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Notice to Decedents' Creditors

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In 1950, the United States Supreme Court decided *Mullane v. Central Hanover Bank & Trust Co.*[1] *Mullane* invalidated a New York statute that permitted a common trust fund trustee to secure judicial approval of its accounts[2] in a proceeding of which trust beneficiaries were given notice merely by publication.[3] The Court explicitly confined the holding of *Mullane* to trust beneficiaries who were identified in the trustee's current records. The Court held that such beneficiaries were at least entitled, under the due process clause of the fourteenth amendment, to be notified of the accounting proceeding by ordinary mail.[4]

Mullane is better known, however, for Justice Jackson's general description of the notice requirement of the due process clause, a description not confined to the rights of known parties with known addresses:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present

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Thanks also are due my former research assistant Andrea Walsh, Esq., of Minneapolis, and my research assistants Amy Kvålseth and Arlene Kelly, of the University of Minnesota Law School's class of 1989, for their valuable contributions.

1. 339 U.S. 306 (1950).
2. The judicial approval purportedly bound all trust beneficiaries. *Id.* at 309.
3. *Id.* at 320 (discussing N.Y. BANKING LAW § 100-C (1944)).
4. *Id.* at 318.

their objections.[5]

This general description suggests that "interested parties" who are *not* known also may be entitled to such notice. *Mullane* did not address the subject of what kind of search for such people due process would require.

Many state probate codes, however, long have authorized one or both of two procedures under which courts may determine the respective rights of successors and creditors of decedents without meeting the *Mullane* notice requirements.[6] One such procedure is the informal or "common form" probate[7] of a will without notice to possible successors.[8] The other is the widespread practice of barring the claims of a decedent's creditors under a two- to six-month short-term[9] nonclaim statute.[10] Under a short-term nonclaim statute, a decedent's creditors' claims will be subject to a statute of limitations period triggered by publication of a notice to creditors.[11] Unsurprisingly then,

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5. *Id.* at 314.

6. Some probate codes authorize both procedures. *See, e.g.*, ARK. STAT. ANN. § 28-40-111 (1987 & Supp. 1988).

7. The English ecclesiastical courts permitted "common form" probate of a testament of personalty without notice, (although interested parties could require a supplemental "solemn form" proceeding with notice to interested parties for an extended period, perhaps as long as 30 years. T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 93, at 482 (2d ed. 1953)). A similar informal probate proceeding without notice has been available in "more than a third" of the states. *Id.* § 95, at 494. This form of proceeding remains available in many of them. W. MCGOVERN, S. KURTZ & J. REIN, WILLS, TRUSTS AND ESTATES § 14.1, at 578 (1988) (citing GA. CODE ANN. §§ 113-601, 113-602 (currently codified at 53-3-8 to -9 (Supp. 1988))). Under typical American versions, the informal proceeding becomes final after one to several years. *Id.*

The Uniform Probate Code contains its own version of informal probate without notice. UNIF. PROB. CODE §§ 3-301, 3-306 (1988). The Code bars claimants seeking to recover assets from informal distributees at the later of three years following the date of the decedent's death or one year following the date of informal distribution. *Id.* § 3-1006.

8. Under these statutes, a party may contest a will admitted to probate without notice for one or more years thereafter. *See, e.g.*, GA. CODE ANN. § 53-3-12 (Supp. 1988) (informal probate bars interested parties after four years).

9. This term, which was coined by Professor Falender, refers to a statute that bars claims of a decedent's creditors who fail to present their claims against the estate within two to six months following the issuance of letters to a decedent's personal representative and the publication of a notice that such letters have been issued. Falender, *Notice To Creditors In Estate Proceedings: What Process Is Due?*, 63 N.C.L. REV. 659, 667-69 (1985).

10. For a general description of nonclaim statutes, see T. ATKINSON, *supra* note 7, § 127, at 690-91.

11. Section 3-801 of the Uniform Probate Code, for example, provides as follows:

> Unless notice has already been given under this section, a personal representative upon his appointment shall publish a notice once a

one early consequence of the *Mullane* decision was scholarly debate as to whether such provisions violated due process notice requirements.[12]

Many state appellate courts wholly rejected arguments that the informal probate of a will without notice[13] or the barring of a decedent's creditors following notice by publication under a short-term nonclaim statute[14] violates the due process requirements articulated in *Mullane*. Moreover, the Supreme Court, although willing to apply *Mullane* expansively in other areas,[15] bolstered the authority of these state court decisions by dismissing appeals from state court proceedings that upheld both types of statutes.[16] Perhaps in partial reliance on such precedents, the Commissioners on Uniform State Laws included pro-

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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 (1988). Section 3-803(a)(1) provides as follows:

(a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(1) *within 4 months after the date of the first publication of notice to creditors if notice is given in compliance with Section 3-801*; provided, claims barred by the nonclaim statute at the decedent's domicile before the first publication for claims in this state are also barred in this state.

(2) within [3] years after the decedent's death, if notice to creditors has not been published.

Id. § 3-803(a)(1) (emphasis added).

12. Thus Atkinson, in the 1953 edition of his treatise on wills, observed that "[s]ome question has been raised" as to whether the probate of a will without notice violates *Mullane*'s notice requirements. T. ATKINSON, *supra* note 7, at § 95, 494 n.26 (citing Comment, 50 MICH. L. REV. 124 (1951); Levy, *Probate in Common Form in the United States: The Problem of Notice in Probate Proceedings*, 1952 WISC. L. REV. 420).

13. *See, e.g.*, Haas v. Haas, 504 S.W.2d 44, 46 (Mo. 1973), *appeal dismissed*, 417 U.S. 928 (1974).

14. *See, e.g.*, Baker Nat'l Bank v. Henderson, 151 Mont. 526, 529, 445 P.2d 574, 576 (1968), *appeal dismissed*, 393 U.S. 530 (1969); Continental Coffee Co. v. Estate of Clark, 84 Nev. 208, 213, 438 P.2d 818, 821 (1968); New York Merchandise Co. v. Stout, 43 Wash. 2d 825, 827-28, 264 P.2d 863, 864 (1953).

15. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 84-86 (1972) (holding that state replevin statutes which permitted chattels to be taken from the defendant prior to hearing violated due process clause); Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969) (holding that pre-judgment garnishment prior to hearing violates the due process clause).

16. *See* Haas v. Haas, 417 U.S. 928 (1974), *dismissing appeal from* 504

visions in the Uniform Probate Code allowing informal probate of a will without notice and the barring of decedents' creditors' claims under a short-term nonclaim statute.[17]

A decade ago, then, it was doubtful whether the Supreme Court would impose *Mullane* notice requirements on probate proceedings. Nonetheless, in *Tulsa Professional Collection Services v. Pope*,[18] the Court recently held that an Oklahoma short-term nonclaim statute, which provided for notice only by publication in most instances, violated the due process clause when applied to the claims of "known or reasonably ascertainable creditors."[19]

This Article proposes amendments to the Uniform Probate Code's pre-*Pope* short-term nonclaim statutes. Part I explains the immediate progenitors of the *Pope* decision and *Pope* itself. Part II addresses the design of nonclaim statutes after *Pope*. It explains the need to make short-term nonclaim statutes consistent with *Pope*'s due process requirements while minimizing the adverse impact of these requirements on the barring of creditors' claims and the efficient and economical administration of decedents' estates. Part III applies the discussion in Part II and proposes amendments to nonclaim statutes of the Uniform Probate Code.

I. *POPE* AND ITS IMMEDIATE PROGENITORS

The centerpiece of Justice Rehnquist's dissenting opinion in *Pope* is *Texaco, Inc. v. Short*,[20] a 1982 decision involving an Indiana statute of limitations popularly known as a "Mineral Lapse Act."[21] The Mineral Lapse Act provided that a "severed mineral interest" lapsed, if not "used" for a twenty-year period, unless the owner recorded a statement of claim.[22] Owners could protect their interests against this lapse by such a record-

S.W.2d 44 (Mo. 1973); Baker Nat'l Bank v. Henderson, 393 U.S. 530 (1968), *dismissing appeal from* 151 Mont. 526, 445 P.2d 574 (1968).

17. *See* UNIF. PROB. CODE §§ 3-301, 3-306 (1988); *id.* §§ 3-801, 3-803(a)(1). Some commentators criticized the commissioners for including common form probate and some other "no-notice" provisions, however. *See, e.g.*, Note, *The Constitutionality of the No-Notice Provisions of the Uniform Probate Code*, 60 MINN. L. REV. 317, 325-36 (1976).

18. 108 S. Ct. 1340 (1988).

19. *Id.* at 1347.

20. 454 U.S. 516 (1982), *cited with approval in Pope*, 108 S. Ct. 1340, 1348-50 (Rehnquist, C.J., dissenting)). *Short* was a consolidation of two cases. *Id.* at 521.

21. *Id.* at 518 (discussing IND. CODE §§ 32-5-11-1 to 11-8 (1976)).

22. *Id.* at 519.

ing during the twenty-year period of nonuse or within two years after the effective date of the statute, whichever came later.[23] Thus, owners who had not used their severed mineral interests for twenty years on the date the statute became effective had only two years in which to preserve their interests by such a recording.[24]

The appellants in *Short* owned severed mineral interests, but had not used them for twenty years when the Act became effective and they failed to record the required statements of claim within the two-year limitations period.[25] The possessory owner of the interests commenced an action to secure a declaratory judgment that appellants' interests had lapsed.[26] The Indiana Supreme Court reversed a lower court's holding in favor of appellants, rejecting their argument that the Act could not effect a lapse of their interests without providing notice and an opportunity to be heard.[27] The United States Supreme Court affirmed the Indiana judgment, stating:

> Appellants . . . claim that the absence of specific notice prior to the lapse of a mineral right renders ineffective the self executing feature of the Indiana statute. That claim has no greater force than a claim that a self-executing statute of limitations is unconstitutional. The Due Process Clause does not require a defendant to notify a 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.[28]

A year after *Short*, the Supreme Court decided *Mennonite Board of Missions v. Adams*,[29] a case involving a mortgagee of record whose security interest in mortgaged premises had been subordinated to the rights of a purchaser of the premises at a tax foreclosure sale.[30] The only notice of the sale given to the appellant mortgagee was a notice posted in the county courthouse and published for three successive weeks.[31] The Indiana courts had held that the purchaser of the mortgaged premises at the tax foreclosure sale took free of the lien of appellant's

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23. *Id.*
24. *Id.*
25. *Id.* at 521.
26. *Id.*
27. Short v. Texaco, Inc., 273 Ind. 518, 523, 406 N.E.2d 625 630-31 (1980), *aff'd* 454 U.S. 516 (1982).
28. 454 U.S. at 536.
29. 462 U.S. 791 (1983).
30. Indiana tax foreclosure statutes did not provide for notice either by mail or by personal service to mortgagees of property subject to tax sales. *Id.* at 793 (citing IND. CODE § 6-1.1-24-4 (1982)).
31. *Id.*

mortgage.[32]

The Supreme Court reversed the Indiana court's decision, holding that the due process clause entitled appellant, as a mortgagee of record, to more than published notice of the sale. The Court stated:

> 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*.[33]

The Court found that although the mortgage on file with the county recorder identified the mortgagee only as "MENNONITE BOARD OF MISSIONS a corporation, of Wayne County, in the State of Ohio," the purchaser could have ascertained the mortgagee's address through reasonably diligent efforts.[34] The Court also noted that "[s]imply mailing a letter to 'Mennonite Board of Missions, Wayne County, Ohio,' quite likely would have provided actual notice, given the well-known skill of postal officials and employés in making proper delivery of letters defectively addressed.' "[35]

Shortly after deciding *Mennonite*, the Court faced the appeal of a decedent's creditor from the Nevada Supreme Court's decision in *Continental Insurance Co. v. Moseley* ("*Moseley I*").[36] In *Moseley I*, the Nevada court held that the published notice provided under the state's short-term nonclaim statute barred the claims of a known creditor of a decedent's estate.[37] The Supreme Court, in a cryptic memorandum opinion ("*Moseley II*"),[38] vacated the Nevada court's judgment and remanded the case for reconsideration in light of *Mennonite*.[39] On remand, the Nevada Supreme Court, also in a per curiam opinion

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32. Mennonite Bd. of Missions, Inc. v. Adams, 427 N.E.2d 686 (1981).

33. 462 U.S. at 798.

34. *Id.* at 798 n.4.

35. *Id.* (citing Grannis v. Ordean, 234 U.S. 385, 397-98 (1914)). The Court noted, however, that a governmental body is not required to undertake extraordinary efforts to discover the identity and whereabouts of a mortgagee whose identity is not in the public record. *Id.* at 798-99 n.4.

36. 98 Nev. 476, 653 P.2d 158 (1982) (per curiam).

37. *Id.* at 479, 653 P.2d at 160-61.

38. Continental Ins. Co. v. Moseley, 463 U.S. 120 (1983) (mem.).

39. The memorandum decision, in its entirety, reads as follows:

> Certiorari granted, judgment vacated, and the case remanded for further consideration in light of Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983).

Id.

("*Moseley III*"),[40] determined that *Mullane* and *Mennonite* required at least mailed notice to known creditors.[41] Academic commentators promptly supplied due process arguments in support of the Nevada court's conclusion.[42]

Other state courts, however, did not follow the Nevada Supreme Court's holding in *Moseley III*. The source of their disagreement with *Moseley III* was *Short*. Commentators have long considered nonclaim statutes to be statutes of limitations.[43] Courts in five states, including the Oklahoma Supreme Court in *Pope* held that nonclaim statutes were statutes of limitations shielded from *Mullane*'s notice requirements by *Short*.[44] Moreover, another five states had previously rejected *Mullane* challenges to the validity of nonclaim statutes on various grounds, including the proposition that *Mullane* was inapplicable to probate proceedings.[45] The Supreme Court's decision in *Pope* therefore probably was needed to prevent *Moseley III* from becoming an aberration.

The *Pope* opinion rescued *Moseley III* in the following passage:

> Appellant's interest is an unsecured claim, a cause of action against the estate for an unpaid bill. Little doubt remains that such an intangible interest is property protected by the Fourteenth Amendment. . . .
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> The Fourteenth Amendment protects this interest, however, only from a deprivation by state action. Private use of state sanctioned private remedies or procedures does not rise to the level of state action. . . . Nor is the State's involvement in the mere running of a

40. Continental Ins. Co. v. Moseley, 100 Nev. 337, 683 P.2d 20 (1984) (per curiam).

41. *Id.* at 338, 683 P.2d at 21.

42. Falender, *supra* note 9, at 678-81; Kuether, *Is Kansas Probate Non Claim Statute Unconstitutional?*, 54 KAN. B.A.J. 115, 118 (1985).

43. *See, e.g.*, T. ATKINSON, *supra* note 7, § 127, at 689-92.

44. Coley v. Estate of Odom, 500 So.2d 188, 190 (Fla. Dist. Ct. App. 1986); Gibbs v. Estate of Dolan, 146 Ill. App. 3d 203, 209, 496 N.E.2d 1126, 1130 (1986); *In re* Estate of Madden, 11 Kan. App. 2d 540, 544, 729 P.2d 464, 467 (1986), *aff'd*, 241 Kan. 414, 736 P.2d 940 (1987); Estate of Busch v. Ferrell-Duncan Clinic, 700 S.W.2d 86, 89 (Mo. 1985); *In re* Estate of Pope, 733 P.2d 396, 400-01 (Okla. 1986).

45. *See* Baker Nat'l Bank v. Henderson, 151 Mont. 526, 529, 445 P.2d 574, 576 (1968) (holding *Mullane* inapplicable to probate proceedings); *see also* Brunell Leasing Corp. v. Wilkins, 11 Ariz. App. 165, 167, 462 P.2d 858, 860 (1969) (holding *Mullane* notice requirements inapplicable to nonclaim statute); Chalaby v. Driskell, 237 Or. 245, 248, 390 P.2d 632, 633 (1964) (same); New York Merchandise Co. v. Stout, 43 Wash. 2d 825, 827-28, 264 P.2d 863, 864 (1953) (same); *In re* Estate of Fessler, 100 Wis. 2d 437, 448, 302 N.W.2d 414, 420 (1981) (holding *Mullane* does not require notice of running of statute of limitations).

> general statute of limitation generally sufficient to implicate due process. . . . The question here is whether the State's involvement with the nonclaim statute is substantial enough to implicate the Due Process Clause.
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> Appellee argues that it is not, contending that Oklahoma's nonclaim statute is a self-executing statute of limitations. Relying on this characterization, appellee then points to *Short*. . . . Appellee's reading of *Short* is correct—due process does not require that potential plaintiffs be given notice of the impending expiration of a period of limitations—but in our view, appellee's premise is not. Oklahoma's nonclaim statute is not a self-executing statute of limitations. . . .
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> As we noted in *Short*, however, it is the "self-executing feature" of a statute of limitations that makes *Mullane* and *Mennonite* inapposite. . . . The State's interest in a self-executing statute of limitations is in providing repose for potential defendants and in avoiding stale claims. The State has no role to play beyond enactment of the limitations period. While this enactment obviously is state action, the State's limited involvement in the running of the time period generally falls short of constituting the type of state action required to implicate the protections of the Due Process Clause.
>
> Here, in contrast, there is significant state action. The probate court is intimately involved throughout, and without that involvement the time bar is never activated. The nonclaim statute becomes operative only after probate proceedings have been commenced in state court. The court must appoint the executor or executrix before notice, which triggers the time bar, can be given. . . .
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> Where the legal proceedings themselves trigger the time bar, even if those proceedings do not necessarily resolve the claim on its merits, the time bar lacks the self-executing feature that *Short* indicated was necessary to remove any due process problem. Rather, in such circumstances, due process is directly implicated and actual notice generally is required.[46]

This passage provides sufficient guidance for legislative revision of short-term nonclaim statutes. It establishes that traditional statutes, which require a judicially appointed personal representative to give creditors notice by publication, involve sufficient state action to trigger *Mullane* notice requirements. Read literally, the passage does not say that state action similarly is involved when a subordinate court official—a registrar rather than a judge—appoints a personal representative with a duty to publish such notice in informal proceedings under the Uniform Probate Code.[47] Nothing else in the opinion, however, supports such a narrow reading of *Pope*'s state-action rationale. Accordingly, legislative efforts to comply with *Pope* should as-

46. Tulsa Professional Collection Servs. v. Pope, 108 S. Ct. 1340, 1344-46 (1988).

47. *See* UNIF. PROB. CODE §§ 3-307 (duties of registrar), 3-801 (notice to creditors) (1988).

sume that *Mullane* notice requirements apply to both formal and informal proceedings.

Pope's state-action rationale is puzzling in an important respect. The passage appears to accept *Short*, because it approves self-executing statutes of limitations that serve "[t]he State's interest . . . in providing repose for defendants and in avoiding stale claims."[48] It remains unclear, however, why a long-term statute of limitations that bars a will contest a year or more after a court has admitted a will to probate without notice does not similarly serve the same state interest, despite the state action involved in admitting the will to probate.[49]

The quoted passage declines to approve long-term[50] nonclaim statutes that bar creditors' claims not asserted within a year, or a longer period, after a decedent's death.[51] Yet these long-term statutes clearly appear to be self-executing statutes of limitations such as those approved in *Short*, as *Short* is explained in *Pope*.[52] Indeed, it seems relatively safe to assume that these long-term nonclaim statutes *are* consistent with *Mullane* and *Mennonite*, as qualified by *Pope*,[53] because nothing in the *Pope* opinion suggests a contrary conclusion.

II. DESIGNING NONCLAIM STATUTES AFTER *POPE*

A. THE ROLE OF NONCLAIM STATUTES

It is a fact familiar to probate lawyers that few creditors of

48. 108 S. Ct. at 1348.

49. Under the Code, an order admitting a will to informal probate without notice becomes final either three years after the decedent's death or twelve months after the informal probate, whichever is later. UNIF. PROB. CODE §§ 3-302, 3-306, 3-108 (1988). *See also id.* § 3-1006 (prescribing ultimate time limit for recovery against distributees).

50. This term is also Professor Falender's. Falender, *supra* note 9, at 667-68.

51. The period is generally one to five years. For example, § 3-803(a)(2) of the Code provides as follows:

> (a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:
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> (2) within [3] years after the decedent's death if notice to creditors has not been published.

UNIF. PROB. CODE § 3-803(a)(2) (1988).

52. *See* Tulsa Professional Collection Servs. v. Pope, 108 S. Ct. 1340, 1345 (1988).

53. *See id.* at 1345-48.

decedents file claims, apparently because few need to do so to secure payment. Professor Langbein has provided evidence of this fact, together with the following explanations.[54] (1) Survivors pay the "vast majority" of decedents' debts quickly and voluntarily, and creditors primarily rely on information voluntarily supplied by survivors for knowledge that their debtors are deceased.[55] (2) Health insurance generally pays for health care indebtedness, and, of course, providers of health care to terminal patients will know of patient deaths.[56] (3) If survivors refuse to pay a decedent's debts, creditors commonly hire bill collectors to badger them.[57] One reason the use of bill collectors is successful is that a surviving spouse generally desires to continue "doing business" with the decedent's creditors.[58] (4) Some creditors make extensive use of credit life insurance, payable directly to the creditor, to satisfy claims.[59] (5) Creditors who finance "big ticket" purchases such as automobiles rely on security interests to collect from decedents' estates or survivors, and cases in which the value of the security is inadequate to cover the debt are "relatively rare."[60] (6) The probate process, involving filing claims and securing payment through adjudication if necessary, is too costly for general use—collection costs would often exceed recoveries.[61] Langbein noted, however, that creditors owed "debts of several thousand dollars," were prepared to file claims if necessary.[62]

The appellees in *Pope* used Langbein's evidence to support their argument that "actual notice" to creditors of decedents would burden estate administration much more than it would

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54. Langbein introduced his evidence as follows:

> Without mounting a systematic empirical study, I have tried to inquire broadly among credit officers and credit information specialists and their lawyers. Among those I interviewed, I found unanimity both on the central proposition that probate plays an inconsequential role in the collection of decedents' debts, and on the reasons why.

Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1120 (1984).

55. *Id.* at 1121.

56. *Id.* at 1121-22.

57. *Id.* at 1122.

58. *Id.* Another reason the use of bill collectors succeeds is that surviving spouses are often jointly and severally liable to retail creditors on deceased spouses' "joint" accounts. *Id.*

59. *Id.* at 1122-23.

60. *Id.* at 1123.

61. *Id.*

62. *Id.*

assist creditors.[63] Although this argument did not persuade the Court, Langbein's basic proposition that "probate plays an inconsequential role in the collection of decedents' debts"[64] simplifies compliance with the *Pope* decision. The requirement of "actual notice" should be confined to those "known or reasonably ascertainable" creditors whose claims remain unpresented or unpaid.

Although short-term statutes have not induced the filing of many claims, they *have* contributed to prompt and efficient estate settlement. These statutes have enabled personal representatives to determine the aggregate amount of claims promptly and at minimal cost, because estate creditors bear the burden of learning of the decedent's death and of asserting claims.[65] Thus short-term statutes typically have required that creditors file claims within a period of two to six months following the date of publication of notice[66] to creditors or following the date of a court's issuance of letters of administration to a personal representative.

It is unclear whether the due process requirement of "actual notice to known or reasonably ascertainable creditors"[67] will substantially delay determination of the aggregate amount of claims. The impact of the due process requirement on the promptness of this determination will depend on whether nu-

63. Brief for Appellee at 15-17, (No. 86-1961) Tulsa Professional Collection Servs. v. Pope, 108 S. Ct. 1340 (1988).

64. Langbein, *supra* note 54, at 1120.

65. The more quickly aggregate claims are determined, the more quickly they can be paid or provided for, and the more quickly later tasks, such as the payment of death taxes and distribution to successors, can be performed.

66. The required notice includes the information that the court has appointed a personal representative and that creditors should file claims within a specified period. Falender, *supra* note 9, at 660-61 n.7. The specified period is usually two to six months. *Id.* at 667. Some of these statutes start to run on the date of publication of notice to creditors; some start to run upon the earlier date that letters are issued to the personal representative. *Id.* at 668.

Some of these statutes bar claims in a much less "short term" than might appear because they are coupled with other provisions which permit the late filing of claims, for example, until the estate is ready for distribution. Under the Minnesota mutation of Uniform Probate Code Section 3-803, certain specified claims, most health care expenses incurred during the decedent's last illness, for example, may be presented for payment up until the personal representative has filed a petition for final settlement of the estate or a closing statement. MINN. STAT. §§ 524.3-803(c)(3)(i), 524.3-715(18). Until such a petition is filed, the court may allow other claims on petition of the claimant "for cause shown." *Id.*, § 524.3-803(c)(3)(ii). For other examples of such provisions, see Falender, *supra* note 9, at 670 n.49.

67. *See supra* note 19 and accompanying text.

merous personal representatives will be led to continue their search for *unknown*, but perhaps reasonably ascertainable, estate creditors substantially beyond the old two- to six-month nonclaim period. Depending on the extent of the required search, this due process requirement may increase substantially the time invested in searching for unknown creditors who might be "reasonably ascertainable."

Long-term nonclaim statutes, those that start to run on the death of the decedent and bar claims not asserted within one to five years, create a different situation. Those that take several years to run will leave successors exposed to creditors' claims a good deal longer than the usual nonclaim period under short-term statutes. Hence these long-term statutes provide some incentive for successors to seek administration under short-term statutes and bar claims more quickly. Conversely, long-term statutes that take no more than a year to run provide much less incentive for successors to invoke short-term statutes. Indeed, such long-term statutes may bar claims within the period commonly expended in administering an estate.[68]

B. REVISING SHORT-TERM STATUTES

The goal of revising short-term statutes should be to effect

68. About fifteen years ago, Dean Robert Stein conducted a survey of the administrations of decedents' estates opened in 1969 in four Minnesota counties, including the state's most populous county, Hennepin. *See generally* Stein, *Probate Administration Study: Some Emerging Conclusions*, 9 REAL PROP. PROB. & TRUST J. 596, 602 (1974). This study determined that, on the average, even estates in the category for estates with the smallest value, those involving less than $10,000 in probate assets, remained in administration for about one and one-third years. *Id.* On the average, estates in the category for estates with the largest value, those involving more than $200,000 in probate assets, remained in administration for nearly three years. *Id.*

One might suppose that Minnesota's adoption of article 3 of the Uniform Probate Code (with some modifications), which became effective in 1976, *see* 1976 Minn. Laws § 456, would have quickly changed this situation. To the contrary, however, the writer's informal inquiries to the Clerk of the Probate Division of the Hennepin County District Court in the summer of 1988 indicate that the usual duration of an estate's administration is still between eighteen months and two years, with large estates requiring up to three years. These generalizations are qualified by two others, however. Again according to the writer's informal inquiries, about five percent of Hennepin County estates are confined to exempt property and administered in summary proceedings, often completed within two months. A number of informally administered estates are closed within a year.

Although the Minnesota experience is an uncertain guide to practices elsewhere, it seems plausible to assume that, across the country, many estate administrations still are not closed within a year after the decedent's death.

compliance with *Pope*'s "actual notice" requirement while minimizing the negative impact of such compliance on prompt, efficient, and economical estate settlement. The Supreme Court in *Pope* disclaims any intention to impose notice requirements that would interfere with these probate reform objectives. The Court notes that "the State undeniably has a legitimate interest in the expeditious resolution of probate proceedings."[69] *Mullane* also disavowed any intent to require "impracticable and extended searches . . . in the name of due process."[70] Moreover, the Court indicated in *Mennonite* that all the executor or executrix need do is make "reasonably diligent efforts" to uncover the identities of creditors.[71] Additionally, the legislative histories of the many short-term statutes affected by *Pope*[72] reflect legislative judgments that these objectives of probate reform are entitled to legislative priority and should be pursued for the primary benefit of decedents' successors rather than decedents' creditors.[73]

The conclusion that legislatures should revise short-term statutes for the primary benefit of successors rather than creditors is significant because it excludes from consideration some

69. Tulsa Professional Collection Servs. v. Pope, 108 S. Ct. 1340, 1347 (1988).

> Death transforms the decedent's legal relationships and a State could reasonably conclude that swift settlement of estates is so important that it calls for very short time deadlines for filing claims. As noted, the almost uniform practice is to establish such short deadlines, and to provide only publication notice. . . . Providing actual notice to known or reasonably ascertainable creditors, however, is not inconsistent with the goals reflected in nonclaim statutes. Actual notice need not be inefficient or burdensome. We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice.

Id. at 1347.

70. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317-18 (1949).

71. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 n.4 (1982).

72. Professor Falender identified such statutes in more than 40 states. Falender, *supra* note 9, at 660-61 n.7.

73. The Uniform Probate Code's basic provision stating the "general duties" of a personal representative recognizes these legislative judgments:

> A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this Code, and as *expeditiously and efficiently* as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this Code, the terms of the will, if any, and any order in proceedings to which he is party for the best interests of *successors* to the estate.

UNIF. PROB. CODE § 3-703(a) (1988) (emphasis added). Note that "successors," as defined by the Code, do not include creditors. *See id.* § 1-201(42).

remedial legislation for which substantial precedent exists. Louisiana statutes of civil-law origin permit successors to avoid estate administration *if* they assume the decedent's debts.[74] In 1982 the Commissioners on Uniform State Laws added similar provisions as an alternative available under the Uniform Probate Code.[75] In 1983 they promulgated these Code provisions as a separate Uniform Succession Without Administration Act.[76] No state has adopted these uniform laws, however. Presumably, a court would regard these civil-law based statutes as consistent with due process. Neither these uniform laws nor their Louisiana predecessors bar creditors' claims prematurely; rather, they leave claims subject to the original "self-executing" statutes of limitations applicable at the claims' inception.[77]

Note that any legislatures which abandon short-term nonclaim statutes in favor of this civil-law approach will have changed course significantly. In order to avoid administration under this approach, successors must assume the burden of identifying a decedent's creditors and satisfying their claims. In contrast, short-term nonclaim statutes have placed the burden

74. Under Louisiana law, a successor may assume the decedent's debts either unconditionally or with the benefit of inventory. By accepting unconditionally (termed "simple acceptance" in some statutes), the heir becomes liable for the decedent's debts not only to the extent of the heir's share of the succession, but also personally. *See* LA. CIV. CODE ANN. art. 1013 (West 1952); LA. CODE CIV. PROC. ANN. art. 3001 (West Supp. 1988); LA. CODE CIV. PROC. ANN. art. 3031 (West 1961). If the successor accepts "with benefit of inventory," the successor is liable for the decedent's debts only to the extent of the successor's share. LA. CIV. CODE ANN. art. 1013 (West 1952); LA. CIV. CODE ANN. arts. 1423-1427 (West 1987). Acceptance of successions without administration is covered generally by LA. CODE CIV. PROC. ANN. arts. 3001-3062 (West 1961 & Supp. 1988). For a general discussion of the Louisiana law governing acceptance of successions without administration, see L. OPPENHEIM, 10 LOUISIANA CIVIL LAW TREATISE: SUCCESSIONS AND DONATIONS §§ 71-74, 77, 80 (1973) (Supp. 1979). For a discussion of the advantages of this Louisiana system, see Sarpy, *Probate Economy and Celerity in Louisiana*, 34 LA. L. REV. 523 (1973-74).

Louisiana law also provides for administration of estates under some circumstances. *See* LA. CODE CIV. PROC. ANN. arts. 3081-3395 (West 1961 & Supp. 1988).

75. UNIF. PROB. CODE §§ 3-312 to 3-322, 8 U.L.A. 256 (1983) (historical note). In particular, note UNIF. PROB. CODE §§ 3-312 (universal succession in general), 3-321 (liability) and 3-322 (remedies of creditors) (1988).

76. *See* UNIF. SUCCESSION WITHOUT ADMIN. ACT § 101, 8A U.L.A. 156 (Supp. 1988).

77. *Cf.* Tulsa Professional Collection Servs. v. Pope, 108 S. Ct. 1340, 1345 (1988) (suggesting self-executing statutes of limitation are consistent with due process because they involve no significant state action).

upon creditors to ascertain that a debtor is deceased and to assert claims against the estate.

Moreover, as other existing statutes demonstrate, legislatures willing to place the burden of satisfying the claims of decedents' creditors upon decedents' successors need not embrace the civil-law approach to reach that result. Rather, they can simply *repeal* their short-term nonclaim statutes. Georgia,[78] New Jersey,[79] and New York[80] have statutes that provide precedent for such a course of action. These statutes provide for notice by publication to a decedent's creditors and for presentation and payment of claims during administration.[81] Rather than barring claims not so presented, these statutes permit creditors who fail to present claims during administration to assert the claims against the decedent's property following distribution.[82] These statutes protect successors against such post-distribution creditors' claims only insofar as the personal representative conducts a sufficient search for creditors at the expense of the estate.[83]

Finally, controversies over late claims, such as the claim involved in *Pope*, arise infrequently. This writer's recent inquiries of Minnesota sources indicate that controversies over late claims arise in fewer than five percent of estates.[84] If so, it

78. GA. CODE ANN. §§ 53-7-92, 53-7-95, 53-13-63 (1982).

79. N.J. STAT. ANN. §§ 3B:22-4, 3B:22-9, 3B:22-40 (West 1983).

80. N.Y. SURR. CT. PROC. ACT LAW §§ 1801-02 (McKinney 1967); N.Y. EST. POWERS & TRUSTS §§ 12-1.1, 12-12.1 (McKinney 1967 & Supp. 1988).

81. *See, e.g.*, GA. CODE ANN. § 53-7-92 (1982).

82. *See, e.g., id.* §§ 53-7-95, 53-13-103.

83. As with the civil-law-based legislation, it seems clear that these statutes merely permit creditors' claims to be barred by self-executing statutes of limitations that do not run afoul of *Pope*. *See supra* note 77 and accompanying text.

84. Under Minnesota's variation of the Uniform Probate Code, late claims may be allowed on several grounds, including "cause shown" for late filing, until either a petition for final settlement or a closing statement is filed. *See* MINN. STAT. §§ 524.3-803(c)(3)(i) to (ii), 524.3-715(18)(1988).

During the summer of 1988, the writer inquired of the clerk of the Probate Division of the Hennepin County District Court regarding the frequency of contested hearings over late claims. This is a large, metropolitan probate court in which substantially more than 4,000 decedents' estates usually are under administration, and about 2,000 new estates are opened each year. Telephone interview with Mary Hawkinson, Clerk of the Probate Division of the District Court For the Fourth Judicial District (Hennepin County) (July 20, 1988). Data from the clerk's records suggested such contested hearings occurred in about three percent of the estates under administration during the year. *Id.*

The Referee of the Probate Division of the Ramsey County Probate Court guessed that contested hearings were held no more than twice a month in that

surely would be inappropriate for legislatures to enact statutes that burden many estates with costly searches for unknown creditors that, save in a few instances, aren't there at all. Because the legislative objective in revising short-term statutes should be to comply with *Pope*'s notice requirements while preserving past short-term statutes' contribution to efficient and economical estate settlement for the primary benefit of successors, it is desirable to keep such costs of compliance within reasonable bounds.

The next task is to examine *Pope*'s general requirement of "actual notice to known or reasonably ascertainable creditors."[85] Some of the content of this requirement is clear. "Actual notice" means notice by at least ordinary first class mail.[86] Giving notice by mail to "known" creditors means giving notice to those *actually known*.[87]

The requirement that successors give notice to "reasonably ascertainable creditors" *cannot* mean that a personal representative must give "actual notice" to a creditor at a time when the creditor *could be*, but as yet is *not*, identified. Rather, the requirement of "notice to . . . reasonably ascertainable creditors" is a shorthand description of a two-step process: (1) the personal representative must *search for* unknown creditors who are "reasonably ascertainable," and (2) the personal representa-

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court. Telephone interview with John Allen, Referee of the Probate Division of the District Court for the Second Judicial District (Ramsey County) (July 18, 1988). About 2,000 decedents' estates usually are under administration in this court, and about 1,000 new estates are opened each year. *Id.*

The writer spoke to several Twin Cities probate lawyers with aggregate experience of about 120 years in practice, and with the senior counsel of a large Twin Cities corporate fiduciary which usually has about 50 good-sized or larger estates under administration. None of these persons believed they encountered late claims in more than one in twenty estates. Telephone interview with Robert L. Bullard, Member, Oppenheimer, Wolff & Donnelly (St. Paul, Minn.) (July 15, 1988); telephone interview with John A. Forrest, Member, Lindquist & Vennum (Minneapolis, Minn.) (July 18, 1988); telephone interview with Larry W. Johnson, Member, Dorsey & Whitney (Minneapolis, Minn.) (summer, 1988); interview with Gene C. Olson, Partner, Rider, Bennett, Egan & Arundel (Minneapolis, Minn.) (July 19, 1988); telephone interview with Honnen S. Weiss, member, Felhaber, Larson, Fenlon & Vogt (Minneapolis, Minn.) (July 15, 1988); telephone interview with Ann Hart Werntz, Vice President and Senior Counsel, Norwest Corporation (Minneapolis, Minn.) (July 20, 1988). All agreed that many of the late claims presented were debts acknowledged by successors that had been overlooked and were paid without objection. *Id.*

85. *See supra* note 19 and accompanying text.

86. Tulsa Professional Collection Servs. v. Pope, 108 S. Ct. 1340, 1347 (1988); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318 (1949).

87. *Pope*, 108 S. Ct. at 1347.

tive must give them notice *after* they are identified. Moreover, the personal representative must conduct the search for unknown creditors with *reasonable diligence*.[88]

In some cases, the slim chance that unknown creditors exist presumably will render the task of conducting a "reasonably diligent" search a manageable one. The personal representative may be familiar with the decedent's debts and liabilities or confident that available information on the subject, supplied by others, is reliable. Often, the surviving spouse of the decedent serves as personal representative and will be in this position. A personal representative who served as the decedent's guardian immediately prior to the decedent's death or managed the decedent's financial affairs under a power of attorney should also be in this position. Survivors of a decedent who was engaged in a proprietorship or partnership business are likely to be familiar with the liabilities of the business.

If the personal representative *is* troubled about the possibility that the decedent had unknown creditors, however, the requirement of "reasonable diligence" does not clearly limit the scope of the search for creditors. No description of the requirements of a "reasonably diligent" search for creditors exists in the post-*Mennonite* federal case law. Professor Falender[89] advocates *very* thorough searches for creditors in the name of "reasonable diligence," asserting that:

> 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. The concept of reasonable diligence would charge the personal representative with the actual knowledge of the decedent's heirs, devisees, and acquaintances.[90]

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88. *See id.* As the Court indicated in *Mennonite*, all that the executor or executrix need do is make "reasonably diligent efforts," 462 U.S., at 798, n.4, . . . to uncover the identities of creditors. *Id.*

89. *See Pope*, 108 S. Ct. at 1342 (citing Falender's article, *Notice To Creditors in Estate Proceedings: What Process is Due?*, cited *supra* note 9).

90. Falender, *supra* note 9, at 695. Falender would impose substantial fiduciary duties on personal representatives, and legal duties of disclosure on third persons with knowledge, to increase the effectiveness of searches for decedents' creditors. *Id.* at 696.

The following passage from her article is instructive.

> Theoretically, it . . . 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

The case law this writer has found concerning "reasonably diligent" searches involves searches required for heirs and next of kin. For several reasons, however, these cases are dubious guides to "reasonably diligent" searches for creditors. Some of the cases requiring "reasonably diligent" searches for heirs are escheat cases and courts in such cases hold the state must assume the burden of proving the decedent died without heirs,[91] sometimes recognizing a *presumption* that heirs survive the decedent.[92] These rules plainly enhance the required search in cases involving heirs and may have made sense under traditional intestate succession statutes which permit remote descendants to inherit. Under such statutes, people are very unlikely to die without heirs, although their remote heirs may be unknown and difficult to find.[93] In contrast, unknown creditors probably are uncommon.[94]

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answers, the personal representative's ultimate knowledge should be the same whether he began with much or little actual knowledge. 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. This potential liability should assure reasonable diligence on the part of any personal representative who is aware of his duty of diligence. [The following footnote accompanies the preceding sentence: "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."]

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

Falender, *supra* note 9, at 696-97.

91. T. ATKINSON, *supra* note 7, § 26, at 98.

92. 7 R. POWELL, THE LAW OF REAL PROPERTY § 989, at 626 n.19 (Rohan rev. ed. 1987); *see, e.g.*, State v. Malhman, 386 S.W.2d 1, 4-6 (Mo. 1965).

93. *See* T. ATKINSON, *supra* note 7, § 18, at 26.

94. Of course, unknown creditors are not easy to count. It seems likely, however, that most of those with claims worth pursuing will "show up" even-

Another reason why cases involving searches for heirs or next of kin do not supply guidelines for creditor searches is that they rarely discuss searches in any detail. Moreover, some of the sources of information they suggest lack apparent relevance; others that seem helpful in searching for heirs are dubiously applicable to searches for creditors. Consider, for example, the following passage from the concurring opinion in a Kansas case.

> As evidence of diligence, the judge may consider whether such primary sources as the records of the county clerk, the county assessor, the county treasurer, the register of deeds, the district court, and the probate court, where applicable, have been examined, and whether such secondary sources as the city, county or municipal directories of the county where the decedent resided and his property is located have been examined, to ascertain the names and addresses of the heirs of the decedent. As further evidence of diligence, as applied to the stipulated facts in this case, the judge should have ascertained whether the tenant on the decedent's land during his life time, the neighbors in the vicinity of the decedent's land, and the *known* heirs of the decedent were examined to determine the names and addresses of all of the heirs of the decedent.[95]

One who is not familiar with the "records" of those public offices listed in the first quoted sentence above as "primary sources" of information about heirs simply cannot tell whether those records are *promising* or merely *possible* sources. Accordingly, this listing sheds no light on a basic question in searching *both* for heirs and for creditors—whether, in the judge's view, a "reasonably diligent" search is limited to *likely* sources of information. The second sentence quoted states that the trial judge must determine whether a survivor asked tenants of the decedent's land, neighbors in the land's vicinity, and known heirs for information regarding the decedent's heirs. "Known heirs" plainly would be promising sources of information about other heirs. If the "tenant" and the "neighbors" were friends of the decedent, they also would be at least plausi-

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tually. The writer's current inquiries regarding the prevalence of late claims in Minnesota suggest that such creditors are few in number. *See supra* note 84.

Under Minnesota law, creditors may file late claims "for cause shown" until the personal representative has filed a petition for final settlement of the estate or a closing statement. MINN. STAT. § 524.3-803(c)(3)(ii) (1988). The writer's current inquiries also indicate that the likely duration of a Minnesota estate administration is eighteen months to two years. *See supra* note 68. Thus, creditors of Minnesota decedents may have nearly that long to file late claims. The writer's inquiries indicate, however, that few late claims arise. *See supra* note 84.

95. *In re* Estate of Barnes, 212 Kan. 502, 522, 512 P.2d 387, 402 (1973).

ble sources of such information. It does not seem likely, however, that these latter persons would have knowledge of the decedent's *creditors*.

Thus the case law describing a "reasonably diligent" search is limited, and the searches it involves are distinguishable from the reasonably diligent search for a decedent's creditors described in the *Pope* opinion. Moreover, these authorities require a *more* thorough search than *Pope* probably requires. These conclusions are important to the design of revised short-term statutes. They indicate it is not appropriate simply to direct personal representatives to comply with *Pope*'s general due process standard of a "reasonably diligent" search for "ascertainable" creditors. The Michigan Supreme Court observed a generation ago that "[w]hatever the steps constituting reasonable diligence may be, they will vary, with the circumstances, from case to case."[96] Neither *Mullane*, *Mennonite*, *Moseley III*, nor *Pope* itself supplies much useful guidance regarding the steps this general due process standard requires of a personal representative. Accordingly, it is likely that, if a statute imposes a duty to conduct a "reasonably diligent" search for "ascertainable" creditors, personal representatives will tend to respond by conducting rather extensive searches, impairing the prompt and economical administration of estates while infrequently revealing additional creditors.

One way to minimize such searches would be to enact a short-term nonclaim statute that *required Mullane* notice only to *known* creditors whose claims remained unpresented and unpaid. Such legislation could deal with unknown creditors, who might or might not be "ascertainable," by giving personal representatives *discretion* to decide whether a search for "ascertainable" creditors is desirable, providing statutory standards that emphasize the successors' interests in prompt and economical administration to govern personal representatives' discretion. Under such legislation, personal representatives' duty to conduct searches for unknown but "ascertainable" creditors would be limited to a duty to exercise their discretion reasonably—that is, to avoid an abuse of discretion.[97] Of course,

96. Daft v. John And Elizabeth Whiteley Found., 363 Mich. 6, 11, 108 N.W.2d 893, 895 (1961) (en banc).

97. The legal effect of granting discretion to a fiduciary is addressed most frequently in the common law of trusts, in which the basic principles governing interpretation of discretionary powers conferred upon a trustee by the terms of a trust are well settled. The leading treatise states the basic doctrine as follows:

such a short-term nonclaim statute would retain the general requirement of notice by publication, to bar unknown creditors who are *not* "ascertainable." Creditors barred by such a statute would include those barred by publication, plus those known to the personal representative and hence given "actual notice" by mail or personal service.

C. REVISING LONG-TERM STATUTES

Under the revised short-term statutes proposed in the preceding paragraph, some "ascertainable" creditors may not become known and thus will not receive the "actual notice" required by *Pope*. If courts are to bar such creditors' claims in the interests of prompt and economical estate settlement, courts must rely on long-term statutes, which run from a decedent's death and currently bar claims not asserted within one to five years thereafter.[98]

Although the *Pope* opinion does not state whether long-term statutes satisfy due process requirements,[99] they appear to be self-executing statutes of limitations, which the Court approved in *Short*. These long-term statutes serve the state's interest "in providing repose for potential defendants and in avoiding stale claims," and the *Pope* opinion approved this interest as the legitimate role of self-executing statutes of limitations.[100] If they are appropriately to supplement the proposed revised short-term statutes, however, long-term statutes should

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> To the extent . . . the trustee has discretion, the court will not control his exercise of it as long as he does not exceed the limits of the discretion conferred upon him. The court will not substitute its own judgment for his. Even where the trustee has discretion, however, the court will not permit him to abuse the discretion. This ordinarily means that so long as he acts not only in good faith and from proper motives, but also within the bounds of a reasonable judgment, the court will not interfere; but the court will interfere when he acts outside the bounds of a reasonable judgment.

III A. SCOTT, THE LAW OF TRUSTS, § 187, at 14-15 (4th ed. 1988). *See also* RESTATEMENT (SECOND) OF TRUSTS § 187 (1959) (court will not interfere with a trustee's discretion, except to prevent an abuse).

Courts also have applied this basic doctrine in interpreting provisions of a will granting discretion to a personal representative. 6 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 59.5, at 394 (1962 ed.). This doctrine should be equally applicable to a statutory grant of discretion to a personal representative.

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

99. *See supra* notes 50 and 51 and accompanying text.

100. Tulsa Professional Collection Servs. v. Pope, 108 S. Ct. 1340, 1345 (1988).

bar creditors within the usual period of time required for estate administration.

Any creditor of a decedent whose claim remains enforceable under the general statute of limitations that applied before the debtor's death may argue that the claim is not barred by the running of a revised short-term statute because he was a "known" or "ascertainable" creditor who had not received "actual notice," and that publication could not bar the claim consistently with due process. If a creditor asserts such a claim during administration, the personal representative will be in a good position to present any available defenses, with access to the decedent's records, those of the estate, and other pertinent information. For example, the personal representative might assert that the claim was excessive or was invalid, that the revised short-term statute barred the claim because the creditor received "actual notice," or that the creditor was neither "known" nor "reasonably ascertainable." If the personal representative knows that the applicable long-term statute will run before the estate is closed, no possibility that such a claimant will appear later will cause the representative to conduct an excessive search for possibly "ascertainable" creditors.

As will be apparent to a well-advised personal representative, on the other hand, if creditors may assert such a claim against successors long after the estate is distributed and closed and the personal representative has been discharged, the successors will be in a relatively poor position to assert the same defenses. It may be difficult or impossible to secure pertinent records and other information. Thus, creditors may be more successful in establishing claims against successors than in asserting claims earlier against personal representatives. At the least, successors will incur increased litigation costs in resisting such claims. Moreover, if a personal representative knows the applicable long-term statute will not run until after the estate is closed, the representative may modify the administration to protect successors against the assertion of such claims. The personal representative's simplest solution may be to postpone distribution and closing of the estate until the long-term statute runs, if this would not delay distribution for an unacceptable period. Otherwise, the representative may conduct an excessive search for creditors at estate expense, to guard against the assertion of claims after distribution and closing of the estate. If the personal representatives follows either course, prompt and efficient estate administration will be compromised.

If the *Pope* opinion did not rest on a "state-action" rationale,[101] legislatures could revise long-term statutes simply to bar all claims against successors following distribution. Such statutes would protect successors and might encourage personal representatives to complete administration more promptly. Moreover, such a statute would allow creditors not barred by a revised short-term statute to assert claims throughout the period of administration. Under *Pope*'s "state-action" rationale, however, it is difficult to argue that a long-term statute that relies on an estate distribution supervised by a court to bar claims is a "self-executing statute of limitations."[102]

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101. *See Pope*, 108 S. Ct. at 1345 (holding probate court's involvement in appointing executor, which is necessary to trigger time bar of short-term nonclaim state, constitutes state action).

102. The negative implications of the state-action rationale, however, are unreliable; it is unwise to assume the Court would *approve* a two-month nonclaim statute resembling the Oklahoma statute in *Pope*, but under which the period runs from the decedent's *death* rather than from the date notice is published following commencement of probate proceedings. In *Pope*, the Court distinguished *Short* on the ground that the "self-executing statute of limitations" in the earlier case did not involve sufficient "state action" to trigger the protections of the due process clause. *See Pope*, 108 S. Ct. at 1345. In *Short*, however, the complaining owner of unused mineral interests was given *less notice* (in fact, none) under the "self-executing statute of limitations" in the Indiana Mineral Lapse Act than the published notice given the decedent's creditors by the Oklahoma statute in *Pope*. See Texaco, Inc. v. Short, 454 U.S. 516, 521-22 (1981). Were the Court to decide that *short-term* nonclaim statutes could be made self-executing and thereby made constitutionally sound, it would be endorsing statutes that provide estate creditors with *less* notice than the publication notice rejected in *Pope* as a denial of due process. Such a result seems very unlikely.

The outcomes of state action cases in fact do not vary in close correspondence with the *amount* of state action involved. The fact that a short-term statute appears to be just as "self-executing" as the statute of limitations in *Short* provides no assurance that the Court would deem the statute consistent with due process for want of state action. Note, for example, the limited state action involved in the famous racial covenant cases, Shelley v. Kramer, 334 U.S. 1, 19-20 (1948) (holding that judicial enforcement of racial restrictive covenant constitutes state action), and Barrows v. Jackson, 346 U.S. 239, 254 (1953) (extending *Shelley v. Kramer* to find judicial enforcement of such a covenant through an action for damages against co-covenantor constitutes state action).

A recent treatise puts this point as follows:

> The Supreme Court's decisions on state action reflect how the judicial balancing of rights functions to sort out those private activities whose collision with other rights makes them constitutionally infirm. While the balancing has nothing to do with finding a minimum quantum of state activity, the process of sorting out proscribed activities has occurred under the guise of a formulistic search for an undefined minimum amount of state acts. In practice, when the challenged practice deserved state protection the Court has ruled that state action is lacking, declaring in effect that the practice is compatible with the four-

The solution therefore is to employ a long-term statute that bars creditors' claims in traditional fashion—on the expiration of a period of time following a decedent's death, selecting a period that is both reasonably respectful of creditor interests and likely to expire before an estate is ready for distribution. Precedent exists to support a one-year period,[103] and it seems reasonable to require that creditors assert claims against a decedent within a year after the decedent's death. In addition, solid evidence suggests that most administered estates are not ready for distribution within a year after the decedent's death despite the availability of informal proceedings, at least under the Minnesota version of the Uniform Probate Code.[104] Accordingly, legislatures should supplement the proposed revised short-term statutes with a one-year long-term statute.

III. SOME PROPOSED STATUTES

The following provisions are proposed amendments to the Uniform Probate Code.[105] Language that would amend existing Code provisions is italicized. Drafting has been simplified by separating amendments to be applied to "future" estate administration proceedings from those to be applied to "past" admin-

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teenth amendment. When the harm to protected rights outweighed the value of the challenged practice, the Court has found sufficient state action, which made easy a final ruling of unconstitutionality.

2 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 16.5, at 196-97 (1986).

103. The Colorado legislature, in enacting its version of Uniform Probate Code Section 3-803, reduced the suggested three-year long-term nonclaim period after the decedent's death to one year. COLO. REV. STAT. § 15-12-803 (1987). As of October 1988, the California Law Revision Commission had before it a tentative recommendation proposing "a new long term statute of limitations of one year commencing with the decedent's death." CALIFORNIA LAW REVISION COMM'N, TENTATIVE RECOMMENDATION RELATING TO PROBATE LAW AND PROCEDURE 3 (1988). Under this recommendation, Subdivision (b) of Section 353 of the California Code of Civil Procedure would be amended to read as follows:

> (b) Except as provided in *subdivisions (c) and (d)*, if a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced within one year after the date of death, *and the time otherwise limited for the commencement of the action does not apply.*

Id. at 4 (amending language italicized). Subdivisions (c) and (d) provide for actions against decedents dying before the effective date of Subdivision (b). *Id.*

104. *See supra* note 68.

105. The Commissioners on Uniform State Laws doubtless will draft their own in due course. The Code is a convenient vehicle for any proposal, however, because at least 14 states have adopted local versions of it.

istration proceedings subject to *Pope*. It is convenient to make Code Sections 3-801 and 3-803, as amended, applicable to the administration of estates of decedents who die after these provisions become law.

A. AMENDMENTS TO UNIFORM PROBATE CODE SECTIONS 3-801 AND 3-803—FUTURE DECEDENTS

Section 3-801, concerning Notice to Creditors, should be amended to read as follows:[106]

Section *3-801A*. [Notice to Creditors]

(a) 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 *unless they are entitled to further service of notice pursuant to this section.*

(b) Within 3 months after the date of the first publication of the notice, the personal representative shall determine, in the personal representative's discretion: (i) what action is necessary to conduct a reasonably diligent search for creditors of the decedent who are either not known or not identified; and (ii) whether such a reasonably diligent search can be conducted without either substantially increasing costs of administration or substantially delaying distribution of the estate. If the personal representative determines that such a search can be so conducted, the personal representative shall conduct the search. If the personal representative does not so determine, the personal representative shall not conduct the search. Under this section, a creditor is "known" if: (i) the personal representative knows that the creditor has asserted a claim that arose during the decedent's life against either the decedent or the decedent's estate; or (ii) the creditor has so asserted such a claim and the fact is clearly disclosed in accessible financial records known and available to the personal representative. Under this section, a creditor is "identified" if the personal representative's knowledge of the name and address of the creditor permits service of notice to be made pursuant to paragraph (c).

(c) Three months after the date of the first publication of the notice, the personal representative shall serve a copy of the notice on each creditor of the decedent who is then known to the personal representative and is then identified (except any creditor whose claim has been either presented to the personal representative or paid), either by delivery of a copy of the notice to the creditor personally, or by mailing a copy of the notice to the creditor by certified, registered, or ordinary first class mail addressed to the creditor at the creditor's office or place of residence.

106. As amended, these sections are numbered 3-801A and 3-803A.

Section 3-803, concerning limitations on presentation of claims, should be amended to read, in pertinent part, as follows:

> Section *3-803A*. [Limitations on Presentation of Claims]
>
> (a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:
>
> (1) *in the case of a creditor who is entitled, under the United States Constitution, to notice only by publication under section 3-801A,* within 4 months after the date of the first publication of notice to creditors if notice is given in compliance with Section *3-801A*; provided, claims barred by the nonclaim statute at the decedent's domicile before the first publication for claims in this state are also barred in this state;
>
> *(2) in the case of a creditor who was served with notice under paragraph (c) of Section 3-801A, within 4 months after the date of the first publication of notice to creditors or one month after such service, whichever expires later;*
>
> *(3) within one year after the decedent's death whether or not notice to creditors has been published or served pursuant to Section 3-801A.*

An effective date provision for these amendments might read as follows:

> Sections 3-801A and 3-803A shall apply to the estates of decedents who die after the date this Act becomes effective.

B. AMENDMENTS TO UNIFORM PROBATE CODE SECTIONS 3-801 AND 3-803—PAST DECEDENTS

The preceding proposed amendments apply only to estates of decedents who die after the amendments' adoption. The sections must be further amended to apply to the estates of past decedents—those who died on or before the effective date of the proposed amendments. Because some of these decedents will have died shortly before the amendments' effective date, it is necessary to require personal representatives of their estates to give creditors the traditional published notice. Similarly, personal representatives of these estates should give actual, *Mullane* notice to *known* creditors who remain unbarred, have not received such notice, have not presented claims, and remain unpaid.

On turning to the subject of barring ascertainable creditors of past decedents, however, one quickly discovers that the remaining need to give notice varies widely from case to case. To

illustrate the varied need for further notice to ascertainable creditors of these estates, consider a situation in which the decedent dies shortly before the effective date of the proposed amendments and survivors make *no* pre-enactment efforts to satisfy creditors' claims. For example, suppose the decedent dies *on* the date the proposed amendments become effective. The need to conduct a reasonably diligent search to bar ascertainable creditors in such a situation surely will be the same as if the decedent had died a day later.

Consider a contrasting situation in which the decedent died and the estate was distributed thirty-seven and thirteen months, respectively, before the effective date of the proposed amendments to Code sections 3-801 and 3-803. Further assume that the decedent's personal representative filed a closing statement ten months before that date. Assume also that the Code became effective in the jurisdiction prior to the decedent's death. In such a situation, the Code's long-term statutes would usually prevent any creditor of the decedent from proceeding against either the personal representative or the distributees of the estate after the proposed amendments became law.[107] If so, no former personal representative or distributee of such an estate should conduct a further search for ascertainable creditors.

Another source of diversity among the estates of past decedents is the likely availability of a self-help remedy for personal representatives. In a pre-*Mullane* decision, *American Power & Light Co. v. S.E.C.*,[108] the Supreme Court stated that a litigant who has received actual notice, but brings a suit alleging that a statute violates the due process clause because it does not require such notice, has suffered no injury and therefore lacks standing to assert the statutory defect.[109] Thus, since *Moseley III*, informed personal representatives seeking to bar known and ascertainable creditors' claims have had the oppor-

107. Under Code section 3-803(a)(2), if notice to creditors has *not* been published, creditors' claims are barred unless presented within three years after the decedent's death. UNIF. PROB. CODE § 3-803 (1988). Under section 3-108, no proceeding to appoint a personal representative can be commenced more than three years after the decedent's death, with a few exceptions. *Id.* § 3-108. Section 3-1005 bars actions by creditors against a personal representative for breach of fiduciary duty unless commenced within six months after the filing of a closing statement. Sections 3-1004 and 3-1006 bar creditors from proceeding against distributees more than three years after the decedent's death or one year after distribution, whichever comes later, with a few exceptions. *Id.* §§ 3-1004, 3-1006.

108. 329 U.S. 90 (1946).

109. *Id.* at 107.

tunity to conduct a search and to give actual notice to creditors when appropriate.[110] Furthermore, it is apparent that this opportunity to comply with *Pope's* notice requirements, in advance of remedial legislation, has been available since the Court rendered the decision. Because of *American Power*, those estates of past decedents that have used this self-help remedy may have no need for recourse to remedial legislation.

Although the *Pope* decision clearly applies to estates of many past decedents, it is inapplicable to some others and uncertainty therefore may exist as to whether *Pope* applies to a given estate. The issue is whether, on particular facts, a court will limit *Pope*'s due process requirements to prospective application or give them retroactive effect. This uncertainty easily could lead to complex remedial legislation. The simple approach proposed here is to give personal representatives of past estates *discretion* to choose between: (i) making a further effort to bar creditors under a short-term statute and (ii) settling for a later bar under an applicable long-term statute or original statute of limitations.

The leading case limiting the retroactive applicability of Supreme Court decisions is *Chevron Oil Co. v. Huson*.[111] In *Chevron*, the Court stated that three factors should be considered in determining whether a decision should be given only prospective effect.

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."[112]

In *Pope*, the Supreme Court's opinion itself suggests the decision is applicable to the estates of decedents who died before the decision was rendered; the decedent in the case died

110. One Minnesota probate lawyer has advised the writer that, after *Moseley III* and before *Pope*, he presented this option to personal representatives who were his clients. Interview with Jerry G. Dygert, member, Dygert Law Office (Minneapolis, Minn., date unavailable) (1988).

111. 404 U.S. 97 (1971).

112. *Id.* at 106-07 (citations omitted).

in 1979 and the Court applied its decision to *his* estate. Although the appellee did not argue that the rule be given only prospective application, the Court could have asked the parties to address the issue or reserved the question and remanded the case to the Oklahoma courts, directing them to address it.

Arguably, *Pope* failed the first prong of the *Chevron* test for limiting retroactive application. The Nevada Supreme Court's decision in *Moseley III*[113] expresses its view that the result in *Pope* was "clearly foreshadowed" by the United States Supreme Court's per curiam decision in *Moseley II*,[114] and it is hard to argue that the Nevada court erred. It is true that several state appellate decisions preceding *Pope* relied on *Short* to conclude that *Moseley III* was incorrectly decided.[115] Arguably, however, prior cases can "clearly foreshadow" a result they support, despite the existence of substantial authority for the contrary result.[116]

Pope may have failed the *Chevron* test's second prong as well. In *Moseley II*, the United States Supreme Court arguably demonstrated its desire to advance the cause of due process notice by applying *Mennonite* to short-term nonclaim statutes unless the Nevada court concluded, on remand, that a good reason counseled against doing so.[117] *Pope* surely decided that no such good reason existed.

Finally, *Pope* may have failed the third prong of the *Chevron* test. The published opinions in *Pope* do not suggest the Pope estate's beneficiaries would suffer significant injustice or hardship if required to pay the appellant's claim. The appellee's brief in the Supreme Court indicates the executrix first became aware of the creditor's claim more than a year after the decedent's 1979 death, although suit to enforce the claim was commenced several years later.[118] A dissenting opinion in the Oklahoma Supreme Court indicates the Pope estate was still open in 1986 when the claimant filed its brief in that court.[119]

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113. *Moseley III*, 100 Nev. 70, 683 P.2d 20 (1984) (per curiam).

114. *See id.* at 71, 683 P.2d at 21.

115. *See supra* note 44 and accompanying text.

116. The Court of Appeals for the Sixth Circuit recently provided support for such a view when it relied on *Chevron* to apply *Mennonite*, a six to three decision, retroactively. Verba v. Ohio Casualty Ins. Co., 851 F.2d 811, 816-17 (6th Cir. 1988) (rejecting nonretroactive application of *Mennonite* because it did not create a principle of law but merely extended *Mullane*).

117. *See Moseley II*, 463 U.S. 1202 (1982).

118. *See* Appellee's Brief at 2, Tulsa Professional Collection Servs. v. Pope, 108 S. Ct. 1340 (1988) (No. 86-1961).

119. "[W]e know that 'this estate, however, . . . is still pending and is sol-

Accordingly, the apparent message of *Pope* is that, except in cases in which "substantial inequitable results" would likely follow, estates of decedents that were open when the Court rendered its decision are subject to *Pope's* notice requirements, unless the bar of a long-term statute applies.[120]

Now consider whether estates of decedents that were *closed* when the Court decided *Pope* present the same problem. Arguably, they do not. First, if a court applies *Pope*'s notice requirements to such estates, the discharged personal representatives of those estates might be held liable to "reasonably ascertainable" but unknown creditors despite the absence, during administration, of any explicit statutory duty to give those creditors *Mullane* notice. Such creditors could argue that the personal representative's general duty to administer the estate with reasonable diligence included the duty to give such notice.[121] Second, if a court applies *Pope* to such estates, it might hold their distributees liable to creditors despite their reliance on the distribution in disposing of distributed funds. These consequences might well be "substantial inequitable results," justifying a holding of nonretroactivity under the third prong of the *Chevron* test.

Enough marginal uncertainty thus exists regarding the retroactive applicability of *Pope*, at least to estates closed when the Supreme Court decided *Pope*, that remedial legislation should afford personal representatives some discretion regarding the need for further efforts to search for ascertainable creditors.

The following provisions are proposed amendments to Uniform Probate Code sections 3-801 and 3-803 for application to past decedents' estates. As amended, these sections are numbered 3-801B and 3-803B.

Section *3-801B.* [Notice to Creditors]

(a) Unless notice has already been given under *Section 3-801 or* this *paragraph*, a personal representative *shall, upon the later of his appointment or the effective date of this paragraph,* 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

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vent so that a delay in . . . closing . . . is not an issue'." *In re* Estate of Pope, 733 P.2d 396, 404 (Okla. 1986) (dissenting opinion) (footnote omitted).

120. A case likely to fall within the exception would be one in which an authorized final distribution preceded the *Pope* decision.

121. If a court accepted this argument, remedial legislation might not relieve a personal representative of the resulting liability, for the court might hold that such legislation retroactively deprived a decedent's creditors of "vested property rights."

after the date of the first publication of the notice or be forever barred *unless they are entitled to further service of notice pursuant to this section.*

(b) If a personal representative is empowered to act at any time within 4 months after the effective date of this section, the personal representative shall forthwith determine, in the personal representative's discretion: (i) what action is necessary to conduct a reasonably diligent search for creditors of the decedent who are either not known or not identified; and, (ii) whether it is appropriate to conduct such a reasonably diligent search. If the personal representative determines that such a search is appropriate, the personal representative shall conduct the search. If the personal representative does not so determine, the personal representative shall not conduct the search. Under this section, a creditor is "known" if: (i) the personal representative knows that the creditor has asserted a claim that arose during the decedent's life against either the decedent or the decedent's estate; or (ii) the creditor has so asserted such a claim and the fact is clearly disclosed in accessible financial records known and available to the personal representative. Under this section, a creditor is "identified" if the personal representative's knowledge of the name and address of the creditor will permit service of notice to be made pursuant to paragraph (c). Discretion conferred on the personal representative under this paragraph shall be exercised in accord with the general duties imposed upon personal representatives by Section 3-703(a).

(c) If a personal representative is empowered to act at any time within 4 months after the effective date of this section, the personal representative shall, on the completion of his or her duties under paragraph (b), give notice to any creditor of the decedent then known to the personal representative and then identified, excepting any creditor: (i) whose claim is barred; (ii) who has been given such notice; (iii) whose claim has been presented; or (iv) whose claim has been paid. The notice shall announce the personal representative's appointment and address and shall notify each such creditor to present any claim within one month after the date of the service of the notice on the creditor or be forever barred. The personal representative shall serve a copy of the notice upon each such creditor, either by delivery of a copy of the notice to the creditor personally, or by mailing a copy of the notice to the creditor by certified, registered, or ordinary first-class mail addressed to the creditor at the creditor's office or place of residence.

Section 3-803, regarding limitations on presentation of claims, should be amended to read, in pertinent part, as follows:

Section *3-803B.* [Limitations on Presentation of Claims]

(a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(1) *in the case of a creditor who was entitled, under the United States*

Constitution, to notice only by publication under section 3-801 or 3-801B, within 4 months after the date of the first publication of notice to creditors if notice is given in compliance with Section 3-801 *or 3-801B;* provided, claims barred by the nonclaim statute at the decedent's domicile before the first publication for claims in this state are also barred in this state;

(2) in the case of a creditor who was served with notice under paragraph (c) of Section 3-801B, within 4 months after the effective date of Section 3-801B or one month after such service, whichever comes later;

(3) within one year after the effective date of this section or any applicable period of limitations under sections 3-108, 3-803, 3-1005, or 3-1006, whichever expires first.

An effective date provision for these amendments might read as follows:

> Sections 3-801B and 3-803B shall apply to the estates of decedents who died on or before the date this Act became effective.

The proposed statutes that apply to past decedents's estates, sections 3-801B and 3-803B, differ from those that apply to future decedents' estates, sections 3-801A and 3-803A,[122] in the following basic respects. First, the periods of limitations in the statutes that apply to past decedents run, in part, from the effective date of those provisions. Second, in section 3-801B, the personal representative is given broader discretion to decide whether to search for unknown or unidentified creditors, because these provisions will apply to a wide variety of past estates. Third, section 3-803B(a)(3) permits the one-year period of this long-term nonclaim statute to *reduce* the period of limitations applicable to pre-existing claims against such past decedents. It seems clear this provision is constitutionally permissible.[123] The provision is also desirable, because it will relieve past decedents' estates of concern over unknown credi-

122. *See supra* Part III(A).

123. Under this provision, the claim of a past decedent's creditor will be barred, at the latest, one year after the effective date of section 3-803B. Note that on the decedent's death, for example, a week *before* that effective date, the creditor's claim would not be barred, absent publication of notice to creditors for nearly three years. *See* UNIF. PROB. CODE § 3-803(a)(2) (1988). Although this shortens the period of the statute of limitations on a pre-existing claim, it is constitutionally permissible because an aggregate period of at least one year following a past decedent's death provides past decedents' creditors a reasonable opportunity to assert their rights. *See* Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314-16 (1944) (noting statutes of limitation involve remedial matters and not destruction of fundamental rights); Terry v. Anderson, 95 U.S. 628, 632-33 (1877) (stating statutes of limitation affecting existing rights are constitutional if reasonable time is allowed to bring affected actions); 2 J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 102, § 15.9, at 111-12 (discussing *Chase Securities Corp.*).

tors' claims within a period similar to that applicable to future decedents' estates under section 3-803A(a)(3).

CONCLUSION

Notwithstanding *Mullane*'s eloquent description of the notice requirements of the due process clause, current doctrine exemplified by the Supreme Court's decision in *Pope* does little more than make clear that a decedent's known creditors must be given actual *Mullane* notice that a short-term nonclaim statute has begun to run, if the statute is to bar their claims consistently with due process.

Thus, while the *Pope* opinion declares that "[p]roviding actual notice to known or reasonably ascertainable creditors . . . is not inconsistent with the goals reflected in nonclaim statutes,"[124] the standards said to govern the required search for unknown but "ascertainable" creditors of decedents are confined to rather general dicta from earlier decisions in cases in which the court did not define the scope of the required search. The *Pope* opinion reiterates the Court's denial in *Mullane* of "any intent to require 'impracticable and extended searches . . . in the name of due process.' "[125] The opinion also quotes from *Mennonite* in the following passage: "[A]ll that the executor or executrix need do is make 'reasonably diligent efforts,' to uncover the identities of creditors."[126] The Court also advises that, "[f]or creditors who are not 'reasonably ascertainable,' publication notice can suffice."[127] The Court then states that, "[h]ere, as in *Mullane*, it is reasonable to dispense with actual notice to those with mere 'conjectural' claims."[128]

Accordingly, pending further light from the Court, the prudent course to follow is that indicated in this Article's proposed amendments to Uniform Probate Code sections 3-801 and 3-803—to require *Mullane* notice to known creditors of decedents and to give personal representatives discretion in searching for "reasonably ascertainable" creditors, under standards that emphasize state interests in prompt and economical estate settlement.

Of course, personal representatives operating under such statutory standards may fail to conduct the required search for

124. *Pope*, 108 S. Ct. at 1347.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*

some "ascertainable" creditors. Nonetheless, these standards will minimize undue expense and delay in searching for "ascertainable" creditors who may not exist.