

## Memorandum 88-76

Subject: Study L-1025 - Probate Law and Procedure (Notice to Creditors--  
approval of tentative recommendation)

The enclosed staff draft of the tentative recommendation relating to notice to creditors incorporates all Commission decisions to date. We have received the letter from Commissioner Walker attached as Exhibit 1, concerning Probate Code Section 9053 (immunity of personal representative and attorney. The relevant provisions are set out below.

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, unless the person establishes that the failure was in bad faith. ~~Liability, if any, for the failure in such a case is on the estate.~~

(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.

Commissioner Walker states that subdivision (a) seems sensible because it fosters or encourages the giving of notice, whereas subdivisions (b) and (c) have the opposite effect and should be deleted. "I fail to appreciate the public policy served by providing that the personal representative and attorney have no duty to search for creditors and, even more startling, the requirement that the omitted creditor must show bad faith to recover. Such provisions seem destined to encourage that legitimate creditors will be overlooked."

The staff has made this same point in the past, and at the September meeting the Beverly Hills Bar Association made a presentation to the same effect. However, the Executive Committee of the State Bar

Probate Section strongly advocates the approach represented by Section 9053 as drafted, and the Commission has consistently supported the State Bar position when this issue has arisen in the past.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

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CALIF. LAW REV. COMMISSION  
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September 20, 1988

Nathaniel Sterling, Esq.  
Assistant Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Dear Nat:

My understanding (or, at least, recollection) is that the Commission requested staff drafts or tentative recommendations relating to Trustees' Fees and the Notice to Creditors provisions of the Probate Law and Procedures, but I did not understand that we approved any particular proposal. I raise the point because I am troubled by certain provisions of both tentative recommendations.

I have sent a copy of this letter to Chairman Plant and would appreciate it if you could send a copy of this letter to the other commissioners.

1. Trustees' Fees.

The fundamental policy of the draft is sound in allowing the parties to the trust to determine trustees' fees rather than imposing fees by statute or requiring court approval for fees. Less sound, in my view, is the limitation on liability for exemplary damages in the new proposed section 16443. The punitive damages remedy is, of course, subject to abuse. No reason has been advanced in our meetings that the threat of such abuse is greater in cases for breaches of duty by trustees than in cases involving breaches by others. Personally, I might be persuaded that punitive damages in all types of cases should be limited to treble damages to prevent exposure to unwarranted levels of liability. But that issue is not before the Commission. And, even though I might be persuaded that a ceiling in all types of cases is sound, that policy conclusion does not justify piecemeal enactment of punitive damages ceilings.

The proposed section clearly seeks to enact a special rule for trustees. No cogent reasons have been advanced at our meetings to suggest that trustees are deserving of special protections not afforded to others who assume or have imposed upon them legal duties. The argument that in the absence of a punitive damages ceiling trust companies may raise their fees goes much more to the wisdom of allowing punitive damages in the first place than it does to the trebling limitation. But existing law apparently allows for recovery of punitive damages against trustees. Under that circumstance, I believe trustees should be entitled to no more or less protection as regards punitive damages than others and, in any event, special rules for trustees should not be enacted without a compelling showing of need. Moreover, if limiting punitive damages would have any effect on trustee fees (which personally I doubt), the result would be to foster use of the trust device by encouraging people and firms to take up trustees' duties. No one has made the case why the laws of this state should encourage allocation of resources to this activity as opposed to the myriad other forms of available economic activity. I perceive no such justification.

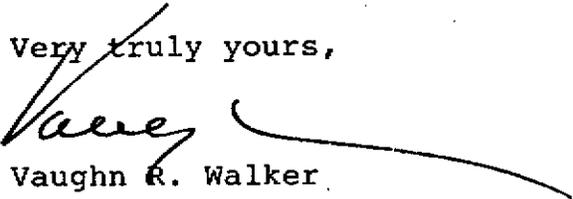
Accordingly, I would urge deletion of "not exceeding three times the amount of liability determined under Section 16440" from new Section 16443.

## 2. Notice to Creditors.

Generally, the changes proposed in the Tentative Recommendation seem sound. Again in the vein of my reservations above, I am troubled by those provisions intending to insulate attorneys and personal representatives from liability in subsections (b) and (c) of Section 9053. While subsection (a) seems sensible because it fosters or encourages the giving of notice, the other subsections have the opposite effect. I fail to appreciate the public policy served by providing that the personal representative and attorney have no duty to search for creditors and, even more startling, the requirement that the omitted creditor must show bad faith to recover. Such provisions seem destined to encourage that legitimate creditors will be overlooked.

Accordingly, I would urge deletion of subsections (b) and (c) of Section 9053.

Very truly yours,

  
Vaughn R. Walker

cc: Forrest A. Plant, Esq., Chairman

#L-1025

ns37j  
09/08/88

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 was inequitable and of questionable constitutionality. 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 ruled on this issue in the case of *Tulsa Professional Collection Services, Inc. v. Pope*.<sup>6</sup> That 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. Stat. 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.

6. No. 86-1961, April 19, 1988.

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. However, it is clear from the rationale of the opinion 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>7</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>8</sup> The personal representative would be protected from liability for the claim unless the personal representative acts in bad faith in failing to notify known creditors.<sup>9</sup>

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

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

8. 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, the liability of a distributee would be joint and several with other distributees, and liability would be based on abatement principles. See Sections 21400-21406 (abatement) [AB 2841].

9. Cf. Prob. Code § 9053 (immunity of personal representative and attorney for good faith actions and omissions).

month claim period, 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>10</sup> will best effectuate the strong public policies of expeditious estate administration and security of title for distributees, and is consistent with the concept that a creditor has some obligation to keep informed of the status of the debtor. 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>11</sup>

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10. It should be noted that such an absolute one-year statute of limitations creates the potential for the decedent's beneficiaries to wait for one year after death in order to bar creditor claims, and then proceed to probate the estate and distribute assets with impunity. However, if the creditor is concerned that the decedent's beneficiaries may fail to commence probate within the one-year period, the creditor may petition for appointment during that time. Prob. Code §§ 8000 (petition), 8461 (priority for appointment).

11. See, e.g., Falender, *Notice to Creditors in Estate Proceedings: What Process is Due?*, 63 N.C.L. Rev. 659, 673-77 (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, and declaring the urgency thereof, to take effect immediately.

Code of Civil Procedure § 353 (amended). Statute of limitations

SECTION 1. Section 353 of the Code of Civil Procedure [as amended by AB 2841] 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 (e)~~ subdivisions (c) and (d), 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 the expiration of that time, and~~ within one year after the date of death, and the time otherwise limited for the commencement of the action does not apply.

(c) If a person against whom an action may be brought died before July 1, 1988, 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 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.

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

(d) If a person against whom an action may be brought died on or after July 1, 1988, and before 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 within one year after the operative date of the 1989 amendment of this section, and the time otherwise limited for the commencement of the action does not apply.

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, regardless of whether the statute otherwise applicable would have expired before or after the one year period.

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 (liability of distributee).

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

SEC. 2. Section 9053 of the Probate Code is amended to read:

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, unless the person establishes that the failure was in bad faith. ~~Liability, if any, for the failure in such a case is on the estate.~~

(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. Section 9053 is amended to make clear that the burden of proof of bad faith of the personal representative or attorney is on the person seeking to impose liability. The personal representative and attorney are otherwise immune from liability to a known creditor who was not given notice. The liability, if any, in such a case generally 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 (liability of distributee). The creditor's right to recover is subject to a one-year statute of limitations from the date of the decedent's death. Code Civ. Proc. § 353.

Probate Code § 9103 (amended). Late claims

SEC. 3. Section 9103 of the Probate Code [as amended by AB 2841] 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 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~~ date of the decedent's death.

~~(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 Except to the extent provided in Section 9392, 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 assets have been distributed, a remedy may be available against distributees under Section 9392 (liability of distributee). If the creditor can establish that the lack of knowledge is a result of the personal representative's bad faith failure to notify known creditors 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 (b)(2) is revised 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.

Probate Code § 9392 (added). Liability of distributee

SEC. 4. 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 known to, or reasonably ascertainable by, a general personal representative within four months after the date letters were first issued to 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 distribution of the property.

(3) The statute of limitations applicable to the claim under Section 353 of the Code of Civil Procedure has not expired at the time of commencement of an action under this section.

(b) Personal liability under this section is applicable only to the extent the claim of the creditor cannot be satisfied out of the estate of the decedent and is limited to the extent of the fair market value of the property on the date of the order for distribution, less the amount of any liens and encumbrances on the property at that time. Personal liability under this section is joint and several, based on 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 whose claim is not merely conjectural but who is not given actual notice of administration may not be cut off by a short claim filing requirement. Section 9392 is intended as a limited remedy to cure due process failures only, and is not intended as a general provision applicable to all creditors.

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, a creditor who has no knowledge of estate administration before an order is made for distribution of property has a remedy against distributees to the extent payment cannot be obtained from the estate. There is a 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. Since liability of distributees under this section is joint and several, a distributee may join, or seek contribution from, others.

An omitted creditor may also have a cause of action against a personal representative who in bad faith fails to give notice to a known creditor. See Sections 9053 (immunity of personal representative and attorney) and Section 11429 (unpaid creditor).

Prob. Code § 11429 (amended). Unpaid creditor

SEC. 5. 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 (liability of distributee).

Subdivision (b) is amended to make specific reference to the statutory immunity of the personal representative and attorney for 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 immunity provided in Section 9053 should not be construed to limit the availability of any other applicable defenses of the personal representative.

Urgency Clause

SEC. 6. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

The existing California statute governing creditor claims in probate does not satisfy constitutional standards announced by the United States Supreme Court in *Tulsa Professional Collection Services, Inc. v. Pope* (U.S. 86-1961, April 19, 1988). This act revises the California statute consistent with the standards announced by the court. In order to resolve the present confusion among lawyers, courts, personal representatives, creditors, and others involved in the probate process who must work with the existing unconstitutional statute, it is necessary that this act take effect immediately.