Notice to Creditors — Publication is No Longer Enough

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I. Introduction

The most significant developments in the area of probate during the past year are the enactment of (1) new provisions governing notice to creditors in estate proceedings and (2) new claims periods respecting creditors' claims. The purpose of this Article is to explain the reasons for the changes and to set forth the nature of the changes and their ramifications to the practitioner. By understanding the reasons for new notice provisions and the legislative choices made, the practitioner hopefully will be less inclined to resist, or at least resent, these changes.

II. Background

Prior to July 1, 1990, Indiana's Probate Code, as part of the probate revisions enacted in 1953, established time periods in which creditors were to file claims against an estate. Like many other jurisdictions, Indiana specified two time periods. The first time period expired five months after the first publication of notice to creditors.[1] This time period was in the nature of a nonclaims period because filing within this time period was necessary to confer jurisdiction on the court to hear the claim.[2] Thus, a failure to file within the time limit served as a complete bar to the adjudication of the claim.[3]

A second time period applied when no administration of the decedent's estate was commenced. This time period ran for one year after a decedent's death.[4] Within this one-year period, a claimant could cause

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1. Ind. Code § 29-1-14-1(a)(1) (1988).
2. *See* Lewis v. Smith's Estate, 130 Ind. App. 390, 162 N.E.2d 457 (1959).
3. Quinlan v. Glissman, 142 Ind. App. 1, 232 N.E.2d 384 (1968); Donnella v. Crady, 135 Ind. App. 60, 185 N.E.2d 623 (1962).
4. Ind. Code § 29-1-14-1(d) (amended effective July 1, 1990).

a decedent's estate to be opened for the purpose of filing a claim against the estate.[5]

No notice of a decedent's death was required to be given in order to bar a claimant under the one-year statute. With respect to the nonclaims statute (the five-month statute), notice had to be published in order to commence the running of the five-month period.[6]

Indiana law only required publication of notice to creditors.[7] No other notice was required even if the personal representative knew the names of the decedent's creditors. Thus, the statute placed a heavy burden on creditors to be vigilant and to act promptly in filing their claims when learning of a debtor's death.[8]

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5. Indiana's nonclaim and one-year statutes were by no means unique. Most states adopted limitation periods for the filing of claims. These periods ranged from two months (Oklahoma) to three years (Minnesota). *See* statutes cited in Note, Tulsa Professional Collection Services v. Pope: *Here Lies John Doe — But When May He Rest in Peace?*, 13 Am. J. Trial Advoc. 681, 705 n.75 (1989).

6. The statute still requires claimants to file within five months "after the date of the first published notice to creditors." Ind. Code Ann. § 29-1-14-1(a)(1) (Burns Supp. 1990); Ind. Code § 29-1-14-1(a)(1) (1988) (amended effective July 1, 1990). Therefore, if no notice is published, the limitations period never starts to run.

7. Ind. Code § 29-1-7-7 (amended effective July 1, 1990).

8. A study, conducted by Professor John Langbein, concluded that "probate plays an inconsequential role in the collection of decedents' debts . . . ." Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1120 (1984). For reasons explained in that article, most creditors obtain payment of their debts without resort to the claims procedures. Professor Langbein notes:

> Thus, when survivors will not acknowledge or pay decedents' debts without court coercion, when survivors cannot pay, or when a decedent's estate is insolvent and apportionment of assets is necessary, creditors still elect their probate remedies if outstanding debts are large enough to justify the expense of the court proceedings. Furthermore, creditors may benefit from the probate system without actually employing it. A creditor's access to the coercive powers of the probate system has a deterrent influence that aids the creditor in his attempts to obtain out-of-court satisfaction from survivors (and from probate representatives — executors and administrators).
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> The creditor protection procedures of American probate law developed in the nineteenth century to serve needs radically different from today's. By routinizing the process of calculating and evidencing consumer debts, the data processing revolution has virtually eliminated the problem toward which much of the debt-resolving phase of probate procedure has been oriented . . . .
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> In the late twentieth century, creditor protection and probate have largely parted company. Had this development been otherwise, the rise of the will substitutes could not have occurred. If creditors had continued to rely significantly upon probate for the payment of decedent's debts, creditors' interests would have constituted an impossible obstacle to the non-probate revolution. For — make no mistake about it —the will substitutes do impair the mechanism by which probate protects creditors. Even though the substantive law governing

Although publication may have created a hardship on creditors by placing a duty of vigilance on their shoulders, it provided efficiency in the estate administration process. Personal representatives did not have to expend time and money serving notice upon all creditors. Further, personal representatives were assured that, after the five-month claims period expired, estate assets safely could be distributed free from the claims of creditors.

III. Tulsa Professional Collection Services, Inc. v. Pope

The rules of the game changed, however, when the United States Supreme Court entered its decision in *Tulsa Professional Collections Services, Inc. v. Pope.*[9] The Supreme Court applied the language in *Mullane v. Central Hanover Bank & Trust Co.*[10] to the estate context. *Mullane* stated that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested

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> most of the major will substitutes usually recognizes the priority of creditors' claims over the claims of gratuitous transferees (life insurance is sometimes an exception), [footnote deleted] the decentralized procedures of the nonprobate system materially disadvantage creditors. Whereas probate directs all assets and all claimants to a common pot, the nonprobate system disburses assets widely and facilitates transfer without creditors' knowledge. [footnote deleted] If modern creditors had needed to use probate very much, they would have applied their considerable political muscle to suppress the nonprobate system. Instead, they have acquiesced without struggle, as have the most powerful of creditor-like agencies, the federal and state revenue authorities.

Id. at 1124-25.

9. 485 U.S. 478 (1988). In *Pope*, the decedent's personal representative opened the estate and, pursuant to Oklahoma law, gave notice to creditors by publication. A claim was asserted against the estate by Tulsa Professional Collection Services after the two-month Oklahoma time limitation on the filing of claims ran. The local probate court, the Oklahoma Court of Appeals, and the Oklahoma Supreme Court held that the claim was barred. *Id.* at 482, 483. This case has been widely discussed in numerous other articles. It is not the author's intent to conduct an analysis of *Pope*. For that purpose, the author refers readers to some excellent articles that discuss the case in some depth. *See* Note, *supra* note 5, at 697; Note, *Constitutional Law — Due Process — When Executor Either Knows or May Reasonably Ascertain the Identity of an Estate's Creditor He Must Provide Actual Notice That Creditor's Claim Will Terminate*, 58 Miss. L.J. 193 (1988); Note, *New Requirements of Creditor Notice in Probate Proceedings*, 54 Mo. L. Rev. 189 (1989); Note, *Probate Nonclaim Statutes and the* Tulsa *Decision: Requiring Actual Notice To Reasonably Ascertainable Creditors*, 18 Stetson L. Rev. 471 (1989); Note, *Probate — Satisfying the Due Process Requirement of Actual Notice To Estate Creditors*, 11 U. Ark. Little Rock L.J. 603 (1988); Note, *Due Process Requires Actual Notice To Known or Reasonably Ascertainable Estate Creditors:* Tulsa Professional Collection Services v. Pope, 58 U. Cin. L. Rev. 303 (1989).

10. 399 U.S. 306 (1950).

parties of the pendency of the action and afford them an opportunity to present their objections."[11] *Mullane* and its progeny established the guideline that, whenever a legal proceeding may affect a property right, due process requires reasonable notice and a realistic opportunity to respond.[12]

The Supreme Court in *Pope* examined Oklahoma's nonclaim statute which, in effect, was similar to Indiana's nonclaim statute (although it provided for only a two-month claims period) and held that: (1) state action was present in the probate proceedings governing the estate,[13] and (2) failure to give personal notice to known or reasonably ascertainable creditors violated the fourteenth amendment based on the rationale in *Mullane*.[14]

The Court was not insensitive to the need to bring a decedent's affairs to a close. The Court noted that a state has an interest in promoting the efficient administration and timely closing of a decedent's estate, but also noted that, on the whole, the failure to give actual notice to known or reasonably ascertainable creditors must be corrected.[15] It concluded that actual notice is not truly inconsistent with the state's legitimate interest in the prompt conclusion of estates.[16]

Thus, *Pope* invalidates as unconstitutional statutes that require only published notice to those creditors who are "known or reasonably as-

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11. *Id.* at 314.

12. *See* 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, 435 n.9 (1990).

13. In support of its "state action" finding, the Court in *Pope* noted:

> Here . . . there is significant state action. The probate court is intimately involved throughout, and without that involvement the time bar is never activated. The nonclaim statute becomes operative only after probate proceedings have been commenced in state court . . . . [The state court's] involvement is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment.

Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 487 (1988). Chief Justice Rehnquist expressed his opinion that the state's involvement was "virtually meaningless" and the probate court's actions were "perfunctory." *Id.* at 494 (Rehnquist, C.J., dissenting).

14. In addition to these two findings, the Court also found that an unsecured claimant has "an interest in property protected by the Fourteenth Amendment." *Id.* at 485.

15. *Id.* at 489.

16. *Id.* at 489, 490. Prior to the *Pope* decision, several courts addressed the issue of due process vis-a-vis published notice to creditors in estate proceedings. Many held that due process considerations were outweighed by the costs, delays, and inefficiencies involved in giving actual notice. *See* Union Pac. R.R. v. Estate of Madden, 241 Kan. 414, 736 P.2d 940 (1987); Estate of Busch v. Ferrell Duncan Clinic, 700 S.W.2d 86 (Mo. 1985); Gibbs v. Estate of Dolan, 146 Ill. App. 3d 203, 496 N.E.2d 1126 (1986).

certainable.''[17] Because Indiana's statute prior to July 1, 1990 required only published notice to all creditors,[18] known or unknown, this statute failed to meet the fourteenth amendment's due process requirements as mandated in *Pope*. Because Indiana's statute could not survive a constitutional challenge under *Pope*, the nonclaims portion of Indiana's statute would not bar the claims of known or reasonably ascertainable creditors who did not receive personal notice of the opening of the estate and of the running of the five-month-claims period.

The Court in *Pope* further drew a distinction between nonclaims statutes — those that run upon publication of notice — and ''self-executing statute[s] of limitation''[19] — those that run from the date of an event not involving state action (such as a date of death). The Court noted that, although a limitation period may be specified in a state statute, the limitation period alone does not necessarily involve a sufficient level of state action to invoke the fourteenth amendment.[20]

Indiana's Legislature addressed the constitutional issues raised by *Pope* in its 1990 legislative session. The result reflects an attempt to balance continued efficiency in the estate administration process and the timely closing of decedent's estates with the *Pope* due process requirements. The end result of the legislature's activity was a group of statutory changes that initially appear to be more complex than necessary in response to *Pope*. A second glance, however, reveals that these changes will cause only minor adjustments in the day-to-day practice of estate administration.[21]

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17. *Pope*, 485 U.S. 478, 491.

18. Ind. Code § 29-1-7-7 (1988) (amended July 1, 1990). Professor Falender concurs that Indiana's statute failed to pass constitutional muster after *Pope*. 1 Henry's Indiana Probate Law & Practice § 307 (D. Falender 8th ed. 1989). She also asserts that this constitutional inadequacy further extends to Indiana's failure to give actual notice to heirs at law in testate estates. *Id.*

19. *Pope*, 485 U.S. at 486-87.

20. *Id.*

21. A legislative goal in response to *Pope* ''should be to effect compliance with *Pope*'s 'actual notice' requirement while minimizing the negative impact of such compliance on prompt, efficient and economical estate settlement.'' Waterbury, *Notice To Decedents' Creditors*, 73 Minn. L. Rev. 763, 774-75 (1989). Professor Waterbury expressed his belief that these new statutes should resolve the constitutional problem in favor of successors rather than creditors. Professor Waterbury noted that ''[t]he conclusion that legislatures should revise short-term statutes for the primary benefit of successors rather than creditors is significant because it excludes from consideration some remedial legislation for which substantial precedent exists.'' *Id.* at 775-76. This remedial legislation includes procedures that would allow direct succession without estate administration and would put the burden of satisfying claims on a decedent's successors. This result could be achieved simply by removing any time bar to the filing of claims. *Id.* at 777.

IV. Legislative Choices

The new notice requirements and changes to Indiana's claims statutes are found in Public Law 154-1990.[22] This bill was joined in committee with the IOLTA (Interest On Lawyer's Trust Accounts) measure, which was hotly debated in the Indiana House and Senate and was recently struck down by the Indiana Supreme Court.[23] The court's finding that the IOLTA provisions were invalid will not affect the validity of the new notice provisions.[24]

Specifically, the new provisions address four outstanding problems faced in the wake of *Pope*. The first problem concerns who should receive actual notice; the second concerns what type of notice should be given to creditors; the third concerns when notice to creditors should be given; and the fourth concerns what time limitation should be placed on the claims of those creditors who are arguably reasonably ascertainable but who are notified only by publication. The legislature's response to these questions is addressed in the subsequent portions of this Article.

A. Who Should Receive Actual Notice

Pope appears to require actual notice to "known or reasonably ascertainable" creditors.[25] Indiana's new statute adopted this language,[26] with the caveat that actual notice needs to be sent only to creditors whose claims remain unpaid.[27] Therefore, publication notice to known or reasonably ascertainable claimants is no longer sufficient.

B. The Type of Notice

Prior to July 1, 1990, Indiana law prescribed the form of notice to be published.[28] The statute mandated the form of notice and required the notification to be sent to distributees.[29] The new statute similarly

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22. 1990 Ind. Acts 1044.

23. *In re Public Law 154-1990*, 561 N.E.2d 791 (Ind. 1990).

24. *Id.* at 794.

25. Tulsa Professional Collection Serv., Inc. v. Pope, 485 U.S. 478, 491 (1988).

26. Ind. Code Ann. § 29-1-7-7(d)(2) (Burns Supp. 1990). This statutory change puts Indiana among those states that require *actual* notice to creditors. For examples of other states that require actual notice, see Fla. Stat. § 733.212(4)(a) (Supp. 1990); Utah Code Ann. § 75-3-801 (Supp. 1990). Several states have opted not to require actual (and sometimes even published) notice at all. This appears to be one approach favored by drafters of the Uniform Probate Code. Unif. Prob. Code § 3-801 to -803 (1969). The Uniform Probate Code contains language that would allow adopting states to make publication of actual notice optional. *Id.*

27. Ind. Code Ann. § 29-1-7-7(d)(3) (Burns Supp. 1990).

28. Ind. Code § 29-1-7-7 (1988) (amended July 1, 1990).

29. *Id.*

prescribes a statutory form of notice to be sent to distributees and creditors and to be published.[30] Thus, Indiana now requires two types of notice: (1) actual notice to known and reasonably ascertainable creditors, and (2) published notice to all other creditors.

The form of notice is similar to the notice form previously required in Indiana.[31] Like prior Indiana law, a copy of the notice must be published in a newspaper of general circulation in the county in which the court administering the decedent's estate is located.[32] Unlike prior Indiana law, the new notice provisions provide that notice can be published in the county adjacent to the county where the estate is being administered if the county where the estate is being administered has no newspaper of general circulation.[33] This language was not added in response to *Pope*, but rather in response to complaints from attorneys practicing in counties where the newspapers of general circulation were published in adjoining counties.

The clerk is required to mail the statutory notice to each distributee *and creditor* whose name and address is in the petition for probate or issuance of letters.[34] Thus, notice to creditors can be given at the

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30. IND. CODE ANN. § 29-1-7-7(i) (Burns Supp. 1990).

31. *Id.* The new notice form states:

NOTICE OF ADMINISTRATION

In the ________________ Court of ________________ County, Indiana.

Notice is hereby given that ____________________ was, on the ____ day of ____________, 19____, appointed personal representative of the estate of ________________, deceased, *who died on the* ____ *day of* ________, *19*____.

All persons *who have* claims against *this* estate, whether or not now due, must file the *claim in the office of the clerk of this* court within five (5) months from the date of the first publication of this notice, *or within one (1) year after the decedent's death, whichever is earlier*, or *the* claims will be forever barred.

Dated at ______________, Indiana, this _____ day of __________, 19____.

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CLERK OF THE ______________COURT

FOR ____________ COUNTY, INDIANA

Id. (italics indicate changes from prior law). The date of death must be disclosed in the notice because of one of the new statutes of limitations respecting claims, discussed *infra* at Section VII.

32. IND. CODE ANN. § 29-1-7-7(b).

33. *Id.*

34. *Id.* § 29-1-7-7(c). The amended statute reads:

(c) *The* notice *required under subsection (a)* shall be served by mail on each commencement of the estate's administration. As discussed later, this is not the only time that notice can be given.

C. *When Notice is to be Given*

The question of when notice must be given to creditors is problematic. The legislature realized that notice could not be required to be given at the time of the opening of the estate because it would cause inordinate and often detrimental delays in the opening of the estate.

Requiring notice at the time of the opening of an estate produces three apparent drawbacks. First, requiring notice at the time of the opening of an estate imposes an almost insurmountable burden on a proposed personal representative to ascertain the identity of a decedent's creditors before the personal representative's appointment. Learning the creditors' identities would be difficult and sometimes impossible because appointment is often a prerequisite to obtaining and reviewing a decedent's records. Second, requiring notice at the time of opening an estate requires giving notice to *all* creditors, including those that the personal representative intends to pay, and would be unduly burdensome and expensive. Finally, requiring notice at this time does not give the personal representative any protection if a creditor were discovered after the opening.

The statute may require the personal representative to give notice upon discovering a creditor. This notice requirement would be easy to administer, except that each notice would result in the commencement of a different nonclaims period operative to each particular creditor. Thus, an estate would never be able to put itself outside the claims period because additional claimants could be discovered at any time during the estate's administration.

The third time when notice could be given would be within a reasonable period after the estate is opened. This would allow the personal representative some time to ascertain the identity of a decedent's creditors and to pay those creditors whose debts the personal representative determined to be valid obligations of the decedent. However, this would not necessarily resolve the problem of finally cutting off claims of creditors who are not notified.

The legislature adopted the last approach with some modifications designed to incorporate a final limitation on the filing of claims by

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> heir, devisee, legatee, *and known creditor* whose name and address is set forth in the petition for probate or letters. The personal representative shall furnish sufficient copies of *the* notice, prepared for mailing, and the clerk *of the court* shall mail the *notice upon the issuance of letters.*

Id. (italics indicate changes from prior law).

unnotified-but-known or reasonably ascertainable creditors. Indiana law now requires notice to be sent to known or reasonably ascertainable creditors within three months after the first published notice to creditors.[35] If this notice is sent after the estate is opened, the personal representative is required to send the notice.[36] After the estate is opened, the personal representative should have an adequate idea of the decedent's creditors and should also have an opportunity to examine the validity of the decedent's debts and to pay those believed to be valid. Thus, notice will never need to be delivered to the great bulk of creditors — those creditors whose debts are paid by the personal representative.

The statute provides that the personal representative or the personal representative's agent can give notice.[37] This language would allow the notice to be given by the estate's attorney, for example. Service by the attorney should be convenient for a personal representative because the attorney can keep a list of those notified along with any evidence of service in the attorney's files. The list of notified creditors is also useful to the attorney in preparing a schedule of notified creditors. This schedule is to be given to the clerk as soon as possible after notice has been given.[38]

Questions exist pertaining to whether a creditor's *actual* knowledge that the decedent had died would be sufficient notice under *Pope*.[39] Knowledge of a debtor's death should not, however, constitute sufficient notice because it does not give the creditor knowledge that a time limitation is running against the creditor, any knowledge of the pendency of the action, or the opportunity to present the creditor's claim. Support for this proposition is found in *Pope*. The claim in *Pope* arose from services rendered by the hospital in which the decedent died. The claimant was a subsidiary of the hospital and had actual notice of the decedent's

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35. *Id.* § 29-1-7-7(e).

36. *Id.* § 29-1-7-7(d). This statute states:

> (d) The personal representative or the personal representative's agent shall serve notice on each creditor of the decedent:
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> (1) whose name is not set forth in the petition for probate or letters under subsection (c);
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> (2) who is known or reasonably ascertainable within three (3) months after the first publication of notice under subsection (1); and
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> (3) whose claim has not been paid or settled by the personal representative.
>
> The notice may be served by mail or any other means reasonably calculated to ensure actual receipt of the notice by a creditor.

Id.

37. *Id.*

38. *Id.* § 29-1-7-7(f).

39. Tulsa Professional Collection Serv., Inc. v. Pope, 485 U.S. 478 (1988).

death. This actual notice of the death was not sufficient to overcome the lack of notice of the proceedings.[40]

D. Nonclaims Statute

In requiring actual notice to known and reasonably ascertainable creditors, Indiana did not shorten its applicable claims period. For creditors notified by publication and for those notified within the first three months of the commencement of the estate's administration, the claims period remains at five months from the date of the first published notice to creditors.[41] However, if the personal representative fails to give this notice, or discovers a creditor after the three-month period expires, creditors will have (1) five months from the date of the first published notice to creditors, and (2) an additional two-month period that runs from the date notice is given to file their claims.[42] A final limitation for filing claims is discussed in a later portion of this Article.[43]

The practical effect of this statutory change is that the creditor will have only two months after actual notice in which to file the claim if the creditor is notified three months after the date of the first published notice to creditors. The two-month period is a shorter period of time than that allowed to claimants notified by publication.[44] This shortened period should not be an impediment to these creditors, however. Unknown creditors, if they miss the published notice, must still discover that the decedent died and must locate the decedent's estate (a process that may take several months). The notified creditor, however, knows

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40. *Id.* at 491.

41. IND. CODE § 29-1-14-1(a)(1) (1988). Some states have shortened their statutory claims period when actual notice is given. This shortened claims period makes some sense because claims generally are easily ascertainable and simple to file. *See* MINN. STAT. § 524.3-801 to -803 (1989); MO. REV. STAT. § 473.444 (1989).

42. IND. CODE ANN. § 29-1-7-7(e) (Burns Supp. 1990). This statute states:

> (e) Notice under subsection (d) shall be served within three (3) months after the first publication of notice under subsection (a) or as soon as possible after the elapse of three (3) months. If the personal representative or the personal representative's agent fails to give notice to a known or reasonably ascertainable creditor of the decedent under subsection (d) within three (3) months after the first publication of notice under subsection (a), the period during which the creditor may submit a claim against the estate includes the period specified under IND. CODE § 29-1-14-1 and an additional period ending two (2) months after the date notice is given to the creditor under subsection (d). However, a claim subject to this subsection may not be filed more than one (1) year after the death of the decedent.

Id.

43. *See infra* Section VII.

44. Several commentators have noted that a shortened time period is, perhaps, unfair. *See generally* Reutlinger, *supra* note 12.

that the decedent died, knows where the estate is located, and knows the time limitation for presentation of the claim. Filing a claim against an estate, unlike filing many other lawsuits, is a simple matter which only requires filing with the court a short, succinct statement of the claim, together with any underlying documents. Many courts even provide claim forms. Considering that defendants have only twenty days to respond to a lawsuit filed against them before default,[45] the sixty-day-claim period seems more than adequate.

The notice served on a creditor must be served either by mail or by "any other means reasonably calculated to ensure actual receipt of the notice by a creditor."[46] This language comes from *Mennonite Board of Missions v. Adams*.[47] The language was later adopted by the Court in *Pope*.[48] This statutory language that provides for service by other means should preserve flexibility in the delivery of notice in the event that means more appropriate than first-class mail are available. However, in opting to use other means of service, the personal representative or the agent of the personal representative should keep in mind that proof of service may become important. The personal representative should select the form of service resulting in actual notice which furnishes some proof not only that notice was served, but when it was served.

To comply with due process, notice to a decedent's creditors should contain statements not only that the decedent died but also that a time limitation will affect any claims that are not presented prior to the running of the limitation period. The prescribed statutory notice form contains language meeting these requirements.[49] However, this notice form should not be used in all circumstances. For notice given more than three months after the first published notice to creditors (and, thus, who have a time limitation expiring two months after the notice), the statutorily prescribed notice should be tailored to reflect the actual expiration of the nonclaims period applicable to the particular claimant.

V. Due Diligence

As noted previously, *Pope* requires notice to both known and reasonably ascertainable creditors.[50] Because known creditors are presumably those who are actually known to the personal representative, the words "reasonably ascertainable" must refer to those who are not known but

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45. *See, e.g.*, Fed. R. Civ. P. 12(b).
46. Ind. Code Ann. § 29-1-7-7(d) (Burns Supp. 1990).
47. 462 U.S. 791, 800 (1983).
48. Tulsa Professional Collection Serv., Inc. v. Pope, 485 U.S. 478, 491 (1988).
49. Ind. Code Ann. § 29-1-7-7(i) (Burns Supp. 1990).
50. *See supra* note 14 and accompanying text.

who could become known upon investigation by the personal representative. One question that will certainly arise with respect to this class of claimants is whether the personal representative used sufficient effort (that is, used due diligence[51]) to locate these creditors. Most claimants who were not notified and whose claims are barred likely will argue that they were known or reasonably ascertainable and that the statutory bar should not operate against their claims.

In an attempt to address these anticipated arguments, the Indiana Legislature provided the personal representative with some guidance as to the meaning of "due diligence" in the estate context. The statute now provides that due diligence in ascertaining creditors will be found if the personal representative reviews any financial records of the decedent's that are "reasonably available" to the personal representative and if the personal representative makes reasonable inquiry of persons "likely to have knowledge of the decedent's debts."[52]

To avoid placing an insurmountable burden on personal representatives, the personal representative is bound to "reasonableness" standards that appear throughout the statute.[53] Documents to be reviewed are only those "reasonably available."[54] Inquiries to individuals are limited to those "likely to have knowledge of the decedent's debts"[55] and then to only "reasonable inquiries."[56] These limitations are designed to avoid the personal representative's self-imposed duty (or arguments that the personal representative has a duty) to reconstruct the decedent's financial records and to interview anyone remotely connected to the decedent's affairs.[57]

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51. The Court in *Pope* appeared to endorse a standard of "reasonable diligence." 485 U.S. at 491.

52. Ind. Code Ann. § 29-1-7-7.5(a), (b) (Burns Supp. 1990). This statute provides:

> (a) A personal representative shall exercise reasonable diligence to discover the reasonably ascertainable creditors of the decedent within three (3) months of the first publication of notice under section 7 of this chapter.
>
> (b) A personal representative is considered to have exercised reasonable diligence under subsection (a) if the personal representative:
>
> (1) conducts a review of the decedent's financial records that are reasonably available to the personal representative; and
>
> (2) makes reasonable inquiries of the persons who are likely to have knowledge of the decedent's debts and are known to the personal representative.

Id.

53. *Id.* § 29-1-7-7.5(b)(2).

54. *Id.* § 29-1-7-7.5(b)(1).

55. *Id.* § 29-1-7-7.5(b)(2).

56. *Id.*

57. Professor Waterbury indicated that statutes which only require a "reasonably diligent" search will cause the personal representative to conduct a "rather extensive search, impairing the prompt and economical administration of estates while infrequently revealing

The due diligence requirement should not impose a new and substantial burden on personal representatives. These due diligence searches generally are conducted in estate proceedings to fully ascertain all of a decedent's assets. Under either Indiana's due diligence requirements or commentators' definitions,[58] no requirement exists to obtain bank statements, cancelled checks, or other documents not otherwise available to the personal representative. Anyone who has tried to obtain these documents knows that the effort results in substantial expense and delay.

Although the statute does not require the personal representative to track down and recreate documents not available, some questions may arise as to what documents are "reasonably available."[59] Documents at the decedent's home and business undoubtedly will be reasonably available. The need to obtain documents located elsewhere should be evaluated based on the reasonableness standard. The question whether to obtain a document may involve balancing the time, effort, and funds needed to obtain it with the document's probable productivity in ascertaining creditors. The personal representative has a clear obligation to review documents available to the personal representative and, presumably, to investigate further those items that might result in revealing any unpaid debts of the decedent.

A "reasonable"[60] search may be harder to define when applied to the duty to inquire of individuals. Presumably, the personal representative must interview the decedent's spouse, children, and other heirs likely to have knowledge of the decedent's debts. A decedent's guardian, attorney-in-fact under a power of attorney, accountants, or business partners would also be reasonable sources. Beyond these, however, the duty to examine other acquaintances becomes less clear. Must the personal representative make inquiries of neighbors or friends? What if the personal representative is aware that they may have rendered services to the decedent prior to death?

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unknown creditors." Waterbury, *supra* note 21, at 782. Hopefully, Indiana's statutes provide sufficient guidance to prevent these costly, time consuming, and extensive searches.

58. Professor Falender, in a persuasive article cited by the U.S. Supreme Court in *Pope*, asserts that "reasonable diligence" would include:

> [A] timely search of the decedent's home, office and safe deposit box; an investigation of the books and records uncovered by the search, including the decedent's tax returns; and an inquiry of those of the decedent's relatives, acquaintances, business associates, and professional advisors whom the representative believes to be fertile sources of information. The concept of reasonable diligence would charge the personal representative with the actual knowledge of the decedent's heirs, devises and acquaintances.

Falender, *Notice To Creditors in Estate Proceedings: What Process Is Due?*, 63 N.C.L. Rev. 659, 696 (1985).

59. Ind. Code Ann. § 29-1-7-7.5(b)(1).

60. *Id.* § 29-1-7-7.5(a), (b).

The personal representative would be well advised to keep good records of the "diligent" search.[61] For example, these records may include a record of the documents examined and the persons consulted. If a creditor later asserts that it was reasonably ascertainable, but that it was not ascertained because of the personal representative's failure to exercise due diligence, these records will be helpful to the personal representative. A diligent search, as outlined in the statute, raises the presumption that the creditor was "not reasonably ascertainable."[62] This presumption can only be rebutted by "clear and convincing evidence."[63]

As proof that the statutory guidelines have been fulfilled, the personal representative of either a supervised or unsupervised estate "may file an affidavit with the clerk . . . stating that the personal representative has complied" with the statute's due diligence requirements.[64] In a supervised estate, the personal representative can also file a petition requesting an order from the court that creditors remaining unknown after this diligent search are "not reasonably ascertainable."[65] This type of order should not be available to personal representatives of unsupervised estates because the court arguably retains no authority to enter orders in these estates.[66]

VI. Notice

A. *Who Must Furnish Notice*

Under Indiana's new notice law, the clerk of the court is required to give notice to all creditors whose names are disclosed in the petition

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61. *Id.*

62. *Id.* § 29-1-7-7.5(d). This statute states:

> If a personal representative complies with the requirements of subsection (b), the personal representative is presumed to have exercised reasonable diligence to ascertain creditors of the decedent and creditors not discovered are presumed not reasonably ascertainable. The presumptions may be rebutted only by clear and convincing evidence.

63. *Id.*

64. *Id.* § 29-1-7-7.5(c). This statute states:

> A personal representative may file an affidavit with the clerk of the court stating that the personal representative has complied with the requirements of subsection (b). In addition, a personal representative may petition the court for an order declaring that:
>
> (1) the personal representative has complied with the requirement of subsection (b); and
>
> (2) any creditors not known to the personal representative after complying with the requirements of subsection (b) are not reasonably ascertainable.

65. *Id.* § 29-1-7-7.5(c)(2).

66. *Id.* § 29-1-7-7.5(b), (c).

to open the estate.[67] The personal representative is required to give notice to any known or reasonably ascertainable creditors whose names are not in the petition.[68]

Unlike some proposals,[69] Indiana's statute provides that the personal representative "shall"[70] give notice to known or reasonably ascertainable creditors discovered after the opening of the estate. Because the statutory language does not contain the permissive "may,"[71] personal representatives should take this new obligation to give notice seriously.

B. *Effect of Giving Notice*

Although notice is required to be given to "known or reasonably ascertainable"[72] creditors, there may be a category of claimants who may or may not be creditors. This category is comprised of creditors believed by the personal representative to have doubtful claims. Examples are a claim for services or claims that might be barred by a statute of limitations. The personal representative will want to notify these claimants in order to start the claims period running against their claims. A question arose during the legislative drafting process as to whether notification would raise the presumption that the personal representative believed the claim was valid. To protect personal representatives from any hint that the delivery of notice constitutes the personal representative's belief that the notified creditor has a valid claim against the estate, the legislature provided that "[t]he giving of notice to a creditor or the listing of a creditor on the schedule delivered to the clerk of the court does not constitute an admission by the personal representative that the creditor has an allowable claim against the estate."[73]

The new statutory language should safely permit the personal representative to notify even those creditors having doubtful claims in order to start the running of the nonclaims period against those creditors.

C. *Notice to Incapacitated Persons*

A potential claimant may not be competent at the time notice is to be served on the claimant. In this event, the statute provides that notice

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67. *Id.* § 29-1-7-7(c). The personal representative is required to furnish the clerk with sufficient copies of the notice "prepared for mailing." *Id.* Presumably, this means that the notices must be accompanied by envelopes addressed to the potential claimants.

68. *Id.* § 29-1-7-7(d).

69. *See, e.g.*, Unif. Prob. Code § 3-801 to -803 (1969).

70. Ind. Code Ann. § 29-1-7-7(c).

71. *See id.*

72. *Id.* § 29-1-7-7(d)(2).

73. *Id.* § 29-1-7-7(g).

to an incapacitated person can be delivered to that person's natural or legal guardian or to a person who has the care and custody of the incompetent person.[74] This provision pertains to distributees of an estate as well as to creditors.

VII. Long-Term Statute of Limitations

The United States Supreme Court in *Pope* devoted some time to discussing the difference between statutes that commence due to some court involvement, such as a court's direction to publish notice, and statutes that commence because of an act not involving court action, such as the death of an individual.[75] The court termed these latter statutes "self-executing statutes of limitations."[76] The former statutes, because they involve state action, are subject to the ambit of the fourteenth amendment. The latter statutes, which involve no role for the state to play "beyond enactment of the limitation period,"[77] do not involve sufficient state action to bring them within the reach of the fourteenth amendment. The Court's discussion of the possible lack of state action in self-executing statutes of limitations offered Indiana's Legislature some hope that 1) estates could be brought outside the creditors' claims period, and 2) final cutoff points for the filing of claims could be established.[78]

Indiana's long-term statute of limitations is similar to the statute referred to in *Pope* as a "self-executing statute of limitations."[79] Prior

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74. *Id.* § 29-1-7-7(h).

75. Tulsa Professional Collection Serv., Inc. v. Pope, 485 U.S. 478, 486 (1988).

76. *Id.* at 486-87.

77. *Id.*

78. The Court in *Pope* did not state clearly that statutes which run from the date of death do not involve state action. Oklahoma did not have such a long-term statute and, thus, no decision was made with respect to the classification of this type of statute. *Id.* at 488. Commentators disagree as to whether a self-executing statute of limitations (*i.e.*, a statute that runs from the date of death) falls within the *Pope* due process requirements. *Compare* Waterbury, *supra* note 21, at 783 (self-executing statutes of limitations do not violate due process) *with* Reutlinger, *supra* note 12, at 435 (a self-executing statute of limitations that eliminates notice to creditors violates due process).

79. *Pope*, 485 U.S. at 486. The Court's example of a self-executing statute of limitations was the statute involved in Texaco, Inc. v. Short, 454 U.S. 516 (1982). *Texaco* involved Indiana's Mineral Lapse Act, which provided that an unused, severed mineral interest would lapse if not "used" for a 20-year period. Lapse could be avoided by filing a statement of claim with the county recorder. Indiana's long-term statute provided: "All claims barrable under the provisions of subsection (a) hereof shall, in any event, be barred if administration of the estate is not commenced within one (1) year after the death of the decedent." Ind. Code § 29-1-14-1(d) (1988) (amended July 1, 1990). Similar to the statute cited in *Texaco*, the time limitation runs from a date that is determined independently of any involvement by the state. Also similar to the statute cited in *Texaco*, recourse to protect against the running of the statute is provided because the claimant can open the estate and file the claim before the period runs.

to the enactment of the new provisions, Indiana's "self-executing statute"[80] set forth a one-year period for filing claims. However, Indiana's statute only applied whenever an estate for the decedent was not being administered. To achieve its goal of prescribing a final period within which claims must be filed in all estates, both administered and not administered, the legislature amended the self-executing statute of limitations and made it applicable even when estate administration is commenced. The amended statute now bars all claims not filed within one year from a decedent's death.[81]

The limitations period of one year was retained.[82] Although Indiana law requires all estates to file final accounts within one year after the appointment of a personal representative unless good cause is shown for the estate to remain open,[83] a personal representative may now find it advisable to postpone closing the estate until after the one-year period expires.[84] This delay is unfortunate but, given the personal representative's duty to pay creditors, may be unavoidable.

The one-year bar on claims may be a statute of limitations and not a nonclaims statute. Because the barring of untimely claims under a nonclaims statute is not subject to attack on any basis,[85] the running of a nonclaims statute clearly provides an estate with the most assurance that the claims of a creditor who did not file within the period are barred. A statute of limitations, however, is subject to certain defenses.

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80. Ind. Code § 29-1-14-1(d) (1988) (amended July 1, 1990).

81. Ind. Code Ann. § 29-1-14-1(d) (Burns Supp. 1990). This statute provides as follows: "All claims barrable under subsection (a) shall be barred if not *filed* within one (1) year after the death of the decedent."

82. Whether a one-year statute of limitations is lengthy enough to survive constitutional challenge is still a matter of debate. Waterbury, *supra* note 21, at 786, believes that it is, while Reutlinger, *supra* note 12, at 464, believes that a minimum period for the running of this type of statute should be 18 months. Both apparently agree on the need to put a final time bar on the filing of claims.

83. Ind. Code Ann. § 29-1-16-2 (Burns Supp. 1990). A review of Indiana estates would undoubtedly disclose that a substantial number of them are not closed within the one-year period.

84. Professor Waterbury noted that a delay in closing estates to allow a long-term statute of limitations to run may be the effect of these statutes. Waterbury, *supra* note 21, at 784. He stated:

> The personal representative's simplest solution may be to postpone distribution and closing of the estate until the long-term statute runs, if this would not delay distribution for an unacceptable period. Otherwise, the representative may conduct an excessive search for creditors at estate expense, to guard against the assertion of claims after distribution and closing of the estate. If the personal representatives [sic] follows either course, prompt and efficient estate administration will be compromised.

Id.

85. *See supra* notes 2-3.

If the one-year statute is a statute of limitation, the running of the one-year period may not act as a complete bar to any claims that are filed after one year if a defense to the running of the statute is claimed. Because of the possibility that these claims might not be barred, the legislature chose to keep the nonclaims period and to reinforce it with the one-year statute, although the easier course would have been to replace the nonclaims period with the statute of limitations.

In addition, whenever an estate is opened, the effect of the long-term statute of limitations will operate only to bar the claims of unnotified creditors who become known either after the expiration of the one-year period or within one month before the one-year period expires. All other creditors' claims will have been barred by the nonclaims statute, either because the claimants were unknown, thus barring their claims by the published notice, or because the claimant failed to file a timely claim after receiving actual notice.

VIII. Technical Changes — Unsupervised Estates

When the notice statutes were revised, certain technical changes were required to make other provisions of the code consistent with the new notice requirements. One change affects procedures in unsupervised estates, changing the notice requirements for unsupervised estates[86] and the averments included in an unsupervised estate's closing statement.[87]

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86. Ind. Code Ann. § 29-1-7.5-1 (Burns Supp. 1990). This statute was amended to provide:

> (a) Upon the filing of a petition under I.C. 29-1-7-5, the following persons may at any time petition the court for authority to have a decedent's estate administered without court supervision:
>
> (1) The decedent's heirs at law if the decedent dies intestate.
>
> (2) The legatees and devises under the decedent's will.
>
> (3) The personal representative.
>
> (b) The clerk of the court shall give notice of *the filing of a* petition for unsupervised administration to creditors of the decedent as provided in *I.C. 29-1-7-7(c) and I.C. 29-1-7-7(d).*

Id. (Emphasis indicates new provisions).

87. *Id.* § 29-1-7.5-4. This statute was amended to read:

> (a) Unless prohibited by order of the court and except for estates being administered in supervised administration proceedings, a personal representative may close an estate by filing with the court no earlier than five (5) months after the date of original appointment of a general personal representative for the estate, a verified statement stating that *the personal representative*, or a prior personal representative, has *done the following*:
>
> (1) Published notice to creditors as provided in *I.C. 29-1-7-7(b)*, and that the first publication occurred more than five (5) months prior to the date of the statement.
>
> (2) *Provided notice to creditors as required under I.C. 29-1-7-7(c) and I.C.*

Pursuant to these changes, the personal representative must report to the court that notice has been sent to those creditors of the decedent's not otherwise notified by the clerk. The personal representative must include that assertion in the closing statement.

IX. Summary

Indiana's new notice provisions reflect a balancing of constitutional due process requirements with the state's interest in expeditiously closing estates. Certainly these provisions increase the personal representative's duties. No longer may the representative sit back and let creditors come to him or her. The personal representative must now take affirmative action to locate and identify creditors and to serve them with notice in a timely fashion. Indiana's statute does not require the performance of these duties at all costs, however. The statute provides guidelines that should help limit the personal representative's search to reasonable bounds. Final time limitations will assist in closing estates with some certainty and will protect estates, personal representatives, and heirs against stale claims. Although estate practitioners are undoubtedly disturbed at the new constitutional notice requirements, Indiana's new rules should meet the constitutional challenge with a minimum of expense, inconvenience, and delay.

29-1-7-7(d).

(3) Fully administered the estate of the decedent by making payment, settlement, or other disposition of all claims which were presented, expenses of administration and estate, inheritance, and other death taxes, except as specified in the statement, and that the assets of the estate have been distributed to the persons entitled. If any claims remain undischarged, the statement shall:

(A) state whether the personal representative has distributed the estate, subject to possible liability, with the agreement of the distributees; or

(B) detail other arrangements which have been made to accommodate outstanding liabilities.

(4) Sent a copy *of the statement* to all distributees of the estate and to all creditors or other claimants of whom *the personal representative* has actual knowledge whose claims are neither paid nor barred and has furnished a full account in writing of *the personal representative's* administration to the distributees whose interests are affected.

(b) If no proceedings involving the personal representative are pending in the court three (3) months after the closing statement is filed, the appointment of the personal representative terminates.

Id. (Emphasis highlights new changes).