DRAKE LAW REVIEW

Volume 39 | 1989-1990 | Number 3

POPE AND IOWA PROBATE*

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* This article was selected as the winner of the 1989 Mason Ladd Legal Writing Competition sponsored by the Young Lawyers Section of the Iowa State Bar Association.

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had most recently been discussed in *Mennonite Board of Missions v. Adams*,[20] which involved the sale of real estate by the county treasurer as a result of the nonpayment of delinquent taxes.

In *Mennonite* state law provided for a two-year redemption period following a tax sale.[21] During that redemption period the landowner or any lien holder could redeem the property.[22] If no one chose to redeem during those two years the tax sale purchaser could apply for a deed.[23] The statutes required that the landowner receive actual notice of the tax sale and redemption period, however, all other interested parties were only entitled to receive notice by publication.[24] The Supreme Court determined that "actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party . . . if its name and address are reasonably ascertainable."[25] The Court held that due process required that other interested parties receive actual notice.[26]

Justice O'Connor noted that Tulsa's claim is considered a protected property interest, however, property interests are only protected by the fourteenth amendment if the deprivation of the property interest is a result of state action.[27] State action can take many forms and the Court has held that when private parties make use of state procedures with the overt, significant assistance of state officials, state action can be found.[28]

The *Pope* decision turned on the question of whether or not Oklahoma's two-month claims statute was a self-executing statute of limitations. If the statute was truly self-executing the state's limited involvement in enacting the statute would not be enough to be labeled state action. If, however, the Court determined the claims statute was not self-executing but, rather, required or involved significant state action to trigger the commencement of the claims period, then the claims statute had to be tested for violation of the due process clause.

The Court determined that the state action involved in the Oklahoma claims statute was significant.[29] Justice O'Connor pointed out that: (1) the two-month claims period only begins to run after probate proceedings have been commenced in state court; (2) the state court must appoint the executor before the publication notice, which triggers the two-month claims pe-

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(1965); Schroeder v. City of New York, 371 U.S. 208 (1962).

20. Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983).

21. *Id.* at 793; *see also* IND. CODE § 6-1.1-25-1 (1982).

22. Mennonite Bd. of Missions v. Adams, 462 U.S. at 793.

23. *Id.* at 794.

24. *Id.*; *see also* IND. CODE § 6-1.1-25-6 (1982).

25. Mennonite Bd. of Missions v. Adams, 462 U.S. at 800 (emphasis in original).

26. *Id.*

27. Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 485 (1988).

28. *See, e.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

29. Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. at 487.

riod, can be given; and (3) copies of the publication notice and an affidavit of publication must be filed with the court.[30]

Justice O'Connor further explained:

> It is only after all these actions take place that the time period begins to run, and in every one of these actions, the court is intimately involved. This involvement is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment.[31]

The Court next determined that the Oklahoma nonclaim statute " 'adversely affect[s]' a protected property interest . . ." by regulating the timeliness of any claims, barring any late claims and thereby making those claims valueless, regardless of the merits of the claims.[32] The Court reasoned that, practically speaking, few creditors become aware of a notice published in the local newspaper.[33] Also, the executor often has an interest in the decedent's estate and this fact acts as a disincentive for the executor to call attention to the running of the claims statute.[34] On the other hand, the states have a legitimate interest in encouraging the quick resolution of probate proceedings so that real and personal property can be transferred to the new owners without unreasonable delay.[35] This view is reiterated by the common practice of establishing short deadlines that require only notice by publication.[36]

The majority opinion relied on *Mennonite* in holding that the executor is only required to make reasonably diligent efforts to uncover the identities of creditors.[37] For any creditor whose identity is not known or reasonably ascertainable, however, notice by publication will suffice.[38] The Court also stated that it is not necessary to give actual notice to every person or entity who might conceivably have a claim against the estate.[39] That is, actual notice need not be sent to those whose claims are merely conjectural.

The Court concluded that "a requirement of actual notice to known or reasonably ascertainable creditors is not so cumbersome as to unduly hinder

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30. *Id.*

31. *Id.* As the lone dissenter, Chief Justice Rehnquist felt that those actions which the Court considered intimate involvement were actually trivial and of an entirely administrative nature. Rehnquist further stated that the Court misinterpreted the meaning of "self-executing" and that the term actually refers to "the absence of a judicial or other determination that *itself* extinguishes the claimant's rights." *Id.* at 493 (Rehnquist, C.J., dissenting) (emphasis in original).

32. *Id.* at 488.

33. *Id.* at 489.

34. *Id.*

35. *Id.*

36. *See, e.g.*, UTAH CODE ANN. § 75-3-801 (1978); TENN. CODE ANN. § 30-5-104 (1983); WYO. STAT. § 2-7-201 (1977).

37. Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 490 (1988).

38. *Id.*

39. *Id.*

the dispatch with which probate proceedings are conducted."[40] The Court went on to suggest using notice by mail.[41]

III. Response of the Iowa Legislature

While *Pope* only applied specifically to the Oklahoma claim statutes, the obvious implication of the case is that the statutes of any other states that adversely affect the claims of creditors by failing to give those creditors actual notice would also be found to violate the due process clause if they were ever subjected to court review. As a result the Iowa Legislature passed a number of statutory revisions that went into effect on July 1, 1989.

A. *Probate Claim Limitation Statutes*

Like most other states, Iowa has two types of probate claim limitation statutes. Prior to July 1, 1989, any claim filed against a decedent's estate was barred against the estate, the personal representative, and the estate's distributees, unless the claim had been filed with the clerk of court within four months after the date of the second publication of the notice to creditors.[42] This first type of claim limitation statute was very similar to the two-month claim statute of Oklahoma that was deemed unconstitutional in *Pope*.[43] As in Oklahoma, Iowa's four-month claims period only began to run after probate proceedings had been commenced in a state court.[44] It was necessary for the court to appoint the executor or administrator before the notice to creditors could be published.[45] Also, copies of the notice and an affidavit of publication had to be filed with the court.[46] Consequently, it appeared likely that in the wake of *Pope*, any court reviewing the Iowa statutes would also determine that significant state action was involved in triggering the running of the four-month claims statute and, therefore, the Iowa statute would be unconstitutional as violative of the due process clause. As a result, the Iowa legislature ("legislature") amended section 633.410 of the Iowa Code by barring any claims except those filed "within the later to occur of four months after the date of second publication of notice to creditors or, as to each claimant whose identity is reasonably ascertainable, one month after service of notice by ordinary mail to the claimant's last known address."[47]

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40. *Id.*
41. *Id.*
42. Iowa Code § 633.410 (1989). Exceptions to this rule include waiver of the time limitation by the personal representative, claims for which there is insurance coverage, and claimants entitled to equitable relief because of peculiar circumstances. *Id.*
43. *See supra* text accompanying notes 5-7.
44. Iowa Code § 633.410 (1989).
45. *Id.* §§ 633.304, 633.230 (1987).
46. *Id.* §§ 633.46, 633.47 (1989).
47. *Id.* § 633.410 (Supp. 1989).

Iowa's second claim limitation statute prohibits proceedings in a decedent's estate unless a petition for probate or administration has been filed in Iowa within five years of the decedent's death.[48] Under the reasoning used by the United States Supreme Court, this would be considered a self-executing statute of limitations. The State of Iowa has no role in triggering the commencement of this limitations period beyond the enactment of the statute. As opposed to the four-month limitation period discussed above, this five-year statute of limitations commences entirely as a result of decedent's death and, therefore, it was not necessary for the legislature to amend the statute in order to comply with *Pope*.

B. *Will Contest Statute*

Pope pertains specifically to those creditors of the decedent whose due process rights have been violated because they failed to receive actual notice. The case contains no discussion of any rights of potential will contestants to receive actual notice. The reason notice to those persons is not discussed is probably two-fold. First, of course, the plaintiff in *Pope* was a creditor of the estate and it was not necessary for the Court to discuss will contestants. Second, the case was brought before the Supreme Court in the context of the probate procedure of Oklahoma. The Court noted that Oklahoma law already requires notice of the hearing date on the petition to prove the will to be mailed "to all heirs, legatees, and devisees, . . . at their last-known place of residence."[49] Nonetheless, the absence of such a discussion does not lessen the impact of the *Pope* decision on the rights of potential will contestants to receive actual notice. It seems unlikely that the Court would consider the rights of heirs, legatees, and devisees to be less important than the rights of creditors.

From *Mullane* through *Mennonite* the Court has steadily expanded the bounds of due process so that actual notice to parties is required in more and more legal settings.[50] *Pope* is simply the latest link in this chain. Iowa's past notice statutes have required will contestants, as well as creditors, to file their actions or claims within four months of the date of second publication.[51] It seems unlikely that any court, faced with a situation in which a will contestant was not given actual notice in the manner described by *Pope*, would decide that an action to set aside the will should be barred simply because it was filed more than four months after the date of second publication. As a result, the legislature amended section 633.309 to state that any action to set aside or contest a will must be commenced "within the later to

48. IOWA CODE § 633.331 (1989).

49. Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 490 (1988) (quoting OKLA. STAT. tit. 58, § 25 (1981)).

50. *See supra* note 19.

51. IOWA CODE §§ 633.230, 633.304, 633.305 (1987).

occur of four months from the date of second publication of notice of admission of the will to probate or one month following the mailing of the notice to all heirs of the decedent and devisees under the will whose identities are reasonably ascertainable, at such persons' last known addresses."[52]

C. *New Notice Requirements*

1. *Statutory Notice*

In the past, Iowa law has provided for an assortment of notices that traditionally have been published for the purpose of triggering the running of the claims statute. The type of notice published has been dependent upon the type of probate procedure that was most appropriate, given factors such as the legal relationship between the decedent and the distributees, the size of the estate, and whether the decedent died testate.[53]

In order to provide those persons entitled to actual notice with a reasonable amount of time in which to file the appropriate actions, the legislature amended all three notice statutes to allow potential claimants and/or will contestants the later of four months from the date of second publication of notice or one month from the date of mailing of the notice in which to file their action.[54] As a result, whenever a notice is mailed more than three months after the date of second publication of the notice, the creditors or will contestants can file their claims for an additional one month, which may extend beyond the typical four-month claims period and may even commence after the four-month claims period has closed.

Even though the personal representative sends actual notice to all known or reasonably ascertainable creditors and will contestants, he is still required to publish notice.[55] This is very important because without published notice the claims of creditors or will contestants whose identities are not known or reasonably ascertainable or whose claims are merely conjectural will not be extinguished and the creditors or will contestants may seek recovery even after the estate has closed.[56]

The amended statutes suggest the personal representative publish precisely the same notice as is mailed to potential claimants and/or will contestants. The language suggested in the amended statutes is ideal for notices that will be mailed because, in addition to notifying potential claimants/contestants of what they must do to preserve their respective causes of action, it informs them of the dual limitations periods—one month from date of mailing of notice and four months from the date of second publication of

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52. *Id.* § 633.309 (Supp. 1989).

53. *See* IOWA CODE § 633.230 (notice in intestate estates), § 633.304 (notice of probate of will with administration), § 633.305 (notice of probate of will without administration) (1987).

54. IOWA CODE §§ 633.230, 633.304, 633.305 (Supp. 1989).

55. *Id.*

56. *See infra* notes 106-34 and accompanying text.

notice—by stating the date of second publication on the notice.[57]

However, the notice that is published in the newspaper should be limited to the language contained in Iowa Code sections 633.230, 633.304, and 633.305 prior to the 1989 amendments. That is, it is not necessary to include any reference in the published notices to the one month from date of mailing limitation period. *Pope* only requires actual notice to be given to certain persons, but published notice is necessary to start the running of the four month limitations period for persons whose identities are not known or reasonably ascertainable or whose claims are merely conjectural. Such persons may be confused by the new published notices suggested by the legislature because of the reference to the one month limitation period. These persons may mistakenly expect to receive a notice by mail and assume they will have an additional month in which to file their claim after that notice is received.

It is certainly conceivable that a court could be persuaded by such an argument and decide to recognize the filing of the claimant/contestant. The language contained in the revised notice statutes was merely suggested by the legislature and is not mandatory. Therefore, in order to avoid the possibility of confusion, it is advisable to use the new notice language for those notices mailed to deserving claimants/contestants; however, for the published notice, personal representatives should use the notices suggested by the legislature prior to July 1, 1989.

2. *Known or Reasonably Ascertainable*

Pope declared publication notice is ineffective against claimants whose identities are "known or reasonably ascertainable" and held that such claimants are entitled to actual notice.[58] The legislature used a similar standard when it amended the Iowa Code to require actual notice to certain claimants and contestants.[59] This raises a question as to who is entitled to actual notice under this standard.

a. Potential Claimants. The personal representative is the person ultimately responsible for the administration of the estate and, therefore, if he *knows* of any creditor with an outstanding claim he must provide that creditor with actual notice, unless the personal representative intends to fully satisfy the claim, in which case actual notice is not required to be given to that creditor.[60]

The more difficult task in deciding who is entitled to actual notice is determining those creditors whose identities are reasonably ascertainable. It is not necessary that any Herculean efforts be made to uncover potential claimants. Justice O'Connor noted that *Mullane* renounced any intent to

57. Iowa Code §§ 633.230, 633.304, 633.305 (1989).
58. Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 491 (1988).
59. Iowa Code §§ 633.309, 633.410 (Supp. 1989).
60. *Id.*

require "impracticable and extended searches . . . in the name of due process."[61] The Court only required that the personal representative use "reasonably diligent efforts."[62] Actual notice need not be given to those whose claims are merely "conjectural."[63] The implication is that the personal representative should familiarize himself with the decedent's affairs as best he can, including a review of all financial records and incoming mail. It is also advisable that the personal representative conduct a records search in the counties or states where the decedent resided and conducted his business, if any, because the personal representative would be considered to have constructive knowledge of any public records.[64] Perhaps the most difficult persons to identify are potential tort claimants.[65]

It is very important that the estate attorney use his professional judgment in counseling the personal representative on which claims are merely conjectural and which are entitled to actual notice. It is essential that the personal representative understand that the issue is not whether the claim is valid, but rather whether the creditor is entitled to actual notice. By giving actual notice to a creditor, the personal representative does not waive his right to disallow the claim if the creditor chooses to become a claimant.[66]

b. Potential Will Contestants. The question of who is entitled to actual notice is more easily answered with regard to potential will contestants. The legislature now requires actual notice to be mailed to the surviving spouse, all heirs of the decedent, and devisees under the will whose identities are reasonably ascertainable.[67] The identification process is largely limited to locating the persons and inquiring as to genealogy. In most cases the decedent's heirs are the only potential will contestants and they should receive actual notice. Clearly this notice is required because, in many instances, if a will contest is successful the decedent will be deemed to have died intestate and his property will pass to his heirs.[68] However, if this line of thought is taken to its logical conclusion it becomes equally clear that there are a number of other potential will contestants. If the decedent executed more than one will during his lifetime and one of the earlier wills has not been destroyed, the devisees named in the earlier will may feel they have a valid claim to contest the decedent's more recent will and should be

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61. Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 490 (1988) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317-18 (1950)).

62. *Id.* (quoting Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 n.4 (1983)).

63. *Id.* (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 317).

64. Fleck v. Iowa Employment Sec. Comm'n, 233 Iowa 67, 8 N.W.2d 703 (1943).

65. *Cf.* Steward v. Farrel, 131 N.H. 458, 554 A.2d 1286 (1989); *In re* Estate of Kopely, 159 Ariz. 391, 767 P.2d 1181 (Ct. App. 1988) (both cases stating that tort claimants were entitled to actual notice if their identities were known or reasonably ascertainable).

66. *See, e.g.*, IOWA CODE §§ 633.438, 633.439 (1989).

67. IOWA CODE §§ 633.304, 633.305, 633.309 (Supp. 1989).

68. *See generally* IOWA CODE §§ 633.210-.226, 633.236-.246 (1989) (statutes of intestacy and rights of surviving spouse).

entitled to receive actual notice.[69] Likewise, if a will is amended by codicil, actual notice should be given to any person whose interest in the decedent's estate was deleted by the codicil.

If more than two wills of the decedent are still in existence, notice should also be given to the devisees under the earlier wills. Those devisees would certainly have a superior claim to a share of the decedent's estate than the would-be heirs.

The personal representative should always be conscious of the standard to be applied in determining who must be given actual notice. The *Pope* decision states that actual notice need not be given to those persons whose claims are merely conjectural.[70] It is very important for the estate attorney to counsel the personal representative as to whose claims are merely conjectural and who is entitled to actual notice.

D. *Duties of Personal Representative*

The legislature has added a proviso to the Iowa Code that specifically requires the personal representative "to ascertain the names and addresses of all persons believed to own or possess claims against a decedent's estate."[71] Although not specifically stated, a similar duty that requires the personal representative to ascertain the names and addresses of all potential will contestants is implied.

Upon ascertaining the names and addresses of all these persons, the personal representative must mail an actual notice to each of them and publish notice to those persons whose identities are not known or reasonably ascertainable.[72] If the personal representative fails to give actual notice to potential claimants, they will be allowed to file their claims after the estate has been closed.[73] Similarly, any personal representative who does not give actual notice to any potential will contestants risks the possibility of a will contest at some time in the future.[74]

One exception to the general rule exists. A personal representative is not required to give actual notice to a potential claimant whose entire claim will be satisfied by the estate.[75] However, it is incumbent upon the personal representative to verify the exact amount and terms of the outstanding claims to prevent the creditor from filing a claim for additional funds after the assets have been distributed. To further protect the estate assets, the personal representative should obtain a satisfaction and release from the creditor.

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69. *In re* Estate of Klages, 209 N.W.2d 110, 113 (Iowa 1973).
70. Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 490 (1988).
71. IOWA CODE § 633.434 (Supp. 1989).
72. *Id.* §§ 633.230, 633.304, 633.305.
73. *See infra* notes 106-34 and accompanying text.
74. *Id.*
75. IOWA CODE §§ 633.230, 633.304 (Supp. 1989).

In the event the personal representative does not follow through with his intention to satisfy the claim, the creditor is entitled to receive actual notice. Also, if any creditor has more than one claim and the personal representative chooses to satisfy one or more of the claims but not all of them, the creditor should be given actual notice. While receipt of payment from the personal representative may be construed as constructive notice of a pending estate and a running claims statute, the personal representative and distributees of the estate should not be required to bear the unnecessary risk of a claim filed after the estate has been closed.

E. *Indemnity Agreements*

One author suggests that the personal representative should attempt to obtain indemnity agreements from all distributees of the estate.[76] Such an agreement secures a contractual obligation from the distributees to reimburse the estate for any successful claim filed by a creditor or will contestant that is not barred because the creditor did not receive actual notice. The indemnity agreement also limits the liability of distributees to the amounts that the distributees received from the estate.

However, obtaining indemnity agreements from the distributees is not only difficult[77] but also unnecessary. Before *Pope* all claims and actions not filed within the four-month claims period were barred. As a result, the Iowa Probate Code does not directly address the satisfaction of creditors' claims or will contestants' actions after an estate is closed. The most applicable statute in the Iowa Code is section 633.427, which pertains to the satisfaction of properly filed contingent claims for which the contingency does not occur until after all estate assets have been distributed.[78] If the contingency does occur after the asset distribution the creditors may commence an action against all distributees whose shares of the estate were increased because of the failure to pay the creditor's claim.[79] These distributees are jointly and severally liable to the creditor but they also have a right of indemnity against the other distributees if they pay more to the creditor than their proportionate share, as determined by the court.[80] Each distributee's liability to the creditor is also limited to the amount that the distributee received from the estate.[81]

Beyond section 633.427, Iowa law does not provide any guidance on how these situations will be handled in the future. However, general support for

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76. Einck, *Probate Law Update*, in ESTATE PLANNING & PROBATE IN IOWA 212-13 (1988).

77. The author has attempted to obtain indemnity agreements with distributees and found that most distributees are very reluctant to sign any agreement to return distributed funds.

78. IOWA CODE § 633.427 (1989).

79. *Id.*

80. *Id.*

81. *Id.*

the method of indemnity described can be found.[82] The share of any distributee of an estate is enhanced by the fact that the creditor's claim was not recognized before the assets were distributed, because if the claim had been recognized at a more appropriate time the distributee's share of the estate would have been reduced proportionately.

If, after *Pope*, any creditor or will contestant is not barred from action against the estate or its distributees because he was not given adequate notice, and a court determines the creditor or will contestant is entitled to funds of the estate, his claim or action will be satisfied proportionately by those distributees who received funds to which they were not entitled. As a result, indemnity agreements with the distributees are not necessary. However, this is an area of expected future litigation that could be simplified by the legislature if it would confirm the method by which successful claimants and will contestants will be compensated by a closed estate.

The personal representative does incur some risk in not obtaining an agreement with the distributees. After the estate has been closed, a creditor's claim or will contest can only be successful if the claimant or contestant should have been given actual notice and was not, or if the personal representative failed to publish notice. In either case, the personal representative may be required to pay damages.[83]

Occasionally, however, the personal representative and the other distributees may be reluctant to have actual notice sent to potential claimants/will contestants because of the possibility of arousing the interest of persons who would have otherwise been oblivious to the decedent's estate. In this situation an indemnity agreement from all distributees would be a prudent step and should include a waiver of any claim of liability against the personal representative arising out of his failure to provide actual notice to potential claimants/will contestants of the decedent's estate.

F. *Final Report*

1. *Contents of Final Report*

The legislature has added a new provision requiring the personal representative to include a statement in the final report "as to whether all statutory requirements pertaining to claims have been complied with and a statement as to whether all claims, including charges, have been paid and whether a lien continues to exist on any property as security for any claim."[84] Effectively, this new provision requires the personal representative to verify that he has made diligent inquiry to determine the identity of anyone having a potential claim against the estate and, having identified such persons, that he gave actual notice to such persons in compliance with the

82. *See* 26A C.J.S. *Descent & Distribution* §§ 136(b)(2), 138, 139 (1956).
83. Iowa Code § 633.160 (1989).
84. *Id.* § 633.477(12) (Supp. 1989).

applicable notice provisions.[85]

The legislature did not include a similar reporting requirement with regard to the statutory requirements pertaining to potential will contestants. Notice of compliance with these statutes is certainly as important as the requirements of the claims statutes. This type of information does more than simply inform the court that the personal representative has fulfilled his duties as a fiduciary. Perhaps the most important effect of this information is its assistance in the transfer of real property. Any real property that passes through an estate to a distributee is subject to the claims of will contestants or creditors whose identities were known or reasonably ascertainable but who were not given actual notice.[86] When that distributee attempts to transfer the property he is required to provide marketable title to the buyer.[87] When the buyer's attorney examines the abstract of title he will need to see that all notice requirements have been met in order to assure his client that the seller has marketable title.[88] If the final report does not show that all statutory notice requirements have been satisfied, the buyer of the real estate is faced with the possibility that the estate may be reopened for settlement or administration at a later date.[89] This is not a problem for the buyer if he is a purchaser in good faith.[90] However, a question arises as to whether a buyer, who has been notified by an abstract of title of a potential notice problem, can still be considered a good faith purchaser.

Presumably the legislature has not required the personal representative

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85. *See* IOWA CODE §§ 633.230, 633.304 (Supp. 1989).

86. Real property that is purchased directly from a pending estate is not subject to the claims of will contestants or creditors when that property is transferred in compliance with the Iowa Code or under a power of sale in the will. IOWA CODE § 633.78 (1989); Iowa Land Title Standard 9.12 (6th ed. 1985).

87. *See, e.g.*, Harris v. Bills, 203 Iowa 1034, 213 N.W. 929 (1927).

88. The Iowa State Bar Association has adopted the following new title standard:

9.14 Problem:

What showing must be made to demonstrate compliance with the notice requirements of the Pope case with respect to estates commenced prior to April 19, 1988?

Standard:

There should be no problem with estates that have been closed over five years prior to April 19, 1988, or with the estates where the real estate was sold in the estate proceedings.

If the final report states that all debts and claims have been paid and there is nothing of record to put the examiner on notice to the contrary, such title should not be objected to on the basis of notice. If such statement is not made in the final report, then the affidavit of the executor or the attorney to that effect should be acceptable.

An obvious shortcoming of this Title Standard is the absence of a requirement that the final report include a statement that all potential will contestants have been identified and have been given actual notice. Also, as discussed in section V(B), *infra*, an estate may be reopened for administration more than five years after the estate has been closed, contrary to the indication of the new Title Standard. *See infra* notes 117-34 and accompanying text.

89. *See infra* notes 106-34 and accompanying text.

90. IOWA CODE § 633.488 (1989).

to report compliance with the notice provisions to potential will contestants because it believes all the necessary information will already be present. The legislature is only requiring notice to be sent to "the surviving spouse, each heir of the decedent and each devisee under the will admitted to probate whose identities are reasonably ascertainable . . . ."[91] The names and addresses of all such persons are included in the Iowa Inheritance Tax Return and the Probate Report and Inventory.[92] In addition, proof of service of all required notices must be filed with the clerk of court.[93] As a result, under the present statutory scheme all relevant information is contained in the court records and further reporting by the personal representative is redundant.[94] However, as demonstrated above,[95] the present statutory system is deficient because there are a number of potential will contestants who the legislature does not require the personal representative to notify. Because many of these persons would have an interest in contesting the will superior to that of the decedent's heirs, it is necessary to provide such persons with actual notice and to report this activity on the final report, in spite of the absence of such a requirement in the Iowa Code.

2. *Notice of Hearing on Final Report*

Iowa Code section 633.478 requires the notice of the hearing on the final report to be served on "all persons interested" unless the notice is waived.[96] The notice must be given to the beneficiaries and heirs of the decedent or, in the alternative, the personal representative must obtain a waiver of such notice from the beneficiaries and heirs.[97] In addition to providing notice to the heirs and beneficiaries or obtaining their waiver, this action also bars those persons from reopening the estate at a later date.[98]

Assuming the personal representative has properly performed his duties, it is not necessary to give the notice to or obtain a waiver of notice from

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91. *Id.* §§ 633.304, 633.305 (Supp. 1989).

92. *Id.* §§ 450.5, 633.361 (1989). The only notable exception is when all property is owned jointly between decedent and the surviving spouse. Iowa Code § 450.22 (1989). In this instance, of course, no inheritance tax is owed, Iowa Code §§ 450.9, 450.10(7) (1989), the property is not subject to the claims of creditors, Rembe v. Stewart, 387 N.W.2d 313 (Iowa 1986), and will contestants would be unable to challenge the surviving joint tenant's ownership, *In re* Miller's Estate, 248 Iowa 19, 79 N.W.2d 315 (1956).

93. IOWA CODE § 633.47 (1989).

94. This same situation does not exist for potential claimants because there is no requirement that the personal representative list all potential claimants except as now provided by amended Iowa Code section 633.477(12). *See* IOWA CODE § 633.477(12) (Supp. 1989).

95. *See supra* notes 67-70 and accompanying text.

96. IOWA CODE § 633.478 (1989).

97. *Id.* § 633.487; *see also In re* Estate of Handy, 256 Iowa 61, 126 N.W.2d 332 (1964); Moser v. Brown, 249 N.W.2d 612 (Iowa 1977).

98. IOWA CODE § 633.487 (1989); *see also* Liska v. First Nat'l Bank, 310 N.W.2d 531, 535 (Iowa Ct. App. 1981).

the creditors of the estate, because at this point in the administration all creditor claims should be barred by either the actual notice or the published notice. In addition, by the time an estate has progressed to the point of filing the final report, any claims that have been filed by creditors either should have been allowed and satisfied or disallowed.

IV. Effect of *Pope* During the Window Period

The United States Supreme Court handed down the *Pope* decision on April 19, 1988.[99] The Iowa legislation that responded to *Pope* did not become effective until July 1, 1989. The intervening "window period" represents a time during which the Iowa probate notice statutes were effectively null and void and the only guidance for personal representatives and their attorneys was found in *Pope*. As a stop-gap measure the Iowa Supreme Court submitted Iowa Rule of Probate Procedure 7, which became effective on September 1, 1988, and was stricken on July 1, 1989.[100]

Because any estate which was pending during the window period may be reopened if anyone entitled to actual notice during this time did not receive notice,[101] it is necessary to examine the law as it existed during the window period.

During the window period there was very little legal authority upon which to rely. The Iowa personal representative could only look to *Pope* and probate rule 7 for guidance. Rule 7 was very similar to Iowa's new notice provisions.[102] Under its terms, any of the probate notices required to be published under the Iowa Code were also required to be sent by ordinary mail to all known or readily ascertainable creditors, except creditors whose claims would be paid or satisfied before the final report was filed in the

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99. Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988).

100. Iowa R. Prob. P. 7 (stricken 1989).

Notice to Creditors.

All notices required to be published by Iowa Code §§ 633.230, 633.304, and 633.305 shall likewise be sent by ordinary mail to all known or readily ascertainable creditors, except creditors whose claims will be paid or satisfied prior to the filing of the personal representative's final report. Notwithstanding the four month limitation specified in Iowa Code section 633.410, creditors will be allowed not less than thirty days from the mailing of the notice in which to file a claim. Proof of service of the required notice* shall be filed with the clerk of court as required by Iowa Code section 633.47.

This rule shall apply to all estates pending on or after its effective date.

*When the notice is mailed more than three months following the date of the second publication of the notice required by §§ 633.230, 633.304, or 633.305, it shall also include a notification that the creditors will be allowed not less than thirty days from the mailing of the notice in which to file a claim.

101. *See infra* notes 106-34 and accompanying text.

102. Iowa Code §§ 633.230, 633.304, 633.305 (Supp. 1989).

estate.[103] Rule 7 required that creditors be allowed at least thirty days from the mailing of the notice in which to file a claim.[104] The rule also required that a proof of service of notice on the known or readily ascertainable creditors be filed with the clerk of court and the notice had to alert the creditors that they would be allowed not less than thirty days from the mailing of the notice to file their claims.[105]

The most obvious difference between probate rule 7 and the new notice provisions is that probate rule 7 did not require actual notice to be sent to potential will contestants. However, as already discussed, *Pope* infers the necessity of serving actual notice upon such persons. Any personal representative who relies upon probate rule 7 when defending an action to reopen an estate by an unnotified will contestant, will, in all likelihood, be unsuccessful.

During the window period, as under the current statutes, the personal representative was required to give actual notice to all known and reasonably ascertainable creditors, heirs and beneficiaries, and to publish notice to all other persons. In addition, it was necessary to include information of all such actions in the final report.

V. Effect of *Pope* on Closed Estates

Most closed estates are not affected by the holding in *Pope* and the legislature has not amended the statutory scheme for reopening estates. The situations under which an estate can be reopened for settlement or reopened for administration are very limited.[106]

A. *Reopening Settlement*

Sections 633.478, 633.487, and 633.488 of the Iowa Code work together to bar any person who has been served with or waived notice of the hearing upon the final report from commencing any action to contest "the correctness or the legality of the inventory, the accounting, distribution, or other acts of the personal representative, or the list of heirs set forth in the final report."[107] As a result, if the personal representative has (1) given actual notice to all those persons entitled to receive it under *Pope*, (2) published notice to bar all other claimants or will contestants, and (3) served notice upon or received a waiver of notice from all interested persons upon the

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103. Probate rule 7 referred to "readily" ascertainable creditors as opposed to those which are "reasonably" ascertainable. Because the rule was obviously in response to Pope, the two terms should be considered synonymous.

104. Probate rule 7 differed only slightly from Iowa Code sections 633.230, 633.304, and 633.305 in allowing thirty days as opposed to one month.

105. Iowa R. Prob. P. 7 (stricken 1989).

106. Iowa Code §§ 633.487-.489 (1989).

107. *Id.* § 633.487. However, the Code does not bar any action based upon any fraud committed by the personal representative.

final report, then no person should have a cause of action to reopen settlement unless there is a claim of fraud on the part of the personal representative.[108] While any interested person who has been properly notified of the hearing on the final report is barred from reopening the settlement of the estate, an unnotified person is not bound by the settlement proceeding if they move to set aside the court's approval within five years of the date of the order.[109]

Under *Pope*, any creditor or will contestant who is entitled to but does not receive actual notice, and has not received notice or been given a waiver of notice of the hearing upon the final report, is considered an interested person and may reopen settlement of the estate.[110] Assuming the petition to reopen settlement is successful and the creditor's or will contestant's claim is found to be valid, no distributee is liable to account for any property other than the property distributed to that distributee.[111] In addition, any property of the estate that has been sold to a good faith purchaser, whether purchased from the estate or a distributee, is not affected by any resettlement of the estate.[112] However, the proceeds of such a sale are subject to an order for resettlement.[113]

Any valid claims of will contestants or creditors may be brought before the court within five years of the date of the order approving the final report.[114] Any petition to reopen settlement after five years has passed will be dismissed.[115] If the claim is valid, the court may order a new accounting or a redistribution from the distributees.[116]

B. *Reopening Administration*

Unlike resettlement of an estate, the statutory provision pertaining to reopening administration of an estate does not contain any built-in statute of limitation regarding when such an action may be brought before a court.[117] The limitation that administration shall not be granted more than five years after the decedent's date of death does not apply in a readministration because the court obtained jurisdiction of the estate in the original administration.[118] As a result, an estate may be readministered at any time, assuming it meets the other statutory requirements.

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108. *Id.* §§ 633.487, 633.488.
109. *Id.* § 633.488.
110. *See, e.g.*, IOWA CODE § 633.477 (1989); IOWA R. PROB. P. 1-6.
111. IOWA CODE § 633.488 (1989).
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* § 633.489.
118. *Id.* § 633.331; *see also* Giberson v. Henness, 219 Iowa 359, 367, 258 N.W. 708, 711 (1935); Crossan v. McCrary, 37 Iowa 684 (1873).

A court can only allow an estate to be reopened (1) if other property is discovered, (2) if any necessary act remains unperformed, or (3) for any other proper cause appearing to the court.[119] Any interested person, whether or not he received notice or waived notice of the hearing on the final report, has standing to petition the court to reopen administration.[120]

1. *Newly Discovered Property*

The discovery of other property includes not only tangible property and funds, but also any cause of action that the estate may have against some other person.[121] Any action may only be brought within the applicable limitations period after the cause of action has accrued.[122]

2. *Necessary Act*

The Iowa Supreme Court has determined that a "necessary act" under section 633.489 of the Iowa Code is an act that the law requires the personal representative to perform in order to properly close the estate.[123] Failure to give actual notice as required by *Pope* would be considered the nonperformance of a necessary act. However, estates that were closed before the *Pope* decision (April 19, 1988) should not be allowed to be reopened simply because of failure to give creditors and will contestants actual notice. The general rule is that judicial decisions operate both retroactively and prospectively.[124] However, the United States Supreme Court has compiled three tests that it applies in giving decisions only prospective application.[125] The Iowa Supreme Court adopted these separate tests on nonretroactive application in *Beeck v. S.R. Smith Co.*:[126]

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker*, [381 U.S. 618] at 629 [85 S.Ct. 1731 at 1737], 14 L Ed 2d [601] at 608. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court

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119. Iowa Code § 633.489 (1989).
120. *Id.*
121. Troester v. Sisters of Mercy Health Corp., 328 N.W.2d 308 (Iowa 1982).
122. *See generally* Iowa Code ch. 614 (1989).
123. *In re* Estate of Witzke, 359 N.W.2d 183, 184 (Iowa 1984).
124. *See, e.g., In re* Estate of Nicolaus, 366 N.W.2d 562, 566 (Iowa 1985); State v. Latham, 366 N.W.2d 181, 184 (Iowa 1985).
125. Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971).
126. Beeck v. S.R. Smith Co., 359 N.W.2d 482 (Iowa 1984).

> could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma*, [395 U.S. 701] at 706 [89 S.Ct. 1897 at 1900], 23 L Ed 2d [647] at 652.[127]

The first test tends to imply retroactive application of *Pope* because the issue of due process of publication notice has been dealt with in the past and, in fact, the line of cases from *Mullane* through *Mennonite* could arguably have foreshadowed the *Pope* decision. However, application of the second test makes it evident that the purpose of *Pope* would not be significantly advanced by a retroactive application of its holding. Because actual notice may not have been given to each creditor and will contestant, every estate that has ever been administered would be subject to readministration. The argument for nonretroactive application is even more compelling when the third test is considered. An enormous inequity and hardship would befall the distributees (and their distributees) if these long-closed estates could be reopened for administration. In addition to these tests, other public policy considerations include the fact that the State of Iowa has a strong interest in the quick and final resolution of its probate proceedings.[128] As a result, *Pope* should be given only prospective effect, rather than retroactive effect.[129]

3. *Proper Cause*

Readministration of an estate is also allowed for "any other proper cause appearing to the court."[130] Before the Iowa Probate Code took effect in 1964, the law of Iowa permitted an order for final settlement to be set aside upon a showing of fraud, mistake, or other equitable grounds.[131] Because section 633.489 allows the court to reopen the estate for proper cause, the right to reopen an estate in an equitable proceeding has been preserved.[132] The Iowa Supreme Court has held that a claimant may seek equitable relief when a personal representative fails to pay a filed claim that is not otherwise barred by law.[133] Based on this reasoning, any creditor or will contestant who was not given actual notice can seek equitable relief to reo-

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127. *Id.* at 484 (quoting Chevron Oil Co. v. Huson, 404 U.S. at 106-07).

128. *See, e.g.*, Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 489 (1988); *In re* Estate of Witzke, 359 N.W.2d 183, 185 (Iowa 1984); *In re* Estate of Northup, 230 N.W.2d 918, 921 (Iowa 1975).

129. *But see* Jefferson Fed. Sav. & Loan Ass'n v. Clark, 540 So. 2d 61 (Ala. 1989) (court approved retroactive application of Pope without discussion of the effects of such an application).

130. IOWA CODE § 633.489 (1989).

131. *See, e.g.*, Foley v. Engstrom, 247 Iowa 774, 782-83, 74 N.W.2d 673, 678 (1956); *In re* Shivvers' Estate, 240 Iowa 93, 102, 34 N.W.2d 632, 637 (1948).

132. S. KURTZ, 1 KURTZ ON IOWA ESTATES § 15.16, at 519 (1981).

133. Harding v. Troy, 217 Iowa 775, 252 N.W. 521 (1934).

pen administration by arguing their claims would not be barred by law. In addition, Iowa Code section 633.410 does not bar the claims of those creditors "entitled to equitable relief due to peculiar circumstances."[134] However, for the same reasons discussed above, *Pope* should be given only prospective effect, not retroactive effect.

VI. Conclusion

When the United States Supreme Court handed down the *Pope* decision it wreaked havoc with the Iowa probate claim limitations statutes. The new legislation has made great strides in alleviating some of the problems posed by *Pope*, however, a few potentially dangerous areas still exist for the unwary.

The law now suggests that the personal representative publish the same notice as is sent to known or reasonably ascertainable claimants or will contestants. While the suggested language is appropriate for the actual notice, there are portions that would be meaningless or perhaps misleading if included in the published notice.

While an indemnity agreement is probably not necessary to require distributees to reimburse an estate, new legislation could remove all doubt in this area by requiring proportionate reimbursement, as determined by the court, for any successful claims or will contests that commence after the estate has been closed. In addition, new legislation should be enacted to circumvent any attempts to reopen administration in pre-*Pope* estates on the basis of lack of notice. The Iowa legislature could enact a self-executing statute of limitations requiring any person who bases his claim or will contest on *Pope* to file such claim or contest on or before a specified date.[135] This would thwart any argument that *Pope* has retroactive, as well as prospective, effect.

Finally, the personal representative should be required to include a statement in his final report that he has given actual notice to potential will contestants as well as creditors. The current legislation requiring the per-

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134. *In re* Estate of Northup, 230 N.W.2d 918, 921-22 (Iowa 1975) (stating peculiar circumstances exist when good conscience and fair dealing demand the merits of the claim be heard).

135. Since this article was written the Iowa legislature has amended Iowa Code § 633.230 to provide a self-executing statute of limitations as follows:

> An action based upon the failure to give notice by mail required by this section, section 633.304 or 633.305, to heirs of a decedent or to persons known by the personal representative to own or possess a claim in any estate in which the personal representative was discharged prior to July 1, 1989, shall not be maintained in any court in this state unless commenced prior to July 1, 1991.

1990 Iowa Acts ch. 1036 (to be codified at Iowa Code § 633.230).

It should be noted, however, that this statute of limitations does not refer to any actions brought by any person who is a beneficiary under the terms of an earlier executed will which has not been destroyed. *See supra* notes 67-70 and accompanying text.

sonal representative to give actual notice to both creditors and will contestants, but report only notice to creditors on the final report, is contradictory.