# Notice to Creditors in Estate Proceedings: What Process Is Due

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# NOTICE TO CREDITORS IN ESTATE PROCEEDINGS: WHAT PROCESS IS DUE?

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*A decedent's creditors are subject to short-term nonclaim statutes, which require that a creditor preserve his claim by asserting it within a short, specific time period that often expires before the debt. Traditionally, publication notice has been held sufficient to notify such creditors of the running of the short-term period. In an analogous setting, however, the United States Supreme Court held, in* Mennonite Board of Missions v. Adams, *that a known or reasonably ascertainable mortgagee is constitutionally entitled to better-than-publication notice that its rights could be terminated as the result of a tax sale. In light of this decision, the Nevada Supreme Court held that an estate creditor is entitled to notice reasonably calculated to inform the creditor of the short-term period. Professor Falender argues that the Nevada decision was correct and demonstrates that requiring mailed notice to known or knowable estate creditors is constitutionally and practically sound. Although adopting a better-notice rule would require altering the traditional duties and liabilities of representatives, heirs, and beneficiaries, she concludes that the better-notice philosophy established by the Supreme Court in* Mullane v. Central Hanover Bank and Trust Co. *was properly extended by the Nevada Supreme Court's decision.*

In 1950 the United States Supreme Court held, in *Mullane v. Central Hanover Bank and Trust Co.*,[1] that a "fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[2] The Court in *Mullane* struck down a provision of a common-trust-fund statute that allowed notice publication as the sole means of informing known trust beneficiaries of an action that would settle their rights against the plaintiff trustee.[3] In cases subsequent to *Mullane*, the Court has invalidated other publication notice provisions.[4] In the

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1. 339 U.S. 306 (1950).

2. *Id.* at 314.

3. *Id.* at 320 (former N.Y. BANKING LAW § 100-c(12)).

4. *See, e.g.*, Mennonite Bd. of Missions v. Adams, 103 S. Ct. 2706 (1983) (publication notice inadequate to inform ascertainable mortgagee about a tax sale of the mortgaged property); Schroeder v. City of New York, 371 U.S. 208 (1962) (publication notice inadequate to inform ascertainable property owner about condemnation proceedings); Walker v. City of Hutchinson, 352 U.S. 112 (1956) (publication notice inadequate to inform known property owner about a proceeding in which compensation for condemned property was to be fixed); *cf.* Greene v. Lindsey, 456 U.S. 444 (1982) (posting on premises inadequate to inform tenant about forcible entry and detainer action). *But cf.*

most recent such case, *Mennonite Board of Missions v. Adams*,[5] the Court held that notice by publication is constitutionally inadequate as the sole means of informing a known or reasonably ascertainable mortgagee that its rights could be terminated as the result of a tax sale.[6]

Despite *Mullane* and its progeny, the prevailing wisdom in estate administration—expressed almost universally in statutes[7] and court opinions[8]—is that publication notice is constitutionally acceptable as the sole means of informing estate creditors that they must file their claims against the decedent's estate or

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Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951) (publication notice adequate to inform unknown and unascertainable owners about escheat).

5. 103 S. Ct. 2706 (1983).

6. *Id.* at 2712.

7. Nearly all states rely on publication notice as the best or only method to inform creditors of the opening of an estate and the consequent running of the short-term nonclaim statute. A short-term creditor nonclaim statute is defined *infra* at note 37. The nonclaim statutes are reviewed *infra* at notes 36-56 and accompanying text. Many states substantially adopted Uniform Probate Code § 3-801, which provides only for publication notice to creditors:

> Unless notice has already been given under this section, a personal representative upon his appointment shall publish a notice once a week for 3 successive weeks in a newspaper of general circulation in the [county] announcing his appointment and address and notifying creditors of the estate to present their claims within 4 months after the date of the first publication of the notice or be forever barred.

UNIF. PROB. CODE § 3-801, 8 U.L.A. 351 (1983). The following statutes incorporate this provision in substantial detail: ALASKA STAT. § 13.16.450 (1962); ARIZ. REV. STAT. ANN. § 14-3801 (1975); COLO. REV. STAT. § 15-12-801 (Supp. 1984); FLA. STAT. ANN. § 733.701 (West 1983); HAWAII REV. STAT. § 560:3-801 (1976 & Supp. 1983); IDAHO CODE § 15-3-801 (1979); ME. REV. STAT. ANN. tit. 18-A, § 3-801 (1981); MINN. STAT. ANN. § 524.3-801 (West 1975); MONT. CODE ANN. § 72-3-801 (1983); NEB. REV. STAT. § 30-2483 (1979); N.M. STAT. ANN. § 45-3-801 (1978); N.D. CENT. CODE § 30.1-19-01 (Supp. 1983); UTAH CODE ANN. § 75-3-801 (1978).

Most other states' statutes also provide for publication notice to estate creditors: ALA. CODE §§ 43-2-60, 43-2-61 (1975); ARK. STAT. ANN. § 62-2111 (1971); CAL. PROB. CODE § 700 (West Supp. 1984); DEL. CODE ANN. tit. 12, § 2101 (1974 & Supp. 1984); D.C. CODE ANN. § 20-704(a) (1981); GA. CODE ANN. § 53-7-92 (1982); ILL. ANN. STAT. ch. 110½, § 18-3 (Smith-Hurd Supp. 1984); IND. CODE ANN. § 29-1-7-7 (Burns Supp. 1983); IOWA CODE ANN. §§ 633.230, 633.304 (West Supp. 1984); KAN. STAT. ANN. § 59-2236 (1983); KY. REV. STAT. § 395.520 (1984); MD. EST. & TRUSTS CODE ANN. § 7-103 (1974); MICH. COMP. LAWS ANN. § 700.725 (West 1980); MO. ANN. STAT. § 473.033 (Vernon Supp. 1985); NEV. REV. STAT. § 155.020(1)(b) (1983); N.H. REV. STAT. ANN. § 553:16 (1974); N.Y. SURR. CT. PROC. ACT § 1801 (McKinney 1967 & Supp. 1984); N.C. GEN. STAT. § 28A-14-1 (1984); OHIO REV. CODE ANN. § 2113.08 (Page 1976); OKLA. STAT. ANN. tit. 58, § 331 (West Supp. 1984); OR. REV. STAT. § 113.155 (1983); 20 PA. CONS. STAT. ANN. § 3162 (Purdon Supp. 1984); R.I. GEN. LAWS § 33-18-1 (1984); S.C. CODE ANN. § 21-15-630 (Law. Co-op. 1976); S.D. COMP. LAWS ANN. § 30-21-13 (1984); TENN. CODE ANN. § 30-2-306 (1984); TEX. PROB. CODE ANN. § 294 (Vernon 1980 & Supp. 1985); VT. STAT. ANN. tit. 14, § 1201 (Supp. 1984); VA. CODE §§ 64.1-171 (Supp. 1984); WASH. REV. CODE ANN. § 11.40.010 (Supp. 1985); WYO. STAT. § 2-7-201 (1977). *See also* CONN. GEN. STAT. ANN. § 45-205(a) (West 1981) (publication and "such other notice as the court deems necessary"); MISS. CODE ANN. § 91-7-145 (Supp. 1984) (posting on courthouse door is acceptable in lieu of publication); N.J. REV. STAT. § 3B:22-4 (1983) (the court "*may*, whether the estate be solvent or not, order the personal representative to give public notice to creditors") (emphasis added); W. VA. CODE §§ 44-2-2, -4 (1982) (statutes provide that known estate creditors are entitled to mailed notice, but that "failure to mail, or to receive, such notice shall not relieve any creditor, distributee or legatee of the duty to present and prove his claim as required by such notice, nor in any way affect the proceedings pursuant to such notice"); WIS. STAT. ANN. § 859.07 (West Supp. 1984) (mailed notice of the time for filing creditors' claims must be sent to the department of health and social services and to the county clerk of the county "if the decedent was at the time of death or at any time prior thereto a patient or inmate of any state or county hospital or institution").

Only a few statutues clearly provide that publication notice is the only notice that must be given to estate creditors. MO. ANN. STAT. § 472.100 (Vernon Supp. 1985) provides:

their claims will be barred forever. Publication notice has been presumed to be

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3. Service by publication is notice to all heirs and devisees, whether known or unknown or whether residents or nonresidents of this state, spouses and to all creditors and other persons interested in the estate.

4. Provisions in this code for notice to interested persons, other than by publication, do not require such notice to creditors unless otherwise specifically required by the code or by the court.

Similarly, S.D. COMP. LAWS ANN. § 30-21-13 (1984) provides that published notice "shall be the only notice to creditors required and shall constitute the notice to creditors referred to in other statutes."

In some jurisdictions, even notice by publication may be dispensed with under certain circumstances. In Nevada, for example, when summary administration is available (when the gross value of the estate does not exceed $100,000 and the court deems summary administration "advisable considering the nature and character of the estate and the obligations thereof," NEV. REV. STAT. § 145.040 (1983)) notice by publication is required only if the cost of publication does not exceed $25. *Id.* § 145.050(2). Should the cost exceed $25, "the notice shall be given in such manner as the court may require." *Id.* In Tennessee, "[i]f the gross value of the estate under administration does not exceed one thousand dollars ($1,000) in personal and real property, advertisement in a newspaper shall not be necessary, but advertisement by three (3) posted notices . . . shall suffice." TENN. CODE ANN. § 30-2-306(e) (1984).

In some states, claimants without notice are allowed to file their claims after expiration of the claim-filing period. In California and Oklahoma a claimant who proves that he did not receive notice because he was out of the state may file a claim at any time before the decree of distribution. *See* CAL. PROB. CODE § 707(a) (West Supp. 1984); OKLA. STAT. ANN. tit. 58, § 333 (West 1965). A Nevada court, when satisfied that a claimant had no notice, may allow him to file a claim at any time before the final accounting. NEV. REV. STAT. § 147.040(2) (1979). *See also* CONN. GEN. STAT. ANN. § 45-205(c) (West 1981) (court may extend, for cause, the time for a creditor to present a claim, not to exceed thirty days); IOWA CODE ANN. § 633.410 (West Supp. 1984) (failure to file "shall not bar claimants entitled to equitable relief due to peculiar circumstances").

8. In the following cases, publication notice was deemed inadequate to inform known or ascertainable estate creditors of the need to file their claims: Gano Farms, Inc. v. Estate of Kleweno, 2 Kan. App. 2d 506, 582 P.2d 742 (1978); Baker Nat'l Bank v. Henderson, 151 Mont. 526, 445 P.2d 574 (1968), *appeal dismissed*, 393 U.S. 530 (1969); Continental Coffee Co. v. Estate of Clark, 84 Nev. 208, 438 P.2d 818 (1968); Chalaby v. Driskell, 237 Or. 245, 390 P.2d 632 (1964); New York Merchandise Co. v. Stout, 43 Wash. 2d 825, 264 P.2d 863 (1953); *In re* Estate of Fessler, 100 Wis. 2d 437, 302 N.W.2d 414 (1981). In June 1984 the Nevada Supreme Court became the first court to hold publication notice inadequate to inform known estate creditors of the running of a nonclaim statute. Continental Ins. Co. v. Moseley, 98 Nev. 476, 653 P.2d 158 (1982), *vacated*, 103 S. Ct. 3530 (1983), *on remand*, 100 Nev. 70, 683 P.2d 20 (1984). The *Moseley* cases are discussed *infra* at notes 93-106 and accompanying text. *Cf. In re* Estate of Engbrock, 90 N.M. 492, 494, 565 P.2d 662, 664 (1977) ("[C]onstructive notice in a general publication of the hearing of the final account and report is insufficient to meet minimum due process requirements" as to known tort claimants.). All post-*Mullane* cases addressing the constitutional adequacy of publication notice to estate creditors are discussed *infra* at notes 95-121 and accompanying text.

The post-*Mullane* scholarship regarding notice and estate creditors is sparse. Two student works have suggested that due process after *Mullane* requires better-than-publication notice to estate creditors. *See* Note, *Notice Requirements in California Probate Proceedings*, 66 CAL. L. REV. 1111, 1112 (1978) [hereinafter cited as Note, *California Probate Proceedings*]; Note, *Requirements of Notice in In Rem Proceedings*, 70 HARV. L. REV. 1257, 1270 (1957) [hereinafter cited as Note, *In Rem Proceedings*]. Some scholars have concluded that *Mullane* does not apply to probate proceedings. *See, e.g.*, Carson, Mullane *and Probate*, 50 MICH. L. REV. 124 (1951); Marlin & Martens, *Informal Proceedings Under the Uniform Probate Code: Notice and Due Process*, 3 PROSPECTUS 39, 50-58 (1969). Most commentators have addressed the constitutionality of publication notice to heirs or devisees rather than to estate creditors. Notice to heirs and devisees is discussed in: Fraser, *Jurisdiction by Necessity—An Analysis of the* Mullane *Case*, 100 U. PA. L. REV. 305, 316-17 (1951); Hayward, *The Effect of* Mullane v. Central Hanover Bank and Trust Company *upon Publication of Notice in Iowa*, 36 IOWA L. REV. 47, 57 (1950); Note, *California Probate Proceedings*, *supra*, at 1111 ; Note, *In Rem Proceedings*, *supra*, at 1269-70; Note, *The Constitutionality of the No-Notice Provisions of the Uniform Probate Code*, 60 MINN. L. REV. 317 (1976).

Most post-*Mullane* courts have upheld the constitutionality of publication notice of probate of the decedent's will, even to known or knowable heirs and devisees. *See, e.g.*, *In re* Pierce's Estate,

acceptable regardless of whether the creditor's name and address are known or reasonably ascertainable. In many cases, this conventional interpretation has been stated baldly without the support of reasoned analysis.[9] In other cases, the courts have concluded that notice publication is acceptable in the estate creditor situation by distinguishing the factual contexts of *Mullane* and its progeny.[10] Publication notice long has been accepted; inertia of tradition and reluctance to change have helped shield it from attack.[11]

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245 Iowa 22, 60 N.W.2d 894 (1953) (court-prescribed notice of probate by one publication and posting in three public places held adequate to those heirs whose names and addresses were readily discoverable); Durham v. Walters, 474 A.2d 523 (Md. 1984) (publication notice of probate adequate to heir whose identity had not been discovered by due diligence); Haas v. Haas, 504 S.W.2d 44 (Mo. 1973) (publication notice of probate adequate to heir whose address in a federal penitentiary could have been discovered with reasonable diligence), *appeal dismissed*, 417 U.S. 928 (1974); *see also In re* Estate of Decker, 194 Colo. 143, 570 P.2d 832 (1977) (publication notice of probate adequate to devisees under prior will); Anson v. Estate of Anson, 399 N.E.2d 432 (Ind. App. 1980) (failure to mail notice to known devisee until four days before expiration of claim-filing period did not affect running of claim-filing period). *But see* Vogel v. Katz, 64 Ill. App. 2d 126, 212 N.E.2d 295 (1965) (publication notice of probate inadequate when heirs' addresses could have been discovered by due diligence); *In re* Estate of Barnes, 212 Kan. 502, 512 P.2d 387 (1973) (statutory requirement that notice of probate be mailed to known heirs means that personal representative must use due diligence to discover heirs' names and addresses); Hesthagen v. Harby, 78 Wash. 2d 934, 481 P.2d 438 (1971) (en banc) (publication notice of probate proceeding inadequate to inform heirs whose identities and addresses would have been revealed by reasonable inquiry); *In re* Estate of Phillips, 92 Wis. 2d 354, 284 N.W.2d 908 (1979) (statute required mailed notice to "any person whose post-office address is known or can with reasonable diligence be ascertained"; complaining heirs' addresses were held not known or reasonably ascertainable).

Published notice has been held inadequate at other stages of the estate proceeding, particularly when an adversary hearing is required. *See, e.g.*, Michels v. Clemens, 140 Colo. 82, 342 P.2d 693 (1959) (en banc) (publication inadequate to inform devisee of final settlement decree); Allan v. Allan, 236 Ga. 199, 223 S.E.2d 445 (1976) (publication inadequate to inform devisee of spouse's petition for year's support); First Nat'l Bank of Winnetka v. Alleman, 115 Ill. App. 3d 224, 227, 450 N.E.2d 760, 762 (1983) (publication inadequate to inform 300 known or ascertainable cousins of will construction action; not "unduly burdensome or oppressive" to require mailed notice); *In re* Estate of Duval, 133 Vt. 197, 332 A.2d 802 (1975) (dictum; publication inadequate to inform beneficiaries of decree of distribution); *In re* Estate of MacLean, 47 Wis. 2d 396, 177 N.W.2d 874 (1970) (publication inadequate as to parties affected by will construction action). *But cf. In re* Estate of Pfeffer, 16 Ariz. App. 147, 492 P.2d 27 (1971) (no notice required to inform creditor of rejection of a claim); Robinson v. Guman, 163 Conn. 439, 311 A.2d 57 (1972) (court-ordered publication notice to nonresidents was "legal notice" under statute reducing time for appeal of a probate court order from one year to thirty days for anyone with "legal notice"); *In re* Estate of Shew, 48 Wash. 2d 732, 296 P.2d 667 (1956) (posting notice of spouse's petition for an award in lieu of homestead allowance afforded due process).

9. *See, e.g.*, Baker Nat'l Bank v. Henderson, 151 Mont. 526, 529, 445 P.2d 574, 576 (1968) ("[T]he *Mullane* doctrine is not applicable to probate proceedings."), *appeal dismissed*, 393 U.S. 530 (1969); Continental Coffee Co. v. Estate of Clark, 84 Nev. 208, 213, 438 P.2d 818, 821 (1968) ("We are not convinced that [the *Mullane*] doctrine has applicability to our non-claim statute."); Chalaby v. Driskell, 237 Or. 245, 248, 390 P.2d 632, 633 (1964) ("[W]e do not regard the [*Mullane*] doctrine as applicable to the present case.").

10. *See, e.g.*, Brunell Leasing Corp. v. Wilkins, 11 Ariz. App. 165, 462 P.2d 858 (1969) (suggesting that the in rem nature of a probate proceeding rendered *Mullane* inapplicable); Gano Farms, Inc. v. Estate of Kleweno, 2 Kan. App. 2d 506, 509, 582 P.2d 742, 744 (1978) (notice under nonclaim statute "does no more than put into operation a special statute of limitations;" *Mullane* therefore inapplicable); New York Merchandise Co. v. Stout, 43 Wash. 2d 825, 264 P.2d 863 (1953) (court distinguished *Mullane* as involving property rights); *In re* Estate of Fessler, 100 Wis. 2d 437, 302 N.W.2d 414 (1981) (nonclaim statute merely a statute of limitations, not an adjudication to which *Mullane* applies).

11. *See, e.g.*, Gano Farms, Inc. v. Estate of Kleweno, 2 Kan. App. 2d 506, 510, 582 P.2d 742, 745 (1978) ("No one would suggest, we suppose, that the heirs must seek out the decedent's creditors and notify them of the death [of the decedent].").

The United States Supreme Court has not addressed directly the issue of *Mullane*'s applicability to estate creditor nonclaim statutes.[12] The Supreme Court cases decided subsequent to *Mullane*, however, have steadily limited the situations in which constructive notice alone is constitutionally acceptable.[13] These cases indicate that mailed notice or something equally likely to reach the intended recipient is necessary to inform a known or reasonably ascertainable intended recipient about a proceeding that will affect his property rights. Moreover, the Court has indicated approval of a better-than-publication-notice rule in the estate creditor context. One week after deciding *Mennonite Board*, the Court, in a memorandum opinion,[14] vacated *Continental Insurance Co. v. Moseley* (*Moseley I*),[15] a Nevada Supreme Court judgment that had refused to apply *Mullane* in favor of a known estate creditor. The Court remanded the case and directed the Nevada court to reconsider its conclusions in light of *Mennonite Board*.[16]

In June 1984 the Nevada Supreme Court rendered its decision on remand in *Continental Insurance Co. v. Moseley* (*Moseley II*).[17] In *Moseley II*, the Nevada court applied *Mullane* and thus became the first to hold that a known estate creditor's claim could not be barred by the running of a nonclaim statute unless "more than service by publication"[18] was afforded the creditor.

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12. Although the Court has had the opportunity, it has declined to address the issue. Two estate creditor notice cases presenting the issue were resolved procedurally. In Continental Ins. Co. v. Moseley, 103 S. Ct. 3530 (1983), *vacating and remanding* 98 Nev. 476, 653 P.2d 158 (1982), the Court vacated and remanded for further consideration in light of Mennonite Bd. of Missions v. Adams, 103 S. Ct. 2706 (1983). The Court in *Mennonite Bd.* had applied *Mullane* and held that publication notice was inadequate to inform a known or reasonably ascertainable mortgagee about a tax sale. *Mennonite Bd.*, 103 S. Ct. at 2707. The Nevada Supreme Court originally had declined to apply *Mullane* in *Continental Ins. Co.*, holding that publication notice adequately informed a known estate creditor of the need to file a timely claim. *See infra* notes 100-102 and accompanying text. In Baker Nat'l Bank v. Henderson, 393 U.S. 530 (1969), *dismissing appeal from* 151 Mont. 526, 445 P.2d 574 (1968), the Court dismissed an estate creditor's appeal. It has been asserted that such a dismissal constitutes an adjudication on the merits with precedential effect. *In re* Estate of Fessler, 100 Wis. 2d 437, 450 n.8, 302 N.W.2d 414, 421 n.8 (1981) (citing L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-5, at 58 n.8 (1978)).

Additionally, in Farrell v. O'Brien, 199 U.S. 89, 117-18 (1905) the Court held meritless a due process challenge to a will probated without notice. Time has weakened, if not destroyed, the precedential effect of this holding. *See* Comment, *Due Process—The Requirement of Notice in Probate Proceedings*, 40 MO. L. REV. 552, 556-57 (1975).

13. *See* Mennonite Bd. of Missions v. Adams, 103 S. Ct. 2706, 2711-12 (1983) (publication notice inadequate to inform ascertainable mortgagee about a tax sale of the mortgaged property); Greene v. Lindsey, 456 U.S. 444, 453-54 (1982) (posting on premises inadequate to inform tenant about forcible entry and detainer action); Schroeder v. City of New York, 371 U.S. 208, 211 (1962) (newspaper publication and posted notice inadequate to inform ascertainable property owner about condemnation proceedings); Walker v. City of Hutchinson, 352 U.S. 112, 116 (1956) (publication notice inadequate to inform known property owner about a proceeding in which compensation for condemned property was to be fixed). *But cf.* Standard Oil Co. v. New Jersey, 341 U.S. 428, 432-35 (1951) (publication notice adequate to inform unknown and unascertainable owners about escheat).

14. Continental Ins. Co. v. Moseley, 103 S. Ct. 3530 (1983) (mem.), *vacating and remanding* 98 Nev. 476, 653 P.2d 158 (1982).

15. 98 Nev. 476, 653 P.2d 158 (1982), *vacated and remanded*, 103 S. Ct. 3530 (1983). The memorandum opinion, as well as the procedure to grant certiorari, vacate, and remand, is discussed *infra* at notes 102-03 and accompanying text.

16. *Continental Ins. Co.*, 103 S. Ct. at 3530.

17. 100 Nev. 70, 683 P.2d 20 (1984), *on remand after* 103 U.S. 3530 (1983).

18. *Id.* at 71, 683 P.2d at 21. Another court had held in *In re* Estate of Engbrock, 90 N.M. 492,

This Article uses *Moseley II* as both a point of arrival and a point of departure. Because the Supreme Court has not addressed the issue presented in the Nevada case[19] and because the Nevada court's reasoning was summary,[20] part II of the Article analyzes whether due process compels "notice reasonably calculated to apprise" estate creditors of the running of a nonclaim period. Part III of the Article analyzes whether a statutory scheme requiring better-than-publication notice would be workable and supportive of the important estate administration policies to be served.

The ultimate conclusion about the constitutionality of publication notice depends on the workability of a better-notice rule. The *Mullane* Court recognized that constitutionality must be determined "with due regard for the practicalities and peculiarities" of the situation;[21] a due process decision that "would place impossible or impractical obstacles in the way [of achieving a vital interest of the state] could not be justified."[22] Thus, the Constitution would not compel adoption of a better-notice rule that would be unduly burdensome or conflict with substantial state interests.

This Article concludes that due process requires better-than-publication notice to inform known or discoverable estate creditors that a short-term nonclaim period has been invoked. Publication notice to such creditors is a "mere gesture".[23] Although a better-notice requirement would change long-standing practice, such a requirement would be workable and would not impair significantly the important state interests at stake.

## I. BACKGROUND: THE NONCLAIM STATUTES

Analysis of the *Mullane* standard's applicability in the estate creditor context requires an understanding of the course of an estate administration proceeding and the operation of creditor nonclaim statutes.[24] The following discussion

565 P.2d 662 (1977), that a known tort claimant was entitled to notice of the hearing on final distribution. The court stated: "[W]e hold that with respect to *known* creditors, tort claimants, and other interested persons, constructive notice in a general publication of the hearing of the final account and report is insufficient to meet minimum due process requirements." *Id.* at 494, 565 P.2d at 664.

19. *See supra* note 12.

20. Ironically, the Nevada court applied *Mullane*'s better-notice rule as summarily as the conventional cases had refused to apply it. The court's anaylsis was limited to quoting *Mullane* and citing *Mennonite Bd. See Moseley II*, 100 Nev. at 71, 683 P.2d at 21.

21. *Mullane*, 339 U.S. at 314-15.

22. *Id.* at 313-14.

23. *Id.* at 315.

24. Estate administration statutes share common purposes and often derive from common sources. These sources include the Model Probate Code, published in 1946 under the sponsorship of the American Bar Association, and the Uniform Probate Code (UPC), promulgated in 1969 by the National Conference of Commissioners on Uniform State Laws. Despite their common purposes and sources, the state statutes vary enough to make precise delineation of a single, typical estate proceeding impossible. Even those states that have enacted the UPC in its entirety have altered it somewhat. *Compare* COLO. REV. STAT. § 15-12-803(b) (1973) (creditor's claims barred "[w]ithin one year after the decedent's death, if notice to creditors has not been published") *and* MINN. STAT. ANN. § 524.3-803(a)(2) (West 1975 & Supp. 1984) (identical to UPC) (creditors' claims barred "[w]ithin three years after the decedent's death, if notice to creditors has not been published") *with* UNIF. PROB. CODE § 3-803(a)(2), 8 U.L.A. 354-55 (1983) (creditor's claims barred "[w]ithin three [3] years after the decedent's death, if notice to creditors has not been published"). *Compare* UNIF.

of the common features of estate administration and nonclaim statutes, therefore, serves as the background for an identification of potentially unconstitutional creditor nonclaim notice provisions.

Administration of an estate involves collection of the decedent's assets, payment of the decedent's debts, and proper distribution of any remaining assets.[25] Administration begins only when the court issues letters testamentary or letters of administration to a personal representative.[26] The court may appoint a personal representative only if it finds that the decedent is dead and either was domiciled or owned property within the state or county where the court is located.[27]

Court involvement is also necessary to establish the validity of the decedent's will. Generally, a will can not transfer title to the named devisees unless a court admits it to probate.[28] Probate of the will and issuance of letters often occur at the same time; however, those two distinct events need not occur simultaneously or in any particular order, and neither is required. A will may be probated for a decedent whose estate does not require administration; an intestate estate may be administered by a personal representative; or an intestate's estate may not require administration.[29]

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PROB. CODE § 3-306(a), 8 U.L.A. 251 (1983) ("no other notice of informal probate is required") *with* MINN. STAT. ANN. § 524.3-306 (West 1975 & Supp. 1984) ("Notice of the informal probate proceedings, in the form prescribed by court rule, shall be given under the direction of the clerk of court by publication once a week for two consecutive weeks in a legal newspaper and by mailing a copy of the notice by ordinary first class mail to all interested persons, other than creditors."). For a general discussion of the effect of differences in state statutes, see UNIF. PROB. CODE art. III, General Comment, 8 U.L.A. 218 (1983) ("Variations in language from state to state can be tolerated without loss of the essential purposes of procedural uniformity and flexibiltiy, *if* the following [listed] characteristics are carefully protected in the redrafting process.").

25. On estate administration in general, see T. ATKINSON, HANDBOOK OF THE LAW OF WILLS §§ 103-144 (2d ed. 1953).

26. *See* UNIF. PROB. CODE § 3-103, 8 U.L.A. 226 (1983) ("[T]o acquire the powers and undertake the duties and liabilities of a personal representative of a decedent, a person must be appointed by order of the Court or Registrar, qualify and be issued letters. Administration of an estate is commenced by the issuance of letters."). The court-appointed personal representative is the decedent's official successor. In most jurisdictions, the personal representative is the only proper plaintiff in an action to recover assets of the estate and the only proper defendant in an action against the decedent by creditors. *See* T. ATKINSON, *supra* note 25, § 103, at 567, 570-71.

In some jurisdictions, statutes provide for dispensing with the administration of small or insolvent estates. No personal representative is appointed when these statutes are invoked. Instead, an unofficial successor to the decedent's property is authorized to collect the decedent's assets by affidavit. *See, e.g.*, CAL. PROB. CODE §§ 630-631.1 (West 1954 & Supp. 1984); IND. CODE ANN. §§ 29-1-8-1 to -4.5 (Burns Supp. 1983); WIS. STAT. ANN. §§ 867.01, 867.03 (West 1957 & Supp. 1984-85); *see also* UNIF. PROB. CODE §§ 3-1201, -1202, 8 U.L.A. 413-14 (1983). Under the no-administration statutes, persons are protected if they in good faith turn over property to one with a proper affidavit. *Id.*

27. *See* T. ATKINSON, *supra* note 25, § 107, at 595-98.

28. *See, e.g.*, IND. CODE ANN. § 29-1-7-24 (Burns 1971 & Supp. 1983) (With limited exceptions, "no will is effective for the purpose of providing title to, or the right to the possession of, any real or personal property disposed of by the will, until it has been admitted to probate."); *see also* WIS. STAT. ANN. § 856.13 (West Supp. 1984-85) ("No will shall pass any property unless it has been proved and admitted to probate or informally admitted to probate under ch. 865."); UNIF. PROB. CODE § 3-102, 8 U.L.A. 224 (1983) (With limited exceptions, "to be effective to prove the transfer of any property or to nominate an executor, a will must be declared to be valid by an order of informal probate by the Registrar, or an adjudication of probate by the Court.").

29. *See* T. ATKINSON, *supra* note 25, §§ 96, 103, 104, at 565-67, 577.

A number of events might take place during administration of a decedent's estate, some involving existing identifiable adversaries, some involving only potentially existing or identifiable adversaries, and others involving no likely adversaries at all.[30] Eventually, when administration is complete, the personal representative will petition the court for approval of his final account and a decree of final distribution and discharge.[31] The decree of distribution and discharge ends all disputes over the administration and distribution of the assets.[32]

Various events during administration may or may not need to be preceded by notice, hearing, or court order, depending on the provisions of the decedent's will and the provisions of the applicable statutes. Notice and hearing statutes vary significantly, not only in their provisions regarding when notice and hearing are required, but also in their provisions regarding acceptable notice. Many probate code provisions for notice and hearing have been attacked on due process grounds, particularly those that rely on publication or posting of notice to inform known or identifiable adversaries of an event that might impair their rights.[33] Some of these publication notice provisions have withstood due process attack, but others have been invalidated.[34] The estate creditor nonclaim notice provisions, however, consistently withstood due process attack until June

30. A personal representative's petition to sell undevised, undesired property to pay established creditor's claims is an example of an event with no likely identifiable adversary. A petition to determine heirship, brought by all the known and knowable heirs of the decedent, is an example of an event with only potentially existing or identifiable adversaries. Events with existing and identifiable adversaries include situations in which the personal representative has disallowed a creditor's claim, or the heirs have contested the probate of a will, or certain devisees seek a more favorable construction of the will.

31. Administration is complete once the assets have been collected, debts and taxes have been determined and paid, and the remaining assets distributed to the rightful successors. T. ATKINSON, *supra* note 25, § 143, at 797.

Different rules apply to unsupervised or informal personal representatives. *Compare* IND. CODE ANN. § 29-1-7.5-4 (Burns Supp. 1983) (Neither a court accounting nor a decree of distribution and discharge is authorized for an unsupervised personal representative.) *with* WIS. STAT. ANN. § 865.16 (West Supp. 1984-85) (An unsupervised personal representative may have his accounts settled in court.).

32. *See* T. Atkinson, *supra* note 25, § 143. Fraud or mistake may negate the apparent finality of the decree in some jurisdictions. *See, e.g.*, IND. CODE ANN. § 29-1-1-21 (Burns 1971 & Supp. 1983) ("For illegality, fraud or mistake, upon application filed within one year after the discharge of the personal representative upon final settlement, the court may vacate or modify its orders, judgments and decrees or grant a rehearing therein."); *see also* UNIF. PROB. CODE § 1-106, 8 U.L.A. 26 (1983) ("Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person (other than a bona fide purchaser) benefitting from the fraud, whether innocent or not.").

33. *See, e.g.*, cases discussed *supra* note 8. Many jurisdictions have provisions for informal or unsupervised administration of a decedent's estate if interested parties consent. When an estate is administered informally, court orders and hearings are unnecessary. *See* IND. CODE ANN. § 29-1-7.5-3 (Burns Supp. 1983) (an "unsupervised" personal representative may perform 27 enumerated acts and "any other act necessary or appropriate to administer the estate" without order of the court); WIS. STAT. ANN. § 865.01 (West Supp. 1984-85) (" 'Informal administration of estates' means the administration of decedents' estates, testate and intestate, without exercise of continuous supervision by the court."). Unsupervised administration is the ordinary method of administration under the UPC. *See* UNIF. PROB. CODE § 3-502, 8 U.L.A. 293 (1983) (Supervised administration shall be ordered only if the decedent's will directs it or if the court finds it necessary.).

34. *See* cases discussed *supra* note 8.

1984.[35]

Creditor nonclaim statutes in both Uniform Probate Code and non-Code states, although not uniform in detail, generally accept publication in a local newspaper as a reasonable method of informing the decedent's creditors that they must take affirmative steps to preserve their rights.[36] Most states have two distinct nonclaim provisions: a short-term provision of two to six months tied to the opening of the decedent's estate and a long-term provision of one to five years tied to the decedent's death.[37] If a creditor's claim is not filed within the relevant short- or long-term period, the claim against the decedent's estate or his successors generally is barred.[38]

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35. *Id.*

36. *See* statutes discussed *supra* note 7.

37. The phrase "long-term provision" is not a term of art—it is used in this Article to identify provisions barring claims if an estate is not opened within one to five years after the decedent's death. The phrase "short-term provision" also is not a term of art—it is used in this Article to identify provisions barring claims that are not filed within two to six months after the opening of an estate or the published notice of such opening.

38. By far the most common result of failure to file a timely claim is the barring of that claim against the estate and successors. The following statutes are substantially identical to UNIF. PROB. CODE §§ 3-801, -803, 8 U.L.A. 351, 354 (1983), which provide that unfiled claims are barred forever: ALASKA STAT. §§ 13.16.450, .460 (1972); ARIZ. REV. STAT. ANN. §§ 14-3801, -3803 (1975); COLO. REV. STAT. §§ 15-12-801, -803 (1973 & Supp. 1984); HAWAII REV. STAT. §§ 560:3-801, -803 (1976 & Supp. 1984); IDAHO CODE §§ 15-3-801, -803 (1979); ME. REV. STAT. ANN. tit. 18-A, §§ 3-801, -803 (1981); MINN. STAT. ANN. §§ 524.3-801, -803 (West 1975 & Supp. 1984); MONT. CODE ANN. §§ 72-3-801, -803 (1983); NEB. REV. STAT. §§ 30-2483, -2485 (1979); N.M. STAT. ANN. §§ 45-3-801, -803 (1978); N.D. CENT. CODE §§ 30.1-19-01, -03, (1976 & Supp. 1983); UTAH CODE ANN. §§ 75-3-801, -803 (1978).

In the following non-UPC states an unfiled claim also is barred forever: ALA. CODE § 43-2-350 (1982); ARK. STAT. ANN. § 62-2601 (1971); DEL. CODE ANN. tit. 12, § 2102 (1979); D.C. CODE ANN. §§ 20-704, -903 (1981); FLA. STAT. ANN. §§ 733.701, .702 (West 1983 & Supp. 1984); ILL. ANN. STAT. ch. 110½, §§ 18-3, -12 (Smith-Hurd 1978); KAN. STAT. ANN. § 59-2239 (1983); KY. REV. STAT. § 396.025 (1984); MO. ANN. STAT. § 473.360.2 (Vernon Supp. 1985); N.C. GEN. STAT. § 28A-19-3(a) (1984); TENN. CODE ANN. § 30-2-310 (1984); VT. STAT. ANN. tit. 14, § 1203 (Supp. 1984); WIS. STAT. ANN. § 859.01 (West 1971).

In Georgia, unfiled claims are not barred forever:

> Creditors failing to give notice of claims within three months from the date of publication of the administrator's or executor's last notice shall lose all rights to an equal participation with creditors of equal dignity to whom distribution is made before notice of such claims is brought to the administrator or executor, and they may not hold the administrator or executor liable for a misappropriation of the funds. If, however, there are assets in the hands of the administrator or executor sufficient to pay such debts and if no claims of higher dignity are unpaid, the assets shall be thus appropriated notwithstanding failure to give notice.

GA. CODE ANN. § 53-7-92 (1981). Presumably, no assets remain "in the hands" of the personal representative after final distribution, and claims thereafter are barred. A similar Oregon statute provides that claims filed within four months after first published notice have priority, but claims filed before twelve months after first published notice and before the personal representative files his final account may be paid. OR. REV. STAT. § 115.005 (1983). In Iowa, failure to file "shall not bar claimants entitled to equitable relief due to peculiar circumstances." IOWA CODE ANN. § 633.410 (West 1964). Other states extend the time for filing claims under certain circumstances, but require filing before distribution to avoid forfeit of the claim. CAL. PROB. CODE § 707 (West Supp. 1984) (if claimant proves that he "had not received notice, by reason of being out of the state," the claim may be filed at any time before a decree of distribution); CONN. GEN. STAT. ANN. § 45-205(c) (West 1958) (30-day extension may be granted for cause); NEV. REV. STAT. § 147.040(2) (1979) (when court is satisfied claimant had no notice, claim may be filed any time before final accounting); OKLA. STAT. ANN. tit. 58, § 333 (West 1965) (similar to California § 707); R.I. GEN. LAWS § 33-11-5 (1984) ("a creditor who, by reason of accident, mistake or any other cause, has failed to file his claim, may [before distribution] . . . petition the probate court for leave to file," and the court may

Long-term nonclaim periods usually begin to run at the decedent's death and usually bar all claims unless administration is begun within a defined period of time after death.[39] No notice or court order is required to invoke their operation. Although the time periods vary, the shortest period is nine months[40] and the longest is six years.[41]

Short-term nonclaim periods usually begin to run either when letters are issued to the personal representative[42] or when notice of the issuance of the letters is published in the appropriate newspaper.[43] No jurisdiction allows a

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grant leave in its discretion); S.D. COMP. LAWS ANN. § 30-21-20 (1984) (similar to California § 707).

In Dubuque Fire & Marine Ins. Co. v. Wilson, 213 F.2d 115 (4th Cir. 1954), the court held that South Carolina's nonclaim statutes "are designed for the personal protection of executors and administrators, and do not bar a creditor who fails to comply with the statutes from enforcing his claim against the persons into whose possession the assets of the estate have come." *Id.* at 121.

If a claim is filed properly and timely, the personal representative must decide whether to allow it. *See, e.g.*, IND. CODE ANN. § 29-1-14-10 (Burns 1971 & Supp. 1983) (claims neither disallowed nor allowed within 15 days after the claim-filing period are transferred for trial); *see also* UNIF. PROB. CODE § 3-806, 8 U.L.A. 364-65 (1983) (failure to mail notice of disallowance within 60 days after the claim-filing period is in effect a notice of allowance). Statutes often provide for notice to claimants of the decision to disallow a claim. *See, e.g.*, DEL. CODE ANN. tit. 12, § 2102(c) (1979) (notification of rejection in writing delivered or mailed to last known address of the claimant); NEB. REV. STAT. § 30-2488(a) (1979) (mailed notice of disallowance); UNIF. PROB. CODE § 3-806, 8 U.L.A. 364-65 (1983) (mailed notice of disallowance). *But see In re* Estate of Pfeffer, 16 Ariz. App. 147, 492 P.2d 27 (1971) (claimant must keep himself advised of the status of his claim).

39. UNIF. PROB. CODE § 3-803(a), 8 U.L.A. 354 (1983) provides that claims are barred "unless presented . . . within three [3] years after the decedent's death, if notice to creditors has not been published." One UPC state, Colorado, changed the three year period to one year. COLO. REV. STAT. § 15-12-803 (1973). Although the period varies, the procedure is equivalent in the following long-term statutes: ARK. STAT. ANN. § 62-2601(d) (1971) (five years); ILL. REV. STAT. ch. 110½, § 18-12(b) (1978) (three years); IND. CODE ANN. § 29-1-14-1(d) (Burns 1971 & Supp. 1983) (one year); IOWA CODE ANN. § 633.413 (West 1964) (five years); KAN. STAT. ANN. § 59-2239(1) (1978) (nine months); KY. REV. STAT. § 396.025 (1984) (three years); MICH. COMP. LAWS ANN. § 700.735 (West 1980) (six years); MO. ANN. STAT. § 473.360(3) (Vernon Supp. 1984) (three years); N.H. REV. STAT. ANN. § 556:29 (1974) (two years); N.C. GEN. STAT. § 28A-19-3(f) (1984) (three years); OR. REV. STAT. § 115.005(4) (1983) (three years).

40. KAN. STAT. ANN. § 59-2239(1) (1983).

41. MICH. COMP. LAWS ANN. § 700.735 (West 1980).

42. The following short-term statutes provide that the time period begins to run when letters are issued to the personal representative: ALA. CODE § 43-2-350 (1982) (six months); CAL. PROB. CODE § 700(a) (West Supp. 1984) (four months); DEL. CODE ANN. tit. 12, § 2102(a) (1979) (six months); ILL. REV. STAT. ch. 110½, §§ 18-3, -12 (1978) (six months); MD. EST. & TRUSTS CODE ANN. §§ 8-103, -104 (1974) (six months); N.H. REV. STAT. ANN. § 556:3 (1974) (six months). *See also* WIS. STAT. ANN. § 859.05 (West Supp. 1984-85) (three months from court order fixing time for barring of claims).

43. The following statutes provide that the time period begins to run when notice of the issuance of letters is published in the appropriate newspaper: ARK. STAT. ANN. § 62-2601(a) (1971) (six months); D.C. CODE ANN. § 20-903(a)(1) (1981) (six months); FLA. STAT. ANN. § 733-701 (West 1983) (three months); IND. CODE ANN. 29-1-14-1 (Burns Supp. 1983) (three months); KAN. STAT. ANN. § 59-2239(1) (1983) (six months); MISS. CODE ANN. § 91-7-151 (Supp. 1984) (90 days); MO. REV. STAT. § 473.033 (1978) (six months); NEV. REV. STAT. §§ 145.060, 147.040 (1979) (sixty days in summary administration, which is available in the court's discretion when the gross value of the estate does not exceed $100,000; 90 days otherwise); OKLA. STAT. ANN. tit. 58, § 331 (West Supp. 1984-85) (two months, or one month when decedent has been dead for five years); S.C. CODE ANN. § 21-15-640 (Law. Co-op. 1976) (five months); TENN. CODE ANN. § 30-2-310 (1984) (six months); VT. STAT. ANN. tit. 14, § 1203(a)(1) (Supp. 1984) (four months). UNIF. PROB. CODE § 3-803(a)(1), 8 U.L.A. 354 (1983), is a short-term statute that requires filing within four months after the first publication of notice. One UPC state reduced this period to three months. N.D. CENT. CODE § 30.1-19-03(1)(a) (Supp. 1983).

If publication of notice starts the running of the short-term period, publication fulfills the dual

short-term statute to be invoked without court involvement in the issuance of the letters.[44]

Short-term statutes rely on publication in a local newspaper to notify creditors that they must file their claims at the appropriate place within the defined time to preserve their rights to payment out of the estate.[45] Some statutes provide that publication must be supplemented by mailed notice to heirs and devisees;[46] however, only one statute even mentions supplemental mailed notice to known or discoverable creditors.[47] Even these minimal publication requirements sometimes are relaxed when the gross estate does not exceed a certain value;[48] some statutes excuse notice under certain conditions.[49] Additionally,

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purpose of starting the period as well as informing the world of the stated facts. If appointment of the personal representative starts the period running, publication serves only as a device for informing the world of the facts stated.

44. The court also must find that decedent is dead and either was domiciled in the court's jurisdiction or owned property there. *See* T. ATKINSON, *supra* note 25, § 107, at 595-98.

In addition, in the following jurisdictions the court sends the material to be published: DEL. CODE ANN. tit. 12, § 2101(a) (1979); IND. CODE ANN. § 29-1-7-7 (Burns Supp. 1983); MO. REV. STAT. § 473.033 (1978); TENN. CODE ANN. § 30-2-306(a) (1984). In the other jurisdictions the personal representative arranges for the publication: ARK. STAT. ANN. § 62-2111 (1971); ILL. ANN. STAT. ch. 110½, § 18-3 (Smith-Hurd 1978); MISS. CODE ANN. § 91-7-145 (Supp. 1984); NEV. REV. STAT. § 147.010 (1979); S.C. CODE ANN. § 21-15-630 (Law. Co-op. 1976). The personal representative arranges for publication under UNIF. PROB. CODE § 3-801, 8 U.L.A. 351 (1983).

If the personal representative arranges for publication, he generally must file proof of publication with the court. *See* CAL. PROB. CODE §§ 333, 700(c) (West Supp. 1984); ILL. REV. STAT. ch. 110½ § 18-3 (1978); MISS. CODE ANN. § 91-7-145 (1973); S.C. CODE ANN. § 21-15-630 (Law. Co-op. 1976); TENN. CODE ANN. § 30-2-306(d) (1984).

45. The following statutes, for example, describe the appropriate newspaper as a newspaper of general circulation in the county in which the court is located: IND. CODE ANN. § 29-1-7-7 (Burns 1983); NEV. REV. STAT. § 145.050(2) (1983); *see also* UNIF. PROB. CODE §§ 3-801, -804, 8 U.L.A. 351, 361 (1983). Some statutes require filing of claims with the court: IND. CODE ANN. § 29-1-14-1 (Burns Supp. 1983); NEV. REV. STAT. § 145.060(1) (1983). Connecticut permits presentation to the personal representative or to the court. CONN. GEN. STAT. ANN. § 45-205 (West 1981).

46. *See, e.g.*, ARK. STAT. ANN. § 62-2111 (1971) (must serve copy on "each heir and devisee whose name and address are known"); FLA. STAT. ANN. § 733-212 (West 1983) (must serve copy on "surviving spouse and all beneficiaries known to the personal representative"); IND. CODE ANN. § 29-1-7-7 (Burns Supp. 1983) (mail to heirs, devisees, and legatees listed in the "petition for probate or letters"); KAN. STAT. ANN. § 59-2209 (1983) (mail to "each heir, devisee, and legatee . . . whose name and address are known to [the petitioner]"). Often, however, there is no sanction for failure to discover or list discoverable heirs and devisees. *See, e.g.*, Anson v. Estate of Anson, 399 N.E.2d 432, 435-36 (Ind. App. 1980) (holding that failure to comply with statutory requirement that notice be mailed to heirs, devisees, and legatees, as well as be published, did not prevent the running of the limitation period from the date of publication); W. VA. CODE § 44-2-4 (1982) (failure of representative to send required mailed notice in no way affects creditors' duty to file). Some statutes provide for broader mailed notice: CAL. PROB. CODE § 700.1 (West Supp. 1984) (mail to Director of Health Services upon death of medical assistance recipients); WIS. STAT. ANN. § 859.07 (West Supp. 1984-85) (mailed notice to department of health and social services upon death of patient in state or county institution).

47. W. VA. CODE § 44-2-4 (1982) provides that known estate creditors are entitled to mailed notice; however, it further provides that "failure to mail, or to receive, such notice shall not relieve any creditor, distributee or legatee of the duty to present and prove his claim as required by such notice, nor in any way affect the proceedings pursuant to such notice."

48. *See, e.g.*, ARK. STAT. ANN. § 62-2111 (1971) (posting is sufficient if estate's value does not exceed $1000 exclusive of homestead); DEL. CODE ANN. tit. 12, § 2101(b) (Supp. 1984) (posting is sufficient if gross personal estate's value is less than $12,500 and gross real and personal value is less than $15,000); TENN. CODE ANN. § 30-2-306(e) (1984) (posting is sufficient if estate's value does not exceed $1000); *see also* NEV. REV. STAT. §§ 145.040, .050 (1983) (court may direct the manner of notice if estate's gross value is less than $100,000, and if publication costs more than $25).

49. *See, e.g.*, VT. STAT. ANN. tit. 14, § 1201(b) (Supp. 1984) (publication excused if court finds

the personal representative often lacks authority to waive noncompliance with the nonclaim provisions.[50]

Long-term and short-term nonclaim statutes normally apply only to debts or other demands of a pecuniary nature enforceable against the decedent during his lifetime;[51] however, the statutes often apply to all such claims, whether the claims are matured, liquidated, due, or absolute.[52] Nonclaim statutes usually do not apply to obligations incurred after the decedent's death, such as estate and inheritance taxes, attorney fees, administration costs, and funeral expenses;[53]

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that no debts exist, or that all debts are known and can be paid, or that value of estate is less than $2500 and is assigned for the support of the widow and children; however, assets distributed are subject to claims later established).

The statutes of some states allow the period to be tolled for hardship on the part of the creditor: CONN. GEN. STAT. ANN. § 45-205(c) (West 1958) (for cause, court may extend time for a creditor to present a claim but not more than 30 days beyond original period); CAL. PROB. CODE § 707(a) (West Supp. 1984) (if claimant proves by affidavit to court's satisfaction that he "had not received notice, by reason of being out of the State," or that he filed a good faith claim in another proceeding for the same deceased, claim may be filed within one year of the prescribed period's expiration and before final distribution); IOWA CODE ANN. § 633.410 (West 1964 & Supp. 1984-85) (claim-filing provision "shall not bar claimants entitled to equitable relief due to peculiar circumstances"); NEV. REV. STAT. § 147.040(2) (1979) (when the court is satisfied that claimant had no notice, claim may be filed any time before final accounting); OKLA. STAT. ANN. tit. 58, § 333 (West 1965) (if claimant proves by affidavit to court's satisfaction that she had no notice by reason of being out of state, claim may be presented at any time before entry of decree of distribution); R.I. GEN. LAWS § 33-11-5 (1984) ("a creditor who, by reason of accident, mistake or any other cause, has failed to file his claim, may . . . petition the court for leave to file [before distribution]"; court may grant leave in its discretion); S.D. CODIFIED LAWS ANN. § 30-21-20 (1984) (similar to Oklahoma § 333).

50. *See, e.g.*, WIS. STAT. ANN. § 859.47 (West Supp. 1984-85) (waiver only with consent of heirs or beneficiaries affected); *see also* UNIF. PROB. CODE § 3-802, 8 U.L.A. 352 (1983) (waiver only with consent of all successors); *see supra* note 49. *But see* IOWA CODE ANN. § 633.410 (West 1964 & Supp. 1984-85) (personal representative may waive filing requirement).

51. *See, e.g.*, Vonderahe v. Ortman, 128 Ind. App. 381, 384, 146 N.E.2d 822, 825 (1958) ("[A claim] is a debt or demand of a pecuniary nature which could have been enforced against the decedent in his lifetime and could have been reduced to a simple money judment."); Maxwell v. Yuncker, 419 So. 2d 580, 583 (Miss. 1982) ("[A]n inchoate and contingent claim involving the ownership . . . of specific property" is not a claim which requires "a specific money demand due or to become due."); *see also* ALA. CODE § 43-2-350(b) (1975) (claim-filing provision does not apply to heirs' or legatees' claims).

No valid claim can be filed if the general statute of limitations has run at the time of the decedent's death. *See* ARK. STAT. ANN. § 62-2601(b) (1971) ("No claim shall be allowed which was barred by any statute of limitations at the time of the decedent's death."); WIS. STAT. ANN. § 859.15 (West Supp. 1984-85) ("A claim shall not be allowed which was barred by any statute of limitations at the time of the decedent's death.").

52. *See, e.g.*, ARK. STAT. ANN. § 62-2601(a) (1971) ("due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise"); DEL. CODE ANN. tit. 12, § 2102(b) (1979) ("due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis"); D.C. CODE ANN. § 20-903(a)(1) (1981) ("due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis") (same as UNIF. PROB. CODE § 3-803(a), 8 U.L.A. 354 (1983)); IND. CODE ANN. § 29-1-14-1(a) (Burns Supp. 1983) ("due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise"); WIS. STAT. ANN. § 859.01(1) (West 1971) ("due or to become due, absolute or contingent, liquidated or unliquidated"); *see also* UNIF. PROB. CODE § 3-803(a), 8 U.L.A. 354 (1983) ("[d]ue or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis"). *But see* OKLA. STAT. ANN. tit. 58, § 333 (West 1965) (claim that is not due, or is contingent, may be filed within one month after it becomes due).

53. *See, e.g.*, IND. CODE ANN. § 29-1-14-1(a) (Burns Supp. 1983) (administration expenses excluded); WIS. STAT. ANN. § 859.01(3) (West Supp. 1984-85) (claims for funeral and administration expenses, claims for described taxes, claims of the United States, and claims based on tort excluded). Other states, however, have special limitation periods for after-death claims against the estate. *See*

and they usually do not bar the enforcement of liens and encumbrances, or preclude assertions of ownership of property in the possession of the personal representative.[54] Tort claimants often are treated more liberally, especially to the extent that insurance proceeds rather than estate assets will be used to compensate the victim.[55] Actions instituted before death usually are not affected by the claim-filing requirements.[56]

One example demonstrates the potential unfairness of a short-term nonclaim provision that relies on publication notice. Creditor *C* loaned individual *D* $5000 in 1983. Interest was to be paid quarterly for three years, and the principal was due and payable in 1986. If *D* died in 1984 early in a quarter and her estate was opened soon thereafter, a two-month nonclaim period might run before a payment was missed. A six-month nonclaim period would extend over only one missed payment. In either situation the creditor might lack sufficient reason to inquire about the well-being of the debtor.[57] The nonclaim statutes of

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DEL. CODE ANN. tit. 12, § 2102(b) (1979) (within six months after personal representative's performance is due); D.C. CODE ANN. § 20-903(a)(2) (1981) (within six months after claim arose); *see also* UNIF. PROB. CODE § 3-803(b), 8 U.L.A. 355 (1983) (within four months after personal representative's performance is due).

54. *See, e.g.*, ARK. STAT. ANN. § 62-2601(e) (1971) (liens not affected); D.C. CODE ANN. § 20-903(b) (1981) (same); IND. CODE ANN. § 29-1-14-1(e) (Burns Supp. 1983) (same); S.C. CODE ANN. § 21-15-640 (Law. Co-op. 1976) (obligations secured by mortgages or other liens not affected); *see also* UNIF. PROB. CODE § 3-803(c)(1), 8 U.L.A. 355 (1983) (proceedings to enforce mortgages, pledges, or liens are not affected).

Applying a short-term nonclaim provision as a bar to the assertion of possessory interests in specific property in the possession of the personal representative would create an inordinately short adverse possession statute of limitations. *See In re* Estate of Toigo, 107 Ill. App. 2d 395, 404, 246 N.E.2d 68, 73 (1969) ("absurd results would occur" if actions to recover property were barred if not filed within the claim-filing period). The *Toigo* court stated:

> For example, suppose by mistake an asset which was never owned by the decedent was inventoried in her estate and the claim period passed. No one would say that the mere passage of time, and in this instance a relatively short time, somehow passed title to the decedent, and therefore, the true owner could not have his property back due to the lapse of time.

*Id.* Florida, however, bars claims for personal property in the possession of the personal representatives. *See* FLA. STAT. ANN. § 733.702(1) (Harrison 1983).

55. *See, e.g.*, ARK. STAT. ANN. § 62-2601(f) (1971) (tort claims excluded to extent of insurance coverage); CONN. GEN. STAT. ANN. § 45-205(f) (West 1958) (claims founded in tort excluded); D.C. CODE ANN. § 20-903(d) (1981) (claims covered by insurance excluded); ILL. ANN. STAT. ch. 110½, § 18-12(a) (Smith-Hurd Supp. 1984-85) (claims excluded to the extent estate is protected by liability insurance); IND. CODE ANN. § 29-1-14-1(f) (Burns Supp. 1983) (same as Connecticut § 45-205(f)); KAN. STAT. ANN. § 59-2239(2) (1983) (tort claims excepted); WIS. STAT. ANN. § 859.01(3) (West Supp. 1984-85) (same as Connecticut § 45-205(f)); *see also* UNIF. PROB. CODE § 3-803(c)(2), 8 U.L.A. 355 (1983) (proceedings to establish decedent's liability excluded to the limits of insurance protection only).

56. *See, e.g.*, CONN. GEN. STAT. ANN. § 45-205(f) (West 1958) (claims on which an action is pending in court against decedent at time of death excepted); D.C. CODE ANN. § 20-903(c) (1981) (actions instituted before death not affected); IND. CODE ANN. § 29-1-14-2 (Burns Supp. 1983) (claimant need not file claim if pending action). *But see* Continental Ins. Co. v. Moseley, 98 Nev. 476, 653 P.2d 158 (1982) (construing NEV. REV. STAT. ch. 145 (1979) to bar claim which was the subject of an action pending at decedent's death).

57. *C* might reside in the same community as *D*, or *C* might reside in another county or state. If *C* does not subscribe to and read regularly the newspaper in which a notice of the opening of *D*'s estate would be published, he is likely to be unaware of the need to file his claim. If the creditor is unaware of the need to file, the creditor's claim will be defeated prematurely and unexpectedly by the running of a short-term nonclaim period. It is possible that even those creditors who subscribe to the appropriate newspapers could be unaware of the need to file a claim. The debtor might have

many states, however, would run even though the creditor was unaware of it, even though his lack of awareness was reasonable, and even though the debt was not due when *D* died. Significantly, as the law stands today, *D*'s heirs, devisees, and personal representative could know of the debt to *C* and intentionally take no action, hoping that the nonclaim period would pass before *C* learned of *D*'s death.[58]

It is axiomatic that a fundamental requirement of due process is the opportunity to be heard in defense of one's property and that notice is the best means to maximize this opportunity.[59] Therefore, if process is due, the known creditor seems to have been denied due process if notice that his claim will be barred for failure to act promptly has been given only by publication in a local newspaper. The known creditor deserves better notice of the estate proceedings and the claim-filing procedures so that he may decide whether to pursue his claim against the estate.[60]

Even short-term nonclaim statutes that require supplementation of published or posted notice with mailed notice to heirs or devisees potentially are unconstitutional,[61] except to the extent that the notified heirs and devisees also are claimants. Statutes that permit or mandate that a court designate the type of notice to be provided also seem unconstitutional to the extent that the court chooses to allow publication or posting in lieu of notice more reasonably calculated to inform known or knowable creditors.[62] On the other hand, for reasons dealt with more fully in part II, long-term statutes probably do not deny due

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moved to a new residence shortly before his death; the creditor would not know which paper to read or how to contact the debtor.

If it is assumed that *C* knows the law and therefore expects the possibility of death and the running of a short-term nonclaim period, the nature of the burden placed on the creditor still must be considered. He must monitor regularly every relevant publication or contact the debtor personally every two, four, or six months. It is also necessary to compare the creditor's burden to the burden placed on the personal representative who invokes the short-term period on behalf of the estate. According to the Court in Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 320 (1950): "[I]t is too much in our day to suppose that each or any individual . . . does or could examine all that is published to see if something may be tucked away in it that affects his property interests."

58. An heir or devisee could pay the interim interest, either innocently or deviously, and the creditor never would suspect that his right to the $5000 soon would be barred against the decedent's estate or his successors. *See* New York Merchandise Co. v. Stout, 43 Wash. 2d 825, 264 P.2d 863 (1953) (spouse made payments on account to creditor after the decedent's death).

59. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (at a minimum due process requires notice and opportunity for a hearing before deprivation of life, liberty, or property); Grannis v. Ordean, 234 U.S. 385, 394 (1914) (fundamental to due process is opportunity to be heard, which includes notice).

60. "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

61. An exception to the potential unconstitutionality of a short-term nonclaim statute that relies on publication or posting exists to the extent that the statute is not used to bar payment of a claim. For example, no constitutional violation occurs if the personal representative or the decedent's successors choose to pay the creditor regardless of whether the creditor had received notice or had officially filed a claim; if the creditor is paid in full, he is not deprived of anything as a result of lack of notice. For the same reason, no constitutional violation occurs if the estate did not contain assets with which to pay the claim had it been filed.

62. Evaluating constitutionally questionable provisions raises an unsolvable dilemma. Identifying such provisions is impossible without the background of the Supreme Court cases. A discussion

process to the creditor, at least to the extent that they operate as statutes of repose and provide a reasonable time for assertion of the claim.

## II. Is Notice Due?

### *A. The Issue*

An estate creditor is entitled to due process only if state action impairs a protected property entitlement.[63] The property-entitlement hurdle is straightforward and is easily overcome in the creditor nonclaim context. All traditional interests in real and personal property, including contract rights and choses in action, are protected by the due process clause.[64] Courts examining the property entitlement requirement have drawn distinctions between entitlements and expectancies, however, and have protected the former but not the latter.[65] The claims to which the nonclaim statutes apply ordinarily are defined as debts or demands enforceable against the decedent during his lifetime.[66] Enforceable debts or demands are protectible property entitlements, not mere expectancies.[67]

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of the cases, however, would not be meaningful without at least a tentative identification of constitutionally questionable provisions.

63. The due process clause expresses the state action and property entitlement requirements: "No state shall . . . deprive any person of . . . property, without due process of law." U.S. CONST. amend. XIV, § 1.

64. *See* Mennonite Bd. of Missions v. Adams, 103 S. Ct. 2706, 2711 (1983) (mortgagee's lien not barred by tax sale of which mortgagee had no notice); Logan v. Zimmerman Brush Co., 455 U.S. 422, 430-31 (1982) (cause of action to redress an employment grievance is protected property interest); Martinez v. California, 444 U.S. 277, 281-82 (1980) ("Arguably," a state tort claim is "a species of 'property' protected by the Due Process Clause."); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11-12 (1978) (property interest in continued utility service is protected while a disputed bill remains unpaid); Goss v. Lopez, 419 U.S. 565, 574 (1975) ("[A] student's legitimate entitlement to a public education [is] a property interest which is protected by the Due Process Clause."); Perry v. Sindermann, 408 U.S. 593, 601-02 (1972) (protected property interest in reemployment can arise from de facto tenure system); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312-13 (1950) (causes of action by trust beneficiaries "to have the trustee answer for negligent or illegal impairments of their interests" are protected property rights). As to debtors and creditors in general, see North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606 (1975) (deprivation of the use of bank account during pendency of litigation violated fourteenth amendment).

65. *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982) ("The hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause.' "); Board of Regents v. Roth, 408 U.S. 564, 577 (1972) ("To have a property interest in a benefit, a person . . . must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."); *see also* Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J. 89 (analyzing the entitlement and present enjoyment doctrines).

66. *See supra* note 51 and accompanying text.

67. Using the now discredited right-privilege distinction, it might be argued that the government is not obligated to allow claims to survive the decedent's death and therefore the government may condition the grant of the privilege of claim survival upon whatever terms it desires. *Cf.* Bailey v. Richardson, 182 F.2d 46, 57-59 (D.C. Cir. 1950) (procedural due process guarantees do not apply to privileges as opposed to rights), *aff'd per curiam*, 341 U.S. 918 (1951) (equally divided court).

The right-privilege distinction, however, can survive no better in estate administration and succession than elsewhere. "[U]nless the government were required to accord fair treatment of individual interests that could not be termed 'rights,' there would be almost no check on the power of government to limit inidvidual freedom in society." J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 528 (2d ed. 1983). The Supreme Court has made clear the general demise of the right-privilege distinction. *See* Board of Regents v. Roth, 408 U.S. 564, 571 n.9 (1972) ("[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."); Graham v. Richardson, 403 U.S. 365, 374 (1971) ("[T]his Court now has rejected the concept that constitutional rights turn

The state-action requirement is less straightforward. The fourteenth amendment does not apply to the states unless the state government acts, directly or indirectly, in a manner that impairs a property entitlement.[68] The existence of a state statute sanctioning a remedy or procedure does not transform an otherwise private use of the procedure or remedy into the state action required under the fourteenth amendment.[69] The transformation of private action to state action will occur, however, when state courts and officials are involved in effectuating a statutory procedure or remedy.[70] The concept of state action is such that a court could conclude that the running of short-term or long-term nonclaim provisions is accompanied by insufficient government activity to trigger application of the fourteenth amendment; indeed, this conclusion would be justifiable for long-term provisions. When a long-term provision bars the creditor's remedy against his debtor's estate, no state action is involved other than the prior legislative enactment of the long-term statute.[71] No court or government official acts to aid the operation of the long-term statute. On the other

upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.' "); Bell v. Burson, 402 U.S. 535, 539 (1971) (holding that "relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.' "). *But cf.* Arnett v. Kennedy, 416 U.S. 134, 155 (1974) ("[T]he property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest."). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) (reviewing the right-privilege distinction).

68. The Civil Rights Cases, 109 U.S. 3, 11 (1883) (The fourteenth amendment "nullifies . . . state action . . . which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law."). *See* U.S. CONST. amend. XIV, § 1 (text at *supra* note 63). Any judicial or administrative adjudication of the rights of one person against another or against the world is government action that directly affects a party's property rights. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312-13 (1950) (State courts' decisions in closing trusts were state actions affecting property entitlements.). Other government action, however, such as the conduct of a government official acting in an official capacity that impairs another's property rights or the enactment or enforcement of a provision in a statute or ordinance that commands or strongly encourages conduct that impairs another's property rights, will also trigger application of the fourteenth amendment. *Compare* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164-66 (1978) (creditor self-help is private, not state action, even though self-help is sanctioned by state statute) *with* Lugar v. Edmonson Oil Co., 102 S. Ct. 2744, 2756 (1982) (creditor remedy sanctioned by state statute amounted to state action when state court issued writ and county sheriff executed it).

69. *See, e.g.*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164-66 (1978) (creditor self-help without court or sheriff involvement was private, not state action even though sanctioned by state statute).

70. *See, e.g.*, Lugar v. Edmondson Oil Co., 102 S. Ct. 2744, 2756 (1982) (issuance of writ of execution by state court and execution of writ by county sheriff held sufficient to satisfy state-action requirement).

71. Publication of the statute affords the notice due when the legislation is first enacted. *See* Texaco, Inc. v. Short, 454 U.S. 516, 530 (1982). Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), supports the conclusion that the enactment of a law that merely legitimates action taken by a private person will not be sufficient state action to trigger application of the fourteenth amendment. If the enactment of a statute permitting or encouraging certain behavior involved sufficient state action to take operation of the statute out of the realm of purely private activity and into the realm of the fourteenth amendment, one would then have to analyze the connection between the action of the state legislature and the impairment of the property entitlement.

The constitutionality of long-term nonclaim statutes will not be affected by the answer to this state-action issue. If the state action is insufficient to trigger application of the fourteenth amendment, the due process inquiry ends; the nonclaim provision will stand regardless of lack of provision for notice, at least to the extent that no substantive due process violation is involved. *See infra* note 86. If the state action is sufficient to trigger application of the due process clause, however, then the issue is whether the state action impairs the property entitlement of the creditor in a way that trig-

hand, the state judiciary is involved to a significant degree when a short-term nonclaim provision is invoked. All jurisdictions require a court order appointing a personal representative as a rerequisite to invocation of the short-term nonclaim period.[72] Under existing caselaw,[73] this should be sufficient judicial involvement to constitute state action.

If state action sufficient to trigger application of the fourteenth amendment exists, the courts must determine whether impairment of the estate creditor's property entitlement occurs as the result of a proceeding to which *Mullane* should apply.[74] If *Mullane* is applicable, due process requires adequate notice before the nonclaim provision can terminate the creditor's rights.[75] Alternatively, a court might conclude that the property impairment results from the operation of a properly enacted statute of limitation governing the abandonment of property or the timeliness of the assertion of a property right.[76] If nonclaim provisions operate merely as statutes of limitations, they may terminate rights

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gers application of *Mullane*'s notice requirements; it probably does not. *See infra* notes 78-88 and accompanying text.

72. *See supra* notes 42 &43 and accompanying text. The court order must have been preceded by an adjudication of death and also by a determination of either domicile or ownership of real property in the jurisdiction. *See supra* note 27 and accompanying text. In those jurisdictions in which the court is responsible for publication of the notice, the state involvement is even greater. *See supra* note 44.

73. *See, e.g.*, Lugar v. Edmondson Oil Co., 102 S. Ct. 2744, 2756 (1982) (state action found in issuance of writ of execution by state court and execution of the writ by county sheriff). Issuance of the writ directly authorizing the remedy in *Lugar* is analogous to issuance of letters indirectly authorizing invocation of the short-term provision. Execution of the writ by the Sheriff in *Lugar* is analogous to invocation of the short-term provision by the court-appointed personal representative. In both situations, judical and official involvement exists.

74. Another way to frame the analysis would be to ask what process is due considering all the circumstances. Is it that process described in *Mullane* or is it that process afforded on the enactment and operation of a statute of limitations? Ultimately, the question determinative of *Mullane*'s applicability is the same. In the framework presented in this Article, however, the general question, what process is due, is reserved for discussion of the timing, method, and content of the required notice.

75. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). *Mullane* required "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." *Id.* at 314. The Court has determined that notice is required before a court may conduct binding adjudication whether a creditor's rights have been terminated by the operation of a nonclaim statute. In Texaco, Inc. v. Short, 454 U.S. 516, 536 (1982), the Court affirmed this point: "The Due Process Clause does not require a defendant to notify a potential plaintiff that a statute of limitations is about to run, although it certainly would preclude him from obtaining a declaratory judgment that his adversary's claim is barred without giving notice of that proceeding." *Id.*

The question in *Texaco* was whether the mineral claimant deserved notice that the time period provided in a mineral lapse statute had begun to run or was about to run and bar his mineral claim. *Id.* at 533. The question in the estate administration setting is the same: whether the estate creditor deserves notice that the nonclaim period has begun to run or is about to run and bar his claim.

76. In Texaco, Inc. v. Short, the Court, commenting on an argument that a mineral lapse statute operated to take private property without compensation, stated:

> We have concluded that the State may treat a mineral interest that has not been used for 20 years and for which no statement of claim has been filed as abandoned; it follows that, after abandonment, the former owner retains no interest for which he may claim compensation. It is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right . . . .

*Id.* at 530.

Similarly, if the nonclaim provision is merely a statute that defines time limitations after which a creditor's property interest is deemed waived or abandoned, it is the creditor's failure to file a claim—and not any state action—that causes the termination of the creditor's property entitlement.

regardless of the notice afforded creditors about the running of the limitations period.[77]

A true statute of limitations has two primary purposes: to afford repose to potential defendants and to preclude the assertion of stale claims by plaintiffs.[78] Furthermore, a true statute of limitations ultimately operates to preclude untimely claims without the need for any private or state intervention.[79] The precipitating event that triggers the statute of limitations may be either an occurrence or a nonoccurrence, and often it is an occurrence or nonoccurrence of which the potential plaintiff is or ought to be aware.[80] Regardless whether a plaintiff actually is aware of the precipitating event, the statute may run and constitutionally bar his claim.[81]

A long-term nonclaim statute approximates a statute of limitations in several ways. First, the long-term nonclaim period begins to run without private or

77. Texaco, Inc. v. Short, 454 U.S. 516, 536 (1982) ("The Due Process Clause does not require a defendant to notify a potential plaintiff that a statute of limitations is about to run . . . ."). Even publication notice probably is not required as a matter of procedural due process if the nonclaim provision is a mere statute of limitations. *See* Gano Farms, Inc. v. Kleweno, 2 Kan. App. 2d 506, 510, 582 P.2d 742, 745 (1978) ("[B]y analogy to a general statute of limitations, notice to a creditor that [the time limitation] has commenced to run is not required at all. Under that reasoning, even publication notice is not constitutionally necessary, and may be regarded as a legislative act of grace.").

Even if the nonclaim provisions were held to be statutes of limitations, publication would be required under some statutes to start the short-term nonclaim period running. Service of process, at a minimum by publication, also would be required to establish the probate court's in rem jurisdiction over the estate's assets. *See* Kulko v. Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977); Hanson v. Denkla, 357 U.S. 235 (1958).

78. *See* Note, *Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185-86 (1950) (quoting Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944)).

> The primary consideration underlying such legislation is undoubtedly one of fairness to the defendant. There comes a time when he ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when "evidence has been lost, memories have faded, and witnesses have disappeared."

*Id.* The short periods "apparently [indicate] disfavor of the action or a policy in favor of particularly quick settlement." *Id.* at 1180.

79. A "self-executing" statute of limitations is constitutional without regard to notice of the occurrence of the precipitating event. Texaco, Inc. v. Short, 454 U.S. 516, 536 (1982).

80. The precipitating event may be purely private, as in a common-law tort action between two individuals, or it may involve the government, as in the rendering of a judgment that must be enforced within a defined period of time. The event may be an occurrence, as in a traditional intentional tort action, or it may be a nonoccurrence, as in Texaco, Inc. v. Short, 454 U.S. 516 (1982) (upholding the constitutionality of a mineral lapse statute).

81. *See id.* 536 ("The Due Process Clause does not require a defendant to notify a potential plaintiff that a statute of limitations is about to run."). In many types of statutes of limitations, the courts have imposed requirements to ensure that a reasonable plaintiff fairly can be deemed to have notice of the accrual of her cause of action. For example, under statutes that apply to actions for the recovery of possession of real estate, the courts have required that the defendant's possession be open and notorious to recover possession from the possessor. Furthermore, notice underlies the applicaton of a "discovery" rule, in which the precipitating event is deemed to occur when the plaintiff actually discovered or ought to have discovered the injury that forms the basis of her cause of action. A statute of limitations, however, constitutionally may operate against one who did not or could not discover the occurrence of the precipitating event. *See* Scalf v. Berkel, Inc., 448 N.E.2d 1201 (Ind. Ct. App. 1983) (product liability statute of limitations that runs from date of delivery of the product constitutionally can bar an action before injury occurs); Rod v. Farrell, 96 Wis. 2d 349, 291 N.W.2d 568 (1980) (malpractice statute of limitations begins to run when the negligent act occurs with accompanying injury, regardless of the date of discovery of the injury).

state intervention.[82] Second, after the nonclaim period has run without opening the estate, the creditor's remedy against the estate is barred,[83] just as any remedy is barred by the running of a statute of limitations. Last, the primary purposes of a long-term nonclaim provision are the traditional dual purposes attributed to statutes of limitations: to afford repose to the decedent's successors and to preclude claims that have become stale because of the passage of time.[84] The one-year, two-year, or longer period of the long-term statutes is a reasonable period for the creditor's discovery of the event precipitating the running of the statute.[85] It is an appropriate time period to afford real repose and to provide a reasonable cutoff for claims that soon would become stale.[86] Long-term nonclaim statutes therefore legitimately can be characterized as statutes of limitations.

If characterized as statutes of limitations, long-term nonclaim statutes pass constitutional muster even though they lack "notice reasonably calculated" to inform known estate creditors of their invocation or operation.[87] Even if it were accepted that the state legislatures' enactment of the long-term statutes was sufficient state action to trigger application of the fourteenth amendment, due process nevertheless was afforded when the statute was enacted. Constitutionally no notice is required under the long-term statutes beyond that required in the law making process.[88] Because long-term statutes are constitutional, the estate creditor notice analysis in this Article focuses on short-term nonclaim statutes.

Short-term nonclaim statutes are not solely statutes of limitations. Short-term provisions resemble statutes of limitations in that a time period runs to bar an action by a potential plaintiff without a judicial determination that the time period is running or has run.[89] The time period, however, is extremely short—ranging from two months to six months[90]—and it is not justified as clearly by the dual purposes of repose and preclusion of stale claims.[91] Furthermore, the short-term time period begins to run only on the entry of a court order opening

82. *See supra* text accompanying notes 39-41.

83. *See supra* note 40 and accompanying text.

84. *See* Note, *supra* note 78, at 1185-86.

85. If the statute did not provide a reasonable time, the creditor could make a substantive due process argument that the time period was arbitrary, unreasonable, and not related rationally to a legitimate state interest. *See* Note, *supra* note 78, at 1190-91. Most long-term provisions are related rationally to legitimate state interests in repose and prevention of stale claims. It is possible, however, to contemplate a time period so unreasonably short as to be arbitrary, unreasonable, and unrelated to legitimate state interests. *Id.*

86. If it did not provide real repose, it would be unrelated to its underlying purpose. See *supra* note 85.

87. *See supra* notes 77, 81.

88. *See supra* notes 77, 81.

89. *See* Gano Farms, Inc. v. Kleweno, 2 Kan. App. 2d 506, 508, 582 P.2d 742, 744 (1978) (nonclaim statutes are special statutes of limitations).

90. *See supra* notes 37, 42 and accompanying text.

91. *See supra* note 78 and accompanying text. No reason exists to believe that a creditor's claim would become stale more quickly when an estate administration was opened than when one was not. Nor is there reason to believe that speedier repose is more necessary in the former circumstance than in the latter. Any jurisdiction that has both a short-term nonclaim statute (with a maximum operative period of six months) and a long-term nonclaim statute (with a minimum operative period of one year) must have reasons for the enactment of the short-term period other than repose.

administration of a decedent's estate.[92]

Proceedings under a short-term nonclaim provision also do not fit the mold of a traditional adjudication—a court battle ending in a court order resolving a dispute. *Mullane* requires notice reasonably calculated to inform parties of the pendency of a traditional judicial proceeding in which specific property rights are to be resolved by a court's order; however *Mullane* has not been limited to traditional judicial proceedings.[93]

### *B. The State Cases*

Before the Nevada Supreme Court's decision on remand in *Moseley v. Continental Insurance Co. (Moseley II)*[94] no appellate court had applied the *Mullane* standards to overturn a statutory scheme accepting publication notice to estate creditors when a short-term nonclaim provision has been invoked. *Moseley II* involved a known estate creditor[95] whose sole notification of the running of the short-term nonclaim period was by publication.[96] The creditor allegedly did not learn of debtor's death until one day before the sixty-day claim-filing period was to expire; he did not file a claim until two days after it expired.[97] When the estate refused to recognize his claim, the creditor filed suit, claiming that the publication notice provision had not afforded him procedural due process.[98]

The Nevada Supreme Court held in *Continental Insurance Co. v. Moseley (Moseley I)*[99] that publication notice was constitutionally sufficient. The court emphasized Nevada's interest in providing, within its summary administration

92. See *supra* notes 42-43 and accompanying text.

93. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950). Several adequacy-of-notice cases have involved traditional plaintiff-to-defendant notice. For example, in *Mullane* better-than-publication notice was required to inform defendant trust beneficiaries of a court proceeding initiated by a plaintiff trustee to determine finally certain of the rights of the beneficiaries against the trustee. *Id.* In Walker v. City of Hutchinson, 352 U.S. 112, 115-16 (1956), *Mullane* was applied to mandate better-than-publication notice of the hearing to determine the compensation due a known landowner whose land was condemned by plaintiff. In Armstrong v. Mango, 380 U.S. 545, 547 (1965), *Mullane* was applied to require notice to defendant father about the pendency of an adoption proceeding. In Robinson v. Hanrahan, 409 U.S. 38, 41 (1972), *Mullane* was applied to require notice reasonably calculated to inform a defendant of the institution of an auto forfeiture proceeding. In Greene v. Lindsey, 456 U.S. 444, 447-51 (1982), *Mullane* was applied to require better-than-publication notice to a defendant tenant who was being evicted from public housing.

94. 100 Nev. 70, 683 P.2d 20 (1984), *on remand after* 103 S. Ct. 3530 (1983), *vacating* 98 Nev. 476, 653 P.2d 158 (1982).

95. The creditor was plaintiff in a civil action pending against decedent at her death. The estate had actual knowledge of plaintiff's claim against decedent; plaintiff's claim was listed in the petition for summary administration pursuant to NEV. REV. STAT. ch. 145 (1983). *Moseley II*, 100 Nev. at 70, 683 P.2d at 20-21. Apparently, the creditor had no knowledge of decedent's death or of the opening of the estate until one day before the sixty-day claim-filing period expired. Moseley v. Continental Ins. Co. *(Moseley I)*, 98 Nev. 476, 478, 653 P.2d 158, 160 (1982), *vacated and remanded*, 103 S. Ct. 3530 (1983).

96. The notice was published pursuant to the summary administration provision of NEV. REV. STAT. § 145.050 (1983). The creditor conceded that the publication had complied with the statute. *Moseley I*, 98 Nev. at 478, 653 P.2d at 160.

97. *Moseley I*, 98 Nev. at 477, 653 P.2d at 159.

98. *Id.*

99. *Id.* at 478, 653 P.2d at 160.

provisions, "an expeditious and comparatively unencumbered means of accomplishing estate administration" for small estates[100] and concluded that published notice was "reasonably and sufficiently calculated to provide actual notice to appellant."[101]

The United States Supreme Court vacated the Nevada court's conclusion[102] and remanded the case for reconsideration in light of the Court's decision in *Mennonite Board of Missions v. Adams*.[103] In contrast to its decision in *Moseley I*, which was relatively lengthy and thoughtful, the Nevada Supreme Court's decision on remand[104] was short and conclusory; it merely reversed its earlier holding without adequate explanation. The court, after quoting *Mullane*'s famous "elementary and fundamental requirement of due process"[105] language, held:

> In *Mennonite*, the Supreme Court applied [the *Mullane*] principle and found that mere constructive notice afforded inadequate due process to a readily ascertainable mortgage holder. Given the facts of this case and the holding in *Mennonite* and *Mullane*, we conclude that more than service by publication was required in order to afford due process to appellant. We therefore reverse the orders of the district courts and remand these matters for further proceedings consistent with this opinion.[106]

Despite its lack of analysis, the Nevada court's decision in *Moseley II* is significant because it was the first decision to hold that due process requires more than publication notice to known estate creditors.[107]

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100. At the time of *Moseley I*, estates less than $60,000 qualified for summary administration. *See id.* The summary administration threshold has been increased to $100,000. *See* NEV. REV. STAT. § 145.040 (1983).

101. *Moseley I*, 98 Nev. at 478, 653 P.2d at 160.

102. Continental Ins. Co. v. Moseley, 103 S. Ct. 3530 (1983) (mem.), *vacating and remanding* 98 Nev. 476, 653 P.2d 158 (1982).

103. *Id.* The decision in Mennonite Bd. of Missions v. Adams, 103 S. Ct. 2706 (1983), was rendered one week prior to the decision to vacate and remand *Moseley I*. The Court's procedure—granting certiorari, vacating, and remanding in light of *Mennonite Bd.*—does not indicate definitely that the Supreme Court has held, or will hold, *Mullane* applicable in the circumstances of the remanded case. The decision to grant certiorari, vacate, and remand is voted on by the Court, and an opinion is rendered in memorandum form. The procedure commonly is used when a decision, such as *Mennonite Bd.*, has been rendered that possibly is relevant to the issue presented in the remanded case. The Court remands so that the lower court can reconsider the issue in light of the new, possibly relevant, holding. If the lower court's decision on remand is not appealed a second time to the Supreme Court, the Court never directly addresses the issue presented in the remanded case. If the same issue is later presented to the Supreme Court, the Court will have the benefit of the lawyers' and the lower court's analysis about the applicability of the possibly relevant case.

The Nevada Supreme Court was free on remand to decide whether *Mennonite Bd.* applied, because no binding precedent existed on the constitutional question. On remand, the Nevada court could have duplicated its earlier holding, but it could not reach the same result without having considered and rejected the applicability of *Mennonite Bd.*

104. *Moseley II*, 100 Nev. 70, 683 P.2d 20.

105. *Mullane*, 339 U.S. at 314.

106. *Moseley II*, 100 Nev. at 71, 683 P.2d at 21.

107. Even *Moseley I* was unique in that it expressly applied the *Mullane* balancing test to the estate creditor nonclaim provision. No state court had applied the *Mullane* balancing analysis prior to *Moseley I*. Several state courts had concluded that *Mullane* should not apply at all in the creditor nonclaim context. *See infra* note 108 and accompanying text. Of course, after applying *Mullane's*

Traditionally, state courts had summarily dismissed the notion that *Mullane* might apply in the context of notice to creditors in probate proceedings.[108] Typical of this state court treatment was the Nevada Supreme Court's statement sixteen years earlier in *Continental Coffee Co. v. Estate of Clark*,[109] that "[w]e are not convinced that [the *Mullane*] doctrine has applicability to our non-claim statute."[110] In two more recent cases, state appellate courts have applied more exhaustive analyses to deny application of *Mullane* to their nonclaim statutes.

In *Gano Farms, Inc. v. Estate of Kleweno*,[111] the Kansas Court of Appeals stressed that in the probate creditor context no " 'property rights are brought before a court for adjudication.' "[112] The *Gano Farms* court also distinguished several United States and Kansas Supreme Court decisions[113] on their facts:

> In each case the effect sought to be given to the notice, at least as to the property right involved, was the same as if the party had been personally served and made a party to the proceeding, and in each a specific, identifiable property right was the subject of the court's order.
>
> The notice under the nonclaim statute, on the other hand, does not make a creditor a party to the proceeding, but merely notifies him that he may become one if he wishes. It does no more than put into operation a special statute of limitations.[114]

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balancing analysis, the Nevada court reached the traditional conclusion that the publication notice feature of the nonclaim statute was not constitutionally infirm.

108. *See* Brunell Leasing Corp. v. Wilkins, 11 Ariz. App. 165, 167, 462 P.2d 858, 860 (1969) (It is not "constitutionally impermissible procedure [to] provid[e] for notice by publication in proceedings in rem which ultimately settle claims of claimants not before the court."); Baker v. National Bank of Henderson, 151 Mont. 526, 529, 445 P.2d 574, 576 (1968) (The court cited Continental Coffee Co. v. Estate of Clark, 84 Nev. 208, 438 P.2d 818 (1968); Chalaby v. Driskell, 237 Or. 245, 390 P.2d 632 (1968); New York Merchandise Co. v. Stout, 43 Wash. 2d 825, 828, 264 P.2d 863, 864 (1953), as authority that the *Mullane* doctrine is not applicable to probate proceedings.); Chalaby v. Driskell, 237 Or. 245, 248, 390 P.2d 632, 633 (1968) ("[W]e shall not attempt to explore the various circumstances under which the *Mullane* doctrine is applicable to probate proceedings. It is enough to say that we do not regard the doctrine as applicable to the present case."); New York Merchandise Co. v. Stout, 43 Wash. 2d 825, 828, 264 P.2d 863, 864 (1953) (The court distinguished *Mullane* as involving property rights.).

It is worth noting that none of these courts engaged in meaningful analysis of the due process issue. The *Brunell Leasing* court even seemed to rely on the in rem/in personam distinction that *Mullane* had struck down as inappropriate to determine issues about notice to known potential parties. *See Brunell Leasing*, 11 Ariz. App. at 167, 462 P.2d at 860. That the in rem/in personam distinction has proved difficult to put to final rest also was evidenced by the decision in *In re* Shew's Estate, 48 Wash. 2d 732, 734, 296 P.2d 667, 669 (1956) (publication notice held sufficient based on the in rem nature of an estate proceeding).

109. 84 Nev. 208, 438 P.2d 818 (1968).

110. *Id.* at 213, 438 P.2d at 821.

111. 2 Kan. App. 506, 509, 582 P.2d 742, 744-45 (1978).

112. *Id.* at 509, 582 P.2d at 744 (quoting New York Merchandise Co. v. Stout, 43 Wash. 2d 827, 828, 264 P.2d 863, 864 (1953))

113. *Gano Farms*, 2 Kan. App. at 509, 582 P.2d at 744. The United States Supreme Court cases were Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956); City of New York v. New York, N.H. & H.R. R.R. Co., 344 U.S. 293 (1953). Four Kansas cases also were cited and distinguished. Three of the Kansas cases involved tax or execution sales: Weaver v. Frazee, 219 Kan. 42, 547 P.2d 1005 (1976); Chapin v. Aylward, 204 Kan. 448, 464 P.2d 177 (1970); Pierce v. Board of County, 200 Kan. 74, 434 P.2d 858 (1967). The other case was *In re* Estate of Barnes, 212 Kan. 502, 511, 512 P.2d 387, 395 (1973), in which the court held that notice of the probate of a decedent's will should have been mailed to known heirs or heirs whose names and addresses should have been known.

114. *Gano Farms*, 2 Kan. App. at 509, 582 P.2d at 744. The court noted further that:

The distinction first noted by the Kansas court between an adjudication, to which *Mullane* was held to apply, and a statute of limitations, to which *Mullane* was held not to apply, was expanded in a thoughtful and thorough opinion of the Wisconsin Supreme Court. In *In re Estate of Fessler*[115] the court held that *Mullane* did not apply because the creditor's claim had been extinguished not by adjudication, but "merely" by the operation of a statute of limitations.[116] The operation of a statute of limitations to toll a claim, even the claim of one unaware of the time limit for filing a claim, did not offend the due process clause.[117]

The most viable arguments against the applicability of *Mullane* in the short-term nonclaim statute context are encompassed within the distinction between adjudication and limitations expressed in *Gano Farms* and *Fessler*.[118] If the short-term nonclaim statute operates merely as a statute of limitations then *Fessler* is correct, and "the legislature may, consistent with notions of due process, divest a person of his cause of action even though he may not precisely know the time within which he must assert his claim to preserve it."[119] A potential defendant need not inform a potential plaintiff when a true statute of limitations is about to run, is running, or is about to expire.[120]

### C. *The Supreme Court Cases*

*Mullane* applies in very traditional judicial proceedings: a defendant is entitled to notice reasonably calculated to inform him that a plaintiff is seeking a

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It is true that the creditor's claim will be barred if not presented before the statute runs, but that is true of any statute of limitations. No order is entered which specifically bars the claim unless, as here, the creditor seeks to enforce the claim after the statute has run.

*Id.*

115. 100 Wis. 2d 437, 302 N.W.2d 414 (1981).

116. *Id.* at 450-51, 302 N.W.2d at 420-21.

117. *Id.*

118. This distinction encompasses all the viable doctrinal arguments about finality, parties, and the direct effect that the constitutionally questionable event has on a recognized property interest. Adjudications are final, between parties, and have a direct effect on property interests in a different way and to a different degree than do statutes of limitations. The only viable considerations not encompassed in the adjudication-limitations distinction are the review of all the circumstances, the balancing of the state and individual interests, and the evaluation of the practical effect of a better-notice rule. These considerations are discussed in part III of this Article.

Other arguments that might be made against *Mullane*'s applicability can be dealt with summarily. First, the in rem nature of the probate proceeding is not itself any basis for approval of constructive notice under the circumstances. *Mullane*, 339 U.S. at 312-13. *See* Note, *California Probate Proceedings*, *supra* note 8, at 1117-18. *But see* Brunell Leasing Corp. v. Wilkins, 11 Ariz. App. 165, 167, 462 P.2d 858, 860 (1969) ("notice by publication in proceedings in rem" is not unconstitutional); *In re* Shew's Estate, 48 Wash. 2d 732, 734, 296 P.2d 667, 669 (1956) (publication notice sufficient in an in rem proceeding). Second, limiting *Mullane* to its facts is not a valid argument. *See* Comment, *Due Process—The Requirement of Notice in Probate Proceedings*, 40 MO. L. REV. 552, 554 (1975); Note, *Due Process of Law and Notice by Publication*, 32 IND. L.J. 469, 480, 488 (1957). Third, Farrell v. O'Brien, 199 U.S. 89 (1905), does not support the proposition that due process does not apply in a probate proceeding. *Farrell* involved the probate of a will, not a creditor's claim, and is more than eighty years old. Fourth, the argument that succession to property is a privilege that may be granted on any condition that the legislature proposes is met elsewhere in this Article, *supra* notes 64-67, as is the argument that established practices establish the norm of due process protection *supra* notes 179-181.

119. *Fessler*, 100 Wis. 2d at 449-50, 302 N.W.2d at 420.

120. *See* Texaco, Inc. v. Short, 454 U.S. 516, 532-33 (1982).

court order affecting the defendant's property rights.[121] *Mullane*, however, has not been limited to traditional adjudications. Notice reasonably calculated to inform also has been required in proceedings that resemble statutes of limitations in the same ways that nonclaim statutes resemble statutes of limitations.[122]

*Schroeder v. City of New York*[123] involved a situation similar to the creditor nonclaim situation. *Schroeder* arose when the City of New York acquired by condemnation the right to divert a waterway.[124] A statute provided that all claims against the city based on the city's diversion of water would be barred unless an injured party took affirmative steps to claim damages within three years.[125] The landowners injured by the city's acquisition of their water rights were potential plaintiffs in a pending court proceeding; the city was a potential defendant. Initiation of the condemnation proceeding set in motion a clock that eventually would run to terminate plaintiffs' property interests if they failed to assert those interests in time.[126] On these facts, the Court held that potential claimants were entitled to better-than-publication notice of the diversion of their water.[127]

Estate creditors are in a position similar to that of the *Schroeder* claimants

121. Several adequacy-of-notice cases have involved traditional plaintiff-to-defendant notice. For example, in *Mullane* better-than-publication notice was required to inform defendant trust beneficiaries of a court proceeding initiated by a plaintiff trustee to determine finally certain of the rights of the beneficiaries against the trustee. *Id.* In Walker v. City of Hutchinson, 352 U.S. 112, 115-16 (1956), *Mullane* was applied to mandate better-than-publication notice of the hearing to determine the compensation due a known landowner whose land was condemned by plaintiff. In Armstrong v. Mango, 380 U.S. 545, 547 (1965), *Mullane* was applied to require notice to defendant father about the pendency of an adoption proceeding. In Robinson v. Hanrahan, 409 U.S. 38, 41 (1972), *Mullane* was applied to require notice reasonably calculated to inform a defendant of the institution of an auto forfeiture proceeding. In Greene v. Lindsey, 456 U.S. 444, 447-51 (1982), *Mullane* was applied to require better-than-publication notice to a defendant tenant who was being evicted from public housing.

*Mullane* has been used to justify plaintiff-to-plaintiff notice. The Court in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), mentioned *Mullane* when it decided that Federal Rule of Civil Procedure 23(c)(2) required better-than-publication notice to potential plaintiffs in a class action that would settle the rights of all included plaintiffs against the defendant. The plaintiffs were entitled to notice of a court order that set a date for them to object to inclusion in the class because if they did not object, they would be bound by the court's judgment in the class action. The order in *Eisen* is analogous to the order appointing the personal representative of an estate, which triggers the running of the claim-filing period. The *Eisen* Court's interpretation of Rule 23(c)(2) is relevant to *Mullane*'s applicability because: the Advisory Committee that drafted Rule 23 referred to *Mullane* as the source of interpretation of the Rule; the *Eisen* Court used *Mullane* as the source of interpretation; and *Eisen* was cited in Mennonite Bd. of Missions v. Adams, 103 S. Ct. 2706 (1983), as relevant to notice.

122. *Mullane* has been cited often in majority, plurality, and dissenting opinions of the United States Supreme Court. It has been cited for the proposition that a hearing must be appropriate to the nature of the case. *E.g.*, Fuentes v. Shevin, 407 U.S. 67, 82 (1972); Boddie v. Connecticut, 401 U.S. 371, 378 (1971). It has been cited generally to reiterate the fundamental proposition that the right to be heard has little reality unless one is informed of the pendency of the hearing. *E.g.*, Sniadach v. Family Fin. Corp., 395 U.S. 332, 339 (1969). It also has been cited in cases concerning deprivations of liberty. *E.g.*, Nevada v. United States, 103 S. Ct. 2906 (1983); New Motor Vehicle Bd. v. Fox, 434 U.S. 1346 (1977); Groppi v. Leslie, 404 U.S. 502 (1972).

123. 371 U.S. 208 (1962) (unanimous decision).

124. *Id.* at 209.

125. *Id.* at 209-10 (ADMIN. CODE OF THE CITY OF NEW YORK, tit. K41, § 18.0)

126. *Id.* at 210.

127. *Id.*

they are potential plaintiffs in a pending court proceeding.[128] The court proceeding will decide who is entitled to specific property.[129] The decedent's personal representative and successors have interests analogous to those of the city in *Schroeder*. The decedent's personal representative and successors are potential defendants in an action by the estate creditor. Estate creditors have a clock running against them, a clock set in motion by a court order initiating the proceeding in which they are potential plaintiffs. When the clock runs out, their claims will be barred without further order or notice. Thus, estate creditors, like the *Schroeder* claimants, should be entitled to notice reasonably calculated to inform them of the pendency of the proceeding in which the clock is running.

In *Schroeder*, the court proceeding to acquire property rights not only caused the clock to run, it also created the claim that eventually would be barred.[130] In this sense, *Schroeder* admittedly differed from an estate creditor case; the court proceeding opening the estate does not create the creditor's claim. Despite this difference, *Schroeder* undermines the argument that a potential defendant need not give a potential plaintiff notice that his claims will be barred. *Schroeder* established that a potential defendant may be required to no-

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128. The status of the estate creditor as a potential plaintiff has been used to support the conclusion that estate nonclaim statutes are mere statutes of limitations that eventually bar the potential plaintiff's claim if it is not timely asserted. *See, e.g.*, Gano Farms, Inc. v. Kleweno, 2 Kan. App. 506, 509, 582 P.2d 742, 744 (1978):

> In each case the effect sought to be given to the notice, at least as to the property right involved, was the same as if the party had been personally served and made a party to the proceeding . . . .
>
> The notice under the nonclaim statute, on the other hand, does not make a creditor a party to a proceeding, but merely notifies him that he may become one if he wishes. It does no more than to put into operation a special statute of limitations.

The Court cited *Mullane*, *Schroeder*, and City of New York v. New York, N.H. & H.R. R.R. Co., 344 U.S. 293 (1953). *Gano Farms*, 2 Kan. App. at 509, 582 P.2d at 744.

In *Schroeder*, however, as in *New York, N.H. & H.R. R.R.*, the notice was to be given to a potential claimant, who, like the estate creditor, was to be told in the notice that he had to file a claim in a pending proceeding within a designated amount of time or lose the claim. *Schroeder*, 371 U.S. at 214; *New York, N.H. & H.R. R.R.*, 344 U.S. at 297. In each case, again as in the estate creditor context, the effect was to notify the claimant that he could become a party if he wished. In each case, as in the estate creditor case, if the creditor chose not to become a party, his claim would be barred against the person who initiated the proceeding or on whose behalf the proceeding was initiated. Thus, the *Gano Farms* distinction should not apply.

129. The *Gano Farms* court also distinguished *Schroeder*, *New York, N.H. & H.R. R.R.*, and *Mullane*, stating that "in each a specific, identifiable property right was the subject of the court's order." *Gano Farms*, 2 Kan. App. at 509, 582 P.2d at 744. In *Schroeder* and *New York, N.H. & H.R. R.R.*, the property subject to the court order was no more identifiable (and no more worthy of protection from deprivation) than the enforceable debt or demand of an estate creditor. In *Mullane*, the property was a cause of action, *Mullane*, 339 U.S. at 307; in *Schroeder*, an enforceable demand for compensation from a condemning authority, *Schroeder*, 371 U.S. at 314; and in *New York, N.H. & H.R. R.R.*, a secured lien, *New York, N.H. & H.R. R.R.*, 344 U.S. at 294.

Furthermore, the court order in *Schroeder* and *New York, N.H. & H.R. R.R.* did not operate any more directly on the property than does a court order in an estate proceeding. In each situation, the court order about which the potential plaintiff was to be notified established a time period during which the potential plaintiff should take steps to preserve his property interest. Although, as in *New York, N.H. & H.R. R.R.*, another court order would be required to close a bankruptcy proceeding, in the estate context a similar second order—a decree of distribution to close the estate proceeding—would be issued. In both situations the later court order only would confirm the prior effective bar of any claim not timely filed. In *Schroeder*, no further court order apparently was contemplated to close the condemnation proceeding.

130. *Schroeder*, 371 U.S. at 314.

tify potential plaintiffs of something similar to the running of a statute of limitations.

*New York v. New York, N.H. & H.R. R.R. Co.*,[131] in which plaintiff's claim was not created by the same proceeding that caused the clock to run, also undermines the assertion that a potential defendant need not notify potential plaintiffs. A potential claimant in a bankruptcy proceeding was entitled, by statute, to " 'reasonable notice of the period in which claims may be filed, . . . by publication or otherwise.' "[132] Citing *Mullane*, the Court held that publication notice was inadequate to inform a creditor whose name and address were known.[133] The creditor, like an estate claimant, was only a potential claimant whose existing claim would be barred prematurely if not filed within the foreshortened period.[134] The claim-filing requirement arose in a statutorily authorized bankruptcy proceeding, similar to the statutorily authorized estate proceeding.[135] Just as a bankruptcy proceeding is a proceeding to be accorded finality, an estate proceeding also is a proceeding to be accorded finality. Therefore, *Mullane* should apply in both contexts to require notice reasonably calculated to inform known creditors of the pendency of the action.

Other notice cases, in which *Mullane* has been applied, demonstrate that *Mullane*'s applicability does not require a court's involvement or adjudication. Thus, in *Mennonite Board of Missions v. Adams*[136] the Court held that a mortgagee was entitled to better-than-publication notice of the tax sale of property on which his mortgage was a lien.[137] Although the tax sale was initiated by a county auditor without court involvement, the Court concluded that it was a

131. 344 U.S. 293 (1953) (unanimous decision).

132. *Id.* at 296 (quoting Bankruptcy Act, ch. 774, § 77(c)(8) 49 Stat. 911, 916 (1935) (repealed)). As Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), *see supra* note 121, *New York, N.H. & H.R. R.R.* was primarily a case determining the intended dimensions of a statutory term—"reasonable notice." The case, however, was cited in *Mennonite Bd.*, along with *Eisen*, as relating to the notice requirements of due process. *Mennonite Bd.*, 103 S. Ct. at 2707. Furthermore, due process would require notice reasonably calculated to inform creditors of a claim-filing requirement in a bankruptcy proceeding—even if the Bankruptcy Act had not stated the notice requirement. The fifth amendment would provide the due process requirement for a federal bankruptcy proceeding.

133. *New York, N.H. & H.R. R.R.*, 344 U.S. at 296.

134. *Id.* at 295.

135. Similarities abound. Both proceedings are initiated only by a filing of a petition with the court, either a bankruptcy petition or a petition to open a decedent's estate. Each petition results in an adjudication—one an adjudication of bankruptcy, the other an adjudication of death. Each petition results in the appointment of an official fiduciary—a bankruptcy trustee, or a personal representative—each of whom often is supervised closely by the court. In each situation, an estate exists that will be distributed to claimants only if they properly have filed their claims.

Differences also exist. For example, it is likely that in bankruptcy the fiduciary will be supervised judicially, while the administration of an estate may be informal or unsupervised. The degree of judicial supervision, however, should not be determinative of whether the essential nature of the proceeding is adjudicatory.

136. 103 S. Ct. 2706 (1983).

137. *Id.* at 2711. *Mennonite Bd.* provided a recent response to the suggestion that *Mullane* may have been applicable in *Schroeder* only because the notice was notice of an event that operated not only to start a clock running, but also to create the claim on which the clock was running. In *Mennonite Bd.*, the tax sale operated, in one sense, to start a clock running after which the mortagee's existing lien would be barred completely; however, the sale did not operate to create the mortagee's lien in the first place. *See id.*

proceeding to which *Mullane* was applicable.[138] Similarly, in *Memphis Light, Gas & Water Division v. Craft*[139] the Court held that *Mullane* applied to define a municipality's duty to notify its customers of procedures for protesting improper handling of their accounts.[140]

*Mullane*'s applicability depends on the existence of a proceeding to be accorded finality. In the estate context, the short-term nonclaim period begins to run when the court appoints a personal representative and authorizes him to embark on court-sanctioned duties.[141] The estate proceeding continues, often with close court supervision, until the court issues an order of distribution and discharges the personal representative.[142] The court order issued at the outset of the estate proceeding alters an estate creditor's existing expectations about repayment of the decedent's debt;[143] it will result in an expedited final termination of the creditor's rights unless he knows about the estate proceeding and acts to submit his claim. Thus, *Mullane* should apply, and the creditor should be entitled to notice reasonably calculated to inform him of the proceedings and the effect that failure to file a claim will have on his rights.

The estate proceeding in which a short-term creditor nonclaim provision is invoked is similar in many respects to proceedings to which *Mullane* has been applied. Stating that a nonclaim provision is merely a statute of limitations[144] ignores the reality that the creditor's claim is being brought within the ambit of a judicially invoked and supervised estate proceeding. To recover his claim, a creditor must comply with the requirements of this judicially invoked and supervised proceeding. Those taking advantage of the process should inform him about the new rules that apply to his claim[145]—he should be given an actual

138. *Id.*, 103 S. Ct. at 2711. The auditor could invoke the tax-sale procedures pursuant to those statutes that described the preconditions to such a sale. *Id.* The preconditions for a tax sale include an adjudication of deliquency by the county auditor, similar to the adjudication of death and domicile (or ownership of property) necessary to obtain a court order to open an estate. The obvious differences between the tax-sale proceeding and the estate proceeding, particularly the drastic and immediate effect of the sale on the mortgagee's secured property interest, do not mean that an unsecured estate creditor should not have notice of the operation of a statutory scheme that will reduce drastically the value of his interest within a short time (two to six months).

139. 436 U.S. 1 (1978).

140. *Id.* at 13.

141. The personal representative in part becomes an officer of the court upon his appointment, *see* T. ATKINSON, *supra* note 25, § 104, at 576, and thus could be deemed to be a state actor analagous to the auditor in *Mennonite Bd.* and the bankruptcy trustee in *New York, N.H. & H.R. R.R.*

142. *Id.* § 104, at 576-77.

143. Death modifies the expectations of a creditor only to the extent that a long-term nonclaim provision operates. Invocation of a short-term nonclaim provision modifies the creditor's expectations even further.

144. If this is a mere statute of limitations, then, as a matter of fairness, this ought to be a statute of limitations in which the debtor must notify the creditor-potential plaintiff.

145. *See* Boddie v. Connecticut, 401 U.S. 371, 377 (1971) ("[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."); *see also* Arnett v. Kennedy, 416 U.S. 134, 181 (1974) (White, J., concurring and dissenting) ("Similar principles prevail when the State affords its process and mechanism of dispute settlement, its law enforcement officers, and its courts, in aiding one person to take property from another."). In the estate creditor situation, the state is affording its process first to create a dispute and then to settle it quickly and quietly.

opportunity to be heard.

## III. WHAT NOTICE IS DUE?

The *Mullane* Court defined the notice mandated by the due process clause as "[n]otice reasonably calculated, under all the circumstances, to inform interested parties of the pendency"[146] of the proceeding. The notice must be reasonable "under all the circumstances,"[147] with "due regard for the practicalities and peculiarities of the case."[148] According to the Court "construction of the Due Process Clause which would place impossible or impractical obstacles in the way [of promoting vital interests of the state] could not be justified."[149]

Two factors must be analyzed to determine what kind of notice will suffice. First, a study of *Mullane* and its progeny reveals the characteristics of notice reasonably calculated to inform under the circumstances. Second, consideration of a statutory scheme that incorporates *Mullane*'s notice philosophy illustrates that enhanced notice is workable in the creditor nonclaim context and that such expanded notice does not interfere with important state interests.

### *A. Notice Reasonably Calculated to Inform*

In *Mullane* the trustee of a common trust fund sought a judicial settlement of its accounts.[150] The trustee notified interested beneficiaries by publication in a local newspaper pursuant to the provisions of the New York statute authorizing the common fund.[151] The published notice set forth only the following information, as required by the statute: the name and address of the trustee, the date of establishment of the common fund, and the names of the 113 participating estates and trusts.[152] Although the names and addresses of many of the beneficiaries of the 113 participating estates and trusts were known to the fund's trustee,[153] none received more than the publication notice required by statute. The decree in the trustee's settlement action would have been "binding and conclusive as to any matter set forth in the account upon everyone having any interest in the common fund or in any participating estate, trust or fund."[154]

The *Mullane* majority held that the publication-notice provisions of the New York statute accorded due process to those beneficiaries whose addresses

146. *Mullane*, 339 U.S. at 314.

147. *Id.*

148. *Id.*

149. *Id.* at 313-14.

150. *Id.* at 307. A common trust fund is an entity, recognized by statute, into which the assets of several small trusts administered by one trust company are pooled for investment efficiency.

151. *Id.* at 308.

152. *Id.* at 309-10. The Court stated: "The record does not show the number or residence of the beneficiaries, but they were many and it is clear that some of them were not residents of the State of New York." *Id.* at 309.

153. The trustee regularly had been sending income checks to many of the beneficiaries. *Id.* at 318. Furthermore, when the trustee made the first investment in the common fund on behalf of each participating trust, the trust company, pursuant to statute, "had notified by mail each person of full age and sound mind whose name and address were then known to it." *Id.* at 310.

154. *Id.* at 309.

or interests were unknown to the trustee.[155] The statute, however, offended due process "as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights."[156] The Court further stated that notice by mail, reinforcing the publication, would be sufficient for known beneficiaries.[157]

*Mullane* did not hold that all known claimants in all actions were to be accorded notice reasonably certain to reach them. The Court held only that "notice and opportunity for a hearing appropriate to the nature of the case"[158] must be provided. Determination of the type of notice that is "appropriate to the nature of the case" involves a balancing of the state's interest in establishing its notice rule and the individual interest protected by the due process clause.[159] The *Mullane* Court asserted that it had "not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet."[160] Nevertheless, the Court disparaged the use of constructive notice:

> It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. . . . Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those to whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint.[161]

The *Mullane* Court's disdain for constructive notice also is implicit in the Court's statement that the means employed to give notice to one entitled to it "must be such as one desirous of actually informing the absentee might reason-

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155. *Id.* at 320. As to unknown persons, see Standard Oil Co. v. New Jersey, 341 U.S. 428, 434-35 (1951) (publication notice identifying the property and the last known owner was held adequate).

156. *Mullane*, 339 U.S. at 320.

157. *Mullane*, 339 U.S. at 318. *Mullane* rejected argument that publication notice was sufficient because of the in rem nature of estate proceedings:

> But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state.

*Id.* at 312; *see generally supra* note 108 (citing cases in which publication notice was held sufficient in in rem proceedings). The *Mullane* Court also rejected the propriety of any different treatment for residents and nonresidents in determining whether due process has been accorded. *Id.* at 313-14.

158. *Id.* at 313.

159. *Id.* at 314. *See also* Matthews v. Eldridge, 424 U.S. 319, 335 (1976) (considers three factors: private interest affected; risk of mistaken deprivation of interest; government interest involved).

160. *Mullane*, 339 U.S. at 314, quoted in *Mennonite Bd.*, 103 S. Ct. at 2713 (O'Connor, J., dissenting).

161. *Mullane*, 339 U.S. at 315, *quoted in Mennonite Bd.*, 103 S. Ct. at 2709-10, and Greene v. Lindsey, 456 U.S. 444, 454 (1982).

ably adopt to accomplish it."[162]

Since *Mullane* the Court has "adhered unwaveringly" to the principle that publication notice is inadequate to inform known or ascertainable parties.[163] Publication notice was deemed inadequate to apprise known or easily discoverable landowners of condemnation proceedings,[164] reasonably identifiable class members of the pendency of a class action,[165] an incompetent individual (not only known to be incompetent but also known to be without the protection of a guardian) of the foreclosure of tax liens against her property,[166] and a bankrupt's creditor of the period in which claims could be filed against the bankrupt's estate.[167] Similarly, the Court has held that due process requires more than posting notice on the premises to inform a tenant of an impending forcible entry and detainer action.[168]

The Court most recently adhered to *Mullane* in *Mennonite Board of Missions v. Adams*,[169] which dealt with the adequacy of publication notice to inform a mortgagee with a properly recorded mortgage of the pendency of tax sale proceedings that eventually would nullify the mortgage. The Court held that publication notice, even supplemented by posting on the property and by mailed notice to the owner of the property, did not accord due process to the recorded mortgagee.[170]

> When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane*.[171]

As in *Mullane*[172] and other cases,[173] the Court touted mail service as an "inex-

162. *Mullane*, 339 U.S. at 315. The Court noted that publication may be sufficient if reinforced by other conduct likely to attract the party's attention to the proceeding, such as "libel of a ship, attachment of a chattel or entry upon real estate in the name of law [, all of which] may reasonably be expected to come promptly to the owner's attention." *Id.* at 316. Additionally, the state may assume that the owner of tangible property located in the state either has abandoned it or has left it with a caretaker. If the property was abandoned, the proceeding will deprive the owner of nothing; if the property was not abandoned, the state may assume that a caretaker exists who will inform the owner of the proceedings. *See id.*

163. *Mennonite Bd.*, 103 S. Ct. at 2710 (6-3 decision).

164. Schroeder v. City of New York, 371 U.S. 208 (1962) (unanimous Court); Walker v. City of Hutchinson, 352 U.S. 112 (1956) (two justices—Frankfurter and Burton—dissented).

165. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1976) (case interpreting Fed. R. Civ. P. 23 with reference to *Mullane*, decided by 6-3 vote; however, the Court was unanimous on the notice issue).

166. Covey v. Town of Somers, 351 U.S. 141 (1956) (under the circumstances, publication was inadequate even as supplemented by posting and mailing).

167. City of New York v. New York, N.H. & H.R. R.R. Co., 344 U.S. 293 (1953) (case decided by 7 to 2 vote; however, the Court apparently was unanimous on the notice issue) (Bankruptcy Act interpretation with reference to *Mullane*).

168. Greene v. Lindsey, 456 U.S. 444 (1982) (case decided by 6-3 vote).

169. 103 S. Ct. 2706 (1983) (case decided by 6-3 vote).

170. *Id.* at 2711.

171. *Id.*

172. 339 U.S. at 319.

173. *See, e.g.*, Greene v. Lindsey, 456 U.S. 444, 455 (1982).

pensive and efficient mechanism," more reliable than publication and posting.[174] That the persons to be notified were "sophisticated," with the means at their disposal to "discover" the pendency of the proceeding, did not sway the Court.[175] Additionally, the Court was unpersuaded by the practical argument that the mortgagees could have protected themselves better by contractual provisions in the mortgage documents.[176]

Thus, the Court's decisions indicate that publication is never notice reasonably calculated to inform interested persons of the pendency of a proceeding when the names and addresses of those persons are known or can be ascertained with reasonable diligence. Instead, mailing of notice to a person's last known address is required. The Court, however, apparently has not discarded a balancing test for the adequacy of notice. All notice requirements have been assessed, impliedly if not expressly, with "due regard for the practicalities and peculiarities of the case," with due regard for their effect on important state interests, and with due regard for their reasonableness under the circumstances.[177] The balance in all the discussed cases has favored better-than-publication notice.

### *B. Better-Than-Publication Notice to Estate Creditors*

Whether the due process clause should mandate better-than-publication notice to known estate creditors cannot be assessed fully until the effect of a better-notice rule is evaluated. Such an assessment must include an identification of the important state interests underlying the current notice rules as well as an analysis of the impact a different notice rule would have on the achievement of legitimate state purposes. Ultimately, the Constitution will not and should not command a better-notice rule unless it is fair and workable.[178]

A better-notice rule would reverse years of established tradition in which the adequacy of publication notice has been presumed. Established practices and procedures would have to be altered if better-than-publication notice were required, and some well-settled rules would have to be modified or discarded.

Nevertheless, the existence of this tradition of publication notice and the

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174. *Mennonite Bd.*, 103 S. Ct. at 2711.

175. *Id.* at 2712. Notice reasonably certain to provide actual notice "is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." *Id.* The dissenters would have defined the constitutional obligation of the state with reference to the "party's ability to protect its interest." *Id.* at 2714 (O'Connor, J., dissenting).

176. The dissenters pointed out that the mortgagee could have exercised greater care to protect his own rights. For example, it "could have required that [the mortgagor] provide it with copies of paid tax assessments, or could have required that [the mortgagor] deposit the tax monies in an escrow account, or could have itself checked the public records to determine whether the tax assessment had been paid." *Id.* at 2716-17 (O'Connor, J., dissenting). The dissenters believed that "[w]hen a party is unreasonable in failing to protect its interest despite its ability to do so, due process does not require that the state save the party from its own lack of care." *Id.* at 2717 (O'Connor, J., dissenting). The majority, however, felt that "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." *Id.* at 2712.

177. *Mullane*, 339 U.S. at 314. It also has been stated that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Local 473, Cafeteria Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

178. *See Mullane*, 339 U.S. at 314.

realization that changes, even substantial ones, may have to be made to accommodate a better-notice rule should not preclude or stifle a reexamination of the fairness and constitutionality of publication.[179] Furthermore, the settled status of publication notice should not increase significantly the burden on those seeking to show its unconstitutionality;[180] practices should not be protected or immunized from constitutional challenge merely because such practices are well established.[181]

### 1. The State Interests Involved

The principal state interest underlying the enactment and interpretation of short-term nonclaim provisions is an interest in the expeditious settlement of estates.[182] The broad state interest favoring speedy settlement of estates implicitly includes an equally strong interest in finality.[183] A strong interest in the accuracy of the settlement underlies each of these policies—an interest in ensuring that the estate is distributed to the intended recipients. At times, however, in the formation of estate administration rules and policies, accuracy consciously has been compromised in the interests of administrative efficiency and finality.[184] Short-term nonclaim statutes that require only publication notice to interested parties illustrate that accuracy of distribution consciously has been deemed less important than the interests in speed and finality. Thus, the goal of estate administration today is not payment of *all* just debts. Instead, the goal is payment of only those just debts that are filed properly within a short time after the decedent's death, with distribution of the remaining assets to heirs and devisees.

The individual creditor's interest lies in the integrity of his relationship with the debtor. The individual creditor wants to be certain that no event will modify or impair this relationship significantly without his knowledge. The creditor

179. The Court has stated that the due process clause is "flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 476, 481 (1972), *cited in* Little v. Streater, 452 U.S. 1, 5 (1981).

180. *But see In re* Pierce's Estate, 245 Iowa 22, 60 N.W.2d 894 (1953).

181. *Compare* Jackson v. Rosenbaum Co., 260 U.S. 22, 24 (1922) ("If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . .") *with* Sniadach v. Family Fin. Corp., 395 U.S. 337, 340 (1969) ("The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms.").

182. *See In re* Estate of Kingseed, 413 N.E.2d 917, 923 (Ind. App. 1980) ("[I]t is now a well established policy of law . . . that estates shall be settled as speedily as possible."); Kusserow v. Blue Cross-Blue Shield, 140 Vt. 328, 335, 437 A.2d 1114, 1118 (1981) ("The law limiting the presentation of claims against a decedent's estate is intended to advance the swift and orderly distribution of that estate.").

183. *See* Allan v. Allan, 236 Ga. 199, 223 S.E.2d 445 (1976).

184. For example, policies regarding the establishment of a parent-child relationship between an illegitimate child and his father for purposes of intestate succession usually sacrifice accuracy for speed and finality. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1978); IND. CODE § 29-1-2-7(b) (Burns 1972). In *Lalli*, a New York statute that required a judicial determination of paternity to establish the parent-child relationship between father and illegitimate son was upheld against equal protection attack. The dissenting justice stated: "All interested parties concede that Robert Lalli is the son of Mario Lalli. . . Yet, for want of a judicial order of filiation entered during Mario's lifetime, Robert Lalli is denied his intestate share of his father's estate." *Lalli*, 439 U.S. at 277 (Brennan, J., dissenting).

especially is interested in protection against such an event when the event's occurrence or control is within the knowledge or control only of persons with competing interests.

The individual creditor's interest in receiving notice of the invocation of the short-term filing period seldom is served by publication notice. A better-notice rule, on the other hand, would satisfy the individual's interest if it afforded him actual notice. In any case enhanced notice nearly always would satisfy the individual creditor's interest better than a mere publication-notice rule.

The state's efficiency and finality interests are served when publication notice is the sole method of notifying creditors of short-term filing periods. The effect of a better-notice rule on the state's interests, however, is not so clear. To discuss the effect of such a rule, one first must put forth a better-notice rule that supports the state's efficiency and finality interests as fully as possible. The effect of the proposed enhanced-notice rule on the state's interests then can be evaluated.

### 2. A Better-Than-Publication-Notice Rule

It is essential to understand initially that the Constitution requires neither that every creditor have the same period of time in which to prepare and file a claim, nor that any creditor have the entire short-term period in which to prepare and file a claim. Therefore, notice to a creditor is not a constitutional prerequisite to the initiation of the short-term period.[185] Publication of notice or court appointment of a personal representative can establish the beginning date of the short-term period for all creditors, known and unknown.[186] It would be best to have the period begin at the same time for all creditors in any given estate in the interests of speed, finality, and order.

Six distinct questions provide the analytic framework for a notice rule that would afford due process and at the same time protect the state's speed and finality interests as fully as possible. First, what method of giving notice should be used? Due process requires notice reasonably calculated to inform; to be calculated to inform the notice must be calculated to be received.[187] Second, to whom should the notice be given? Due process does not require notice to persons with merely conjectural or valueless interests.[188] Third, what information should the notice contain? Due process requires that the notice convey sufficient information to afford the creditor an opportunity to prevent the deprivation of his rights.[189] Fourth, when should the notice be given? Due process requires

185. *Accord* Schroeder v. City of New York, 371 U.S. 208 (1962) (notice was required that a claim-filing period was running; by implication such notice not essential to the initiation of general expiration of the nonclaim period).

186. A jurisdiction could continue to use the beginning event that it now uses, whether triggered by publication or appointment. No compelling reason exists to prefer one to the other.

187. "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315.

188. "Nor do we consider it unreasonable for the State to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future . . . ." *Id.* at 317.

189. The notice must reasonably apprise interested parties of the pendency of the proceeding and of the imposition of a claim-filing requirement. *See generally* Memphis Light, Gas & Water Div. v.

that the notice must afford a reasonable time for the interested person to make an appearance.[190] Fifth, what is the effect of failure to give the required notice? Usually, lack of due process invalidates a proceeding as to the affected person.[191] Last, are there special circumstances in which failure to give notice will be excused? A due process violation might be deemed de minimis in the estate creditor context.[192]

*a. Method of giving notice.*—Estate creditors whose names and addresses are known or can be ascertained with reasonable diligence should be notified by the mailing of notice to each creditor's last known address.[193] In *Mullane*[194] and *Mennonite Board*[195] mailed notice was touted by the Court as a constitutionally acceptable alternative to notice by publication or posting.[196] Mailing of notice to the creditor's last known address is the method most likely to reach the creditor; often, mailing is the only method likely to reach the creditor at all.[197] As the Court in *Mullane* noted, one "desirous of actually informing" a known creditor with a known address almost always would choose the mails, as opposed to publishing notice in a newspaper or some other method of notice.[198]

Many short-term nonclaim provisions include a requirement that the published notice be mailed to heirs and devisees.[199] The interest of the heirs or devisees competes with the interest of a creditor of the decedent's estate because the heirs or devisees share only what is left of the estate after the payment of

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Craft, 436 U.S. 1, 14 (1978) (notice must inform interested party of opportunity to present objections); Goss v. Lopez, 419 U.S. 565, 579 (1975) (the "timing and content of the notice . . . will depend on appropriate accommodation of the competing interests involved.").

190. *Mullane*, 339 U.S. at 314.

191. Most of the cases simply have been reversed and remanded. *See, e.g., Mennonite Bd.*, 103 S. Ct. at 2712; *Mullane*, 339 U.S. at 320.

192. See *infra* part III(B)(2)(f).

193. The only viable methods are mailing, publication, and posting. In the estates context, the creditor has no specific property that he should be monitoring; thus, posting is useless as an informative device. For the same reason, no steps are available, other than mailing, that would reinforce posting or publication notice. Thus, the creditor's case cannot fall within an area in which "publication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning." *Mullane*, 339 U.S. at 316.

194. "However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication." *Mullane*, 339 U.S. at 319.

195. "The . . . use of these less reliable forms of notice is not reasonable where, as here, 'an inexpensive and efficient mechanism such as mail service is available.' " *Mennonite Bd.*, 103 S. Ct. at 2711 (quoting Greene v. Lindsey, 456 U.S. 444, 455 (1982)). *Mennonite Bd.* held that mailing was required by due process: "When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service." *Id.* at 2712.

196. *See also* Schroeder v. City of New York, 371 U.S. 208, 213-14 (1962) *quoted in*, Walker v. City of Hutchinson, 352 U.S. 112, 116 (1956) ("Even a letter would have apprised him.").

197. The only possible alternatives to mailing are publication or posting; in the estates context, the only practical, viable alternative is publication. *See supra* note 193. Publication in more than one newspaper would increase the chances that the creditor will discover the publication. Publication in any newspaper, however, will reach only those creditors who might read that newspaper. Publication in a local newspaper would be as effective as mailing only in rare cases, such as for those creditors who regularly read estate notices in the appropriate newspaper or those who learn of the debtor's death and therefore are encouraged to read the estate notices to discover if and when an estate has been opened.

198. *Mullane*, 339 U.S. at 315.

199. *See supra* note 46.

creditors' claims. Thus, heirs or devisees normally would not be inclined to share claim-filing information with potential creditors of the estate. Personal notice to heirs or devisees therefore cannot be considered sufficient notice likely to lead to actual notice to *all* estate creditors;[200] however, notice actually mailed to heirs and devisees affords due process to those claimants who have a claim against the estate.[201]

Publication notice, as it currently is used in most jurisdictions, would be sufficient for those estate creditors whose existence or whereabouts is unknown.[202] The *Mullane* court recognized the sufficiency of publication notice in such circumstances:

> This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights . . . . However great the odds that publication will never reach the eyes of such unknown parties, it is not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the best notice practicable.[203]

*b. Recipients of notice.*—Mailed notice must be sent to the last known address of creditors whose names and addresses are known or knowable with reasonable diligence. Identity of the proper recipients of mailed notice requires a determination of who is creditor and a determination of who is a known or knowable creditor.

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200. *See infra* note 209 and accompanying text.

201. In Indiana, for example, a copy of the published notice must be mailed to heirs or devisees listed in the petition to probate the will or the petition to appoint an administrator. IND. CODE ANN. §§ 29-1-7-5(2), 29-1-7-7 (Burns Supp. 1983). No sanction is imposed, however, if a known heir or devisee is not listed and therefore gets no mailed notice. *See, e.g.*, Anson v. Estate of Anson, 399 N.E.2d 432 (Ind. App. 1980) (failure to list and mail notice to known devisee until two days before expiration of claim-filing period did not affect running of the period.). *But see* Vogel v. Katz, 64 Ill. App. 2d 126, 212 N.E.2d 295 (1965) (Reasonable diligence is required to discover the identity of heirs and devisees to be listed on the petition.); Hesthagen v. Hartby, 78 Wash. 2d 934, 481 P.2d 438 (1971) (personal representative liable for loss caused by his failure to notify heirs whose names and addresses were ascertainable with reasonable diligence).

202. The *Mullane* Court listed the following situations as those in which publication would be acceptable: persons "missing or unknown"; persons "whose interests or whereabouts could not with due diligence be ascertained"; and persons "whose interests are either conjectural or future." *Mullane*, 339 U.S. at 317. *See also* City of New York v. New York, N.H. & H.R. R.R. Co., 344 U.S. 293, 296 (1953) ("But when the names, interests and addresses are unknown, plain necessity may cause a resort to publication."); Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951) (publication sufficient to inform unknown owners of property subject to escheat).

Whenever the estate assets are sufficient to pay creditors, publication would be a practical necessity to establish jurisdiction over unknown creditors; such notice would be sufficient to render the decree of distribution of the estate final as to them. *See generally* Hanson v. Denckla, 357 U.S 235, 241 (1958) (under state statute, notice by publication was sufficient constructive service of process on unknown natural person). Additionally, if the beginning of the short-term claim-filing period is tied to the date of the first published notice to creditors, publication notice always would be necessary to invoke the short-term period.

203. *Mullane*, 339 U.S. at 317.

i. Who is a creditor?—The current definition of claims that will be barred if not filed within the filing period can be used to define creditors entitled to mailed notice. All known or knowable creditors with barrable claims should be given mailed notice. In most jurisdictions, claims are barred even if they are not yet due, contingent, unliquidated, or founded in tort.[204] Although property claimants and lien claimants do not have barrable claims to the extent of their property interest or lien they nevertheless must follow the claim-filing rules to assert a claim over and above the property interest or lien. Thus, a lien holder with a potential deficiency between the value of the security and the amount of the debt ordinarily must file a claim to preserve his right to a deficiency judgment against the decedent.[205] Similarly, a property owner may recover possession of his property from the estate without filing a claim, but must file to preserve his right to damages for wrongful detention or use of his propety. Because of potential deficiency or damages claims, known or knowable property interest claimants and lien claimants should be sent mailed notice. Mailed notice also should be sent as a matter of practice to known or knowable joint obligors, partners, landlords, bailees, credit card issuers, charge account creditors, professional advisors, ex-spouses with alimony or child support claims, tort claimants,[206] and any other known or knowable person who might have a claim against the decedent's estate.[207]

In *Mullane* the Court found it reasonable "to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future."[208] The trust beneficiaries who were notified, however, had interests very similar to the interests of the beneficiaries not notified.[209] Thus, objections asserted by the

204. *See supra* note 52 and accompanying text.

205. This statement assumes that contingent claims not yet due are barred under the particular nonclaim statute.

206. Tort claims illustrate a special problem. Notice of a tortfeasor's death might induce a tort victim to file an action that otherwise would have been forgotten or abandoned. This possibility will not excuse notice. *See infra* note 253 and accompanying text. Two classes of tort claimants clearly are not entitled to notice: those whose claims are covered by insurance, because their claims would not be barred by failure to file, *see supra* note 55 and accompanying text; and those whose claims would be barred by the running of a statute of limitations before the expiration of the claim-filing period, because they are not deprived of property as a result of the operation of the nonclaim provision. Other tort claimants should be given notice if they are discoverable with reasonable diligence and if the nonclaim provision will be asserted as a bar. Personal representatives might be permitted the choice of giving no notice and awaiting the expiration of the statute of limitations or the long-term nonclaim period. *See infra* part III(B)(2)(f) and accompanying text.

207. Any creditor who would be paid even if he did not file a claim need not be given notice. *See infra* note 250 and accompanying text. Any creditor whose claim would be barred by the running of a statute of limitations before expiration of the claim-filing period need not be given notice because operation of the claim-filing provision would not deprive that creditor of property. Reasonable conditions probably could be imposed in a new nonclaim statutory scheme and still pass muster under *Mullane*. Lehr v. Robertson, 103 S. Ct. 2985, 2988 n.5 (1983) (statutory scheme provided for seven categories of unwed fathers to whom notice had to be given). For example, mailing could be excused and publication deemed sufficient for claimants with claims below a specific amount of money or below a specific percentage of the estate or those with claims against estates below a specific gross amount.

208. *Mullane*, 339 U.S. at 317.

209. *Mullane*, 339 U.S. at 317. The Court noted:

> This type of trust presupposes a large number of small interests. The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity

notified beneficiaries would serve to protect the interests of the beneficiaries who were not notified. Similarity of interest ordinarily does not exist among estate claimants, particularly when an estate is insufficient to pay all claims. It therefore may not be reasonable to dispense with enhanced notice to claimants with conjectural claims against an estate.

ii. Who is a known or knowable creditor?—In deciding who is a known creditor, a crucial preliminary issue is whose knowledge is important. Is the actual knowledge of the personal representative the only actual knowledge that counts, or should that of heirs, devisees, or others also count? At one extreme, the personal representative could be someone who knows little or nothing about the personal and financial affairs of the decedent. No creditor will be a known creditor to that representative. At the other extreme, the personal representative could be someone who is intimately familiar with the personal and financial affairs of the decedent. Many creditors will be known to that representative. In some cases heirs, devisees, or acquaintances will know nothing about the decedent's affairs; in other cases heirs, devisees, or acquaintances will be familiar with the details of the decedent's financial circumstances.

The existence of these potential extremes of actual knowledge on the part of personal representatives, heirs, devisees, or others must be considered in fashioning appropriate rules defining known or knowable creditors. The rules that are fashioned neither should reward the successors of a decedent who chooses a personal representative with no actual knowledge nor punish the successors of a decedent who chooses a personal representative who possesses a substantial degree of actual knowledge. The rules regarding whose knowledge will be considered also should not encourage appointment of a personal representative other than the one the decedent otherwise would have chosen.

A fair and workable rule, therefore, would depend only preliminarily on the actual knowledge of the personal representative. The actual knowledge of the personal representative must be supplemented by the knowledge that would be gained by a diligent investigation of the decedent's financial affairs. Reasonable diligence would include: a timely search of the decedent's home, office, and safe deposit box; an investigation of the books and records uncovered by the search, including the decedent's tax returns; and an inquiry of those of the decedent's relatives, acquaintances, business associates, and professional advisers whom the representative believes to be fertile sources of information.[210] The concept of reasonable diligence would charge the personal representative with the actual knowledge of the decedent's heirs, devisees, and acquaintances.

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of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all.

*Id.* at 319. *Cf. Mennonite Bd.*, 103 S. Ct. at 2709 (notice to owner did not give actual notice to mortgagee of the impending tax sale).

210. Due diligence was contemplated by *Mullane*. The Court stated that publication notice was adequate as to "[t]hose beneficiaries . . . whose interests or whereabouts could not with due diligence be ascertained." *Id.* The identity of fertile sources of information may be uncovered in the personal representative's search for, and investigation of, the decedent's books and records.

Theoretically, it therefore would be irrelevant whether the personal representative began with any actual knowledge of the decedent's financial affairs. Assuming that the personal representative uses reasonable diligence in making inquiries and that the inquiries result in honest answers, the personal representative's ultimate knowledge should be the same whether he began with much or little actual knowledge.[211] In practice, however, the actual knowledge of the personal representative may make a difference unless clear liability rules are developed to ensure that the two preceding assumptions are as accurate as possible.

To ensure that personal representatives use reasonable diligence in finding creditors, the personal representatives should be liable to pay the claim of any creditor who should have been discovered, notified, and paid by the estate.[212] This potential liability should assure reasonable diligence on the part of any personal representative who is aware of his duty of diligence.[213]

To ensure that inquirees will respond honestly, dishonest or nonresponsive inquirees also should be held liable to pay the claim of any creditor who would have been discovered, notified, and paid by the estate if the inquiree had responded to reasonable inquiry.[214] This liability rule may be called into play frequently by personal representatives who are making inquiries and wish to impress upon the inquirees that an honest and complete response must be given.

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211. The only exception would be the rare case in which the personal representative was the only person with certain information and in addition was a person that no other reasonably diligent personal representative would have consulted as a potential source of information.

212. The personal representative also should be liable for interest from the time the creditor should have been paid by the estate. Alternatively, the personal representative could be liable for all damages proximately caused by his breach of duty, including all foreseeable consequential losses to the creditor. Liability for damages would impose a greater burden on the personal representative than liability to pay the claim plus appropriate interest. To establish the personal representative's liability, the creditor should meet the burdens of proof discussed *infra* notes 235-39 and accompanying text.

213. Professional personal representatives will know about this duty; lay personal representatives may not. At the time of appointment, the court should emphasize the importance of all the fiduciary duties to the lay personal representative. Bonds should become more important as creditor-related duties are increased.

214. *See, e.g.*, Hesthagen v. Harby, 78 Wash. 2d 934, 481 P.2d 438 (1971) (beneficiaries who failed to discover existence of heirs may be liable to them under constructive trust theory). Ideally, this duty should be expressed clearly in a statute that imposes a better-notice rule. The inquiree could be held liable for all damages proximately caused by the breach of duty to disclose relevant facts; this liability could be onerous. Alternatively, liability could be limited to payment of the creditor's claim to the same extent that the claim would have been paid out of the estate assets. A third possibility would be to limit liability to the value of the property received from the estate by the inquiree who failed to disclose relevant facts; however, that would eliminate recovery from one who deceived the personal representative to get a greater share of the estate for another. The best solution is to require payment of the creditor's claim, plus appropriate interest, to the same extent that the claim would have been paid out of the estate's assets. To establish the inquiree's liability, the creditor should meet the burdens of proof discussed *infra* notes 235-239 and accompanying text.

Special problems of establishing and apportioning liability will arise when more than one inquiree has breached a duty to disclose information that would have led to discovery and notification of a creditor. Similar problems will arise if the personal representative's breach of duty contributed to the failure to discover the creditor. All breaching parties could be jointly and severally liable to the undiscovered creditor; or liability could be based on the relative innocence of the breaching parties. An inquiree whose information would have led, not directly to discovery of a creditor, but indirectly to an otherwise unknown source of additional information, could be liable to the creditor, but not to the same extent as an inquiree who intentionally failed to name a creditor known to him. Neither of these inquirees should be liable to the same extent as a professional representative who failed to exercise reasonable diligence.

Because those with knowledge are often those who will benefit financially by not sharing it,[215] liability rules must be developed to encourage honest responses to the personal representative's reasonable inquiries; otherwise, creditor notice rules could be avoided.[216]

*c. Content of notice.*—Due process requires that the mailed notice inform the known creditor of the facts necessary to give him an opportunity to prevent deprivation of his rights.[217] The mailed notice would be sufficient if it included the same information that currently is contained in the publication notice: that the decedent has died; that an estate has been opened in *X* Court, *Y* County, *Z* State, under *N* Docket Number; that the personal representative of the estate is *P*; and that creditor's claims must be filed within *T* time after *D* date or be barred against the estate and the decedent's successors.[218]

The mailed notice also should include the exact date of the beginning and the end of the claim-filing period. It would be illogical to require a mailed notice, intended to inform a known creditor of the need to file a claim or be barred forever, but then permit that mailed notice to omit essential information about the time for filing—especially if the time for filing is within the knowledge of the personal representative. In any jurisdiction in which the nonclaim period currently begins to run on the court's appointment of the personal representative, the mailed notice could be simply a reproduction of the published notice; no new document would be needed. In jurisdictions in which the nonclaim period currently begins to run on publication of notice to creditors, the mailed notice could not be a reproduction of the published notice and still include the exact date of the beginning and end of the claim-filing period. Thus, in those jurisdictions in which publication starts the period running, a new document would have to be created for mailing.[219]

Whether the notice is a copy of the published notice or a new document, it need not be tailored for or directed to any individual creditor. The notice also need not describe the kind of claim which the personal representative suspects that particular creditor has or might have. The notice should not suggest that the recipient actually is a creditor or that a particular claim, if filed by the creditor, likely would be approved or paid.

*d. Timing of notice.*—*Mullane* required that "notice reasonably calculated

215. The estate creditor's situation can be contrasted to a bankruptcy creditor's. In bankruptcy, the debtor's best interest is to identify all the creditors of whom he is aware so that he can be discharged completely from his obligations.

216. Creditor notice rules could be avoided by dishonest successors of decedents who have not kept accurate and organized books and records. The disorder may be the result of carelessness or the result of an intentional attempt to mislead and confuse. Regardless of the reason for the disorder, successors of the disorganized decedent should not be rewarded for the decedent's disorder.

217. *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14 (1978) ("purpose of notice under the Due Process Clause is to apprise the affected individual of . . . an impending 'hearing' "); Goss v. Lopez, 419 U.S. 565, 578 (1975) (The "timing and content of notice will depend on appropriate accommodation of the competing interests involved.").

218. The content of the current publication notice is not objectionable constitutionally. The objection is to the way the message is delivered.

219. A copy of the published notice easily could be supplemented by the addition of the date of publication.

[to inform] . . . must afford a reasonable time for those interested to make their appearance."[220] In an estate administration setting, this would mean that notice would have to be given in time to afford creditors an opportunity to prepare and present their claims within the short-term period.

The personal representative should begin a review of the decedent's books and records immediately on appointment. Ideally, this review will identify all of the known or knowable creditors soon after the decedent's death so that notice can be given well within the claim-filing period. Unfortunately, the ideal will not always occur; consideration only of the ideal does not take into account the practicalities and peculiarities of estate administration.

The decedent may not have kept accurate or organized records.[221] Furthermore, the disorganized decedent may not have discussed his or her financial affairs with anyone, so that no one person has accurate knowledge about the decedent's debts and obligations.[222] Even with the exercise of reasonable diligence, the name and address of a creditor may not be discovered in time to afford the creditor an opportunity to prepare and present a claim within the short-term period.

A workable notice rule would conclude that those creditors whose names and addresses cannot be discovered with the exercise of due diligence within a reasonable time prior to the expiration of the short-term claim-filing period are not entitled to mailed notice.[223] Given the strong state interests in speedy and final settlement of estates, a reasonable time limitation would be appropriate and constitutional in the estate administration setting.[224] Definition of a reasonable time could be left to the courts, but case-by-case assessment would result in uncertainty. Thus, a reasonable time should be defined specifically in a statute.[225]

A sensible approach would be to require mailed notice only to creditors whose identity and address were discovered within the defined reasonable time prior to expiration of the claim-filing period. Providing notice after expiration of the claim-filing period to a creditor whose name and address were not discovered within it would produce nothing but litigation between the creditor and the estate over the issue of the personal representative's due diligence.[226]

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220. *Mullane*, 339 U.S. at 314.

221. The decedent may be a carelessly or intentionally disorganized decedent. *See supra* note 217.

222. Alternatively, the disorganized decedent may have discussed his financial affairs with heirs or devisees who may be slow to share information about creditors if they realize that their share of the decedent's estate will be greater if the creditors remain unknown and unknowable.

223. This statement assumes that a creditor's claim is barred if it is not filed within the claim-filing period. The reasonable time period should be tied to the event that bars the creditor's claim.

224. The Court in *Mullane* found it reasonable "to dispense with more certain notice to those beneficiaries whose interests . . . , although they could be discovered upon investigation, do not in due course of business come to the knowledge of the common trustee." *Mullane*, 339 U.S. at 317.

225. The specified time period should be short, for example, 10 or 20 days, but should include a reasonable time for a creditor to file a claim after the mailed notice was likely to reach him. If the creditor's existence or address is discovered after the specified time for notice but before the claim-barring event, notice by telephone could be required.

226. If the creditor's name and address could not have been discovered in the exercise of reason-

*e. Failure to give notice.*—Failure of the personal representative to give adequate notice to a creditor may result from his failure to use reasonable diligence to discover the name and address of the creditor. Failure to give notice also may result despite the personal representative's reasonable diligence, if those with knowledge otherwise unavailable to the personal representative fail to respond to his inquiry, or if no reasonably available facts existed that would have led to the discovery of the name and address of the creditor.[227]

Several situations involving failure to give notice are easy to resolve. First, if the creditor who was not given mailed notice nonetheless filed a claim within the short-term period, no one should be held liable to that creditor for breach of the duty to give notice. The creditor has suffered no damages for the technical breach of duty. Second, if the creditor's name and address were not discoverable by the use of reasonable diligence within the claim-filing period, the personal representative had no duty to send mailed notice to that creditor. Last, if the creditor fails to file a claim within the short-term period, either because the personal representative breached his duty of reasonable diligence or because an inquiree did not respond openly and honestly to the personal representative's inquiry, the personal representative or the inquiree may be liable to pay the creditor's claim.[228]

The question that must be addressed is whether a creditor who was entitled to mailed notice but was not given it may assert his claim successfully against the decedent's estate or the decedent's innocent successors. The resolution of this question is important, particularly in light of the state's interest in speedy and final distributions of decedent's estates. The finality interest is disserved to the extent that a creditor may assert a claim against the decedent's successors after distribution of the estate.[229]

Generally, if due process is not accorded, the person deprived of due process is not bound by the action.[230] Thus, a creditor who was not given notice to which he was entitled could argue that he should be able to assert a claim against the decedent's estate—or against the decedent's successors if the estate has been distributed—without regard to whether he filed his claim within the claim-filing period. If this argument prevailed, the finality interest would be dis-

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able diligence, this litigation will do nothing but deplete estate assets. The undiscoverable creditor is not entitled to notice. If the creditor's name and address should have been discovered within the claim-filing period, then any litigation produced by the late notice would be productive. Notice rules, however, should protect diligent personal representative from unproductive litigation.

227. Persons with knowledge of relevant facts could be unavailable temporarily. Unavailability could pose a problem if it continued for a substantial portion of the claim-filing period. The law might provide that the creditor takes the risk of inadvertent temporary unavailability, but that the creditor's notice rights are protected if the unavailability is intentional. Modern communications methods should make absolute unavailability a fairly rare occurrence.

228. See *supra* notes 212-13 and accompanying text (discussion of the personal representative's liability); *supra* note 214-16 and accompanying text (discussion of the inquiree's liability).

229. The interest in expeditious settlement also could be affected, but the effect could be positive. Placing carefully chosen time limitations on the assertion of a denial of due process might encourage the speedier settlement of decedent's estates. See *infra* note 233 and accompanying text. Another question is whether the aggrieved creditor could recover from innocent junior creditors.

230. *See Mennonite Bd.*, 103 S. Ct. at 2712; *Mullane*, 339 U.S. at 320.

served by a better-notice rule in every case in which better notice should have been given, but was not.

In the context of a decedent's estate, however, the broad application of this general proposition would be inappropriate. Other rules should operate to place limits on the ability of a creditor to assert an unfiled claim against the estate. Thus, an unnotified creditor should be required to discover and assert his claim within the applicable statute of limitations.[231] Furthermore, an unnotified creditor reasonably could be required to assert his claim within the long-term claim-filing period, measured from the decedent's death, regardless of notice and of the time of the running of the short-term period.[232] Alternatively, it also is reasonable to require that an unnotified creditor assert his claim against the estate while the estate remains open; this limitation might encourage even speedier settlements of estates than does the present law.[233]

A mailed notice requirement therefore does not have to interfere substantially with the state's interests in finality and expedition. Applying a reasonable limitations period would not disserve the finality interest but would only postpone it, even in an estate in which the personal representative failed to use due diligence.[234]

The unnotified creditor who seeks payment without having filed a timely claim should have the burden of proving certain facts to establish his right to payment from the estate, the personal representative, the decedent's successors, or dishonest or uncooperative inquirees.[235] The creditor would have to prove that his claim was valid and enforceable—a burden he would have had to carry even if he had filed a timely claim. Furthermore, the creditor should have to prove that he asserted a claim within the reasonable limitations period adopted

231. If the general statute of limitations expires during the claim-filing period, the creditor should be required to assert his claim either within the limitations period or within the long-term nonclaim period, regardless of notice. If the creditor is a known creditor and has not received notice of the opening of the estate and has attempted to assert his claim against the decedent within the limitations period, he could properly be allowed a longer time to file his claim in the court or with the personal representative.

232. The long-term claim-filing period could be established as the statute of limitations applicable to all claims of due process violations or other irregularities in the estate proceeding; a shorter time, if it is reasonable, also could be chosen.

233. It would be possible to relegate the unnotified creditor to an action against the personal representative (individually or on his bond) after the estate is closed. The speedy settlement of estates might be discouraged if the personal representative could be sued individually by creditors after estate distribution, but could not be sued while the estate remained open. A personal representative might await the expiration of other statutes of limitations before distributing the estate.

234. Some jurisdictions already have provisions that disserve the finality interest. *See, e.g.*, IND. CODE ANN. § 29-1-1-21 (Burns Supp. 1983) ("For illegality, fraud or mistake, upon application filed within one year after the discharge of the personal representative upon final settlement, the court may vacate or modify its orders, judgments and decrees or grant a rehearing therein."). The finality interest is disserved not only to the extent that the estate could be reopened and previously distributed property forceably returned to it, but also to the extent that the personal representative or the decedent's successors could be found liable after the decree of distribution and discharge.

235. *But see* Armstrong v. Manzo, 380 U.S. 545 (1965). The *Armstrong* Court held that a hearing was not meaningful for due process purposes when the burden of proof was shifted from what it would have been if the party to be notified had appeared earlier and presented his objections. *Id.* at 547. Thus, in establishing reasonable burdens of proof for the unnotified estate creditor, he must not bear significantly greater or different burdens than does a creditor who appears earlier and presents his claims.

in the jurisdiction.[236] Lack of timeliness could be a matter of affirmative defense, as with any limitations period, or timeliness could be an element of the creditor's cause of action.

The creditor should be required to prove affirmatively that he had no knowledge of the opening of the estate and the invocation of the claim-filing period in time to file a claim.[237] A creditor who had such knowledge should be deemed to have waived his rights against the estate or successors.[238] The creditor also should be required to prove that property existed in the estate out of which the claim could have been satisfied.[239]

A creditor who is not given proper notice also should be directed to pursue his remedies against the personal representative, the estate, or others in a designated order. The decedent's innocent successors should be liable to the creditor only to the extent that the creditor is unable to recover against the personal representative who failed to use reasonable diligence,[240] or against any dishonest inquirees. Innocent successors also should be held liable only to the extent that they received estate property gratuitously.[241]

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236. *See supra* notes 231-33 and accompanying text.

237. This requirement would have to be phrased carefully. For actual knowledge to defeat the creditor's action, the creditor would have to have had actual knowledge of the opening of the estate. *Mennonite Bd.* supports the argument that notice of death is not the same as notice of the opening of an estate and the running of a claim-filing period. In an analogous situation in the tax sale context, the Court in *Mennonite Bd.* stated that "a mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending." *Mennonite Bd.*, 103 S. Ct. at 2712. Thus, notice of a pending tax sale was required in *Mennonite Bd.* regardless of the mortgagee's knowledge or access to knowledge of the delinquency in taxes. Notice of the pending estate administration and the running of the nonclaim period likewise should be required regardless of the creditor's knowledge of the debtor's death. In the estate context, if a creditor had actual knowledge of the claim-filing period, and the creditor did not file a timely claim against the estate, one could conclude that the creditor had chosen to waive his rights to be paid out of the estate.

A different question is raised when the creditor had actual knowledge of the opening of the estate, but had no idea of the claim-filing requirement. Is it reasonable to assume that everyone should know the law; that is, everyone should know that a short-term claim-filing requirement is tied to the opening of an estate? If it is reasonable to assume that everyone knows the law, the next logical use of the assumption would be in assessing the proper content of notice. If it is assumed that everyone knows of the short-term filing period, then notice would be sufficient if it merely informed the recipient of the opening of an estate, without any mention of the need for, or the time limitations on, filing of claims. Both applications of a presumption of knowledge of the law are inappropriate.

238. The creditor might be required to allege, but should not have the burden to prove, that his name and address were or could have been discovered by the use of reasonable diligence within the claim-filing period. Proof of diligence should be a matter of defense whenever the personal representative is a party defendant. Even if inquirees are defendants, the burden of proving diligence logically should be placed on them. The creditor usually will not have access to as much relevant information as the personal representative or the inquirees.

239. If no such property existed, the creditor would have been deprived of no property entitlement by the lack of due process. In a judicially supervised estate, this information will be a matter of public record in the decree of distribution. In an estate in which information about estate property does not exist in a public decree of distribution, the burden of proving insufficient property might best be placed on the defendant.

240. The creditor could be required to prove that he could not recover against the representative either personally or on his bond; or he could be required to raise the issue as a defense.

241. The liability of innocent successsors could be limited to the value of estate property that they still owned or those proceeds that are identifiable when the creditor either notified them of his claim or filed suit. Collusive sales and transfers—or those sales and transfers entered into merely to avoid liability—could be deemed ineffective to reduce the successor's liability. Bona fide purchasers should be protected.

Reasonable burdens and risks, as described above, could be developed to strike a fair balance between a better-notice requirement and the state's finality interest. A creditor who did not get the notice due him gets too much if he can use his lack of notice as a threat either to reopen a settled estate proceeding or to sue the successors individually unless he must meet basic burdens of proof and persuasion.

*f. Excuse of Notice.*—If the estate had insufficient assets to cover the costs of making reasonable searches and of mailing notice, the assets would be insufficient to pay any creditors' claims that are filed. If the estate is so insolvent as to be unable to pay any creditors' claims, the burdens of enhanced notice should not be imposed. Publication notice also should be excused and creditors claims should be deemed barred. If the estate has assets available to pay creditors' claims, the estate could be granted the option either to invoke the short-term filing period—with its attendant and expensive publication, due diligence, and mailed notice requirements—or to await the expiration of the long-term period, with none of the attendant expenses. If the estate has assets to pay some but not all creditor's claims, notice to creditors whose claims cannot be paid should be excused. If additional assets are discovered, however, the unnotified creditors should be given notice and an opportunity to share in the newly discovered assets.

*g. Miscellaneous Considerations.*—The creditor could waive the right to mailed notice prior to or after the decedent's death,[242] and existing rules regarding whether the personal representative had the right to waive the filing period could continue under a better-notice rule.[243] Nothing suggests that better-notice rules should be retroactive,[244] and nothing commends a change in rules preventing an extension of time for a claimant's infancy or insanity.[245]

### 3. Effects of a Better-Notice Rule

The proposed, better-notice rule would increase the burdens on the per-

242. Assuming that the waiver was made knowingly and voluntarily, the creditor could not have been deprived of a property entitlement by lack of due process once he waived his right to notice.

243. See *supra* note 50 and accompanying text for the existing waiver rule.

244. *See generally* Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1939) ("all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified"); Allan v. Allan, 236 Ga. 199, 208, 223 S.E.2d 445, 452 (1976) (decision to make law prospective balances constitutional interests with people's reliance on old probate law); Klinger v. Kepano, 635 P.2d 938, 946 (Hawaii 1981) (because of potential impact on tax deed-based land titles, decision not retroactive). In *Klinger*, the court restricted the applicability of its holding "to the instant case and to other cases in which a complaint questioning the constitutional adequacy of notice . . . had been filed as of the date of this decision." *Id.* at 946. In an estate setting, a court which held that publication notice was inadequate could restrict its holding to estates opened after, or to estates opened for decedents who died after, the date of the decision. Similarly, a new statutory scheme of better-than-publication notice could limit its application to those estates of decedents dying after the effective date or to those that were opened after the effective date.

245. If the personal representative is aware of a claimant's "inexperience or incompetence," then "particularly extensive efforts to provide notice may often be required." *Mennonite Bd.*, 103 S.Ct. at 2712 (citing Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13-15 (1978), and Covey v. Town of Somers, 351 U.S. 141, 146-47 (1956)). In *Covey*, even mailing of notice of a tax foreclosure was held insufficient when the "person was known to be an incompetent who is without the protection of a guardian." *Covey*, 351 U.S. at 146.

sonal representative by requiring reasonable and timely diligence in the discovery of creditors,[246] requiring the preparation of envelopes (and perhaps documents) for mailing to the discovered creditors,[247] and imposing personal liability on the personal representative to pay the claim of the creditor if the personal representative breaches his duty to use reasonable diligence.[248] The courts also may be required to accept a slightly increased burden to ensure that the reasonable diligence requirements are satisfied. At the outset of an administration, the court should emphasize the duties of the personal representative, especially if the personal representative is not familiar with the responsibilities of his position. When administration is complete, the court should inquire for the record about the representative's diligence. An inquiry into diligence, perhaps by requiring an affidavit of diligence or by a due-diligence hearing, should be made a standard feature of the final accounting and decree of final distribution. If a hearing is held, an aggrieved creditor should be entitled to participate as a party if he wishes. He also could be joined as a party against his will.

These burdens will not interfere substantially with the expeditious and final settlement of estates. The "reasonable diligence" duties of the personal representative certainly make his responsibilities greater. Even under a publication notice rule, however, a diligent personal representative would conduct a similar review of the decedent's books and records—as well as an inquiry of the decedent's relatives and business associates—in the course of collecting assets, discovering the identity of heirs or devisees, and investigating the validity of timely filed claims. Under an enhanced-notice rule all that would be required are a few more questions to be added to those already asked of relatives and friends, and a new list that would include debts as well as assets. The due diligence requirement thus would not add as many new chores as it first appears, and the increased potential liability should not affect a personal representative who documents his diligent efforts to locate creditors.[249]

Other possible problems of personal representatives under a better-notice rule may be anticipated. Some will complain that a mailed notice requirement would require notices to the electric company, telephone company, gas company, water company, landlord, credit card issuers, *ad infinitum*. Such notices would be wasteful and useless as to any creditors who would be paid regardless of filing, either by the personal representative or by the decedent's successors.[250] The law, however, does not require the doing of useless things. Notice need not

246. Careful personal representatives will document their diligence, and this documentation may further increase the burdens on the personal representative.

247. Mailing rarely will render publication unnecessary. Therefore, all the chores incident to the mailing of notice will increase the burdens without any corresponding reduction of costs.

248. Bonds may be required more often and in more cases, and the bonds may be more expensive given the personal representative's increased liability. To ensure that the better-notice rule operates as fairly as possible, an increased burden also would be imposed on dishonest or uncooperative relatives and acquaintances of the decedent—they would be held liable to the creditor for damages suffered as a result of failure to answer honestly the reasonable inquiries of the personal representative.

249. See *supra* notes 212-13 and accompanying text for discussion of the potential liability of the personal representative who is not diligent.

250. *See* Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97

be sent to a creditor who would be paid in full regardless of filing; any creditor who is paid in full will not be able to show deprivation of a property entitlement resulting from inadequate notice.

Any discoverable creditors who would not be paid if they did not file claims, including the utilities, the credit card issuers, and the landlord, would be entitled to mailed notice.[251] The personal representative's search for, discovery of, and notification to these creditors is a small task compared to the task that all creditors would have to undertake to discover the need to file claims.[252]

A second concern that must be anticipated is that a better-notice rule would promote litigation and thereby interefere with and disserve the state interest in the speedy settlement of estates. In many respects the better-notice requirement requires that a potential defendant notify a potential plaintiff that the plaintiff should sue. This kind of notice almost certainly would promote litigation, which in turn would delay the settlement of estates.

One response to this concern is that the enhanced-notice requirements imposed in *Mullane* and its progeny could promote more active litigation than would have been promoted without them. By increasing the awareness of possible litigants any better-notice requirement will promote litigation despite the state's interests in suppressing it.

The notice to creditors, however, will not invite the recipient to file a claim and will not indicate to the recipient that he has a valid claim. The notice will provide general information about the basic facts that any creditor would need to know if he intended to file a claim and should be in a form that looks as if it has been directed to many appropriate individuals and organizations. To the extent that receipt of such notice encourages the recipient to consider whether the recipient has a claim that should be asserted against the decedent's estate, the notice will have performed its precise function. It will promote litigation and delay only to the extent that this consideration by the recipient results in the filing of a claim that otherwise would not have been filed. If the filed claims are valid and easily determined to be so, however, litigation and delay will not occur; the claim will be allowed and if assets are available the creditor will be paid. Therefore, the better-notice requirement will result in increased litigation and consequent delay only to the extent that questionable claims that otherwise would not have been filed are pursued in court after disallowance in whole or in

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HARV. L. REV. 1108, 1120-25 (1984). Langbein suggests that many creditors are paid voluntarily by the decedent's successors, perhaps more because of moral considerations than legal ones.

251. Such a burden is not overwhelming. Postage today for even 100 envelopes would be a mere $22.

252. Mailing individual notices is not the only constitutionally acceptable method of notifying creditors of the need to file a claim within the filing period. Mailing is merely one example, touted by the Supreme Court, of an inexpensive and effective method of providing the best notice practicable. It is possible to imagine a case in which local radio advertisements or properly placed posters, telephone calls, or handbills might be equally as effective as mailed notice under the circumstances. Methods of notice other than mailing could be appropriate in the case of the death of a notable and newsworthy individual, or of a local businessman with a large number of potential local creditors. A statutory better-notice scheme could authorize exceptions to mailed notice under extraordinary circumstances when the personal representative can convince the court that alternative means would provide adequate actual notice.

part.[253]

This litigation and delay, however, results because due process was afforded to all creditors, including those with clearly valid demands and those willing to assert and pursue questionable claims. Each creditor has been entitled to choose for himself to have a day in court against the estate, just as he would have been entitled to choose to pursue his claim against the decedent during the decedent's lifetime. The interest in speedy and expeditious settlement cannot justify secrecy and lack of meaningful notice in the estates context merely because of the possibility of unjustified contentiousness any more than an interest in speedy dispute resolution could justify lack of notice in a condemnation action, bankruptcy proceeding, or action to settle a trustee's accounts. Speed and expedition should give way to due process. This especially is true in an estate proceeding in which the victims of the speedy settlement are persons whom the decedent had a legal obligation to pay.

The costs of administering decedent's estates will rise with a better-notice requirement. Personal representatives will have to spend more time complying with (and documenting compliance with) the reasonable-diligence requirement. Bonds probably will be more prevalent and more costly with the increased creditor-related duties. The increased administration costs, however, eventually should be counterbalanced by decreased costs of credit. A better-notice rule essentially effects a transference of the risks of nonpayment from the creditor to the debtor's successors. Thus, donees, rather than persons who gave value for their "share" of the decedent's estate, will bear the costs and risks.

Ultimately, the reasonable-diligence requirement and the mailed-notice requirement are not likely to interfere significantly with the final and reasonably expeditious settlement of a decedent's estate. Interference with speedy settlement occurs only to the extent that the creditor pursues a questionable claim that he would not have pursued without notice.

Interference with finality occurs only if reasonable diligence is not used or inquirees are unresponsive, and only if the creditor's name and address could have been discovered in time if reasonable diligence had been used or proper responses had been given.[254] The personal representative or the inquiree who failed to perform his duties is primarily responsible for the interference with finality and should be held primarily liable.

Thus, a better-notice rule would not place impracticable or impossible ob-

253. The real risk is that persons with very questionable claims will be more likely to pursue them in hopes of a compromise.

254. The nonclaim period still will run from the date of appointment of the personal representative or the date of the first published notice. If the creditor's existence and address are discovered by due diligence in time to mail notice to the creditor within a reasonable time prior to expiration of the claim-filing period, then the reasonable diligence requirement will not interfere with finality. If the creditor's name or address cannot be discovered with reasonable diligence within a reasonable time prior to the end of the claim-filing period, then the creditor is entitled to no notice; the claim-filing period expires and finality has not been disserved. The creditor might be more likely to pursue a case for payment, even under a better-notice rule with substantial burdens of persuasion placed on him, than he would have been under the traditional rule, in which publication was assumed to be adequate. Thus, some interference with finality may occur as an indirect consequence of creating burdens that are met more easily.

stacles in the way of achieving vital state interests. At the same time, such a rule would provide creditors with the process they are due. A better-notice rule therefore is workable because it adequately meets the requisites of all parties to an estate administration proceeding.

## IV. CONCLUSION

The Supreme Court has acknowledged in *Mullane v. Central Hanover Bank and Trust* that in proceedings to be accorded finality due process demands notice sufficient to inform interested parties and afford them the opportunity to be heard. The Nevada Supreme Court's holding in *Contintental Insurance Co. v. Moseley* was the first recognition that this fundamental due process right must inhere to estate nonclaim provisions. Estate proceedings cannot use tradition and inertia to justify unfairness. Known and knowable creditors should be given better-than-publication notice of a judicial event that will impair or destroy their property entitlements. A workable statutory scheme could provide for better notice and at the same time serve the important state interests of speed and finality in estate proceedings. A better-notice requirement would be fair and practical.