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JURISDICTION IN PROBATE –

PARTIES, BENEFICIARIES, INTERESTED PERSONS, IN REM, IN PERSONAM

WHAT DO YOU NEED AND HOW DO YOU GET IT?

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A. History of Probate Jurisdiction

Florida Statute §2.01 provides:

> The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.

Before July 4, 1776 in England, matters sounding in probate were handled in neither a law nor an equity court, but in ecclesiastical courts.

In Florida, probate jurisdiction was vested under the state constitution in the county judge's court until the constitutional revision of 1972, which eliminated that court and granted exclusive probate jurisdiction to the circuit court. This is so-called "subject matter jurisdiction". The circuit court has "subject matter jurisdiction" of all probate proceedings filed in that circuit. The shortcut to determining subject matter jurisdiction in a probate matter is to ask the question "are we in the circuit court?" Subject matter jurisdiction is often incorrectly confused with the court's jurisdiction over the *rem.*

The 1972 constitutional revision rendered a great many procedural problems moot. Among these issues were questions as to whether a will construction could be brought in the county judge's court or the circuit court, whether the validity of a will could be attacked in a declaratory judgment proceeding in the circuit court, and various other matters, such as the proper form of an action to determine the ownership of property passing under right of survivorship as against the right of the personal representative arising because of the donor's failure to make a present gift.

B. Territorial Jurisdiction and Venue

The primary venue for the probate of a decedent's estate is the county of the decedent's domicile at the time of his or her death. *F.S. §* 733.101(1)(a). Alternatively, if the decedent had no domicile in Florida, the probate of a decedent's estate may be had in any county where the decedent's property is located. *F.S. §* 733.101(1)(b). Thus, a Florida court may have jurisdiction over the administration of a decedent's estate if Florida was the decedent's domicile at the time of death, or alternatively may have original jurisdiction (as opposed to ancillary) even if the decedent was domiciled in another state but owned

property in Florida at the time of death. *F.S. §* 733.101; *Cuevas v. Kelly*, 873 So.2d 367 (Fla. 2d DCA 2004); see Smith, 2 FLORIDA PROBATE CODE MANUAL §9.03 (Matthew Bender & Co. 2008).

The court's jurisdiction is limited to the territory belonging to the sovereign on behalf of which it functions. The jurisdiction of the circuit court (and in fact all Florida courts) extends to the boundary limits of the State of Florida. However, the "local action rule" is a limitation on the court's subject matter jurisdiction. This rule is applicable in proceedings such as quiet title or mortgage or other lien foreclosure.

> Florida adheres to the local action rule which dictates that when real property is in controversy, "jurisdictional authority exists over the property only in the circuit where the land is situated." *Ruth v. Dep't of Legal Affairs*, 684 So.2d 181, 185 (Fla.1996). Thus, an *in rem* suit, in which the real property is the primary dispute and the parties are seeking to act directly on the property or the title, may only be entertained in the circuit where the property is located.

Hammond v. DSY Developers, LLC, 951 So.2d 985, 988 (Fla. 3d DCA 2007)

An exception to the local action rule provides that a court in one county can determine or transfer title to real property located in another county if determination or transfer of that title is only incidental to the main proceeding. *Bauman v. Rayburn*, 878 So.2d 1273 (Fla. 5th DCA 2004). The central purpose of a probate proceeding would be to marshal assets, pay creditors and taxes and sell or distribute estate assets to beneficiaries and only incidentally to determine or transfer title to real property. There is no reported case of the local action rule being applied to a probate administration.

It is possible, if a decedent died domiciled in another state owning personal property in Florida, that both states have jurisdiction over the original administration of that property. *Cuevas*. "[Which] state must defer to the finding of a sister state depends on the facts of the particular case." *Id*. at 371. Ordinarily, personal property will be administered by the domiciliary court. *Id.*, citing *Saunders v. Saunders,* 796 So.2d 1253 (Fla. 1st DCA 2001). Once the domiciliary court determines that the decedent was domiciled there, that court has the right to determine the distribution of the decedent's personal property, wherever it is located. *Cuevas*. Although it is possible for courts in two states to find that court has original domiciliary administration of the estate of a decedent, ordinarily the court first exercising its jurisdiction is the court which will proceed with the administration.

C. Subject Matter Jurisdiction

Jurisdiction over proceedings "relating to the settlement of the estate of decedents and minors, the granting of letters testamentary, . . . and other jurisdiction usually pertaining to courts of probate" is vested in the circuit court. Art. V, §20(c)(3), Fla. Const.

Florida Statute Section 26.012 Jurisdiction of circuit court provides:

* * *

(2) [The circuit court] shall have exclusive original jurisdiction:

* * *

(b) Of proceedings relating to the settlement of the estates of decedents and minors, the granting of letters testamentary, guardianship, involuntary hospitalization, the determination of incompetency, and other jurisdiction usually pertaining to courts of probate;

This is the "subject matter" jurisdiction to administer estates.

The circuit court has the inherent jurisdiction to supervise the administration of estates and to take whatever actions it considers necessary to preserve the assets of the estate for its beneficiaries. *Estate of Conger v. Conger*, 414 So.2d 230 (Fla. 3d DCA 1982); see Smith, 2 FLORIDA PROBATE CODE MANUAL §9.03 (Matthew Bender & Co. 2008). This includes the power to help marshal assets of an estate and to issue a temporary injunction freezing assets claimed to belong to an estate. *Landau v. Landau*, 230 So.2d 127 (Fla. 3d DCA 2017).

Article V, sec. 7 of the Florida Constitution provides "All courts except the supreme court may sit in divisions as may be established by general law." The circuit court, in most counties (but not all), is divided into divisions for convenience and efficiency as may be provided by local rule or administrative order of the chief judge. However, each division, including the probate division, is staffed by circuit judges. "All circuit court judges are empowered to hear and determine any case properly within the [circuit] court's jurisdiction." *Payette v. Clark*, 559 So.2d 630, 633 (Fla. 2d DCA 1990) (reproduced on page 67 of this outline). The reference is to the "court's" jurisdiction, not to the "division's" jurisdiction. Circuit judges in the probate division have "jurisdiction" to hear criminal cases or personal injury cases, for example, even though the clerk may not, under the applicable rule or order, assign such cases to that division. See *Willie v. State*, 600 So.2d 479 (Fla. 1st DCA 1992); see also *Grossman v. Selewacz*, 417 So.2d 728 (Fla. 4th DCA 1982) (judge assigned to civil division has jurisdiction to hear probate matter); *In re Guardianship of Bentley*, 342 So.2d 1045 (Fla. 4th DCA 1977) (judge assigned to probate division has

jurisdiction to hear civil matter). Therefore, a personal injury action may properly be "filed" in the probate division, if the clerk will accept it, and it will not be subject to a motion to dismiss for lack of "jurisdiction." However, the action may be subject to a motion to transfer to the appropriate division under the applicable rule or order directing what cases are to be assigned to the probate division. In several counties in Florida that do not have a "probate division," this is not an issue. Also it is not unusual for circuit judges to sit in 2 or more divisions. For example, a circuit judge may sit in the family division and the probate division.

Subject matter jurisdiction is not affected by the decedent's domicile. Domicile is distinguishable "from the general power of the court to adjudicate the class of cases to which the subject matter of the case belongs." *In re Estate of Dalton*, 246 So.2d 612, 614 (Fla. 3d DCA 1971). Objections to venue or jurisdiction based on an allegation that the decedent was not a Florida domiciliary are waived if not filed during the period allowed by *F.S. §* 733.212(3) *Klem v. Espejo-Norton*, 983 So.2d 1235 (Fla. 3d DCA 2008); *Pastor v. Pastor*, 929 So.2d 576 (Fla. 4th DCA 2006); *In re Estate of Dalton*. Subject matter jurisdiction, on the other hand, cannot be waived and can be attacked at any time and by any party, including on appeal or in a collateral attack years later. *Fla.R.Civ.P.* 1.140(h)(2). It can be raised for the first time by the appellate court on its own initiative even if not raised by either party at the trial level. "Although the trial court's jurisdiction to enter the order in question was not raised below or on appeal, it is the duty of this Court to remain vigilant to the issue of subject-matter jurisdiction." *Hammond v. DSY Developers, LLC*, 951 So.2d 985 (Fla. 3d DCA 2007). A court cannot proceed in a matter without subject matter jurisdiction, and any order or judgment issued by a court without subject matter jurisdiction is unwaivably void and not entitled to full faith and credit. See Stephens, *Florida's Third Species of Jurisdiction*, 82 Fla. Bar J. 10 (March 2008), for an excellent discussion of different types of jurisdiction and the different effects they have on a proceeding.

D. In Personam and In Rem Jurisdiction

1. In General

In addition to jurisdiction over the subject matter, the court must also have jurisdiction either over the person or over the res. In personam jurisdiction is over the person and in rem jurisdiction is over the res or "thing." See PRACTICE UNDER FLORIDA PROBATE CODE §§3.6–3.7 (Fla. Bar CLE 5th ed. 2007).

It has long been acknowledged that a probate proceeding is an in rem proceeding. *In re Estate of Williamson*, 95 So.2d 244 (Fla. 1957), 65 A.L.R.2d 1195; *F.S. §* 731.105. An in rem proceeding is one in which the court has jurisdiction over the property and, after reasonable notice that complies with due process requirements, the court may decide the rights of persons to that property. *Royalty v. Florida Nat. Bank of Jacksonville*, 127 Fla. 618, 173 So. 689 (1937); 12A FLA.JUR.2d *Courts and Judges* §60.

To have in rem jurisdiction, the court must have jurisdictional authority over the property that is the subject matter of the case or controversy. *Ruth v. Dept. of Legal Affairs*, 684 So.2d 181 (Fla. 1996); see *Padovano*, FLORIDA CIVIL PRACTICE §1.3 (Thomson/West 2007-2008 ed.). In most probate proceedings, the estate being administered is the property (or "*res*") over which the court has jurisdiction. *Pitts v. Pitts*, 120 Fla. 363, 162 So. 708 (1935). In addition, the court may acquire jurisdiction over certain of the parties. The type of jurisdiction acquired or required depends on the particular proceeding within the estate administration. An adversary proceeding does not necessarily contemplate nor require in personam jurisdiction. See Chapter 3 of PRACTICE UNDER FLORIDA PROBATE CODE for extensive commentary on probate jurisdiction.

2. Personal Jurisdiction In Probate Proceedings

In personam jurisdiction is required to support a personal judgment or order. 12A FLA.JUR.2d *Courts and Judges* §45. In personam jurisdiction in probate is acquired after service of process, waiver, or voluntary appearance. 12A FLA.JUR.2d *Courts and Judges* §§48–49, 53. Formal notice does not support in personam jurisdiction unless it already exists, as for example, a surcharge action against a personal representative. In that instance, the notice is adequate and proper to give notice of the proceeding, but is not adequate to

acquire in personam jurisdication. *Fla. Prob R.* 5.025(a),(d). *Kozinski v. Stabenow*, 152 So.3d 650 (4th DCA 2014).

In addition to service of process, in personam jurisdiction may be acquired in probate proceedings by consent, by the voluntary general appearance of an interested person, or by an interested person asking the court for affirmative relief. *Babcock v. Whatmore*, 707 So.2d 702 (Fla. 1998); *Paradise of Port Richey v. Estate of Boulis*, 810 So.2d 1044 (Fla. 4th DCA 2002). The in personam jurisdiction, however, probably is limited to the subject matter of that special proceeding within the administration. *Brasch v. Brasch*, 109 So.2d 584 (Fla. 3d DCA 1959). It is the authors' view that voluntary appearance for one purpose (for example, a spouse's notice of election) does not confer in personam jurisdiction for an unrelated purpose (for example, recovery of joint accounts). But see *Markowitz v. Merson*, 869 So.2d 728 (Fla. 4th DCA 2004), in which minimal actions by a beneficiary in an estate administration were deemed to be a waiver of objections to personal jurisdiction for the separate matter of determining the ownership of contested assets that were located in a different state in the possession of the beneficiary and *Brodfuehrer v. Estate of Brodfuehrer*, 833 So.2d 784, 27 (Fla. 3d DCA 2002), where the court found that filing a claim, filing a motion to extend time to file an independent action and filing a motion to sever the claim (from another claim by another party filed with it) conferred personal jurisdiction over the claimant for purpose of ordering the claimant to return property belonging to the estate.

In personam jurisdiction over the personal representative is acquired by the filing of the petition for administration and is for all purposes related to the administration, including surcharge. *Payette v. Clark*, 559 So.2d 630 (Fla. 2d DCA 1990). Frequently, in a probate administration, the personal representative is the only person over whom the court has in personam jurisdiction. It is important to keep in mind that even if in personam jurisdiction is present, such as by filing a petition for administration, proper notice complying with due process and, if service is not in-state personal service, minimum contacts is also necessary to obtain a valid judgment or personal order (an injunction, for example.) Most often it is not the court's jurisdiction that is the issue, but the notice.

Once personal jurisdiction is gained over a fiduciary (in this case, a personal representative), that personal jurisdiction is persistent and pervasive. In *Levey v. Adams*, 609 So.2d 163 (Fla. 4th DCA 1992), the court held that a nonresident personal

representative had submitted himself to personal jurisdiction in the Florida courts for an alleged breach of contract with his lawyers by serving as personal representative of a Florida estate and retaining and agreeing to pay attorneys for their representation. The court in *Laushway v. Onofrio*, 670 So.2d 1135 (Fla. 5th DCA 1996), found Laushway guilty of undue influence and rejected a challenge to its jurisdiction to order Laushway to account for property given to him by the decedent prior to the decedent's death. The court held that "the trial court had the authority to continue jurisdiction over Mr. Laushway and any property in his possession to which the estate has a claim, including *inter vivos* gifts which the court considered procured by undue influence." *Id.* at 1136.

A personal judgment may not be entered against one over whom the court does not have in personam jurisdiction, although a judgment affecting property rights may be entered based solely on in rem jurisdiction. For example, a judgment determining that one is not an heir at law may be entered based on formal (mailed) notice, even though the person never appears or defends. In this instance, the court has jurisdiction over the property or res (the estate) and over the person's interest in the estate (assuming there has been proper due process (formal notice)), but the action is in rem only. In other words, formal notice will give the court jurisdiction to determine a person's interest in the assets of the estate, but will not support a personal judgment, for example to pay required contribution to estate tax by a joint account owner or provide contribution for elective share, against that person.

An interesting case is *Payette v. Clark*. (Attached at page 67.) In an intestate administration, probate was commenced, a personal representative appointed, distribution accomplished, and the estate closed, all without any notice to one of two branches of the family. The omission was intentional. Four years later, the omitted beneficiary learned of the probate and petitioned for subsequent administration under *F.S. §* 733.903. Of the five distributees, only one, the personal representative, was a resident of Florida. The only connection the nonresident distributees had with the administration was to file consent to the personal representative's appointment and request that he be appointed without bond, and, of course, to receive their share of the estate.

In the subsequent proceedings, the nonresident beneficiaries were served by registered mail. The court correctly determined that as to two counts that stated a cause of action for money damages, such service was inadequate. ("Such service is insufficient to

confer personal jurisdiction . . . for money damages.") Even though the lower court dismissed these counts for that reason, the proper action was simply to quash the service but to leave the counts pending, presumably so proper service may be subsequently attempted.

However, as to the probate relief requested (and the case is silent as to what that relief was other than reopening the estate), the court found that "participation in the estate process by the remaining appellees is sufficient to constitute a voluntary submission to the jurisdiction of the court for the purpose of determination of counts one through four of the petition." *Payette*, 559 So.2d at 634. The opinion never states what relief is requested in these counts but the implication is that they requested refund of part of the distribution. The participation by these non-resident beneficiaries in the estate constituted their filing of a consent to the appointment of the personal representative and request that bond be waived. If this was their only participation in the proceedings, one would think that did not constitute waiver of proper service, contrary to the court's ruling. The case suggests that service of formal notice was sufficient to allow the court to exercise personal jurisdiction over the respondents. That holding is clearly wrong. This case has cited subsequently as authority for this proposition.

There is also a line of cases beyond *Payette*, and generally relying on that case, that hold where a person is an interested person in an estate, formal notice is sufficient to acquire in personam jurisdiction over that person which will support a personal judgment or a personal order. Kountze v. Kontze, 20 So.3 428 (Fla 2d DCA 2009), *Hall v. Tungett*, 980 So.2d 1289 (Fla. 2d DCA 2008), *Galego v. Robinson*, 695 So.2d 443 (Fla. 2d DCA 1997) and cases limited to estate attorney's fees, Roberts & Wells v. Winston, 662 So.2d 1303 (Fla. 4th DCA 1995), *Simmons v. Estate of Baranowitz*, 189 So.2d 819 (Fla. 4th DCA 2015).

The case does contain an interesting analysis of the difference between subject matter jurisdiction and personal jurisdiction. It also correctly notes the distinction between quashing service when it is defective and dismissing the cause of action.

In *Simmons v. Estate of Baranowitz*, 189 So.3d (Fla. 4th DCA 2015), a beneficiary objected to the amount of compensation paid to the attorney for the personal representative and served only informal notice on the personal representative. An evidentiary hearing was held and the court entered an order directing the attorney to refund a portion of the fee paid.

The attorney appealed arguing that he was not a party to the proceeding, and the court had no jurisdiction over him to order a refund. The appellate court overturned the trial court order, but went astray when it held that the objector should have served the attorney with formal notice. In fact, if a personal order or judgment was to be entered against the attorney, the attorney must be a party to the proceeding and must be served with process.

Another case that could be clearer on the subject is *Rogers & Wells v. Winston*, 662 So.2d 1303 (Fla. 4th DCA 1995) (reproduced on page 68 of this material.) In that case, a New York law firm that performed (mostly tax-related) legal services for the personal representative of a Florida estate, which services were performed mostly in New York, "was doing business in Florida and should have foreseen that it would be haled into a Florida court in the event of litigation over the services performed for the estate." *Id.* at 1304. Unfortunately, this case picks up on the incorrect interpretation of formal notice from *Payette* and applies it. It rejects a challenge to the service when formal notice was used rather than service under the Florida Rules of Civil Procedure. The court held "that rule 5.041(b), Florida Rules of Probate only requires notice be mailed to all interested persons. Rogers & Wells is an interested party as defined by rule 5.041 . . . and section 731.201(21), Florida Statutes, and therefore service by mail was appropriate. *See Payette v. Clark*." *Id.*

The shortcoming of this case is its reach. The opinion determines that the Florida court having jurisdiction over the probate also has jurisdiction to determine the propriety of fees paid to the attorneys or agents of the personal representative, even if those agents or attorneys are located in another state. In that instance, formal notice is used to give constitutional due process. In the opinion of the authors, in an in rem determination, that would be sufficient. However, practitioners should note the provision in *F.S. §* 733.6175(3) to the effect that "[a]ny person who is determined to have received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds." The statute creates the right of recovery, but does not and cannot dispense with the requirement that the defendant must still receive notice consistent with due process. Unless the means to enforce the court's determination regarding the fee is within the custody of the court, thereby allowing in rem jurisdiction, due process notice is still a requirement for any personal judgment to be entered by the court.

This improper direction that courts seem to be pursuing regarding formal notice and in personam jurisdiction is the subject of a proposed new statute that has been approved

by the RRPTL section of The Florida Bar and will be in its legislative package presented for the 2019 legislative session. *F.S. §* 731.301(2) will have the underlined language added:

> (2) In a probate proceeding, formal notice is sufficient to acquire jurisdiction over the person receiving formal notice to the extent of the person's interest in the estate or in the decedent's protected homestead. Formal notice is not sufficient to invoke the court's personal jurisdiction over the person receiving notice regardless of the manner in which it is served.

Another example of the reach of in personam jurisdiction is *Ciungu v. Bulea* 162 So.23 290 (1st DCA 2015). In this case, the estate was intestate and the decedent was survived by 3 children. Two of the children were personal representatives of her Florida estate and the other child had some form of control over title to decedent's real property located in Romania, perhaps as a personal representative in that jurisdiction. All three were entitled to an equal intestate share in both jurisdictions. The one sibling had apparently not transferred title to the Romanian property to her two siblings, and the local probate court ordered her to do so. The U.S. court could not make an order transferring the title because the property was outside its territorial jurisdiction, but, because it had in personal jurisdiction over all 3 children (this was agreed by all and not an issue), it ordered the 3rd sibling to transfer the title to the Romanian property in 3 shares and ordered the local personal representatives to withhold distribution of the Florida estate until this had been done.

3. Formal Notice And In Rem Jurisdiction

Formal notice (*Fla.Prob.R.* 5.040) is not a pleading or paper. It is *only* a method of service used in probate proceedings. The document "Formal Notice" does not take the place of a summons. However, service by formal notice is one method of complying with the constitutional due process notice requirements necessary to invoke the in rem jurisdiction of the court, and is "sufficient to acquire jurisdiction over the person receiving formal notice to the extent of the person's interest in the estate." *F.S. §* 731.301(2).

Rule 5.040 requires that, in addition to a copy of the pleading or motion, the (formal) service must include a notice requiring the person served to serve written defenses within 20 days and advising the person so served that failure to file and serve defenses may result in a judgment or order for the relief demanded *without* further notice. An

accompanying letter or instruction sheet would meet the requirements of the rule, but the use of the appropriate form is still strongly recommended.

Also noteworthy is subdivision (a)(3)(A)(iv) to *Rule* 5.040, governing service of formal notice on a minor. This revision to *Rule* 5.040 was implemented in direct response to *Cason ex rel. Saferight v. Hammock*, 908 So.2d 512 (Fla. 5th DCA 2005). Prior to this revision, the rule did not specifically address how formal notice was to be made on a minor. The court held in *Saferight* that, to the extent the rule allowed service on a minor simply by delivering the notice to the minor's usual place of abode and obtaining his or her signature or the signature of another minor of very young age who may also reside there, "[t]his method of service does not adequately safeguard the due process rights of minors who receive the notice and may not understand its significance or have the ability to take the necessary steps to ensure that their rights are protected." *Id.* at 516. Service of formal notice on a minor must be served on the persons designated to accept service of process on a minor under *F.S. §* Chapter 48. See *F.S. §* 48.041 governing service of process on a minor by serving a parent or guardian as provided in *F.S. §* 48.041.

In summary, formal notice is a method of service, not a summons or judicial process. The paper titled "Formal Notice" is not formal notice. Service of that paper or service by formal notice does not confer in personam jurisdiction. Rather, service by formal notice confers in rem jurisdiction on the court. *F.S. § 731.301(2).*

Service by formal notice is effective only for those persons "interested" in the assets of the estate, and only to the extent of that interest. *F.S. §* 731.301(2); *In re Estate of Vernon*, 608 So.2d 510 (Fla. 4th DCA 1992). An "interested person" is "any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved." *F.S. §* 731.201(23). The court in *Vernon* found that the use of the less restrictive method of service set forth in *F.S. §* 731.301 (formal notice) applies only to persons who continue to have an interest in the probate estate. It quashed service on a person who had no interest in the estate who was alleged to be holding assets belonging to the estate. Compare *Markowitz v. Merson*, 869 So.2d 728 (Fla. 4th DCA 2004), which reached the opposite result (discussed below).

Another case that demonstrates the ineffectiveness of service of formal notice on persons who are not interested in the assets of the estate is *Galego v. Robinson*, 695 So.2d 443 (Fla. 2d DCA 1997). In that case the co-personal representatives of the decedent's

estate brought an action against the holder of a durable power of attorney (the appellant) for the decedent, alleging mismanagement of the decedent's assets through the use of this power. The appellant was not a beneficiary, claimant, or administrator of the decedent's estate and, in fact, had no interest in the estate. The court held that, because the appellant was not an interested person in the estate, service by formal notice was improper; the appellant was entitled to the traditional form of service of process under *F.S. §* 48.031. Also noteworthy is that the appellant's actions in admitting the will to probate did not subject the appellant to the personal jurisdiction of the probate court. Furthermore, it seems as if the court applied a minimum contacts standard to find that he had not exercised the power of attorney in Florida and there were insufficient jurisdictional allegations in the pleading. The case is difficult to understand because the minimum contacts test is not applied until after there is an effective service, but for the minimum contacts. Here, there apparently was not.

An adversary proceeding does not necessarily contemplate nor require in personam jurisdiction. If relief greater than merely determining a person's interest in the assets of an estate is requested, more than in rem jurisdiction will be required. For example, if the personal representative wishes to recover joint account transfers from an estate beneficiary, unless some form of jurisdiction over the subject matter or res (the accounts) could be obtained, it would be necessary to obtain in personam jurisdiction over the person to support entry of a personal judgment. The earlier service of formal notice on the beneficiary, or even a new formal notice, would be insufficient. In personam jurisdiction may be acquired, however, by consent or voluntary general appearance, or by asking for affirmative relief that goes to the merits of the case. *Babcock v. Whatmore*, 707 So.2d 702 (Fla. 1998); *Paradise of Port Richey v. Estate of Boulis*, 810 So.2d 1044 (Fla. 4th DCA 2002). Otherwise, in personam jurisdiction would probably have to be obtained by service of original process under seal of court by personal or substitute service, in the manner of a civil action. It should also be noted that, with regard to service of process, a respondent who takes any action in the proceeding other than moving to quash the service will be deemed to have waived any objection to service. *EGF Tampa Associates v. Edgar V. Bohlen, G.F.G.M. A.G.*, 532 So.2d 1318 (Fla. 2d DCA 1988); *Krasnosky v. Krasnosky*, 282 So.2d 186 (Fla. 1st DCA 1973). The procedure that formerly required a party wishing to contest service or jurisdiction "appear specially" to avoid waiving objections to service is

no longer required. As long as the appearance is actually limited to contesting jurisdiction or service, that appearance will not constitute a waiver.

There is a question whether the right of offset provided in to an estate in *F.S. §* 733.809 could be invoked in this instance, to the extent of a person's distributive interest in an estate, without the necessity of a separate civil action and requirement for personal service or without in personam jurisdiction. The answer, in the view of the author, leans slightly more to the "yes" side. See *F.S. §* 731.301(2). This is because the court is only acting on property within its control, the fund against which the setoff will be imposed.

4. Personal and In Rem Jurisdiction in Trust Proceedings

Trust litigation generally does not proceed in the same manner as probate litigation. That is to say, the Florida Rules of Civil Procedure and other civil procedures are initially applicable to trust litigation, even though many circuits have a local rule or administrative order providing that trust litigation is to be assigned into the probate division. For example, formal notice is not available for use in trust litigation. The question often arises, "How do we acquire jurisdiction and how do we serve a trustee or a beneficiary of a revocable trust that has become irrevocable upon the death of the settlor?"

In 2013, the RPPTL section drafted and offered legislation that was enacted into law as *F.S. §* 736.0202 and 736.02025, as reproduced below to add clarity to those questions.

> **736.0202 Jurisdiction over trustee and beneficiary.—**
>
> (1) IN REM JURISDICTION.—Any beneficiary of a trust having its principal place of administration in this state is subject to the jurisdiction of the courts of this state to the extent of the beneficiary's interest in the trust.
>
> (2) PERSONAL JURISDICTION.—
>
> (a) Any trustee, trust beneficiary, or other person, whether or not a citizen or resident of this state, who personally or through an agent does any of the following acts related to a trust, submits to the jurisdiction of the courts of this state involving that trust:
>
> 1. Accepts trusteeship of a trust having its principal place of administration in this state at the time of acceptance.
>
> 2. Moves the principal place of administration of a trust to this state.
>
> 3. Serves as trustee of a trust created by a settlor who was a resident of this state at the time of creation of the trust or serves as trustee of a trust having its principal place of administration in this state.
>
> 4. Accepts or exercises a delegation of powers or duties from the trustee of a trust having its principal place of administration in this state.

> 5. Commits a breach of trust in this state, or commits a breach of trust with respect to a trust having its principal place of administration in this state at the time of the breach.
>
> 6. Accepts compensation from a trust having its principal place of administration in this state.
>
> 7. Performs any act or service for a trust having its principal place of administration in this state.
>
> 8. Accepts a distribution from a trust having its principal place of administration in this state with respect to any matter involving the distribution.
>
> (b) A court of this state may exercise personal jurisdiction over a trustee, trust beneficiary, or other person, whether found within or outside the state, to the maximum extent permitted by the State Constitution or the Federal Constitution.

F.S. § 736.0202(1) grants the court in rem jurisdiction over trust beneficiaries of trusts having a principal place of administration in Florida. It is often the case that in trust construction or trust disputes, the beneficiaries are necessary parties to the litigation. This section of the statute grants the court jurisdiction over the parties as well. Generally, in rem jurisdiction is all that is required over a beneficiary for the court to grant the proper relief. This grant of jurisdiction is still subject to the requirement of giving notice that complies with requirements of due process (discussed below), and the overlay of the minimum contacts test also to satisfy due process requirements. The simple *grant* of jurisdiction in the statute is only the starting point.

The more important aspect of this statue is its "long arm" grant of jurisdiction over trustees. In that regard, it parallels *F.S. §* 48.171 providing long arm jurisdiction over non-residents operating a motor vehicle in this state, or *F.S. §* 48.193 providing that jurisdiction over a non-resident who operates a business in this state or commits a tortious act within this state among other specified activities. This long arm jurisdiction provides in personam jurisdiction, once again, subject to proper notice and the overlay of the minimum contacts test of due process.

On the matter of minimum contacts to support in rem jurisdiction over a non-resident trust beneficiary, that test is met so long as the court has territorial jurisdiction over the trust or in personam jurisdiction over the trustee. The minimum contact is the beneficiary's claim to the trust within the control of the court.

Minimum contacts for a non-resident trustee is a more complicated matter. The minimum contacts requirement for long arm in personam jurisdiction over a non-resident

was first discussed in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and later, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). The minimum contacts test was best explained in Florida in *Venetian Salami v. Parthenais*, 554 So.2d 499 (Fla. 1989)[1] (reproduced on page 62 of this outline). It provides "that in order to subject a defendant to an in personam judgment when he is not present within the territory of the forum, due process requires that the defendant have certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." (At page 500.)

As previously stated, the formal notice utilized in a probate proceeding is not available in a civil action (as, for instance, trust litigation.) Therefore, in support of the in rem jurisdiction over a trust beneficiary, the RPPTL section also drafted and offered legislation that was enacted into law as *F.S. §* 736.02025 providing for mail service upon trust beneficiaries to acquire in rem jurisdiction that meets the constitutional requirements for notice as set forth in the cases of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. (reproduced on page 31 of this outline) and *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (reproduced on page 39 of this outline).

> **736.02025 Service of process.—**
>
> (1) Except as otherwise provided in this section, service of process upon any person may be made as provided in chapter 48.
>
> (2) Where only in rem or quasi in rem relief is sought against a person in a matter involving a trust, service of process on that person may be made by sending a copy of the summons and complaint by any commercial delivery service requiring a signed receipt or by any form of mail requiring a signed receipt. Service under this subsection shall be complete upon signing of a receipt by the addressee or by any person authorized to receive service of a summons on behalf of the addressee as provided in chapter 48. Proof of service shall be by verified statement of the person serving the summons, to which must be attached the signed receipt or other evidence satisfactory to the court that delivery was made to the addressee or other authorized person.
>
> (3) Under any of the following circumstances, service of original process pursuant to subsection (2) may be made by first-class mail:

[1] *Venetian Salami* is required reading in any matter involving long arm in personam jurisdiction. It also describes the pleading procedure that must be followed in such cases.

(a) If registered or certified mail service to the addressee is unavailable and if delivery by commercial delivery service is also unavailable.

(b) If delivery is attempted and is refused by the addressee.

(c) If delivery by mail requiring a signed receipt is unclaimed after notice to the addressee by the delivering entity.

(4) If service of process is obtained under subsection (3), proof of service shall be made by verified statement of the person serving the summons. The verified statement must state the basis for service by first-class mail, the date of mailing, and the address to which the mail was sent.

If the trustee cannot be served within the boundaries of the State of Florida, the required service on a non-resident trustee must be obtained pursuant to *F.S. §* 48.194 which provides:

48.194 Personal service outside state.—

(1) Except as otherwise provided herein, service of process on persons outside of this state shall be made in the same manner as service within this state by any officer authorized to serve process in the state where the person is served. No order of court is required. An affidavit of the officer shall be filed, stating the time, manner, and place of service. The court may consider the affidavit, or any other competent evidence, in determining whether service has been properly made. Service of process on persons outside the United States may be required to conform to the provisions of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

In summary, in order to proceed, a court must have subject matter jurisdiction and either in personam or in rem jurisdiction. In rem jurisdiction requires territorial jurisdiction over the rem, jurisdictional authority, typically by statute, and as to non-resident beneficiaries, proper service comporting with due process, and minimum contacts.

In personam jurisdiction may be acquired over non-resident defendants/respondents though long arm service provided by statute, with the overlay of the requirement of minimum contacts. The most recent case discussing the interplay between the long arm statute, which grants jurisdiction to the court over non-residents (assuming proper service is effected), and the due process test of the long arm statute known as minimum contacts is *The Sampson Farm Limited Partnership v. Parmenter*, 238 So.3d 387 (Fla. 3d DCA 2018). The court explained "The plaintiff bears the initial burden of alleging sufficient jurisdictional facts in his or her complaint to establish the basis for the court's long-arm jurisdiction under section 48.193, Florida Statutes (2014). (Citations omitted). If the plaintiff meets this hurdle, the second inquiry is whether the defendant

possesses sufficient minimum contacts with Florida to satisfy constitutional due process requirements. (Citation omitted). This requires the court to determine whether a non-resident defendant's conduct in connection with Florida is such that the defendant "should reasonably anticipate being haled into court" here. (Citation omitted.)"

E. Separate Actions Within and Outside the Probate Proceeding

Separate actions may simultaneously exist, under some circumstances, within the probate proceeding. Examples would be adversary proceedings (see *Fla.Prob.R.* 5.025) to (1) revoke the probate, (2) remove the personal representative, and (3) determine the amount of the elective share.

On the other hand, some separate actions may be outside the probate proceeding. Examples of actions that relate to, but that are not necessarily a part of, the probate proceeding might include recovery of joint assets, declaration of rights regarding a trust (whether that trust is a revocable living trust into which the estate pours or a testamentary trust under the will currently in probate), an action on a claim that is objected to and substitution or resignation of a trustee.

The determination of whether a proceeding is "within" or "independent of" the probate proceeding is not whether it has a separate case number, or even whether a separate filing fee has been paid. Procedure varies from circuit to circuit because clerks have different approaches. Some clerks file every adversary proceeding in a separate file folder. Some of those clerks assign a new number and, depending on the clerk, it may or may not be an extension of the basic probate case number. Some clerks will segregate the adversary proceeding in a separate file folder only if a separate filing fee is paid. Some clerks require payment of a separate filing fee for all adversary proceedings. Whether a particular proceeding is "within" or "independent of" the basic probate proceeding is determined by whether original process is required to support jurisdiction or whether jurisdiction depends on the probate jurisdiction.

In *In re Estate of Vernon*, 608 So.2d 510 (Fla. 4th DCA 1992), an estate sued two individuals in a dispute over ownership of shares of stock in a bank. The estate began the lawsuit in the probate case by mailing to the defendants a copy of the initial pleading and filing an adversary proceeding as a part of the estate proceeding. The defendants had no claim in the probate estate and moved to quash process and dismiss the proceedings on the

ground that the probate court lacked jurisdiction. The appellate court agreed with the defendants, and observed that neither *F.S. §* 731.301 nor *F.S. §* 733.812 allowed the defendants to be served in the probate proceeding. "To use section 733.812 is to assume the very fact sought to be litigated as the jurisdictional base for the probate court. . . . [W]e conclude that the estate's remedy is to institute an ordinary civil action against defendants, not to use the more summary tools of estate administration." *Vernon*, 608 So.2d at 512; see also *Manufacturers National Bank of Detroit v. Moons*, 659 So.2d 474 (Fla. 4th DCA 1995) (in guardianship proceeding, service of process under civil rules is required for probate court to obtain jurisdiction over trustee of trust of which the ward is beneficiary); *In re Estate of Black*, 528 So.2d 1316 (Fla. 2d DCA 1988) (use of formal notice did not confer on probate court jurisdiction over trustee in matters unrelated to probate proceedings; trustee was entitled to service as provided in Florida Rules of Civil Procedure). See also *Hall v. Tungett*, 980 So.2d 1289 (Fla. 2d DCA 2008) (reproduced on page 70 of this outline).

An independent action filed by a creditor based on an objected-to claim must be filed separately. *F.S. §* 733.705(5). Such an action would require service, if not waived, of a summons and complaint on the personal representative. Similarly, an action by the personal representative to recover assets should properly be brought outside the probate proceeding and a separate summons and complaint would be required. An example might be recovery of joint account transfers or inter vivos gifts alleged to be the product of undue influence. But see *Markowitz v. Merson*, 869 So.2d 728 (Fla. 4th DCA 2004), in which the court indicated that the estate proceedings would be the appropriate forum to determine the ownership of bearer bonds when there was a dispute as to whether they were joint assets belonging to the survivor or were an estate asset. "If appellant has a claim to ownership [of the bonds], it can be made in the probate proceedings." *Id.* at 729.

However, if a will were challenged, it seems logical and orderly to bring a challenge to a concurrent pour-over revocable living trust on the same grounds in the same action in the probate proceeding. In *Sun Bank/Miami, N.A. v. Hogarth*, 536 So.2d 263 (Fla. 3d DCA 1989), the district court held that a probate court that has jurisdiction to determine the validity of a will also can determine the validity of an inter vivos trust agreement that is incorporated by reference into the will. See also *Laushway v. Onofrio*, 670 So.2d 1135 (Fla. 5th DCA 1996); *Pasquale v. Loving*, 82 So.23 1205 (Fla. 4th DCA 2012). More than

a reference to the document is required for incorporation by reference. *Vaughan v. Boerckel, 963 So.2d 915 (Fla. 4th DCA 2007); Martin v. Martin*, 687 So.2d 903 (Fla. 4th DCA 1997); *Flinn v. Van Devere*, 502 So.2d 454 (Fla. 3d DCA 1987).

The greater issue may be the method and adequacy of service in the trust proceeding, not whether the cause of action is litigated within the probate proceeding.

On closer analysis of the opinion issued by the court in *Hogarth*, however, it is questionable whether that part of the opinion addressing the jurisdiction of the court is correct. The court held that, because the trust agreement was incorporated by reference into the will, "the probate court had *jurisdiction* to determine [the trust] validity" [emphasis added]. *Id.* at 268. Clearly, the probate court, a division of the circuit court, had *subject matter* jurisdiction to determine the validity of the trust *with or without* its incorporation by reference. Art. V, §20(c)(3), Fla. Const. Therefore, the opinion could not have been addressing the issue of subject matter jurisdiction of the circuit court.

The issue the court had to be addressing is whether the probate division of the circuit court, in the probate proceeding, had sufficient jurisdiction over the parties to determine their interests in the trust property. A proceeding involving the validity of a will or a trust is an in rem proceeding. An in rem proceeding is one in which the court has jurisdiction over the property and, after reasonable notice that complies with due process requirements, may decide the rights of persons to that property. *Royalty v. Florida Nat. Bank of Jacksonville*, 127 Fla. 618, 173 So. 689 (1937); 12A FLA.JUR.2d *Courts and Judges* §60. Therefore, the parties who were interested in the assets of the trust, and whose interests would be affected by the invalidity of the trust, were entitled to reasonable notice that complies with due process requirements before the court could determine those parties' rights to the trust assets. Keep in mind that service of formal notice is not authorized in a trust proceeding. But see *F.S.* § 736.02025 authorizing service of process "by any commercial delivery service requiring a signed receipt or by any form of mail requiring a signed receipt" or in some cases by first class mail.

In some instances, a party can represent the interests of other parties. Note that the changes made to *F.S. §* 731.303 Representation in 2007 eliminated application of that statute to trusts. The Florida Trust Code, Part III, now has specific representation provisions applicable to trusts and actions involving trust beneficiaries. Specifically, see *F.S. §* 736.0304 regarding representation of beneficiaries by other beneficiaries having

substantially identical interests. If the parties (or one representing them) received proper notice (service of process), the court has jurisdiction over the parties to determine their rights in the trust assets. Incorporation of the trust into the will by reference is irrelevant to this determination, and without some authorized form of service, would not be a sufficient basis to give the court jurisdiction over the persons interested in the assets of the trust. There is no question that the circuit court has jurisdiction to hear both a challenge to a will and a challenge to a trust, whether or not incorporated by reference into the trust. If *Hogarth* stands for the proposition that the probate division of the circuit court, which has jurisdiction to determine the validity of a will, also has jurisdiction to determine the validity of a trust (thereby determining the rights of the parties interested in the trust) based solely on the probate formal notice, the decision is wrong. Jurisdiction exists, but service is improper. See *Martin*, 687 So.2d at 907 ("while we question the reasoning of the third district . . . in *Hogarth*, we do agree with the result"). The only way the court could have had jurisdiction over the parties who were interested in the trust is if those parties received proper service of process, waived the requirement of notice, or voluntarily submitted to the jurisdiction of the court. The opinion mentions nothing about service on the interested persons, so it is impossible to determine if the result in the case is correct.

It should also be pointed out that service by formal notice would be ineffective to give the probate division of the circuit court jurisdiction in that probate proceeding over the parties interested in the trust. Service by formal notice is effective only for those persons who are interested in the assets of the estate, and only to the extent of that interest.[2] *Vernon*; *F.S. §* 731.301(2). See also *F.S. §* 731.201(23), 733.212(1)(c), 736.05053. The assets in a funded inter vivos trust are not assets of the estate. See *In re Estate of Stisser*, 932 So.2d 400 (Fla. 2d DCA 2006) (trial court lacked authority to rule on personal representative's complaint against trustees of foreign-situs trust in absence of personal jurisdiction over trustees).

With some exceptions, the probate proceeding is not the proper forum to resolve issues collateral to the actual probate. *Vernon*.

[2] The sole exception is if the trust is a pour over trust, then the reasonableness of compensation for a trustee or any person employed by the trustee may be determined in the estate proceeding after formal notice to interested persons. *F.S. §* 736.0206(6).

Jurisdiction over Trusts and Estates

Excerpts from the U.S. Constitution, Florida Constitution and Florida Statutes

United States Constitution

Amendment XIV (Due process)

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF FLORIDA

AS REVISED IN 1968 AND SUBSEQUENTLY AMENDED

ARTICLE I DECLARATION OF RIGHTS

SECTION 9. Due process.—No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.

ARTICLE V JUDICIARY

SECTION 5. **Circuit courts.—**

(a) ORGANIZATION.—There shall be a circuit court serving each judicial circuit.

(b) JURISDICTION.—The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law. They shall have the power to issue writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction. Jurisdiction of the circuit court shall be uniform throughout the state. They shall have the power of direct review of administrative action prescribed by general law

SECTION 20. **Schedule to Article V.—**

(c) After this article becomes effective, and until changed by general law consistent with sections 1 through 19 of this article:

* * *

(3) Circuit courts shall have jurisdiction of appeals from county courts and municipal courts, except those appeals which may be taken directly to the supreme court; and they shall have exclusive original jurisdiction in all actions at law not cognizable by the county courts; of proceedings relating to the settlement of the estate of decedents and minors, the granting of letters testamentary, guardianship, involuntary hospitalization, the determination of incompetency, and other jurisdiction usually pertaining to courts of probate; in all cases in equity including all cases relating to juveniles; of all felonies and of all misdemeanors arising out of the same circumstances as a felony which is also charged; in all cases involving legality of any tax assessment or toll; in the action of ejectment; and in all actions involving the titles or boundaries or right of possession of real property. The circuit court may issue injunctions. There shall be judicial circuits which shall be the judicial circuits in existence on the date of adoption of this article. The chief judge of a circuit may authorize a county court judge to order emergency hospitalizations pursuant to Chapter 71-131, Laws of Florida, in the absence from the county of

the circuit judge and the county court judge shall have the power to issue all temporary orders and temporary injunctions necessary or proper to the complete exercise of such jurisdiction.

2015 Florida Statutes

26.012 Jurisdiction of circuit court.—

(1) Circuit courts shall have jurisdiction of appeals from county courts except appeals of county court orders or judgments declaring invalid a state statute or a provision of the State Constitution and except orders or judgments of a county court which are certified by the county court to the district court of appeal to be of great public importance and which are accepted by the district court of appeal for review. Circuit courts shall have jurisdiction of appeals from final administrative orders of local government code enforcement boards.

(2) They shall have exclusive original jurisdiction:

(a) In all actions at law not cognizable by the county courts;

(b) Of proceedings relating to the settlement of the estates of decedents and minors, the granting of letters testamentary, guardianship, involuntary hospitalization, the determination of incompetency, and other jurisdiction usually pertaining to courts of probate;

(c) In all cases in equity including all cases relating to juveniles except traffic offenses as provided in chapters 316 and 985;

(d) Of all felonies and of all misdemeanors arising out of the same circumstances as a felony which is also charged;

(e) In all cases involving legality of any tax assessment or toll or denial of refund, except as provided in s. 72.011;

(f) In actions of ejectment; and

(g) In all actions involving the title and boundaries of real property.

(3) The circuit court may issue injunctions.

(4) The chief judge of a circuit may authorize a county court judge to order emergency hospitalizations pursuant to part I of chapter 394 in the absence from the county of the circuit judge; and the county court judge shall have the power to issue all temporary orders and temporary injunctions necessary or proper to the complete exercise of such jurisdiction.

(5) A circuit court is a trial court.

History.—s. 3, ch. 72-404; s. 1, ch. 74-209; s. 1, ch. 77-119; s. 1, ch. 80-399; s. 1, ch. 81-178; s. 22, ch. 81-259; s. 12, ch. 82-37; s. 2, ch. 84-303; s. 5, ch. 91-112; s. 27, ch. 94-353; s. 52, ch. 95-280; s. 3, ch. 98-280; s. 1, ch. 2004-11.

731.301 Notice.—

(1) If notice to an interested person of a petition or other proceeding is required, the notice shall be given to the interested person or that person's attorney as provided in the code or the Florida Probate Rules.

(2) In a probate proceeding, formal notice is sufficient to acquire jurisdiction over the person receiving formal notice to the extent of the person's interest in the estate or in the decedent's protected homestead.

(3) Persons given proper notice of a proceeding are bound by all orders entered in that proceeding.

History.—s. 1, ch. 74-106; s. 5, ch. 75-220; s. 3, ch. 77-87; s. 1, ch. 77-174; s. 1, ch. 93-257; s. 64, ch. 95-211; s. 950, ch. 97-102; s. 12, ch. 2001-226; s. 5, ch. 2010-132.

Note.—Created from former s. 732.28.

731.303 Representation.—In the administration of or in judicial proceedings involving estates of decedents, the following apply:

(1) Persons are bound by orders binding others in the following cases:

(a)1. Orders binding the sole holder or all coholders of a power of revocation or a general, special, or limited power of appointment, including one in the form of a power of amendment or revocation to the extent that the power has not become unexercisable in fact, bind all persons to the extent that their interests, as persons who may take by virtue of the exercise or nonexercise of the power, are subject to the power.

2. Subparagraph 1. does not apply to:

a. Any matter determined by the court to involve fraud or bad faith by the trustee;

b. A power of a trustee to distribute trust property; or

c. A power of appointment held by a person while the person is the sole trustee.

(b) To the extent there is no conflict of interest between them or among the persons represented:

1. Orders binding a guardian of the property bind the ward.

2. Orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will, in establishing or adding to a trust, in reviewing the acts or accounts of a prior fiduciary, and in proceedings involving creditors or other third parties. However, for purposes of this section, a conflict of interest shall be deemed to exist when each trustee of a trust that is a beneficiary of the estate is also a personal representative of the estate.

3. Orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate, in actions or proceedings by or against the estate.

(c) An unborn or unascertained person, or a minor or any other person under a legal disability, who is not otherwise represented is bound by an order to the extent that person's interest is represented by another party having the same or greater quality of interest in the proceeding.

(2) Orders binding a guardian of the person shall not bind the ward.

(3) In proceedings involving the administration of estates, notice is required as follows:

(a) Notice as prescribed by law shall be given to every interested person, or to one who can bind the interested person as described in paragraph (1)(a) or paragraph (1)(b). Notice may be given both to the interested person and to another who can bind him or her.

(b) Notice is given to unborn or unascertained persons who are not represented pursuant to paragraph (1)(a) or paragraph (1)(b) by giving notice to all known persons whose interests in the proceedings are the same as, or of a greater quality than, those of the unborn or unascertained persons.

(4) If the court determines that representation of the interest would otherwise be inadequate, the court may, at any time, appoint a guardian ad litem to represent the interests of an incapacitated person, an unborn or unascertained person, a minor or any other person otherwise under a legal disability, or a person whose identity or address is unknown. If not precluded by conflict of interest, a guardian ad litem may be appointed to represent several persons or interests.

(5) The holder of a power of appointment over property not held in trust may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power. Representation under this subsection does not apply to:

(a) Any matter determined by the court to involve fraud or bad faith by the trustee;

(b) A power of a trustee to distribute trust property; or

(c) A power of appointment held by a person while the person is the sole trustee.

History.—s. 1, ch. 74-106; s. 7, ch. 75-220; s. 5, ch. 77-87; s. 1, ch. 77-174; s. 1, ch. 88-217; s. 3, ch. 92-200; s. 951, ch. 97-102; s. 13, ch. 2001-226; s. 3, ch. 2002-82; s. 3, ch. 2003-154; s. 30, ch. 2006-217; s. 9, ch. 2007-153.

734.201 Jurisdiction by act of foreign personal representative.—A foreign personal representative submits personally to the jurisdiction of the courts of this state in any proceeding concerning the estate by:

(1) Filing authenticated copies of the domiciliary proceedings under s. 734.104;

(2) Receiving payment of money or taking delivery of personal property, under s. 734.101; or

(3) Doing any act as a personal representative in this state that would have given the state jurisdiction over that person as an individual.

History.—s. 1, ch. 74-106; s. 99, ch. 75-220; s. 1031, ch. 97-102; s. 174, ch. 2001-226.

734.202 Jurisdiction by act of decedent.—In addition to jurisdiction conferred by s. 734.201, a foreign personal representative is subject to the jurisdiction of the courts of this state to the same extent that the decedent was subject to jurisdiction immediately before death.

History.—s. 1, ch. 74-106; s. 1032, ch. 97-102; s. 175, ch. 2001-226.

736.0106 Common law of trusts; principles of equity.—The common law of trusts and principles of equity supplement this code, except to the extent modified by this code or another law of this state.

History.—s. 1, ch. 2006-217

736.0107 Governing law.—The meaning and effect of the terms of a trust are determined by:

(1) The law of the jurisdiction designated in the terms of the trust, provided there is a sufficient nexus to the designated jurisdiction at the time of the creation of the trust or during the trust administration, including, but not limited to, the location of real property held by the trust or the residence or location of an office of the settlor, trustee, or any beneficiary; or

(2) In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction where the settlor resides at the time the trust is first created.

Notwithstanding subsection (1) or subsection (2), a designation in the terms of a trust is not controlling as to any matter for which the designation would be contrary to a strong public policy of this state.

History.—s. 1, ch. 2006-217.

736.0108 Principal place of administration.—

(1) Terms of a trust designating the principal place of administration of the trust are valid only if there is a sufficient connection with the designated jurisdiction. Without precluding other means for establishing a sufficient connection, terms of a trust designating the principal place of administration are valid and controlling if:

(a) A trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction; or

(b) All or part of the administration occurs in the designated jurisdiction.

(2) Unless otherwise validly designated in the trust instrument, the principal place of administration of a trust is the trustee's usual place of business where the records pertaining to the trust are kept or, if the trustee has no place of business, the trustee's residence. In the case of cotrustees, the principal place of administration is:

(a) The usual place of business of the corporate trustee, if there is only one corporate cotrustee;

(b) The usual place of business or residence of the individual trustee who is a professional fiduciary, if there is only one such person and no corporate cotrustee; or otherwise

(c) The usual place of business or residence of any of the cotrustees as agreed on by the cotrustees.

(3) Notwithstanding any other provision of this section, the principal place of administration of a trust, for which a bank, association, or trust company organized under the laws of this state or bank or savings association organized under the laws of the United States with its main office in this state has been appointed trustee, shall not be moved or otherwise affected solely because the trustee engaged in an interstate merger transaction with an out-of-state bank pursuant to s. 658.2953 in which the out-of-state bank is the resulting bank.

(4) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes and its administration.

(5) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee, in furtherance of the duty prescribed by subsection (4), may transfer the trust's principal place of administration to another state or to a jurisdiction outside of the United States.

(6) The trustee shall notify the qualified beneficiaries of a proposed transfer of a trust's principal place of administration not less than 60 days before initiating the transfer. The notice of proposed transfer must include:

(a) The name of the jurisdiction to which the principal place of administration is to be transferred.

(b) The address and telephone number at the new location at which the trustee can be contacted.

(c) An explanation of the reasons for the proposed transfer.

(d) The date on which the proposed transfer is anticipated to occur.

(e) The date, not less than 60 days after the notice is provided, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

(7) The authority of a trustee to act under this section without court approval to transfer a trust's principal place of administration is suspended if a qualified beneficiary files a lawsuit objecting to the proposed transfer on or before the date specified in the notice. The suspension is effective until the lawsuit is dismissed or withdrawn.

(8) In connection with a transfer of the trust's principal place of administration, the trustee may transfer any of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to s. 736.0704.

History.—s. 1, ch. 2006-217.

736.0109 Methods and waiver of notice.—

(1) Notice to a person under this code or the sending of a document to a person under this code must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed facsimile or other electronic message.

(2) Notice otherwise required under this code or a document otherwise required to be sent under this code need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.

(3) In addition to the methods listed in subsection (1) for sending a document, a sender may post a document to a secure electronic account or website where the document can be accessed.

(a) Before a document may be posted to an electronic account or website, the recipient must sign a separate written authorization solely for the purpose of authorizing the sender to post documents on an electronic account or website. The written authorization must:

1. Enumerate the documents that may be posted in this manner.

2. Contain specific instructions for accessing the electronic account or website, including the security procedures required to access the electronic account or website, such as a username and password.

3. Advise the recipient that a separate notice will be sent when a document is posted to the electronic account or website and the manner in which the separate notice will be sent.

4. Advise the recipient that the authorization to receive documents by electronic posting may be amended or revoked at any time and include specific instructions for revoking or amending the authorization, including the address designated for the purpose of receiving notice of the revocation or amendment.

5. Advise the recipient that posting a document on the electronic account or website may commence a limitations period as short as 6 months even if the recipient never actually accesses the electronic account, electronic website, or the document.

(b) Once the recipient signs the written authorization, the sender must provide a separate notice to the recipient when a document is posted to the electronic account or website. As used in this subsection, the term "separate notice" means a notice sent to the recipient by means other than electronic posting, which identifies each document posted to the electronic account or website and provides instructions for accessing the posted document. The separate notice requirement is satisfied if the recipient accesses the document on the electronic account or website.

(c) A document sent by electronic posting is deemed received by the recipient on the earlier of the date that the separate notice is received or the date that the recipient accesses the document on the electronic account or website.

(d) At least annually after a recipient signs a written authorization, a sender shall send a notice advising recipients who have authorized one or more documents to be posted to an electronic account or website that such posting may commence a limitations period as short as 6 months even if the recipient never accesses the electronic account or website or the document and that authority to receive documents by electronic posting may be amended or revoked at any time. This notice must be given by means other than electronic posting and may not be accompanied by any other written communication. Failure to provide such notice within 380 days after the last notice is deemed to automatically revoke the authorization to receive documents in the manner permitted under this subsection 380 days after the last notice is sent.

(e) The notice required in paragraph (d) may be in substantially the following form: "You have authorized the receipt of documents through posting to an electronic account or website where the documents can be accessed. This notice is being sent to advise you that a limitations period, which may be as short as 6 months, may be running as to matters disclosed in a trust accounting or other written report of a trustee posted to the electronic account or website even if you never actually access the electronic account or website or the documents. You may amend or revoke the authorization to receive documents by electronic posting at any time. If you have any questions, please consult your attorney."

(f) A sender may rely on the recipient's authorization until the recipient amends or revokes the authorization by sending a notice to the address designated for that purpose in the authorization. The recipient, at any time, may amend or revoke an authorization to have documents posted on the electronic account or website.

(g) A document provided to a recipient solely through electronic posting must remain accessible to the recipient on the electronic account or website for at least 4 years after the date that the document is deemed received by the recipient. The electronic account or website must allow the recipient to download or print the document. This subsection does not affect or alter the duties of a trustee to keep clear, distinct, and accurate records pursuant to s. 736.0810 or affect or alter the time periods for which the trustee must maintain those records.

(h) To be effective, the posting of a document to an electronic account or website must be done in accordance with this subsection. The sender has the burden of establishing compliance with this subsection.

(i) This subsection does not preclude the sending of a document by other means.

(4) Notice to a person under this code, or the sending of a document to a person under this code by electronic message, is complete when the document is sent.

(a) An electronic message is presumed received on the date that the message is sent.

(b) If the sender has knowledge that an electronic message did not reach the recipient, the electronic message is deemed to have not been received. The sender has the burden to prove that another copy of the notice or document was sent by electronic message or by other means authorized by this section.

(5) Notice under this code or the sending of a document under this code may be waived by the person to be notified or to whom the document is to be sent.

(6) Notice and service of documents in a judicial proceeding are governed by the Florida Rules of Civil Procedure.

History.—s. 1, ch. 2006-217; s. 1, ch. 2015-176.

736.0201 Role of court in trust proceedings.—

* * *

(2) The court may intervene in the administration of a trust to the extent the court's jurisdiction is invoked by an interested person or as provided by law.

736.0202 Jurisdiction over trustee and beneficiary.—

(1) IN REM JURISDICTION.—Any beneficiary of a trust having its principal place of administration in this state is subject to the jurisdiction of the courts of this state to the extent of the beneficiary's interest in the trust.

(2) PERSONAL JURISDICTION.—

(a) Any trustee, trust beneficiary, or other person, whether or not a citizen or resident of this state, who personally or through an agent does any of the following acts related to a trust, submits to the jurisdiction of the courts of this state involving that trust:

1. Accepts trusteeship of a trust having its principal place of administration in this state at the time of acceptance.
2. Moves the principal place of administration of a trust to this state.
3. Serves as trustee of a trust created by a settlor who was a resident of this state at the time of creation of the trust or serves as trustee of a trust having its principal place of administration in this state.
4. Accepts or exercises a delegation of powers or duties from the trustee of a trust having its principal place of administration in this state.
5. Commits a breach of trust in this state, or commits a breach of trust with respect to a trust having its principal place of administration in this state at the time of the breach.
6. Accepts compensation from a trust having its principal place of administration in this state.
7. Performs any act or service for a trust having its principal place of administration in this state.
8. Accepts a distribution from a trust having its principal place of administration in this state with respect to any matter involving the distribution.

(b) A court of this state may exercise personal jurisdiction over a trustee, trust beneficiary, or other person, whether found within or outside the state, to the maximum extent permitted by the State Constitution or the Federal Constitution.

History.—s. 2, ch. 2006-217; s. 10, ch. 2013-172.

736.02025 Service of process.—

(1) Except as otherwise provided in this section, service of process upon any person may be made as provided in chapter 48.

(2) Where only in rem or quasi in rem relief is sought against a person in a matter involving a trust, service of process on that person may be made by sending a copy of the summons and complaint by any commercial delivery service requiring a signed receipt or

by any form of mail requiring a signed receipt. Service under this subsection shall be complete upon signing of a receipt by the addressee or by any person authorized to receive service of a summons on behalf of the addressee as provided in chapter 48. Proof of service shall be by verified statement of the person serving the summons, to which must be attached the signed receipt or other evidence satisfactory to the court that delivery was made to the addressee or other authorized person.

(3) Under any of the following circumstances, service of original process pursuant to subsection (2) may be made by first-class mail:

(a) If registered or certified mail service to the addressee is unavailable and if delivery by commercial delivery service is also unavailable.

(b) If delivery is attempted and is refused by the addressee.

(c) If delivery by mail requiring a signed receipt is unclaimed after notice to the addressee by the delivering entity.

(4) If service of process is obtained under subsection (3), proof of service shall be made by verified statement of the person serving the summons. The verified statement must state the basis for service by first-class mail, the date of mailing, and the address to which the mail was sent.

History.—s. 11, ch. 2013-172.

736.0203 Subject matter jurisdiction.—The circuit court has original jurisdiction in this state of all proceedings arising under this code.

History.—s. 2, ch. 2006-217.

736.0204 Venue.—Venue for actions and proceedings concerning trusts, including those under s. 736.0201, may be laid in:

(1) Any county where the venue is proper under chapter 47;

(2) Any county where the beneficiary suing or being sued resides or has its principal place of business; or

(3) The county where the trust has its principal place of administration.

History.—s. 2, ch. 2006-217.

518.112 Delegation of investment functions.—

(1) A fiduciary may delegate any part or all of the investment functions, with regard to acts constituting investment functions that a prudent investor of comparable skills might delegate under the circumstances, to an investment agent as provided in subsection (3), if the fiduciary exercises reasonable care, judgment, and caution in selecting the investment agent, in establishing the scope and specific terms of any delegation, and in reviewing periodically the agent's actions in order to monitor overall performance and compliance with the scope and specific terms of the delegation.

* * *

(5) The investment agent shall, by virtue of acceptance of its appointment, be subject to the jurisdiction of the courts of this state.

* * *

History.—s. 3, ch. 93-257; s. 8, ch. 97-240; s. 2, ch. 2010-172.

Form of general jurisdictional allegations in complaint by beneficiary against trustee Pursuant to requirements of Fla.R.Civ.P. 1.110(b) and Fla.Prob.R. 5.020(b)

Plaintiff, ***&***** *("&*****)*, sues ***&***** ("Defendant Trustee") individually and in her representative capacity as Trustee of the &***** Trust under agreement dated &***** f/b/o &***** (the "Trust") and &***** and &*****, as nominal defendants ("Nominal Defendants"), (collectively referred to as the "Defendants"), and alleges:

Jurisdictional Allegations

1. This is an action for [Accounting, Breach of Trust and Removal of Trustees, and Surcharge], is within the equitable jurisdiction of the court and is also brought pursuant to one or more of Florida Statutes §§ [736.0201, 736.0202, 736.0106] and the common law of the State of Florida.

2. This court has subject matter jurisdiction under Article V, sections 5 and 20(c)(3) of the Florida Constitution and Florida Statutes §§736.0203 and 26.012.

3. This court has original jurisdiction over this matter under Florida Statutes §§[86.011, 86.021, 86.041, 26.012, 736.0201 or 737.201]. This action is administratively assigned to the Probate Division of the Circuit Court under Administrative Order No.[&***** Broward county is 2009-86-PRC, Dade County is 14-07 A1]

4. This court has jurisdiction over the Defendant Trustee and the Nominal Defendants under Florida Statutes § 736.0202.

5. Plaintiff is an individual who is *sui juris*, residing in &***** County, Florida.

6. &****, the trustee is a national association, maintains an office for the conduct of business in &*****, Florida and maintains the records of the Trust in that office.

7. &***** and &***** are individuals who are *sui juris,* each residing in &*****, Florida.

8. Venue is proper in &***** County, Florida pursuant to one or more of Florida Statutes §§ 736.0204, 736.0108 or 737.202, since &***** County, Florida is the location where the Trustee resides, and where the Trust has its principal place of administration.

9. All prerequisites to filing this action have occurred or been waived.

Allegations Common to All Counts

CASES ON JURISDICTION AND SERVICE

339 U.S. 306
70 S.Ct. 652
94 L.Ed. 865
MULLANE

v.

CENTRAL HANOVER BANK & TRUST CO. et al.

No. 378.
Argued and Submitted Feb. 8, 1950.
Decided April 24, 1950.

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Header ends here. Mr. Kenneth J. Mullane, New York City, for appellants.

Mr. Albert B. Maginnes, New York City, for appellee, Central Hanover Bank and Trust Co.

Mr. James N. Vaughan, New York City, for appellee, James N. Vaughan, Guardian et al.

Mr. Justice JACKSON delivered the opinion of the Court.

This controversy questions the constitutional sufficiency of notice to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund established under the New York Banking Law, Consol.Laws, c. 2. The New York Court of Appeals considered and overruled objections that the statutory notice contravenes requirements of the Fourteenth Amendment and that by allowance of the account beneficiaries were deprived of property without due process of law. 299 N.Y. 697, 87 N.E.2d 73. The case is here on appeal under 28 U.S.C. § 1257, 28 U.S.C.A. § 1257.

Common trust fund legislation is addressed to a problem appropriate for state action. Mounting overheads have made administration of small trusts undesirable to corporate trustees. In order that donors and testators of moderately sized trusts may not be denied the service of corporate fiduciaries, the District of Columbia and some

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thirty states other than New York have permitted pooling small trust estates into one fund for investment administration.* The income, capital gains, losses and expenses of the collective trust are shared by the constituent trusts in proportion to their contribution. By this plan, diversification of risk and economy of management can be extended to those whose capital standing alone would not obtain such advantage.

Statutory authorization for the establishment of such common trust funds is provided in the New York Banking Law, § 100-c, c. 687, L.1937, as amended by c. 602, L.1943 and c. 158, L.1944. Under this Act a trust company may, with approval of the State Banking Board, establish a common fund and, within prescribed limits,

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invest therein the assets of an unlimited number of estates, trusts or other funds of which it is trustee. Each participating trust shares ratably in the common fund, but exclusive management and control is in the trust company as trustee, and neither a fiduciary nor any beneficiary of a participating trust is deemed to have ownership in any particular asset or investment of this common fund. The trust company must keep fund assets separate from its own, and in its fiduciary capacity may not deal with itself or any affiliate. Provisions are made for accountings twelve to fifteen months after the establishment of a fund and triennially thereafter. The decree in each such judicial settlement of accounts is made binding and conclusive as to any matter set forth in the account upon everyone having any interest in the common fund or in any participating estate, trust or fund.

In January, 1946, Central Hanover Bank and Trust Company established a common trust fund in accordance with these provisions, and in March, 1947, it petitioned the Surrogate's Court for settlement of its first account as common trustee. During the accounting period a total of 113 trusts, approximately half inter vivos and half testamentary, participated in the common trust fund, the gross capital of which was nearly three million dollars. The record does not show the number or residence of the beneficiaries, but they were many and it is clear that some of them were not residents of the State of New York.

The only notice given beneficiaries of this specific application was by publication in a local newspaper in strict compliance with the minimum requirements of N.Y. Banking Law § 100-c(12): 'After filing such petition (for judicial settlement of its account) the petitioner shall cause to be issued by the court in which the petition is filed and shall publish not less than once in each week

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for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition, all of which may be described in the notice or citation only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of any such estate, trust or fund.' Thus the only notice required, and the only one given, was by newspaper publication setting forth merely the name and address of the trust company, the name and the date of establishment of the common trust fund, and a list of all participating estates, trusts or funds.

At the time the first investment in the common fund was made on behalf of each participating estate, however, the trust company, pursuant to the requirements of § 100-c(9), had notified by mail each person of full age and sound mind whose name and address was then known to it and who was 'entitled to share in the income therefrom * * * (or) * * * who would be entitled to share in the principal if the event upon which such estate, trust or fund will become distributable should have occurred at the time of sending such notice.' Included in the notice was a copy of those provisions of the Act relating to the sending of the notice itself and to the judicial settlement of common trust fund accounts.

Upon the filing of the petition for the settlement of accounts, appellant was, by order of the court pursuant to § 100-c(12), appointed special guardian and attorney for all persons known or unknown not otherwise appearing who had or might thereafter have any interest in the income of the common trust fund; and appellee Vaughan was appointed to represent those similarly interested in the principal. There were no other appearances on behalf of any one interested in either interest or principal.

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Appellant appeared specially, objecting that notice and the statutory provisions for notice to beneficiaries were inadequate to afford due process under the Fourteenth Amendment, and therefore that the court was without jurisdiction to render a final and binding decree. Appellant's objections were entertained and overruled, the Surrogate holding that the notice required and given was sufficient. 75 N.Y.S.2d 397. A final decree accepting the accounts has been entered, affirmed by the Appellate Division of the Supreme Court, In re Central Hanover Bank & Trust Co., 275 App.Div. 769, 88 N.Y.S.2d 907, and by the Court of Appeals of the State of New York, 299 N.Y. 697, 87 N.E.2d 73.

The effect of this decree, as held below, is to settle 'all questions respecting the management of the common fund.' We understand that every right which beneficiaries would otherwise have against the trust company, either as trustee of the

common fund or as trustee of any individual trust, for improper management of the common trust fund during the period covered by the accounting is sealed and wholly terminated by the decree. See Matter of Hoaglund's Estate, 194 Misc. 803, 811—812, 74 N.Y.S.2d 156, 164, affirmed 272 App.Div. 1040, 74 N.Y.S.2d 911, affirmed 297 N.Y. 920, 79 N.E.2d 746; Matter of Bank of New York, 189 Misc. 459, 470, 67 N.Y.S.2d 444, 453; Matter of Security Trust Co. of Rochester, 189 Misc. 748, 760, 70 N.Y.S.2d 260, 271; Matter of Continental Bank & Trust Co., 189 Misc. 795, 797, 67 N.Y.S.2d 806, 807—808.

We are met at the outset with a challenge to the power of the State—the right of its courts to adjudicate at all as against those beneficiaries who reside without the State of New York. It is contended that the proceeding is one in personam in that the decree affects neither title to nor possession of any res, but adjudges only personal rights of the beneficiaries to surcharge their trustee for negligence or breach of trust. Accordingly, it is said, under the strict doctrine of Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565, the Surrogate

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is without jurisdiction as to nonresidents upon whom personal service of process was not made.

Distinctions between actions in rem and those in personam are ancient and originally expressed in procedural terms what seems really to have been a distinction in the substantive law of property under a system quite unlike our own. Buckland and McNair, Roman Law and Common Law, 66; Burdick, Principles of Roman Law and Their Relation to Modern Law, 298. The legal recognition and rise in economic importance of incorporeal or intangible forms of property have upset the ancient simplicity of property law and the clarity of its distinctions, while new forms of proceedings have confused the old procedural classification. American courts have sometimes classed certain actions as in rem because personal service of process was not required, and at other times have held personal service of process not required because the action was in rem. See cases collected in Freeman on Judgments, §§ 1517 et seq. (5th ed.).

Judicial proceedings to settle fiduciary accounts have been sometimes termed in rem, or more indefinitely quasi in rem, or more vaguely still, 'in the nature of a proceeding in rem.' It is not readily apparent how the courts of New York did or would classify the present proceeding, which has some characteristics and is wanting in some features of proceedings both in rem and in personam. But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions in rem and those in personam in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding

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upon how its courts or this Court may regard this historic antithesis. It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.

Quite different from the question of a state's power to discharge trustees is that of the opportunity it must give beneficiaries to contest. Many controversies have raged about the cryptic and abstract words of the Due Process Clause but

there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

In two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. Certainly the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up to the standards of due process.

Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. But the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which

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would place impossible or impractical obstacles in the way could not be justified.

Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that 'The fundamental requisite of due process of law is the opportunity to be heard.' Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents. We disturb none of the established rules on these subjects. No decision constitutes a controlling or even a very illuminating precedent for the case before us. But a few general principles stand out in the books.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, 132 A.L.R. 1357; Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363; Priest v. Board of Trustees of Town of Las Vegas, 232 U.S. 604, 34 S.Ct. 443, 58 L.Ed. 751; Roller v. Holly, 176 U.S. 398, 20 S.Ct. 410, 44 L.Ed. 520. The notice must be of such nature as reasonably to convey the required information, Grannis v. Ordean, supra, and it must afford a reasonable time for those interested to make their appearance, Roller v. Holly, supra, and cf. Goodrich v. Ferris, 214 U.S. 71, 29 S.Ct. 580, 53 L.Ed. 914. But if with due regard for the practicalities and peculiarities of the case these conditions

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are reasonably met the constitutional requirements are satisfied. 'The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' American Land Co. v. Zeiss, 219 U.S. 47, 67, 31 S.Ct. 200, 207, 55 L.Ed. 82, and see Blinn v. Nelson, 222 U.S. 1, 7, 32 S.Ct. 1, 2, 56 L.Ed. 65, Ann.Cas.1913B, 555.

But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, compare Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091, with Wuchter v. Pizzutti, 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed. 446, 57 A.L.R. 1230, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint.

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Nor is publication here reinforced by steps likely to attract the parties' attention to the proceeding. It is true that publication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning. The ways or an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights. Hence, libel of a ship, attachment of a chattel or entry upon real estate in the name of law may reasonably be expected to come promptly to the owner's attention. When the state within which the owner has located such property seizes it for some reason, publication or posting affords an additional measure of notification. A state may indulge the assumption that one who has left tangible property in the state either has abandoned it, in which case proceedings against it deprive him of nothing, cf. Anderson National Bank v. luckett, 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692, 151 A.L.R. 824; Security Savings Bank v. California, 263 U.S. 282, 44 S.Ct. 108, 68 L.Ed. 301, 31 A.L.R. 391, or that he has left some caretaker under a duty to let him know that it is being jeopardized. Ballard v. Hunter, 204 U.S. 241, 27 S.Ct. 261, 51 L.Ed. 461; Huling v. Kaw Valley Ry. & Imp. Co., 130 U.S. 559, 9 S.Ct. 603, 32 L.Ed. 1045. As phrased long ago by Chief Justice Marshall in The Mary, 9 Cranch 126, 144, 3 L.Ed. 678, 'It is the part of common prudence for all those who have any interest in (a thing), to guard that interest by persons who are in a situation to protect it.'

In the case before us there is, of course, no abandonment. On the other hand these beneficiaries do have a resident fiduciary as caretaker of their interest in this property. But it is their caretaker who in the accounting becomes their adversary. Their trustee is released from giving notice of jeopardy, and no one else is expected to do so. Not even the special guardian is required or apparently expected to communicate with his ward and client, and, of course, if such a duty were merely trans-

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ferred from the trustee to the guardian, economy would not be served and more likely the cost would be increased.

This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights. Cunnius v. Reading School District, 198 U.S. 458, 25 S.Ct. 721, 49 L.Ed. 1125, 3 Ann.Cas. 1121; Blinn v. Nelson, 222 U.S. 1, 32 S.Ct. 1, 56 L.Ed. 65, Ann.Cas.1913B, 555; and see Jacob v. Roberts, 223 U.S. 261, 32 S.Ct. 303, 56 L.Ed. 429.

Those beneficiaries represented by appellant whose interests or whereabouts could not with due diligence be ascertained come clearly within this category. As to them the statutory notice is sufficient. However great the odds that publication will never reach the eyes of such unknown parties, it is not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the best notice practicable.

Nor do we consider it unreasonable for the State to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee. Whatever searches might be required in another situation under ordinary standards of diligence, in view of the character of the proceedings and the nature of the interests here involved we think them unnecessary. We recognize the practical difficulties and costs that would be attendant on frequent investigations into the status of great numbers of beneficiaries, many of whose interests in the common fund are so remote as to be ephemeral; and we have no doubt that such impracticable and extended searches are not required in the

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name of due process. The expense of keeping informed from day to day of substitutions among even current income beneficiaries and presumptive remaindermen, to say nothing of the far greater number of contingent beneficiaries, would impose a severe burden on the plan, and would likely dissipate its advantages. These are practical matters in which we should be reluctant to disturb the judgment of the state authorities.

Accordingly we overrule appellant's constitutional objections to published notice insofar as they are urged on behalf of any beneficiaries whose interests or addresses are unknown to the trustee.

As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

The trustee has on its books the names and addresses of the income beneficiaries represented by appellant, and we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses. Cf. Wuchter v. Pizzutti, supra. Certainly sending them a copy of the statute months and perhaps years in advance does not answer this purpose. The trustee periodically remits their income to them, and we think that they mgith reasonably expect that with or apart from their remittances word might come to them personally that steps were being taken affecting their interests.

We need not weigh contentions that a requirement of personal service of citation on even the large number of known resident or nonresident beneficiaries would, by

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reasons of delay if not of expense, seriously interfere with the proper administration of the fund. Of course personal service even without the jurisdiction of the issuing authority serves the end of actual and personal notice, whatever power of compulsion it might lack. However, no such service is required under the circumstances. This type of trust presupposes a large number of small interests. The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable. 'Now and then an extraordinary case may turn up, but constitutional law, like other mortal contrivances, has to take some chances, and in the great majority of instances, no doubt, justice will be done.' Blinn v. Nelson, supra, 222 U.S. at page 7, 32 S.Ct. at page 2, 56 L.Ed. 65, Ann.Cas.1913B, 555.

The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication. Moreover, the fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund was established is persuasive that postal notification at the time of accounting would not seriously burden the plan.

In some situations the law requires greater precautions in its proceedings than the business world accepts for its own purposes. In few, if any, will it be satisfied with

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less. Certainly it is instructive, in determining the reasonableness of the impersonal broadcast notification here used, to ask whether it would satisfy a prudent man of business, counting his pennies but finding it in his interest to convey information to many persons whose names and addresses are in his files. We are not satisfied that it would. Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests. We have before indicated in reference to notice by publication that, 'Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.' McDonald v. Mabee, 243 U.S. 90, 91, 37 S.Ct. 343, 61 L.Ed. 608, L.R.A.1917F, 458.

We hold the notice of judicial settlement of accounts required by the New York Banking Law § 100-c(12) is incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights. Accordingly the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice DOUGLAS took no part in the consideration or decision of this case.

Mr. Justice BURTON, dissenting.

These common trusts are available only when the instruments creating the participating trusts permit participation in the common fund. Whether or not further notice to beneficiaries should supplement the notice and representation here provided is properly within the discretion of the State. The Federal Constitution does not require it here.

[*] Ala.Code Ann., 1940, Cum.Supp.1947, tit. 58, §§ 88 to 103, as amended, Laws 1949, Act 262; Ariz.Code Ann., 1939, Cum.Supp.1949, §§ 51-1101 to 51-1104; Ark.Stat.Ann.1947, §§ 58-110 to 58-112; Cal.Bank.Code Ann., Deering 1949, § 1564; Colo.Stat.Ann., 1935, Cum.Supp.1947, c. 18, §§ 173 to 178; Conn.Gen.Stat.1949 Rev., § 5805; Del.Rev.Code, 1935, § 4401, as amended, Laws 1943, c. 171, Laws 1947, c. 268; (D.C.) Pub.Law No. 416, 81st Cong., 1st Sess., c. 767, Oct. 27, 1949, 63 Stat. 938; Fla.Stat., 1941, §§ 655.29 to 655.34, *F.S.* A.; Ga.Code Ann., 1937, Cum.Supp.1947, §§ 109-601 to 109-622; Idaho Code Ann., 1949, Cum.Supp.1949, §§ 68-701 to 68-703; Ill.Rev.Stat., 1949, c. 16 1/2, §§ 57 to 63; Ind.Stat.Ann., Burns 1950, §§ 18-2009 to 18-2014; Ky.Rev.Stat., 1948, § 287.230; La.Gen.Stat.Ann., 1939, § 9850.64, Act No. 81 of 1938, § 64; Md.Ann.Code Gen.Laws, 1939, Cum.Supp.1947, art. 11, § 62A; Mass.Ann.Laws, 1933, Cum.Supp.1949, c. 203A; Mich.Stat.Ann., 1943, Cum.Supp.1949, §§ 23.1141 to 23.1153, Comp.Laws 1948, §§ 555.101—555.113; Minn.Stat., 1945, § 48.84, as amended, Laws 1947, c. 234, M.S.A.; N.J.S.A., 1939, Cum.Supp.1949, §§ 17:9A—36 to 17:9A—46; N.C.Gen.Stat., 1943, §§ 36 47 to 36—52; Ohio Gen.Code Ann. (Page's 1946), Cum.Supp.1949, §§ 715 to 720, 722; Okla.Stat.1941, Cum.Supp.1949, tit. 60, § 162; Pa.Stat.Ann., 1939, Cum.Supp.1949, tit. 7, §§ 819—1109 to 819 1109d; So.Dak.Laws 1941, c. 20; Vernon's Tex.Rev.Civ.Stat.Ann., 1939, Cum.Supp.1949, art. 7425b—48; Vt. Stat., 1947 Rev., § 8873; Va.Code Ann., 1950, §§ 6-569 to 6-576; Wash.Rev.Stat.Ann., Supp.1943, §§ 3388 to 3388—6; W.Va.Code Ann., 1949, § 4219 (1) et seq.; Wisc.Stat., 1947, § 223.055.

462 U.S. 791
103 S.Ct. 2706
77 L.Ed.2d 180
MENNONITE BOARD OF MISSIONS,
Appellant
v.
Richard C. ADAMS.
No. 82-11.
Argued March 30, 1983.
Decided June 22, 1983.

Syllabus

An Indiana statute requires the county auditor to post notice in the county courthouse of the sale of real property for nonpayment of property taxes and to publish notice once each week for three consecutive weeks. Notice by certified mail must be given to the property owner, but at the time in question in this case there was no provision for notice by mail or personal service to mortgagees of the property. The purchaser at a tax sale acquires a certificate of sale that constitutes a lien against the property for the amount paid and is superior to all prior liens. The tax sale is followed by a 2-year period during which the owner or mortgagee may redeem the property. If no one redeems the property during this period, the tax sale purchaser may apply for a deed to the property, but before the deed is executed the county auditor must notify the former owner that he is entitled to redeem the property. If the property is not redeemed within 30 days, the county auditor may then execute a deed to the purchaser who then acquires an estate in fee simple, free and clear of all liens, and may bring an action to quiet title. Property on which appellant held a mortgage was sold to appellee for nonpayment of taxes. Appellant was not notified of the pending sale and did not learn of the sale until more than two years later, by which time the redemption period had run and the mortgagor still owed appellant money on the mortgage. Appellee then filed suit in state court seeking to quiet title to the property. The court upheld the tax sale statute against appellant's contention that it had not received constitutionally adequate notice of the pending tax sale and of its opportunity to redeem the property after the sale. The Indiana Court of Appeals affirmed.

Held: The manner of notice provided to appellant did not meet the requirements of the Due Process Clause of the Fourteenth Amendment. Pp. 795- 780.

(a) Prior to an action that will affect an interest in life, liberty, or property protected by the Due Process Clause, a State must provide "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Notice by publication is not reasonably calculated to inform interested parties who can be notified by more effective means such as personal service or mailed notice. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865. Pp. 795-797

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(b) Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale. Constructive notice to a mortgagee who is identified in the public record does not satisfy the due process requirement of Mullane. Neither notice by publication and posting nor mailed notice to the property owner are means "such as one desirous of actually informing the [mortgagee] might reasonably adopt to accomplish it." Mullane, supra, at 315, 70 S.Ct., at 657. Personal service or notice by mail is required even though sophisticated creditors have means at their disposal to discover whether property taxes have not been paid and whether tax sale proceedings are therefore likely to be initiated. Pp. 798-800 .

Ind.App., 427 N.E.2d 686, reversed and remanded.

William J. Cohen, Elkhart, Ind., for appellant.

Robert W. Miller, Elkhart, Ind., for appellee.

MARSHALL, Justice.

This appeal raises the question whether notice by publication and posting provides a mortgagee o real property with adequate notice of a proceeding to sell the mortgaged property for nonpayment of taxes.

I

To secure an obligation to pay $14,000, Alfred Jean Moore executed a mortgage in favor of appellant Mennonite Board of Missions (MBM) on property in Elkhart, Indiana, that Moore had purchased from MBM. The mortgage was recorded in the Elkhart County Recorder's Office on March 1, 1973. Under the terms of the agreement, Moore was responsible for paying all of the property taxes. Without MBM's knowledge, however, she failed to pay taxes on the property.

Indiana law provides for the annual sale of real property on which payments of property taxes have been delinquent for

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fifteen months or longer. Ind.Code § 6-1.1-24-1 et seq. Prior to the sale, the county auditor must post notice in the county courthouse and publish notice once each week for three consecutive weeks. § 6-1.1-24-3. The owner of the property is entitled to notice by certified mail to his last known address. § 6-1.1-24-4.1 Until 1980, however, Indiana law did not provide for notice by mail or personal service to mortgagees of property that was to be sold for nonpayment of taxes.2

After the required notice is provided, the county treasurer holds a public auction at which the real property is sold to the highest bidder. § 6-1.1-24-5. The purchaser acquires a certificate of sale which constitutes a lien against the real property for the entire amount paid. § 6-1.1-24-9. This lien is superior to all other liens against the property which existed at the time the certificate was issued. Ibid.

The tax sale is followed by a two-year redemption period during which the "owner, occupant, lienholder, or other person who has an interest in" the property may redeem the property. § 6-1.1-25-1. To redeem the property an individual must pay the county treasurer a sum sufficient to cover the purchase price of the property at the tax sale, the amount of taxes and special assessments paid by the purchaser following the sale, plus an additional percentage specified in the statute. §§ 6-1.1-25-2, 6-1.1-25-3. the county in turn remits the payment to the purchaser of the property at the tax sale.

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If no one redeems the property during the statutory redemption period, the purchaser may apply to the county auditor for a deed to the property. Before executing and delivering the deed, the county auditor must notify the former owner that he is still entitled to redeem the property. § 6-1.1-25-6. No notice to the mortgagee is required. If the property is not redeemed within thirty days, the county auditor may then execute and deliver a deed for the property to the purchaser, § 6-1.1-25-4, who thereby acquires "an estate in fee simple absolute, free and clear of all liens and encumbrances." § 6-1.1-25-4(d).

After obtaining a deed, the purchaser may initiate an action to quiet his title to the property. § 6-1.1-25-14. The previous owner, lienholders, and others who claim to have an interest in the property may no longer redeem the property. They may defeat the title conveyed by the tax deed only by proving, inter alia, that the property had not been subject to, or assessed for, the taxes for which it was sold, that the taxes had been p id before the sale, or that the property was properly redeemed before the deed was executed. § 6-1.1-25-16.

In 1977 Elkhart County initiated proceedings to sell Moore's property for nonpayment of taxes. The County provided notice as required under the statute: it posted and published an announcement of the tax sale and mailed notice to Moore by certified mail. MBM was not informed of the pending tax sale either by the county auditor or by Moore. The property was sold for $1,167.75 to appellee Richard Adams on August 8, 1977. Neither Moore nor MBM appeared at the sale or took steps thereafter to redeem the property. Following the sale of her property, Moore continued to make payments each month to MBM, and as a result MBM did not realize that the property had been sold. On August 16, 1979, MBM first learned of the tax sale. By then the redemption period had run and Moore still owed appellant $8,237.19.

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In November 1979, Adams filed a suit in state court seeking to quiet title to the property. In opposition to Adams' motion for summary judgment, MBM contended that it had not received constitutionally adequate notice of the pending tax sale and of the opportunity to redeem the property following the tax sale. The trial court upheld the Indiana tax sale statute against this constitutional challenge. The Indiana Court of Appeals affirmed. 427 N.E.2d 686 (1981). We noted probable jurisdiction, --- U.S. ----, 103 S.Ct. 204, 74 L.Ed.2d 164 (1982), and we now reverse.

II

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), this Court recognized that prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Invoking this "elementary and fundamental requirement of due process," ibid, the Court held that published notice of an action to settle the accounts of a common trust fund was not sufficient to inform beneficiaries of the trust whose names and addresses were known. The Court explained that notice by publication was not reasonably calculated to provide actual notice of the pending proceeding and was therefore inadequate to inform those who could be notified by more effective means such as personal service or mailed notice:

"Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name

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those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its

sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint." Id., at 315, 70 S.Ct., at 658.3

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In subsequent cases, this Court has adhered unwaiveringly to the principle announced in Mullane. In Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178 (1956), for example, the Court held that notice of condemnation proceedings published in a local newspaper was an inadequate means of informing a landowner whose name was known to the city and was on the official records. Similarly, in Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962), the Court concluded that publication in a newspaper and posted notices were inadequate to apprise a property owner of condemnation proceedings when his name and address were readily ascertainable from both deed records and tax rolls. Most recently, in Greene v. Lindsey, 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed. d 249 (1982), we held that posting a summons on the door of a tenant's apartment was an inadequate means of providing notice of forcible entry and detainer actions. See also Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13-15, 98 S.Ct. 1554, 1562-1563, 56 L.Ed.2d 30 (1978); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 174-175, 94 S.Ct. 2140, 2150-2151, 40 L.Ed.2d 732 (1974); Bank of Marin v. England, 385 U.S. 99, 102, 87 S.Ct. 274, 276, 17 L.Ed.2d 197 (1966); Covey v. Somers, 351 U.S. 141, 146-147, 76 S.Ct. 724, 727, 100 L.Ed. 1021 (1956); City of New York v. New York, N.H. & H.R. Co., 344 U.S. 293, 296-297, 73 S.Ct. 299, 301, 97 L.Ed. 333 (1953).

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This case is controlled by the analysis in Mullane. To begin with, a mortgagee possesses a substantial property interest that is significantly affected by a tax sale. Under Indiana law, a mortgagee acquires a lien on the owner's property which may be conveyed together with the mortgagor's personal obligation to repay the debt secured by the mortgage. Ind.Code § 32-8-11-7. A mortgagee's security interest generally has priority over subsequent claims or liens attaching to the property, and a purchase money mortgage takes precedence over virtually all other claims or liens including those which antedate the execution of the mortgage. Ind.Code § 32-8-11-4. The tax sale immediately and drastically diminishes the value of this security interest by granting the tax-sale purchaser a lien with priority over that of all other creditors. Ultimately, the tax sale may result in the complete nullification of the mortgagee's interest, since the purchaser acquires title free of all liens and other encumbrances at the conclusion of the redemption period.

Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale. Cf. Wiswall v. Sampson, 55 U.S. 52, 67, 14 L.Ed. 322 (1852). When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of Mullane.4

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Neither notice by publication and posting, nor mailed notice to the property owner, are means "such as one desirous of actually informing the [mortgagee] might

reasonably adopt to accomplish it." Mullane, supra, 339 U.S., at 315, 70 S.Ct., at 657. Because they are designed primarily to attract prospective purchasers to the tax sale, publication and posting are unlikely to reach those who, although they have an interest in the property, do not make special efforts to keep abreast of such notices. Walker v. City of Hutchinson, supra, 352 U.S., at 116, 77 S.Ct., at 202; New York v. New York, N.H. & H.R. Co., supra, 344 U.S., at 296, 73 S.Ct., at 301; Mullane, supra, 339 U.S., at 315, 70 S.Ct., at 657. Notice to the property owne , who is not in privity with his creditor and who has failed to take steps necessary to preserve his own property interest, also cannot be expected to lead to actual notice to the mortgagee. Cf. Nelson v. New York City, 352 U.S. 103, 107-109, 77 S.Ct. 195, 197-199, 1 L.Ed.2d 171 (1956). The County's use of these less reliable forms of notice is not reasonable where, as here, "an inexpensive and efficient mechanism such as mail service is available." Greene v. Lindsey, supra, 456 U.S., at 455, 102 S.Ct., at 1881.

Personal service or mailed notice is required even though sophisticated creditors have means at their disposal to discover whether property taxes have not been paid and whether tax sale proceedings are therefore likely to be initiated. In the first place, a mortgage need not involve a complex commercial transaction among knowledgeable parties, and it may well be the least sophisticated creditor whose security interest is threatened by a tax sale. More importantly, a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation. It is true that particularly extensive efforts to provide notice may often be required when the State is aware of a party's inexperience or incompetence. See, e.g., Memphis Light, Gas & Water Div. v. Craft, supra, 436 U.S., at 13-15, 98 S.Ct., at 1562-1564; Covey v. Somers, supra. But it does not follow that the State may

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forego even the relatively modest administrative burden of providing notice by mail to parties who are particularly resourceful.5 Cf. New York v. New York, N.H. & H.R. Co., supra, 344 U.S., at 297, 73 S.Ct., at 301. Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable. Furthermore, a mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending. The latter "was the information which the [County] was constitutionally obliged to give personally to the appellant—an obligation which the mailing of a single letter would have discharged." Schroeder v. City of New York, supra, 371 U.S., at 214, 83 S.Ct., at 283.

We therefore conclude that the manner of notice provided to appellant did not meet the requirements of the Due Process Clause of the Fourteenth Amendment.6 Accordingly, the judgment of the Indiana Court of Appeals is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice O'CONNOR, with whom Justice POWELL and Justice REHNQUIST join, dissenting.

Today, the Court departs significantly from its prior decisions and holds that before the State conducts any proceeding that will affect the legally protected property interests of

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any party, the State must provide notice to that party by means certain to ensure actual notice as long as the party's identity and location are "reasonably ascertainable." Ante, at 800. Applying this novel and unjustified principle to the present case, the Court decides that the mortga ee involved deserved more than the notice by publication and posting that were provided. I dissent because the Court's approach is unwarranted both as a general rule and as the rule of this case.

I

In Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), the Court established that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." We emphasized that notice is constitutionally adequate when "the practicalities and peculiarities of the case . . . are reasonably met," id., at 314-315, 70 S.Ct., at 657. See also Walker v. City of Hutchinson, 352 U.S. 112, 115, 77 S.Ct. 200, 202, 1 L.Ed.2d 178 (1956); Schroeder v. City of New York, 371 U.S. 208, 211-212, 83 S.Ct. 279, 281-282, 9 L.Ed.2d 255 (1962); Greene v. Lindsey, 456 U.S. 444, 449-450, 102 S.Ct. 1874, 1877-1878, 72 L.Ed.2d 249 (1982). The key focus is the "reasonableness" of the means chosen by the State. Mullane, supra, 339 U.S., at 315, 70 S.Ct., at 657. Whether a particular method of notice is reasonable depends on the outcome of the balance between the "interest of the State" and "the individual interest sought to be protected by the Fourteenth Amendment." Id., at 314, 70 S.Ct., at 657. Of course, "[i]t is not our responsibility to prescribe the form of service that the [State] . . . should adopt." Greene, supra, 456 U.S., at 455, n. 9, 102 S.Ct., at 1880, n. 9. It is the primary responsibility of the State to strike this balance, and we will upset this process only when the State strikes the balance in an irrational manner.

From Mullane on, the Court has adamantly refused to commit "itself to any formula achieving a balance between these interests in a particular proceeding or determining

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when constructive notice may be utilized or what test it must meet." 339 U.S. at 314, 70 S.Ct., at 657. Indeed, we have recognized "the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice will vary with the circumstances and conditions." Walker, supra, 352 U.S., at 115, 77 S.Ct., at 202 (emphasis added). Our approach in these cases has always reflected the general principle that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). See also Mathews v. Eldridge, 424 U.S. 319, 334-335, 96 S.Ct. 893, 902-903, 47 L.Ed.2d 18 (1976).

A.

Although the Court purports to apply these settled principles in this case, its decision today is squarely at odds with the balancing approach that we have developed. The Court now holds that whenever a party has a legally protected property interest, "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests . . . if [the party's] name and address are reasonably ascertainable." Ante, at 800.

Without knowing what state and individual interests will be at stake in future cases, the Court espouses a general principle ostensibly applicable whenever any legally protected property interest may be adversely affected. This is a flat rejection of the view that no "formula" can be devised that adequately evaluates the constitutionality of a procedure created by a State to provide notice in a certain class of cases. Despite the fact that Mullane itself accepted that constructive notice satisfied the dictates of due process in certain circumstances,1 the

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Court, citing Mullane, now holds that constructive notice can never suffice whenever there is a legally protected property interest at stake.

In seeking to justify this broad rule, the Court holds that although a party's inability to safeguard its interests may result in imposing greater notice burdens on the State, the fact that a party may be more able "to safeguard its interests does not relieve the State of its constitutional obligation." Ante, at 799. Apart from ignoring the fact that it is the totality of circumstances that determines the sufficiency of notice, the Court also neglects to consider that the constitutional obligation imposed upon the State may itself be defined by the party's ability to protect its interest. As recently as last Term, the Court held that the focus of the due process inquiry has always been the effect of a notice procedure on "a particular class of cases." Greene, supra, 456 U.S., at 451, 102 S.Ct., at 1878 (emphasis added). In fashioning a broad rule for "the least sophisticated creditor," ante, at 799, the Court ignores the well-settled principle that "procedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases, not the rare exceptions." Mathews v. Eldridge, supra, 424 U.S., at 344, 96 S.Ct., at 907; see also Califano v. Yamasaki, 442 U.S. 682, 696, 99 S.Ct. 2545, 2555, 61 L.Ed.2d 176 (1979). If the members of a particular class generally possess the ability to safeguard their interests, then this fact must be taken into account when we consider the "totality of circumstances," as required by Mullane. Indeed, the criterion established by Mullane " 'is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' " 339 U.S., at 315, 70 S.Ct., at 657 (quotingAmerican Land Co. v. Zeiss, 219 U.S. 47, 67, 31 S.Ct. 200, 207, 55 L.Ed. 82 (1911)).

The Court also suggests that its broad rule has really been the law ever since Mullane. See ante, at 796-797, n. 3. The Court reasons that before Mullane, the characterization of proceedings as in personam or in rem was relevant to

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determining whether the notice given was constitutionally sufficient,2 and that once Mullane held that the "power of the State to resort to constructive service" no longer depended upon the "historic antithesis" of in rem and in personam proceedings, 339 U.S., at 312-313, 70 S.Ct., at 656, constructive notice became insufficient as to all proceedings.

The plain language of Mullane is clear that the Court expressly refused to reject constructive notice as per se insufficient. See 339 U.S., at 312-314, 70 S.Ct., at 656-657. Moreover, the Court errs in thinking that the only justification for constructive notice is the distinction between types of proceedings. See ante, at 796-797, n. 3. The historical justification for constructive notice was that those with an interest in property were under an obligation to act reasonabl in keeping

themselves informed of proceedings that affected that property. See e.g., North Laramie Land Co. v. Hoffman, 268 U.S. 276, 283, 45 S.Ct. 491, 494, 69 L.Ed. 953 (1925); Ballard v. Hunter, 204 U.S. 241, 262, 27 S.Ct. 261, 269, 51 L.Ed. 461 (1907). As discussed in Part II of this dissent, infra, Mullane expressly acknowledged, and did not reject, the continued vitality of the notion that property owners had some burden to protect their property. See 339 U.S., at 316, 70 S.Ct., at 658.

B

The Court also holds that the condition for receiving notice under its new approach is that the name and address of the party must be "reasonably ascertainable." In applying this requirement to the mortgagee in this case, the Court holds that the State must exercise "reasonably diligent efforts" in determining the address of the mortgagee, id., at 798, n. 4,

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and suggests that the State is required to make some effort "to discover the identity and the whereabouts of a mortgagee whose identity is not in the public record." Ibid. Again, the Court departs from our prior cases. In all of the cases relied on by the Court in its analysis, the State either actually knew the identity or incapacity of the party seeking notice, or that identity was "very easily ascertainable." Schroeder, supra, 371 U.S., at 212-213, 83 S.Ct., at 282. See also Mullane, supra, 339 U.S., at 318, 70 S.Ct., at 659; Covey v. Town of Summers, 351 U.S. 141, 146, 76 S.Ct., at 727 (1956); Walker, supra, 352 U.S., at 116, 77 S.Ct., at 202-203; Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175, 94 S.Ct. 2140, 2151, 40 L.Ed.2d 732 (1974).3 Under the Court's decision today, it is not clear how far the State must go in providing for reasonable efforts to ascertain the name and address of an affected party. Indeed, despite the fact that the recorded mortgage failed to include the appellant's address, see ante, at 798-799, n. 4, the Court concludes that its whereabouts were "reasonably identifiable." Id., at 798. This uncertainty becomes particularly ominous in the light of the fact that the duty to ascertain identity and location, and to notify by mail or other similar means, exists whenever any legally protected interest is implicated.

II

Once the Court effectively rejects Mullane and its progeny by accepting a per se rule against constructive notice, it applies its rule and holds that the mortgagee in this case must receive personal service or mailed notice because it has a legally protected interest at stake, and because the mortgage was publicly recorded. See ante, at 798. If the Court had

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observed its prior decisions and engaged in the balancing required by Mullane, it would have reached the opposite result.

It cannot be doubted that the State has a vital interest in the collection of its tax revenues in whatever reasonable manner that it chooses: "In authorizing the proceedings to enforce the payment of the taxes upon lands sold to a purchaser at tax sale, the State is in exercise of its sovereign power to raise revenue essential to carry on the affairs of state and the due administration of the laws. . . . 'The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain.' " Leigh v. Green, 193 U.S. 79, 89, 24 S.Ct. 390, 392, 48 L.Ed. 623 (1904) (quoting Bell's Gap Railroad Company v. Pennsylvania, 134 U.S. 232, 239, 10 S.Ct. 533, 535, 33 L.Ed. 892 (1890)). The State has decided to accommodate its vital interest in this respect

through the sale of real property on which payments of property taxes have been delinquent for a certain period of time.4

The State has an equally strong interest in avoiding the burden imposed by the requirement that it must exercise "reasonable" efforts to ascertain the identity and location of any party with a legally protected interest. In the instant case, that burden is not limited to mailing notice. Rather, the State must have someone check the records and ascertain with respect to each delinquent taxpayer whether there is a mortgagee, perhaps whether the mortgage has been paid off, and whether there is a dependable address.

Against these vital interests of the State, we must weigh the interest possessed by the relevant class—in this case,

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mortgagees.5 Contrary to the Court's approach today, this interest may not be evaluated simply by reference to the fact that we have frequently found constructive notice to be inadequate since Mullane. Rather, such interest "must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted." North Laramie Land Co., supra, 268 U.S., at 283, 45 S.Ct., at 494.

Chief Justice Marshall wrote long ago that "it is part of common prudence for all those who have any interest in [property], to guard that interest by persons who are in a situation to protect it." The Mary, 13 U.S. (9 Cranch) 126, 144, 3 L.Ed. 678 (1815). We have never rejected this principle, and, indeed, we held in Mullane that "[a] State may indulge" the assumption that a property owner "usually arranges means to learn of any direct attack upon his possessory or proprietary rights." 339 U.S., at 316, 70 S.Ct., at 658. When we have found constructive notice to be inadequate, it has always been where an owner of property is, for all purposes, unable to protect his interest because there is no practical way for him to learn of state action that threatens to affect his property interest. In each case, the adverse action was one that was completely unexpected by the owner, and the owner would become aware of the action only by the fortuitous occasion of reading "an advertisement in small type inserted in the back pages of a newspaper . . . . [that may] not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention." Mullane, supra, 339 U.S., at 315, 70 S.Ct., at 658. In each case, the individuals had no reason to expect that their property interests were being affected.

This is not the case as far as tax sales and mortgagees are concerned. Unlike condemnation or an unexpected account-

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ing, the assessment of taxes occurs with regularity and predictability, and the state action in this case cannot reasonably be characterized as unexpected in any sense. Unlike the parties in our other cases, the Mennonite Board had a regular event, the assessment of taxes, upon which to focus, in its effort to protect its interest. Further, approximately 95% of the mortgage debt outstanding in the United States is held by private instit tional lenders and federally-supported agencies. U.S. Dept. of Commerce, Statistical Abstract of the United States: 1982-83, 511 (103d ed.).6 It is highly unlikely, if likely at all, that a significant number of mortgagees are unaware of the consequences that ensue when their mortgagors fail to pay taxes assessed on the mortgaged property. Indeed, in this case, the Board itself required that Moore pay all property taxes.

There is no doubt that the Board could have safeguarded its interest with a minimum amount of effort. The county auctions of property commence by statute on the second Monday of each year. Ind.Code § 6-1.1-24-2(5). The county auditor is required to post notice in the county courthouse at least three weeks before the date of sale. Ind.Code § 6-1.1-24-3(a). The auditor is also required to publish notice in two different newspapers once each week for three weeks before the sale. Ind.Code § 6-1.1-24-3(a); Ind.Code § 6-1.1-22-4(b). The Board could have supplemented the protection offered by the State with the additional measures suggested by the court below: The Board could have required that Moore provide it with copies of paid tax assessments, or could have re-

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quired that Moore deposit the tax monies in an escrow account, or could have itself checked the public records to determine whether the tax assessment had been paid. Pet. for Cert. 27.

When a party is unreasonable in failing to protect its interest despite its ability to do so, due process does not require that the State save the party from its own lack of care. The balance required by Mullane clearly weighs in favor of finding that the Indiana statutes satisfied the requirements of due process. Accordingly, I dissent.

1. Because a mortgagee has no title to the mortgaged property under Indiana law, the mortgagee is not considered an "owner" for purposes of § 6-1.1-24-4. First Savings & Loan Assn. of Central Indiana v. Furnish, 174 Ind.App. 265, 367 N.E.2d 596, 600, n. 14 (Ind.App.1977).

2. Ind.Code § 6-1.1-24-4.2, added in 1980, provides for notice by certified mail to any mortgagee of real property which is subject to tax sale proceedings, if the mortgagee has annually requested such notice and has agreed to pay a fee, not to exceed $10, to cover the cost of sending notice. Because the events in question in this case occurred before the 1980 amendment, the constitutionality of the amendment is not before us.

3. The decision in Mullane rejected one of the premises underlying this Court's previous decisions concerning the requirements of notice in judicial proceedings: that due process rights may vary depending on whether actions are in rem or in personam. 339 U.S., at 312, 70 S.Ct., at 656. See Shaffer v. Heitner, 433 U.S. 186, 206, 97 S.Ct. 2569, 2580, 53 L.Ed.2d 683 (1977). Traditionally, when a state court based its jurisdiction upon its authority over the defendant's person, personal service was considered essential for the court to bind individuals who did not submit to its jurisdiction. See, e.g., Hamilton v. Brown, 161 U.S. 256, 275, 16 S.Ct. 585, 592, 40 L.Ed. 691 (1896); Arndt v. Griggs, 134 U.S. 316, 320, 10 S.Ct. 557, 558, 33 L.Ed. 918 (1890); Pennoyer v. Nef , 95 U.S. 714, 726, 733-734, 24 L.Ed. 565 (1878) ("Due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."). In Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927), the Court recognized for the first time that service by registered mail, in place of personal service, may satisfy the requirements of due process. Constructive notice was never deemed sufficient to bind an individual in an action in personam.

In contrast, in in rem or quasi in rem proceedings in which jurisdiction was based on the court's power over property within its territory, see generally Shaffer v. Heitner, supra, 433 U.S., at 196-205, 97 S.Ct., at 2575-2580, constructive notice to nonresidents was traditionally understood to satisfy the requirements of due process. In order to settle questions of title to property within its territory, a state court was generally required

to proceed by an in rem action since the court could not otherwise bind nonresidents. At one time constructive service was considered the only means of notifying nonresidents since it was believed that "[p]rocess from the tribunals of one State cannot run into another State." Pennoyer v. Neff, supra, at 727. See Ballard v. Hunter, 204 U.S. 241, 255, 27 S.Ct. 261, 266, 51 L.Ed. 461 (1907). As a result, the nonresident acquired the duty "to take measures that in some way he shall be represented when his property is called into requisition." Id., at 262, 27 S.Ct., at 269. If he "fail[ed] to get notice by the ordinary publications which have been usually required in such cases, it [was] his misfortune." Ibid.

Rarely was a corresponding duty imposed on interested parties who resided within the State and whose identities were reasonably ascertainable. Even in actions in rem, such individuals were generally provided personal service. See, e.g., Arndt v. Griggs, supra, 134 U.S., at 326-327, 10 S.Ct., at 560-561. Where the identity of interested residents could not be ascertained after a reasonably diligent inquiry, however, their interests in property could be affected by a proceeding in rem as long as constructive notice was provided. See Hamilton v. Brown, supra, 161 U.S., at 275, 16 S.Ct., at 592; American Land Co. v. Zeiss, 219 U.S. 47, 61-62, 65-66, 31 S.Ct. 200, 206-207, 55 L.Ed. 82 (1911).

Beginning with Mullane, this Court has recognized, contrary to the earlier line of cases, "that an adverse judgment in rem directly affects the property owner by divesting him of his rights in the property before the court." Shaffer v. Heitner, supra, 433 U.S., at 206, 97 S.Ct., at 2580. In rejecting the traditional justification for distinguishing between residents and nonresidents and between in rem and in personam actions, the Court has not left all interested claimants to the vagaries of indirect notice. Our cases have required the State to make efforts to provide actual notice to all interested parties comparable to the efforts that were previously required only in in personam actions. See infra, this page.

4. In this case, the mortgage on file with the county recorder identified the mortgagee only as "MENNONITE BOARD OF MISSIONS a corporation, of Wayne County, in the State of Ohio." We assume that the mortgagee's address could have been ascertained by reasonably diligent efforts. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317, 70 S.Ct. 652, 658-659, 94 L.Ed. 865 (1950). Simply mailing a letter to "Mennonite Board of Missions, Wayne County, Ohio," quite likely would have provided actual notice, given "the well-known skill of postal officials and employees in making proper delivery of letters defectively addressed." Grannis v. Ordean, 234 U.S. 385, 397-398, 34 S.Ct. 779, 784, 58 L.Ed. 1363 (1914). We do not suggest, however, that a governmental body is required to undertake extraordinary efforts to discover the identity and whereabouts of a mortgagee whose identity is not in the public record.

5. Indeed, notice by mail to the mortgagee may ultimately relieve the county of a more substantial administrative burden if the mortgagee arranges for payment of the delinquent taxes prior to the tax sale.

6. This appeal also presents the question whether, before the county auditor executes and delivers a deed to the tax-sale purchaser, the mortgagee is constitutionally entitled to notice of its right to redeem the property. Cf. Griffin v. Griffin, 327 U.S. 220, 229, 66 S.Ct. 556, 560-561, 90 L.Ed. 635 (1946). Because we conclude that the failure to give adequate notice of the tax sale proceeding deprived appellant of due process of law, we need not reach this question.

1. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), we held that "[p]ersonal service has not in all circumstances

been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents."

2. The Court is simply incorrect in asserting that before Mullane, constructive notice was rarely deemed sufficient even as to in rem proceedings when residents of the State were involved, ante, at 796-797, n. 3. See, e.g., Longyear v. Toolan, 209 U.S. 414, 417-418, 28 S.Ct. 506, 507-508, 52 L.Ed. 859 (1908). See also Note, The Constitutionality of Notice by Publication in Tax Sale Proceedings, 84 Yale L.J. 1505, 1507 (1975) ("This rule [permitting constructive notice] was . . . extended to all in rem proceedings, whether involving property owned by nonresidents or residents.").

3. In Mullane, the Court contrasted those parties whose identity and whereabouts are known or "at hand" with those "whose interests or whereabouts could not with due diligence be ascertained." 339 U.S., at 318, 317, 70 S.Ct., at 658, 659. This language must be read in the light of the facts of Mullane, in which the identity and location of certain beneficiaries were actually known. In addition, the Court in Mullane expressly rejected the view that a search "under ordinary standards of diligence" was required in that case. Id., 339 U.S., at 317, 70 S.Ct., at 659.

4. The Court suggests that the notice that it requires "may ultimately relieve the county of a more substantial administrative burden if the mortgagee arranges for payment of the delinquent taxes prior to the tax sale." Ante, at 800, n. 5. The Court neglects the fact that the State is a better judge of how it wants to settle its tax debts than is this Court.

5. This is not to say that the rule espoused must cover all conceivable mortgagees in all conceivable circumstances. The flexibility of due process is sufficient to accommodate those atypical members of the class of mortgagees.

485 U.S. 478
108 S.Ct. 1340
99 L.Ed.2d 565
TULSA PROFESSIONAL COLLECTION SERVICES, INC., Appellant

v.

JoAnne POPE, Executrix of the Estate of H. Everett Pope, Jr., Deceased.

No. 86-1961.
Argued March 2, 1988.
Decided April 19, 1988.
Syllabus

Header ends here. Under the nonclaim provision of Oklahoma's Probate Code, creditors' claims against an estate are generally barred unless they are presented to the executor or executrix within two months of the publication of notice of the commencement of probate proceedings. Appellee executrix published the required notice in compliance with the terms of the nonclaim statute and a probate court order, but appellant, the assignee of a hospital's claim for expenses connected with the decedent's final illness, failed to file a timely claim. For this reason, the probate court denied appellant's application for payment, and both the State Court of Appeals and Supreme Court affirmed, rejecting appellant's contention that, in failing to require more than publication notice, the nonclaim statute violated due process. That contention was based upon *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, which held that state action that adversely affects property interests must be accompanied by such notice as is reasonable under the particular circumstances, balancing the State's interest and the due process interests of individuals, and *Mennonite Board of Missions v. Adams,* 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180, which generally requires actual notice to an affected party whose name and address are "reasonably ascertainable."

Held: If appellant's identity as a creditor was known or "reasonably ascertainable" by appellee (a fact which cannot be determined from the present record), the Due Process Clause of the Fourteenth Amendment, as interpreted by *Mullane* and *Mennonite,* requires that appellant be given notice by mail or such other means as is certain to ensure actual notice. Appellant's claim is properly considered a property interest protected by the Clause. Moreover, the nonclaim statute is not simply a self-executing statute of limitations. *Texaco, Inc. v. Short,* 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738, distinguished. Rather, the probate court's intimate involvement throughout the probate proceedings particularly the court's activation of the statute's time bar by the appointment of an executor or executrix—is so pervasive and substantial that it must be considered state action. Nor can there be any doubt that the statute may "adversely affect" protected property interests, since untimely claims such as appellant's are completely extinguished. On balance, satisfying creditors'

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substantial, practical need for actual notice in the probate setting is not so cumbersome or impracticable as to unduly burden the State's undeniably legitimate interest in the expeditious resolution of the proceedings, since mail service (which is already routinely provided at several points in the probate process) is inexpensive, efficient, and reasonably calculated to provide actual notice, and since publication notice will suffice for creditors whose identities are not

ascertainable by reasonably diligent efforts or whose claims are merely conjectural. Pp. 484-491.

733 P.2d 396 (Okl.1986), reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, STEVENS, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., concurred in the result. REHNQUIST, C.J., filed a dissenting opinion, *post,* p. 484—491.

Randall E. Rose, Tulsa, Okl., for appellant.

Phillip K. Smith, Tulsa, Okl., for appellee.

Justice O'CONNOR delivered the opinion of the Court.

This case involves a provision of Oklahoma's probate laws requiring claims "arising upon a contract" generally to be presented to the executor or executrix of the estate within two months of the publication of a notice advising creditors of the commencement of probate proceedings. Okla.Stat., Tit. 58, § 333 (1981). The question presented is whether this provision of notice solely by publication satisfies the Due Process Clause.

I

Oklahoma's Probate Code requires creditors to file claims against an estate within a specified time period, and generally bars untimely claims. *Ibid.* Such "nonclaim statutes" are almost universally included in state probate codes. See Uniform Probate Code § 3-801, 8 U.L.A. 351 (1983); Falender, Notice to Creditors in Estate Proceedings: What Process is Due?, 63 N.C.L.Rev. 659, 667-668 (1985). Giving creditors a limited time in which to file claims against the estate serves the State's interest in facilitating the adminis-

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tration and expeditious closing of estates. See, *e.g., State ex rel. Central State Griffin Memorial Hospital v. Reed,* 493 P.2d 815, 818 (Okla.1972). Nonclaim statutes come in two basic forms. Some provide a relatively short time period, generally two to six months, that begins to run after the commencement of probate proceedings. Others call for a longer period, generally one to five years, that runs from the decedent's death. See Falender, *supra,* at 664-672. Most States include both types of nonclaim statutes in their probate codes, typically providing that if probate proceedings are not commenced and the shorter period therefore never is triggered, then claims nonetheless may be barred by the longer period. See, *e.g.,* Ark.Code Ann. §§ 28-50-101(a), (d) (1987) (three months if probate proceedings commenced; five years if not); Idaho Code §§ 15-3-803(a)(1), (2) (1979) (four months; three years); Mo.Rev.Stat. §§ 473.360(1), (3) (1986) (six months; three years). Most States also provide that creditors are to be notified of the requirement to file claims imposed by the nonclaim statutes solely by publication. See Uniform Probate Code § 3-801, 8 U.L.A. 351 (1983); Falender, *supra,* at 660, n. 7 (collecting statutes). Indeed, in most jurisdictions it is the publication of notice that triggers the nonclaim statute. The Uniform Probate Code, for example, provides that creditors have four months from publication in which to file claims. Uniform Probate Code § 3-801, 8 U.L.A. 351 (1983). See also, *e.g.,* Ariz.Rev.Stat.Ann. § 14-3801 (1975); Fla.Stat. § 733.701 (1987); Utah Code Ann. § 75-3-801 (1978).

The specific nonclaim statute at issue in this case, Okla.Stat., Tit. 58, § 333 (1981),

provides for only a short time period and is best considered in the context of Oklahoma probate proceedings as a whole. Under Oklahoma's Probate Code, any party interested in the estate may initiate probate proceedings by petitioning the court to have the will proved. § 22. The court is then required to set a hearing date on the petition, § 25, and to mail notice of the hearing "to all heirs,

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legatees and devisees, at their places of residence," §§ 25, 26. If no person appears at the hearing to contest the will, the court may admit the will to probate on the testimony of one of the subscribing witnesses to the will. § 30. After the will is admitted to probate, the court must order appointment of an executor or executrix, issuing letters testamentary to the named executor or executrix if that person appears, is competent and qualified, and no objections are made. § 101.

Immediately after appointment, the executor or executrix is required to "give notice to the creditors of the deceased." § 331. Proof of compliance with this requirement must be filed with the court. § 332. This notice is to advise creditors that they must present their claims to the executor or executrix within two months of the date of the first publication. As for the method of notice, the statute requires only publication: "[S]uch notice must be published in some newspaper in [the] county once each week for two (2) consecutive weeks." § 331. A creditor's failure to file a claim within the 2-month period generally bars it forever. § 333. The nonclaim statute does provide certain exceptions, however. If the creditor is out of State, then a claim "may be presented at any time before a decree of distribution is entered." § 333. Mortgages and debts not yet due are also excepted from the 2-month time limit.

This shorter type of nonclaim statute is the only one included in Oklahoma's Probate Code. Delays in commencement of probate proceedings are dealt with not through some independent, longer period running from the decedent's death, see, *e.g.,* Ark. Code Ann. § 28-50-101(d) (1987), but by shortening the notice period once proceedings have started. Section 331 provides that if the decedent has been dead for more than five years, then creditors have only 1 month after notice is published in which to file their claims. A similar one-month period applies if the decedent was intestate. § 331.

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II

H. Everett Pope, Jr., was admitted to St. John Medical Center, a hospital in Tulsa, Oklahoma, in November 1978. On April 2, 1979, while still at the hospital, he died testate. His wife, appellee JoAnne Pope, initiated probate proceedings in the District Court of Tulsa County in accordance with the statutory scheme outlined above. The court entered an order setting a hearing. Record 8. After the hearing the court entered an order admitting the will to probate and, following the designation in the will, *id.,* at 2, named appellee as the executrix of the estate. *Id.,* at 12. Letters testamentary were issued, *id.,* at 13, and the court ordered appellee to fulfill her statutory obligation by directing that she "immediately give notice to creditors." *Id.,* at 14. Appellee published notice in the Tulsa Daily Legal News for two consecutive weeks beginning July 17, 1979. The notice advised creditors that they must file any claim they had against the estate within two months of the first publication of the notice. *Id.,* at 16.

Appellant Tulsa Professional Collection Services, Inc., is a subsidiary of St. John Medical Center and the assignee of a claim for expenses connected with the decedent's long stay at that hospital. Neither appellant, nor its parent company, filed a claim with appellee within the 2-month time period following publication of notice. In October 1983, however, appellant filed an Application for Order Compelling Payment of Expenses of Last Illness. *Id.,* at 28. In making this application, appellant relied on Okla.Stat., Tit. 58, § 594 (1981), which indicates that an executrix "must pay . . . the expenses of the last sickness." Appellant argued that this specific statutory command made compliance with the 2-month deadline for filing claims unnecessary. The District Court of Tulsa County rejected this contention, ruling that even claims pursuant to § 594 fell within the general requirements of the nonclaim statute. Accordingly, the court denied appellant's application. App. 3.

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The District Court's reading of § 594's relationship to the nonclaim statute was affirmed by the Oklahoma Court of Appeals. *Id.,* at 7. Appellant then sought rehearing, arguing for the first time that the nonclaim statute's notice provisions violated due process. In a supplemental opinion on rehearing the Court of Appeals rejected the due process claim on the merits. *Id.,* at 15.

Appellant next sought review in the Supreme Court of Oklahoma. That court granted certiorari and, after review of both the § 594 and due process issues, affirmed the Court of Appeals' judgment. With respect to the federal issue, the court relied on *Estate of Busch v. Ferrell-Duncan Clinic, Inc.,* 700 S.W.2d 86, 88-89 (Mo.1985), to reject appellant's contention that our decisions in *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), and *Mennonite Board of Missions v. Adams,* 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), required more than publication notice. 733 P.2d 396 (1987). The Supreme Court reasoned that the function of notice in probate proceedings was not to " 'make a creditor a party to the proceeding' " but merely to " 'notif[y] him that he may become one if he wishes.' " *Id.,* at 400 (quoting *Estate of Busch, supra,* 700 S.W.2d, at 88). In addition, the court distinguished probate proceedings because they do not directly adjudicate the creditor's claims. 733 P.2d, at 400-401. Finally, the court agreed with *Estate of Busch* that nonclaim statutes were self-executing statutes of limitations, because they "ac[t] to cut off potential claims against the decedent's estate by the passage of time," and accordingly do not require actual notice. 733 P.2d, at 401. See also *Gibbs v. Estate of Dolan,* 146 Ill.App.3d 203, 100 Ill.Dec. 61, 496 N.E.2d 1126 (1986) (rejecting due process challenge to nonclaim statute); *Gano Farms, Inc. v. Estate of Kleweno,* 2 Kan.App.2d 506, 582 P.2d 742 (1978) (same); *Chalaby v. Driskell,* 237 Or. 245, 390 P.2d 632 (1964) (same); *William B. Tanner Co. v. Estate of Fessler,* 100 Wis.2d 437, 302 N.W.2d 414 (1981) (same); *New York Merchandise Co. v. Stout,* 43 Wash.2d 825, 264 P.2d 863 (1953) (same).

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This conclusion conflicted with that reached by the Nevada Supreme Court in *Continental Insurance Co. v. Moseley,* 100 Nev. 337, 683 P.2d 20 (1984), after our decision remanding the case for reconsideration in light of *Mennonite, supra.* 463 U.S. 1202, 103 S.Ct. 3530, 77 L.Ed.2d 1383 (1983). In *Moseley,* the Nevada Supreme Court held that in this context due process required "more than service by publication." 100 Nev., at 338, 683

P.2d, at 21. We noted probable jurisdiction, 484 U.S. 813, 108 S.Ct. 62, 98 L.Ed.2d 26 (1987), and now reverse and remand.

III

Mullane v. Central Hanover Bank & Trust Co., supra, 339 U.S., at 314, 70 S.Ct., at 657, established that state action affecting property must generally be accompanied by notification of that action: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." In the years since *Mullane* the Court has adhered to these principles, balancing the "interest of the State" and "the individual interest sought to be protected by the Fourteenth Amendment." *Ibid.* The focus is on the reasonableness of the balance, and, as *Mullane* itself made clear, whether a particular method of notice is reasonable depends on the particular circumstances.

The Court's most recent decision in this area is *Mennonite, supra,* which involved the sale of real property for delinquent taxes. State law provided for tax sales in certain circumstances and for a 2-year period following any such sale during which the owner or any lienholder could redeem the property. After expiration of the redemption period, the tax sale purchaser could apply for a deed. The property owner received actual notice of the tax sale and the redemption period. All other interested parties were given notice by publication. 462 U.S., at 792-794, 103 S.Ct., at 2708-2709. In *Mennonite,* a mortgagee of property that had been sold and on which the re-

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demption period had run complained that the State's failure to provide it with actual notice of these proceedings violated due process. The Court agreed, holding that "actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." *Id.,* at 800, 103 S.Ct., at 2712 (emphasis in original). Because the tax sale had "immediately and drastically diminishe[d] the value of [the mortgagee's] interest," *id.,* at 798, 103 S.Ct., at 2711, and because the mortgagee could have been identified through "reasonably diligent efforts," *id.,* at 798, n. 4, 103 S.Ct., at 2711, n. 4, the Court concluded that due process required that the mortgagee be given actual notice.

Applying these principles to the case at hand leads to a similar result. Appellant's interest is an unsecured claim, a cause of action against the estate for an unpaid bill. Little doubt remains that such an intangible interest is property protected by the Fourteenth Amendment. As we wrote in *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982), this question "was affirmatively settled by the *Mullane* case itself, where the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." In *Logan,* the Court held that a cause of action under Illinois' Fair Employment Practices Act was a protected property interest, and referred to the numerous other types of claims that the Court had previously recognized as deserving due process protections. See *id.,* at 429-431, and nn. 4-5, 102 S.Ct., at 1154-1155, and nn. 4-5. Appellant's claim, therefore, is properly considered a protected property interest.

The Fourteenth Amendment protects this interest, however, only from a deprivation by state action. Private use of state-sanctioned private remedies or procedures does not rise to the level of state action. See, *e.g., Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). Nor is the State's involvement in the mere running of a general statute of limitations

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generally sufficient to implicate due process. See *Texaco, Inc. v. Short,* 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982). See also *Flagg Bros., Inc. v. Brooks, supra,* 436 U.S., at 166, 98 S.Ct., at 1738. But when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found. See, *e.g., Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982); *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). The question here is whether the State's involvement with the nonclaim statute is substantial enough to implicate the Due Process Clause.

Appellee argues that it is not, contending that Oklahoma's nonclaim statute is a self-executing statute of limitations. Relying on this characterization, appellee then points to *Short, supra*. Appellee's reading of *Short* is correct—due process does not require that potential plaintiffs be given notice of the impending expiration of a period of limitations—but in our view, appellee's premise is not. Oklahoma's nonclaim statute is not a self-executing statute of limitations.

It is true that nonclaim statutes generally possess some attributes of statutes of limitations. They provide a specific time period within which particular types of claims must be filed and they bar claims presented after expiration of that deadline. Many of the state court decisions upholding nonclaim statutes against due process challenges have relied upon these features and concluded that they are properly viewed as statutes of limitations. See, *e.g., Estate of Busch v. Ferrell-Duncan Clinic, Inc.,* 700 S.W.2d, at 89; *William B. Tanner Co. v. Estate of Fessler,* 100 Wis.2d 437, 302 N.W.2d 414 (1981).

As we noted in *Short,* however, it is the "self-executing feature" of a statute of limitations that makes *Mullane* and *Mennonite* inapposite. See 454 U.S., at 533, 536, 102 S.Ct., at 794, 796. The State's interest in a self-executing statute of limitations is in providing repose for potential defendants and in avoiding stale claims. The State has no role to play beyond enactment of the limitations period. While this enactment obvi-

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ously is state action, the State's limited involvement in the running of the time period generally falls short of constituting the type of state action required to implicate the protections of the Due Process Clause.

Here, in contrast, there is significant state action. The probate court is intimately involved throughout, and without that involvement the time bar is never activated. The nonclaim statute becomes operative only after probate proceedings have been commenced in state court. The court must appoint the executor or executrix before notice, which triggers the time bar, can be given. Only after this court appointment is made does the statute provide for any notice; § 331 directs the executor or executrix to publish notice "immediately" after appointment. Indeed, in this case, the District Court reinforced the statutory command with an order expressly requiring appellee to

"immediately give notice to creditors." The form of the order indicates that such orders are routine. Record 14. Finally, copies of the notice and an affidavit of publication must be filed with the court. § 332. It is only after all of these actions take place that the time period begins to run, and in every one of these actions, the court is intimately involved. This involvement is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment.

Where the legal proceedings themselves trigger the time bar, even if those proceedings do not necessarily resolve the claim on its merits, the time bar lacks the self-executing feature that *Short* indicated was necessary to remove any due process problem. Rather, in such circumstances, due process is directly implicated and actual notice generally is required. Cf. *Mennonite,* 462 U.S., at 793-794, 103 S.Ct., at 2708-2709 (tax sale proceedings trigger 2-year redemption period); *Logan v. Zimmerman Brush Co., supra,* 455 U.S., at 433, 437, 102 S.Ct., at 1156, 1158 (claim barred if no hearing held 120 days after action commenced); *City of New York v. New York, N.H. & H.R. Co.,* 344 U.S. 293, 294, 73 S.Ct. 299, 300, 97 L.Ed. 333 (1953) (bankruptcy proceedings trigger specific time pe-

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riod in which creditors' claims must be filed). Our conclusion that the Oklahoma nonclaim statute is not a self-executing statute of limitations makes it unnecessary to consider appellant's argument that a 2-month period is somehow unconstitutionally short. See Tr. of Oral Arg. 22 (advocating constitutional requirement that the States provide at least one year). We also have no occasion to consider the proper characterization of nonclaim statutes that run from the date of death, and which generally provide for longer time periods, ranging from one to five years. See Falender, 63 N.C.L.Rev., at 667-669. In sum, the substantial involvement of the probate court throughout the process leaves little doubt that the running of Oklahoma's nonclaim statute is accompanied by sufficient government action to implicate the Due Process Clause.

Nor can there be any doubt that the nonclaim statute may "adversely affect" a protected property interest. In appellant's case, such an adverse effect is all too clear. The entire purpose and effect of the nonclaim statute is to regulate the timeliness of such claims and to forever bar untimely claims, and by virtue of the statute, the probate proceedings themselves have completely extinguished appellant's claim. Thus, it is irrelevant that the notice seeks only to advise creditors that they may become parties rather than that they are parties, for if they do not participate in the probate proceedings, the nonclaim statute terminates their property interests. It is not necessary for a proceeding to directly adjudicate the merits of a claim in order to "adversely affect" that interest. In *Mennonite* itself, the tax sale proceedings did not address the merits of the mortgagee's claim. Indeed, the tax sale did not even completely extinguish that claim, it merely "diminishe[d] the value" of the interest. 462 U.S., at 798, 103 S.Ct., at 2711. Yet the Court held that due process required that the mortgagee be given actual notice of the tax sale. See also *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) (termination of utility service); *Schroeder v. City of New York,* 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962) (condemnation proceeding); *City of New*

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York v. New York, N.H. & H.R. Co., supra (Bankruptcy Code's requirement of "reasonable notice" requires actual notice of deadline for filing claims).

In assessing the propriety of actual notice in this context consideration should be given to the practicalities of the situation and the effect that requiring actual notice may have on important state interests. *Mennonite, supra,* 462 U.S., at 798-799, 103 S.Ct., at 2711-2712; *Mullane,* 339 U.S., at 313-314, 70 S.Ct., at 656-657. As the Court noted in *Mullane,* "[c]hance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper." *Id.,* at 315, 70 S.Ct., at 658. Creditors, who have a strong interest in maintaining the integrity of their relationship with their debtors, are particularly unlikely to benefit from publication notice. As a class, creditors may not be aware of a debtor's death or of the institution of probate proceedings. Moreover, the executor or executrix will often be, as is the case here, a party with a beneficial interest in the estate. This could diminish an executor's or executrix's inclination to call attention to the potential expiration of a creditor's claim. There is thus a substantial practical need for actual notice in this setting.

At the same time, the State undeniably has a legitimate interest in the expeditious resolution of probate proceedings. Death transforms the decedent's legal relationships and a State could reasonably conclude that swift settlement of estates is so important that it calls for very short time deadlines for filing claims. As noted, the almost uniform practice is to establish such short deadlines, and to provide only publication notice. See, *e.g.,* Ariz.Rev.Stat.Ann. § 14-3801 (1975); Ark. Code Ann. § 28-50-101(a) (1987); Fla.Stat. § 733.701 (1987); Idaho Code § 15-3-803(a) (1979); Mo.Rev.Stat. § 473.360(1) (1986); Utah Code Ann. § 75-3-801 (1978). See also Uniform Probate Code § 3-801, 8 U.L.A. 351 (1983); Falender, at 660, n. 7 (collecting statutes). Providing actual notice to known or reasonably ascertainable creditors, however, is not inconsistent with the goals reflected in nonclaim statutes. Actual notice need not be inefficient or

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burdensome. We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice. See, *e.g., Mennonite,* 462 U.S., at 799, 800, 103 S.Ct., at 2711, 2712; *Greene v. Lindsey,* 456 U.S. 444, 455, 102 S.Ct. 1874, 1880, 72 L.Ed.2d 249 (1982); *Mullane, supra,* 339 U.S., at 319, 70 S.Ct., at 659. In addition, *Mullane* disavowed any intent to require "impracticable and extended searches . . . in the name of due process." 339 U.S., at 317-318, 70 S.Ct., at 658-659. As the Court indicated in *Mennonite,* all that the executor or executrix need do is make "reasonably diligent efforts," 462 U.S., at 798, n. 4, 103 S.Ct., at 2711, n. 4, to uncover the identities of creditors. For creditors who are not "reasonably ascertainable," publication notice can suffice. Nor is everyone who may conceivably have a claim properly considered a creditor entitled to actual notice. Here, as in *Mullane,* it is reasonable to dispense with actual notice to those with mere "conjectural" claims. 339 U.S., at 317, 70 S.Ct., at 659.

On balance then, a requirement of actual notice to known or reasonably ascertainable creditors is not so cumbersome as to unduly hinder the dispatch with which probate proceedings are conducted. Notice by mail is already routinely provided at several points in the probate process. In Oklahoma, for example, § 26 requires that "heirs, legatees, and devisees" be mailed notice of the initial

hearing on the will. Accord, Uniform Probate Code § 3-403, 8 U.L.A. 274 (1983). Indeed, a few States already provide for actual notice in connection with short nonclaim statutes. See, *e.g.,* Calif. Prob. Code Ann. §§ 9050, 9100 (West Supp.1988); Nev.Rev.Stat. §§ 147.010, 155.010, 155.020 (1987); W.Va.Code §§ 44-2-2, 44-2-4 (1982). We do not believe that requiring adherence to such a standard will be so burdensome or impracticable as to warrant reliance on publication notice alone.

In analogous situations we have rejected similar arguments that a pressing need to proceed expeditiously justifies less than actual notice. For example, while we have recognized that in the bankruptcy context there is a need for prompt administration of claims, *United Savings Assn. of Texas v. Timbers of Inwood Forest Assoc., Ltd.,* 484 U.S.

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365, 375-376, 108 S.Ct. 626, ----, 98 L.Ed.2d 740 (1988), we also have required actual notice in bankruptcy proceedings. *Bank of Marin v. England,* 385 U.S. 99, 87 S.Ct. 274, 17 L.Ed.2d 197 (1966); *City of New York v. New York, N.H. & H.R. Co.,* 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333 (1953). See also *Mullane v. Central Hanover Bank & Trust Co., supra,* 339 U.S., at 318-319, 70 S.Ct., at 659 (trust proceedings). Probate proceedings are not so different in kind that a different result is required here.

Whether appellant's identity as a creditor was known or reasonably ascertainable by appellee cannot be answered on this record. Neither the Oklahoma Supreme Court nor the Court of Appeals nor the District Court considered the question. Appellee of course was aware that her husband endured a long stay at St. John Medical Center, but it is not clear that this awareness translates into a knowledge of appellant's claim. We therefore must remand the case for further proceedings to determine whether "reasonably diligent efforts," *Mennonite, supra,* 462 U.S., at 798, n. 4, 103 S.Ct., at 2711, n. 4, would have identified appellant and uncovered its claim. If appellant's identity was known or "reasonably ascertainable," then termination of appellant's claim without actual notice violated due process.

IV

We hold that Oklahoma's nonclaim statute is not a self-executing statute of limitations. Rather, the statute operates in connection with Oklahoma's probate proceedings to "adversely affect" appellant's property interest. Thus, if appellant's identity as a creditor was known or "reasonably ascertainable," then the Due Process Clause requires that appellant be given "[n]otice by mail or other means as certain to ensure actual notice." *Mennonite, supra,* at 800, 103 S.Ct., at 2712. Accordingly, the judgment of the Oklahoma Supreme Court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice BLACKMUN concurs in the result.

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Chief Justice REHNQUIST, dissenting.

In *Texaco, Inc. v. Short,* 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982), the Court upheld against challenge under the Due Process Clause an Indiana statute providing that severed mineral interests which had not been used for a period of 20 years lapsed and reverted to the surface owner unless the mineral owner filed a statement of claim in the

appropriate county office. In the present case Oklahoma has enacted a statute providing that a contractual claim against a decedent's estate is barred if not presented as a claim within two months of the publication of notice advising creditors of the commencement of probate proceedings. The Court holds the Oklahoma statute unconstitutional.

Obviously there is a great difference between the 20-year time limit in the Indiana statute and the 2-month time limit in the Oklahoma statute, but the Court does not rest the constitutional distinction between the cases on this fact. Instead, the constitutional distinction is premised on the absence in *Texaco, Inc.,* of the "significant state action" present in this case. In the words of the Court:

"The nonclaim statute becomes operative only after probate proceedings have been commenced in state court. The court must appoint the executor or executrix before notice, which triggers the time bar, can be given. Only after this court appointment is made does the statute provide for any notice; § 331 directs the executor or executrix to publish notice 'immediately' after appointment." *Ante,* at 487.

Just why the due process implications of these two cases should turn upon the "activity" of the Oklahoma probate court is not made clear. Surely from the point of view of the claimant—for whom, after all, the Due Process Clause is designed to benefit—the difference between having the time bar to his claim activated by a notice published by a court-appointed executor, as it was here, and having the time bar

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activated by acquisition of the mineral interest, as it was in Indiana, makes little if any difference.

The owner of a mineral interest in Indiana who neither made any use of it for 20 years nor filed a statement of claim, would lose a quiet title action brought in the Indiana courts against him by the surface owner because those courts would apply the 20-year statute of limitations. The appellant in the present case lost a suit in the Oklahoma courts because those courts applied the 2-month statute of limitations contained in the Oklahoma probate statute. Why there is "state action" in the latter case, but not in the former, remains a mystery which is in no way elucidated by the Court's opinion. The factual differences which the Court points out, showing that the probate court is "intimately involved" in the application of the Oklahoma nonclaim statute, seem to me trivial.

Probate proceedings have been traditionally uncontested and administrative, designed to transfer assets from someone who has died to his successors. Before making these transfers, probate codes universally require that the estate settle the debts of the decedent, and to do this it is necessary that claims against the estate be marshaled and proved. *Ante,* at 479—480. Once the debts of the estate are paid, the necessary steps can be taken to distribute the remainder of the property.

Occasionally there may be a disputed claim against the estate, which is then in most jurisdictions tried like any other civil suit. Occasionally there may be a dispute over the validity of the will, with a resultant will contest. Occasionally there may be objections to the account of the executor or the administrator, which are then in most jurisdictions heard and decided by the probate court. But by and large, the typical probate proceeding—and the one involved in the instant case seems to have followed that pattern—is uncontested, and the publication

of notice to creditors simply shortens the otherwise applicable statute of limitations.

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The "intimate involvement" of the probate court in the present case was entirely of an administrative nature.

Would this Court have struck down the Indiana mineral lapse statute involved in *Texaco, Inc.,* if that statute had provided—as an *additional* protection to mineral owners—that a state official should publish notice to all mineral owners of the effect of the operation of the lapse statute? I find it difficult to believe that would be the case, and yet the thrust of the Court's reasoning today points in that direction. Virtually meaningless state involvement, or lack of it, rather than the effect of the statute in question on the rights of the party whose claim is cut off, is held dispositive.

The Court observes that in Oklahoma, it is the court-ordered publication of notice that triggers the running of the statute of limitations. This judicial involvement, the Court concludes, is inconsistent with the "self-executing feature," of the time bar in *Texaco, Inc. Ante*, at 487. This reading of the term "self-executing" is, I believe, out of context and contrary to common sense. That term refers only to the absence of a judicial or other determination that *itself* extinguishes the claimant's rights. This is made clear by the *Texaco, Inc.,* Court's juxtaposition of "the self-executing feature of the [Indiana] statute and a subsequent judicial determination that a particular lapse did in fact occur." 454 U.S., at 533, 102 S.Ct., at 794. Certainly the Oklahoma provision is more like the former than the latter, and there is no reason to conclude that the perfunctory administrative involvement of the Oklahoma probate court triggers a greater level of due process protection.

Appellant also claims that the 2-month period provided by Oklahoma law, even if deemed to be a statute of limitations, is too short to afford due process. The Court does not reach that question, and neither do I.

Supreme Court of Florida.
VENETIAN SALAMI COMPANY, etc., Petitioner,
v.
J.S. PARTHENAIS, Respondent.
No. 73848.

Dec. 14, 1989.

On appeal from order dismissing for lack of personal jurisdiction, the First District Court of Appeal, 538 So.2d 532, reversed. The Supreme Court, Grimes, J., held that: (1) requisite minimum contacts are not built into long-arm statute, and (2) limited evidentiary hearing must be held when the facts upon which assertion of long-arm jurisdiction is based are disputed.

Ordered accordingly.

***499** Laurence H. Bartlett of Black, Crotty, Sims, Hubka, Burnett, Bartlett and Samuels, Daytona Beach, for petitioner.
Kenneth S. Davis, Gainesville, for respondent.

GRIMES, Justice.
We review *Parthnais v. Venetian Salami Co.*, 538 So.2d 532 (Fla. 1st DCA 1989), because of conflict with *Unger v. Publisher Entry Service, Inc.*, 513 So.2d 674 (Fla. 5th DCA 1987), *review denied*, 520 So.2d 586 (Fla.1988); *Scordilis v. Drobnicki*, 443 So.2d 411 (Fla. 4th DCA 1984); and *Osborn v. University Society, Inc.*, 378 So.2d 873 (Fla.2d DCA 1979). We have jurisdiction under article V, section 3(b)(3), of the Florida Constitution.

This case involves the circumstances under which Florida may obtain jurisdiction over a nonresident defendant pursuant to its long-arm statute. Because it is relevant to our discussion, the complaint filed in this case is reproduced in full:

The plaintiff, J.S. PARTHENAIS, sues the Defendant, VENETIAN SALAMI COMPANY, a foreign corporation, and says:

***500** 1. This is an action for damages in an amount greater than Five Thousand and No/100 ($5,000.00) Dollars.

2. Plaintiff's principal place of business is Alachua County, Florida.

3. On or about March 30, 1987, officer of the Defendant corporation contacted Plaintiff in Alachua County, Florida, and engaged the services of the Plaintiff to assist the Defendant in determining the collectability and methods of collection of a large delinquent account due to Defendant.

4. The Defendant agreed to reimburse Plaintiff his expenses. Payment was to be made to Plaintiff at his place of business in Alachua County, Florida.

5. The Plaintiff performed the services, but the Defendant has refused to pay.

WHEREFORE, Plaintiff demands judgment against the Defendant for damages and costs of court.

Parthenais sought to obtain jurisdiction over Venetian Salami under section 48.193(1)(g), Florida Statutes (1987), which provides:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

....

(g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.

Venetian moved to quash service of process for lack of jurisdiction over the defendant. Thereafter, the parties filed affidavits supporting their positions. The trial judge dismissed the suit on the ground that Parthenais had failed to establish that Venetian had

sufficient minimum contacts with the State of Florida. The First District Court of Appeal reversed the order of dismissal. Acknowledging conflict among the district courts of appeal, the court held that jurisdiction may be obtained by meeting the statutory requirements of Florida's long-arm statute without the necessity of further showing that the defendant had sufficient minimum contacts with the State of Florida in order to satisfy due process. The court held that jurisdiction over Venetian Salami had been obtained because the complaint alleged facts sufficient to fall within the scope of section 48.193(1)(g) and that when these allegations were challenged, they were backed by affidavit. *Accord* *Engineered Storage Systems, Inc. v. National Partitions & Interiors, Inc.*, 415 So.2d 114 (Fla.3d DCA 1982).

Long ago, the United States Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), held that in order to subject a defendant to an in personam judgment when he is not present within the territory of the forum, due process requires that the defendant have certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. More recently, the same Court stated that the test is whether the defendant's conduct in connection with the forum state is "such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

[1] In essence, the court below held that the requisite minimum contacts are built into section 48.193. Otherwise, the statute would be held unconstitutional. We respectfully disagree. By enacting section 48.193, the legislature has determined the requisite basis for obtaining jurisdiction over nonresident defendants as far as Florida is concerned. It has not specifically addressed whether the federal constitutional requirement of minimum contacts has been met. As a practical matter, it could not do so because each case will depend upon the facts.

The principle that the determination of minimum contacts will depend upon the facts was highlighted by the United States Supreme Court in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). In that case, Burger ***501** King, a Florida corporation, sued a Michigan resident for breach of a franchise agreement. Burger King sought to obtain jurisdiction under section 48.193(1)(g) by asserting that the defendant failed to make required payments under the agreement in Florida. After rejecting the defendant's jurisdictional arguments, the trial court held a bench trial and entered judgment in favor of Burger King. The Eleventh Circuit Court of Appeals reversed, concluding that the court did not have personal jurisdiction over the defendant. On petition for certiorari, the United States Supreme Court observed:

At the outset, we note a continued division among lower courts respecting whether and to what extent a contract can constitute a "contact" for purposes of due process analysis. If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot. The Court long ago rejected the notion that personal jurisdiction might turn on "mechanical" tests, *International Shoe Co. v. Washington, supra*, 326 U.S., at 319, 66 S.Ct., at 159, or on "conceptualistic ... theories of the place of contracting or of performance," *Hoopeston Canning Co. v. Cullen*, 318 U.S., [313] at 316, 63 S.Ct., [602] at 604 [87 L.Ed. 777]. Instead, we have emphasized the need for a "highly realistic" approach that recognizes that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." *Id.*, at 316-317, 63 S.Ct., at 604-605. It is these factors-prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing-that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

Id. at 478-79, 105 S.Ct. at 2185 (footnotes omitted). The Court then discussed the facts in detail and concluded that there was substantial record evidence to support the trial court's decision that the assertion of personal jurisdiction over the defendant in Florida did not offend due process. The Court went on to say:
We ... therefore reject any talismanic jurisdictional formulas; "the facts of each case must [always] be weighed" in determining whether personal jurisdiction would comport with "fair play and substantial justice." *Kulko v. California Superior Court*, 436 U.S. [84], at 92, 98 S.Ct. [1690], at 1696-1697 [56 L.Ed.2d 132 (1978)].[29] The "quality and nature" of an interstate transaction may sometimes be so "random," "fortuitous," or "attenuated" that it cannot

fairly be said that the potential defendant "should reasonably anticipate being haled into court" in another jurisdiction.

> FN29 This approach does, of course, preclude clear-cut jurisdictional rules. But any inquiry into "fair play and substantial justice" necessarily requires determinations "in which few answers will be written 'in black and white. The greys are dominant and even among them the shades are innumerable.' " *Kulko v. California Superior Court*, 436 U.S., [84] at 92, 98 S.Ct. [1690], at 1697,

471 U.S. at 485-86, 105 S.Ct. at 2189 (footnotes omitted). If Parthenais's position is correct, the United States Supreme Court engaged in an unnecessary exercise of factual analysis because the parties had stipulated before the court of appeals that the court had jurisdiction over the defendant for purposes of section 48.193. *Id.* at 470 n. 12, 105 S.Ct. at 2181 n. 12.

In a case involving an effort to obtain jurisdiction over a nonresident under section 48.193, the Fourth District Court of Appeal stated:

Admittedly, if the general principles of contract law can be applied so as to find a breach of the contract in Florida, then a literal reading of the statute would suggest that Florida has jurisdiction over the son-in-law. But, in our view, such an application of the statute would not pass constitutional muster.

Scordilis v. Drobnicki, 443 So.2d 411, 412 (Fla. 4th DCA 1984). In ***502***Unger v. Publisher Entry Service, Inc.*, 513 So.2d 674, 675 (Fla. 5th DCA 1987), *review denied*, 520 So.2d 586 (Fla.1988), the Fifth District Court of Appeal addressed the same issue as follows:
In determining whether long-arm jurisdiction is appropriate in a given case, two inquiries must be made. First, it must be determined that the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of the statute; and if it does, the next inquiry is whether sufficient "minimum contacts" are demonstrated to satisfy due process requirements.

(Citations omitted.)

As in the instant case, the plaintiff in *Osborn v. University Society, Inc.*, 378 So.2d 873 (Fla.2d DCA 1979), sought to obtain jurisdiction over a nonresident debtor on allegations that there was a breach of contract to pay the plaintiff money. The Second District Court of Appeal explained:

Section 48.193(1)(g), Florida Statutes (1977), provides that a person is subject to the jurisdiction of the court if he "[b]reaches a contract in this state by failing to perform acts required by the contract to be performed in this state." In *Madax International Corp. v. Delcher Intercontinental Moving Services, Inc.*, 342 So.2d 1082 (Fla.2d DCA 1977), our court in considering the reach of this section stated that where there is an express promise to pay and the contract does not state a place of payment, the debtor must seek the creditor and thus the breach occurs where the creditor is domiciled. In light of the principle announced in *Madax*, a literal reading of the statute suggests that the court had jurisdiction over the Society in this case.

Nevertheless, in cases involving jurisdiction over nonresidents, there are constitutional issues which we must also consider. A court may acquire personal jurisdiction over a nonresident only if the nonresident has "minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (1945). Thus, under a given factual situation, even though a nonresident may appear to fall within the wording of a long arm statute, a plaintiff may not constitutionally apply the statute to obtain jurisdiction in the absence of the requisite minimum contacts with the forum state. *Harlo Products Corp. v. Case Co.*, 360 So.2d 1328 (Fla. 1st DCA 1978); *Jack Pickard Dodge, Inc. v. Yarbrough*, 352 So.2d 130 (Fla. 1st DCA 1977).

Id. at 874.

[2] We approve of the foregoing analyses in *Scordilis*, *Unger*, and *Osborn.* The mere proof of any one of the several circumstances enumerated in section 48.193 as the basis for obtaining jurisdiction of nonresidents does not automatically satisfy the due process requirement of minimum contacts. We do recognize, however, that implicit within several of the enumerated circumstances are sufficient facts which if proven, without more, would suffice to meet the requirements of *International Shoe Co.*

[3][4] Our task does not end here because there must be a disposition of the instant case. With one notable exception, previous decisions of the district courts of appeal have outlined the procedure to be followed in cases such as this. Initially, the plaintiff may seek to obtain jurisdiction over a nonresident defendant by pleading the basis for service in the language of the statute without pleading the supporting facts. Fla.R.Civ.P. 1.070(i); *Jones v. Jack Maxton Chevrolet, Inc.*, 484 So.2d 43 (Fla. 1st DCA 1986). By itself, the filing of a motion to dismiss on grounds of lack of jurisdiction over the person does nothing more than raise the legal sufficiency of the pleadings. *Elmex Corp. v. Atlantic Fed. Savings & Loan Ass'n*, 325 So.2d 58 (Fla.4th DCA 1976). A defendant wishing to contest the allegations of the complaint concerning jurisdiction or to raise a contention of minimum contacts must file affidavits in support of his position. The burden is then placed upon the plaintiff to prove by affidavit the basis upon which jurisdiction may be obtained. *Elmex Corp.* In most ***503** cases, the affidavits can be harmonized, and the court will be in a position to make a decision based upon facts which are essentially undisputed. However, the question remains with respect to what should be done if the relevant facts set forth in the respective affidavits are in direct conflict. There is no Florida decision on this question, and the instant case highlights the dilemma.

In his affidavit, Parthenais stated that he had been contacted by Venetian at his place of business in Gainesville, Florida, and requested to investigate a large receivable owed to Venetian. He said that he and Venetian made an oral agreement that he would investigate the collectibility of the receivable in Florida, New York, and Canada and such other locations as might be required. It was agreed that Venetian would pay him at his business location in Alachua County, Florida. He further stated that he had performed services and incurred expenses in Florida, Canada, and New York. Parthenais also filed a supporting affidavit of Pierre Patenaude who was president of Venetian when the transaction in question took place. Patenaude said that in March of 1987 Venetian contacted Parthenais at his place of business in Alachua County and engaged his services to advise Venetian with respect to a large delinquent account due the company. He said that it was agreed that Parthenais would submit his statement and that Venetian would send its payment to Parthenais' place of business in Alachua County.

Venetian filed an affidavit of its president, Antoine Bertrand, stating that Venetian was a Canadian corporation which does no business in Florida. Bertrand said that Venetian did discuss with Parthenais a delinquent account which was located in New York. All discussions concerning the account took place in New York and Montreal, and no discussions with Parthenais took place in Florida. He further stated that Venetian never reached any agreement with Parthenais, much less an agreement to pay any money in Florida.

[5][6] It is evident that these affidavits cannot be reconciled. We believe that the facts set forth in Parthenais' affidavits would be sufficient to establish Venetian's requisite minimum contacts with the state. On the other hand, Venetian denies that the parties reached any agreement whatsoever. Furthermore, we do not believe that the mere failure to pay money in Florida, standing alone, would suffice to obtain jurisdiction over a nonresident defendant.[FN1] *See Unger v. Publisher Entry Service, Inc.*, 513 So.2d 674 (Fla. 5th DCA 1987), *review denied*, 520 So.2d 586 (Fla.1988). Therefore, we hold that in cases such as this, the trial court will have to hold a limited evidentiary hearing in order to determine the jurisdiction issue.

> FN1. To put this statement in perspective, consider a scenario in which a New York company telephones a Florida resident and convinces him to buy a $5 widget. The Florida resident returns the widget without payment because it does not work. Surely, it could not be said that the Florida resident had sufficient minimum contacts with New York such that he should reasonably contemplate being haled into court there to defend against a suit for nonpayment.

We disapprove the decision in *Engineered Storage* and quash the decision below.[FN2] We remand the case with directions that the trial judge hold an evidentiary hearing on the issue of jurisdiction over Venetian.

> FN2. We note that some of the earlier First District Court of Appeal's decisions are inconsistent with its position in the instant case. *Harlo Products Corp. v. J.I. Case Co.*, 360 So.2d 1328 (Fla. 1st DCA 1978); *Jack Pickard Dodge, Inc. v. Yarbrough*, 352 So.2d 130 (Fla. 1st DCA 1977). In each of these cases the complaint contained allegations sufficient to bring the defendant within the

> scope of section 48.193. However, the court concluded that the facts showed that the defendant had insufficient minimum contacts with the state. The statute was held unconstitutional in its application to the facts of the case. These decisions have the same practical effect as the one we reach today. Rather than holding the statute unconstitutional as applied, we have chosen to hold that the statute extends only to the limits of the due process clause. *See Burger King v. Rudzewicz*, 471 U.S. 462, 470 n. 12, 105 S.Ct. 2174, 2181 n. 12, 85 L.Ed.2d 528 (1985).

It is so ordered.

***504** EHRLICH, C.J., and OVERTON, McDONALD, SHAW, BARKETT and KOGAN, JJ., concur.

Fla.,1989.
Venetian Salami Co. v. Parthenais
554 So.2d 499, 14 Fla. L. Weekly 595

District Court of Appeal of Florida, Second District.
Constance Clark Campbell PAYETTE, Appellant,
v.
Theodore W. CLARK, individually, and Theodore W. Clark, as Personal Representative of the Estate of Stanley Osgood Clark, Deceased, Arthur E. Clark, Carter S. Clark, Shirley Lorraine Warner, Della I. Clark, individually, and Della I. Clark, as Executrix of the Estate of Gaylord O. Clark, Deceased, Appellees.
No. 89-01288.

Feb. 16, 1990.
Rehearing Denied April 26, 1990.

Niece petitioned to reopen intestate estate of her uncle and requested award of monetary damages. The Circuit Court, Pinellas County, Robert F. Michael, J., dismissed petition, and niece appealed. The District Court of Appeal, Patterson, J., held that: (1) petition's attempt to combine probate petition and civil complaint into single pleading without payment of civil action filing fee did not affect Circuit Court's jurisdiction of overall controversy; (2) improper service by registered mail was not valid ground for dismissal of petition; (3) niece's failure to challenge discharge of personal representative within one year did not preclude niece's petition; and (4) participation in estate process by parties who accepted distribution of estate assets was sufficient to constitute voluntary submission to jurisdiction of court for purpose of determination of niece's petition.

Reversed.

***632** Teresa Cooper Ward, St. Petersburg, for appellant.
Mark I. Shames of Stolba, Englander & Shames, P.A., St. Petersburg, for appellee Theodore W. Clark.
Walter E. Smith of Meros, Smith & Olney, St. Petersburg, for appellee Arthur E. Clark.
William S. Belcher, George E. Owen, Jr., and Bruce Crawford, St. Petersburg, for appellees Shirley Lorraine Warner, Carter S. Clark and Della I. Clark.

PATTERSON, Judge.
Constance Payette appeals from a final order of the trial court dismissing her petition to reopen the intestate estate of her uncle. We reverse.

The appellant's uncle, Stanley Osgood Clark, died intestate on December 23, 1983. He was survived by the appellees, who are the children of his deceased brother, and by appellant, who is the child of his deceased sister.

In March, 1984, appellee Theodore W. Clark was appointed personal representative of the estate with the consent of the other appellees. Appellant was not listed as a beneficiary or interested party, received no notice, and was not included in the distribution. The entire estate was distributed to the appellees and, in the case of Gaylord Clark, his surviving spouse. A final order of discharge was entered on September 27, 1985.

On February 3, 1989, appellant filed a six-count petition in the then-closed probate case, naming the appellees as respondents. Counts one through four asserted claims for relief within the jurisdiction of the probate division of the circuit court. Counts five and six are claims for damages cognizable in the civil division of the court.

The nonresident appellees countered with motions to dismiss for lack of personal jurisdiction and lack of subject matter jurisdiction. Arthur Clark, the only appellee who is a Florida resident, moved to dismiss and asserted that the petition was untimely under Florida Rule of Civil Procedure 1.540(b). Theodore Clark also asserted that ground. In an order dated April 12, 1989, the trial court, after hearing, dismissed the petition without stating the basis for its action. A reading of the hearing transcript reveals that the parties relied on the argument that the petition is barred by the time limitations of Florida Rule of Civil Procedure 1.540(b). Notwithstanding the probable abandonment of the other issues set forth in the motions to dismiss, we find it appropriate to address them.

[1][2] The assertion that the trial court lacks subject matter jurisdiction of the issues framed by the petition is totally without merit. Counts one through four find their basis in the Florida Probate Code. Counts five and six are civil actions in which the appellant claims money damages in excess of $5,000. Jurisdiction of the subject matter does not mean jurisdiction of a particular case, but rather jurisdiction of the class of cases to which the particular controversy belongs. *Lusker v. Guardianship of Lusker,* 434 So.2d 951 (Fla. 2d DCA 1983). All counts of the petition fall within the jurisdiction of the circuit court as set out in section 26.012, Florida Statutes (1987).

[3][4] The question, therefore, becomes whether the petition in this case is adequate to invoke the jurisdiction of the court. Jurisdiction of matters

cognizable in probate is invoked by the filing of a petition. Fla.P.R. 5.020. Jurisdiction in a civil action for money damages attaches upon the filing of a complaint. *See*Fla.R.Civ.P. 1.050. Each filing is accompanied by an appropriate filing fee. *See*§ 28.241, Florida Statutes (1987).

The petition in this case attempts to combine the probate petition and the civil complaint into a single pleading without payment of the civil action filing fee. This ***633** fact, however, does not affect the court's jurisdiction of the overall controversy. Payment of the appropriate filing fee is not a condition precedent to the court acquiring jurisdiction. *Williams v. State*, 324 So.2d 74 (Fla.1975); *Outboard Marine Domestic Int'l Sales Corp. v. Fla. Stevedoring Corp.*, 483 So.2d 823 (Fla. 3d DCA 1986). Assuming that the petition otherwise states claims for relief under Florida law, it was properly before the court from the jurisdictional standpoint.

[5][6] All circuit court judges are empowered to hear and determine any case properly within the court's jurisdiction. For efficiency of administration, however, most circuit courts are divided into divisions, and cases of a particular type are assigned to judges within the division. In this case, where counts five and six of the pleading were filed in the wrong division, the proper disposition is to sever those counts and transfer them to the proper division. *Grossman v. Selewacz*, 417 So.2d 728 (Fla. 4th DCA 1982); *In re Guardianship of Bentley*, 342 So.2d 1045 (Fla. 4th DCA 1977). This is true whether or not the balance of the petition is barred by Florida Rule of Civil Procedure 1.540(b). Such an order of transfer may require payment of the applicable civil action filing fee.

[7][8][9] We note from the record that service was effected on the appellees by registered mail. Such service is insufficient to confer personal jurisdiction in a civil action for money damages. *See Huguenor v. Huguenor*, 420 So.2d 344 (Fla. 5th DCA 1982). Yet, had this specific issue been raised at the trial level, it would not have constituted a valid ground for dismissal. When an invalid method of service is used, the proper procedure is to quash the service and permit the action to remain pending. *Jones v. Denmark*, 259 So.2d 198 (Fla. 3d DCA 1972). We, therefore, reverse the dismissal of counts five and six of the petition and direct the lower court to sever and transfer them to the appropriate division of the court.

[10][11] We now turn our attention to the principal ground argued by appellees in support of the dismissal: that the petition was untimely pursuant to Florida Rule of Civil Procedure 1.540(b), and that dismissal was required based on our prior opinion in *First Florida Bank v. Shafer*, 503 So.2d 459 (Fla. 2d DCA 1987). In *Shafer* the decedent died testate. The will, which named her husband as personal representative, was duly probated. The estate was closed and the personal representative discharged on January 25, 1983. On April 16, 1984, a daughter of the decedent filed a petition to reopen the estate alleging that the husband had caused the decedent to transfer substantial assets to him during her lifetime and had exercised undue influence over her in the preparation of the will. We held that the petition was controlled by the fraud and misrepresentation provision of Florida Rule of Civil Procedure 1.540(b)(3) and was untimely under the rule.

Shafer has no application here and the appellees' position fails for two reasons. First, if the allegations of omissions and misrepresentations on the part of Theodore W. Clark, the personal representative, are true, they constitute fraud upon the court, to which the one-year limitation of rule 1.540(b) does not apply. *Arrieta-Gimenez v. Arrieta-Negron*, 551 So.2d 1184 (Fla.1989); [FN1] ***634***Whitman v. Whitman*, 532 So.2d 82 (Fla. 3d DCA 1988); *Feldan v. Goodman*, 460 So.2d 515 (Fla. 3d DCA 1984). Second, the petition can be maintained under section 733.903, Florida Statutes (1987).[FN2] *Estate of Lewin v. Marksbury*, 374 So.2d 58 (Fla. 3d DCA 1979); *see also* Fla.P.R. 5.460. We reverse the order of the trial court dismissing counts one through four of the petition and direct that these counts be reinstated in the probate division of the court.

> FN1. *Arrieta-Gimenez v. Arrieta-Negron*, 551 So.2d 1184, 1185 (Fla.1989) (quoting *DeClaire v. Yohanan*, 453 So.2d 375, 378-9 (Fla.1984)):
>
> > For better understanding, the circumstances under which a judgment may be challenged are set forth as follows:
> >
> > *Within One Year under Rule 1.540(b)*
> >
> > 1) Mistake, inadvertence, surprise, or excusable neglect.

2) Newly discovered evidence which could not have been discovered in time to move for a new trial.

3) Any type of fraud, misrepresentation, or other misconduct of an adverse party including intrinsic fraud which occurs during the proceeding such as false testimony.

No Time Limitation under Rule 1.540(b) or Independent Action

1) Where the judgment is void.

2) Where it can be established that the judgment had been satisfied, released, or discharged.

3) Where the judgment has prospective application and equity should now require relief from its present enforcement.

4) Extrinsic fraud which prevents a party from having an opportunity to present his case in court.

FN2. § 733.903 provides:

Subsequent administration.-The final settlement of an estate and the discharge of the personal representative shall not prevent a revocation of the order of discharge or the subsequent issuance of letters if other property of the estate is discovered or if it becomes necessary that further administration of the estate be had for any cause.

However, the order of discharge may not be revoked under this section based upon the discovery of a will or later will.

[12] Lastly, we address the authority of the probate division to exercise personal jurisdiction over the appellees. All the appellees are "interested persons" in the estate. § 731.201(21), Fla.Stat. (1987). All are required to be given notice of the petition. § 731.303(4)(a), Fla.Stat. (1987). Service of notice was made as provided by law. § 731.301(1), Fla.Stat. (1987); Fla.P.R. 5.041.

At the inception of the probate proceedings the appellee Theodore W. Clark, by obtaining appointment as personal representative, submitted himself to the jurisdiction of the court for all purposes, including the resolution of the issues raised by this petition. The appellees Carter S. Clark and Shirley Lorraine Warner filed consents to his appointment with requests that he be permitted to serve without posting bond. All appellees accepted distribution of the estate assets, thereby availing themselves of the judicial powers of the Florida court, and filed receipts and consents to the discharge of Theodore W. Clark as personal representative. Additionally, the petition alleges that all the appellees had knowledge of the existence of the appellant and knowingly appropriated her interest in the estate assets. We conclude that this participation in the estate process by the remaining appellees is sufficient to constitute a voluntary submission to the jurisdiction of the court for the purpose of determination of counts one through four of the petition. *See In re Estate of Bechtel*, 348 So.2d 927 (Fla. 2d DCA 1977); *First Wis. Nat'l Bank v. Donian*, 343 So.2d 943 (Fla. 2d DCA 1977).

Reversed.

FRANK, A.C.J., and ALTENBERND, J., concur.

Fla.App. 2 Dist.,1990.
Payette v. Clark
559 So.2d 630, 15 Fla. L. Weekly D518

END OF DOCUMENT

662 So.2d 1303
District Court of Appeal of Florida,
Fourth District.

ROGERS & WELLS, Appellant,
v.
Ronald WINSTON, as Personal Representative of the Estate of Edna Vivian Winston, Deceased, and Bruce Winston and Bankers Trust Company, Appellees.

No. 94-0738.
|
Oct. 25, 1995.
|
Rehearing, Certification and Rehearing En Banc Denied Dec. 11, 1995.

Following remand from prior appeal in probate case, 610 So.2d 1323, New York law firm's motion to dismiss or abate petition by personal representative of Florida estate to review employment of agents was denied by the Circuit Court, Broward County, John A. Miller, J. Law firm appealed. The District Court of Appeal, Polen, J., held that: (1) law firm was doing business in Florida for purposes of long-arm jurisdiction; (2) petition contained adequate statement of probate court's jurisdiction; and (3) service upon law firm by mail was appropriate.

Affirmed.

Attorneys and Law Firms

***1303** David A. Riggs and Robert J. Hunt of Hunt, Cook, Riggs, Mehr & Miller, P.A., Boca Raton, for appellant.

Richard L. Lapidus and Marta Lederman Rub of Lapidus & Frankel, P.A., Miami, for appellee Ronald Winston.

Opinion

POLEN, Judge.

Rogers & Wells, a New York law firm, appeals the trial court's denial of its motion to dismiss/abate the petition to review the employment of agents filed by Ronald Winston as the personal representative of the estate of Edna Winston, Ronald's mother. The estate of Edna Winston, who died a resident of Florida, is being probated in Florida. Ronald and his brother Bruce Winston are co-beneficiaries of the estate. A provision in Ms. Winston's will required that costs, fees and estate taxes incurred in the administration of her estate be paid by the trustees out of assets in a New York marital trust. Rogers & Wells, a New York law firm, was employed by the personal representative to perform legal services for the Florida estate. Bruce objected to the payments made to Rogers & Wells. In response to the objections, the personal representative filed a petition to review the compensation to Rogers & Wells. Rogers & Wells filed a motion to dismiss/abate the action, claiming that they are not subject to the jurisdiction of the Florida courts because virtually all of ***1304** the services performed on behalf of the estate were performed in New York for the marital trust. The trial court denied the motion. We affirm the decision of the trial court.

Our opinion *In re Estate of Winston*, 610 So.2d 1323 (Fla. 4th DCA 1992) dismissed Rogers & Wells' appeal of the trial court's abatement of that aspect of the case, because such an order is a non-final, non-appealable order. Thus, we have never passed on the merits of whether the Florida court has personal jurisdiction over Rogers & Wells. That issue is now properly before us, and we reject appellee's initial contention that that issue was decided adverse to Rogers & Wells, and is the law of the case.

[1] Even if virtually all of the services provided by Rogers & Wells were performed in New York, because Rogers & Wells was employed to perform these services by an estate being probated in Florida, it was doing business in Florida and should have foreseen that it would be haled into a Florida court in the event of litigation over the services performed for the estate. In *In Re Estate of Vernon*, 609 So.2d 128 (Fla. 4th DCA 1992), an estate being probated in Florida sued a New York law firm for damages, and this court held that non-resident partners of the New York law firm were subject to Florida jurisdiction because of their work on an estate being probated in Florida. *See also Windels, Marxs, etc. v. Solitron Devices, Inc.*, 510 So.2d 1177 (Fla. 4th DCA 1987) in which this court held that an out-of-state law firm hired by a corporation headquartered in Florida was subject to long-arm jurisdiction in Florida because of services rendered both in and out of Florida, notwithstanding that the particular omission which was the subject of the suit occurred outside of Florida.

[2] [3] We disagree with appellant's assertion that the court lacks jurisdiction because appellee failed to comply with the requisite pleading and service requirements under the Rules of Civil Procedure. According to Florida Rule of

Civil Procedures 1.010, the rules of civil procedure do not apply when there is an applicable probate rule. Rule 5.020(b), Florida Rules of Probate, requires a petition in probate matters to contain a statement of the court's jurisdiction, if the jurisdiction has not already been established. We find that the petition's allegation that the proceeding to review the employment of agents was commenced pursuant to section 733.6175, Florida Statutes, was sufficient to comply with rule 5.020(b), Florida Rules of Probate. Further, we find that rule 5.041(b), Florida Rules of Probate only requires notice be mailed to all interested persons. Rogers & Wells is an interested party as defined by rule 5.041, Florida Rules of Probate, and section 731.201(21), Florida Statutes, and therefore service by mail was appropriate. *See Payette v. Clark*, 559 So.2d 630 (Fla. 2d DCA 1990).

AFFIRMED.

KLEIN and STEVENSON, JJ., concur.

All Citations

662 So.2d 1303, 20 Fla. L. Weekly D2377

980 So.2d 1289
District Court of Appeal of Florida,
Second District.

Valerie Renee HALL, Appellant,
v.
Charles Lloyd TUNGETT, as Personal Representative of the Estate Of Jack E. Green, Deceased, Appellee.

No. 2D07-1176.
|
May 16, 2008.

Synopsis
Background: Successor personal representative of husband's estate filed motion to compel surrender of estate information and estate assets, alleging that a brokerage account belonging to estate had been wrongfully distributed by wife to her daughter while wife was personal representative of the estate. After concluding that it had personal jurisdiction over daughter, the Circuit Court, Collier County, Cynthia A. Ellis, J., ordered daughter to return the account or its equivalent value. Daughter appealed.

Holdings: The District Court of Appeal, Silberman, J., held that:

[1] personal representative's allegations were sufficient to support service by formal notice on daughter as an interested person, but

[2] probate court lacked an evidentiary basis for its order that daughter return property to estate.

Affirmed in part, reversed in part, and remanded.

Attorneys and Law Firms

***1290** J. Michael Coleman and Sonia M. Diaz of Coleman, Hazzard & Taylor, P.A., Naples, for Appellant.

Christopher L. Ulrich and Marve Ann Alaimo of Cummings & Lockwood LLC, Naples, for Appellee.

Opinion

SILBERMAN, Judge.

Valerie Renee Hall challenges a probate court order directing her to transfer certain property to Charles Lloyd Tungett as the personal representative (the PR) of the Estate of Jack E. Green. Ms. Hall argues that the probate court did not have personal jurisdiction over her and that it improperly compelled her to transfer property to the PR without first holding an evidentiary hearing. We conclude that the court correctly determined that it had jurisdiction over Ms. Hall, but we reverse that portion of the order compelling transfer of property and remand for further proceedings.

In the probate proceeding, the PR filed a "Motion to Compel Surrender of Estate Information and Surrender of Estate Assets." The motion stated that at the time of Mr. Green's death, his assets included a brokerage account at UBS AG in Zurich, Switzerland and certain tangible personal property. Marilyn Green, the decedent's wife, was the initial personal representative of the Estate. After she died, Mr. Tungett took over as personal representative. The motion alleged that while the wife was the personal representative, she improperly distributed the proceeds of the brokerage account into a new account titled in the joint names of herself and Ms. Hall.[1]

The PR's motion asserted that upon the wife's death, the brokerage account proceeds became Ms. Hall's property. The motion also claimed that Ms. Hall and Debra Sue Tungett (who is not a party to this appeal) improperly took possession of certain tangible personal property of the Estate and that they possessed information regarding Estate assets, interests, and liabilities. Pursuant to section 733.812, Florida Statutes (2006), the PR requested ***1291** that the probate court enter an order directing Ms. Hall and Ms. Tungett to return to the Estate the brokerage account proceeds and any other assets, or their equivalent value. The PR also requested that Ms. Hall and Ms. Tungett be directed to surrender to the PR all information in their possession concerning Estate assets, interests, or liabilities.

Ms. Hall filed a response, asserting that the probate court did not have jurisdiction and that the PR could not claim jurisdiction because Ms. Hall was not a distributee of Estate property, an interested person, or a claimant against the Estate. However, Ms. Hall did not challenge the PR's factual allegations or the manner in which she was served with the motion.

At a hearing on the PR's motion, Ms. Hall's attorney acknowledged that the court had subject matter jurisdiction. But he argued that the court should quash service of process on Ms. Hall and dismiss the PR's motion

for lack of personal jurisdiction over her or over the property that the PR sought to recover. The attorney contended that Ms. Hall was not an "interested person" or a "distributee" as defined by Florida law and that formal notice under section 731.301, Florida Statutes (2006), was not sufficient to give the court jurisdiction over Ms. Hall. He did not offer any evidence to contest service or jurisdiction but asserted that the PR had to file a separate civil action and serve process upon Ms. Hall. He added that if the court determined it had jurisdiction over Ms. Hall, then it would need to hold an evidentiary hearing to resolve contested issues of fact relating to the ultimate relief requested by the PR. The PR responded as to the factual background and the allegations made in the PR's motion but did not offer any evidence to the court.

The court took the matter under advisement and later entered the order now on appeal. The court found that "service of process" was properly accomplished over Ms. Hall and that it had jurisdiction. The court directed Ms. Hall "to facilitate the transfer of the property that is within her care, custody, control or within her ability to secure to the Personal Representative."

Jurisdiction

[1] We first address the issue of jurisdiction. The plaintiff bears the initial burden of pleading a sufficient basis to obtain jurisdiction over a person. *Venetian Salami Co. v. Parthenais,* 554 So.2d 499, 502 (Fla.1989); *Hilltopper Holding Corp. v. Estate of Cutchin,* 955 So.2d 598, 601 (Fla. 2d DCA 2007). In *Hilltopper,* we explained as follows:

> If the plaintiff meets this pleading requirement, the burden shifts to the defendant to file a legally sufficient affidavit or other sworn proof that contests the essential jurisdictional facts of the plaintiff's complaint. To be legally sufficient, the defendant's affidavit must contain factual allegations which, *if taken as true,* show that the defendant's conduct does not subject him to jurisdiction.... If the defendant does not fully dispute the jurisdictional facts, the motion must be denied....
>
> If the defendant's affidavit does fully dispute the jurisdictional allegations in the plaintiff's complaint, the burden shifts back to the plaintiff to prove by affidavit or other sworn proof that a basis for long-arm jurisdiction exists. If the plaintiff fails to come forward with sworn proof to refute the allegations in the defendant's affidavit and to prove jurisdiction, the defendant's motion to dismiss must be granted.

955 So.2d at 601-02 (citations omitted).

[2] In his motion, the PR set forth sufficient allegations concerning jurisdiction to allow Ms. Hall to be served as an ***1292** "interested person" by "formal notice" pursuant to section 731.301. Section 731.301(2) states that "[f]ormal notice shall be sufficient to acquire jurisdiction over the person receiving formal notice to the extent of the person's interest in the estate." Florida Probate Rule 5.040(a)(3) describes the manner in which formal notice shall be served, including by mail, a commercial delivery service, service of process under the Florida Rules of Civil Procedure, or as otherwise provided by Florida law.

Section 731.201(21) of the probate code defines an "interested person" as "any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved." Further, the meaning of "interested person" "may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceedings." *Id.* The statute defines a "distributee" as "a person who has received estate property from a personal representative or other fiduciary other than as a creditor or purchaser." § 731.201(10). A distributee who improperly receives assets or funds from an estate may be compelled to return the assets or funds received. § 733.812.

The PR's motion alleged that the brokerage account was titled in the decedent's name at the time of his death, was wrongfully distributed to Ms. Hall by Ms. Green as the predecessor personal representative, and was in Ms. Hall's possession. The motion claimed that the account and other property belonged to the Estate and must be returned to it, or if the account and property were no longer in Ms. Hall's possession then she had to return to the Estate the equivalent value, as well as any income earned on the assets or any gain received with respect to the assets.

These allegations were sufficient to meet the PR's pleading requirement and to support service on Ms. Hall by the formal notice method permitted under section 731.301 and rule 5.040. Further, Ms. Hall did not contest the allegations by affidavit or other sworn proof. Thus, the court could properly find that it had jurisdiction over Ms. Hall to the extent of her interest in the Estate and to the extent that she received Estate property, other than as a creditor or purchaser, from Ms. Green.

Ms. Hall relies upon *Estate of Vernon v. Resolution Trust Corp.,* 608 So.2d 510 (Fla. 4th DCA 1992), to argue that the PR's allegations were insufficient to support service by formal notice or to allow the court to exercise personal jurisdiction. In *Estate of Vernon,* the estate initiated an adversary proceeding against two individuals and claimed that bank stock which previously had been held in one

defendant's name was actually beneficially owned by the decedent. The administrator ad litem served the defendants by mailing to them a copy of the initial pleading. The defendants moved to quash process and to dismiss for lack of jurisdiction. The Fourth District observed that the essential purpose of the lawsuit was to establish that the stock was in reality the decedent's stock. The court stated that the defendants had no claim in the estate and that they did not fit within the definition of an interested person, a distributee, or a claimant. *Id.* at 511-12. The court concluded as follows:

> Nor is there any basis under section 733.812, Florida Statutes (1991), to find that defendants were "distributees" of property of the estate who could be reached by this rather summary method. The administrator's suit has as its essential purpose to establish that *stock in Weitzman's name was in reality Harold Vernon's and therefore should have been marshaled into the probate estate,* ***1293** *rather than being liquidated by Weitzman outside the estate.*

Id. at 512 (emphasis added).

Here, the PR alleged that Mr. Green owned the brokerage account at the time of his death, that upon his death the account was an Estate asset, and that as the initial personal representative Ms. Green improperly distributed the account proceeds to herself and Ms. Hall. Unlike the litigation in *Estate of Vernon,* the present litigation is not intended to determine whether the Estate, in the first instance, had any interest in the brokerage account; rather, the litigation is intended to recover an Estate asset that allegedly had been improperly distributed by Ms. Green. The allegations contained in the motion were not refuted by Ms. Hall in her response to the motion or by sworn evidence challenging the PR's factual allegations. Thus, based on the information before it, the probate court properly determined that service by formal notice was sufficient and that it could exercise jurisdiction over Ms. Hall.

Compelling Transfer of Property

[3] Concerning that part of the probate court's order that directed Ms. Hall to transfer property to the PR, Ms. Hall argued to the probate court that once the court resolved the issue of jurisdiction, an evidentiary hearing would be necessary to resolve disputed issues of fact relating to the property and the relief sought by the PR. After hearing the arguments of counsel as to jurisdiction and service by formal notice, the probate court took these issues under advisement. Then, the court entered its order determining that service had been proper and that it had jurisdiction over Ms. Hall. In the same order, and without receiving any evidence, the court determined that the Estate was entitled to return of the property and directed Ms. Hall to transfer the property to the PR.

As an interested person regarding the disputed property, Ms. Hall was entitled to be heard and to present evidence in support of her position. *See Fleming v. Demps,* 918 So.2d 982, 984 (Fla. 2d DCA 2005) (reiterating that due process requires that a party be given the opportunity to be heard and to present evidence "to determine who is the rightful owner of the funds and whether the funds should be administered as estate assets or otherwise distributed to the proper owner"). Moreover, the PR did not present any evidence establishing the Estate's entitlement to return of the property. Because the court acted without an evidentiary basis in directing Ms. Hall to transfer the property to the PR, we reverse and remand for an evidentiary hearing.

Conclusion

For the forgoing reasons, we affirm that portion of the probate court's order that concluded that service was proper and that the court had jurisdiction over Ms. Hall. However, we reverse that portion of the order that directed Ms. Hall to transfer property to the PR and remand for further proceedings.

Affirmed in part, reversed in part, and remanded.

WHATLEY and CASANUEVA, JJ., Concur.

Footnotes

1 When the PR filed the motion, Ms. Hall's name was Valerie Renee Wheeler. For the sake of clarity, we refer to her as Ms. Hall throughout the opinion. Ms. Hall is Ms. Green's daughter.

152 So.3d 650
District Court of Appeal of Florida,
Fourth District.

Kathleen G. KOZINSKI, as Trustee and as Personal Representative, Appellant,
v.
Amy STABENOW and Nora Faul, Appellees.

No. 4D14–1056. | Nov. 5, 2014.

Synopsis

Background: Consolidated probate proceedings were brought concerning mother's trust and administration of her estate. Two daughters who were beneficiaries of the trust and the estate filed petition for, among other things, review of the fees paid to third daughter in her capacities as trustee of the trust and personal representative of the estate. The Fifteenth Judicial Circuit Court, Palm Beach County, Krista Marx, J., denied third daughter's motion to dismiss for lack of personal jurisdiction. Third daughter appealed.

[Holding:] The District Court of Appeal, Conner, J., held that proceeding for review of fees was an adversary proceeding requiring formal service of process on third sister individually.

Reversed and remanded.

Attorneys and Law Firms

***650** Beverly A. Pohl of Broad and Cassel, Fort Lauderdale and Gary E. Lehman of Broad and Cassel, Miami, for appellant.

***651** Edward Downey and Lee McElroy IV of Downey & Downey, P.A., Palm Beach Gardens, for appellees.

Opinion

CONNER, J.

Appellant, Kathleen Kozinski, appeals the entry of a non-final order denying her motion to dismiss the Appellees' petition for lack of personal jurisdiction. Kozinski argues that the trial court erred in denying her motion to dismiss because she was never served with formal notice that she might be subject to personal liability. Specifically, Kozinski argues that the remedy of "surcharge" sought in the Appellees' petition against her *individually* constituted an adversary proceeding requiring service by formal notice under the Florida Probate Rules in order for the probate court to have personal jurisdiction over her individually, as opposed to personal jurisdiction over her as personal representative or trustee. We agree and reverse.

Facts and Trial Proceedings

Kozinski, an attorney, serves as the trustee of a trust created by her mother, E.W.H. After E.W.H. died, Kozinski filed a notice of trust, which noted that the trust would be liable to E.W.H.'s creditors to the extent her estate was insufficient to pay them. Thereafter, a petition for administration of E.W.H.'s estate was filed as a separate case. Kozinski was appointed as personal representative of the estate. Subsequently, the two cases were consolidated. Appellees Stabenow and Faul, E.W.H.'s two other daughters, are beneficiaries under the will and the trust. Kozinski is also a beneficiary under the will and the trust.

Pursuant to sections 733.6175 and 736.0206, Florida Statutes (2014), the appellees filed a petition to review the compensation of Kozinski as personal representative and as trustee, as well as fees paid to Kozinski's law firm and the law firm of Broad and Cassel. In the petition, the appellees also objected to accountings based on the payment of the fees. The appellees claimed Kozinski had paid excessive fees from the estate and trust assets. The appellees asked the court to determine the reasonableness of the compensation and also "to enter such *surcharge or disgorgement* orders as are warranted," along with fees and other relief. (emphasis added).

The appellees' petition for review was not formally served upon Kozinski, but was sent via e-mail service to her counsel. In response, Kozinski filed a motion to dismiss the petition for lack of personal jurisdiction, arguing, among other things, that the appellees failed to invoke the court's personal jurisdiction over her where they sought surcharge and disgorgement against her in her *individual* capacity.

At the hearing on the motion, Kozinski argued that a surcharge action, which is based on a breach of fiduciary duty, was an adversary proceeding which required formal notice or a complaint served under the Florida Rules of Civil Procedure in order to obtain personal jurisdiction over Kozinski individually. *See* Fla. Prob. R. 5.025(a), (d). The appellees disagreed and argued that the petition was not an adversary proceeding and did not require formal notice. The appellees maintained that the remedy of a "refund" which is provided for under sections 733.6175 and 736.0206 was indistinguishable from a "surcharge," and asserted that the court already had jurisdiction over Kozinski as personal representative and trustee by virtue of her initial pleadings. The trial court denied the motion to dismiss, but granted a stay pending this appeal.

Appellate Analysis

[1] "The denial of a motion to dismiss for lack of personal jurisdiction is reviewed ***652** de novo." *Kent v. Marmorstein*, 120 So.3d 604, 605 (Fla. 4th DCA 2013).

The appellees filed their petition in a probate case pursuant to section 733.6175 (Proceedings for review of employment of agents and compensation of *personal representatives and employees of estate*) and section 736.0206 (Proceedings for review of employment of agents and review of compensation of *trustee and employees of trust*). §§ 736.0206, 733.6175, Fla. Stat. Both statutes provide that "[a]ny person who is determined to have received excessive compensation [from a trust or estate] for services rendered may be ordered to make appropriate *refunds.*" §§ 733.6175(3), 736.0206(3), Fla. Stat. (emphasis added).

The issue on appeal is whether a proceeding filed in a probate case pursuant to those statutory sections requires service by formal notice under the Florida Probate Rules.

Section 736.0206(1), Florida Statutes, allows for the review of fees paid to a trustee or the trustee's agents in general. Subsection (2) of the statute allows for the review to be filed in with the settlor's probate proceeding. § 736.0206(2), Fla. Stat. If the fee review proceeding is filed in a probate proceeding, the Florida Probate Rules regarding formal notice apply. § 736.0206(6), Fla. Stat. If the fee review proceeding is not filed in the settlor's probate proceeding, the Florida Rules of Civil Procedure and service of process procedure under Chapter 48, Florida Statutes, apply. *See* §§ 736.0201(1), 736.02025, Fla. Stat. (2014).

[2] Resolution of the issue of whether a proceeding for the review of fees paid to a personal representative or the personal representative's agents requires service by formal notice depends on whether the proceeding is considered an "adversary proceeding" under the Florida Probate Rules.[1] The issue of whether such a proceeding is considered an adversary proceeding, in turn, depends on whether a "refund" ordered pursuant to either statute is tantamount to a "surcharge," as that term is used in the Florida Probate Rules and the case law. Section 733.6175 makes no reference to "surcharge."[2] However, as discussed below, the case law in Florida clearly indicates that a fee dispute arising under section 733.6175 is, in essence, a surcharge proceeding.

Florida Probate Rule 5.025(a) specifically provides that a proceeding to "surcharge a personal representative" is an adversary proceeding. Fla. Prob. R. 5.025(a). The rule provides the same regarding guardians and guardianship proceedings. Thus, case law discussing the principles of "surcharge" in the guardianship context are useful in analyzing the principles of "surcharge" in the probate context. We also note that Chapter 744 governing guardianship proceedings has similar provisions for review of fees as found in section 733.6175. *See* § 744.108, Fla. Stat. (2014).

[3] [4] "A 'surcharge' is the amount that a court may charge a fiduciary that has breached its duty." *Reed v. Long*, 111 So.3d 237, 238 (Fla. 4th DCA 2013) (citing *Merkle v. Guardianship of Jacoby*, 862 So.2d 906, 907 (Fla. 2d DCA 2003)). We also wrote in *Reed* that "[t]he purpose of ***653** such an award is to make the [ ] estate whole when the [fiduciary]'s actions cause loss or damage to the [estate]." *Id.* at 239 (citations omitted). Moreover, in the context of trust proceedings, the Fifth District has said that "[a] surcharge action seeks to impose personal liability on a fiduciary for breach of trust through either intentional or negligent conduct." *Miller v. Miller*, 89 So.3d 962, 962 n. 1 (Fla. 5th DCA 2012). It is clear under the case law that a surcharge proceeding can be pursued when a fiduciary pays excessive fees to himself, herself, or agents of the fiduciary. *In re Estate of Winston v. Winston*, 610 So.2d 1323, 1325 (Fla. 4th DCA 1992) ("It follows without the necessity of citation of authority that the personal representative is subject to surcharge for any improper or excessive payments [of fees].").

The case which most strongly equates a petition for review of fees pursuant to section 733.6175 with a surcharge is *Beck v. Beck*, 383 So.2d 268 (Fla. 3d DCA 1980). In *Beck*, the Third District said that "[the appellee]'s challenge to payment of that compensation *invoked* Section 733.6175, Florida Statutes (1977), which placed the burden of proof as to the propriety, reasonableness and necessity of such payments upon the personal representative." *Id.* at 271 (emphasis added). The court went on to hold that "[t]he record amply reflects the propriety of the *surcharge* against [the appellant-personal representative] for payments he made with funds from [the appellee]'s share of the estate for ... overpayment of attorneys' fees." *Id.* at 272 (emphasis added); *see also Merkle*, 862 So.2d at 907 (holding that the order directing a refund of fees paid to the guardian "was tantamount to an order surcharging the guardian").[3]

"A personal representative is a fiduciary who shall observe the standards of care applicable to trustees." § 733.602(1), Fla. Stat. (2014); *see also* § 733.609(1), Fla. Stat. (2014) ("A personal representative's fiduciary duty is the same as the fiduciary duty of a trustee of an express trust, and a personal representative is liable to interested persons for damage or loss resulting from the breach of this duty."); *State v. Lahurd*, 632 So.2d 1101, 1104 (Fla. 4th DCA 1994) ("The personal representative, like a trustee, is a

fiduciary in handling the estate for the beneficiaries. As such, he or she is to observe the standard of care in dealing with the estate as a prudent trustee exercises in dealing with property of the trust.") (citations omitted). A trustee is required to seek only reasonable fees for his or her services and the trustee's agents. *See* §§ 736.0105(1), (2)(b); 736.0801; 736.0802(1), (7)(b), (8), Fla. Stat. (2014).

"Issues of liability as between the estate and the personal representative *individually* may be determined in a proceeding for *accounting, surcharge,* or *indemnification,* or other appropriate proceeding." § 733.619(4), Fla. Stat. (2014) (emphasis added). In *In re Estate of Pearce,* 507 So.2d 729 (Fla. 4th DCA 1987), we said:

> Inasmuch as section 733.609 likens the role of a personal representative to that of a trustee of an express trust, we find it helpful to see what is the usual law respecting surcharge, which is payment by a trustee ... out of the *trustee's own funds for breach of trust.*"

Id. at 731 (emphasis added).

Accordingly, we hold that a proceeding seeking an order or judgment imposing a ***654** refund or surcharge against a fiduciary or a fiduciary's agent, individually, and the immediate return of money to a trust, probate, or guardianship estate as a result of a breach of fiduciary duty (charging excessive fees) is tantamount to a judgment for damages, requiring personal service on the fiduciary as an *individual,* and not in any representative capacity.[4]

We thus reject appellees' contention that their petition for review of fees pursuant to sections 733.6175 or 736.0206 seeking an immediate refund of money to the probate or trust estate does not initiate an adversary proceeding subject to the notice requirements of the Florida Probate Rules.[5] We hold that, absent a written waiver, formal notice served on the respondent individually, and not in a representative capacity, is required for a proceeding to surcharge a personal representative, as well as for a petition filed in a probate case pursuant to sections 733.6175 or 736.0206 seeking to require the fiduciary to return to the estate the overpayment of compensation paid to the fiduciary or agent. With regard to notice and procedure in such adversary proceedings, Florida Probate Rule 5.025(d)(1) explicitly states that in adversary proceedings, a "[p]etitioner *must serve formal notice.*" Fla. Prob. R. 5.025(d)(1) (emphasis added).

Kozinski was not served individually with formal notice of the petition for review of fees, and she did not waive in writing her right to receive such notice. Because personal jurisdiction over Kozinski in her individual capacity was not properly obtained, the trial court's order denying Kozinski's motion to dismiss is reversed without prejudice.

Reversed and remanded.

LEVINE and KLINGENSMITH, JJ., concur.

Footnotes

1 Florida Probate Rule 5.025 provides three mechanisms for treating a proceeding as an "adversary proceeding." The only mechanism at issue in this appeal is the one provided for in Rule 5.025(a) (specific proceedings).

2 Likewise, section 736.0206 makes no reference to "surcharge."

3 In *In re Estate of Winston,* we said that because a personal representative could be subject to surcharge for the payment of excessive fees, a personal representative has the right to file a petition for review of fees pursuant to section 733.6175, Florida Statutes, but we did not equate a petition for review of fees with a petition for surcharge for the obvious reason that it was the fiduciary who brought the review proceeding. 610 So.2d at 1325.

4 Even if the order or judgment is construed to be a sanction, the result would be the same. *Taylor v. Mercedes,* 760 So.2d 282 (Fla. 4th DCA 2000) (treating an order directing a guardian to reimburse the guardianship from the guardian's personal funds to be in the nature of a sanction and holding that the failure to give the guardian formal notice that such a sanction would be imposed required reversal).

5 Neither section 733.6175 nor section 736.0206 prescribes a time period as to when the refund is to be paid. Arguably, the court has the discretion to order the refund *against future compensation payable to the fiduciary.* We do not address whether formal notice is required in a situation in which a refund is used as an offset of the amount of the overpayment against *future* compensation.

District Court of Appeal of Florida
Fourth District.
COVENANT TRUST COMPANY, Appellant,
v.
The GUARDIANSHIP OF Lillian IHRMAN, Appellee.

Nos. 4D09-4283, 4D09-4551.
Sept. 15, 2010.
Rehearing Denied Nov. 3, 2010.

Background: Ward's guardian filed petition to remove non-resident trustee for trust under which ward was beneficiary, alleging that trustee breached its fiduciary duties, and requested an order compelling trustee to pay guardian's attorney fees. Trustee filed motion to dismiss based on lack of jurisdiction. The Seventeenth Judicial Circuit Court, Broward County, Mark A. Speiser, J., denied motion, and ordered trustee to expend no further funds and to pay $10,000.00 to guardian's attorney. Trustee appealed.

Holdings: The District Court of Appeal, Gates, Michael L., Associate Judge, held that:
(1) trial court was required to hold a limited evidentiary hearing to determine if trustee had minimum contacts to expect to be haled into a Florida court;
(2) trial court could not prohibit trustee from paying its attorney further fees; and
(3) trial court was without authority to order trustee to remove trust assets to pay guardian's attorney.

Reversed and remanded.

***500** Joseph G. Young of the Law Office of Joseph G. Young, Fort Lauderdale, for appellant.

No appearance for appellee.

GATES, MICHAEL L., Associate Judge.

This is a consolidated appeal from non-final orders denying Covenant Trust Company's (Covenant) Motion to Quash Service of Process; an order directing Covenant to expend no further funds; and an order requiring Covenant to pay $10,000.00 to guardian's attorney, whereby Covenant argues the probate court erred in finding that it had *in personam* jurisdiction over Covenant and in directing expenditures of trust funds by Covenant. The appellant argues, among other things, that the trial court erred in denying the motion to dismiss without an evidentiary hearing. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Dolores Irhman is the Guardian of the ward Lillian Ihrman ("Guardian").

In January 2009, Guardian removed Lillian from Covenant Village of Florida and placed her in Bayview Retirement Home, due to concerns with Covenant Village's health care. The Guardian then filed a ***501** Petition to Order Payment of Monthly Cost of Care/Petition to Remove Covenant as Trustee. The petition, alleging Covenant breached its fiduciary duties, requested the court enter an order compelling Covenant to pay Lillian's expenses, order a trust accounting, and remove Covenant as trustee. The petition and notice of hearing were sent by U.S. Mail to Covenant in Illinois.

Covenant objected to Guardian's petition, and moved the court to dismiss and adjudicate that process and service of process had not been effected. Covenant further argued that section 736.0205, Florida Statutes, requires the action to be brought in Illinois.

At the April 2009 hearing, Covenant argued it administers the trust in Illinois, there had been no service of process, and therefore, the court did not have personal jurisdiction. Guardian's counsel admitted that Covenant was not properly served. The court entered an order giving the guardian 30 days to effectuate service of process of the petition to remove trustee. The court reserved ruling on the 736.0205 objection.

On May 22, 2009, Covenant filed its motion to quash process and service of process, renewed objection to the petition, and motion to dismiss, along with supporting affidavits controverting that sufficient contacts existed to invoke long-arm jurisdiction. Guardian, in response to Covenant's motion to quash service, filed an affidavit to establish that Covenant did in fact do business within the State of Florida.

On September 25, 2009, the trial court entered an order prohibiting Covenant from expending trust funds without court order. Covenant appealed this order contending the court erred because it lacked *in personam* jurisdiction over Covenant, or, alternatively, because no evidence was offered to support the breach of trust required by section 736.0802(10).

On October 21, 2009, a hearing was held on Covenant's second motion to quash process and service of process, motion to dismiss, and renewed objection to the petition. Covenant argued the petition did not allege *in personam* jurisdiction over Covenant because it failed to set forth the elements to establish long-arm jurisdiction

and the necessary minimum contacts. Thus, the service of process was invalid.

The trial court found that while the petition was not artfully drawn, it was sufficient to survive a motion to dismiss. The motion to dismiss was denied and Covenant was directed to file a responsive pleading. Covenant also appealed this order.

On October 28, 2009, the trial court held a hearing on Guardian's motion for additional retainer, and entered an order granting the motion requiring Covenant to pay the additional retainer. Covenant appealed this order.

ANALYSIS

[1][2] "The standard of review for personal jurisdiction over a foreign corporation is de novo." *Buckingham, Doolittle & Burroughs, LLP v. Kar Kare Auto. Grp., Inc.*, 987 So.2d 818, 821 (Fla. 4th DCA 2008). "Additionally, we are required to strictly construe Florida's long-arm statute." *Greystone Tribeca Acquisition, LLC v. Ronstrom*, 863 So.2d 473, 475 (Fla. 2d DCA 2004).

Covenant argues the trial court did not have *in personam* jurisdiction over Covenant Trust Company, an Illinois company, because the petition failed to properly allege a basis for jurisdiction under the long-arm statute.

Section 736.0201(1), Florida Statutes (2009), provides that trust proceedings ***502** "shall be commenced by filing a complaint and shall be governed by the Florida Rules of Civil Procedure." Florida Rule of Civil Procedure 1.070(h) states that "[w]hen service of process is to be made under statutes authorizing service on nonresidents of Florida, it is sufficient to plead the basis for service in the language of the statute without pleading the facts supporting service."

[3] To determine jurisdiction over a non-resident defendant, the court must conduct a two-part analysis, as set forth in *Venetian Salami Co. v. Parthenais*, 554 So.2d 499, 502 (Fla.1989): " 'First, it must be determined that the complaint alleges sufficient jurisdictional facts to bring the action within the ambit of the statute; and if it does, the next inquiry is whether sufficient "minimum contacts" are demonstrated to satisfy due process requirements.' " *Buckingham, Doolittle*, 987 So.2d at 821. To exercise personal jurisdiction over a non-resident defendant, both parts must be met. *Id.* (citing *Am. Fin. Trading Corp. v. Bauer*, 828 So.2d 1071, 1074 (Fla. 4th DCA 2002)).

[4] Satisfying the first prong requires examining the four corners of the complaint to "determine if the pleadings sufficiently allege a basis for jurisdiction." *Id.* The plaintiff may satisfy this burden " 'either by alleging the language of the statute without pleading supporting facts, *or by alleging specific facts that indicate that the defendant's actions fit within one of the sections of Florida's long arm statute, section 48.193.*' " *Biloki v. Majestic Greeting Card Co.*, 33 So.3d 815, 819 (Fla. 4th DCA 2010) (quoting *Becker v. Hooshmand*, 841 So.2d 561, 562 (Fla. 4th DCA 2003)) (emphasis added).

[5] Here, the first prong of the *Venetian Salami* analysis was met, because although the petition was poorly constructed, it alleged sufficient facts indicating Covenant's actions fit within the long-arm statute.

[6] Next, to contest the complaint's allegations or to contest the existence of minimum contacts, a defendant must file an affidavit supporting his argument. *Buckingham, Doolittle*, 987 So.2d at 821 (citing *Venetian Salami*, 554 So.2d at 502-03). The burden then shifts to the plaintiff to prove by affidavit on which basis jurisdiction may be obtained. *Id.* (citing *Venetian Salami*, 554 So.2d at 502-03). If the affidavits can be reconciled, then the court may make a decision based on the undisputed facts; however, if they cannot be reconciled, then the court should conduct a limited evidentiary hearing to determine the issue of jurisdiction. *Id.* (citing *Venetian Salami*, 554 So.2d at 502-03).

[7] Here, Guardian's and Covenant's affidavits cannot be reconciled, as Guardian attested Covenant conducted business in Florida, and Covenant denied this. The trial court only held hearings and decided the issue based on the attorneys' arguments. *See Ralph v. McLaughlin*, 756 So.2d 240, 241 (Fla. 2d DCA 2000) (where trial court only heard the arguments of counsel before deciding the motions to dismiss based on lack of personal jurisdiction, the Second District, pursuant to *Venetian Salami*, reversed and remanded the case so the trial court could hold a limited evidentiary hearing on the minimum contacts issue to resolve the conflicting affidavits); *Sonson v. Hearn*, 17 So.3d 745, 747 n. 1 (Fla. 4th DCA 2009) (citing *Leon Shaffer Golnick Adver., Inc. v. Cedar*, 423 So.2d 1015, 1017 (Fla. 4th DCA 1982)) (unsworn statements by an attorney at a hearing do not establish facts upon which the trial court can rely). Therefore, the trial court erred by not conducting a limited evidentiary hearing to determine if Covenant had the required minimum contacts***503** to expect to be haled into court in Florida. *See Golant v. German Shepherd Dog Club of Am., Inc.*, 26 So.3d 60, 62-63 (Fla. 4th DCA 2010) (with regard to minimum contacts,

due process is met if a non-resident defendant would reasonably anticipate being haled into a Florida court).

Assuming the trial court has the requisite *in personam* jurisdiction, Covenant argues section 736.0205 requires this action be brought in Illinois, unless all parties could not be bound by litigation in the courts where the trust is registered.

Section 736.0205, Florida Statutes (2009) (emphasis added), states in pertinent part that "[o]ver the objection of a party, the court shall not entertain proceedings under s. 736.0201 for a trust registered, or having its principal place of administration, in another state *unless* all interested parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration." Section 736.0108, Florida Statutes (2009), controls the determination of the trust's principal place of administration. The Ihrman trust states that "[t]his instrument and the disposition under it shall be construed and regulated and their validity and effect shall be determined by the laws of the State of Illinois." However, this does not designate the "principal place of administration." *See* § 736.0108(1). If the trust does not specify, then the principal place of administration is the trustee's usual place of business. § 736.0108(2). According to the senior trust administrator's affidavit, Illinois is the usual place of business.

It is not clear from the record if "all interested parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration." Thus, if the trial court determines it has *in personam* jurisdiction, it will next need to determine if the interested parties could be bound by litigation in Illinois. *See Meyer v. Meyer*, 931 So.2d 268, 269-70 (Fla. 5th DCA 2006) (trust administered in New York where trustee resided; no parties had any connections with Florida; trial court should have applied section 737.203 (predecessor to section 736.0205); thus, it "reverse[d] the order denying the motion to dismiss and remand[ed] for the purpose of allowing the trial court to determine whether all interested parties could be bound by litigation in New York"). We reverse and remand the case to the trial court with directions to hold an evidentiary hearing on the issue of jurisdiction over Covenant.

Covenant next contends the trial court erred in entering its September 25, 2009 order (a) because the court assumed *in personam* jurisdiction over Covenant, which it lacked, or alternatively (b) because no evidence was offered in support of the breach of trust as required under section 736.0802(10).

If the trial court determines it lacked *in personam* jurisdiction, then the court erred in assuming it had the required jurisdiction and thus it lacked power over Covenant. *Springbrook Commons, Ltd. v. Brown*, 761 So.2d 1192, 1194 (Fla. 4th DCA 2000) ("If the court is to exercise its power over a person it must have jurisdiction over that individual."). However, if the trial court does have the required *in personam* jurisdiction, it must next be determined if the court could properly enter its September 25 order.

[8] Guardian filed her motion to prohibit payment pursuant to section 736.0802, arguing she was not provided written notice as required by section 736.0802(10)(a) and requesting the court enter an order pursuant to section 736.0802(10)(b) prohibiting further payment of attorney's fees out of the trust.

***504** Section 736.0802(10) (emphasis added) provides in pertinent part:

> (10) Payment of costs or attorney's fees incurred in any proceeding from the assets of the trust may be made by the trustee without the approval of any person and without court authorization, unless the court orders otherwise as provided in paragraph (b).
>
> (a) *If a claim or defense based upon a breach of trust is made against a trustee in a proceeding, the trustee shall provide written notice to each qualified beneficiary of the trust whose share of the trust may be affected by the payment of attorney's fees and costs of the intention to pay costs or attorney's fees incurred in the proceeding from the trust prior to making payment.* ... If a trustee is served with a motion for an order prohibiting the trustee from paying attorney's fees or costs in the proceeding and the trustee pays attorney's fees or costs before an order is entered on the motion, the trustee and the trustee's attorneys who have been paid attorney's fees or costs from trust assets to defend against the claim or defense are subject to the remedies in paragraphs (b) and (c).
>
> (b) *If a claim or defense based upon breach of trust is made against a trustee in a proceeding, a party must obtain a court order to prohibit the trustee from paying costs or attorney's fees from trust assets.* To obtain an order prohibiting payment of costs or attorney's fees from trust assets, *a party must make a reasonable showing by evidence in the record or by proffering evidence that provides a reasonable basis for a court to conclude that there has been a breach of trust.* The

> trustee may proffer evidence to rebut the evidence submitted by a party. The court in its discretion may defer ruling on the motion, pending discovery to be taken by the parties. *If the court finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court finds good cause, the court shall enter an order prohibiting the payment of further attorney's fees and costs from the assets of the trust and shall order attorney's fees or costs previously paid from assets of the trust to be refunded ....*

[9] A breach of trust is "[a] trustee's violation of either the trust's terms or the trustee's general fiduciary obligations." BLACK'S LAW DICTIONARY 201 (8th ed. 2004).

Here, Guardian's counsel argued at the hearing that Covenant failed to provide notice to Guardian concerning attorney's fees that were being paid, as required under section 736.0802(10)(a). To obtain an order prohibiting Covenant from paying any more attorney's fees from the trust assets, section 736.0802(10)(b) states that the "party must make a reasonable showing by evidence in the record or by proffering evidence that provides a reasonable basis for a court to conclude that there has been a breach of trust." No evidence was provided or proffered showing a breach of trust. Guardian's counsel argued that six months before the September hearing, the trust had approximately $130,000, and as of September 11, the corpus was about $67,000; although some of this went to pay for Lillian's monthly maintenance, most of it went to pay attorney's fees and costs. The trust provisions do not prohibit the payment of attorney's fees, and section 736.0802(10) states that attorney's fees may be made by the trustee without any approval, although subsection (10)(a) requires the trust company send notice when the proceedings involve a breach of trust, which Covenant apparently did not do.

During the hearing, the court did not explicitly decide whether the trustee breached the trust. ***505**Section 736.0802(10)(b) states that "[i]f the court finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court finds good cause, the court shall enter an order prohibiting the payment of further attorney's fees and costs from the assets of the trust and shall order attorney's fees or costs previously paid from assets of the trust to be refunded." Accordingly, the trial court erred in entering this order without making any such finding of breach of trust.

Lastly, Covenant contends the trial court erred in entering its October 28, 2009 order for an additional retainer (a) because it lacked *in personam* jurisdiction over Covenant, or alternatively (b) because this was "an order for the immediate possession of property," which it argues "must be reversed where no basis in law or fact is provided by the guardian to support such order."

[10] The court must have personal jurisdiction over the trustee "in order to enter a ruling affecting the corpus of the trust." Thus, if the trial court does not have the requisite *in personam* jurisdiction over Covenant, then the trial court erred by entering the October 28, 2009 order directing Covenant to pay the additional retainer from the trust. However, if the trial court does have jurisdiction, it must next be determined if the court could properly enter its October 28, 2009 order.

[11] Covenant argues the trial court erred in requiring it to pay $10,000 to Guardian's attorney. The trust provides as follows:

> 2.01 During the lives of the Grantors, or the survivor of them, the Trustee [Covenant] shall pay so much or all the net income of the trust to the Grantors, or the survivor of them, as they direct in writing, and the Trustee shall pay any part of the principal of the trust as the Grantors, or the survivor of them, direct in writing. *However, during any period in which the Grantors, or the survivor of them, are in the opinion of a licensed physician incapable of managing their own affairs, the Trustee may in its discretion pay to or use for the benefit of the Grantors or the survivor of them, so much of the income and principal of the trust as the Trustee determines to be required for their health, support and maintenance, in their accustomed manner of living, or for other purposes the Trustee determines to be for their best interests.* Any excess income shall be added to principal at the discretion of the Trustee.

Here, Lillian was adjudicated incapacitated and Guardian was appointed as her plenary guardian. This was enough to bring Lillian within the language of this trust provision, as Lillian is unable to manage her own affairs. Thus, the trust requires Covenant to act in its discretion to pay to Lillian that which she needs for her health, support, and maintenance, and for any other purposes within her best interests.

[12] In *Cohen v. Friedland*, 450 So.2d 905, 906 (Fla. 3d DCA 1984) (citing *White v. Bacardi*, 446 So.2d 150, 155 n. 5 (Fla. 3d DCA 1984)), the Third District explained that "[a] trustee, in the strictest sense, holds legal title to property which he administers for the named beneficiary in accordance with the terms of the instrument creating the

trust." The trust agreement provided that the beneficiary would receive the trust income and the trustees had sole discretion to invade the trust principal for the beneficiary's maintenance, comfort, and welfare. *Id.* But "[i]n the absence of proof that the trustee has failed to perform, or has performed arbitrarily, a court is without authority to remove trust assets ***506** from control of the trustee to be administered by the court or other guardian." *Id.*

In *Giglio v. Perretta*, 493 So.2d 470, 470 (Fla. 4th DCA 1986), we held the "trial court erred in requiring the trustee to use trust assets to reimburse the guardian of the trust beneficiary for guardianship administration expenses, attorneys fees, and other costs." We explained that although paying some of these costs may have been allowed, in the trustee's discretion, these payments were "not legally mandated by the trust provisions," so the court had "no authority to compel the trustee to make such payments," nor any authority for the attorney's fees award. *Id.* (citing *Cohen*, 450 So.2d 905).

Further, in *Johnson v. Guardianship of Singleton*, 743 So.2d 1152, 1153 (Fla. 3d DCA 1999), the Third District, citing *Cohen*, held that there was "no statutory or other satisfactory legal justification for the award" of legal expenses, where the trial court ordered the trustee "to pay from trust assets the legal expenses incurred" by the guardian.

Here, Covenant, as trustee, was granted, within the trust provision, the discretion to make payments from the trust assets. There was no evidence that Covenant acted arbitrarily. Therefore, the court lacked the authority to order Covenant to remove trust assets. As explained in *Giglio*, these payments were not legally mandated in the trust terms. Further, as in *Johnson*, there was no statutory or other legal authority for the court to order the payments. Because the trust did not provide for the payment of attorney's fees, and Covenant could make payments in its discretion for Lillian's best interests, the court was without authority to order Covenant to pay Guardian's attorney $10,000 from the trust assets.

This case is reversed and remanded for the trial court to conduct an evidentiary hearing consistent with this opinion.

Reversed and Remanded.

POLEN and MAY, JJ., concur.

Fla.App. 4 Dist.,2010.
Covenant Trust Co. v. Guardianship of Ihrman
45 So.3d 499, 35 Fla. L. Weekly D2074