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Probate: Notice to Estate Creditors: the Effect of *Tulsa Professional Collection Services v. Pope*

On April 19, 1988, the United States Supreme Court ruled that estate creditors should be afforded actual notice of probate proceedings. This decision will have a significant impact on probate procedure throughout the country.

Before the decision in *Tulsa Professional Collection Services v. Pope*,[1] most states, including Oklahoma, employed short-term nonclaim statutes in probate proceedings. These nonclaim statutes worked to bar a creditor's claim unless it was presented for payment to the executor of the estate. The time limit imposed by the majority of the nonclaim statutes varied from two to six months. These special statutes of limitation usually started running when notice of the estate proceedings was first published in a local newspaper. The policies for the use of such nonclaim statutes were two-fold. First, the statutes were utilized to bar stale claims. Second, short term nonclaim statutes afforded repose to potential defendants. In other words, the beneficiaries of the estate were given the peace of mind that the proceeding was final.

In 1950 the Supreme Court, in *Mullane v. Central Hanover Bank & Trust*,[2] held that notice reasonably calculated to inform must be given for proceedings to be accorded finality. *Mullane* also established a balancing test for courts to use when deciding whether actual notice is appropriate.

Until *Pope*, no court had applied *Mullane*'s principles to the probate setting. State courts distinguished *Mullane* by limiting its application only to judicial proceedings. State courts concluded that actual notice did not make estate creditors parties to a probate action, but simply notified them that they could be if they desired. Therefore, no judicial decree extinguished a creditor's property rights. Rather, the creditor's own inaction and the passage of time barred the claim. This, of course, has changed with the recent decision in *Pope*.

This note will examine the evolution of notice provisions from their inception with *Mullane*, progressing through various state court decisions, and culminating with *Pope*'s application of the *Mullane* principles to the probate arena. Of more acute importance, this note will further consider the effects of *Pope*, and Oklahoma's legislative response to *Pope*, on the future administration of decedents' estates.

History of Notice Requirements Under Supreme Court Guidance

Mullane is the most important decision concerning the notice that parties to an action must receive, establishing the standards by which notice provisions are judged. *Mullane* involved the sufficiency of notice to beneficiaries

1. 108 S. Ct. 1340 (1988).
2. 339 U.S. 306 (1950).

of a common trust fund in regard to a judicial settlement of accounts. At that time, under New York banking law, the only notice required to be given to the beneficiary was publication notice in a local newspaper.[3] This type of notice was challenged for depriving beneficiaries of their due process rights. The United States Supreme Court agreed, holding that the due process clause[4] required that notice reasonably calculated to inform interested parties must be given in any proceeding which is to be afforded finality.[5]

Mullane held publication notice to be insufficient because the beneficiaries involved were known to the bank, and therefore, could have easily been notified in a manner more likely to give actual notice.[6] The Court specifically held that publication notice to known or reasonably ascertainable parties did not satisfy due process requirements.[7] This ruling, however, did not extinguish the constitutionality of publication notice in all cases. For example, when parties are unknown and cannot be discovered through a diligent search publication notice will suffice.[8]

The *Mullane* Court's balancing test determined the constitutionally required form of notice[9] by balancing the interest of the state against an individual's interest protected by the fourteenth amendment.[10] Advocating this balancing test did not force the Court to commit itself to any standard formula for determining adequate notice.[11] Therefore, courts can make decisions on a case by case basis.

Based on *Mullane*, more than publication notice will be required when an individual's interest in receiving notice is greater than the interest a state may have in requiring only publication notice. In *Mullane*, the Court held that since the bank's proceeding might have deprived the beneficiaries of property rights, the notice must comport with due process requirements.[12] The Court essentially found that the beneficiaries' interest in safeguarding their property rights was greater than the state's interest in giving publication notice.

Recently, the rationale of *Mullane* was extended in *Mennonite Board of Missions v. Adams*.[13] *Mennonite* involved an Indiana statute that provided for an annual sale of real property on which taxes had been delinquent for

3. *Id.* at 309.

4. U.S. CONST. amend. XIV, stating, in relevant part, that: "No state shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, libert, or property, without due process of law."

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

6. *Id.* at 315. In *Mullane*, the publication contained only the names and addresses of the trust company, the name of the common trust fund and the date it was established, and a list of the participating estates, trusts, and funds. The publication did not include the names of the beneficiaries.

7. *Id.*

8. *Id.* at 317.

9. *Id.* at 313-14.

10. *Id.* at 314.

11. *Id.*

12. *Id.* at 313.

13. 462 U.S. 791 (1983).

at least fifteen months. The statute required that, before the sale, the county auditor had to both post and publish notice. Furthermore, the owner of the property was to personally receive notice by mail.[14] However, the statute did not require notice to be given to mortgagees of the property. The appellant mortgagee claimed that it possessed a property interest in the real estate and was therefore entitled to more than publication notice.

The Court, citing *Mullane*, held that the Mennonite Board of Missions had been deprived of notice reasonably calculated to inform it of the pending sale.[15] The Court held that because the Mennonite Board of Missions had a publicly recorded, legally protected property interest publication notice was inadequate.[16] In essence, publication notice did not "satisfy the mandate of *Mullane*."[17]

Though stating that *Mennonite* was controlled by *Mullane*,[18] the Court seemingly took *Mullane* one step further. *Mennonite* expanded *Mullane* in two ways. First, *Mennonite* ruled that notice by mail or other means equally effective is the minimum constitutional requirement.[19] This expands *Mullane* because *Mullane* never specified the type of notice required.[20] Second, *Mennonite* held that more than publication notice is required in a proceeding which adversely affects the property interests of "any" party.[21] By including the word "any," the *Mennonite* Court effectively disposed of the *Mullane* balancing test of state versus beneficiaries' interests.

The dissent in *Mennonite* noted these distinctions between *Mullane* and the majority's opinion.[22] The dissent contended that the majority opinion disregarded the *Mullane* mandate of focusing the analysis on the reasonableness of the notice required by the state.[23] The dissent also contended the majority approach was too broad,[24] and furthermore, not at all clear on the degree of diligence required when ascertaining the names of affected parties.[25]

14. *Id.*

15. *Id.* at 798.

16. *Id.*

17. *Id.* By noting that the state did not satisfy *Mullane*'s mandate the Court simply meant that it was not duly diligent in attempting to locate the mortgagee's address.

18. *Id.*

19. *Id.* at 800.

20. *Mullane* did not go as far as to specify the type of notice that must be given. Rather, *Mullane* simply noted:

> The notice must be of such a nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.

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

21. *Mennonite*, 462 U.S. at 800.

22. *Mennonite*, 462 U.S. at 801 (Dissent by O'Connor, Powell and Rehnquist).

23. *Id.*

24. The dissent contended that the majority opinion was too broad by holding that publication notice would never suffice when a property interest is involved. *Id.* at 803.

25. *Id.*

Effect of Mullane on Probate Proceedings

Since *Mullane*, decided almost forty years ago, no state court has extended the notice rationale to probate proceedings with regard to creditors. In fact, courts have consistently distinguished *Mullane* upholding the constitutional validity of publication notice to estate creditors.[26] In making the distinction, courts have ruled that *Mullane* only applies when property rights are to be affected by an adjudication proceeding, an element lacking in the probate setting.[27]

In *Gano Farms, Inc. v. Estate of Kleweno*,[28] a creditor of the estate whose claim was barred by a nonclaim statute, contended that he was denied due process because he was not given actual notice of the proceedings. This argument was based on the *Mullane* rationale. However, the *Gano* court held that the doctrine expressed in *Mullane* was not applicable to probate proceedings. In *Mullane*, receiving notice made the informed person an actual party to the litigation.[29] However, notice under a nonclaim statute "does not make a creditor a party to the proceeding, but merely notifies him that he may become one if he wishes."[30] The *Gano* court rationalized that no judicial order deprived the creditor of his property, but rather the statute of limitations had run on its claim.[31] *Gano* has been cited by many state courts that have refused to apply *Mullane* to probate proceedings.[32]

In 1982, *Continental Insurance Co. v. Moseley* ("Moseley I")[33] marked the beginning of a change in the notice requirements for probate proceedings. In this case, creditors again claimed that publication notice to a decedent's creditors was insufficient to meet due process requirements. In rejecting this contention, the Nevada Supreme Court first considered the policy behind nonclaim statutes.[34] It held that the reason for nonclaim statutes in probate proceedings was "to provide an expeditious and comparatively unencumbered means of accomplishing estate administration."[35] The court next applied the balancing test suggested by *Mullane*.[36] It balanced the interests of the heirs

26. For cases holding *Mullane* inapplicable in probate proceedings, see Brunell Leasing Corp. v. Wilkins, 11 Ariz. App. 165, 462 P.2d 858 (1969); Gibbs v. Estate of Dolan, 146 Ill. App. 3d 203, 496 N.E.2d 1126 (1986); Gano Farms, Inc. v. Estate of Kleweno, 2 Kan. Ct. App. 2d 506, 582 P.2d 742 (1978); Estate of Busch v. Ferrell-Duncan Clinic, 700 S.W.2d 86 (Mo. 1985); New York Merchandise Co. v. Stout, 43 Wash. 2d 825, 264 P.2d 863 (1954); William B. Tanner Co. v. Estate of Fessler, 100 Wis. 2d 437, 302 N.W.2d 414 (1981).

27. Estate of Busch v. Ferrell-Duncan Clinic, 700 S.W.2d 86 (Mo. 1985).

28. 2 Kan. App. 2d 506, 582 P.2d 742 (1978).

29. *Id.* at 744.

30. *Id.*

31. *Id.*

32. *See, e.g.*, Estate of Busch v. Ferrell-Duncan Clinic, 700 S.W.2d 86 (Mo. 1985); William B. Tanner Co. v. Estate of Fessler, 100 Wis. 2d 437, 302 N.W.2d 414 (1981).

33. 98 Nev. 476, 653 P. 2d 158 (1982).

34. The particular non-claim statute in *Moseley I* provided that any claim which was not filed within 60 days from the first publication of notice would be forever barred. *Id.* at 160.

35. *Id.*

36. *Id.*

and beneficiaries in the speedy administration of the estate against the interest of the creditors in satisfying their claims.[37] The court in *Moseley I* concluded that based on all the circumstances, publication notice was "reasonably and sufficiently calculated to provide actual notice to the creditor."[38]

Moseley I was appealed to the United States Supreme Court. In a memorandum opinion, the Court vacated and remanded the prior decision by the Nevada Supreme Court.[39] The Nevada Supreme Court was instructed to reconsider the case in light of the then newly decided case of *Mennonite Board of Missions v. Adams.*

On remand, the Nevada Supreme Court reversed its earlier decision and rendered a new decision in *Continental Insurance Co. v. Moseley*[40] ("Moseley II"). In a short opinion, which simply cited passages from *Mullane*, *Moseley II* became the first case requiring that creditors receive actual notice in probate proceedings.[41]

Even though *Moseley II* was the first to require more than publication notice to estate creditors, it was not persuasive in other jurisdictions addressing the same issue.[42] Despite the clear language in *Moseley II*, state courts remained steadfast in rejecting the need for more than publication notice to estate creditors. For example, in *Estate of Busch v. Ferrell-Duncan Clinic*,[43] the Missouri Supreme Court held the requirements of *Mullane* inapplicable to probate proceedings.[44] The nonclaim statute involved in *Busch* was deemed to be a self-executing statute of limitations.[45] In other words, the passage of time, rather than a judicial decree, extinguished the creditor's claim.[46]

In *Estate of Busch*, the court held that the plaintiff-creditor relied upon *Moseley II*[47] as supporting the contention that a creditor's claim could not be barred by a nonclaim statute unless more than publication notice was given.[48] However, the Missouri Supreme Court declined to follow the Nevada rationale in *Moseley II*. Instead, the court noted that:

> [t]he Supreme Court's procedure—granting certiorari, vacating and remanding for further consideration in light of *Mennonite* . . . does

37. *Id.*

38. *Id.* The fact that the court applied the *Mullane* balancing test is significant. In earlier cases dealing with notice to creditors, the courts summarily dismissed the *Mullane* holding as inapplicable to probate proceedings.

39. Continental Ins. Co. v. Moseley, 463 U.S. 1202 (1983) (vacating and remanding 98 Nev. 476, 653 P.2d 158 (1982)).

40. 100 Nev. 70, 683 P.2d 20 (1984).

41. *Id.* at 21.

42. Union Pacific R.R. Co. v. Estate of Madden, 241 Kan. 414, 736 P.2d 940, 945 (1987); Estate of Busch v. Ferrell-Duncan Clinic, 700 S.W.2d 86, 87 n.2 (Mo. 1985).

43. 700 S.W.2d 86 (Mo. 1985).

44. *Id.* at 89.

45. A self-executing statute of limitations "operates independently of any adjudicatory process." *Estate of Busch*, 700 S.W.2d at 89.

46. William B. Tanner v. Estate of Fessler, 100 Wis. 437, 302 N.W.2d 414, 420 (1981).

47. 100 Nev. 70, 683 P.2d 20 (1984).

48. Estate of Busch v. Ferrell-Duncan Clinic, 700 S.W.2d 86 (Mo. 1985).

> not conclusively indicate that the Supreme Court has held, or will hold, *Mullane* applicable in the circumstances of the remanded case. We are not persuaded by the Nevada court's holding after considering the *Mennonite* case.[49]

Therefore, *Moseley II* obviously was not going to persuade other courts deciding the issue of notice appropriate for estate creditors. The majority of state courts were still ruling that *Mullane* did not require more than publication notice under nonclaim statutes. The stubbornness shown in *Estate of Busch* seemed to indicate that this view would remain until the United States Supreme Court specifically ruled on the issue.

New and More Stringent Notice Requirement Imposed Upon Estate Administrators

In *Tulsa Professional Collection Services v. Pope*,[50] the United States Supreme Court addressed the issue of the level of notice due estate creditors in Oklahoma. In an 8-1 decision written by Justice O'Connor, the Court held that due process required known or reasonably ascertainable creditors to receive actual notice. This decision promises to have a tremendous effect on probate procedure throughout the country. Before this decision, most states relied on constructive notice to estate creditors,[51] however, this procedure must now be modified in order to satisfy the mandates of *Pope*.

On April 2, 1979, H. Everett Pope died in Tulsa, Oklahoma, at St. John's Hospital. His wife initiated probate proceedings and was later appointed administratrix of the decedent's estate. Although she complied with the requirements of the Oklahoma Probate Code regarding creditor notice,[52] the appellant, a subsidiary of the hospital, failed to file its claim within the time limit prescribed by the nonclaim provision.[53]

The hospital creditor brought suit against the estate claiming that their due process guaranties had been denied. After both the District Court of Tulsa County and the Oklahoma Court of Appeals rejected the appellant's contentions, the case reached the Oklahoma Supreme Court where *Mullane* was held inapplicable regarding notice to estate creditors.[54]

49. *Id.* at 87 n.2.

50. 108 S. Ct. 1340 (1988).

51. Falender, *Notice to Creditors in Estate Proceedings: What Notice is Due?*, 63 N.C.L. REV. 659 (1985).

52. 58 OKLA. STAT. § 331 (1981), *amended by* 58 OKLA. STAT. § 331 (Supp. 1989), requires that the administrator give notice to creditors of the deceased immediately after their appointment.

53. 58 OKLA. STAT. § 333 (1981), *amended by* 58 OKLA. STAT. § 333 (Supp. 1989), requires that the creditor file its claim with the administrator within 2 months from the date of first publication.

54. In Tulsa Prof. Collection Serv. v. Pope, 733 P.2d 396 (Okla. 1986), the Oklahoma Supreme Court was confronted with two issues. The first issue presented by the case was one of statutory interpretation while the second issue involved the due process question. The first issue centered on which of two statutes were applicable to the situation. In providing notice to creditors the

Application of Mullane to Probate Proceedings

The rationale for requiring more than publication notice, as expressed by the Supreme Court in *Mullane*, was essentially twofold.[55] First, when the state conducts a proceeding which could deprive an individual of property, that individual must be afforded due process of law. Second, notice and the opportunity to be heard are fundamental principles of due process. Therefore, the primary issue discussed in *Pope* was whether the involvement of the probate court was substantial enough to be considered state action, thereby, invoking the due process clause of the fourteenth amendment.[56] Of course, the Court first had to decide whether a creditor's unsecured claim was a property interest and thus deserving of the protection of the fourteenth amendment. The Court did indeed determine that such claims were "property." Therefore, the only significant issue remaining before the Court was whether to characterize the nonclaim statute as a self-executing statute of limitation.

Differentiating Between Nonclaim Statutes and Self-Executing Statutes of Limitation

The issue of whether there is a difference between nonclaim statutes and statutes of limitations was of critical importance in *Pope*. A consideration of the purposes of each indicates that there is a significant difference between a nonclaim statute and a statute of limitation. The purpose of a statute of

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personal representative relied on 58 OKLA. STAT. § 331 (1981), *amended by* 58 OKLA. STAT. § 331 (Supp. 1989), which requires that immediately after the personal representative is appointed he is to publish notice to creditors in a county newspaper once a week for two consecutive weeks. *Id.* The statute further provides that if the creditor failed to present his claim within the prescribed time, the claim was forever barred. 58 OKLA. STAT. § 331 (1981), *amended by* 58 OKLA. STAT. § 331 (Supp. 1989). However, the hospital-creditor claimed that under 58 OKLA. STAT. § 594 (1953), their claim was exempt from the above mentioned non-claim statute. *Pope*, 733 P.2d at 398. Section 594 provides that as soon as the personal representative has sufficient funds he must pay the expenses of the decedent's last illness. 58 OKLA. STAT. § 594 (1954). The court rejected this argument and held that the hospital-creditor was not exempt from the non-claim statute. *Pope*, 733 P.2d at 399. In reaching its decision, the court cited Rogers v. Oklahoma Tax Comm'n, 263 P.2d 409 (Okla. 1952). The court held that "in the construction of statutes, harmony, not confusion, is to be sought." *Pope*, 733 P.2d at 399. To allow the claim to come under section 594 would allow claims to exist outside of the time limit prescribed in section 331. *Id.* The court held that this would be contrary to the goal of expediting the administration of estates. *Id.*

The court also considered the due process argument by the hospital-creditor. It should be noted that the appellant did not raise the due process issue until they petitioned for a rehearing after the Oklahoma court of appeals had affirmed the trial court's decision in favor of the estate. *Pope*, 733 P.2d at 399. The appellant claimed that without actual notice of the probate proceedings they were denied due process of law. *Id.* The Oklahoma Supreme Court considered, but nonetheless, rejected this argument. The court essentially ruled that non-claim statutes did not amount to adjudicatory proceedings. The court held that the passage of time rather than an adjudicatory proceeding cut off the creditor's claim. *Id.* at 401.

55. 339 U.S. 306 (1950).

56. 108 S. Ct. 1340, 1345 (1988).

limitation is twofold. First, statutes of limitation are utilized to "afford repose to potential defendants."[57] This allows potential defendants to feel secure in the knowledge that they are no longer subject to liability for their past actions. The second purpose of statutes of limitation is to "preclude the assertion of stale claims."[58]

In *State ex rel. Central State Griffin Memorial Hospital v. Reed*, the Oklahoma Supreme Court defined the purpose of nonclaim statutes in Oklahoma.[59] The court held that the "purpose of the nonclaim statute is to facilitate the handling and closing of estates."[60] The court further noted that the legislative intent behind such statutes was to expedite and quicken the disposal of estate administrations.[61]

As discussed previously, some courts upholding the validity of publication notice in the probate setting have likened nonclaim statutes to statutes of limitation.[62] The basic theory found throughout these decisions was that the nonclaim statute simply notifies creditors that, if they so wished, they could become part of the estate administration.[63] *Gano* held that the notice to creditors simply "put into operation a special statute of limitation."[64]

In *Pope*, convincing the Court that nonclaim statutes were self-executing statutes of limitation was critical to the estate's case. The estate contended that in light of *Texaco, Inc. v. Short*,[65] the nonclaim statute in the Oklahoma Probate Code was a self-executing statute of limitations, and therefore, due process did not require actual notice to be given to potential claimants. *Texaco* involved an Indiana Dormant Mineral Lapse Act[66] which extinguished mineral rights left unused for more than twenty years. The interest in the mineral rights left dormant would revert back to the surface owner unless the mineral owner filed a claim with the county recorder's office. The appellants, whose

57. Falender, *Notice to Creditors in Estate Proceedings: What Notice Is Due?*, 63 N.C.L. REV. 659, 676 (1985).

58. *Id.*

59. 493 P.2d 815 (Okla. 1972).

60. *Id.* at 818.

61. *Id. See* Union Pacific R.R. Co. v. Estate of Madden, 241 Kan. 414, 736 P.2d 940 (1987) (e.g., a primary purpose of non-claim statutes is the speedy settlement of estates); *See also* Buxton, *Does the Idaho Nonclaim Statute Violate Due Process Notice Requirements?*, 24 IDAHO L. REV. 465, 465 (1988) (e.g., "the general thrust of the nonclaim statute is to quickly and efficiently wrap up . . . the decedent's estate"); Smith, *Known Estate Creditors and Notice by Publication: A Due Process Issue is Resolved in Florida*, 61 FLA. B.J. 71 (1987) (noting that nonclaim statutes facilitate the speedy settlement of estates).

62. *See, e.g.*, Union Pacific R.R. Co. v. Estate of Madden, 241 Kan. 414, 736 P.2d 940, 946 (1987); Gano Farms, Inc. v. Kleweno, 2 Kan. Ct. App. 2d. 506, 582 P.2d 742, 744 (1978); Estate of Busch v. Ferrell-Duncan Clinic, 700 S.W.2d 86, 89 (Mo. 1985); William B. Tanner Co. v. Estate of Fessler, 100 Wis. 2d 437, 302 N.W.2d 414, 420 (1981).

63. *Gano Farms, Inc.*, 582 P.2d at 744.

64. *Id.*

65. 454 U.S. 516 (1982).

66. IND. CODE §§ 32-5-11-1 through 32-5-11-8 (1976).

mineral rights had reverted under the Act, contended that due process required that they receive actual notice before being deprived of their property.[67]

In rendering its decision, the *Texaco* Court noted the distinction between a self-executing statute of limitation and a judicial determination that a lapse of some sort had occurred.[68] A self-executing statute of limitation requires no state action to begin the running of the statute. When state action is present, actual notice is constitutionally required.[69] A self-executing statute of limitation does not have to satisfy the requirements set forth by *Mullane*.[70] *Mullane* is only "applicable to a judicial proceeding brought to determine whether a lapse . . . did or did not occur."[71]

As mentioned, in *Pope* the estate attempted to persuade the Court that the nonclaim statute was only a statute of limitations, and therefore, publication notice would pass constitutional muster. However, the Court ruled that by appointing an estate administrator the probate court's involvement rose to state action and therefore, the nonclaim statute was no longer self-executing.[72] If the state is involved in any way beyond enacting the statute, the self-executing characterization is nullified.[73]

The Court held that significant state action existed in Oklahoma probate proceedings.[74] In Oklahoma, the probate court was found to have a significant role in the administration of estates. The determinative factor for the Supreme Court's finding of state action was that the Oklahoma probate court appointed administrators and then directed them to immediately publish notice to creditors.[75] The Court held that the involvement of the probate court throughout the proceedings was so "pervasive and substantial" that state action must be found, thereby invoking the due process clause of the fourteenth amendment.[76]

Further, the Court rejected the argument that creditors in estate proceedings were not made parties to actions by receiving notice, but instead simply informed of their potential involvement.[77] The Court also noted a property interest could be adversely affected even if the proceeding did not address the claim on its merits.[78]

67. *Texaco, Inc.*, 454 U.S. at 522.
68. *Id.* at 534.
69. *Id.*
70. *Id.* at 535.
71. *Id.*
72. 108 S. Ct. 1340, 1345 (1988).
73. *Id.*
74. *Id.*
75. *Id.* at 1345-46.
76. *Id.*
77. *Id.* at 1346.
78. *Id.* In providing this rule the Court cited *Mullane*. The Court noted that the proceedings in that case did not address the merits of the mortgagees claim. Nevertheless, in *Mullane* due process required actual notice be given. *See* Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1958). However, it could be argued that the claim found in *Mullane* and the claim in *Pope* can be distinguished. In *Pope*, a creditor's claim could be completely untenable, but nevertheless would, under the ruling of the Court, deserve actual notice.

Application of the Mullane Balancing Test

Whenever a court must decide the type of notice required, it must first balance the interest of the state against the interest of the individual who is seeking enforcement of his due process rights.[79] In *Pope*, the Court balanced the interest of the creditors to receive payment of their debt, against the interest of the state to expedite the administration of estates.[80] When balancing these interests, the *Pope* Court reasoned that creditors are less likely to benefit from publication notice,[81] while at the same time the estate's interests in short-term, nonclaim statutes suffers little by refusing to give estate creditors actual notice.[82]

Based on this balancing test, the *Pope* Court suggested that mailed notice would be an efficient and inexpensive way of providing notice to known creditors. Accordingly, known and reasonably ascertainable creditors must now be given actual notice.[83] Those creditors who are not reasonably ascertainable need only be given publication notice. However, the Court failed to expressly define who is considered a known or reasonably ascertainable creditor. It only provided that a known or reasonably ascertainable creditor is one who could be located through reasonably diligent efforts. When stating that reasonably diligent efforts must be used, the Court cited *Mennonite*.[84] However, the *Mennonite* decision does not provide much guidance to the estate executor who is attempting to comport with the mandates of *Pope*.

Mennonite involved a mortgagee who did not receive notice of a pending tax sale. The Court merely stated that extraordinary efforts were not required to locate an interested party and suggested that public records be checked when searching for such parties.[85] The *Mennonite* opinion provides no further guidance. Therefore, even after *Pope*, it is not clear how far a personal representative must go when locating possible estate creditors. Some commentators, in anticipation of the constitutional problems of published notice in

79. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1958).

80. 108 S. Ct. 1340, 1347 (1988). In *Pope*, the Court once again utilized the balancing test which was enunciated in *Mullane*. The court in *Mennonite* departed from this balancing test. See *supra* text accompanying notes 13-24.

81. "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper." *Mullane*, 339 U.S. at 315.

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

83. *Id.*

84. It is interesting to note that Justice O'Connor, who wrote the *Pope* decision, dissented in *Mennonite*, stating that the decision to require reasonably diligent efforts in locating mortgagees was not clear. *Mennonite*, 462 U.S. at 791. In *Mennonite*, Justice O'Connor stated that the majority decision failed to define what a reasonably diligent effort entails. *Id.* However, in writing for the majority in *Pope*, Justice O'Connor cites to the *Mennonite* majority in holding that reasonably diligent efforts are required when locating estate creditors. *Pope*, 108 S. Ct. at 1347. Interestingly, *Pope* does not provide any further guidance as to what is necessary in locating creditors. It seems as though Justice O'Connor is espousing exactly what she criticized in *Mennonite*.

85. *Mennonite*, 462 U.S. at 798 n.4.

probate, have suggested various steps which should be taken by the personal representative when locating creditors.[86] The suggestions include searching public records, the decedent's mail, his personal records, and inquiring into the knowledge of family and business associates. However, even though these suggestions provide guidelines, it remains unclear how extensive the search must be.

Such mandate, which sets a subjective standard of "reasonably diligent efforts" when searching for creditors, will result in an increase in litigation. Whenever a creditor finds that his claim has been barred from an estate proceeding, it is likely that the creditor will bring suit against the estate, claiming that the personal representative was not duly diligent in his search for creditors. Because there are no objective standards as to what constitutes a duly diligent search, suits by creditors could easily become increasingly burdensome in probate proceedings.

Oklahoma's Response to Pope

In response to the ruling in *Pope*, the Oklahoma legislature recently amended many of the provisions in the probate code dealing with notice to estate creditors. Following the Supreme Court's suggestion, the Oklahoma legislature revised the code to provide mailed notice to estate creditors.[87]

Title 58, section 331 of the Oklahoma Statutes has been significantly changed since *Pope*.[88] Before *Pope*, this section provided that immediately after appointment the executor of the estate was to provide published notice to estate creditors. The notice was to be published in any newspaper in the county once each week for two consecutive weeks. Furthermore, under the old statute

86. *See* Borron, *Due Process of Law and the Sufficiency of Published Notice of Letters Granted*, 7 PROB. L.J. 61, 69-70 (1985); Buxton, *Does the Idaho Nonclaim Statute Violate Due Process Notice Requirements?*, 24 IDAHO L. REV. 466, 484 (1988); Falender, *Notice to Creditors in Estate Proceedings: What Process is Due?*, 63 N.C.L. REV. 660, 695 (1985); Kuether, *Is Kansas Probate Non Claim Statute Unconstitutional?*, 54 J. KAN. B.A. 115, 125 (1985).

87. The amendments to the Oklahoma Probate Code were approved June 22, 1988. The new amendments will be applied to estates in which probate is commenced on or after November 1, 1988. *See* 58 OKLA. STAT. § 331.1 (Supp. 1989).

88. Section 331 provides, in pertinent part:

> Every personal representative must, unless the notice has been given by a special administrator as provided in Section 215 of this title, within two (2) months after the issuance of his letters, file notice to the creditors of the decedent stating that claims against said deceased will be forever barred unless presented to such personal representative . . . by the presentment date stated in the notice. The presentment date shall be a date certain which is at least two (2) months following the date said notice is filed, and the first publication of said notice shall appear on or before the tenth day after the filing of said notice. . . . The notice to creditors shall be given by publication in some newspaper in the county in which the probate is filed once each week for two (2) consecutive weeks and by mail to all known creditors of the decedent at their respective last-known available addresses.

58 OKLA. STAT. § 331 (Supp. 1988).

the creditor had only two months from the date of first publication to file his claim with the executor.[89]

The amended statute is significantly different. Under the new statute the personal representative has two months from the issuance of his letters to file notice to creditors.[90] This added time is imperative due to the added responsibility of locating the creditors who are due mailed notice.[91] In addition to mailed notice, section 331 still requires the personal representative provide creditors with published notice.[92]

The notice detailed in section 331 is defined further in section 331.2.[93] This section provides that the notice to creditors shall be given by regular first class mail.[94] The section also provides that personal delivery by the personal representative or his attorney would also be sufficient.[95]

The Oklahoma legislature codified a new section to the probate code, section 331.1, which attempts to define known creditors.[96] This section provides two definitions of a known creditor. A "known" creditor is one which is "actually known" to the personal representative or reasonably ascertainable by the personal representative.[97] The newly codified section defines a "reasonably ascertainable" creditor as one whose last known address and claims can be determined by a reasonably diligent search of the decedent's personal effects.[98]

Although the language of this section regarding known creditors and due diligence is more specific than that found in *Pope*,[99] the language remains deficient. First, the statute considers the actual knowledge of the personal representative to determine a creditor's status. Due to this language, more creditors would conceivably be within the actual knowledge of the executor

89. 58 OKLA. STAT. § 331, *amended by* 58 OKLA. STAT. § 331 (Supp. 1989).

90. 58 OKLA. STAT. § 331 (Supp. 1989).

91. Obviously, the executor has added responsibilities under the new statute. The old statute simply required the executor to provide published notice. However, the new amended statutes require the executor to conduct a search for specific creditors and provide each with notice.

92. This satisfies the mandate in *Pope* that unknown creditors may still be afforded only publication notice. *See Pope*, 108 S. Ct. at 1347.

93. 58 OKLA. STAT. § 331.2 (Supp. 1989).

94. *Id.*

95. *Id.*

96. Section 331.1 provides, in relevant part:

> As used in this act, 'known creditors' . . . shall mean those creditors of the decedent actually known to the personal representative or reasonably ascertainable by the personal representative as of the date notice to creditors is filed. 'Reasonably ascertainable creditors' shall be those whose identities, last-known addresses and claims can be determined by reasonably diligent efforts of the personal representative. If reasonable under the circumstances, such efforts shall include the personal representative's conducting a search after the decedent's death and prior to the filing of the notice to creditors, of the personal effects of the decedent.

58 OKLA. STAT. § 331.1 (Supp. 1989).

97. *Id.*

98. *Id.*

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

if the executor had a close relationship with the decedent. Whereas, if the executor knew nothing of the decedent's affairs, some creditors could possibly be avoided.[100] Accordingly, estates with administrators who did not have a close relationship with the decedent would be in an advantageous position. Furthermore, the consideration of the administrator's knowledge may lead to burdensome litigation, further inhibiting the speedy administration of estates.

Another problem with section 331.1 is the definition of "reasonably diligent efforts." The language in this section states that the administrator's "efforts shall include . . . a search . . . of the personal effects of the decedent."[101] This section remains unclear on whether anything else is required in order to satisfy the due diligence requirement, and could certainly lead to wasteful litigation.

The new legislation also increases the involvement of the probate court. The legislation requires that various affidavits be filed with the probate court. For example, section 331.1 requires an affidavit to be filed which attests that the executor employed due diligence in attempting to identify creditors.[102] Also, section 332 now requires an affidavit to be filed which lists the names and addresses of all known creditors who were sent first class mailed notice.[103] Finally, due to a newly codified section, the judge must "conduct an inquiry to judicially determine whether the personal representative has complied with the provisions . . . of this act."[104]

100. The situation could arise where a creditor is actually known to the executor but would not otherwise be reasonably ascertainable. In this situation, the estate benefits by the appointment of the administrator who did not have a close relationship with the decedent.

101. 58 OKLA. STAT. § 331.1 (Supp. 1989).

102. The filing of the affidavit provided for in section 332 of Title 58 of the Oklahoma Statutes shall constitute an affirmation by the personal representative that reasonably diligent efforts have been made by the personal representative to determine the identities, last-known addresses and claims of the decedent's creditors in accordance with this section. *Id.*

103. Section 332 provides:

> After notice is given as required by section 331 of this title and affidavit of mailing and, if applicable, of personal delivery, and an affidavit of publication must be filed with the district court clerk. The affidavit of mailing, and if applicable, of personal delivery shall be made by the personal representative and shall state words to the effect that the personal representative personally, or by and through the personal representative's attorney mailed notice by first-class mail to all creditors of the decedent known to the personal representative on the date said notice was filed with the district court for the county in which probate is pending. Said affidavit shall also state the identities and last-known addresses of such creditors and the date said notice was mailed or delivered.

58 OKLA. STAT. § 332 (Supp. 1988).

104. 58 OKLA. STAT. § 632.3 (Supp. 1989) provides, in relevant part:

> 1. At the hearing on the final account of any personal representative who has given notice to creditors as provided in this title, the judge shall conduct an inquiry to judicially determine whether the personal representative has complied with the provisions of Sections 3 and 4 of this act.
> 2. The final decree shall contain a finding in substantially the following form: that notice to creditors as required by Section 3 and 4 of this act was given by the

This legislation greatly expands the personal representative's duties as well as the duties and involvement of the probate court in Oklahoma estate administration. Due to the increased duties of both the personal representative and the probate court, it is questionable whether the goals of the nonclaim statute are still intact. The new legislation seems to be too cumbersome and time consuming to effectuate the goal of speedy estate administration.

One Possible Alternative to the Oklahoma Legislation

The approach taken by the Oklahoma legislature was one way to satisfy the mandates of *Pope*. However, there is another possible alternative. When addressing the issue of notice rights of estate creditors, the Supreme Court in *Pope* only ruled on the constitutionality of short-term, nonclaim statutes. The Court did not rule on the constitutionality of long-term, nonclaim statutes. These statutes begin running at the decedent's death and provide a longer period in which to file a claim with the decedent's estate.[105] Before *Pope*, most states[106] included such statutes in conjunction with short-term, nonclaim statutes.[107] Therefore, even after *Pope*, long-term, nonclaim statutes which begin to run at the decedent's death remain constitutionally intact.

The alternative to the cumbersome and time consuming approach enacted by the Oklahoma legislature would be to only utilize a long-term, nonclaim statute in probate proceedings. If the statute comported with the mandates of *Texaco, Inc. v. Short*,[108] it would be classified as a statute of limitation. Based on the holding in *Texaco*, a nonclaim provision which begins to run at the time of the decedent's death, rather than at the time the court appoints an administrator, may be constitutionally valid even without giving notice to creditors. If the time limit of the nonclaim provision begins at the decedent's death, with no involvement of the probate court, the statute may be held to be a self-executing statute of limitations.

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personal representative, including notice by mail to all creditors . . . at their respective last-known addresses; and that all claims not filed within the time permitted for the presentation of claims are nonsuited, void and forever barred . . .

3. A final decree which fails to contain the finding required by this section be voidable.

105. *Pope*, 108 S. Ct. at 1346. (Court stating "[w]e also have no occasion to consider the proper characterization of nonclaim statutes that run for the date of death, and which generally provide for longer time periods, ranging from 1 to 5 years.").

106. For a listing of states with long term nonclaim statutes, *see* Falender, *Notice to Creditors in Estate Proceedings: What Notice is Due?*, 63 N.C.L. REV. 659, 668 n.39 (1985). Oklahoma does not have the type of long-term nonclaim statute as is noted in this article. 58 OKLA. STAT. § 331 (Supp. 1989), provides that if the decedent has been dead for more than 5 years before the commencement of probate proceedings, the creditors only have one month from the date of notice in which to file their claim.

107. Falender, *supra* note 106, at 668-69.

108. 454 U.S. 516 (1982) (if a statute is deemed self-executing, due process does not require notice to be given).

At least one commentator has suggested that long-term, nonclaim statutes should pass constitutional muster so long as they possess the characteristics of statutes of limitation.[109] Long term statutes are similar to statutes of limitations in many ways.[110] Long-term, nonclaim statutes and statutes of limitation have two critical similarities. First, no state action is involved with the running of long-term, nonclaim statutes.[111] These statutes begin running with the death of the decedent. Secondly, long-term, nonclaim provisions possess the two characteristics of all statutes of limitation. Such statutes afford repose to potential defendants and bar the assertion of stale claims.[112]

However, a problem may exist with this alternative. In order to pass a constitutional challenge such a provision may need to be classified as a long-term statute. The typical long-term, nonclaim statutes involve a time span of one year or more, after the death of the decedent, for creditors to file claims. Therefore, by utilizing a long-term, nonclaim statute the goal of expediting estate administration may be inhibited. However, it appears a better alternative than the cumbersome approach which was taken by the Oklahoma legislature.

Conclusion

The extension of *Mullane* to probate proceedings in regard to estate creditors was a long awaited, but inevitable step. Because of the extension in *Pope*, dramatic changes will occur in the administration of estates. In Oklahoma, for example, the legislature has recently amended the probate code to reflect the mandates of *Pope*. The new notice provisions require that estate creditors be provided with actual notice of the proceedings. This will undoubtedly result in an increase in the number of claims made against estates. The decision in *Pope* and the resulting legislation should be considered a victory for estate creditors. However, the new legislation is very cumbersome and time consuming. The legislation has added dramatically to the duties of both the personal representative and the probate court. The new mandates by the legislature have effectively done away with the ability to conduct a simple and expeditious resolution of estate administration.

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109. Falender, *supra* note 106, at 677.

110. *Id.* at 676.

111. *Id.* at 676-77.

112. *Id.* at 677. Long-term nonclaim statutes are said to bar the assertion of stale claims because of their length. In *Pope*, the appellant attacked the characterization of short-term, nonclaim statutes as statutes of limitation by arguing that, due to their short length, they do not have the purpose of barring stale claims. The heart of this argument was that claims do not become stale after two months; therefore, the short-term nonclaim statute does not meet the definitional requirements of a statute of limitation. Brief for Appellant at 20-22, Tulsa Professional Serv. v. Pope, 108 S. Ct. 1340 (1988).