#L-1025

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First Supplement to Memorandum 90-39

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

Attached to this supplementary memorandum is a copy of a letter from Charles G. Schulz of Palo Alto arguing against the Commission's proposal to make probate distributees liable to an omitted creditor (subject to a one year statute of limitations).

Respectfully submitted,

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Assistant Executive Secretary

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March 2, 1990

Hon. Robert G. Beverly
29th Senatorial District
State Capitol
Sacramento, CA 95814

Re: SB 1855, Hearing Senate Judiciary Committee
March 6, 1990

Dear Senator Beverly:

SB 1855, amending sections of the Code of Civil Procedure and the Probate Code, deals with the statute of limitations applicable to creditors of a decedent. Section 9 of SB 1855 adds a new section to the Probate Code, § 9392. It imposes transferee liability on a distributee of an estate if the identity of the creditor was known or reasonably ascertainable by a general personal representative within four months after letters were issued, the claim of the creditor "was not merely conjectural" (whatever that means), notice of administration was not given to the creditor and neither the creditor nor its attorney had actual knowledge before the court made its order for final distribution, and the statute of limitations applicable under CCP § 353 had not expired at the time action was commenced under § 9392.

Transferee liability already exists in the Probate Code, for transferees who receive spousal property directly or property passing by affidavit under §§ 13100 et. seq. (less than $60,000 etc).

Although it may seem that transferee liability to protect creditors ought also to apply to estate distributions, the net effect of this change will be to extend the normal time for administration of estates to more than one year. A prudent personal representative, or an even more prudent attorney, will not want to run the risk that a potential creditor may try to assert liability against a distributee. Once a distributee has been contacted by a creditor who is attempting to use § 9392, the distributee will be quick to contact the personal representative, and the personal representative will just as quickly contact the attorney. The easiest way to avoid this possible "second bite from the apple" is to delay distribution of the estate until more than one year after the decedent's death. That is when the period of limitations ends under CCP § 353, so one of the preconditions of an action under Probate Code § 9392 cannot be met.

I realize that the holding of Tulsa v. Pope, that a short period of published notification is insufficient to restrict the rights of creditors of a decedent, compels some change in the California Probate Code process. Already, Probate Code § 9103 allows for the late filing of claims. Section 6 of SB 1855 expands this by allowing such a late claim also from trade creditors. Nevertheless, a personal representative can, with some safety, proceed to a distribution of an estate less than one year from the date of the decedent's death by giving notice to known or reasonable ascertainable creditors in a timely fashion or paying the bills of such creditors. If the personal representative has acted in bad faith by failing to notify a creditor, the creditor can proceed against the personal representative for a period of up to 16 months after letters were issued. Probate Code § 9053.

The difficulty with § 9392 is that it gives a creditor who may only be remotely concerned with the decedent or who has not been diligent in sending repeat statements to the decedent's home an opportunity to exert pressure on a distributee, if only for the purpose of trying to put pressure on someone who might make payment. I have represented enough clients who have received dunning letters from collection bureaus to know that letters are often sent when there is no substantial factual basis for the claim being asserted by or through the collection bureau.

In my practice, I am often involved in probating the estates of decedents who leave less than $600,000, who usually do not have a large number of creditors. However, if they have been in business or a profession or done any consulting, there may be people who might file a claim or take a chance at filing a claim, of whom the personal representative has no knowledge and no duty to inquire. Either I must advise the personal representative (and the distributees) that no distribution can safely be made until one year after the decedent's death, or I must take the risk of dealing with inquiries and/or claims from possible creditors against distributees which come in after distribution but before the end of that year. Not many distributees will be eager to have the distribution postponed, which may be important to their well being. It adds additional fiduciary income tax responsibilities and costs. Distributions which are deferred earn interest, but they also fuel the public perception that estate administration takes too long, is too complicated, and is always being tied up by the attorneys.

Can't we do away with § 9392?

Sincerely,

CGS

CHARLES G. SCHULZ

CGS:bh

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