

## Second Supplement to Memorandum 91-10

Subject: Study L-3041 - Procedure for Creditor to Reach Nonprobate Assets (Policy Issues--more comments on whether this project should be undertaken)

Exhibit 1 attached is a letter from the Los Angeles County Bar Association, Probate and Trust Law Section, Executive Committee. The committee takes a position similar to that of the State Bar (see First Supplement to Memorandum 91-10):

--creditors are adequately protected through their access to probate assets

--we should observe experience under the new State Bar proposal for a trust claims procedure before getting involved with other nonprobate assets

--the concept of reaching nonprobate assets through the decedent's personal representative is strongly opposed

Exhibit 2 attached is a letter from Richard S. Kinyon of San Francisco. He supports the staff position that there ought to be a recognized procedure for creditors to pursue nonprobate assets in those cases where the problem may arise:

--"I have been concerned for some time that it apparently is possible for a testator to pass most if not all of his or her estate to beneficiaries through joint tenancies, beneficiary designations, and possibly other means, to the detriment of legitimate creditors, commercial or otherwise."

--there should be an augmented estate concept, similar to the gross estate for federal estate tax purposes, to which creditors could look for satisfaction of their claims if the probate estate is inadequate

--there is no better forum for resolving policy issues relating to rights of creditors against nonprobate assets than the regular probate proceeding

Mr. Kinyon thinks it would be helpful to clarify the law as to the rights of creditors and other possible claimants against nonprobate assets and to provide a procedure by which their claims can be

satisfied if the decedent's family or the beneficiaries of the decedent's estate do not voluntarily assume that burden.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

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May 8, 1991

Nathaniel Sterling  
Assistant Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

Re: Study L-3041 (Procedure For Creditor to Reach  
Non-Probate Assets)

Dear Mr. Sterling:

The Executive Committee of the Probate and Trust Law Section of the Los Angeles county Bar Association has reviewed Memorandum 91-10, raising policy issues relating to the Procedure for creditor to reach non-probate property. As a member of the Executive Committee I have been asked to convey to the Commission our observations.

There is substantial support for the position that creditors are adequately protected through access to probate assets and, now, through access to revocable trust assets as proposed in SB727, and that there should be no effort made to provide procedures for reaching additional non-probate property such as joint tenancies, life insurance proceeds, retirement benefits, etc. The opposition is particularly strong in regard to the Staff's suggestion that the procedure to enable a creditor to reach non-probate property should go through the decedent's personal representative. We believe that the procedure as regards living trusts ought to be tested prior to extending the treatment into these other areas.

Thank you for your consideration of these comments. I expect to attend the June meeting and will be glad to answer any questions that may arise.

Very truly yours,



Carol A. Reichstetter

cc: Members of the Executive Committee

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R E C E I V E D

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Assistant Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Re: Study L-3041 - Procedure for  
Creditor to Reach Nonprobate Assets

Dear Nat:

I have read the First Supplement to Memorandum 91-10 (dated 05/07/91) and Anne Hilker's letter of April 9, 1991, attached thereto, regarding the above referenced matter. Although the majority of the Executive Committee of the State Bar Estate Planning, Probate and Trust Section may be right that this is not a significant problem in the vast majority of the cases, I agree with you that there ought to be a recognized procedure for creditors to pursue nonprobate assets in those cases where the problem may arise.

One of the reasons I was in favor of the CLRC sponsoring legislation to amend Probate Code Section 13101 and related sections to encourage "dry probates" was to enable creditors to have a ready form (the probate procedure) to resolve creditors claims. Furthermore, so long as the regular California probate procedure continues to be somewhat costly and burdensome, requiring continuing court involvement even where the personal representative and all of the beneficiaries would prefer to avoid it, individuals will continue to try to avoid probate by using various nonprobate transfers; and CLRC Study L-3052 facilitates that goal.

I have been concerned for some time that it apparently is possible for a testator to pass most if not all of his or her estate to beneficiaries through joint tenancies, beneficiary designations, and possibly other means, to the detriment of legitimate creditors, commercial

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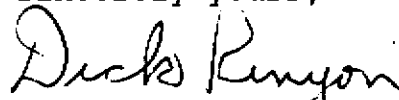
Mr. Nathaniel Sterling  
May 23, 1991  
Page Two

or otherwise; and I see no reason why there should not be an augmented estate (similar, but not necessarily identical, to the gross estate for federal estate tax purposes) to which creditors could look for satisfaction of their claims if the probate estate is inadequate (or even if adequate, if it consists of assets that the decedent presumably intended to pass to beneficiaries free of claims, administration expenses, and taxes).

I suspect that the insurance industry will resist making life insurance proceeds subject to creditors claims, even though those proceeds may be subject to estate taxes, and federal law may prevent creditors from seeking to satisfy their claims from various qualified employee death benefits. However, I still think it would be worthwhile examining the policy issues relating to creditors rights (as well as the support rights of the surviving spouse and other dependants of a decedent) with respect to nonprobate assets, and I cannot think of a better forum to resolve those issues than the regular probate proceeding.

I think (and hope) that most individuals do not want to defeat the rights of their just creditors following their deaths, although there undoubtedly are some who do. In any event I think it would be helpful to clarify the law as to the rights of creditors and other possible claimants against nonprobate assets and to provide a procedure by which any such claims can be satisfied if the decedent's family or the beneficiaries of his or her estate do not voluntarily assume that burden.

Sincerely yours,

  
Richard S. Kinyon

RSK:bjs

cc: Bruce S. Ross