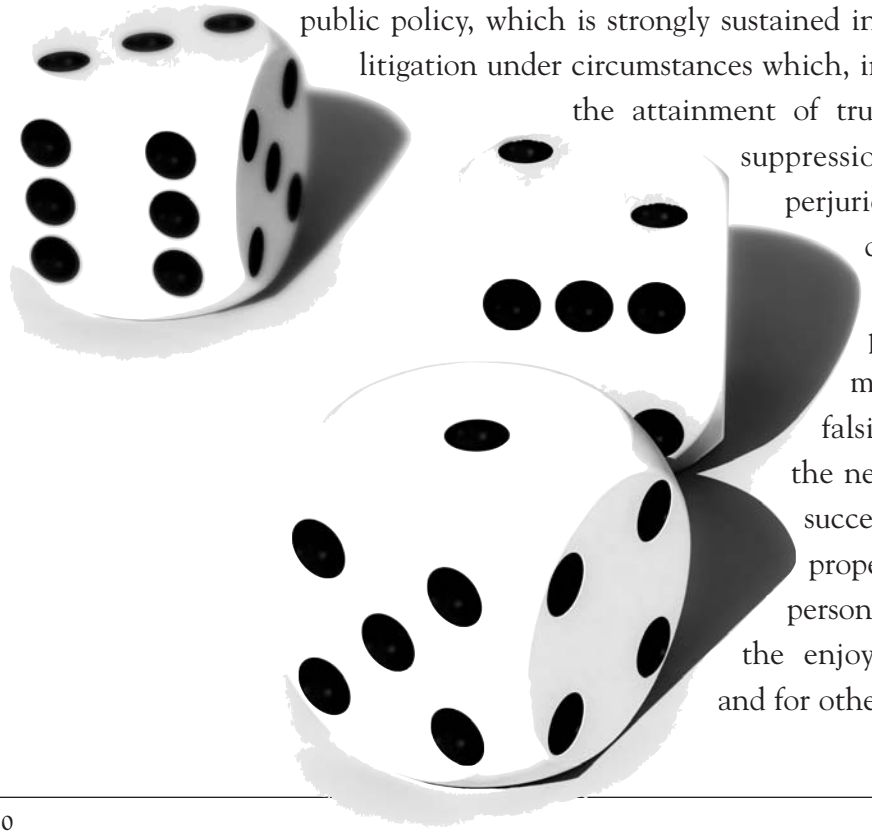
As 'Luck' would have it
Evolving law on creditors' claims in an estate

By Dan W. Holbrook

Much of law involves resolving competing interests, and legislators and judges are routinely asked to recognize but balance such interests. In estate administration, there is such a conflict regarding creditors' claims. Two recent decisions, *Luck*[1] and *Burke*[2], bring clarity to a previously confusing situation.

On the one hand, the law must recognize the rights of creditors to establish and prove claims against an estate. On the other hand, there is an ancient doctrine of repose that insists on estates being administered diligently. "Limitation statutes are found upon considerations of public policy, which is strongly sustained in its discouragement of litigation under circumstances which, in many cases, preclude the attainment of truth and justice; in its suppression of frauds and perjuries in attempts to set up demands against the estates of deceased persons, when the means to exposing their falsity have perished; in the necessity that those who succeed to the rights and property of such deceased persons should be quieted in the enjoyment of their rights, and for other reasons."[3]



In *Tenn. Code Ann.* §§ 30-2-306, 307 and 310, our state legislature established a procedure for creditors to file and prove claims, but created two separate time limits, commonly known as "nonclaim statutes," either of which can permanently bar a claim. First, the "inside limit" provides that, once an estate is opened, the court has a duty to publish notice to creditors, and the personal representative (PR) has a duty to notify all known or reasonably ascertainable creditors. Any claim not filed within four months from the date of first publication is forever barred.[4] Second, the "outside limit" provides that, whether or not an estate is ever opened, and whether or not a creditor has received any notice, any claim must be filed within 12 months from the date of death or it is forever barred.[5]

In 1988, the U.S. Supreme Court decision in *Pope*[6] necessitated statutory changes in all 50 states. The Supreme Court struck down an Oklahoma "inside" nonclaim statute, as a violation of the Due Process Clause of the Fourteenth Amendment to the Constitution, when the only notice requirement was by publication. Due process requires actual notice to known or reasonably ascertainable creditors. Accordingly, the Tennessee statute, in *Tenn. Code Ann.* § 30-2-306(e), added a "duty" by the PR to notify all known or reasonably ascertainable creditors. Neither Oklahoma nor Tennessee at the time had an "outside" limit computed solely from date of death,[7] but the *Pope* opinion in dictum implied that a reasonable outside limit would pass constitutional muster since it was "self-executing" and required no state action. Accordingly, the Tennessee statute added the 12-month outside limit at that time as well.

These two statutory changes raised two questions. First, is the new 12-month "outside" statute really an absolute bar when probate is not opened until after 12 months? Second, what happens if a PR fails to provide actual notice to a known creditor?

In 2000, the Tennessee Court of Appeals addressed the 12-month bar in *Divinny*.[8] The decedent's estate was not opened until after 12 months from the date of death, whereupon the PR gave notice to creditors and a claim was filed within four months. The court held that the "outside" limit of 12 months from date of death did not bar the claim, based on the fear that "[R]elatives of a decedent could avoid payment to a decedent's creditors by not seeking probate until a year had elapsed. We do not believe this is what our legislature intended." In other words, the Court of Appeals sympathized with the poor creditors who seemed to be unfairly treated if the beneficiaries and the PR conspired to deprive them of a forum for timely filing a claim.

"If you represent a creditor, be afraid, be very afraid."

In 2005, the Court of Appeals reversed itself in *Luck*, declaring that the statute says what it means, and means what it says, i.e., file within 12 months, or you're out of luck:

> [O]ur decision in *Estate of Divinny* and its progeny have misconstrued the statute of limitations applicable to a creditor's claim against an estate. ... We are ... mindful of the public policy concern raised in *Divinny* ... However, this court's concern in *Divinny* is not well founded."

A creditor is not without remedy, says the court, citing *Tenn. Code Ann.* § 30-1-301, which permits a probate court to appoint a PR upon the petition by any creditor (or any next of kin) after six months have elapsed from date of death.

Also in 2005, the Court of Appeals addressed the duty of providing notice. In *Burke*, the estate was opened within 12 months after death; the PR was the decedent's ex-wife; the creditor was the ex-wife's divorce lawyer (the ex-wife's debt having been assumed by the decedent under the divorce decree); and the PR did not notify the creditor of the decedent's death. The 12-month outside limit clearly barred any claim against the estate. However, the Court of Appeals permitted a claim by the creditor against the PR personally, for breach of fiduciary duty. Not only does this make sense as a matter of fiduciary law and statutory interpretation, it is no doubt required as a matter of constitutional due process under *Pope*.

How to advise your clients

If you represent a creditor, be afraid, be very afraid. The law essentially assumes that a creditor will learn of a debtor's death within 12 months. There is no exception (except for taxes or the state, including TennCare, or possibly on account of actual fraud). Therefore, diligence is required on creditors' parts to pay attention to death notices. If no estate has been opened and the 12-month deadline is approaching, any creditor (or any next of kin) can petition the probate court to appoint a PR. *Tenn. Code Ann.* § 30-1-301. If neither the spouse nor any next of kin want to be PR, a creditor is eligible to serve, and may receive compensation for serving just as any PR can. *Tenn. Code Ann.* § 30-1-106.

If you represent a beneficiary of the estate, your advice may reasonably be to suggest that the PR delay getting appointed until after 12 months from date of death, in hopes of reaping a windfall from an inattentive creditor whose claim becomes barred. On the other hand, delay may preclude access to the estate assets or cost the estate in other ways, so some balancing of interests may be necessary. Further, if a cred-

(Continued on page 40)

Where there's a will ...

(Continued from page 31)

itor petitions the court for appointment of a PR, the court might select a PR other than the beneficiary's choice. Finally, your duty as an attorney under Rule 2.1 of the Tennessee Rules of Professional Conduct[9] may include the moral and ethical implications, which could include advice to open the estate before 12 months anyway, or to pay a legitimate creditor even if the 12-month deadline has passed.

If you represent a PR, you may advise that a PR is not required to open an estate within any particular time frame, so that the PR may legally honor a beneficiary's request to delay the opening beyond 12 months from date of death. Nor is a PR required to serve even when named in a will, so any delay in opening an estate should not make the PR liable for any negative consequences of the delay itself. On the other hand, delay may cause administrative difficulties, especially with wasting assets or with regard to tax deadlines. If the PR does qualify before the 12-month outside limit, you must advise the PR to take the duty of notice to known or reasonably ascertainable creditors very seriously indeed, or the PR may become personally liable. Worse, you may in turn become liable to the PR if you have not properly advised the PR to give such notice.

If you represent (or are) a title attorney, *Luck* is good news. It helps quiet title in certain cases, especially where there is probate of a will without administration, for muniment of title only. *Tenn. Code Ann.* §§ 32-2-111 and 32-5-109.

Like the common law Rule Against Perpetuities, our nonclaim statutes can operate harshly. *Luck* stands for the proposition that the legislature strongly favored the doctrine of repose over the rights of inattentive creditors, and *Burke* for the proposition that even heedless creditors have some rights too, perhaps at the expense of the PR. As the court in *Burke* pointed out, this balancing of interests is a policy decision for the legislature. *Caveat Creditor!*

Notes

1. *In re: Estate of Luck v. FDS/Goldsmith's*, No. W2004-01554-COA-R3-CV, 205 Tenn. App. Lexis 332 (Tenn. Ct. App. June 7, 2005).

2. *Burke v. Langdon*, No. E2004-02241-COA-R3-CV, ___ Tenn. App. Lexis ____ (Tenn. Ct. App. Oct.13, 2005).

3. *State v. Crutcher*, 32 Tenn 504 (1852).

4. The four-month claims period is lengthened if actual notice is received less than 60 days before the four-month period expires, or shortened if actual notice is received less than four months before the 12-month period. Prior to 1997, the notice period was six months instead of four.

5. The 12-month statute may apply differently to the state of Tennessee (including TennCare) or with regard to taxes.

6. *Tulsa Professional Collection Services, Inc. v. Pope*, 108 S.Ct. 1340 (1988).

7. In the absence of a specific "outside" limit on probate claims, it was generally felt that the Tennessee seven-year statute on contracts would apply.

8. *Estate of Divinny v. Wheeler Bonding Company, Inc.*, No. M1999-00678-COA-R3-CV, 2000 Tenn. App. Lexis 212 (Tenn. Ct. App. Mar. 31, 2000). The *Divinny* logic was followed in *Glanton v. Lord*, No. M2002-02362-COA-R3-CV, ___ Tenn. App. Lexis 96 (Tenn. Ct. App. February 15, 2005).

9. TPRC Rule 2.1: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation."

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(Continued from page 35)

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