PRACTICAL POINTERS FOR PROBATE ADMINISTRATION

By

Tae Kelley Bronner
Tampa

Practical Pointers for Probate Administration
Legislative Update 2013
By: Tae Kelley Bronner, Esquire
Tae Kelley Bronner, P.L.
Tampa, FL 33647

I. 2013 Legislation – Senate Bill 492 is the "estate" bill for this year and includes all relevant probate legislation**.**

A. **Clarification of Service of a Petition for Administration after filing of a Caveat -- s. 731.110**

1. **Background/Problem** – Before the proposed change, Florida Statutes, Section 731.110(3) provided:

> (3) If a caveat has been filed by an interested person other than a creditor, the court may not admit a will of the decedent to probate or appoint a personal representative **until formal notice of the petition for administration has been served on the caveator or the caveator's designated agent** and the caveator has had the opportunity to participate in proceedings on the petition, as provided by the Florida Probate Rules.

The above described subsection was creating confusion in some circuits when a caveator later filed a petition for administration. In some circuits, the caveator was required to actually serve formal notice of the petition on his or herself, as caveator, before the petition for administration could be considered by the court, or, in the alternative, withdraw the caveat. In withdrawing the caveat, a window was opened that permitted another party to file a competing petition for administration and actually secure appointment without consideration of the caveat.

2. **Solution** -- To avoid the confusion and to provide consistency across the circuits, s.731.110(3) was amended to add the following language:

> (3) If a caveat has been filed by an interested person other than a creditor, the court may not admit a will of the decedent to probate or appoint a personal representative until formal notice of the petition for administration has been served on the caveator or the caveator's designated agent and the caveator has had the

> opportunity to participate in proceedings on the petition, as provided by the Florida Probate Rules. Notwithstanding the foregoing, nothing in this subsection shall require that a caveator be served with formal notice of its own petition for administration.

The change makes it absolutely clear that a caveator need not serve formal notice of his or her own petition for administration on his or herself before the court may consider the petition. The change also alleviates the caveator's need to withdraw the caveat should it fail to provide itself formal notice of its own petition for administration and eliminate an unnecessary delay in the issues of Letters of Administration to an otherwise qualified personal representative.

3. **Effective Date** – Changes are effective as of October 1, 2013.

B. **Deposit and Retention of Original Wills – s. 732.901.**

1. **Background –** The Florida Supreme Court made significant changes to the Rules of Judicial Administration to facilitate the implementation of electronic filing and record keeping for all circuit courts in the state of Florida. While the Real Property, Probate and Trust Law Section supported the implementation of electronic filing, the rule changes resulted in a significant impact on the records retention rules for all court records, including probate documents. Of particular concern was the impact the proposed amendments would have on the retention of original wills and codicils.

In addition to retention issues, there was some confusion over whether a separate writing was part of the will and would be entitled to the same treatment as the original will or codicil.

2. **Problem** – Original wills and codicils are unique documents for which the original must be retained for an extended period of time for evidentiary purposes. In probate proceedings, original wills and codicils and information regarding the identity of interested

persons is often submitted ex parte. If the proper notice is not provided, it may be months or even years before the true heirs of the decedent learn of the administration. If proper notice was not provided, the interested person may be able to petition to reopen the estate even after a final order is issued. In addition, in many cases a will or codicil is filed and the estate is never opened. It may be years later upon the death of another family member, that the prior original will and its deposit with the court may be discovered. If a forgery has occurred or a will has been altered in some way, the retention of the original documents is crucial from an evidentiary standpoint to establish the true beneficiaries of an estate.

Because of the unique nature of the documents, Florida Statutes, Section 732.901 has always provided that original wills are "deposited", not filed with the clerk. Further, the Clerk's Schedule (GS-11) for the General Records Schedules for all agencies, posted on the Department of State's Division of Library Services website, required the clerk to retain an original will deposited for safekeeping for 20 years. However, once a probate proceeding was initiated, the will could be added to the court file. While this did not previously pose a danger, under the new Rules of Judicial Administration the addition of the original will to the court file appears to permit the clerk to scan the original, store the copy within the electronic record keeping system and then destroy the original will.

To clarify the unique evidentiary importance of the original will and codicil, the Probate Rules Committee requested the Florida Supreme Court enact new rule which provides as follows:

> Rule 5.043
>
> Notwithstanding any rule to the contrary, and unless the court orders otherwise, any original executed will or codicil deposited with the court shall be retained by the clerk in its original form and may not be destroyed or disposed of by the clerk for 20 years after submission regardless of whether the will or codicil has been

permanently recorded as defined by Rule 2.430, Florida Rules of Judicial Administration.

Rule 5.043 became effective in 2012.

The changes to s.732.901 mirror the proposed new probate rule and clarify that all wills and codicils are "deposited" not filed. In addition, regardless of where the original is maintained by the clerk, the original will or codicil must be maintained in its original form for a period not less than 20 years.

While it is clear that a will and codicil are unique documents that are deposited and not filed, and therefore, must be maintained in their original form, it was unclear if a separate writing merited the same treatment. s. 732.515 provides for the disposition of tangible personal property, other than property used in a trade or business, through a written statement or list referred to in the decedent's will, commonly referred to as a "separate writing." To qualify, the separate writing must be "signed by the testator and must describe the items and the devisees with reasonable certainty." *Id.* Separate writing are routinely used in wills because they allow clients to change the disposition of items such as china, jewelry, automobile, ect., without the need to return their attorney and execute a codicil or new will. A separate writing may also, however, dispose of very valuable property, such as expensive family heirlooms, valuable paintings or valuable pieces of jewelry. They are also very susceptive to abuse or forgery because they are not required to be executed with the formalities of a will and are often done in the privacy of the testator's home, with no witnesses. Therefore, there is an even greater need to be able to examine the original document to assure that it is the decedent's signature or submit the original to the qualified handwriting experts. Therefore, s. 732.901 has been expanded to require the original of a separate writing , when filed, be maintained by the clerk in its original form for not less than 20 years, under the same procedure for a will or codicil.

3. **Solution** -- s. 732.901 has been revised to mirror Rule 5.043 and to include separate writings in the documents that must be maintained in their original form with the court. The revised statute provides as follows:

> 732.901 Production of wills.—
>
> (1) The custodian of a will must deposit the will with the clerk having venue of the estate of the decedent within 10 days after receiving information that the testator is dead. The custodian must supply the testator's date of death or the last four digits of the testator's social security number to the clerk upon deposit.
>
> (2) Upon petition and notice, the custodian of any will may be compelled to produce and deposit the will as provided in subsection (1). All costs, damages, and a reasonable attorney's fee shall be adjudged to petitioner against the custodian if the court finds that the custodian had no just or reasonable cause for failing to timely deposit the will.
>
> (3) An original will submitted to the clerk with a petition or other pleading shall be deemed to have been deposited with the clerk.
>
> (4) Upon receipt of an original will, the clerk must retain and preserve that will in its original form for a period of not less than 20 years. If the probate of a will is initiated, the original will may be maintained by the clerk with the other pleadings during the pendency of the proceedings, but the will must all at times be retained in its original form for the remainder of the 20 year period whether or not the will has been admitted to probate or the proceedings are terminated. Transforming and storing a will on film, microfilm, magnetic, electronic, optical or other substitute media or recording a will onto an electronic record keeping system, whether or not in accordance with the standards adopted by the Supreme Court of Florida, or permanently recording a will does not eliminate the requirement to preserve the original will.
>
> (5) For purposes of this section, the term "will" shall include a separate writing described in s. 732.515.

4. **Effective Date** – The changes to s. 732.901 will become effective October 1, 2013.

C. **Elimination of Requirement to File Estate Tax Return with State of Florida – s. 198.13.**

1. **Background/Problem –** "Under the American Taxpayer Relief Act of 2012, the Internal Revenue Code does not provide a federal tax credit for the amount an individual pays in state death taxes or state generation skipping taxes. Under the Florida Constitution, the state may not tax estates in excess of the amount of federal credit provided by the Internal Revenue Code. Because federal law does not authorize federal credits for state death taxes or state generation-skipping taxes, no taxes for either are owed under s. 198.02, F.S., or 198.021, F.S. However, even though the Florida Constitution effectively prohibits a Florida estate tax, s. 198.13, F.S., requires any estate of a decedent dying after December 31, 2012, to file a tax return with the Florida Department of Revenue." *Florida Senate Bill Analysis and Fiscal Impact,* Judiciary Committee, page 2.

2. **Solution –** Florida Statutes, Section 198.13 is amended to remove the language limiting the exception provided in subsection (4) (which provides that no estate tax return need be filed with the State of Florida for any decedent dying after December 31, 2004). The changes is reflected as follows:

198.13 Tax return to be made in certain cases; certificate of nonliability.—

(4) Notwithstanding any other provisions of this section and applicable to the estate of a decedent who dies after December 31, 2004, if, upon the death of the decedent, a state death tax credit or a generation-skipping transfer credit is not allowable pursuant to the Internal Revenue Code of 1986, as amended:

(a) The personal representative of the estate is not required to file a return under subsection (1) in connection with the estate.

(b) The person who would otherwise be required to file a return reporting a generation-skipping transfer under subsection (3) is not required to file such a return in connection with the estate.

~~**The provisions of this subsection do not apply to estates of decedents dying after December 31, 2012**~~

3. **Effective Date –** This change was a retroactive to January 1, 2013.

II. **Important Developments for Probate Practitioners** – In addition to new statutory changes, there are several important issues that the Probate Law Committee is examining, but until proposed changes can be finalized, it is important for probate practitioners to be aware of the potential traps.

A. **Creditor Claims –** Florida Statutes, §733.702 governs the filing of creditor claims in estates. Recent appellate court decisions in *Morgenthau v. Estate of Andzel,* 26 So.3d 628 (Fla. 1st DCA 2009) and *Lubee v. Adams*, 77 So.3d 882 (Fla. 2d DCA 2012) have construed §733.702 in a manner that serves as a trap for creditors. Furthermore, as those decisions have construed the statute, it may violate the due process clause in the 14th amendment to the United States Constitution and section 9 of article I of the Florida Constitution in its application. While neither of the opinions considered the due process implications of the construction the court applied to the statute, the effect of *Morgenthau* and *Lubee* is to bar a creditor by application of the 3 month publication date which is applicable to and bars unascertainable creditors but does not bar reasonably ascertainable creditors. In both of those cases, the creditor claimed to have been reasonably ascertainable and the court made no finding on this point.

Mogenthau and *Lubee* have also demonstrated the need for a more organized and less confusing statute that clearly delineates the duties of a personal representative, the classes and treatment of creditors and the ability to quickly and efficiently determine the validity of claims filed in estates.

1. **Problem/Background** - Prior to 1988, Florida, as most other states, barred creditors by simple publication without any requirement for further notice. In Florida, at that time, creditors were required to file claims within 6 months after the first publication of a

notice of administration. No distinction was made between reasonably ascertainable creditors and those who were not, and no other notice was required in either instance.

In direct response to the United State Supreme Court's opinion in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478; 108 S. Ct. 1340; 99 L. Ed. 2d 565; (S. Ct. 1988) (determining an Oklahoma nearly identical to Florida's statute to be unconstitutional), a rule was adopted on an emergency basis, and language was subsequently added to several statutes to bring our procedures into compliance with the Supreme Court's interpretation of the due process requirements. (The time for filing claims after published notice was also shortened from 6 months to 3 months.) The Supreme Court in Tulsa Professional Collection Services held that a creditor's claim is property, and the creditor may not be deprived of that property through state action unless the process meets due process requirements for notice.

As a result of this decision, our statutes were changed so creditors are now classified in two classes, with differing notice requirements and procedures applicable to each class. Initially, a personal representative is required to make a diligent search for creditors. §733.2121(3)(a) Fla.Stat. After this diligent search, it is possible to classify the creditors in the two classes.

The first class is creditors who are not known or reasonably ascertainable. These are creditors the personal representative failed to locate in the diligent search. These creditors cannot practically be given notice other than by publication of the notice to creditors. If such a creditor fails to file a claim within 3 months after the first publication, the claim is barred. §733.702(1) Fla.Stat. This classification and notice procedure meets the constitutional due process requirements.

The other class is those creditors who are known to the personal representative or are discovered by the diligent search. These creditors can be barred only after they have been given

actual notice by a method reasonably calculated to provide that notice. Regular mail is sufficient for this purpose. Fla.Prob.R. 5.241, 5.041(b). The Committee Notes to Fla. Prob.R. 5.241 succinctly sums up these issues. "This case [Tulsa Professional Collection Services] substantially impacted the method for handling (and barring) creditors' claims. This case stands for the proposition that a creditor may not be barred by the usual publication if that creditor was actually known to or reasonably ascertainable by the personal representative, and the personal representative failed to give notice to the creditor by mail or other means as certain to ensure actual notice. Less than actual notice in these circumstances would deprive the creditor of due process rights under the 14th Amendment to the U.S. Constitution but creditors who are not know or reasonably ascertainable may be barred by the publication alone if a claim is not timely filed."

Then §733.702 sets the filing time limits applicable to each class of creditors and actually bars claims that are not filed within those limits. Under that statute, a claim is barred if the creditor who was not reasonably ascertainable fails to file a claim on or before a date that is 3 months after the first publication of notice to creditors. If the creditor was reasonably ascertainable, the creditor is required by law to be served with a copy of the notice of administration, and is then barred if no claim is filed on the later of a date that is 3 months after the first publication or 30 days after service of the notice to creditors. As to known creditors, then, no time limit under this statute begins until the service of the notice to creditors. In instances where the personal representative fails in his or her duty to give that notice to a reasonably ascertainable creditor (either because a diligent search was not conducted or even if known, the notice was not sent to the creditor), no time period begins to run under this statute against the reasonably ascertainable creditor. Therefore, a reasonably ascertainable creditor not

served with notice who files, for example, 7 months after the first publication is not late because the publication did not start the time running; only the service of notice would start that time period, and it didn't occur.

A practical problem is that the personal representative, who may also be a beneficiary of the estate or more partial to the beneficiaries than the creditors, may be less than diligent in searching for creditors and sending them notice. The Tulsa Professional Collection Services opinion noted this practical problem. It said at page 578:

> *Moreover, the executor or executrix will often be, as is the case here, a party with a beneficial interest in the estate. This could diminish an executor's or executrix's inclination to call attention to the potential expiration of a creditor's claim. There is thus a substantial practical need for actual notice in this setting.*

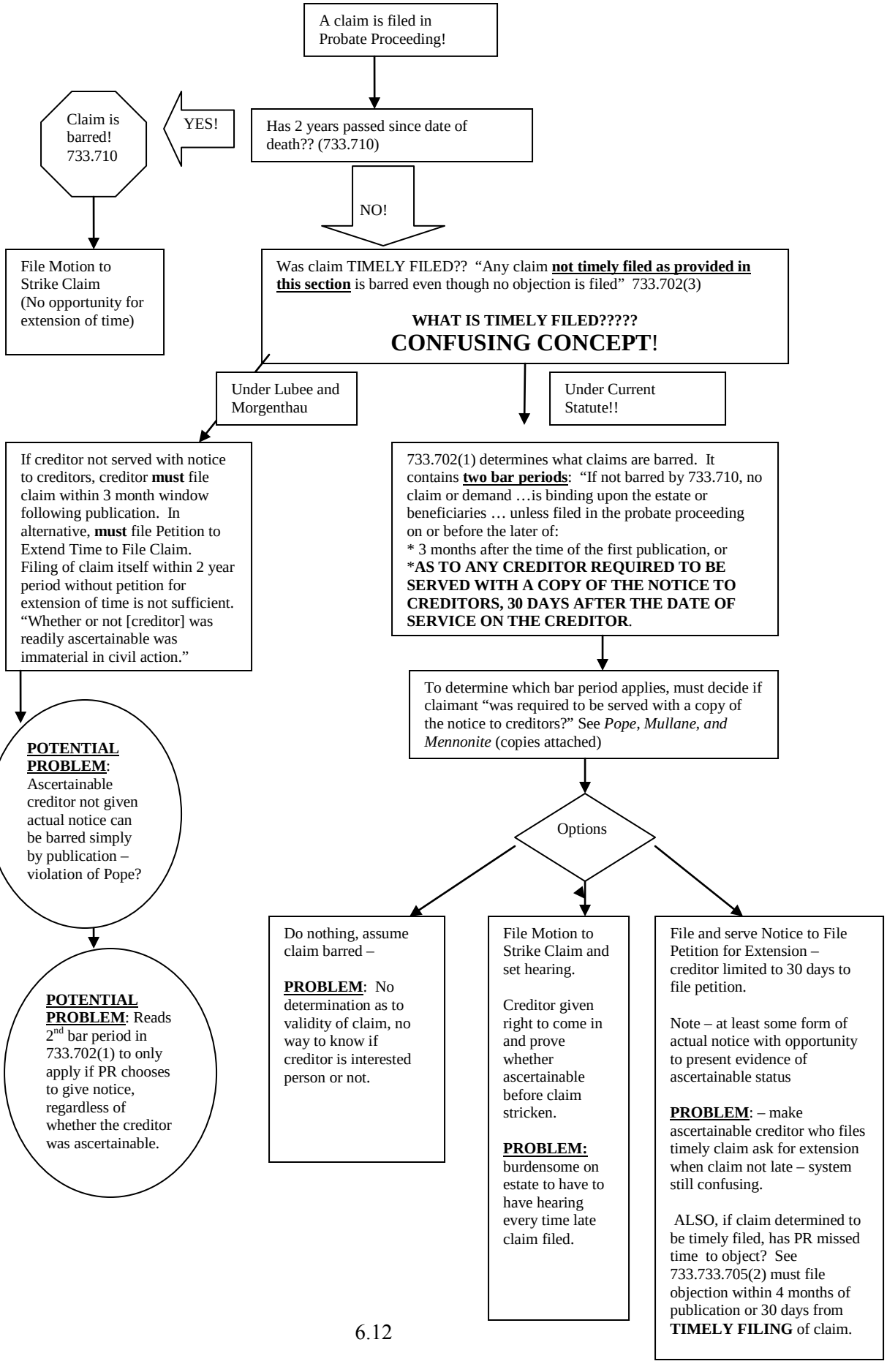
The U.S. Supreme Court ultimately concluded at page 579 of the opinion:

> *If [the creditor's] identity was known or 'reasonably ascertainable,' then termination of appellant's claim without actual notice violated due process. . . . Thus, if appellant's identity as a creditor was known or 'reasonably ascertainable,' then the Due Process Clause requires that appellant be given 'notice by mail or other means as certain to ensure actual notice.'*

Ultimately, there is a need to create procedures that will encourage the personal representative to follow the requirements of the law and search for, and then give required notice to, those reasonably ascertainable creditors, to comply with due process requirements.

In both the *Morgenthau* and *Lubee* cases, the court held that the creditor was barred by failure to file a claim within 3 months after the first publication, even though both of those creditors alleged they were reasonably ascertainable and were entitled to, but were not served with, notice by mail, the event which should have been the triggering event for the time period to file the claim. The chart below illustrates the problems with the current statute and the confusion created by the *Morgenthau* and *Lubee* cases.

[Remainder of Page Intentionally Left Blank]


A claim is filed in Probate Proceeding!
Has 2 years passed since date of death?? (733.710)
YES!
Claim is barred! 733.710
NO!
File Motion to Strike Claim (No opportunity for extension of time)
Was claim TIMELY FILED?? "Any claim not timely filed as provided in this section is barred even though no objection is filed" 733.702(3)
WHAT IS TIMELY FILED?????
CONFUSING CONCEPT!
Under Lubee and Morgenthau
Under Current Statute!!
If creditor not served with notice to creditors, creditor must file claim within 3 month window following publication. In alternative, must file Petition to Extend Time to File Claim. Filing of claim itself within 2 year period without petition for extension of time is not sufficient. "Whether or not [creditor] was readily ascertainable was immaterial in civil action."
733.702(1) determines what claims are barred. It contains two bar periods: "If not barred by 733.710, no claim or demand …is binding upon the estate or beneficiaries … unless filed in the probate proceeding on or before the later of:
* 3 months after the time of the first publication, or
*AS TO ANY CREDITOR REQUIRED TO BE SERVED WITH A COPY OF THE NOTICE TO CREDITORS, 30 DAYS AFTER THE DATE OF SERVICE ON THE CREDITOR.
To determine which bar period applies, must decide if claimant "was required to be served with a copy of the notice to creditors?" See Pope, Mullane, and Mennonite (copies attached)
Options
POTENTIAL PROBLEM: Ascertainable creditor not given actual notice can be barred simply by publication – violation of Pope?
POTENTIAL PROBLEM: Reads 2nd bar period in 733.702(1) to only apply if PR chooses to give notice, regardless of whether the creditor was ascertainable.
Do nothing, assume claim barred –
PROBLEM: No determination as to validity of claim, no way to know if creditor is interested person or not.
File Motion to Strike Claim and set hearing.
Creditor given right to come in and prove whether ascertainable before claim stricken.
PROBLEM: burdensome on estate to have to have hearing every time late claim filed.
File and serve Notice to File Petition for Extension – creditor limited to 30 days to file petition.
Note – at least some form of actual notice with opportunity to present evidence of ascertainable status
PROBLEM: – make ascertainable creditor who files timely claim ask for extension when claim not late – system still confusing.
ALSO, if claim determined to be timely filed, has PR missed time to object? See 733.733.705(2) must file objection within 4 months of publication or 30 days from TIMELY FILING of claim.

2. **Practical Pointer/Solution** – The Probate Law Committee is working on a proposed statute to clarify the rights of an ascertainable creditor who has not received a notice to creditors and a new procedure to allow a personal representative to force a creditor to timely establish any rights they may have as an ascertainable creditor or strike the late filed claim. Until the legislation is completed a petition for extension of time should be filed with any claim filed after the expiration of the 3 month creditor period and the petition should be set for hearing prior to the expiration of 2 years from the decedent's date of death to preserve all rights of the creditor and assure the creditor is provided the opportunity to establish whether their claim was timely filed.

B. **After born Heirs** -- A recent federal case caused controversy in Florida regarding the prospect of the rights of after-born heirs to inherit under Florida Law. See *Astrue v. Capato 132 S.Ct. 2021 (2012, 566 U.S. ___ (2012).*

1. **Background:** In *Astrue,* Robert Capato was diagnosed with cancer. Prior to his treatment, he deposited sperm in a sperm bank. Subsequent to his death, his widow, Karen Capato, underwent in vitro fertilization using the frozen sperm, which resulted in the birth of twins. The twins are undisputedly the natural children of Robert Capato. After their birth, Ms. Capato applied for social security survivorship benefits for the twins. Her attorneys argued that the SSA defines child as a "the child or legally adopted child of an insured individual." The court, however, held that the SSA also requires that to be entitled to benefits, the child must "qualify for inheritance from the decedent under the state intestacy law, or satisfy one of the statutory alternatives to that requirement." *Id.* At 2026. At the time of his death, Mr. Capato was a resident of Florida. Under Florida law, the child must be conceived before the decedent's death to qualify as an after born heir. See Florida Statutes, Section 732.106. Further, a child conceived through artificial means is not eligible for a claim against the decedent's estate unless the transfer of the pre-embryo, sperm, or egg is complete prior to the death of the father or the child has been provided for the by decedent's will. Florida Statutes, Section 742.17(4). In this case, the twins were not conceived before Mr. Capato's death and were not provided for in his will. Therefore, the twins were not entitled to social security survivorship benefits. *Id.* at 2036

2. **Practical Pointer/ Solution** -- The implications of this case extend far beyond the limited issue of social security benefits. The questions remain as to the interpretation of the language of s. 742.17(4) in the application to beneficiaries under trusts and other testamentary documents. The Probate Law Committee is reviewing this issue and will be proposing statutory revisions in the near future. In the meantime, if you have a client who has, because of health reasons or other personal reasons, frozen pre-embryos, you should discuss whether the client wishes to include the children who may ultimately be born as a result of those pre-embryos in their estate plan.