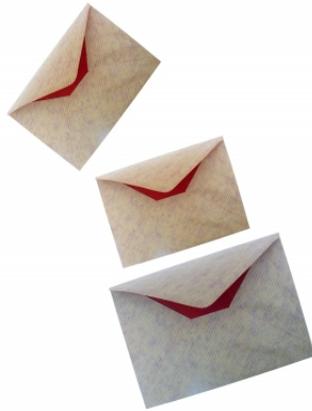


PROBATE PROCEEDINGS IN TENNESSEE &
A LOOK AT THE NOTICE REQUIREMENTS APPLICABLE TO ESTATE CREDITORS¹



A Legal Research Paper

Presented

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I. INTRODUCTION

Historically, state probate statutes establishing the notice standard applicable to estate creditors served to further expeditious estate settlement by imposing short-term nonclaim statutory bars against claims not brought within the statutes time frame.² For most statutes, notice by publication was usually sufficient.³ In Tulsa Professional Collection Services v. Pope,⁴ the United States Supreme Court expressly extended the actual notice standard articulated in Mullane v. Central Hanover Bank and Trust Co.⁵ to estate creditors in probate proceedings when the nonclaim statute was not-self-executing.⁶ This was a victory for estate creditors, but added responsibilities to the executor of an estate. In Tennessee, some post-*Pope* cases have brought to light that even when “actual notice” is sent by a personal representative, the content of the notice must be sufficient to meet Due Process Clause demands.⁷ This essay examines probating an estate in Tennessee with special emphasis on the notice requirements between a personal representative and estate creditors.

A. Preliminary Pre-probate Matters

Unless a decedent leaves no assets or a small estate⁸ at death or conducts effective estate

² See Needham v. Moore, 4 McCanless 445, 292 S.W.2d 720 (Tenn. 1956) (intent of the act dealing with claims against the estate is to afford a very simple and expeditious remedy for the administration of probate estates); In re Estate of Cunningham, M2001-01965-COA-R3-CV, 2002 WL 1800973 (Tenn. Ct. App. 2002) (failure of funeral home director to file a claim against the estate until 20 months after the decedent's death resulted in application of Tennessee's nonclaim provision).

³ See Continental Ins. Co. v. Moseley, 100 Nev. 337, 338, 683 P.2d 20, 21 (Nev. 1984) (Moseley II) (the first case requiring that estate creditors receive actual notice instead of publication notice in probate proceedings).

⁴ Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 491, 108 S.Ct. 1340, 1348 (1988) (examining Oklahoma's nonclaim statute and establishing the standard for determining whether a estate creditor is entitled to actual notice pursuant to the Due Process Clause of the Fourteenth Amendment).

⁵ Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 108 S.Ct. 1340 (1950) (at a minimum due process requires notice and opportunity for a hearing before deprivation of life, liberty, or property).

⁶ See Pope, *supra*, at 487 (where the state plays no other role outside of enacting the statute, such a “limited involvement in the running of the time period generally falls short of constituting the type of state action required to implicate the protection of the Due Process Clause). Due process is implicated where there is more state action for the nonclaim statute to become operative, e.g., judge may have to appoint personal representative or clerk may have to publish notice to creditors to start run of statute. See also Texaco v. Short, 454 U.S. 516, 533, 102 S.Ct. 781, 794 (1982) (“it is essential to recognize the difference between the self-executing feature of the statute and a subsequent judicial determination that a particular lapse did in fact occur”).

⁷ U.S. Const. Amend. XIV § 1. See Estate of Jenkins v. Guyton, 912 S.W.2d 134 (Tenn. 1956) and Bowden v. Ward, 1999 WL 144933 (Tenn. Ct. App. 1999), *aff'd*, 27 S.W.3d 913 (Tenn. 2000).

⁸ Tenn. Code Ann. § 30-4-101 (allowing filing small estate petition where property of the estate is less than \$25,000).

planning by non-probate devises,⁹ the decedent's assets will be probated under either intestate¹⁰ or testate¹¹ succession. Generally, probate is a personal representative's action to settle a decedent's estate.¹² Probate involves locating, gathering, and valuing decedent's assets to notify and distribute to beneficiaries or heirs,¹³ creditors, and taxing authorities. The term "personal representative," as it is applied to probate matters in Tennessee, refers to those who represent a decedent and includes executors and administrators.¹⁴ For purposes of efficiency, where I use the term personal representative in this essay it refers to either an executor or administrator.

Though a personal representative's legal powers are limited until the estate is formally opened,¹⁵ there are some important pre-probate activities that must be performed by the personal representative. The personal representative is often charged with informing a decedent's family members, employer, attorney, accountant, business partners, and any other person who had an important role in the

⁹ Nonprobate or will substitute transfers include establishing payable on death transfers, holding jointly held survivorship accounts or property in joint tenancy, and creating inter vivos trusts. Professor Langbein attributed the growth of nonprobate transfers of wealth to the declining need of creditors for the protection offered by the probate system. He attributes this in large part to voluntary payments by decedent's survivors, medical insurance, life insurance, credit life insurance, and security interests. John H. Langbein states that "[i]f modern creditors had needed to use probate very much, they would have applied their considerable political muscle to suppress the nonprobate system." See Langbein, "The Nonprobate Revolution and the Future of the Law of Succession," 97 Harv. L.Rev. 1108, 1120, 1125 (1984).

¹⁰ A decedent is considered to have died intestate if a person has no will or creates a will that is invalid because it does not comply with the state's legal requirements.

¹¹ A decedent is considered to have died testate if there is a legally valid will in place at the time of death.

¹² Blacks Law Dictionary, Seventh Edition (2000). Additionally, probate can proceed in solemn or common form. The "common form" is without notice and is an ex parte proceeding with the witnesses to the will. Common form proceedings are available at the discretion of the court. A probate proceeding in "solemn form" usually has as its sole issue whether the document presented as the decedent's will is authentic. See 95 Corpus Juris Secundum Wills § 472. The principal advantage of the solemn form probate is that any person wanting to contest the will must do so at the hearing when the will is presented for probate. If the contestant does not contest at that time, the admission of the will becomes conclusive and the contestant is forever estopped to contest. See Albert W. Secor, 18 Tenn. Prac. Probate Law § 4:4 (2006).

¹³ Tenn. Code Ann. § 30-2-301 (the personal representative has a duty to notify beneficiaries of a decedent of the fact the person or institution is a beneficiary).

¹⁴ Technically, an executor refers only to the personal representative designated by a testator by will. Testator refers to the person who made a will, whether or not he or she is alive or dead. Pursuant to Tenn. Code Ann. § 1-3-105(8), an "executor" is defined to include an administrator, where the subject matter applies to an administrator. Where an executor has not been designated by decedent, most state laws provide that a surviving spouse or other family member be appointed if they want to serve. See Tenn. Code Ann § 30-1-106 (setting forth the preference to grant the spouse administration where a person dies intestate, if the spouse applies). Additionally, pursuant to Tenn. Code Ann § 30-1-108, the court has the power to appoint an administrator *pendente lite* where a case may be the subject of contest or litigation. In Tennessee, anyone over 18 years old, not otherwise considered unsuitable by the court, can be an executor.

¹⁵ Although Tenn. Code Ann. § 30-1-101 prohibits the administration of a decedent's estate without court approval, there is no estate to administer unless the decedent died owning assets in the decedent's name alone or assets in the joint names of the decedent and another without a right of survivorship. Thus, another important pre-probate activity is determining what constitutes the property of the estate, as well as, who are the interested parties that can lay claim to the property of the estate.

deceased's financial or legal affairs.¹⁶ During this preliminary, informal notice process, the personal representative will gather any of the decedent's important papers, documents, books, and safe deposit box keys that may contain more documents, such as bonds or stock certificates. Unless otherwise taken care of by others, the personal representative also makes the funeral arrangements. Accordingly, obtaining the death certificate is an important preliminary matter because creditors and other parties may demand to see proof of death.

B. Opening the Estate for Probate Proceedings

1. Filing with the Proper Court: Jurisdiction and Venue

Opening the estate is the process by which the court approves and supervises an estate's administration and settlement. There are three initial issues involved in filing the petition, namely, subject matter jurisdiction, "judicial jurisdiction,"¹⁷ and venue. The probate of an estate is an *in rem* proceeding, held to conclusively affect title or possession of any *res* belonging to the decedent within a court's jurisdiction as between interested parties.¹⁸ Generally, a decedent's estate is probated in the state and county where the deceased "resided at the time of the decedent's death, or, ancillary, in which the decedent's estate, goods, and chattels or effects were at the time of the decedent's death."¹⁹ Tennessee's probate courts have concurrent subject matter jurisdiction over probate and administration of estates with chancery court.²⁰ Generally, the proper venue is where the deceased had a "legal

¹⁶ See Tenn. Code Ann. § 30-2-301(b)(1)(A), (B) (notwithstanding the exception in subdivision (b)(4), within sixty (60) days after entering on the administration the personal representative shall notify "[e]ach legatee or devisee under the will that such person or entity is a beneficiary by sending, by first class mail or personal delivery, a complete copy of the will to those beneficiaries sharing in the residue of the estate, and by sending a copy of the paragraph(s) of the will containing such bequests to those beneficiaries only receiving bequests; and [sending a copy] to [e]ach residuary distributee of an intestate deceased person by sending such person a copy of the letters of administration").

¹⁷ Judicial Jurisdiction refers to "the power or lawful authority of a court, within its subject matter jurisdiction, to adjudicate controversies concerning particular persons and property interests." Pivnick, Lawrence A., Tennessee Civil Procedure, Ch. 2, pg. 1 (2005).

¹⁸ See Collins v. Ruffner, 185 Tenn. 290, 294, 206 S.W.2d 298 (Tenn. 1947).

¹⁹ Tenn. Code Ann. § 30-1-301 (jurisdiction). See also Tenn. Code Ann. § 30-1-102 (provides that "letters of administration shall be granted by the probate court of the county where the intestate had usual residence at the time of the intestate's death, or, in case the intestate had fixed places of residence in more than one county, the probate court of either county may grant letters of administration upon the intestate's estate"); Tenn. Code Ann. § 30-1-103 (sets out the requirements for seeking letters testamentary or administration for nonresident decedents).

²⁰ Tenn. Code Ann. §§ 16-16-107(1), (3), 30-2-401. See also 1985 Tenn. Private Acts, ch. 28, 1935 Tenn. Private Acts, ch. 407, 1870 Tenn. Private Acts, ch. 86. But see Walker v. Gambill, 181 Tenn. 38, 178 S.W.2d 390 (Tenn. 1944) (probate act recognizes as distinct and independent, proceedings relating to the filing and proving of claims and the

residence” or domicile.²¹

2. Filing the Petition

In Tennessee, as in other states, probate can be commenced by filing a petition for the appointment of an administrator in an intestate estate, or for the appointment of an executor in a testate estate and admission of the decedent’s will to probate.²² In Tennessee, the petition must include the following information:²³

- a) The identity of the petitioner.
- b) The decedent’s name, age, if known, date and place of death, and residence at time of death (this establishes venue).
- c) In case of intestacy, the name, age, if known, mailing address, and relationship of each of the heirs at law of the decedent.
- d) A statement that the decedent died intestate or, if a will is presented, the date of execution, if known, of the document or documents offered for probate and the names of all attesting witnesses.
- e) A copy of the document(s) offered for probate is attached to the petition.
- f) The names and relationships of the devisees and legatees and the city of residence of each if known and, similar information for those who are entitled to the decedent’s property under the statutes of intestate succession. The petition shall also state the names of any minors or other persons under disability.
- g) An estimate of the fair market value of the estate to be administered, unless bond²⁴ is waived by the document offered for probate or is waived as authorized by statute.
- h) If there is a document, whether the document offered for probate waives the filing of any inventory and accounting or whether such is not otherwise required by law.
- i) If there is a document, a statement that the petitioner is not aware of any instrument revoking the document being offered for probate, if such be the case, and that the petitioner

sale of real estate. Appeals on filing of claims go to the circuit court, whereas appeals relating to the sale of real estate lie to the court of appeals). See also Pritchard on Wills and Estates, § 630 (generally, real property vests immediately in either heirs or devisees unless the personal or probate estate is insufficient to pay debts or it is specifically directed by will that the property would be under control of the executor as part of the estate).

²¹ See Conservatorship of Clayton, 914 S.W.2d 84, 89 (Tenn. App. 1995) (the term legal residence or domicile “indicates a particular place where a person has a permanent home and to which the person has a concurrent intention to return and to remain,” citing Denny v. Sumner County, 134 Tenn. 468, 473-74, 184 S.W. 14, 16 (1915); Snodgrass v. Snodgrass, 49 Tenn.App. 607, 611, 357 S.W.2d 829, 831 (1961)).

²² See Tenn. Code Ann. §§ 30-1-305 (appointments), 30-1-308 (actions and proceedings; parties).

²³ See Tenn. Code Ann. § 30-1-117 (sets forth what must be included in a petition to admit wills and petitions for the administration of estates); see also Rules of Probate Court of Shelby County, Tennessee, Rule IV, p. 8 (Effective March 15, 2005) (available at http://co4.shelbycountyn.tn.gov/court_clerks/probate_court/probaterules.PDF (last visited November 8, 2005)).

²⁴ Bond is required of any personal representative unless one of the following conditions exists, pursuant to Tenn. Code Ann. § 30-1-201: (1) the decedent’s will excuses the personal representative from making bond; (2) the personal representative and the sole beneficiary of the estate are the same person and the court approves; (3) all of the beneficiaries of the estate are adults, all of them consent in writing to the personal representative’s serving without bond, and the court approves; or (4) the personal representative is a bank that is excused from the requirements of bond by Tenn. Code Ann. § 45-2-1005. If an interested party can show the personal representative is wasting or is likely to waste the decedent’s estate, a bond can be required irrespective of application of an exception under Tenn. Code Ann. § 30-1-201.

believes that the document being offered for probate is the decedent's last will.

The specific rules published for the applicable court should be considered when opening a probate estate. For instance, the Rules of the Probate Court of Shelby County, Tennessee, specify that all petitions and complaints filed with the court must be sworn to and addressed in the following form: "To the Honorable Judges of the Probate Court of Shelby County, Tennessee."²⁵

3. Letters Testamentary or of Administration & Filing Inventory

In Tennessee, no person can claim to administer any of the decedent's estate until the person has obtained Letters Administration or Testamentary ("Letters").²⁶ Letters provide proof to the world of the personal representative's court authority to act on behalf of the estate in a fiduciary capacity.²⁷ Letters Testamentary are the court order for testate decedents. Letters of Administration are the court order for intestate decedents. Forms for each are available with the clerk of the court and must be completed and filed with the court²⁸ with the verified petition containing the information and documents listed above.²⁹

There is always the possibility that the court will refuse to grant a request for Letters. Reasons for denying Letters may include: (1) filing incomplete forms or failing to file all the required forms, and (2) failing to meet the state qualification requirements for personal representatives.³⁰ If the Letters are granted, however, the personal representative is officially the executor or administrator of the estate.³¹

Lastly, unless the will excuses the inventory, the personal representative is required to file an

²⁵ See Rules of the Probate Court of Shelby County, Tennessee, Rule IV, Pleadings, p. 7.

²⁶ Tenn. Code Ann. §30-1-101 (can not administer an estate without Letters Testamentary or of Administration).

²⁷ See Tenn. Code Ann. §§ 16-16-107(2), 18-6-106(b)(3) and 32-2-101.

²⁸ Tenn. Code Ann. §30-1-105.

²⁹ See Tenn. Code Ann. § 30-1-117.

³⁰ Examples of denial under (2) are either the nonresident status of the petitioner or the existence of a felony criminal record. See In re Vaughn's Estate, 59 Tenn.App. 155, 438 S.W.2d 760 (Tenn. App. 1968) (denied mother of decedent letters because she was serving a sentence in state penitentiary for a felony conviction).

³¹ It should also be noted that "any person who claims a right to execute a will, or to administer on the estate of an intestate, and who thinks such person to be injured by an order of the court awarding letters testamentary or of administration, may appeal to the appropriate court in accordance with § 30-2-609, on giving bond as in other cases of appeal." Tenn. Code Ann. § 30-1-107.

inventory within 60 days after appointment.³² If the decedent is intestate or the decedent's will does not excuse the inventory, the residuary beneficiaries may unanimously agree to waive the requirement of an inventory.³³

II. NOTICE TO CREDITORS

Death does not eliminate an individual's debts.³⁴ Instead, the decedent's estate becomes liable for settling remaining debts from assets in which decedent had an ownership interest.³⁵ By the time an estate is opened, nearly all the decedent's property has flowed into what has become the property of the estate³⁶ reachable by decedent's creditors. State nonclaim statutes work to bar creditor's claims unless filed within the statutory time limit.³⁷

Nonclaim statutes are often likened to statutes of limitations but there is a significant difference. The purpose of a "self-executing"³⁸ statute of limitation or nonclaim statute is to afford repose to potential defendants and preclude the assertion of stale claims. The "short term" nonclaim statute, said to involve judicial oversight, usually runs concurrently with the "self-executing" nonclaim statute. The "short-term" nonclaim statute serves to both provide estate creditors notification of their right to

³² Tenn. Code Ann. § 30-2-301(a).

³³ Id. See also Tenn. Code Ann. § 30-2-601(a)(2) ("[a]ll of the distributees of the residue may file with the clerk of the court waivers excusing the personal representative from filing all court accountings).

³⁴ Tenn. Code Ann. § 30-2-305 provides that "every debtor's property, except such as may be specifically exempt by law, is assets for the satisfaction of all the debtor's just debts."

³⁵ Id.

³⁶ See Tenn. Code Ann. §§ 30-2-301(a) (providing that the personal representative, "within sixty (60) days after entering on the administration of a testate or intestate estate, shall make a complete and accurate inventory of the probate estate of the deceased, and return the same to the clerk of the court exercising probate jurisdiction in the county of the estate"); and 1-3-105(23) (defining "property" to include both personal and real property); 1-3-105(24) (defining "Real estate" and "real property" to include "lands, tenements and hereditaments, and all rights thereto and interests therein, equitable as well as legal"); 30-1-103(a)(1) (accounting of goods, chattels, or assets, or any estate, real or personal, at the time of his death, required when applying for Letters); 30-1-117(a)(7) (requiring an "estimate of the fair market value of the estate to be administered, unless bond is waived by the document offered for probate or is waived as authorized by statute").

³⁷ Tenn. Code Ann. § 30-2-307.

³⁸ The United States Supreme Court used the phrase "self-executing" to describe the Indiana Mineral Lapse Act, which was upheld in Texaco, Inc. v. Short, 454 U.S. 516, 535-36, 102 S.Ct. 781, 797 (1982). The point being made by this phrase was that such a statute, where state action was limited to legislative enactment, did not present procedural due process problems because there were no adjudications or proceedings. The Fourteenth Amendment restricts the actions of states, not the actions of private individuals, making it a threshold issue in determining whether a nonclaim statute must meet the demands of due process. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

become part of the estate's administration³⁹ and to expedite an efficient disposal and closing of estates.⁴⁰ Because notice is a procedural due process issue that arises when there is some sort of procedure that could result in a loss of a legally protected interest, the Due Process Clause of the Fourteenth Amendment is implicated, as will be discussed later in this essay.⁴¹

A. What is a Claim?

For purposes of a probate proceeding in Tennessee, a claim is a debt of the decedent that is properly filed by a claimant with the clerk of the court.⁴² Filing a claim against an estate amounts to "demand for payment" and is equivalent to "commencement of an action."⁴³ A copy of any written instrument purporting to evidence the obligation must be attached to the claim with an affidavit of the creditor verifying that it is correct.⁴⁴ A claim against decedent's estate must prima facie appear to be valid or the personal representative is not liable for payment of the claim, even without filing the required claim exception.⁴⁵ Though various types of claimants can seek recovery from the estate, claims based on a written instrument, judgment or decree, or by open account are expressly

³⁹ See also Bowden v. Ward, 1999 WL 144933 (Tenn. Ct. App. 1999), appeal granted, (Oct. 4, 1999) and judgment aff'd 27 S.W.3d 913 (Tenn. 2000); Alamo Development Corp. v. Thomas, 22 Beeler 631, 212 S.W.2d 606 (Tenn. 1948) (statute requiring persons with claims against estate to file them within 12 months after publication of notice is a nonclaim or administrative statute for orderly, expeditious, and exact settlement of estates and is jurisdictional).

⁴⁰ In Tulsa Professional Collection Services, *supra*, at 487 (United States Supreme Court ruled on the constitutionality of nonclaim statutes with only publication or posting notice and held that self-executing nonclaim statutes that began to run at the decedent's death are constitutional without actual notice).

⁴¹ U.S. Const. Amend. XIV, § 1. See Schroeder v. City of New York, 317 U.S. 208, 212-13 (1962) (Mullane notice was construed to apply to "proceedings which may directly and adversely affect [] legally protected interests.")

⁴² The claim must be filed under oath. If the claim is supported by a written instrument, such as a note, either the original or a photocopy of the original instrument must be filed. If the claim is based on a judgment or decree, a certified copy must be filed with the claim. If the claim is based on an open account, an itemized statement of the account must be filed with the claim. In filing the claim, the creditor must set forth any credits against the account. The claimant is also required to pay a four dollar fee, pursuant to Tenn. Code Ann. § 30-2-312 and Tenn. Code Ann. § 8-21-401(c)(9). The statute also requires filing triplicate copies of the claim to the clerk of the court.

⁴³ See Woods v. Palmer, 496 S.W.2d 474, 475-76 (Tenn. 1973) (citing Wilson v. Hafley, 189 Tenn. 598, 608, 226 S.W.2d 308, 312 (Tenn. 1950) (the timely filing of prima facie valid claim against decedent's estate for services rendered to decedent amounted to demand for payment of claim).).

⁴⁴ Tenn. Code Ann. § 30-2-307(b) (when any claim is evidenced by a written instrument, such instrument or a photocopy of such instrument shall be filed; when due by a judgment or decree, a copy thereof certified by the clerk of the court where rendered shall be filed). But see In re Estate of Lucas, 844 S.W.2d 627 (Tenn. 1992) (Chapter 7 bankruptcy trustee's claim against deceased debtor's probate estate, based on bankruptcy court judgment against debtor, was not void merely because certified copy of judgment was not filed in probate court in probate court because personal representative failed to file an exception to the claim).

⁴⁵ Miller v. Morelock, 185 Tenn. 466, 469, 206 S.W.2d 427, 429 (Tenn. 1947) ("any written instrument or copy thereof upon which the claim is based is required to be filed, and if due by open account the statement must be itemized. The effect of this provision is that the claim must prima facie appear to be valid.")

contemplated in Tenn. Code Ann. § 30-2-307(b).⁴⁶ The probate court does, however, have jurisdiction over an action for specific performance.⁴⁷ It does not have jurisdiction to hear an action in tort, which must first be reduced to judgment to be considered as a claim in the estate.⁴⁸ Additionally, the nonclaim statute does not apply to bar recovery of taxes.⁴⁹

Creditors may include an individual or business that the deceased was indebted to, including, but not limited to, credit-card companies, utilities, doctors, hospitals, and car-finance companies.⁵⁰ The personal representative has a duty to collect and preserve estate assets,⁵¹ evaluate and, where necessary, challenge creditor claims against the estate, and pay legitimate and properly filed claims.⁵² The court clerk provides notice to the personal representative and attorney of record of all claims within five days after the claim is filed with the clerk.⁵³ If a creditor who has filed a legitimate claim is not paid, the claimant can sue the estate in an adversary proceeding.⁵⁴

In some cases, the personal representative will have to completely deplete the estate to support the family. The creditor, as an interested party, is entitled to ten days written notice of the application

⁴⁶ Tenn. Code Ann. § 30-2-307(b) (providing that copies of the documents evidencing such indebtedness should be attached to any claim); see also Williams v. Conrad, 30 Tenn. 412, 1850 WL 2135 *4 (Tenn. 1850) (all persons are considered “creditors” under the act of limitations of 1715, who have demands originating from contracts or agreements).

⁴⁷ Wright v. Universal Tire, Inc., 577 S.W.2d 194, 195 (Tenn.App. 1978) (probate court had jurisdiction of the subject matter of the suit for specific performance).

⁴⁸ See Collins v. Ruffner, *supra*, at 297, 301 (Tenn. 1947) (claims sounding in tort were not contemplated by the Tennessee probate act. Accordingly, a party who has a right of action in tort against personal representative of deceased cannot be deemed a “creditor” of an estate until he obtains a judgment). But see, Tenn. Code Ann. § 30-2-302 (allowing pending actions against any person at the time of that person’s death as “demands legally filed” against the estate at the time of the filing. Pending actions must be revived upon obtaining a judgment or decree within the statutory period in § 30-2-307(a) or it abates).

⁴⁹ See Hamilton Nt’l Bank v. Richardson, 42 Tenn.App. 486, 492, 304 S.W.2d 504, 507 (Tenn.App. 1957) (county trustee was not required to file claim for personal property taxes to be entitled to recover from the estate).

⁵⁰ See Cooper’s Estate v. Keathley, 27 Tenn.App. 7, 11, 177 S.W.2d 356, 358 (Tenn. 1943) (where a claim against a decedent’s estate is based on a [promissory] note, the claim is sufficient in form if the original note, verified by affidavit required by statute is filed); Collins v. Ruffner, *supra*, at 301.

⁵¹ Price v. Price, 37 Tenn.App. 690, 694-95, 269 S.W.2d 920, 921 (Tenn.App. 1954) (executrix who was the sole beneficiary under the will still had a duty to collect and preserve assets of estate and pay debts and to offer will for probate or else had to resign trust.)

⁵² See Tenn. Code Ann. § 30-2-319 (payment of all uncontested claims and claims adjudged as allowable against the estate shall be paid by the personal representative as soon as practicable “not in any event to exceed ninety (90) days after the expiration of five (5) months after the date of the notice to creditors,” subject to § 30-2-317 priority claims).

⁵³ Tenn. Code Ann. § 30-2-313(a).

⁵⁴ See Tenn. Code Ann. § 30-2-314(b)(1), in relevant part, providing that “[i]f the claim or the exception filed contains a demand for a trial by jury, or there is a demand as provided in § 30-2-313, the probate court clerk shall certify the claim and the exception to the circuit court for trial by jury upon the issues made thereby.” Additionally, if there isn’t enough to pay everyone in a class, a pro rata distribution is paid against the claims in such class.

and hearing on petitions for spousal elective share,⁵⁵ exempt property laws⁵⁶ or Year's Support allowance,⁵⁷ if the estate is or could reasonably be expected to be insolvent.⁵⁸ Absent family preference statutes, any property in the estate will be distributed according to the Tennessee's preference laws⁵⁹ A discussion of Tennessee's state preference laws in probate estates is beyond the scope of this essay, but it should be noted that the classification of claims with priority in Tennessee are (1) administrative costs, (2) funeral expenses, (3) federal, state, or subdivision taxes and assessments, (4) all other debts filed within four (4) months after the date of notice to creditors.⁶⁰ Additionally, the unpaid security lien on a home should be noted if the property is in the estate.

If the personal property assets are insufficient to satisfy the estate's debts, real property, which vests immediately upon the death of an intestate decedent in his heirs⁶¹ or immediately in the devisees named in the will unless the will specifically directs that the property be part of the estate under the control of the personal representative,⁶² is subject to pay debt. If the collateral is not worth enough to pay off the secured creditor, the creditor may file a claim against the estate to recover the difference.

B. Constructive Notice

Though publishing or posting notice of the opening of a probate estate is not a condition precedent to a self-executing statute of limitations,⁶³ nonclaim provisions that involve judicial oversight may entitle creditors to different types of notice depending on whether they are known to the personal representative or are reasonably ascertainable. Tennessee's constructive notice statute to creditors

⁵⁵ Tenn. Code Ann. § 31-4-102(a)(1).

⁵⁶ Tenn. Code Ann. § 30-2-101 (exempt tangible personal property); 31-1-104 (homestead exemption).

⁵⁷ Tenn. Code Ann. § 30-2-102 (support allowance).

⁵⁸ Tenn. Code Ann. § 30-2-101.

⁵⁹ See Tenn. Code Ann. § 30-2-317(a) (setting for priority classifications of claims against the estate of the deceased).

⁶⁰ See Tenn. Code Ann. § 30-2-317(a)(1)-(4).

⁶¹ In Bilbrey v. Smithers, a child born out of wedlock, whose paternity was not adjudicated prior to father's death, established a right to inherit by intestate succession by asserting that right against the estate within the time allowed for creditors to file claims against estate and by establishing paternity by clear and convincing proof.

⁶² See Tenn. Code Ann. § 31-2-103. Notably, unless otherwise provided for by the testator, the devisee of real property in Tennessee is entitled to exoneration of a mortgage lien under case law. See O'Connor v. O'Connor, 88 Tenn. 76, 12 S.W. 447 (Tenn. 1889), which requires that the personal representative satisfy the lien creditor out of estate proceeds.

⁶³ See Johnson v. Risk, 137 U.S. 300, 11 S.Ct. 111 (1890); Todd v. Wright, 59 Tenn. 442, 1873 WL 3808 (Tenn. 1873).

provides:

Except as provided in subsection (f), it is the duty of the clerk of the court in which an estate is being administered, within thirty (30) days after the issuance of letters testamentary or of administration, to give in the name of the personal representative of such estate public notice of such personal representative's qualification as such by two (2) consecutive weekly notices published in some newspaper of the county in which letters testamentary or of administration are granted, or, if no newspaper is published in such county, by written notices posted in three (3) public places in the county, one (1) of which shall be posted at the usual place for posting notices at the courthouse.

Tenn. Code Ann. § 30-2-306(a). Subsection (f) exempts application of subsection (a) if the letters testamentary or of administration are issued more than one (1) year from the decedent's date of death.⁶⁴ Generally, claimants must file a claim within four months from the date of the first publication or posting of the notice to creditors or they will be barred.⁶⁵ The personal representative, or any interested party in the estate, can file a written exception to any claim no later than 30 days after the expiration of four months from the date of the notice to creditors as provided in Tenn. Code Ann. § 30-2-306(c).⁶⁶

In Holland v. King,⁶⁷ the Robertson County, Tennessee clerk caused notice of probate proceedings in the matter of the estate of Redell Holland to be published in the *Springfield Herald*, a newspaper of general circulation in Robertson County.⁶⁸ The notice appeared in the newspaper on May 28, 1954 and June 4, 1954.⁶⁹ Subsequently, the clerk caused a second notice to be published in the *Robertson County Times* which ran on June 10 and June 17, 1954.⁷⁰ At the time of the publication of the notice to creditors, Tennessee's applicable statute allowed claimants to file up to nine-months from the date of the first published notice.⁷¹ Additionally, the statute allowed a personal representative to file

⁶⁴ Tenn. Code Ann. § 30-2-306(f) (“[t]he requirement of subsection (a) shall not apply if the letters of testamentary or of administration are issued more than one (1) year from the decedent's date of death.”). See also In re Estate of Luck v. FDS/Goldsmith, No. W2004-01554-COA-R3-CV, 2005 WL 1356448 (Tenn. Ct.App. 2005).

⁶⁵ Tenn. Code. Ann. § 30-2-306(c).

⁶⁶ See Tenn. Code Ann. § 30-2-314(a).

⁶⁷ Holland v. King, 199 Tenn. 588, 288 S.W.2d 447 (Tenn. 1956).

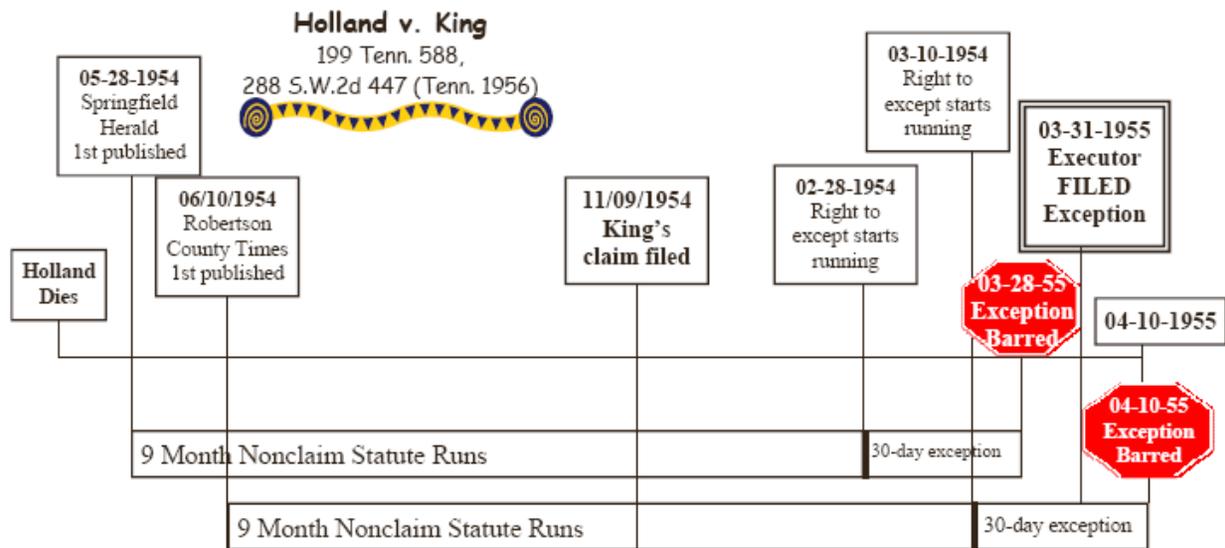
⁶⁸ Id. at 589.

⁶⁹ Id.

⁷⁰ Id. at 590.

⁷¹ Id.

an exception to a claim up to 30 days after the expiration of the nine-months.⁷² Claimant Redell King filed a timely claim with the clerk on November 9, 1954.⁷³ The executors filed an exception on March 13, 1955.⁷⁴ King answered, contending that the executors were time-barred from filing an exception to the claim.⁷⁵ The executor argued that their exception was timely because the first publication date in the *Robertson County Times* started the statutory run, not the publication date in the *Springfield Herald*.⁷⁶



The trial judge held that the *Springfield Herald's* first publication date, May 28, 1954, was determinative and, as a result, the executor's exception was deemed filed too late.⁷⁷ The issue before the Supreme Court of Tennessee was which date fixed the time for running the statute when the notice to creditors is published in two newspapers at different times. The Supreme Court of Tennessee found that the parties had stipulated in the record that the executor had relied on the *Robertson County Times* publication date in fixing the time for filing its exception.⁷⁸ In recognizing this stipulation, the Court

⁷² Id. at 590.
⁷³ Id. at 589.
⁷⁴ Id. at 589.
⁷⁵ Id. at 590.
⁷⁶ Id.
⁷⁷ Id.
⁷⁸ Id. at 448, 590.

did not rule squarely on the issue. In deciding not to depart from the parties' stipulation, the Court held in favor of the executor.⁷⁹ By fixing the date that started the statutory run at June 10, 1954, the first publication date in the *Robertson County Times*, the executor would have until April 10, 1955 to file an exception (nine-months plus 30-days), making its March 31, 1955 filing date timely.

As a matter of practice, the personal representative should exercise diligence in overseeing the publication process, though the clerk's office causes the notice to be published. This may include checking periodically with the clerk's office to make sure that the clerk has timely published the notice. Additionally, the personal representative may seek to limit publication to one newspaper, of general circulation. Alternatively, she can suggest to the clerk that when the clerk causes publication in more than one newspaper to try to assure simultaneous publication to by-pass the potential for conflicting interpretations of which publication date starts the statutory run. Though the *Holland* Court didn't directly address this issue, a plain reading of the statute strongly suggests that the statutory run begins at the "first" publication date, regardless of whether published in more than one newspaper. Whether parties should be allowed to stipulate around a clear reading of the statute is questionable.

Before departing notice by publication, there are additional considerations to note. The statute requires that the newspaper publisher submit an affidavit that includes the date on which notice to creditors was first published.⁸⁰ It is also notable that the language in the Tennessee statute only requires publication in two consecutive editions in "some newspaper in the county."⁸¹ The Uniform Probate Code would require three consecutive weeks of publication and expressly provides that it be a newspaper "of general circulation in the [county]."⁸² Because publication is effected by probate court

⁷⁹ Id.

⁸⁰ See Tenn. Code Ann. § 30-2-306(d).

⁸¹ Tenn. Code Ann. § 30-2-306(a).

⁸² Uniform Probate Code § 3-801(a) (1993). The UPC gives the personal representative the option of giving notice by publication, personal notice by mail, or no notice at all. U.P.C. § 3-801. There is a four-month nonclaim bar if notice by publication is given. U.P.C. §§ 3-801(a), 3-803(a)(2) (1993). If the personal representative chooses notice by mail, the creditor has at least sixty days after the mailing or other form of delivery of the notice to file a claim before being barred. U.P.C. §§ 3-801(b), 3-803(a)(2) (1993). The "self-executing" limitation is one year. U.P.C. § 3-803(a)(1) (1993).

personnel, publication in newspapers of small or novel circulations should not be an issue. If notice by posting is provided, however, the personal representative coordinates posting, and must file an affidavit to the clerk with the dates of posting.⁸³ In estates with a gross value of \$1,000 or less, newspaper publishing may be omitted; however, the notice by posting is mandatory.⁸⁴

C. Actual Notice: What Must it Contain?

Known or reasonably ascertainable creditors are entitled to a higher level of notice than publication or notice by posting. The personal representative must at the minimum send or deliver⁸⁵ to creditors, actually known or “reasonably ascertainable,”⁸⁶ notice that includes a copy of the first published notice to creditors of the commencement of probate proceedings. The Tennessee statute⁸⁷ provides, in relevant part:

[I]t shall be the duty of the personal representative to mail or deliver by other means a copy of the published or posted notice as described in subsection (c) to all creditors of the decedent of whom the personal representative has actual knowledge or who are reasonably ascertainable by the personal representative, at such creditors’ last known addresses. Such notice shall not be required where a creditor has already filed a claim against the estate, has been paid, or has issued a release of all claims against the estate.

Tenn. Code Ann. §30-2-306(e). Additionally, the general rule in Tenn. Code Ann. § 30-2-307(a) (1) provides that all claims are barred unless filed within the four months of the notice to creditors,⁸⁸ with exceptions provided in §§ 30-2-307(a)(1)(A),(B), to be discussed in more depth later.

In Tennessee, actual notice may be something other than an exact copy of the published notice to creditors outlined in Tenn. Code Ann. § 30-2-306(c), but must at minimum include 1) information of

⁸³ Id.

⁸⁴ Id.

⁸⁵ Although the statute only requires the personal representative to send the notice by mail, the prudent personal representative should send the notice by certified mail, return receipt requested, to prove the creditor was notified. If the notice is personally delivered, a receipt should be obtained to prove delivery.

⁸⁶ The Tennessee statute makes no attempt to define the actions that are deemed sufficient for the personal representative to establish that she has done everything to reasonably ascertain the identity of the decedent’s creditors.

⁸⁷ Tenn. Code Ann. §30-2-306(e).

⁸⁸ Tenn. Code Ann. § 30-2-307(a) (“all claims against the estate arising from a debt of the decedent shall be barred unless filed within the period prescribed in the notice published or posted in accordance with § 30-2-306(c)).

commencement of probate proceedings, and 2) the time period for the particular creditor in which to file.⁸⁹ Additionally, though literally in compliance with the statute, notice that gives erroneous information of the time period to file a claim is no more acceptable than a “notice” with no information of the time period.⁹⁰

1. *Estate of Jenkins v. Guyton: The Minimal Contents to Effect Actual Notice*

In *Estate of Jenkins v. Guyton*⁹¹ the Supreme Court of Tennessee articulated what is minimally required communicated content to creditors to satisfy the actual notice standard. The claimant, Thomas L. Guyton, domesticated a foreign judgment⁹² in Davidson County, Tennessee against Richard H. Jenkins.⁹³ On September 15, 1992, an agreed order was entered in the court awarding Guyton a collectible judgment of \$141,781 against Jenkins.⁹⁴ Installment payments were negotiated between the parties and an order was effectuated on the judgment in accordance with the parties’ agreement to stay execution.⁹⁵ Jenkins died testate on September 25, 1992.⁹⁶ On October 1, 1992, Jenkins’ will was offered for probate in Davidson County Probate Court.⁹⁷ The probate clerk caused a notice to creditors to be published in the *Nashville Business Journal* on October 12 and October 19, 1992.⁹⁸ A co-executor of the estate sent out an installment payment on the judgment to Guyton’s attorney from the prior proceeding that stated that Guyton had died and his will was being probated in Davidson County.⁹⁹ Subsequently, installment payments on the judgment were timely sent for four months from the October 21 date, but no further action to “notify” Guyton as a known creditor was provided.¹⁰⁰ On

⁸⁹ See, generally, *In re Estate of Jenkins v. Guyton*, 912 S.W.2d 134 (Tenn. 1995)

⁹⁰ See, generally, *Bowden v. Ward*, *supra*, at 916.

⁹¹ *Guyton*, *supra*, 912 S.W.2d, at 134.

⁹² *Id.* at 135 (judgment was obtained in an Alabama federal court in 1992).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

April 26, 1993, Guyton called the co-executor when he did not receive the fifth installment payment.¹⁰¹ Guyton was informed that no further payments would be sent because he had not filed a claim within the then six-month period provided in Tenn. Code Ann. §§ 30-2-306(c) and 30-2-307(a)(1).¹⁰²

Guyton filed a claim on May 3, 1993 in the Davidson County Probate Court.¹⁰³ On May 25, 1993, the co-executors filed an exception to the claim alleging that the six months from the publication of notice to creditors in the *Nashville Business Journal* barred the claim.¹⁰⁴ The probate court allowed the claim and the intermediate appellate court affirmed.

The issue before the Supreme Court of Tennessee was whether the communication within the letter sent by the co-executor to Guyton that 1) Jenkins had died and 2) that his will was being probated, constituted the requisite “actual notice” under Tenn. Code Ann. § 30-2-306(c)¹⁰⁵ to limit the period for filing claims to the then six-months¹⁰⁶ from the date of publication of the notice to creditors.¹⁰⁷ Guyton was indisputably a known creditor of the estate. The Court noted that the letter sent to Guyton’s attorney did not include a copy of the notice to creditors published in the *Nashville Business Journal*, pursuant to Tenn. Code Ann. § 30-2-306(e) requirement.¹⁰⁸ The executor argued that Guyton’s attorney should be presumed to know the law and should have been put on inquiry per the October 21, 1992 letter to satisfy the “actual notice” standard.¹⁰⁹ The Court rejected the executor’s attempt to establish a “different standard of ‘actual notice’ for those well-versed in probate law, such as attorneys, and those not so well informed.”¹¹⁰ The Court reasoned, *inter alia*, that such analysis would

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ See Appendix A, with the Notice to Creditors form letter provided by Tenn. Code Ann. § 30-2-306(c).

¹⁰⁶ Tenn. Code Ann. § 30-2-307(a)(1) (limited the filing of claims against the estate to six months). See 1997 Tenn. Pub. Acts ch. 426, §5 (legislature amended § 30-2-306(c) in 1997 and changed the period for filing a claim from six months to four months at the first date of publishing the notice to creditors).

¹⁰⁷ Id.

¹⁰⁸ Id.

¹⁰⁹ Id.

¹¹⁰ Id.

“run afoul of the *Mennonite* Court’s injunction that ‘actual notice’ shall be made available to ‘any party, whether unlettered or well-versed in commercial practice, if its name and address are reasonably ascertainable.’”¹¹¹ In holding that Guyton had not received “actual notice” because of the deficiency of the content, the Court looked to Tenn. Code Ann. § 30-2-307(a)(1)(B), which effectively provides a one year limitation where a known or reasonably ascertainable creditor receives no notice at all.¹¹² The Court noted that though an exact copy of the publication may not be required, at minimum, information of the probate proceeding’s commencement and the time period requirements for filing a claim were required.¹¹³

2. *Bowden v. Ward: Communicating an Accurate Time-Period to Creditors*

Accurate information about the time-period for filing claims must also be conveyed to creditors receiving actual notice or the notice will be deemed defective and equivalent to no notice. In an opinion delivered by Justice Birch, in *Bowden v. Ward*¹¹⁴ the Tennessee Supreme Court addressed the issue of the duty of the personal representative to convey an accurate time-period for filing a claim to a creditor.

Jones Elmer Bowden died on March 27, 1996.¹¹⁵ On April 9, 1996 his daughter qualified as executrix.¹¹⁶ On April 12, 1996, the clerk caused the notice to creditors to be published.¹¹⁷ The executrix delivered notice of the probate proceedings to creditors ascertained from the decedent’s records.¹¹⁸ This did not include Larry E. Ward because the executrix found no record of decedent’s debt to Ward.¹¹⁹ On October 28, 1996, the executrix recognized Ward’s name in an address file and

¹¹¹ *Id.* at 137 (citing *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800, 103 S.Ct. 2706, 2712 (1993)) (emphasis in original).

¹¹² *Id.* at 138.

¹¹³ *Id.*

¹¹⁴ *Bowden v. Ward*, *supra*, 1999 WL 144933 * 2.

¹¹⁵ *Id.* * 1

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

attempted to call him on an unrelated matter, but Ward was out of the country.¹²⁰ In a conversation with Ward's daughter, the executrix was advised of a debt owed by the decedent to Ward from an installment note from the sale of a business and airplane in January 20, 1989.¹²¹

Upon returning to the United States and learning of Bowden's death, Ward forwarded a letter identifying himself as a creditor and explaining the status of the installment loan.¹²² On December 2, 1996, the estate's attorney sent a letter to Ward rejecting Ward's status as a creditor.¹²³ Additionally, the estate attorney expressly asserted that even if Ward were a creditor a claim would be barred "because [he] did not file such claim with the Probate Court as required by law within six (6) months after the first publication of the notice to creditors."¹²⁴ The estate attorney included a copy of the published notice to creditors that set forth the initial six-month limitation notice.¹²⁵

Ward contacted a different attorney who advised him that he had twelve months from decedent's death to file a claim, but should file immediately.¹²⁶ In a letter to the estate attorney dated December 30, 1996, Ward forwarded documents pertaining to the sale of the airplane and advised the estate attorney that his counsel advised him that he had 12 months from the date of the Jenkins' death to file a claim because he had not been notified of the decedent's death and was a known creditor.¹²⁷ Ward filed a claim in the estate with the clerk in the amount of \$64,668.55 on February 11, 1997.¹²⁸

The trial court found that Ward had become a known creditor on November 20, 1996, and was entitled to actual notice.¹²⁹ Furthermore, the court found that actual notice to Ward was effectuated when Ward received the letter and copy of the published notice to creditors from the estate attorney on

¹²⁰ Id.

¹²¹ Id.

¹²² Id.

¹²³ Id.

¹²⁴ Id.

¹²⁵ Id.

¹²⁶ Id.

¹²⁷ Id.

¹²⁸ Id.

¹²⁹ Id. * 2

December 6, 1996.¹³⁰ Accordingly, the trial court held that this letter started the 60 days from receipt of actual notice statutory period for filing a claim, pursuant to Tenn. Code Ann. § 30-2-307(a)(1)(A).¹³¹

This section provides, in relevant part:

[i]f a creditor receives actual notice less than sixty (60) days before the expiration of the period prescribed in § 30-2-306(c) or after the expiration of the period prescribed in § 30-2-306(c) and more than sixty (60) days before the date which is twelve (2) months from the decedent's date of death, such creditor's claim shall be barred unless filed within sixty (60) days from the date of receipt of actual notice.

The trial court held that to come within this section, Ward would have needed to file a claim by February 6, 1997. Because his claim was not filed until February 11, 1997, the trial court held the claim had not been timely filed and was barred.¹³²

The appellate court reversed the trial court and concluded that the notice to creditors Ward received did not constitute actual notice under the statute because it “contained a time period that had since expired and failed to contain, at a minimum, the applicable time period in which he had to file his claim.”¹³³ Accordingly, the appeals court held the twelve-month self-executing statute of limitations applied per Tenn. Code Ann. § 30-2-307(a)(1)(B), making the filed claim timely.¹³⁴ Section (B) provides, in relevant part:

If a creditor receives actual notice less than sixty (60) days before the day which is twelve months from the decedent's date of death or receives no notice, such creditor's claim shall be barred unless filed within twelve (12) months from the decedent's date of death.

Tenn. Code Ann. § 30-2-307(a)(1)(B). The Supreme Court of Tennessee agreed with the appellate court. Instructively, the Court intimated that communication to this creditor should have included not only a copy of the published or posted notice to creditors but a copy of the statute which sets out the various time limits and a statement of the date of the decedent's death.¹³⁵

¹³⁰ Id.

¹³¹ Id.

¹³² Id.

¹³³ Id. * 5

¹³⁴ Id.

¹³⁵ Id. at 917 (citing Tenn. Code Ann. §§30-2-307).

3. Estate of Luck v. FDS/Goldsmith:¹³⁶ *The Twelve-Month Absolute Bar on Claims*

As seen in Bowden v. Ward, if the creditor never receives notice or gets actual notice less than 60 days before the date which is 12 months from the date of the debtor's death, the creditor has the full 12 months from date of death to file a claim.¹³⁷ The question becomes, does the 12-month bar really mean 12 months in all situations. By way of illustration, if D's probate proceeding is instituted, say, 24 months after decedent's death, are all claims forever barred? In Estate of Luck v. FDS/Goldsmith, the Tennessee court made clear that 12 months from the date of death is in fact the absolute last date a creditor of a decedent may file a claim in all circumstances.¹³⁸ The 12-month statute of limitations applies regardless of whether the creditor knew the debtor was dead, received any type of notice of the debtor's death, or received notice to file a claim.

In Luck, the decedent's estate was not probated until more than 19-months after decedent died.¹³⁹ William H. Luck, a Memphis attorney, died on January 1, 2002.¹⁴⁰ On August 14, 2003, decedent's sons, the executors, admitted three documents into probate as decedent's holographic will and codicils.¹⁴¹ On October 17, 2003, FDS/Goldsmith ("Goldsmith"), filed a claim against the estate in the amount of \$751.32 representing an outstanding credit card balance owed by the decedent.¹⁴² Executors filed an exception to Goldsmith's claim alleging that because it was filed over twenty-one months after the date of death it was barred by Tenn. Code Ann. § 30-2-307(a)(1)(B).¹⁴³ The issue before the Shelby County probate court was whether Tenn. Code Ann. §§ 30-2-307(a)(1)(B) should be interpreted to bar a claim not filed within twelve months from the decedent's death even if the creditor received no notice of the death nor that a probate estate had been opened during this time.¹⁴⁴ Looking

¹³⁶ Estate of Luck v. FDS/Goldsmith, No. W2004-01554-COA-R3-CV, 2005 WL 1356448 (Tenn. Ct.App. 2005).

¹³⁷ Tenn. Code Ann. § 30-2-307(a)(1)(B).

¹³⁸ Tenn. Code Ann. § 30-3-306(f).

¹³⁹ In re Estate of Luck v. FDS/Goldsmith, No., 2005 WL 1356448 (Tenn. Ct.App. 2005).

¹⁴⁰ Id.

¹⁴¹ Id.

¹⁴² Id.

¹⁴³ Id.

¹⁴⁴ Id.

to Estate of Divinny v. Wheeler Bonding Co.,¹⁴⁵ the trial court held that Goldsmith's complied with the statutory requirements for filing a claim against the estate and denied the executor's exception.¹⁴⁶ In Divinny the decedent had contracted with the creditor on an appearance bond for a third party, who subsequently failed to appear in court.¹⁴⁷ The failure to appear in court required the creditor to pay a forfeiture judgment, which it sought to recoup from the decedent.¹⁴⁸ The probate proceeding in the Divinny was not opened until after 12 months of decedent's death.¹⁴⁹ The Tennessee court of appeals in Divinny allowed the creditor to file a claim by holding that the legislature could not have intended that a claim be barred without notice to creditors.¹⁵⁰

The *Luck* Court stated that in light of subsequent legislative amendments¹⁵¹ to the probate act since Divinny, it was clear that the Tennessee legislature did in fact intend the 12 months from the date of the person's death statute of limitations to be absolute.¹⁵² The Court, looking to *Pope*,¹⁵³ where the United States Supreme Court indicated that a self-executing statute of limitation that ran from the date of the person's death would not violate due process if no notice were given because the state has no role beside the enactment of the limitations period.¹⁵⁴ This so-called self-executing statutory provision simply "act[s] to cut off potential claims against the decedent's estate by the passage of time," and accordingly does not require actual notice.¹⁵⁵ In enacting Tenn. Code Ann. § 30-2-306 and Tenn. Code Ann. § 30-2-310, the Tennessee legislature thought 12 months should be enough time for a creditor to

¹⁴⁵ In Estate of Divinny v. Wheeler Bonding Co., Inc., 2000 WL 337584 (Tenn. Ct. App. 2000), appeal denied, (Dec. 4, 2000).

¹⁴⁶ Luck, *supra*, at * 4.

¹⁴⁷ Divinny, *supra*, at * 1

¹⁴⁸ Luck, *supra*, at * 4.

¹⁴⁹ Id.

¹⁵⁰ Id. at * 5.

¹⁵¹ See 1999 Tenn. Pub. Acts ch. 491, § 5 (enacting subsection § 30-2-306(f) ("[t]he requirement of subsection (a) shall not apply if the letters testamentary or of administration are issued more than one (1) year from the decedent's date of death"); Luck at * 111 (citing Divinny, *supra*, at * 3, noting that section (f) did not control the trial court because the hearing was on May 12, 1999).

¹⁵² Luck, *supra*, at * 7.

¹⁵³ Pope, *supra*, 485 U.S., at 485, 108 S.Ct., at 1344.

¹⁵⁴ Id.

¹⁵⁵ Pope, *supra*, at 483, 1344.

discover¹⁵⁶ the death of the debtor. Even if there were no administration opened, 12 months was sufficient time for the creditor to begin the administration to protect its right to be paid.¹⁵⁷

The *Luck* Court additionally noted that pursuant to Tenn. Code Ann. § 30-2-306(f), if the letters testamentary were issued more than one (1) year from decedent's date of death, neither the clerk nor the personal representative need publish, post, or send a notice to creditors.¹⁵⁸ Additionally, the appeals court noted that Tenn. Code Ann. § 30-2-310 expressly iterated that all claims or demands not filed with the court if not brought or revived¹⁵⁹ before the end of "twelve (12) months from the date of death of the decedent are "forever" barred."¹⁶⁰

Based on the constitutionality of the 12-month bar, even without notice, relatives of a decedent could effectively seek out this loop-hole and avoid payment to a decedent's creditors by not opening the probate estate until after a year from the decedent's death.¹⁶¹ Only when a creditor follows through in an adverse proceeding will there be evidence of a practice of delaying starting probate proceedings to avoid creditor claims. Notably, in *Luck*, Goldsmith didn't file a brief or otherwise respond to the appeal filed by executors.¹⁶² The fact that the amount of Goldsmith's claim was \$751.32 likely was a significant consideration in deciding whether an appeal was cost effective.

In light of the possibility of abuse of the statutory scheme, the legislature should amend the statute to provide an exception to the 12-month statutory bar if by clear and convincing evidence it can

¹⁵⁶ See also *Nix v. French*, 57 Tenn. 377, 1873 WL 3658 *1 (Tenn. 1873) (fact that the death of the debtor was unknown to the creditor was immaterial in law). In 1999, in *Estate of Key; Roddy v. Hamilton County Nursing Home*, 1999 WL 172675 (Tenn. Ct. App. 1999) the Tennessee court of appeals upheld the effectiveness of Tennessee's "12 months from date of death" self-executing statute of limitations on claims against an estate.

¹⁵⁷ Tenn. Code Ann. § 30-2-406(a) (creditor serving as administrator).

¹⁵⁸ *Luck, supra*, at *8. The running of the 12-month period was not from the date of the issuance of the letters of testamentary or of administration, but from the date of death of the decedent.

¹⁵⁹ See Pritchard on Wills and Estates § 733 (an unsatisfied judgment isn't extinguished with the death of the debtor, but becomes temporary dormant); See *Windsor Hosiery Mills, Inc. v. Haren*, 222 Tenn. 479, 437 S.W.2d 248 (Tenn. 1969) (providing that procedure for revival of action in probate proceeding governed by Tenn. Code Ann. § 30-2-320).

¹⁶⁰ Tenn. Code Ann. § 30-2-310(a). See also *Prewett v. Goddlett*, 98 Tenn. 82, 38 S.W. 434 (Tenn. 1897) (even in decedent's estate subject to insolvency proceeding, creditors were still required to file claims within the period of limitations even though they were statutorily enjoined from bringing suit).

¹⁶¹ *Luck, supra*, at * 7 (noting that the court's decisions in *Divinny* and its progeny have "misconstrued the statute of limitations applicable to a creditor's claim against an estate").

¹⁶² *Id.*

be shown that the delay in opening the estate was done to avoid creditor claims. To put teeth to such a provision, all costs associated with appealing a personal representative's challenge to the claim should be taxed to the estate where the creditor carries this burden of proof.

Notably, the duty of the personal representative to send notice to an ascertained creditor continues until the date that is 12 months from the person's date of death. If, however, an estate is closed before 12 months from the decedent's date of death and a creditor discovers the debtor's death after the estate is closed, the creditor is required to seek recovery from the distributees, who will share liability to the creditor in proportion to their share of the residue.¹⁶³ Additionally, Tenn. Code Ann. § 30-1-301 does provide a creditor, faced with an estate that hasn't been administered, the right to petition the court six-months after decedent's death to request the appointment of an administration.¹⁶⁴

III. DUE PROCESS: REASONABLY DILIGENT EFFORTS TO FIND ASCERTAINABLE CREDITORS

The Due Process Clause of the Fourteenth Amendment at a minimum requires that deprivation of life, liberty or property by adjudication be preceded by notice and allowance for participation in a hearing on the nature of the case with an opportunity to object.¹⁶⁵ Notice sufficient to comport with due process must rise to a quality that would reasonably convey the required information.¹⁶⁶ Those bound to effect due process notice do not have to alert notice beneficiaries of all conceivable injuries that may be possible, just the reasonable character of the statutory requirements at issue.¹⁶⁷ However, the

¹⁶³ The intent of the provision directing the creditor to look to the distributees is to avoid the situation where the estate is reopened for the personal representative to deal with the creditor even though there are no assets in the estate with which to pay the creditor or the personal representative's additional fees for the additional services. The late claiming creditor has the burden of proving its identity was reasonably ascertainable and that it therefore should have received actual notice.

¹⁶⁴ Tenn. Code Ann. § 30-1-301 (requesting appointment is available where "no person will apply or can be procured to administer on the decedent's estate"); see also Tenn. Code Ann. § 30-1-106 (appointment shall be granted "to a creditor providing the decedent's debt on oath before the probate court").

¹⁶⁵ U.S. Const. Amend. XIV, § 1. See also Mullane v. Central Hanover Bank & Trust Co., *supra*, 339 U.S., at 313, 70 S.Ct., at 656-57 (holding that published notice of an action to settle common trust fund was not sufficient to inform beneficiaries of the trust whose names and addresses were known, but that a more effective means such as personal service or mailed notice would comport with due process).

¹⁶⁶ Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779 (1914).

¹⁶⁷ American Land Co. v. Zeiss, 219 U.S. 47, 67, 31 S.Ct. 200, 207 (1911).

Supreme Court has said that process that is “a mere gesture is not due process.”¹⁶⁸

In Tulsa Professional Collection Services, Inc. v. Pope,¹⁶⁹ the Supreme Court was faced with the question of whether Oklahoma’s probate nonclaim statute comported with due process.¹⁷⁰ H. Everett Pope, Jr. was admitted to St. John Medical Center in November 1978 and died in that hospital in April 1979.¹⁷¹ Oklahoma Probate Code required creditors to file claims against an estate within two months of the date of the first publication to creditors or be forever barred.¹⁷² The Oklahoma Probate Code required only notice by publication and did not require that known or reasonably ascertainable creditors be extended actual notice.¹⁷³ The hospital’s assignee, Tulsa Professional Collection Services, Inc., did not file its claim in the estate within the applicable two month statutory provision following publication by notice.¹⁷⁴ The Supreme Court, looking to its decision in *Mullane*, held that because the statute was not self-executing, but required significant state action, due process required actual notice to reasonably ascertainable estate creditors that the nonclaim statute had started running.¹⁷⁵

In Mullane v. Central Hanover Bank and Trust Co.,¹⁷⁶ the progenitor of the notice requirement, a bank published notice of an accounting action to settle common trusts by petition to a state decree.¹⁷⁷ Under New York state law, the action was binding and final on everyone having an interest in the common fund.¹⁷⁸ The effect of not raising an objection within the period provided by the publication notice was a loss of right to sue the trustee for improper management of the common trust during the period covered by the accounting, or to otherwise diminish their interest by allowance of fees and

¹⁶⁸ Mullane, *supra*, 339 U.S. at 314, 70 S.Ct. at 657.

¹⁶⁹ Pope, *supra*, 485 U.S. at 478, 108 S.Ct. at 1340.

¹⁷⁰ Id.

¹⁷¹ Id.

¹⁷² Id.

¹⁷³ Id.

¹⁷⁴ Id.

¹⁷⁵ Id. at 487. The Court also relied heavily on the “self-executing” statute analysis in Texaco, Inc. v. Short.

¹⁷⁶ Mullane, *supra*, at 339 U.S. at 313 (at a minimum due process requires notice and opportunity for a hearing before deprivation of life, liberty, or property).

¹⁷⁷ Id. at 309.

¹⁷⁸ Id. at 313

expenses.¹⁷⁹ The names and addresses of those parties who had interest in the common trust were available to the bank.¹⁸⁰ The issue before the Court was whether the notice by publication to these reasonably ascertainable parties comported with the Due Process Clause.¹⁸¹ The Court held that prior to an action that would affect an interest in life, liberty, or property protected by the Due Process Clause, the notice required is that which could “reasonably [be] calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection.”¹⁸² The *Mullane* Court did not articulate a mechanical divide of when notification by publication or actual notice should be given; rather, the Court states that in all respects 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.”¹⁸³ Significantly, the *Mullane* Court did find that publication notice met constitutional muster for those beneficiaries “whose interests or whereabouts could not with due diligence be ascertained,” and “beneficiaries whose interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the common trustee.”¹⁸⁴ The Court required personal notice to known beneficiaries of common trust funds whose names and post office addresses were “at hand.”¹⁸⁵

The *Pope* Court’s extension of *Mullane* notice to probate proceedings was a victory for estate creditors, but added responsibilities to the executor of an estate. Before *Pope*, the personal representative of an estate was charged with assuring notice to estate creditors by publication only. The *Pope* Court held that a creditor is considered a known or reasonably ascertainable creditor if the creditor can be uncovered with “reasonably diligent efforts.”¹⁸⁶

¹⁷⁹ *Id.* at 311.

¹⁸⁰ *Id.* at

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 314-15.

¹⁸⁴ *Id.* at 317.

¹⁸⁵ *Id.* at 318.

¹⁸⁶ *Id.*

The question arises, how far must a personal representative go to locate possible estate creditors under the “reasonably diligent efforts”¹⁸⁷ standard? Additionally, what constitutes “reasonably ascertainable creditors” that give rise to an actual notice right? The Tennessee statute does not define the actions that are deemed diligent for the personal representative to establish that she has done everything to reasonably ascertain the identity of the decedent’s creditors. Additionally, in Tennessee, the estate creditor bears the burden of proof where there is a question of whether it was known to or reasonably ascertainable by the personal representative and should have been accorded actual notice in accordance with Tenn. Code Ann. § 30-2-306.¹⁸⁸ The *Pope* Court looked to Mennonite Bd. of Missions v. Adams¹⁸⁹ for suggestions of what would be reasonable steps for a personal representative in ascertaining creditors. This included searching decedent’s personal records and mail, searching the public records, and inquiring into the knowledge of family and business associates.¹⁹⁰

In Mennonite, Indiana law allowed the state to force a sale of real property when property tax payments were delinquent for fifteen months or longer.¹⁹¹ Prior to sale, the county auditor was required to post notice in the county courthouse and publish notice once each week for three consecutive weeks.¹⁹² The owner of the property, Alfred Jean Moore, was entitled to notice by certified mail to his last known address, but at the time a mortgagee of property was not entitled to notice by mail, under Indiana law, that the property was to be sold for nonpayment of taxes.¹⁹³ Subsequently, Moore’s lien encumbered property was sold for \$1,167.75, the amount of delinquent taxes, to Richard Adams.¹⁹⁴ In opposition to Adams’ motion for summary judgment to quiet title to the property, the

¹⁸⁷ Professor Mark Reutlinger clever inquiry on this issue was “Can no notice be good notice if some notice is not?” Mark Reutlinger, “State Action, Due Process, and the New Nonclaim Statutes: Can No Notice Be Good Notice If Some Notice Is Not?” 24 Real Prop. Prob. Tr. J. 433 (1990).

¹⁸⁸ Tenn. Code Ann. § 30-2-307(a)(2).

¹⁸⁹ Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706 (1983).

¹⁹⁰ Pope, at 489 (citing to Mennonite, 462 U.S., at 798, n.4, 103 S.Ct., at 2711, n.4).

¹⁹¹ Id.

¹⁹² Id. at 792-93

¹⁹³ Id. at 793.

¹⁹⁴ Id. at 795.

mortgage company contended that, as a secured creditor, it had an interest in property that gave rise to a due process right to actual notice of the pendency of a tax sale and of the opportunity to redeem the property following the tax sale.¹⁹⁵ The issue before the Court was whether notice by publication and posting provided a mortgagee of real property with adequate notice of a proceeding to sell the mortgaged property for nonpayment of taxes.¹⁹⁶ The Court held that because the mortgagee's name and address were reasonably ascertainable in public records and the state was affecting a proceeding that would adversely affect the mortgagee's property interest, notice by mail or other means as certain to ensure actual notice was a minimum constitutional precondition to such an adverse proceeding.¹⁹⁷ In this case, the Court observed that the identity of the owner of the affected interest was easily accessible through the public records.¹⁹⁸ By way of contrast, it is notable that the personal representative of a decedent is in a different position. The personal representative may not have personal knowledge of the decedent's business or personal affairs which may have led to debts or obligations still outstanding at death.¹⁹⁹

The following are some reasonable "reasonably diligent" steps suggested by attorney Albert A. Secor:²⁰⁰

- a) Review the records in the register's office of the decedent's county of residence and each county in which the decedent owned property for any recorded liens, including tax liens and recorded UCC-1s.
- b) Review the decedent's mail for three to four months after death to make a list of each statement received.
- c) Review the decedent's income tax returns for the last three years to identify any deductions for interest expense, medical expense, or businesses in which the decedent was engaged to determine where the decedent may have had indebtedness.
- d) Review the decedent's cancelled checks for the prior two years.
- e) Make a list of each credit card issued to the decedent or members of the immediate family.

¹⁹⁵ Id.

¹⁹⁶ Id. at 792.

¹⁹⁷ Id. at 800.

¹⁹⁸ Id. at 798 n. 4.

¹⁹⁹ Professor Falender asserts that the personal representative may have either no knowledge or intimate knowledge. See Debra A. Falendar, "Notice to Creditors in Estate Proceedings: What Process is Due?," 63 N.C. L. Rev. 659, 695 (1985).

²⁰⁰ See Secor, *supra*, at 18 Tenn. Prac. Probate Law § 7:8.

Some credit card issuers are requiring the parent to guarantee the debts incurred by a child if a card is issued in just the child's name.

- f) Identify each doctor who saw the decedent during the prior three years and each hospital in which the decedent was a patient during the same period.
- g) If the personal representative has access to credit bureau reports, order a report.
- h) Review other records the decedent may have indicating an indebtedness.

IV. CLOSING THE PROBATE ESTATE IN TENNESSEE

Once the estate has been distributed to the heirs or beneficiaries,²⁰¹ the personal representative can close the estate checking account and obtain the forms or court orders from the clerk's office that are necessary to formally and legally close the estate.²⁰² To close an estate in Tennessee, whether or not a final accounting is waived, the personal representative, after the period for creditors to file claims against the estate has expired, files a petition to close the estate with the clerk of the court.²⁰³ As part of the final report to the court, the personal representative must indicate that the required notice to each of the known or reasonably ascertainable creditor was sent.²⁰⁴ Additionally, it should be noted that a release from TennCare to evidence repayment of medical assistance benefits, premiums, or other costs due from the estate must be filed with the petition to close the probate estate.²⁰⁵

After the estate is closed and the personal representative has been discharged from duties, all the estate records should be kept in a safe place, such as a safe deposit box or public storage facility for several years. State law may give heirs, beneficiaries, creditors and other parties the right to sue the personal representative for breach of a fiduciary duty for a number of years after the estate is closed.

²⁰¹ Tenn. Code Ann. § 30-2-701.

²⁰² Rules of the Probate Court of Shelby County, Tennessee, XV, p. 19 (closing of decedent's estates)

²⁰³ Id.

²⁰⁴ Id. at XV (d)., p. 19.

²⁰⁵ Tenn. Code Ann. § 71-5-116(c) (The TennCare release is furnished from the Bureau of TennCare of the Tennessee Department of Finance and Administration or, in the alternative, a statement that the decedent was under age 55 at the time of death and not enrolled in the TennCare program).