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In 1988, the United States Supreme Court in *Tulsa Professional Collection Services, Inc., v. Pope,*[1] significantly changed the procedure of how personal representatives must notify creditors in probate proceedings.[2] As all experienced probate lawyers know, as a result of *Pope,* Florida's current notice to creditors section 733.2121 of the *Florida Statutes* requires personal representatives not only to publish a notice to creditors, but also serve a copy on the decedent's creditors who are "reasonably ascertainable,"[3] after making a "diligent search"[4] to determine their names and addresses. The statute goes on to state that "[i]mpracticable and extended searches are not required."[5] Creditors then have the later of three months after the "first publication of the notice to creditors, or as to any creditor required to be served with a copy of the notice to creditors, thirty days after the date of service on the creditor . . . ."[6]

Section 733.2121 of the *Florida Statutes*, effective January 1, 2002, is a spin off of the prior section 733.212, which incorporated a notice to beneficiaries and notice to creditors. The language in section 733.2121 of the *Florida Statutes* is substantially the same as the former section 733.212, except that section 733.212 of the *Florida Statutes* did not contain any reference to creditors whose "[c]laims are unmatured, contingent, or unliquidated . . . ."[7] The abstract and cryptic phrases in the *Florida Statutes*, requiring a "diligent search" to determine creditors "who are reasonably ascertainable,"[8] have spawned many appellate decisions, but none, however, have given the practitioner much guidance in defining those phrases, or for that matter, the phrase "impracticable and extended searches," which the statute says are not re-

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1. 485 U.S. 478 (1988).
2. *Id.* at 491.
3. FLA. STAT. § 733.2121(3)(a) (2002).
4. *Id.*
5. *Id.*
6. § 733.702(1).
7. § 733.2121(3)(a).
8. *Id.*

quired.[9] Nor have the Florida Probate Rules spelled out any express minimum guidelines to satisfy the search requirements.

The case of *In re Estate of Vickery*,[10] one of the early opinions construing the former section 733.212 of the *Florida Statutes*, which required the service of a notice of administration on creditors, involved beneficiaries asserting that the decedent had breached a contract allegedly established under a "joint and mutual will" executed by the decedent's husband prior to the will of the decedent.[11] The will of the decedent's predeceased husband set forth a plan that the survivor of them would, by will, distribute their unconsumed assets available at the survivor's death to the same beneficiaries.[12] The three-month publication period expired on November 11, 1987.[13] Only two claimants were served personally with notice in May of 1988.[14] The various claimants filed identical claims beginning June 7, 1988, and ending on August 1, 1988.[15] Seven months after the first claimant received notice of the decedent's death, the disgruntled would-be beneficiaries filed a motion to extend time to file their claims.[16] The trial court granted the personal representative's motion to strike.[17] The Fourth District affirmed, ruling that the trial court did not abuse its discretion.[18]

The appellate court noted that the personal representative for the wife's estate, an attorney, had represented her husband in real estate matters and had "handled some of his estate work, but had never discussed wills or estate planning with him."[19] There was no explanation of what "some of his estate work" meant.[20] The court further stated that though the attorney, as personal representative, had prepared the surviving wife's will (which made no mention of a mutual will arrangement), "he had no knowledge of any other document disposing of her property."[21] The court explained that the decedent's sisters cleaned her apartment and threw away "many items" (apparently without description), but gave her financial papers to the personal rep-

9. *Id.*
10. 564 So. 2d 555 (Fla. 4th Dist. Ct. App. 1990).
11. *Id.* at 557.
12. *Id.* at 556.
13. *Id.* at 557.
14. *Id.*
15. *Estate of Vickery*, 564 So. 2d at 557.
16. *Id.* at 558.
17. *Id.* at 557.
18. *Id.* at 558.
19. *Id.*
20. *Estate of Vickery*, 564 So. 2d at 558.
21. *Id.*

resentative,[22] and then went on to say that the personal representative "made a cursory search" of the wife's apartment and took possession of the contents of the decedent's safe deposit box.[23]

In *Jones v. Sunbank /Miami, N.A.*,[24] another case decided under the aegis of the *Pope* doctrine,[25] a party who had purchased real property from the decedent several years before the seller's death was not served with actual notice of administration.[26] Almost six months after the claim bar date expired, the buyer filed a claim against the deceased seller's estate based on land contamination.[27] The trial court made exhaustive findings and concluded that the claimant was not a "known or reasonably ascertainable creditor."[28] The Third District affirmed, deciding, as is so often the case in these settings, that the trial court did not abuse its discretion.[29] While the opinion is well written, it does not enlighten the probate bar as to what would equate to a "diligent search" or define "[i]mpracticable and extended searches . . . ."[30]

In *In re Estate of Gleason*,[31] an alleged creditor of Jackie Gleason, not served with a notice of administration, had been litigating with Gleason in New York for over a year prior to his death.[32] The creditor sought to reopen Gleason's estate fourteen months after it had been closed.[33] The Fourth District affirmed the lower court's refusal to reopen the estate.[34] Again, no guidelines were outlined with respect to what steps a personal representative should take to effectuate a "diligent search" for creditors.[35]

The claimant in the case of *In re Estate of Danese*,[36] who had not been served with a notice of administration, sought to reopen the estate several years after it had been closed.[37] The claimant, who had filed a civil action

22. *Id.*
23. *Id.*
24. 609 So. 2d 98 (Fla. 3d Dist. Ct. App. 1992).
25. Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988).
26. *Jones*, 609 So. 2d at 99–100.
27. *Id.*
28. *Id.* at 101.
29. *Id.* at 103.
30. § 733.2121(3)(a).
31. 631 So. 2d 321 (Fla. 4th Dist. Ct. App. 1994).
32. *Id.* at 322.
33. *Id.* at 323.
34. *Id.*
35. *See* FLA. STAT. § 733.2121(3)(a) (2002).
36. 641 So. 2d 423 (Fla. 1st Dist. Ct. App. 1994).
37. *Id.* at 425.

against the decedent's estate prior to the expiration of the three months creditors' period, argued that the *Pope* requirements were not met.[38]

The trial court entered an order reopening the estate.[39] However, the First District reversed on the ground that the claimant had actual knowledge of the probate proceeding, having filed a civil action against the estate within the three month creditors' period, and thus did not come within the purview of *Pope*.[40] Because of the factual circumstances in *Estate of Danese*, it was not relevant for the court to give any clues as to what constitutes a "diligent search."[41]

Section 733.2121 of the *Florida Statutes* contains a reference to creditors whose "[c]laims are unmatured, contingent or unliquidated," which was not in the predecessor section 733.212 of the *Florida Statutes*, and was apparently added to overcome the Fourth District decision of *U.S. Trust Co. of Florida Savings v. Haig*.[42] There, the buyers of a residence who gave the seller a purchase money mortgage received from the seller a five-year guaranty, allowing the buyers to offset against the mortgage debt the cost of repairs due to "leaks and cracks caused by structural defects."[43] The seller died within the five-year period "and the claims period expired on February 8, 1995."[44] No actual notice was served on the buyers.[45]

However, the personal representative, by a letter to the buyers dated January 30, 1995, sought to verify the existence of the purchase money note as an estate asset.[46] At the same time, the buyers, unaware of the seller's death, tried to reach him by mail.[47] The personal representative did not receive the buyer's letter until eight days after the creditors period expired.[48] Because the claim was filed late, the appellate court overruled the trial court's order granting the buyers' petition to extend time to file a claim, finding that the buyers were not entitled to actual notice since their claim was contingent and not quantified.[49] Furthermore, the Fourth District ruled that there was no showing of fraud or estoppel as required by section 733.702(3)

38. *Id.*
39. *Id.*
40. *Id.* at 424.
41. § 733.2121(3)(a).
42. 694 So. 2d 769 (Fla. 4th Dist. Ct. App. 1997).
43. *Id.* at 770.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Haig*, 694 So. 2d at 770.
48. *Id.*
49. *Id.* at 771.

of the *Florida Statutes*.[50] However, it is not clear from the opinion, though it may be presumed, that the buyers were seeking reimbursement for actual repairs made to the residence under the guaranty. The court made no ruling regarding the buyers' rights under the mortgage set-off provision.[51]

In *In re Estate of Ortolano*,[52] the Fourth District ruled that "the trial court abused its discretion" in granting the personal representatives' motion to strike a claim filed one month after the three month creditor's period expired.[53] The claimant, who was not served with a notice of administration, had a lawsuit pending against the decedent at the time of death.[54] The Fourth District determined that, because the personal representative had actual knowledge of the claim, the claimant should have been served with notice.[55] Furthermore, the personal representative failed to file a suggestion of death in the civil action, as required by the *Florida Rules of Civil Procedure*, until after the creditors period expired.[56] The facts in *Ortolano* made it unnecessary for the appellate court to discuss what steps should or need not be taken to conduct a diligent search.[57]

In *Miller v. Estate of Baer*,[58] the decedent passed away on September 23, 1996, and the personal representative first published a notice of administration on December 4, 1996.[59] The claimant, a bank, was not served with the notice and did not file its claim within the three-month period.[60]

On August 24, 1998, almost two years after the decedent's death, the bank filed a petition for extension of time, which the trial court granted.[61] The Fourth District affirmed, citing the key issue to be whether the lower court abused its discretion *vel non*.[62] The decedent was "a general partner of a partnership" and had signed as a guarantor on loans to the partnership by the bank.[63] By the terms of the debt arrangement with the bank, the death of the decedent triggered a default on the note for which the decedent was a guarantor.[64] The trial court found, and the court of appeal agreed, that the

50. *Id.*
51. *See id.*
52. 766 So. 2d 330 (Fla. 4th Dist. Ct. App. 2000).
53. *Id.* at 332.
54. *Id.* at 331.
55. *Id.* at 332 (citing Davis v. Evans, 132 So. 2d 476, 481 (Fla. 1st Dist. Ct. App. 1961)).
56. *Id.*
57. *See Estate of Ortolano*, 766 So. 2d at 332.
58. 837 So. 2d 448 (Fla. 4th Dist. Ct. App. 2002).
59. *Id.* at 449.
60. *Id.*
61. *Id.*
62. *Id.* at 450.
63. *Miller*, 837 So. 2d at 450.
64. *Id.*

facts were distinguishable from those in *Haig*,[65] thereby requiring actual notice to the claimant.[66] Again, it was unnecessary for the appellate court to recite a litany of steps that should have been taken to accomplish a "diligent search" regarding the existence of the claimant.

The result in that case was disastrous for the personal representative. Distributions had been made to such an extent that there were insufficient assets available to satisfy the claim by the bank, by casting a burden on the personal representative personally.[67]

The latest case as of this writing, *Strulowitz v. Cadle Co., II, Inc.*,[68] seems to raise the bar for personal representatives to comply with the "diligent search" standard. Once again, however, the case turned on what seems to be the fundamental issue in these types of cases: whether the trial court abused its discretion.[69] The Fourth District, in *Strulowitz*, quoting from *Canakaris v. Canakaris*,[70] stated, "discretion is abused only where no reasonable man would take the view adopted by the trial court."[71]

In *Strulowitz*, the decedent died on May 17, 2000, and the statutory claim period ended November 20, 2000.[72] The personal representative first became aware of the debt owed to The Cadle Company II, Inc. ("Cadle") as a result of a telephone call he received on January 18, 2001.[73] The debt arose by virtue of an unrecorded joint stipulation of settlement entered into by the decedent and his wife, who predeceased the decedent in 1994, that resolved a lawsuit filed by Cadle to collect on a promissory note.[74] Under the settlement, the Strulowitzes were to pay quarterly payments over a period of six years, and on June 1, 2000, the balance became due.[75] After the personal representative advised Cadle's agent that he had no record of the debt, he requested documentation and payment history.[76] In early February of 2001, the personal representative's attorney advised Cadle that the claim was time-barred, whereupon Cadle on February 16, 2001, filed a petition for leave to

65. U.S. Trust Co. of Fla. Sav. Bank v. Haig, 694 So. 2d 769 (Fla. 4th Dist. Ct. App. 1997).

66. *Miller*, 837 So. 2d at 450 (citing Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 485 (1988)).

67. *Id.* at 449.

68. 839 So. 2d 876 (Fla. 4th Dist. Ct. App. 2003).

69. *Id.* at 879.

70. 382 So. 2d 1197, 1203 (Fla. 1980).

71. *Strulowitz*, 839 So. 2d at 881 (quoting *Canakaris*, 382 So. 2d at 1203 (citing Delno v. Market St. Ry. Co., 124 F.2d 965, 967 (9th Cir. 1942))).

72. *Id.* at 877.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Strulowitz*, 839 So. 2d at 877.

file a claim.[77] The personal representative responded with a motion to strike, along with a supporting affidavit which, in summary, related that his "diligent search" included going through all of the decedent's personal and business files and check book for the year 2000, indicating that the checkbooks were handwritten and for the most part illegible.[78]

The trial court in *Strulowitz* declined to rule on the evidence presented.[79] Rather, an attorney ad litem was appointed, who acknowledged that he had difficulty locating the Cadle Company and the debt because Cadle had not sent a payment book to the decedent, even though, as the appellate court noted, the attorney ad litem had the benefit of hindsight and was aware of the creditor at that point in time.[80] Moreover, Cadle failed to send a delinquent notice when the June 2000 payment was not made.[81] The attorney ad litem did find an illegible check dated March 11, 2000 for $1500 to "'The Cadle Co.?? II'" and a December 14, 1999 check in the same amount to "'Cadle II Company,'" along with four legible checks for $1500 made during 1999, each payable to Cadle.[82]

The attorney ad litem, armed with the name of the claimant, was unable to find a listing for that company in the Broward County, Florida phone book, and upon calling information he learned that there was no listing for Cadle in the State of Florida.[83] On inquiring about a Cadle phone number in other states, he was told that he would have to call every state in the union, which he concluded was impractical.[84] The attorney ad litem finally learned from the telephone operator that Cadle did have a toll free number.[85] On reaching the company, the employee could not locate the account.[86] Only after being asked by the Cadle contact to furnish the decedent's social security number was the account located.[87] Even though the statute provides that "[i]mpracticable and extended searches are not required,"[88] the attorney ad litem concluded that the personal representative could have conducted a more "diligent search."[89] A "diligent search" would have recalled Cadle as a

77. *Id.*
78. *Id.* at 878.
79. *See id.*
80. *Id.*
81. *Strulowitz*, 839 So. 2d at 878.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Strulowitz*, 839 So. 2d at 878.
87. *Id.* at 878–89.
88. FLA. STAT. § 733.2121(3)(a) (2002).
89. Strulowitz v. Cadle Co., II, Inc., 839 So. 2d 876, 879 (Fla. 4th Dist. Ct. App. 2003).

creditor, and a more extensive review of the decedent's bank statements or checkbook would have led him to Cadle.[90] The lower court adopted the attorney ad litem's conclusion and denied the motion to strike.[91] The Fourth District, relying on the nebulous doctrine of "abuse of discretion" affirmed, stating that:

> Applying this standard, we cannot say that no reasonable person could take the trial court's view. Reasonable people could differ as to what constitutes a reasonable search and what entails impractical or extraordinary effort. Certainly, as the attorney ad litem acknowledges, his success in locating Cadle and the decedent's account came only after several phone calls. *Moreover, it came in hindsight, after Cadle had filed its claim and its name was known to the attorney ad litem.*[92]

It appears from the Fourth District's decision that had the trial court ruled the other way, which it could have done facilely, the appellate court would have also affirmed, on the basis that the trial court did not abuse its discretion.[93]

After scanning the progeny of *Pope*,[94] and looking through the judicial camera lens, the picture is anything but clear as to what constitutes a "diligent search" or "impracticable searches."[95] We know more about what does *not* satisfy those vague terms than what fulfills the requirements. By way of a footnote in *Strulowitz*, the Fourth District, having recognized the problem, has issued a summons of responsibility to the Probate Rules Committee of the Florida Bar, requesting that the body suggest guidelines for personal representatives to aid them in performing their "diligent searches."[96] Hopefully, the rules committee will not allow a default to be entered against it. To be sure, there will be naysayers who will pontificate to the effect that promulgating guidelines for construing that abstract phrase is fools' play, and that each estate is unique and will have to stand on its own peculiar facts. That, of course, is the easy way out. The rules committee should not, however, turn a blind eye toward the mantle placed on it by the court. Indeed, the rules committee has a moral, if not an ethical, responsibility to assist the personal representatives, probate practitioners, as well as the trial judges, in carrying

90. *Id.*
91. *Id.*
92. *Id.* at 881 (emphasis supplied).
93. *Id.*
94. 485 U.S. 478 (1988).
95. *Strulowitz*, 839 So. 2d at 879.
96. *Id.* at n.3.

out the statutory mandate. This is an opportunity for the Bar to supply the legal yeast that will leaven the definition of "diligent search."

In the meantime, lawyers laboring in the vineyard of probate law would be well advised to review an excellent article by David T. Smith, a University of Florida law professor, and Robert Winick, an experienced probate practitioner,[97] which constructively sets forth numerous cogent steps a personal representative should consider in ferreting out "reasonably ascertainable" creditors.[98] How extensively the list should be followed will of course depend on how knowledgeable the personal representative is with the decedent's personal and financial affairs. As section 733.2121 of the *Florida Statutes* says, "[i]mpracticable and extended searches are not required."[99] The well-written article by Smith and Winick, *inter alia*, recommends that the first step should be to have the postal service direct all of the decedent's mail to the personal representative.[100] Next, after inspecting the decedent's wallet/purse, personal and financial files, letters should be sent to credit card companies and department stores, requesting account balance information.[101] Also, one should review tax returns for three years prior to date of death and bank statements, canceled checks or check stubs for at least one year prior to death.[102] Making inquiries of relatives, friends and business associates is also advised.[103]

Personal representatives and probate practitioners should keep the Smith and Winick article handy for easy reference because it is still timely. The only thing missing—as a result of expanded technology—as suggested by William Platt,[104] a prominent probate lawyer in Tampa, Florida, is that it is also a good idea to search the decedent's personal computer and maybe even the internet—a phenomenon not extant when Smith and Winick authored their article.

Unless the Probate Rules Committee acts upon the charge given to it by the Fourth District, to paraphrase Lewis Carroll's Humpty Dumpty, "diligent search" and "impractical searches" will be what each probate judge says it is!

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97. David T. Smith & Robert M. Winick, *Known or Ascertainable Estate Creditors: The* Pope *Decision*, 62 FLA. B.J. 66 (Oct. 1988).
98. *Id.* at 67.
99. FLA. STAT. § 733.2121(3)(a) (2002).
100. Smith & Winick, *supra* note 97, at 67.
101. *Id.*
102. *Id.*
103. *Id.*
104. Platt is a former chairman of the Florida Probate Rules Committee.