

Memorandum 88-60

Subject: Study L-1025 - Probate Code (Notice to Creditors--draft of tentative recommendation)

Attached to this memorandum is a draft of a tentative recommendation to deal with due process concerns raised by the Tulsa case. The draft embodies the decisions made by the Commission at the July meeting, i.e.:

(1) A personal representative is required only to notify known creditors and not to make a search for reasonably ascertainable creditors.

(2) A creditor who is not notified and who otherwise has no knowledge of the administration has no recourse against the personal representative, but may recover either through the late claim procedure or, if the estate has been distributed, from a distributee.

(3) There is a one year statute of limitations running from the date of death on all claims, unless the ordinary statute of limitations would expire earlier, in which case the earlier statute would control.

The staff raises a few issues concerning this scheme in notes following the draft provisions of the tentative recommendation.

Respectfully submitted,

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Staff Draft  
Tentative Recommendation  
relating to  
NOTICE TO CREDITORS

Effective July 1, 1988, California law requires a personal representative in decedent estate administration proceedings to mail actual notice of administration to known creditors of the decedent,<sup>1</sup> in addition to publication of notice to unknown creditors.<sup>2</sup> All creditors, known and unknown, thereupon have four months in which to file a claim against the estate.<sup>3</sup>

The requirement of actual notice to known creditors was enacted on recommendation of the Law Revision Commission.<sup>4</sup> The former law had been inequitable and of questionable constitutionality, and developments in the United States Supreme Court and in state courts had raised the likelihood that the former scheme violated due process of law.<sup>5</sup>

The United States Supreme Court has now spoken on this issue in the case of Tulsa Professional Collection Services, Inc. v. Pope (No. 86-1961, April 19, 1988). The Tulsa case holds that a state cannot impose a two-month claim filing requirement on known or reasonably ascertainable creditors merely by publication of notice; actual notice is required for a short-term claim filing requirement.

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1. Prob. Code §§ 9050-9054; enacted by 1987 Cal. Stats. ch. 923 § 93.

2. Prob. Code § 333.

3. Probate Code Section 9100 requires a creditor to file a claim within the later of four months after issuance of letters to a general personal representative or, if notice is mailed as required, within 30 days after the notice is given.

4. *Recommendation Relating to Creditor Claims Against Decedent's Estate*, 19 Cal. L. Revision Comm'n Reports 299 (1988).

5. 19 Cal. L. Revision Comm'n Reports at 303.

Although the Supreme Court cites the new California statute in support of the proposition that a few states already provide for actual notice in connection with short nonclaim statutes, it is clear from a reading of the opinion in the case that the new California statute does not satisfy the announced constitutional standards in that it purports to cut off unnotified but "reasonably ascertainable" creditors with a short claim-filing requirement.

To bring the California statute into conformity with constitutional requirements, the Law Revision Commission further recommends that, notwithstanding the four month claim-filing requirement, a known or reasonably ascertainable creditor who does not have actual knowledge of the administration of the estate during the four month claim period should be permitted to petition for leave to file a late claim.<sup>6</sup> If the estate has already been distributed when the known or reasonably ascertainable creditor acquires actual knowledge of the administration proceeding, the creditor would have recourse against distributees of the estate.<sup>7</sup> The personal representative would be protected from liability for the claim so long as the personal representative acts in good faith in notifying known creditors.<sup>8</sup>

Although known or reasonably ascertainable creditors who have no knowledge of administration are given remedies beyond the four month

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6. Existing California law already authorizes such a late claim petition, but only for creditors who were out of the state during the four month claim period and whose claim is on a nonbusiness debt. Section 9103. Legislation proposed by the Commission that is pending in the 1988 legislative session would remove the out-of-state limitation. See AB 2841 (Harris). The present recommendation would remove the business claim limitation.

7. This would be a limited exception to the general rule that an omitted creditor has no right to require contribution from creditors who are paid or from distributees. Prob. Code § 11429. Under the Commission's proposal, a distributee held to account by a creditor would be able to join other distributees, and liability would be based on abatement principles. See Sections 21400-21406 (abatement) [AB 2841].

8. This is existing law. Prob. Code § 9053.

claim cut-off, these remedies must be exercised within one year after the decedent's death. The Commission believes that a new long term statute of limitations of one year commencing with the decedent's death<sup>9</sup> will best effectuate the strong public policies of expeditious estate administration and security of title for distributees. While the Supreme Court declined to rule on the validity of long term statutes of limitation that run from one to five years from the date of death, a one-year statute is believed to be constitutional since it is self-executing, it allows a reasonable time for the creditor to discover the decedent's death, and it is an appropriate period to afford repose and provide a reasonable cutoff for claims that soon would become stale.<sup>10</sup>

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9. Or such shorter time as the statute of limitations otherwise applicable to the particular claim will run. This reverses the policy of existing Code of Civil Procedure Section 353, which extends an earlier expiring statute of limitations to one year after the decedent's death.

10. See, e.g., Falender, Notice to Creditors in Estate Proceedings: What Process is Due?, 63 N. C. L. Rev. 659, 673-677 (1985).

The Commission's recommendation would be effectuated by enactment of the following measure.

An act to amend Section 353 of the Code of Civil Procedure and to amend Sections 9053, 9103, and 11429 of, and add Section 9392 to, the Probate Code, relating to creditors of a decedent.

Code Civ. Proc. § 353 [AB 2841] (amended). Statute of limitations

SEC. . Section 353 of the Code of Civil Procedure is amended to read:

353. (a) If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by the person's representatives, after the expiration of that time, and within six months from the person's death.

(b) Except as provided in subdivision (c), if a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced ~~against the person's representatives, after~~ before the expiration of that time, and within one year after the date of death.

(c) If a person against whom an action may be brought died before ~~July 1, 1988,~~ the operative date of the 1989 amendment of this section and before the expiration of the time limited for the commencement of the action, and the cause of action survives, an action may be commenced against the person's representatives before the expiration of the ~~later~~ earlier of the following times:

(1) ~~July 1, 1989, or one year after the issuing of letters testamentary or of administration, whichever is the earlier time.~~ One year after the operative date of the 1989 amendment of this section.

(2) The time limited for the commencement of the action.

Comment. Subdivision (b) of Section 353 is amended to impose a new statute of limitations on all actions against a decedent on which the statute of limitations otherwise applicable has not run at the time of death. The new statute is one year after the death of the decedent, unless the statute otherwise applicable would run before that time, in which case the shorter time controls.

If a general personal representative is appointed during the one year period, the personal representative must notify known creditors, and the filing of a claim tolls the statute. Prob. Code §§ 9050 (notice required), 9352 (tolling of statute of limitations). If the creditor is concerned that the decedent's beneficiaries may not have a general personal representative appointed during the one year period, the creditor may petition for appointment during that time. Prob. Code §§ 8000 (petition), 8461 (priority for appointment); see also Prob. Code § 48 ("interested person" defined).

The reference to the decedent's "representatives" is also deleted from subdivision (b). The reference could be read to imply that the one year limitation is only applicable in actions against the decedent's personal representative. However, the one year statute of limitations is intended to apply in any action on a debt of the decedent, whether against the personal representative under Probate Code Sections 9350 to 9354 (claim on cause of action), or against another person, such as a distributee under Probate Code Section 9392 (known or reasonably ascertainable creditor).

Note. Shortening statute of limitations to one year. A special one year statute of limitations running from the date of death has the effect of limiting an ordinary statute of limitations that would otherwise run longer than one year. The one year statute would enable the heirs of a decedent to do nothing for a year (thereby cutting off all creditor claims by inaction) and then open a probate and take all the assets free and clear. Of course, the creditor has a right to open a probate during that time if the creditor is concerned about getting paid. But the creditor may be unaware of the decedent's death during the one year period, or the debt may not be due during the one year period. Shouldn't a creditor be able to make a claim in probate any time a probate is opened, unless the ordinary statute of limitations applicable to the creditor's claim has already run? What public policy supports use of a special one-year creditor cutoff when ordinary probate processes are still at work? If the regular statute of limitations has not run at the time probate is started, the one year cutoff should run from the opening of probate.

The State Bar has raised the question whether a statute of limitations running from the date of opening probate would satisfy the Tulsa argument distinguishing creditor claim statutes from "self executing" statutes of limitation that run from the date of death. The staff believes that if a one-year cutoff running from the date of death is constitutional, a one-year cutoff period running from the date of opening probate, which will always be longer, is necessarily constitutional, notwithstanding loose language and logic in the Tulsa opinion. In fact, Chief Justice Rhenquist's dissenting opinion focuses on the apparently fallacious reasoning of the court in this respect.

Apart from the public policies involved, the staff is also concerned that a one year cutoff running from the date of death will be held unconstitutional. Although there is language in Tulsa about self-executing statutes of limitations, the one year cutoff is not a statute of limitations. A statute of limitations is calculated from the time a cause of action arises or is discovered--the parties have knowledge of the facts that cause the statute to run. This is not the case of the one year cutoff, which is based on the decedent's death, a

fact that the creditor may be unaware of. If the court decides to uphold a statute running from the date of death, it will have to find the statute reasonable in length. Most states that have such statutes, including Uniform Probate Code states, run them for three years, not one year, after the decedent's death.

Cutting off claims in less than one year. As drafted, this section applies a limitation period of one year after the date of death unless the statute of limitations otherwise applicable would expire earlier, in which case the shorter statute applies. This reverses a Commission recommendation made to the Legislature and just enacted (effective July 1, 1988), that a statute of limitations that expires within one year after death should be extended to one year. (Before that, the law had been that the statute of limitations was extended until one year after issuance of letters.) The Commission's reasoning was that if the statute of limitations will expire within a short time after death, a creditor will be trapped because of the need to open a probate and have a personal representative appointed in order to have an estate against which to file a claim and, if the claim is rejected, in order to have a proper party to sue. The Commission felt that one year after death would be a satisfactory period to extend the statute of limitations. What reason can we now offer to reverse this recommendation made only last year? If we want to strictly enforce the statute that would otherwise be applicable, without a grace period of one year after death, the creditor should be authorized to satisfy the statute of limitations by naming the decedent as defendant and substituting the personal representative or other proper party before summons is served.

Prob. Code § 9053 (amended). Immunity of personal representative and attorney

9053. (a) If the personal representative or attorney for the personal representative in good faith 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 or attorney is not liable to any person for giving the notice, whether or not required by this chapter.

(b) If the personal representative or attorney for the personal representative in good faith fails to give notice required by this chapter, the personal representative or attorney is not liable to any person for the failure. Liability, if any, for the failure in such a case is on the estate or on a person to whom property is distributed.

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

Comment. Subdivision (b) of Section 9053 is amended to make clear that the liability to an omitted creditor follows the property in the estate. Thus, if the estate remains open, the property is reached through the late claim procedure. Section 9103 (late claims)). If property has been distributed, distributees are liable to the extent of the property. Section 9392 (known or reasonably ascertainable creditors).

Prob. Code § 9103 [AB 2841] (amended). Late claims

SEC. . Section 9103 of the Probate Code is amended to read:

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 is 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.~~

~~(e)~~ (b) The court shall not allow a claim to be filed under this section after the ~~earlier~~ earliest 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.

(3) The time the statute of limitations otherwise applicable to the claim expires.

~~(d)~~ (c) 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 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)~~ (d) 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 distributee, or payee is not liable on account of the prior distribution or payment.

Comment. Former subdivision (b) of Section 9103, limiting the types of claims eligible for late claim treatment, is deleted. It should be noted that a creditor who is omitted because the creditor had no knowledge of the administration is not limited to the remedy provided in this section. If the creditor can establish that the lack of knowledge is a result of a breach of the personal representative's duty under Chapter 2 (commencing with Section 9050) (notice to creditors), recovery may be available against the personal representative personally or on the bond, if any. See Section 11429 (unpaid creditor). See also Section 9053 (immunity of personal representative and attorney).

Paragraph (3) is added to subdivision (b) to make clear that a late claim should not be permitted if the statute of limitations has run on the claim. This is the consequence of the rule stated in Section 9253 that a claim barred by the statute of limitations may not be allowed by the personal representative or approved by the court or judge. Under Code of Civil Procedure Section 353, the statute of limitations expires one year after the decedent's death if the regular statute has not expired by then.

Prob. Code § 9392 (added). Known or reasonably ascertainable creditor

SEC. . Section 9392 is added to the Probate Code, to read:

9392. (a) Subject to subdivision (b), a person to whom property is distributed is personally liable for the claim of a creditor without a claim first having been filed if all of the following conditions are satisfied:

(1) The identity of the creditor was, within four months after the date letters were first issued to a general personal representative, known to the personal representative or ascertainable by a reasonably

diligent search by the personal representative, and the claim of the creditor was not merely conjectural.

(2) Notice of administration of the estate was not given to the creditor under Chapter 2 (commencing with Section 9050) and neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the administration of the estate before the time the court made an order for final distribution of the estate.

(3) The statute of limitations otherwise applicable to the claim has not expired at the time of commencement of an action under this section.

(b) Personal liability under this section is limited to the extent of the fair market value of the property on the date of the order for final distribution of the estate, less the amount of any liens and encumbrances on the property at that time. A person to whom property is distributed may, in an action under this section, join any other person to whom property is distributed, and the court shall determine their personal liability on the basis of the principles stated in Part 4 (commencing with Section 21400) of Division 11 (abatement) [AB 2841].

Comment. Section 9392 is new. It implements the rule of Tulsa Professional Collection Services, Inc. v. Pope (U.S. 86-1961, April 19, 1988), that the claim of a known or reasonably ascertainable creditor who does not receive actual notice of administration may not be cut off by a short claim filing requirement.

A creditor who has knowledge of estate administration must file a claim or, if the claim filing period has expired, must petition for leave to file a late claim. See Sections 9100 (time for filing claims); 9103 (late claims). This rule applies whether the creditor's knowledge is acquired through notification under Section 9050 (notice required), by virtue of publication under Section 8120 (publication required), or otherwise.

Under Section 9392, the remedy of a creditor who has no knowledge of estate administration before an order is made for final distribution of the estate, has a remedy against distributees. There is a maximum one year statute of limitations, commencing with the date of the decedent's death, for an action under this section by the creditor. Code Civ. Proc. § 353.

An omitted creditor may also have a cause of action against the personal representative in an appropriate case, although the good faith of the personal representative is a defense under Section 9053 (immunity of personal representative and attorney). See Section 11429 (unpaid creditor).

Note. *Can we justify allowing a remedy for known or reasonably ascertainable creditors but not for unknown creditors? Once we've admitted a remedy here for some, equal protection of the laws would seem to mandate a remedy for all.*

Prob. Code § 11429 (amended), Unpaid creditor

SEC. . Section 11429 of the Probate Code is amended to read:

11429. (a) Where the accounts of the personal representative have been settled and an order made for the payment of debts and distribution of the estate, a creditor who is not paid, whether or not included in the order for payment, has no right to require contribution from creditors who are paid or from distributees, except to the extent provided in Section 9392.

(b) Nothing in this section precludes recovery against the personal representative personally or on the bond, if any, by a creditor who is not paid, subject to Section 9053.

Comment. Subdivision (a) of Section 11429 is amended to recognize the liability of distributees provided by Section 9392 (known or reasonably ascertainable creditor).

Subdivision (b) is amended to make specific reference to the statutory immunity of the personal representative and attorney for good faith actions and omissions in notifying creditors. This amendment is not a change in law, but is intended for cross-referencing purposes only. The reference to the specific defense provided in Section 9053 should not be construed to limit the availability of any other applicable defenses.