

Memorandum 90-39

Subject: Study L-1025 - Senate Bill 1855 (Beverly)--Notice to Creditors
(Problems on Bill)

Attached to this memorandum is a copy of the Commission's recommendation relating to notice to creditors in estate administration. The recommendation provides that if a known or reasonably ascertainable creditor fails to receive actual notice of estate administration, the creditor may file a late claim in probate or, if the estate is already closed, may recover from distributees, subject to a one-year statute of limitations running from the date of the decedent's death.

This recommendation has been introduced by Senator Beverly under the cosponsorship of the State Bar Probate Section. The bill has been set for hearing in the Senate Judiciary Committee. There are a number of issues that have surfaced concerning the bill, raised by the Senate Judiciary Committee consultant, by Garrett H. Elmore (see Exhibit 1 letter), and by the staff. The Commission needs to review these issues.

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

Code of Civil Procedure Section 353 includes the Commission's basic recommendation that all causes of action against a decedent are subject to a statute of limitations that runs one year after the decedent's death. The one year period is not tolled or extended for any reason.

Mr. Elmore raises three policy issues concerning this provision:

(1) A one-year limitations period applicable to all decedents will protect nonresident decedents against whom a California cause of action exists. Yet the fact of death of the nonresident may not even be known to California creditors within one year. Section 353 would thus curtail California court jurisdiction and deny a forum to California creditors without cause.

(2) If an absolute limitations period running from the date of death is necessary, two years is more appropriate than one. One year encourages beneficiaries to delay probate until after the limitation period expires in order to defeat creditor claims. To say that the creditor may open a probate within one year if the beneficiaries do not act is no solution--it is an unfair burden on a creditor to discover the fact of death, commence proceedings, have a personal representative appointed, and file a claim, all within one year.

(3) An absolute one-year bar improperly protects a wrongdoer's fraud or active concealment of a cause of action, and fails to take into account that some types of claims, such as professional malpractice, may not be discovered until more than a year after death.

The staff believes these points have merit. In fact, as Mr. Elmore indicates, the situation is even worse in the many cases in which there will never be a probate because all assets have gone into an inter vivos trust; a creditor may have a very difficult time indeed collecting a debt within the one year deadline. However, when the Commission has considered these concerns in the past, the Commission has felt that the benefits to the personal representative and beneficiaries of a one-year limitations period outweigh the possible detriment to creditors, and the policy of the recommendation is sound.

There are also a few technical issues that have arisen concerning this section:

(1) The one year statute "is not tolled or extended for any reason". This statement is inaccurate, as the Comment indicates, since the filing of a claim in probate tolls the statute. Probate Code § 9352. ~~This should be made explicit in the statute, thus: "The Subject to Chapter 8 (commencing with Section 9350) of Part 4 of Division 7 of the Probate Code, the~~ time provided in this subdivision for commencement of an action is not tolled or extended for any reason."

(2) We are amending a number of Probate Code sections to incorporate the one-year limitations period. These are sections that make the decedent's successor in interest who takes property outside probate liable for the decedent's debts. A typical provision would be amended thus: "In Subject to Section 353 of the Code of Civil Procedure, in any action based on the debt, the person may assert any

defenses, cross-complaints, or setoffs that would have been available to the decedent if the decedent had not died." But Section 353 deals with causes of action in favor of a decedent as well as causes of action against a decedent; it extends to six months any surviving cause of action in favor of a decedent that would expire before that time. Do we intend by our cross-reference to incorporate that aspect of Section 353 as well? The Commission has not considered this point before, but the staff believes the six-month extension is appropriate and should be available to a nonprobate taker who wishes to assert a cross-complaint or setoff. If the Commission agrees, we will revise the Comments accordingly. If the Commission disagrees, we will revise the Probate Code sections so that they refer only to subdivision (b) of Section 353.

Probate Code § 9050. Notice required

Probate Code Section 9050 requires the personal representative to give notice to creditors of which the personal representative acquires knowledge before the four-month claim filing period expires. This section is not currently in the bill, but the Senate Judiciary Committee consultant has raised the issue of the personal representative who acquires knowledge after the expiration of the four-month claim period. Shouldn't the personal representative be required to notify the creditor of the existence of the probate proceeding so that the creditor has an opportunity to make a late claim?

The staff thinks this is a good point. We provide a late claim procedure; why shouldn't we facilitate use of it by creditors who send in bills after the four-month claim period has run who may be unaware of the probate? It only seems fair that they be notified. The staff would add this requirement to the statute:

Probate Code § 9050 (amended). 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 giving of notice under this chapter is in addition to the publication of the notice under Section 8120.

Probate Code § 9051 (amended). Time of notice

9051. (a) Except as provided in subdivision (b), the notice shall be given within four months after the date letters are first issued to a general personal representative.

(b) If the personal representative first has knowledge of a creditor after, or less than 30 days before , expiration of the time provided in subdivision (a), the notice shall be given within 30 days after the personal representative first has knowledge of the creditor.

Probate Code § 9052 (amended). Form of notice

9052. The notice shall be in substantially the following form:

NOTICE OF ADMINISTRATION OF
ESTATE OF _____, DECEDENT

Notice to creditors:

Administration of the estate of _____ (deceased) has been commenced by _____ (personal representative) in Estate No. _____ in the Superior Court of California, County of _____. You must file your claim with the court and mail or deliver a copy to the personal representative within the last to occur of four months after _____ (the date letters were issued to the personal representative), or 30 days after the date this notice was mailed to you or, in the case of personal delivery, 30 days after the date this notice was delivered to you, as provided in Section 9100 of the California Probate Code, or petition to file a late claim as provided in Section 9103 of the California Probate Code. A claim form may be obtained from the court clerk. For your protection, you are encouraged to file your claim by certified mail, with return receipt requested.

(Date of mailing
this notice)

(Name and address of personal
representative or attorney)

Probate Code § 9103 (amended). Late claims

Probate Code Section 9103 is being amended to allow an unnotified creditor to file a late claim in probate, but not after the one year statute of limitations has run. Subdivision (b) (formerly c) would be amended to read:

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

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

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

Mr. Elmore points out that this change is gratuitous and could cause problems. After reading his argument, the staff agrees. Other statutes control the limitation period, and the court may not allow a claim after the limitation period has run. Moreover, it may be appropriate in some cases to allow a late claim more than a year after the decedent's death. Specifically, we are thinking of the situation where the creditor has commenced an action and the action is pending at the time of the decedent's death. If the creditor learns of the probate more than one year after the decedent's death, the creditor should not be precluded from filing a late claim for the pending action. The staff would leave this subdivision unamended.

Probate Code § 9392 (added). Liability of distributee

Proposed Section 9392 would allow an omitted creditor to recover against distributees. The consultant for the Senate Judiciary Committee has raised the issue that the proposal allows for "joint and several" liability of distributees, with the result that an omitted creditor could recover the entire amount of the debt from a single distributee and leave it to that distributee to seek indemnity or contribution from the others.

This is correct. The Commission deemed it better policy to put the burden on beneficiaries to straighten out allocations among themselves than to require a creditor to seek out proportionate contributions from many different distributees. The staff believes this policy is sound, but the Commission may wish to review it in light of the legislative concern.

Interrelation With New Probate Code Bill

The various provisions of SB 1855 have been double-jointed with the Commission's new Probate Code bill so that no matter what the sequence of enactment, the substance of SB 1855 will be incorporated into the new code. There appears to be one error in the double-jointing provisions (omission of Probate Code Section 9392).

The staff has requested a corrective amendment from the Legislative Counsel's office, and will incorporate it with any other amendments to the bill the Commission decides may be appropriate.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

*COPY MR STERLING
CAL. LAW REVISION Comm.*

**CA LAW REV. COMM'N
FEB 28 1990
RECEIVED**

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**RE: SENATE BILL 1855-STATEMENT
IN PARTIAL SUPPORT AND IN PART-
IAL OPPOSITION**

Note: The concern of the undersigned with Senate Bill 1855 as introduced is with those provisions that state a time bar generally, and also in specific subsidiary "transfers" upon death. The time bar is "within one year after the date of death."

However, the "late claims" section of the Probate Code is being amended in a non-related aspect. Comment is made thereon. No other comment on Senate Bill 1855's provisions is made.

I

**The Deletion of sec. (b) of Probate Code
section 9103 (Bill, p. 7,8) Is Proper
And Should Be Approved.**

Subsection (b) purports to limit "late claim" relief to a claim that relates to a pending action or if none, to a cause of action that does not arise out of the conduct of a trade, business or profession. S. B. 1855 would repeal it.

This was an unnecessary limitation upon the court's powers not found in predecessor "late claim" relief statutes of this state. (A question of retroactivity or effective date is per-

involved. This change was in (1989) A. B. 156 but was amended out with time bar provisions similar to those now proposed. The subject matters, however, are separate)

II

The Amendment to sub. (c) of Probate Code Section 9103 Should Not Be Adopted

Section 9103 permits the court in a probate proceeding to allow a "late" creditor's claim, upon certain conditions.

It has nothing to do with the time when an action may (must) be brought (see infra). The latter is S. B. 1855's subject.

Nonetheless, a time bar of "one year from date of death" would curtail the court's power to grant permission to a creditor to file a claim required by usual creditor's claim statutes long in the California Probate Code. See Bill, p.7-26-28.

The "one year from death" limitation is arbitrary in limiting the court's power to conduct estate administration. Once estate administration starts, how it started seems immaterial, unless it is intended to penalize a claimant for not seeing an estate was earlier opened by the creditor's alternative efforts.

The precedent of this type of estate procedural regulation is bad. More importantly, this amendment would reverse or limit a policy adopted in 1988 by the Legislature.*

* In 1988 the Legislature added sub. (a) (2) to Section 9103. It provides as a ground for "late" claim that the creditor and his attorney had no knowledge of the existence of the claim. Typically, this might occur from active concealment by a decedent or because of events coming to light after decedent's death such as suits on torts arising out of 2-person accidents or suits on product liability unknown to claimant during the claim period in California.

The present wording that limits relief to one year after letters are first issued to a general personal representative is adequate. This amendment by Senate Bill 1855 should be rejected.

III

On The Remaining Parts of Senate Bill 1855, The Writer Submits Two Specific "Policy" Changes And Opposes The Bill Generally Because It Omits Fraud And Other Provisions That Are Needed

1. First "Policy" Change

Use of the statute of limitations to curtail California court jurisdiction of actions to enforce personal liability obligations of a person who dies is not justified.

It is to be noted this proposed change affects non California decedents. Persons having no connection with California at time of death or within one year are denied the use of California state courts for disputes and causes of action that have accrued (breach, maturity) unless they sue in California courts within one year after death. The alleged personal liability in that limited period may not be due or known. The fact of death may not be known until after the "one year" period. But California refuses jurisdiction. It is not logical to assume that memories fail, and claims become stale in that short period of one year after death.

The illogical use of the statute of limitations should

be deleted. See Bill, sec. 1, p. 1, 2, amending section 353 of the Code of Civil Procedure. The definition of creditor claim in Probate Code sec. 9000 ff. should be expanded. Short and long claim periods will then appear in the same place.

This will eliminate the confusing dual creditor claim limits if the proposed format were to be adopted. *

2. Second "Policy" Change.

If a second and longer "cut off" period is to be included, it should be two years from date of death, rather than one year, as now proposed. Reason: The "one year from death" rule permits and indeed encourages heirs/beneficiaries from promptly opening the probate estate. If the decedent was indebted and there is little in the estate but ample in living trusts, counsel may well be under a duty to suggest delay until close to the end of "one year." Various advantages flow or may be thought to flow. Among them, the creditor may become time barred under the proposed statute of limitations rule.

The two year from date of death rule tends to avoid or cut down the strategies mentioned above. It tends to eliminate the unfair burden placed on a creditor of trying to open a probate, have a general personal representative appointed and file a claim within "one year" after death, which may not

* Section 353 since amendment in 1987 has been used also to cut off "tail" liability that resulted from past wording when the probate was passed by or notice to creditors was not given. This can be taken care of by direct statement in a new section. That limited aspect is a true statute of limitations subject.

be readily discoverable.

3. Omission Of Fraud And Other Proper Exceptions

As drafted, the "one year" time bar in Section 353 states no exceptions.

This has the undesirable effect of protecting wrongdoer's acts by reason of his or her death. Exceptions similar to UPC sections based on fraud should be added. Likewise, active concealment of a cause of action by a decedent should be reason for tolling. Even delayed discovery principles have a place. See, for example, the careful framework of section 337.1 and section 337.15 of the Code of Civil Procedure, relating to actions against architects, contractors and others for alleged patent or latent defects in construction projects.*

This Statement does not include drafting questions. In 1989, the writer opposed a similar bill by the same proponent. See A. B. 156 (1989) by Assembly Judiciary Committee (Member Friedman, presenter). The present proponent, upon a requested study by the Legislature, changed the scope of its proposals of 1989 (A. B. 156 (1989)), narrowing them. However, the proponent, without comment, has again taken the position a creditor would not be deprived of a cause of action, because under present California law, a creditor may petition for probate (last priority, next to any interested person). The writer continues to believe the alternate route to opening probate mentioned is

* These limitation sections state directly "No action shall be brought." In contrast, Section 353 uses "An action may be brought" wording, when the intent is to provide a shortened statute of limitations along the lines of the "architect" statutes.

not an adequate means for a creditor to present and if necessary litigate the creditor's claims, particularly where a "one year after date of death" time bar is imposed. Reference is made to the writer's 1989 statement opposing A. B. 156 (1989).

Respectfully submitted, February 27, 1990

Warrett H. Elmore
Warrett H. Elmore

CC: Senate Judiciary Committee,
Senator Lockyer, Chair

Senator Robert Beverly
(author)

Nathaniel Sterling, for
Proponent (California
Law Revision Commis-
ion)

Ferry Friedman, Member
of Assembly

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

**Notice to Creditors in
Estate Administration**

December 1989

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

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Notice to Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507 (1990).

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

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December 1, 1989

To: The Honorable George Deukmejian
Governor of California, and
The Legislature of California

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

The Commission has given further study to this matter and renews its recommendation for a one-year statute of limitations from the date of death for all claims against a decedent. The factors the Commission considers to be significant in renewing this recommendation are outlined in the attached revised recommendation.

This recommendation is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980.

Respectfully submitted,

Edwin K. Marzec
Chairperson

RECOMMENDATION

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 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

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

2. Prob. Code §§ 8100, 8120.

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, *supra*, at 303.

6. 108 S. Ct. 1340 (1988).

that, notwithstanding the four-month claim filing requirement, a known or reasonably ascertainable creditor who does not have actual knowledge of the administration of the estate during the four-month claim period should be permitted to petition for leave to file a late claim.⁷ If the estate has already been distributed when the known or reasonably ascertainable creditor acquires actual knowledge of the administration proceeding, the creditor would have recourse against distributees of the estate.⁸ The personal representative would be protected from liability for the claim unless the personal representative acts in bad faith in failing to notify known creditors.⁹

Although known or reasonably ascertainable creditors who have no knowledge of administration would be given remedies beyond the four month claim period, these remedies must be exercised within one year after the decedent's death. The Commission believes that a new long term statute of limitations of one year commencing with the decedent's death¹⁰ will best effectuate the strong public policies of expeditious estate administration and security of title for distributees, and is consistent with the concept that a creditor has some obligation to keep informed of the status of the debtor. While the Supreme Court declined to rule on the validity of long term statutes of limitation that run from one to five years from the date of death, a one-year statute is believed to be constitutional since it is self-

7. Existing California law already authorizes such a late claim petition, but only for a creditor whose claim is on a nonbusiness debt. Prob. Code § 9103. The present recommendation would remove the business claim limitation.

8. This would be a limited exception to the general rule that an omitted creditor has no right to require contribution from creditors who are paid or from distributees. Prob. Code § 11429. Under the Commission's proposal, the liability of a distributee would be joint and several with other distributees, and liability would be based on abatement principles. See Prob. Code §§ 21400-21406 (abatement).

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

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).

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

Selection of one year as the appropriate limitations period is based on the following considerations:

(1) In estate administration, all debts are ordinarily paid. Even under the existing four-month claim period it is unusual for an unpaid creditor problem to arise. A year is usually sufficient time for all debts to come to light. Thus it is sound public policy to limit potential liability to a year: this will avoid delay and procedural complication of every probate proceeding for the rare claim that might arise more than a year after the decedent's death.

(2) The one year limitation period would not apply to special classes of debts where public policy favors extended enforceability. These classes are (i) secured obligations,¹² (ii) tax claims,¹³ and (iii) liabilities covered by insurance.¹⁴ The rare claim that may become a problem more than a year after the decedent's death is likely to fall into one of these classes.

(3) Every jurisdiction of which the Commission is aware that has considered the due process problem addressed by the recommendation, including the Uniform Probate Code,¹⁵ has adopted the one-year statute of limitations as part of its solution.

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

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

12. Prob. Code § 9391.

13. Prob. Code § 9201.

14. Prob. Code § 550.

15. See, e.g., Uniform Probate Code § 3-803 (1989).

PROPOSED LEGISLATION

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

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

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

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

SECTION 1. Section 353 of the Code of Civil Procedure is amended to read:

353. (a) If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by the person's representatives, after the expiration of that time, and within six months from the person's death.

(b) Except as provided in ~~subdivision (c)~~ subdivisions (c) and (d), if a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced ~~against the person's representatives, after the expiration of that time, and~~ within one year after the date of death, and the time otherwise limited for the commencement of the action does not apply. The time provided in this subdivision for commencement of an action is not tolled or extended for any reason.

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

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

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

(d) If a person against whom an action may be brought died on or after July 1, 1988, and before January 1, 1991, 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 before the earlier of the following times:

(1) January 1, 1992.

(2) One year after the issuing of letters testamentary or of administration, or the time otherwise limited for the commencement of the action, whichever is the later time.

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

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

The reference to the decedent's "representatives" is also deleted from subdivision (b). The reference could be read to imply that the one year limitation is only applicable in actions against the decedent's personal representative. However, the one year statute of limitations is intended to apply in any action on a debt of the decedent, whether against the personal representative under Probate Code Sections 9350 to 9354 (claim on cause of action), or against another person, such as a distributee under Probate Code Section 9392 (liability of distributee), a person who takes the decedent's property and is liable for the decedent's debts under Sections 13109 (affidavit procedure for collection or transfer of personal property), 13156 (court order determining succession to real property), 13204 (affidavit procedure for real property of small value), and 13554 (passage of property to surviving spouse without administration), or a trustee.

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

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

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

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

Probate Code § 551 (amended). Statute of limitations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Probate Code § 9103 (amended). Late claims

SEC. 6. Section 9103 of the Probate Code is amended to read:

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

(1) Neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the administration

of the estate ~~within~~ *more than* 15 days before expiration of the time provided in Section 9100, and the *creditor's* petition was filed within 30 days after either the creditor or the creditor's attorney had actual knowledge of the administration whichever occurred first.

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

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

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

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

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

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

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

provided in Section 9392 and subject to Section 9053, the personal representative, designee distributee, or payee is not liable on account of the prior distribution or payment.

Comment. Former subdivision (b) of Section 9103, limiting the types of claims eligible for late claim treatment, is deleted. It should be noted that a creditor who is omitted because the creditor had no knowledge of the administration is not limited to the remedy provided in this section. If assets have been distributed, a remedy may be available against distributees under Section 9392 (liability of distributee). If the creditor can establish that the lack of knowledge is a result of the personal representative's bad faith failure to notify known creditors under Chapter 2 (commencing with Section 9050) (notice to creditors), recovery may be available against the personal representative personally or on the bond, if any. See Section 11429 (unpaid creditor). See also Section 9053 (immunity of personal representative).

Paragraph (b)(2) is revised to make clear that a late claim should not be permitted if the statute of limitations has run on the claim. This is the consequence of the rule stated in Section 9253 that a claim barred by the statute of limitations may not be allowed by the personal representative or approved by the court or judge. Under Code of Civil Procedure Section 353, the statute of limitations runs one year after the decedent's death.

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

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

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

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

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

(b)

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

Unemployment Insurance Code	Section 1090 of the Unemployment insurance Code
State Hospitals for the Mentally Disordered (commencing with Section 7200 of the Welfare and Institutions Code)	Section 7277.1 of the Welfare and Institutions Code
Medi-Cal Act (commencing with Section 14000 of the Welfare and Institutions Code)	Section 9202 of the Probate Code
Waxman-Duffy Prepaid Health Plan Act (commencing with Section 14200 of the Welfare and Institutions Code)	Section 9202 of the Probate Code

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

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

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

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

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

Probate Code § 9392 (added). Liability of distributee

SEC. 9. Section 9392 is added to the Probate Code, to read:

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

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

(2) Notice of administration of the estate was not given to the creditor under Chapter 2 (commencing with Section 9050) and neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the administration of the estate before the time the court made an order for final distribution of the property.

(3) The statute of limitations applicable to the claim under Section 353 of the Code of Civil Procedure has not expired at the time of commencement of an action under this section.

(b) Personal liability under this section is applicable only to the extent the claim of the creditor cannot be satisfied out of the estate of the decedent and is limited to the extent of the fair market value of the property on the date of the order for distribution, less the amount of any liens and encumbrances on the property at that time. Personal liability under this section is joint and several, based on the principles stated in Part 4 (commencing with Section 21400) of Division 11 (abatement).

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

Comment. Section 9392 is new. It implements the rule of *Tulsa Professional Collection Services, Inc. v. Pope*, 108 S. Ct. 1340 (1988), that the claim of a known or reasonably ascertainable creditor whose claim is not merely conjectural but who is not given actual notice of administration may

not be cut off by a short claim filing requirement. Section 9392 is intended as a limited remedy to cure due process failures only, and is not intended as a general provision applicable to all creditors.

A creditor who has knowledge of estate administration must file a claim or, if the claim filing period has expired, must petition for leave to file a late claim. See Sections 9100 (time for filing claims) and 9103 (late claims). This rule applies whether the creditor's knowledge is acquired through notification under Section 9050 (notice required), by virtue of publication under Section 8120 (publication required), or otherwise.

Under Section 9392, a creditor who has no knowledge of estate administration before an order is made for distribution of property has a remedy against distributees to the extent payment cannot be obtained from the estate. There is a one year statute of limitations, commencing with the date of the decedent's death, for an action under this section by the creditor. Code Civ. Proc. § 353. Since liability of distributees under this section is joint and several, a distributee may join, or seek contribution from, other distributees. Subdivision (c) is a specific application of the general purpose of this section to subject a distributee to personal liability but not to require rescission of a distribution already made.

An omitted creditor may also have a cause of action against a personal representative who in bad faith fails to give notice to a known creditor. See Sections 9053 (immunity of personal representative) and Section 11429 (unpaid creditor).

Probate Code § 11429 (amended). Unpaid creditor

SEC. 10. Section 11429 of the Probate Code is amended to read:

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

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

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

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

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

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

13109. A person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is personally liable, to the extent provided in Section 13112, for the unsecured debts of the decedent. Any such debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. ~~In~~ *Subject to Section 353 of the Code of Civil Procedure, in any action based upon the debt, the person may assert any defenses, cross-complaints, or setoffs that would have been available to the decedent if the decedent had not died. Nothing in this section permits enforcement of a claim that is barred under Part 4 (commencing with Section 9000) of Division 7.*

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

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

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

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

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

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

(d) Nothing in this section permits enforcement of a claim that is barred under Part 4 (commencing with Section 9000) of Division 7.

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

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

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

13204. Each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is personally liable to the extent provided in Section 13207 for the unsecured debts of the decedent. Any such debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. *In Subject to Section 353 of the Code of Civil Procedure.* in any action based upon the debt, the person may assert any defense, cross-complaint, or setoff that would have been available to the decedent if the decedent had not died. Nothing in this section permits enforcement of a claim that is barred under Part 4 (commencing with Section 9000) of Division 7.

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

Probate Code § 13554 (amended). Enforcement of liability

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

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

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

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

