

#L-1025

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12/12/86

Fifth Supplement to Memorandum 86-202

Subject: Study L-1025 - Actions Involving Decedent (State Bar Comments)

Attached to this supplement is a letter from the creditor claims study team of the State Bar's Estate Planning, Trust and Probate Law Executive Committee, commenting on the draft provisions relating to actions involving a decedent. At the meeting we will orally review the issues raised in the letter in connection with the portions of the draft to which they relate.

Respectfully submitted,

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Assistant Executive Secretary

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BY FEDERAL EXPRESS

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Re: LRC Memo 86-202 (Second Supplement)

Dear Jim:

The following are the comments of the creditor's claim study team of the Executive Committee with respect to LRC Memo 86-202 (second supplement).

This memorandum sets out the rights and obligations to enforcement of and protection from claims relating to decedents. It defines such rights and obligations particularly with respect to nonprobate proceedings and generally places the statute of limitations with respect to claims relating to decedents in one unified section of the probate code. The study team is in agreement with the general structure and policies of the memorandum.

In particular, the Team had the following comments:

1. Successor in interest. The Team agrees with the expansion to allow a cause of action to be maintained either by a personal representative or by a successor in interest. This encourages the transfer of property without probate in an appropriate situation. Where one successor is particularly eager and acts without consulting other parties in interest the provision for review of parties in new CCP 377.120 provides court review.

2. Parity between 630 and other nonprobate administrations. We note, but also support, the distinction made between successors under a section 630 affidavit and other types of nonprobate transfers. We note that in the former, successors can both sue and be sued as transferees of the decedent, while in the latter, successors can sue but cannot themselves be sued. A similar distinction is made for causes of action against decedents that were pending at his or her death: only the personal representative can step into the decedent's shoes. This encourages the nonprobate transfer of claims held by the decedent but also protects transferees from suit.

3. Claims against trust assets. We caution against any treatment of claims against trustees at this time. The staff has commented that it would be appropriate to specify the manner in which trust assets could be subject to claims of creditors either where there is a probate proceeding or where none exists. This matter requires careful thought and attention and thus should not be handled by insertion to the current supplement. Many of the issues raised are complex and not easily determined. For example, where there are probate and trust proceedings, what should be the priority of claim responsibility? Should it be proportionate? Should the probate be exhausted first? What if the probate and trust beneficiaries differ? What are the fiduciary obligations in such situations? If there is more than one trust, what priority on claims should exist? We will be happy to work with the Commission but strongly believe that the question is too significant to be addressed as part of this package.

4. CCP 377.540. We believe this priority is necessary as it facilitates closing estates quickly. The urgency upon death is quite similar to urgency at death:

after death evidence that could substitute for the decedent's recollections evaporates quickly and is governed by complex rules of evidence. Fresher evidence is always best and will expedite dispute resolution.

5. Section 9400: claim prerequisite to bringing an action. The staff comment to this section proposes a 30-day period after the four-month creditors period to allow for filing of a claim by a plaintiff who has not received notice. The study team is strongly opposed to any remedy that in effect erodes the four-month claim period. The study team has approved the mechanism for protection of creditors that is already contained in section 9100 and 9200 and sees no need to alter that rule in this particular category of potential claims. For similar reasons we support the staff conclusion with respect to section 9401.

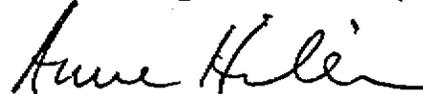
6. Section 9403: claims covered by insurance. Subsection (a) of that section should provide in line four "may be enforced against the insurance carrier."

7. Tolling of statute of limitations. The study team supports this recommendation. A consistent probate trap has been that the statutes of limitation contained in the code of civil procedure run concurrently with the claims limitations and do not always provide similar protection. Enactment of Section 9405 to toll the statute by a claim filing alleviates this potential

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hardship, particularly in the case where rejection of a claim has not occurred but the statute of limitations is about to run. Suit at that time could be at once both premature and late.

Respectfully submitted,



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