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## Victims of Substantiated Child Abuse: Missouri's New Reasonably Ascertainable Creditors

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## NOTE

### **Victims of Substantiated Child Abuse: Missouri's New Reasonably Ascertainable Creditors**

*In re Austin*, 389 S.W.3d 168 (Mo. 2013).

ALICE HASELTINE\*

#### I. INTRODUCTION

A recent decision from the Supreme Court of Missouri, *In re Austin*, held that victims of substantiated child abuse are reasonably ascertainable creditors.<sup>1</sup> The practical effect of *Austin* is to afford victims of substantiated child abuse an extra six months to file claims against the estate of his or her abuser.<sup>2</sup> While this decision is a small victory for victims of sexual abuse, the facts in *Austin* raise controversial questions about whether the unique circumstances surrounding claims of childhood sexual abuse warrant an exception to the one-year claim bar against a decedent's estate.

This Note begins with an exploration of the unique factual circumstances that gave rise to the court's determination that victims of child abuse are reasonably ascertainable creditors. The Note goes on to discuss the constitutionality of creditor claim bars and the evolution of the reasonably ascertainable creditor in Missouri. Next, this Note provides an analysis of the Supreme Court of Missouri's reasoning in *Austin* and – finally – explores possible extensions of *Austin* while weighing the policy considerations associated with a broad extension of the court's holding to future claims of child abuse against decedents' estates.

#### II. FACTS AND HOLDING

In 2006, two female minors, R.M.N. and R.D.N.,<sup>3</sup> alleged that Allen Austin sexually abused them.<sup>4</sup> The Division of Family Services (“DFS”) investigated the allegations and substantiated the minors' claims against Aus-

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1. *In re Estate of Austin*, 389 S.W.3d 168, 173 (Mo. 2013) (en banc).

2. *Id.* at 169.

3. R.M.N. and R.D.N. were approximately seven and eight years old, respectively, at the time of the alleged abuse. *Id.*

4. *Id.*

tin “by a ‘preponderance of the evidence.’”<sup>5</sup> Austin never appealed the substantiation.<sup>6</sup>

Three years later, Austin died.<sup>7</sup> Cathy Snead, a beneficiary of Austin’s estate, was appointed personal representative.<sup>8</sup> On August 26, 2009, Snead published notice that Austin’s estate was open to creditor claims.<sup>9</sup> This publication initiated a six-month time period during which creditors could file claims against Austin’s estate.<sup>10</sup>

Following the opening of the estate, Snead, a social worker by trade, conducted an independent investigation of R.M.N. and R.D.N.’s allegations against Austin.<sup>11</sup> The investigation included interviews with various members of R.M.N. and R.D.N.’s extended family.<sup>12</sup> Throughout the course of Snead’s investigation, she did not contact the minors, their father,<sup>13</sup> or DFS.<sup>14</sup> Snead’s investigative work led her to determine that R.M.N. and R.D.N.’s 2006 sexual assault claims were fictitious.<sup>15</sup> Despite Snead’s knowledge that the allegations were substantiated by DFS, Snead used her personal knowledge of the allegations to conclude that R.M.N. and R.D.N. were not

5. *Id.*

6. *Id.* A substantiated claim is not a determination of fault. *See* Mo. Dep’t of Family Servs., Children’s Div., Guidelines for Mandated Reporters of Child Abuse and Neglect, at 5 (2013), available at [http://dss.mo.gov/cd/pdf/guidelines\\_can\\_reports.pdf](http://dss.mo.gov/cd/pdf/guidelines_can_reports.pdf). A claim is substantiated when DFS determines that a minor is in substantial risk of physical injury by non-accidental means. *See id.* at 7. The state keeps a list of people who have been found to have committed “substantiated” abuse. *See id.* at 30. Individuals on this list are considered at-risk for neglecting or abusing children in the future. This list is used for various background checks for jobs that require work in proximity of children. *Id.* at 32.

7. *Austin*, 389 S.W.3d at 170.

8. *Id.* at 170 & n.4.

9. *Id.* at 170.

10. *See* MO. REV. STAT. § 473.360.1 (2012) (“[A]ll claims against the estate of a deceased person . . . which are not filed in the probate division of the circuit court within six months after the date of the first published notice of letters testamentary or of administration or, if notice was actually mailed to, or served upon, such creditor, within two months after the date such notice was mailed, or served, whichever later occurs, or which are not paid by the personal representative, within six months after the first published notice of letters testamentary or of administration, are forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent.”).

11. *Austin*, 389 S.W.3d at 170.

12. *Id.* Snead contacted R.M.N. and R.D.N.’s aunt and grandmother. *Id.*

13. *Id.* The minors’ father was their sole guardian and custodian. *Id.* at 170 n.5.

14. *Id.* at 170; *cf.* *Bosworth v. Sewell*, 918 S.W.2d 773, 774 (Mo. 1996) (en banc) (holding that “the failure of the personal representative to provide [the heirs] actual notice of the probate of a will precludes the . . . six-month statutory bar”).

15. *Austin*, 389 S.W.3d at 170.

creditors with a “colorable claim” and were therefore not required to receive actual notice upon the opening of Austin’s estate.<sup>16</sup>

Eight months following the date on which Snead first published notice of the estate’s opening, R.M.N. and R.D.N.’s (the “minors”) father filed claims against the estate in the Circuit Court of Gentry County as the minors’ “next friend.”<sup>17</sup> The claims included counts for intentional infliction of emotional distress, assault, battery, sexual abuse, invasion of privacy, and civil false arrest.<sup>18</sup> However, the court disallowed the claims against the estate, citing the six-month statutory bar in Missouri Revised Statutes Section 473.360.<sup>19</sup> In response, the minors’ father petitioned the court to reclassify the claims as an adversary proceeding.<sup>20</sup>

Snead filed a motion to dismiss the minors’ claims against Austin’s estate, arguing that the claims were filed more than six months after August 26, 2009 – the day on which Snead first published notice of the opening of the estate – and were, therefore, untimely.<sup>21</sup> Further, Snead argued that the minors’ claims did not meet an exception to the statutory bar<sup>22</sup> and that the minors were not “known or reasonably ascertainable creditors.”<sup>23</sup> The Circuit Court of Gentry County sustained Snead’s motion, and the minors’ father filed a timely appeal.<sup>24</sup>

Upon review, the Supreme Court of Missouri reversed and remanded the trial court’s dismissal of the minors’ claims, holding that due process requires the personal representative of an estate to provide “all reasonably ascertainable creditors who may have . . . more than a merely conjectural claim against the estate” actual notice of the initiation of the probate proceeding.<sup>25</sup>

### III. LEGAL BACKGROUND

In 1988, the Supreme Court of the United States handed down *Tulsa Professional Collection Services, Inc. v. Pope*, which held that notice by pub-

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16. *See id.* at 170, 172.

17. *Id.* at 170. In Missouri, a “next friend” is a person “who, without being regularly appointed guardian, acts for the benefit of” a minor. *See, e.g., Crawford v. Amusement Syndicate Co.*, 37 S.W.2d 581, 584 (Mo. 1931).

18. *Austin*, 389 S.W.3d at 169 n.1.

19. *See id.* at 170.

20. *Id.* at 170 & n.7.

21. *Id.* at 170.

22. *Id.* There are exceptions to non-claim statutes. *See* MCGOVERN, KURTZ & ENGLISH, *PRINCIPLES OF WILLS, TRUSTS & ESTATES* 670-71 (2d ed. 2011) (“A claimant who had a suit pending against the decedent at the time of the decedent’s death need not present the claim in the estate proceedings. . . . Claims which arise after the decedent’s death . . . can be presented within 4 months after performance is due. . . . The federal government is not subject to state non-claim statutes.”).

23. *Austin*, 389 S.W.3d at 170.

24. *Id.*

25. *Id.* at 173.

lication was constitutionally insufficient to bar the claims of certain creditors against a decedent's estate.<sup>26</sup> This holding called into question the constitutionality of Missouri's non-claim statute as well as non-claim statutes in probate codes across the country.<sup>27</sup> For this reason, it is beneficial to analyze the due process considerations that have transformed Missouri's non-claim statute through the lens of *Pope*. In doing so, this Part examines Missouri's non-claim statute prior to the Court's holding in *Pope*, the Supreme Court's refinement of the "reasonably ascertainable" creditor, and, finally, Missouri's response to *Pope*.

### A. Missouri's Non-Claim Statute Before *Pope*

Upon the death of a testator, a personal representative may initiate probate.<sup>28</sup> The probate process commences when the letters testamentary are filed "[i]n the county in which the domicile of the deceased is situated."<sup>29</sup> Once the personal representative is appointed, that individual must publish notice in "some newspaper" and assert that the individual has been appointed representative.<sup>30</sup> The notice must include a notification to the decedent's creditors warning them of their right to file their claims in the court within six months after the first published notice of letters testamentary or administration – or be forever barred from doing so.<sup>31</sup> This notice, which is published once a week for four consecutive weeks,<sup>32</sup> is designed to make creditors aware of the strict time limit imposed on creditor claims found in Missouri Revised Statutes Section 473.360, which provides:

[A]ll claims against the estate of a deceased person, other than costs and expenses of administration, exempt property, family allowance, homestead allowance, claims of the United States and claims of any taxing authority within the United States . . . which are not filed in the probate division . . . or which are not paid by the personal representative, within six months after the first published notice of letters testamentary or of administration, are forever barred against the estate, the

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26. 485 U.S. 478, 490 (1988).

27. *See id.* at 480.

28. *See* MO. REV. STAT. § 473.010 (2012); MO. REV. STAT. § 473.110 (2012).

29. § 473.010.1(1). However, "if [the decedent] had no domicile in the state then [probate may be initiated] in any county wherein [the decedent] left any property." § 473.010.1(2). And "[i]f the decedent had no domicile in the state and left no property therein, [probate may be initiated] in any county in which the granting thereof is required in order to protect or secure any legal right." § 473.010.1(3).

30. MO. REV. STAT. § 473.033 (2012).

31. *Id.*

32. *Id.*

personal representative, the heirs, devisees and legatees of the decedent.<sup>33</sup>

Prior to the Court's 1988 decision in *Pope*, Missouri's non-claim statute included a second, long-term bar on creditor claims.<sup>34</sup> This bar was found in a subsequent portion of Section 473.360 and provided that "[a]ll claims barable under the provisions of the six month non-claim statute, in any event, are barred if administration of the estate is not commenced within three years after the death of the decedent."<sup>35</sup> Throughout the mid-twentieth century, the U.S. Supreme Court handed down several decisions that more specifically defined the constitutional requirements for notice.<sup>36</sup>

*B. Notice Laws Challenged by the Due Process Clause – The Rise of the Reasonably Ascertainable Party*

In 1950, the U.S. Supreme Court decided *Mullane v. Central Hanover Bank & Trust*.<sup>37</sup> The case involved a common trust fund established pursuant to N.Y. Banking Law Section 100-c.<sup>38</sup> This statute permitted beneficiaries of a common trust to receive notification of a judicial accounting solely by publication.<sup>39</sup> The court in *Mullane* considered whether the beneficiaries' receipt of notice by publication violated the beneficiaries' due process rights.<sup>40</sup> In addressing this issue, the Court explained, "An 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 parties of the pendency of the action and afford them an opportunity to present their objections."<sup>41</sup> The Court held that the notice requirement found in Section 100-c was unconstitutional because notice by publication is unreasonable to uphold a ban on a beneficiary's untimely objection when "an efficient and inexpensive means," such as the United States Mail Service, is available.<sup>42</sup> While *Mullane* established that there are indeed circumstances under which notice by publication is insufficient to satisfy due process, it was

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33. MO. REV. STAT. § 473.360.1 (2012).

34. MO. REV. STAT. § 473.360.3 (1986) (repealed 1989).

35. *Id.*

36. *See, e.g.*, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983); *see also* Brian J. Doherty, Comment, *Notice and the Missouri Probate Nonclaim Statutes: The Lingering Effects of Pope*, 59 MO. L. REV. 187, 189-90 (1994).

37. 339 U.S. 306.

38. *Id.* at 308-09.

39. *Id.* at 309-10.

40. *Id.* at 311.

41. *Id.* at 314.

42. *Id.* at 318-19.

initially unclear how far *Mullane*'s holding extended and whether it applied to creditor non-claim statutes in probate.<sup>43</sup>

More than three decades after the Supreme Court handed down *Mullane*, the Court again addressed the constitutionality of notice by publication in *Mennonite Board of Missions v. Adams*.<sup>44</sup> The law under scrutiny in *Mennonite* was an Indiana statute that allowed for a tax sale of real property when taxes remained unpaid on the property for fifteen months.<sup>45</sup> The statute did not require that interested parties receive actual notice.<sup>46</sup> The Indiana law further provided that the tax sale was followed by a "two-year redemption period during which the 'owner, occupant, lienholder, or other person who has an interest in' the property" may reclaim title.<sup>47</sup> The property at issue in *Mennonite* was mortgaged in favor of the Mennonite Board of Missions (the "Board"), and when the property owner failed to pay taxes on the property, the county initiated a tax sale.<sup>48</sup> While the owner of the property received actual notice of the sale, the Board did not.<sup>49</sup> In its discussion of the unconstitutionality of the Indiana notice statute, the Court explained, "[A]ctual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party . . . if [the party's] name and address are *reasonably ascertainable*."<sup>50</sup>

### C. Constitutionality of Non-Claim Statutes Contemplated

It was not until *Continental Insurance Co. v. Moseley* that the holdings of *Mullane* and *Mennonite* were applied to creditor non-claim statutes.<sup>51</sup> In *Continental Insurance*, creditors of a decedent's estate argued that a Nevada non-claim statute, which provided that a claim not filed within sixty days of the first instance of publication by notice was forever barred, violated the creditors' rights under the Due Process Clause.<sup>52</sup> The Supreme Court of Nevada rejected their argument, citing the important function of non-claim statutes in the probate process.<sup>53</sup> The court explained that non-claim statutes promoted the "expeditious and comparatively unencumbered means of ac-

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43. See Debra A. Falender, *Notice to Creditors in Estate Proceedings: What Process Is Due?*, 63 N.C. L. REV. 659, 663 (1985).

44. 462 U.S. 791, 792 (1983).

45. *Id.* at 792-93; see also IND. CODE ANN. § 6-1.1-24-1 (West 2014).

46. *Mennonite*, 462 U.S. at 793; see § 6-1.1-24-1.

47. *Mennonite*, 462 U.S. at 793 (quoting IND. CODE ANN. § 6-1.1-25-1 (West 2014) (amended 1988)).

48. *Id.* at 792, 794-95.

49. *Id.* at 794.

50. *Id.* at 800 (emphasis added).

51. See *Cont'l Ins. Co. v. Moseley*, 653 P.2d 158 (Nev. 1982), *vacated*, 463 U.S. 1202 (1983).

52. *Id.* at 160.

53. *Id.*

completing estate administration.”<sup>54</sup> Ultimately, the Supreme Court of Nevada held that notice by publication in the non-claim context was “reasonably and sufficiently calculated to provide actual notice to [the creditor].”<sup>55</sup> When the case was appealed to the U.S. Supreme Court, it was reversed and remanded “for further consideration in light of [*Mennonite*].”<sup>56</sup> Upon remand, the Supreme Court of Nevada applied *Mullane* and *Mennonite* and ultimately held that the Due Process Clause requires that an ascertainable creditor receive “more than service by publication.”<sup>57</sup>

Two years later, in 1985, the constitutionality of non-claim statutes came before the Supreme Court of Missouri in *Estate of Busch v. Ferrell-Duncan Clinic, Inc.*<sup>58</sup> In *Busch*, creditor Ferrell-Duncan Clinic filed a claim for services provided prior to the decedent’s death.<sup>59</sup> The claim was filed eleven months after notification of the opening of the decedent’s estate was published.<sup>60</sup> The probate court held that, because the clinic failed to file the claim within the six-month time limit set forth in Missouri Revised Statutes Section 473.360, the clinic’s claim was forever barred.<sup>61</sup>

The clinic attacked the constitutionality of the statute, arguing that the six-month time bar set forth in the statute deprived the creditor of its due process rights.<sup>62</sup> In its analysis, the Supreme Court of Missouri distinguished *Mullane* and rejected the Supreme Court of Nevada’s holding in *Moseley*.<sup>63</sup> The court explained,

In *Mullane*, and the cases following it, the person to be notified was, in effect, made an actual party to the litigation by the notice, and the judgment of the court operated directly on that person’s property. Notice under a nonclaim statute does not make a creditor a party to the proceeding; it merely notifies him that he may become one if he wishes.<sup>64</sup>

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54. *Id.*

55. *Id.*

56. *Cont’l Ins. Co. v. Moseley*, 463 U.S. 1202, 1202 (1983).

57. *Cont’l Ins. Co. v. Moseley*, 683 P.2d 20, 21 (Nev. 1984).

58. 700 S.W.2d 86 (Mo. 1985) (en banc), *abrogated by* Tulsa Prof’l Collection Servs., 485 U.S. 478 (1988).

59. *Id.* at 87.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 87-89.

64. *Id.* at 88. The court also cited *Texaco, Inc. v. Short*, wherein the Court held that a self-executing statute of limitations does not necessitate Due Process analysis. *Estate of Busch*, 700 S.W.2d at 89 (citing *Texaco, Inc. v. Short*, 454 U.S. 516 (1982)).



*D. Due Process Extended: Tulsa Professional Collection Services, Inc. v. Pope*

In *Tulsa Professional Collection Services, Inc. v. Pope*, the court confronted the dissonance between the strict language of non-claim statutes and creditors' rights to constitutionally sufficient notice under the Due Process Clause.<sup>65</sup> In *Pope*, the decedent, H. Everett Pope, spent more than four months in the hospital before his death.<sup>66</sup> Upon Pope's death, creditor St. John Medical Center sought payment of a hospital bill for Pope's last sickness.<sup>67</sup> Pope's widow initiated probate pursuant to Oklahoma's statutory framework and published notice to potential creditors.<sup>68</sup> The Oklahoma statute at issue required claims "arising upon a contract" to be presented to the personal representative of an estate within two months of the first publication of the opening of the probate estate.<sup>69</sup>

This particular non-claim statute was far from unique.<sup>70</sup> In fact, Oklahoma's non-claim statute mirrored non-claim statutes in most U.S. jurisdictions.<sup>71</sup> The hospital failed to file its claim within the two-month statutory period and, as a result, was denied payment.<sup>72</sup> The hospital argued that Section 594 of the probate code, which required that a personal representative "pay . . . the expenses of the last sickness," nullified the two-month claim bar set forth in Section 333.<sup>73</sup> The court of appeals rejected the hospital's argument,<sup>74</sup> and the hospital sought a rehearing at which time it challenged the constitutionality of the statute under the Due Process Clause.<sup>75</sup> Both the court

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65. *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 479 (1988).

66. *Id.* at 482.

67. *Id.*

68. *Id.*

69. *Id.* at 479; see OKLA. STAT. ANN. tit. 58, § 333 (West 2014). The statute sets forth exceptions that were not at issue in *Pope*. See § 333. For example, a claim asserted by an out-of-state creditor "may be presented at any time before a final decree of distribution is entered." *Id.*

70. The court explained that there are two common species of non-claim statutes. *Pope*, 485 U.S. at 480. The first type of non-claim statute runs from the opening of the decedent's estate and affords the claimant a narrow window (usually two to six months) during which the creditor may file his or her claim. *Id.* The second type of non-claim statute runs from the decedent's death and provides the claimant with a more generous timeframe for notifying the personal representative (usually one to five years) of the claim. *Id.* Some probate codes include both a long and short non-claim. *Id.* (citing ARK. CODE ANN. § 28-50-1010(a), (d) (1987); IDAHO CODE ANN. § 15-3-803(a)(1), (2) (1979); MO. REV. STAT. § 473.360.1, .3 (1986)). Oklahoma's probate code, however, only included a short non-claim statute. *Id.*

71. *Id.* at 479 (citing UNIF. PROBATE CODE § 3-801); see also Falender, *supra* note 43, at 667.

72. *Pope*, 485 U.S. at 482.

73. *Id.*

74. *Id.* at 483.

75. *Id.*

of appeals and, later, the Supreme Court of Oklahoma, rejected the hospital's Due Process argument.<sup>76</sup>

The U.S. Supreme Court granted certiorari.<sup>77</sup> The Court explained that while the hospital's claim against Pope's estate was undeniably a property interest,<sup>78</sup> the Fourteenth Amendment protects exclusively against deprivation by state action.<sup>79</sup> While the Court had previously established that the "mere running of a . . . statute of limitations" did not rise to the level of state action,<sup>80</sup> the issue at bar was whether the *probate process* was sufficiently intertwined with state action to implicate the Due Process Clause.<sup>81</sup> The court held that it was and explained:

Where the legal proceedings themselves trigger the time bar, even if those proceedings do not necessarily resolve the claim on the merits, the time bar lacks the self-executing feature that *Short* indicated was necessary to remove any due process problem . . . . [Therefore,] due process is directly implicated and actual notice . . . is required.<sup>82</sup>

Finally, the Court asserted that under the principles of *Mullane* and *Menonite*, the personal representative of an estate is required to make reasonable efforts to give all "known or 'reasonably ascertainable'" creditors actual notice of the proceedings.<sup>83</sup>

#### *E. Missouri's Non-Claim Statute After Pope*

The Missouri Legislature reacted to *Pope* in 1989 by proposing Missouri Revised Statutes Section 473.034, which required personal representatives to provide "ascertainable" creditors actual notice.<sup>84</sup> Proponents of this statute took the position that the legislation was a needed codification of the

76. *Id.*

77. *Id.* at 484.

78. *Id.* at 485 (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982)).

79. *Id.*

80. *Id.* at 485-86 (citing *Texaco, Inc. v. Short*, 454 U.S. 516 (1982)).

81. *Id.*

82. *Id.* at 487.

83. *Id.* at 491.

84. Doherty, *supra* note 36, at 193. Proposed Section 473.034 set forth:

1. Within one hundred twenty days of the date of first publication, the personal representative of the estate shall mail a copy of the notice prescribed by section 473.033 by ordinary mail to all known or reasonably ascertainable creditors whose claims may not be paid or acknowledged by the personal representative to be due as provided in section 473.035.

2. The burden of proof on any issue as to whether a creditor was known or reasonably ascertainable by the personal representative shall be on the creditor.

*Id.* at 193 n.58 (quoting H.R. Res. 145, 85th Gen. Assemb., 1st Reg. Sess. (Mo. 1989)).

holding in *Pope*.<sup>85</sup> A codification of *Pope* was viewed as a valuable addition to the probate code because it would make personal representatives, unapprised of case law, aware of the need to give certain creditors actual notice.<sup>86</sup> While the Missouri Legislature declined to pass 473.034, discernable changes were made to Missouri's non-claim statute. Section 473.033 was amended to provide that "all claims not filed within six months 'will be forever barred to the fullest extent permissible by law.'"<sup>87</sup> Further, the bar in Section 473.044, which previously barred a claimant from asserting a claim more than three years after the decedent's death, was reduced to one year from the decedent's death.<sup>88</sup>

In *Missouri Highway & Transportation Commission v. Myers*, the Supreme Court of Missouri had its first occasion to analyze Missouri's six-month non-claim bar.<sup>89</sup> In *Myers*, the creditor had actual notice of the proceedings but failed to file a timely claim with the probate court pursuant to Section 473.360.<sup>90</sup> In its application of *Pope*, the Supreme Court of Missouri reiterated that *Pope* did not void Oklahoma's non-claim statute, but rather held that a reasonably ascertainable creditor is entitled to *more* than notice by publication.<sup>91</sup> In *Myers*, the Supreme Court of Missouri concluded that "nothing in *Pope* . . . invalidates Missouri's nonclaim statute . . ."<sup>92</sup> Further, the court held that the Due Process Clause is satisfied when a creditor has actual notice of probate proceedings.<sup>93</sup>

#### IV. THE INSTANT DECISION

Two threshold determinations were resolved in *Austin*.<sup>94</sup> The first issue before the court was whether a victim of substantiated sexual abuse is a reasonably ascertainable creditor.<sup>95</sup> Second, the court had to decide whether substantiated allegations of sexual abuse are "conjectural" claims.<sup>96</sup> The court ultimately held that because a victim of substantiated sexual abuse is a reasonably ascertainable creditor, and because a substantiated claim of abuse is more than conjectural, a victim's due process rights are violated when he or

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85. *See id.* at 193.

86. *Id.*

87. *Id.* (quoting MO. REV. STAT. § 473.033 (2012)). The old Section 473.033 merely provided that claims not filed within six months would "be forever barred." *Id.*

88. *Id.* (citing MO REV. STAT. § 473.444 (2012)).

89. 785 S.W.2d 70, 71 (Mo. 1990) (en banc); *see* Doherty, *supra* note 36, at 194.

90. *Myers*, 785 S.W.2d at 72.

91. *Id.* at 74-75.

92. *Id.* at 74 (emphasis added).

93. *See id.*

94. *In re Estate of Austin*, 389 S.W.3d 168, 171 (Mo. 2013) (en banc).

95. *Id.*

96. *Id.*

she is denied actual notice and his or her claims are barred pursuant to Section 473.360 without actual notice of the opening of the decedent's estate.<sup>97</sup>

The court's discussion began with an explanation of the notice requirements of Section 473.360.<sup>98</sup> The statute requires that claims against a decedent's estate be filed in the probate division of the circuit court "within six months after the date of the first published notice of letters testamentary."<sup>99</sup> However, the statute provides that "if notice was actually mailed to, or served upon, such creditor," the creditor has only two months after the date the notice was mailed to file his or her claim.<sup>100</sup> The statute further provides that claims not brought within these strict windows are "forever barred against the estate."<sup>101</sup>

The court's analysis began with an explanation of the purpose of notice in a legal proceeding.<sup>102</sup> The court cited *Mullane v. Central Hanover Bank & Trust* – the "seminal case" on a claimant's due process rights – to establish that a "proceeding which is to be accorded finality" requires "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."<sup>103</sup>

After explaining the reason for statutory notice requirements, the court then reiterated the U.S. Supreme Court's most fundamental assertions regarding notice and due process, explaining that "[a claimant] is entitled to actual notice as a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of [that claimant] . . . if its name and address are reasonably ascertainable."<sup>104</sup> The court then explained that R.M.N. and R.D.N.'s claims of sexual abuse were property as provided in the Fourteenth Amendment's Due Process Clause because the U.S. Supreme Court held that causes of action are "property interests" in this context.<sup>105</sup> The court determined that, because reasonably ascertainable claimants are entitled to actual notice when their property is adversely affected by a proceeding, and because causes of action are property interests, R.M.N. and R.D.N. were entitled to actual notice, but only if they were "reasonably ascertainable claimants."<sup>106</sup>

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97. *Id.* at 172-73.

98. *Id.* at 171.

99. *Id.* (quoting MO. REV. STAT. § 473.360 (2012)).

100. *Id.* (quoting § 473.360).

101. *Id.* (quoting § 473.360).

102. *Id.*

103. *Id.* (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)) (internal quotation marks omitted).

104. *Id.* (quoting *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983)) (internal quotation marks omitted) (citing *Mullane*, 339 U.S. 306).

105. *Id.* at 171-73 (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)).

106. *Id.* at 172.

The court next inquired as to whether R.M.N. and R.D.N. were indeed creditors entitled to actual notice.<sup>107</sup> The court explained that a claimant is entitled to actual notice only if she meets a two-pronged test: the claimant must be “reasonably ascertainable,” and the claim must be more than “merely conjectural.”<sup>108</sup> The court first analyzed whether R.M.N. and R.D.N.’s identities as creditors were reasonably ascertainable.<sup>109</sup> The court cited Snead’s personal investigation into the legitimacy of the minors’ claims as an indication that Snead was aware of the potential claims against the estate.<sup>110</sup> Further, the court cited Snead’s conversations with the minors’ aunt and grandmother as grounds for concluding that Snead had the resources necessary to locate R.M.N. and R.D.N.’s father and serve him notice.<sup>111</sup>

After the court concluded that the minors were reasonably ascertainable creditors, it next analyzed whether their substantiated claims of sexual abuse were “merely conjectural” claims against the estate.<sup>112</sup> The court explained that the Supreme Court of Missouri had not provided a working definition of “conjectural.”<sup>113</sup> For this reason, the court looked to the plain meaning of the word as provided in *Webster’s Third New International Dictionary*.<sup>114</sup> The court explained that “conjectural” means “of the nature of or involving or based on conjecture” or “inference or conclusion drawn or deduced by surmise or guesswork.”<sup>115</sup> Applying the facts to this definition, the court explained that it would be contrary to the plain meaning of the word to conclude that R.M.N. and R.D.N.’s claims were conjectural.<sup>116</sup> The court reasoned that claims that were substantiated by a preponderance of the evidence were neither deduced by guesswork nor presumed from defective or presumptive evidence.<sup>117</sup> Ultimately, the court concluded that R.M.N. and R.D.N. were reasonably ascertainable creditors with more than conjectural claims against Austin’s estate.<sup>118</sup>

Next, the court analyzed the facts of an analogous case from the Supreme Court of Alabama.<sup>119</sup> In *American Home Assurance Co. v. Gaylor*, an insurance company was not provided notice of the opening of the decedent’s estate and failed to file a timely claim as required by the Alabama non-claim

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107. *Id.* at 171-72.

108. *Id.* at 172.

109. *Id.*

110. *Id.*

111. *Id.* at 173.

112. *Id.* at 172.

113. *Id.*

114. *Id.*

115. *Id.* (citation omitted) (internal quotation marks omitted).

116. *Id.*

117. *Id.*

118. *Id.* at 173.

119. *Id.* at 172-73.

statute.<sup>120</sup> American Home argued that the bar was a deprivation of its due process rights because the company was a reasonably ascertainable creditor.<sup>121</sup> The executor of the Gaylor estate had knowledge of an accident involving the decedent and a tractor-trailer, but the executor was unaware of any injuries resulting from the accident.<sup>122</sup> The Alabama court held that even if “the [executor] ‘was not aware that [the truck driver] had been injured in any way,’ the knowledge of the accident required her ‘to inquire into the possibility of a claim’” based on the knowledge she was provided in the accident report.<sup>123</sup> The accident report contained the truck driver’s contact information, which provided the executor “reasonable means of ascertaining the existence of a claim.”<sup>124</sup>

The court compared the insurance company claim in *Gaylor* to R.M.N. and R.D.N.’s claim against Austin’s estate.<sup>125</sup> In analogizing the two situations, the court explained that – like the executor’s knowledge of the tractor-trailer accident – Snead had knowledge of the minors’ allegations of sexual abuse against Austin.<sup>126</sup> Furthermore, just as the executor in *Gaylor* had the accident report with the potential claimant’s contact information, Snead contacted several members of the minors’ family and was therefore in a position to access the contact information necessary for providing notice.<sup>127</sup>

The court concluded that Snead deviated from her responsibilities as personal representative when she declined to provide R.M.N. and R.D.N. with notice of Austin’s probate proceeding, explaining that it was not the duty of the personal representative to determine whether a claim against an estate has “legal merit.”<sup>128</sup> The court reiterated that it was Snead’s responsibility to provide notice to reasonably ascertainable creditors with more than conjectural claims, and Snead failed to do this.<sup>129</sup> Ultimately, the court concluded that the minors’ due process rights were violated when their claims were barred pursuant to the six-month time limitation set forth in Section 473.360.<sup>130</sup> Because the minors’ claim should not have been dismissed, the court reversed the trial court’s judgment and remanded the case.<sup>131</sup>

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120. *Id.* at 172 (citing *Am. Home Assurance Co. v. Gaylor*, 894 So. 2d 656, 657 (Ala. 2004)).

121. *Id.* (citing *Am. Home Assurance*, 894 So. 2d at 658).

122. *Id.* (citing *Am. Home Assurance*, 894 So. 2d at 660).

123. *Id.* (quoting *Am. Home Assurance*, 894 So. 2d at 660-61) (alteration in original).

124. *Id.* (citing *Am. Home Assurance*, 894 So. 2d at 660-61).

125. *Id.* at 173.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

## V. COMMENT

Because R.M.N.'s and R.D.N.'s father asserted claims *prior* to the universal one-year time bar set forth in Section 473.444,<sup>132</sup> the court in *Austin* was able to limit its analysis to whether a victim of substantiated sexual abuse is a reasonably ascertainable creditor.<sup>133</sup> The court's holding – that such a victim is reasonably ascertainable and, therefore, not barred by the six-month claim bar set forth in Section 473.360 – is significant for victims of sexual abuse: *Austin* effectively affords a victim of *substantiated* sexual abuse an extra six months to file a claim against the estate of his or her perpetrator. However, the court's discussion of Snead's personal knowledge of the DFS investigation and its ultimate substantiation of the allegations of R.M.N. and R.D.N. raises questions about just how far this holding can be extended to other victims of sexual abuse and whether an exception to the claim bar is warranted.

*A. Must a Claim Be "Substantiated" to Circumvent the Six-Month Claim Bar?*

Two factual considerations weighed heavily on the court's determination that R.M.N. and R.D.N. were reasonably ascertainable creditors.<sup>134</sup> First, Snead, acting as personal representative, personally investigated the validity of the claims.<sup>135</sup> In its discussion of this particular fact, the court explained, "[T]he children's identity was known or reasonably ascertainable to Snead *because* she was aware of the underlying events that led to the potential claims."<sup>136</sup> This might suggest that when a personal representative is aware of claims of sexual abuse, the individuals asserting those claims are reasonably ascertainable. Alternatively, where a personal representative is not aware of any incident or allegations of abuse, the creditor may not be reasonably ascertainable. It is not entirely clear what role the personal representative's subjective knowledge played in the court's analysis.

The second fact that weighed on the court's analysis was the finding that the claims were substantiated by a preponderance of the evidence by DFS.<sup>137</sup> While substantiation is not conclusive of misconduct, it requires the service to gather physical and testimonial evidence and conclude that it is more likely than not that abuse occurred.<sup>138</sup> When DFS makes a finding of substantiated abuse, the state is required to publish the identity of the alleged perpetrator in

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132. MO REV. STAT. § 473.444 (2012).

133. *Austin*, 389 S.W.3d at 169-71.

134. *Id.* at 172-73.

135. *Id.* at 173.

136. *Id.* at 172 (emphasis added).

137. *Id.* at 172.

138. See generally MO. DEP'T OF FAMILY SERVS., *supra* note 6 (outlining the process for reporting and investigating child abuse and neglect in Missouri).

the state's sexual abuse registry.<sup>139</sup> Is it the decedent's existence in this register that puts a personal representative on notice of potential claimants? Or, is the personal representative's personal knowledge of an unsubstantiated claim sufficient to make the claimant reasonably ascertainable? The role of DFS substantiation remains unclear in the court's analysis.

*B. Possible Exception to Claim Bar for Claims of Sexual Abuse of a Child*

There are well-founded exceptions to claims that arise after a decedent's death. For example, the Uniform Probate Code provides that a claim arising after a decedent's death can be asserted within four months of the date the claim arises or performance is due.<sup>140</sup> However, Missouri Revised Statutes Section 473.360 provides that all claims, "whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise," must be asserted within the strict timeframes set forth in Missouri's non-claim statute.<sup>141</sup> The practical effect of this language is to require that claims be *presented* before the expiration of the non-claim even though the claim will not necessarily be paid during administration.<sup>142</sup> While the court in *Austin* found that the claim was *not* conjectural, this conclusion was based on Snead's knowledge of the abuse and (or) DFS's substantiation.<sup>143</sup> The very facts in *Austin* that deem this particular claim non-conjectural are the same facts that make this claim arise *before* the death of the decedent and, thus, outside the realm of this exception. While *Austin* does not address treatment of unsubstantiated claims that are asserted for the first time after the death of a decedent, the court's analysis in *Austin* and a literal reading of Missouri's non-claim statute suggest that such a claim would be barred.

The facts in *Austin* raise a controversial question: do the unique circumstances surrounding claims of childhood sexual abuse warrant an exception to the one-year claim bar against a decedent's estate? There are strong policy considerations cutting in favor of an exception. The sexual abuse of a child is universally recognized as a particularly heinous form of tortious conduct. Despite the obvious need for redress, there are several reasons why claims of sexual abuse are particularly *unlikely* to be asserted within a court's strict procedural framework. Not only does a claim of sexual child abuse present challenging evidentiary hurdles, but also 90% of sexually-abused minors personally know their perpetrators.<sup>144</sup> For this reason, minor victims often

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139. *See id.* at 24.

140. UNIF. PROBATE CODE § 3-803(c).

141. MO. REV. STAT. § 473.360.1 (2012).

142. MCGOVERN, KURTZ & ENGLISH, *supra* note 22, at 671.

143. *In re Estate of Austin*, 389 S.W.3d 168, 173 (Mo. 2013) (en banc).

144. *National Child Abuse Statistics*, CHILDHELP, <http://www.childhelp-usa.com/pages/statistics> (last visited Dec. 19, 2014) (citing HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW



feel incapable of asserting allegations of sexual misconduct against an authoritative figure.<sup>145</sup> Often years – and in some instances decades – pass before a child recounts the sexual abuse the child endured during his or her youth.<sup>146</sup>

Delayed assertions of sexual abuse can also be explained on a psychological and social level.<sup>147</sup> Neurologically, a child's mind is capable of repressing and later recovering memories of abuse.<sup>148</sup> Additionally, social considerations like embarrassment, shame, and self-blame can cloud a child's conscience, ultimately deterring the child from confronting his or her abuser.<sup>149</sup> These factors further explicate why tort claims for sexual abuse are particularly unlikely to be asserted within a narrow statute of limitations or non-claim statute.

While an exception to non-claim statutes for sexual abuse claims is unprecedented, these legitimate policy considerations are reflected in an exception to the statute of limitations in claims of child abuse. For example, in Oregon, there is an exception for future claims by minor claimants who have suppressed memories of abuse or have “not discovered the . . . [resulting] injury . . . nor . . . should have discovered the causal connection between the injury and the child abuse . . . .”<sup>150</sup> While the policy considerations that drive this exception mirror those supporting an exception to Missouri's non-claim statute, there are considerations that complicate this exception in the realm of decedents' estates.

Statutes of limitations balance competing goals. A procedural time bar should afford a claimant adequate time to bring a claim, but should also reflect the reality that evidence is lost with the passage of time. One of the ultimate goals of this balance is to ensure that a defendant has a fair opportunity to defend against a claim. Yet, a non-claim is implicated only when

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ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (2000), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/saycrle.pdf>.

145. See Cynthia Grant Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 HARV. L. REV. 549, 605 (1996).

146. *Id.* at 599-611.

147. *Id.*

148. *Id.* at 599. The repression and recovery of traumatic memories is referred to as “traumatic amnesia.” *Id.*

The blocked-off memories, however they are caused, do not disappear altogether, but appear to remain stored subconsciously, at times signaling their presence in ‘neurotic’ symptoms. If an event occurs that is similar in character to the original situation, it can stimulate the brain to ‘replay’ the memory, causing a “flashback.”

*Id.*

149. See, e.g., Caia Johnson, *Traumatic Amnesia in the New Millennium: A New Approach to Exhumed Memories of Childhood Sexual Abuse*, 21 HAMLIN J. PUB. L. & POL'Y 387, 432-33 (2000).

150. OR. REV. STAT. ANN. § 12.117(1) (West 2014). This statute only applies to individuals who are abused during minority. *Id.* Claims must be brought prior to age forty unless the suppressed-memory exception applies. *Id.*

the alleged perpetrator is deceased, and, for this reason, the very evidentiary hurdles that cut in favor of an exception to the statute of limitations for claims of sexual abuse against living defendants cut even harder against an exception to a non-claim: upon the accused's death, the individual is particularly ill-suited to defend against false claims.

## VI. CONCLUSION

The court in *Austin* struck a practicable balance: a substantiated claim for sexual abuse is sufficiently rooted in factual findings to counter the concern that posthumous, unfounded claims will be asserted – for the first time – upon the administration of the accused's estate.<sup>151</sup> However, *Austin* leaves the treatment of a category of claims uncertain:<sup>152</sup> can an alleged victim assert an unsubstantiated claim after the six-month time bar when the personal representative is aware of allegations of abuse? Under *Austin*, an alleged victim may very well have a colorable claim.

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151. See *In re Estate of Austin*, 389 S.W.3d 168, 172 (Mo. 2013) (en banc).

152. See *supra* Part V.A.