

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT**

JOAN JOHNSON,

CASE NO.: 4D18-0432

Appellant,

L.T. No.: 502015CP001096XXXXNB

v.

LEE TOWNSEND, et al.,

Appellees.

**ANSWER BRIEF OF APPELLEES, LEE TOWNSEND, LESLIE LYNCH,
ELIZABETH DENECKE and LISA EINHORN**

On Appeal from the Probate Court of the Fifteenth Judicial Circuit
in and for Palm Beach County, Florida

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Statement of the Case and Facts

Appellees supplement Appellant's Statement of the Case and Facts with the following:

Appellant Joan Johnson ("Joan") occupies two separate and distinct capacities in this action: individually, she is the surviving spouse and a beneficiary of the Estate (R. 0327-0329). In her other capacity as Personal Representative ("PR"), Joan is responsible for the timely and efficient administration of the Estate (R. 0359).

Joan, in her individual capacity, did not make a written demand upon herself as PR to determine her belatedly-asserted title to the subject property within three months after service of the Notice of Administration. (*See* § 732.223, Fla. Stat.). As she concedes, Joan made no effort to assert any community property rights in the subject property until more than two years after the Decedent's death. Initial Brief, p. 1.

Summary of the Argument

It is undisputed that Joan's Petition to perfect and determine her community property interests in Decedent's Estate was filed September 6, 2017, well more than two years after Decedent's death on January 21, 2015. Joan's Petition was therefore properly stricken by the Probate Court as untimely pursuant to both section 733.702(1) and section 733.710, Florida Statutes.

Joan's Petition is not excepted from either of the above statutes, as her claim does not constitute a lien, mortgage, or security interest, nor does her claim fall within the narrow trust exception which applies, if at all, only to §733.702 and not to §733.710, Fla. Stat.

Argument

I. Joan's Petition is a Claim and a Cause of Action

A. Joan's Petition Claims Personal Property in the Possession of the Personal Representative

Section 733.702(1), Florida Statutes, provides in pertinent part:

If not barred by s. 733.710 ... no claim for **personal property in the possession of the personal representative** is binding on the estate, on the personal representative, or on any beneficiary unless filed in the probate proceeding on or before the later of the date that is 3 months after the time of the first publication of the notice to creditors ... ¹

Joan's Petition (R. 0778-0797), which requests "a determination and Order as to her community property rights in the **assets held in the Probate Estate. . . .**" is plainly a "claim for personal property in the possession of the PR" and therefore barred by §733.702(1). It is also a "cause of action" and, as such, is further barred by §733.710(1):

¹ Joan also failed to serve herself with a copy of the Notice to Creditors. That issue is pending, fully briefed, before this Court under Case No. 4D17-3268. Even if this Court were to find that Joan's failure to serve herself exempted her from the time limitations prescribed by § 733.702, her Petition would still be barred by § 733.710. "...the probate court lacks the authority to extend the time period set forth in section 733.710." *May v. Illinois National Ins. Co.*, 771 So.2d 1143, 1162 n. 12 (Fla. 2000).

Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent's estate, the personal representative, if any, nor the beneficiaries shall be liable for any **claim or cause of action** against the decedent, whether or not letters of administration have been issued, except as provided in this section.

B. No “Lien” Exception Under §733.710(3)

Joan’s efforts to characterize her community property claim as a lien are equally unavailing. Section 733.710(3) is much narrower than §733.702(3); §733.710(3) provides an exception only for “the lien of any **duly recorded mortgage or security interest** or the **lien of any person in possession of personal property** or the **right to foreclose and enforce the mortgage or lien.**”

Joan’s “lien” is not a “duly recorded mortgage or security interest,” nor is she, in her individual capacity, “in possession of [the subject] personal property.” Thus, Joan could fall within this exception only by having a “right to foreclose and enforce the mortgage or lien.”

Joan had no such right prior to Clark’s death, as she concedes that the subject assets were properly titled in her late husband, and it does not appear that she attained any such right upon his death. Rather, she at most acquired the right, upon Clark’s death, to seek to “perfect” her title to the subject property in the Probate Court.

Joan cites to the 1967 Third DCA case of *Quintana v. Ordone*, 195 So. 2d 577 (Fla. 3rd DCA 1967), in her efforts to describe her community property claim as something other than a claim. *Quintana*, however, construed former §733.16, Fla.

Stat., which was repealed in 1974. Laws 1974, c. 74-106, § 3. Prior to its repeal, §733.16 had provided a 6-month limitation period. Section 733.16 was not the predecessor of §733.710; rather, former §733.108 was renumbered as § 733.710 in 1975. Laws 1975, c. 75-220, § 50. Thus, it appears that *Quintana* addressed only the initial “limitations” period of what is now §733.702, and not the “non-claim” period provided by the current §733.710. *See also Grijalva v. Gulf Bank*, 2011 WL 282754 (S.D. Fla. 2011).²

C. Time to Seek Perfection Under §§732.216 – 732.228

Joan is correct that, by failing (in her individual capacity) to serve a written demand on herself as PR to investigate her potential interests in the subject property, she (individually) exonerated herself (as PR) from liability for failure to do so. It does not logically follow, however, that Joan’s failure to assert her claim in a timely manner also granted her an unlimited period of time in which to assert such claims. The most logical reason for including such exoneration provisions in the statutory procedure is to protect the PR in a case, like this one, in which the purported community property is lost to the claimant because the claim is not timely asserted. If the claim could be asserted at any time, as Joan argues, there would be no purpose for providing exoneration.

² The Eleventh Circuit provides in Eleventh Circuit Rule 36-2 that while “unpublished opinions are not considered binding precedent[, t]hey may be cited as persuasive authority.”

The statutory scheme, taken as a whole and keeping in mind its purpose of fostering the expeditious and efficient administration of estates, clearly evidences the intent that community property claims, like all others, must be brought within the times provided for any other claims.

II. The Trust Exception Does Not Apply

The “trust exception” applies only to §733.702 (and its predecessor, §733.16), not §733.710. *Grijalva v. Gulf Bank*, 2011 WL 282754 (S.D. Fla. 2011):

This argument fails as the *Scott* case dealt with the idea of a "trust exception" in the context of §733.702's statute of limitations. It also fails because, as the May court explained, the only exceptions to the application of §733.710 are contained in the statute itself.

* * *

Consequently, both prior to and after the May decision, numerous Florida appellate courts have barred claims filed against a decedent's estate that fell outside the two-year bar set forth in §733.710 and did not fall within the statutory exceptions.

See also section 733.702(5), Fla. Stat. ("Nothing in this section shall extend the limitations period set forth in s. 733.710."); *Velzy v. Estate of Miller*, 502 So.2d 1295 (Fla. 2d DCA 1987) (trust exception not applied); and *Scott v. Reyes*, 913 So.2d 13 (Fla. 2d DCA 2005) (trust exception not applied). Florida law is clear that there are no exceptions to the two-year non-claim statute other than those specifically set forth in that statute itself.

Conclusion

The Probate Court properly struck Joan's Petition as untimely. This Court should AFFIRM.

Certificate of Service

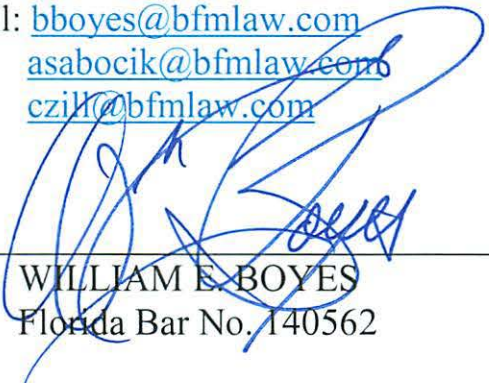
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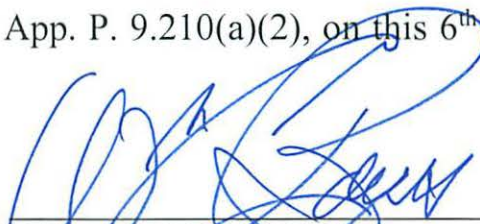
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Certificate of Compliance

I HEREBY CERTIFY that the contents of this Answer Brief are in compliance with the font requirements of Fla. R. App. P. 9.210(a)(2), on this 6th day of June, 2018.



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