

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 1, Honorable Jacqueline Duong, Presiding
Mai Jansson, Courtroom Clerk

191 North First Street, San Jose, CA 95113
Telephone 408.882-2120

**To contest the ruling, call (408) 808-6856 Or Email at
Department1@scscourt.org before 4:00 P.M.**

PROBATE LAW AND MOTION TENTATIVE RULINGS

DATE: November 6, 2024 TIME: 10:00 A.M.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23PR195898	Joseph and Maureen Andrade Living Trust	Click on LINE 1 or scroll down for attached Tentative Ruling.

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PROBATE LAW AND MOTION TENTATIVE RULINGS

LINE 2	23PR194102	Estate of David Liu	Click on LINE 2 or scroll down for attached Tentative Ruling.
LINE 3			Click on LINE 3 or scroll down for attached Tentative Ruling.
LINE 4			
LINE 5			
LINE 6			

Line 1

Case Names: *The Joseph and Maurene Andrade Living Trust*

Case No.: 23PR195898

Hearing date, time, and department: November 6, 2024, at 10:00 a.m. in Department 1

INTRODUCTION

Petitioners Joseph Andrade and Kathy Jo Andrade Bera (“Petitioners”) initiated this action by filing a petition seeking to obtain trust documents executed by their father, settlor and decedent Joseph Andrade (“Decedent”). They sought these documents from the other settlor and current trustee, Maurene Andrade (“Respondent”). Respondent opposed the petition. Via written order filed January 16, 2024, the court (Hon. Jacqueline Arroyo) ordered Respondent to provide copies of all trust instruments executed by Decedent. Thereafter, Petitioners filed a petition to invalidate Decedent’s estate planning documents.

Currently before the court is Petitioners’ motion to compel compliance with a subpoena for production of business records and request for sanctions. The motion is unopposed.

DISCUSSION

Petitioners seek to compel compliance with a deposition subpoena served on Decedent’s estate planning attorney, James A. Ward, pursuant to Code of Civil Procedure section 2025.480.¹

I. Motion to Compel Subpoenaed Records

A. Timeliness

A motion to compel compliance with a deposition subpoena addressed to a non-party “shall be made no later than 60 days after the completion of the record of the deposition[.]” (§ 2025.480, subd. (b).) For purposes of a deposition subpoena requesting business records, the deposition record is deemed complete once the responding party serves objections or other responses to said subpoena. (*Unzipped Apparel, LLC v. Bader* (2007) 156 Cal.App.4th 123, 132-136 (*Unzipped*); *Ruttledge v. Hewlett-Packard Co.* (2015) 238 Cal.App.4th 1164, 1192.)

Here, on September 6, 2024, Mr. Ward served an objection to the subpoena. The motion was timely filed on September 24, 2024.

B. Meet and Confer

¹ All further undesignated statutory references are to the Code of Civil Procedure.

A motion to compel compliance must be accompanied by a meet and confer declaration stating facts showing a reasonable and good faith attempt to informally resolve the discovery matters at issue. (§ 2025.480, subd. (b).) “A reasonable and good faith attempt at informal resolution entails something more than bickering with [opposing] counsel . . . [R]ather, the law requires that counsel attempt to talk the matter over, compare their views, consult, and deliberate.” (*Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1294.) A determination of whether a party’s efforts were sufficient to satisfy the meet and confer requirement involves the exercise of discretion. (*Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 431.)

Here, Petitioners have provided the declaration of their counsel, explaining Petitioners’ meet and confer efforts. (See Declaration of Hengameh Kishani, Esq. in Support of Motion to Compel (“Kishani Decl.”), ¶ 8.) Specifically, Petitioners’ counsel declares that before filing this motion, he attempted to meet and confer about Mr. Ward’s noncompliance, clarify that the Subpoena was properly authorized, and explain that his electronic signature was sufficient. (See Memorandum of Points and Authorities in Support of Motion to Compel (“Memo”), p. 3:3-12; see also Kishani Decl., ¶ 8, Ex. E) In response, Ward “refused to provide any authority or support for his position” to require Petitioners’ counsel’s physical signature on the Subpoena, and further “stonewall[ed]” compliance. (See Memo, p. 3:3-12; see also Kishani Decl., ¶ 8, Exs. F-G). This is sufficient to satisfy the meet and confer requirement.

A. Legal Background

If a nonparty disobeys a deposition subpoena, the subpoenaing party may seek a court order compelling the nonparty to comply with the subpoena within 60 days after completion of the deposition record. (See § 2025.480, subd. (b); see also *Unzipped, supra*, 156 Cal.App.4th at p. 127.) The above rule applies to subpoenas for production of documents at a deposition and also to business records subpoenas. (*Ibid.*) Code of Civil Procedure section 2025.480 provides, in pertinent part, that: “If a deponent fails to answer any question or to produce any document, electronically stored information, or tangible thing under the deponent’s control that is specified in the deposition notice or deposition subpoena, the party seeking discovery may move the court for an order compelling that answer or production.” (§ 2025.480, subd. (a).)

A good cause requirement, similar to that of section 2031.310, has been read into section 2025.480 “since it is unlikely the Legislature intended to place greater burdens on a nonparty than on a party to the litigation.” (*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 223-224.) To establish good cause, the burden is on the moving party to show relevance to the subject matter and specific facts justifying the discovery. (See *Glenfed Develop. Corp. v. Superior Court* (1997) 53 Cal.App.4th 1113, 1117.) Once a showing of good cause is made, the burden shifts to the opposing party to justify his or her objections. (See *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.)

“Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the

matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.” (§ 2017.010.) For discovery purposes, information is “relevant to the subject matter” if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement thereof. (*Gonzalez v. Super. Ct.* (1995) 33 Cal.App.4th 1539, 1546 (*Gonzalez*).)

B. Merits of the Motion

Petitioners served Ward with a deposition subpoena requesting Decedent’s estate planning documents. The production date was listed as September 9, 2024. (See Kishani Decl., ¶ 6, Ex. C.) Ward objected to the subpoena, via a written letter, asserting that the subpoena was invalid on the “sole basis that it was not physically signed by an attorney.” (See Memo, pp. 2-3; see also Kishani Decl., ¶¶ 6-8, Exs. F-G.) As noted above, Respondent’s counsel failed to cite any authority or support for the proposition that a physical signature was required for purposes of “fraud prevention.” (Memo, p. 3:9-12; Kishani Decl., ¶ 8, Ex. G [“I do not believe that it is incumbent upon me to site [sic] the authority that requires your signature on the subpoena, nor do I find that my client should pay for my time to do so”].) Ward did not turn over any documents. Accordingly, Petitioners move to compel Mr. Ward to produce all documents requested in the subpoena pursuant to section 2025.480, subdivision (b). The motion is unopposed.

With respect to good cause, the Petitioners’ Subpoena requests the following from Respondent’s counsel:

Your entire legal file for Decedent Joseph Andrade, Sr, (D.O.D. October 22, 2022), including any and all records or documents relating or pertaining to the estate planning file of Joseph Andrade, Sr.

Your entire legal file for Decedent Joseph Andrade, Sr, (D.O.D. October 22, 2022), including any and all records or documents relating or pertaining to the estate of Joseph Andrade, Sr.

Your entire legal file for Decedent Joseph Andrade, Sr, (D.O.D. October 22, 2022), including any and all records or documents relating or pertaining to the estate of Joseph Andrade, Sr. or any trust document executed by Joseph Andrade, Sr., including but not limited to, all files, books, documents and records in your possession, custody or control.

Your entire legal file for Decedent Joseph Andrade, Sr. (D.O.D. October 22, 2022), including but not limited to, correspondence, memoranda, telephone notes, pleadings, books of account, inventories, appraisements, financial statements, bills, statements, receipts, vouchers, checks, cancelled checks, check registers, banks statements, bank signature cards, passbooks, deeds, promissory notes, automobile registrations, stock certificates, stock brokerage account statements, mutual funds statements, partnership agreements, other partnership

certificates, drafts of estate planning documents, signed estate planning documents, or any documents related to Joseph Andrade, Sr.'s estate plan.

(See Kishani Decl., ¶ 6, Ex. C, p. 3.)

Petitioners have shown good cause for the motion to compel compliance as to Mr. Ward's legal file pertaining to Decedent as this information is relevant to the subject matter of the lawsuit – undue influence over, and lack of capacity of, Decedent. (Memo, p. 4:11-21; see also *Gonzalez, supra*, 33 Cal.App.4th at p. 1546 [For discovery purposes, information is “relevant to the subject matter” if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement thereof].) Notably, Mr. Ward did not object based on relevance or lack of good cause. Accordingly, any such objection is waived. (*Scottsdale Ins. Co. v. Superior Court* (1997) 59 Cal.App.4th 263, 273 [failure to object in initial response to discovery waives objections]; *Coy v. Superior Court* (1962) 58 Cal. 2d 210, 216-217 [same].)

As to Mr. Ward's objection that the subpoena is invalid because it is not signed by Petitioners' counsel, he has not opposed the motion and, therefore, said objection is forfeited. (See *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98 [The objecting party generally bears the burden of justifying any objections to the subpoena]; *Coy v. Superior Court of Contra Costa County* (1962) 58 Cal.2d 210, 220-221 [if a timely motion to compel is filed, the burden is on the responding party to justify any objection]; see also *Fairmont Ins. Co. v. Super. Ct.* (2000) 22 Cal. 4th 245, 255.) Even if it were not forfeited, the court would find that the objection is without merit. Notably, there is a signature on the signature line on the subpoena. (See Kishani Decl., Ex. C, p. 2.) Petitioners' counsel indicates that she signed the subpoena electronically. (Kishani Decl., ¶ 6.) Further, Petitioners' counsel informed Mr. Ward that the signature was hers and that she had issued the subpoena. (See Kishani Decl., ¶ 8.) Documents that require a signature under penalty of perjury may be signed electronically, (see Rules of Court, rule 2.257(b)), as can contracts (see *Fabian v. Renovate America, Inc.* (2019) 42 Cal.App.5th 1062, 1067; Civ. Code, § 1633.9). Accordingly, in the absence of any authority requiring a wet signature on a subpoena, the court does not see any reason why a subpoena may not be signed electronically.

The motion to compel compliance is GRANTED. The court orders Ward to produce the items requested in the subpoena within 30 days of the date of the court's order.

C. Petitioners' Request for Attorney Fees

Petitioners seek sanctions in the form of attorney fees and costs associated with bringing this motion under section 2025.480, subdivision (j) in the amount of \$2,850. This amount consists of 3.9 hours drafting the instant motion and related documents at \$475 per hour, plus anticipated costs of additional time reviewing any oppositions, drafting a reply, and preparing for oral argument.

Section 2025.480, subdivision (j) provides, “The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or

attorney who unsuccessfully makes or opposes a motion to compel an answer or production, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.”

Here, as the motion is not opposed, the court does not find that Mr. Ward acted with substantial justification or that other circumstances would make the imposition of sanctions unjust. However, the court only awards monetary sanctions for expenses actually incurred and does not award them for anticipated time. (See *Tucker v. Pacific Bell Mobile Services* (2010) 186 Cal.App.4th 1548, 1551.) Accordingly, the court will grant the request for sanctions in part in the amount of \$1,852.50 (3.9 hours x \$475 per hour). Mr. Ward is ordered to pay \$1,852.50 to Petitioners’ counsel within 30 days of the date of this court’s order.

CONCLUSION

The court GRANTS the motion to compel and orders Mr. Ward to provide the subpoenaed records within 30 days of the date of the court’s order. The request for sanctions is GRANTED, in part, in the amount of \$1,852.50. Mr. Ward is ordered to pay \$1,852.50 to Petitioner’s counsel within 30 days of the date of this court’s order.

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Calendar line 2

Case Name: *The Estate of David Liu*

Case No.: 23PR194102

Hearing date, time, and department: November 6, 2024, at 10:00 a.m. in Department 1

INTRODUCTION

Decedent David Taiwei Liu (“Decedent”) passed away on December 28, 2022. On January 31, 2023, Decedent’s sister, Katherine L. Chen (“Petitioner”), initiated this case by filing a petition for letters of administration alleging that Decedent died intestate. Letters of administration issued on April 5, 2023.

Currently before the court is a petition by David M. Bigelow (“Bigelow”) to file a creditor’s claim outside the timeframe specified in Probate Code section 9100. Petitioner opposes the petition.

BACKGROUND

In 2019, Bigelow filed a civil lawsuit naming Defendant as one of the defendants.

Bigelow filed the instant petition to file a late creditor’s claim in March 2024, and Petitioner filed an opposition in April 2024. The court identified some deficiencies in the petition and Bigelow filed a supplemental verified petition to address those deficiencies on April 17, 2024. On June 21, 2024, the court was informed that the parties would submit on the declarations provided. The court determined that this matter should be set on the law and motion calendar and set a briefing schedule allowing Bigelow to file an additional declaration by August 2, 2024. Petitioner could then file a reply by August 23, 2024.

On August 1, 2024, Bigelow filed two declarations, one by Robert S. Parada, his attorney, and his own declaration. On August 22, 2024, Petitioner responded to those declarations.²

On September 13, 2024, the court requested supplemental briefing regarding the impact of the civil court case Bigelow had filed prior to Decedent’s death on the statute of limitations under Code of Civil Procedure section 366.2. Bigelow timely filed his supplemental briefing on October 4, 2024, and Petitioner timely filed her supplemental briefing on October 18, 2024.

² On September 3, 2024, Petitioner filed a “Reply to Petitioner’s Unauthorized Supplemental Memorandum of Points and Authorities []”, asserting that Bigelow filed an additional memorandum after she filed her August 22, 2024, response and asking the court to strike it. However, the court never received the memorandum at issue and the court declined to consider both the memorandum and Petitioner’s September 3, 2024, response. Petitioner subsequently represented that Bigelow’s memorandum was filed under an incorrect docket number.

I. Preliminary Matters

A. Late Filed Documents by Bigelow

The parties appeared at a hearing on this matter on September 13, 2024, to set a briefing schedule for briefing requested by the court in its tentative ruling. A briefing schedule was set, providing that Bigelow could file his supplemental briefing by October 4, 2024, and Petitioner could file her supplemental briefing by October 18, 2024. The parties each timely filed supplemental briefs.

Thereafter, on October 23, 2024, Bigelow filed an unauthorized sur-reply demanding an evidentiary hearing on his petition to file a late creditor's claim pursuant to Probate Code section 1022.³ On October 25, 2024, Petitioner filed an unauthorized reply and requested to strike Bigelow's sur-reply.

The court declines to consider Bigelow's sur-reply and Petitioner's response. The parties appeared to set the briefing schedule on this matter and Bigelow did not argue that he should be allowed to file additional briefs. He did not seek leave of court to file the sur-reply. Further, even if the court were to consider the sur-reply, it basically consists of a request for an evidentiary hearing. But, Bigelow already agreed to the court's determination of his petition on the papers. (See Minute Order of June 21, 2024, hearing, filed June 26, 2024.) Even if he had not agreed to proceed without an evidentiary hearing, he contends that the factual issue requiring said hearing is whether Petitioner knew about the existence of the civil lawsuit. As will become clear in the discussion below, this issue is not relevant to the outcome of the motion.

B. Requests for Judicial Notice

i. Bigelow's Requests

In connection with his initial petition to file a late creditor's claim, Bigelow requests judicial notice of:

- (1) The court file, including all pleadings, for Santa Clara County Superior Court Case Number 19CV348513, entitled *David M. Bigelow vs. Luis Maciel, et al.*
- (2) The Civil Complaint filed May 21, 2019, in Case No. 19CV348513 attached hereto as Exhibit A
- (3) The POS showing proof of service on David Liu in Case No. 19CV348513 attached

³ That section provides, "An affidavit or verified petition shall be received as evidence when offered in an uncontested proceeding under this code." Bigelow contends that the proceedings are contested and that an evidentiary hearing is required as to his estoppel argument.

hereto as Exhibit B

(4) The Notice of Creditor's Claim filed in the subject action attached hereto as Exhibit C

The court GRANTS the unopposed requests for judicial notice of items 2 through 4 pursuant to Evidence Code section 452, subdivision (d), with the caveat that while the court is free to take judicial notice of the existence of a document in a court file, it may not take judicial notice of the truth of hearsay statements contained therein. (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882 (*Lockley*).) The court DENIES the request for judicial notice of the entire file because Bigelow has not shown how the entire file is relevant. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2 ["a precondition to the taking of judicial notice in either its mandatory or permissive form--any matter to be judicially noticed must be relevant to a material issue"].)

In connection with his supplemental briefing filed on October 4, 2024, Bigelow requests judicial notice of multiple court documents. Again, the court will take judicial notice of those items, but not the hearsay content therein. (See Evid. Code, § 452, subd. (d); *Lockley, supra*, 91 Cal.App.4th at p. 882.) The court GRANTS the unopposed requests for judicial notice of items 1 through 7. Bigelow also requests judicial notice of the Superior Court of Santa Clara County's online case portal and its case search, online party search, and view case features as they relate to Bigelow's civil case against Decedent. The court DENIES the request for judicial notice regarding items 8 through 11 as irrelevant. Finally, Bigelow requests judicial notice of the U.S. Supreme Court case *Tulsa Prof. Collection Servs., Inc. v. Pope* (1988) 485 US 478 (*Pope*). The court DENIES judicial notice of *Pope* (item 12) as there is no need for judicial notice of published decisional authority. However, the court will consider *Pope* to the extent necessary in the context of making its ruling.

ii. Petitioner's Requests

On September 3, 2024, Petitioner filed a request for judicial notice of two documents in support of her reply to Bigelow's unauthorized filing in August 2024, which this court never received. The court declined to consider both that reply and the unauthorized filing by Bigelow. Accordingly, the court DENIES Petitioner's request for judicial notice as irrelevant.

C. Evidentiary Objections

On August 22, 2024, Petitioner filed evidentiary objections to portions of the Declaration of David M. Bigelow filed on August 1, 2024. The objections relate to portions of the declaration discussing a potential settlement between Bigelow and Decedent. Petitioner objects on the ground that settlement negotiations are confidential pursuant to Evidence Code sections 1152⁴ and 1154.⁵ The court SUSTAINS the objections and, on its own motion and

⁴ That section provides, in pertinent part, "Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has

under its inherent authority, strikes the portions of paragraph five of the Declaration of David M. Bigelow filed on August 1, 2024, that speak to the content of the settlement discussions. (See *Overstock.com, Inc. v. Goldman Sachs Group, Inc.* (2014) 231 Cal.App.4th 471, 499 [court has inherent authority to strike].) The court will consider the fact that settlement discussions occurred because that is the relevant fact Bigelow relies on to prove that Decedent was aware of the pending civil lawsuit during his lifetime. The court OVERRULES the objections based on relevance as the court finds that the fact that Decedent had knowledge of the civil lawsuit indicates that Petitioner could have discovered evidence of the civil lawsuit in Decedents belongings or could otherwise have been aware of the lawsuit through contact with Decedent.

Paragraph five, with the offending portions stricken reads: “Decedent came to my residence for the second time on or about May 6, 2021, at which time he verbally to settle the civil case. He then came to my residence for the third time on or about May 22, 2021, and provided a written settlement offer, to settle the civil case.” The court also strikes, on its own motion, Exhibit C to the Declaration of David M. Bigelow filed on August 1, 2024. The court orders Bigelow to prepare a redacted version of the Declaration of David M. Bigelow filed on August 1, 2024, to conform to this ruling. The version of the Declaration of David M. Bigelow filed on August 1, 2024, that is currently filed with the court, is ordered sealed. Bigelow is admonished not to include similar evidence of settlement offers in filings in the future.

II. Analysis

Bigelow moves to file a late creditor’s claim under Probate Code section 9103.⁶ Section 9100, subdivision (a) provides, “A creditor shall file a claim before expiration of the later of the following times: (1) Four months after the date letters are first issued to a general personal representative. (2) Sixty days after the date notice of administration is mailed or personally delivered to the creditor. Nothing in this paragraph extends the time provided in Section 366.2 of the Code of Civil Procedure.” (Formatting modified.)

Section 9103, subdivision (a) provides, “Upon petition by a creditor or the personal representative, the court may allow a claim to be filed after expiration of the time for filing a claim provided in Section 9100 if either of the following conditions is satisfied: (1) The personal representative failed to send proper and timely notice of administration of the estate to the creditor, and that petition is filed within 60 days after the creditor has actual knowledge of

sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.” (Evid. Code, § 1152, subd. (a).)

⁵ That section provides, in full, “Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it.” (Evid. Code, § 1154.)

⁶ All further undesignated statutory references are to the Probate Code.

the administration of the estate. (2) The creditor had no knowledge of the facts reasonably giving rise to the existence of the claim more than 30 days prior to the time for filing a claim as provided in Section 9100, and the petition is filed within 60 days after the creditor has actual knowledge of both of the following: (A) The existence of the facts reasonably giving rise to the existence of the claim. (B) The administration of the estate.” (Formatting modified.)

Bigelow asserts that he filed a civil complaint in Santa Clara County docket 19CV348513 against Decedent and others while Decedent was alive. That complaint sought some \$92,000 in damages for breach of contract and trespass, alleging that Decedent and others dumped debris and rubbish on Bigelow’s property. Bigelow hired investigators to locate Decedent and through that investigation, Bigelow ultimately discovered, on January 19, 2024, that Decedent had passed away. He was not served with notice of the administration of the estate. Bigelow filed the instant petition for leave to file late creditor’s claim on March 6, 2024, less than 60 days after learning of Decedent’s death. Thus, he contends that his creditor’s claim is timely under the provisions of section 9103.

In her initial opposition, Petitioner contends that even if Bigelow complied with section 9103, his claim against the estate is still barred by Code of Civil Procedure section 366.2 (“section 366.2”), which requires a claim based on liability of the decedent to be brought within one year of Decedent’s death.

Code of Civil Procedure section 366.2, subdivision (a) provides, “If a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, and whether accrued or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply.” Section 9103, subdivision (f) provides, “Nothing in this section authorizes allowance or approval of a claim barred by, or extends the time provided in, Section 366.2 of the Code of Civil Procedure.”⁷ If a creditor’s claim “is not filed in a probate proceeding within either the claims filing period of Probate Code section 9100, or within the one-year limitation period of Code of Civil Procedure section 366.2, a creditor will be forever barred from asserting a claim against the decedent.” (*Dobler v. Arluk Medical Ctr. Indus. Group* (2001) 89 Cal.App.4th 530, 535-536 (*Dobler*).)

As mentioned above, Decedent passed away on December 28, 2022 and the instant petition was not filed until March 6, 2024, more than one year later. Despite the fact that Petitioner raised this argument in her initial opposition to the petition filed in April 2024, Bigelow did not respond to this argument in his initial filings. However, the court requested supplemental briefing regarding the impact of the fact that Bigelow had filed his civil action

⁷ Section 9100, subdivision (c) also provides, “Nothing in this section shall be interpreted to extend or toll any other statute of limitations or to revive a claim that is barred by any statute of limitations. The reference in this subdivision to a ‘statute of limitations’ includes Section 366.2 of the Code of Civil Procedure.”

against Decedent prior to Decedent's death on the statute of limitations for filing of the creditor's claim.

In his supplemental briefing, Bigelow argues that section 366.2 does not apply to a pending civil action. He relies on Code of Civil Procedure section 377.2, subdivision (a), which states, "Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period." Pointing to the language of section 366.2, subdivision (a), he further asserts that section 366.2 applies to actions commenced after the defendant has passed away.

Citing Probate Code section 9370, Petitioner contends that an action pending against a decedent at the time of death may not be maintained unless a timely creditor claim has been filed. That section provides, "An action or proceeding pending against the decedent at the time of death may not be continued against the decedent's personal representative unless all of the following conditions are satisfied: (1) A claim is first filed as provided in this part. . . ." (Prob. Code, § 9370, subd. (a)(1), formatting altered.)

A. The Statute of Limitations Does Not Bar Bigelow's Petition

This is not, as Petitioner claims, a case where the statute of limitations (section 366.2) must be tolled by the filing of a creditor's claim or otherwise extended. As mentioned above, Probate Code section 9370, subdivision (a)(1) provides that an action pending against the decedent at the time of death may not be maintained against the personal representative if a timely creditor's claim is not filed. However, the court is not faced with the decision of whether the civil lawsuit may continue. Instead, it is concerned with whether Bigelow may file a late creditor's claim within the timeframe specified in Probate Code section 9103.

Section 9103, subdivision (f) provides, "Nothing in this section authorizes allowance or approval of a claim barred by, or extends the time provided in, Section 366.2 of the Code of Civil Procedure." But, here, the civil action was commenced prior to Decedent's death and remains pending at this time. In other words, the claim is not barred by section 366.2 because it was commenced against the Decedent before the expiration of the one-year statute of limitations.

In *Burgos v. Tamulonis* (1994) 28 Cal.App.4th 757, 759 (*Burgos*), the Court of Appeal held that a complaint was timely filed under former Code of Civil Procedure section 353, now section 366.2. There, the complaint was timely filed within one year of the decedent's death but no timely claim was presented to the personal representative of the probate estate. The court explained, "The problem was that at the time Burgos [the creditor] filed the original complaint, she did not know of Moscaritolo's [the decedent] death. After taking steps to perfect substituted service under section 415.20, subdivision (b), Burgos first learned of the death. By the time Burgos petitioned for leave to file a late claim against the estate (which was granted) and the time Burgos filed and served the amended complaint naming Tamulonis [the personal representative] in her representative capacity as defendant, more than one year had passed since Moscaritolo's death." (*Id.* at p. 759.) The court explained that the complaint

survived the personal representative's demurrer stating, "Having timely commenced the action and having been granted leave to file the late claim against the estate, Burgos was entitled to continue pursuit of her cause of action by the standard method of amending the complaint to name Tamulonis as defendant in her representative capacity. This the trial court also properly allowed." (*Id.* at p. 763.)

The *Burgos* court rejected the argument that the action had to be commenced *against the personal representative* within the statute of limitations in the section 353. It reasoned, "If a creditor does not have such actual knowledge [of the decedent's death and probate administration], how could the creditor possibly commence the action against the personal representative? Any such 'unknowing' creditor having a cause of action with a one-year limitations period would have to file the action naming as defendant the person who is deceased. In addition, in a case where the defendant dies after the event giving rise to the cause of action, under the generally applicable one-year statute of limitations ([Code Civ. Proc.], § 340, subd. (3)) such an 'unknowing' creditor would normally commence the action at a point in time earlier than the time when the section 353 [now section 366.2] limitation period expires in order to avoid a limitations issue. [Citation.]" (*Burgos, supra*, 28 Cal.App.4th at p. 762.) The court went on to state, "What we are saying is that the legislative scheme encompasses exactly the type of situation that arose in this case where it is uncontroverted the creditor had no actual knowledge of the administration of the estate, did not even know of the death, and timely commenced the action (under both § 340, subd. (3) and § 353) naming Moscaritolo as defendant. This would be the expected course of action in any situation where there is no known administration of an estate, including the situation where there is never an administration of the estate. [Citation.]" (*Burgos, supra*, 28 Cal.App.4th at pp. 762-763.)

Here, as in *Burgos*, it is undisputed that Bigelow was not aware of Decedent's death or the administration of the estate. It is undisputed that Petitioner did not serve Bigelow with a notice to creditors. As in *Burgos*, Bigelow commenced a lawsuit naming Decedent as a defendant prior to the expiration of the section 366.2 limitations period. He is now pursuing a request to file a late creditor's claim under section 9103. Pursuant to Probate Code section 9370, this request is a requirement to substitute the personal representative as a defendant in the pending civil action.

Admittedly, the court in *Kapila v. Belotti (In re Pearlman)* (Bankr.M.D.Fla. June 18, 2012, Nos. 6:07-bk-00761-KSJ, 6:09-ap-00655-KSJ) 2012 Bankr. LEXIS 2858, at *9, *12 (*Kapila*), which neither party mentions, reached the opposite conclusion, finding that a bankruptcy court claim against estate beneficiaries was barred because no creditor's claim was timely filed even though bankruptcy court action was filed before decedent's death and stating that "under no circumstances may a creditor file a claim later than one year after the death of a defendant, as indicated in California Code of Civil Procedure § 366.2(a)". But, the decisions of lower federal courts are not binding on this court. (*Hargrove v. Legacy Healthcare, Inc.* (2022) 80 Cal.App.5th 782, 789, fn. 4.) Further, in *Kapila*, the creditor did not petition the court to file a late creditor's claim and the court indicated that the time in which to file such a claim had passed before the court issued its opinion. (*Id.* at *9, fn. 19.)

The cases Petitioner relies on are likewise distinguishable. Petitioner cites *Levine v. Levine* (2002) 102 Cal.App.4th 1256, *Bradley v. Breen* (1999) 73 Cal.App.4th 798, and *Dawes v. Rich* (1997) 60 Cal.App.4th 24. But, none of those cases involved a situation where a civil lawsuit had commenced against the decedent prior to the expiration of the one-year statute of limitations period. (See *Levine v. Levine*, *supra*, 102 Cal.App.4th at p. 1258 [civil complaint filed more than a year after decedent's death barred by section 366.2]; *Bradley v. Breen*, *supra*, 73 Cal.App.4th at pp. 800, 803 [cross-complaint against estate for indemnity filed four years after decedent's death time barred]; *Dawes v. Rich*, *supra*, 60 Cal.App.4th at pp. 27, 33 [complaint against trustees filed six years after decedent's death time barred].).)

B. Probate Code Section 9103 is Controlling in this Case

Here, Bigelow has petitioned the court to allow a late creditor's claim. Thus, the issue is whether Bigelow has timely sought to file his creditor's claim within the timeframes specified in Probate Code section 9103, given that he has already timely commenced an action against Decedent.

As mentioned above, Probate Code section 9103, subdivision (a) provides,

Upon petition by a creditor or the personal representative, the court may allow a claim to be filed after expiration of the time for filing a claim provided in Section 9100 if either of the following conditions is satisfied:

- (1) The personal representative failed to send proper and timely notice of administration of the estate to the creditor, and that petition is filed within 60 days after the creditor has actual knowledge of the administration of the estate.
- (2) The creditor had no knowledge of the facts reasonably giving rise to the existence of the claim more than 30 days prior to the time for filing a claim as provided in Section 9100, and the petition is filed within 60 days after the creditor has actual knowledge of both of the following:
 - (A) The existence of the facts reasonably giving rise to the existence of the claim.
 - (B) The administration of the estate.

Here, the elements of Probate Code section 9103 are met. It is undisputed that Petitioner did not send notice of administration of the estate to Bigelow. Bigelow declares that he learned of the death and the administration of the estate on January 19, 2024. (Declaration of David M. Bigelow filed on August 1, 2024, ¶ 13.) Petitioner does not counter this assertion with evidence to the contrary. Bigelow filed the instant petition to file a late creditor's claim on March 6, 2024, less than 60 days after learning of Decedent's death. Accordingly, Bigelow's petition is timely under Probate Code section 9103.⁸

CONCLUSION

⁸ In light of the conclusion that section 366.2 does not bar the petition, the court need not address Bigelow's estoppel argument.

The petition to file a late creditor's claim is GRANTED.

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