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✓ MAR 23 1991  
CLERK, SUPREME COURT  
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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 Reply 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 to Petitioner's Initial Brief is referred to as "(I.B. App. \_\_\_)."

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## ARGUMENT

### I. APPLICATION OF SECTION 733.702 (1987).

In their brief claimant's take the position that the claim they assert only arose after Decedent's death and, therefore, was not governed by Florida Statutes, section 733.702 and the time limitations provided therein. All of the operative events giving rise to the cause of action, claimants suggest, occurred after death. If their Complaint is examined, however, it is readily apparent that the lawsuit was based not only on an agreement executed by Decedent during his lifetime, but the breach of that agreement during Decedent's lifetime was alleged as well. In this regard paragraph twelve (12) of the Complaint provides:

12. William E. Spohr failed to comply with the property settlement agreement incorporated into his final decree of divorce by failing to maintain, at all times, a last will and testament which gave or devised at least one-half of his entire estate to his then wife, Anna M, Spohr and his children, William E. Spohr and Joan A. Gardner and breached the contract embodied in the agreement.

The alleged breach of this agreement must have occurred, and could have been sued on, shortly after execution of the 1953 Divorce Agreement and thereafter.

Claimants, as the District Court, misinterpret "claim" as an obligation of Decedent that could have been enforced against him while living. This is incorrect, as held by the court in Gates Learjet Corporation vs. Moyer, 459 So.2d 1082, 1084:

.... since the non-claim section itself mentions the inclusion within it's scope of claims whether due or not, direct or contingent, or liquidated or unliquidated, and also claims for damages, including but not limited to actions founded on fraud or other wrongful act or omission of the Decedent. At section 731.201 (4), in the definitions portion of our probate law,

claims are defined as "liabilities of the Decedent, whether arising in contract, tort, or otherwise, and funeral expenses."...

The Respondent/Claimants further proceed to compare the provisions of section 733.702 (1987) with the language of the predecessor non-claim statute, section 733.16 (1973). They argue as significant that the prior statute contains in sub-section one (1) a provision that the statute applies to claims or causes of action which accrued "heretofore or hereafter," with death as the measuring time. The current statute contains the same language, in sub-section two (2), which claimants apparently overlooked.

Respondents further suggest as important the inclusion in section 733.702 of funeral and burial expenses as a category of claims which must be filed. Nevertheless, it is apparent to Petitioner that funeral and burial expenses are not obligations of a Decedent, but those of the decedent's estate or others who contracted for them after Decedent's death.

Respondents proceed to place undue emphasis on the Uniform Probate Code and in Re: The Estate of Kulow, 449 So.2d 280 (2nd DCA Fla. 1983). Florida did not adopt the Uniform Probate Code provisions on "limitations on presentation of claims." The Uniform Probate Code, section, 3-803, categorically separated claims that arose before death from those that arose at or after death. The Florida non-claim statute did not formally bifurcate such claims but provided a comprehensive statute of its own which essentially was the same as in the prior probate code except to the extent it brought within its confines even more claims that were required to be filed. See, Velsey vs. The Estate of Miller, 502 So.2d 1297,

1300 (2nd DCA Fla. 1987). Moreover, the legislative intent has been for the non-claim statute to be broadly applied to bring claims within its confines. See, Gates Learjet, supra at 1084.

The Uniform Probate Code, sub-section (a), by its terms only applies to claims arising before death. What claims are intended to be within its confines must be interpreted with reference to claims within the next subsection -claims that arise at or after death. The Florida non-claim statute is not so limited or interpreted. Also, sub-section (a) of the Uniform Probate Code does not provide, as does the Florida statute, that no cause of action "heretofore or hereafter" survives the death of the person against whom the claim may be made, unless the claim is filed in the manner and within the time limited in the creditor's claims provision of the Probate Code. (e.s.).

As far as Kulow, surpa, is concerned, it certainly did not hold that the only claims that were required to be filed pursuant to section 733.702 were those that arose before death. In construing the current statute the Kulow court simply found that the claim at issue in the case was not an obligation of the decedent and was not within the "claims" definition in the Probate Code. Moreover, the assets that were the subject of the claim were not even assets of the decedent. The claim involved the recovery by an insurance company of monies paid to the decedent's personal representative. The monies claimed were a refund of monies paid by the insurance company to a hospital which were paid well after decedent died. As the court said, the cause of action by the insurance company did not exist even in contingent form until after

decedent's death. Id., at 282. Thus, the case, and Respondent's analysis of it, simply are not relevant.

Respondents have not even attempted to distinguish numerous authorities analyzed in Petitioner's brief. Respondents also have not tried to refute in any way the various arguments Petitioner advanced concerning the District Court's Opinion establishing an unsound precedent and which could result in substantial and far-reaching problems in the administration of estates.

## II. WAIVER OF ISSUE ON APPEAL.

Respondent's claim the issue of whether Florida Statutes, section 733.702 (1987) was applicable in these proceedings was preserved in their record on appeal. While Petitioner concedes that this issue was argued to the Trial Court and determined adversely to Respondents as the final judgment in the Trial Court reflects, this really is insignificant to the issue in the proceeding before this court. The issue here is not whether somewhere in the over 400 page record of the Trial Court proceedings there is an issue that may be raised pertaining to the applicability of the referenced statute, but whether that issue was in fact raised in the District Court of Appeal.

In its opinion the District Court characterized Respondent's issue on appeal in that court as whether the filing of a complaint in a civil proceeding satisfied the statutory requirement that claimants must file their claims in Decedent's probate proceedings within a prescribed time and manner, and cited Florida Statutes, section 733.702 (1987). That is different from the issue of whether the statute applied to the claim in the first instance.



As the District Court noted in its opinion, whether the claim was one that came within the provisions of the non-claim statute was not argued on appeal. Respondents suggest that the issue was raised in its brief in the District Court on page twelve (12). Petitioner detects no such issue there.

**III. FAILING TO SATISFY THE CLAIM-FILING REQUIREMENTS OF THE PROBATE CODE.**

The Complaint filed by Respondents was the wrong thing in the wrong place at the wrong time. It was an "independent action" filed in the Circuit Court without any claim being filed in Decedent's Probate Administration or, obviously, any objection being filed to that claim. Florida Statutes, section 733.705(3) (1987) necessitates a claim being filed prior to an independent action on such claim. Respondents "Notice of Independent Action",<sup>1</sup> (R. 302), in the probate proceedings characterizes Respondent's litigation in the Trial Court was just what it was - an "independent action" that was filed pursuant to Florida Statutes, section 733.705(3)1987, but which was unauthorized, untimely, premature and a nullity which cannot legally be resurrected because its conditions precedent have not, and due to the passage of time cannot, be satisfied.

The members of this court and all of the attorneys in this case surely know that an obligation of a Decedent initially is

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1. Filed on May 14, 1987, (R. 302), and after expiration of the thirty (30) day maximum period provided by Florida Statutes section 733.705 (3) (1987).

sought to be enforced by filing a claim in his or her estate within a limited time period and not by initiating a law suit against the estate. Respondents knew the statutorily provided procedure and followed it in regard to filing another claim in Decedent's probate administration and were put on notice by the Personal Representative of the adverse consequences of failure to timely file claims there. (See, p. 2 of Petitioner's Brief on the Merits, R. 282-290 and I.B. App. C). No explanation or excuse has been offered for the failure to file in Decedent's Probate Administration a claim based on the alleged breach of the divorce agreement at issue in this case.

**A. Statutory Requirements.**

Respondents argue that filing this independent action is the equivalent of filing a claim within the meaning of Florida Statutes, section 733.703 (1987) and the definitional provisions of section 731.201 (1987). The introduction to Florida Statutes, section 731.201 provides that the definitions in that section may not be applicable to specific chapters or parts of the probate code and are not applicable when "the context otherwise requires." See, Fla. Stat. {731.201 (1987)}. Petitioner has referred to numerous circumstances in her initial brief, (p. 19 - 20), to demonstrate that in the context of the creditor's claims provision of the probate code the filing of an independent action cannot be intended to satisfy the statutory requirements and does not mesh with the statutory procedures.

In response to claimant's effort to distinguish certain of Petitioner's authority, this Court in Jones vs. Allen, 184 So. 651 (Fla. 1938) rejected the filing of a lawsuit against the Personal Representative as sufficient compliance with the non-claim requirement that it be filed in writing with the County Judge. The court noted that the purpose of the statute was "to expedite the disposition of estates," and failed to find an exception to the statute's requirement. Id., at 652.

The Probate Code certainly doesn't contemplate that filing a lawsuit in the Circuit Court is what was intended by the claim-filing statute, as claimants argue. This alternative was in the prior probate code but was not carried over. Extending Respondent's argument, the lawsuit could be filed in any Circuit Court anywhere in the state and satisfy the requirement of only having to be filed in the Circuit Court. Filing in any Circuit Court, and not in a decedent's estate administration, could prejudice the rights of an "interested person" who was attempting to determine the status of the estate, what claims are filed and what objections were filed. Florida courts have observed that a claim is required to be filed in a decedent's estate proceedings. See, Velsey vs. Miller, 502 So.2d 1297, 1299 (2d DCA Fla. 1987). Moreover, a lawsuit is not such a claim as the court observed in Summit Pools Supplies, Inc. vs. Price, 461 So.2d 272, 274 (5th DCA Fla. 1985):

... the filing of a statement of claim against an estate is not an appearance in court or the filing of a "pleading" therefore is not the practice of law. The filing of a statement of claim in an estate proceeding requires no action by the court. It is merely a procedural step in the administration of an estate whereby the personal

representative is advised, within the statutorily limited time, who the creditors are and what their claims amount to. Thus, the filing of a statement of claim is nothing more than presenting a bill to the personal representative in the manner required by the statute.

B. Filing Complaint equated with "presentment" of claim.

Respondents contend that filing a lawsuit within the non-claim time period, with nothing more, it is a sufficient alternative to the probate code's claim-filing requirement. This position is supported only by wishful thinking.

Respondents have cited to this court Koschmeder vs. Griffin, 386 So.2d 625 (4th DCA Fla. 1980) as authority that filing a civil action within the non-claim period is the equivalent of presenting a statement of claim against a decedent's estate. Respondents reliance upon Koschmeder is misplaced. In that case a legal proceeding was filed after expiration of the non-claim period and statements of claim in the estate were filed thereafter as well. Id., at 625 - 26. In Koschmeder this court held that it was encumbent upon Respondents to file a claim "in the estate" within three (3) months of notice to creditors. The court noted that there would be occasions when harsh results would occur. Nevertheless, to hold otherwise would defeat the public policy considerations which resulted in passage of the non-claim statute, which was to expedite and facilitate the settlement of estates in the interest of the public welfare and for the benefit of those interested in decedent's estates. Id., at 627.

Respondent's reliance on Koschmeder stems from a footnote in that proceeding. Id., at 627, N.1. That footnote, though,

addresses circumstances where neither a claim nor civil action are filed within a three (3) month period, but in a situation where there is insurance coverage. The civil action in that circumstance is not barred if insurance exists, understandably - this is a statutorily provided exception to the claim-filing requirements that is contained in sub-section three of section 733.702 (1987). In this connection Koschmeder further provides that the failure to file a claim of civil action within the three and one-half month period where insurance exists does not barr the civil action, but it does bar the right to enforce any personal liability of the decedent against the estate except to the extent of the insurance. Id. That is exactly what the Respondents are attempting to do in the instant case.

Steigman vs. Danese, 502 So.2d 463 (1st DCA Fla. 1987) also is relied upon by Respondents. That case could be read as permitting a complaint to be filed without a statement of claim, but not without significantly more material conditions that were not satisfied in this case. If you examine the decision, it is apparent that support for this reading of the case was based in part on a misinterpretation of Koschmeder, from which the Steigman court found an "inference" to arise that filing a civil action within the statutory period satisfies the filing requirements of section 733.703.

Similiarly, the Steigman court's reliance upon Notar vs. State Farm Mutual Automobile Insurance Company, 438 So.2d 531 (2nd DCA Fla. 1983) is misplaced and does not provide support for the

Steigman court reaching the conclusion considered here. In Notar, supra, no notice of administration was published and thus no three month period of limitation commenced to run under section 733.702 (1) (a). There also was no formal administration of the estate in Notar and there was a three-year non-claim period at issue. The creditor filed a petition for administration of decedent's estate in the Probate Court. The court found that the creditor could have done nothing more to preserve it's rights against the estate in the circumstances. Also, since no estate administration was commenced in that case there was no representative of decedent upon whom to serve the legal proceedings.

The Steigman court also relied on an "implication" in Coley vs. The Estate of Odem, 500 So.2d 188 (1st DCA Fla. 1986). The Steigman court, as the Respondents here, misinterpret Coley, supra. In that case the Trial Court dismissed probate claims of a creditor not filed within the three-month non-claim period and dismissed a wrongful death action the decedent's Personal Representative as well. As the court stated, Id., at 1989:

These actions were dismissed due to Appellants' failure to file claims against Odem's estate within the time prescribed by section 733.702, Florida Statutes, 1985.

Moreover, it is noteworthy that Coley did not concern the issue of whether filing a lawsuit satisfied the claim-filing requirements of section 733.702, but concerned whether actual notice instead of notice by publication was required to be given to creditors.

Regardless of the authority relied upon, the Steigman court still observed that two conditions were required to be satisfied for a complaint to be timely filed for the purposes of a time constraints of section 733.702. Filing a suit within the three-month statutory non-claim period was the first of these. The second was service of process "upon all parties interested in the estate within the three-month statutory period." Id., at 470. In Steigman the Defendants were the Decedent's Personal Representative and four other individuals. The court found that service was effectuated on all parties within the statutory period. In the instant case those conditions have not been satisfied.

In order to satisfy the Steigman requirements, it necessarily is pre-supposed 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. JANET SPOHR a was the person "interested" in this estate and upon whom service should have been timely made. See, Fla. Stat. {731.201 (21)(1987). In fact, as 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).<sup>2</sup>

2. If the Personal Representative waived service of the summons and complaint on himself, this should not be binding upon JANET SPOHR as beneficiary of the estate. See, Fla. Stat. {731.303 (1)(b) (1987)(conflict of intest provision), c.f., Community Federal Savings and Loan Association of the Palm Beaches vs. Wright, 452, So.2d 638 641 - 42 (4th DCA Fla. 1984). Fla. Stat. {733.612 (1987)(power of Personal Representative limited to actiong reasonably for the benefit of interested persons).

American Telephone & Telegraph Company vs. Fraiser, 545 So.2d 405 (1st DCA Fla. 1989), also is not support for Respondent's position. The issues presented in that case were whether the non-claim statute, section 733.702, barred the complaint against the Personal Representative and whether the complaint stated a cause of action. The Court in that case affirmed the Trial Court's dismissal of the claims based upon the expiration of the time for filing claims against the estate. In affirming the ruling the Court noted the Trial Court found that the time for filing "claims" against the estate expired on a particular date, but no claim was timely made. Thus, the "cause of action" was barred. The Trial Court apparently distinguished between filing a claim in Decedent's Probate Administration and a cause of action that is initiated by a lawsuit. Moreover, and significantly, there was no issue in that case as to whether a complaint filed within three months of first publication a notice of administration satisfies the claim-filing requirements.

The Respondents further rely on Olenick vs. Bennett, 537 So.2d 160 (5th DCA Fla. 1989). In that case the court found an estoppel from raising the non-claim statute as a defense, based upon the conduct of the Personal Representative's counsel. The case involved a proceeding which was pending against decedent at the time of his death and the estate had been substituted as a Defendant in lieu of the deceased. After this had transpired the attorney for the estate agreed to accept service of the complaint as well as to file an answer to the complaint. The court further



noted that the complaint was served within three (3) months of first publication of the notice of administration. A combination of these factors was found by the court to be sufficient to create an estoppel against the Personal Representative, although the opinion is devoid of any reference to the facts relating to any reliance upon these circumstances which resulted in the failure to file a claim in the administration proceedings. Both waiver and estoppel were present in Olenick. Neither defenses were raised in the present case.

Finally, it is more than of passing interest to note that the Uniform Probate Code does provide for filing a proceeding against the Personal Representative as an alternative to presenting the claim in the form of a written statement in the decedent's probate administration. See, UPC {3-804. That provision, obviously, was not adopted in the current Florida Probate Code, which also eliminated from the prior Probate Code the alternative of presenting a claim through filing a lawsuit and serving the Personal Representative, both within the three month non-claim period.

C. Estoppel from Raising the Non-claim Statute.

Respondents claim that the Personal Representative is "estopped" from arguing their claim as time barred. Olenick, supra, cited as Respondent's authority, already has been distinguished. Furthermore, in its opinion the Trial Court noted that the issue of waiver or estoppel had not been raised by

Respondents in their pleadings by means of a "reply" or otherwise. The Trial Court held that any such avoidances were deemed waived. The Trial Court was correct pursuant to the authority cited in its judgment.

The Trial Court was also correct in noting that any agreement to waive service of the summons the complaint did not reflect that any defenses were waived, the affirmative defenses filed by the Personal Representative showed that there was no waiver of the statute of limitations or the non-claim statute, (R. 202), and the record was devoid of any reference to Respondent's reliance on the conduct of counsel for the Personal Representative in not filing a claim or how they changed their position to their detriment in doing so. (R. 202). Id. See, Kuge vs. The State of Florida, Department of Administration, Division of Retirement, 449 So.2d 389 (3rd DCA Fla. 1984). Respondents have no basis for urging an estoppel against the Personal Representative, and the estoppel argument is not even suggested to apply to any conduct of Petitioner JANET SPOHR.

#### IV. Public Policy.

Lastly, Respondents argue that presenting a "claim" by filing an independent action is consistent with public policy. Petitioner disagrees. Filing a complaint certainly could result in "surprise, delay or inequity," and result in expenses being incurred by an objectant and administrative problems that clearly were not intended by the non-claim statutes.

While it is true that a Personal Representative has an obligation to file a notice in decedent's probate proceedings of civil actions filed against the Personal Representative, this assumes that the Personal Representative will be put on notice of the litigation by service or otherwise notified in a timely manner, and that he will discharge that obligation. That obligation was not discharged in the present case, which was noted in the District Court's opinion. (P.3). Respondents likewise had that obligation as provided in section 733.705(3)(1987), which they did not discharge in a timely manner either. The rule pertaining to filing such a notice really is no substitute for filing a claim in a decedent's Probate Administration pursuant to which a party interested in the estate will immediately know of its filing.

As far as is concerned the statement that Petitioner intervened and participated in the litigation, that also is no substitute for the Probate Code provisions that give the Petitioner, as beneficiary of the estate, the right to object to any claims being filed without having to hire an attorney and participate in litigation to do so. In this case that intervention was vigorously opposed. (See, R. 88, 90).

#### 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 25th day of March, 1991.

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