties and the default was therefore proper.

¶8 We note that the docket sheet shows no entry by an attorney in this case for either the McVeys or a personal representative until after the default

judgment. Before considering the legitimacy of this fractured chain of notice, which is evidently based upon conversations between the state and certain local attorneys, we must address the primary question of whether the state could continue forfeiture proceedings by serving the "estate" with notice, or whether a personal representative was a necessary and proper party to receive notice.

¶9 In a matter of general litigation, the answer is relatively clear. "Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases and in the same courts in which the same might have been maintained by or against their respective testators and intestates." 58 O.S. § 252. Although the language of § 252 is facially permissive—"*may* be maintained"—caselaw is clear that, in cases where a cause of action survives the death of the defendant, the case cannot proceed without a personal representative,[3] because the personal representative is the only proper party to take up the claims and defenses previously belonging to the deceased.[4] Although, in the absence of a personal representative, naming an "estate" as defendant is

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[3] Pursuant to 58 O.S. § 11, the term "personal representative" is synonymous with executor, administrator, administrator with will annexed, conservator, and guardian.

[4] The personal representative "stands in the shoes" of the deceased, and title to an intestate's personal property ordinarily vests in the personal representative. *Underwood v. Pinson*, 1953 OK 337, ¶ 20, 263 P.2d 418, 422; *In re Estate of Bleeker*, 2007 OK 68, ¶ 13, 168 P.3d 774, 779. The legal effect of naming the personal representative in the action when appointed is to substitute a proper party for the deceased person. *Weeks v. Cessna Aircraft Company*, 1994 OK CIV APP 171, 895 P.2d 731 (approved for publication by the Oklahoma Supreme Court). Whatever rights the decedent might have had in his life accrue to the personal representative at death. *Matter of Estate of Williams*, 2023 OK 103, ¶ 18, 538 P.3d 176, 183. "A substituted party steps into the same position of the original party." *Ransom v. Brennan*, 437 F.2d 513 (5th Cir.1971), cert. denied, 403 U.S. 904, 91 S.Ct. 2205, 29 L.Ed.2d 680 (1971) (construing the federal counterpart to 12 O.S. § 2025).

sufficient to preserve a statute of limitations, a trial court obtains no jurisdiction for purposes of trial or judgment until "a party defendant is brought into court who actually legally exists and is legally capable of being sued." *Stone v. Estate of Sigman*, 1998 OK CIV APP 173, ¶ 13, 970 P.2d 1185, 1188 (citing 59 Am.Jur.2d Parties § 42 and 12 O.S. § 2017(B), which fails to reference an "estate" as a legal entity capable of being sued). While no Oklahoma caselaw references this principle in relation to a seizure of property, federal caselaw in this area provides substantial guidance.

¶10 A civil forfeiture action is generally remedial in nature. *See United States v. Ursery*, 518 U.S. 267, 278, 288–92, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996) (analyzing congressional intent and the nature of 21 U.S.C. § 881 forfeitures for double jeopardy purposes); *United States v. Chambers*, 121 F.3d 710, 1997 WL 441801, at *6 (6th Cir.1997) (unpublished table decision) ("[A] true in rem civil forfeiture is not an additional penalty for the commission of a criminal act, but rather is a separate civil sanction, remedial in nature."). A remedial civil forfeiture therefore does not abate with death. *United States v. Land, Winston Cnty.*, 221 F.3d 1194, 1199 (11th Cir. 2000).

¶11 Defenses that the owner of the property could have raised do not expire at death either. Rather, "[t]he claim of an administrator of a claimant's estate derives from the deceased claimant," and the administrator "can assert defenses that would have been available to the deceased claimant." *United States v. 133 Firearms with 36 Rounds of Ammunition,* No. 2:08–cv–1084, 2012 WL 511287, at *8 (S.D.Ohio Feb.15, 2012) (citing *United States v. Real Prop. Located at 265*

Falcon Rd., Civil NO. 08–700–JPG, 2009 WL 1940457 at *6 (S.D.Ill. July 7, 2009); *Hopper v. Nicholas*, 140 N.E. 186, 189 (1922); *Kelley v. Buckley*, 950 N.E.2d 997, 1013 (Ohio App. 8th Dist.2011)). However, because "the claim of the estate is purely derivative of any claim or defense of the deceased, the estate cannot raise defenses which might be available to individuals who stand to inherit from the estate." *United States v. $129,374 in U.S. Currency*, 769 F.2d 583, 587 (9th Cir.(1985)). As such, it is clear that two groups of claims and defenses against forfeiture arise in cases such as we have here—claims the deceased could have raised, which are exclusive to the personal representative—and claims that other parties could have raised. In this case, some potential "other parties" appear to have been notified, but no representative was standing in the shoes of the deceased.

¶12 The normal procedure when a defendant dies while a claim is pending is governed by three Oklahoma statutes. If the decedent died testate, and the plaintiff has an "interest in the estate," the plaintiff may open a probate pursuant to 58 O.S. § 22. If the decedent died intestate, he may seek letters of administration pursuant to 58 O.S. § 122. Alternatively, 12 O.S. § 2025 allows the plaintiff to file a statement of death, which then requires the opposing parties to make a substitution of the original defendant within ninety days of service of the statement. Section 2025 states that if a substitution is not made on this time period, "the action shall be dismissed without prejudice as to the deceased party."

¶13 Case law interpreting § 2025 is sparce and there is none involving a civil forfeiture. Because § 2025(A)(1) is taken from Rule 25(a)(1) of the Federal Rules of Civil Procedure, however, we "may look to the federal courts for guidance in interpretation and application of [§ 2025]." *Campbell v. Campbell*, 1994 OK 84, ¶ 19, 878 P.2d 1037, 1041–42. Federal cases involving Rule 25 and civil forfeiture indicate that the correct procedure when a claimant dies after a seizure of property, but before hearing, is for the state to file and serve a suggestion of death on an "estate representative" or "heir." This statement triggers the commencement of a ninety-day period for the filing by the claimant's estate of a motion for substitution of parties. If no successor or representative moves to substitute themselves, the state may seek default. *See United States v. Seventy-Nine Thousand, One Hundred Ten Dollars ($79,110.00) in United States Currency*, 1:14-CV-274, 2017 WL 1106363, at *3 (S.D. Ohio Mar. 24, 2017); *United States v. 256,276.00 in U.S. Currency*, 2:21-CV-07310-CAS (KSX), 2024 WL 4467593, at *1 (C.D. Cal. May 17, 2024).

¶14 In this case, the state did not open a probate proceeding or follow the procedure mandated by § 2025. The law is clear that the personal representative is the only person entitled to bring defenses to forfeiture that would have been available to the original owner of the seized property. As such, no party with the ability to raise these defenses was notified of the hearing, and default could not have disposed of these defenses.

¶15 The state next argues that, even if a necessary party was not noticed, the default should be affirmed because there were no viable defenses the deceased,

and hence the personal representative, could have brought. The state proposes that the deceased could have availed himself only of the defenses stated in 63 O.S. § 2-506(H) and did not show any chance of success under these facts.

¶16 Section 2-506(H), however, concerns the defenses that an "innocent owner" may bring. These defenses may be brought, as the name clearly implies, by a non-target who claims to be the actual owner of the property and claims they had no "knowledge or reason to believe that the property was being, or was to be, used for the [illegal] purpose charged." *Id.* This statutory section does not concern the defenses that the *target of a seizure* may bring, however.

¶17 Alleged owners who are the target of the seizure, such as the deceased here, may bring other defenses than those stated in § 2-506(H).[5] For example, the owner of property declared forfeit because of the owner's illegal activities has a right to challenge whether the state has met its initial burden to show the required nexus between the property subject to forfeiture pursuant 63 O.S. § 2-503 and a violation of the Uniform Controlled Dangerous Substances Act. Additionally, a defense that the forfeiture of all vehicles belonging to McVey Used

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[5] The distinction between the position of an "owner" and the position of an "innocent owner" appears to be this: an owner has Article III standing to litigate the initial question of whether the state has met its burden to show that the property in question is legally subject to forfeiture. *United States v. One 1962 Aero Twin Commander 500B, Tail No. N37CK, Serial No. 500A-1251-76, Russell Robinson,* 24-1277, 2025 WL 25853, at *1 (3d Cir. Jan. 3, 2025). An innocent owner litigates the affirmative defense provided by 18 U.S.C. § 983(d)(1) that property that is otherwise properly subject to forfeiture should, nonetheless, be returned because the actual owner had no knowledge or reason to believe that the property was being, or was to be, used for the purpose charged. *United States v. Ferro,* 681 F.3d 1105, 1109 (9th Cir. 2012).

Cars was penal, not civil, may also be available, and an excessive fine defense would therefore be available at least as to these vehicles.[6]

¶18 The state next argues that it acted based on a good faith belief that giving notice to an attorney whom the state reasonably believed was representing "the estate" was legally sufficient in this case.[7] However, even if "good faith" failure to notice a necessary party could, in some circumstances provide a defense against the motion to vacate, the state relied in good faith on an incorrect legal conclusion that an attorney can agree to accept service and notice on behalf of a personal representative when a personal representative had neither been appointed nor apparently hired any counsel.

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[6] We intend no proclamation on the merits of these potential defenses as to either the vehicles or the currency seized. We note, however, that the Oklahoma Supreme Court has distinguished between seizures of property directly related to the offense of possession with the intent to distribute or purchased with the proceeds from a drug sale, which are not subject to the excessive fines clause (because they are not "fines" but remedial acts), and property not directly related to or purchased with the proceeds from a drug sale. *Compare State ex rel. Campbell v. Eighteen Thousand & Two Hundred Thirty-Five Dollars in U.S. Currency*, 2008 OK 32, ¶ 31, 184 P.3d 1078, 1085 (cash found in close proximity to marijuana was presumably the proceeds of drug sales, hence the forfeiture was remedial, not punitive or penal in nature and was not subject to an excessive fine defense), *with, State ex rel. Dep't of Pub. Safety v. 1985 GMC Pickup, Serial No. 1GTBS14EOF2525894, OK Tag No. ZPE852*, 1995 OK 75, ¶ 10, 898 P.2d 1280, 1283 (seizure of vehicle not used for the purposes of facilitating a violation of controlled substance act or obtained with proceeds of drug sale was penal in nature).

[7] The state's brief states on several occasions that it "relied in good faith" on assertions that one of three attorneys was representing the estate. *Response Brief*, 13. By the time of hearing, the state knew that neither David McKenzie nor Pam Snider was representing the estate. Another attorney, Greg Wilson, stated that he was *going* to enter an appearance in the case. *See* R. 112 (e-mail stating that "we are going to make an appearance" but that a continuance was needed because Wilson was going to be in trial the whole day of the hearing). The day before the hearing, the state refused to agree to a continuance, and the docket sheet shows that the state also filed a motion to disqualify Wilson from appearing. It is difficult to see how these acts generated a "good faith belief" that Wilson would appear.

CONCLUSION

¶19 A personal representative is entitled to notice when a decedent's property is subject to a forfeiture proceeding. In the absence of a personal representative, the state must avail itself of the procedure set forth in 12 O.S. § 2025. Further, a personal representative is the only party authorized by law to bring defenses to a forfeiture proceeding on behalf of a decedent. These defenses are separate from those that innocent owners may bring under 63 O.S. § 2-506(H). Because the trial court proceeded under an incorrect view of the law on these questions, we reverse the court's order failing to vacate the default forfeiture as to the claims and defenses that a personal representative could have raised if properly noticed and remand for further proceedings consistent with this opinion.

¶20 **REVERSED AND REMANDED**.

WISEMAN, P. J., and FISCHER, J., concur.

April 11, 2025