

# REAL PROPERTY, PROBATE AND TRUST LAW SECTION OF THE FLORIDA BAR

## WHITE PAPER

### Proposed amendment of § 731.301 to provide that service of formal notice does not confer in personam jurisdiction over the recipient.

#### I. SUMMARY

Appellate court opinions in several cases have determined that service by formal notice under the Florida Probate Rules is sufficient for a probate court to acquire *in personam* jurisdiction over persons deemed to be “interested persons” under the Florida Probate Code. There is no authority in statutes or the probate rules suggesting that to be the law, and the Ad Hoc Jurisdiction & Service of Process Committee, although acknowledging that it is possible to provide such authority in a manner that complies with due process, believes that it is preferable to limit the means of acquiring personal jurisdiction to service of summons or other process by traditional means currently allowed by statute or the Florida Rules of Civil Procedure.

#### II. CURRENT SITUATION

In a series of decisions, the Second District Court of Appeal has held that those who are deemed to be “interested persons” within the meaning of F.S. 731.201(23) (i.e., those who may reasonably be expected to be affected by the outcome of a particular proceeding) may be subjected to personal jurisdiction by the service of formal notice pursuant to F.S. 731.301(2). Payette v. Clark, 559 So.2d 630 (2d DCA 1990); Kountze v. Kountze, 20 So.3d 428 (2d DCA 2009); Hall v. Tungett, 980 So.2d 1289 (2d DCA 2008); Galego v. Robinson, 695 So.2d 443 (2d DCA 1997). The Fourth District Court of Appeal has agreed, at least in cases where law firms or attorneys have rendered legal services to a Florida probate estate, that they are interested persons and that *in personam* jurisdiction (for the purpose of reviewing and potentially ordering refund of fees paid) could be acquired by service of formal notice. Rogers & Wells v. Winston, 662 So.2d 1303 (4<sup>th</sup> DCA 1995); Simmons v. Est. of Baranowitz, 189 So.3d 819 (4<sup>th</sup> DCA 2015).

Prior to October 1, 2010, when all of the foregoing cases except Baranowitz were decided, F.S. 731.301(2) read as follows:

(2) Formal notice shall be sufficient to acquire jurisdiction over the person receiving formal notice to the extent of the person’s interest in the estate.

Effective October 1, 2010, the subsection was amended to read as it does today:

(2) *In a probate proceeding*, formal notice is sufficient to acquire jurisdiction over the person receiving formal notice to the extent of the

person's interest in the estate or in the decedent's protected homestead.  
[Emphasis added].

By statute, probate proceedings are *in rem*, meaning that the court has jurisdiction over the will, if any, the tangible and intangible assets of the decedent's estate (wherever located), and real estate located in Florida, all without the necessity of any original process. F.S. 731.105; *Also see In re: Estate of Williamson*, 95 So.2d 244 (Fla. 1957). Service by formal notice is one method of complying with due process requirements necessary to invoke the court's *in rem* jurisdiction over those receiving the notice to the extent of their interest in the estate. Even without addition of the phrase, "in a probate proceeding," the statute is easily read to be addressing only a means of notice to persons subject to the court's *in rem* jurisdiction that is calculated to effect due process over those receiving the notice.

Formal notice is not judicial process, and is not the equivalent of a summons. For example, nowhere in the Florida Probate Code does it provide that a default may be entered after service of Formal Notice, as would be the case with judicial process. Formal notice does not support *in personam* jurisdiction because formal notice is not judicial process, is not issued under the seal of the court, nor is it typically served as provided in Chapter 48. If the clerk's seal is not affixed to judicial process, it is void and cannot be used to obtain personal jurisdiction. 12A FLA.JUR2d *Courts and Judges* §§ 53-55 and 61-62. While acknowledging that it is possible to provide such authority in a manner that complies with due process, the Committee believes that it is preferable to limit the means of acquiring personal jurisdiction to service of summons or other judicial process by traditional means currently allowed by statute or the Florida Rules of Civil Procedure. By requiring compliance with the existing procedural rules for acquiring personal jurisdiction, the safeguards that assure actual notice by the person over whom personal jurisdiction is sought are preserved.

Personal jurisdiction is neither contemplated nor required in a majority of adversary proceedings in probate. Of those specific adversary proceedings listed in Probate Rule 5.025(a) that require service of formal notice, only surcharge of a personal representative or guardian requires *in personam* jurisdiction, and those fiduciaries have submitted to the court's personal jurisdiction by instituting or participating in the court proceedings. See *Payette v. Clark*, 559 So.2d 630 (2d DCA 1990) (filing of a petition for administration subjects the personal representative to *in personam* jurisdiction "for all purposes related to the administration").

Thus the formal notice procedure was never intended to be a method of obtaining personal jurisdiction over persons having an interest in the probate estate. *In Re Estate of Black*, 528 So.2d 1316 (Fla. 2d DCA 1988); *In Re Estate of Vernon*, 608 So.2d 510 (Fla. 4<sup>th</sup> DCA 1992). Formal notice is a method of service of notice to a person subject to the court's *in rem* jurisdiction. It is not a summons or judicial process that confers *in personam* jurisdiction over the recipient.

The notion that any person determined to be an “interested person” can be subjected to personal jurisdiction by service of formal notice is incorrect and can be made clear by the proposed amendment to F.S. 731.301.

### **III. EFFECT OF PROPOSED CHANGES**

The proposed amendment to section 7331.301(2) provides:

In a probate proceeding, formal notice is sufficient to acquire jurisdiction over the person receiving formal notice to the extent of the person’s interest in the estate or in the decedent’s protected homestead. Formal notice is not sufficient to invoke the court’s personal jurisdiction over the person receiving notice regardless of the manner in which it is served.

The proposed amendment would change the result in each of the cases cited in the first paragraph of Section II above. In those factual situations it would be necessary for the petitioners to obtain personal jurisdiction over the adverse parties by traditional means such as service of a summons pursuant to Chapter 48, Florida Statutes.

### **IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

The proposal does not have a fiscal impact on state or local governments.

### **V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR**

The proposal does not have a direct economic impact on the private sector.

### **VI. CONSTITUTIONAL ISSUES**

There appear to be no constitutional issues raised by this proposal.

### **VII. OTHER INTERESTED PARTIES**

Florida Justice Association, Inc.

1 A bill to be entitled

2 An act relating to personal jurisdiction of probate courts over persons having an interest in  
3 an estate; amending s. 731.301, F.S.; providing that in personam jurisdiction over interested  
4 persons cannot be acquired by service of formal notice.

5 Be It Enacted by the Legislature of the State of Florida:

6 Section 1. Subsection (2) of section 731.301, Florida Statutes, is amended to read:

7 731.301 Notice

8 (2) In a probate proceeding, formal notice is sufficient to acquire jurisdiction over the person  
9 receiving formal notice to the extent of the person's interest in the estate or in the decedent's  
10 protected homestead. Formal notice is not sufficient to invoke the court's personal jurisdiction  
11 over the person receiving notice regardless of the manner in which it is served.

12  
13 Section 2. This act shall take effect upon becoming law and shall apply to formal notice  
14 given on or after such date.