IN THE SUPREME COURT OF FLORIDA
CASE NO. 77,086

IN RE: AMENDMENTS TO THE FLORIDA PROBATE RULES

Comments

In this matter, the Probate Rules Committee of the Florida Bar has submitted certain amendments to the Florida Probate Rules for the Court's consideration. Among those changes is a modification to Rule 5.240(a) dealing with the publication and service of the Notice of Administration. It is the opinion of the undersigned that proposed Rule 5.240(a), as proposed by the Committee, has substantial problems. If the proposed rule change is adopted, it will invite new litigation between estates and creditors over the sufficiency of notice to creditors. The proposed rule change may also not pass constitutional muster under Tulsa Professional Collection Services, Inc. v. Pope, 108 S. Ct. 1340 (1988).

The proposed rule showing insertions and deletions to the old rule is as follows:

Rule 5.240. NOTICE OF ADMINISTRATION.

(a) Publication and service. After issuance of letters, the personal representative shall publish a notice of administration and promptly serve a copy of the notice in the manner provided for formal notice in these rules on the surviving spouse and all beneficiaries known to the personal representative who have not been barred by law. Service upon creditors shall be in the manner provided for informal notice. ~~Within 2 months after the first publication of notice of administration the personal representative shall serve a copy of the notice on all persons having claims or demands against the estate whose name and location or address are known to or reasonably ascertainable by the personal representative. No such notice need be served on a creditor who has filed a claim in the proceedings or whose claim has been included in a personal representative's proof of claim filed in the proceedings, or on a creditor whose claim has been paid.~~

At the outset one has to wonder the rationale behind a double standard of notice between beneficiaries and creditors. Section 733.602(1), Florida Statutes, provides that a personal representative has a fiduciary duty and the obligation to act in the best interests of interested persons, specifically including creditors as well as beneficiaries. Since the Florida Statutes provide one fiduciary standard toward beneficiaries and creditors, a double standard for notice, which must be considered one of the most important fiduciary duties of a personal representative, is simply unacceptable under this statute.

Under the proposed rule, service upon creditors is to be "in the manner provided for informal notice". The Florida Probate Rules, however, do not explicitly state what is this so-called "manner provided for informal notice." One has to follow a maze of rules within the Florida Probate Rules to try to determine exactly what is meant by "informal notice". Although a detailed definition of "formal notice" is provided in Rule 5.040(a), under Rule 5.040(b), the following non-definition of "informal notice" is provided:

> Informal Notice. When informal notice of a petition or other proceeding is required or permitted, it shall be served as provided in these rules.

Although Rule 5.040(b) is extremely vague, one can speculate the rule is referring to Rule 5.041(b), which reads:

> (b) Service; How Made. When service is required or permitted to be made in a particular proceeding in the administration of an estate on an interested person represented by an attorney, service shall be made on the attorney unless service on the interested

> person is ordered by the court. Except when serving formal notice, service on the attorney or interested person shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule shall mean
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> (1) handing it to the attorney or to the interested person, or
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> (2) leaving it at his office with his clerk or other person in charge thereof, or
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> (3) if there is no one in charge, leaving it in a conspicuous place therein, or
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> (4) if the office is closed or the person to be served has no office, leaving it at his usual place of abode with some person of his family above 15 years of age and informing that person of the contents.
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> Service by mail shall be complete on mailing except where serving formal notice.

Rule 5.041(b) appears to provide for service to parties who have already made an appearance in the probate case. It is not at all clear whether Rule 5.041(b) is what is meant by "informal notice", but it is doubtful whether this rule will provide effective guidance in serving the Notice of Administration. When an estate is opened and the Notice of Administration is served, it is axiomatic that creditors will not have made an appearance in the case through an attorney or otherwise. If such an appearance has been made, service of the Notice of Administration would be a pointless exercise. Therefore, the reference in Rule 5.041(b) to service on an attorney is totally useless in determining how the

Notice of Administration is to be served on creditors. Rule 5.041 also talks about service on an interested party, but in the case of an institutional interested person, the rule is very vague as to exactly on whom notice is to be served.

The series of recent changes to the Florida Probate Code and the Florida Probate Rules regarding notice to creditors apparently stem from the United States Supreme Court case, Tulsa Professional Collection Services, Inc. v. Pope. The Pope case held that the due process clause requires that a notice served on creditors be reasonably calculated to put the creditor on notice that a probate proceeding has commenced and the creditor must take appropriate action to protect its interests. Id. at 347-48. If the method of notice is not reasonably calculated to put the creditor on notice, then the method is constitutionally defective. Id.

In Pope, the United States Supreme Court held that known or reasonably ascertainable creditors of an estate must be provided actual notice of administration. Id. Simply publishing a notice in a newspaper without serving known or reasonably ascertainable creditors is not enough. Id. According to the Court, these creditors must be given notice by mail or other means as certain to ensure actual notice in order not to violate the due process clause of the Fourteenth Amendment to the United States Constitution. Id. at 1348. It is not clear whether the "informal notice" procedure referenced in proposed Rule 5.240(a), whatever that procedure is, sufficiently ensures actual notice to creditors under Pope. The rational of the Pope decision is very important here:

> Creditors, who have a strong interest in maintaining the integrity of their relationship with their debtors, are particularly unlikely to benefit from publication notice. As a class, creditors may not be aware of a debtor's death or the institution of probate proceedings. Moreover, the executor or executrix will often be, as the case here, a party with a beneficial interest in the estate. This could diminish an executor's or executrix's inclination to call attention to the potential expiration of a creditor's claim. But there is thus a substantial practical need for actual notice in this setting. (emphasis supplied). Id. at 1347.

A concern in Pope was that some personal representatives might try to "sneak" the Notice of Administration past a creditor by publishing the notice in an obscure newspaper, hoping the creditor would not see it. The lack of a clearly defined procedure for serving notice on creditors raises a similar concern that some personal representatives may be tempted to try to "sneak" a Notice of Administration past a creditor. Further, the personal representative may continue to pay the creditor during the three month claim period, lulling the creditor into a false sense of security. The probate rules should be written to prevent a personal representative from using such tactics to enhance the remaining assets of the estate for the benefit of the heirs.

Although the Pope decision set forth the basic due process requirement for actual notice to creditors of estates, further analysis is needed to ascertain how much notice is enough. As the United States Supreme Court noted in Tulsa Professional Collection Services, Inc. v. Pope, citing Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950):

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the

> circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Pope at 1344.

The very next sentence from Mullane, sets forth the necessary content for notice to meet due process requirements:

> The notice must be of such nature as reasonably to convey the required information, Granis v. Ordean [234 U.S. 385, 34 S. Ct. 779] . . . and it must afford a reasonable time for those interested to make their appearance . . . (emphasis supplied). Mullane at 314.

Other United States Supreme Court cases have dealt with the content of the notice to be given. According to the distinguished constitutional scholar, Lawrence Tribe, in these cases the Supreme Court has "generally required that, where a significant interest is at stake, there must be a greater certainty that notice will be effective." Tribe, American Constitutional Law, (2d ed. 1987), at 733. In Brock v. Roadway Express, Inc., 107 S. Ct. 1740, 1743 (1987), the United States Supreme Court held notice must include not only information that a hearing is about to occur, but information as to what the hearing will entail. In Memphis Light, Gas, and Water Division v. Craft, 436 U.S. 1 (1978), the U.S. Supreme Court held that a utility company's mailed threat to terminate service violated due process because it did not advise customers of the proper procedures for contesting the company's actions. According to the Court, this notice "was not reasonably calculated to inform [consumers] of the availability of an opportunity to present their objections to their bills." Id. at 14. "Notice in a case of this kind does not comport with constitutional requirements when it does not advise the customer of the

availability of procedure for protesting termination of utility service as unjustified." Id. at 14-15. The Court noted the notice at issue "is given to thousands of customers at various levels of education, experience and resources" and thus the utility company had a duty to inform consumers "of the availability of an opportunity to present their complaints" and tell them "where, during which hours of the day, and before whom disputed bills appropriately may be considered." Id. at 15.

When the Pope case and the other cases discussed above are read together, one must draw the conclusion that the United States Supreme Court wants the notice to creditors of an estate to be taken seriously because a fundamental right to due process is involved. On its face, it is hard to see how a procedure described as "informal" meets the fundamental due process concerns raised in Pope and other U.S. Supreme Court decisions. In view of Pope and the other decisions discussed above, it would appear extremely important for the Florida Probate Rules to have a clearly defined procedure for service of the Notice of Administration to Creditors. Adopting the vague and confusing procedure labeled "Informal Notice" runs a significant risk the Florida Probate Rules will be constitutionally deficient under the Pope decision.

Under the procedure set forth in Rule 5.041(b), assuming that is what is meant by "informal notice," it would appear likely that an institutional creditor such as a bank, a finance company, or other corporation, would not receive the notice in a manner reasonably calculated for the creditor to take appropriate action

within the time required. First, the rule indicates the copy of the paper is to be mailed to the interested person "at the last known address". In many cases a creditor will have a payment drop-box address. If the personal representative simply sends the Notice of Administration to the payment drop-box, it is quite possible the notice may not be delivered to the appropriate person within the institutional creditor for that creditor to take timely action. Most invoices from creditors which use a payment drop-box indicate that only payments are to be sent to the drop-box. Typically the creditor will have a separate address provided for correspondence.

If Rule 5.240(a) is to be modified at all, it is suggested that Rule 5.240(a) be modified to provide the specific manner for notice to creditors. Among other things, the rule should provide that the personal representative review the contracts and invoices of the decedent and address the Notice of Administration to any address provided in such contracts and invoices for delivery of correspondence. Sending the Notice of Administration to the payment drop-box when a separate address for correspondence has been clearly designated by the creditor would be an unacceptable method of ensuring notice is received and, thus, of questionable constitutional validity.

It is further recommended that the rule require that the Notice of Administration be sent by certified mail return receipt requested. Rule 5.041(b) makes no provision for certified mail but rather provides notice may be sent by regular mail. Without a

certified mail requirement, the probate courts of this state could be subjected to endless litigation as to whether the Notice of Administration was received by the creditor. A certified mail requirement would not be a financial burden, would impose a minimal burden on the personal representative, and is a reasonable way of minimizing litigation on the issue of whether the Notice of Administration was received.

Alternatively, the Notice of Administration could be sent by regular mail if the personal representative were required to submit an affidavit to the court specifically reciting the service by mail to the specific creditors by name. A certified mail procedure should result in fewer disputes over whether notice was sent. It is the undersigned's understanding that most probate attorneys use certified mail already to reduce the possibility of litigation over notice to creditors. If the court concludes certified mail is too burdensome for estates, however, the personal representative should, at a minimum, be required to document in some manner with the probate court the sending of the Notice of Administration to creditors. Such a requirement currently appears in Rule 5.240(e), but the Probate Rules Committee also proposes to delete this requirement.

Rule 5.240(a) provides for formal notice of the Notice of Administration to the surviving spouse and all beneficiaries known to the personal representative who have not been barred by law. The procedure for formal notice includes the certified mail procedure discussed previously. The proposed rule could be

modified most simply by providing for formal notice to both beneficiaries and creditors known or reasonably ascertainable to the personal representative. Such a requirement would make the rule consistent with Section 732.602(1), Florida Statutes, regarding the fiduciary duty of personal representatives to beneficiaries and creditors alike.

The proposed Rule 5.240 before the Court should not be adopted. Rather, the proposed rule should be referred back to the Probate Rules Committee and The Florida Bar Business Law Section to work out a procedure which is balanced, fair, and equitable to both estates and creditors of estates.

Rule 2.130, Florida Rules of Judicial Administration, provide for a Probate Rules Committee of the Florida Bar to consider and vote on proposed amendments to the Florida Probate Rules. However, it is troubling that proposed rules such as Rule 5.240 which substantially affect the rights of creditors are not submitted to an appropriate committee of the Florida Bar Business Law Section for review prior to being voted upon by the Board of Governors. Most of the Florida Probate Rules are probably of great interest only to attorneys who handle estates and are probably of very little interest to attorneys for creditors.[1] However, the few probate rules affecting creditors are of critical importance to creditors and their attorneys. In order to ensure proposed probate

[1] It is unlikely that attorneys who primarily represent creditors are interested in serving on the Florida Probate Rules Committee, which raises a concern whether creditors' interests are fairly represented on this Committee.

rules affecting creditors are fair and balanced with respect to both estates and creditors, it would be highly desirable to require any proposed probate rule changes affecting creditors, particularly rules affecting notice to creditors, be reviewed by the Business Law Section as well as the Probate Rules Committee prior to being voted upon by the Board of Governors and being submitted to the Florida Supreme Court.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to JOHN F. HARKNESS, JR., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; H. LAURENCE COOPER, JR., Co-Chair, Florida Probate Rules Committee of The Florida Bar, P. O. Box 3746, West Palm Beach, Florida 33402-3746; and to SAMUEL S. SMITH, Co-Chair, Florida Probate Rules Committee of The Florida Bar, 701 Brickell Avenue, 19th Floor, Miami, Florida 33131-2822, this 26th day of February, 1991.

Respectfully submitted,

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