Probate Case Summaries

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If a known or reasonably ascertainable creditor is not served with a copy of the Notice to Creditors, its claim is not barred by the three-month claim period if filed within two years of the decedent's death.

Jones v. Golden, 40 Fla. L. Weekly S517 (Fla. 2015)

The creditor, Jones, who was the decedent's ex-wife, was never served with the Notice to Creditors. Just prior to two years after the decedent's death, Jones's guardian filed a statement of claim with the probate court. The claim asserted that the decedent owed Jones money based on their marital settlement agreement. After a hearing to determine whether the claim was timely, the probate court entered an order striking the claim as untimely under §§ 733.702 and 733.710, Fla. Stats., based on the First and Second DCA decisions of *Morgenthau v. Andzel*, 26 So. 3d 628 (Fla. 1st DCA 2009) and *Lubee v. Adams*, 77 So. 3d 882 (Fla. 2d DCA 2012). Both *Morganthau* and *Lubee* held that even a reasonably ascertainable creditor who was not served with a copy of the notice to creditors is required to file a claim within three months after the first publication of the notice to creditors, unless the creditor files a motion for an extension of time under § 733.702(3), Fla. Stat., within the two-year period of repose set forth in § 733.710, Fla. Stat.

On appeal to the Fourth DCA, the creditor argued that because the Notice to Creditors was not properly served on her, the three month limitations period set forth in § 733.702(1), Fla. Stat,. never began to run, and therefore she could only be barred by the two year statute of repose set forth in § 733.710, Fla. Stat. The Fourth DCA agreed, and because it was in direct conflict with *Morganthau* and *Lubee*, the Florida Supreme Court accepted jurisdiction and affirmed.

The Florida Supreme Court held that where a known or reasonably ascertainable creditor is never served with the notice to creditors, the applicable limitations period of § 733.702(1), Fla. Stat., never begins to run and cannot bar that creditor's claim. The Florida Supreme Court stated as follows: "A known or reasonable ascertainable creditor is absolved from the limitations of § 733.702(1) by virtue of the fact that the personal representative failed to serve the creditor with the required notice." "Instead, the claims of such a creditor are only barred if not filed within the two-year period of repose set forth in § 733.710." The Florida Supreme Court further held that because §733.702, Fla. Stat., is inapplicable to an unserved known or reasonably ascertainable creditor, "it is not necessary for the creditor to seek an extension of time under § 733.702(3) since that section applies only to claims that are untimely under § 733.702."

The Florida Supreme Court cited to the case of *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988) to support the conclusion that personal representatives are obligated to provide actual notice to known or reasonably ascertainable creditors, and if the personal representative fails to provide such notice, those creditors cannot be barred except under the two year period of repose under § 733.710, Fla. Stat.

Because Argentine testator's notarial Will was not signed by the testator, it was deemed nuncupative and therefore prohibited by § 733.502(2), Fla. Stat.

Malleiro v. Mori, 40 Fla. L. Weekly D2226 (Fla. 3d DCA 2015)

Five years prior to her death, the Testator executed a Will in New York that complied with the requirements of New York law, including her signature at the end and attestations by three witnesses who subscribed in the presence of each other and the presence of the Testator. Several months later, the Testator executed a second Will in Argentina. The terms of the Argentine Will were orally pronounced by the Testator to a notary who transcribed them. It set forth that the Testator made her attestations before the notary in the presence of three witnesses who were identified by name, address, and national identity card number. The Will was read back to the Testator and the notary signed and stamped the Will. Importantly, the Testator and witnesses did not sign it.

The beneficiaries under the New York Will were different from the beneficiaries under the Argentine Will. The beneficiaries of the Argentine Will objected to the petition for administration of the New York Will and filed their own competing petition for administration of the Argentine Will. The probate court admitted the Argentine Will and held that it had revoked the New York Will.

The Third DCA reversed the probate court and held that although notarial Wills are admissible to probate under § 733.205, Fla. Stat., the Argentine Will is a prohibited nuncupative Will under § 732.502(2), Fla. Stat., because it was not signed by the testator. The appellate court pronounced that "[e]ven if the Testator was a nonresident of Florida at the time she executed the Argentine Will, the claim of the beneficiaries of the Argentine Will cannot prevail." As a result, the Argentine Will did not operate to revoke the New York Will.

At the end of its decision, the Third DCA called for the Legislature to clarify the Probate Code by defining important

terms, including "notarial," "nuncupative," "holographic," and "nonresident."

If no guardian is appointed at the conclusion of an incapacity proceeding, the circuit court loses jurisdiction and has no authority to reopen the case.

Adelman v. Elfenbein, 174 So. 3d 516 (Fla. 4th DCA 2015)

The Ward's grand-niece initiated a guardianship proceeding to determine the Ward's capacity. After the Ward was deemed to be totally incapacitated by the general magistrate, the magistrate found that the Ward's advanced directive and power of attorney documents provided a less restrictive alternative to guardianship. The trial court adopted and ratified the general magistrate's report and then dismissed the grand-niece's petition for appointment of a plenary guardian.

Several months after dismissal of the petition for appointment of a plenary guardian, the grand-niece filed a "petition to reopen the guardianship," in which she again sought the appointment of a plenary guardian and alleged that the Ward's attorney-in-fact and health care surrogate (the Ward's ex-spouse) was not providing "consistent adequate care." Over objections by both the Ward and the ex-spouse, the trial court heard the petition and ultimately appointed a professional plenary guardian for the Ward.

In finding that the trial court lacked jurisdiction to hear the petition to reopen the guardianship, the Fourth DCA reversed and instructed the trial court to vacate its order appointing the plenary guardian and to dismiss the case. The Fourth DCA held that under § 744.331(6)(b), Fla. Stat., if there is an alternative to guardianship, the court is prohibited from appointing a guardian, and specifically held that "[u]pon a finding of incapacity, the court is required to *either* appoint a guardian or find that there is an alternative to guardianship."

After the trial court issued its order ratifying the magistrate's report and dismissing the case, the parties had ten days to file a motion for rehearing. *See* Fla. Prob. R. 5.020(d). "Once the ten days for rehearing expired, the trial court lost jurisdiction to do anything other than enforce the orders previously entered." *See Hunt v. Forbes*, 65 So. 3d 133, 134 (Fla. 4th DCA 2011). Further, because no appeal was taken, the orders became final and absolute, and the court lost jurisdiction to alter, modify, or amend them. The Fourth DCA further held that there is no statutory authority to reopen an incapacity proceeding where no guardianship was ordered and that the "ongoing jurisdiction of the circuit court in an incapacity proceeding does not exist *unless a guardian is appointed*."

When property is titled in a decedent's name but another claims a colorable right to possess that property, the question of who should temporarily possess the property is a factual question that should be resolved by a preliminary evidentiary hearing, pending final resolution of the claim of entitlement.

Delbrouck v. Eberling, 2015 WL 5948724 (Fla. 4th DCA 2015)

The decedent's Will left all of his property equally to his three sons. One of the sons, Georges Delbrouck, occupied several parcels of real property that were titled in the decedent's name, including a residence and an automotive repair and sales business. Georges filed a statement of claim in the estate in which he alleged that he and the decedent had operated a business together and he continued to operate it after the decedent's death. When the personal representative denied the claim, Georges filed an independent action to impose a constructive trust over the property. That action remained pending at the time of the court's opinion.

The personal representative then moved the probate court to compel Georges to surrender the property because it was titled in the decedent's name. Relying on § 733.607(1), Fla. Stat., Georges then asked the court to authorize occupancy of the property by the beneficiaries. After two non-evidentiary hearings, the probate court directed Georges to immediately surrender possession of the property to the personal representative and enjoined him from transferring any of the decedent's personal or business assets.

The Fourth DCA reversed and concluded that the probate court erred in ousting Georges from the property without first hearing any evidence. The court held that although § 733.607(1), Fla. Stat., states that the personal representative's request for property is conclusive evidence of the personal representative's *need* for the property, it does not mean that a personal representative's right to possession of the property cannot be contested. Because the statute speaks of "conclusive evidence," it implies that an evidentiary hearing may be required when the right to possession of a decedent's property is genuinely disputed. The court concluded that when property is titled in a decedent, but another claims a right to possess it, the question of who should temporarily possess it is a factual question that should be resolved by a preliminary evidentiary hearing.

Personal representatives need only make reasonably diligent efforts to uncover the identities of creditors and not everyone who may conceivably have a claim is properly considered a creditor entitled to actual notice. It is reasonable to dispense with actual notice to those with mere conjectural claims.

Soriano v. Estate of Manes, 2015 WL 5965203 (Fla. 3d DCA 2015)

Ms. Soriano filed a statement of claim in the decedent's estate four months after the first publication of the notice to creditors. Prior to the decedent's death, he was charged with misdemeanor battery against Ms. Soriano but after his death, the State *nolle prossed* the criminal case. Contemporaneous with her statement of claim, Ms. Soriano filed a petition for an

order declaring her statement of claim timely filed, or in the alternative, for an extension of time to file her claim. Ms. Soriano asserted that she was a "reasonably ascertainable creditor" and therefore entitled to be personally served with the notice.

In response, the Personal Representative filed an affidavit in which she alleged that she had conducted a diligent search and inquiry to determine the identities of the decedent's creditors, had served all those creditors she identified, and had never heard of Ms. Soriano until she was informed by her own attorney that the claim had been filed. The Personal Representative further alleged that she searched the decedent's personal and business records, extensively reviewed documents in preparation to sell the decedent's business and home, and never discovered any documents regarding Ms. Soriano. Furthermore, the Personal Representative had spoken with the decedent once a week on average prior to his death and the decedent never mentioned Ms. Soriano. Ms. Soriano replied by filing affidavits by the prosecutor, the decedent's criminal attorney, and her own personal attorney. None of the affidavits, however, averred "that Ms. Soriano or her attorney placed *anyone* on notice that she was pursuing, or intended to pursue, a civil claim against [the decedent] or his estate." As a result, the trial court denied Ms. Soriano's petition, found that she was not an ascertainable creditor, and struck her claim as untimely.

The Third DCA affirmed the trial court and stated that although a personal representative has a duty to make a diligent search to determine the names and addresses of creditors of the decedent, § 733.2121(3)(a), Fla. Stat., clearly states that "impracticable and extended searches are not required." Further, the court held that "all the [personal representative] need do is make 'reasonably diligent efforts' to uncover the identities of creditors, and not everyone who may conceivably have a claim is property considered a creditor entitled to actual notice." As a mere conjectural creditor, Ms. Soriano was not required to be served with the notice to creditors.