

Memorandum 90-44

Subject: Study L-1025 - Creditor Claims (Remedies of Creditor Where
Personal Representative Fails to Give Notice)

LATE CLAIMS; LIABILITY OF PERSONAL REPRESENTATIVE

At the March 1990 meeting the Commission considered the problem of the personal representative who fails to notify creditors of the administration proceedings and depletes the estate by preliminary distributions. The Commission approved the concept of requiring preliminary distributees to restore their distributions to the estate if necessary to satisfy a creditor's late claim.

However, the Commission felt that while this remedy may be satisfactory in some situations, it does not protect a creditor where the distributees are insolvent. The Commission asked the staff to investigate the possibility of imposing liability on the personal representative in this situation.

The statutes governing preliminary distributions do not appear to provide a basis for imposing liability on the personal representative. The court may order preliminary distribution under Probate Code Section 11621 if "it appears that the distribution may be made without loss to creditors". We have been unable to find any authority for making the personal representative liable to creditors if the personal representative withholds information from the court under this section. The remedy of creditors is governed by the claim statutes.

Probate Code Section 9053 subjects a bad faith personal representative to liability only in cases where the creditor learns of the administration after the estate is closed. To fill the gap that concerns the Commission, we would need to revise Section 9053 to subject a bad faith personal representative to liability in cases where the creditor learns of the administration after the claim filing period has expired. Liability would be limited to those situations where the

creditor's claim could have been satisfied out of the estate if the claim had been timely but cannot now be satisfied out of the estate because it is late and disbursements have been made.

Attached to this memorandum is a draft tentative recommendation to accomplish these objectives. We would circulate this for comment with a view toward legislation in 1991.

TIME FOR FILING CLAIMS

There is a related anomaly in the creditor claim statute that has recently been brought to our attention.

Under Section 9051, the personal representative must notify creditors of the administration within 4 months after administration is commenced. If the personal representative discovers the existence of a creditor towards the end of the 4-month period, the personal representative has 30 days after discovery of the creditor to give the notice, and the creditor has 30 days after the notice is given to file the claim. Thus it is theoretically possible, if a creditor is discovered on the last day of the 4-month period, that the creditor will have up to 60 additional days to file the claim if the personal representative actually gives the creditor notice.

But if the personal representative fails to give the notice, the creditor has no additional time to file the claim, and is relegated to the remedy of a petition for leave to file a late claim. This in effect punishes the creditor and rewards the estate for the personal representative's misdeed of failing to give notice.

~~The staff is proposing no changes, but merely brings this matter~~ to the Commission's attention. We note that the creditor does have a remedy in the late claim statute, but this remedy is not ideal since it is subject to limitations and is discretionary with the court.

Respectfully submitted,

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Tentative Recommendation
relating to
REMEDIES OF CREDITOR WHERE PERSONAL REPRESENTATIVE
FAILS TO GIVE NOTICE

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

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

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

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1. Prob. Code § 9053.
 2. Prob. Code § 9103(e).
 3. Prob. Code § 11622(c).

distributee is insolvent, the creditor should have an alternative remedy against the personal representative who acted in bad faith.

These recommendations would be implemented by enactment of the following provisions.

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

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

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

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

(1) The failure was in bad faith.

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

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

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

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

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

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

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

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

Probate Code § 9103 (amended). Late claims

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

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

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

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

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

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

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

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

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

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

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

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