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Effect of Death on the Statute of Limitations: Statutes Dealing with Death of a Person Liable to an Action

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EFFECT OF DEATH ON THE STATUTE OF LIMITATIONS: STATUTES DEALING WITH DEATH OF A PERSON LIABLE TO AN ACTION

Where the statute of limitations has commenced running prior to the death of the person and prior to his death no action was commenced, in the absence of some other statute, his death will not toll or suspend the regular statute of limitations.[1] Where the cause of action accrues subsequent to the death of the person, however, the statute will not commence running until such time as an administrator of his estate is appointed.[2] The reason for this latter result is that, until such time, there is no one amenable to suit for the cause of action then existing.[3] It shall be the primary purpose of this note to explore the various state statutes enacted to attempt mitigation of this otherwise harsh rule of no-suspension upon death where the statute has commenced running. The principal consideration will be those statutes, similarly phrased, and perhaps derived from the same source as the North Dakota provision.[4] This note shall also concern itself with the situation resulting upon the death of the person against whom a cause of action has accrued, rather than the situation resulting upon the death of a person entitled to bring an action. Throughout the note, there will be some general reference to probate procedure and statutes of the various jurisdictions involved to the extent that they affect the problem under consideration.

Beyond the scope of this note will be any discussion of the rules regarding substitution of parties after an action has commenced as affecting the running of the statute of limitations.[5] Also

1. *E.g.*, Rossner v. Jeffrey, 234 Ark. 723, 354 S.W.2d 705 (1962), Berger v. O'Hearn, 41 Cal.2d 729, 264 P.2d 10 (1953), Glenn V McDavid, 316 Ill.App. 130, 44 N.E.2d 84 (Ct.App. 1942), *In re* Hoenig's Estate, 230 Iowa 718, 298 N.W 887 (1941), Parrish v. McKee, 59 Ohio Op. 316, 135 N.E.2d 486 (Ct.C.P. 1956).

2. See *e.g.*, Matthews v. Matthews, 177 So.2d 497 (Fla.Dist.Ct.App. 1965), Hewitt v. Biege, 183 Kan. 352, 327 P.2d 872 (1958).

3. See Berger v. Jackson, 156 Fla. 251, 23 So.2d 265 (1945). *But see* Wrinkle v. Trabert, 174 Ohio St. 233, 188 N.E.2d 587 (1963) (plaintiff had the power to have an administrator appointed but failed to do so, thus causing the loss of his cause of action).

4. N.D. CENT. CODE § 28-01-26 (1960).

5. See *Fed. R. Civ. P* 25 (a) Annot. 67 A.L.R.2d 497 (1959) (continuance of civil case because of illness or death of counsel).

beyond the inquiry here will be any discussion of the various non-claim statutes, except as they affect the particular problem here involved.[6] Further, there will be no discussion of statutes for wrongful death in view of the fact that these often provide limitation periods separate and apart from those prescribed in general limitation statutes.[7]

SCOPE OF THE PROBLEM

The potential harshness of a rule whereby the applicable statute of limitation is not suspended following the death of a person liable to suit is readily apparent. The problem might best be illustrated by a hypothetical case. Assume that A is injured by the negligence of B on January 1, 1960. The applicable statute of limitation provides for a two year period in which suit must be brought. B dies in June, 1961, when there are six months of the statute left to run. In this situation, the plaintiff's claim could be lost if he had no knowledge of the defendant's demise, or was unable to secure the appointment of a representative before the expiration of the statutory [8] This would be especially true in a jurisdiction having a statute allowing the personal representative or administrator a period of immunity from suit after appointment.[9] In such a case, the period of immunity might well cause the loss of the plaintiff's claim in spite of his efforts to bring the action.[10] Further, it is felt that where the person liable dies, a period of time should be afforded the personal representative in which to acquaint himself with all the claims against the estate before he is required to defend an action.[11]

As a result of these considerations, many states have enacted statutes suspending the running of limitations from the time of the person's death until the appointment of a representative or administrator of his estate.[12] A similar result is reached by suspending

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6. See Annot. A.L.R. 289 (1938).

7. See *e.g.*, Wilson v. Tromly, 403 Ill. 307, 89 N.E.2d 22 (1949), Annot. 174 A.L.R. 815 (1948) (time from which statute of limitations begins to run against action for wrongful death), Annot. 67 A.L.R. 1070 (1930) (Provision of death statute as to time of bringing action as a condition of the right of action or as a mere statute of limitations).

8. See Berger v. O'Hearn, *supra* note 1, at 12, Blaskower v. Steel, 23 Ore. 106, 31 P 253 (1892).

9. *E.g.*, ALA. CODE tit. 7, § 29 (1960) (exempt from suit for 6 months) KY. REV. STAT. § 395.270 (1962) (providing for 5 months after date of qualification of 1st personal representative of a decedents estate before an action shall be commenced against an executor or administrator thereof), S.C. CODE § 19-554 (1962) (providing for 6 months period after death of decedent).

10. See Blaskower v. Steel, *supra* note 8, at 254.

11. See Jones v. Womack, 53 Ga.App. 741, 187 S.E. 285 (Ga.Ct.App. 1936) Great Southern Box Co. v. Barrett, 231 Miss. 101, 94 So.2d 912 (1957).

12. *E.g.*, ALA. CODE tit. 7, § 53 (1958) (statute is suspended for a period not exceeding six months), MINN. STAT. ANN. § 541.16 (1947) (statute is suspended for a period not exceeding six months before granting of letters and a further period of six months after

the statute of limitations for a reasonable time only, or for such time as is necessary to secure the appointment of an administrator for the estate.[13] Where such relief from the rule of no-suspension is provided, it might still be necessary to ascertain whether the claim must be presented to the estate for payment before any action is commenced. If the claim is one appropriate for presentation as a claim against the estate, it could be lost by the failure to present it to the estate within the time prescribed by statute.[14] This same consideration prevails in all aspects of this discussion and no specific reference will be made to it hereafter.

EXTENSION STATUTES

Most of the states have enacted statutes purporting to alter the time in which an action may be brought against the estate of the person liable.[15] Many of the statutes[16] contain some variation of the following language as respects actions against the representatives of the person liable:

> If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.[17]

It will be seen that this provision standing alone, is subject to different interpretations. Arguably, the last portion of the section should govern thus giving the statute the effect of a limitation statute. Considering the statute in its entirety, however, results in the equally valid conclusion that it is an extension of the regular statute of limitations. At any rate, this particular type of statute has caused some confusion as to just what is intended.[18] This has been especially true where a particular court seeks to reconcile

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granting of letters), N.D. CENT. CODE § 30-18-09 (1960) (The running of the statute is suspended following death until such time as a creditor is authorized to apply for letters of administration).

13. *E.g.*, Gentry v. Mitchell, 207 Okla. 488, 250 P.2d 856 (1952) (claim held barred), Robitaille v. Mumaugh, 167 Okla. 337, 29 P.2d 602 (1934) (claim not barred).

14. See N.D. CENT. CODE § 30-18-04 (1960).

15. *E.g.*, IND. ANN. STAT. § 2-607 (1946), IOWA CODE ANN. § 614.2 (1950), MICH. COMP. LAWS § 609.18 (1948).

16. ALASKA STAT. § 09.10.150 (1962) (6 months after issuing of letters testamentary) CAL. CODE CIV. PROC. § 353 (1954) ILL. REV. STAT. ch 83 § 20 (Smith-Hurd 1966) (9 months after issuing of letters testamentary) KY. REV. STAT. § 413.180 (3) (1962), MONT. REV. CODES ANN. § 93-2704 (1947) NEV. REV. STAT. § 11.310 (2) (1963) N.C. GEN. STAT. § 1-22 (1953) N.D. CENT. CODE § 28-01-26 (1960) ORE. REV. STAT. § 12.190 (1965) S.C. CODE ANN. § 10-107 (1962), S.D. CODE § 33.0205 (1939) UTAH CODE ANN. § 78-12-37 (1953), WASH. REV. CODE § 4.16.200 (1962) WIS. STAT. ANN. § 893.34 (1966).

17. IDAHO CODE ANN. § 5-231 (1948).

18. See *e.g.*, Genslinger v. New Ill. Ath. Club, 229 Ill.App. 428 (1923) Strain v. Babb, 30 S.C. 342, 9 S.E. 271 (1889) Curran v. Witter, 68 Wis. 16, 31 N.W. 705 (1887).

this type of provision with the non-claim statutes dealing with the presentation of claims to the administrator [19]

Generally, this type of provision is found in a section of the state statutes dealing with the various periods of limitation and with tolling or suspension provisions.[20] For the most part, the construction placed on them has been that they allow the plaintiff additional time in which to bring the action, if such time is needed.[21] That is, under the above quoted statute, if the death of the defendant occurred within the last year of the period allowed by the general statue of limitations, this special statute would apply, thus giving the plaintiff at least one year from the granting of letters in which to bring the action. If, however, the general statute was greater in length than the one year period, the general statute would apply [22] It will be seen, then, that the statute here involved might serve to extend the running of the limitation period, but would not operate to limit the period otherwise applicable.[23]

In a few instances, however, there has been confusion caused by the existence of this particular statute.[24] This is perhaps a by-product of the notion that there should be some point of finality in the settling of a decedent's estate. Under a statute such as here involved, it is conceivable that a tort claim may not be barred for some years after the death of the person liable thus hampering any final settlement and distribution of the estate. This is unlike the situation with respect to contract claims where a non-claim statute may prescribe a definite time in which claims are to be presented, after which time they will be barred.[25] Florida provides an excellent study of the resolution of this dichotomy In that state prior to 1892, the statute was phrased as follows:

> If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his executors or administrators after the

19. See *e.g.*, White v. Coleman, 146 Wash. 148, 262 P 232 (1927).

20. *E.g.*, NEV. REV. STAT. § 11.310 (1963), S.D. CODE § 33.0205 (1939), WIS. STAT. ANN. § 893.34 (1966).

21. *E.g.*, Sammis v. Wightman, 31 Fla. 10, 12 So. 526 (1893), Miller v. Lewiston Nat. Bank, 18 Idaho 124, 108 P. 901 (1910), Hodge v. Perry, 255 N.C. 695, 122 S.E.2d 677 (1961) Benson v. Bennett, 112 N.C. 505, 17 S.E. 432 (1893) Bank of Montreal v. Buchanan, 32 Wash. 480, 73 P 482) (1903), Curran v. Witter, *supra* note 18.

22. *E.g.*, Miller v. Lewiston Nat. Bank, *supra* note 21 Blaskower v. Steel, 23 Ore. 106, 31 P 253 (1892), Gray Realty Co. v. Robinson, 111 Utah 521, 184 P.2d 237 (1947).

23. *E.g.*, Harris v. Mt. Washington Co., 55 Cal.App. 144, 202 P 903 (Dist.Ct.App. 1921) Bank of Montreal v. Buchanan, *supra* note 21, at 484, Palmer v. O'Rourke, 130 Wis. 507, 110 N.W 389 (1907).

24. *E.g.*, Langroise v. Cummings, 123 F.2d 969 (9th Cir. 1941) (construing the Idaho provision as applicable only to those circumstances where the claim was not a claim appropriate for filing with the personal representative), Irvin v. Harris, 182 N.C. 656, 109 S.E. 871 (1921) Gray Realty Co. v. Robinson, *supra* note 22.

25. *E.g.*, N.D. CENT. CODE § 30-18-04 (1960).

> expiration of that time, and within one year after the issuing of letters testamentary or of administration.[26]

This statute was found in the section dealing with tolling of the general statute of limitations applicable and, as construed, operated to give the person one year from the time of issuance of letters in which to bring the action unless the general statute of limitations still had a greater period than one year to run.[27] The court in construing this section in this manner, noted the possibility of conflicting interpretations. In this regard, an earlier case,[28] which had indicated that the section should be construed as an independent or distinct limitation upon the right to bring suit, was discussed. The court reasoned, however, that the avowed purpose of the statute was to prolong, and not to curtail the time in which an action could be brought.[29] As a part of a general revision of the Florida statutes, and perhaps as a result of this conflict, this section was later modified to read as follows:

> If a person against whom a suit may be brought die, such suit shall not be brought against his executor or administrator after two years from the issuance of letters testamentary or of administrator [30]

In construing this statute, the court in *Inman v Davis*[31] held, that it should be given the effect of a non-claim statute and hence the period prescribed therein was, in itself, a limitation period. The belief of the court seemed to be that the change in phraseology clearly pointed to the revisor's intention that the section operate as a non-claim provision thus securing similar treatment as to all claims against the estate.[32] The conclusion of this court seemed to be that the estate should be settled as expeditiously as possible, and that the statute was changed to aid in achieving this end.[33]

Today, the provision appears in the Florida probate law and reads as follows:

> If a person against whom a cause of action exists dies before the expiration of the time limited for commencement thereof and the cause of action survives, claim shall be

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26. Sammis v. Wightman, 31 Fla. 10, 12 So. 526 (1893).
27. *Id.* at 533.
28. Sanderson's Administrators v. Sanderson, 17 Fla. 820, 850 (1880).
29. Sammis v. Wightman, *supra* note 26 at 534, the court here also notes that the same construction had been placed on a similar statute by the California court, citing Smith v. Hall, 19 Cal. 85 (1861).
30. See Inman v. Davis, 125 Fla. 298, 169 So. 741 (1936).
31. *Id.* at 743.
32. *Id.* at 742.
33. *Id.* at 743.

> filed thereon and like proceedings had as in the case of other claims against the estate.[34]

As the statute now stands, there can be little doubt as to the intention of the legislature. The Florida position as to settlement of estates and construction of their probate law is stated in *Bedenbaugh v Lawrence*[35] as follows:

> [I]t is apparent that it is a matter of public policy in this State that estates of decedents shall be *speedily* and *finally determined.* To effect this policy, statutes of non-claim and of limitations have been set up. When these limitations have expired, any and all claims of *whatsoever nature* are *barred forever* The limitations operate against *contingent* as well as other claims or demands. The period of limitations is an effective both in law and equity (Emphasis by the court)

The instruction provided by the Florida experience might be of interest to those states now having a statute in the same or similar terms as the early Florida statute. If the desired end is finality of administration of the estate, the enactment of a statute such as Florida now has, would serve this end quite well. On the other hand, if the end to be gained is the allowance of additional time to the injured party, where, but for such time, the general statute would run, the present statute could be construed or perhaps clarified to attain this goal.

It should be noted that other jurisdictions, originally having a statute in the same terms as the early Florida provision, have altered or at least modified their statutes, perhaps in response to factors such as were present under the Florida experience.[36] As an example, New York now has a statute providing:

> The period of 18 months after the death, within or without the state, of a person against whom a cause of action exists is not a part of the time within which the action must be commenced against his executor or administrator [37]

This section as earlier construed,[38] was enacted to alleviate some of the hardships inherent in a no-suspension rule, especially where there might be difficulty in getting an administrator appointed.[39]

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34. FLA. STAT. ANN. § 734.28 (1964).
35. 141 Fla. 341, 193 So. 74 (1940).
36. See *e.g.,* MINN. STAT. ANN. § 541.16 (1947) NEV. REV. STAT. § 11.310 (2b) (1963) (Nevada adds a proviso dealing with claims presented to the estate as required by law and with real estate of the decedent not being liable for debts unless letters are granted within 3 years of the death).
37. N.Y. CIV. PROC. § 210 (b) (1963).
38. Butler v. Price, 271 App.Div. 259, 65 N.Y.S.2d 688 (1946).
39. *Id.* at 690.

A lower court in New York has held, however, that the section should not operate as an extension of the general statute of limitations, but instead, should be construed as establishing an alternative period as do non-claim statutes.[40] It might be pointed out that the construction thus placed on this section is in opposition to the legislative intent and obvious purpose of the statute.[41] Nevertheless, the case does evidence the concern expressed as well by some other courts over the differing limitation periods depending upon whether or not the claim is one appropriate for presentation as a claim against the estate.[42]

NORTH DAKOTA STATUTE

The statute in North Dakota dealing with this problem provides as follows:

> If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof and the cause of action survives *and is not one based upon a claim which may be filed in a probate proceeding,* an action may be commenced against his executors or administrators after the expiration of that time and within one year after the issuing of letters testamentary or of administration.[43] (Emphasis added).

The North Dakota statute is unique among similar statutes in other states in that the italicized portion thereof is not found in any of the other statutes, including that of California.[44] The insertion of this section would seem to indicate a realization by the legislature that there might be some confusion if a situation arose involving both survivng tort claims[45] and contract claims against the estate. On the surface, these words would seem to point to a legislative intent that the statute be construed as one pertaining to actions arising out of tort, while the non-claim statutes are to be applied only to contract claims.[46]

The position of this section in the code is perhaps not without significance in attempting to point to the legislative intent. The section is presently placed in Chapter 28-01 providing for the various

40. Schwartz v. Public Adm. of County of Bronx, 50 Misc.2d 200, 266 N.Y.S.2d 873 (Sup. Ct. 1966) (The court said construction of the statute as an extension would be "unconscionable").

41. See Butler v. Price, *supra* note 33.

42. *E.g.,* Langroise v. Cummings, 123 F.2d 969 (9th Cir. 1941) (construing the Idaho provision and its proper relationship to the probate code), White v. Coleman, 146 Wash. 148, 262 P 232 (1927).

43. N.D. CENT. CODE § 28-01-26 (1960).

44. See *e.g.,* ALASKA STAT. § 09.10.150 (1962), CAL. CODE CIV. PROC. § 353 (1954).

45. N.D. CENT. CODE § 28-01-26.1 (1960) (providing that all actions will survive except those for breach of promise, alienation of affections, and libel and slander).

46. N.D. CENT. CODE § 30-18-04 (1960).

times of limitation and particularly is placed with those sections dealing with the suspension or tolling of the general statutory periods of limitation.[47] This latter fact would seemingly evidence an intent to have the statute operate as a tolling provision rather than as a non-claim or short limitation statute.

The derivation of the section is listed as New York and California, the former state having since altered the wording of their statute while the latter has retained essentially the same statute as North Dakota.[48] Although the construction placed on the statute by those states might not be binding on any future interpretation by the North Dakota court,[49] it would certainly provide some guide for any decision. While the North Dakota court has not ruled on the effect to be given the section, California has passed on the section on several occasions.[50] The California provision has been consistently construed as operating to allow the plaintiff an additional period of time to bring suit if such time is needed. Thus, the section may serve to enlarge the statute of limitations but will not operate to shorten it.[51] As noted earlier, this is as well true of other jurisdictions having a similar statute.[52]

A district court in North Dakota has held that the statute should be read as a non-claim statute thus barring the plaintiff's cause of action after one year from the issuing of letters testamentary regardless of the time remaining of the general statutory period.[53] The feeling of the court there was that the administration of the estate can be entirely finalized at an earlier date by construing the section in this manner.[54] Although such an approach would serve to integrate the judicial procedure as to probate with the various provisions regarding limitation periods, accomplishing it in this way would seemingly lead only to confusion. This would seem to be especially true where the defendant dies shortly after the statute begins running. In this event, a plaintiff relying on the general

47. N.D. CENT. CODE §§ 28-01-24, -34 (1960).

48. CAL. CODE CIV. PROC. § 353 (1954).

49. *But see* Bonde v. Stern, 73 N.D. 273, 14 N.W.2d 249 (1944) (New York construction adopted with the New York Code of Civil Procedure) State v. Blaisdell, 18 N.D. 31, 119 N.W 360 (1909) (Presumption that the legislature adopted a statutory provision with the knowledge of the construction placed on it by the parent state).

50. *E.g.*, San Francisco Bank v. St. Clair, 47 Cal.App.2d 194, 117 P.2d 703 (Dist.Ct.App. 1941), Harris v. Mt. Washington Co., 55 Cal.App. 144, 202 P 903 (1921) Lowell v. Kier, 50 Cal. 646 (1875), Smith v. Hall, 19 Cal. 85 (1861).

51. *E.g.*, Berger v. O'Hearn, 41 Cal.2d 729, 264 P.2d 10 (1953).

52. See cases *supra*, note 21.

53. Schwartz v. Estate of Keller, 6th Jud. Dist. No. Dak., (March 9, 1966) "The court concludes, therefore, that since plaintiffs failed to bring their one (1) year after the issuance of letters testamentary, the causes of action are barred by Section 28-01-26 N.D.C.C."

54. *Id.* at 12, "Manifestly any other construction of said section (4) Would require the executor or administrator to bring suits within one year after the death of the decedent but authorize claimant to sue the executor in causes of action arising out of tort, where such action survives, within two to four years after letters of administration or

statute of limitations (e.g. 6 years) might lose his cause if he failed to learn of the defendant's death or for some other reason delayed bringing the action.[55]

CONCLUSION

It is apparent from a perusal of the decisions in other states that the quoted provision of the North Dakota statute was originally designed to provide additional time to bring suit where the statute might otherwise have run between the death of the defendant and the appointment off an administrator [56] If this is not the end desired by a particular jurisdiction, the best course would be a clarification of their statute to reflect the exact result sought.[57] As the North Dakota statute now reads, the possibility of differing interpretations could be easily resolved by an addition to, or alteration of, the present statute.[58] If, on the other hand, the legislature should want to provide a shorter period or non-claim statute applicable to actions arising out of tort, the logical solution here would be to provide for such in the probate section with a corresponding modification of the section here involved. As the section now exists, there is certainly much ground for differing interpretations, with resulting confusion and injustice.

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testamentary were issued and probate proceedings were completed, the estate distributed and closed and the executor discharged, (5) Would require claimants who have claims arising upon contract or that were contingent to present, file and prove their claims within 90 days after the first publication of notice to creditors but would authorize claimants with claims based upon tort to sue after the expiration of two to four years from the issuance of letters of administration or testamentary or even after the estate is finally administered and executor has been discharged, (6) Would render the requirement that the administrator or executor render final account within 6 months or 1 year or as soon as tthe estate can be closed, meaningless and ineffective, if the administrator or executor would have to wait from two to four years after the issuance of letters before he could close the estate, to make sure that no one brought an action under the 6 year statute of limitations, before probate proceedings were completed and the estate closed and the executor discharged from his trust."

55. *E.g.*, Schwartz v. Estate of Keller, *supra* note 53 (Injury occurred May 26, 1961, Defendant died May 23, 1963. An executor was appointed June 23, 1963 and on April 9, 1964 the estate was closed. The plaintiff secured the appointment of a special administrator and brought the action January 10, 1966).

56. *E.g.*, Berger v. O'Hearn, *supra* note 51.

57. *E.g.*, FLA. STAT. ANN. § 734.28 (1964) (Provision re-phrased and meaning entirely changed), MINN. STAT. ANN. § 541.16 (1947) (Provision re-phrased), N.Y. CIV. PROC. § 210 (b) (1963) (Provision entirely re-phrased).

58. *E.g.*, ILL. REV. STAT. ch. 83, § 20 (Smith-Hurd 1966) (Clarifies the last section to read, "After the expiration of the time limited for the commencement of the action, and within 9 months after the issuing of letters testamentary or of administration."), S.D. CODE § 33.0205 (1939) (Adds; "The time shall not be extended for a period exceeding two years from the death of a person to the commencement of the action against his executors or administrators.").