#L-1025

ns37j
12/15/88

Memorandum 89-1

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

The Commission's tentative recommendation on notice to creditors was distributed for comment in October 1988. The tentative recommendation deals with due process issues raised in the United States Supreme Court case of Tulsa Professional Collection Services, Inc. v. Pope, 108 S. Ct. 1340 (1988). It provides creditors who did not receive actual notice of probate within the claim-filing period an opportunity to file a late claim or, if the estate has already been distributed, a right to recover from distributees; these rights of the creditor are subject to an overriding statute of limitations that runs one year from the date of the decedent's death.

The reaction to this tentative recommendation was mixed. The recommendation is supported by Robert J. Berton of San Diego (Exhibit 5) and by State Bar Team 3 (Exhibit 6). However, the basic concept of the recommendation, to extend the rights of unnotified creditors rather than to require the personal representative to make a reasonable search and give notice, was opposed by a number of commentators. Key comments include:

> [B]oth creditors and beneficiaries of decedents' estates would be better served by providing notice to "reasonably ascertainable" creditors rather than simply providing them an additional period of time within which to present claims. Indeed, I suggest the notice provision, itself, be rewritten to incorporate the Supreme Court's phrase so that the personal representative has an affirmative obligation to notify both known and "reasonably ascertainable" creditors.
> --Russell G. Allen of Newport Beach (Exhibit 8)

> [The] Tentative Recommendation is a legally adequate but labyrinthine way to solve possible Pope applications in California. I think it is simpler to require the personal representative to exercise due diligence to discover reasonably ascertainable creditors. This approach would make it unnecessary to extend the short non-claim statute.
> --John C. Hoag of Ticor Title Insurance (Exhibit 9)

Simply stated: The Notice to Creditors is not only confusing but I think unmanageable as proposed. Probate has always been a procedure with a set "finality" to it. Now we will leave the beneficiaries and, yes, the attorneys, hanging in the air as to what will happen in the limitations period? There has to be a better way and "going overboard" just can't be it!
--David W. Knapp, Sr. of San Jose (Exhibit 7)

I am opposed to the Commission's recommendation to increase the amount of time in which a claimant may file a claim. If the Estate is distributed in less than a year, the burden to satisfy a claim will be the responsibility of the distributees who may not be aware of any unsettled claims.

A prudent personal representative will usually change the decedent's address to that of the personal representative, receive a billing for the decedent and notify the claimant. Any responsible Creditor would have made an attempt to bill the decedent during the statutory period allowed for filing claims.

Most estates will not be closed within one year, and thus will not be affected by the increase of time. I am concerned only about the uncomplicated estates which may be probated prior to the expiration of one year.
--Jacqueline Cannon, Chief Deputy Public Administrator, Riverside County (Exhibit 10)

In addition to these general comments on the basic philosophy of the tentative recommendation, there were a number of comments addressed to specific details of the proposal. These comments are analyzed in Notes following the sections to which they relate in the attached draft of the tentative recommendation. If the Commission confirms the basic approach of the tentative recommendation, it will need to address the specific problems raised.

Our objective is to finalize a recommendation for submission to the Legislature on an urgency basis. There is no doubt that the existing California law does not satisfy constitutional standards, and there is much confusion as to what to do. People are looking to the Commission for a solution.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

#L-1025

ns37j
10/24/88

TENTATIVE RECOMMENDATION
relating to
PROBATE LAW AND PROCEDURE:
NOTICE TO CREDITORS

Effective July 1, 1988, California law requires a personal representative in decedent estate administration proceedings to mail actual notice of administration to known creditors of the decedent,[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

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1. Prob. Code §§ 9050-9054; enacted by 1987 Cal. Stat. ch. 923, § 93.

2. Prob. Code § 333.

3. Probate Code Section 9100 requires a creditor to file a claim within the later of four months after issuance of letters to a general personal representative or, if notice is mailed as required, within 30 days after the notice is given.

4. *Recommendation Relating to Creditor Claims Against Decedent's Estate*, 19 Cal. L. Revision Comm'n Reports 299 (1988).

5. 19 Cal. L. Revision Comm'n Reports at 303.

6. 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]

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7. Existing California law already authorizes such a late claim petition, but only for a creditor who was out of the state during the four month claim period and whose claim is on a nonbusiness debt. Prob. Code § 9103. Legislation enacted in the 1988 legislative session removes the out-of-state limitation effective July 1, 1989. See 1988 Cal. Stat. ch. 1199, § 84.5. 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 serveral with other distributees, and liability would be based on abatement principles. See Sections 21400-21406 (abatement) [1988 Cal. Stat. ch. 1199, § 108].

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

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 after the decedent's death. The Commission believes that a new long term statute of limitations of one year commencing with the decedent's death[10] 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]

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

11. See, e.g., Falender, *Notice to Creditors in Estate Proceedings: What Process is Due?*, 63 N.C.L. Rev. 659, 673-77 (1985).

The Commission's recommendation would be effectuated by enactment of the following measure.

An act to amend Section 353 of the Code of Civil Procedure, and to amend Sections 9053, 9103, and 11429 of, and add Section 9392 to, the Probate Code, relating to creditors of a decedent, and declaring the urgency thereof, to take effect immediately.

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

SECTION 1. Section 353 of the Code of Civil Procedure, as amended by Chapter 1199 of the Statutes of 1988, 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 (c)~~ subdivisions (c) and (d), if a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced ~~against the person's representatives, after the expiration of that time, and~~ within one year after the date of death, and the time otherwise limited for the commencement of the action does not apply.

(c) If a person against whom an action may be brought died before July 1, 1988, and before the expiration of the time limited for the commencement of the action, and the cause of action survives, an action may be commenced against the person's representatives before the expiration of the later of the following times:

(1) July 1, 1989, or one year after the issuing of letters testamentary or of administration, whichever is the earlier time.

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

(d) If a person against whom an action may be brought died on or after July 1, 1988, and before the operative date of the 1989 amendment of this section, and before the expiration of the time limited for the commencement of the action, and the cause of action survives, an action

may be commenced within one year after the operative date of the 1989 amendment of this section, and the time otherwise limited for the commencement of the action does not apply.

Comment. Subdivision (b) of Section 353 is amended to impose a new statute of limitations on all actions against a decedent on which the statute of limitations otherwise applicable has not run at the time of death. The new statute is one year after the death of the decedent, regardless of whether the statute otherwise applicable would have expired before or after the one year period.

If a general personal representative is appointed during the one year period, the personal representative must notify known creditors, and the filing of a claim tolls the statute. Prob. Code §§ 9050 (notice required), 9352 (tolling of statute of limitations). If the creditor is concerned that the decedent's beneficiaries may not have a general personal representative appointed during the one year period, the creditor may petition for appointment during that time. Prob. Code §§ 8000 (petition), 8461 (priority for appointment); see also Prob. Code § 48 ("interested person" defined).

The reference to the decedent's "representatives" is also deleted from subdivision (b). The reference could be read to imply that the one year limitation is only applicable in actions against the decedent's personal representative. However, the one year statute of limitations is intended to apply in any action on a debt of the decedent, whether against the personal representative under Probate Code Sections 9350 to 9354 (claim on cause of action), or against another person, such as a distributee under Probate Code Section 9392 (liability of distributee).

Note. Paul Gordon Hoffman of Los Angeles (Exhibit 4) supports the self-executing one year statute of limitations, particularly because it provides equal treatment for probate estates and trust estates. He also suggests that we may wish to exempt the special insurance liability statute (relocated to Probate Code § 551 by AB 2841) from the one year limitation of this section. The staff agrees that, as presently phrased, it is not clear that the special insurance statute is an exception. We would amend Probate Code Section 551 to make this clear:

> *551. 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.*

Along these same lines, the staff also thinks it is important to make clear that we are not intending to disrupt the normal tax claim collection procedures by the one-year limitation in Section 353. We would amend Probate Code Section 9201 and add a Comment to this effect:

(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.

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).

State Bar Team 3 (Exhibit 6) also raises a technical point--whether it might not be useful to note in the Comment to this section that the one-year statute of limitations applies to actions of a creditor against persons who take property of the decedent by affidavit under one of the nonprobate transfer procedures. The concept of the one-year statute is certainly to extend to all actions based on the decedent's liability, as the last paragraph of the Comment plainly indicates. We would expand the last sentence of that paragraph as suggested by the Bar Team:

> 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) or 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).

The Bar Team also suggests it might be useful to cross-refer back to Code of Civil Procedure Section 353 in the Comments to these Probate Code Sections. We would do that in the process of compiling the complete new Probate Code and official Comments.

Volney F. Morin of Los Angeles (Exhibit 1) raises a substantive point--he believes one year is too long and the statute of limitations should be six months. He points out that in his practice it is routine to make distributions within six months after the date of death. He apparently feels that the one year limitation period will cause practitioners to delay distribution until the one year period has run. "For more than 30 years I have held firmly to the belief that we attorneys and our courts, should give creditors, the taxing authorities and most especially the beneficiaries, a faster shake than they get." He would shorten the one year to six months "if there are no constitutional, or other, reasons why we must have a 1 year statute."

Of course, that's just the point--we are trying to make a constitutional statute. Mr. Morin's objective could be satisfied by the approach of requiring a search and notification, with a prompt cutoff of claims. But if we are to stick with the approach of not searching and notifying, we have to give creditors a reasonable opportunity to discover the probate and make their claims. One year is on the short side, and may already be constitutionally suspect; a six-month cutoff would almost certainly be unconstitutional. In fact, the staff believes the statute could be helped by providing:

> *(b) Except as provided in subdivisions (c) and (d), if a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced within one year after the date of death, and the time otherwise limited for the commencement of the action does not apply. An action commenced within one year after the date of death against the decedent satisfies this subdivision if there is no general personal representative appointed for the estate of the decedent at the time the action is commenced.*
>
> *Comment. Subdivision (b) is amended to recognize an action that names the decedent as a defendant for the limited purpose of satisfying the statute of limitations. This provision does not excuse the creditor from filing a claim after estate administration is commenced and does not eliminate the need for the creditor to substitute a proper party and make timely service of summons if the action is to be pursued. It merely provides a creditor with a simple means of satisfying the statute of limitations in a case where there is no probate proceeding pending.*

This provision would remove the substantial burden Section 353 imposes on a creditor to open a probate within a year merely to file a claim in cases where the beneficiaries have not opened a probate, perhaps in the hope of avoiding creditors by lying low for the one year period.

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

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

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

(b) If the personal representative ~~or attorney for the personal representative in good faith~~ fails to give notice required by this chapter, the personal representative ~~or attorney~~ is not liable to any

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

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

Comment. Section 9053 is amended to make clear that the burden of proof of bad faith of the personal representative is on the person seeking to impose liability. The personal representative is otherwise immune from liability to a known creditor who was not given notice. The liability, if any, in such a case generally follows the property in the estate. Thus, if the estate remains open, the property is reached through the late claim procedure. Section 9103 (late claims). If property has been distributed, distributees are liable to the extent of the property. Section 9392 (liability of distributee). The creditor's right to recover is subject to a one-year statute of limitations from the date of the decedent's death. Code Civ. Proc. § 353.

The section is also amended to delete the references to the attorney for the personal representative. This chapter imposes no duty on the attorney to give notice.

Note. Wilbur L. Coats of Poway (Exhibit 3) believes the protection given the personal representative by this section is inadequate. He believes the personal representative will be subjected to "frivolous actions brought by would be creditors" alleging that the personal representative failed to give the required notice. He suggests that some protection be provided where the personal representative prevails in the action. He makes no specific suggestions, but presumably he's thinking along the lines of an award of attorney's fees.

The staff questions Mr. Coats' assumption. The personal representative can be held liable only if the creditor is able to prove both that the personal representative had actual knowledge of the creditor and that the personal representative failed to give notice to the creditor in bad faith; the burden of proof is on the creditor. The staff does not believe this will encourage unmeritorious litigation.

Jerome Sapiro of San Francisco (Exhibit 2) is concerned that, even with the attorney removed from this section, there is still a potential for attorney liability. "Giving immunity, in absence of bad faith, to the personal representative and deleting the immunity of the attorney could give rise to inference that the attorney may have liability." He does not believe the statement in the Comment that the attorney has no duty to give notice is sufficient to overcome the implication. He would add to the statute a clear statement that "the responsibility of giving notice to creditors is that of the personal representative and not of the attorney for the personal representative, and that the attorney for the personal representative has no liability or responsibility for the neglect, failures, or bad faith of the personal representative in the area of giving or not giving notice to creditors."

The staff disagrees with this analysis. We believe the section and Comment are adequate as drafted, and we would be cautious about trying to draft exculpatory language for the attorney since the attorney should be subject to liability if the attorney improperly advises the personal representative on the matter.

Probate Code § 9103 (amended). Late claims

SEC. 3. Section 9103 of the Probate Code, as amended by Chapter 1199 of the Statutes of 1988, is amended to read:

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

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

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

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

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

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

(2) One year after the ~~time letters are first issued to a general personal representative~~ date of the decedent's death.

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

~~(e)~~ (d) Regardless of whether the claim is later established in whole or in part, property distributed under court order and payments otherwise properly made before a claim is filed under this section are not subject to the claim. ~~The~~ Except to the extent provided in Section 9392 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.

Note. John C. Hoag of Ticor Title Insurance (Exhibit 9) is fairly certain that subdivision (d) is ambiguous in its protection of bona fide purchasers and encumbrancers, especially in its reference to Section 9392 (liability of distributee). If this is a problem, it can be cured by making clear the bona fide purchaser protection under Section 9392. See the Note under that section.

We also received a couple of technical suggestions from Irving Kellogg and Russell Allen for clarifying existing language in this section, which we will pick up in the next draft.

Probate Code § 9392 (added). Liability of distributee

SEC. 4. Section 9392 is added to the Probate Code, to read:

9392. (a) Subject to subdivision (b), a person to whom property is distributed is personally liable for the claim of a creditor, without a claim first having been filed, if all of the following conditions are satisfied:

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

(2) Notice of administration of the estate was not given to the creditor under Chapter 2 (commencing with Section 9050) and neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the administration of the estate before the time the court made an order for 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) [1988 Cal. Stats. ch. 1199, § 108].

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.

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).

Note. John C. Hoag of Ticor Title Insurance (Exhibit 9) is concerned that bona fide purchasers and encumbrancers from the distributee may not be adequately protected under this section. "If it isn't clear, we have a marketplace problem." The staff believes there is no problem here; however, it would be a simple matter to add a subdivision to this section:

> *(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. Subdivision (c) is a specific application of the general purpose of this section to subject a distributee to personal liability but not to require recision of a distribution already made.*

Prob. Code § 11429 (amended). Unpaid creditor

SEC. 5. Section 11429 of the Probate Code is amended to read:

11429. (a) Where the accounts of the personal representative have been settled and an order made for the payment of debts and distribution of the estate, a creditor who is not paid, whether or not included in the order for payment, has no right to require contribution from creditors who are paid or from distributees, except to the extent provided in Section 9392.

(b) Nothing in this section precludes recovery against the personal representative personally or on the bond, if any, by a creditor who is not paid, subject to Section 9053.

Comment. Subdivision (a) of Section 11429 is amended to recognize the liability of distributees provided by Section 9392 (liability of distributee).

Subdivision (b) is amended to make specific reference to the statutory immunity of the personal representative for actions and omissions in notifying creditors. This amendment is not a change in law, but is intended for cross-referencing purposes only. The

reference to the specific immunity provided in Section 9053 should not be construed to limit the availability of any other applicable defenses of the personal representative.

Urgency Clause

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

The existing California statute governing creditor claims in probate does not satisfy constitutional standards announced by the United States Supreme Court in *Tulsa Professional Collection Services, Inc. v. Pope*, 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.

VOLNEY F. MORIN, INC.

LAW CORPORATION

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November 8, 1988

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

Re: Your letter Tentative Recommendation
Notice To Creditors
10/24/88

My understanding of your tentative recommendation is that the statute of limitations for creditors to present claims be 1 year after date of death.

This may be satisfactory for a number of law firms, perhaps even for a majority of law firms in California.

However, it is not satisfactory for our law firm - if it is possible that the statute can be shortened to 6 months.

Routinely, we make distribution of estates below $600,000 within 6 months from date of death, including sale of real property, if necessary. We promptly file our petition for probate; we obtain a probate referee and give appropriate notices as soon as possible; sales of real property within this frame work are generally handled within a matter of 30 to 60 days, including if necessary the period of escrow. Our first report and final account is generally filed within 5 months after date of death, we are on calendar, RFA (because we usually have written approvals of all residual legatees), and make distribution before 6 months are up.

Even when a 706 is required, we have frequently closed estates within the same time frame. Typcally the assets of such an estate may be invested in money market accounts, treasury bills, etc., so an alternate date has little significance. In our society, many beneficiaries are now past 60, 70 or 80 years of age; they are delighted to forego the alternate valuation date, in order to obtain early distribution. We have done this, even with a corporate fiduciary as personal respresentative, within the past 6 months.

Continued...

If there are no constitutional, or other, reasons why we must have a 1 year statute, I respectfully suggest that the statute be 6 months from date of death.

For more than 30 years I have held firmly to the belief that we attorneys and our courts, should give the creditors, the taxing authorities and most especially the beneficiaries, a faster shake than they get.

I for one, would like to continue to be able to serve our clients, and their heirs, on a prompt basis. The probate courts are the nesting places for endless Jaryndice v. Jaryndice type continuances. In my view, a 1 year statute will encourage continuances.

I wrote about all this 20 years ago in my book on law office economics and practice. And I still believe it to be true.

I am sending a copy of this letter to our local officials, as I know at least one of them is on the law revision committee. I hasten to say for their benefit, however, that the courtesy of a response to this letter is neither expected nor required, as I know they are very busy.

However, if the commission needs any further information, please let me know.

Kindest regards,

Volney F. Morin

VFM:fc

cc: BY MESSENGER
Judge Richard C. Hubbell - Dept. 11
Commr. Robert J. Blaylock - Dept. 5
Commr. Ann E. Stodden - Room 258

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EXHIBIT 2

JEROME SAPIRO
ATTORNEY AT LAW
SUTTER PLAZA, SUITE 608
1388 SUTTER STREET
SAN FRANCISCO, CA, 94109-5416
(415) 928-1515

Nov. 9, 1988

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

Re: Tentative Recommendation
Relating to Notice to Creditors
#L-1025 Oct. 1988

Hon. Commissioners:

Above-mentioned tentative recommendations seem to meet the needs created by the Tulsa case.

However your proposed amendments to Probate Code §9053 and its subdivisions seem to leave a potential for attorney liability, which I do not believe that you contemplate.

There should be section added clearly stating that that the responsibility of giving notice to creditors is that of the personal representative and not of the attorney for the personal representative, and that the attorney for the personal representative has no liability or responsibility for the neglect, failures, or bad faith of the personal representative in the area of giving or not giving notice to creditors.

Your proposed amendment deletes the immunity of the attorney and imposes liability on the personal representative if the failure to give notice is in bad faith.

A clear statement of immunity and non-liability of the attorney should be included. Giving immunity, in absence of bad faith,to the personal representative and deleting the immunity of the attorney could give rise to inference that the attorney may have liability.

The immunity of the attorney should be in the section. I do not believe that the comment at the end "This chapter imposes no duty on the attorney to give notice" is sufficient.

Respectfully,

Jerome Sapiro

JS:mes

EXHIBIT 3

WILBUR L. COATS
ATTORNEY AND COUNSELOR AT LAW

TELEPHONE (619) 748-6512

November 10, 1988

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

In re: Tenative Recommendation NOTICE TO CREDITORS and TRUSTEES' FEES

Gentlemen:

I approve comments and recommendations as to TRUSTEES' FEES.

The following is suggested for inclusion in NOTICE TO CREDITORS.

Some protection to be provided for the Personal Representative if an action is brought that requires the Personal Representative to defend and the Personal Representative prevails.

I can envision an action that might be settled by agreement or other means whereby it is clear the Personal Representative met all the statutory notice requirements but was still out personal funds to defend an action which had no real merit.

The notice requirement as being set forth is liable to be a mine field for Personal Representatives that do not have a reasonably close relationship with the decedents personal transactions. Some protection should be provided for frivolous actions brought by would be creditors.

Very truly yours,

Wilbur L. Coats

Wilbur L. Coats

12759 Poway Road, Suite 104, Poway, California 92064

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November 10, 1988

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

Re: Tentative Recommendation Relating to
Probate Law and Procedure-Notice to Creditors

Ladies and Gentlemen:

I support the adoption of a self-executing one year statute of limitations.

Where an estate is subject to probate administration, the beneficiaries have the advantage of a short claims period to protect them. If all assets are held in a living trust, and no probate administration is implemented, then it would appear that the benefits of a short claims period are not available. (Recent amendments seem to indicate that if a probate is commenced, assets held in a living trust are available to satisfy the claims of creditors, and thus there may be protection for the beneficiaries of the living trust in that case.)

In order to further narrow the distinctions between probate administration and the administration of a living trust, I would strongly support the adoption of a short self-executing claims statute.

Under Probate Code §721, an extended statute of limitations is available where the decedent was protected by liability insurance. You may wish to consider specifically exempting Section 721 from the operation of the proposed statute.

Very truly yours,

Paul Gordon Hoffman

PGH:sc
P11

LAW OFFICES OF
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JOHN C. MALUGEN
FREDERICK K. KUNZEL
ROBERT G. RUSSELL, JR.
GEORGE L. DAMOOSE
KELLY M. EDWARDS
ANTONIA E. MARTIN
RAYMOND G. WRIGHT
JAMES G. SANDLER
MICHAEL J. RADFORD
THOMAS R. LAUBE
PHILIP J. GIACINTI, JR.
STEVEN J. UNTIEDT
STEVEN M. STRAUSS
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M. WAINWRIGHT FISHBURN, JR.
ARTHUR M. WILCOX, JR.
ROBERT K. BUTTERFIELD, JR.
MICHAEL J. KINKELAAR
VICKI L. BROACH
KENNETH L. ROSE
ERIC B. SHAISBERG
GERALD P. KENNEDY
JILL T. AARON
DAVID A. NIDORIE
JEFFREY D. CAWDREY
LYNNE R. LASRY
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KENNETH J. WITHERSPOON
JOSEPH A. HAYES
EDWARD I. SILVERMAN
CYNDY DAY-WILSON

A. T. PROCOPIO
1900-1974

HARRY HARGREAVES
RETIRED
JOHN H. BARRETT
RETIRED

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November 15, 1988

Mr. John Demoulley
Executive Director
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Dear John:

I support the California Law Revision Commission's Tentative Recommendation relating to Probate Law and Procedure for Notice to Creditors dated October 1988.

Sincerely,

ROBERT J. BERTON

RJB:jb

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

November 21, 1988

John H. DeMoully
Executive Director
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303

Re: LRC TR - Noctice to Creditors

Dear John:

I have enclosed a copy of Neal Well's report on the TR noted. The report is to assist in the technical and substantive review of those sections involved.

Very truly yours,

James V. Quillinan
Attorney at Law

JVQ/hl
Encls.
cc: Chuck Collier Valerie Merritt
Terry Ross Irv Goldring

ETATE PLANNING, TRUST AND PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
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November 16, 1988

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

Re: Tentative Recommendation Relating to Notice to Creditors

Dear Nat:

As you recall, the Executive Committee approved Memorandum 88-76 concerning notice to creditors.

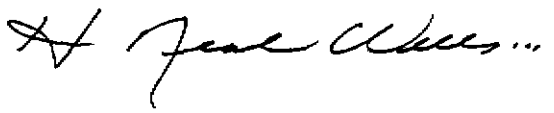
The Tentative Recommendation is the same as the Memorandum except for changes to Probate Code Section 9053 and the comment thereto. These changes delete the immunity of the attorney for the personal representative because the Probate Code imposes no duty on the attorney to give notice.

Anne Hilker and I have reviewed the changes on behalf of Team 3 and approve them in substance. It is anticipated that the Executive Committee will also approve them and continue to support the Tentative Recommendation as presently drawn.

There is, however, a two part technical question which

the staff may wish to address. It is whether the comment to Code of Civil Procedure § 353 should include a cross reference to Probate Code §§ 13109, 13156, 13204, and 13554 and whether the latter probate sections (or the comments thereto) should reflect the new one year statute of limitations.

Sincerely yours,



LAW OFFICES
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1093 LINCOLN AVENUE
SAN JOSE, CALIFORNIA 95125
TELEPHONE (408) 298-3838

DAVID W. KNAPP, SR.
DAVID W. KNAPP, JR.

November 22, 1988

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

Honorable Commissioners:

First and foremost let me state that I read each and every word of your Tentative Recommendations, sent to me faithfully by your Commission. I have nothing in my heart but praise for the efforts you have made and are making and I almost always totally agree with your endeavors. Keep up the good work, we certainly need it in California.

I have practiced law in California since 1953 and prior to that was Clerk of the Superior Court in Santa Clara County for years. I have watched "probate" evolve to its present status and must say, sometimes the "changes" have been confusing to me as I felt that in certain cases the same were not warranted and did not improve the procedures.

I have read the following which have recently been sent to me: "Compensation Of Estate Attorney and Personal Representative", "Notice To Creditors", and "Trustee's Fees", with interest.

Simply stated: The Notice To Creditors is not only confusing but I think unmanageable as proposed. Probate has always been a procedure with a set "finality" to it. Now we will leave the beneficiaries and, yes, the attorneys, hanging in the air as to what will happen in the limitations period? There has to be a better way and "going overboard" just can't be it!

The reduction of attorney's fees on smaller estates as set forth in the Compensation, etc, recommendation is not in agreement with the recommendations of the Trustee's Fees, i. e. a lesser fee to the attorneys "who can make it up on larger estates" (suppose there are none?) and "increased cost of doing business"...."such as inflation" (see page 2 of Trustee's fees) is in conflict. Do not the attorney's have a increase in cost of doing business?

The statement that by reducing the statutory fees we would be more in line with the other statutory states is ridiculous. Look at the cost of living in those states!

I know nothing will come of this statement of mine, however have always been a believer of the old saying "He who accepts evil without protesting against it is really cooperating with it!" I

certainly do not herein mean to imply that your commission is the doer of "evil" and would not want you to think so. I have stated heretofore that I admire the work you have produced in the many fields, however felt that the foregoing needed stating by myself.

Respectfully,

DAVID W.KNAPP, SR.
KNAPP & KNAPP
DWK:dd

EXHIBIT 8

SUITE 1700
610 NEWPORT CENTER DRIVE
NEWPORT BEACH, CALIFORNIA 92660

November 23, 1988

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

Dear Ladies and Gentlemen:

I have comments about several recently-issued tentative recommendations that I wish to submit for your consideration.

Multiple-Party Accounts and Financial Institutions

I have one observation and one suggestion with respect to this recommendation. First, the observation: I believe footnote 8 to the introduction dated October 25, 1988 is incorrect. It states that the California Supreme Court has denied the petition for hearing in the Propst case. I am informed by the clerk of the Supreme Court, however, that on October 27, 1988, the court granted the petition for hearing. Second, the suggestion: Apply a survivorship feature only to an account explicitly designated as a "joint tenancy" account.

Although I have performed no empirical study, I have the impression that tenancy-in-common accounts are often used by siblings, business partners or others who may have no intent to have a survivorship feature. They also are used occasionally by married persons who want to let either spouse manage, but provide assets to persons other than the surviving spouse at the first death. Because the traditional distinction in California law that survivors own all of a joint tenancy account while a decedent's interest in an account that is dominated as tenancy-in-common or community property is subject to disposition by the decedent's will (in the case of community property) or automatically becomes part of the decedent's estate (in the case of a tenancy in common) is familiar to many of my clients, adding an "automatic" survivorship feature will lead to at least some confusion and misunderstanding. It likely will reduce the property subject

to a decedent's testamentary disposition in a way that will not be perceived by the uninformed. Particularly because of the increasing prevalence of large certificates of deposit that may be held in some joint ownership form, this leads to the likelihood of inadvertently making or over-funding gifts to those with whom joint accounts are maintained. While the unlimited marital deduction allows this to take place between spouses without generating any tax cost at the first death, the same may not be true at the second death and certainly is not true in the case of non-spousal joint owners. I strongly favor the traditional distinction between joint tenancy with its survivorship feature and tenancy in common or community property without that "automatic" feature.

Insofar as married persons are concerned, we could apply a rebuttal presumption that any funds held in a tenancy-in-common account are, in fact, community property and avoid the need for probate administration of both community property and tenancy-in-common accounts if the decedent does not leave a will providing for disposition other than to the surviving spouse.

But for the suggestion about survivorship, I heartily endorse the expansion of the multi-party accounts law to include banks and savings and loan associations.

Notice of Creditors

I suggest that the proposed revision of Section 9103 of the Probate Code be amended to provide that:

> "(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 the expiration . . . ."

I suggest subsection (c) be deleted from Section 9053 or be rewritten in light of Tulsa. Although one might read Tulsa to apply only to the effectiveness of short claim periods that are not self-executing, both creditors and beneficiaries of decedents' estates would be better served by providing notice to "reasonably ascertainable" creditors rather than simply providing them an additional period of time within which to present claims. Indeed, I suggest the notice provision, itself, be rewritten to incorporate the Supreme Court's phrase so that the personal representative has an affirmative obligation to notify both known and "reasonably ascertainable" creditors.

Trustees' Fees

While I agree with the proposed change to Section 15642 of the Probate Code to permit a settlor to seek the removal of a trustee and provide that a trustee is removable if the trustee's compensation is excessive, I do not agree with the proposed structure of notice and review of fee increases.

The proposed system reflects the way in which many corporate fiduciaries compute their trustees' fees. While one could debate the desirability of determining trustees' fees (as corporate fiduciaries usually do) based primarily on a percentage of asset value, percentage of income, number of receipts or disbursements, or number of investments held, any further treatment in the trust law concerning trustees' fees, the proposal should contemplate a fee basis that considers other factors that more commonly may be considered by individual trustees. I submit that individual trustees, in particular, often consider family relationship, investment performance, amount of time required, tax consequences, and probably a number of other factors that do not immediately leap to mind. The proposed Sections 15690-15698 do not fit comfortably with these other criteria for reasonableness of trustees' fees. Although I realize it would be more helpful if I proposed an alternative formulation, for the moment I am inclined to suggest that these new proposed sections be deleted from the overall recommendation. (Indeed, it is not obvious to me that anything more than a statement of the amount of trustees' fees paid over some relatively current period of time is necessary. For trusts recently established, the Code already requires disclosure of that information as a part of the periodic account.)

I also question the desirability of the plan to allow all beneficiaries to remove a trustee who wishes to increase compensation and replace that trustee with a trust company without court intervention. The settlor may pick a fiduciary for a number of reasons, only one of which may be compensation. While I support the right of the beneficiaries to seek judicial removal and replacement of a trustee, I submit that allowing the beneficiaries to proceed without court intervention effectively removes any check to protect the purpose or purposes of the trust relationship as contemplated by the settlor. In my own experience, I have found some settlors to be particularly paternalistic in ways not appreciated by the beneficiaries. Although I believe this

is more often true with individual trustees than with corporate trustees, that has not always been the case.

I oppose enactment of the proposed Section 16443 allowing a liability for exemplary damages limited to three times the amount of actual damages. In any particular instance, policy decisions of corporate fiduciaries and the exercise of discretionary decisions with respect to the administration of individual trusts by corporate fiduciaries is not likely to be affected dramatically by the potential award of exemplary damages in addition to an award of actual damages plus the unfavorable publicity that often attends a breach of trust finding. Overall, however, trustees likely will (and I would argue should) seek (depending on the competitive pressures of the marketplace) higher fees because of the greater financial risk involved. As for individual trustees, I think it is much more likely that we will discourage persons from serving (or continuing to serve) as trustee of "difficult" or "messy" situations if they risk an award of exemplary damages. Notwithstanding the Vale and Werschkull pension plan cases, I think amending the Code to admit the possibility of exemplary damages for breach of trust is a serious mistake. Deletion of the proposed section by the legislature during its consideration of the trust law -- though perhaps motivated by concern about the limit on liability on the part of some members of the plaintiffs' bar -- was the most beneficial change to the proposed law made during the course of the legislative process.

Compensation of Estate Attorney and Personal Representative

Scrap the statutory fee system, and adopt the reasonable fee system proposed by the Uniform Probate Code! As your recommendation with respect to trustees' fees says,

> "The appropriate level of fees for services should . . . be determined by the parties to the trust and not by statute or by requiring court approval of fees. This approach is consistent with modern trust administration under which the interested parties are expected to take the initiative in protecting their rights. The settlor [or testator] presumably may take the trustees' fees schedule into account in selecting the trustee." [footnote amended]

Requiring a routine court involvement in the review of charges by the personal representative and counsel for the personal representative unnecessarily consumes judicial resources. If

there is a dispute, the court can become involved. Otherwise, the court should not be involved. Requiring disclosure at the outset of a relationship -- whether between attorney and personal representative, or personal representative and beneficiaries, is appropriate. Beyond that, either a statutory system or mandatory judicial involvement simply reduces price competition in the marketplace and unnecessarily consumes judicial resources.

Very truly yours,

Russell G. Allen

RGA/br

TICOR TITLE INSURANCE

John C. Hoag
Vice President and
Senior Associate Title Counsel

December 5, 1988

John H. DeMoully, Esq.
California Law Revision Commission
4000 Middlefield Road, Suite 2
Palo Alto, CA 94303-4739

RE: L-1025

Dear Mr. DeMoully:

L-1025 Tentative Recommendation is a legally adequate but labrynthine way to solve possible Pope applications in California.

I think it is simpler to require the personal representative to exercise due diligence to discover reasonably ascertainable creditors. This approach would make it unnecessary to extend the short non-claim statute.

If the estate has been distributed by the time the ubiquitous known or reasonably ascertainable creditor acquires actual knowledge of the administration proceeding, the creditor - a la the tentative recommendations - has "recourse against distributees of the estate".

What about bona fide purchasers and encumbrancers? Is it clear those two classes are protected from the carelessly vigilant creditor? If it isn't clear, we have a marketplace problem. I am fairly certain 9103(d) is ambigous - especially with the added reference to 9392 and even assuming by inference that a distributee is not a bona fide purchaser under any circumstances.

I look forward to struggling with drafting a rule of title practice for the industry when your final recommendation is made to and passed by the Legislature. Incidentally, I have completed my study of the five summary procedures for distributing a decedent's real and personal property and have indicated in my written analysis of them that reliance may be placed thereon to insure title with approval of individual title insurance company counsel.

Very truly yours,

John C. Hoag

COUNTY OF RIVERSIDE

OFFICE OF
PUBLIC ADMINISTRATOR
1420 Citrus Avenue
Riverside, California 92507
(714) 369-0450

RAYMOND L. CARRILLO
Coroner & Public Administrator

JACQUELINE CANNON
Chief Deputy Public Administrator

December 9, 1988

REPLY TO Jacqueline Cannon

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

Re: NOTICE TO CREDITORS

Dear Mr. Sterling:

I am opposed to the Commission's recommendation to increase the amount of time in which a claimant may file a claim. If the Estate is distributed in less than a year, the burden to satisfy a claim will be the responsibility of the distributees who may not be aware of any unsettled claims.

A prudent personal representative will usually change the decedent's address to that of the personal representative, receive a billing for the decedent and notify the claimant. Any responsible Creditor would have made an attempt to bill the decedent during the statutory period allowed for filing claims.

Most estates will not be closed within one year, and thus will not be affected by the increase of time. I am concerned only about the uncomplicated estates which may be probated prior to the expiration of one year.

Sincerely,

RAYMOND L. CARRILLO
Public Administrator

By Jacqueline Cannon
Jacqueline Cannon, Chief
Deputy Public Administrator

JC:jj

cc: Raymond L. Carrillo
Coroner/Public Administrator