

## Florida Supreme Court Resolves Conflict Between Circuits of Limitation Period for Known or Reasonably Ascertainable Estate Creditors

The probate process is designed to balance the rights of both estate beneficiaries and creditors, with each entitled to statutory and constitutional rights. In terms of treatment of an estate creditor, the probate code has specific statutory sections which address how an estate creditor is served notice of the probate proceeding and when they may file a claim.<sup>1</sup> In summary, upon notice and if the creditor fails to file a timely claim, that creditor's claim will be forever barred. All estate creditors are barred from filing a claim after two (2) years has elapsed after the death of the decedent.<sup>2</sup> In most cases, the statutory time limitations when a creditor may file a claim cannot be waived or extended except for limited and specific circumstances<sup>3</sup> approved by the Court upon Petition with notice to all interested parties.

No claim or demand made by the creditor against the decedent's estate is binding on the estate unless filed in the probate proceeding on or before the later of the date that is 3 months after the time of the first publication of the notice to creditors or as to any creditor required to be served with a copy of the notice to creditors, 30 days after the date of service upon that creditor.<sup>4</sup> The duty to identify and provide notice to creditors is the responsibility of the Personal Representative.<sup>5</sup> In accordance with their duties, the Personal Representative must then make a diligent search to determine the name and addresses of creditors of the decedent who are reasonably ascertainable and to promptly serve a copy of a notice to creditors to them.<sup>6</sup> In addition, the Personal Representative is required to publish a notice to creditors in a newspaper where the decedent was domiciled.<sup>7</sup>

On October 01, 2015, the Florida Supreme Court issued its opinion in *Jones v. Golden*<sup>8</sup> as to the treatment of claim filed by a known creditor who did not receive a notice to creditors and filed a claim after the 3 month publication period. This case resolved a conflict between circuits as to the treatment of reasonably known and ascertainable creditors and how long they have to file a claim in the estate if they are not served a Notice to Creditors.

In *Jones*, the Florida Supreme Court followed the treatment of the 4th District Court of Appeal<sup>9</sup> and held if a known or reasonably ascertainable creditor is not served with a notice to creditors, the creditor may file their claim within two years after

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<sup>1</sup> §733.701-§733.710, Fla. Stat. (2016).

<sup>2</sup> §733.710, Fla. Stat. (2016).

<sup>3</sup> §733.702, Fla. Stat. (2016).

<sup>4</sup> §733.702.

<sup>5</sup> §733.701, Fla. Stat. (2016).

<sup>6</sup> §733.2121, Fla. Stat. (2016).

<sup>7</sup> *Id.*

<sup>8</sup> *Jones v. Golden*, 176 So. 3d 242 (Fla. October 1, 2015).

<sup>9</sup> *Jones v. Golden*, 126 So. 3d 390, 390 (Fla. 4<sup>th</sup> DCA 2013).

the date of death of the decedent. Further, the creditor is not barred from filing their claim even if the 3 month publication period of the Notice of Creditors has expired. In support of its' holding, the Supreme court relied upon Florida Statute and in dicta, addressed the due process rights of the known and ascertainable creditors.

The facts of this case are common to many families involved in probate proceedings. In this case, the decedent, *Jones*, died in February 2007 with a Notice to Creditors published in June 2007. However, neither the decedent's former wife nor her guardian were ever served with a copy of the notice to creditors. In January 2009, less than two years after the date of death of the decedent, the guardian for the former spouse filed a claim in the decedent's probate estate. The basis of the claim was money owed under a marital settlement agreement executed in 2002 between the former wife and the decedent. The Personal Representative of the estate moved to strike the claim as it was not timely filed as it was filed outside the publication period and therefore barred. The 4th DCA, applying its standard, held the claim was not time barred because the former spouse was a reasonable ascertainable creditor and she should have been served a notice to creditors. As she was not served, she was not time barred by the publication period and could file her claim within two years of the date of death of the decedent. The 4th DCA then certified its decision to the Florida Supreme Court as the 4th District treatment of known and ascertainable creditors when not served a notice to creditors was in conflict with decisions of the First and Second Courts of Appeal.

Under treatment in the 1st and 2nd District Courts of Appeal case decisions<sup>10</sup>, even if a known or reasonably ascertainable creditor was not served a notice to creditors, the creditor was still obligated to file their claim within the three-month window following the first publication of the notice. Under the 1st and 2nd District Courts of Appeal analysis, unless a reasonably known or ascertainable creditor filed for an extension of time, a claim filed outside the publication period was untimely filed and therefore barred.<sup>11</sup>

The resolution of the conflict between the District Courts of Appeal is helpful and provides clear delineation of the time period known and ascertainable creditors have to file a claim when they are not served with a Notice to Creditors. In dicta, the Florida Supreme Court in *Jones* noted that its holding was in accordance with due process protections with the plain language of section 733.702, Fla. Stat. and in accordance with the requirements of due process in accordance with the Federal Constitution.<sup>12</sup> The Florida Supreme Court noted that the United States Supreme Court has addressed the issue of actual notice to a known and reasonably ascertainable

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<sup>10</sup> *Morgenthau v. Andzel*, 26 So. 3d 628 (Fla. 1<sup>st</sup> DCA 2009), *Lubee v. Adams*, 77 So. 3d 882 (Fla. 2<sup>nd</sup> DCA 2012).

<sup>11</sup> *Jones*, 176 So. 3d at 243.

<sup>12</sup> U.S. Const. amend. XIV §1.

creditor in the case of *Tulsa Professional Collection Services, Inc. v. Pope*.<sup>13</sup> Relying upon the analysis under *Tulsa*<sup>14</sup> of when the Federal Due Process Clause is triggered to provide protections to creditors, the Florida Supreme Court found a Personal Representative is therefore constitutionally obligated to provide actual notice to known or reasonably ascertainable creditors and if the personal representative fails to provide that notice, the creditors' claims cannot be barred except under § 733.710, Fla. Stat.<sup>15</sup>

With the ruling in *Jones*, practitioners need to be mindful of the procedures they undertake to identify reasonably known and ascertainable estate creditors. Practitioners should document all efforts to locate all reasonable ascertainable creditors and also consider advising clients at the time of engagement, the constitutional duties which impute to them as the court appointed Personal Representative. Many times a testator will nominate in his or her Will, a Personal Representative who is a remote family member in both distance or relationship; however, such nominated person may hold little information as to the decedent or their life history and unable to identify known creditors of the decedent. During the estate administration, a practitioner is able to provide assistance to the Personal Representative by undertaking reasonable steps to identify reasonable ascertainable creditors. A practitioner may undertake a public record search in the county the decedent was domiciled to locate any dissolution of marriage, outstanding judgments or other pending criminal and civil matters that the decedent may have been a party. A Personal Representative may also seek to review the decedents' credit report or secure a title search if the estate has real property as an asset in efforts to identify an ascertainable creditor.

What has not been resolved or addressed in *Jones* is which party does the burden fall upon to prove if a creditor was known and ascertainable. In the event a claim is filed by a creditor during the estate administration who was not served a notice of creditors and the Personal Representative moves to strike the claim based upon it being untimely filed, *Jones* is silent on whom must carry the burden to prove the claim should be stricken as untimely filed or defend as timely filed. Case law will more than likely develop to determine which party carries the burden of proof. However, until such time case law emerges as to whom carries the burden of proof, the personal representative should undertake all reasonable efforts to document the steps they undertook to identify all reasonably know and ascertainable creditors. The Personal Representative should be prepared to introduce as evidence the reasonable efforts undertaken by the Personal Representative to identify ascertainable creditors.

With the recent decision in *Jones*<sup>16</sup>, the Florida Supreme Court has clarified the treatment of known and reasonably ascertainable creditors as to when they may file a claim if not actually served a notice to creditors. This clarification is important

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<sup>13</sup> *Jones*, 176 So. 3d. at 248 citing to *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 489-91, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988).

<sup>14</sup> *Tulsa*, 485 U.S. 478.

<sup>15</sup> *Jones*, 176 So. 3d at 249.

<sup>16</sup> *Id.*

as a reasonably ascertainable or known creditors are entitled to due process and to actually receive their notice to creditors. The failure of a Personal Representative to serve a notice to creditors upon all reasonably ascertainable creditors may result in future estate litigation, complicate estate distribution and be actionable against the Personal Representative as breach of duty. A practitioner may no longer rely upon the catch all safety net of a publication of notice to creditors for notice to known or reasonable ascertainable creditors.

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