

July 13, 1998

The Honorable Earl I. Anzai  
Director of Finance  
Department of Budget and Finance  
State of Hawaii  
250 S. Hotel Street  
Honolulu, Hawaii 96813

Dear Mr. Anzai:

Re: Escheat of Abandoned Property

This is in response to your letter relating to whether Act 214, Session Laws of Hawaii 1996 ("Act 214"), which amended Hawaii's unclaimed property law, chapter 523A, Hawaii Revised Statutes, to permit escheat of abandoned property, [\(1\)](#) is constitutional.

For the reasons discussed below, we answer in the affirmative. We point out, however, that a court could come to a different conclusion with respect to the high (\$5,000) threshold limit that must be met before names of last known owners are included in the public notice, even though a list of the name's of last known owners will be made available as a government record. Consequently, we recommend that the notice of custodial taking under section 523A-18 include notice that, if the property remains unclaimed for the statutory period, it may escheat to the State under section 523A-3.5 and we also recommend that the Department of Budget and Finance's escheat notice under section 523A-3.5 include the names of persons whose property will escheat even though the value of the property is between the values of \$5,000 and \$100.

#### Background

Chapter 523A, Hawaii Revised Statutes, allows the State of Hawaii to take physical custody of abandoned property. Holders of abandoned property must file reports of unclaimed property with the Director of Finance (§ 523A-17). The Director of Finance then causes public notice of the unclaimed property to be given (§ 523A-18) and the holder pays or delivers the unclaimed property to the Director of Finance (§ 523A-19). ([top](#))

Before amendment of chapter 523A by Act 214, the State was merely the custodian of the property until it was claimed by the owner. It was possible that the State could be custodian in perpetuity if an owner never claimed the property.

Act 214 amended chapter 523A to permit the State to escheat abandoned property that was already in the State's custody. Section 523A-3.5(a) provides that abandoned property already in the custody of the State escheats after a period of time which varies according to the value of the property, ranging from two years (property the value of which is less than or equal to \$100) to six years (property the value of which is greater than \$10,000). Before the property escheats, the State must give statewide public notice at least once, pursuant to section 523A-3.5(b). Pursuant to section 523A-3.5(c), the notice must be entitled "Notice to Declare Certain Abandoned Property Escheated to the State of Hawaii." If the value of the abandoned property scheduled to escheat is \$5,000 or less, the names of the owners need not be included in the public notice pursuant to section 523A-3.5(c)(2), but, pursuant to section 523A-3.5(c)(3), the notice must list the location where a list of names and last known addresses, if any, of persons appearing to be owners of abandoned property subject to escheat may be found, section 523A-3.5(b) and (c)(1) also gives the owners a period of time in which to claim the property before the escheat will occur and section 523A-3.5(a) provides that if a claim or an action to establish a claim is pending, the property that is subject to the claim or action to establish the claim will not escheat until those proceedings are over. Although the statute does not expressly so state, we believe that if a claim

is established under that procedure, the property would not be subject to escheat. ([top](#))

## Discussion

Escheat is a procedure whereby the sovereign may acquire title to abandoned property if, after a number of years, no rightful owner appears.<sup>(2)</sup>

Although escheats are not favored, one reason for permitting escheat is that the whereabouts of an owner or a beneficiary is not ascertainable, and it is inexpedient to hold assets indefinitely pending the beneficiary's discovery or appearance. In re Estate of Johnson, 208 Cal.Rptr. 821 (Cal. Ct. App. 1984). While courts will not enforce escheat statutes so as to deprive persons of property without due process of law, if the statutes provide adequate notice to the owner and an opportunity to be heard, they satisfy the requirements of due process. *Texaco. Inc. v. Short*, 454 U.S. 516, 102 S. Ct. 781 (1982); *State v. American-Hawaiian S.S. Co.*, 29 N.J.Super. 116, 101 A.2d 598 (1953); *Marine Nat'l Exch. Bank v. State*, 248 Wis. 410, 22 N.W.2d 156 (1946). ([top](#))

The due process that is appropriate in a given situation requires consideration of the private interests that will be affected, the risk of erroneous deprivation through the procedures used and the value of alternative procedural safeguards, and the government's interest, including the function involved and the fiscal or administrative burdens that additional procedures would entail. *Kernan v. Tanaka*, 75 Haw. 1, 856 P.2d 1207 (1993).

Sometimes, the statutes require that notice be given to all interested persons, and that the notice identify the subject matter of the proceeding, the property of which escheat is sought, and the last known owner. *State v. Standard Oil Co.*, 5 N.J. 281, 74 A.2d 565 (1950), *aff'd.*, 341 U.S. 428, 71 S. Ct. 822 (1951). ([top](#))

Notice by publication in situations where it is not practicable or possible to give personal notice, as when owners are unknown, has been approved by various courts. In *Security Savings Bank v. California*, 263 U.S. 282, 44 S. Ct. 108, 68 L. Ed. 301 (1923), a proceeding to compel the bank to pay over to the state inactive bank accounts as the first step in their sequestration and eventual escheat, the court allowed service by publication upon owners of the accounts. The court stated that "[t]he legislature evidently assumed that it would be impossible to serve such depositors personally. . . . The owners of the deposits were, therefore, treated like persons unknown." 263 U.S. at 289. Such a view was not "so unreasonable as to constitute a denial of due process," *id.*, especially when the deposits had remained unclaimed after multiple publications in the newspaper. The receipt of the property from the holder constituted a seizure, and the seizure, together with service by publication, was sufficient due process for the depositors. Furthermore, the court held that publication of notice of the proceeding only in a newspaper at the state capital was sufficient notice to absent depositors. ([top](#))

*Clovis National Bank v. Callaway*, 69 N.M. 119, 364 P.2d 748 (1961), involved the escheat portion of the New Mexico unclaimed property statute. The New Mexico statute provided:

After any separate sum has been collected from any holder and the amount collected paid into the reserve investment fund by the state treasurer and the amount deposited has resided in the reserve investment fund for a period of forty (40) years without the owner asserting a claim and collecting upon his claim, then the amount of the original deposit shall escheat to the state and be credited to the current school fund of the state.

364 P.2d at 751.

The Clovis court held the statutory procedure adequate notice for transfer of custody, but not adequate in the escheat context because there was only one notice that escheat would occur, and

that notice occurred forty years before the escheat. In Clovis, the court noted that "the escheat occurs without further notice or opportunity to be heard beyond that provided at the time custody of the property is changed." 364 P.2d at 754 (emphases added). The court further stated: ([top](#))

The provision for escheat after the passage of 40 years added [into the statute] is nothing more nor less than a means of depriving the owners of the property because of the passage of time without a claim thereto being asserted. There is no requirement that the true owner shall have died without known heirs, nor is any means provided for judicially making such a determination after notice and opportunity to be heard by interested persons. Omission of such steps as preliminary to the escheating of the property is to our minds absolutely fatal to the validity of the provision.

Id.

Because there was a total absence of any provision for notice of the escheat, and no opportunity whatsoever to appear and oppose the escheat, the Clovis court held the provision invalid. In addition, the portion of the statute that provided that no notice was required to be published concerning items of less than \$25 value was invalidated by the court and was not appealed. ([top](#))

The statute in Clovis is different from Hawaii's statute because Hawaii's law provides two notices -- the notice of custodial taking and the notice of escheat. Section 523A-3.5 provides for notice that an escheat will occur and for a period of time within which a claim of ownership can be made before the escheat occurs. Thus, section 523A-3.5 is not invalid under the rulings in that case.

Although Clovis seems to require a judicial determination, the United States Supreme Court does not require a judicial determination in order for property to escheat. In Connecticut Mutual Life Insurance Co. v. Moore, 333 U.S. 541, 68 S. Ct. 682 (1948), the court found no constitutional reason why a state may not proceed administratively to take over the care of abandoned property rather than adopt a plan through judicial process. Because there was ample provision for notice to beneficiaries and for administrative and judicial hearing of their claims, the court found that there was no possible injury to any beneficiary. ([top](#))

In Anderson National Bank v. Lockett, 321 U.S. 233, 64 S. Ct. 599 (1944), one of the issues was whether the statute under which the state purported to acquire the right to demand custody of property afforded due process of law, even though the depositors might not receive personal notice of the pending transfer and there might be no prior judicial proceedings. The court stated:

The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved, the demands of due process are fulfilled. Measured by this standard, we cannot say that the present notice is insufficient. ([top](#))

For this reason also it is not an indispensable requirement of due process that every procedure affecting the ownership or disposition of property be exclusively by judicial proceeding. Statutory proceedings affecting property rights which, by later resort to the courts, secure to adverse parties an opportunity to be heard, suitable to the occasion, do not deny due process.

Id. at 246-47.

Act 214 allows owners whose property is subject to escheat an opportunity to claim the property and an opportunity to appeal a denial of a claim before the escheat will actually occur.

The publication limit of \$5,000 value is vulnerable. The cases that have discussed the issue have permitted no publication when only nominal amounts (up to \$50 value) are involved. The court in *Standard Oil v. New Jersey*, 341 U.S. 428, 434 (1950), disapproved, on due process grounds, a provision that dispensed with publication of notices of claims of less than \$50 value (in contrast to the \$5,000 value limit in section 523A-3.5). The \$50 limit, which is in the Uniform Unclaimed Property law, was held not unconstitutional in *American Petrofina Co. v. Nance*, F. Supp. 1183 (W.D. Okla. 1986), *aff'd.*, 859 F.2d 840 (10th Cir. 1988). In the early 1980's, the State of Illinois adopted an escheat law that dispensed with publication for claims under a value of \$100. There are no reported cases challenging that limit. ([top](#))

## Conclusion

The escheat permitted by Act 214 is of property that has already been presumed abandoned under other sections of chapter 523A and is already in the custody of the State. The property has come into the custody of the State after published notice.

Although the "Notice to Declare Certain Abandoned Property Escheated to the State of Hawaii" does not list all the potential owners or claimants or contain a description of all of the property subject to escheat, that information was published prior to the State's taking custody of the property by notice titled "Notice to Persons Appearing to be Owners of Abandoned Property," pursuant to section 523A-18. In addition, the "Notice to Declare Certain Abandoned Property Escheated to the State of Hawaii" also states where a list of potential owners or claimants and descriptions of the property can be found. ([top](#))

While we believe the "Notice to Declare Certain Abandoned Property Escheated to the State of Hawaii" by itself satisfies due process requirements, we urge the Department of Budget and Finance to publish the names of owners whose property is valued at more than \$100 to avoid any challenges. Even if that notice, by itself, is not sufficient, nevertheless, that notice, coupled with the prior "Notice to Persons Appearing to be Owners of Abandoned Property," which does list the names of apparent owners, appears to be sufficient. We recommend that this first notice also include a short statement that if the property is not claimed within the period prescribed by section 523A-3.5, it is subject to escheat.

Finally, we note that the precise statutory scheme set forth in Act 214 is not similar to those of other jurisdictions, so there is no case law on this issue, even from other jurisdictions. Thus, the question is not entirely free from doubt and if a challenge is raised, the Hawaii Supreme Court, based on a specific set of facts, may decide differently. ([top](#))

Very truly yours,  
Diane Erickson  
Deputy Attorney General

APPROVED:  
John W. Anderson  
Acting Attorney General

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1. Act 214 amended section 523A-1 by adding a definition of "escheat," meaning the "taking of title or interest by the State of property presumed abandoned." ([top](#))

Act 214 also added a new section, subsequently designated as section 523A-3.5, as amended by Act 2, Session Laws of Hawaii 1998, which describes the escheat process:

"(a) Any property in custody of the State pursuant to this chapter at the close of a fiscal year ending June 30, shall escheat to the State as follows:

(1) If the value of the property is greater than \$10,000, the property shall escheat six years after the end of the fiscal year in which the property was paid or delivered to the director;

(2) If the value of the property is greater than \$5,000 but less than or equal to \$10,000, the property shall escheat five years after the end of the fiscal year in which the property was paid or delivered to the director;

(3) If the value of the property is greater than \$1,000 but less than or equal to \$5,000, the property shall escheat four years after the end of the fiscal year in which the property was paid or delivered to the director;

(4) If the value of the property is greater than \$100 but less than or equal to \$1000, the property shall escheat three years after the end of the fiscal year in which the property was paid or delivered to the director; and

(5) If the value of the property is less than or equal to \$100, the property shall escheat two years after the end of the fiscal year in which the property was paid or delivered to the director;

provided that the property for which a timely claim has been filed with the director pursuant to section 523A-24, or a timely action has been filed pursuant to section 523A-26, shall not escheat until the disposition of the claim or action. ([top](#))

(b) The director shall cause notice to be given no later than April 1 of the fiscal year ending June 30 in which the property shall escheat to the State at least once statewide.

(c) The notice shall be entitled, "Notice to Declare Certain Abandoned Property Escheated to the State of Hawaii" and contain:

(1) A statement that any property presumed abandoned and paid or delivered to the director that remains unclaimed as of June 30 of the year the notice is given and that meets the escheat criteria established in subsection (a)(1), (2), (3), (4), or (5) shall escheat to the State on June 30, and all rights, title, or interest of the owner shall be terminated and all claims of the owner shall be forever barred;

(2) A statement listing the names of owners of abandoned property with a value greater than \$5,000 scheduled to escheat to the State; and

(3) A statement identifying the location where a list of names and last known addresses, if any, of persons appearing to be owners of abandoned property subject to escheat on June 30 of the year the notice is given; and stating that this list shall be made available as a government record. ([top](#))

This section shall not apply to sums payable on:

(1) Travelers checks, money orders, and other written instruments presumed abandoned under section 523A-4; or

(2) Checks, drafts, or similar instruments on which a banking or financial organization is directly liable, including a cashier's check and a certified check presumed abandoned under section 523A-5.

2. *Texas v. New Jersey*, 379 U.S. 674, 85 S. Ct. 626 (1964), opinion supplemented, 380 U.S. 518, 85 S. Ct. 1136 (1965); *Travelers Ins. Co. v. Workers' Compensation Appeals Bd.*, 187 Cal. Rptr. 838 (Cal. Ct. App. 1982). ([top](#))