

RESOLUTION 02-10-2014

DIGEST

Trusts: Enable Decedent's Creditors to Sue Revocable Trust without Formal Probate

Amends Probate Code section 19008 to provide a statutory framework for creditors to proceed directly against the decedent's trust without opening a formal probate proceeding.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to Resolution 12-03-2009 which was approved as amended. Related to Resolution 05-06-2013, which was disapproved, and Resolution 03-09-2001, which was withdrawn.

Reasons:

This resolution amends Probate Code section 19008 to provide a statutory framework for creditors to proceed directly against the decedent's trust without opening a formal probate proceeding. This resolution should be approved in principle because when a decedent's assets are held in a revocable trust, the law is currently unclear about what procedure is required, and opening a formal probate as a precondition to proceeding in a separate, civil action against the trust is burdensome in both time and expense.

The law is unclear as to whether a formal probate proceeding is necessary to enable a deceased trustor's creditor to sue the revocable trust of a deceased creditor. Some attorneys infer from Probate Code section 19008 that direct litigation against the trust is allowed. Others disagree. (See *California Trust Litigation*, section 7.09[7] [stating creditor must open probate to recover debt if no probate or trust proceeding is open].) Statutory clarity on this point is important. For example, if a creditor proceeds directly against a trustee, without a formal probate or trustee creditor proceeding, the creditor risks having the matter dismissed. Note that Code of Civil Procedure section 366.2 would then bar the claim if the dismissal occurred over a year after the death.

The resolution provides a reasonable (6-month) waiting period, to allow interested persons to open a formal probate, or for the trustee to initiate a proceeding under Probate Code section 19003 to address issues involving the deceased settlor's creditors. If either of those proceedings are initiated, then the creditor must participate in those proceedings rather than utilizing the procedure proposed by this resolution.

This resolution would only indirectly address the lack of required notice by the trustee to known creditors of the decedent, as decied in proponent's argument. However, if a creditor is delayed while searching for the trust (e.g., because the trustee gave no notice) this resolution would clarify an efficient and expeditious procedure for the creditor to utilize. While Probate Code section 19050 does state a requirement for notice by a trustee to creditors of a deceased settlor, but it appears from the notice format specified in the statute that this requirement applies only where the trustee initiates a formal proceeding to address the deceased settlor's creditors under Part 8 of Division 9 of the Probate Code.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 19008 to read as follows:

§ 19008

1 (a) If 6 months after the death of the deceased settlor there is no proceeding to administer
2 the his or her estate of the deceased settlor, and if the trustee does has not filed a proposed notice
3 to creditors pursuant to Section 19003, and does not published notice to creditors pursuant to
4 Chapter 3 (commencing with Section 19040), then the liability of the trust to any creditor of the
5 deceased settlor shall be as otherwise provided by law. any creditor of the deceased settlor may
6 serve a notice on a trustee of the creditor's intent to enforce the deceased settlor's liability. The
7 notice shall be given as provided in Section 1215.

8 (b) A creditor's notice served under Subdivision (a):

9 (1) Shall be accompanied by an affidavit of the creditor or the person on behalf of the
10 creditor in compliance with the requirements of Section 19151(a).

11 (2) Shall, if based on a written instrument, comply with the requirements of Section
12 19152(a).

13 (3) If secured in whole or part on a mortgage, deed of trust, or other lien that is recorded
14 in the office of the recorder of the county in which the property subject to the lien is located, it is
15 sufficient to describe the mortgage, deed of trust, or lien and the recording reference for the
16 instrument that created the mortgage, deed of trust or other lien.

17 (c) Provided that if, 45 days after service on a trustee of a notice under Subdivision (b),
18 neither a notice under Section 9050 nor a notice under Section 19050 has been served on the
19 creditor, commencing 45 days after service on a trustee of a creditor's notice under Subdivision
20 (a) then the creditor may bring an action against the trustee to enforce the liability identified in
21 the notice under Subdivision (a).

22 (d) If within 45 days after service of the creditor's notice under Subdivision (a) a notice
23 pursuant to Section 9050 is served on the creditor, then the provisions of Part 4 of Division 7
24 shall apply.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: San Bernardino County Bar Association and by East Bay Trust and Estate
Lawyers

STATEMENT OF REASONS

The Problem: Presently notice to creditors by a trustee of a decedent's estate is optional. Unlike in the administration of a probate estate, a trustee's duty is solely to the beneficiaries, and there is no affirmative duty to seek out and notify creditors or to pay claims, unless the trust instrument requires such a duty. The trustee has no duty to even notify creditors of the decedent's death or the existence of the trust. Furthermore, Code of Civil Procedure section 366.3 bars any claim against a decedent's estate if it is filed more than one year after the decedent's death. Thus, creditors are completely beholden to the trustee to either open a probate estate so that a claim can be filed, or must themselves as creditors open a probate estate for the filing of a claim.

The Solution: This resolution provides a clearly laid out method for a creditor to bring an action against a trustee to enforce a liability owed to the creditor by the decedent without the necessity for the creditor to open a formal probate proceeding. If six months have passed since the death

of the decedent, and the trustee has not filed a notice to creditors, then the creditor may serve notice on the trustee of the creditor's intent to enforce a claim, and subsequently commence an action to enforce the claim. Upon service of the creditor's notice, the resolution also tolls the statute under Code of Civil Procedure 366.2 to allow the creditor sufficient time to enforce the claim.

LEGISLATIVE HISTORY

Not known.

IMPACT STATEMENT

The proposed resolution does not affect any other law, statute or rule.

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SECTION COMMENTS TO RESOLUTION 02-10-2014

TRUST AND ESTATE SECTION OF THE STATE BAR OF CALIFORNIA

OPPOSE: The Executive Committee of the Trusts & Estates Section (TEXCOM) opposes this resolution because the proposed amendment does not fix the stated problem or address other problems which may be created by the amendment. The Trustee still has no duty to notify the creditors of the decedent's death or the existence of the trust. The creditor still must learn of the Settlor's death and location of the trust administration. The proposed amendment also does not address other issues which may arise with respect to the payment of creditors when there are multiple trusts created by the Settlor.

Under California law a trustee is not obligated to send notice to any creditor, but may elect the optional creditor claim procedure found in sections 19000 etc., including section 19008. While the proposed resolution clarifies that that a creditor may bring an action against the trustee to enforce a liability without opening a probate - if certain steps are taken by the creditor - it does not address how the creditor will learn of the Settlor's death or the location of the trust administration and it does not address the issue of multiple trusts created by the deceased Settlor and when there are multiple trusts, the payment of the creditors.

On the other hand, TEXCOM acknowledges there is existing disparity among California courts about whether a creditor may sue a trustee directly if there is no pending probate proceeding for the deceased settlor. While *Valentine v. Read* (1996) 50 CA4th 787 suggests a direct suit is acceptable and *Dobler v. Arluck Med. Ctr. Indus. Group Inc.* (2001) 89CA4th 530 implies direct suit would be the remedy if no probate was pending, some California courts disagree and require a probate be opened.

Consequently, a solution would seem to require legislative enactment of a law specifically permitting a suit to be filed against a trustee in circumstances where no probate proceeding for the deceased settlor is pending. However, this Resolution does not set forth a solution where all the various issues have been considered.

Disclaimer:

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California. Membership in the TRUSTS and ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.