CREDITOR CLAIMS IN PROBATE PROCEEDINGS

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I. Duty to Determine Creditors

A. United States Constitutional Due Process Requirements. The seminal case for the personal representative's responsibilities toward creditors is *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478,108 S.Ct. 1340, 99 L.Ed.2d 565 (1988). H. Everett Pope, Jr. died at the St. John Medical Center in Tulsa, Oklahoma, having been a patient at the hospital for over four months and incurring medical expenses in excess of $140,000 prior to his death (most of which was covered by insurance). The Oklahoma statute at the time barred all creditors, claims that were not filed with the probate court within two months after first publication of the probate proceedings. Mrs. Pope duly published notice for two weeks, as required by law, but the hospital did not file a claim. Four years later, Tulsa Professional Collection Services filed suit for collection of the balance due. Mrs. Pope won at every level in the state courts of Oklahoma, but then she hit the Supreme Court.

The Supreme Court acknowledged that most states had statutory provisions to notify creditors of the requirement to file claims solely by publication, or be barred by a nonclaims statute. But the Court held that "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." 485 U.S. at 490. The Due Process Clause of the United States Constitution requires that the creditor be given notice by mail or such other means as to ensure actual notice. 485 U.S. at 491.

> 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. 485 U.S. at 489.
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> All that the executor or executrix need do is make "reasonably diligent efforts" to uncover the identities of the 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. 485 U.S. at 490.

[1] The majority of this outline was prepared and has been reprinted here with the permission of Tami Foley Conetta. Minor updates were made by the speaker, Tae Kelley Bronner, for the purpose of this seminar.

After *Pope*, the Florida courts followed suit:

- Notice of probate proceedings by publication to known creditors of estate is constitutionally insufficient under Fourteenth Amendment. *Public Health Trust of Dade County v. Estate of Jara*, 526 So.2d 745 (Fla. 3d DCA 1988).
- Statute requiring that claims against estate be presented within three months of first publication of notice of administration violated due process and could not, alone, operate as bar to claim; actual notice had to be served on known or ascertainable creditors. *Thames v. Jackson*, 598 So.2d 121 (Fla. 1st DCA 1992).

II. Statute of Nonclaim.

A. Claims Barred. Any claim filed more than two years after the decedent's date of death is barred under F.S. 733.710(1), whether or not the creditor was reasonably ascertainable, or whether the personal representative served the creditor with notice. The Florida Supreme Court affirmed the status of F.S. 733.710(1) as a jurisdictional statute of nonclaim in *May v. Illinois Nat. Ins. Co.*, 771 So.2d 1143 (Fla. 2000). As such, it trumps all other creditor claim provisions in the Probate Code and sets an absolute deadline by which any claim must be filed to be enforceable. The deadline cannot be waived or extended by the personal representative or the court. Shortly after the *May* decision, the Fourth District Court of Appeals ruled in *In re Estate of Fleming*, 786 So.2d 660 (Fla. 4th DCA 2001) that a former spouse was barred from filing an action against the former husband's estate since she had not filed a claim within two years after his death, even though she alleged that the personal representative fraudulently induced her to delay filing a claim.

B. Liens Not Barred. One should note the specific exception to the two-year bar for a lien created by a duly-recorded mortgage or security interest, or the lien of any person in possession of personal property, including the right to foreclose or enforce the mortgage or lien. F.S. 733.710(3). No similar protection is provided for a judgment creditor's lien according to Hogan v. Howard, 716 So.2d 286 (Fla. 2d DCA 1998). Accordingly, a judgment creditor must file a claim like all other creditors. Note also that the claim is not protected to the extent it exceeds the value of the security unless a timely claim is filed.

III. Notice and Limitations Periods

In response to the *Pope* decision, the Florida legislature amended the requirements in the Florida Probate Code to require a prompt and diligent search to determine the names and addresses of reasonably ascertainable creditors, as well as publication of notice to creditors who were not reasonably ascertainable. Florida law now also provides for two distinct limitations periods determined by whether a creditor is reasonably ascertainable.

A. F.S. 733.701 General Requirements. Unless creditors' claims are otherwise barred by F.S. 733.710 (discussed above), every personal representative must publish and serve notice to creditors under F.S. 733.2121. The form and service requirements for the Notice to Creditors are contained in Fla.Prob.R. 5.241, included in the Appendix.

1. Publication and Service. The personal representative shall *promptly* publish a notice to creditors and serve a copy of the notice on all creditors of the decedent who are reasonably ascertainable and, if required by law, on the Agency for Health Care Administration. Service of the notice shall be either by informal notice, or in the manner provided for service of formal notice at the option of the personal representative. Service on one creditor by a chosen method shall not preclude service on another creditor by another method.

2. Contents. The notice to creditors must contain the name of the decedent, the file number of the estate, the designation and address of the court, the name and address of the personal representative and of the personal representative's attorney, and the date of first publication of the notice to creditors. The notice must advise all creditors to file all claims against the estate with the court, within the time provided by law.

3. Method of Publication and Proof. Publication shall be made as required by law. Proof of publication must be filed with the court within 45 days after the date of first publication of the notice to creditors.

4. Statement Regarding Creditors. Within 4 months after the date of the first publication of notice to creditors, the personal representative must file a verified statement that diligent search has been made to ascertain the name and address of each person having a claim against the estate. The statement must identify the name and address of each person at that time known to the personal representative who has or may have a claim against the estate, and whether such person was served with the notice to creditors or otherwise received actual notice. The statement need not include persons who have filed a timely claim or who were included in the personal representative's proof of claim.

5. Service with Death Certificate. If service of the notice on the Agency for Health Care Administration is required, it shall be accompanied by a death certificate.

B. Limitations on Presentation of Claims. The statute of limitations for creditors to file timely claims is triggered by whether they are reasonably ascertainable or not. If not, the Probate Code provides for notice by publication, and the claim must be filed within 3 months after the first date of publication. If the creditor is reasonably ascertainable, then the personal representative must serve notice on the creditor and the creditor's claim must then be filed within the

later of 3 months from the first publication date, or 30 days after service of the notice. Any claims not filed within the specified time period are barred unless the court grants an extension of time to file the claim. F.S. 733.702

C. Notice by Publication. The personal representative shall promptly publish a notice to creditors... Publication shall be once a week for 2 consecutive weeks, in a newspaper published in the county where the estate is administered or, if there is no newspaper published in the county, in a newspaper of general circulation in that county. F.S. 733.2121 (1) and (2)

In *Richard v. Richard*, 193 So.3d 964 (Fla. 3d DCA 2016) the first publication of notice to creditors occurred one day before appointment of the two personal representatives. A creditor whose claim was filed after the 3 months date from initial publication challenged the validity of the published notice on the grounds that the personal representatives lacked authority at the time of publication. The trial court ruled that the published notice was not valid, and therefore, the creditor claim was not late. The appellate court reversed and relied on the "relation back" doctrine to ratify the sequence of events. The court concluded that the powers of a personal representative relate back in time to give the "acts" (the exercise of both powers and duties) prior to the appointment the same effect as those occurring after the appointment. The appellate court may have been influenced by the fact that the late-filing creditor was one of the personal representatives who signed and published the original notice.

D. Notice by Service on Reasonably Ascertainable Creditors. The personal representative must promptly make a diligent search to determine the names and addresses of creditors of the decedent who are reasonably ascertainable, even if the claims are unmatured, contingent, or unliquidated, and promptly serve a copy of the notice on those creditors. Impracticable and extended searches are not required. Service is not required on any creditor who has already filed a claim, whose claim has been paid in full, or whose claim is listed in a personal representative's timely filed proof of claim. F.S. 733.2121(3)(a) However, a decedent's creditors are entitled to notice even if they have actual knowledge that the estate is being probated. *Foster v. Cianci*, 773 So.2d 1181 (Fla. 2d DCA 2000). Note, a personal representative who has a claim is deemed to have received the required notice on the earlier of the date when he or she is required to serve the notice to creditors under the probate code on known or reasonably ascertainable creditors or the date when the required notice is first served on any other person. Fla. Prob. Rule 5.2405(b)(1)-(3). Therefore, a personal representative will always be barred at the expiration of the 3 months period.

E. Caveat by Creditor. Any creditor of a decedent may file a caveat with the court to receive notice when the letters of administration have been issued. The clerk of court is tasked with notifying the creditor of the issuance of letters, as well as the name and address of the personal representative and the attorney for the personal representative. The creditor's caveat is treated very differently from the caveat of an interested person. It may only be filed after the decedent's death,

the creditor is not entitled to formal notice of the petition for administration, and the burden is placed on the creditor to take further action to protect their interest. The requirements for filing a caveat and the contents are provided in F.S. 731.110 and Fla.Prob.R. 5.260.

F. Extension of Time to File Claim. When a creditor fails to file a claim within the limitations period, the creditor may seek an extension of time to file by petition to the probate court. An extension may be granted only upon grounds of fraud, estoppel, or insufficient notice of the claims period. The creditor may not pursue any action until an extension has been granted by the court. The personal representative, or any other interested person, can force the hand of a late filing creditor by serving a notice to the creditor that they must file a petition for an extension. The creditor then has only 30 days from the date of service of the notice to file a petition for extension and failing to do so bars the claim. F.S. 733.702(3).

G. Reasonably Ascertainable Creditor Without Notice. When the personal representative does not serve notice on a reasonably ascertainable creditor, the limitations period in F.S. 733.702 does not begin to run as to that creditor. The creditor may file their claim any time during the probate proceeding, up until 2 years after the decedent's death, when the nonclaim statute (discussed above) serves as an absolute bar. Whether the reasonably ascertainable creditor who was not served with notice, and who files a claim beyond the 3 months publication period, must petition the court for an extension of time before doing so was an open issue until recently.

Over the last five years, Florida's First, Second, Fourth and Fifth District Courts of Appeal have each addressed the question. *See*, *Morgenthau v. Estate of Andzel*, 256 So. 3d 628 (Fla. 1st DCA 2009); *Lubee v. Adams*, 77 So. 3d 882 (Fla. 2d DCA 2012); *Golden v. Jones*, 126 So. 3d 390 (Fla. 4th DCA 2013); and *Souder v. Malone*, 143 So. 3d 486 (Fla. 5th DCA 2014). The Florida Supreme Court resolved the split among the circuits in favor of the creditor, ruling in *Jones v. Golden*, 176 So.3d 242 (Fla. 2015) that if a known or reasonably ascertainable creditor is not served with a notice, F.S. 733.702(1) does not govern the timeliness of the creditor's claim. As a result, it is not necessary for the creditor to seek an extension of time under F.S. 733.702(3) since that section only applies to claims that are untimely under F.S. 733.702(1). The Florida Supreme Court specifically overruled the *Morgenthau* and *Lubee* decisions and upheld the Fourth District's ruling in *Golden v. Jones*. The decision reaffirmed Florida's deference to known or reasonably ascertainable creditors. (See attached flow chart for explanation of the difficulty of dealing with late filed claims.)

IV. Known or Reasonably Ascertainable Creditors

A. Statutory creditors.

1. F.S. §733.2121(3)(d) **Agency for Health Care Administration** - "If a decedent at the time of death was 55 years of age or older, the personal representative shall promptly serve a copy of the notice to creditors and provide a copy of the death certificate on the Agency for Health Care Administration within 3 months after the first publication of the notice to creditors,

unless the agency has already filed a statement of claim in the estate proceedings."

2. F.S. §733.2121(3)(e) **Department of Revenue** - If the personal representative has reason to believe that there are unpaid taxes owed to the Department of Revenue, the personal representative must serve a copy of the notice to creditors on the Department. If the Department of Revenue has not previously been served with a copy of the notice to creditors, then service of the inventory on the Department of Revenue shall be the equivalent of service of a copy of the notice to creditors.

B. Florida Case Law.

1. **Tort Liability**.

a. Tort action resulting from criminal conduct. Decedent committed suicide after being charged with criminal sexual activity with a child, D.G. The victim 's attorneys alleged that the decedent had informed his children in writing prior to his death to expect D.G. to file a civil action. The case was remanded to the trial court for an evidentiary hearing on whether D.G. was a reasonably ascertainable creditor, or the personal representative had actual knowledge of the victim's identity. *Faerber v. D.G.*, 928 So.2d 517 (Fla. 2d DCA 2006).

b. Automobile negligence. Claimant was a reasonably ascertainable creditor based on tort litigation for automobile accident resulting in death of decedent and injury to claimant. Parties to litigation arising from known events that occurred prior to death are reasonably ascertainable creditors. *Longmire v. Estate of Rufin*. 909 So.2d 443 (Fla. 4th DCA 2005).

c. Premises liability. Claimant whose cause of action for injuries sustained while walking on a pier was not a contingent claimant (under prior version of statute) against the estate of the pier's owner, and thus, the personal representative of the estate, who had knowledge of the claim, was not relieved of responsibility under due process of giving actual notice of the necessity of filing her claim in the probate proceeding prior to the expiration of the estate claims period, even though the injured party was aware that the estate was being probated, and the personal representative had been substituted in as party defendant for the decedent in the tort action. *Foster v. Cianci,* 773 So. 2d 1181 (Fla. 2d DCA 2000).

d. Battery. Claimant was not a reasonably ascertainable creditor in a claim for civil damages where a criminal complaint had been filed for workplace battery, but no civil action had been filed by the claimant. The criminal complaint was filed weeks before the decedent's death and was dropped soon thereafter. As a mere conjectural creditor, she was not entitled to personal service of the notice to creditors, her petition was untimely, and her asserted claim was barred by F.S. 733.702(1). *Soriano v. Estate of Manes*, 177 So.3d 677, 681 (Fla. 2015). ("No affidavit or other evidence was presented to establish that Ms. Soriano or her counsel ever sent correspondence or otherwise notified Decedent, his counsel, or Ms. Manes that there was an actual

or potential civil claim arising out of the pending criminal battery prosecution. The most that can be said is that Ms. Soriano was the victim of an alleged misdemeanor battery, and she had hired "personal counsel" who contacted Decedent's criminal defense attorney and advised that he was representing Ms. Soriano. The fact that Ms. Manes may have paid the retainer fee for Decedent's criminal defense is of no moment, as there is no evidence that Decedent's criminal defense counsel was ever made aware of any actual or potential civil claim by Ms. Soriano.")

2. **Partnership Debts**. Creditor of a general partnership was a reasonably ascertainable creditor of the deceased partner entitled to actual notice, not notice by publication. The deceased partner also personally guaranteed the loan, the death of the partner was a specific event of default under the loan documents, and the amount of guarantee was clearly defined. *Miller v. Estate of Baer*, 837 So. 2d 448 (Fla. 4th DCA 2002).

3. **Interest in Family Business**. Nephew who claimed he was entitled to shares in family business was reasonably ascertainable creditor, where personal representative (aunt) verbally acknowledged her awareness of his claim, and discussed it on several occasions with family members before and after she published notice of administration. *Simpson v. Estate of Simpson,* 922 So.2d 1027 (Fla. 5th DCA 2006).

4. **Recurring Payments**. Creditor successfully argued that a review of the deceased's checks, bank statements, check stubs and/or check registers would have shown recurring payments on a quarterly basis for six years prior to death. Within the one year preceding his death on May 17, 2000, the deceased wrote four checks to the creditor, each for the same amount. As the attorney ad litem noted in his report, the words "Cadle Company II were legible on all the checks, except for the check just prior to death. The personal representative acknowledged that he did not look at any of the decedent's cancelled checks and that he reviewed only his checkbook for the year 2000, which only covered a period of about seventeen weeks before the decedent's death. *Strulowitz v. Cadle Company II. Inc.*, 839 So.2d 876 (Fla. 4th DCA 2003).

5. **Removal of Joint Owner from Account**. Decedent's act of transferring account from joint names and removing spouse's name by depositing funds into new account in his individual name, divested her of her one-half interest in the property, and was an assertion of beneficial ownership by him that renders the trust exception inapplicable. Spouse was a creditor of the decedent as a result of the actions he took prior to his death, resulting in a claim against the estate that became barred when she failed to timely file (even though she was the personal representative). No grounds for extension of time to file claim. *Scott v. Reves,* 913 So.2d 13 (Fla. 2d DCA 2005). See also, *Velzy v. Estate of Miller,* 502 So.2d 1297 (Fla. 2d DCA 1987).

6. **Community Property**. A surviving spouse's community property interest in an investment asset acquired and titled in the decedent's sole name while the decedent and his wife lived in Texas was a claim which the wife had to pursue against the estate of the decedent. Therefore, to enforce the claim, the wife was required to file a claim within the creditor period and was barred by

the 2-year state of non-claim. The court rejected the argument of the wife that the interest fell under the common law trust exception or constituted a mortgage or security interest that provided an exception to the 2-year non-claim statute. *Johnson v. Townsend,* ___ So.3d ___ (Fla. 4th DCA 2018), 43 Fla. L. Weekly D2383 (Oct. 24th, 2018).

7. **Obligations to Former Spouse and Children**. Obligation to leave one-half of his estate to former wife and children by the terms of marital settlement agreement created a contingent claim against decedent's estate, which required filing of timely claim. *Spohr v. Berrvman,* 589 So.2d 225 (Fla. 1991). The *Spohr* case did not specifically address whether a former spouse was a reasonably ascertainable creditor because the former wife filed suit against the personal representative and a claim was never filed.

8. **Mortgage payable**. When decedent leaves homestead real estate, which is subject to mortgage, and mortgagee fails to file claim against decedent's estate within eight months from date of first publication of notice to creditors or thereafter, payment of mortgage debt may not be made out of other assets of the estate, but mortgagee will be limited to enforcement of the mortgage. *In re Comstock's Estate,* 143 Fla. 500, 197 So. 121 (Fla. 1940). See also, F.S. §733.702(4)(a) "Nothing in this section affects or prevents:... a proceeding to enforce any mortgage, security interest, or other lien on property of the decedent." and §733.710. (This case was also decided well before *Pope,* so there is no discussion of notice.) Mortgagees should be given actual notice since they are reasonably ascertainable (mortgage being recorded in the public records), so that the mortgagee has an opportunity to file a claim and preserve its right to pursue any deficiency against the estate.

9. **Pending Civil Litigation**. The claimant had filed a civil action against the decedent for unpaid rent prior to his death. The court found it was "undisputed that the personal representatives knew of the pending litigation against the deceased" which was the basis for actual knowledge of the claim against the estate. Accordingly, the claimant was reasonably ascertainable and entitled to actual notice. *In Re Estate of Ortolano,* 766 So.2d 330, 332 (Fla. 4th DCA 2000). See also, *Foster v. Cianci, supra* (similar facts based on civil claim for negligence); but compare to *Soriano v. Estate of Manes, supra* (potential civil claim not filed before death merely conjectural and not reasonably ascertainable under the circumstances).

10. **Contingent Claims**. A claim based on a five-year guaranty for structural defects arising out of the sale of residential property was a contingent claim because although the guaranty was in effect, there were no known defects at the time of decedent's death. Claimant was not a reasonably ascertainable creditor entitled to actual notice. *U.S. Trust Co. v. Haig,* 694 So.2d 769 (Fla. 4th DCA 1997). *NOTE* that this case was decided prior to the current version of §733.2121, which now requires notice to reasonably ascertainable creditors, even if their claims are "unmatured, contingent or unliquidated." Compare this to "conjectural" claims, discussed below.

11. **Decedent as surety on bond**. A claim against a decedent for breach of a bond

on which he was a surety must be presented as required by statute of nonclaim. *American Surety Co. of New York v. Mullony*. 151 Fla. 151, 9 So.2d 355 (Fla. 1942). The principal on a surety bond would arguably be an ascertainable creditor.

12. **Charitable pledge**. In order for pledge to hospital to survive death of donor and be considered valid claim against estate of pledgor, document stating conditions of pledge must recite with particularity the specific purpose for which funds are to be used, and donee must affirmatively show actual reliance of substantial character in furtherance of specified purpose set forth in pledge instrument. *Mount Sinai Hospital of Greater Miami, Inc. v. Jordan*, 290 So.2d 484 (Fla. 1974). Any church, school, or nonprofit organization to which the decedent made a charitable pledge that remains unpaid at death could be an ascertainable creditor, entitled to notice.

13. **Federal income taxes**. Here's a big "gotcha" for the unwary: Florida's probate claims procedure does not cut off the Internal Revenue Service. In *U.S. v. Stevenson*, 159 F. Supp. 2d 1371 (M.D. Fla. 2001), the IRS sought a judgment against the estate and the personal representative for the decedent's unpaid federal income tax liabilities. The personal representative objected on the basis that the claim was time-barred because the IRS did not file a claim within the 3 months set forth in F. S. § 733.702. The U. S. District Court for the Middle District of Florida held that F.S. § 733.702 does not bar the U.S. Government from seeking payment of unpaid taxes. Even the two-year nonclaim statute in F.S. §733.710 does not bar the IRS from pursuing an estate for the decedent's unpaid tax liabilities. *U.S. v. Summerlin*, 310 U.S. 414 (1990). The Bottom Line: the U.S. Government is not bound by state law in enforcing its rights.

C. <u>When Must the Creditor be Reasonably Ascertainable</u>? There are no Florida cases that address this particular question, but this interesting case from Iowa, which also cites similar cases from Kansas and Arkansas, says they must be ascertainable during the statutory publication claims period.

> "When we consider the various and competing interests before us in light of the Pope analysis, we conclude that claimants are not constitutionally entitled to mailed notice when the Estate acquires actual knowledge or constructive notice of their claims after the four-month period in section 633.410 has elapsed. The claimant must be reasonably ascertainable during the claims period." *Wasker v. McDonald*, 711 N.W. 2d 732 (Iowa App. 2006).

Not discussed in the case, but what one must presume, is that the estate first met the threshold test of making reasonably diligent efforts to locate creditors, and that this particular creditor was not located by those efforts.

D. <u>What Are Reasonably Diligent Efforts</u>?

1. Whether a personal representative has complied with due process notice

obligations is a mixed question of fact and law. *In re Estate of Bryant*, 793 A.2d 487 (Ark. Ct App. 2002). Actual notice required to known creditors of general partnership was not satisfied by personal representative who was unaware that she had to "try to run down and track every person [to whom Bryant and Bryant] owed" money. Although the personal representative knew the partnership was heavily in debt, she relied on the surviving business partner to identify and pay the partnership creditors. The court noted that a simple inquiry of the surviving partner, or an examination of the financial records of the business, would have disclosed the creditors entitled to notice.

2. Committee Note from Fla.Prob.R. 5.241: 'The steps to be taken by a personal representative in conducting a diligent search for creditors depends, in large measure, on how familiar the personal representative is with the decedent's affairs. Therefore, the committee believes it is inappropriate to list particular steps to be taken in each estate, since the circumstances will vary from case to case."

The Committee note was revised in response to footnote 3 in *Strulowitz v. Cadle Company II, Inc.*, 839 So.2d 876 (Fla. 4th DCA 2003):

> "Additionally, the personal representative argues that there is no legal authority requiring him to review any check stubs at all, let alone those beyond seventeen weeks. In so arguing, the personal representative highlights a concern that makes his appeal problematic: the absence of any written rules or guidelines on specific steps that an estate administrator must take during the course of a diligent search. [FN3]
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> FN3. In this regard, we think it would be helpful if the Probate Section of the Florida Bar Probate Rules Committee considered proposing or extending existing rules to give estate administrators and trustees more direction in their diligent searches for creditors." 839 So.2d at 881.

The Florida Probate Rules Committee recognized that, in most instances, a personal representative has the disadvantage of not having personal knowledge of all of the decedent's personal and business affairs, and that there is virtually no limit on the types and sources or claims that may be asserted, or the sources from which knowledge may be gleaned. The Committee, in its discussions, expressed a concern that creating a "checklist" would allow personal representatives to excuse an insufficient search by claiming they had met the criteria provided by the rule.

3. The court in the *Soriano* case noted the personal representative's actions taken to identify potential creditors.

> "Ms. Manes filed an affidavit, wherein she averred that she had conducted a diligent search and inquiry to determine the identities of the Decedent's creditors and had

served all those creditors whom she identified. Specifically, Ms. Manes averred in her affidavit that she:

> • Searched Decedent's personal and business records both at his business and at his home;
> • Extensively reviewed each and every document from Decedent's business in preparation for the sale of the business;
> • Extensively reviewed each and every document from his personal residence in preparation for the sale of the residence and the clearing of the contents of his residence;
> • Never discovered any documents regarding Ms. Soriano or regarding any claim or potential claim by Ms. Soriano;
> • Spoke with Decedent once a week on average, and Decedent never mentioned Ms. Soriano, or that he had been charged with any crime involving Ms. Soriano; and
> • Had never heard of Ms. Soriano until Ms. Manes was advised by the attorney for Decedent's estate that Ms. Soriano had filed a statement of claim.

Soriano v. Estate of Manes, *id* at 679. This affidavit provides a template, at least in this situation, for appropriate and diligent search that protected the estate and the personal representative.

4. Compare the lack of guidance in the Florida Probate Rules to statutory guidelines in other states that result in "safe harbors."

Indiana Code 29-l-7-7.5(b): "A personal representative is considered to have exercised reasonable diligence under subsection (a) if the personal representative: (1) conducts a review of the decedent's financial records that are reasonably available to the personal representative; and (2) makes reasonable inquiries of the persons who are likely to have knowledge of the decedent's debts and are known to the personal representative. A personal representative who complies with the statutory requirements can then file an affidavit, or obtain a court order certifying compliance, which then creates a presumption that can only be rebutted by clear and convincing evidence.

Washington State uses a statutory creature termed a "notice agent" (RCW 11.42.040) The notice agent is "deemed to have exercised reasonable diligence upon conducting a reasonable review of the decedent's correspondence, including correspondence received after the date of death, and financial records, including personal financial statements, loan documents, checkbooks, bank statements, and income tax returns, that are in the possession of or reasonably available to the notice agent." Similar provisions for an affidavit or court order are available, likewise creating the rebuttable presumption of a diligent search that can be overcome only by "clear, cogent, and convincing evidence."

But do these "safe harbors" really provide any more protection? Or are they "false

harbors?"

5. Impracticable and Extended Searches Are Not Required

a. The U.S. Supreme Court in *Pope* distinguished between those entitled to actual notice and those to whom notice by publication is sufficient. Citing *Mullane vs. Central Hanover Bank and Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), the Court stated:

> In addition, *Mullane* disavowed any intent to require "impracticable and extended searches ... in the name of due process" (citation omitted) as the Court indicated in *Mennonite* [*Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983)] (citation added), all that the Executor or Executrix need do is make reasonably diligent efforts 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, (citation omitted)." *Pope*, 485 U.S. at 490, 108 S.Ct. at 1347-48.

In *Mullane*, the Supreme Court, in determining the extent of diligence required to discover creditors, stated:

> 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. 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 name of due process. 339 U.S., at 317, 70 S.Ct. at 659.

b. Florida's Interpretation. "This Court does not interpret *Pope* to require that a personal representative determine the identities of persons or entities with whom a decedent had business dealings or other transactions during a given number of years prior to death and to serve a Notice of Administration upon each one merely because such person might possibly have some uncommunicated dissatisfaction with the matter. As to those persons, notice by publication is sufficient to afford due process." *Jones v. Sun Bank/Miami, N.A.*, 609 So.2d 98 (Fla. 3d DCA 1992). (Purchaser of gasoline station filed suit for environmental contamination four years after

purchase and claim in estate six months after claim bar date, not a reasonably ascertainable creditor.)

c. Must you notice every potential claimant? Not likely. See, *Carter v. Beck*, 598 So.2d 1390 (Ala. 1992), where the decedent was the sole proprietor of a tractor company and the claimant was injured as a result of alleged negligent modifications made to the tractor by decedent's company. Although finding that Carter was a reasonably ascertainable creditor as a result of an injury he sustained while operating the modified tractor, the Alabama Supreme Court declined to extend the administratix's legal duty to give actual notice to all of the decedent's previous customers who had purchased a modified tractor on the assumption that one or more of them might have a personal injury claim against the estate "Imposition of such a broad duty of ascertaining potential claimants would create an unreasonable burden on personal representatives and, thus, would be inconsistent with the intent of the legislature in providing for the 'speedy, safe, and definitive settlement of estates.'" 598 So.2d at 1391 n.2 (citing *Motley v. Battle*, 368 So.2d 20, 22 (Ala.1979))

E. Documenting Actions Taken To Determine Reasonably Ascertainable Creditors.

1. Have all of the decedent's mail forwarded to the attorney/personal representative for review.

2. Provide a standard checklist for general guidance to personal representatives - not all actions will be required in every situation (see Exhibit).

3. Keep copies of checkbooks, bank statements, and personal papers reviewed.

4. Keep notes of conversations with family, friends, and business associates.

5. Save results of online searches for the file - Official Records, UCC searches, corporate/partnership entity searches.

F. Proof of Service.

1. Method of Service. Fla.Prob.R. 5.241 provides: "Service of the notice shall be either in the manner provided for informal notice, or in the manner provided for service of formal notice at the option of the personal representative. Service on one creditor by a chosen method shall not preclude service on another creditor by another method." The Supreme Court says in Pope: "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)." 485 U.S. at 490.

2. Costs of Service. Personal representative of estate was entitled to reimbursement of the cost of sending registered mail notices to decedent's creditors, even if there

was no statutory mandate for the use of registered mail; no objection was made to personal representative's claim for this cost, and probate rules required service of notice to creditors and authorized personal representative to choose the form of notice, including any form of mail requiring a signed receipt. *Baumann v. Estate of Blum*, 898 So.2d 1106 (Fla. 2d DCA 2005).

3. Filing Proof of Service

a. If served in the manner provided for formal notice. Fla.Prob.R. 5.040(4) Service of formal notice pursuant to subdivision (3)(A) shall be complete on receipt of the notice. Proof of service shall be by verified statement of the person giving the notice; and there shall be attached to the verified statement the signed receipt or other evidence satisfactory to the court that delivery was made to the addressee or the addressee's agent. Fla.Prob.R. 5.040(5) If service of process is made pursuant to Florida law, proof of service shall be made as provided therein. (See chapters 48 and 49, Florida Statutes)

b. If served by informal notice. Fla.Prob.R. 5.041(b) When service is required or permitted to be made on an interested person represented by an attorney, service shall be made on the attorney unless service on the interested person is ordered by the court. Except when serving formal notice, or when serving a motion, pleading, or other paper in the manner provided for service of formal notice, service shall be made by delivering or mailing a copy of the motion, pleading, or other paper to the attorney or interested person at the last known address or, if no address is known, leaving it with the clerk of the court. Service by mail shall be complete upon mailing except when serving formal notice or when making service in the manner of formal notice. Delivery of a copy within this rule shall be complete upon (1) handing it to the attorney or to the interested person; or (2) leaving it at the attorney's or interested person's office with a clerk or other person in charge thereof; or (3) if there is no one in charge, leaving it in a conspicuous place therein; or (4) if the office is closed or the person to be served has no office, leaving it at the person's usual place of abode with some person of his or her family above 15 years of age and informing that person of the contents; or (5) transmitting it by facsimile to the attorney's or interested person's office with a cover sheet containing the sender's name, firm, address, telephone number, facsimile number, and the number of pages transmitted. When delivery is made by facsimile, a copy shall also be served by any other method permitted by this rule. Facsimile delivery occurs when transmission is complete.

c. Certificate of Service. Fla.Prob.R. 5.041(f) When any attorney shall certify in substance: "I certify that a copy hereof has been served on (here insert name or names) by (delivery) (mail) (fax) on (date). Attorney"

V. Procedural Considerations in Filing and Payment of Claim.

A. Form of Claim. Pursuant to F.S. 733.703, a creditor must file a written claim with the court. The requirements for the Statement of Claim are set forth in Fla.Prob.R. 5.490. A

creditor's statement of claim must be verified and filed with the clerk and must include:

(1) the basis for the claim;
(2) the amount claimed;
(3) the name and address of the creditor;
(4) the security for the claim, if any; and
(5) whether the claim is currently due or involves an uncertainty and, if not due, then the due date and, if contingent or unliquidated, the nature of the uncertainty.

If a bona fide attempt to file a claim is made but the claim is defective as to form, the court may permit the amendment of the claim at any time. F.S. 733.704

B. E-Filing Requirement. Florida implemented mandatory e-filing on April 1, 2013 for all documents in civil cases, including probate. "Documents" required to be e-filed include pleadings, motions, petitions, memoranda, briefs, notices, exhibits, declarations, affidavits, orders, judgments, decrees, writs, opinions, and any paper or writing submitted to a court unless the filing falls under one of the exceptions in Fla. R. Jud. Admin. 2.525(d). A statement of claim (which qualifies as a "document") is not filed unless it is electronically submitted or falls within one of the exceptions to electronic filing.

Since filing can only be accomplished through electronic means (in the absence of a Rule 2.525 exception), the clerk of court is not required to accept paper filings and any such filing will be disregarded. In the case of *United Bank v. Estate of Frazee*, 197 So.3d 1190 (Fla. 4th DCA 2016), the bank's attorney mailed two statements of claim which were received by the clerk's office one day before the expiration of the applicable claim period. After the claims period had expired, the clerk's office notified the bank counsel that claims must be submitted electronically. Counsel subsequently submitted the claims by e-filing. The trial court determined that the claims were not timely filed because electronic filing was mandatory and none of the exceptions applied.

C. When Claim Not Required. Note that the notice and service requirements are applicable to creditors of the decedent, and not general expenses of administration or post-death liabilities. As noted by the Florida Supreme Court in *Spohr v. Berryman,* 589 So.2d 225 (Fla. 1991):

> "We believe that the reference in the statute to claims arising before the death of the decedent is intended to make clear that it is unnecessary to file a statement of claim in order to prosecute an action against the estate that is predicated upon events that take place after the decedent's death. See, e.g., *In re Estate of Kulow,* 439 So.2d 280 (Fla. 2d DCA 1983) (claim for money mistakenly paid to personal representative after the decedent's death)."

See also, *Swenszkowski v. Compton,* 662 So.2d 722, 723 (Fla. 1 DCA 1995) (also citing *In*

re Estate of Kulow, 439 So.2d 280, 282 (Fla. 2d DCA 1983)); *Langford v. Ferrera*, 823 So.2d 795, 797 (Fla. 1st DCA 2001) (stating that claims for post-death expenditures "are not subject to the probate code's statutes of nonclaim").

1. Statutory Exceptions.

a. The holder of a mortgage, security interest, or other lien on property of the decedent need not file a claim to protect or enforce their security. F.S. 733.702(4)(a). However, if the mortgagee or lienholder wants to pursue a deficiency judgment or other compensation in excess of the value of the security, they must file a claim to protect their rights.

b. A claim need not be filed to proceed against the decedent's casualty insurance policy unless the creditor seeks to recover more than the policy limits. F.S. 733.702(4)(b)

c. A claim is also not required for a cross-claim or counter-claim against an estate. F.S. 733.702(4)(c). However, the cross/counter-claimant's recovery is limited to the amount the estate recovers in the same action. A claim must be filed to protect recovery of a cross or counter claim judgment in excess of that amount.

2. Judicially Recognized Exceptions. The courts have recognized exceptions in addition to the ones specified in the Probate Code.

a. The "trust exception" applies to actions to enforce a trust relationship where the decedent held property for the benefit of another. The reasoning is that the property is not a part of the decedent's estate. In addition to being excepted from the filing requirements, the trust exception also avoids application of the 2-year statute of nonclaim. While there is a line of cases that discuss the trust exception, it is best explained in *Velzy v. Estate of Miller*, 501 So.2d 1297 (Fla. 2d DCA 1987).

b. A claim against the recipient of life insurance proceeds does not require the filing of a claim because the proceeds are not part of the decedent's estate. *Gartley v. Gartley*, 622 So.2d 77 (Fla. 2d DCA 1993). This of course, would not hold true for proceeds paid to the estate, in which case a claim should be filed.

c. The court in *Prescott v. Stanley*, 710 So.2d 674 (Fla. 5th DCA 1998), held the filing requirements inapplicable to a suit against the personal representative who, while acting as agent under a power of attorney, changed the beneficiary designation from the creditor to the estate of the decedent. While the estate received the annuity proceeds, the court found that the cause of action and potential recovery was against the personal representative individually, and not the estate.

D. Lawsuit Not a Substitute for a Claim. The Supreme Court in *Spohr v. Berryman*

also addressed the question of whether a lawsuit filed against the personal representative was an adequate substitute for filing a statement of claim. While allowed under previous versions of Florida probate law, the court confirmed that it is no longer allowed after the adoption of the "new" Florida Probate Code in 1974. *Spohr*, at 229.

E. Personal Representative's Proof of Claim. The personal representative is authorized to file claims on behalf of creditors the personal representative intends to pay. Special rules are provided for the filing and objection to the Proof of Claim in Fla.Prob.R. 5.498 and 5.499.

F. Objections to Claims. F.S. 733.705 and Fla.Prob.R. 5.496 set forth the requirements for properly objecting to a claim. Objections to claims must be in writing and filed with the clerk, as well as served on the creditor. The personal representative or a beneficiary may object to a claim. If the beneficiary objects, then the personal representative must also be served with a copy of the objection. The objection must be filed on or before the expiration of 4 months from the first publication of notice to creditors or within 30 days from the timely filing or amendment of the claim, whichever occurs later. If the person filing the claim does not serve it on the creditor as required, the objection is deemed abandoned. For good cause, the court may extend the time for filing or serving an objection to any claim. Objection to a claim continues even if an amended claim is filed, unless the objection is withdrawn.

The creditor then has 30 days from service of the objection to file an independent action, or the claim is barred unless an extension of time is agreed to by the personal representative in writing before it expires. Additionally, for good cause, the court may extend the time for filing an action or proceeding when an objection is filed. One should also note the special rules under F.S. 733.705(4) for objecting to items listed on the personal representative's Proof of Claim, which vary depending on whether the item has been paid or not.

G. Contingent and Unmatured Claims. An unmatured claim is one that has not yet become due, but that is certain to become due in the future, such as a promissory note with a term ending in the future and no acceleration of the amount due upon death. A contingent claim is one where no cause of action has accrued yet, and that may or may not become due in the future, such as a guarantee of another's debt. The normal requirements for notice, filing and objecting to such claims apply. If an objection is filed, the creditor must bring a declaratory action to establish the validity and amount of the claim. F.S. 733.705(5)

H. Payment. The personal representative must pay all proper claims within 1 year from the date of first publication of notice to creditors, and cannot be compelled to pay a claim earlier than the end of the 5th month after the date of first publication. The court may grant an extension of time to pay claims for good cause, such as lack of liquidity or pending litigation F.S. 733.705

1. Unmatured Claim at Time of Distribution. If an unmatured claim has not become

due before the time for distribution of an estate, the personal representative may prepay the full amount of principal plus accrued interest due on the claim, without discount and without penalty, despite any contrary provisions in the contract or debt instrument. If the claim is not prepaid, the creditor and personal representative must either reach an agreement on payment and release of the claim, or the court may implement one of the following payment methods so as not to delay the closing of the estate:

a. Reserve an amount or assets adequate to pay the claim when it becomes due, including any security or collateral,

b. Require that the claim be adequately secured by a mortgage, pledge, bond, trust, guaranty, or other security, or

c. Other equitable satisfaction of the claim.

2. Contingent Claim at Time of Distribution. If a cause of action has not yet accrued on a contingent claim, the creditor and personal representative must either reach an agreement on payment and release of the claim, or the court may either (i) determine that the claim is adequately secured and designate the source of payment, or that it has no value; or delay the closing of the estate until after the action accrues, but no longer than 5 years from the date of first publication of notice to creditors at which time the claim would be deemed unenforceable absent some agreement or provision for payment. F.S. 733.705(8)

3. Coordination of Payment of Claims Between Domiciliary and Ancillary Estates. The coordination of claims between domiciliary and ancillary administrations can be particularly tricky. In *Staum v. Rubano*, 120 So.3d 109 (Fla. 4th DCA 2013), a nursing home in the decedent's state of residence filed a claim in the domiciliary estate and also in the Florida ancillary estate. The claim in the Florida estate was filed more than two years after the decedent's death, and the estate argued it was barred by F.S. 733.710(1). The creditor filed a petition with the court requesting an accounting of the ancillary administration and transfer of any remaining funds to the domiciliary estate. The trial court agreed that the claim was untimely, concluded that the creditor was thus not an interested person entitled to an accounting, and denied the petition. The appellate court reversed, finding that the validity of the claim was governed by New York law, and that as the creditor's claim against the domiciliary estate was still pending, the creditor was an interested person with standing in the ancillary administration to request an accounting and transfer of assets to the domiciliary estate. The court found no authority providing a Florida court with jurisdiction to determine that a creditor's pending claim against a foreign domiciliary estate is untimely. (Citing *Smith v. DeParry*, 86 So.3d 1228, 1235 (Fla. 2d DCA 2012) "Under the probate code, the term 'interested person' refers to a person's or entity's standing, i.e., the right to notice and an opportunity to be heard in a particular proceeding pending in a probate or guardianship matter."; and Fla. Prob. R. 5.150(b) (2011) "On the petition of an interested person ... the court may require the personal representative ... to file an

accounting or return not otherwise required by statute or rule.")

I. Priority of Payment. It is possible that the estate may be insufficient to satisfy all expenses of administration, taxes and claims. F.S. 733.707 creates a class system of prioritization. All debts in the highest class must be paid before any debts in the next highest class can be paid. If there are insufficient assets to fully pay a particular class, payment is prorated among the claims in that class. The classes are defined as follows:

> Class 1. Costs, expenses of administration, and compensation of personal representatives and their attorneys fees and attorneys fees awarded under s. 733.106(3).
>
> Class 2. Reasonable funeral, interment, and grave marker expenses, whether paid by a guardian, the personal representative, or any other person, not to exceed the aggregate of $6,000.
>
> Class 3. Debts and taxes with preference under federal law, claims pursuant to ss. 409.9101 and 414.28, and claims in favor of the state for unpaid court costs, fees, or fines.
>
> Class 4. Reasonable and necessary medical and hospital expenses of the last 60 days of the last illness of the decedent, including compensation of persons attending the decedent.
>
> Class 5. Family allowance.
>
> Class 6. Arrearage from court-ordered child support.
>
> Class 7. Debts acquired after death by the continuation of the decedent's business, in accordance with s. 733.612(22), but only to the extent of the assets of that business.
>
> Class 8. All other claims, including those founded on judgments or decrees rendered against the decedent during the decedent's lifetime, and any excess over the sums allowed in Classes 2 and 4.

VI. Claims in Ancillary Estates

When a Florida ancillary administration is opened for real property and other assets belonging to a non-resident decedent, the creditor claims process is handled the same as the primary administration of a Florida resident's estate. The ancillary personal representative is authorized to provide notice to creditors and settle claims in the ancillary estate.

VII. Liability of Trusts and Trustees

A. Notice of Administration. The personal representative is required to serve a notice of administration on the trustee of any trust described in F.S. 733.707(3) where the decedent was the settlor of the trust and had a right of revocation, either alone or in conjunction with another person. The purpose of the notice is to alert the trustee to the administration of the settlor's probate estate, and the trust's potential liability for expenses of administration of the estate and claims of creditors if the estate is insufficient under F.S. 733.607 and 733.707(3). This is a mandatory provision under the Florida Trust Code. F.S. 736.0105(2)(m).

B. Notice of Trust. Correspondingly, a trustee must file a Notice of Trust in the probate proceeding of a deceased settlor when the trust qualifies under F.S. 733.707(3). This ensures the personal representative is aware of the trust as a source of payment and how to reach the trustee.

C. Claims Against Trust. Creditor claims against a decedent must be brought in the probate proceeding. F.S. 736.1014 specifically provides that a creditor of a settlor may not directly pursue an action against the trust, the trustee of the trust, or any beneficiary of the trust that was dependent on the individual liability of the decedent/settlor. See, *Tobin v. Damian*, 723 So2d 396 (Fla. 4th DCA 1999); *Becklund v. Fleming*, 869 So.2d 1 (Fla. 2d DCA 2003); and *In re Guardianship of Gneiser*, 873 So2d 573 (Fla. 2d DCA 2004).

The trustee has a duty to pay expenses and obligations of the settlor's estate only to the extent the estate assets are insufficient, as provided in F.S. 736.05053, and as the personal representative certifies to the trustee. Default ordering rules are also provided, with direction to pay estate liabilities first from the residue of the trust, then from general devises, and finally from specific devises. As a result of this statutory liability, the trustee should not distribute the trust assets until the trustee is assured that all expenses and claims have been identified and sources of payment have been determined. This may delay final distribution of the trust until receipt of the IRS Closing Letter (or its equivalent) or closing of the probate estate.

D. Trust Liabilities. It should be noted that this provision does not preclude a direct action against a trust or the trustee of the trust when the liability is properly one of the trust, such as contracts or actions taken by the settlor in his capacity as trustee rather than in his individual capacity. It also does not affect a duly recorded mortgage or security interest, or the lien of any person in possession of personal property, or the right to foreclose and enforce the mortgage or lien on trust-owned property.

E. Payment of Estate Liabilities and Expenses.

The trustee's contribution to the estate expenses and liabilities is determined first by reference to any specific provisions in the will or trust agreement, and if none, or if the provisions are inadequate, then by reference to F.S. 736.05053(2):

a. First from property of the residue of the trust, meaning those assets

remaining after all distributions made by reference to a specific property or type of property, fund, or sum, and if insufficient, then

b. Property that is not specifically identified for distribution, and then

c. Property that is specifically identified for distribution.

Note that the expenses of trust administration, including the trustee's fees and the fees of the trustee's attorney, are to be paid before any payment to the settlor's personal representative.

The general rule is that trust assets that would not be subject to claims against the decedent's estate if they had been paid directly to a *testamentary* trust, such as life insurance payable to a testamentary trust as beneficiary, or assets received from any trust that does not meet the requirements of F.S. 733.707(3) are not available to the decedent's estate for payment of expenses and liabilities. This includes trusts and employee annuities established under section 403 of the Internal Revenue Code, Individual Retirement Accounts, Keough accounts, and similar arrangements as identified F.S. 733.707(3)(a) – (c).

However, in *Morey v. Everbank*, 93 So.3d 482 (Fla. 1st DCA 2012) life insurance proceeds payable to the insured's revocable trust were determined to be available for payment of the insured decedent's creditors. In *Morey*, the provisions of the trust agreement directed the Trustee to pay the settlor's "death obligations" prior to distribution to the beneficiaries. The court found this direction to be unambiguous, and held that even though life insurance proceeds are generally exempt from creditor's claims, the settlor waived the exemption under the terms of the trust by directing payment of his debts from the general trust assets, which included the insurance proceeds. The court equated the designation of the revocable trust as beneficiary to the designation of the decedent's estate as beneficiary. Had the insured named the Morey Family Trust (a sub-trust of the revocable trust) as beneficiary, the issue would have been avoided and the proceeds would not have been available to satisfy the creditor claims. Unfortunately, almost all trusts contain language similar to the language in the *Morey* trust directing the payment of the settlor's creditors, usually by payment of funds to the personal representative.

The RPPTL Section of The Florida Bar quickly prepared "Morey fix" legislation to address this problem, which was adopted in 2014 making changes to both F.S. 733.808(4) and F.S. 736.05053(1). With these changes, any waiver of the creditor protection under F.S. 222.13(1) must be specific as opposed to general. Section 733.808(4) was amended to read as follows:

> (4) *Unless the trust agreement, declaration of trust, or will expressly refers to this subsection and directs that it does not apply,* death benefits payable as provided in subsection (1), subsection (2), or subsection (3), unless paid to a personal representative under the provisions of subsection (3), shall not be deemed to be part of the decedent's estate and shall not be subject to any obligation to pay the expenses

> of administration and obligations of the decedent's estate or for contribution required from a trust under s. 733.607(2) to any greater extent than if the proceeds were payable directly to the beneficiaries named in the trust.

It also amends F.S. 736.05053(1) to provide:

> A trustee of a trust described in s. 733.707(3) shall pay to the personal representative of a settlor's estate any amounts that the personal representative certifies in writing to the trustee are required to pay the expenses of the administration and obligations of the settlor's estate. Payments made by a trustee, otherwise provided in the trust instrument, must be charged as expenses of the trust without a contribution from anyone. The interests of all beneficiaries of such a trust are subject to the provisions of this subsection; however, the payment must be made from assets, property, or the proceeds of the assets or property that are included in the settlor's gross estate for federal estate tax purposes and may not be made from assets proscribed in s. 733.707(3) *or death benefits described in s. 733.808(4) unless the trust instrument expressly refers to s. 733.808(4) and directs that it does not apply*.

VIII. Liability of Recipients of Non-Probate Assets

Certain assets pass outside of probate by operation of law to designated beneficiaries or joint owners. These assets effectively function as "will substitutes" by passing assets at death outside of the probate or trust administration process. They may include:

1. Property registered in "beneficiary form" pursuant to Florida's Transfer-on-Death Statute, F.S. Chapter 711 (i.e., where the words "transfer on death," "TOD," "pay on death," or "POD" appear after the name of the owner and before the name of the beneficiary).

2. Accounts established under Florida's Pay-on-Death Statute, F.S. 655.82.

3. Survivorship accounts established under the multiple party account statute, F.S. 655.79.

4. Totten or Tentative Trust accounts established under former F.S. 655.81, which was repealed in 2001. When F.S. 655.81 was repealed, F.S. 655.825(1) was enacted so that any Totten Trust accounts then in existence would be treated as pay-on-death accounts under F.S. 655.82.

5. Tangible personal property and real property held as joint tenants with right of survivorship (but not as tenants by the entirety).

There has been much debate about the availability of these types of assets to satisfy debts of the decedent/owner after death. Because they are not included in the probate or trust administration process, they are often overlooked as a source of funds. The Uniform Nonprobate

Transfers on Death Act (as codified in Article VI of the Uniform Probate Code) specifically addresses this issue in the affirmative. Section 6-102 of the UPC "clarifies that the recipients of nonprobate transfers [excluding transferees of a survivorship interest in a joint tenancy of real property and assets exempt from creditors] can be required to contribute to pay allowed claims and statutory allowances to the extent the probate estate is inadequate." UPC §6-102, Comment 1.

However, there has been little traction to adopt the Uniform Act in Florida. Some courts have recognized in *dicta* that Totten Trusts may be available for payment of a decedent's creditor claims. See, *Kearney v. Unibay Co*., 466 So.2d 271 (Fla. 4th DCA 1985) (citing the following statement from SCOTT ON TRUSTS §330.12, with approval: "Since the depositor has complete control over the deposit during his lifetime, . . . he is treated as the owner insofar as his creditors are concerned. His creditors can reach the deposit while he is living, and can reach it as part of his estate on death."), and *Serpa v. North Ridge Bank*, 547 So.2d 199 (Fla. 4th DCA 1991) (citing the following statement from *In re Estate of Schuck*, 419 Pa. 466, 214 A.2d 629, 631 (1965), with approval: "A tentative [Totten] trust may be revoked, among other means, . . . by facts and circumstances resulting in inadequacy of the estate assets to satisfy the testamentary gifts, funeral and administration expenses, taxes and other charges."). But neither of these cases involved post-death payment of creditor claims.

VII. Personal Representative as Fiduciary

A. Fiduciary Duty to Creditors. It is without question that the personal representative of an estate stands in a fiduciary position to the creditors of the estate. "A personal representative is a fiduciary who shall observe the standards of care applicable to trustees as described by F.S. 737.302. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of the decedent's will and this code as expeditiously and efficiently as is consistent with the best interests of the estate. A personal representative shall use the authority conferred by this code, the authority in the will, if any, and the authority of anyorder of the court, for the best interests of interested persons, including creditors (emphasis added) F.S.733.602(1)

B. Actions in Bad Faith. In *Burke v. Langdon*, 190 S.W. 3d 660 (TN App. 2005), the personal representative was aware of the potential claim against the decedent's estate (the claimant was her divorce attorney, who was awarded fees payable by her ex-husband, the decedent). The court held that a personal representative can be held personally liable for the breach of her duty to notify a known or reasonably ascertainable creditor. "To hold otherwise would mean that a personal representative would be protected from knowingly violating a statutory duty with the hope that the known or reasonably ascertainable creditors would fail to file claims within the statutory bar period, likely resulting in more money for the beneficiaries. A personal representative who is also a beneficiary could, therefore, create a windfall for herself with no repercussions for violating her statutory duty." While there is no Florida case similar to this Tennessee case, query

whether a Florida court would reach the same conclusion.

These materials do not constitute and should not be treated as, legal, tax or other advice regarding the use of any particular tax, estate planning or other technique, device, or suggestion, or any of the tax or other consequences associated with them. Although reasonable efforts have been made to ensure the accuracy of these materials and the seminar presentation, neither Tae Kelley Bronner, Esq., Tae Kelley Bronner, P.L., Tami F. Conetta nor The Northern Trust Corporation assumes any responsibility for any individual's reliance on the written or oral information presented during the seminar. Each seminar attendee should verify independently all statements made in the materials and during the seminar presentation before applying them to a particular fact pattern, and should determine independently the tax and other consequences of using any particular device, technique, or suggestion before recommending it to a client or implementing it for a client.

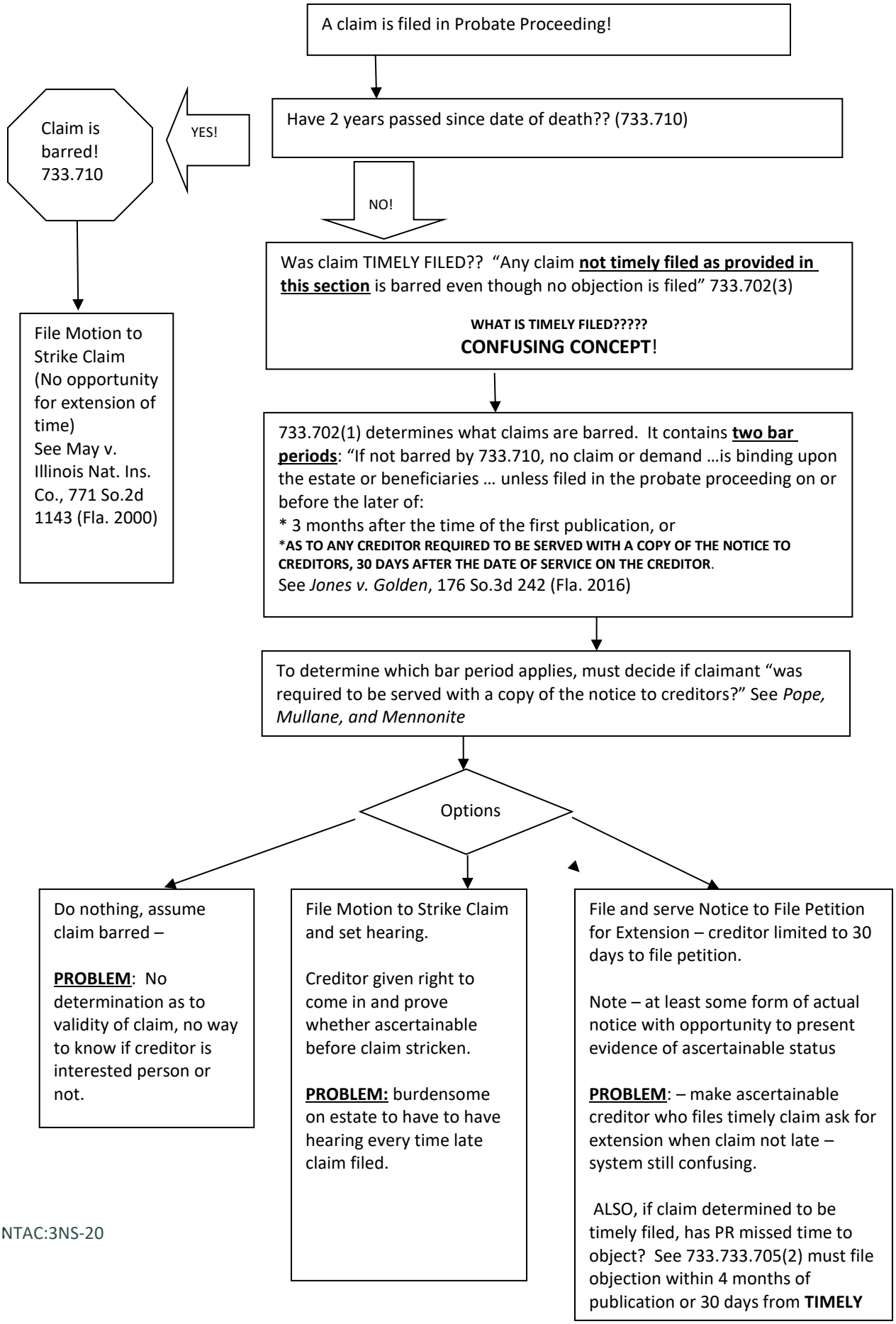
CHECKLIST FOR IDENTIFYING POTENTIAL CREDITORS

(Note that this checklist is intended for general guidance, and is not intended to be either all-inclusive, nor to suggest applicability to every estate proceeding.)

TYPE OF LIABILITY	WHERE TO LOOK	WHAT TO LOOK FOR
Recorded liabilities and judicial determinations *Holding Electric v. Roberts*, 530 So.2d 301 (Fla. 1988) (liens recorded in the public record provide constructive notice of claims)	Public records search in county of residence and other counties where real property owned or businesses operated MyFloridaCounty.com	Judgments, liens, UCC filings, orders, dissolution of marriage, mortgages, name change or aliases
Alimony/support obligation	Divorce decree Settlement Agreement	Unpaid alimony or other obligations required by the court order or settlement agreement Children of the marriage could also be third-party beneficiaries entitled to notice
Recurring payments	Checkbook/bank statements Wire transfers Credit card statements Online banking	Regular payments to a creditor - payment of a loan, contract for purchase, utilities, alimony, child support, judgment creditor
Credit cards	Credit Report Checkbook/bank statements Mail Online banking	Recurring payments, although not always regular in amount or timing
Business liabilities	Business records Buy-sell agreement	Personal guarantees, obligations to purchase shares or sell shares based on buy-sell agreement, general liability as partner

(cont.)	Accountant, lawyer or other advisor Business partners UCC filings, business loan documents Managers, key employees Public Records Sunbiz.org	or trustee of liquidating corporation
Tort liability	Police reports Insurance notices Recent vehicle damage Pending litigation	Persons with possible tort claims against the decedent
Personal property loans	Car, boat and "toy" titles Mail, payment notices Online payments on CC or statements	Lienholders, recurring payments
Medical expenses *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478,108 S.Ct. 1340 (1988).	Decedent's mail Personal knowledge of family members Death certificate (place of death in hospital, nursing home, etc.) Medicare/insurance statements	Name and address of providers, dates of service, co-pay/disallowed expenses
Claim for domestic services	Family members Banking records Tax returns	Individuals providing personal care services – housekeeper, gardener, nanny, caregiver or companion may have claim for unpaid taxes, wages, injury

Specific performance of pending contracts	For sale sign in front yard (call the Realtor if there is one) Mail OR search will reveal any contracts for deed	Listing agreements, contract for sale/purchase (personal service contracts are not specifically enforceable)
Decedent as fiduciary	Family, neighbors Bank and account records Professional advisors Court records	Appointment/service as guardian, trustee, personal representative or power of attorney - may require final accounting and other actions to transition to successor and obtain release of liability
Landlord/tenant liability	Rental property Tax returns reflecting rental income on Schedule Deposits/payments Leases	Decedent may have liability as lessee or as lessor to tenant - give notice in either instance
Co-tenants of real property	OR for deeds Co-tenancy agreements Trust agreement granting right of occupancy with obligation to pay expenses	Claims for contribution for taxes, insurance, expenses, liability, etc.
Predeceased spouse *In re Estate of Vickery*, 564 So.2d 555 (Fla. 4DCA 1990) Joint and mutual will claims by beneficiaries under prior joint and mutual will superceded by last will of surviving spouse	Home Office Safe deposit box Professional advisors	


A claim is filed in Probate Proceeding!
Have 2 years passed since date of death?? (733.710)
YES!
Claim is barred! 733.710
NO!
Was claim TIMELY FILED?? "Any claim not timely filed as provided in this section is barred even though no objection is filed" 733.702(3)
WHAT IS TIMELY FILED?????
CONFUSING CONCEPT!
File Motion to Strike Claim (No opportunity for extension of time)
See May v. Illinois Nat. Ins. Co., 771 So.2d 1143 (Fla. 2000)
733.702(1) determines what claims are barred. It contains two bar periods: "If not barred by 733.710, no claim or demand …is binding upon the estate or beneficiaries … unless filed in the probate proceeding on or before the later of:
* 3 months after the time of the first publication, or
*AS TO ANY CREDITOR REQUIRED TO BE SERVED WITH A COPY OF THE NOTICE TO CREDITORS, 30 DAYS AFTER THE DATE OF SERVICE ON THE CREDITOR.
See Jones v. Golden, 176 So.3d 242 (Fla. 2016)
To determine which bar period applies, must decide if claimant "was required to be served with a copy of the notice to creditors?" See Pope, Mullane, and Mennonite
Options
Do nothing, assume claim barred –
PROBLEM: No determination as to validity of claim, no way to know if creditor is interested person or not.
File Motion to Strike Claim and set hearing.
Creditor given right to come in and prove whether ascertainable before claim stricken.
PROBLEM: burdensome on estate to have to have hearing every time late claim filed.
File and serve Notice to File Petition for Extension – creditor limited to 30 days to file petition.
Note – at least some form of actual notice with opportunity to present evidence of ascertainable status
PROBLEM: – make ascertainable creditor who files timely claim ask for extension when claim not late – system still confusing.
ALSO, if claim determined to be timely filed, has PR missed time to object? See 733.733.705(2) must file objection within 4 months of publication or 30 days from TIMELY

RULE 5.241. NOTICE TO CREDITORS

(a) **Publication and Service**. Unless creditors' claims are otherwise barred by law, the personal representative shall promptly publish a notice to creditors and serve a copy of the notice on all creditors of the decedent who are reasonably ascertainable and, if required by law, on the Agency for Health Care Administration. Service of the notice shall be either by informal notice, or in the manner provided for service of formal notice at the option of the personal representative. Service on one creditor by a chosen method shall not preclude service on another creditor by another method.

(b) **Contents.** The notice to creditors shall contain the name of the decedent, the file number of the estate, the designation and address of the court, the name and address of the personal representative and of the personal representative's attorney, and the date of first publication of the notice to creditors. The notice shall require all creditors to file all claims against the estate with the court, within the time provided by law.

(c) **Method of Publication and Proof**. Publication shall be made as required by law. The personal representative shall file proof of publication with the court within 45 days after the date of first publication of the notice to creditors.

(d) **Statement Regarding Creditors**. Within 4 months after the date of the first publication of notice to creditors, the personal representative shall file a verified statement that diligent search has been made to ascertain the name and address of each person having a claim against the estate. The statement shall indicate the name and address of each person at that time known to the personal representative who has or may have a claim against the estate and whether such person was served with the notice to creditors or otherwise received actual notice of the information contained in the notice to creditors; provided that the statement need not include persons who have filed a timely claim or who were included in the personal representative's proof of claim.

(e) **Service of Death Certificate.** If service of the notice on the Agency for Health Care Administration is required, it shall be accompanied by a death certificate.

Committee Notes

It is the committee's opinion that the failure to timely file the proof of publication of the notice to creditors shall not affect time limitations for filing claims or objections.

On April 19, 1988, the United States Supreme Court decided Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565. This case substantially impacted the method for handling (and barring) creditors' claims. This case stands for the proposition that a creditor may not be barred by the usual publication if that creditor was actually known to or reasonably ascertainable by the personal representative, and the personal representative failed to give notice to the creditor by mail or other means as certain to ensure actual notice. Less than actual notice in these circumstances would deprive the creditor of due process

rights under the 14th Amendment to the U.S. Constitution. Probably actual notice of the death (as in the case of a hospital where the decedent died as a patient) without notice of the institution of probate proceedings is not sufficient.

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 persons of the pendency of the proceeding and afford them an opportunity to present their claims.

The steps to be taken by a personal representative in conducting a diligent search for creditors depends, in large measure, on how familiar the personal representative is with the decedent's affairs. Therefore, the committee believes it is inappropriate to list particular steps to be taken in each estate, since the circumstances will vary from case to case.

The statement required by this rule is not intended to be jurisdictional but rather to provide evidence of satisfaction (or lack thereof) of the due process requirements.

Rule History

2002 Revision: New rule to implement procedures consistent with new section 733.2121, Florida Statutes.

2003 Revision: Committee notes revised.

2005 Revision: Subdivision (a) amended to clarify approved methods of service on creditors. Committee notes revised.

2007 Revision: New subdivision (e) added to require service of a copy of the decedent's death certificate on the Agency for Health Care Administration, as is now required by section 733.2121(3)(d), Florida Statutes.

2007 Revision: Editorial change in (a).

Statutory References

ch. 50, Fla. Stat. Legal and official advertisements.
§ 731.301, Fla. Stat. Notice.
§ 733.2121, Fla. Stat. Notice to creditors; filing of claims.
§ 733.702, Fla. Stat. Limitations on presentation of claims.
§ 733.703, Fla. Stat. Form and manner of presenting claim.
§ 733.704, Fla. Stat. Amendment of claims.
§ 733.705, Fla. Stat. Payment of and objection to claims.
§ 733.708, Fla. Stat. Compromise.

Rule Reference

Fla. Prob. R. 5.490 Form and manner of presenting claim.

RULE 5.241. SERVICE OF NOTICE OF ADMINISTRATION ON PERSONAL REPRESENTATIVE

(a) **Date Notice of Administration is Considered Served on Person who is Personal Representative.** Unless service of the notice of administration is waived pursuant to Rule 5.240(e), when a person who is entitled to service of the notice of administration pursuant to Rule 5.240(a) is also a personal representative, the notice of administration shall be deemed served upon the person on the earliest of the following dates:

(1) the date on which the person acknowledges in writing receipt of the notice of administration;

(2) the date on which the notice of administration is first served on any other person entitled to service of the notice of administration (or the first among multiple persons entitled to service); or

(3) the date that is 30 days after the date letters of administration are issued.

(b) **Date Other Notices are Considered Served on Person who is Personal Representative.** When a person who is entitled to service of notice under these rules or the Florida Probate Code (other than the notice of administration) is also a personal representative, any notice shall be deemed as having been served on the personal representative on the earliest of the following dates:

(1) the date on which the person acknowledges in writing receipt of the notice;

(2) the date on which the notice is required to be served by the personal representative under these rules or the Florida Probate Code; or,

(3) the date on which the notice is first served by the personal representative on any other person entitled to service of the same notice.

COMMITTEE NOTES

This rule is intended to address situations in which the personal representative is also an interested person in an estate, but claims that he or she has not received the notice of administration, despite the personal representative being required to serve the notice. The receipt of the notice of administration can trigger time limits for the person receiving the notice with regard to certain rights, such as the right to claim an elective share.

Rule History

2013 Revision: New rule.

Statutory References

§ 731.201(23), Fla. Stat. General definitions.
§ 731.301, Fla. Stat. Notice.
§ 731.302, Fla. Stat. Waiver and consent by interested person.

§ 732.2135, Fla. Stat. Time of election; extensions; withdrawal.
§ 732.5165, Fla. Stat. Effect of fraud, duress, mistake, and undue influence.
§ 733.101, Fla. Stat. Venue of probate proceedings.
§ 733.109, Fla. Stat. Revocation of probate.
§ 733.212, Fla. Stat. Notice of administration; filing of objections.
§ 733.2123, Fla. Stat. Adjudication before issuance of letters.
§ 733.302, Fla. Stat. Who may be appointed personal representative.
§ 733.303, Fla. Stat. Persons not qualified.

RULE 5.490. FORM AND MANNER OF PRESENTING CLAIM

(1) **Form**. A creditor's statement of claim shall be verified and filed with the clerk and shall state:

a. the basis for the claim;

b. the amount claimed;

c. the name and address of the creditor;

d. the security for the claim, if any; and

e. whether the claim is currently due or involves an uncertainty and, if not due, then the due date and, if contingent or unliquidated, the nature of the uncertainty.

(2) **Copy**. At the time of filing the claim, the creditor shall also furnish the clerk with a copy thereof.

(3) **Mailing**. The clerk shall mail a copy of claims, noting the fact and date of mailing on the original, to the attorney for the personal representative unless all personal representatives file a notice directing that copies of claims be mailed to a designated personal representative or attorney of record. Absent designation, a copy of claims shall be mailed to the attorney for the personal representative named first in the letters of administration.

(4) **Validity of Claim**. Failure to deliver or receive a copy of the claim shall not affect the validity of the claim.

(5) **Amending Claims**. If a claim as filed is sufficient to notify interested persons of its substance but is otherwise defective as to form, the court may permit the claim to be amended at any time.

(6) **Service by Personal Representative**. If the personal representative files a claim individually, or in any other capacity creating a conflict of interest between the personal representative and any interested person, then at the time the claim is filed, the personal representative shall serve all interested persons with a copy of the claim and notice of the right to object to the claim. The notice shall state that an interested person may object to a claim as provided by law and rule 5.496. Service shall be either by informal notice or in the manner provided for service of formal notice. Service on one interested person by a chosen method shall not preclude service on another interested person by another method.

Committee Notes

Subdivision (e) of this rule represents a rule implementation of the procedure found in section 733.704, Florida Statutes. It is not intended to change the effect of the statute from which it was derived but has been reformatted to conform with the structure of these rules. It is not intended to create a new procedure or modify an existing procedure.

Rule History

1975 Revision: Sets forth the claims procedure to be followed and clarifies the matter of delivery of copies where there are multiple personal representatives or where the attorney of record desires to accept such delivery.

1984 Revision: Extensive editorial changes and requires furnishing of copy of claim to the attorney for the personal representative. Committee notes revised.

1988 Revision: Clarifies the matter of delivery of copies and directs the clerk to mail the same to the attorney for the personal representative unless designations are filed by all personal representatives to the contrary. Subdivision (e) added to implement the procedure found in section 733.704, Florida Statutes. Editorial changes. Committee notes expanded. Citation form change in committee notes.

1992 Revision: Committee notes revised. Citation form changes in committee notes.

1999 Revision: Reference to repealed rule deleted from committee notes.

2003 Revision: Committee notes revised.

2007 Revision: Editorial change in (a). New (f) added, providing procedure for notice when personal representative files a claim individually or otherwise has a conflict of interest with any interested person regarding a claim.

Statutory References

§ 731.104, Fla. Stat. Verification of documents.
§ 733.2121, Fla. Stat. Notice to creditors; filing of claims.
§ 733.702, Fla. Stat. Limitations on presentation of claims.
§ 733.703, Fla. Stat. Form and manner of presenting claim.
§ 733.704, Fla. Stat. Amendment of claims.
§ 733.708, Fla. Stat. Compromise.
§ 733.710, Fla. Stat. Limitations on claims against estates.
§ 734.102, Fla. Stat. Ancillary administration.

Rule References

Fla. Prob. R. 5.020 Pleadings; verification; motions.
Fla. Prob. R. 5.241 Notice to creditors.
Fla. Prob. R. 5.470 Ancillary administration.
Fla. Prob. R. 5.475 Ancillary administration, short form.
Fla. Prob. R. 5.530 Summary administration.

RULE 5.496. FORM AND MANNER OF OBJECTING TO CLAIM

(a) **Filing**. An objection to a claim, other than a personal representative's proof of claim, shall be in writing and filed on or before the expiration of 4 months from the first publication of notice to creditors or within 30 days from the timely filing or amendment of the claim, whichever occurs later.

(b) **Service**. A personal representative or other interested person who files an objection to the claim shall serve a copy of the objection on the claimant. If the objection is filed by an interested person other than the personal representative, a copy of the objection shall also be served on the personal representative. Any objection shall include a certificate of service.

(c) **Notice to Claimant**. An objection shall contain a statement that the claimant is limited to a period of 30 days from the date of service of an objection within which to bring an action as provided by law.

Committee Notes

This rule represents an implementation of the procedure found in section 733.705, Florida Statutes, and adds a requirement to furnish notice of the time limitation in which an independent action or declaratory action must be filed after objection to a claim.

Rule History

1992 Revision: New rule.

2003 Revision: Reference in (a) to notice of administration changed to notice to creditors. Committee notes revised.

2005 Revision: Removed provision for objections to personal representative's proof of claim, now addressed in rule 5.498, and subsequent subdivisions relettered. Reference to service on the claimant's attorney removed because service on the attorney is required by rule 5.041(b). Committee notes revised.

2007 Revision: Editorial change in (a). Second sentence of (b) added to specify that the objection must include a certificate of service.

2010 Revision: Subdivision (b) amended to delete the requirement to serve a copy of an objection to a claim within 10 days, and to clarify the requirement to include a certificate of service.

2012 Revision: Committee notes revised.

Statutory References

§ 731.201(4), Fla. Stat. General definitions.
§ 733.705, Fla. Stat. Payment of and objection to claims.

Rule References

Fla. Prob. R. 5.040 Notice.
Fla. Prob. R. 5.041 Service of pleadings and documents.

Fla. Prob. R. 5.498 Personal representative's proof of claim.
Fla. Prob. R. 5.499 Form and manner of objecting to personal representative's proof of claim.
Fla. R. Jud. Admin. 2.516 Service of pleadings and documents.

RULE 5.498. PERSONAL REPRESENTATIVE'S PROOF OF CLAIM

(a) **Contents**. A personal representative's proof of claim shall state:

(1) the basis for each claim;

(2) the amount claimed;

(3) the name and address of the claimant;

(4) the security for the claim, if any;

(5) whether the claim is matured, unmatured, contingent, or unliquidated;

(6) whether the claim has been paid or is to be paid; and

(7) that any objection to a claim listed as to be paid shall be filed no later than 4 months from first publication of the notice to creditors or 30 days from the date of the filing of the proof of claim, whichever occurs later.

(b) **Service**. The proof of claim shall be served at the time of filing or promptly thereafter on all interested persons.

Committee Notes

This rule represents an implementation of the procedure found in section 733.703(2), Florida Statutes, with respect to a proof of claim filed by the personal representative.

Rule History

2005 Revision: New rule.

2007 Revision: Subdivision (b) amended to eliminate the need to serve claimants listed as paid on the proof of claim, and clarifying editorial change.

2012 Revision: Committee notes revised.

Statutory References

§ 733.703(2), Fla. Stat. Form and manner of presenting claim.
§ 733.705, Fla. Stat. Payment of and objection to claims.

Rule References

Fla. Prob. R. 5.041 Service of pleadings and documents.
Fla. Prob. R. 5.499 Form and manner of objecting to personal representative's proof of claim.
Fla. R. Jud. Admin. 2.516 Service of pleadings and documents.

RULE 5.499. FORM AND MANNER OF OBJECTING

TO PERSONAL REPRESENTATIVE'S PROOF OF CLAIM

(a) **Filing**. An objection to a personal representative's proof of claim shall be in writing and filed on or before the expiration of 4 months from the first publication of notice to creditors or within 30 days from the timely filing of the proof of claim, whichever occurs later.

(b) **Contents**. The objection shall identify the particular item or items to which objection is made. An objection to an item listed on the proof of claim as to be paid shall also contain a statement that the claimant is limited to a period of 30 days from the date of service of an objection within which to bring an independent action as provided by law.

(c) **Items Listed as Paid**. If an objection is filed to an item listed on the proof of claim as paid, it shall not be necessary for the claimant to file an independent action as to that item. Liability as between estate and the personal representative individually for claims listed on the proof of claim as paid, or for claims treated as if they were listed on the proof of claim as paid, shall be determined in the estate administration, in a proceeding for accounting or surcharge, or in another appropriate proceeding, whether or not an objection has been filed.

(d) **Items Paid Before Objection**. If an item listed as to be paid is paid by the personal representative prior to the filing of an objection as to that item, the item shall be treated as if it were listed on the proof of claim as paid.

(e) **Service**. The objector shall serve a copy of the objection on the personal representative and, in the case of any objection to an item listed as to be paid, shall also serve a copy on that claimant within 10 days after the filing of the objection. In the case of an objection to an item listed as to be paid, the objection shall include a certificate of service.

Committee Notes

This rule represents an implementation of the procedure found in section 733.705, Florida Statutes, with respect to a proof of claim filed by the personal representative. The rule recognizes the different treatment between items listed on a proof of claim as having been paid versus items listed as to be paid. An objection to an item listed as to be paid is treated in

the same manner as a creditor's claim and there is a requirement to furnish notice of the time limitation in which an independent action or declaratory action must be filed after objection to a claim.

Rule History

2005 Revision: New rule.

2007 Revision: Editorial change in (a). Extensive revisions to rest of rule to clarify the differences in procedure between items listed as paid and items listed as to be paid. Committee notes revised.

2012 Revision: Committee notes revised.

Statutory Reference

§ 733.705, Fla. Stat. Payment of and objection to claims.

Rule References

Fla. Prob. R. 5.040 Notice.

Fla. Prob. R. 5.041 Service of pleadings and documents.

Fla. Prob. R. 5.496 Form and manner of objecting to claim.

Fla. Prob. R. 5.498 Personal representative's proof of claim.

Fla. R. Jud. Admin. 2.516 Service of pleadings and documents.