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Real Property

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REAL PROPERTY

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I. INTRODUCTION

This survey includes a potpourri of cases dealing with subjects ranging from "tax sales" to "partition." The survey period includes decisions from 1986 to 1988. The article does not cover all published cases and opinions decided during the survey period and related to the subject.

II. TAX SALES

Four New Mexico cases[1] dealt with tax sales under the 1973 Administration and Enforcement of Property Taxes Act[2] (hereinafter the "Tax Enforcement Act"). New Mexico's courts broadened and clarified the notice provision related to tax sales in these four cases. By so doing, the courts enhanced the "curative" features of the Tax Enforcement Act and concurrently increased the burden on the Tax Division to search for interested parties entitled to notice. All decisions during the survey period endorsed the policy that "forfeitures are not favored by the courts in New Mexico."[3] The cases will be discussed in chronological order.

Cano v. Lovato[4] presents a rare coincidence. Placido Lovato entered into a real estate contract for the purchase of property located in Bernalillo County on September 30, 1980.[5] On the same day, Bernie and Elena Cano purchased the same Bernalillo County property at a tax sale conducted by the New Mexico Property Tax Division.[6]

The residential property originally belonged to Niven Robinson and his wife.[7] Mrs. Robinson died in 1978 and her husband died the following

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1. State *ex rel.* Klineline v. Blackhurst, 106 N.M. 732, 749 P.2d 1111 (1988); Brown v. Greig, 106 N.M. 202, 740 P.2d 1186 (Ct. App. 1987); Macaron v. Associates Capital Serv. Corp., 105 N.M. 380, 733 P.2d 11 (Ct. App. 1987); and Cano v. Lovato, 105 N.M. 522, 734 P.2d 762 (Ct. App. 1986).

2. N.M. STAT. ANN. §§ 7-38-1 to -93 (Repl. Pamp. 1986). The portions of the Tax Enforcement Act applicable to the survey discussion are Sections 7-38-65 to -74.

3. *E.g., Klineline*, 106 N.M. at 735, 749 P.2d at 1114.

4. 105 N.M. 522, 734 P.2d 762.

5. *Id.* at 524, 734 P.2d at 764.

6. *Id.*

7. *Id.*

year.[8] Mr. Lovato purchased the property from the Robinsons' Estate.[9] The real property taxes on the property had not been paid for the years 1976 through 1979.[10] The Estate assumed the burden of paying the delinquent taxes, penalties and interest.[11] The Estate hired New Mexico Title to act as closing agent for the purchase and to provide a title insurance policy.[12] The title company discovered the tax delinquency before closing but did not tell either the Estate or Mr. Lovato about the problem.[13] The title company did not make any inquiry of the New Mexico Property Tax Division concerning the possibility of a tax sale[14] even though Section 7-38-65 of the Tax Enforcement Act expressly provided that "[r]eal property may be sold for delinquent taxes at any time after the expiration of three years from the first date shown on the tax delinquency list on which the taxes became delinquent."[15]

The title company updated its tax search on September 29, 1980, and discovered that the tax receipt in the County Treasurer's Office now bore the notation "transferred to P.T.D. for collection."[16] As the court of appeals noted, "[t]he tax searcher took no action in response to this information."[17] The Estate and Mr. Lovato closed the real estate transaction on October 3, 1980.[18] The delinquent taxes appeared on the closing statement and according to the parties' agreement the title company withheld sufficient money from the closing to pay any delinquent taxes.[19]

The title company tried to pay the back taxes around October 9, 1980, and discovered then that the property had been sold to satisfy the delinquent *ad valorem* taxes.[20] Consequently, the title company returned the money to an escrow account established for the transaction.[21] The title company recorded the real estate contract on Mr. Lovato's behalf on October 9, 1980.[22] Mr. Lovato and the Estate were unaware of the title company's discovery that the property had been sold.[23]

The Tax Division sent notice of the pending tax sale by certified mail to "Robinson, Niven, Etux [sic], 4217 4th St., NW, Albuquerque, NM

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. N.M. STAT. ANN. § 7-38-65(A) (Repl. Pamp. 1986).
16. *Cano*, 105 N.M. at 525, 734 P.2d at 765.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*

87107."[24] The notice was returned to the Division with a notation that taxpayer Robinson did not reside at the address shown.[25] The Division executed a tax deed transferring the property to the Canos on September 30, 1980, but the Canos did not receive physical possession of the deed until the first of November.[26] They recorded their deed on November 7, 1980.[27]

Mr. Lovato lived on the property and made improvements to it.[28] He had no notice of the Canos' adverse claim to the property until early October 1981 when the Canos first filed an action to take possession of the property.[29] The trial court found that the Canos held superior title to that of Mr. Lovato.[30] On appeal, the New Mexico Court of Appeals picked its way through the parties' claims to superior title and ended up remanding the case for additional fact-finding.[31] On remand, the court of appeals wanted the trial court to determine whether Placido Lovato executed the real estate contract before or after the Canos purchased the property on the same day.[32]

To reach this result, the court of appeals first determined that Mr. Lovato possessed no valid challenge to the tax sale under the applicable provisions of the Tax Enforcement Act.[33] To defeat title acquired by a tax deed from the state under the Tax Enforcement Act, a claimant, like Lovato, is limited to four avenues of attack. Basically, Mr. Lovato would

24. *Id.* at 524, 734 P.2d at 764.
25. *Id.*
26. *Id.* at 525, 734 P.2d at 765.
27. *Id.*
28. *Id.* at 524, 734 P.2d at 764.
29. *Id.* at 525, 734 P.2d at 765.
30. *Id.*
31. *Id.* at 531, 734 P.2d at 771.
32. *Id.*
33. *Id.* at 527, 734 P.2d at 767. The Tax Enforcement Act, Section 7-38-70(D), provides:

> Subject to the limitation of Subsection C of this section, in all controversies and suits involving title to real property held under a deed from the state issued under this section, any person claiming title adverse to that acquired by the deed from the state must prove, in order to defeat the title, that:
>
> (1) the real property was not subject to taxation for the tax years for which the delinquent taxes for which it was sold were imposed;
>
> (2) the division failed to mail the notice required under Section 7-38-66 NMSA 1978 or to receive any required return receipt;
>
> (3) he, or the person through whom he claims, had title to the real property at the time of the sale and had paid all delinquent taxes, penalties, interest and costs prior to the sale as provided in Subsection E of Section 7-38-66 NMSA 1978; or
>
> (4) he, or the person through whom he claims, had entered into an installment agreement to pay all delinquent taxes, penalties, interest and costs prior to the sale as provided in Section 7-38-68 NMSA 1978 and that all payments due were made timely.

N.M. STAT. ANN. § 7-38-70(D).

have to prove (1) that the real property was not subject to taxation during the years the delinquency occurred; (2) that the Division failed to mail or receive return of the required notice according to Section 7-38-66(E) of the Tax Enforcement Act; (3) that Mr. Lovato had title to the property at the time of the sale and had paid all the delinquent taxes; or (4) that Mr. Lovato had entered into an installment agreement to pay delinquent taxes under Section 7-38-68 of the Tax Enforcement Act.[34] Placido Lovato could make no such claims.[35]

In an effort to treat both the Canos and Placido Lovato as fairly as possible, given the extraordinary coincidence of their nearly simultaneous purchase of the property, the court of appeals next turned to New Mexico's Recording Act to determine if its provisions provided Lovato with title superior to the Canos.[36] As a threshold matter, the court reaffirmed that the purpose of the Act is to "prevent injustice by protecting innocent purchasers for value . . . who have invested money in property."[37] The court held that Mr. Lovato became a purchaser for value on September 30, 1980, when the Estate and Lovato exchanged mutual promises.[38] Further, the court refused to impute the title company's knowledge of the tax sale to Placido Lovato because the title company had failed to disclose its knowledge of the tax sale.[39]

As a bona fide purchaser without knowledge, Placido Lovato may have had a superior title to the Canos. A strict reading of New Mexico's Recording Act and Section 7-38-48 of the Tax Enforcement Act created this conundrum for the court.[40] Placido Lovato had recorded his contract

34. *Cano*, 105 N.M. at 527, 734 P.2d at 767.

35. *Id.*

36. *Id.* at 529, 734 P.2d at 769. Mr. Lovato, on appeal, attempted to invalidate the Canos' title by claiming the state's failure to deliver the deed to the Canos on the date of the tax sale constituted a jurisdictional defect. *Id.* at 527, 734 P.2d at 767. While the court admitted that a jurisdictional defect constituted a proper challenge under the Tax Enforcement Act, it held that the tax deed to the Canos was issued in accordance with the Division's statutory authority. *Id.* at 528, 734 P.2d at 768. Section 7-30-70(A) requires the Division to deliver a tax deed "*upon* receiving payment." *Id.* The court reasoned "the statute does not mandate *immediate* delivery at the time of sale" (emphasis added) and thus "[n]o definite time period is set out for the issuing of the deed." *Id.* Although the Division took two months to deliver the deed it executed on September 30, 1980, the court decided that period fell within the time limit imposed by statutes. *Id.* at 528-29, 734 P.2d at 768-69. Thus, a two-month delay in delivery of a tax deed was interpreted as delivery "with little or no interval after" the Division's sale of the property. *Id.* at 528, 734 P.2d at 768.

37. *Id.* at 529, 734 P.2d at 769 (quoting Jeffers v. Doel, 99 N.M. 351, 353, 658 P.2d 426, 428 (1982)).

38. *Id.* at 529-30, 734 P.2d at 769-70.

39. *Id.* at 530, 734 P.2d at 770. The court also supported this finding by deciding that even though the title company was Lovato's agent, the failure to disclose information made the transaction "adversarial." *Id.* Thus, at least as to the content of the undisclosed information, the agency was destroyed. *Id.* Perhaps underlying this finding was the court's determination that the title company breached its duty to communicate the possibility of a tax sale to Mr. Lovato. *Id.* at 535, 734 P.2d at 775.

40. *Id.* at 530, 734 P.2d at 770. N.M. STAT. ANN. § 14-9-3 (1978) provides:

> No deed, mortgage or other instrument in writing, not recorded in accordance

before the Canos were able to record their tax deed but after the tax lien attached.[41] The Recording Act expressly provides that no unrecorded "instrument in writing" shall affect the title of a bona fide purchaser without knowledge of the unrecorded instrument.[42] Section 7-38-48 creates a tax lien which arises by operation of law.[43] The court concluded "[b]ecause such a lien is not a written instrument, we fail to see how it is embraced by the [Recording] Act."[44] Therefore, if Placido Lovato executed the real estate contract before the tax sale was held on September 30, 1980, his status as a bona fide purchaser did not cut off the Canos' title because no *written* instrument as yet existed. If Placido Lovato executed the real estate contract after the tax sale, however, his right to the property would be superior because he purchased for value, without knowledge of a written instrument (the tax deed) issued by the Division on September 30th. Therefore, the court left the final question of who had a better right to the property—the Canos or Mr. Lovato—essentially to a toss of a coin.

The problem the court encountered in *Cano* stems, perhaps, from the substitution of the new notice provisions of the tax act for the old curative provisions. As *Cano* recognized, the "new code . . . eliminated the right of redemption, the right of repurchase, and the initial transfer of the property from the county treasurer to the state."[45] In its place, the current tax act provides for four challenges listed in Section 7-38-70(D).[46]

One of the available challenges to title transferred by a tax deed is that the Division failed to provide adequate notice under Section 7-38-66(C).[47] Challenges to tax sales following the *Cano* case have revolved around the adequacy of the notice of sale given by the Division.[48] The subsequent cases have established a trend toward providing actual notice of the tax sale to individuals having an interest in the property subject to sale. *Cano* remains an anomaly after these cases. A tax sale cannot be challenged if

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with Section 14-9-1 NMSA 1978, shall affect the title or rights to, in any real estate, of any purchaser, mortgagee in good faith or judgment lien creditor, without knowledge of the existence of such unrecorded instruments.

41. *Cano*, 105 N.M. at 530-31, 734 P.2d at 770-71.

42. N.M. STAT. ANN. § 14-9-3 (1978).

43. N.M. STAT. ANN. § 7-38-48 (Repl. Pamp. 1986).

44. *Cano*, 105 N.M. at 531, 734 P.2d at 771. The court was persuaded that a lien arising under Section 7-38-48 was different from other statutory liens because it is "not dependent upon a filing of notice of lien for its creation and effect against purchasers." *Id.*

45. *Id.* at 527, 734 P.2d at 767.

46. *See supra* note 33.

47. N.M. STAT. ANN. § 7-38-66(C) (Repl. Pamp. 1986) provides:

> Failure of the division to mail the notice by certified mail, return receipt requested, or failure of the division to receive the return receipt shall invalidate the sale; provided, however, that the receipt by the division of a return receipt indicating that the taxpayer does not reside at the address shown on the most recent property tax schedule shall be deemed adequate notice and shall not invalidate the sale.

48. *E.g.*, State *ex rel.* Klineline v. Blackhurst, 106 N.M. 732, 749 P.2d 1111 (1988).

the Division, as it did in the *Cano* case, receives a return receipt "indicating that the taxpayer does not reside *at the address shown*."[49] Placido Lovato took possession of the property on August 1, 1980, and the notice mailed by the Division, presumably sometime in August, was returned with a notation that Robinson did not reside at the address shown on the notice.[50] Although later cases stretch to require that individuals holding an interest in property receive some form of actual notice before a tax sale is found valid, such developments would have failed to offer any "curative" opportunities to persons in the shoes of Mr. Lovato.

A strict parallel construction of the Tax Enforcement Act and New Mexico's Recording Act forced the court's result in *Cano*. Caught between provisions of the Tax Enforcement Act and the Recording Act, the court recognized "that the result which we reach today may seem inequitable."[51] As later tax sale cases demonstrate, New Mexico's courts, in an apparent effort to avoid further inequities, evolved a more demanding policy of requiring actual notice to persons holding an interest in real property subject to sale for delinquent taxes.[52] The facts in *Cano*, however, precluded any such felicitous or fair result.

In *Macaron v. Associates Capital Services Corp.*,[53] the New Mexico Supreme Court held that a bank, as mortgagee, was entitled to notice reasonably calculated to apprise it of an impending tax sale. The court found that Section 7-38-66(A) of the Tax Enforcement Act violated the due process clause of the United States Constitution because it failed to provide for notice of a tax sale "by mail or personal service" to a mortgagee who had properly recorded its mortgage.[54] Relying upon the United State's Supreme Court decision in *Mennonite Board of Missions v. Adams*,[55] the court decided that the state should be required to exercise "reasonably diligent efforts" to discover names and addresses of any party who might have an interest in the property.[56] The bank in *Macaron* had recorded its mortgage before the tax sale.[57] The court thus found that its decision did not require the Division to make an "extraordinary effort" to ascertain a party possessing a constitutionally-protected interest in the property.[58]

Interestingly, although the court did not refer to the *Cano* decision, it

49. *Id.* at 737, 749 P.2d at 1116.
50. *Cano*, 105 N.M. at 524, 734 P.2d at 764.
51. *Id.* at 531, 734 P.2d at 771.
52. *Klineline*, 106 N.M. 732, 749 P.2d 1111.
53. 105 N.M. 380, 733 P.2d 11 (Ct. App. 1987).
54. *Id.* at 382-83, 533 P.2d at 13-14.
55. 462 U.S. 791 (1983).
56. *Macaron*, 105 N.M. at 382, 733 P.2d at 13.
57. *Id.* at 381, 733 P.2d at 12.
58. *Id.* at 382, 733 P.2d at 13.

did opine that "[t]he fact that the tax lien had arisen before the mortgage was executed and recorded does not mandate a different result."[59] Individuals holding an interest in real property after *Macaron* can at least be assured that once they have recorded their interest they are entitled to something more than notice by publication before a tax sale affects their interest in the property.

Brown v. Greig[60] held that a record owner of title, even if not the holder of legal title of the property, must be given notice of a tax sale under Section 7-38-66(A).[61] Mr. Brown sold certain lots located in Taos, New Mexico, to Mr. Overton in 1973 under a contract for sale.[62] Mr. Overton paid for the lots in full in 1978.[63] He received warranty deeds to the property but never recorded the deeds.[64] Brown received a tax bill for the property in 1978.[65] He telephoned the Taos County Reassessment office upon receipt of the bills and told the office that he no longer owned the lots and would not pay the taxes.[66] He eventually provided the office with Overton's address.[67] From 1979 forward, the record property cards of the Taos County Assessor's Office recognized Overton as the owner of the lots.[68] Tax notices were sent to Overton.[69] Mr. Brown repurchased the property from Overton in September 1980.[70] The mortgage and warranty deed executed as part of the sale were not recorded until November 1984.[71] In 1983, the New Mexico Taxation and Revenue Department mailed Overton a notice of sale of the property due to delinquent taxes.[72] The Greigs bought the property at a tax sale in May of 1984.[73]

Brown's and Overton's laxity in recording their various transactions operated in Brown's favor. The court held that even though Brown notified the assessor's office that he no longer owned the property, the burden rested on the Tax Department to "make a diligent search of the record" to determine the persons entitled to notice of the sale.[74] The court found

59. *Id.*
60. 106 N.M. 202, 740 P.2d 1186 (Ct. App. 1987).
61. *Id.* at 206, 740 P.2d at 1190. N.M. STAT. ANN. § 7-38-66(A) (Repl. Pamp. 1986) requires actual notice by mail to "each property owner."
62. *Brown*, 106 N.M. at 203, 740 P.2d at 1187.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* Mr. Overton actually purchased three lots from Brown, but information Mr. Brown supplied to the Taos County Assessor's Office only identified two of these lots. *Id.* The Assessor's Office had absolutely no written information concerning any change in tax liability as to the third lot. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 204, 740 P.2d at 1188.
73. *Id.*
74. *Id.* at 205-06, 740 P.2d at 1189-90.

Brown entitled to notice by mail because his was the last recorded interest in the property.[75]

The unstated policy driving the decisions in both the *Macaron* and *Brown* cases at last came out of the closet in *Klineline v. Blackhurst*: "Forfeitures are not favored by the courts in New Mexico."[76] The court of appeals opined:

> We believe that in repealing the redemption provisions, the legislature intended, under the new law, to make the notice requirements stricter to assure proper notice was given, in light of the fact that the property owner no longer had the right to repurchase the property. In this connection, we are mindful that '[t]he law favors redemption.'[77]

The court in *Klineline* was faced, once again, with a most unusual story. Mrs. Klineline suffered from chronic paranoid schizophrenia for most of her forty-one years of married life.[78] Although Mrs. Klineline had been institutionalized on and off during the 1960's, she remained at home following that period.[79] One of Mrs. Klineline's beliefs, associated with her illness, was that her husband had died and that Mr. Klineline was an imposter posing as her dead husband.[80] The Klinelines fully paid a real estate mortgage on their home in 1978.[81] The mortgage company had paid the taxes on the Klinelines' home during the life of the mortgage.[82] The Klinelines failed to pay their taxes once the mortgage was paid; their taxes from 1978 to 1981 were delinquent.[83] The Division mailed a certified letter to the Klinelines' home informing them of the delinquency and impending tax sale.[84] Apparently, Mrs. Klineline destroyed the notice which would have told the Klinelines of the attempt to deliver the certified letter.[85] She failed to tell her "imposter" husband about the attempted delivery and she did not answer the door when the mailman attempted personal delivery of the certified letters.[86] The Division received the return receipt form and certified letter marked "unclaimed."[87] The Division posted a "red-tag" notice of the delinquency at the Klineline home.[88]

75. *Id.* at 205, 740 P.2d at 1189.
76. 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988).
77. *Id.* at 736, 749 P.2d at 1115 (citing State *ex rel.* McFann v. Hately, 34 N.M. 86, 88, 278 P. 206, 207 (1929)).
78. *Id.* at 734, 749 P.2d at 1113.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* The court found that the Division's red-tag procedure "did not give the property owner actual notice of the sale, but only of the delinquency." *Id.*

Henry and Jane Deaton purchased the Klinelines' home at a tax sale.[89]

Considering the validity of the tax sale on appeal, the supreme court announced, as an initial premise, that "substantial compliance with the express terms of the statute is required" before a tax sale will be considered valid.[90] Section 7-38-66(C) provides:

> Failure of the division to mail the notice by certified mail, return receipt requested, *or* failure of the division to receive the *return receipt* shall invalidate the sale; *provided, however*, that the receipt by the division of a return receipt indicating that the taxpayer *does not reside at the address shown* on the most recent property tax schedule shall be deemed adequate notice and *shall not invalidate the sale*.[91]

The court found the tax sale to the Deatons invalid under Section 7-38-66(C).[92] The court concluded that the receipt by the Division of the return receipt form and certified letter marked "unclaimed" did not satisfy the statutory requirement that the Division "receive the return receipt."[93] The court reasoned that had the legislature intended to allow the Division to comply with the notice provisions of Section 7-38-66(C) by mere receipt of the return receipt form, the legislature would have used the word "form" when drafting the provision.[94] Having failed to require receipt of the mere return receipt *form*, the court reasoned the legislature must have contemplated actual delivery of the notice to the taxpayer.[95]

After *Klineline* and *Macaron*, the Division shoulders a heavy burden. To conduct a valid tax sale the Division must be certain it has conducted a reasonably diligent search to ascertain all persons holding an interest in the property to be sold. To date, such a search appears to be limited to persons who have recorded such property interests. Additionally, under *Klineline*, the Division must assure itself that a certified letter giving notice of the tax sale is actually delivered to the taxpayer or interest holder.

The only guidance the Division currently has received from the courts concerning actual delivery is that a returned letter marked "unclaimed" constitutes, as a matter of law, failure to achieve actual delivery. A letter returned to the Division with the notation that the taxpayer does not reside at the address of the property to be sold, complies with the statutory

89. *Id.* at 733, 749 P.2d at 1112.
90. *Id.* at 735, 749 P.2d at 1114.
91. N.M. STAT. ANN. § 7-38-66(C) (Repl. Pamp. 1986)(emphasis added).
92. *Klineline*, 106 N.M. at 737, 749 P.2d at 1116.
93. *Id.*
94. *Id.* at 736, 749 P.2d at 1115.
95. *Id.*

notice provisions.[96] Whether a notice returned to the Division marked "refused" by the postal authorities, as was the case in *Brown*, satisfies the actual delivery requirement remains unanswered. Although New Mexico's "curative policy is, and always has been, an attempt 'to clothe tax titles with a measure of certainty and security,'"[97] the recent tax forfeiture cases illustrate the continued tension between assuring the certainty of title following a tax sale and providing a property owner the opportunity to protect his interest.

III. FORECLOSURE SALES

Plaza National Bank v. Valdez[98] should alert practitioners involved in foreclosure proceedings to obtain judicial confirmation of a foreclosure sale immediately in order to protect certainty of title for the purchaser at the sale. William and Susan Valdez defaulted on a promissory note they executed in favor of the bank.[99] The Valdezes secured the note with mortgages on vacant land, a residence and commercial property.[100] The Bank obtained a judgment and decree of foreclosure in its favor on November 1, 1985.[101] The foreclosure decree contained fairly standard terms. It provided that the special master should enter his deed after confirmation of the sale by the court, whereupon the purchaser of the property would hold title free and clear, subject to "the Valdezes' right of redemption for thirty days following the judicial sale."[102] The special master conducted the foreclosure sale on December 2, 1985, and the district court approved the special master's report of sale by order entered December 10, 1985.[103] The Valdezes filed a motion for extension of the redemption period with the district court on January 2, 1986.[104] The court granted the motion.[105] On appeal, the Bank argued that the district court lacked subject matter jurisdiction to grant the extension.[106]

The Bank relied on New Mexico's grant of continuing jurisdiction to its district courts for a thirty-day period after entry of final judgment.[107]

96. *Id.* at 737, 749 P.2d at 1116; Cano v. Lovato, 105 N.M. 522, 524, 734 P.2d 762, 764 (Ct. App. 1986).

97. *Cano*, 105 N.M. at 527, 734 P.2d at 764 (quoting Bailey v. Barranca, 83 N.M. 90, 92, 488 P.2d 725, 727(1971)).

98. 106 N.M. 464, 745 P.2d 372 (1987).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 465, 745 P.2d at 373.

105. *Id.*

106. *Id.*

107. *Id.* N.M. STAT. ANN. § 29-1-1 provides in part:

> Final judgment and decrees . . . shall remain under the control of [the district] courts for a period of thirty days after the entry thereof, and for such future

The Bank concluded that the district court only retained jurisdiction over the foreclosure proceeding for thirty days from the entry of the foreclosure decree on November 1, 1985.[108] Thus, the Bank reasoned, the district court lacked jurisdiction to consider the Valdezes' motion filed two months later on January 2, 1986.[109]

The supreme court summarily quashed the Bank's argument. A foreclosure proceeding is comprised of two distinct and separate adjudications. "The initial judgment operates to foreclose the mortgage."[110] The second "adjudication" is judicial confirmation of the foreclosure sale.[111] The sale "of the mortgaged property does not become a final judgment until judicial confirmation of the sale, whereupon it becomes final."[112] Therefore, the court found jurisdiction in the district court for thirty days following its order confirming the foreclosure sale on December 10, 1985, and the Valdezes' January 2, 1986, motion to extend the redemption period was timely filed.[113]

The court could have given final effect to the foreclosure decree and found the Valdezes had thirty days from the date of the decree within which to redeem or request equitable relief. It opted not to do so. The rule in New Mexico after *Plaza National Bank* is clear. The redemption period may begin to run from the date of foreclosure sale; however, an individual possessing a right of redemption has the opportunity to request an extension of the redemption period for thirty days following the order confirming the special master's sale.

IV. PUBLIC LAND USE CONTROL

The court of appeals found the State Highway Department authorized to grant a private corporation the right to use a highway easement to lay a carbon dioxide pipeline in *Amerada Hess Corp. v. Adee*.[114] The court relied upon two statutory grants. Section 67-3-12(C) gives the State Highway Commission authority "to prescribe by rules and regulations the conditions under which pipelines, telephone, telegraph and electric transmission lines and ditches may be hereafter placed along, across, over or under all public highways in this state."[115] Section 67-8-13 empowers the Commission to issue permits for the placement of "any conduit, wires

time as may be necessary to pass upon and dispose of any motion which may have been filed within such period, directed against such judgment.

108. *Plaza National Bank*, 106 N.M. at 465, 745 P.2d at 373.
109. *Id.*
110. *Id.* (quoting Speckner v. Riebold, 86 N.M. 275, 277, 523 P.2d 10, 12 (1974)).
111. *Id.*
112. *Id.*
113. *Plaza National Bank*, 106 N.M. at 465-66, 745 P.2d 373-74.
114. 106 N.M. 422, 744 P.2d 550 (Ct. App. 1987).
115. N.M. STAT. ANN. § 67-3-12(C) (1978).

or cables across, upon, attached to or upon such highway right-of-way."[116]

Amerada Hess wanted to pipe carbon dioxide from northeast New Mexico to a location sixteen miles away.[117] The corporation planned to then transport the carbon dioxide for use in enhanced oil recovery projects in the Permian Basin.[118] The State Highway Department granted Amerada Hess permission to lay its carbon dioxide pipeline within an easement previously granted to the State Highway Department by New Mexico landowners.[119] Amerada Hess filed for declaratory judgment after receiving the Highway Department's permission and requested that the district court declare it had the right to construct and operate the pipeline within the easement.[120] Certain of the affected defendant landowners counterclaimed for an injunction prohibiting Amerada Hess from creating an additional burden to their lands.[121] The landowners asked the court for compensatory and punitive damages.[122] The district court granted summary judgment to Amerada Hess and found that New Mexico's statutes granted the Highway Department authority to permit the construction of the pipeline.[123] The landowners appealed this decision.

On appeal, the landowners objected to the use by a private corporation of the state-owned easement.[124] They argued that private corporations, unlike public utilities, ought not be permitted use of "public highways for emplacement of pipelines for their own profit."[125] Thus they concluded that Amerada Hess's use of the highway easement constituted an added burden, or servitude, upon their servient estates.[126] The court found this argument unpersuasive.

The court focused on the intended use of the public easement.[127] It declined to give weight to the landowners' argument that the nature of the ownership of the proposed pipeline (i.e., private versus public) ought to govern the result.[128] The court's decision was driven, in part, by an

116. N.M. STAT. ANN. §67-8-13 (1978).

117. *Amerada Hess*, transcript of the record at 3-4, 7-8.

118. *Id.* at 3.

119. *Amerada Hess*, 106 N.M. at 423, 744 P.2d at 551.

120 *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 423-24, 744 P.2d at 551-52.

124. *Id.* at 424, 744 P.2d at 552.

125. *Id.* The court noted that the landowners did not argue "that the legislature's grant of authority to the State Highway Commission [was] unconstitutionally excessive." *Id.* It may be that the court's observation identifies a potentially successful argument for landowners the next time a private corporation receives permission to additionally burden an existing state highway easement.

126. *Id.*

127. *Id.*

128. *Id.* The court found "the language of the statute provides for no such exclusion, nor does it limit its application to utilities. . . . We cannot depart from the express language of an act. . . ." *Id.* (citations omitted). Justice Alarid, in dissent, disagreed with this narrow reading of the statute:

> The advisory committee finds persuasive, as I do, the distinction made by

earlier court-approved use of a highway easement by a rural electric cooperative.[129] The court reasoned that since an electric coop is not a public utility, the private-public distinction urged by the landowners was not justified.[130] Thus, the court of appeals opined that the use of highway easements should be expansive rather than restrictive.[131] The court suggested that the guiding inquiry should be whether the intended use constitutes a "public good."[132] The court found that "an underground pipeline may be more preferable for the transportation of the gas than the use of the highway itself. Large trucks traveling on highways accelerate the road's deterioration."[133] The court also pointed out that the intended use did not interfere with the owners' other surface uses, such as grazing.[134]

What does one do with the uneasy feeling that Amerada Hess was given a valuable right for free as a result of the court's decision? Perhaps, if the court of appeals had looked to New Mexico's constitutional provisions which prohibit donations of state monies or properties to private entities[135] it might have reached a somewhat different result. Even if the landowners burdened by the public easement were not entitled to compensation for the additional servitude imposed by the private gas pipeline, perhaps the state, and its taxpayers, should be entitled to some benefit.

V. OTHER CASES

A. *Joint Tenancy Rights*

New Mexico addressed the question of whether one joint tenant may

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> defendants between utilities, both public and private, and private corporations which claim no public purpose. It is undisputed that plaintiff corporation is not a public utility, is not the holder of a public utility franchise, has no duty to serve the public, its pipeline is not subject to administrative regulation as to who can use it, and its use is solely for its own corporate projects. I don't believe that these are idle distinctions, nor do I believe that this view expands the statute or is contrary to the caselaw.

Id. at 426, 744 P.2d at 554.

129. *Id.* at 424-25, 744 P.2d at 552-53 (citing Hall v. Lea County Elec. Coop, 78 N.M. 792, 438 P.2d 632 (1968).

130. *Amerada Hess*, 106 N.M. at 424, 744 P.2d at 552. The court cited with approval Herold v. Hughes, 141 W.Va. 182, 90 S.E.2d 451 (1955). The *Herold* case, however, concerned the limited question of whether the use of highway easements by nonpublic utilities (like the rural electric coop in *Hall*) constituted transportation of property for public use. *Id.* at 94, 90 S.E.2d at 458. The *Herold* case did not address the question of whether a private corporation, not regulated as a utility, and transporting gas for its own oil enhancement recovery project, constituted transporting property for public use. Neither New Mexico precedent embodied in *Hall* nor case law from other jurisdictions relied upon by the court, supported the proposition that transportation of gas by a private corporation constitutes transportation of property for public use.

131. *Amerada Hess*, 106 N.M. at 425, 744 P.2d at 553.

132. *Id.*

133. *Id.*

134. *Id.*

135. N.M. CONST. art IV, § 31.

encumber the property interest of a cotenant without the cotenant's consent in *Texas American Bank/Levelland v. Morgan*.[136] Mr. Halliburton executed a warranty deed to himself and Mary Morgan as joint tenants.[137] The deed was recorded in April of 1983.[138] The Texas Bank loaned Mr. Halliburton $100,000 in November of 1983.[139] Halliburton secured the loan with a mortgage encompassing the property owned by Morgan and Halliburton as joint tenants.[140] The Bank recorded its mortgage shortly after it was executed.[141] Mary Morgan did not execute or otherwise consent to the loan or mortgage.[142] Halliburton conveyed his remaining interest in the property to Morgan by warranty deed in July 1984.[143] Morgan recorded the deed in August of that year.[144] The Bank foreclosed on the property after Halliburton defaulted on the loan.[145] The trial court entered a judgment in favor of the Bank covering all of the real property.[146]

The supreme court reversed the trial court decision.[147] In doing so it agreed with other jurisdictions and found that an act "by one joint tenant respecting the joint property without the authority or consent of his cotenants cannot bind or prejudicially affect the latter."[148] The court supported its holding by relying on the age-old principle of property law that a grantor can only give away that which he owns.[149] Furthermore, the court refused to apply the doctrine of merger to the case.[150] The Bank argued that Halliburton's later grant of his interest to Mary caused her interest to merge with his.[151] The court spurned this argument because such a finding would allow the Bank's lien to reach "more than it had a right to foreclose upon at the time it took the mortgage."[152]

The real question posed by the court's decision concerned the remedies available to the Bank and Mary Morgan upon reversal and remand of the case. Morgan urged the court to find that Halliburton's execution of the mortgage severed the joint tenancy.[153] Consequently, she maintained, the

136. 105 N.M. 416, 733 P.2d 864 (1987).
137. *Id.* at 417, 733 P.2d at 865.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* (quoting Motz v. Central Nat'l Bank, 119 Ill.App.3d 601, 608, 75 Ill.Dec. 137, 143, 456 N.E.2d 958, 964 (1983)).
149. *Texas Am. Bank*, 105 N.M. at 417, 733 P.2d at 865.
150. *Id.* at 418, 733 P.2d at 866.
151. *Id.*
152. *Id.*
153. *Id.* at 417, 733 P.2d at 865.

proper remedy was a partition with the Bank entitled to foreclose on Halliburton's interest as it existed at the time the mortgage was executed.[154] The court responded by holding "title and joint tenant unities are unaffected by the execution of a mortgage" and, therefore, the execution of the mortgage by Halliburton did not sever the joint tenancy.[155] The court also found that Morgan received Halliburton's interest encumbered by the mortgage when he deeded the property to her.[156] Thus it appears that on remand the Bank would be entitled to foreclose on Halliburton's joint tenancy interest as it existed on the date of execution of the mortgage. Any deficiency judgment would be against Halliburton.

As is so often the case, this property dispute could have been avoided if the Bank had searched the title of the property before it took the mortgage from Halliburton. A search would have revealed the joint tenancy ownership. As the court tersely noted, "[t]he Bank did not require Morgan's approval of the mortgage, and we will not do for the Bank what it failed to do for itself."[157]

B. Partition

In re Estate of Lopez[158] resolved a family dispute not uncommon to rural New Mexico. Feloquio Lopez died intestate in 1981.[159] Erlinda Trujillo, his daughter, and his second wife, Josefita Lopez, survived him.[160] Feloquio left a small amount of cash and a house in Cordova, New Mexico, as his estate.[161] Feloquio initially held the house in Cordova as his separate property.[162] He and his second wife occupied the home.[163]

After payment of funeral and estate taxes, the house in Cordova constituted the only asset in the estate to be distributed.[164] Neither the daughter nor the second wife disputed a trial court finding that community contributions to the value of the home comprised 41.08% of the total value of the property.[165] The daughter's share was thus 58.92% of the value of the property. The real dispute between daughter and wife was over who should be allowed to take possession of the home.[166] The trial court

154. *Id.*
155. *Id.* at 417-18, 733 P.2d at 865-66.
156. *Id.* at 418, 733 P.2d at 866.
157. *Id.*
158. 106 N.M. 157, 740 P.2d 707 (Ct. App. 1987).
159. *Id.* at 158, 740 P.2d at 708.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 159, 740 P.2d at 709.
165. *Id.* at 158, 740 P.2d at 708.
166. *Id.*

effectively required the daughter to sell her interest in the home to the wife.[167]

On appeal, Ms. Trujillo requested an in kind distribution of her interest in the estate.[168] The court of appeals found that the two women held the property as tenants-in-common under New Mexico law.[169] Upon request of an heir the district court must partition if partition can be accomplished without prejudice to any heir.[170] If the property cannot be partitioned or conveniently allotted to one heir the only alternative under the law is to order the personal representative to sell the property.[171] Thus, the court of appeals found no statutory authority to support the trial court's order essentially forcing one heir to sell her undivided interest to the other.[172]

The court of appeals pointed out that both Trujillo and Lopez overlooked the fact that the family home was the only asset in the estate to be distributed.[173] Therefore, both Ms. Trujillo's and Mrs. Lopez' desire to have the property allotted to them was inappropriate under the circumstances.[174]

The court of appeals revised the trial court's order and remanded the case. The court advised the trial court that if the single-family home could not be partitioned, there were two options on remand.[175] The trial court could either order the daughter and the second wife to retain undivided interests in the property as tenants-in-common or the property could be sold and the proceeds divided according to Section 45-3-911(C).[176] The court justified its result by stating,

> [w]e do not believe it is the intent of that section that the personal representative may sell the property to herself over the objection of

167. *Id.* The trial court approved Mrs. Lopez's motion to distribute the estate. *Id.* Mrs. Lopez tendered a check to Ms. Trujillo in the amount of $13,331.37 which Mrs. Lopez represented as "full payment of Erlinda Trujillo's interest in the estate of Feloquio Lopez." *Id.* The net estate after deductions for funeral, estate expenses, family allowance and personal property allowance totalled $22,626.40. *Id.* This sum was less than the value of the home. *Id.* The trial court applied the percentage proportions representing the two women's interests in the house to the net estate value when it approved the distribution calculated by Mrs. Lopez. *Id.*

168. *Id.*

169. *Id.* at 160, 740 P.2d at 710. The court of appeals states, "[u]pon defendant's death, title to the real property devolved to Lopez and Trujillo. NMSA 1978, § 45-3-101(B)(3)." *Id.*

170. *Id.*; N.M. STAT. ANN. § 45-3-911(A) and (B) (1978).

171. *Lopez*, 106 N.M. at 160, 740 P.2d at 710; N.M. STAT. ANN. § 45-3-911(C) (1978).

172. *Lopez*, 106 N.M. at 160, 740 P.2d at 710.

173. *Id.* at 159, 740 P.2d at 709.

174. *Id.* at 159-60, 740 P.2d at 709-10.

175. *Id.* at 160, 740 P.2d at 710.

176. *Id.*; N.M. STAT. ANN. § 45-3-911(C) (1978). Practitioners should note that the court also held that Ms. Trujillo's partition proceeding be disposed of as part of the probate proceedings under N.M. STAT. ANN. §§ 45-5-1 to -9. By this procedural determination the court hoped "to facilitate a more efficient distribution of the estate" and to "minimize costs to the estate." *Lopez*, 106 N.M. at 160, 740 P.2d at 710.

> the other heirs, thus unilaterally divesting them of their interest in the property, where, as here, each heir was willing and able to buy out the other.[177]

Just as Solomon ordered two women to split the baby which they both claimed to have borne, so too the court of appeals practically ordered the daughter and wife to sell, and thus split, the family home. Both decisions were just. Both decisions were calculated to encourage settlement of a family squabble. The common problem raised by *Lopez* could have been prevented. The court of appeals sagely noted "this case illustrates the value of a will, even in a small estate, when there is more than one beneficiary and an asset is not easily divided."[178]

C. Warranty Deed Postponing Rights Until Death

Vigil v. Sandoval[179] may prove that the name is the game. Maria Eucarnacion Sandoval executed an instrument before a Notary Public in Chimayo, New Mexico, denominated "Warranty Deed."[180] The instrument described land located in Chimayo which included a five-room house and improvements.[181] In addition to the property description, the instrument recited: "Conditions: This instrument shall become effective only upon the death of grantor only. If grantor survives grantee this instrument will be void."[182]

Despite the testamentary tone of the grant from Maria to her grandson, Johnny, the court of appeals upheld the trial court's conclusion that the instrument conveyed a present interest in the property which was irrevocable upon delivery.[183] Both courts apparently treated the instrument as a deed passing fee simple title to Johnny and reserving a life estate in his grandmother, Maria.[184] The court of appeals seemingly ignored the additional condition found in the instrument: "If the grantor survives grantee, this instrument will be void."[185] The court rested its decision

177. *Lopez*, 106 N.M. at 160, 740 P.2d at 710.
178. *Id.* at 160-61, 740 P.2d at 710-11.
179. 106 N.M. 233, 741 P.2d 836 (Ct. App. 1987).
180. *Id.* at 234, 236, 741 P.2d at 837, 839.
181. *Id.* at 234, 741 P.2d at 837.
182. *Id.* at 234-35, 741 P.2d at 837-38.
183. *Id.* at 235-36, 741 P.2d at 838-39.
184. *Id.* The court of appeals referred to the trial court's findings numbered 3 and 5 which provided:

> 3. [T]he instrument presently conveyed a fee title to the Defendant, Johnny Sandoval, but postponed possession during the lifetime of [decedent].
>
> . . .
>
> 5. The conveyance is a valid deed with title in the Defendant, Johnny Sandoval, and that accordingly, the property is not a part of the decedent's estate.

185. *Id.* at 235, 741 P.2d at 838.

upon its determination of Maria's intent when she executed the instrument.[186] Its passing comment that "[c]ourts will construe a deed in such a manner that will uphold the validity of the conveyance, if possible," was perhaps the court's true polestar.[187] Normally, the grantor's intent is determined from the face of the document.[188] The "warranty deed" executed by Maria Sandoval conditioned delivery of a fee title upon her grandson. Basically, Maria said to her grandson, "The property described by this deed is yours only if I die before you do."[189] The delivery of the deed was conditioned. The general rule of property law is that there can be no conditional delivery to a grantee.[190] Courts have two choices under such circumstances. They can find a present intent in the grantor to make the deed operative. In such instances the delivery is absolute and the attempted condition fails. The other choice is to find that the condition itself negates any present intent and consequently, the court must conclude that no delivery of the deed occurred.

After a review of the evidence at trial, the court of appeals concluded that Maria intended to create a present interest in her grandson and therefore delivery of the deed to Johnny's father constituted effective delivery of a fee-simple title to the property to her grandson.[191] The court's holding negated the express condition found on the face of the warranty deed concerning survival, without so stating. The court, in such circumstances, did the best it could. Once again, the usefulness of a will, even in the case of a small estate, is apparent.

VI. CONCLUSION

The New Mexico courts' broadening of the notice requirements under the Tax Enforcement Act during the survey period brought the state into line with constitutional guidelines. In addition, common law developments enhanced this relatively new legislative scheme governing tax sales to provide some curative relief for property owners whose taxes are

186. *Id.* at 236, 741 P.2d at 839.

187. *Id.* at 235, 741 P.2d at 838.

188. *See, e.g.*, Birtrong v. Coronado Building Corp., 90 N.M. 670, 672, 568 P.2d 196, 198 (1977) (the "intention of the grantor must be derived from the language of the instrument of conveyance. . . .")

189. The court of appeals examined evidence which supported this conclusion. The notary public who drafted the warranty deed testified that Mrs. Sandoval told him that "she wanted to leave the real estate to her grandson, but that she also wanted security for herself." *Vigil*, 106 N.M. at 236, 741 P.2d at 839.

190. *See, e.g.*, Den-Gar Enterprises v. Romero, 94 N.M. 425, 429, 611 P.2d 1119, 1122 (Ct. App. 1980) where the court outlined the law controlling delivery of deeds and stated "[a] deed will not be regarded as delivered while anything remains to be done by the parties who propose to deliver it. . . . There must be *no* reservation made by the grantor nor any *suggestion* of recalling the deed." (citations omitted)(emphasis added).

191. *Vigil*, 106 N.M. at 236-37, 741 P.2d at 839-40.

delinquent. The survey discussed other New Mexico decisions which either enriched the state's body of common law or broke new ground in a wide range of areas affecting property rights. The variety of cases decided during the survey period should please the palate of most New Mexico practitioners. The courts' obvious efforts to achieve fair and just results should reassure these same practitioners.