IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 67,643

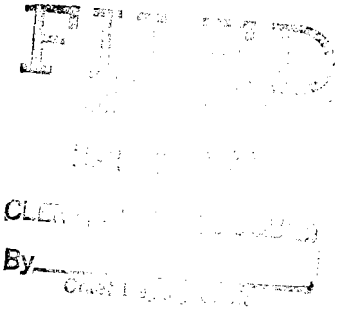
BARNETT BANK OF PALM BEACH COUNTY,

Petitioner,

vs.

THE ESTATE OF LEON HENRY READ, JR., Deceased.

Respondent.
_____/



RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

This case is before this Court on conflict certiorari. The Fourth District Court of Appeal, in accord with prior decisions of this Court and the express statutory language involved, reversed an order of the Circuit Court which allowed payment of a claim filed against an estate seven and one-half months after the three-month claim period had expired (R. 50-51).

STATEMENT OF THE FACTS

The only disagreement with appellant's statement of the facts is appellant's allegation that Richard Ralph was the lawyer, or was acting as the lawyer, for the estate at the time he went to Barnett Bank (hereinafter referred to as the bank) as personal representative to open the estate account.

The only fact which appellee feels needs to be added is that the bank's petition for payment and enforcement of its secured claim filed with the Circuit Court was apparently written in a manner to give the Circuit Court the impression the Bank had filed a timely claim and that the personal representative had not objected to the claim within the four-month period subsequent to the notice of first publication (R. 34-38).

SUMMARY OF ARGUMENT

Sections 733.701 and 733.702, Fla. Stats. (1983) provide that all claims against an estate must be filed with the Court within a stated time and that this filing requirement cannot be waived by the personal representative. Because a personal representative cannot waive the filing requirement, there is no necessity for the personal representative to raise a creditor's lack of timely filing as an affirmative defense. Filing a timely claim is a condition precedent to the validity of any claim.

Even though a personal representative recognizes an estate's obligation to a creditor prior to the expiration of the time for filing claims, §§733.701 and 733.702, Fla. Stats. provide that a personal representative is not estopped to assert the absolute bar when a creditor does not file a timely claim. Once barred, a claim is not revived by a subsequent acknowledgement of the debt by the personal representative.

Should this Court hold that a personal representative can be estopped to raise the bar of §§733.701 and 733.702, Fla. Stats., the bank is precluded from arguing estoppel on appeal because it did not raise the issue in the Probate Court. If the bank did raise the issue below, the personal representative's acknowledgement of the debt sub judice

does not give rise to estoppel as a matter of law.

Finally, if this Court were to reinstate the order of the Circuit Court, there is the issue as to the propriety of the award of attorneys fees to the bank. If a secured creditor as alleged, the bank could have foreclosed on its security interest and avoided the bulk of fees which it incurred.

ARGUMENT

POINT I

SECTION 733.702, FLA. STAT. PROVIDES THAT A PERSONAL REPRESENTATIVE CANNOT WAIVE ITS PROVISIONS; THEREFORE, A PERSONAL REPRESENTATIVE IS NOT REQUIRED TO FILE AN OBJECTION TO A CLAIM NOT FILED WITHIN THE THREE-MONTH CLAIM PERIOD.

Section 733.701 and 733.702, Fla. Stats. (1983), provide that if a claim against an estate is not filed with the Clerk of the Court by a creditor within three months from the date of first publication of the letters of administration, the claim is forever barred. This Court, in **Twomey v. Clausohm**, 234 So2d 338 (Fla. 1970), held that the personal representative cannot waive the provisions of this non-claim statute. This Court held that Fla. Laws 1961, ch. 61-394, which remains in §733.702, Fla. Stat.:

> preclude(s) the possibility of a waiver of the filing requirement arising out

> of action by a personal representative.
>
> * * *
>
> The conclusion which we reach in the matter at hand is not inconsistent with these earlier cases. We now simply deal with a more positive, clear-cut legislative insistence that all claims be filed in the Court and filing cannot be waived by the personal representative.
>
> * * *
>
> When, as here, a valid legislative mandate is clear, we do not have the judicial power to ignore it or otherwise hold it for naught merely because we personally think the problem should be handled in some other fashion.
> 234 So2d at p. 340-341.

Because the personal representative cannot waive the provisions of §733.702, Fla. Stat., there is no requirement to raise the statute as an affirmative defense to a late-filed claim with the Probate Court. The Court will have a record which will demonstrate the untimeliness of the creditor's claim, **In re Estate of Read,** 472 So2d 1271, 1273 (Fla. 4th DCA 1985). As was held in **U.S. v. Embry,** 199 So. 41 (Fla. 1940):

> As to all claimants but the United States, if filed after [3] months, it would be the duty of the probate judge to declare them void. 199 So. at p. 42.

This is to be distinguished from the situation, not applicable here, where the statute must be plead as an affirmative defense to a suit brought outside of probate unless the Court is made aware through the complaint, admission of a party, or motion to dismiss,

that the claim is untimely. **Grossman v. Selewacz,** 417 So2d 728 (Fla. 4th DCA 1982).

A waiver can be by an affirmative act or non-action. This Court held in **Twomey** that the personal representative could not waive the provisions of the statute. **Twomey** involved waiver by an affirmative act. **Twomey** must also apply to waiver by non-action or the legislature's insistence that all claims be filed and that filing cannot be waived would be meaningless because a personal representative could, by design, not file an objection and thereby avoid the non-claim bar.

Goggin v. Shanley, 81 So2d 728 (Fla. 1955), cited by the bank at page 9 of its brief, is not controlling because **Goggin** involved a statute which "did not preclude the possibility of a waiver of the filing requirement arising out of action by a personal representative", **Twomey, supra,** at 340. Additionally, the basis for the decision in **Goggin,** cited by the bank at page 10, is irrational. A creditor does not lose its right to compensation or right to bring an action on a claim because the personal representative does not object to the claim. A creditor loses its right if they do not file a timely claim. Complying with §§733.701 and 733.702, Fla. Stats. is a condition precedent to the validity of any claim.

It should be noted that at the time the late claim was filed in the Probate Court, there was no provision

in Florida Statutes (1984) or Florida Rules of Probate and Guardianship Procedure for a personal representative to object to a late claim. This fact supports the personal representative's belief that the Probate Judge had the duty to declare the claim void. Since that time, however, the legislature has enacted Fla. Laws 1984, ch. 84-25, section 2, effective May 15, 1984, which provides for filing objections to claims within four months from the first publication of notice of administration or thirty days from the filing of a claim, whichever occurs later. Whatever the implication of this statute, suffice it to say that it was not effective as to the personal representative sub judice.

POINT II

THE PERSONAL REPRESENTATIVE'S RECOGNITION OF THE DECEDENT'S DEBT IN THIS CASE DOES NOT ESTOP THE PERSONAL REPRESENTATIVE FROM ASSERTING THE BAR OF §733.702, FLA. STAT. WHERE THE STATUTE EXPRESSLY PROVIDES THAT ALL CLAIMS ARE BARRED IF NOT TIMELY FILED, EVEN WHEN THE PERSONAL REPRESENTATIVE RECOGNIZES THE CLAIM.

Sections 733.701 and 733.702, Fla. Stats. are statutes of non-claim. As such, the personal representative cannot be estopped to assert the absolute bar. In **Miller v. Nolte**, 453 So2d 397 (Fla. 1984), this Court held that an estoppel argument could not be asserted to prevent application of a statutory bar. **Miller v. Nolte** is applicable here, particularly since the statute

itself provides that all claims are barred unless timely filed, even if the personal representative has recognized the claim "by paying a part of it or interest on it or otherwise", §733.702(a), Fla. Stat. [emphasis added].

The personal representative's actions in the case sub judice amount to no more than the protected activity of the statute. The statute expressly provides that recognition by the personal representative of the debt does not excuse the filing requirement. Furthermore, where a claim has become barred, the claim cannot be revived by an acknowledgment of the debt by the personal representative, **Patterson v. Cobb**, 4 Fla. 481 (Fla. 1852).

Although several cases since **Twomey** have permitted estoppel arguments to overcome the absolute bar of §733.702, Fla. Stat., the rationale of these cases was disapproved of by **Twomey**. **Twomey** expressly held that as a result of the amendment to the statute by Fla. Laws 1961, ch. 61-394, there can be no exception to the bar as was permitted in **Ramseyer v. Datson,** 162 So. 904 (Fla. 1935). In **Ramseyer**, a claim was presented by the personal representative within the statutory time and the personal representative executed three promissory notes acknowledging the debt and paid interest thereon. Based on this, the creditor did not file his claim in the Probate Court until after the time for filing claims had expired. The personal representative made no objection and the

Probate Court ordered payment. When the personal representative later raised the bar as a defense, the Court held that the personal representative could not assert the bar.

By expressly disapproving **Ramseyer**, this Court has disapproved the basis of all the cases cited by the bank as supporting any estoppel theory against the personal representative.

As noted in Point I above, it is not the personal representative's action that has prejudiced the bank. It was the bank's own failure to file a timely claim that has caused their claim to become barred.

Whether this Court determines that §733.702, Fla. Stat. is a statute of non-claim or a non-waivable statute of limitations, the result in this case is the same. As the Fourth District Court of Appeal determined, the actions of the personal representative sub judice did not, as a matter of law, give rise to an estoppel because the legislature has provided that the personal representative is not estopped "even though the personal representative has recognized the claim or demand by paying a part of it or interest on it or otherwise", §733.702(a), Fla. Stat.

POINT III

THE BANK CANNOT RAISE THE ISSUE OF ESTOPPEL FOR THE FIRST TIME ON APPEAL; BUT, IF IT COULD, THE PERSONAL REPRESENTATIVE'S ACTION DID NOT GIVE RISE TO AN ESTOPPEL AS A MATTER OF LAW.

If there are grounds to avoid the non-claim statute and if the bank had those grounds, the procedure it should have followed would have been to plead in avoidance of the non-claim statute at the time their claim was sought to be filed. Having proceeded to imply that their claim was timely filed, the bank cannot convert either its void claim or its petition for payment and enforcement of claim into a motion for extension of time to file a claim. A party cannot assert matters for the first time on appeal which are waived if not raised below. **Dover v. Worrell**, 401 So2d 1322 (Fla. 1981); **Goodman v. Habif**, 424 So2d 171 (Fla. 3d DCA 1983).

If this Court determines that the bank did raise the issue of estoppel below, this Court can rule on the issue as a matter of law because the evidence the bank seeks to rely on for its estoppel argument is in the record at page 48. And, under the express wording of the statute, the personal representative's acknowledgement of the debt sub judice does not give rise to estoppel as a matter of law.

POINT IV

THE CIRCUIT COURT SHOULD NOT HAVE AWARDED ATTORNEYS FEES TO THE BANK.

A party should not be awarded attorneys fees where they have not been reasonably incurred. The bank's late claim asserted that they were a secured creditor (R. 31). If a secured creditor as alleged, the bank should have

foreclosed on its security interest.

If a secured party fails to file a timely claim against the estate within the prescribed period, it may look only to the secured assets for recovery, **In re Comstock's Estate**, 197 So. 121 (Fla. 1940).

Foreclosing would have been the reasonable way to proceed and would have avoided any issue as to the bank's failure to timely file a claim since secured assets do not become part of a decedent's estate, **Grossman v. Selewacz, supra.**

CONCLUSION

For the foregoing reasons, the express legislative directive has been heeded and the District Court of Appeal's reversal of the Circuit Court's order granting payment of the Bank's late claim should be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on the Merits was mailed to JOHN R. BERANEK, ESQ., Klein & Beranek, P.A., Suite 503-Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida 33401 and to CROMWELL & REMSEN and FREEMAN W. BARNER, JR., P.A., Attorneys for Petitioner, Barnett Bank Building, 2001 Broadway - 6th Floor, Riviera Beach, Florida 33404, this 14th day of March, 1986.