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27 pgs

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IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 76,526

JANET W. SPOHR,

Petitioner,

vs.

ANNA M. SPOHR, WILLIAM E.
SPOHR JR., JOAN A. GARDNER
and JOHN C. BERRYMAN as
Personal Representative of
the Estate of William E.
Spohr.

Respondents.

Petitioner's Brief on the Merits

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Preface

Petitioner JANET W. SPOHR was Intervenor and Defendant in the Trial Court and Appellee in the District Court of Appeal. She will be referred to alternatively as Petitioner and "Surviving Spouse." Respondents ANNA M. SPOHR, WILLIAM E. SPOHR, JR. and JOAN A. GARDNER were the Plaintiff's in the Trial Court and the Appellants in the District Court of Appeal. They will be referred to herein as "claimants" and "former wife and children." Respondent JOHN C. BERRYMAN, Personal Representative of the Estate of William E. Spohr, was a Defendant in the Trial Court and an Appellee in the District Court of Appeal. He will be referred to herein as "Personal Representative." William E. Spohr, the Decedent whose estate is the subject of the litigation, will be referred to as "Decedent."

The symbol "(R. ___)" refers to the Record on Appeal. The Appendix is referred to as "(App. ___)."

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Issues Presented For Review

- I. WHETHER A CLAIM BASED UPON A DECEDENT'S ALLEGED BREACH OF AN AGREEMENT TO MAKE A WILL WAS REQUIRED TO BE FILED WITHIN THE TIME AND MANNER PRESCRIBED BY FLORIDA STATUTES, SECTION 733.701(1) (1987) AND OTHER PROVISIONS OF THE FLORIDA PROBATE CODE.
- II. WHETHER THE FOURTH DISTRICT ERRED IN REVERSING THE TRIAL COURT BY ADJUDICATING UPON APPEAL AN ISSUE THAT PREVIOUSLY WAS NOT RAISED BY THE FORMER WIFE AND CHILDREN IN THAT COURT.
- III. WHETHER FILING AN INDEPENDENT ACTION AGAINST THE PERSONAL REPRESENTATIVE OF AN ESTATE IN THE CIVIL DIVISION OF THE CIRCUIT COURT, WITHOUT PREVIOUSLY HAVING FILED A "STATEMENT OF CLAIM" IN DECEDENT'S PROBATE ADMINISTRATION, AND WITHOUT SERVING THE SUIT UPON THE PERSONAL REPRESENTATIVE OR JOINING AND SERVING AS DEFENDANTS THOSE INTERESTED IN THE ESTATE WITHIN THE THREE MONTH NON-CLAIM PERIOD, IS SUFFICIENT TO SATISFY THE CLAIM-FILING REQUIREMENTS OF THE NON-CLAIM STATUTES OF THE FLORIDA PROBATE CODE.

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STATEMENT OF CASE AND FACTS

In June 1953 Decedent William E. Spohr executed with his former wife and Respondent herein, Anna M. Spohr, an Agreement, (R. 52, App. A), in contemplation of a pending separation. The Agreement provided for disposition of various marital and property rights. In the Agreement was a provision, (R. 55), that Decedent would provide for the future welfare and maintenance of his wife and children by preparing a will in which he would devise to his wife and children a portion of his estate amounting to not less than one-half of the valuation of his entire estate. The Agreement also contained provisions for alimony, child support, a division of property and other provisions.¹

Decedent and Anna Spohr were divorced in Palm Beach County in 1954. (R. 56). Decedent married Petitioner Janet W. Spohr in 1955. (R. 126). They were continuously married until William Spohr's death thirty-one years later, in September 1986. (R. Id.). A Petition for Administration of Decedent's estate was filed December 3, 1986. (R. 341). Decedent's testamentary instruments admitted to Probate on December 5, 1986 did not bequeath to his former wife and two children any portion of the estate. Instead, William Spohr bequeathed his entire estate to Janet W. Spohr, his surviving spouse. (R. 199).

¹ Paragraph Sixth of the Agreement, which is at issue in these proceedings, provided that all provisions for the benefit of the wife and children would be void if the wife did not survive the husband. (R. 55, 56). This did not occur, of course.

In Decedent's estate administration proceedings, (R. 238 et. seq.), the first publication of Notice of Administration, (R. 265, App. B), was on January 9, 1987, (R. 269), thereby requiring there to be filed no later than April 9, 1987 a "Statement of Claim" for any claims or demands against Decedent's estate that were according to law mandated to be so filed. The Notice of Administration was timely served, (see, App. C), on the former wife and children, the three claimants herein, shortly after administration commenced. Each of them in writing acknowledged receipt of the notice. A letter from the Personal Representative's counsel also was mailed to each of them explaining expiration of the non-claim period and the consequences of failure to file a claim within the prescribed time period in the Probate Division of the Circuit Court. (See, attachments to Proof of Service of Notice of Administration, R. 282-290, App. C).

Thereafter, the former wife and children's attorney filed an ENTRY OF APPEARANCE, (R. 295, App. D), on each of their behalf in the Decedent's Probate Administration proceedings. The Notice was filed approximately one month prior to the expiration of the non-claim period. Furthermore, the claimants' attorney filed a STATEMENT OF CLAIM, (R. 300), in Decedent's Probate Administration on behalf of Respondent Anna Spohr, which was filed within the non-claim period. Although this claim was based on Decedent's 1953 divorce agreement, it was on a purported obligation under that agreement that was not the subject of these proceedings in the civil division of the Trial Court. (R. 203).

In spite of the claimants receipt of the various documents notifying them of the claim-filing requirements and the "appearance" of their counsel in the probate administration proceedings, no "Statement of Claim" was filed in the probate administration proceedings for the alleged obligation of Decedent pertaining to his apparent failure to execute a will to make his former wife and children beneficiaries of one-half of his estate. Instead, the former wife and children filed a lawsuit, (R. 47, App. E), seeking to enforce this obligation in the Civil Division of the Circuit Court of Palm Beach County on April 7, 1987, two days before the expiration of the claim-filing period. The litigation was filed only against the Personal Representative of William Spohr's estate.

On April 9, 1989, the last day of the claim-filing period, a summons was issued for service on the Personal Representative. (R. 73). The record does not reflect any service of the Complaint upon the Personal Representative. An "answer" of the Personal Representative was filed April 27, 1986. (R. 75, App. F). As the Summary Final Judgment for Defendants reflects, in that answer the personal representative raised as a bar to the action the Plaintiff's failure to file a "Statement of Claim" in the Probate proceedings within the time provided in the Florida Probate Code, and otherwise raised the statute of limitations as a defense. (R. 76-77, App. F).

Pursuant to court order of June 7, 1988, (R. 12), Janet Spohr intervened as a Defendant in the Trial Court proceedings and filed

pleadings and actively participated in the litigation. Janet Spohr, as the Personal Representative had done, plead various affirmative defenses to the Complaint of the former wife and children, including those based upon their claims being barred by the applicable statutes of limitation, including the non-claim statute found in Part VI of the Florida Probate Code. (R. 19, App. G).

On January 25, 1989 Janet Spohr filed a Motion for Summary Judgment on alternative grounds. (R. 117). On May 11, 1989 the Trial Court entered a Summary Final Judgment for Defendants, (R. 198, App. H), which provided, after a detailed analysis of the facts and applicable law, that summary judgment was entered in favor of Defendants Janet Spohr and the Personal Representative and that the Complaint was dismissed with prejudice. After claimants' motion for rehearing was denied, (R. 221), an appeal to the Fourth District Court of Appeal ensued. (R. 227-228).

The Fourth District, in an opinion of July 18, 1990, (App. I), Spohr vs. Berryman, 546 So.2d 241 (4th DCA Fla. 1990), reversed the Trial Court's entry of summary judgment and remanded the case to that Court. On August 16, 1991 Petitioner Spohr filed a notice to invoke the discretionary jurisdiction of this court based upon conflict jurisdiction. On January 18, 1991 this Court accepted jurisdiction. (App. J).

Summary of Argument

A claim based on an agreement to make a will must be filed within the time and manner provided in Florida Statutes, section 733.702(1987). Such a claim is based upon a contractual agreement with the decedent during his lifetime and must be filed even though it may be considered contingent or immature in nature. As far as the filing requirements of such claims are concerned, there is no material difference between section 733.702 and its predecessor, section 733.16, pursuant to which were decided cases that were based upon similar claims as in the instant case. The decision of the Fourth District overrules established principals of law and creates an unsound precedent that may seriously and adversely affect the administration of estates and the rights of various persons "interested" in these estates.

A party to an appeal waives issues not raised on appeal. A court should not entertain such issues. The District Court adjudicated the appeal on an issue never raised by the wife and children and which was not briefed or the subject of oral argument.

The Florida Probate Code has strict limitations on the presentation of claims. The code requires a statement of claim to be filed in decedent's estate administration. Filing a lawsuit in the circuit court, even during the non-claim period, is not sufficient to satisfy the claim filing requirements. The public policy of the non-claim statute is to expedite and facilitate settlement of estates. Affirming the decision of the trial court will be consistent with those public policy requirements.

ARGUMENT

I. THE FOURTH DISTRICT ERRED IN HOLDING THAT A CLAIM BASED UPON DECEDENT'S ALLEGED BREACH OF AN AGREEMENT TO MAKE A WILL WAS NOT REQUIRED TO BE FILED WITHIN THE TIME AND MANNER PRESCRIBED BY FLORIDA STATUTES, SECTION 733.702(1)(1987) AND OTHER PROVISIONS OF THE FLORIDA PROBATE CODE.

Florida Statutes, section 733.702 (1987), entitled Limitations on presentation of claims, provides, in part:

(1) No claim or demand against the decedent's estate that arose before the death of the decedent, including claims of the state and any of its subdivisions, whether due or not, direct or contingent, or liquidated or unliquidated; no claim for funeral or burial expenses; no claim for personal property in the possession of the personal representative; and no claim for damages, including, but not limited to, an action founded on fraud or another wrongful act or omission of decedent, is binding on the estate, on the personal representative, or on any beneficiary unless presented:

(a) Within 3 months from the time of the first publication of the notice of administration, even though the personal representative has recognized the claim or demand by paying a part of it or interest on it or otherwise

(2) No cause of action heretofore or hereafter accruing, including, but not limited to, an action founded upon fraud or other wrongful act or omission, shall survive the death of the person against whom the claim may be made, whether an action is pending at the death of the person or not, unless the claim is filed in the manner provided in this part and within the time limited. (e.g.).

The Probate Code further defines "claims" in section 731.201(4)(1987):

"Claims" means liabilities of the decedent, whether arising in contract, tort, or otherwise, and funeral expenses. The term does not include expenses of administration or estate, inheritance, succession, or other death taxes.

The Fourth District held that the claim of the former wife and children did not come within the provisions of Florida Statutes, section 733.702 and reversed the Trial Court's summary judgment in Petitioner's favor. In so doing that Court interpreted the 1976

probate code version of section 733.702 to be limited to claims arising only prior to a decedent's death. The claim in this case, so the court reasoned, necessarily arose only after decedent's death. Therefore, the Court opined that cases decided under former probate code, section 733.16, which was the predecessor to section 733.702 and was revised in 1976, and which would have dictated a different result, were inapplicable in the instant case. Petitioner submits the Court was in error.

Florida Statutes, section 733.16 (1973), entitled "Form and manner of presenting claims; limitation," is strikingly similar to the current version of the section:

(1) No claim or demand, whether due or not, direct or contingent, liquidated or unliquidated, or claim for personal property in the possession of the personal representative or for damages, including but not limited to actions founded upon fraud or other wrongful act or commission of the decedent, shall be valid or binding upon an estate, or upon the personal representative thereof, or upon any heir, legatee or devisee of the decedent unless the same shall be in writing Any such claim or demand not so filed within six months from the time of the first publication the notice to creditors shall be void even though the Personal Representative has recognized such claim or demand by paying a portion thereof or interest thereon or otherwise; and no cause of action, at law or in equity, heretofore or hereafter accruing, including but not limited to actions founded upon fraud or other wrongful act or omission, shall survive the death of the person against whom such claim may be made, whether suit be pending at the time of the death of such person or not, unless such claim be filed in the manner and within the said six months as aforesaid; (e.s.);

...

This statute has been examined in a number of cases with issues similiar to the instant case.

In Hofer vs. Caldwell, 53 So.2d 872 (Fla. 1951), this Court previously determined that actions to enforce an agreement to execute a reciprocal will are within the definition of those claims

that must be filed within the time provided in section 733.16, or the suit will be barred. Id., at 873. In Hofer this Court found that such a cause of action, Id.:

... was clearly within the intendment of the Legislature in enacting that portion of the statute ..., in accordance with its general policy of providing for the speedy settlement of estates.

Bonner vs. Atlantic National Bank of Jacksonville, 18 Fla.Supp. 150 (Cir. Ct. Duval County 1961), expresses a similar result for the same reason. In the case the Court notes as significant that such a claim has its foundation in a contract with the decedent. Id., at 153.

Similar to the Hofer and Bonner cases is Van Sciver vs. Miami Beach First National Bank, 88 So.2d 912 (Fla. 1956). In that case the issue was whether the claim of the former wife against her deceased ex-husband's estate, which arose out of a separation agreement and trust agreement executed prior to their divorce, was required to be filed in the manner and the time provided in section 733.16. No probate claim was filed for the monies due under the agreement until after expiration of the period prescribed in section 733.16. The Court in Van Sciver found that the obligation was a contractual one arising out of a promise decedent made during his lifetime with the intention of binding his executor after his death. Id., at 914. The Court affirmed dismissal of Plaintiff's complaint since a claim was not filed in the probate court within the time specified by the statute. Id., at 915.

The Trial Court relied on Hofer and Bonner in dismissing the Complaint and holding that a claim such as in the instant case was

required to be filed within the period of limitations contained in section 733.702(1)(1987). (App. H, p.3). In its opinion the District Court, as indicated previously, determined this to be error because these were two older cases decided under the prior probate code section 733.16. Nevertheless, the District Court did agree that this statute, as it existed at the time of the Hofer and Bonner decisions, would have been applicable and operate to bar the claims of the former wife and children in the Trial Court.

As is revealed by a comparison of section 733.16 with section 733.702, the claims within the parameters of both statutes, and which must be filed, are exceeding broad. Claims encompassed within both versions are those whether due or not; direct or contingent; liquidated or unliquidated; claims for damages including those founded upon fraud or other wrongful act or omission of a decedent; as well as various other claims. As is evident, claims within section 733.702 (1987) are not merely those claims that arise before a decedent's death, as the District Court suggests, but there are numerous other categories of claims as well. As a separate and distinct category from claims arising before the death of a decedent, section 733.702 requires there to be filed any claim for damages. (e.s.). The damages claims required to be filed are not determined by the time when they arose, and these claims are dissociated in the statute by a semi-colon from the category of claims arising prior to death. A claim such as in the instant case could be categorized as a damages claim and one that is contingent, as well. The claim here also certainly is an obligation of the decedent that had its basis in

a contractual agreement prior to decedent's death.

Petitioner's position is further supported by the case of In Re: Estate of Vickery, 564 So.2d 555 (4th DCA 1990), a decision of the Fourth District filed only one week before the filing of the Fourth District's opinion in this case. Vickery, supra, involved various claimants who filed a complaint in the Civil Division of the Circuit Court seeking damages from Decedent's estate for her alleged breach of an agreement to make a mutual will with her previously deceased husband. The claimants also filed identical claims in the probate court alleging this breach of contract, but none of the claims were filed within the period of limitations contained in Florida Statutes, section 733.702 (1987). The Probate Court found that the timely filing of a statement of claim was a prerequisite to the maintenance of the claims and struck the untimely filed claims. The probate court cited as authority for its decision the cases of Hofer vs. Caldwell, supra, and Landers vs. Sherwin, 261 So.2d 542 (4th DCA 1972), both cases being decided under the prior version of the probate code.

The Appellate Court in Vickery affirmed the striking of the probate claims as well as the Trial Court's dismissal of the breach of contract complaint. That Court characterized these claims as arising in 1973 when the husband's mutual will was admitted to probate, and determined these claims to be "contingent" upon the wife executing a mutual will. As the Court further observed:

As contingent claims arising before the 1987 death of Rose Vickery, each appellant had three months from the date of the first publication of the notice of administration to present a claim. {733.702(1), Fla.Stat. (1987); See, Gates Learjet Corp. vs. Moyer, 459 So.2d 1082, 1084 (Fla. 4th DCA 1984), cert. denied sub. nom., Bass Aviation, Inc. vs. Hernandez, 471

U.S. 1136, 105 S. Ct. 2676, 86 L.Ed. 2d 695 (1985). No appellant presented a claim before the claims period expiration date. Id. at 557-58.

The Fourth District in Vickery, as is apparent, did not distinguish between section 733.16 and section 733.702 in reaching its decision - yet the issues presented are not materially different from the instant case. That Court in Vickery also did not suggest that either Hofer, or the later case of Landers, supra, were inapplicable to Vickery, even though both of these cases were decided under the prior probate code section 733.16.

In Landers, a final decree of divorce incorporated a custody and property settlement agreement wherein the former husband agreed that by his Last Will and Testament he would devise one-third of his net estate to his daughter, should she survive him. His will did not provide for her in accordance with the terms of the agreement. In fact, it expressly provided that she would not share in his estate. Instead of filing a claim in the estate, the daughter brought an action against the executors of her father's estate. The personal representative affirmatively plead in bar the Plaintiff's failure to comply with Florida Statutes, section 733.16. The District Court observed that the father clearly breached his agreement and the daughter as a third party beneficiary had a cause of action for her damages. Not having filed a claim against the estate within the time provided, however, the Court held that the daughter's claim was barred by Florida Statutes, section 733.16.

Petitioner does not perceive that Vickery or Landers are dissimilar from the instant case or that the requirements of

section 733.16 are any different from the requirements of section 733.702 as they relate to the issues in this case. Perhaps a point of the District Court's divergence, although erroneous, is the Court's interruption of the definition of "claim" within the intendment of section 733.702. The District Court appears to interpret "claim" as an obligation of decedent that could have been enforced against the decedent while living and could have been reduced to judgment against him while alive. This has been judicially determined otherwise, however. Gates Learjet Corp., supra at 1084. Gates Learjet involved a contingent claim that, although it could not have been sued on during decedent's lifetime, was required to be filed within the time limitations of section 733.702. Van Sciver, supra was similiar. The Van Sciver court placed in the category of "contingent claims" those claims such as in the instant case. The statute in that regard is unchanged today from former section 733.16. Vickery also determined that such a claim was a contingent claim as the quoted portion of the decision states.

There have been no changes in the probate code from former section 733.16 which could be the basis for changing the result that would be dictated by the Hofer, Bonner, Landers and Van Sciver cases. Vickery, decided under section 733.702, is further authority for this conclusion. Section 733.702 is an all-inclusive claims statute. The legislative intent has been for the statute to be broadly applied to bring claims within it's confines. Gates Learjet Corp., supra at 1084. The statute applies to claims that arise even after a decedent's death, Id., at 1983-84, and to claims

that are not even known by a creditor at the time of death -notwithstanding harsh results that might arise. Id. It clearly applies to the claim in the instant case. It even has been recognized that the words in section 733.702 that were added in 1976 and expressly bar all claims that arise before the death of a decedent, were not intended to limit the kinds of claims that were required to be filed, but to bring within it's confines even more claims. See, Velsey vs. The Estate of Miller, 502 So.2d 1297, 1300 (2nd DCA Fla. 1987).

In addition to overruling established principals of law, the decision of the Fourth District in this case establishes an unsound precedent. If claims based upon agreements to make a will were not required to be filed within the three month period of limitations in section 733.702 then these claims, that could change distribution of an entire estate, could be filed in civil proceedings against a personal representative up until foreclosed by a statute of limitations that would apply later in time.² Beneficiaries of an estate might not be able to be determined, even after a will was admitted to probate, until the closing of the estate or perhaps even later. No partial distribution, (see, Fla.Stat.{733.802 (1989), safely could be made.

² Florida Statutes, section 733.710 (1989) provides for a limitation period of two years. Even a closed estate might be re-opened under section 733.903 (1989) if further administration of the estate was necessary for "any reason." An agreement to make a will may not be the "will" exception that might prevent re-opening the estate. See, Fla.Stat., {731.201 (35) (1989) (definition of "will").

There may be a cloud on title to estate real property being conveyed prior to expiration of the applicable period of limitations, since title to real property vests in the heirs in an intestate estate, Fla.Stat.{732.101 (1989), and the devisees in a testate estate. See, Fla.Stat. {733.514 (1989), Grobart vs. Grobart, 382, So.2d 117, 118 (3rd DCA Fla. 1980). For a partial distribution or a conveyance of real estate property would every estate require a determination of beneficiaries, see, Fla.Stat. {733.105 (1989), and an appointment of an attorney ad litem or guardian ad litem to represent unknown persons who are "interested" in the estate but whose claims to the estate under agreements to make a will are not barred by section 733.702? Such results as these never could have been intended by the legislature in drafting section 733.702, yet this is the very result which the decision of the Fourth District may dictate. The decision must be reversed.

II. THE FOURTH DISTRICT ERRED IN REVERSING THE TRIAL COURT BY ADJUDICATING UPON APPEAL AN ISSUE THAT PREVIOUSLY WAS WAIVED BY THE FORMER WIFE AND CHILDREN IN THAT COURT.

The decision of the District Court also should be reversed because error was committed in reversing the Trial Court's entry of summary judgment on an issue that was never raised, briefed or argued in that Court. The Opinion of the District Court characterized the issue on appeal as, (App. I):

... whether the timely filing of a complaint in a civil proceeding satisfies the probate statutory requirement that claimants must file their claims in the decedent's probate proceedings within a prescribed time frame and manner. }733.702 Fla.Stat. (1987).

This issue on appeal was neither adjudicated nor discussed in the Opinion. The Court proceeded to adjudicate the appeal on an entirely separate issue - whether section 733.702 applied to the claim in the instant case at all. The court further observed in the Opinion that it wrote to address the issue even though it was not argued by the parties on appeal.³ Id. p.2.

In not raising on appeal the Trial Court's adjudication that section 733.702 was applicable to the claims in the Trial Court Claimants, Appellants in the District Court and Plaintiff's in the Trial Court, waived any error relating to this issue. Atrio Consolidated Industries, Inc. vs. Southeast Bank, 434 So.2d 349 (3rd DCA Fla. 1983). See, Sag Harbour Marina, Inc. vs. Fickett, 484 So.2d 1250, 1256 (1st DCA Fla. 1986). Even though this issue was raised by Claimants in the Trial Court, it is not cognizable on appeal if it is not included in their appellate brief. McDonald vs. Pickins, 544, So.2d 261, 264 (1st DCA Fla. 1989). Moreover, and importantly, as the Fifth District Court noted in Norris vs. Edwin W. Peck, Inc., 381 So.2d 353, 354-55 (5th DCA Fla. 1980):

...this Court should not address portions of orders which have not been raised on appeal and about which the parties are not complaining.

Since the former wife and children, as Appellants in the District Court, waived the issue upon which the District Court

³ In the decision the District Court suggested that the matter upon which the appeal was decided was not argued because the Trial Court found that the statute barred the claim. (App. I, p.2). Petitioner fails to understand why the ruling of the Trial Court on the issue could not have been made an issue in the appeal by the Appellant-it was in the Trial Court. If it had been, it would have been briefed and argued by both of the parties.

decided the appeal, the District Court was in error in adjudicating the appeal on that issue. This is consistent with decisions that hold that a court should not address portions of orders which have not been raised on appeal, although there may be involved the application of a statute that may change the result of the litigation. See, Norris vs. Edwin W. Peck, Inc., 381 So.2d 353, 354-55, U.S. vs. Harris and Company, Adv., Inc., 149 So.2d 384, 385 (3rd DCA Fla. 1963).

III. THE FILING OF AN INDEPENDENT ACTION AGAINST THE PERSONAL REPRESENTATIVE OF AN ESTATE IN THE CIVIL DIVISION OF THE CIRCUIT COURT, WITHOUT PREVIOUSLY HAVING FILED A "STATEMENT OF CLAIM" IN DECEDENT'S PROBATE ADMINISTRATION, AND WITHOUT SERVING THE SUIT UPON THE PERSONAL REPRESENTATIVE OR JOINING AND SERVING AS DEFENDANTS THOSE INTERESTED IN THE ESTATE WITHIN THE THREE MONTH NON-CLAIM PERIOD, IS NOT SUFFICIENT TO SATISFY THE CLAIM-FILING REQUIREMENTS OF THE NON-CLAIM STATUTES OF THE FLORIDA PROBATE CODE.

The issue that was appealed and presented to the Fourth District Court for adjudication was the Trial Court's determination that the filing of the Complaint in the Circuit Court did not satisfy the claim-filing requirements of the Florida Probate Code. The summary judgment of the Trial Court should be affirmed on this basis.

Petitioner's research has disclosed no case, in the factual circumstances of the instant proceedings, where a Florida Court has held that the mere filing of suit in the Civil Division of the Circuit Court within the time for filing claims in an estate, without more extenuating and material circumstances, constitutes the "presentation" and filing of a claim which satisfies the requirements of the Florida Probate Code sections 733.702 and

requirements of the Florida Probate Code sections 733.702 and 733.703. In 1945 the Florida legislature amended the probate code to permit the filing of a law suit against the decedent's personal representative to act as a substitute for filing a claim in the appropriate probate court. Crosson vs. Conlee, 745 F2 D.896, 901, n.5 (4th Cir. 1984). This statutory procedure was changed in 1976 by the new probate code which is under consideration in this appeal. Importantly, the non-claim statute in effect from 1945 to 1976 required both the filing of a lawsuit and obtaining service of that law suit on the personal representative to be accomplished within the non-claim period. See, e.g. Fla. Stat. 733.16 (1)(a)(1967). Filing such a suit in lieu of a "statement of claim," however, operated to preclude the Plaintiff in such suit from recovering any suit costs or attorney's fees. Furthermore, a suggestion of the pendency of the suit was required to be filed in the probate administration and to be noted on the "claim docket." Id.

This statutory exception is no longer a part of the Florida Probate Code. It should therefore be assumed that the legislature intended that the exception was no longer to apply. Crosson, supra, at 901, n.5. This Court also has determined, under the pre-1945 non-claim statute, which is similar to the current statute in many respects, that the mere filing of an action against the personal representative is not sufficient compliance with the filing or "presentment" requirement of the non-claim statute. See, Douglas vs. McRainey, 102 Fla. 1141, 137 So. 157 (1931), Jones vs. Allen, 134 Fla. 751, 755 184 So. 651 (1938).

The closest authority that can be found relating to the sufficiency of filing a lawsuit versus filing a claim in the estate, is Steigman vs. Danese, 502 So.2d 463 (1st DCA Fla. 1987). That case is patently inapplicable to the present case and its rationale seriously must be questioned. The Steigman court found support for it's decision only based upon the inferences and implications of two prior court decisions - not based upon any direct authority. See, Steigman, at 469.

In Steigman, supra, the First District observed that two conditions were required to be satisfied for a Complaint to be timely filed for the purpose of the time constraints of section 733.702. Filing suit within the three-month statutory non-claim period was the first of these. The second was effectuating service of process upon all parties interested in the estate within the same statutory period. Id. at 470. In the instant case those conditions have not been satisfied because there was no service upon the personal representative within the three-month statutory period. Also, in connection with the Steigman requirement of effectuating service of process on all persons interested in the estate within the three-month statutory period, it necessarily is presupposed that all persons interested in the estate must be named as parties. In this case Petitioner Janet Spohr, the surviving spouse who was sole beneficiary of the estate, was not made a party to these proceedings at all so, obviously, she was not served with process during the three-month statutory period. Janet Spohr was a person "interested" in this estate and upon whom service should have been timely effectuated as indicated by Steigman. See,

Fla.Stat. {731.201(21)(1987)}. In fact, as a beneficiary of the estate Janet Spohr had the right to file an objection to any claim filed in the estate even if the personal representative chose not to. See, Fla.Stat. {733.705(2)(1987)}.

In further support of the decision of the Trial Court, other court decisions have interpreted the non-claim statute to require that the "statement of claim" be filed in decedent's estate proceedings. See, Velzy vs. Miller, 502 So.2d 1297 (2nd DCA Fla. 1987). Moreover it has been observed that the filing of a "statement of claim" against an estate is not a court appearance or the filing of "pleadings" or a matter that even necessitates the services of an attorney. Summitt Pool Supplies, Inc. vs. Price, 461 So.2d 272, 274 (5th DCA Fla. 1985). The filing of a statement of claim judicially has been observed to be no more than merely presenting a bill to the personal representative in the manner required by statute. Id.

In this further connection, the requirement of filing a claim in decedent's probate administration is consistent with the requirements of the Florida Probate Code. This is the only practical means by which a person "interested" in the estate could review estate proceedings and determine whether he will file an objection to a claim. See, Fla.Stat. {733.705 (2) (1987)}. If a complaint were filed in the Civil Division of the Circuit Court, it may or may not be filed in the same circuit as the estate administration proceedings. Service of process might not be promptly effectuated. If not, the time within which the personal representative or interested persons could file an objection to the

claim, Fla.Stat. {733.705 (2) (1987)}, may expire before there is even notice of the "claim." In such circumstances the rights of the personal representative and interested parties might be prejudiced. Also, the "clerk" of the court would be put in the position of being required to serve a lawsuit on the personal representative, see, Fla.Stat. {733.703 (1987)}⁵, instead of serving on the personal representative the "statement of claim." As a further consideration, the Florida Probate Code makes a distinction between an "independent action" and the "claim" upon which that action is based. See, Fla.Stat. {733.705 (3) (1987)}. In short, the creditors' claims provisions of the probate code simply do not contemplate the filing a lawsuit is a substitute for filing a statement of claim in the decedent's probate administration.⁶ Proceeding immediately to litigation is not intended by the code and cannot be argued to satisfy the claim filing requirements.

5 See, also, Fla.Stat. {733.705(1)(1987)} that precludes attorney's fees or costs to a person who brings an action against the personal representative, within four months from the first publication of notice of administration, on any claim to which the personal representative has filed no objection.

6 As a further illustration that the creditors' claims statutes are not satisfied in circumstances where a claim is "presented" by filing legal proceedings, Florida Statutes, section 733.703 (1987) requires the clerk to serve a copy of the claim on the personal representative in the manner provided for serving any formal notice under the Probate Code, and to note that fact on the original. There then commences a thirty day or longer time period for a personal representative or other interested person to file a written objection to the claim. Fla.Stat. {733.705(2)(1987)}. In contrast, a civil action complaint is served by the sheriff or process server and the summons accompanying the complaint requires defenses to the complaint be interposed within twenty days of service.

It should further be noted that this case involves no statement of claim being filed in decedent's probate administration, no motion for an extension of time to file the claim and no extenuating circumstances relating to conduct the personal representative or his counsel or others, which is alleged to have misled the former wife and children in not filing or erroneously filing a statement of claim. As the Trial Court noted in its opinion, the issue of waiver or estoppel was not raised by the claimants in their pleadings by means of a "reply" or otherwise. No reply was even filed. For this reason the Trial Court found that any such "avoidances" were deemed waived and cited as authority, Florida Rule of Civil Procedure 1.100 (a), 1.140 (b), Barnett Bank of Palm Beach County vs. Estate of Read, 493 So.2d 447 (Fla. 1986), and American Salvage and Jobbing Company, Inc. vs. Solomon, 295 So.2d 710 (3d DCA Fla. 1974). The Trial Court was eminently correct.

There is a strong public policy to expedite and facilitate settlement of estates. Brown vs. Gulf Fertilizer Co., 117 So.2d 478 480 (Fla. 1960). Filing a lawsuit in lieu of a statement of claim in a decedent's probate administration is diametrically opposed to furthering the stated public policy. Creditors are required to strictly comply with the various provisions of the non-claim statute or their claims will be barred. Baldwin vs. Lewis, 397 So.2d 985, 988 (3rd DCA Fla. 1981). Sometimes harsh results occur and claims are barred before their very existence is even perceived. See, Gates Learjet Corp., supra. Nevertheless, the Legislature intended a broad application of the non-claim statute.

Id., at 1084. Affirming the decision of the Trial Court will be consistent with that application and the statute's public policy requirements and preclude an unwieldy and unsound result.

Conclusion

The decision of the Fourth District should be quashed and the Final Judgment of the Circuit Court reinstated.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Peter Matwiczuk, Esquire, at 140 Royal Palm Way, Suite 206, Palm Beach, Florida 33480 and to Leonard J. Adler, Esquire at 777 South Flagler Drive, Suite 310 East Tower, West Palm Beach, Florida 33401 this 12th day of February, 1991.

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