

Memorandum 89-93

Subject: Study L-1025 - Notice to Creditors in Estate Administration
(Comments on Tentative Recommendation)

Attached to this memorandum is a copy of the Commission's tentative recommendation on notice to creditors in estate administration. The recommendation provides that if a known or reasonably ascertainable creditor does not receive actual notice of estate administration during the four month claim filing period, the creditor may file a late claim or, if the estate has already been distributed, recover from distributees. The right of an omitted creditor, however, is subject to a general one-year statute of limitations applicable to all causes of action against a decedent.

This is the same recommendation the Commission submitted to the 1989 Legislature. The recommendation passed the Assembly but did not make it out of the Senate Judiciary Committee because of concern that the one-year statute of limitations could deprive a person of a legitimate claim. The Commission has resolicited comments on the tentative recommendation preparatory to deciding what further recommendation, if any, to make to the Legislature on this matter.

We have received 15 letters commenting on the tentative recommendation, of which 10 are reproduced as Exhibits to this memorandum; the remaining 5 deal primarily with other matters and only incidentally with notice to creditors, and are not reproduced here. The letters all directly address the concept of an absolute one-year limitation period. Eight letters approve the one-year period; six letters are concerned with problems the one-year statute of limitations will cause. The reasons supporting the various positions are summarized below.

The following observations are made in support of the one-year period:

(1) The one-year period is reasonable in comparison with the existing four-month claim filing period which allows an estate to be opened to see whether any creditors will show up during the short period. Professor Goda, Santa Clara University (Exhibit 1).

(2) The one-year period is useful because it will cut off claims against non-probate transfers as well as against probate estates. "With the enactment of your proposal the treatment of living trusts and probated wills will be brought closer together and be of a substantial benefit to those persons choosing the living trust as their primary estate planning vehicle." If a longer term is believed to be necessary, it should be kept under 18 months. Robert K. Maize, Jr., Santa Rosa (Exhibit 7).

(3) The one-year period is the most fair and efficient way to resolve the constitutional problem. Howard Serbin, Santa Ana (letter not attached).

A variety of concerns with the one-year period were expressed:

(1) The one-year period should be an extension, but not a limitation. A creditor should have four months after opening of probate, if that occurs after the one-year period. Allen J. Kent, San Francisco (Exhibit 2).

(2) While the one-year period may generally be satisfactory, it presents a problem for claims not yet due within the year. "For example, the decedent may have had an obligation with no security or inadequate security payable annually, and if the death occurred immediately after an annual payment, there might be little time to go through the claim process if the death was only discovered at the time of the next annual payment." Peter L. Muhs, San Francisco (Exhibit 10).

(3) One correspondent likes the one-year period but wonders whether it will receive legislative approval. Cheryl Templeton, Van Nuys (letter not attached).

(4) The most common concern expressed in opposition to the one-year limitation period is that it will delay distribution and cause problems in many probate proceedings. "A prudent personal representative might well refrain from distributing estate assets for the one-year period, thereby frustrating the public policy which encourages prompt distribution of estate assets. ... I believe a

nine-month period would satisfy the concerns of the United States Supreme Court as expressed in Tulsa, yet still permit reasonably prompt distribution of estate assets." Kim T. Schoknecht, San Francisco (Exhibit 5). "The ramifications that your bill would introduce are horrendous in that either substantial (and unwarranted) retainers would have to be kept within the estate or some type of bond would have to be established. Real property distributed and then sold AFTER distribution and assets disbursed would be disastrous. If the Commission feels this is something that must be done, then the lesser of the evils would be to return to the six (6) months mandatory period and require the 'all known' creditors personal notice." David W. Knapp, Sr., San Jose (Exhibit 8). "A one-year provision is going to mean keeping more estates open longer than a year, requiring the filing of two sets of fiduciary income tax returns instead of a single set of "First and Final" fiduciary tax returns. Many simple estates are being made more cumbersome by the one-year requirement." John G. Lyons, San Francisco (Exhibit 9).

In this connection, one commentator believes it should be made clear that distribution may be made after four months notwithstanding the one-year limitation period. She would add a statement in the code that "the new sections dealing with extending the statute of limitations for creditors to file a claim to one year would not prevent the estate from being distributed after four months from the date of appointment of the personal representative. Any distribution, of course, would be subject to the provisions in the Code with respect to after-discovered creditors who do file a claim within the one-year statute of limitations." Florence J. Luther, Fair Oaks (Exhibit 3).

These letters in support and opposition typify the arguments pro and con the Commission has heard in the past on this issue, and they also replicate the mixed feelings the staff has about the tentative recommendation. The staff agrees that the one-year limitation period probably would be found constitutional, but the staff is concerned about adding delay to many probates in order to deal with the rare case of the omitted creditor. In addition, the staff is concerned that the one-year limitation period is unduly short for some types of debts, such as long-term or contingent obligations, and the staff's sense is

that the Legislature is also concerned about cutting off legitimate claims in the interest of expediency of probate. The staff also worries that, because the one-year limitations period applies to all claims against a decedent, whether or not a probate is involved, many assets passing outside of probate (e.g. in an inter vivos trust) will escape creditors completely, there being neither notice of death published nor actual notice to known creditors given in such situations. How can we justify this?

The staff recommends that the Commission not renew its recommendation to the Legislature. Instead, the staff would keep existing law that requires publication of notice and notification of known creditors, with a four-month claim period. An omitted creditor would have a remedy against the estate through the late claim procedure, as in the present tentative recommendation. If the estate has already been distributed, there would be no recourse against distributees, but a known or reasonably ascertainable creditor who was not given actual notice would have a remedy against a personal representative who acted in bad faith in failing to give notice. This would require only a slight modification of existing Probate Code Section 9053, which is quite protective of the personal representative; it features a 16 month limitation period for bringing a bad faith action and imposes the burden of proof of bad faith on the creditor. As a separate matter, the staff believes the Commission should give priority to developing a claim procedure or some other method of dealing with rights of creditors against nonprobate assets such as trust assets.

The staff's recommendation could be easily implemented. It would basically keep existing law and require only modest modifications of Probate Code Sections 9053, 9103, and 11429, thus:

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 to a creditor~~, the personal representative is not liable to any person for the failure, unless a the creditor establishes all of the following:

(1) The personal representative had knowledge of the creditor, or knowledge of the creditor was reasonably ascertainable by the personal representative.

(2) The failure was in bad faith.

~~(2)~~ (3) 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, and payment would have been made on the creditor's claim in the course of administration if the claim had been properly filed.

~~(3)~~ (4) 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 413.10) 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.

~~(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 provide a remedy for an omitted creditor if knowledge of the creditor was reasonably ascertainable by the personal representative.

Subdivision (b) protects the personal representative from liability for a failure to give notice to a creditor, whether known or reasonably ascertainable, unless the creditor establishes that the failure was in bad faith and satisfies the other requirements of the subdivision. As provided in subdivision (c), the remedy, if any, of a creditor who suffers loss as a result of a good-faith or inadvertent failure to give notice is against the estate and not against the personal representative.

Although the creditor has the burden of proof under subdivision (b), evidentiary inferences and presumptions may be available to prove bad faith of the personal representative in a disputed case. Thus, the burden of proof might be satisfied by showing that the personal representative willfully ignored information that would likely impart knowledge of a creditor.

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 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 more than 15 days before expiration of the time provided in Section 9100, and the creditor's 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 more than 15 days before expiration of the time provided in Section 9100, and the creditor's 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~~ 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 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) (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 Subject to Section 9053, 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 for payment of the distributee's proper share of the claim, not exceeding the amount distributed.

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 the personal representative's bad faith failure to notify 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).

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 runs until the later of one year after the decedent's death or the time the statute of limitations would otherwise expire.

Subdivisions (c) and (d) 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 (d) is also amended to delete an incorrect reference to a "designee".

Probate Code § 11429 (amended). Unpaid creditor

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.

(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.

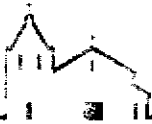
Comment. Subdivision (b) of Section 11429 is amended to make specific reference to the statutory immunity of the personal representative for acts and omissions in notifying creditors. This amendment is not a change in law, but is intended for cross-referencing purposes only. The reference to the specific immunity provided in Section 9053 should not be construed to limit the availability of any other applicable defenses of the personal representative.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

SEP 21 1989

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SANTA CLARA UNIVERSITY

SCHOOL OF LAW

Sept. 19, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, Calif. 94303-4739

To whom it may concern:

I write to make comments on three tentative recommendations which you have sent to me:

ACCESS TO DECEDENT'S SAFE DEPOSIT BOX

It is unfortunate that something like this is needed since Codes have a habit of becoming cluttered. However, the experience mentioned by Mr. Klug in note 2 is similar to my experience with a bank in closing out a small estate, even with an applicable statute. So it is needed and carefully meets the need.

NOTICE TO CREDITORS IN ESTATE ADMINISTRATION

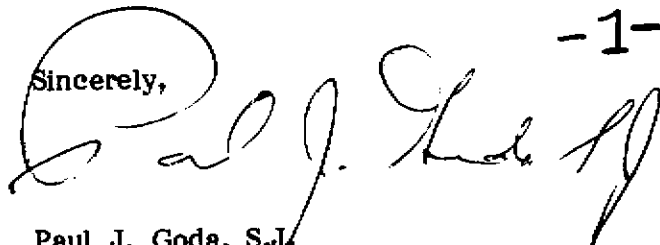
It seems to me that the 1 year statute of limitations that you recommend is reasonable. Although as you point out in note 10, "such an absolute one-year statute of limitations creates the potential for the decedent's beneficiaries to wait for one year after death..." On the other hand, a short, 4 month statute of limitations created the potential for a quick in and out to see if creditors would show up. I know of lawyers who recommended that methodology to see if the estate should be opened up.

The compromise of PrC 9103 on pp. 9 and 10 seem to meet the needs of both the estate and the creditor.

MISCELLANEOUS PROBATE CODE REVISIONS

There is no way that I will read these in detail. A quick overview did not disclose any problems to me.

Sincerely,

 -1-

Paul J. Goda, S.J.

SEP 22 1989

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September 20, 1989

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California Law Revision Commission
4000 Middlefield Road, Suite D-2
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Greetings:

You have asked for my comments concerning certain proposed tentative recommendations relating to probate law and procedure. I am responding in connection with the tentative recommendations dealing with Notice to Creditors in Estate Administration.

This letter deals with footnote 10 of page 3 of the tentative recommendation. This footnote implies a one year absolute time period without interaction with the probate proceedings. I would recommend that the time period be changed to one year from the date of death or within four (4) months of appointment of a personal representative by the Probate Court and issuance of letters, whichever is later.

The time within which to file suit or file a claim should be governed by the above.

Very truly yours,



Allen J. Kent

AJK:eyr

skent/ajk/pers/ltr200

CHARLES W. LUTHER
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September 20, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Tentative Recommendation Relating to
Notice to Creditors in Estate Administration

Dear Sir or Madam:

I would like the Commission to consider whether or not it would be advisable to add a statement in the Code that nothing in the new sections dealing with extending the statute of limitations for creditors to file a claim to one year, would not prevent the estate from being distributed after four months from the date of appointment of the personal representative. Any distribution, of course, would be subject to the provisions in the Code with respect to after-discovered creditors who do file a claim within the one-year statute of limitations.

I realize that the current situation is that a probate estate may be distributed after the four-month period of time from date of appointment of the administrator or executor has expired, but it would seem that it may be advisable to have this specifically set forth in the Probate Code.

Thank you for your consideration.

Very truly yours,

LUTHER & LUTHER
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By 
FLORENCE J. LUTHER

FJL:jj.1

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September 22, 1989

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CA LAW REV. COMM'N
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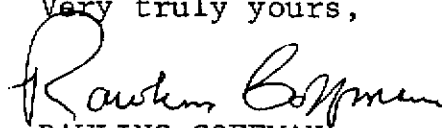
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendation relating to
Probate Law and Procedure
Notice to Creditors in Estate Administration

Dear Commissioners:

I concur in establishing one-year statute of
limitations.

Very truly yours,


RAWLINS COFFMAN

RC/cld

LAW OFFICES

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SEP 26 1989

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IN REPLY REFER TO
 SAN FRANCISCO OFFICE

September 25, 1989

California Law Revision Commission
 4000 Middlefield Road, Suite D-2
 Palo Alto, CA 94303-4739

Re: Notice to Creditors in Estate Administration

Dear Sir or Madam:

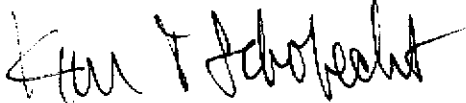
Thank you for forwarding a copy of your tentative recommendation relating to Notice to Creditors in Estate Administration. The proposed legislation appears to have been carefully thought through; my only comment is that many estates are distributed in their entirety within nine months from the date of death in reliance upon the four-month limitation for filing creditor's claims, and to extend this period to allow a known or reasonably ascertainable creditor to petition for leave to file a late claim might unduly delay distribution of smaller estates. Given the potential difficulty in proving whether or not a creditor was "reasonably ascertainable," a prudent personal representative might well refrain from distributing estate assets for the one-year period, thereby frustrating the public policy which encourages prompt distribution of estate assets.

I would recommend a maximum nine-month period following the decedent's death for allowing a petition for leave to file a late claim. I believe a nine-month period would

California Law Revision Committee
September 25, 1989
Page 2

satisfy the concerns of the United States Supreme Court as expressed in Tulsa, yet still permit reasonably prompt distribution of estate assets.

Sincerely,



KIM T. SCHORNECHT

KTS/kh

SEP 29 1989

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September 26, 1989

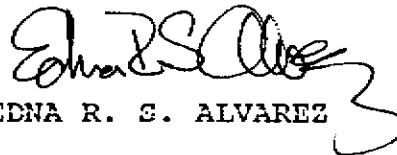
John DeMauley
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

RE: CALIFORNIA LAW REVISIONS COMMISSION
TENTATIVE RECOMMENDATION RELATING TO
PROBATE LAW AND PROCEDURE - NOTICE TO CREDITORS
IN ESTATE ADMINISTRATION

Dear Mr. DeMauley:

I am in receipt of the September 1989 Tentative Recommendation in regard to the above-captioned matter. I have reviewed the Recommendation and approve of the concept of a one-year extended statute of limitations period for creditors as provided for under the proposed legislation.

Yours truly,


EDNA R. S. ALVAREZ

ERSA:dp

misc\cal-097.ltr

ROBERT K. MAIZE, JR.
A PROFESSIONAL LAW CORPORATION

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September 26, 1989

California Law Revision Commission
2000 Middlefield Road, Suite D-2
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Re: Notice to Creditors

Ladies/Gentlemen:

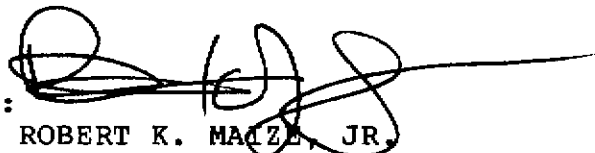
The review of your report indicates that you are proposing statutes that you believe will eliminate state involvement and be self-executing, so that the statute will not be constitutionally invalid.

The solution you have proposed has more universal application than just in a probate estate. There has been substantial debate and discussion regarding the statute of limitations on property passing without probate administration, particularly inter vivos revocable trusts. With the enactment of your proposal the treatment of living trusts and probated wills will be brought closer together and be of a substantial benefit to those persons choosing the living trust as their primary estate planning vehicle.

Therefore, I would support your recommendation; however, if a longer term was believed to be necessary I believe that it should be kept under 18 months.

Very truly yours,

ROBERT K. MAIZE, JR.,
A Professional Law Corporation

by: 
ROBERT K. MAIZE, JR.

RKM:jas

OCT 02 1989

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DAVID W. KNAPP, JR.LAW OFFICES
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September 29, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: TENTATIVE RECOMMENDATION - NOTICE TO CREDITORS

Honorable Commissioners:

I have again read your arguments concerning your contemplated re-submission of your recommendation concerning the length of time a creditor can file claims within an estate.

I do not know the past experience of the members of the Commission in regards to probate and estates, however will assume that it is substantial.

I have been an attorney for 36 years and prior to that was a Clerk of the Santa Clara County Superior Court during which time a great portion was as Probate Clerk. My practice is mainly probate and estate planning this time.

I highly disagree with your position as to extending a time limit on allowing creditors to file claims up to one year.

As you are aware for many, many years there was a six (6) months period and this was reduced to the present four (4) months in order to expedite probate. Now, to extend the time a POSSIBLE claim could be filed to one (1) year, is a step backward!

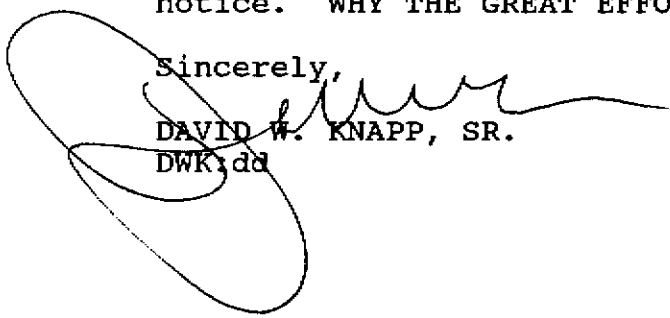
The improvement throughout the years of forcing notice within the area of the decedent's residence was a good step although it did put the estate at the mercy of any small town newspaper to charge whatever they liked as they had an exclusive field (I attempted to have the State Senate adopt a bill to force a maximum that could be charged, however my Senator disagreed).

The required giving of notice to all known creditors seems sufficient; any creditor who doesn't pay that much attention to his accounts would be rare anyway.

The ramifications that your bill would introduce are horrendous in that either substantial (an unwarranted) retainers would have to be kept within the estate or some type of bond would have to be established. Real property distributed and then sold AFTER distribution and asset disbursed would be disastrous.

If the Commission feels this is something that must be done, then the less of the evil would be to return to the six (6) months mandatory period and require the "all known" creditors personal notice. WHY THE GREAT EFFORT TO HELP THOSE WHO ARE LAX?

Sincerely,



DAVID W. KNAPP, SR.
DWK:dd

-9-

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OCT 0 8 1989

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October 2, 1989

California Law Revision Commission
 4000 Middlefield Road, Suite D-2
 Palo Alto, CA 94303-4739

Re: #L-1025
 Tentative Recommendation
 relating to Notice to Creditors
 in Estate Administration

Gentlemen:

My reading of Tulsa Professional Collection Services, Inc. v. Pope, 108 S Ct. 1340 (1988) is that due process required notice by mail or other means as certain to ensure actual notice. (ibid. p. 1348), and requires that such notice be given to reasonably ascertainable creditors (ibid. p. 1347). The case does not hold that a two-month period for filing claims is too short to afford due process. In my view, the four-months California period is not affected.

I have in mind Justice O'Connor's words where she says: "Our conclusion that Oklahoma nonclaim statute is not a self-executing statute of limitations makes it unnecessary to consider appellant's argument that a two-month period is somehow unconstitutionally short." (ibid p. 1346)

In his dissent, Chief Justice Rehnquist said: "Appellant also claims that the two-month period provided by Oklahoma law, even if deemed to be a statute of limitations, is too short to afford due process. The Court does not reach that question, and neither do I." (ibid. p. 1350)

Inasmuch as our four-months period is not in question, I feel we should not expand the scope of a one-year limitation provision.

A one-year provision is going to mean keeping more estates open longer than a year, requiring the filing of two sets of fiduciary income tax returns instead of a single set of "First and Final" fiduciary tax returns. Many simple estates are being made more cumbersome by the one-year requirement. Therefore, I must disapprove of the present proposal.

Very truly yours,

John G. Lyons
 John G. Lyons

-10-

JGL:car

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November 3, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendations on
Access to Decedent's Safe Deposit Box,
Miscellaneous Probate Code Revisions, and
Notice to Creditors in Estate Administration ✓

Ladies and Gentlemen:

With respect to your tentative recommendation on access to decedent's safe deposit box, I think it generally helpful to provide a procedure which allows access to a safe deposit box. However, I have a number of comments. First, if the person seeking entry is willing to pay the expense of drilling the box, it does not seem to me necessary that the person produce a key to the box. Often, the keys are impossible to find, yet there is a box in the decedent's name at the financial institution where the decedent maintained a regular banking relationship. Proposed §331 still requires proof of death and, in the absence of a key, could require reasonable proof that the boxholder is in fact the decedent in question.

Second, the financial institution should be authorized to allow an inventory of the box. In situations where access to a safe deposit box has been available without a court order or formal court administration, some personnel at financial institutions allow an inventory to be made and others will not. Authorizing an inventory, and its release to the named executor, and to the person given access to the box, will protect the concerns of the financial institution and generally facilitate the initial steps of probate administration.

Third, I had overlooked the change from former Probate Code §320, which formerly required the custodian of a will to deliver the document either to the county clerk or to the executor named in the will. While infrequently a named executor might properly withhold a will, automatic delivery to the county clerk increases the administrative burden in connection with the estate. For example, it is convenient and cheaper to obtain copies of the often lengthy document prior to delivery to the clerk if probate is to

be established and in fact no dealings with the clerk need to occur in the situation of a funded revocable trust with a "pour-over" will unless there is a desire to appoint the executor. Also, it is possible that all parties may agree that the purported last dated will is not in fact the decedent's will without the need for formal court determination and the parties may not wish to make the matter the subject of a public determination. While I realize that Probate Code §8200 is not directly a part of your current proposal, I nonetheless wish to submit my concerns over that section, and apologize for overlooking the change and not commenting on it earlier.

I have reviewed the recommendation on notice to creditors in estate administration, and agree that a one-year limitation is generally desirable. My one concern would be those claims which by their terms are not yet due, even though unsecured. For example, the decedent may have had an obligation with no security or inadequate security payable annually, and if the death occurred immediately after an annual payment, there might be little time to go through the claim process if the death was only discovered at the time of the next annual payment.

With respect to the recommended miscellaneous probate code revisions, I find them generally helpful. I have only a few comments. With respect to the duration of custodianship under the Uniform Transfers to Minors Act, §3920.5, I think increasing the age to twenty-five creates a substantial risk that these "automatic" accounts would inadvertently cause immediate taxable gifts. Of course, for the majority of those involved, the consequences will not increase their ultimate tax because of the applicability of the unified estate and gift tax credit. Nonetheless, since it seems unlikely that there is a ready way to warn those who might create such accounts, retaining limit on inter vivos gifts to age twenty-one would be desirable. The consequence is that for substantial regular gifts, the donor will need to create a trust if the gifts are to continue beyond age twenty-one. Perhaps an alternative would be to create a procedure for a Crummey gift, allowing a Uniform Transfers to Minors Act transfer to be subject to notice to the donee and immediate short-term right of withdrawal. A further comment is that Uniform Transfers to Minors Act transfers might be allowed for someone over age eighteen (although not technically a minor); if the property is to be retained until age twenty-one or age twenty-five (or even some later age), it should not be a requirement that the donee be under age eighteen. This allows the simplified procedures of the Uniform Transfers to Minors Act to be used to handle the disposition of amounts expected to be relatively small and of relatively short duration of management (and possibly for which

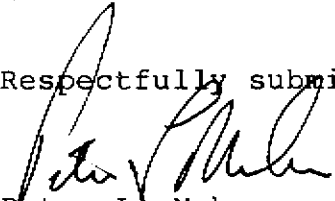
the chance of a provision coming into play is remote). For example, rather than have complex successive trusts upon the death of a first or second generation beneficiary, a provision for Uniform Transfers to Minors Act may be satisfactory if the next recipient upon failure of the first or second generation is then under age eighteen, but may not be satisfactory (because it leads to immediate outright distribution) if the beneficiary is between eighteen and twenty-five.

With respect to new Probate Code §10006, which mirrors common practice, it would also be helpful for purposes of overbidding of one or more interests subject to probate and court confirmation if the minimum overbid could be set forth in a pre-determined way. One option would be to eliminate the extra 5% on the first \$10,000, which is now largely outmoded. Another would be to base the minimum overbid on all interests being confirmed, including those voluntarily subjected to the court procedure under Probate Code §10006. Currently, I believe that the code requires the minimum overbid to be calculated on the smallest percentage being sold subject to confirmation, and then that price is by custom prorated among all portions being sold. Again, the simplest solution would be to eliminate the extra 5% increment on the first \$10,000.

Finally, I particularly applaud the recognition under §12250 of informal distribution, since I find this occurring with increasing frequency for specific bequests and for distribution in the case of a very small group of friendly beneficiaries.

Thank you for the opportunity to comment on these tentative recommendations.

Respectfully submitted,



Peter L. Muhs

PLM:em:3021

STATE OF CALIFORNIA

California Law Revision Commission

TENTATIVE RECOMMENDATION

relating to

PROBATE LAW AND PROCEDURE

NOTICE TO CREDITORS IN ESTATE ADMINISTRATION

September 1989

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature in 1990. 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 revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN OCTOBER 31, 1989.

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.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

9/13/89

Letter of Transmittal

The California Law Revision Commission submitted its *Recommendation Relating to Notice to Creditors in Probate Proceedings*, 20 Cal. L. Revision Comm'n Reports 165 (1990), to the 1989 legislative session. The legislation was not enacted because of legislative concern about the one-year statute of limitations proposed in the recommendation. The Senate Judiciary Committee requested that the Commission give further study to this aspect of the recommendation.

The Commission has given further study to this matter and renews its earlier recommendation. The Commission also solicits further comments on this recommendation from interested persons and organizations. Comments should be received by the Commission not later than October 31, 1989.

Recommendation
relating to
NOTICE TO CREDITORS IN ESTATE ADMINISTRATION

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

The requirement of actual notice to known creditors was enacted on recommendation of the Law Revision Commission.⁴ 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.⁵

The United States Supreme Court has now ruled on this issue in the case of Tulsa Professional Collection Services, Inc. v. Pope.⁶ That case holds that a state cannot impose a two-month claim filing requirement on known or reasonably ascertainable creditors merely by

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. 108 S. Ct. 1340 (1988).

publication of notice. Actual notice is required for a short-term claim filing requirement.

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.⁷ 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.⁸ 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.⁹

Although known or reasonably ascertainable creditors who have no knowledge of administration would be given remedies beyond the four month claim period, these remedies must be exercised within one year

7. Existing California law already authorizes such a late claim petition, but only for a creditor whose claim is on a nonbusiness debt. Prob. Code § 9103. 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 Prob. Code §§ 21400-21406 (abatement).

9. Cf. Prob. Code § 9053 (immunity of personal representative).

after the decedent's death. The Commission believes that a new long term statute of limitations of one year commencing with the decedent's death¹⁰ 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.¹¹

Legislation introduced in the 1989 legislative session to implement the Commission's recommendation on this matter was not enacted because of legislative concern about the one-year statute of limitations.¹² The Senate Judiciary Committee requested that the Commission give further study to this aspect of the recommendation.

The Commission has given further study to this matter and renews its recommendation for a one-year statute of limitations from the date of death. The Commission considers the following factors to be significant in addition to the basic policy considerations outlined above:

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).

12. 1989 Cal. Stats. ch. 21. The Commission's recommendation was published as *Recommendation Relating to Notice to Creditors in Probate Proceedings*, 20 Cal. L. Revision Comm'n Reports 165 (1990).

(1) In estate administration, debts are ordinarily paid. Even under the existing four-month claim period it is unusual for an unpaid creditor problem to arise. One year is ordinarily sufficient time for all debts to come to light. To extend liability beyond a year, with attendant delays and procedural complications in every probate for the rare claim that is made more than a year after the decedent's death, is not sound public policy.

(2) The one year limitation period would not apply to special classes of debts where public policy favors extended enforceability. These classes are secured obligations,¹³ tax claims,¹⁴ and liabilities covered by insurance.¹⁵ The type of claim that may become a problem more than a year after the decedent's death is likely to fall into one of these classes.

(3) Nearly every jurisdiction, including the Uniform Probate Code, that has considered the due process problem, has adopted the one-year statute of limitations as part of the solution.¹⁶

In sum, a general limitation period longer than one year would burden all probate proceedings for little gain. The one-year limitation period is a reasonable accomodation of interests and is widely accepted.

The Commission's recommendation would be enacted by the following measure.

13. Prob. Code § 9391.

14. Prob. Code § 9201.

15. Prob. Code § 550.

16. See, e.g., Uniform Probate Code § 3-803 (limitations on presentation of claims), as amended at the 1989 Annual Meeting of the National Conference of Commissioners on Uniform State Laws.

An act to amend Section 353 of, and repeal Section 353.5 of, the Code of Civil Procedure, and to amend Sections 551, 6611, 7664, 9053, 9103, 9201, 9391, 11429, 13109, 13156, 13204, and 13554 of, and add Section 9392 to, the Probate Code, relating to creditors of a decedent, and declaring the urgency thereof, to take effect immediately.

The people of the State of California do enact as follows:

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

SECTION 1. 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--(e)~~ subdivisions (c) and (d), if a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, 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. The time provided in this subdivision for commencement of an action is not tolled or extended for any reason.

(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 1990 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 1990 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), a person who takes the decedent's property and is liable for the decedent's debts under Sections 13109 (affidavit procedure for collection or transfer of personal property), 13156 (court order determining succession to real property), 13204 (affidavit procedure for real property of small value), and 13554 (passage of property to surviving spouse without administration), or a trustee.

Code of Civil Procedure § 353.5 (repealed). Limitation on action against spouse of decedent

SEC. 2. Section 353.5 of the Code of Civil Procedure is repealed.

~~353.5. If a person against whom an action may be brought dies before the expiration of the statute of limitations for the commencement of the action and the cause of action survives, an action against the surviving spouse of the person which is brought pursuant to Chapter 3 (commencing with Section 13550) of Part 2 of Division 8 of the Probate Code may be commenced within four months after the death of the person or before the expiration of the statute of limitations which would have been applicable to the cause of action against the person if the person had not died, whichever occurs later.~~

Comment. Section 353.5 is repealed because it conflicted with Code of Civil Procedure Section 353 (general one-year statute of limitations).

Probate Code § 551 (amended). Statute of limitations

SEC. 3. Section 551 of the Probate Code is amended to read:

551. ~~If~~ Notwithstanding Section 353 of the Code of Civil Procedure, if the limitations period otherwise applicable to the action has not expired at the time of the decedent's death, an action under this chapter may be commenced within one year after the expiration of the limitations period otherwise applicable.

Comment. Section 551 is amended to make clear that the general one-year limitation period for commencement of an action on a cause of action against a decedent under Code of Civil Procedure Section 353 does not apply to an action under this chapter.

Probate Code § 6611 (amended). Liability for unsecured debts of decedent

SEC. 4. Section 6611 of the Probate Code is amended to read:

6611. (a) Subject to the limitations and conditions specified in this section, the person or persons in whom title vested pursuant to Section 6609 are personally liable for the unsecured debts of the decedent.

(b) The personal liability of a person under this section shall not exceed the fair market value at the date of the decedent's death of the property title to which vested in that person pursuant to Section 6609, less the total of all of the following:

(1) The amount of any liens and encumbrances on that property.

(2) The value of any probate homestead interest set apart under Section 6520 out of that property.

(3) The value of any other property set aside under Section 6510 out of that property.

~~(e) The personal liability under this section ceases one year after the date the court makes its order under Section 6609, except with respect to an action or proceeding then pending in court.~~

~~(d)~~—In (c) Subject to Section 353 of the Code of Civil Procedure, in any action or proceeding based upon an unsecured debt of the decedent, the surviving spouse of the decedent, the child or children of the decedent, or the guardian of the minor child or children of the decedent, may assert any defense, cross-complaint, or setoff which would have been available to the decedent if the decedent had not died.

~~(e)~~ (d) If proceedings are commenced in this state for the administration of the estate of the decedent and the time for filing claims has commenced, any action upon the personal liability of a person under this section is barred to the same extent as provided for claims under Part 4 (commencing with Section 9000) of Division 7, except as to the following:

(1) Creditors who commence judicial proceedings for the enforcement of the debt and serve the person liable under this section with the complaint therein prior to the expiration of the time for filing claims.

(2) Creditors who have or who secure an acknowledgment in writing of the person liable under this section that that person is liable for the debts.

(3) Creditors who file a timely claim in the proceedings for the administration of the estate of the decedent.

Comment. Section 6611 is amended to delete former subdivision (c), which conflicted with Code of Civil Procedure Section 353 (statute of limitations), and to make clear that the general one-year statute of limitations applicable to all causes of action against a decedent is applicable to liability for the decedent's debts under Section 6611.

Probate Code § 7664 (amended). Liability for decedent's unsecured debts

SEC. 5. Section 7664 of the Probate Code is amended to read:

7664. A person to whom property is distributed under this article is personally liable for the unsecured debts of the decedent. Such a debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. In Subject to Section 353 of the Code of Civil Procedure, in an action based on the debt, the person may assert any defenses available to the decedent if the decedent had not died. The aggregate personal liability of a person under this section shall not exceed the fair market value of the property distributed, valued as of the date of the distribution, less the amount of any liens and encumbrances on the property on that date.

Comment. Section 7664 is amended to make clear that the general one-year statute of limitations applicable to all causes of action against a decedent is applicable to liability for the decedent's debts under Section 7664.

Probate Code § 9103 (amended). Late claims

SEC. 6. 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 more than 15 days before expiration of the time provided in Section 9100, and the creditor's 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 more than 15 days before expiration of the time provided in Section 9100, and the creditor's 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 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) (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 and subject to Section 9053, 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).

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 runs one year after the decedent's death.

Probate Code § 9201 (amended), Claims governed by special statutes

SEC. 7. Section 9201 of the Probate Code is amended to read:

9201. (a) Notwithstanding any other ~~provision--of--this--part~~ statute, if a claim of a public entity arises under a law, act, or code listed in subdivision (b):

(1) The public entity may use a form as is necessary to effectively administer the law, act, or code. Where appropriate, the form may require the decedent's social security number, if known.

(2) The claim is barred only after written notice or request to the public entity and expiration of the period provided in the applicable section. If no written notice or request is made, the claim is enforceable by the remedies, and is barred at the time, otherwise provided in the law, act, or code.

(b)

Law, Act, or Code	Applicable Section
Sales and Use Tax Law (commencing with Section 6001 of the Revenue and Taxation Code)	Section 6487.1 of the Revenue and Taxation Code
Bradley-Burns Uniform Local Sales and Use Tax Law (commencing with Section 7200 of the Revenue and Taxation Code)	Section 6487.1 of the Revenue and Taxation Code
Transactions and Use Tax Law (commencing with Section 7251 of the Revenue and Taxation Code)	Section 6487.1 of the Revenue and Taxation Code
Motor Vehicle Fuel License Tax Law (commencing with Section 7301 of the Revenue and Taxation Code)	Section 7675.1 of the Revenue and Taxation Code
Use Fuel Tax Law (commencing with Section 8601 of the Revenue and Taxation Code)	Section 8782.1 of the Revenue and Taxation Code
Personal Income Tax Law (commencing with Section 17001 of the Revenue and Taxation Code)	Section 19266 of the Revenue and Taxation Code
Cigarette Tax Law (commencing with Section 30001 of the Revenue and Taxation Code)	Section 30207.1 of the Revenue and Taxation Code
Alcoholic Beverage Tax Law (commencing with Section 32001 of the Revenue and Taxation Code)	Section 32272.1 of the Revenue and Taxation Code
Unemployment Insurance Code	Section 1090 of the Unemployment Insurance Code

State Hospitals for
the Mentally Disordered
(commencing with Section
7200 of the Welfare
and Institutions Code)

Section 7277.1 of the
Welfare and
Institutions Code

Medi-Cal Act (com-
mencing with Section
14000 of the Welfare
and Institutions Code)

Section 9202 of the
Probate Code

Waxman-Duffy Prepaid
Health Plan Act (com-
mencing with Section
14200 of the Welfare
and Institutions Code)

Section 9202 of the
Probate Code

Comment. Subdivision (a) of Section 9201 is amended to make clear that it applies notwithstanding statutes located in places other than this part. Specifically, Section 9201 applies notwithstanding Code of Civil Procedure Section 353 (general statute of limitations running one year from the decedent's death).

Probate Code § 9391 (amended). Enforcement of security interest

SEC. 8. Section 9391 of the Probate Code is amended to read:

9391. The holder of a mortgage or other lien on property in the decedent's estate, including but not limited to a judgment lien, may commence an action to enforce the lien against the property that is subject to the lien, without first filing a claim as provided in this part, if in the complaint the holder of the lien expressly waives all recourse against other property in the estate. Section 353 of the Code of Civil Procedure does not apply to an action under this section.

Comment. Section 9391 is amended to except an action to enforce a lien from the one-year statute of limitations in Code of Civil Procedure Section 353. The statute of limitations otherwise applicable to an action to enforce the lien continues to apply notwithstanding Section 353.

Probate Code § 9392 (added). Liability of distributee

SEC. 9. 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 final 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).

(c) Nothing in this section affects the rights of a purchaser or encumbrancer of property in good faith and for value from a person who is personally liable under this section.

Comment. Section 9392 is new. It implements the rule of Tulsa Professional Collection Services, Inc. v. Pope, 108 S. Ct. 1340 (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) and 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, other distributees. Subdivision (c) is a specific application of the general purpose of this section to subject a distributee to personal liability but not to require rescission of a distribution already made.

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 Section 11429 (unpaid creditor).

Prob. Code § 11429 (amended). Unpaid creditor

SEC. 10. 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 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.

Probate Code § 13109 (amended). Liability for decedent's unsecured debts

SEC. 11. Section 13109 of the Probate Code is amended to read:

13109. A person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is personally liable, to the extent provided in Section 13112, for the unsecured debts of the decedent. Any such debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the

decedent had not died. In Subject to Section 353 of the Code of Civil Procedure, in any action based upon the debt, the person may assert any defenses, cross-complaints, or setoffs that would have been available to the decedent if the decedent had not died.

Comment. Section 13109 is amended to make clear that the general one-year statute of limitations applicable to all causes of action against a decedent is applicable to liability for the decedent's debts under Section 13109.

Probate Code § 13156 (amended). Liability for decedent's unsecured debts

SEC. 12. Section 13156 of the Probate Code is amended to read:

13156. (a) Subject to subdivisions (b) and (c), the petitioner who receives the decedent's property pursuant to an order under this chapter is personally liable for the unsecured debts of the decedent.

(b) The personal liability of any petitioner shall not exceed the fair market value at the date of the decedent's death of the property received by that petitioner pursuant to an order under this chapter, less the amount of any liens and encumbrances on the property.

(c) In Subject to Section 353 of the Code of Civil Procedure, in any action or proceeding based upon an unsecured debt of the decedent, the petitioner may assert any defense, cross-complaint, or setoff which would have been available to the decedent if the decedent had not died.

Comment. Section 13156 is amended to make clear that the general one-year statute of limitations applicable to all causes of action against a decedent is applicable to liability for the decedent's debts under Section 13156.

Probate Code § 13204 (amended). Liability for decedent's unsecured debts

SEC. 13. Section 13204 of the Probate Code is amended to read:

13204. Each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is personally liable to the extent provided in Section 13207 for the unsecured debts of the decedent. Any such debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. In Subject to Section 353

of the Code of Civil Procedure, in any action based upon the debt, the person may assert any defense, cross-complaint, or setoff that would have been available to the decedent if the decedent had not died.

Comment. Section 13204 is amended to make clear that the general one-year statute of limitations applicable to all causes of action against a decedent is applicable to liability for the decedent's debts under Section 13204.

Probate Code § 13554 (amended). Enforcement of liability

SEC. 14. Section 13554 of the Probate Code is amended to read:

13554. (a) Except as otherwise provided in this chapter, any debt described in Section 13550 may be enforced against the surviving spouse in the same manner as it could have been enforced against the deceased spouse if the deceased spouse had not died.

(b) In Subject to Section 353 of the Code of Civil Procedure, in any action based upon the debt, the surviving spouse may assert any defense, cross-complaint, or setoff which would have been available to the deceased spouse if the deceased spouse had not died.

Comment. Section 13554 is amended to make clear that the general one-year statute of limitations applicable to all causes of action against a decedent is applicable to liability for the decedent's debts under Section 13554. Cf. former Code Civ. Proc. § 353.5 and Comment thereto.

Urgency Clause

SEC. 15. 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, 108 S. Ct. 1340 (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.