

Memorandum 88-49

Subject: Study L-1025 - Probate Code (Notice to Creditors—
constitutional requirements)

The Due Process Problem

In response to the United States Supreme Court case of Tulsa Professional Collection Services v. Pope (No. 88-1961, April 19, 1988), the Commission has decided to review our new California creditor notice statute (operative July 1) to see what changes appear desirable. If a satisfactory solution can be worked out before the current legislative session ends, the Commission may seek to have the changes amended into an existing bill.

The Tulsa case holds that if a creditor's identity is known or "reasonably ascertainable," due process requires that the creditor be given actual notice (as opposed to published notice) before the creditor's claim may be cut off by a short probate filing requirement.

The California statute clearly does not satisfy this due process standard, since it purports to cut off claims of all creditors who fail to file within the four month filing period, even though the statute requires actual notice only to known, as opposed to "reasonably ascertainable" creditors.

For assistance in crafting a constitutional but workable statute, the staff has investigated the probate laws of other jurisdictions. There are only a few in existence that attempt to deal with the due process problem. The Supreme Court in the Tulsa case mentions three. "Indeed, a few States already provide for actual notice in connection with short nonclaim statutes. See, e.g., Calif. Prob. Code Ann. §§ 9050, 9100 (Supp. 1988); Nev. Rev. Stat. §§ 147.010, 155.010, 155.020 (1987); W. Va. Code §§ 44-2-2, 44-2-4 (1982)." Of these, we know the California situation; West Virginia likewise requires notice only to known creditors. Nevada requires notice to creditors whose "names and addresses are readily ascertainable", but without elaboration as to the definition of ready ascertainability.

The Joint Editorial Board for the Uniform Probate Code has worked on this matter in the past. Initially they thought to simply impose a duty on the personal representative to notify reasonably ascertainable creditors. They have since decided that this approach doesn't provide adequate guidance or protection for personal representatives, and are investigating alternative ways to deal with the problem. They have not yet developed any tentative solutions.

Possible Solutions

At this point, the staff sees four possible approaches for California:

(1) Simply incorporate the constitutional standard requiring notice to known or reasonably ascertainable creditors. The virtues of this approach are its simplicity, its constitutionality, and the fact that it plainly alerts personal representatives of the need to make an effort to discover creditors who are reasonably ascertainable. Its vices are that it provides no guidance as to the scope of the search required and it may expose a personal representative to potential liability if an undiscovered creditor is later found to have been "reasonably ascertainable."

(2) Attempt to define reasonable ascertainability in the statute. For example, "The personal representative shall mail notice to all creditors whose existence may be ascertained by a reasonably diligent search of the papers of the decedent most likely to contain information concerning creditors and by inquiry of persons close to the decedent who are most likely to have knowledge of the existence of creditors." The advantage of this approach is that it gives the personal representative guidance as to what sort of search is required. The disadvantage is that we cannot tell whether the standard selected would satisfy the due process clause of the constitution.

(3) Limit the notice requirement to known creditors, and provide that other creditors who were reasonably ascertainable but who received no notice are not cut off by the four-month claim statute but may assert their claims either through the late claim procedure or directly against the estate for a period of time, such as a one year period. The advantage of this scheme is that the duty of the personal

representative is limited and clear. The disadvantages are that it may impose procedural complications and burdens on other creditors or beneficiaries, depending on the remedy made available to the omitted creditor, and that the cutoff period selected may itself be held to violate the due process clause if too short. The State Bar special creditor's claim team recommends basically this scheme. See Exhibit 1. Their recommendation is analyzed in more detail below.

(4) Enact a hybrid scheme containing the more desirable features of the options set out above. Specifically, a reasonably diligent search duty could be imposed on the personal representative, as in #1), with immunity from liability for good faith actions and omissions, or no liability except in the case of gross negligence or willful failure. Omitted creditors would retain their claims for a limited period, but would be unable to recover against the personal representative except in the case of bad faith. The staff outlines an alternate scheme along these lines, and discusses its advantages, below.

A key aspect of each of these proposals is the treatment of creditors who received no notice. The Tulsa case did not address the issue of remedies for an omitted creditor; evidently there is some leeway for the state to prescribe appropriate remedies. If the estate is open and solvent, there ordinarily will be no problem. But if the estate is closed or insolvent, issues arise as to the liability of the personal representative, distributees, and other creditors who have been paid.

The State Bar Suggested Solution

The State Bar special creditor's claim team proposes enactment basically of approach #3. The Bar team recommends that a duty not be imposed on the personal representative to make a search for "reasonably ascertainable" creditors--the team strongly supports the policy of our new statute limiting the duty of the personal representative to notify only known creditors without making further search. "The fact that a Tulsa v. Pope creditor may be entitled to payment from an estate without filing a claim (or upon filing a late claim), is no reason to reconsider the soundness of these policies."

Under the Bar proposal, the personal representative would be required to notify known creditors. A known creditor who was not notified, or an unknown creditor who was reasonably ascertainable, would be permitted either to file a late claim or to commence a civil suit directly against the estate without filing a claim. There would be a one year statute of limitations on the claim, commencing on the date of the decedent's death, whether or not the claim was then due. The Bar team elaborates this proposal with arguments in support and sample drafts.

This proposal has all the basic advantages and disadvantages of a scheme of the #3 type, described above. There are also a number of specific problems that the staff believes require some discussion.

(1) Under the Bar draft, a creditor who was not given notice of probate within the four-month claim period may sue directly without the need to make a claim:

A claim that is not filed as provided in this part is not barred and an action may be commenced or continued thereon without the filing of a claim if the identity of the holder of the claim as a creditor of the Decedent was known or reasonably ascertainable by the personal representative within four months after the date Letters were first issued to a general personal representative, the claim was not merely conjectural, and notice was not given to the creditor pursuant to Chapter 2.

As a technical matter, the staff believes this section is overbroad in allowing a lawsuit by any creditor who was not sent a copy of the notice of administration. A creditor who had actual knowledge of administration by any means during the four-month claim period, whether or not a notice was sent, should be required to abide by the claim procedure.

As a policy matter, a direct lawsuit to enforce a liability without first running it through the late claim procedure violates the concept of the claim-filing process, which alerts the personal representative to the existence of the claim and enables the personal representative either to settle the claim or to plan for a possible lawsuit in estate administration. The Bar team anticipates this criticism, responding that the estate may already be closed, and in any case due process would require some notice to the creditor of the need

to follow the late claim procedure. They would make the late claim procedure available to the creditor as an option, but would not require it. But as long as the estate remains open, the staff believes the late claim procedure should be followed. The staff can conceive of no due process problem in requiring a creditor to follow the late claim procedure if the creditor becomes aware of the administration proceeding while the estate is still open.

(2) The late claim option proposed by the Bar team states:

Upon petition by a creditor, the court may allow a claim to be filed after the expiration of the time for filing a claim if it appears that both of the following conditions are satisfied:

(a) Notice was not mailed to the creditor pursuant to Chapter 2.

(b) The identity of the creditor as a creditor was known or reasonably ascertainable by the general personal representative within four months after the date Letters were issued to the general personal representative, and the claim was not merely conjectural.

In addition to the same technical problem as above--the late claim procedure should not be available to a creditor who was aware of the administration during the four-month period (even though notice was not sent)--the staff thinks the special late claim procedure set out here is overly simplified. The general late claim procedure gives the court some guidance as to whether and on what terms to allow a late claim, based on whether distributions and payments have already been made, how rights of parties will be affected, and the like. This is useful statutory material that should apply to any late claim. We would not create a special procedure for Tulsa late claims, but would run them through the existing general procedure.

(3) The idea of imposing a one-year statute of limitations from the date of death for all creditors has some surface attraction:

Except as otherwise provided in the Probate Code, any action against the personal representative of a Decedent or the successor in interest to the Decedent's estate upon a claim as defined in Probate Code Section 9000 shall be commenced within one year after the date of the Decedent's death.

As the Bar team points out, the Tulsa court, while it does not resolve this issue, does recognize the validity of self-operating statutes of limitation, and an argument can be made that one year is of sufficient length to render the statute constitutional. However, the staff can see arguments both ways on this, both on due process and equal protection grounds, and the ultimate constitutional resolution is not completely clear. The staff would like to think there is a fair chance such a statute of limitations would be valid.

(4) The Bar team approach appears to work so long as the estate is still open and solvent. What happens, however, when a reasonably ascertainable but omitted creditor seeks payment within the one-year limitation period but the estate is already distributed and the personal representative discharged? The Bar team expressly recommends against a provision for transferee liability "as it would seriously undermine the finality of probate distributions." The team remarks that remedies under the Uniform Fraudulent Transfer Act would probably be available to the creditor. As a technical matter, the staff questions whether the UFTA would be construed to apply in probate (which provides a complete and overriding creditor claim scheme) absent an express provision making it applicable. Moreover, we are not satisfied that UFTA is adequate to handle the kinds of issues that would come up involving abatement and contribution among distributees and creditors where an omitted creditor seeks to take property from a distributee or from a lower priority creditor who has been paid. Finally, as a policy matter, we do not see how throwing the creditor over into the UFTA in any way advances the concept of finality of probate distributions.

Staff Analysis

In the staff's opinion, the critical issue is whether to impose a duty to search and notify on the personal representative. That decision will affect the direction and structure of the statute. If the Commission adopts the Bar team view that the personal representative should not have a search burden imposed because of the uncertainty and potential liability involved, then the remainder of the Bar team approach follows generally as a logical consequence. However,

before the Commission passes on this, the staff believes some attention should be paid to the possibility of imposing a search and notify duty, since that approach offers some clear advantages that are lacking in the Bar team approach.

Most fundamentally, the issue comes down to the ultimate purposes of the probate process and the place of probate in relation to competing interests. From our long work in this area, we may have a tendency on the Commission to view the probate process from a probate practitioner's perspective as a way to get the decedent's assets to the beneficiaries as nearly intact as possible. Yet an equally valid perspective is that probate is a process for satisfying the decedent's just debts--basically a bankruptcy-type proceeding--and only what is left over passes to beneficiaries. The effect of the Tulsa case is to refocus attention on this second perspective that tends to be lost in state probate statutes. We also know from recent experience in the Legislature dealing with creditor rights in connection with AB 2841 that the Legislature tends to give substantial weight to creditors' claims and questions short and simple procedures that may have the effect of denying a creditor what may be justly due.

A statute such as that proposed by the Bar team, which limits the duty of a personal representative to notify creditors and imposes a burden on unnotified creditors to sue within a year after death, is representative of the probate practitioner perspective. A statute that imposes a duty on the personal representative to search for and notify reasonably ascertainable creditors is drawn more from a probate-as-bankruptcy perspective.

But what would be the consequences of imposing a duty to search and notify? We have been concerned about uncertainty in the scope of the personal representative's duties and about potential liability of the personal representative if the search turns out to be inadequate. But this is not the necessary result of such a duty. A hybrid statute could be drafted with the following features:

- (1) The personal representative must notify known creditors and those creditors who are ascertainable from a reasonably diligent effort by the personal representative.

- (2) A personal representative who makes a good faith effort to notify known and reasonably ascertainable creditors is not liable to an omitted creditor.

(3) An omitted creditor may follow the late claim procedure if the estate is still open.

(4) Whether or not the estate is still open, the omitted creditor has a cause of action against the personal representative if the creditor proves that the creditor was known or reasonably ascertainable and that the personal representative did not make a good faith effort to notify the creditor.

(5) Distributees and other creditors are not subject to liability for the claim of an omitted creditor.

A draft of this scheme is attached as Exhibit 2. What are its advantages over the Bar team proposal? From a policy perspective, it focuses on identifying and paying creditor claims rather than avoiding them. It gives the personal representative a clear immunity simply for acting in good faith, with the burden of proof on the creditor that this standard has been violated. It avoids the procedural tangles of a creditor lawsuit against distributees or other creditors under the Uniform Fraudulent Transfer Act. It is probably constitutional.

In summary, the Bar team proposal is certainly feasible, and is probably the approach many states will adopt. But it does entail a number of undesirable consequences that (1) result in a constitutionally uncertain shortening of the statute of limitations on the creditor's cause of action and (2) allow for setting aside prior payments and distributions under UFTA. The alternative proposal avoids these consequences by imposing a search duty at the outset; the only liability is on a personal representative who does not act in good faith. Either scheme can work, but the second offers both policy and procedure advantages that the Commission should not ignore before making a decision.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

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June 17, 1988

Mr. Nathaniel Sterling
Assistant Executive Secretary
Law Revision Commission
4000 Middlefield Road; Suite D-2
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Re: Tulsa Professional Collection
Services, Inc. v. Pope

Dear Nat:

The Executive Committee appointed a special creditor's claim team to prepare recommendations to the Law Revision Commission concerning claims procedures in light of Tulsa Professional Collection Services, Inc. v. Pope.

Tulsa v. Pope held that Oklahoma's requirements for presenting creditor's claims in probate violated the Due Process Clause of the U.S. Constitution when applied to a creditor who was known or reasonably ascertainable to the personal representative of the Decedent's estate if the creditor was not given notice by mail or by other means as certain to insure actual notice. As a consequence, the creditor (a hospital where the Decedent expired) may be permitted to maintain a suit without the necessity of filing a claim.

It is important to note that, while finding infirm Oklahoma's "non claim" or "claims bar" statute, the Supreme Court implied that a self-executing statute of limitations respecting Decedents or Decedents' estates may be permissible under the Due Process Clause.

It is also important to note that the Supreme Court dealt

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solely with the due process consequences of the failure to give notice. It did not deal with any duty a personal representative may or may not have to locate or give notice to creditors.

California's claims procedures are not distinguishable from Oklahoma's when viewed in light of Tulsa v. Pope. Both are "non claim" or "claims bar" statutes which involve significant state action and adversely affect creditor property rights.

It would thus appear that a Tulsa v. Pope type creditor of a Decedent whose estate is being administered in California would be able to institute suit without having to file a creditor's claim.

It would also appear that California could enact a self-executing statute of limitations pertaining to the personal representatives and distributees of Decedents' estates which would limit the exposure to Tulsa v. Pope type suits to a reasonable period commencing with date of death (e.g., one year).

With the foregoing in mind, the Team recommends the following.

1. Codify Tulsa v. Pope to permit a creditor of a Decedent who was known or reasonably ascertainable by the personal representative to institute or continue a suit without the filing of a claim if the creditor was not given notice pursuant to Chapter 2 of the Probate Code.

2. Permit a Tulsa v. Pope creditor to file a late claim with leave of the probate court and thereby avoid a separate civil suit if the claim is not otherwise objected to.

3. Enact a one year statute of limitations as to claims against personal representatives and distributees of a Decedent's estate. The one year would commence as of date of death irrespective of whether or not the claim was then due. Claims would be as defined in Probate Code Section 9000.

The reasons for codifying Tulsa v. Pope are to provide a statutory creditor's claim procedure that is constitutionally sound; alert creditors, personal representatives and attorneys to the new law; encourage the liberal giving of notice by personal representatives; and facilitate planning by personal representatives and distributees respecting the possibility of overlooked creditors.

The codification of Tulsa v. Pope could be placed in either Chapter 1, Part 4 of Division 7 of the Probate Code

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(General Provisions) or Chapter 8 of Part 4 (Claims in Litigation).

If Chapter 1 is selected, Section 9002.5 could be added to the Code providing in substance that:

"9002.5 A claim that is not filed as provided in this part is not barred and an action may be commenced or continued thereon without the filing of a claim if the identity of the holder of the claim as a creditor of the Decedent was known or reasonably ascertainable by the personal representative within four months after the date Letters were first issued to a general personal representative, the claim was not merely conjectural, and notice was not given to the creditor pursuant to Chapter 2."

If Chapter 8 is selected, Section 9392 could be added to Article 3 (Litigation Where no Claim Required) providing in substance that:

"9392 An action to establish the liability of an estate may be commenced or continued without first filing a claim as provided in this part if the identity of the holder of the claim as a creditor of the Decedent was known or reasonably ascertainable by the personal representative within four months after the date Letters were first issued to a general personal representative, the claim was not merely conjectural, and notice was not given to the creditor pursuant to Chapter 2."

The reasons for providing late claim filing relief for a Tulsa v. Pope creditor are that it is more expeditious and less costly to both the creditor and the Decedent's estate for the probate court to hear a petition to allow a late filing than to require the matter to be adjudicated as a general civil suit.

The relief could be provided by enacting Probate Code Section 9103.5 reading in substance as follows:

"Upon petition by a creditor, the court may allow a claim to be filed after the expiration of the time for filing a claim if it appears that both of the following conditions are satisfied:

(a) Notice was not mailed to the creditor pursuant to Chapter 2.

(b) The identity of the creditor as a creditor was known or reasonably ascertainable by the general personal representative within four months after the date Letters were issued to the general personal representative, and the claim was not merely conjectural."

Please note that the enactment of a late claim procedure for Tulsa v. Pope creditors does not obviate the necessity of codifying Tulsa v. Pope. This is because a Tulsa v. Pope creditor cannot be required to file a petition for relief or a late claim unless the personal representative gives the creditor notice of the requirement (any requirement of filing a petition or late claim being another version of a non self-executing "claims bar statute"), and because there will be situations where the personal representative would not give notice of late filing requirements because the personal representative either has no knowledge of the Tulsa v. Pope creditor or does not want to encourage a petition for relief in the good faith belief that the creditor is not entitled to it. Moreover, a late claim procedure will not of itself be satisfactory in situations where an estate is closed or otherwise has insufficient assets with which to satisfy a claim.

One reason for enacting a special self-executing statute of limitations respecting the personal representatives and distributees of a Decedent's probate estate is the legitimate state interest in the expeditious resolution of probate procedures. This is the same reason for the long standing "claims bar statute" of California and most other states.¹ Without the new statute, a creditor such as the hospital in Tulsa v. Pope would be able to institute suit without the filing of a claim (or any other notice to the personal representative or distributees of a Decedent's estate) at any time within four years from the last entry on the Decedent's account with the creditor.² If the Decedent was covered by Medicare or other medical insurance (such as was the case in Pope), the final credits to the Decedent's account may not occur for several months or even a year following the Decedent's death. Accordingly, the distributees of the Decedent's estate could be

¹The Team does not recommend a self-executing statute of limitations that would apply to non-probate transfers. This is because the procedures for transferring assets outside of probate do not currently provide notices to creditors.

²The statute of limitations for a book account is four years, CCP 337.

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surprised by a Tulsa v. Pope suit instituted as much as five years after the date of the Decedent's death.³

A reason for selecting one year as a period of limitations is that a shorter statute may bring into question an issue specifically not addressed by Tulsa v. Pope, viz., whether the shortness of a statute of limitations can, in and of itself, violate due process. Another reason for selecting one year as a period of limitations is that a materially longer statute would prolong the limitations period beyond that often required for the administration of an estate.

The statute of limitations could be placed in either Chapter 1 of Title 2 of the Code of Civil Procedure (Time of Commencing Actions in General), Chapter 4 of Title 2 of the Code of Civil Procedure (General Provisions as to the Time of Commencing Actions), or the Probate Code.

General provisions respecting the time of commencing actions regarding Decedents are found in Code of Civil Procedure Section 353 (Chapter 4 of Title 2). Accordingly, this may be the best place to insert the new provision.

It could be done by adding a new Subdivision (d) to Section 353 providing in substance that:

"(d) Except as otherwise provided in the Probate Code, any action against the personal representative of a Decedent or the successor in interest to the Decedent's estate upon a claim as defined in Probate Code Section 9000 shall be commenced within one year after the date of the Decedent's death."

The foregoing addition will also require the amendment of the first line of Subdivision (b) to reference both Subdivision (c) and (d).

The Team does not recommend expansion of Probate Code Section 9050 to require a personal representative to give notice to a creditor who is not known but is reasonably ascertainable. Likewise, the Team does not recommend any abridgement of Probate Code Section 9053(c) which provides that:

³The Decedent in Tulsa v. Pope died April 2, 1979. The hospital did not file its proceeding to compel payment of the Decedent's bill until October 17, 1983.

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"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."

As we discussed, both the Team and the Executive Committee strongly supported and still support the policies of the Commission embodied in Probate Code Section 9053, and are loathe to consider any changes in it. The fact that a Tulsa v. Pope creditor may be entitled to payment from an estate without filing a claim (or upon filing a late claim), is no reason to reconsider the soundness of these policies.

The remedy of the creditor (hospital) in Tulsa v. Pope will be that of payment from the Decedent's solvent estate.

The Law Revision Commission may inquire as to the remedies of a Tulsa v. Pope creditor where an estate has been distributed or otherwise no longer has sufficient assets to pay claims. If this situation arises in California, the creditor would probably use Civil Code Sections 3439.05 and 3439.07 to reach distributed assets. Section 3439.05 provides that a transfer made by an estate is fraudulent as to a creditor whose claim arose before the transfer was made if the estate made the transfer without receiving a reasonable equivalent value in exchange, and became insolvent as the result of the transfer. Section 3439.07 allows a creditor to set aside a fraudulent transfer or otherwise reach transferred assets. These remedies would usually be equitable because it would normally have been the distributed assets which would have been used to pay the creditor had a timely claim been filed in the probate proceeding.

In view of these remedies, the Team perceives no need for the enactment of specific transferee liability provisions pertaining to distributees from a Decedent's estate. To the contrary, the Team specifically recommends against the enactment of transferee liability as it would seriously undermine the finality of probate distributions

The Team looks forward to working with you and to your memorandum in the premises.

Very truly yours,



H. Neal Wells III

EXHIBIT 2

Prob. Code § 9050 (amended [AB 2841]). Notice required

9050. (a) If, within four months after the date letters are first issued to a general personal representative, the personal representative has knowledge of a creditor of the decedent, the personal representative shall give notice of administration of the estate to the creditor, subject to Section 9054. The notice shall be given as provided in Section 1215. ~~For the purpose of this subdivision, a personal representative has knowledge of a creditor of the decedent if the personal representative is aware that the creditor has demanded payment from the decedent or the estate.~~

~~(b) The~~

The giving of notice under this chapter is in addition to the publication or posting of the notice under Section 8120.

(b) For the purpose of this chapter, a personal representative has knowledge of a creditor of the decedent if either of the following conditions are satisfied:

(1) The personal representative is aware that the creditor has demanded payment from the decedent or the estate.

(2) The identity of the creditor is ascertainable by a reasonably diligent search by the personal representative and the claim is not merely conjectural.

Comment. Section 9050 is amended to adopt the standard for notice prescribed in Tulsa Professional Collection Services, Inc. v. Pope (U.S. 86-1961, April 19, 1988). A known or reasonably ascertainable creditor who does not receive notice of administration may petition for permission to file a late claim under Section 9103. Such a creditor may also have a cause of action against the personal representative, although the good faith of the personal representative is a defense under Section 9053 (immunity of personal representative and attorney).

Note. This particular draft is not completely satisfactory, since it paradoxically defines a "known" creditor to include an unknown but reasonably ascertainable creditor. A more direct draft would state plainly the duty of the personal representative to notify both known and reasonably ascertainable creditors. The staff has drafted it in this fashion in order to illustrate two points:

(1) The personal representative knows, or should know, of creditors that would ordinarily come to the personal representative's attention while tending to the decedent's affairs in the usual course of administration. The reasonable ascertainability requirement may be viewed as simply an objective standard by which actual knowledge or presumed actual knowledge of the personal representative can be demonstrated.

(2) The existing statute defines knowledge of a creditor as awareness that the creditor has demanded payment. This definition is unduly narrow, since the personal representative may be fully aware of the existence of a creditor who has not demanded payment. For example, the decedent may be the obligor on a note and the personal representative has seen a copy of the note, but the creditor has not demanded payment because the note is not yet due. Regardless of the approach to the Tulsa problem ultimately adopted by the Commission, this situation should be covered, at least in the definition of knowledge of a creditor if not in the provisions on remedies of omitted creditors.

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

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

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

~~(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.~~

(c) For the purpose of this chapter, the personal representative or attorney for the personal representative is presumed to have acted in good faith. This presumption is a presumption affecting the burden of proof.

Comment. Former subdivision (c) of Section 9053 is deleted for consistency with Section 9050 (notice required). New subdivision (c) is added to make clear that if the personal representative or attorney raises the good faith defense provided in the section, the burden is on the person seeking to impose liability to establish lack of good faith.

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

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

(e) (d) Regardless of whether the claim is later established in whole or in part, property distributed under court order and payments otherwise properly made before a claim is filed under this section are not subject to the claim. The personal representative, distributee, or payee is not liable on account of the prior distribution or payment.

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

Note. The limitation in subdivision (b) may have served a function at some point, but now that we know more about due process in probate, the limitation appears inappropriate. The staff believes this limitation should be deleted regardless of the statutory approach to the Tulsa problem.

Prob. 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. Section 11429 is amended to make specific reference to the statutory immunity of the personal representative and attorney for good faith actions and omissions in notifying creditors. This amendment is not a change in law, but is intended for cross-referencing purposes only. The reference to the specific defense provided in Section 9053 should not be construed to limit the availability of any other applicable defenses.

Note. Although this amendment is not essential, it is useful to help show the functioning of the statutory scheme.