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To the Holder of **Antiquity** Go the Spoils—or Do They?

With title to gold tablet in litigation, value is hard to pinpoint.

An ancient gold tablet excavated in Iraq is at the center of litigation between a museum that once displayed it and the estate of a Holocaust survivor.

NYLJ/RICK KOPSTEIN

A legal battle waged between the Estate of Riven Flamenbaum and the Vorderasiatisches, a German museum, each claiming title to a 13th century gold tablet which had last been seen prior to World War II on display at the museum has, for the moment, been resolved in favor of the estate. On March 30, 2010, Nassau County Surrogate John B. Riordan allowed the Flamenbaum estate to retain possession of the tablet, holding that the doctrine of laches barred the museum's claim.[1] The museum has appealed.

BY TERENCE E. SMOLEV AND MARY E. MONGIOI

The facts presented to the Nassau County Surrogate's Court in *In the Matter of Flamenbaum*[2] are more like those that capture our imagination when sitting in a movie theatre, bucket of popcorn at the ready. What is at stake, however, is far more compelling than the outcome of a Saturday matinee. The decision, currently on appeal (but as of this writing, not yet perfected) may have a tremendous impact on the body of law that governs the return of artifacts obtained during wartime, especially when these claims are asserted years later, after the death of citizens who have held the artifacts for decades and without any prior claim made or registered by the person and/or entity making claim against the estate.

In *Flamenbaum*, Surrogate Riordan held that where a claim is made for the return of such an item, when the claimant had reason to know the location of the item prior to the death of the owner and failed to take any action to secure its return, the item would remain in the hands of the estate based upon the doctrine of laches, rather than the ancient concept, (still generally accepted at the time Mr. Flamenbaum came into possession of the antiquity), that "to the victor go the spoils." That particular defense, asserted by the estate against the claimant, was not addressed by the court since the Surrogate ruled in favor of the estate based on the equitable defense of laches. The "spoils of war" defense asserted by the estate, while a more compelling theory, is certainly the more difficult defense in terms of proof, given the passage of time and the failure of the claimant to seek return of the item at the time it first learned of its possible possession by the decedent.

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The facts of this case are what initially caught the attention of the authors; however, it is the basis upon which the decision was reached and how the decision will affect the valuation of the relic and ultimately, what the heirs of Riven Flamenbaum can do with the artifact, which is the focus of this writing. How will the artifact be valued for estate tax purposes? Can the estate sell it to a bona fide purchaser for value, or will the court's decision, founded on laches, chill a sale such that the artifact is unmarketable and therefore, while priceless, without value? The case leaves these questions

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unresolved and should leave practitioners alert and wary of what to advise a client with similar assets, whether their existence comes to light during estate planning or during probate.

Tracing the History

A review of the trial transcript and the post-trial memorandum submitted by the various parties shows that they all agree on one thing: that in the chaos that was Berlin after the end of World War II, Riven Flamenbaum, a Polish citizen and Auschwitz survivor, somehow came into possession of a small gold tablet. Two theories were postulated. One, based on family lore, is that while in a holding camp in Germany after the end of World War II, Mr. Flamenbaum received Red Cross packages containing food and other items, including cigarettes. Penniless, he decided to trade cigarettes with a Russian general in exchange for the small gold tablet. Alternatively, as posited by the claimant, Russian troops, German troops, people who lost their homes, and other war survivors, including Mr. Flamenbaum, took refuge at the Vorderasiatisches Museum in Berlin and pillaged valuable items from the museum, including the small gold tablet.

When and where Mr. Flamenbaum acquired the tablet will forever remain a mystery.[3] What we do know is that in 1949 Mr. Flamenbaum arrived in the United States with the small gold tablet to start a new life. Today, the tablet may be worth as much as $10 million,[4] or it may be nothing more than a family heirloom which cannot be sold by the estate due to the cloud that exists on title to the tablet. Mr. Flamenbaum, the only person who can speak to the manner in which he took possession, has passed on, and those who can tell his story, silenced by the constraints of the Dead Man's Statute and the hearsay rules.

The testimony at trial and the report of claimant's expert admitted at trial established that the tablet was discovered in 1913 when a German team of archaeologists performed archaeological excavations in the ancient city of Ashur, now Qual'at Serouat, Iraq. Found in the Ishta temple in Ashur, the tablet dates back to the era of 1243 to 1207 BCE.

In 1914, while in transport to Germany, the Portuguese government confiscated and stored the tablet until 1926 at which time it shipped the tablet to the Vorderasiatisches Museum in Berlin. From 1934 to 1939, the Vorderasiatisches Museum displayed it. When it became apparent that war was inevitable, the museum closed and placed the gold tablet in storage. At the conclusion of the war in 1945 the museum conducted an inventory and discovered the tablet was missing.[5]

In 1954, a German assyriologist H.G. Güterbock, then a professor at the Oriental Institute at the University of Chicago, saw what he believed was the missing tablet in the possession of a New York dealer and reported the same to the museum. The museum kept a record of this sighting. It is this record which the estate used, in part, to persuade the court that the laches defense was valid.

In 1983 Mr. Güterbock's observation was recorded in Donald K. Grayson's book on antiquities.[6] Still no action was taken by the museum. For more than 60 years, the museum took no action—it did not contact the New York art dealer, the New York Police Department, the Federal Bureau of Investigation, or Interpol, nor did it register the tablet as missing with an international art registry.[7] It was not until three years after the tablet was discovered in Mr. Flamenbaum's safe deposit box, upon his death in 2003, that the museum made a claim for the tablet.[8]

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In 2006, the museum received correspondence from Mr. Flamenbaum's son, Israel, who through his attorneys, stated: "I have been advised that among the property to be distributed by the executrix is a small gold tablet. Efforts were undertaken to determine the origins and value and I have been provided information that suggests that this amulet may have been part of your museum's inventory…."[9] Subsequently, the museum filed a notice of claim for the tablet with the Nassau County Surrogate's Court.[10]

Defense of Laches

The estate raised numerous defenses to the museum's claim of ownership, the most significant being the equitable defense of laches, asserting that the museum's unreasonable delay in bringing a claim against Riven Flamenbaum during his lifetime so prejudiced him and his estate as to bar the claim. The estate successfully argued that: "[H]ad any action been taken, the decedent would have still been alive, and, if the Tablet which was sighted in the hands of the New York dealer was in fact the same Tablet which the Museum now makes a claim to, a proper showing of a chain of possession or title could have been demonstrated by the dealer or decedent. The Museum's delay, however, has removed any such opportunity to do so."[11]

The museum, in an effort to defeat the laches defense, proffered for its lack of action, that it had been located in East Berlin, under Russian control, and that the Russian state would not permit the claim, because it did not want to establish a precedent for return of art taken from Germany as "spoils of war." At trial, the museum director also testified that with regard to the 1954 sighting of the tablet, the museum believed it would be "unreasonable to require a museum located in East Berlin to follow up on this vague, unsupported rumor in New York at the height of the cold war."[12]

Surrogate Riordan found these arguments unpersuasive, and in direct contradiction to the facts which support the holding in *Kunstsammlungen Zu Weimar v. Elicofon*, a U.S. Court of Appeals, Second Circuit, case. There, the court held that a German museum engaged in a diligent search after two priceless Albrecht Durer paintings were stolen in 1945 in East Germany. The German museum, Staatliche Kunstsammlungen zu Weiman (predecessor to "KZW"), displayed the paintings before they were transported to a nearby castle for safekeeping during the war.

The director of the museum discovered the theft while inspecting the castle. The director immediately reported the theft and engaged in a diligent search to find the paintings. The director contacted multiple German museums, the Allied Control Council, the Soviet Military Administration, the U.S. State Department, and the Fogg and Germanic museums at Harvard, but was unsuccessful

in locating the paintings. When KZW located the paintings in 1966, both the U.S. District Court and the Second Circuit granted its request for recovery of the paintings, finding its efforts to locate the paintings were reasonably diligent and, as such, not barred by the doctrine of laches.[13]

In *Flamenbaum*, the Surrogate highlighted the fact that even if one credited the testimony of the director with respect to the inability to make a claim while under Soviet control, the museum took no action to report the theft after the collapse of the Berlin Wall in 1989, which lessened the political and financial restraints throughout Germany. Therefore, the court found the doctrine of laches barred the museum's claim.[14]

Determining Value Today

How valuable is the tablet today? This answer depends on the marketability of the item and whether or not the determination that the estate remain in possession of the relic is enough to establish good title such that a bona fide purchaser would be willing to pay full value for the item. It is has been opined that if the estate decides to sell the tablet, its value can range from zero to $10 million. This range of value is due, in part, to the doctrine of laches. Laches is a personal defense which necessarily depends on the defendant's relationship to the plaintiff.[15] If the estate can successfully market and sell the tablet, the subsequent possessor of the tablet may or may not have a valid defense of laches against the museum's claim of ownership.

The court will have to determine if tacking of the predecessor's holding time by a successor interest is allowed. There is no case law on point to discuss the issue of tacking with regard to ownership rights. In a somewhat analogous area of law where the issue of tacking has arisen, patent rights, courts are divided if a successor patent infringer can tack on the infringement of a predecessor and raise laches as a defense.[16]

This is clearly not the first time a museum or a sovereign nation has sought to recover artwork or an antiquity from an individual or nation that has possession of a piece it believes rightfully belongs to them. The cases are numerous, and all are fact-driven. It must be understood and remembered however, that before a court can determine whether or not an individual, a museum, an estate or even a sovereign nation is the rightful owner of a particular piece of art or an artifact, it must determine, if at all possible, how that article came to be in possession of the present owner. Was the item confiscated by a government? Was it stolen? Was it traded or bartered for from a person who held it rightfully or was it simply misplaced or lost? The manner in which it was obtained will determine to whom the item belongs on a case-by-case basis. This determination is complicated by the passage of time, and the difficult, if not impossible task, of obtaining true and impartial information. The transactions and events that are at issue occurred during a period in history when the world was in turmoil and record-keeping nearly non-existent.

Based upon the facts as presented in *Flamenbaum*, it would appear to the authors that the laches defense and the decision of the Surrogate will be upheld by the Appellate Division, Second Department, due to the inaction of the museum for so many years. The problem for the estate and the heirs is where does such a holding leave them?

If there is no buyer willing to take on the risk of litigation with the museum which is almost certain to follow a purchase, then the artifact, while priceless, is for all intents and purposes worth nothing, despite the value of $10 million that Stephen Schlesinger, attorney for the estate attached to the artifact when discussing the case in the New York Daily News. Mr. Schlesinger may very well be correct if the right of possession clears title to the piece such that the estate can convey good title, rather than just retain the right of possession. If Mr. Flamenbaum were alive and could testify, it is possible that he could prove that he traded for the item with a Russian general who rightfully owned the piece as a "spoil of war." If so, his children would have good title and not mere possession and the piece would indeed be priceless.

The victory based on laches may not financially benefit the estate beyond the right to keep and hold a family heirloom, and it remains to be seen how the Internal Revenue Service will treat the object for estate tax purposes. Perhaps the Appellate Division will shed light on the doctrine of laches and whether, in this case, title as well as possession devolved to the estate.

Where does this leave us as estate practitioners? What should we tell a client who holds such an item at the time we draft an estate plan? What should we advise heirs when an estate has such a piece in its inventory? The best advice the authors can give is that one must be certain to discuss these issues with the clients so that they are aware of the potential pitfalls and claims that may lie ahead of them and are not taken by surprise when something thought long forgotten becomes a clear and present issue which will involve the expenditure of time and money, and embroil the family in a shadowy past about which the truth may never be revealed.

1. *In the Matter of Flamenbaum*, 27 Misc.3d 1090, 1100, 899 N.Y.S.2d 546, 554 (Nassau Co. Sur. 2010).
2. *In the Matter of Flamenbaum*, id.
3. Trial transcript, 9-10.
4. New York Post.
5. *Flamembaum*, supra, 899 N.Y.S.2d at 548-49.
6. Dr. Frahm's Report, 3-4. Grayson, D.K., "The Establishment of Human Antiquity" (New York: Academic Press 1983).
7. *Flamenbaum*, supra, 899 N.Y.S.2d at 552-53.
8. Id. at 548-49.
9. Museum's Summation, 4.
10. *Flamenbaum*, supra, 899 N.Y.S.2d 546, 549.
11. Estate's Post-Trial Memo, 9.
12. Museum's Reply Brief, 9.
13. *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1152, 1155-56, 1165-66 (2d Cir. 1982).
14. *Flamenbaum*, supra, 899 N.Y.S.2d at 553-54.
15. *Eastman Kodak Co. v. Rakow*, 739 F.Supp. 116, 120 (WDNY 1990).
16. *Raber v. Pittway Corp.*, No. C 92-2581, 1994 WL 374542, at *3 (N.D. Cal. July 11, 1994).