

## Memorandum 2018-60

**Nonprobate Transfers: Liability of a Surviving Spouse Under Probate Code Sections 13550 and 13551 (Draft Tentative Recommendation)**

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The Commission<sup>1</sup> has been studying the liability of nonprobate transfers (“NPTs”)<sup>2</sup> for creditor claims and family protections.

Earlier in this study, the Commission considered a case, *Kircher v. Kircher*,<sup>3</sup> related to NPT liability. In *Kircher*, the court interpreted a statutory rule (found in Probate Code Sections 13550 and 13551) that imposes liability on a surviving spouse for a decedent’s debts under certain circumstances.<sup>4</sup>

The Commission directed the staff to prepare a tentative recommendation to clarify the scope of this liability rule.<sup>5</sup> In particular, the Commission decided that the liability rule should apply *only* to property that a surviving spouse receives under the part of the Probate Code containing the rule — i.e., Part 2 of Division 8 (Sections 13500-13660), which authorizes a surviving spouse to receive property that passes by will or intestate succession without probate administration.<sup>6</sup>

Unless otherwise indicated, every statutory citation in this memorandum is to the Probate Code.

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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](http://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. For the purposes of this memorandum, “NPT” refers to transfers of a decedent’s property outside of probate by means of an instrument designed for that purpose (e.g., joint tenancy, trust, transfer on death deed, pay-on-death (“POD”) bank account). The term is not meant to include the special statutory procedures for the disposition of a decedent’s estate without administration. See Prob. Code Sections 13000-13660.

3. 189 Cal. App. 4th 1105 (2010), *rev. denied*, 2011 Cal. LEXIS 1437.

4. See Memorandum 2017-23, pp. 1-4.

5. Minutes (Oct. 2018), p. 10.

6. *Id.*

TENTATIVE RECOMMENDATION

As anticipated in Memorandum 2018-38, the primary reform in the tentative recommendation was straightforward to implement.<sup>7</sup> The attached draft proposes to amend Section 13551 as follows:

**Prob. Code § 13551 (amended). Maximum liability of surviving spouse**

SEC. \_\_\_\_\_. Section 13551 of the Probate Code is amended to read:

13551. The liability imposed by Section 13550 shall not exceed the fair market value at the date of the decedent's death, less the amount of any liens and encumbrances, of the total of the following:

(a) The portion of the one-half of the community and quasi-community property belonging to the surviving spouse under Sections 100 and 101 that is not exempt from enforcement of a money judgment and is not administered in the estate of the deceased spouse.

(b) The portion of the one-half of the community and quasi-community property belonging to the decedent under Sections 100 and 101 that passes to the surviving spouse without administration under this part.

(c) The separate property of the decedent that passes to the surviving spouse without administration under this part.

**Comment.** Section 13551 is amended to specify that the liability imposed on the surviving spouse under Section 13550 only extends to property that the surviving spouse receives without probate administration according to the statutory authority in this part. See Section 13500.

This change does not affect the surviving spouse's liability under laws other than Sections 13550 and 13551.

That proposed revision would limit the liability of a surviving spouse under Section 13551:

- As under existing law, the section would authorize a decedent's creditors to collect from property that passes to the surviving spouse under "Part 2. Passage of Property to Surviving Spouse Without Administration" of Division 8 of the Probate Code (Sections 13500-13660).
- Contrary to the interpretation of existing law in *Kircher v. Kircher*,<sup>8</sup> however, the section would *not* authorize a decedent's creditors to collect from property that passes to the surviving spouse by any other type of nonprobate transfer (e.g., joint tenancy). Other

7. See Memorandum 2018-38, p. 12.

8. See 189 Cal. App. 4th at 1113-14.

statutes might (or might not) provide authority to collect from such property, but not Section 13551.

#### CONFORMING REVISION

In preparing the attached draft, the staff found a section that requires a conforming revision. Civil Code Section 682.1 pertains to community property with a right of survivorship (“CPWROS”). As shown in italics below, it explicitly makes such property subject to the chapter of the Probate Code that contains the liability rule discussed above (Section 13551):

682.1. (a) Community property of spouses, when expressly declared in the transfer document to be community property with right of survivorship, and which may be accepted in writing on the face of the document by a statement signed or initialed by the grantees, shall, upon the death of one of the spouses, pass to the survivor, without administration, pursuant to the terms of the instrument, subject to the same procedures, as property held in joint tenancy. Prior to the death of either spouse, the right of survivorship may be terminated pursuant to the same procedures by which a joint tenancy may be severed. Part 1 (commencing with Section 5000) of Division 5 of the Probate Code and Chapter 2 (commencing with Section 13540), *Chapter 3 (commencing with Section 13550)*, and Chapter 3.5 (commencing with Section 13560) of *Part 2 of Division 8 of the Probate Code apply to this property.*

(b) This section does not apply to a joint account in a financial institution to which Part 2 (commencing with Section 5100) of Division 5 of the Probate Code applies.

(c) This section shall become operative on July 1, 2001, and shall apply to instruments created on or after that date.<sup>9</sup>

Without a conforming revision of Section 682.1, the Commission’s proposed amendment of Section 13551 could raise questions about whether the liability rule stated in that section applies to CPWROS. Arguably, the liability rule would not apply because the decedent’s share of CPWROS does not pass to the surviving spouse without administration under the specified part of the Probate Code.<sup>10</sup>

In order to preserve the apparent liability of CPWROS under current law, the tentative recommendation includes a conforming revision, adding a new paragraph to Civil Code Section 682.1, as shown in underscore below:

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9. Emphasis added.

10. See proposed amendment of Section 13551.

**Civ. Code § 682.1 (amended). Community property with right of survivorship**

SEC. \_\_\_\_\_. Section 682.1 of the Civil Code is amended to read:

682.1. (a)(1) Community property of spouses, when expressly declared in the transfer document to be community property with right of survivorship, and which may be accepted in writing on the face of the document by a statement signed or initialed by the grantees, shall, upon the death of one of the spouses, pass to the survivor, without administration, pursuant to the terms of the instrument, subject to the same procedures, as property held in joint tenancy. Prior to the death of either spouse, the right of survivorship may be terminated pursuant to the same procedures by which a joint tenancy may be severed.

(2) Part 1 (commencing with Section 5000) of Division 5 of the Probate Code and Chapter 2 (commencing with Section 13540), Chapter 3 (commencing with Section 13550), and Chapter 3.5 (commencing with Section 13560) of Part 2 of Division 8 of the Probate Code apply to this property.

(3) For the purposes of Chapter 3 (commencing with Section 13550) of Part 2 of Division 8 of the Probate Code, this property shall be treated as if it had passed without administration under Part 2 (commencing with Section 13500) of Division 8 of the Probate Code.

(b) This section does not apply to a joint account in a financial institution to which Part 2 (commencing with Section 5100) of Division 5 of the Probate Code applies.

(c) This section shall become operative on July 1, 2001, and shall apply to instruments created on or after that date.

**Comment.** Section 682.1 is amended to make clear that Probate Code Section 13551 applies to community property with a right of survivorship, notwithstanding the addition of language that limits the application of that section. The added language provides that Section 13551(b) and (c) only apply to property that passes to a surviving spouse without administration under Part 2 (commencing with Section 13500) of Division 8 of the Probate Code.

This section is also amended to add paragraph numbers to subdivision (a).

**Is this conforming revision acceptable to the Commission?**

APPROVAL OF DRAFT AS TENTATIVE RECOMMENDATION

**Does the Commission approve the attached draft (as is or with modifications) as a tentative recommendation, to be posted to its website and circulated for public comment?**

Respectfully submitted,

Kristin Burford  
Staff Counsel



# CALIFORNIA LAW REVISION COMMISSION

**STAFF DRAFT**

TENTATIVE RECOMMENDATION

## Nonprobate Transfers: Liability of a Surviving Spouse Under Probate Code Sections 13550 and 13551

December 2018

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

**COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **January 25, 2019.****

The Commission will often substantially revise a proposal in response to comment it receives. Thus, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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## SUMMARY OF TENTATIVE RECOMMENDATION

Assets of a deceased person are distributed in a number of different ways, depending on the circumstances:

- (1) According to the terms of the decedent's will, if the decedent had a will;
- (2) According to the rules of intestate succession, if the decedent lacked a will or other estate planning instrument; or
- (3) By various forms of nonprobate transfer ("NPT"), if the decedent executed the necessary documentation for such a transfer (e.g., a beneficiary designation form or a living trust).

When a decedent's assets are distributed by will or intestate succession, they are usually subject to probate administration. In probate, the decedent's outstanding debts are paid from the decedent's assets before the heirs or devisees receive their shares.

To facilitate prompt transfer of a decedent's assets to a surviving spouse, Part 2 of Division 8 of the Probate Code creates an exception to the usual requirement of probate administration: It allows a surviving spouse to receive property by will, or by intestate succession, *without* probate administration.

To ensure repayment of a decedent's debts, however, Part 2 of Division 8 also includes a rule imposing liability on a surviving spouse for a decedent's debts. Under Probate Code Sections 13550 and 13551, the surviving spouse's liability extends to any property received from the decedent "without administration."

In 2010, a California appellate court considered the scope of this liability rule. In particular, the court considered whether the rule would impose liability on a surviving spouse for the value of property received from a decedent via joint tenancy (i.e., not by will or intestate succession). The court concluded that the rule *would* apply to that situation. See *Kircher v. Kircher*, 189 Cal. App. 4th 1105, 117 Cal. Rptr. 3d (2010).

The Commission reviewed the statutory context and history for this statutory liability rule. The Commission concluded that although the liability rule was drafted broadly, the rule probably was intended to have a narrower scope, applying only to property that a surviving spouse receives under Part 2 of Division 8.

The Commission recommends that the liability rule be revised to make clear that it applies only to property that a surviving spouse receives without probate administration under Part 2 of Division 8 of the Probate Code.

This tentative recommendation was prepared pursuant to Chapter 158 of the Statutes of 2018.

NONPROBATE TRANSFERS: LIABILITY OF A  
SURVIVING SPOUSE UNDER PROBATE CODE  
SECTIONS 13550 AND 13551

1 This tentative recommendation addresses a significant ambiguity in Probate  
2 Code Sections 13550 and 13551. These sections concern liability of a surviving  
3 spouse to creditors of a deceased spouse.

4 To explain the proposed reform, it is first necessary to describe the existing  
5 statutory scheme and identify the ambiguity in question. The discussion then turns  
6 to a 2010 appellate decision on the point.

7 Next, the Law Revision Commission analyzes the situation. Based on the work  
8 it has done thus far, the Commission tentatively recommends revising Section  
9 13551 to make clear that its liability rule only applies to property that a surviving  
10 spouse receives pursuant to the part of the Probate Code containing that section  
11 (Part 2 of Division 8, which authorizes distribution to a surviving spouse without  
12 administration under certain circumstances).

13 EXISTING STATUTORY SCHEME

14 After death, a person’s assets may be distributed in a number of different ways,  
15 depending on the circumstances:

- 16 (1) According to the terms of the decedent’s will, if the decedent had a will;<sup>1</sup>
- 17 (2) According to the rules of intestate succession, if the decedent lacked a will  
18 or other estate planning instrument;<sup>2</sup> or
- 19 (3) By various forms of nonprobate transfer (“NPT”), if the decedent executed  
20 the necessary documentation for such a transfer (e.g., a beneficiary  
21 designation form or a living trust).<sup>3</sup>

22 When a decedent’s assets are distributed by will or intestate succession, they are  
23 usually subject to probate administration.<sup>4</sup> In probate, the decedent’s outstanding  
24 debts are paid from the decedent’s assets before the heirs or devisees receive their  
25 shares of those assets.<sup>5</sup>

26 To facilitate prompt transfer of a decedent’s assets to a surviving spouse, Part 2  
27 of Division 8 of the Probate Code creates an exception to the usual requirement of

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1. See Prob. Code § 7000.  
2. See *id.*  
3. See generally Prob. Code § 5000.  
4. See Prob. Code § 7001.  
5. See Prob. Code §§ 11420, 21401.

1 probate administration: It allows a surviving spouse to receive property by will, or  
2 by intestate succession, *without* probate administration.<sup>6</sup>

3 However, Part 2 of Division 8 also contains a rule imposing liability on the  
4 surviving spouse for the debts of the decedent. More specifically, Sections 13550  
5 and 13551 provide:

6 13550. Except as provided in Sections 11446, 13552, 13553, and 13554, upon  
7 the death of a married person, the surviving spouse is personally liable for the  
8 debts of the deceased spouse chargeable against the property described in Section  
9 13551 to the extent provided in Section 13551.

10 13551. The liability imposed by Section 13550 shall not exceed the fair market  
11 value at the date of the decedent’s death, less the amount of any liens and  
12 encumbrances, of the total of the following:

13 (a) The portion of the one-half of the community and quasi-community  
14 property belonging to the surviving spouse under Sections 100 and 101 that is not  
15 exempt from enforcement of a money judgment and is not administered in the  
16 estate of the deceased spouse.

17 (b) The portion of the one-half of the community and quasi-community  
18 property belonging to the decedent under Sections 100 and 101 that passes to the  
19 surviving spouse without administration.

20 (c) The separate property of the decedent that passes to the surviving spouse  
21 without administration.

22 These sections ensure that property passing to a surviving spouse under Part 2 of  
23 Division 8 is available to satisfy a decedent’s debts, even though the property is  
24 not probated.

25 In 2010, a California appellate court considered whether the liability rule  
26 contained in Sections 13550 and 13551 also applies to property that a surviving  
27 spouse receives through nonprobate transfers. The court’s decision is discussed  
28 below.

29 *KIRCHER V. KIRCHER*

30 In *Kircher v. Kircher*,<sup>7</sup> the court considered the scope of the liability rule in  
31 Probate Code Sections 13550 and 13551. The court concluded that the liability  
32 rule applied to property that a surviving spouse received as the surviving joint  
33 tenant.<sup>8</sup>

34 This conclusion was based on the language of Section 13551.<sup>9</sup> The *Kircher* court  
35 found that the surviving spouse’s liability under Section 13551 encompasses all  
36 property “properly characterized as community property or the decedent’s separate

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6. See Prob. Code § 13500

7. 189 Cal. App. 4th 1105, 117 Cal. Rptr. 3d (2010).

8. See *id.* at 1115-16.

9. See *id.* at 1112-1116.

1 property” that is received by the surviving spouse without probate  
2 administration.<sup>10</sup> The court’s analysis suggests that the surviving spouse’s liability  
3 extends to *any* property received from the decedent outside of probate.<sup>11</sup>

4 Thus, under the *Kircher* decision, the liability under Section 13551 extends  
5 beyond property that the surviving spouse is statutorily authorized to receive  
6 without probate administration under Part 2 of Division 8 of the Probate Code.

## 7 COMMISSION STUDY

8 The Commission is studying the liability rule in Sections 13550 and 13551,  
9 particularly the scope of the liability imposed by these provisions and the  
10 implications of the *Kircher* decision. After explaining the scope of the study, the  
11 Commission reports its findings regarding legislative intent, potentially conflicting  
12 liability rules, and other policy considerations.

### 13 **Scope of Study**

14 In this study, the Commission has been examining whether the liability rule  
15 stated in Sections 13550 and 13551 should be understood to impose liability for  
16 property that passes to a surviving spouse by NPT (as indicated by the analysis in  
17 the *Kircher* decision), not just liability for property that passes to a surviving  
18 spouse under the exception to probate administration established in Part 2 of  
19 Division 8. This tentative recommendation only addresses that issue.

20 The tentative recommendation does not address the broader question of whether,  
21 as a policy matter, property transferred by NPT *should* be liable for a decedent’s  
22 debts.<sup>12</sup>

### 23 **Legislative Intent**

24 The Commission considered whether the Legislature intended to have the  
25 liability rule of Sections 13550 and 13351 impose liability on a surviving spouse  
26 for property conveyed by NPT. In other words, the Commission sought to  
27 determine whether the Legislature intended the result that the court reached in  
28 *Kircher*.

29 The Commission found no evidence that the Legislature considered applying, or  
30 intended the liability rule to apply, to such property. To the contrary, the  
31 legislative history suggests that such an interpretation of the liability rule is in

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10. *Id.* at 1113.

11. See *id.* at 1113-14.

12. This broader question is discussed in a background report prepared for the Commission. See Nathaniel Sterling, *Liability of Nonprobate Transfer for Creditor Claims and Family Protections* (2010).

All staff memoranda and other Commission materials cited in this report are available on its website ([www.clrc.ca.gov](http://www.clrc.ca.gov)).

1 tension with prior legislative understanding and decisions regarding the liability of  
2 property conveyed by NPT.<sup>13</sup>

### 3 **Potentially Conflicting Liability Rules**

4 For certain NPTs (including a trust or a revocable transfer on death deed), the  
5 Probate Code includes specific liability rules applicable to *any* recipient of such a  
6 transfer, not just a surviving spouse.<sup>14</sup> Consequently, if Sections 13550 and 13551  
7 impose liability for NPTs, a surviving spouse recipient could be subject to two  
8 potentially applicable liability rules, which might impose different levels of  
9 liability.<sup>15</sup> Such a conflict would be problematic.

### 10 **Other Policy Considerations**

11 From a policy standpoint, imposing liability on a surviving spouse for NPTs  
12 under Sections 13550 and 13551 could have another adverse consequence: It  
13 could sometimes cause a surviving spouse to bear an inequitable share of liability.

14 For certain NPTs, the law does not provide a rule of liability.<sup>16</sup> A surviving  
15 spouse could therefore be liable under Sections 13550 and 13551 for receiving  
16 such an NPT, while a non-spouse recipient would not be subject to liability. The  
17 surviving spouse would thus have to bear a disproportionate burden of the creditor  
18 liability.

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13. See generally 32 *CEB Est. Plan Rep.* 85 (Dec. 2010).

In particular, the history of the California Multiple-Party Accounts Act suggests that the Legislature understood joint tenancy accounts to pass free from liability and, at that time, did not want to disrupt that treatment. See *Recommendation Relating to Non-Probate Transfers*, 15 Cal. L. Revision Comm'n Reports 1605, 1654 (1980) (Commission comment to proposed Prob. Code § 6107 provides that the section “changes former law with respect to a true joint tenancy account. It was the former rule that the surviving joint tenant took the funds free of the claims of the deceased joint tenant’s creditors.”); CLRC Staff Memorandum 1981-26, p. 1 (“The bill [addressing deposit accounts and other nonprobate transfers] was not approved by [the Assembly Committee on Judiciary] because the chairman and at least one other member strongly objected to the provision of the bill which would change the existing law that a surviving joint tenant takes funds on deposit in a joint deposit account free of claims of creditors of the deceased joint tenant.”); CLRC Staff Memorandum 1982-36, p. 1 (“At the last meeting, the Commission was in general agreement that we should reintroduce the nonprobate transfer bill (AB 325) that was killed in the Assembly Judiciary Committee in 1981. ... The proposed legislation is in the same form as the last amended version of AB 325, except for the omission of provisions relating to rights of the decedent’s creditors in a joint account, P.O.D. account, or Totten trust account (Sections 6107 and 6107.5 in AB 325). These provisions were not acceptable to the members of the Assembly Judiciary Committee.”).

14. See Prob. Code §§ 5674(b) (liability of a revocable transfer on deed beneficiary), 19402(b) (liability of a trust distributee).

15. Compare Prob. Code § 13550, 13551 with *id.* § 19402 (personal liability of trust distributee limited to pro rata portion of creditor’s claim).

16. See, e.g., discussion of the Multiple-Party Accounts Act *supra* note 13.

1 This result is inconsistent with the family protection policies in the Probate  
2 Code, which generally provide more favorable treatment for a surviving spouse  
3 (and children) than other recipients of the decedent’s property.<sup>17</sup>

4 Moreover, for NPTs, a surviving spouse does not have an opportunity to claim  
5 family protections (e.g., probate homestead) that would be available in probate  
6 administration.<sup>18</sup> Thus, the liability rule announced in *Kircher* would impose  
7 creditor liability as in probate administration, without providing the probate family  
8 protections. This result would appear to be at odds with the legislative policy for  
9 allocating a decedent’s property where creditors are owed payment, but the family  
10 is in need of financial protection.

11 TENTATIVE RECOMMENDATION

12 For the foregoing reasons, the Commission tentatively recommends that Section  
13 13551 be amended to impose liability for the decedent’s property only when it  
14 would, absent the statutory authorization for the surviving spouse to receive the  
15 property without administration, be subject to probate administration.<sup>19</sup>

16 The Commission also recommends conforming changes to continue the existing  
17 liability treatment for community property with a right of survivorship.<sup>20</sup>

18 REQUEST FOR COMMENT

19 The Commission seeks public comment on all of the proposed statutory changes  
20 included in this tentative recommendation.<sup>21</sup> Input from knowledgeable persons is  
21 critical in the Commission’s study process, and may cause the Commission to  
22 substantially revise its proposal. Comments supporting the proposed approach are  
23 just as important as comments suggesting changes to that approach or expressing  
24 other views.

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17. See generally Prob. Code §§ 6500-6615.

18. See Prob. Code §§ 6520-6528.

19. See proposed amendment to Prob. Code § 13551 & Comment *infra*.

20. See proposed amendment to Civ. Code § 682.1 & Comment *infra*.

Currently, Civil Code Section 682.1 provides that “Chapter 3 (commencing with Section 13550) ... of Part 2 of Division 8 of the Probate Code” applies to community property with a right of survivorship (“CPWROS”). Sections 13550 and 13551 are contained within this chapter. Thus, it appears that CPWROS is currently subject to the liability rule in Sections 13550 and 13551. The proposed amendment to Civil Code Section 682.1 is intended to preserve the existing application of the liability rule to CPWROS.

21. Comments may be submitted by mail to the address on the cover page of this tentative recommendation or by email to [kburford@clrc.ca.gov](mailto:kburford@clrc.ca.gov).





1 (b) This section does not apply to a joint account in a financial institution to  
2 which Part 2 (commencing with Section 5100) of Division 5 of the Probate Code  
3 applies.

4 (c) This section shall become operative on July 1, 2001, and shall apply to  
5 instruments created on or after that date.

6 **Comment.** Section 682.1 is amended to make clear that Probate Code Section 13551 applies to  
7 community property with a right of survivorship, notwithstanding the addition of language that  
8 limits the application of that section. The added language provides that Section 13551(b) and (c)  
9 only apply to property that passes to a surviving spouse without administration under Part 2  
10 (commencing with Section 13500) of Division 8 of the Probate Code.

11 This section is also amended to add paragraph numbers to subdivision (a).

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