

VOLUME NO. 37

OPINION NO. 135

ATTORNEY GENERAL - When Attorney General opinion is inappropriate; CLAIMS - Time and method of presenting claims against a decedent's estate; COURTS - When court determination of questions submitted by state agency to Attorney General is appropriate; DEATH - Time and method of presenting claims against a decedent's estate; INHERITANCE - Administration of estates; time and method of presenting claims; STATE AGENCIES - Presentment of claims by state agency against a decedent's estate; REVISED CODES OF MONTANA, 1947 - Sections 91A-3-104, 91A-3-108, 91A-3-203(1), 91A-3-204, 91A-3-803(1), and 91A-3-804 to 91A-3-813.

HELD: Whether district court clerk must accept for filing creditor's claims against a decedent prior to appointment of a personal representative for the estate and whether such filing interrupts and tolls the three year limitation on presentment of claims of section 91A-3-803(1)(b), or any shorter applicable statute of limitation, are inappropriate questions for an Attorney General opinion. The answers to these questions are unclear and an opinion regarding district court clerks to file such claims and holding that such filing tolls applicable time limitations for presentment and enforcement of creditor's claims against decedents would not protect the department's claims if a court reached a contrary conclusion. These questions must be answered by the district court and, ultimately, the Montana Supreme Court. Until a Supreme Court determination is secured, the department should assume for protection of the state's claims that any claim it has against a decedent will be barred three years after death, or other shorter time specified by any other applicable statute of limitation, if no personal representative is appointed.

17 April 1978

Thomas H. Mahan, Esq.
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Department of Social &
Rehabilitation Services
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Dear Mr. Mahan:

You have requested my opinion on behalf of the Department of Social and Rehabilitation Services concerning the following questions:

1. Does section 91A-3-804(1), R.C.M. 1947, require a district court clerk to accept and file a creditor's claim against a decedent's estate when no informal or formal probate or appointment proceeding has been commenced.
2. If so, does the filing of a creditor's claim with the district court toll the limitations and non-claim provisions of section 91A-3-803(1), or other applicable statutes of limitations, until such time as a personal representative is appointed?

The department has claims against numerous individuals who die each year. The Montana Uniform Probate Code provides for a simple procedure for presentment of creditor's claims against estates of decedents. It requires that a personal representative be appointed to administer a decedent's estate as a prerequisite to enforcement of any claims against the estate. Section 91A-3-104, R.C.M. 1947. Once a representative has been appointed, claims may either be presented directly to that representative or filed with the clerk of the district court. Section 91A-3-804(1), R.C.M. 1947, provides in relevant part:

Claims against a decedent's estate may be presented as follows:

(1) The claimant shall mail to the personal representative return receipt requested a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, or may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court. The claim is deemed presented on the first to occur of receipt of the written statement of claim by the personal representative, or the filing of the claim with the court. * * * (Emphasis added.)

This provision clearly permits filing of a creditor's claims once a personal representative has been appointed. The department interprets the provisions as also permitting the

filing of claims with the district court prior to appointment of a personal representative. However, some district court clerks disagree and have refused to accept written claims tendered by the department for filing before appointment of a personal representative. This refusal gives rise to your first question.

Your first question is important only in the context of your second question. The department's purpose in attempting to file claims against decedents prior to appointment of their personal representatives is to toll the general three year limitation on presentment of claims which is provided in section 91A-3-803(1), R.C.M. 1947. That provision requires presentation of claims arising prior to a decedent's death within three years of death or within any shorter time provided by any other applicable statute of limitation, providing:

(1) All claims against a decedent's estate with the exception of claims for taxes and claims founded on tort which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(a) within four (4) months after the date of the first publication of notice to creditors if notice is given in compliance with section 91A-3-801; provided, claims barred by the nonclaim statute at the decedent's domicile before the first publication for claims in this state are also barred in this state; or

(b) within three (3) years after the decedent's death, if notice to creditors has not been published. (Emphasis added.)

The department does not question the application or effect of subsection (a). Its specific concern is with those estates for which personal representatives have not been appointed, where the three year limitation specified under subsection (1)(b), or other shorter, applicable statute of limitations, continues to decay. The department is not powerless in such cases, and may take affirmative action any time forty-five days after a decedent's death to enforce its

claims. After that time it may seek appointment of itself as personal representative if no other person with higher priority has sought and secured appointment, section 91A-3-203(1), R.C.M. 1947, and proceed with the usual presentment and enforcement procedures prescribed in sections 91A-3-804 to 91A-3-813, R.C.M. 1947. However, the department considers this method of collection both costly and impractical, and takes the position that filing of a creditor's claim with the district court clerk, if permitted, is an alternative to securing the appointment of a personal representative. It submits that such filing interrupts and tolls the running of the three year limitation of section 91A-3-803(1)(b), and any other applicable statutes of limitations. If the department is correct in its position, it can obtain virtual immortality for claims against a decedent's estate by filing statements of its claims in the district court; nonclaim provisions and statutes of limitations would not begin running again until appointment of a personal representative.

It is doubtful that either the Uniform Probate Code draftsmen or the Montana Legislature intended section 91A-3-804(1) as a means of tolling the nonclaim provisions of section 91A-3-803(1)(b), or other statutes of limitations, for estates for which personal representatives have not been appointed and thereby give a decedent's creditors a simple tool to extend the life of their claims indefinitely beyond three years after death. The three year limitation on claims is a common thread running through the provisions of the Uniform Probate Code. The Editorial Board comment to section 91A-3-803, adopted as a part of the Montana Uniform Probate Code, states in part:

* * *

The limitation stated in [subdivision (1)(b)] dovetails with the three year limitation provided in section [91A-3-108] to eliminate most questions of succession that are controlled by state law after three years from death have elapsed. Questions of interpretation of any will probated within such period, or of the identity of heirs in intestacy are not barred, however.

Similarly, the Comment to section 91A-3-108 states in part:

This section establishes a basic limitation period of three years within which it may be determined whether a decedent left a will and to commence administration of his estate. ***

* * *

All creditor's claims are barred after three years from death. See section [91A-3-803(I)(b)].
(Emphasis added.)

* * *

The introductory comment to the chapter on Probate of Wills and Administration (chapter 3) states in part:

* * *

(12) Statutes of limitation bar creditors of the decedent who fail to present claims within four months after legal advertising of administration and unsecured claims not previously barred by nonclaim statutes are barred after three years from the decedent's death.

One purpose of the three year limitation is to eliminate uncertainty concerning claims and disputes against a decedent's estate after three years whether or not a probate or administration proceeding has been brought. Mechanically the Code provides for appointment of a personal representative as a prerequisite to enforcement of any claims against an estate. Section 91A-3-104, R.C.M. 1947, provides in relevant part:

No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. (Emphasis added.)

The Comment to this section expressly mentions creditors' alternatives where other interested persons fail to seek appointment.

This and sections of Part 8 [chapter 3], are designed to force creditors of decedents to assert their claims against duly appointed personal representatives. Creditors of a decedent are interested persons who may seek the appointment of a personal representative section [91A-3-301]. If no appointment is granted to another within 45 days after the decedent's death, a creditor may be eligible to be appointed if other persons with priority decline to serve or are ineligible (section [91A-3-203]). (Emphasis added.)

Finally, under section 3-108 of the Uniform Probate Code, as adopted by the Commission on Uniform Laws, the ability to appoint a personal representative, with exceptions not relevant here, terminates three years after death, making it impossible for creditors to thereafter satisfy the appointment prerequisite to enforcing their claims. Section 91A-3-108, R.C.M. 1947, is the Montana counterpart, and provides in relevant part: •

No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three (3) years after the decedent's death, ***.

* * *

These limitations do not apply to proceedings to construe probated wills or determine heirs of an intestate, nor do they limit the right of interested persons to commence informal probate or appointment proceedings or formal testacy or appointment proceedings at any time after three (3) years from the decedent's death if there have been no previous formal or informal probate or appointment proceedings commenced in respect of that decedent. *** (Emphasis added.)

The underlined portion was added by the Montana Legislature and does not appear in the original Uniform Probate Code. Thus, while a personal representative cannot be appointed after three years under the Uniform Probate Code, under the Montana version it appears that there is no time limitation on appointment of a representative in any case where there has been no prior probate or appointment proceedings. The underlined language is inconsistent with the Code's overall purpose of finalizing all estate matters within three years of death and destroys the broad limitation the Code drafters provided in Uniform Probate Code section 3-108. What affect, if any, this language has on the three year limitation for the presentment of claims is unclear. I am unable to determine with absolute certainty whether filing of a claim with the district court prior to appointment of a personal representative, if permitted under section 91A-3-804(1), would toll the running of the period of limitations of section 91A-3-803(1) or other statutes of limitations.

Even if I were to determine that the limitations are tolled by such filing, my determination would not protect the department's claims if a court were to reach the contrary conclusion. An Attorney General's opinion is therefore inappropriate and I advise the department to seek a district court and, ultimately, a Montana Supreme Court determination concerning these questions. In the meantime, or as an alternative to a court determination, the department must assume that all claims will be barred three years after death, or after any shorter time provided by other applicable limitations, in those cases where personal representatives are not appointed. For all claims which may be collectible, the department should petition for appointment of a representative within applicable periods of limitation if other persons fail to do so. This does not mean the department must commence appointment proceedings on the forty-sixth day after death. It may wait for others to petition, so long as it does not wait until applicable limitations have run. It can protect its interests during any waiting period by demanding, pursuant to section 91A-3-204, R.C.M. 1947, that it be notified of any proceedings filed in the district court.

THEREFORE, IT IS MY OPINION:

Whether district court clerks must accept for filing creditor's claims against a decedent prior to appointment of a personal representative for the estate and whether such filing interrupts and tolls the three year limitation on presentment of claims of section 91A-3-803(1)(b), or any shorter applicable statute of limitation, are inappropriate questions for an Attorney General opinion. The answers to these questions are unclear and an opinion requiring district court clerks to file such claims and holding that such filing tolls applicable time limitations for presentment and enforcement of creditor's claims against decedents would not protect the department's claims if a court reached a contrary conclusion. These questions must be answered by the district court and, ultimately, the Montana Supreme Court. Until a Supreme Court determination is secured, the department should assume for protection of the State's claims that any claim it has against a decedent will be barred three years after death, or other shorter time specified by any other applicable statute of limitation, if no personal representative is appointed.

Very truly yours,

MIKE GREELY
Attorney General