

Memorandum 90-7

Subject: Study L-1025 - Creditor Claims (Suggestions for Substantive Revision)

The Commission has received a few suggestions for revision of the law relating to claims of creditors in probate. The suggestions are analyzed below. The Commission needs to decide whether any revisions are necessary and, if so, to prepare a tentative recommendation on the matter.

§ 9103. Late claims

If a personal representative in bad faith fails to notify a known creditor of the estate proceeding, when the creditor learns of the administration the creditor has no remedy against the personal representative so long as the estate is open, but is relegated to a late claim. It is only where the creditor becomes aware of the administration after the estate is closed that the creditor may have a remedy against the personal representative. Section 9053.

Commissioner Plant has suggested there may be a problem where the personal representative has depleted the estate by preliminary distributions so that even though the estate is open, the late claim is not a remedy for the omitted creditor. In this situation, it would be logical to make the preliminary distributions subject to late claims in probate. The late claim statute, Section 9103, does not do this, however.

Section 9103(e) provides that property distributed before a late claim is filed is not subject to the claim. The staff believes this is a defect in the late claim statute. The statute should not immunize distributions made under an order for preliminary distribution, but only those made under an order for final distribution. A preliminary distribution should be just that, and distributees should take with the understanding that until there is an order for final distribution they may be liable for the property or its value if required for estate

administration. This is the implication of the preliminary distribution statute itself, which provides that the court may require a bond conditioned on "payment of the distributee's proper share of the debts of the estate, not exceeding the amount distributed." Section 11622(c).

We would amend Section 9103 (the late claims statute) to read:

....

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

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

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

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

§ 9150. How claim is filed

The law formerly was that a creditor might either file a claim with the court or present the claim to the personal representative for payment. The law was revised on Commission recommendation to require the creditor to file with the court and mail a copy to the personal representative. The reason for this change was that "if the claim is presented to the personal representative, the creditor may have difficulty later proving to the court that the claim was actually made in case of fraud or neglect by the personal representative."

At the time of this recommendation the Commission heard objections from a number of persons concerned that a legitimate creditor who sends a bill to the personal representative would be trapped as a result of an innocent failure also to file with the court. We have now received two more letters renewing this objection. See Exhibits 1 (Professor Benjamin Frantz of McGeorge School of Law) and 2 (John H. Pitts of Fullerton).

Mr. Pitts notes that on several occasions in the past few months he has had the situation where creditors filed their claim with the personal representative but failed to file with the clerk as now required by statute. "While I understand and realize that the Commission drafted the new Code in an effort to insure that creditors had their bite of the apple, I am afraid that in practical practice it is not working that way in many instances, and creditors who should be paid find themselves barred." Mr. Pitts suggests that the ability to file with the personal representative be reinstated and perhaps expanded to allow filing with the personal representative's attorney.

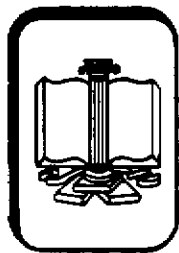
Professor Frantz echoes this concern, stating, "Certainly, I am willing to concede that the vast majority of personal representatives and attorneys will not take advantage of that technicality; but, for the life of me, I cannot understand why we abandoned the long-established provision permitting the creditor either to present his claim to the personal representative or to file it with the court (in which event it was the responsibility of well-informed deputy clerks to mail a copy to the personal representative's attorney)."

In response to these concerns, Section 9154 provides that a claim presented to the personal representative may be paid without a court filing during the four-month filing period. This was augmented by language added at the 1989 session to make clear that "Nothing in this section limits application of the doctrine of waiver, estoppel, laches, or detrimental reliance, or of any other equitable principle." Moreover, if a claim is presented to the personal representative, the personal representative is required to give notice to the now "known creditor" of the need to file the claim.

Despite these protections, it appears likely that in our zeal to protect creditors from possible fraudulent personal representatives we in fact have protected some creditors out of their claims.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

**McGEORGE SCHOOL OF LAW**

UNIVERSITY OF THE PACIFIC 3200 Fifth Avenue, Sacramento, California 95817

WRITER'S DIRECT DIAL NUMBER

CALIF. REV. COMMISSION

SEP 26 1989

RECEIVED

September 20, 1989

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

Attention: Mr. John H. DeMouilly, Executive Secretary

Subject: Recommendations Relating to
Access to Decedent's Safe Deposit Box
Miscellaneous Probate Code Revisions
Notice to Creditors in Estate Administration

Dear Mr. DeMouilly:

I concur in all of the tentative recommendations; but I do have some comments with respect to the filing of creditors' claims.

Probate Code section 9150 requires the claim to be filed; section 9002 provides that an unfiled claim is barred; and section 9054 gives the personal representative discretion to honor an unfiled claim. While we are presently concerned about the constitutionality of a one-year period of limitation, apparently no consideration has been given to the plight of a creditor who fails to file a claim. It must be conceded that most laymen do not make a study of the Probate Code, so it appears that an unsuspecting creditor may present his claim to the personal representative and lose his right to payment because he did not file the claim. Certainly, I am willing to concede that the vast majority of personal representatives and attorneys will not take advantage of that technicality; but, for the life of me, I cannot understand why we abandoned the long-established provision permitting the creditor either to present his claim to the personal representative or to file it with the court (in which event it was the responsibility of well-informed deputy clerks to mail a copy to the personal representative's attorney).

Very truly yours,

BDF:mb

DEC 06 1989

R E C E I V E D

**JOHN H. PITTS
ATTORNEY AT LAW
1400 N. BREA BOULEVARD
FULLERTON, CALIFORNIA 92635-3838**

(714) 879-5300 OR (213) 691-4726

December 4, 1989

Law Revision Commission
4000 Middlefield Road
Room D-2
Palo Alto, CA 94303

Attention: Mr. John H. DeMouilly
Executive Director

Re: Creditors' claim procedure

Dear Mr. DeMouilly:

I have been a practicing attorney in the State of California for almost 40 years. For the last fifteen years of my practice, it has been essentially limited to probate matters, trust law, estate planning and tax work. For several years last past, I have been one of the panelists in the Continuing Education of the Bar program entitled "Fundamentals of Probate Administration".

I would like to request that the Law Revision Commission review the provisions with reference to creditors' claims, particularly Section 9150(b) of our California Probate Code.

On several occasions in the past few months, we have had the situation where creditors filed their claim with the personal representative but failed to file the claim with the clerk, as required by that section. Section 9002(b) provides that a claim that is not filed, "as provided in this part," is barred.

Part of the problem is the fact that in many instances the creditor's claim is prepared and filed by a billing clerk, hopefully with a 12-grade education.

I suggest that the former rule be reinstated, which provided that if the creditor wished to do so, the creditor could file a claim directly with the clerk of the court but had to file it in duplicate, and the clerk then was directed to send a copy of the claim to the personal representative. Alternatively, the creditor could file the claim directly with the personal representative, and this would meet

December 4, 1989

the filing requirements of our Code. Personally, I feel that the law should be even expanded to provide that filing of the creditor's claim with the attorney for the personal representative should be sufficient.

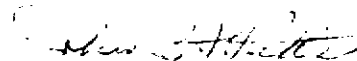
I have no problem at all with the provisions of the new law, which are intended to meet the requirements of the Tulsa case. Practically, it was my practice for many years to have creditors' claim forms sent to known creditors, and I had developed my own personal creditors' claim letter. The use of the new form, Notice to Creditors, is no problem to me or my office at all.

I do feel the Commission should re-examine the filing requirements to expand the concept back to at least the original law or, even further, as mentioned above, to allow filing with the attorney for personal representative, as meeting the requirements of the Code.

While I understand and realize that the Commission drafted the new Code in an effort to insure that creditors had their bite of the apple, I am afraid that in practical practice it is not working that way in many instances, and creditors who should be paid find themselves barred.

I would appreciate it if you and the Law Revision Commission would consider the comments made in this letter. Thank you very much.

Yours truly,



John H. Pitts

JHP:hk

cc: Mr. William V. Schmidt
Mr. Michael V. Vollmer