

Representing Creditors in Estate Administration



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Representing Creditors in Estate Administration

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REPRESENTING CREDITORS IN ESTATE ADMINISTRATION

by

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I.

INTRODUCTION

A. What Happens When Someone Dies

In Shakespeare's *Tempest*, the scheming, boisterous and conspicuously inebriated Stephano declares "He that dies pays all debts . . ." in response to Trinculo's plea for forgiveness upon his death (Act. III, Sc. 2, Ln. 1530). In today's language, we would read this as the exclamation that all dead people ultimately have to pay their due and lawful debts. Alas, if only real life were more like a Shakespearean play. Oftentimes the exact opposite occurs, because, as is clear, dead people can neither be sued nor can they pay off their debts. But not all hope is lost. Death alone does not render a debt uncollectable; rather it simply makes the process that much more difficult. It isn't always simple and easy when representing creditors in an estate administration, but, if managed properly, the process does work.

When a person dies, it is generally understood that a designated person takes control over the dead person's "**estate**" comprised of their rights, money and property, provides notice to interested parties (including creditors), acts to wind down the dead person's business and financial affairs, provides for the last debts and bills of the decedent to be paid and then serves to distribute the remaining money and property to the dead person's heirs. The process generally occurs in a formal and structured setting in a court or court-like setting, called "**probate**."

Probate is an old common law concept that has been developed over the course of hundreds of years. It has been a slow-to-change area of the law, which has resulted in great levels of certainty for those willing to plan their affairs in advance of death or a decline in physical or mental capacity (also known as "**estate planning**"). But this has also led to a number of anachronistic procedures which today may seem archaic and inefficient, causing many professional (financial, legal or otherwise) to create new and exciting ways to engage in estate planning, including traditional "probate avoidance" methods as well as more modern trust arrangements.

Probate usually applies only to assets that are owned, or titled, in the individual name of the dead person at the time of his or her death. The probate process does not generally apply to probate avoidance methods of controlling money or property, such as when assets are held in trust, or in joint tenancy with right of survivorship, or when a non-probate mechanism exists by law or contract to control who succeeds to a dead person's assets, such as beneficiary designations, pay-on-death accounts or transfer-on-death accounts.

It is the sometimes antiquated and archaic way that probate works that makes difficult the process of collecting debts and enforcing judgments in estate administration. As if that were not enough, probate is not uniform throughout the United States, and, as a consequence, the probate process is different between each of the states. The differences can be very significant, such as with the implications of community property laws, and especially as to the issue of claim/non-claim jurisdictions (more on this below). Nevertheless, there are common theories and procedures which can be used to explain how creditors are affected by and participate in the probate process, and to help understand the proper application of creditor's rights during estate administration.

B. Definitions

1. Wills, Probate and Estate

No discussion of the issues involved in representing creditors in estate administration would be complete without a review of the definitions and basic terminology applicable to probate.

The definitions of "**creditor**" and "**debtor**" have the usual meaning in the context of probate law, as does the term "**debt**." However, certain jurisdictions may specially define the word "debt" for the purposes of their applicable laws (again, more on this concept, below).

A "**will**" is the basic device used to direct the disposition of a person's estate after death. Another word for will is "**testament**," and a person's desire to control affairs after death is known as "**testamentary intentions**." Among such testamentary intentions, a person's will should identify those whom are to receive assets after the person's death, designate someone to take charge of assets and make arrangements for payment of debts, including delivery of those assets, designate someone to be responsible for any minor children left behind, etc. A will is a written instrument, signed and executed in a ceremonial manner designed to impart solemnity and formality to the occasion, including the use of disinterested, third-party witnesses. The goal of these ceremonial functions is to create a trustworthy record of the person's testamentary desires which can be relied upon by others after the person's death. A similar but lesser known word is "**codicil**," which refers to an amendment or written change to an existing will.

The person who creates a will is sometimes known as a "**testator**." It is important to note that a will generally has no application during a testator's life, and therefore has no impact upon a creditor during the testator's life. It is only after the testator has died that the will has effect, and, at that point, it may impact the rights of that testator's creditors.

The formal term of "**decedent**" is used to refer to the person who has died. If a decedent dies with a will which controls the disposition of the decedent's assets, then the decedent is described as dying "**testate**." If the decedent died without a will, then the word is "**intestate**." As previously mentioned, this is an old and archaic area of the law. For example, words and phrases such as testament, testamentary, testator, testate and intestate are each derived from Latin words referring to "making a will" and "bearing witness."

The persons or entities which receive a decedent's money or property after death, pursuant to the decedent's will or through the laws applicable to intestacy, are "**heirs**" or "**heirs at law**." In some jurisdictions the word "**beneficiary**" or "**beneficiaries**" is used, but the concept is the same.

The word "**estate**" is most often used improperly, even by those trained in probate law. An estate is merely a word used to describe the collection of the decedent's assets and liabilities as of the date of death. It is not a thing in the traditional sense, although in ordinary conversation the word is frequently used as if it were a legal entity (for instance, you are likely to hear things such as: "the estate is open," "the estate is closed," or "you must sue the estate," etc.).

The estate is the subject of the probate "**administration**," generally under the provisions set forth in each jurisdiction's version of its probate law, usually codified into a Probate Code. Attempts have been made to bring clarity and uniformity this area of the law. The Uniform Probate Code (abbreviated as "**UPC**") is a uniform act drafted by the National Conference of Commissioners on Uniform State Laws to govern inheritance and the decedents' estates in the United States, designed to both standardize and modernize the various state laws governing wills, trusts and estate administration. Unfortunately, the UPC is not universally adopted. Further, some jurisdictions have only adopted portions of the UPC, such that significant differences exist amongst the states with respect to estate administration and the rights of creditors. California has not adopted the UPC and has established its comprehensive estate administration procedures as enacted in the California Probate Code (abbreviated as "**Cal. Prob. Code**"). See Cal. Prob. Code §§7000 et seq.

Estate administration is conducted by a person appointed to represent the decedent's estate; generally known as the "**personal representative**." Although it is not an adversarial process like a civil lawsuit or a trial, it customarily takes place in part within a judicial setting, administered by a personal representative, supervised by a judge or other judicial officer, and concluded with a formal decree or judgment. This is known as "**probate court**" in many jurisdictions, but also goes by other names such as "**surrogate's court**." California has a unified state court system, whereby the probate court (as well as the family law court and juvenile justice court) is not a separate court system but rather is simply a division of the countywide civil court of first instance (that is, the civil trial court in each county, known as the Superior Court). This arrangement is superficially similar to a modern consumer bankruptcy administration, which takes place in a United States Bankruptcy Court (a division of the federal court of first instance, the United States District Court), administered by a court-appointed trustee, supervised by a judge and concluded with a decree of discharge.

In most jurisdictions it is generally understood that no person has the power to administer the decedent's estate until that person is appointed as the personal representative. See, for example, Cal. Prob. Code §8400. Such appointment is effective only when Letters Testamentary (or Letters of Administration) are issued by the court clerk. It is the personal representative's duty to effectuate the decedent's testamentary intentions, or, if there is no will or other applicable testamentary instrument, then to effectuate the intentions presumed under the laws of intestacy, during the administration.

Interestingly, there are multiple 'flavors' of personal representatives (you may hear various titles, such as **Executor**, **Surrogate**, **Administrator**, **General Administrator**, **Special Administrator**, **Administrator with the Will Annexed**, etc.). Cal. Prob. Code §58; UPC §1-201(35). For example, a personal representative designated in a decedent's will is generally known as

an "Executor." California deems each such person to be a personal representative with the general power to administer a decedent's estate, regardless of the title, but other jurisdictions may differ. See Cal. Prob. Code §§8400-8577 (appointment) & 9600-10382 (powers and authority).

PRACTICE TIP: California's Probate Code, as with other jurisdictions, provides for "special" administrators with various but usually limited powers. The power and authority of a special administrator depends upon court order. When dealing with a special administrator, always review the probate court's order for appointment. See Cal. Prob. Code §§8540-8547.

2. Trusts

The subject of trusts often arises when dealing with claims asserted against a decedent. Like an estate (described above), a "**trust**" in this context is usually not a legal entity. Rather, a trust is simply a legally-enforceable fiduciary relationship with respect to existing and ascertainable property. Note that, depending upon the applicable jurisdiction, some trusts (such as statutory business trusts, etc.) are considered to be separate, distinct legal entities. The issues related to such trusts are not within the scope of this discussion.

Being a fiduciary relationship, a trust requires a certain number of parties to exist, although the parties need not actually be separate and distinct persons:

- The person who creates a trust is the "**settlor**" (sometimes known as "**trustor**"). It is common for married couples, and sometimes other persons, to jointly create a trust, and, in such context they would be known as the "**settlers**" or "**trustors**."
- The person or persons who hold the property are the "**trustee**" (or "**trustees**" if there is more than one, also known as "**co-trustees**"). The trustee has the duty and obligation to administer the trust pursuant to its terms and in accordance with law.
- The recipients of the income or principal managed by the trustees are the "**beneficiary**" or "**beneficiaries**." The beneficiaries might receive money or property periodically during the existence of the trust relationship, or the beneficiaries may be entitled to receive a distribution of money or property only after the death of the settlors or of any lifetime beneficiaries.

Unlike a will, a trust has direct application during the settlor's lifetime because, obviously, the settlor no longer holds the property, rather it is the trustee. Nevertheless, because a trust is one of the methods commonly used to control money and property to avoid the requirements of probate (that is, a "probate avoidance" method), the law applicable to the creation, interpretation and administration of a trust may be equivalent to a probate, depending upon the jurisdiction. In some jurisdictions, such as California, the use of trusts has become normal in the world of estate planning, such that trust administration is more common than probate and traditional estate administration.

Except as may be established by a court judgment/decreed/order, or as a remedy entered in a lawsuit or other judicial proceeding (for example, pursuant to the doctrines of resulting trust, constructive trust, etc.), a trust is created by one of the following methods:

- (1) A person's declaration that he or she holds certain property as trustee for the benefit of some beneficiary (which may be required to be in writing, not oral, pursuant to an applicable Statute of Frauds, etc.);

- (2) The conveyance or transfer of certain property to another person as trustee on behalf of some beneficiary, such as by deed, etc.;
- (3) The transfer of certain property by valid testamentary instrument to another person as trustee (or the exercise of power of appointment), such as a trust established in a will; or
- (4) An enforceable promise to create a trust.

The most common modern method of creating a trust is by the first method described above, an express written declaration signed by the trustor. Note that a written document creating a trust is known as a declaration of trust or a trust instrument, but is often (confusingly) referred to by most lay persons as "the trust."

The property held in the trust is described as being the trust "**corpus**" (derived from the Latin word for "body"). Generally a trust without existing and ascertainable property is not a trust at all. See, for example, Cal. Prob. Code §15202. In comparison to a will, there is little ceremonial function in creating a trust, and it is the implications of the fiduciary relationship which the law primarily respects and enforces. Thus, depending upon the jurisdiction, a court may choose to enforce the fiduciary relationship despite the lack of an existing trust corpus so as to preserve the intention to create a trust while the property is marshaled or brought to the control of the trustee.

One often overlooked concept is the legality of trust creation. In most jurisdictions, a trust is created and will be enforced by a court only if the settlor properly manifests an intention to create a trust, and that the purpose of the trust is not illegal or against public policy. See Cal. Prob. Code §§15021 & 15203. Thus, each of the above-described 4 methods for the creation of a trust either expressly or impliedly requires the decedent's proper manifestation of an intention to create a trust. See Cal. Prob. Code §15200.

There are generally two categories of trusts. One category is known as a "**revocable**" trust. A trust is revocable if the settlor or settlors retain the power to change, alter, modify or terminate the trust. Such revocable trusts are common in modern estate planning, and generally serve as a testamentary substitute for a will with the goal of avoiding the need for formal estate administration (hence, revocable trusts are sometimes known as "will substitutes"). The other category is known as an "**irrevocable**" trust. A trust is irrevocable (or not revocable) if the settlor or settlors do not have the power to change, alter, modify or terminate the trust.

PRACTICE TIP: Generally, a revocable trust becomes irrevocable upon the death of the settlor or settlors with the power to change, alter, modify or terminate the trust.

The power to change, alter, modify or terminate is generally defined by the trust instrument itself, or, if not, then it may be found in the default trust law applicable in each jurisdiction. For example, California presumes a trust is revocable unless it is expressly made irrevocable by the terms of the trust instrument, but other jurisdictions differ. See Cal. Prob. Code §15400.

PRACTICE TIP: Whether a trust is revocable or irrevocable has important creditor implications, including the right for creditors to seek satisfaction of their debts from a deceased settlor's formerly revocable trust, as will be further explained.

II.

UNDERSTANDING THE TIMELINE OF EVENTS

A. Overview

Now that we have reviewed some of the basic principles and definitions applicable to understanding probate, it is time to focus on procedures. As mentioned above, the antiquated and archaic way that probate works tends to cause problems and issues for all of the interested parties, including heirs, beneficiaries, personal representatives and, most of all, creditors.

Probate can last anywhere from 6 months to 2 years, or even much longer if there is litigation. Understanding the basic steps of estate administration is essential in order to identify a creditor's rights, duties and obligations concerning a debtor decedent. As briefly discussed above, probate is a judicially supervised proceeding – it takes place, at least in part, in court. A probate judge decides whether the decedent left a valid will and also appoints the personal representative. The personal representative prepares and files inventories of the decedent's assets, pays or makes arrangements for the decedent's lawful debts, prepares and files any required tax returns and manages those assets during the estate administration. When the personal representative's work is completed, the probate judge issues a court order transferring legal title to the decedent's assets to the designated beneficiaries under the will, or to the heirs if there is no will.

B. Estate Administration Timeline

1. Outline of Significant Events

An overview of the basic timeline of the significant events in an estate administration is provided below. Obviously each jurisdiction may have slightly different steps that need to be undertaken, but the general steps and their impact upon creditors are generally the same. (Those procedural steps of particular interest to creditors are in highlighted in **BOLD**.)

<u>Phase</u>	<u>Description</u>	<u>Impact to Creditors</u>
Preliminary	<ul style="list-style-type: none">• Decedent's death.• Default in payment or breach of obligation (if any).	<ul style="list-style-type: none">• Statute of Limitations begins to accrue.
Beginning	<ul style="list-style-type: none">• Filing of original will, codicil and other testamentary instruments.• Filing of petition for probate,• Publication of notice of petition to probate estate.• Filing of proof of due execution of will, codicil and other testamentary instruments (if any).• Resolution or litigation as to disputed petitions for probate (a.k.a. "will contest") (if any).• Resolution or litigation as to disputed petitions for probate as to appointment of personal representative, etc. (if any).• Post surety bond (unless waived by will or law).• Obtain issuance of order for probate, appointment of personal representative (and admission of will, codicil and other testamentary instruments, if any).• Obtain issuance of Letters of Administration.	<ul style="list-style-type: none">• Appointment of person responsible for administering estate.

Middle	<ul style="list-style-type: none"> • Preparation of tax returns. • Review or investigation of decedent's financial affairs. • Marshaling assets. • Close decedent's accounts and open new estate accounts. • Ascertain value of marshaled assets. • Prepare, file and serve inventories of marshaled assets. • Actual notice to public agencies (depending upon jurisdiction). • Actual notice to known and/or reasonably ascertainable creditors. • Publication of notice to all creditors and other persons with an interest in decedent's affairs. • Filing of creditor claims. • Review, allowance or rejection of creditor claims. • Sale or liquidation of estate property (if needed). • Payment of priority claimants (if any). • Payment of uncontested administrative claimants (if any). 	<ul style="list-style-type: none"> • Establishes the claim filing deadline. • Provision of required actual notice to known and/or reasonably ascertainable creditors. • Requirement to file and serve formal creditor claim.
Litigation	<ul style="list-style-type: none"> • Pursue, maintain and conclude litigation involving the decedent's financial and property affairs (if any). • Litigation of disputed creditor claims (if any). • Litigation of disputes regarding estate property (if any). • Litigation of disputes regarding payment (if any). 	<ul style="list-style-type: none"> • Resolution of disputes regarding payment, liability, etc.
Conclusion	<ul style="list-style-type: none"> • Clearance of final tax returns. • Petition for distribution and closure of estate. • Notice to interested parties. • Judgment/Decree/Final order for distribution. • Judgment/Decree/Final order for closure of estate. • Payment of allowed claims. • Distribution and transfer of estate property (including recording of judgment/decreed/final order). 	<ul style="list-style-type: none"> • Judgments, decrees and final orders may be binding even upon those without actual notice. • Payment (if any).

2. Beginning – Initiation of Formal Estate Administration Proceedings

The initial step in the estate administration process is for an interested party to deliver an original or copy of the decedent's will to the probate court with the jurisdiction of the decedent's usual domicile, and to thereafter file a formal, written petition for probate in the probate court. The person who does this is usually the person designated in a decedent's will as personal representative (that is, the Executor). However, any interested party may do so - even a creditor – despite the fact that the person filing for probate is not seeking appointment as personal representative or that there is another person with higher priority for appointment.

PRACTICE TIP: The filing of a petition for probate, even by someone with priority for appointment as personal representative, does not confer authority to act on behalf of the decedent's estate. The Probate Court's order appointing the personal representative and the issuance of formal "**Letters of Administration**" or "**Letters Testamentary**" (the title for which may vary by jurisdiction, and which are generally described as Letters of Office) is the actual requirement. It is often at this stage that creditors first receive notice of the decedent's death and/or the administration of a decedent's estate. As a consequence, the person filing the petition (or his or her lawyer) is often the best person with whom to communicate as to the nature and status of the proceedings even if the person filing the petition is not or may not be seeking the power to administer the estate.

3. Appointment of Personal Representative

Most jurisdictions allow any interested person to seek appointment as personal representative of a decedent's estate. However, the person named in a decedent's will as Executor normally has priority and an absolute right to appointment. Cal. Prob. Code §8420; UPC §3-203.

In the absence of an Executor, it is usual to have a hierarchy of those persons entitled to appointment, based upon their relationship with the decedent and interest in the due and prompt administration of the estate. The list may be established by statute, rule or case law, depending upon the jurisdiction. See Cal. Prob. Code §8461; UPC §3-203.

The list often includes creditors. As a general rule, however, creditors are usually at or near the bottom of the list, with a low or lowest priority for appointment, and a common theme amongst most jurisdictions is that creditors are disfavored as personal representatives. See Cal. Prob. Code §8466. This can be a difficult problem if there is no person willing to seek appointment as personal representative of a decedent's estate.

Recognizing these issues, each jurisdiction also has a personal representative of last resort, when a probate is needed but no interested party is willing or able to act. In California the personal representative of last resort is known as the "**Public Administrator**," which is a public office run by an elected or appointed official and is the equivalent of other public officials such as a Coroner, District Attorney, Public Defender, Sheriff, etc.

4. Middle – Administration and Litigation

Once appointed by the probate court, it is the personal representative's duty and obligation to investigate the decedent's financial affairs, marshal assets, close old accounts, open new accounts, report to the court upon the nature and value of assets marshaled and prepare and file the necessary final tax returns. The personal representative is also charged with the duty to receive and review creditor claims, and resolve disputes through appropriate litigation on behalf of the parties interested in the estate. These can be daunting tasks. The personal representative's job is often more difficult because of the acts or omissions of the decedent, which may leave the personal representative with a paucity of information.

Perhaps the most important obligation for the personal representative during this process is the duty and obligation to provide notice to creditors of the existence of proceedings for the administration of a decedent's estate. All creditors are entitled to notice of the administration of a decedent's estate. Such notice is extremely important, especially because most creditors will not immediately discover the decedent's death, nor are they likely to be voluntarily notified by the decedent's survivors. The type of notice to be provided is more fully discussed below.

SAMPLE FORM # 1 - Notice of Petition to Administer Estate

5. Creditor Claims

i. Claim Filing Requirements and "Quick" Deadlines

A corollary of the personal representative's duty to give notice to creditors is the requirement for creditors to formally present their claims against the decedent or the estate to the personal representative. Most jurisdictions require that creditor claims be filed with the probate court and served on the personal representative before expiration of a certain deadline. The deadline is usually calculated based upon the date that notice was actually provided by the personal representative, or, alternatively, from the date that Letters of Office are issued to the personal representative if notice was not actually provided to the creditor. The critical issue for creditors is that these deadlines are "quick," meaning they expire within a very short period of time.

The public policy underlying these procedures is to ensure the prompt administration of a decedent's estate, so that the decedent's affairs can be wound-down and money and property distributed to those rightfully entitled to receive them. Having a quick deadline for the formal assertion of claims against a decedent's assets is critical and necessary to satisfy such policies.

ii. Filing, Allowance and Rejection of Creditor Claims

A creditor claim is generally required to be written, in a proper form (each jurisdiction has its own), supported by facts, enclosing copies of supporting records and documentation, signed by the creditor (or its authorized agent), filed in the estate administration and served upon the personal representative. See Cal. Prob. Code §§9000 et seq.; UPC §3-804. For these purposes, the creditor's burden is much the same as in bankruptcy court. See F.R.B.P. Rule 3001.

PRACTICE TIP: Claims can generally be amended to correct errors, but usually not increased in amount. See, for example, Cal. Prob. Code 9104(b).

SAMPLE FORM # 3 - Creditor's Claim

In many states, the personal representative may only pay allowed claims. If a creditor's claim is timely filed and served, the personal representative has a set deadline in which to either accept or reject the claim, in whole or in part. If a claim is approved, then it is paid by the personal representative from the assets of the estate during the regular court of administration. If a claim is rejected, in whole or in part, or if the creditor disagrees with the personal representative's allowance or rejection, then the creditor must pursue an action against the personal representative to determine and liquidate the claim. If a claim is not accepted or rejected within a set period of time, most jurisdictions allow the creditor the option to treat the failure to respond as a rejection and proceed with an action against the personal representative. The failure to timely and properly file a creditor claim within the short time period provided by law bars the creditor from pursuing a claim against the personal representative, or receiving a distribution from the estate. In other states, the consequences may be less drastic. Unfortunately, the deadlines applicable to creditor claims, and the consequences for failure to timely and properly file a creditor claim, often vary by jurisdiction.

SAMPLE FORM # 4 - Allowance or Rejection of Creditor's Claim

California requires creditor claims, with rare exception. The decedent's creditors must file their claims against the estate in the manner and within the time prescribed by the California Probate Code, which is the later of 4 months after the date Letters of Administration are first issued, or 60 days after the date notice is given to the creditor. Cal. Prob. Code §§9002 & 9100 et seq. The failure to duly, timely and properly file and serve a creditor claim generally means the creditor is barred from pursuing a claim against the personal representative and the claim will be unpaid. Cal. Prob. Code §§9002 & 9351. If the creditor disagrees with the personal representative's decision to accept or reject, in whole or in part, then the creditor must file a civil action against the personal representative within 90 days from rejection to determine and liquidate the claim. Cal. Prob. Code §9353. If a claim is neither accepted nor rejected, the creditor may optionally treat the failure to respond as a rejection and proceed with an action against the personal representative. Cal. Prob. Code §9256.

The same basic 4 month and 60 day deadlines apply to states which have enacted the Uniform Probate Code in its entirety. UPC §3-801. Again, the failure to duly, timely and properly file and serve a creditor claim generally means the creditor is barred from pursuing a claim against the personal representative and the claim will be unpaid. UPC §3-803. If the creditor disagrees with the decision to accept or reject, in whole or in part, then the creditor must initiate a civil action against the personal representative within 90 days from rejection to determine and liquidate the claim. See UPC §3-806.

PRACTICE TIP: These are very "quick" time periods, indeed. It is important for creditors and their counsel to understand that the failure to comply with the quick claim-filing rules and procedures generally results in the creditor's claim being barred and unpaid.

iii. Claims in Litigation at Time of Decedent's Death

People generally do not properly remain as defendants in pending lawsuits once they die (it's not easy to sue dead people). Instead, the usual procedure in most jurisdictions is to seek to substitute the decedent's personal representative in place of the decedent. In most jurisdictions, the claim-filing rules and deadlines discussed above also apply to creditors with claims pending in litigation against a debtor decedent as of the date of the decedent's death.

In California, civil actions pending against the decedent at the time of death may not be continued against the personal representative without compliance with the creditor claim statutes, or the claim would be barred. Creditors are advised to duly, timely and properly file and serve a claim in the deceased settlor's estate administration first before pursuing any remedies against the personal representative. See Cal. Code of Civ. Proc. §§377.10-11 & 377.40-41; Cal. Prob. Code §9370.

6. Notice Requirements

The running of the "quick" claim-filing deadline, and the consequent requirement to duly, timely and properly file a creditor claim, is triggered only if proper notice to file and serve claims is given to a decedent's creditors. Proper notice to creditors for these purposes is subject to a myriad of statutory and constitutional law, which are discussed below.

i. Constructive Notice by Publication

The personal representative's initial required notice is the publication of a notice that the personal representative has filed a petition for probate and seeks to administer a decedent's estate. See Cal. Prob. Code §§8120 et seq.; UPC §3-801. Publication in this context means publication in a newspaper of general circulation. Because probate is an "in rem" proceeding binding against the entire world, absent the requisite publication, the probate court has no jurisdiction to proceed on a formal estate administration. See *Estate of Buckley* (1982) 132 Cal.App.3d 434, 449. Publication serves the general function of advising the entire world that a decedent's estate administration is pending (to satisfy the "in rem" jurisdiction requirements) and generally serves as constructive notice to the decedent's creditors to file their claims with the probate court, and serve copies upon the personal representative, within the applicable time limits and deadlines.

However, as is more fully discussed below, mere published notice generally does not satisfy constitutional due process requirements for purposes of cutting off the rights of known and reasonably ascertainable creditors. In modern times, publication in a newspaper (whether one of general or limited circulation) is almost guaranteed not to provide any notice whatsoever to creditors. This is simply a lingering consequence of the archaic procedures established in probate law, as well as in other areas of the law where such things as service of summons are permitted to occur by way of publication. One day the law will catch up with these requirements and new methods to ensure actual notice and compliance with due process will be developed. Until then, of course, these notice requirements apply and creditors should understand their impact and application.

ii. Actual Notice upon Known and Reasonably Ascertainable Creditors

Publication alone is sufficient to notify the decedent's creditors of the simple fact that an estate administration proceeding is about to be opened and that a personal representative will be appointed. But that publication is not sufficient under traditional notions of "due process" to notify creditors of the need to file and serve claims in the estate administration and to commence the running of the "quick" claim-filing deadline period. ("Due process" is a legal doctrine, arising from, among other places, in the United States Constitution, which provides fundamental fairness including the requirement that someone not lose their rights without adequate notice and an opportunity for a fair hearing.)

As a matter of constitutional due process, the "quick" claim-filing deadline period generally may not be invoked against the decedent's known and reasonably ascertainable creditors based upon published notice alone because publication is the least likely procedure to give actual notice. At a minimum, the decedent's creditors who are known or reasonably ascertainable by the personal representative generally must be notified by mail that they are required to file their claims within applicable statutory time limits. See *Tulsa Professional Collection Services, Inc. v. Pope* (1988) 485 US 478, 490-491, 108 S.Ct. 1340, 1347-1348 ("*Pope*"). The United States Supreme Court ruled in *Pope* that providing actual notice to known or reasonably ascertainable creditors is not inconsistent with the goals reflected in the claim-filing statutes to expedite the prompt resolution of the decedent's estate administration, and that notice sent through the mail is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice. *Pope*, supra, 485 US at 489-490, 108 S.Ct. at 1347.

In an attempt to comply with due process standards and ensure that creditors receive sufficient notice during estate administration, California requires, in addition to notice by publication, the service by U.S. Mail of written notice to creditors. Cal. Prob. Code §1215 & 9050. Thus, a personal representative appointed for a California estate normally is required to serve such notice on all of the decedent's known and reasonably ascertainable creditors. Cal. Prob. Code §9050(a). The recipients of distributions from the estate may be personally liable to known and reasonably ascertainable creditors if the personal representative distributes money or property from the estate without giving the required notice, to the extent that such creditors are harmed by such failure. See Cal. Prob. Code §9392. The standard of practice in jurisdictions which have adopted the Uniform Probate Code in its entirety is generally the same. See UPC §3-801.

SAMPLE FORM # 3 - Notice of Administration to Creditors

PRACTICE TIP: The creditor that does not monitor its mail for such notice risks its claims being barred. Consistent with the theory set forth in *Pope*, this duty is likely no more onerous than monitoring the mail for notice of bankruptcy filings.

7. Payment

Payment is a creditor's ultimate goal. All allowed claims are payable in the course of administration, regardless of whether the personal representative initially allows the claim or it is resolved by judgment after litigation against the personal representative. See, for example, Cal. Prob. Code §§9003 & 9300; UPC §3-803.

In California a personal representative generally pays allowed claims when the estate is ready to close and the probate court settles the personal representative's final account. See Cal. Prob. Code §11422. Unless the debt is without argument indisputable and the estate is confirmed to be solvent, payment without court order risks surcharge should the particular claim ultimately be disallowed or the estate thereafter become insolvent (which would require that approved claims be prioritized for payment). Practice under the UPC is slightly different, in that payment for allowed claims is generally made when the time period in which to file and assert claims against the estate as well as the statute of limitations has expired. See UPC §3-807.

Note that, although differences exist amongst jurisdictions, most permit a personal representative to pay certain types of allowed and undisputed debts without court order (such as regular monthly bills, etc.). For instance, California provides that the personal representative may pay all or part of an undisputed debt and any lawful interest accumulated and unpaid thereon at any time when there are sufficient funds, whether the debt is then due or not. Cal. Prob. Code §§11422 & 11423. The same is true as UPC §3-807(b). Otherwise, as mentioned above, payment occurs only at the end or conclusion of the estate administration proceedings, upon settlement of the personal representative's account or upon expiration of the claim-filing period and any applicable statute of limitation (see discussion of statutes of limitation, below).

If the estate is insufficient to satisfy all creditors (i.e., insolvent), creditors are categorized and then paid pro rata in order of the priority assigned to each category. See, for example, Cal. Prob.

Code §§9003, 9300 & 11400 et seq.; UPC §3-805(a). Note that the usual and customary creditors with priority under non-probate law generally have priority in the context of estate administration, although jurisdictions may differ. See, for example, Cal. Prob. Code §§9204 & 11420; UPC §3-805.

Funeral expenses, expenses of last illness and similar claims generally enjoy priority status in estate administrations. An interesting but peculiar aspect of probate law is that funeral expenses, which are incurred only after the decedent's death, are treated as pre-death claims, although the personal representative usually is directed to pay such priority claims immediately. See, for example, Cal. Prob. Code §11421.

In California the accrual of interest is generally unaffected by the death of a decedent, although other jurisdictions may differ. See Cal. Prob. Code §11423; UPC §3-806(e). Debts based on a written contract bear interest at the rate and in accordance with the terms of the contract. If the contract does not specify a legal rate of interest, the debt bears interest at the maximum statutory rate for unpaid judgments (10% per year in California) from and after the date of breach. Interest accrues on all other debts at the legal rate on judgments from the date the court orders payment of the debt until the date the debt is paid.

8. Conclusion – Estate Closure

Once the personal representative has performed his or her duties to administer the decedent's estate, the estate is ready for closure, including the payment of allowed claims, distribution to the beneficiaries and/or heirs, entry of judgment/decreed/final order and for the transfer of estate property. This process may be protracted and delayed depending upon the existence of litigation or other contested proceedings.

III.

APPLICATION OF "QUICK" CLAIM DEADLINES AND STATUTES OF LIMITATION

A. Overview

A "**statute of limitations**" is a doctrine, established by statute, rule or other law, that sets the maximum time after an event that legal proceedings based on that event may be initiated (either by way of notice, submission of a claim, filing of a lawsuit, etc., depending upon the statute, rule or other law). The existence of the statute of limitations must be distinguished from the deadline in which a creditor has to submit a formal claim in an estate administration. Although both serve to restrict the rights of creditors, the concepts are different and are applied in much different ways.

B. The Effect of the Statute of Limitations

The applicable statute of limitations is one of the most critical issue for creditors. Obviously each jurisdiction's laws differ; however, most creditors are familiar with the statute of limitations applicable to the claims they seek to enforce against debtors. For instance, depending upon the jurisdiction, debts based upon breach of contract is possibly 2 years, 4 years or maybe even 10 years from the date of breach. If the limitation period has not expired prior to a decedent's death, then

generally the claim is still ripe and it may be asserted against the decedent's personal representative by way of the creditor claim procedure, etc. If not, the mere filing of a claim does not revive an otherwise barred debt. See Cal. Prob. Code §9253; UPC §§3-802 & 3-803.

Some jurisdictions create new limitation periods upon the happening of the debtor decedent's death, including California. Knowing the application of this special new limitation period is essential. California provides for a special 1 year statute of limitations for all claims (either accrued or unaccrued) which could have been made against a decedent and for which the otherwise applicable limitations period was not expired as of the date of the decedent's death. Cal. Code of Civ. Proc. §366.2. A similar 1 year period exists under the Uniform Probate Code. See UPC §3-803(a)(1). This type of special statute of limitations arises automatically once a person dies, and is tolled only by a creditor's compliance with the creditor claim rules in an estate administration, or similar laws. See Cal. Prob. Code §§9000 et seq. The personal representative's allowance or approval of the claim, either in whole or in part, further tolls the statute. See Cal. Prob. Code §9352.

PRACTICE TIP: As it concerns only the time within which an action on a liability of the decedent may be brought, not with the proper parties in such a case, virtually any action or claim based upon the liability of a decedent must be made by a creditor within 1 year of the decedent's death regardless of against whom it may be asserted. In other words, the 1 year limitation applies to a creditor's claim, whether against a personal representative, or against another person, such as a trustee, distributee or a person who takes the decedent's property and is otherwise liable for the decedent's debts. Thus, it applies in a number of actions which may otherwise permit the avoidance of formal estate administrations, including but not limited to those against the distributees of a trust (discussed more fully below) and/or with respect to claims against distributees of non-probate assets (discussed above).

C. The Effect of "Quick" Creditor Claim Deadlines

As mentioned above, creditors generally have a duty to present their claims to the personal representative. The timely filing of a creditor's claim in probate is usually a prerequisite to the creditor's right to pursue a claim against the personal representative, or to receive a distribution from the decedent's estate. See, for instance, Cal. Code of Civ. Proc. §§377.40 et seq.; Cal. Prob. Code §9002(b).

The deadlines applicable to creditor claims are quick but do vary in length by jurisdiction. For instance, as mentioned above, both the California Probate Code and the UPC require that creditors must file their claims against the estate in the manner and within the time prescribed by the Probate Code, which is the later of 4 months after the date Letters of Administration are first issued, or 60 days after the date notice is given to the creditor. Thus, the creditor's failure to duly, timely and properly file and serve a claim generally means the debt cannot be allowed nor paid in the course of estate administration. Cal. Prob. Code §§9002 & 9351; UPC §§3-801 & 3-803.

The timely filing of a creditor's claim in the administration of a decedent's estate may be excused only in limited circumstances, depending upon the laws of the jurisdiction. In California, the requirement is excused where, for instance, the decedent was insured and the party suing limits its recovery to the limits of insurance coverage, or where a party holding a security interest in property

of the decedent expressly waives all recourse to any other estate property for satisfaction of the debt owed. See Cal. Prob. Code §§9390 & 9391. Similar exceptions may apply in other jurisdictions.

Note that a creditor may be relieved from the statutory deadline for filing a creditor's claim upon petition to the court, but only if the creditor can show that the personal representative failed to serve notice as required by law or if the creditor was not aware of the facts giving rise to its claim against the deceased before expiration of the claims-filing period. For example, California permits a creditor to petition for allowance of a late creditor's claim, but that petition must be filed within 60 days after the creditor became aware of the administration of the estate or of the facts giving rise to the claim against the decedent. See Cal. Prob. Code §9103.

PRACTICE TIP: It is important to note that the personal representative's failure to timely and properly give notice does not preclude a creditor with actual knowledge of the estate administration from filing a claim within the quick claim-filing period. Relief from the bar for failure to duly file and serve a creditor claim is not available to a creditor who, despite the representative's failure, had actual knowledge of the estate's administration before expiration of that claim-filing period. See Cal. Prob. Code §§9053(b)(2), 9103 & 9392; *Venturi v. Taylor* (1995) 35 Cal.App.4th 16, 18.

D. Disparity Between Deadline Periods; Strategy

The disparity between the deadline of the Statute of Limitations for claims against a decedent, on the one hand, and the much shorter creditor claim deadline, on the other hand, is the source of much dispute, contention and litigation. The disparity leads to the strategic decision by some interested parties whom might not need a formal estate administration (see "Alternatives to Probate," discussed in more detail below) to initiate a formal administration proceeding to take advantage of the "quick" deadlines with the hoping of catching creditors unaware of the formal claim requirements and, hopefully, extinguishing various claims, reducing the amount to be paid to creditors, and increasing the eventual distribution to beneficiaries and/or heirs.

IV.

REVIEW OF ALTERNATIVES TO PROBATE

A. Overview

Most jurisdictions have some low-cost provide alternative to formal estate administration proceedings. For instance, in California, the most common alternatives to probate include the various statutory small estate transfer procedures, as well as a transfer of property to a surviving spouse (also known as a "Spousal Property Petition").

B. Spousal Property Petitions

After the death of a spouse, the surviving spouse may inherit property without formal estate administration. In California, such Spousal Property Petitions are provided for in Cal. Prob. Code §§13500, 13501 & 13560 et seq. A Spousal Property Petition can be used to transfer assets which are in the name of the decedent spouse, or the joint name of the decedent spouse and surviving spouse,

to the sole name of the surviving spouse. It is, essentially, a simplified probate process, and takes much less time and expense than a full probate estate administration. The procedure is available whenever someone has died and that person leaves a surviving spouse (or domestic partner, depending upon the jurisdiction). If there is a will, and the only beneficiary is the surviving spouse, then both community property and separate property can be transferred by a spousal property petition. If the will has beneficiaries other than a surviving spouse, then a probate may still be needed to transfer assets gifted to non-spouse beneficiaries. If there is no will, the estate will be transferred in accordance with the laws of intestate succession. This procedure works best for the transfer of community property, but it also can work for separate property depending upon the jurisdiction and the existence of a will or other valid testamentary instrument providing for the surviving spouse to inherit the decedent spouse's separate property. Regardless, in some cases the surviving spouse may want to probate the decedent spouse's estate because litigation against the estate or a will contest is likely, or because of potential problems with creditors.

C. Small Estate Transfer Proceedings

Various jurisdictions also have various forms of small estate transfer proceedings. See Cal. Prob. Code §§13100 et seq., 13150 et seq. & 13200 et seq. For instance, in California, if the value of a decedent's estate is less than \$150,000.00 as of the date of death, then it need not be probated in California. Instead, after a period of 40 days expires from the date of death, an affidavit or declaration signed under penalty of perjury can be used to collect the assets for the beneficiaries or heirs of the decedent's estate, and no documents are required to be filed with the Probate Court. The small estate rule can accomplish the transfer of bank accounts, brokerage accounts, stock, bonds, mutual funds, other investments, and similar assets that the decedent owned in his or her name only. As with probate generally, it has no application to assets which are held in trust, or in joint tenancy with right of survivorship, or when a lawful and valid non-probate mechanism exists by law or contract to control whom succeeds to a dead person's assets, such as beneficiary designations, pay-on-death accounts or transfer-on-death accounts, assets whose succession is controlled by federal law (IRAs, 401K accounts, pensions, etc.), life insurance, and separately-titled motor vehicles. A similar procedure exists for the proceedings to transfer real property of a decedent if the value of the real property does not exceed \$50,000.00 as of the date of death.

The small estate transfer proceedings usually require an affidavit or declaration to be signed under penalty of perjury. The affidavit or declaration must include the information described in each jurisdiction's laws. The affidavit or declaration is then given to the institution that holds the assets, and the assets are transferred to the beneficiary or heir who signed the affidavit or declaration.

D. Impact Upon Creditor Rights

The use of a probate alternative such as a Spousal Property Petition or small estate transfer proceeding does not avoid the obligation to arrangement payment of creditors. Depending upon the jurisdiction, the affiant or declarant beneficiary or heir might need to declare that creditors have been paid or that none exist, or otherwise be responsible for payment to creditors to the extent of the value that they receive using the probate alternative procedure.

The key impact for creditors would be that these procedures dispense with the requirement for notice, and therefore creditors may not become aware of the decedent's death and/or the need to pursue a claim. Depending upon the jurisdiction, the statute of limitations might apply to the liability of the affiant or declarant beneficiary or heir using these procedures, or it may not apply. For instance, California's special 1 year limitations period pursuant to Cal. Code of Civ. Proc. §366.2 applies also to transferees who take via these probate alternative procedures. See Cal. Prob. Code §§13109, 13156, 13204 & 13554. This sometimes leads to unjust results, especially for creditors unaware of the death of a debtor and whom, for business reasons, may have not yet chosen not to pursue the debtor for collection.

V.

REVIEW OF CREDITOR RIGHTS DURING ESTATE ADMINISTRATION AND APPLICATION TO COMMONLY-ENCOUNTERED SCENARIOS

A. Overview

The proper action for a creditor facing the death of a decedent debtor is determined based upon the nature of the debt or claim to be asserted.

B. Debts and Claims Not Reduced to Judgment Pre-Death

As for debts and other claims against a decedent not reduced to judgment, most survive the decedent's death and may be asserted against the decedent's personal representative. As discussed above: (i) the personal representative is obligated to publish notice and serve the creditor; (ii) the creditor is obligated to duly, timely and properly file and serve a creditor claim; (iii) the claim is allowed or rejected, in whole or in part; (iv) the creditor accepts treatment or litigates the dispute; and (iv) the claim as allowed or judicially determined is paid in the course of the administration of the decedent's estate, in order of its priority.

C. Judgments Obtained Prior to Decedent's Death

Regarding debts and other claims reduced to judgment prior to the decedent's death, it seems logical that a creditor whom successfully prosecuted its claim and obtained a judgment should be rewarded for its efforts with a higher priority than other debts. Nonetheless, it is a general principle in most jurisdictions that creditors with mere money judgments do not have priority over those with none in the context of the administration of a decedent's estate, and all must submit claims if otherwise required to do so by the jurisdiction's applicable Probate Code.

PRACTICE TIP: In most jurisdictions, having a pre-death judgment does not excuse the requirement to file a creditor claim.

For example, in California, a money judgment generally may not be enforced pursuant to the provisions of the Enforcement of Judgments Law (Title 9 of the Cal. Code of Civ. Proc. §§680.010 et seq.) after the death of the judgment debtor. See Cal. Prob. Code §9300. Instead, a judgment creditor's collection efforts, whether or not the creditor has previously obtained a money judgment,

are thereafter governed by the Probate Code and the requirements for the creditor to duly, timely and properly file a creditor claim. See Cal. Code of Civ. Proc. §686.020; Cal. Prob. Code §9300. However, depending upon the relief sought, certain non-money judgments may still be enforced pursuant to non-probate law and procedure, with restriction. See Cal. Prob. Code §9302.

D. Secured Creditors

Creditors holding secured claims (claims secured by a lien or other charge against specific property) are treated differently in an estate administration. A fully secured creditor ordinarily does not have a collection problem. Estate property generally passes from a decedent to a beneficiary subject to all then-existing liens and encumbrances on the property, unless action is taken during the course of administration to the contrary (such as for the sale of property, etc.). Thus, in the absence of provisions in a will for exoneration, or as pursuant to law, property generally passes from a decedent to a beneficiary, whether by probate or non-probate transfer, subject to all then-existing liens and encumbrances. This is analogous to the results in bankruptcy proceedings; discharge extinguishes the right to enforce a claim against the debtor but the debtor's property remains liable for a debt secured by a valid and unavoidable lien. Simply put, liens "ride through" both probate and bankruptcy proceedings.

For example, a lien holder may enforce the lien directly without compliance with the probate creditor procedures if the lien holder waives recourse against other property in the estate. Cal. Prob. Code §§9391 (lien enforcement action) & 9303 (same as to property subject to an execution lien as of the date of the decedent's death). In addition, a debt secured by non-estate property is usually payable first from that property, without exoneration from the decedent's estate. See *Estate of Dolley* (1968) 265 Cal.App.2d 63. See also Cal. Prob. Code §11420(a)(2) (priority of secured debt in probate, providing that liens in property of an estate have a priority over general unsecured claims).

PRACTICE TIP: Secured creditors are not entirely exempt from the need to protect their rights during an estate administration. Deficiency claims, for instance, involve the personal liability of the decedent. Compliance with the creditor claim statutes is a necessity or the claim would be barred, as discussed above. Further, the impact of any special limitations period arising from the debtor decedent's death should be considered (including the 1 year statute of limitations of Cal. Code of Civil Proc. §366.2).

VI.

SELECTED ISSUES CONCERNING TRUSTS

A. Overview

A complete review of the interaction between trust law and probate law is outside the scope of this discussion. There are some relevant topics which frequently arise with respect to creditors, and those are worthy of a short review.

The law concerning these trust topics does differ distinctly amongst the various jurisdictions, so creditors are cautioned that the discussion below focuses primarily on California law only.

B. Irrevocable Trusts

Property over which the settlor did not retain the power to revoke (in other words, property held in a trust in which the settlor did not hold or retain the power to change, alter, modify or terminate the trust, as discussed above) as of the date of the settlor's death is generally not subject to the claims of a settlor's creditors. Creditors may seek to exercise any rights available under other laws, such as those applicable for the enforcement of judgments, the Uniform Fraudulent Transfer Act, and other applicable laws to seek the return of the property contributed to the trust by the settlor, or, alternatively, its value in money damages and other permissible relief. Critical issues for the creditor include obtaining jurisdiction over the trustee and the impact of relevant statutes of limitation and/or repose.

C. Revocable Trust

i. Property in Revocable Trust Subject to Claims of Deceased Settlor's Creditors

In California, property over which the settlor had power of revocation (again, property held in a trust in which the settlor held or retained the power to change, alter, modify or terminate the trust, as discussed above) as of the date of the settlor's death is subject to the settlor's creditors' claims. This is consistent with the idea that a revocable trust is merely a will substitute, not a separate entity distinct from its settlor. California law permits liability only to the extent the decedent's settlor's estate is "inadequate." See Prob. Code §§19000 et seq. and 19001(a). Although assets in a trust were transferred without probate to a trustee and not in the decedent's name at time of death, the trust estate is subject to the settlor's creditors without any need for showing fraudulent intent or other means to undo the non-probate transfer (as would be the case for an irrevocable trust, discussed above). However, the trust estate is only secondarily liable to creditors, not primarily liable, depending upon the necessary showing of inadequacy.

Determining inadequacy may be problematic if there is no estate administration proceeding. The creditor has the burden to demonstrate that the probate estate is exhausted. See, for example, *Dobler v. Arluk Medical Center Industrial Group, Inc.* (2001) 89 Cal.App.4th 530 ("*Dobler I*"). This requires a balancing of the claims and expenses against the probate assets and a determination that, if the claims exceed the assets, then the estate is "inadequate." Claims for taxes and funeral expenses are also included, although disputes regarding title to specific property alleged to be included in the trust estate are not. See Cal. Prob. Code §§19000(a) & (b).

An argument can be made that an estate administration is not a formal prerequisite to trust liability as discussed herein because California Probate Code §19008 states that if there is no proceeding to administer the estate and the trustee does not invoke the trust claim procedure, "then the liability of the trust to any creditor of the deceased settlor shall be as otherwise provided by law." This may include liability asserted against distributees. See Cal. Prob. Code §§19400, 19401 & 19402. Remember that the 1 year statute of limitations of Cal. Code of Civ. Proc. §366.2 still applies to such actions, so, unless it tolled by the due, timely and proper filing of a creditor claim in an estate administration, all such action must still be commenced before expiration of the 1 year from the date of the decedent settlor's death.

It has also been suggested that a creditor may proceed directly against a successor (such as a trust beneficiary, the successor trustee, etc.) that receives a trust distribution during the pendency of estate administration proceedings, without waiting for the conclusion of those proceedings and the determination that the probate estate is "inadequate," but that the case should not be concluded until the probate is concluded. See *Dobler I*, supra (holding that creditors may pursue claims against the decedent by taking action against the decedent's distributees when there was no proceeding to administer a decedent's estate pending). Again, the 1 year statute of limitations of Cal. Code of Civ. Proc. §366.2 still applies absent tolling by compliance with the creditor claim rules.

ii. Creditor "Standards of Practice"

California provides that, to the extent that an estate administration has been initiated, and the personal representative of the deceased settlor's estate has duly published and given notice of administration of the estate, then the protection from creditors afforded the personal representative of the deceased settlor's estate is afforded to the trustee and to the beneficiaries of any trust which was formerly revocable but became irrevocable upon the settlor's death. See Cal. Prob. Code §19006(b). Thus, creditors are advised to duly, timely and properly file and serve a claim in the deceased settlor's estate administration first before pursuing any remedies against the trustee. Other jurisdictions may have differing rules and procedures, so creditors are advised to check with their counsel as to their rights and obligations.

In the absence of a pending administration case, creditors in California are advised to seek to open probate, have someone appointed as a "special" administrator with the sole purpose to receive creditor claims and bind the estate in further legal proceedings, file and serve a claim in the deceased settlor's estate administration, deem the claim rejected and then commence litigation against the trustee without waiting for completion of the estate administration. Upon proof of the creditor's compliance with the probate creditor claim requirements, the one 1 year statute of limitations of Code of Civ. Proc. §366.2 is tolled. This enables the filing of a civil action to enforce the claim and liability against the trust, however the creditor is still required to prove inadequacy or exhaustion of the probate estate. Again, other jurisdictions may have differing rules and procedures, so creditors are advised to check with their counsel as to their rights and obligations.

iii. Trustee Duties Towards Creditors

Unless the trust instrument provides otherwise, the trustee of a trust which was formerly revocable but became irrevocable upon the settlor's death does not have a duty to withhold distributions to beneficiaries pending the resolution of a creditor's disputed claim and cannot prefer unresolved claims over the interests of the trust beneficiaries. Further, a trustee's duty to preserve trust assets while a lawsuit against the estate is pending is limited to the duty to refrain from engaging in affirmative misconduct designed to defeat the creditor's reasonable expectation for a recovery from trust assets. See *Arluk Med. Ctr. Indus. Group, Inc. v. Dobler* (2004) 116 Cal.App.4th 1324 ("*Dobler II*"). If creditors of the deceased settlor are successful in prosecuting a claim against trust assets then judgment is rendered against the trustee in the trustee's fiduciary capacity only, not personally, to be paid from the trust's remaining corpus. See Cal. Prob. Code 19301.

D. Optional Trust Claims Procedure

Note that California and other jurisdictions provide optional but systematic and well-articulated schemes for resolving creditor claims against a decedent settlor's formerly revocable trust, almost identical to a formal estate administration, but they cannot be used if estate administrations exist. See, for example, Cal. Prob. Code §§19000 et seq. These procedures are optional and the trustee is not required to initiate proceedings. The procedure used to be rare; considering the increased use of trusts in modern estate planning, the use of the optional trust claim procedure is now become more common. In practice, creditors should treat these procedures as being the equivalent to probate and comply with their duties, obligations and deadlines accordingly, including but not limited to prepare, filing and serving creditor claims (as may be provided for in the statutory trust claims procedures).

PRACTICE TIP: Notwithstanding the breadth of these schemes, they have no application with respect to a trust that was not revocable by the settlor during the settlor's lifetime. See Prob. Code §1900(d).

SAMPLE FORMS

(California)

1. Notice of Petition to Administer Estate
2. Notice of Administration to Creditors
3. Creditor's Claim
4. Allowance or Rejection of Creditor's Claim

Notice of Petition to Administer Estate

ESTATE OF (Name): _____	CASE NUMBER: _____
DECEDENT	

PROOF OF SERVICE BY MAIL

1. I am over the age of 18 and not a party to this cause. I am a resident of or employed in the county where the mailing occurred.
 2. My residence or business address is (*specify*):

 3. I served the foregoing *Notice of Petition to Administer Estate* on each person named below by enclosing a copy in an envelope addressed as shown below **AND**
 - a. ☐ **depositing** the sealed envelope with the United States Postal Service on the date and at the place shown in item 4, with the postage fully prepaid.
 - b. ☐ **placing** the envelope for collection and mailing on the date and at the place shown in item 4 following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
 4. a. Date mailed: _____ b. Place mailed (*city, state*): _____
 5. ☐ I served, with the *Notice of Petition to Administer Estate*, a copy of the petition or other document referred to in the notice.
- I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

(SIGNATURE OF PERSON COMPLETING THIS FORM)

NAME AND ADDRESS OF EACH PERSON TO WHOM NOTICE WAS MAILED

	<u>Name of person served</u>	<u>Address (number, street, city, state, and zip code)</u>
1.		
2.		
3.		
4.		
5.		
6.		

☐ Continued on an attachment. (*You may use form DE-121(MA) to show additional persons served.*)

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available upon request if at least 5 days notice is provided. Contact the clerk's office for *Request for Accommodations by Persons With Disabilities and Order* (form MC-410). (Civil Code section 54.8.)



Notice of Administration to Creditors

NOTICE OF ADMINISTRATION OF THE ESTATE OF

(NAME)

DECEDENT

NOTICE TO CREDITORS

1. (Name):
(Address):

(Telephone):

is the **personal representative** of the **ESTATE OF** (name):

, who is deceased.

2. The personal representative HAS BEGUN ADMINISTRATION of the decedent's estate in the
a. **SUPERIOR COURT OF CALIFORNIA, COUNTY OF** (specify):

STREET ADDRESS:

MAILING ADDRESS:

CITY AND ZIP CODE:

BRANCH NAME:

- b. Case number (specify):

3. You must **FILE YOUR CLAIM** with the court clerk (address in item 2a) AND mail or deliver a copy to the personal representative before the **later** of the following times as provided in Probate Code section 9100:

- a. **four months** after (date): , the date letters (authority to act for the estate) were first issued to the personal representative, OR

- b. **sixty days** after (date): , the date this notice was mailed or personally delivered to you.

4. **LATE CLAIMS:** If you do not file your claim before it is due, you must file a petition with the court for permission to file a late claim as provided in Probate Code section 9103.

WHERE TO GET A CREDITOR'S CLAIM FORM: If a *Creditor's Claim* (form DE-172) did not accompany this notice, you may obtain a copy from any superior court clerk or from the person who sent you this notice. A letter to the court stating your claim is *not* sufficient.

FAILURE TO FILE A CLAIM: Failure to file a claim with the court and serve a copy of the claim on the personal representative will in most instances invalidate your claim.

IF YOU MAIL YOUR CLAIM: If you use the mail to file your claim with the court, for your protection you should send your claim by certified mail, with return receipt requested. If you use the mail to serve a copy of your claim on the personal representative, you should also use certified mail.

Note: To assist the creditor and the court, please send a copy of the *Creditor's Claim* form with this notice.

(Proof of Service on reverse)

[Optional]

PROOF OF SERVICE BY MAIL

1. I am over the age of 18 and not a party to this cause. I am a resident of or employed in the county where the mailing occurred.
2. My residence or business address is (*specify*):

3. I served the foregoing *Notice of Administration of Creditors* ☐ and a blank *Creditor's Claim* form* on each person named below by enclosing a copy in an envelope addressed as shown below AND

- a ☐ **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid.
- b ☐ **placing** the envelope for collection and mailing on the date and at the place shown in item 4 following our ordinary business practices. I am readily familiar with the business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

4. a. Date of deposit:

b. Place of deposit (*city and state*):

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

.....
(TYPE OR PRINT NAME)



(SIGNATURE OF DECLARANT)

NAME AND ADDRESS OF EACH PERSON TO WHOM NOTICE WAS MAILED

☐ List of names and addresses continued in attachment.

* **NOTE:** To assist the creditor and the court, please send a copy of the Creditor's Claim (form DE-172) with the notice.

Creditor's Claim

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):		TELEPHONE AND FAX NOS.:	FOR COURT USE ONLY
ATTORNEY FOR (Name):			
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:			
ESTATE OF (Name):			
DECEDENT			
CREDITOR'S CLAIM			CASE NUMBER:

You must file this claim with the court clerk at the court address above before the LATER of (a) four months after the date letters (authority to act for the estate) were first issued to the personal representative, or (b) sixty days after the date the *Notice of Administration* was given to the creditor, if notice was given as provided in Probate Code section 9051. You must also mail or deliver a copy of this claim to the personal representative and his or her attorney. A proof of service is on the reverse.

WARNING: Your claim will in most instances be invalid if you do not properly complete this form, file it on time with the court, and mail or deliver a copy to the personal representative and his or her attorney.

- Total amount of the claim: \$
 - Claimant (name):
 - ☐ an individual
 - ☐ an individual or entity doing business under the fictitious name of (specify):
 - ☐ a partnership. The person signing has authority to sign on behalf of the partnership.
 - ☐ a corporation. The person signing has authority to sign on behalf of the corporation.
 - ☐ other (specify):
 - Address of claimant (specify):
 - Claimant is ☐ the creditor ☐ a person acting on behalf of creditor (state reason):
 - ☐ Claimant is ☐ the personal representative ☐ the attorney for the personal representative.
 - I am authorized to make this claim which is just and due or may become due. All payments on or offsets to the claim have been credited. Facts supporting the claim are ☐ on reverse ☐ attached.
- I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

..... (TYPE OR PRINT NAME AND TITLE)  (SIGNATURE OF CLAIMANT)

INSTRUCTIONS TO CLAIMANT

- On the reverse, itemize the claim and show the date the service was rendered or the debt incurred. Describe the item or service in detail, and indicate the amount claimed for each item. Do not include debts incurred after the date of death, except funeral claims.
- If the claim is not due or contingent, or the amount is not yet ascertainable, state the facts supporting the claim.
- If the claim is secured by a note or other written instrument, the original or a copy must be attached (state why original is unavailable.) If secured by mortgage, deed of trust, or other lien on property that is of record, it is sufficient to describe the security and refer to the date or volume and page, and county where recorded. (See Prob. Code, § 9152.)
- Mail or take this original claim to the court clerk's office for filing. If mailed, use certified mail, with return receipt requested.
- Mail or deliver a copy to the personal representative and his or her attorney. Complete the *Proof of Mailing or Personal Delivery* on the reverse.
- The personal representative or his or her attorney will notify you when your claim is allowed or rejected.
- Claims against the estate by the personal representative and the attorney for the personal representative must be filed within the claim period allowed in Probate Code section 9100. See the notice box above.

(Continued on reverse)

ESTATE OF (Name): _____	CASE NUMBER: _____
DECEDENT	

Date of item	FACTS SUPPORTING THE CREDITOR'S CLAIM <input type="checkbox"/> See attachment (if space is insufficient) Item and supporting facts	Amount claimed
	TOTAL:	\$

PROOF OF ☐ **MAILING** ☐ **PERSONAL DELIVERY** **TO PERSONAL REPRESENTATIVE**
(Be sure to mail or take the original to the court clerk's office for filing)

1. I am the creditor or a person acting on behalf of the creditor. At the time of mailing or delivery I was at least 18 years of age.
2. My residence or business address is (specify):

3. I mailed or personally delivered a copy of this *Creditor's Claim* to the personal representative as follows (check either a or b below):
 - a. ☐ **Mail.** I am a resident of or employed in the county where the mailing occurred.
 - (1) I enclosed a copy in an envelope AND
 - (a) ☐ **deposited** the sealed envelope with the United States Postal Service with the postage fully prepaid.
 - (b) ☐ **placed** the envelope for collection and mailing on the date and at the place shown in items below following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.
 - (2) The envelope was addressed and mailed first-class as follows:
 - (a) Name of personal representative served:
 - (b) Address on envelope:

 - (c) Date of mailing:
 - (d) Place of mailing (city and state):
 - b. ☐ **Personal delivery.** I personally delivered a copy of the claim to the personal representative as follows:
 - (1) Name of personal representative served:
 - (2) Address where delivered:

 - (3) Date delivered:
 - (4) Time delivered:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
 Date: _____

.....
 (TYPE OR PRINT NAME OF CLAIMANT)



 (SIGNATURE OF CLAIMANT)

Allowance or Rejection of Creditor's Claim

Attach a copy of the creditor's claim to this form. If approval or rejection by the court is not required, do not include any pages attached to the creditor's claim.

1. Name of creditor (*specify*):
2. The claim was filed on (*date*):
3. Date of first issuance of letters:
4. Date of *Notice of Administration*:
5. Date of decedent's death:
6. Estimated value of estate: \$
7. Total amount of the claim: \$
8. ☐ Claim is allowed for: \$ *(The court must approve certain claims before they are paid.)*
9. ☐ Claim is rejected for: \$ *(A creditor has 90 days to act on a rejected claim.* See box below.)*
10. Notice of allowance or rejection given on (*date*):
11. ☐ The personal representative is authorized to administer the estate under the Independent Administration of Estates Act.

Date:

Date:

(TYPE OR PRINT NAME OF PERSONAL REPRESENTATIVE)

(SIGNATURE OF PERSONAL REPRESENTATIVE)

From the date that notice of rejection is given, you must act on the rejected claim (e.g., file a lawsuit) as follows:

1. **Claim due:** within 90 days* after the notice of rejection.
2. **Claim not due:** within 90 days* after the claim becomes due.

* The 90-day period mentioned above may not apply to your claim because some claims are not treated as creditors' claims or are subject to special statutes of limitations, or for other legal reasons. You should consult with an attorney if you have any questions about or are unsure of your rights and obligations concerning your claim.

12. Approved for: \$

13. Rejected for: \$

Date:

SIGNATURE OF JUDICIAL OFFICER

14. Number of pages attached:

☐ SIGNATURE FOLLOWS LAST ATTACHMENT

(Proof of Mailing or Personal Delivery on reverse)

Page 1 of 2

ESTATE OF (Name):	CASE NUMBER:
DECEDENT	

PROOF OF ☐ MAILING ☐ PERSONAL DELIVERY TO CREDITOR

1. At the time of mailing or personal delivery I was at least 18 years of age and **not a party** to this proceeding.
2. My residence or business address is *(specify)*:

3. I mailed or personally delivered a copy of the *Allowance or Rejection of Creditor's Claim* as follows *(complete either a or b)*:
 - a. ☐ **Mail.** I am a resident of or employed in the county where the mailing occurred.
 - (1) I enclosed a copy in an envelope AND
 - (a) ☐ **deposited** the sealed envelope with the United States Postal Service with the postage fully prepaid.
 - (b) ☐ **placed** the envelope for collection and mailing on the date and at the place shown in items below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.
 - (2) The envelope was addressed and mailed first-class as follows:
 - (a) Name of creditor served:
 - (b) Address on envelope:

 - (c) Date of mailing:
 - (d) Place of mailing *(city and state)*:
 - b. ☐ **Personal delivery.** I personally delivered a copy to the creditor as follows:
 - (1) Name of creditor served:
 - (2) Address where delivered:

 - (3) Date delivered:
 - (4) Time delivered:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)

THANK YOU

for choosing NBI for your
continuing education needs.

Please visit our website at
www.nbi-sems.com
for a complete list of
upcoming learning opportunities.

