DEATH OF A LITIGANT:

What Is a Trusts and Estates Litigator to Do?

Synopsis:

When a party to pending or anticipated litigation dies, the litigators handling that matter are often left to navigate unfamiliar waters in dealing with the particularized procedures and timeframes that are triggered by the litigant’s death. This article provides a step-by-step examination of the many procedural requirements and practical considerations of which litigators should be aware.

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I. INTRODUCTION

By now, the graying of America is old news. Demographers have long noted the increasing percentage of senior citizens in the American population—a percentage that is currently higher than it has ever been, with all expectations that the trend will continue. One ramification of this trend is the effect that the aging population has on litigation. It is now more likely than ever that a party to a civil action will die before commencement of an action or during litigation. This situation creates new challenges for probate lawyers who might be unfamiliar with the timing requirements triggered by the death of a litigant and must advise the personal representative and/or the civil litigator handling the matter (who are often less familiar with the process) about deadlines and possible strategies.

Although most probate lawyers avoid civil litigation, if the decedent died during pending litigation (or died with a viable claim by or against him), engaging in civil litigation or retaining a litigator on behalf of the estate is likely necessary. Whether the probate lawyer handles the litigation or retains a civil litigator, the probate lawyer must know the death of a party will almost certainly demand strict observance of the statutory scheme and time constraints of both the Code of Civil Procedure and the Probate Code. The statutory scheme and deadlines can be used to the estate’s advantage or can harm the estate’s position and hence it is wise to know and/or advise the civil litigator of the strategic options created by the procedural requirements and deadlines.

The statutory schemes set forth in the Probate Code and the Code of Civil Procedure do not and cannot anticipate every possible scenario. As a result, uncertainty sometimes exists in determining how to proceed in litigation after a party has died. The safest practice is to follow and enforce compliance with all of the applicable procedures in both Codes, even if it may appear a particular procedure is unwarranted or duplicative. Requiring strict adherence by the opposing party or following such oneself can both safeguard the interests of the estate and sometimes create a procedural bar to a plaintiff proceeding against the estate.

II. INITIAL CONSIDERATIONS

The first step in analyzing how to proceed with an action when a party dies begins with determining if the claim survives death. Generally, most claims for or against a party survive the death of that party. In 1961, the California Legislature—departing from the ancient common law rule based on the maxim “Personal actions die with the person”—expanded the survival statute to include personal torts that do not result in physical injury. These torts include malicious prosecution, false imprisonment, invasion of privacy, and defamation. This increase in the types of claims that survive the death of a party remains the law in California today.

Still, there are claims that die with the decedent, and the most common of these are punitive damages claims against a decedent, and pain and suffering damages, including emotional distress damages, claimed by the decedent. There is a clear rationale for the death of these claims: preventing future misconduct or compensating for pain and suffering cannot be achieved if the party is deceased.
Once a determination is made that a claim survives the death of the party, counsel must then ascertain: (1) the procedural steps required to initiate or continue the action if the claim belongs to the decedent; (2) the procedural steps a plaintiff must undertake to continue or initiate litigation against a decedent’s estate (such as by whom or against whom the action can or must proceed); and (3) the applicable statutes of limitations and other deadlines that must be followed. These deadlines are strictly enforced to promote finality in legal affairs associated with a decedent’s estate and must be carefully calculated as they can often be used to the estate’s advantage.

III. PROCEDURES FOR LITIGATING CLAIMS AGAINST A DECEASED DEFENDANT

Whether litigation has yet to commence or is already pending against a defendant who dies, the plaintiff must follow a series of procedures to continue or pursue that litigation. Indeed, litigation against a deceased defendant is the most time-sensitive and procedurally burdensome of the actions involving parties who die before the resolution of a claim. In addition, these procedures and time limits change if the litigation is already being defended by the decedent’s insurer and the complaint only seeks recovery within the policy limits. Probate lawyers, therefore, must be particularly familiar with proper procedure, as the procedures can sometimes be used as a tactic to cause a plaintiff to forfeit some or all of his claims. Specifically, these procedures can be broken down into three major categories: 1) ensuring the proper parties are named or substituted in to the action; 2) compliance with the Probate Code’s creditor’s claims filing requirements; and 3) compliance with the Code of Civil Procedure special statutes of limitations for bringing suit against a deceased litigant.

A. Ensuring the Proper Parties in an Action Against a Deceased Litigant Are Before the Court

A civil action cannot proceed until all of the correct parties are before the court. Once a defendant dies, he is no longer an appropriate party. Failure to bring or join the proper parties into an action may prevent a plaintiff from initiating or continuing an action against a deceased defendant, which may in turn ultimately impact the plaintiff’s ability to pursue his claim. Determining who is the “proper party” will depend on the circumstances of the case.

As mentioned above, the procedures for pursuing claims covered by a decedent’s insurance policy differ from the procedures for claims that exceed policy limits. If the plaintiff seeks to recover only the policy limits, a plaintiff may commence or continue an action against the estate without substituting in or joining the personal representative of the decedent or filing a creditor’s claim against the estate. The personal representative need not be involved in the litigation at all. However, to commence such an action, the plaintiff must serve a summons on either a person designated in writing by the insurer, or if none, the insurer itself. Therefore, the plaintiff must have knowledge of the decedent’s insurer and of the policy prior to commencing the action if the plaintiff wishes to avoid serving a personal representative and filing a creditor’s claim with the estate. If the plaintiff opts to take this route, the judgment is enforceable only against the insurer and only for the amount of the policy.
However, if the plaintiff seeks amounts above the policy limits or seeks to recover against assets of the estate rather than against the policy, the appropriate party to sue or join is the decedent’s “representative.” 17 The representative is usually the personal representative of the decedent’s estate but can be, under limited circumstances, the successor in interest. 18 To initiate an action, the plaintiff must sue the personal representative. 19 For pending actions, the plaintiff must file a motion with the court in which the action is pending to substitute the decedent’s representative into the action in place of the decedent. 20

The plaintiff is barred from continuing his lawsuit until he takes action to bring the appropriate parties before the court. This can often delay proceedings, allowing the personal representative to get up to speed on the action and perhaps causing the trial court to dismiss the action for lack of prosecution if the delay pushes the action beyond the five-year window to bring an action to trial. 21

B. Compliance with the Probate Code’s Creditor’s Claims Procedures

The plaintiff and defendant-estate should also be cognizant of the creditor’s claims procedures required by the Probate Code. Whether compliance with these procedures is required again depends on whether the plaintiff seeks recovery within a decedent’s policy limits. A plaintiff need not file a creditor’s claim when the plaintiff is continuing a lawsuit to establish the decedent’s liability if the decedent’s liability was protected by insurance, and the plaintiff seeks recovery within the policy limits. 22

In contrast, if the plaintiff seeks damages outside of the policy limits or it is not an insurance-based claim, then the plaintiff must show the court that it has already complied with the creditor’s claims procedures set forth in the Probate Code at the time the action is filed or the motion for substitution is filed. 23 This rule also applies to an insurer who seeks reimbursement for a deductible or any other amounts from the decedent’s estate. 24 Merely informing the representative of the pending lawsuit is insufficient; a creditor’s claim must be filed. This process allows the representative to quickly ascertain the obligations against the estate and the assets at issue, 25 and ensures the representative of the estate and the probate court are notified of all claims within a reasonable period. This way, the estate can be expeditiously settled and distributed to legatees or heirs. 26

To that end, a plaintiff who must file a creditor’s claim is required to do so within four months from the date that letters testamentary or letters of administration are first issued to a personal representative with general powers or within sixty days after notice of administration is given to the creditor—whichever is later. 27 The personal representative must treat this claim as any other in which litigation is not already pending. The personal representative must accept it, accept it in part and reject it in part, or reject it completely. 28 If the representative takes no action, the creditor has the option to deem the claim rejected on the thirtieth day after the date it was filed. 29 Within ninety days of the date of formal rejection, or within the applicable statute, whichever is later, the plaintiff must bring an action against the estate, naming the personal representative as defendant, or, if the action is already pending, move the court in which the action is pending for an order substituting in the personal representative. 30 If the plaintiff fails to comply with any of these procedures, recovery is barred against the decedent’s estate. 31
probate lawyer is wise to keep track of these timelines as plaintiffs can miss them—a grave error for the plaintiff, but a windfall for the estate if exploited.

As a result, determining whether a claim is a creditor’s claim for the purposes of the Probate Code is a critical issue for both the defendant-estate and the plaintiff. Generally, a creditor’s claim is required if the claim is a demand for payment for a liability based in “contract, tort, or otherwise.” Additionally, a creditor’s claim must be a claim that could have been enforced against the decedent during his lifetime. Further, there are certain situations delineated by statute, and by case law that do not require the filing of a creditor’s claim prior to allowing the plaintiff to proceed with an action against a decedent’s estate. These include but are not limited to enforcement of liens, title disputes, and claims by governmental entities against the estate.

Because failure to timely file a creditor’s claim when one is required will result in forfeiture of the claim, if there is any doubt as to whether the claim falls within an exception, it is wise to proceed as if the claim might not fall into an exception. If the claim is not excepted and the plaintiff fails to comply with the creditor’s claim procedure, then his claim will be time-barred and invalid. The litigator for the decedent’s estate often has to alert the court of this failure and educate the court about the plaintiff’s procedural missteps and why the court cannot and should not proceed (remembering that many civil judges have never had any probate experience).

C. Compliance with the Code of Civil Procedure’s Special Statute of Limitations for Actions Against a Deceased Litigant

In addition to the creditor’s claim procedures, the probate lawyer must also be aware that the statute of limitations changes when the defendant is a decedent, as this is often an effective weapon for the estate. Code of Civil Procedure section 366.2 sets forth a time limit of one year from the date of death for filing any claim against a decedent, “whether accrued or not accrued,” regardless of what the applicable statute would have been had the decedent survived. This one-year time-bar does not apply to actions seeking recovery within policy limits. Instead, the action may be brought one year after the expiration of the limitations period otherwise applicable had the defendant not died.

Although the language of the statute requires that an action be commenced within one year from the death of the decedent, one could argue that this statute also governs the time within which a plaintiff must substitute a decedent’s estate as the defendant in the stead of the decedent. Technically, an action against the decedent’s representative does not “commence” until the court grants the motion substituting the representative for the decedent. While no case has specifically stated whether section 366.2 applies to an action continued against a decedent’s estate, this argument is consistent with the California Legislature’s policy behind the law. That is, to set relatively short periods of time for taking action against a representative of the decedent’s estate to “protect . . . a decedent’s heirs, legatees, or beneficiaries from stale and unknown claims” and thus “effectuate the strong public policy of expeditious and final estate administration.”

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Despite this underlying policy, the courts have been gradually chipping away at the hard and fast one-year time bar. Consequently, Code of Civil Procedure section 366.2 has been interpreted to only apply to causes of action arising from the personal liability of the decedent.42 For instance, in *Estate of Yool*, Code of Civil Procedure section 366.2 was inapplicable to bar a daughter’s petition to impose a resulting trust on property in her mother’s estate on the grounds that the mother did not hold a beneficial interest in the trust property, and therefore was not personally liable as required by section 366.2.44

Furthermore, Code of Civil Procedure section 366.2 only applies to causes of action that survive the death of the decedent, and therefore does not apply where the underlying misconduct occurs after the death of the decedent. A prime example of this can be found in *Dacey v. Taraday*.45 In conjunction with the dissolution of their legal practice, the decedent and the petitioner entered into a fee-splitting agreement regarding a series of inverse condemnation cases that were pending and assigned to the decedent. Although the cases eventually settled, resulting in a substantial fee recovery, this occurred three years after the decedent’s death, with all of the recovery paid to the decedent’s estate. Petitioner did not file a creditor’s claim, but instead, brought a suit for breach of contract when the administrator failed to pay him anything from the fee recovery. The court of appeal held that section 366.2 did not apply to bar petitioner’s claim since the administrator, not the decedent, breached the contract in refusing to honor the fee-splitting agreement.46 While the contractual obligation was in existence at the time of decedent’s death, petitioner’s cause of action against decedent had not accrued, since decedent “never repudiated or otherwise breached the dissolution agreement.”47 The court reasoned that “liability of the person” requires a wronged party, and since the petitioner was not wronged until after decedent’s death, he could not have brought a cause of action before then.48

In addition to providing insight into how section 366.2 is applied, *Dacey* also illustrates the importance of being familiar with the Probate Code’s creditor’s claim procedures. Although the contractual obligation under the fee-splitting agreement had not accrued at decedent’s death, the court acknowledged that such an obligation could still have constituted a “creditor’s claim” under the Probate Code, requiring petitioner to file a claim before bringing suit against the estate. However, since the estate failed to assert petitioner’s failure to file such a claim as an independent defense at trial, it waived it on appeal. Had the estate asserted such a defense, it is possible that the outcome of *Dacey* could have been substantially different. Given the court’s discussion of this possible defense, it remains better practice to file a claim on an existing contract with a decedent, even if not breached or due.

It is also critical to recognize that the creditor’s claim procedure tolls this one-year time bar,49 while most equitable principles do not.50 The exception is equitable estoppel, which acts as a bar to the assertion of the statute of limitations as a defense rather than a tolling device.51 Thus, the plaintiff must file his creditor’s claims within one year of death to toll the statute as nothing in the time requirements to file a creditor’s claim extends the statute of limitations under Code of Civil Procedure section 366.2.52 A plaintiff who does not file a claim in probate court within one year of a decedent’s death stands to lose the ability to recover forever against the decedent’s estate.

The case of *Bradley v. Breen*53 is illustrative. In *Bradley*, the former wife of a convicted child molester was sued by the victim for “aiding and abetting” the molestation. The convicted
child molester died in prison prior to the suit, so the ex-wife filed a cross-complaint for indemnity against the decedent’s estate. One would think that, at the very least, justice would require the estate of the perpetrator to contribute to the victim’s recovery. But the ex-wife did not file a claim in the decedent’s probate estate within one year of death. Thus, recovery from the estate was barred, despite the fact that the ex-wife was not sued until many years after the molester’s death and did not even have a claim to assert within the one-year period.

When courts have applied the principle of equitable tolling, they have done so only in cases in which the party attempting to utilize the statute of limitations defense has unclean hands. The litigator for the estate, the personal representative, and the probate lawyer must therefore be exceptionally clear in any settlement discussions or negotiations that no time limits are being extended or waived. An example of a case in which equitable estoppel was applied to bar the application of Code of Civil Procedure section 366.2 is Battuello v. Battuello. In that case, the plaintiff’s father promised to leave plaintiff the family vineyard after both the father and the plaintiff’s mother died. The plaintiff relied on this promise; for example, he went to college for the purpose of learning the formal aspects of running a vineyard. After his father died, the plaintiff learned that his father had changed his trust, and the vineyard was not necessarily going to be left to the plaintiff. The plaintiff intended to object in the trust proceedings and properly proceed with an action on his claim. However, he and his mother entered into a settlement agreement in which his mother agreed to fulfill his father’s promise and give him the vineyard by the end of 1996.

In reliance on his mother’s promise, the plaintiff refrained from making a claim against the trust. The plaintiff’s mother then repudiated the settlement agreement, and the plaintiff filed suit to enforce his father’s promise. The plaintiff’s mother alleged that the claim was time-barred based on the one-year statute of limitations for bringing a claim against the father’s estate or its assets. The court found that the plaintiff’s mother was equitably estopped from asserting the statute of limitations because, had she not entered into the settlement agreement, the plaintiff would have filed his objections in a timely fashion.

Obviously, the circumstances in the Battuello case are extreme, and the doctrine of equitable estoppel will likely be applied only on rare occasions, but should be kept in mind when any negotiations occur. The case law interpreting Code of Civil Procedure section 366.2 is fact-specific and focuses only on whether the statute applies to the facts of those cases. Therefore, the probate lawyer must ensure that no inference of a promise to extend time or take an action in the future has been made during any negotiations.

IV. OTHER PRACTICAL CONSIDERATIONS & PROCEDURAL REQUIREMENTS IN LITIGATING AGAINST A DECEDEDENT

The complexity of and interplay between these procedural requirements provides the estate with plenty of opportunities to shield itself from creditor’s claims. For instance, the savvy probate lawyer for the decedent’s estate could, if such action does not harm the beneficiaries’ interests or other estate interests, deliberately prolong the opening of a probate to delay the filing of creditor’s claims. This strategy could result in a time-bar to a creditor proceeding or collecting from the decedent’s estate. Therefore, if the one-year deadline from the date of death is approaching and no probate has been opened, the plaintiff must then open a probate
proceeding as a creditor and file a timely creditor’s claim, which the general practitioner might not know he can do.\textsuperscript{58}

One downside to this strategy is the named representative will have to file a competing petition for probate if he does not want the creditor to act as personal representative or like the creditor’s choice of representative. However, given the statutory priority of persons to serve and the hassle for the creditor—who likely filed the petition only to avoid the time bar—it is probable either the court will appoint the named representative or the creditor will withdraw his petition now that he has an action in which to file a claim and someone on whom to serve it.

If the plaintiff meets the many procedural requirements and the representative rejects the creditor’s claim, the plaintiff may substitute the representative into a pending proceeding,\textsuperscript{59} or file suit in any county in which the action could have been commenced had the defendant not died or in the county in which the probate estate is being administered.\textsuperscript{60} Once the suit is filed, the plaintiff must file a notice of pendency of the action in the probate proceeding along with a notice of service on the personal representative or personally serve a summons and complaint on the personal representative.\textsuperscript{61} This requirement alerts the probate court and the personal representative that all action in the probate court must be taken in light of pending litigation that could affect the decedent’s estate and assets. Distributions from the estate, for example, must be examined in conjunction with the litigation and its potential impact on them.

Probate Code section 9354 states:

\textit{Any property distributed under court order, or any payment properly made, before the notice is filed and given \[to the probate court that an action is now pending against the estate in another court\] is not subject to the claim. The personal representative, distributee, or payee is not liable on account of the prior distribution or payment.}\textsuperscript{62}

This means the creditor cannot seek recovery on monies already distributed by the estate. Therefore, the value of the estate could be significantly diminished if a plaintiff delays taking action. Distributions from the estate could be made prior to the commencement of litigation, and those assets cannot be part of the plaintiff’s recovery.\textsuperscript{63} Therefore, if the creditor delays in filing the notice of the pending action and the personal representative unknowingly seeks early distributions, then the plaintiff will be barred from recovering against those assets—unless, of course, such distribution was made in bad faith, with knowledge by the personal representative or the beneficiaries of the litigation.\textsuperscript{64} If the beneficiaries and/or the representative know of the suit, but fail to inform the court solely to avoid creditors, the court could find extrinsic fraud and either the personal representative could be surcharged or the beneficiaries could be required to return the assets—as in any extrinsic fraud situation.\textsuperscript{65}

\section*{V. SPECIAL CONSIDERATIONS FOR CLAIMS AGAINST REVOCABLE TRUST ASSETS\textsuperscript{66}}

Situations where the decedent has left the bulk of his estate in a revocable trust are becoming increasingly common. As such, a plaintiff will likely encounter the problem of needing to reach assets held in a decedent’s revocable trust because the assets of the estate are
insufficient to satisfy his claim. The Probate Code provides procedures for asserting claims against revocable trust assets of a deceased settlor in three scenarios: 1) after a trustee institutes a formal trust claim proceeding; 2) after a personal representative has initiated a probate proceeding; and 3) when neither a probate or a formal trust claim procedure has been initiated.

A. Formal Trust Claim Proceedings

If a probate proceeding has not been initiated, a trustee has the option of opening a trust claim proceeding by filing a proposed notice to creditors. As with the creditor’s claim procedure, the trust claims procedure allows the trustee to identify potential creditors and limits the time period in which claims can be asserted against trust assets. Once a trust claim proceeding has commenced, many of the same timeframes and procedural rules as discussed above apply, and a plaintiff must comply with the trust claim procedures before initiating or continuing a lawsuit against the trustee of the decedent’s trust. Likewise, the Code of Civil Procedure § 366.2’s one-year deadline to file an action against the decedent is also in effect, and can be tolled by the filing of a trust claim.

However, unlike the creditor’s claim procedure, which requires the personal representative to give notice of administration to the decedent’s creditors and other action to the court, the trust claim procedure is entirely optional, as the trustee can elect to informally administer the trust. Accordingly, the trustee incurs no liability for deciding to forego giving notice to creditors before distributing trust assets. The downside of opting out of the formal trust claim procedure is that beneficiaries to whom property is distributed are personally liable for any unsatisfied judgment obtained by a creditor against the decedent settlor’s estate or trust to the same extent the trust property would have been available to satisfy the judgment during the decedent settlor’s lifetime. By utilizing the optional trust claim procedure, the trustee ensures that assets distributed from the trust are no longer subject to creditors’ claims.

It is important to note, however, that a plaintiff seeking recovery from already-distributed trust assets is still bound by Code of Civil Procedure section 366.2, and must initiate an action against the beneficiaries who have received trust assets within a year of decedent’s death. Failure to do so will bar the plaintiff from using the distributed trust assets to satisfy his claim. Therefore, a good-faith distribution from the trust more than a year after the death of the decedent could prevent a creditor from asserting claims not only against the trustee for distributing trust assets, but also against the beneficiaries, leaving the creditor without recourse to satisfy his claim from the trust.

The case of Arluk Medical Center Indus. Group v. Dobler is illustrative. Arluk Medical Center had obtained a judgment against the decedent’s estate for breach of his agreement to execute a life insurance policy for the benefit of Arluk. While that litigation was pending, the trustees of decedent’s trust made distributions to the beneficiaries, and by the time Arluk attempted to enforce the judgment against the estate, the estate and trust were insolvent. The court denied Arluk’s petition to surcharge the trustees, finding the trustees owed no duty to Arluk to preserve the trust assets before Arluk became a creditor, since Arluk’s breach of contract claim was still pending at the time the distributions were made. Furthermore, the practical effect of the timing of the distributions—over a year after the death of the decedent—precluded
Arluk from bringing an action against the beneficiaries to satisfy its judgment with the distributed trust assets.

B. Probate Proceedings Have Been Initiated

If a probate proceeding has been initiated, the optional trust claim procedure is no longer available, and all creditor’s claims against the decedent must be submitted to the decedent’s personal representative in connection with the probate proceeding.85 In this case, even if the plaintiff seeks to satisfy his claim with trust assets, the plaintiff must follow the ordinary creditor’s claims procedures, and file suit against the estate. If the plaintiff prevails, his claim will be satisfied with estate assets in the ordinary course of the administration of the estate. In this case, the plaintiff will only be able to satisfy his claim with trust assets if the estate is inadequate to satisfy the judgment, and he need not file a separate claim against the trustees in order to subject trust assets to creditor claims.87 In such a case, the plaintiff need only establish he “has a money judgment against the decedent/settlor[;] thereafter, the judgment is paid in the normal course of administration of the trust.”88

As noted above, if trust assets are distributed to the beneficiaries while probate proceedings are pending, and both the estate and remaining trust assets are insufficient to satisfy the plaintiff’s claim, the plaintiff may seek recovery from the distributed trust assets as long he does so within a year of the decedent’s death. A practitioner might consider seeking an injunction against the trustee to prevent distribution.

C. Neither a Trust Claim nor Probate Proceeding Has Been Initiated

Because the trust claim procedure is optional, an additional scenario exists for asserting claims against trust assets—one in which neither a trust claim nor probate proceeding has been initiated. The law is not settled as to what a creditor must do in this situation. While some courts have held that the more general statute of limitations under Code of Civil Procedure § 366.2 applies, making the one-year deadline to file an action against the decedent the controlling limitations period,89 other courts have noted that a creditor must still abide by the shorter timeframes delineated by the probate creditor’s claim procedures in order to preserve his or her claim.90 Thus, the best practice is to abide by the shorter timeframes under the Probate Code and open a probate as a creditor, file a timely creditor’s claim, toll the one-year statute of limitations, and proceed with a lawsuit against the estate. As noted above, the plaintiff will only be able to recover against the decedent’s trust assets to the extent the estate’s assets are insufficient to fully satisfy plaintiff’s claim.

VI. CONTINUING OR INITIATING LAWSUITS ON BEHALF OF DECEDENT’S ESTATES

If a plaintiff dies during litigation, the action will most likely survive the decedent’s death, with the most common exception being a claim for damages for pain and suffering.91 In order to continue litigation on the decedent’s behalf, certain procedures must be followed. Either the personal representative of the decedent’s estate or the decedent’s successor in interest (if there is no personal representative) may pursue the litigation on behalf of the decedent.
A successor in interest is defined as the “beneficiary of the decedent’s estate or other successor in interest who succeeds to a cause of action or to a particular item of the property that is the subject of a cause of action.” A successor in interest can act only if certain criteria are met, the relevant criteria, from a probate lawyer’s perspective, being that: no proceeding for the administration of the decedent’s estate can be pending in California, and there cannot be a personal representative acting on behalf of the decedent’s estate. If a personal representative has already been appointed, only the personal representative has standing to pursue the action on behalf of the decedent, as the burden of pursuing any litigation lies with the personal representative.

In order for the personal representative to continue an action on behalf of a decedent, the personal representative must file a motion with the court in which the action is proceeding, requesting that he or she be allowed to continue the matter in the decedent’s stead. Failure to do so in a timely manner may result in dismissal of the action for failure to prosecute if it causes the action to go beyond the five-year window.

In granting the motion, the court will allow the proceeding to continue as long as the action survives death and all other prerequisites are met. Again, the court must have the proper parties before it and a decedent is not a proper party. Thus, the personal representative must take action to continue the suit, not just idly allow the action to be prosecuted by the civil litigator even if the defendant does not present this issue to the court. The motion to allow the action to be continued by the decedent’s personal representative or, if none, by the decedent’s successor in interest, must be filed in the court in which the action was already proceeding.

A personal representative may also commence an action on behalf of a decedent, so long as the action is one that survives death. The action may be commenced any time before the later of six months after the decedent’s death or within the limitations period that would have been applicable had the person not died. This affords the representative at least six months to sift through the decedent’s papers and discovery to evaluate and commence action on any claims the decedent might have had but did not initiate prior to death.

VII. CONCLUSION

The story of the untimely demise of litigants or potential litigants has a clear moral: if a case has been “litigated to death” (or was about to be filed when one of the parties died), specific procedural actions must be taken quickly. Under these circumstances, the probate court does not provide litigants with the luxury of time. For a probate lawyer, this can afford fertile ground for strategy and planning to protect the estate.

2 References in this article to “party” and “litigant” include prospective or potential litigants.

3 References in this article to “probate lawyer” are to the trusts and estates practitioner advising an executor, administrator or trustee in the post-mortem administration of a decedent’s estate or trust. This article is intended to address both probate and non-probate administration situations.

4 The statutory scheme governing litigation against a decedent is based on the plaintiff taking action in a probate estate. However, a probate may not be necessary to dispose of the decedent’s assets. For instance, where a trust will likely be the true source of recovery, it might seem unnecessary for a plaintiff to sue a probate estate (or open a probate for the sole purpose of filing a creditor’s claim).


9 Neal v. Farmers Ins. Exch. (1978) 21 Cal.3d 910, 920 n.3.

10 See Prob. Code, sections 550 and 9390.

11 Prob. Code, sections 9000 et seq.


13 See Prob. Code, sections 550 et seq.

14 Prob. Code, section 9390(b).

15 Prob. Code, section 552.

16 Prob. Code, sections 552, 554.


18 The representative will be the successor in interest when, for example, the entire estate passes to the surviving spouse under a spousal property petition or it is a small estate that passes outside of probate. See Prob. Code, sections 13000 et seq. and 13500 et seq.


22 Prob. Code, section 9390.

23 Code Civ. Proc., section 377.41; Prob. Code, sections 9000 et seq.; see also Prob. Code, sections 9351, 9370. A possible exception to this rule exists for claims against trust assets, which is discussed in further detail infra. See Prob. Code, sections 19001, 19006; Dobler v. Arluk Med. Ctr. Indus. Group, Inc. (2001) 89 Cal.App.4th 530 at p. 535. A narrow exception to this rule exists for claims arising out of a contract to make a will. In Allen v. Stoddard (2013) 212 Cal.App.4th 807, the appellate court overturned the dismissal of the plaintiff’s action arising from a contract to make a will, finding that plaintiff’s action was not time-barred for failure to file suit within ninety days of the estate’s rejection of her creditor’s claim. Id. at 815-17. Using rules of statutory construction, the court reasoned Probate Code section 9353’s ninety-day statute of limitations is countermanded by Code of Civil Procedure section 366.3, which permits a
litigant to bring a suit arising out of a contract to make a will within one year of the decedent’s death. *Id.* *But see* *Stewart v. Seward* (2007) 148 Cal.App.4th 1513 (holding this type of action is not a “claim” at all under the Probate Code).

32 Prob. Code, section 9000(a).

33 *Patrick v. Alacer Corp.* (2011) 201 Cal.App.4th 1326, 1338-39 (holding a creditor’s claim was not required for a surviving spouse’s action for declaratory relief as to her community property interest in her deceased husband’s estate on the grounds the surviving spouse was unable to enforce her community property interest while decedent was alive, since their divorce was pending at the time of his death). *See also Stewart, supra*, 148 Cal.App.4th at pp. 1516-17, 1522-23 (holding claims arising from a contract to make a will are not creditor’s claims since liability for breach only arises upon promisor’s death). *But see Allen, supra*, 212 Cal.App.4th at pp. 815-16 (explicitly disagreeing with *Stewart v. Seward* in finding that such claims are “creditor’s claims” under the Probate Code).

34 Actions that do not require creditor’s claims are: 1) Disputes over title to specific property alleged to be included in the decedent’s estate. Prob. Code, section 9000. *See Patrick, supra*, 201 Cal.App.4th 1326. This type of dispute is, by definition, not considered to be a claim. For an action to be excluded as a claim under the theory that it is a title dispute over specific property, it must truly be a title dispute. For example, a claim that the decedent was contractually obligated to transfer property to the claimant during the decedent’s lifetime is not a title dispute. 2) Actions to establish the decedent’s liability for which the decedent was protected by insurance, unless the plaintiff seeks amounts outside the coverage limits or the insurer seeks reimbursement. Prob. Code, section 9390. 3) Actions to enforce a lien against a property subject to the lien, even if it is part of the decedent’s estate—such as a mortgage—so long as the lien holder waives all other recourse against other property in the decedent’s estate. Prob. Code, section 9391. 4) Actions against a person to whom estate property was distributed without the estate first having followed notice requirements to creditors. Prob. Code, section 9392. 5) Claims by governmental entities against an estate. Prob. Code, sections 9200-9205; *see also Shrewwy v. Wooten* (2009) 172 Cal.App.4th 741, 746 (holding Probate Code section 9100 inapplicable to Department of Health Care Services’ claims for reimbursement of Medi-Cal expenditures made for decedent’s benefit, since Probate Code sections 9200-9205 properly govern the filing of claims by governmental entities against an estate).

35 *See e.g.*, *Estate of Bonzi* (2013) 216 Cal.App.4th 1085, 1104 (holding a creditor’s claim was not needed to file suit against an estate where the suit sought to enforce a prior court order to fund a government-mandated landfill waste remediation trust. In so holding, the court reasoned a “creditor’s claim” under the Probate Code required the estate’s indebtedness in a specified sum to a particular person, and because the remediation trust was created to comply with government regulation rather than to benefit any particular person, the suit against the estate to force it to fund the remediation trust was not a “creditor’s claim” subject to Probate Code section 9100).

36 Prob. Code, sections 9370, 9351.

37 Code Civ. Proc., section 366.2. *See also* Code Civ. Proc., section 366.3 (requiring claims arising out of a contract to make a will be brought within a year of the decedent’s death).

38 Prob. Code, section 551.

39 *Cf. Burgos v. Tamulonis* (1994) 28 Cal.App.4th 757 (finding, under a prior version of Probate Code section 9100, a party properly complied with the creditor’s claim statute (although the claim would be time-bared under today’s statute) and the substitution of the estate essentially related back to the date of the filing of the lawsuit).

40 *Dobler I, supra*, 89 Cal.App.4th at pp. 541-42.


42 *See e.g.*, *Estate of Ziegler* (2010) 187 Cal.App.4th 1357, 1366-67 (holding petitioner’s quantum meruit claim for services rendered during decedent’s lifetime in consideration of receiving decedent’s home time-barred pursuant to Code of Civil Procedure section 366.2); *Stoltenberg v. Newman* (2009) 179 Cal.App.4th 287, 296-97 (holding a cause of action for breach of fiduciary duty against a former trustee time-barred under Code of Civil Procedure section 366.2 on the grounds petitioner’s claims were against the deceased former trustee rather than against the trust itself, since the claims were for personal misconduct of the deceased trustee on behalf of and for the benefit of the trust, which occurred completely before the trustee’s death, and for which he could have been held personally liable during his lifetime). In contrast, actions to enforce a court order existing prior to the decedent’s death, and actions for declaratory relief do not stem from the decedent’s personal liability, and therefore do not trigger Code of Civil Procedure section 366.2’s one-year statute of limitations. *See e.g.*, *Estate of Bonzi, supra*, 216 Cal.App.4th at 1105 (holding section 366.2 inapplicable where suit against decedent’s estate was not for damages, but to enforce a court order existing prior to decedent’s death); *Estate of Bennett* (2008) 163 Cal.App.4th 1303, 1310 (noting Code of Civil Procedure section 366.2 inapplicable to bar petitioner’s claims where the “claim against decedent had been reduced to judgment before he died”). *See also Patrick, supra*, 201 Cal.App.4th at p. 1337 (holding Code of Civil
Procedure section 366.2 inapplicable where surviving spouse sought declaratory relief as to her community property interest in shares of her husband’s separate property corporation).

44 Id. at pp. 876-77.
46 Id. at p. 967.
47 Id. at p. 980.
48 Id. at p. 982.

49 The limitations period can also be tolled by the filing of a petition for payment of debts, claims or expenses from the decedent’s revocable trust, or a proceeding to judicially construe a “no contest” provision. Dobler I, supra, 89 Cal.App.4th at pp. 535-36. In contrast, the filing of a creditor’s claim will not toll the one-year time bar where the claim arises from a contract to make a will. See Code Civ. Proc., section 366.3; Stewart, supra, 148 Cal.App.4th at pp. 1522-23 (holding the filing of a creditor’s claim under Probate Code section 9100 will not toll Code of Civil Procedure section 366.3’s statute of limitations for claims arising out of a promise to make a will).

50 It is therefore imperative for the plaintiff’s attorney to first assess whether his claim is a “creditor’s claim,” allowing him the ability to toll the applicable statute of limitations.


52 See Prob. Code, section 9100.
53 Bradley, supra, 73 Cal.App.4th at pp. 805-06; cf. Burgos, supra, 28 Cal.App.4th 757 (relying on equitable principles to avoid the time bar but decided prior to revisions to Probate Code section 9100).
54 See Estate of Bonzi, supra, 216 Cal.App.4th at pp. 1105-06 (estate was equitably estopped from asserting that claims were barred by a failure to file a creditor’s claim under Probate Code section 9100 where the decedents and their executors had repeatedly acknowledged the estate’s obligation to fund a waste remediation trust, and had not advocated that seeking financial assurances in accordance with these obligations were not “claims” under the Probate Code). See also Estate of Bonnano (2008) 165 Cal.App.4th 7 in which the court held that a wife was estopped from asserting her statutory right to have her share of her husband’s estate pass through to her without administration under Probate Code section 13500, after she had benefitted from the administration of the estate. Id. at pp. 22-23. Of note, the court pointed out that a surviving spouse who receives a share of decedent’s property without administration usually becomes personally liable for the decedent’s debts that are chargeable against such property. However, because the wife allowed the estate to be administered before she asserted her right to take her husband’s property without administration, creditors had a shortened time with which to file their claims (pursuant to Probate Code section 9100), resulting in her ability to take her share of the estate without any personal liability to those creditors. Id. at p. 23. Although estoppel in this case was asserted by the estate to prevent a beneficiary from avoiding sharing the costs of administration with the rest of the estate, it is possible that a creditor may be able to make a similar estoppel argument preventing a person benefiting from Probate Code section 9100 from later avoiding personal liability.
55 Battuello, supra, 64 Cal.App.4th 842.

58 Prob. Code, section 8000 (allowing any interested person to commence probate proceedings for administration); Prob. Code, section 48 (including a creditor in the definition of “interested person”). If the plaintiff, as creditor, is appointed as the personal representative, the court must rule on the claim. If the court rejects the claim, and the creditor/personal representative files an action, the court must receive the summons and appoint an independent attorney to defend the action. Prob. Code, section 9252. It is permissible for a plaintiff to name the successor in interest rather than a personal representative if a probate is not opened and the assets are transferred without administration. See Prob. Code, sections 13109 et seq., 13550 et seq., 18201. However, specific rules apply for a plaintiff to initiate a lawsuit directly against a successor in interest, and the one-year time bar still applies.

59 Prob. Code, section 9370.
60 Prob. Code, section 9354(a).
61 Prob. Code, section 9354(b).
62 Id.
63 Id.
See Estate of Wilcox (1945) 68 Cal.App.2d 780 (noting the purpose of enacting the predecessor to Probate Code section 9354(b) was to limit the liability of personal representatives who, in good faith, closed an estate believing that all claims had been disposed).

C.f. Purinton v. Dyson (1937) 8 Cal.2d 322 (noting “equity may afford relief from orders and decrees in probate proceedings for extrinsic fraud,” and authorizing relief where an executor and residuary legatee knowingly failed to disclose the existence of a pretermitted heir in his petition for probate, resulting in an order distributing the residue of the estate to him).

Prob. Code, section 18200 provides that trust property is subject to the claims of the settlor’s creditors to the extent the trust was revocable during the lifetime of the settlor. In contrast, creditors of a deceased settlor cannot reach the assets of a decedent’s irrevocable trust to satisfy their claims. Laycock v. Hammer (2006) 141 Cal.App.4th 25, 27-28.

See Prob. Code, sections 19000 et seq.

Prob. Code, sections 9050, 9051.

Prob. Code, sections 19003, 19008, 1910; Wagner v. Wagner (2008) 162 Cal.App.4th 249, 255 (noting a trustee is not required to utilize the statutory formal claims procedure and may proceed informally in administering a decedent’s trust.).

See Prob. Code, section 19100 (a creditor must file a claim in the trust proceeding within the later of four months after the first publication of notice to creditors or sixty days after the creditor receives actual notice); Prob. Code, section 19254 (a creditor may deem a claim rejected thirty days after the trustee has refused or neglected to act on the claim); Prob. Code, section 19255 (a creditor must bring an action against a rejected claim within ninety days of the date of formal rejection); Prob. Code, section 19253(b) (the filing of a claim in a trust claim proceeding tolls the applicable statute of limitations).

Prob. Code, section 19255.

Prob. Code, sections 9050, 9051.


Prob. Code, section 19010; Dobler II, supra, 116 Cal.App.4th at pp. 1333-34 (holding trustees not liable for distributing trust assets while litigation against the estate was pending, since the trustees’ only duty to creditors of the settlor’s estate is to refrain from affirmative misconduct that defeats the creditor’s reasonable expectation for recovery from trust assets).


Dobler II, supra, 116 Cal.App.4th at pp. 1333-34; Prob. Code, section 19255(d) (any property distributed after 120 days from the time the notice of rejection is given and before the notice of pendency of action is filed is not subject to the claim, and neither the trustee or the beneficiary is liable on account of the distribution). However, in certain circumstances, beneficiaries can still be liable even if a formal trust claim procedure was initiated. Under Probate Code section 19401, a beneficiary who received trust assets can be personally liable, if within four months of publishing notice to creditors, the trustee distributed trust assets without notice to a known or reasonably ascertainable creditor whose claim was not merely conjectural.


There is authority to suggest that a trustee could be personally liable for distributing trust assets if such distribution is motivated by a desire to put trust assets beyond the reach of creditors while litigation is pending. See Dobler II, supra, 116 Cal.App.4th at p. 1340.

See id. at p. 1341.


Id. at p. 1330.

Id. at p. 1328.

Id. at p. 1341.


Prob. Code, section 9300.

Prob. Code, section 19001(a); Dobler I, supra, 89 Cal.App.4th at p. 541.

Dobler II, supra, 116 Cal.App.4th at p. 1335 (citations omitted); Prob. Code, section 19300(a).
Prob. Code, section 19008 (in such an event, “the liability of the trust to any creditor . . . shall be as otherwise provided by law.”); Code Civ. Proc., section 366.2; Wagner, supra, 162 Cal.App.4th at p. 255; Embree, supra, 125 Cal.App.4th at pp. 494-95; Levine, supra, 102 Cal.App.4th at pp. 1263-65.

See Dobler I, supra, 89 Cal.App.4th at pp. 541-542 (“[A]ll creditor claims which are untimely as to the decedent’s probate estate are similarly time-barred as against trust assets as well.”).


Id.
