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IN THE SUPREME COURT OF FLORIDA

CASE NO: SC13-2536
DCA Case No.: 4D12-2094

CAROL ANN JONES,
petitioner,

v.

EDWARD I. GOLDEN,
respondent.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

AMICUS CURIAE BRIEF
OF
THE REAL PROPERTY, PROBATE & TRUST LAW SECTION
OF THE FLORIDA BAR

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IDENTITY AND INTEREST

The Real Property Probate & Trust Law Section of The Florida Bar ("Section") is a group of Florida lawyers who practice in the areas of real estate, trust and estate law. The Section is dedicated to serving all Florida lawyers and the public in these fields of practice. We produce educational materials and seminars, assist the public *pro bono*, draft legislation, draft rules of procedure, and occasionally serve as a friend of the court to assist on issues related to our fields of practice.[1] Our Section has over 10,000 members.

Pursuant to Section bylaws, the Executive Council of the Section voted unanimously to appear in this case if permitted by the Court. The Florida Bar approved the Section's involvement in this case. [2]

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[1] For example, see *North Carillon, LLC, v. CRC 603, LLC,* 135 So. 3d 274 (Fla. 2014; *Aldrich v. Basile*, 136 So. 3d 530 (Fla. 2014); *Chames v. DeMayo*, 972 So. 2d 850, 854-55 (Fla. 2007); *McKean v. Warburton,* 919 So. 2d 341 (Fla. 2005); *May v. Illinois Nat. Ins. Co*., 771 So. 2d 1143 (Fla. 2000); *Friedberg v. SunBank/Miami*, 648 So. 2d 204 (Fla. 3d DCA 1994).

[2] The Executive committee of the Section approved the filing of this brief, which was subsequently approved by the Section's Executive Council. Pursuant to Standing Board Policy 8.10, the Board of Governors of The Florida Bar (typically through its Executive Committee) must review a Section's amicus brief and grant approval before the brief can be filed with the Court. Although reviewed by the Board of Governors, the amicus brief will be submitted solely by the Section and supported by the separate resources of this voluntary organization---not in the name of The Florida Bar, and without implicating the mandatory membership dues paid by Florida Bar licensees. The Florida Bar approved our filing of this brief.

Kenneth B. Bell, Gerald B. Cope, Jr., Robert W. Goldman, and John W. Little III, are the four co-chairs of the amicus committee of the Section, which is charged with preparing amicus briefs for the Section.

The Section's interest in this case stems from the Section's expertise and experience with the Florida Probate Code and creditor claims in probate proceedings and the impact this case will have on creditor rights in probate proceedings.

SUMMARY OF ARGUMENT

Underlying the creditor claim laws in probate is the Legislature's effort to strike a balance between the fundamental policies of promptly closing estates and the due process rights of creditors of an estate.

Not all creditors are due the same amount of process. Indeed, there are two types of creditors of an estate: those who are reasonably ascertainable and those who are not. A reasonably ascertainable creditor is entitled to a notice to creditors, the service of which begins the running of a statute of limitation (ending on the later of 30 days from service of the notice to creditors or 3 months from first publication of notice to creditors). The statute of limitation for creditors who are not reasonably ascertainable begins to run upon first publication of the notice to

creditors (ending 3 months from first publication). The claims of all creditors of an estate are barred if not filed within two years from the death of the decedent.

Therefore, assuming there is a reasonably ascertainable creditor of a decedent's estate and assuming the personal representative of that decedent's estate never served that reasonably ascertainable creditor with a notice to creditors, the limitation period for that creditor to file a claim against the estate is governed by the two-year statute of repose, not the 3-month limitations period for claims filed after publication of the notice to creditors. §§733.702, 733.710 Fla. Stat. (2006).

ARGUMENT

Florida, like most states, has a strong and unwavering public policy in favor of settling and closing estates in a speedy manner. *In re Jeffries' Estate*, 136 Fla. 410, 181 So. 833 (Fla. 1938); *Estate of Brown,* 117 So. 2d 478 (Fla. 1960); *Barnett Bank v. Estate of Read*, 493 So. 2d 447 (Fla. 1986); *May v. Illinois Nat'l Ins.*, 771 So. 2d 1143 (Fla. 2000).

While mindful of the rights of creditors, the Legislature's enthusiastic embrace of this policy originally caused it to develop a "one size fits all" approach to processing creditor claims in probate. See §733.702, Fla. Stat. (Supp. 1988), and pre-1988 versions of the statute.

But, what this claim process offered in simplicity and speed, it lacked in due process for those creditors reasonably ascertainable to the personal representative. *See Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988). In *Pope*, the Supreme Court of the United States considered a probate claims process substantially identical to our own as of that time. As in Florida, the Oklahoma statute involving probate claims was *not* self-executing. It required the opening of a probate proceeding by a court and the appointment of a personal representative by the court before any notice was required and before a limitation period could commence. The law also required that notice of publication of the notice to creditors, and an affidavit indicating publication had occurred, be filed with the clerk of court. 485 U.S. at 487. A very similar process was followed in Florida (§§733.202, 733.2121; Fla. P. R. 5.200, 5.235, 5.241) and, like Florida, the entire probate process in Oklahoma was supervised by the probate court. The Supreme Court held:

> This involvement is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment.

Id. Self-executing claim statutes, on the other hand, that simply ran from date of death until a date certain, did not involve state action and were not restricted by the Fourteenth Amendment. 485 U.S. at 485-86.

The Supreme Court in *Pope* grappled with the obvious limitations on a creditor getting the needed information through a publication of notice in a newspaper and a state's "legitimate interest in the expeditious resolution of probate proceedings. Death transforms the decedent's legal relationships and a State could reasonably conclude that swift settlement of estates is so important that it calls for very short time deadlines for filing claims." 485 U.S. at 489. The Supreme Court made clear that actual notice to "reasonably ascertainable creditors" was required in order to satisfy due process. 485 U.S. at 490. Further, as the Supreme Court had already held in *Mennonite Board of Missions v. Adams,* 462 U.S. 791, 798, n.4 (1983), impractical and extended searches by the estate's representative were not required. 485 U.S. at 491. The Supreme Court also held that actual notice by U.S. mail was sufficient to satisfy due process for "reasonably ascertainable creditors." 485 U.S. at 490. The Supreme Court concluded:

> On balance then, a requirement of actual notice to known or reasonably ascertainable creditors is not so cumbersome as to unduly hinder the dispatch with which probate proceedings are conducted.

Id. Actual notice was not required for creditors "with mere 'conjectural' claims." *Id*., *citing to and quoting*, *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 317 (1950).

In response to *Pope*, and with some assistance from the Section, the Legislature amended the Florida Probate Code to address the due process issue.[3] These amendments were adopted over the ensuing few years culminating in statutes we believe are germane to this Court's resolution of this appeal: sections 733.2121, 733.702 and 733.710, Florida Statutes (2006).[4]

In pertinent part, section 733.2121 provides:

> (1) Unless creditors' claims are otherwise barred by s. 733.710, the personal representative shall promptly publish a notice to creditors. The notice shall contain the name of the decedent, the file number of the estate, the designation and address of the court in which the proceedings are pending, the name and address of the personal representative, the name and address of the personal representative's attorney, and the date of first publication. The notice shall state that

[3] This Court also reacted promptly to *Pope* and issued rules, which were subsequently codified in Florida Statutes as well. *The Florida Bar. In re Rules of Probate and Guardianship Procedure*, 537 So. 2d 500 (Fla. 1988). One of these rules, 5.495, was repealed by this Court after statutory amendments made it unnecessary. *In re Amendments to the Florida Probate Rules*, 584 So. 2d 964 (Fla. 1991). Rule 5.240 was amended and a new rule 5.241 was adopted in 2002 in order to separate the notice to creditors from a notice of administration in a manner consistent with the Legislature's adoption of section 733.2121, Florida Statutes in 2001. *Amendments to the Florida Probate Rules*, 824 So. 2d 849 (Fla. 2002). These rules do not appear to have an impact on the resolution of this case, but are identified for the Court's consideration. The language of rule 5.241 is not inconsistent with our analysis of the relevant statutory law and the *Pope* decision.

[4] We understand that the 2006 versions of the statutes pertain to this case. *Golden v. Jones*, 126 So. 3d 390, 394, n.1 (Fla. 4th DCA 2013) ("The 2006 versions of sections 733.702 and 733.710 are applicable in this case because they were in effect at the time of Harry's death on February 16, 2007. *See May,* 771 So.2d at 1150 n. 7 (using decedent's date of death to determine applicable version of the statute).").

creditors must file claims against the estate with the court during the time periods set forth in s. 733.702, or be forever barred.

(2) Publication shall be once a week for 2 consecutive weeks, in a newspaper published in the county where the estate is administered or, if there is no newspaper published in the county, in a newspaper of general circulation in that county.

(3)(a) *The personal representative shall promptly make a diligent search to determine the names and addresses of creditors of the decedent who are reasonably ascertainable, even if the claims are unmatured, contingent, or unliquidated, and shall promptly serve a copy of the notice on those creditors. Impracticable and extended searches are not required.* Service is not required on any creditor who has filed a claim as provided in this part, whose claim has been paid in full, or whose claim is listed in a personal representative's timely filed proof of claim.

(b) The personal representative is not individually liable to any person for giving notice under this section, even if it is later determined that notice was not required. The service of notice to creditors in accordance with this section shall not be construed as admitting the validity or enforceability of a claim.

(c) If the personal representative in good faith fails to give notice required by this section, the personal representative is not liable to any person for the failure. Liability, if any, for the failure is on the estate.

…

(4) Claims are barred as provided in ss. 733.702 and 733.710.

(Emphasis added.).

Section 733.702, in pertinent part, provides:

(1) If not barred by s. 733.710, 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 political subdivisions, even if the claims are unmatured, contingent, 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 the decedent, is binding on the estate, on the personal representative, or on any beneficiary unless filed in the probate proceeding *on or before the later of the date that is 3 months after the time of the first publication of the notice to creditors or, as to any creditor required to be served with a copy of the notice to creditors, 30 days after the date of service on the creditor,* even though the personal representative has recognized the claim or demand by paying a part of it or interest on it or otherwise. The personal representative may settle in full any claim without the necessity of the claim being filed when the settlement has been approved by the interested persons.

> (2) No cause of action, 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 or not an action is pending at the death of the person, unless a claim is filed within the time periods set forth in this part.
>
> (3) *Any claim not timely filed as provided in this section* is barred even though no objection to the claim is filed unless the court extends the time in which the claim may be filed. An extension may be granted only upon grounds of fraud, estoppel, or insufficient notice of the claims period. No independent action or declaratory action may be brought upon a claim which was not timely filed unless an extension has been granted by the court. If the personal representative or any other interested person serves on the creditor a notice to file a petition for an extension, the creditor shall be limited to a period of 30 days from the date of service of the notice in which to file a petition for extension.

Section 733.710, in pertinent part, provides:

> (1) *Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent's estate, the personal*

> *representative, if any, nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.*
>
> (2) *This section shall not apply to a creditor who has filed a claim pursuant to s. 733.702 within 2 years after the person's death, and whose claim has not been paid or otherwise disposed of pursuant to s. 733.705*.

(Emphasis added.). These three statutes are clear on their face at least as to the issue before this Court.

Section 733.2121(3) (a) outlines the duty of a personal representative to serve a notice to creditors on reasonably ascertainable creditors. The Legislature provided that if the claims of these reasonably ascertainable creditors are unmatured, contingent or unliquidated claims they still must be served with the notice to creditors. But, the personal representative need not turn over every stone and look in every nook and cranny for this species of creditor. *See Pope,* 485 U.S. at 491; *see* §733.2121 (3) (a), Fla. Stat. (2006); *Estate of Vickery*, 584 So. 2d 555, 558 (Fla. 4th DCA 1990); *Jones v. Sun Bank/Miami, N.A.*, 609 So. 2d 98, 102-03 (Fla. 3d DCA 1992).

As the Court will no doubt recognize, intuitively or after evaluating the applicable case law, the definition of a reasonably ascertainable creditor is hard to articulate in such a way as to capture all possible examples and circumstances. *See* Medlin, Alan S., "Claims-Barring Due Process Concerns, *Probate Practice Reporter*, Vol. 26, no. 8, pg. 3 (August 2014) ("For the state to anticipate every

category of known or reasonably ascertainable creditor that could arise in any particular fact pattern would be problematic, if not impossible."). It is not enough to identify a potential creditor, it is the nature of the claim and whether it was reasonably ascertainable that also matter. *See Simpson v. Estate of Simpson*, 922 So. 2d 1027, 1029 (Fla. 5th DCA 2006); *Jones*, 609 So. 2d at 102. The potential difficulties in this determination are highlighted in *Strulowitz v. Cadle Company, II, Inc*., 839 So. 2d 876 (Fla. 4th DCA 2003) and other cases. *See Jones, Id*; *U.S. Trust Co. of Florida Sav. Bank v. Haig*, 694 So. 2d 769 (Fla. 4th DCA 1997); *Miller v. Estate of Baer*, 837 So. 2d 448 (Fla. 4th DCA 2003); *Faerber v. D.G.*, 928 So. 2d 517 (Fla. 2d DCA 2006).[5]

Strulowitz, for example, involved the decedent's settlement of a dispute over a promissory note and the decedent's indebtedness to the Cadle Company. 839 So. 2d at 877. The personal representative was the decedent's son, who testified he knew nothing of the creditor or the debt until an employee of Cadle called him in 2001, months after the 3 month time limitation passed. 839 So. 2d at 878. The personal representative testified about the nature of his diligent search for creditors:

> My diligent search included the following: I went through all my father's personal and business files. I went through the decedent's checkbook for

[5] Some of these cases might have been decided differently after the adoption of section 733.2121 in 2001, effective 2002 (service of notice to creditors is required even if their claims are "unmatured, contingent, or unliquidated….").

> the year 2000. I spoke with my brother regarding my father's debts. I went through my father's bills and correspondence to determine creditors.

Id. He served approximately 19 creditors with a notice to creditors. *Id.* In a somewhat unusual move, the circuit court appointed an "attorney ad litem" to investigate and report on whether the Cadle claim was reasonably ascertainable. *Id.* In the ad litem's report opining that Cadle was reasonably ascertainable, he "acknowledged the difficulty he had tracking down the company and the debt. He noted that Cadle did not send a payment book to the decedent, record the settlement, or send out a delinquency notice after failing to receive the June 2000 payment." *Id.* The ad litem said he did find some legible, historical entries of check payments in the decedent's check register, but then reported:

> I checked the local Broward County phone book to find a listing for Cadle. I was unsuccessful so I called information and I was told that there was no listing for Cadle in the State of Florida. I asked about other states and I was told that I would have to call every state in the union. This alone I believe was impracticable for a personal representative to act on.
> …
> I made one final query when I called the operator to learn if a toll free number for Cadle existed. The operator provided [me] with a toll free number for Cadle.
> …
> I called the number and read the number listed on the bottom of the check. The individual could not locate the number and asked me if it was an old account. She then asked me for a Social Security number and I gave her the decedent's social security number. She ***879** found the account and transferred my call.

839 So. 2d at 878-79. The circuit court determined that under the totality of circumstances the personal representative's search was inadequate and that the Cadle claim was reasonably ascertainable. 839 So. 2d at 881. The personal

representative argued there was no legal authority requiring him to do more than he did. To that the appellate court noted:

> In so arguing, the personal representative highlights a concern that makes his appeal problematic: the absence of any written rules or guidelines on specific steps that an estate administrator must take during the course of a diligent search.

Reviewing that decision on an "abuse of discretion" standard, the appellate court affirmed. *Id*. The district court of appeal, in obvious frustration, asked this Section to develop a rule to assist personal representatives in making an appropriate search and in identifying reasonably ascertainable creditor claims. *Id* at n. 3. The Section was no less frustrated in its effort to satisfy the court's request, worked on the issue for at least two years, and gave up trying, at least for now....[6] Obviously the trial court must decide this question on a case by case basis.

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[6] A list of "items constituting a diligent search" is offered at 18 Fla. Jur. 2d, Decedent's Property, §624. The list, however, is ambiguous (eg "examining all bills" could mean dating back a lifetime; in *Sturlowitz,* 17 months was not enough), and certainly would not be sufficient in all cases, and might take over 2 years in other cases, and would no doubt be expensive. Oklahoma, the state directly involved in *Pope* has a statute that defines an appropriate search as: "If reasonable under the circumstances, such efforts shall include the personal representative's conducting a search after the decedent's death and prior to the filing of the notice to creditors, of the personal effects of the decedent." 58 OKLA. STAT. § 331.1 (Supp. 1989). This might be misread by many to suggest that a mere search of the decedent's personal effects is enough. That would be an error. *See Estate of Vann*, 925 P.2d 80, 81 (Ct. App. Okla. 1996) ("By statute, the diligent effort by the personal representative to determine the identity of creditors 'shall include ... a search ... of the personal effects of the decedent,' but is not limited to such search.

Assuming for now, that the personal representative can readily discern the reasonably ascertainable creditors he, she or it must serve, the applicable statute of limitation is clearly expressed in 733.702(1): the later of 3 months from first publication of the notice to creditors or 30 days after service of the notice by the personal representative. Assuming no service by the personal representative, the creditor *must* file a claim within two years of the decedent's date of death. §733.710, Fla. Stat. There are no exceptions. Section 733.710 is a statute of repose. *May v. Illinois Nat. Ins. Co.*, 771 So. 2d at 1155-56.

The law seems clear that a personal representative must serve a reasonably ascertainable creditor and the statute of limitation in 733.702(1) does not begin to run until the personal representative perfects that service. Because the law is clear on these points, it is not subject to interpretation. *See Pewtty v. Florida Insurance Guaranty Ass'n*, 80 So. 3d 313, 316, n.3 (Fla. 2012); *Kephart v. Hadi*, 932 So. 2d 1086, 1091 (Fla. 2006); *May v. Illinois Nat'l. Ins. Co.*, 771 So. 2d at 1156. That said, if the law as to these points is subject to interpretation, then, if possible, it must be interpreted in a manner that would make the law constitutional. *See State*

The effort must generally be 'reasonable under the circumstances.'"). We made a reasonable, but not exhaustive, search of cases, statutes, rules and treatises and found nothing the Section might offer that would serve as a useful rule for practitioners and all other Floridians beyond what we already have, but the Section will continue to consider the issue.

v, Jefferson, 758 So. 2d 661, 664 (Fla. 2000); *Murray v. Mariner Health*, 994 So. 2d 1051, 1057 (Fla. 2008). Except in the case of the statute of repose, which is self-executing, it would seem that requiring a reasonably ascertainable creditor to take steps to preserve a claim absent service on that creditor of a notice to creditors would disregard the creditor's entitlement to notice and the personal representative's obligation to give it, and would violate the Fourteenth Amendment to the United States Constitution as explained in *Pope*. *See Estate of Puzzo*, 637 So. 2d 26 (Fla. 4th DCA 1994).

In light of these points, how did the courts in *Morgenthau v. Estate of Andzel,* 26 So. 3d 628 (Fla. 1st DCA 2009); *Lubee v. Adams,* **77** So. 3d 882 (Fla. 2d DCA 2012); and *Souder v. Malone*, 2014 WL 3756356 (Fla. 5th DCA, August 1, 2014) reach a result in conflict with the Section's analysis and in conflict with *Golden v. Jones*, 126 So. 3d 390 (Fla. 4th DCA 2013) and *Puzzo*?

It appears that all three appellate courts were distracted by Section 733.702 (3), Florida Statutes (2006), so we should examine that provision closely and how it is in harmony with 733.2121 (3) and 733.702 (1) in a constitutionally sound way.

Section 733.702 (3) begins with the provision that a claim *not timely filed* under 733.702 (1) is barred even though no objection to a tardy claim is filed. So, as long as the personal representative met its obligations to publish notice to

creditors and to serve the reasonably ascertainable creditors, then the personal representative need do nothing more, even if a creditor files a tardy claim.[7]

The problem is: what certainty does the personal representative have in a situation where the potentially tardy creditor was not served with a notice to creditors other than by publication? Is the claim really tardy or was the claim reasonably ascertainable, requiring actual service on the creditor by the personal representative? If the personal representative has identified this would-be creditor and desires clarity on this issue, section 733.702(3) permits the personal representative to serve a notice to petition for extension of time on the would-be creditor, which requires a response in 30 days. In this way the personal representative has not committed to the creditor being reasonably ascertainable. The personal representative has only committed to getting the issue of whether the creditor's claim was reasonably ascertainable resolved by the court.

From the creditor's standpoint in this scenario, how can the creditor be sure it was reasonably ascertainable and entitled to service of the notice to creditors? The creditor can respond to the personal representative's notice to petition for extension of time or, independently, serve a petition for extension of time based on insufficient notice, as contemplated by 733.702 (3). Assuming the two-year statute

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[7] Before the adoption of 733.702 (3) in 1988 (88-340, Laws of Florida), a personal representative had to move to strike a tardy claim or otherwise object to it on the ground of tardiness. *See Barnett Bank v. Estate of Read*, 493 So. 2d 447, 449 (Fla. 1986).

of repose is fast upon the would-be creditor, that creditor would wisely also file a creditor's claim.

We have already discussed the fact that oftentimes there is no clear answer to which creditor claims are reasonably ascertainable and it is a case-by-case analysis for the judge sitting in probate. Section 733.702 (3) offers the creditor, personal representative, and other interested persons the option of seeking clarity on these issues and speeding up the determination, nothing more. *See* Pilotte, Frank, *Practice Under The Florida Probate Code*, §8.7, pgs. 8-16 and 8-17 (7th Ed. 2012). Indeed, the anxiety and slothful resolution of estates that the first sentence of 733.702(3) might cause, generated the amendments to 733.702(3) to permit the optional processes for would-be creditors and personal representatives described above. *See* 89-340, §5, Laws of Fla.

A reasonably ascertainable creditor, however, need not avail itself of the option offered in 733.702(3) and can rely on the belief that it was reasonably ascertainable, was not properly served, and filed its claim before the two-year statute of repose foreclosed its claim. Similarly, a personal representative can do nothing and hope a lack of actual service of a notice to creditors on a creditor was appropriate or that two years will pass without a claim being filed.[8]

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[8] Under this scenario, the personal representative will be inclined to wait to distribute assets to the beneficiaries and creditors with valid claims until after the two year statute of repose in 733.710 has run or it will require a refunding

The *Morgenthau* decision, on which its sister courts rely in *Lubee* and *Souder,* also seemed to base its decision, in part, on language in section 733.705 (6), Florida Statutes (2006), which provides:

> (6) A claimant may bring an independent action or declaratory action upon a claim which was not timely filed pursuant to s. 733.702(1) only if the claimant has been granted an extension of time to file the claim pursuant to s. 733.702(3).

26 So. 3d at 630. But, the quoted language only begs the question of whether a claim was timely filed under 733.702 (1). The language does not answer the question other than to send us back to the clear limitation language of 733.702 (1), which provides that a reasonably ascertainable creditor who is not served with notice to creditors is not barred from filing a claim by that statute. The creditor will only be barred under that circumstance by the two-year statute of repose, 733.710, if the creditor fails to file its claim within the two year limitation period. *Puzzo*, 637 So. 2d at 27.

The *Morgenthau* court's analysis may have been hampered by the appellant's apparent concession in that case that his claim was untimely. *Morgenthau*, 26 So. 3d at 630. Given that concession, the *Morgenthau* court may have reached the correct result, *albeit* for the wrong reasons.

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agreement or rely on section 733.812, Florida Statutes (2006) for the return of improper distributions. *See* 733.802, Fla. Stat. (2006); 733.705 (1), Fla. Stat. (2006).

Bottom line, the *Morgenthau*, *Lubee*, *Souder* trilogy appear to miss the fundamental point clear in Florida law and under the United States Constitution after *Pope*, that the reasonably ascertainable creditor is *entitled* to actual notice as a matter of due process. *See Puzzo*, 637 So. 2d at 27. A personal representative is obligated to provide that actual notice. §733.2121(3)(a), Fla. Stat. (2006). And, if the personal representative fails to give that notice, only the two-year statute of repose can bar the creditor's claim. §733.710, Fla. Stat. (2006). Any appellate decision reading our law in a way that emasculates the personal representative's *duty* to give, and the reasonably ascertainable creditor's *right* to receive, actual notice, is contrary to Florida law and the Fourteenth Amendment to the United States Constitution, and, therefore, should be overruled.

The Uniform Probate Code addresses the *Pope* due process concerns in certain ways that differ from Florida's approach. But in some ways the U.P.C. and Florida approaches are almost identical except the time periods are different: 4 months instead of Florida's 3 months on publication, 60 days instead of Florida's 30 for creditors served with a notice to creditors, and a 1 year statute of repose, instead of Florida's 2 years. *See* U.P.C. §§3-803, 3-801. Interpreting the nearly identical UPC time bar scheme for creditors, Professor Alan Medlin, University of South Carolina College of Law, concludes:

> Thus, under the post-*Tulsa* [*Pope*] UPC process, if the personal representative does not provide actual notice, the known creditor will

> not be barred by the time period commenced by notice because the 60 days from actual notice time period was never triggered. However, the other time period, ending one year from date of death, applies even to known creditors. So if the creditor fails to present a claim within that one-year period, the claim is barred.

Medlin, Alan S., *Id.,* at pg. 4. *See Estate of Kotowski*, 704 N.W.2d 522, 527 (Minn. Ct. App. 2005); *In re Estate of Emery,* 258 Neb.789, 606 N.W.2d 750, 755-56 (2000); *In re Estate of Russo,* 994 P.2d 491, 495 (Colo.Ct.App.1999); *In re Estate of Anderson,* 821 P.2d 1169, 1172 (Utah 1991) (all interpreting UPC same as professor Medlin and consistent with the Section's analysis of Florida law).

CONCLUSION

For the reasons expressed in this brief, we believe the legal reasoning in *Morgenthau*, *Lubee*, *and Souder* should be rejected by this Court. The legal reasoning of the appellate court below seems to be consistent with Florida law and *Pope*. As is our practice, the Section offers no opinion about the appropriate outcome for the litigants in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of this brief was served through the e-portal on William H. Glasko, Golden & Cowan, P.A., counsel for respondent, bill@palmettobaylaw.com; Robin F. Hazel, Hazel Law, P.A., counsel for petitioner, robinhazel_esq@yahoo.com, hazellawpa@gmail.com this 9th day of September, 2014.

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CERTIFICATE OF FONT COMPLIANCE

I certify that this brief complies with the font requirement of rule 9.210 (a) (2), Florida Rules of Appellate Procedure.

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