

Memorandum 2017-46

**Nonprobate Transfers: Creditor Claims and Family Protections
(Discussion of Issues)**

In this study, the Commission¹ is considering the extent to which nonprobate transfers (“NPTs”) should be liable for a decedent’s debts and family protections. This study is based on a background report from the Commission’s former Executive Secretary Nathaniel Sterling entitled *Liability of Nonprobate Transfer for Creditor Claims and Family Protections* (“NPT Report”).²

BACKGROUND ON STUDY

One of the key concerns underlying this study is that the liability of a decedent’s assets depends on the particular form of transfer used to convey the asset. In particular, the means used to transfer a particular asset (e.g., will vs. NPT) can affect whether the asset is available to satisfy family protections or to pay the decedent’s or the estate’s creditors.

The NPT Report states “[t]he policy of the law to require payment of a decedent’s just debts and to protect a decedent’s surviving spouse and children in probate has been shredded by the ad hoc development of nonprobate transfer law.”³ The Report concludes that the law in California governing the liability of a nonprobate transfer for debts of a decedent “is sketchy, and what there is of it shows no coherent public policy but rather a pattern of haphazard development.”⁴

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. The NPT Report is available at <http://www.clrc.ca.gov/pub/BKST/BKST-L4100-NPT-Creditors.pdf>.

3. NPT Report, p. 151.

4. *Id.* at 10.

Thus, a primary goal of this study is to develop a coherent scheme that governs the liability of an NPT for a decedent's debts and family protections.

Existing Liability Rules for NPTs in California, Generally

With respect to creditor claims, each individual type of NPT falls into one of the following categories:

- (1) Liable for a decedent's debts.
- (2) Liable for a decedent's debts, if probate estate inadequate.
- (3) Not liable for a decedent's debts.
- (4) Not subject to a clear rule of liability.⁵

For certain assets, the same type of property could fall into different liability categories. For instance, a bank account that is held by trust would be liable for debts if the probate estate is inadequate, while a bank account that passes according to a pay-on-death beneficiary designation is not subject to a clear rule of liability.

California law would also permit creditors to recover NPTs that qualify as voidable transactions under the Uniform Voidable Transactions Act.⁶

NPTs do not appear to be liable for family protections under California law.⁷

Study Approach

At its June meeting, the Commission decided that this study should focus on two possible statutory changes: enactment of Section 102 of the Uniform Nonprobate Transfers on Death Act ("Uniform Act")⁸ and reforms to address the decision in *Kircher v. Kircher*, 189 Cal. App. 4th 1105, 117 Cal. Rptr. 3d 254 (2010), *rev. denied* 2011 Cal. LEXIS 1437.⁹

5. See generally Memorandum 2017-7, pp. 6-14.

6. *Id.* at 14-15. The Uniform Voidable Transactions Act is a revision and renaming of the former Uniform Fraudulent Transfer Act. See Uniform Voidable Transactions Act, available at http://www.uniformlaws.org/shared/docs/Fraudulent%20Transfer/2014_AUVTA_Final%20Act_2016mar8.pdf.

7. Memorandum 2017-36, p. 19.

8. Section 102 of the Act is codified as Section 6-102 of the Uniform Probate Code. Throughout this memorandum, any quoted language is drawn from the Uniform Probate Code unless noted. The Uniform Probate Code and the Uniform Act are available at the following addresses, respectively: http://www.uniformlaws.org/shared/docs/probate%20code/UPC_Final_2017mar30.pdf; http://www.uniformlaws.org/shared/docs/nonprobate%20transfers%20on%20death/unptda_final_with98amend.pdf.

9. Minutes (June 2017), p. 6.

This memorandum continues the analysis of Section 102, focusing on the obligations for which an NPT should be liable.

Under Section 102, transferees of NPTs can be liable for “for allowed claims against decedent’s probate estate and statutory allowances to the decedent’s spouse and children.”¹⁰ According to the ULC’s commentary, Section 102 is designed to extend the probate protections for creditors and families already applicable to multiple-party accounts to NPTs generally.¹¹

CLAIMS AGAINST THE DECEDENT’S PROBATE ESTATE

Section 102 imposes liability on NPTs “for allowed claims against the decedent’s probate estate....”¹²

Uniform Probate Code: “Claims”

Under the Uniform Probate Code (“UPC”), claims include “liabilities ..., whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration.”¹³

Thus, “claims” includes creditor claims against the decedent or estate, as well as the expenses associated with a probate proceeding. The UPC provision that prioritizes claims for payment gives a sense of the different types of claims for which an NPT could be liable under Section 102:

If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

- (1) costs and expenses of administration;
- (2) reasonable funeral expenses;
- (3) debts and taxes with preference under federal law;
- (4) reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him;
- (5) debts and taxes with preference under other laws of this state;

10. See UPC § 6-102(b); see also UPC §§ 1-201(6), 2-402 to 2-404.

11. See Uniform Act § 102 Comment 2 (from 1989 Act); see also Uniform Act § 102 Comment 1 (from 1989 Act).

12. UPC § 6-102(b).

13. UPC § 1-201(6); see also UPC § 3-803(a), (b).

(6) all other claims.¹⁴

The UPC provides a procedure for the presentation and approval of creditor claims, which requires appointment of a personal representative with authority to allow or disallow claims.¹⁵

Analogous “Claims” under California Law

The “claims” in the UPC have clear analogs in California law (creditor claims and expenses of administration).¹⁶

Currently, under California law, different types of “claims” are not necessarily treated the same for liability purposes. In California, all of the existing rules imposing liability on NPTs make the NPT liable for creditor claims.¹⁷ In some cases, the NPT is also expressly liable for expenses of administration.¹⁸

The Commission’s prior decisions in this study have addressed NPT liability *for creditor claims*. The Commission now needs to decide whether to also impose liability on NPTs for the expenses of administration.

Section 102’s scheme for imposing liability on NPTs requires a probate proceeding.¹⁹ To the extent that the Section 102 procedure is adopted in California, it seems reasonable to make NPTs liable for the cost of the probate proceeding.

Does the Commission agree?

STATUTORY ALLOWANCES TO DECEDENT’S SURVIVING SPOUSE AND CHILDREN

The UPC provides the following statutory allowances for family protection:

14. UPC § 3-805. The definition of “claims” in the UPC expressly excludes “estate or inheritance taxes, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.” UPC § 1-201(6).

15. See UPC Article III, Part 8; UPC §§ 3-804, 3-806.

16. Probate Code Section 9000(a) defines “claim” as:

a demand for payment for any of the following, whether due, not due, accrued or not accrued, or contingent, and whether liquidated or unliquidated:

(1) Liability of the decedent, whether arising in contract, tort, or otherwise.

(2) Liability for taxes incurred before the decedent’s death, whether assessed before or after the decedent’s death, other than property taxes and assessments secured by real property liens.

(3) Liability of the estate for funeral expenses of the decedent.

17. See generally Memorandum 2017-36, pp. 8-11, 13-16, 18.

18. *Id.* at 18, n. 90.

19. See UPC § 6-102 Comment 1.

- Homestead Exemption
- Exempt Property
- Family Allowance

After a brief general discussion, the UPC statutory allowances and their California analogs are discussed, in turn, below.

Statutory Allowances in UPC, Generally

Under the UPC, each of the statutory allowances appears to be mandatory.²⁰ Thus, the court would not have discretion *whether* to grant such allowances to the family.²¹

According to the Uniform Law Commission’s commentary, “[t]he allowances have priority over unsecured creditors of the estate and persons to whom the estate may be devised by will.”²²

The UPC prioritizes which property will be used to satisfy the allowances. “If the estate is otherwise sufficient, property specifically devised may not be used to satisfy rights to homestead allowance or exempt property.”²³

California Analogs to Statutory Allowances, Generally

Certain family protections offered in California law are conceptually similar to the statutory allowances from the UPC.

Currently, California law does not impose liability on any NPT for family protections, as these protections are imposed in a probate proceeding.²⁴

The NPT Report notes:

The family protections evolved to shield a decedent’s dependents from the decedent’s improvidence (creditor claims) and from the decedent’s intentional or inadvertent neglect of the decedent’s support obligation (claims of other beneficiaries). Most of the family protections require a probate proceeding for implementation. ...

Otherwise, if there is no probate proceeding there is no mechanism to implement the protection. Nonprobate transfers were not intentionally excluded from the purview of the family

20. See UPC §§ 2-402, 2-403, and 2-404.

21. See generally UPC § 2-402 Comment (“A set dollar amount for homestead allowance was dictated by the desirability of having a certain level below which administration may be dispensed with or be handled summarily, without regard to the size of allowances under Section 2-404.”).

22. UPC Article III, Part 4 Comment.

23. UPC § 2-405(a).

24. See Memorandum 2017-36, p. 19.

protections. They were simply developed at a time when probate rather than nonprobate transfer was the primary mechanism for passing property at death.²⁵

The NPT Report recommends that the “family protection statutes should be extended to nonprobate transfers.”²⁶

Section 102 makes NPTs liable to the decedent’s probate estate.²⁷ Pulling NPTs into the probate estate would provide a practical way to impose the family protections available in California law.

Homestead

Both the UPC and California law provide some form of “homestead” right to certain surviving family members. However, as discussed below, the homestead right afforded to surviving family under the UPC is significantly different from that under California law.

The key difference in these homestead rights is highlighted in a 1982 Commission memorandum.

[California’s probate homestead provisions] permit the probate court to set apart a dwelling for the use of the surviving spouse or minor children of the decedent. ... The purpose of the probate homestead is to preserve a home for the surviving members of the decedent’s family.

The UPC “homestead” provision, on the other hand, does not provide a homestead at all, but rather provides a dollar allowance. ... [I]t may be selected out of any property of the estate whether real or personal.²⁸

UPC Homestead Allowance

Section 2-402 of the UPC provides:

A decedent’s surviving spouse is entitled to a homestead allowance of [\$22,500]. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to [\$22,500] divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate. Homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent

25. NPT Report, p. 139.

26. *Id.* at 156. The NPT Report also notes “[t]his has already been done for the small estate set-aside and to a limited extent for omitted spouse and child protections.” *Id.*

27. UPC § 6-102(b).

28. Memorandum 1982-17, p. 7 (citations omitted).

child by the will of the decedent, unless otherwise provided, by intestate succession, or by way of elective share.²⁹

Thus, the homestead allowance entitles the surviving spouse or minor children to a dollar value from the decedent's estate. The homestead allowance does not necessarily provide the family with a home or another property that could serve as a dwelling.³⁰

California Probate Homestead

Probate Code Section 6520 provides:

Upon the filing of the inventory or at any subsequent time during the administration of the estate, the court in its discretion may on petition therefor select and set apart one probate homestead in the manner provided in this chapter.

The probate homestead grants the surviving family members the right to possess and use a specific piece of property that can serve as a dwelling.³¹ The probate homestead is a temporary, albeit possibly long-term, burden on a particular piece of property selected by the court.³²

The probate homestead can be for the benefit of the surviving spouse, minor children, or both.³³ The probate homestead can extend up to the lifetime of the surviving spouse or the minority of the children.³⁴ Presumably, title to the property passes to the heir or devisee upon distribution of the estate, subject to the possession and use right created by the probate homestead.³⁵

In deciding whether to create a probate homestead, the court is directed to consider "the needs of the surviving spouse and minor children, the liens and

29. Bracketed text is as in the original. The bracketed dollar amounts are 2008 dollars and are subject to annual cost-of-living adjustments. See UPC § 2-402 Comment.

30. See *id.* ("A set dollar amount for homestead allowance was dictated by the desirability of having a certain level below which administration may be dispensed with or be handled summarily, without regard to the size of allowances under Section 2-404."); but see UPC § 2-405(a) ("If the estate is otherwise sufficient, property specifically devised may not be used to satisfy rights to homestead allowance or exempt property. Subject to this restriction, the surviving spouse, guardians of minor children, or children who are adults *may select* property of the estate as homestead allowance and exempt property.") (emphasis added).

31. See NPT Report, p. 143; Prob. Code § 6523(b)(1) (directing the court to "[s]elect as a probate homestead the most appropriate property available that is suitable for that use, including in addition to the dwelling itself such adjoining property as appears reasonable.").

32. NPT Report, p. 143; see also Prob. Code § 6524 ("The property set apart as a probate homestead shall be set apart only for a limited period, to be designated in the order, and in no case beyond the lifetime of the surviving spouse, or, as to a child, beyond its minority.").

33. Prob. Code § 6521.

34. Prob. Code § 6524.

35. See *id.*

encumbrances on the property, the claims of creditors, the needs of the heirs or devisees of the decedent, and the intent of the decedent with respect to the property in the estate and the estate plan of the decedent as expressed in inter vivos and testamentary transfers or by other means.”³⁶

The court is directed to, in light of relevant considerations, set apart the probate homestead “for such a term and upon such conditions (including, but not limited to, assignment by the homestead recipient of other property to the heirs or devisees of the property set apart as a homestead) as appear proper.”³⁷ The corresponding Commission Comment states that “[t]his section expressly authorizes the court to condition the homestead on any terms that appear proper to the court.”³⁸ This suggests that the court has broader equitable powers to, for instance, award the heir or devisee of the property compensation from the estate.

In deciding what property to use for a probate homestead, the court is limited to the property in the decedent’s probate estate (i.e., a probate homestead cannot be granted over property passing outside of probate administration).³⁹

Typically, the selected homestead is the family’s residence, but it may be any property subject to probate court administration. Since preexisting liens and encumbrances may be satisfied out of the probate homestead right, the probate court will generally select as the probate homestead property that is free from liens and encumbrances even if it is not the family home.⁴⁰

Currently, the statute precludes the court from selecting a property for which the right to possession “is vested in a third person unless the third person consents thereto.”⁴¹

The probate homestead right is protected from the creditors of the recipient of the homestead right.⁴² However, the probate homestead right is liable to secured creditors who had a lien or encumbrance on the property at the time of the decedent’s death (subject to the Code of Civil Procedure’s homestead exemption if the claim would have been subject to a homestead exemption at the time of the

36. Prob. Code § 6523(a).

37. Prob. Code § 6523(b)(2).

38. Prob. Code § 6523 Comment.

39. See Prob. Code § 6522; see also NPT Report, p. 144.

40. Estate of Liccardo, 232 Cal. App. 3d 962, 965 (1991).

41. Prob. Code § 6522(b) (A “‘third person’ means a person whose right to possession of the property (1) existed at the time of the death of the decedent or came into existence upon the death of the decedent and (2) was not created by testate or intestate succession from the decedent.”).

42. Prob. Code § 6526(b).

decedent's death).⁴³ Thus, the probate homestead right is not absolute; secured creditors could defeat the homestead recipient's right to possess the property.⁴⁴

The underlying property is liable to the decedent's unsecured creditors, as well as the unsecured creditors of the decedent's heir or devisee, *subject to the probate homestead right*.⁴⁵ In other words, it appears that those creditors cannot disturb the possession and use right provided by the probate homestead.

Would the Commission like to make NPTs liable for the probate homestead?

If the Commission decides to make NPTs liable for the probate homestead, a future memorandum will address implementation issues, including whether to expand the court's broad equitable power to condition the granting of the homestead in a manner that would affect NPT beneficiaries, beyond the recipient of the homestead property (e.g., require contribution from NPT beneficiaries to compensate the decedent's heir or devisee who received the property burdened by the homestead).

Exempt Property

Both the UPC and California law permit surviving family members to claim exempt property from the decedent's estate. However, as discussed below, the exact contours of those rights under the UPC and California law differ.

An earlier Commission memorandum highlights two key differences relevant to this study:

- (1) The California provisions are unlimited in amount; the UPC has a maximum [dollar amount].
- (2) California makes the award discretionary with the court; under the UPC, it is a matter of right and a court determination is not required.⁴⁶

43. Prob. Code § 6526(a).

44. See Recommendation Relating to *Probate Homestead*, 15 Cal. L. Revision Comm'n Reports 401, 416 (1980) ("Setting apart a probate homestead, regardless of its character, does not affect rights of secured creditors; liens and encumbrances continue to burden the homestead property and are enforceable against the property."); see also Prob. Code § 6523(a) (In selecting the probate homestead property, the court is directed to consider, among other things, "the liens and encumbrances on the property."); Memorandum 1979-43, p. 2 ("The court would have discretion to require payment of secured creditors out of estate funds if necessary to protect the homestead.").

45. Prob. Code § 6526(a), (c).

46. Memorandum 1982-17, p. 8.

UPC Exempt Property Allowance

Section 2-403 of the UPC provides:

In addition to the homestead allowance, the decedent's surviving spouse is entitled from the estate to a value, not exceeding \$15,000 in excess of any security interests therein, in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, the decedent's children are entitled jointly to the same value. If encumbered chattels are selected and the value in excess of security interests, plus that of other exempt property, is less than \$15,000, or if there is not \$15,000 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the \$15,000 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, but the right to any assets to make up a deficiency of exempt property abates as necessary to permit earlier payment of homestead allowance and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by the decedent's will, unless otherwise provided, by intestate succession, or by way of elective share.⁴⁷

The last sentence of this section indicates that the exempt property allowance permits the family to receive exempt property valued at \$15,000 *in addition to* the property that they would otherwise receive from the decedent's estate. In other words, the family is claiming \$15,000 worth of exempt property that would otherwise go to a different recipient or be used to pay creditor claims.

This section appears to grant the surviving spouse or children⁴⁸ the right to choose specific exempt property (up to \$15,000 in value) from the estate.⁴⁹ To the extent that the exempt property in the estate is less than \$15,000 in value, the surviving spouse and children are entitled to other assets from the estate to make up the shortfall.

47. Bracketed text is as in the original. The dollar amounts are 2008 dollars and are subject to annual cost-of-living adjustments. See UPC § 2-403 Comment.

48. Unlike other UPC statutory allowances, this allowance could benefit the decedent's adult children. See *id.* ("Unlike the exempt amount described in Sections 2-402 and 2-404, the exempt amount described in this section is available in a case in which the decedent left no spouse but left only adult children.").

49. "If the estate is otherwise sufficient, property specifically devised may not be used to satisfy rights to ... exempt property. Subject to this restriction, the surviving spouse, guardians of minor children, or children who are adults may select property of the estate as ... exempt property." UPC § 2-405(a).

California Exempt Property Set-Aside

Probate Code Section 6510 permits the court to, on petition, set apart “all or any part of the property of the decedent exempt from enforcement of a money judgment, other than the family dwelling” to the surviving spouse or minor children. According to the Commission’s Comment to Section 6510, “[t]his section permits, for example, the minor children to receive the furniture and household furnishings for a probate homestead set apart for the use of the minor children.”

In deciding whether to set aside exempt property, the court may take into account the existence of NPTs that go to the family.⁵⁰

The NPT Report notes that “an award under Section 6510 is permanent.”⁵¹ Given that, this set-aside would grant full ownership of such property to the family. This set-aside would prioritize the family’s ownership over the claims of beneficiaries and creditors of the decedent or the decedent’s estate.⁵²

As discussed above, the UPC limits the exempt property allowance to a certain dollar value. This differs from California. Although many of the individual exemptions from money judgments in California law are limited to a certain dollar amount,⁵³ this set-aside provision does not itself have an overall dollar value limit.

However, the reference to “property exempt from enforcement of a money judgment” may be intended to incorporate the individual dollar limits that apply to each of the relevant exemptions. For instance, where the decedent owned \$50,000 worth of jewelry, it is unclear whether the court has authority to set aside all of the jewelry or only a portion of jewelry equivalent to the amount that is exempt from a money judgment (\$8,000).⁵⁴ **The staff welcomes comment on how this set-aside operates in practice.**

50. See cases cited in NPT Report, p. 143, n. 458.

51. NPT Report, p. 142.

52. See *id.* at 137.

53. See, e.g., Robert E. Temmerman Jr., Sondra J. Allphin, & Patricia A. Cain, *Additional Property Transfer Obstacles for Married Persons and Registered Domestic Partners* § 4.26, in *California Estate Planning* (Cal. Cont. Ed. Bar. 2017) (listing exempt property under California law, including “\$3050 of equity in a motor vehicle,” “\$8000 of jewelry, heirlooms, and works of art,” “\$3200 in deposit accounts containing Social Security payments directly deposited by the government.”).

54. See Judicial Council of California, *Current Dollar Amounts of Exemptions from Enforcement of Judgments*, Form EJ-156 (rev. April 1, 2016), *available at* <http://www.courts.ca.gov/documents/ej156.pdf>.

In probate, the exempt property set-aside would seemingly allow the family to claim exempt property that the decedent sought to dispose of to another recipient by will.⁵⁵ Under current law, the court has discretion to set-aside “all or any part” of the exempt property.⁵⁶ The court is presumably in the best position to determine the appropriate result for a particular piece of property (i.e., whether a devisee should be permitted to keep a gift of exempt property when the family is requesting that the property be set aside).

Unlike California’s probate homestead provisions,⁵⁷ the exempt property set-aside provisions do not expressly permit the court to condition a set-aside in a manner that offsets the heir or devisee’s loss of property. It seems possible that the decedent who anticipates the possibility of family protections could, by will or trust, provide for an alternative disposition if certain gifts are defeated by a set-aside. NPT instruments, aside from trusts, do not appear to offer the decedent this sort of flexibility.

Does the Commission want to authorize NPTs to be liable for a permanent set-aside of exempt property for the benefit of the decedent’s family?

Family Allowance

Both the UPC and California law grant a family allowance to certain surviving family members of the decedent. However, as discussed below, the family allowances under the UPC and California law differ somewhat in their particulars.

UPC Family Allowance

Section 2-404 of the UPC provides:

(a) In addition to the right to homestead allowance and exempt property, the decedent’s surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by the decedent are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the

55. As indicated above, the UPC precludes the use of property specifically devised for satisfying the exempt property entitlement if there is other property available in the estate. See *supra* note 49. California law does not contain such a restriction.

56. Prob. Code § 6510.

57. See discussion of “California Probate Homestead” *supra*.

surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having their care and custody. If a minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or his [or her] guardian or other person having the child's care and custody, and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority over all claims except the homestead allowance.

(b) The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent, unless otherwise provided, by intestate succession, or by way of elective share. The death of any person entitled to family allowance terminates the right to allowances not yet paid.⁵⁸

Subdivision (b) seems to indicate that the family allowance is paid out of a portion of the estate that would otherwise pass to a different beneficiary or be used to pay creditor claims.

The UPC grants the personal representative the authority to grant a family allowance of "a lump sum not exceeding \$27,000 or periodic installments not exceeding \$2,250 per month for one year."⁵⁹ If a larger allowance is required, the personal representative or an aggrieved party may petition the court.⁶⁰

The ULC's comment to Section 2-404 provides:

In determining the amount of the family allowance, account should be taken of both the previous standard of living and the nature of other resources available to the family to meet current living expenses until the estate can be administered and assets distributed. ... Whether life insurance proceeds payable in a lump sum or periodic installments were intended by the decedent to be used for the period of adjustment or to be conserved as capital may be considered. *A living trust may provide the needed income without resorting to the probate estate.*⁶¹

Although Section 2-404 appears to provide for a mandatory allowance, this comment suggests that a court has discretion to reduce (or possibly deny altogether) a family allowance if a trust (or another asset) provides sufficient income.

58. Bracketed text is as in the original.

59. UPC § 2-205(a).

60. See *id.*

61. Emphasis added.

California Family Allowance

Probate Code Section 6540 entitles certain family members⁶² to “such reasonable family allowance out of the estate as is necessary for their maintenance according to their circumstances during administration of the estate.” According to a treatise, “[a]n award to these persons is mandatory, *i.e.*, the court does not have discretion to withhold support if the person is one of those identified in § 6540(a). The court, however, has broad discretion in determining the amount of the family allowance.”⁶³ Section 6540 also gives the court discretion to grant a family allowance to certain other family members.⁶⁴

The purpose of the allowance has been described as:

eas[ing] the economic hardship presumably suffered by those whom the decedent either had a duty to support or actually provided support, during the period from the decedent’s death until distribution of the estate. By virtue of this humane purpose, and because they have priority over most other debts, charges, and liabilities of the estate, these family allowances are said to enjoy a highly preferential position and to be strongly favored in the law.⁶⁵

“The family allowance in effect is a continuation of the decedent’s support obligation for a limited period after the decedent’s death.”⁶⁶

The statute requires the family allowance to “terminate no later than the entry of the order for final distribution of the estate or, if the estate is insolvent, no later than one year after the granting of letters.”⁶⁷

The NPT Report notes that “[t]he amount of the family allowance may be significant and, if the estate is not closed promptly, the ‘temporary’ allowance may exhaust the estate.”⁶⁸ Given this, it is perhaps unsurprising that some local courts “have adopted a stated policy against awards of ‘unlimited’ duration,

62. The decedent’s surviving spouse, minor children, and dependent physically or mentally incapacitated adult children are entitled to the family allowance. See Prob. Code § 6540(a).

63. Craig L. Judson, Sharon M. Nagle, & Ruth A. Phelps, *Statutory Protections for Family Members* § 17.40, in *California Decedent Estate Practice* 2d. ed. (Cal. Cont. Ed. Bar. 2017).

64. The decedent’s dependent adult children and dependent parents are permitted to receive a family allowance. See Prob. Code § 6540(b).

65. Estate of Herrera, 10 Cal. App. 4th 630, 634 (1992) (citations and quotation marks omitted).

66. NPT Report, p. 145.

67. Prob. Code § 6543(a). Letters of administration or letters testamentary are issued by a probate court to confirm the appointment of an administrator or representative with legal authority to represent the estate. See generally Los Angeles Superior Court – Central, *Starting a Probate or Obtaining Letters of Administration* (Aug. 2014), available at <http://www.lacourt.org/selfhelp/willsestate/trusts/pdf/startingaprobateinstructions.pdf>.

68. NPT Report, p. 145.

prescribing instead a maximum duration subject to a request for extension or renewal on a showing of need.”⁶⁹

To the extent that the decedent provided for the reasonable maintenance of family members with nonprobate property, a court must account for such property when determining how to allocate a family allowance among eligible family members.

If a person otherwise eligible for family allowance has a reasonable maintenance from other sources and there are one or more other persons entitled to a family allowance, the family allowance shall be granted only to those who do not have a reasonable maintenance from other sources.⁷⁰

Under current law, the family allowance may only be awarded in a probate proceeding.⁷¹ However, the California appellate decision in *Parson v. Parson* suggests in dicta that a trust could be required to pay a family allowance that was properly awarded in probate:

Such a payment might be required from a trust, if for example, a settlor placed some assets in a revocable trust and provided for the disposition of other assets by will. In that case, a surviving spouse may be entitled to a family allowance from the estate (e.g., those assets subject to the will). Section 19001, subdivision (a) makes the assets of a revocable trust “subject to the claims of creditors of the deceased settlor’s estate ... to the extent that the deceased settlor’s estate is inadequate to satisfy those claims....” Thus, if the assets of the estate were insufficient to pay the family allowance, section 11420 may require the trust to make up the difference.⁷²

The court’s analysis indicates that a family allowance award is like a creditor claim against the estate. Where the probate estate is inadequate, the trust estate, being liable for creditor claims, could therefore be liable for the family allowance. Thus, according to this reasoning, under current law, NPTs liable for creditor claims would be liable for a family allowance awarded in probate, where the probate estate is inadequate to satisfy the allowance.

69. B. Ross & J. Cohen, Cal. Practice Guide: Probate § 7:104, at p. 7-28 (The Rutter Group 2016).

70. Prob. Code § 6540(c).

71. See NPT Report, p. 154; see also *Parson v. Parson*, 49 Cal. App. 4th 537, 542 (1996) (“Section 6540 authorizes the award of a family allowance only in connection with the administration of an estate. No estate exists here because the deceased disposed of his assets through a revocable trust. Sections 19001 and 11420 do not authorize the payment of a family allowance from a revocable trust where, as here, no estate exists.”).

72. *Parson*, 49 Cal. App. 4th at 541.

Making the allowance applicable to NPTs raises timing questions about the family's need for support. As indicated above, this allowance provides support during the time between the decedent's death and the distribution of the estate. In probate, it can take many months for the estate to be distributed.⁷³ In this situation, the decedent's assets may not be available to the family for some time while the estate is administered. Assuming, though, that the decedent's property largely passes by NPT, the decedent's property is effectively "distributed" as soon as the NPT recipients collect it. If the family receives NPTs, they can simply collect those and use them for their support.

If the allowance is intended primarily to provide support *until the decedent's estate is distributed*, then it seems that the use of NPTs would avoid the need for the family allowance by permitting the decedent's property to be recovered by the recipients quickly. They would not need to wait for distribution at the end of a lengthy probate proceeding.

However, the family allowance might also serve a different purpose. In addition to providing support while assets are locked up in probate, the allowance might reflect a policy that the decedent's family should receive some level of financial support from the decedent for some period after the decedent's death. If the family receives much of the decedent's property via NPT and has adequate support from those assets, that purpose would seem to be satisfied. If, however, the decedent did not provide for the surviving family and distributed property via NPT to other recipients, the purpose would be defeated.

The family allowance could also be thought of as providing a preferential payment to the family that is not subject to the decedent's creditors. Making NPTs liable to creditors would defeat this purpose if the family was not entitled to receive an allowance, particularly where the decedent's debts are greater than the decedent's assets. In such a situation, where the family received the decedent's property via NPT and the decedent's creditors seek payment under Section 102, the family would be personally liable up to the value of the property received under Section 102. A family allowance would presumably permit the family to keep some of the property without liability to the decedent's creditors.

Does the Commission want to make NPTs liable for the family allowance?

73. See generally <http://www.alameda.courts.ca.gov/pages.aspx/Probate-a-Decedents-Estate#8>.

ADDITIONAL FAMILY PROTECTIONS IN CALIFORNIA

California's probate law includes additional statutory provisions that provide family protection. Those family protections⁷⁴ include:

- Temporary Possession of Exempt Property and Family Dwelling.
- Small Estate Set-Aside.
- Omitted Spouse or Child Share.

Each of these protections is discussed in turn below.

The Commission will need to decide whether to make these family protections applicable to NPTs.

Temporary Possession of Exempt Property and Family Dwelling

Probate Code Section 6500 provides that the decedent's surviving spouse and minor children "are [temporarily] entitled to remain in possession of the family dwelling, the wearing apparel of the family, the household furniture, and the other property of the decedent exempt from enforcement of a money judgment." The family is entitled to remain in possession until 60 days after the inventory is filed, although the court, for good cause, can order a different time period.⁷⁵

The NPT Report notes that "[t]he tenor of the provision is to ensure that the family is not left destitute during the period immediately following the decedent's death."⁷⁶

This section appears to apply automatically and grants the family temporary possession rights "[u]ntil the inventory is filed [in probate] and for a period of 60 days thereafter, or for such other period as may be ordered by the court for good cause on petition therefor."⁷⁷

The section appears to effectively freeze the status quo with respect to possession of a decedent's exempt property and the family dwelling for a brief period of time. This section does not appear to permit a decedent's family to

74. The family protections, with the exception of the omitted spouse or child share, are codified in Part 3 (Family Protection) of Division 6 (Wills and Intestate Succession), along with the probate homestead, exempt property set-aside, and family allowance.

75. Prob. Code § 6500.

76. NPT Report, p. 141, *citing* Robson v. Meder, 66 Cal. App. 2d 47 (1944).

77. Prob. Code § 6500.

This 60-day post-inventory timeframe was intended to ensure that the family has time to request a probate homestead and the court has time to rule on that request before the family's temporary possession right expires. See Memorandum 1979-60, pp. 2-3.

recover the decedent's exempt property that is not in the family's possession, as the section simply entitles the family to "remain" in possession of such property.

It is easy to understand why this protection might be useful in a situation where the decedent's property largely passes through probate. It would be significantly disruptive to force the family to immediately relinquish all of the decedent's property upon the filing of a probate petition. This section could presumably prevent situations where the family is forced to give up property of the decedent, which the family then later receives back as heirs, devisees, or for family protection.

Assuming an insolvent probate estate, this protection could also be useful in a proceeding for NPT liability under Section 102. Although initiating a Section 102 proceeding would not result in the family being divested of possession of any particular property, such a protection could provide the family with temporary respite from other NPT beneficiaries who seek immediate possession of the relevant property. Permitting the family to remain in temporary possession could minimize disruption and give the court time to determine the appropriate final disposition of the property, assuming that the NPT could be held liable for the long-term or permanent family protections.⁷⁸ As discussed above, the family may be granted a longer-term possession right over the dwelling (i.e., probate homestead) or permanent right to the decedent's exempt property (i.e., exempt property set-aside).

Is the Commission interested in incorporating a temporary possession right in favor of the decedent's family in a proceeding for NPT liability?

If the Commission decides to provide a temporary possession right in a proceeding for NPT liability, a future memorandum will address implementation issues, including the duration of this right. As currently drafted, the duration of this temporary possession right may present a practical problem where the probate estate is insolvent. Specifically, it is unclear whether an "inventory" would be filed if the probate estate is insolvent. And, if not, it is unclear when this temporary possession right would terminate.

78. See NPT Report, pp. 141-142 (The temporary possession provision "is a provisional remedy intended to preserve that property from dispersion pending the court's determination of the right of the dependents to have that property set aside notwithstanding other claims to or against it.").

Small Estate Set-Aside

The Probate Code authorizes the absolute set-aside of a small estate (less than \$20,000) to the decedent's surviving spouse and minor children on court order.⁷⁹ This can be done even if the decedent's will would have granted the property to another.⁸⁰ Thus, "[t]he small estate set-aside statute serves a dual function — it provides family protection for the decedent's dependents and it enables a small estate to pass without the need for probate."⁸¹

In a proceeding on a petition for set-aside of a small estate, Probate Code Section 6609 directs, in part:

(a) If the court determines that the net value of the decedent's estate, over and above all liens and encumbrances at the date of death of the decedent and over and above the value of any probate homestead interest set apart out of the decedent's estate under Section 6520, does not exceed twenty thousand dollars (\$20,000) as of the date of the decedent's death, the court shall make an order under this section unless the court determines that making an order under this section would be inequitable under the circumstances of the particular case.

(b) In determining whether to make an order under this section, the court shall consider the needs of the surviving spouse and minor children, the liens and encumbrances on the property of the decedent's estate, the claims of creditors, the needs of the heirs or devisees of the decedent, the intent of the decedent with respect to the property in the estate and the estate plan of the decedent as expressed in inter vivos and testamentary transfers or by other means, and any other relevant considerations. ...

In computing the value of the decedent's estate, the statute excludes any property where the decedent's interest terminates on death, any property the decedent held in joint tenancy, and any multiple-party account.⁸² In a situation

79. The UPC provides for summary disposition of small estates, but this appears to only apply in situations where the "value of the entire estate, less liens and encumbrances, does not exceed homestead allowance, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent." UPC § 3-1203. Conceptually, California's small estate set-aside is different from the UPC's small estate summary disposition, as the UPC procedure would only apply where the listed expenses and allowances consume the entire estate (i.e., there are no additional assets that require administration).

80. See Prob. Code § 6609; NPT Report, p. 138.

81. NPT Report, p. 147.

82. Prob. Code § 6000. The definition of the decedent's estate appears to include other NPTs, e.g., TOD registered securities. This may have been an oversight. See also Prob. Code § 13050 (defining estate for the purposes of the collection or transfer of small estates, not exceeding \$150,000, without administration).

where a decedent endeavored to pass all of his or her property outside of probate, this provision could be useful to collect the decedent's tangible property and personal effects that could not be or simply were not conveyed by NPT.

"The court has discretion whether to make a set-aside order but the court's discretion is limited to an all or nothing award."⁸³

As indicated above, the family receiving this set-aside is preferred over other devisees. However, the family receiving this set-aside does *not* receive protection from the decedent's creditors. Rather, the family members receiving the set-aside are personally liable for the unsecured debts of the decedent up to the value of the set-aside and receive the property subject to any liens or encumbrances.⁸⁴

In a situation where the aggregate value of the decedent's probate estate and NPTs is less than \$20,000, making the small estate set-aside applicable to NPTs could be helpful to the family who may need NPT assets for support.

Under existing law, the small estate set-aside is available if the value of the *probate* estate is less than \$20,000. This is true regardless of how much property the decedent transfers to the family or others via NPT. In other words, currently, a decedent's probate estate valued at less than \$20,000 is eligible for the small estate set-aside even if the value of the decedent's NPTs exceeds the \$20,000 threshold.

If the small set-aside were made applicable to NPTs, presumably this would mean that the set-aside would only be available if the aggregate value of the probate estate and the decedent's NPTs was less than \$20,000. Thus, the set-aside would become unavailable in many situations where it is currently available (e.g., a probate estate valued at less than \$20,000 and decedent's NPTs valued at greater than \$20,000).

For that reason, the staff recommends against making the small estate set-aside applicable to NPTs.

Omitted Spouse or Child Share

In general, the omitted spouse or child share⁸⁵ provisions provide a share of the estate to a surviving spouse or child where in which the decedent prepared

83. NPT Report, p. 147.

84. Prob. Code §§ 6609(c)-(e); 6611(a).

85. The UPC also includes provisions granting an omitted spouse or child share. See UPC §§ 2-301 to 2-302 (omitted spouse and children). The UPC provisions only address omissions from a will, not any other testamentary or non-testamentary documents. See UPC §§ 2-301, 2-302. The

estate plan documents prior to marriage or the birth of the child, the spouse or child is omitted from the document, and the omission appears to be unintentional. “The law protects the decedent’s intent to disinherit; the pretermitted heir statute addresses only an unintended disinheritance.”⁸⁶

For ease of explanation, this discussion focuses on the omitted spouse share. Although the rules governing the omitted child share⁸⁷ are somewhat different, those differences are not relevant for the purposes of this memorandum.

California Omitted Spouse Share

Probate Code Sections 21610 grants a spouse who has been omitted from a decedent’s will and trust a specified share of the decedent’s estate. In these provisions, the will and trust are collectively referred to as the decedent’s “testamentary instruments” and the estate includes the probate estate and all property held in a revocable trust that becomes irrevocable upon the decedent’s death.

For a surviving spouse, subject to exceptions listed below:

[I]f a decedent fails to provide in a testamentary instrument for the decedent’s surviving spouse who married the decedent after the execution of all of the decedent’s testamentary instruments, the omitted spouse shall receive a share in the decedent’s estate, consisting of the following property in said estate:

(a) The one-half of the community property that belongs to the decedent under Section 100.

(b) The one-half of the quasi-community property that belongs to the decedent under Section 101.

(c) A share of the separate property of the decedent equal in value to that which the spouse would have received if the decedent had died without having executed a testamentary instrument, but in no event is the share to be more than one-half the value of the separate property in the estate.⁸⁸

The omitted spouse does not receive a share of the estate if any of the following apply:

- The omission was intentional, as evidenced by the testamentary instruments.

omitted shares do not appear to be “statutory allowances” for which NPTs can be liable under UPC Section 102.

86. NPT Report, p. 148.

87. See Prob. Code §§ 21620-21623 (omitted child share).

88. Prob. Code § 21610.

- The decedent provided for the omitted spouse by non-testamentary transfers (including NPTs) and evidence shows the decedent intended those transfers to be in lieu of a transfer by will or trust.
- The surviving spouse waived the right to the decedent’s estate.⁸⁹

In the simplest case — situations where the spouse was omitted altogether and all the testamentary instruments and NPTs were executed prior to the marriage — it seems clear that applying the omitted spouse share to NPTs would be appropriate.

However, in many cases, application of the omitted spouse protection to NPTs would be more complicated and could lead to disadvantageous results. In order for the protection to apply, the marriage must have occurred after execution of *all* testamentary instruments.⁹⁰ If NPTs were included in the class of “testamentary instruments,” it would seem that execution of *any* new NPT after marriage could defeat a spouse’s claim of omission. For example, if the decedent, after marriage, opens a joint checking account with the spouse, the omitted share statute would become entirely inapplicable, even if the spouse was omitted from the will and trust.

The staff recommends that the Commission exclude omitted spouse and child protections from the current NPT liability reform. In the staff’s view, the omitted spouse and child provisions are more of a rule of construction than a family protection — the family can still be disinherited if that is the decedent’s clear intent. Moreover, determining how to incorporate NPTs into the omitted spouse and child provisions poses significant practical difficulties.

How does the Commission want to proceed?

NEXT STEPS

Future memoranda in this study will address the following issues.

Exemptions

The Uniform Act includes a clause intended to clarify that Section 102 “does not supersede existing legislation protecting death benefits in life insurance,

89. Prob. Code § 21611.

90. Prob. Code § 21610.

retirement plans or IRAs from claims by creditors.”⁹¹ This clause caveats Section 102’s liability rule with “[e]xcept as otherwise provided by statute.”⁹²

California law provides a number of exemptions from the enforcement of money judgments.⁹³ A future memorandum will discuss the possible application of California’s exemptions to NPTs otherwise liable under Section 102.

Community Property

Section 102 does not specifically address community property. This is perhaps unsurprising, as community property is not recognized in most states.

The staff’s initial impression is that Section 102 may be in tension with some aspects of California’s community property laws. That concern will be addressed in a future memorandum.

Imposition of Liability under Section 102

Section 102 makes NPTs liable to the decedent’s probate estate and the personal representative in probate enforces this liability. The procedural and substantive aspects of the imposition of liability under Section 102 will be discussed in more detail in a subsequent memorandum. This will include the implementation of liability through a probate proceeding and the abatement scheme for allocating liability.

Implementation

Later in this study, the Commission will also need to decide how to address California’s existing liability rules and schemes applicable to specific NPTs (e.g., revocable trusts) and whether any adjustments to family protections may be needed to accommodate the NPT liability rule. These implementation questions will be addressed in a memorandum later in this study.

Respectfully submitted,

Kristin Burford
Staff Counsel

91. UPC § 6-102 Comment 2.

92. UPC § 6-102(b).

93. See generally Code Civ. Proc. §§ 703.010-704.995.