

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

Remedies of Creditor Where Personal Representative Fails to Give Notice

April 1990

This tentative recommendation is being distributed so interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Comments sent to the Commission are a public record, and will be considered at a public meeting of the Commission. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe it should be revised.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN JUNE 30, 1990.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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Letter of Transmittal

This recommendation supplements the remedies available to a creditor who is forced to petition for a late claim in probate because of the personal representative's failure timely to notify the creditor of the probate:

- (1) The filing of a late claim petition by the creditor would toll the statute of limitations on the creditor's claim.
- (2) Preliminary distributees would be required to restore property to the estate to the extent necessary to satisfy the late claim.
- (3) A personal representative whose failure to notify the creditor is wrongful would be personally liable to the extent preliminary distributions are not recoverable and have caused the estate to be insolvent.

This recommendation is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980.

RECOMMENDATION

If a personal representative in bad faith fails to notify a known creditor of the estate proceeding, the creditor has no remedy against the personal representative so long as the estate is open, but is relegated to a late claim. It is only where the creditor becomes aware of the administration after the estate is closed that the creditor may have a remedy against the personal representative.¹

Even though the estate is open, the personal representative may have depleted the estate by preliminary distributions, with the result that the late claim is not a remedy for the omitted creditor. The late claim statute does not provide that preliminary distributions are subject to late claims in probate; property distributed before a late claim is filed is not subject to the claim.²

The statute should not immunize preliminary distributions from late claims. A preliminary distribution is intended as a convenience to potential distributees, not as a device to defeat the just claims of creditors. Distributees should take with the understanding that until there is an order for final distribution they may be liable to make restitution of the property or its value if required for estate administration. This is the implication of the preliminary distribution statute itself, which provides that the court may require a bond conditioned on "payment of the distributee's proper share of the debts of the estate, not exceeding the amount distributed".³ Where a preliminary distributee is unable to make restitution because the distributee is insolvent, the creditor should have an

1. Prob. Code § 9053.

2. Prob. Code § 9103(e). In addition, the filing of a late claim does not toll the statute of limitations applicable to the claim, with the result that the late claim remedy of an unnotified creditor may be illusory in some cases. Probate Code Section 9352 should be amended to provide that filing a petition for a late claim tolls the statute of limitations applicable to the claim.

3. Prob. Code § 11622(c).

alternative remedy against the personal representative who acted in bad faith.

PROPOSED LEGISLATION

Probate Code § 9053 (amended). Immunity of personal representative

9053. (a) If the personal representative believes that notice to a particular creditor is or may be required by this chapter and gives notice based on that belief, the personal representative is not liable to any person for giving the notice, whether or not required by this chapter.

(b) If the personal representative fails to give notice required by this chapter, the personal representative is not liable to any person for the failure, unless a creditor establishes all of the following:

(1) The failure was in bad faith.

(2) Neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the administration of the estate before ~~the court made an order for final distribution~~ *expiration of the time for filing a claim*, and payment would have been made on the creditor's claim in the course of administration if the claim had been properly filed.

(3) Within 16 months after letters were first issued to a general personal representative, the creditor did both of the following:

(A) Filed a petition requesting that the court in which the estate was administered make an order determining the liability of the personal representative under this subdivision.

(B) At least 30 days before the hearing on the petition, caused notice of the hearing and a copy of the petition to be served on the personal representative in the manner provided in Chapter 4 (commencing with Section 431.10) of Title 5 of Part 2 of the Code of Civil Procedure.

(c) Nothing in this section affects the liability of the estate, if any, for the claim of a creditor, and the personal

representative is not liable for the claim to the extent it is paid out of the estate *or could be paid out of the estate pursuant to Section 9103*.

(d) Nothing in this chapter imposes a duty on the personal representative to make a search for creditors of the decedent.

Comment. Section 9053 is amended to extend liability to a bad faith personal representative in a case where the estate is open but the debt cannot be satisfied out of the estate due to preliminary distributions that cannot be recovered under Section 9103 (late claims).

Probate Code § 9103 (amended). Late claims

9103. (a) Upon petition by a creditor and notice of hearing given as provided in Section 1220, the court may allow a claim to be filed after expiration of the time for filing a claim if the creditor establishes that either of the following conditions are satisfied:

(1) Neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the administration of the estate within 15 days before expiration of the time provided in Section 9100, and the petition was filed within 30 days after either the creditor or the creditor's attorney had actual knowledge of the administration whichever occurred first.

(2) Neither the creditor nor the attorney representing the creditor in the matter had knowledge of the existence of the claim within 15 days before expiration of the time provided in Section 9100, and the petition was filed within 30 days after either the creditor or the creditor's attorney had knowledge of the existence of the claim whichever occurred first.

(b) This section applies only to a claim that relates to an action or proceeding pending against the decedent at the time of death or, if no action or proceeding is pending, to a cause of action that does not arise out of the creditor's conduct of a trade, business, or profession in this state.

(c) The court shall not allow a claim to be filed under this section after the earlier of the following times:

(1) The time the court makes an order for final distribution of the estate.

(2) One year after the time letters are first issued to a general personal representative.

(d) The court may condition the claim on terms that are just and equitable, and may require the appointment or reappointment of a personal representative if necessary. The court may deny the *creditor's* petition if ~~a preliminary distribution to beneficiaries or~~ a payment to general creditors has been made and it appears that the filing or establishment of the claim would cause or tend to cause unequal treatment among ~~beneficiaries or~~ creditors.

(e) Regardless of whether the claim is later established in whole or in part, ~~property distributed under court order and~~ payments otherwise properly made before a claim is filed under this section are not subject to the claim. The personal representative, ~~designee~~, or payee is not liable on account of the prior ~~distribution or~~ payment. *Nothing in this subdivision limits the liability of a person who receives a preliminary distribution of property to restore to the estate an amount sufficient for payment of the distributee's proper share of the claim, not exceeding the amount distributed.*

Comment. Subdivisions (d) and (e) of Section 9103 are amended so that they do not immunize a distribution made under an order for preliminary distribution from subsequent liability for a late claim. Only a distribution made under an order for final distribution is entitled to the immunity provided in the subdivision. Cf. Section 11622(c) (bond for preliminary distribution).

Subdivision (e) is also amended to delete an incorrect reference to a "designee".

Probate Code § 9352 (amended). Tolling statute of limitations

9352. (a) The filing of a claim *or a petition under Section 9103 to file a claim* tolls the statute of limitations otherwise applicable to the claim until allowance, approval, or rejection.

(b) The allowance or approval of a claim in whole or in part further tolls the statute of limitations during the administration of the estate as to the part allowed or approved.

Comment. Subdivision (a) of Section 9352 is amended to provide that filing a petition for a late claim tolls the statute of limitations applicable to the claim.

