

Memorandum 2020-17

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

This memorandum continues the Commission's¹ study of "nonprobate transfers," focusing on the possible application of "family protections" to such transfers (these terms will be explained below).

In this memorandum, the staff is seeking Commission decisions on whether to proceed with work on this topic. And, if so, the staff seeks guidance on which specific family protections or nonprobate transfers should be addressed in the Commission's reform effort.

Unless otherwise indicated, all statutory citations in this memorandum are to the Probate Code.

BACKGROUND

In general, if a person dies having executed a will ("testate") or with no instrument to govern the disposition of that person's property ("intestate"), the decedent's property will be administered in a judicially-supervised process known as "probate."

Probate administration is similar in effect to a bankruptcy proceeding. It is a judicial proceeding designed, among other functions, to marshal the decedent's property, discharge the decedent's debts, and pass the decedent's property to beneficiaries with clear title and free of creditor claims. The system also provides family protections, such as a family allowance or a probate homestead, to ensure that the decedent's dependents are not left destitute.

All this comes at a cost, both in time and expense. A probate estate can rarely be closed more quickly than six months after the

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.

decedent's death. Even for a routine estate, nine months is more typical.

Probate fees include filing fees, personal representative and legal fees, and appraisal fees. The cost of probate administration is based on the value of the estate. A reasonable estimate is that probate costs consume 5 to 6 percent of a modest estate.²

Some instruments allow the transfer of property on death outside of a probate proceeding. These instruments are referred to as "nonprobate transfers" (or "NPTs"). Using NPTs, property can be transferred to beneficiaries without the cost and delay of probate.

The revocable inter vivos trust is perhaps the most commonly used NPT. Trusts are generally more flexible than other NPTs. They can serve as a complete estate plan, addressing essentially all of the decedent's property and permitting complex arrangements for the management and disposition of property on death.

Other NPTs typically only govern a single piece of property and do not allow for complex distribution plans. Such NPTs allow the decedent to designate the person or people who will receive a single asset upon the decedent's death. These NPTs include joint tenancy survivorship; the revocable transfer on death deed; pay on death accounts in financial institutions; transfer on death registration of securities, vehicles, and mobile homes; and beneficiary designations in life insurance, retirement accounts, and other kinds of financial instruments.

The purpose of this study is to consider whether property transferred by NPT should be subject to some of the obligations that govern property in probate. The study was prompted by a 2010 background report ("NPT Report") prepared by the Commission's former Executive Secretary, Nathaniel Sterling.³ That report addressed two related questions:

- (1) To what extent should property transferred by NPT be liable for a decedent's debts (as it would be in probate)?
- (2) Should such property be subject to family protections (as it would be in probate)?

Beginning in 2017, the Commission studied a reform, based on the Uniform Probate Code, to address both of these issues. The reform would allow property subject to an NPT to be pulled into a probate proceeding and the probate rules for payment of debts and family protections to be imposed on the property. In 2018,

2. Nathaniel Sterling, *Liability of Nonprobate Transfer for Creditor Claims and Family Protections*, 7 (2010), available at <http://www.clrc.ca.gov/pub/BKST/BKST-L4100-NPT-Creditors.pdf>.

3. See *id.*

the Commission decided against pursuing that reform.⁴ Instead, the Commission directed the staff to “prepare a memorandum discussing the possible application of probate family protections to nonprobate transfers, including trusts.”⁵ This memorandum begins discussion of that topic.

FAMILY PROTECTIONS

In probate, there are several provisions that protect the decedent’s surviving spouse (or registered domestic partner⁶) and minor children (hereafter “protected family members”).

Effectively, California law does not permit a decedent to leave protected family members in a financially precarious situation — either by leaving effectively all property to others or leaving behind substantial debts that could consume property needed by the family. According to the NPT Report, “[t]he 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).”⁷

The different kinds of family protections afforded in probate are summarized below.

Protections During Probate Proceeding

During the course of a probate proceeding, the law offers certain protections for the decedent’s protected family members:

- Protected family members are entitled to temporarily retain possession of the family dwelling, certain necessities, and other property of the decedent that is exempt from the enforcement of money judgments.⁸ This protects these family members from being dispossessed of this essential property through, at a minimum, the initial stages of the probate proceeding.

4. See Minutes (April 2018), p. 3. The Commission also decided to pursue a reform to address a narrow problem that had been identified in the Commission’s study. Work on that topic is complete. See *Nonprobate Transfers: Liability of a Surviving Spouse Under Probate Code Sections 13550 and 13551*, 46 Cal. L. Revision Comm’n Reports 11 (May 2019).

5. See Minutes (April 2018), p. 3.

6. Going forward, this memorandum uses “surviving spouse” to refer to either a surviving spouse or registered domestic partner. Under California law, registered domestic partners have the same rights, protections, and benefits and the same responsibilities, obligations, and duties as spouses. See Fam. Code § 297.5.

7. NPT Report, p. 139.

8. See Section 6500.

- Protected family members are also entitled to a “reasonable” family allowance, as necessary for their maintenance.⁹ The allowance provides a source of income during the course of the probate proceeding.

Protections Extending Beyond Probate Proceeding

The law also offers family protections that extend beyond the probate proceeding. These protections can operate to transfer property to protected family members, regardless of whether the property is needed to pay creditors or the decedent intended that it go to someone else. Such a transfer can be permanent or for a specified, but potentially lengthy, period of time (during which time the family enjoys an inalienable use right). These family protections are described briefly below:

- *Exempt Property Set-Aside*: on petition, the court can set aside for the family all or part of the decedent’s property that is exempt from the enforcement of a money judgment. The set-aside is prioritized over the rights of the decedent’s creditors and other beneficiaries.¹⁰
- *Probate Homestead*: on petition, the court can grant the family a long-term occupancy right in a dwelling. The occupancy right is prioritized over the rights of the creditors and other beneficiaries.¹¹
- *Small Estate Set-Aside*: If the value of the decedent’s probate estate¹² is no more than \$85,900, the court must set aside the estate for the family, unless the court finds that doing so would be inequitable under the circumstances. This set-aside is prioritized over the rights of other beneficiaries, but the set-aside property remains liable for creditor claims.¹³
- *Omission of Spouse or Child*: Where the decedent’s estate plan document (will or trust) was prepared prior to marriage or the birth/adoption of a child and the document does not provide for the spouse or child, the omitted spouse or child is entitled to an intestate share of the estate, unless the omission was intentional. The share will often be satisfied from property intended for other beneficiaries. However, the share would seem to be subject to

9. The family allowance has a broader class of protected family members. See Section 6540. For the family allowance, certain dependent adult children are also entitled to the allowance, while other dependent adult children and dependent parents are eligible to receive an allowance at the court’s discretion.

10. See Sections 6510-6511; see also NPT Report, pp. 137, 142-143.

11. See Sections 6520-6528; see also NPT Report, pp. 138, 143-144.

The court may impose conditions on the grant of a probate homestead, including a requirement that the person benefitted by the homestead assign other property to the person who receives title to the property. Section 6523(b)(2). This allows the court some room to soften the blow on the person whose property will be burdened by the probate homestead.

12. The estate value expressly excludes the value of a probate homestead interest. Section 6602.

13. See Sections 6600-6615; see also NPT Report, pp. 138, 146-148.

creditor liability, as part of the decedent's estate, before it is distributed.¹⁴

Earlier in this study, the Commission decided to exclude the small estate set-aside and the omitted spouse/child share from its reform effort.¹⁵ In light of that decision, those family protections will not be discussed further in this memorandum.

GENERAL ISSUES

There are a few general issues that should be taken into consideration, before turning to an examination of specific types of family protections. They are discussed briefly below.

Expansion of Probate and/or Protection Without Probate

The staff sees two different ways in which family protections might be extended to property that is governed by an NPT.

First, the law could require that family protections be sought in a probate proceeding. The probate court could be given jurisdiction to impose family protections on property outside the probate estate. If a probate has not otherwise been opened, the family could open a probate for the purpose of seeking family protections. With the expansion of the court's jurisdiction to cover NPT property, this reform would likely rely on the existing statutory framework governing these protections.

Second, if a probate would not otherwise be required, the law could allow for the imposition of family protections on NPT assets, outside of a probate proceeding. This would extend the scope of family protections wholly beyond the probate administration process. Expanding the application of the protections in this manner will require addressing a number of implementation issues. For instance, making the protections that apply during the probate proceeding applicable when there is no probate will require, at a minimum, creating timelines

14. See Sections 21600-21630; see also NPT Report, pp. 138, 148-150.

Share is first satisfied from intestate property, if available. However, "[i]n a well-planned estate there is likely to be little property not disposed of by the will or trust." NPT Report, p. 149.

15. See Minutes (Sept. 2017), pp. 5-6.

For the small estate set-aside, the primary concern was that the inclusion of NPTs could cause the value of the property to exceed the "small estate" dollar threshold, thus preventing the use of this protection for a small probate estate. See Memorandum 2017-46, pp. 19-20.

For the omitted spouse/child protection, there are difficult practical questions about how to determine whether a spouse or child was omitted when looking beyond the decedent's primary estate plan (i.e., a will or trust) to potentially numerous, individual NPT instruments. See Memorandum 2017-46, pp. 20-22.

for the application of the protection that are independent of the timing of a probate proceeding.

The staff is not yet sure of all of the implications of this distinction, but it should be kept in mind as this study proceeds. It is unclear whether a reform should offer both of these alternative paths for seeking family protections.

Court Discretion

One of the key features of the existing family protections is that they involve an exercise of discretion by the judge overseeing probate. In some cases, the judge decides whether the family protection is needed. In other instances, the judge decides the extent or duration of the protection. In addition, when granting a probate homestead, the court has discretion to impose conditions, including a requirement that the person benefitted by the homestead assign other property to the person burdened by it.¹⁶

Where the decedent's property is governed by a number of individual NPTs, it may be more difficult for the court to get an understanding of the decedent's overall property distribution plan. In this case, it may be harder for a court to determine whether family protections are appropriate in a particular case.

For instance, in deciding whether to grant family protections, a court may want to assess whether protected family members' needs have been adequately met by the decedent's property distribution plan. For example, does a surviving spouse need a probate homestead, if the decedent otherwise provided more than enough cash to the surviving spouse to obtain housing?

Assessing the totality of the decedent's property and protected family members' needs may be difficult if the decedent's property includes a scattered collection of single-asset NPTs. Unless the court can gather information about the existence and effect of all of those NPTs, it may have only a partial understanding of the protected family members' situation.

That problem may be less acute if the decedent's estate is governed by a comprehensive trust. In that situation, the court may have access to the same breadth of information that would be available in probate.

Reform Limited to Certain NPTs

As noted above, where the decedent's property is subject to a variety of single-asset NPTs, the application of family protections may be more challenging. It could be harder for the family and the court to gather information about all of the

16. See *supra* note 11.

NPTs. Unless the different assets can be found and the court can exercise jurisdiction over them, it may be difficult to fairly allocate the burden of the family protection among the decedent's beneficiaries (as in the family allowance, discussed later).

Given these challenges, the Commission could consider focusing its initial reform effort on only certain NPTs.

For instance, the Commission could consider extending family protections to apply to trusts. As noted earlier, a trust can serve as a complete estate plan, applicable to a trustor's entire estate, with complex rules for administration and disposition of assets. Trust administration is also similar to probate in that it is a process for gathering, managing, and distributing the decedent's estate as a whole. Trusts are administered by a trustee who is responsible for managing the trust property and distributing it according to the trust's terms.¹⁷

The Commission could also consider focusing its initial effort on NPTs that could serve as a probate homestead. As discussed later in this memorandum, the probate homestead is perhaps the most significant family protection. Expanding the probate homestead to apply to NPTs may only affect a subset of NPT property — property that could serve as a dwelling. In many situations, there would likely be only one or two properties owned by the decedent that could serve as a probate homestead.

PROTECTIONS DURING PROBATE PROCEEDING

These family protections help to ensure that the family's living situation is not immediately disrupted while the decedent's estate is being administered.

For these protections (i.e., family allowance, temporary possession), the law provides those protections as a matter of course. The family is "entitled" to receive the protection.¹⁸ However, the court has a role in determining how long the protection should be provided and, in the case of the allowance, determining a reasonable amount.¹⁹

17. See generally Sections 16000-16015; http://www.scscourt.org/self_help/probate/property/probate_trusts.shtml.

18. See Sections 6500, 6540(a).

19. See Sections 6500 (family may remain in possession of certain property for specified period "or for such other period as may be ordered by the court for good cause on petition therefor"), 6540 (family is entitled to "reasonable" allowance), 6543(b) (family allowance continues "until modified or terminated by the court or until such time as the court may provide in its order.").

These protections seem to prioritize the temporary stability of the family's living situation over other competing concerns (e.g., the interest in quick distribution and maximizing the value of the decedent's estate).

Temporary Possession of Exempt Property

This protection entitles the family 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.²⁰

Thus, the family is entitled to remain in possession of the relevant property until a specified date (i.e., 60 days after the filing of the inventory in probate).²¹ The court can grant a longer duration for good cause.²²

Duration

For probate property, this protection exists, by operation of law, for an initial period extending to 60 days after the inventory is filed. That initial period is subject to extension by court order. Where there is a probate proceeding, this protection could be expanded to cover NPT property for the specified period.

In the absence of a probate proceeding, a similar approach could be taken if the protection were applied to NPTs. The protection could apply by operation of law for an initial period, subject to the possibility of extension by court order. However, in the absence of a probate proceeding, how long should the protection last? ²³

20. Section 6500.

Although this provision is not expressly limited to property in the decedent's probate estate, the statutory context suggests that this protection is intended to be limited to such property. For this reason, the analysis presented here assumes that this protection applies only to probate property. If the scope of this protection is understood differently, the staff would welcome comment on this issue.

21. See *id.*

22. *Id.*

23. See Sections 8000 (petition to open probate and appoint personal representative can be filed anytime after a decedent's death), 8003 (hearing on petition should be 15-45 days after the petition is filed), 8400 (personal representative has no powers until the representative is appointed and letters are issued), 8403 (letters cannot be issued until oath is filed; oath may be filed anytime after the petition is granted), 8800 (inventory shall be filed by the personal representative within four months of the issuance of letters, unless court provides additional time based on circumstances of the case).

Scope of Exempt Property

The temporary right of possession only applies to property that is exempt from the enforcement of a money judgment. The exemptions from the enforcement of money judgments generally deal with necessities of life.²⁴

It may not always be clear whether a particular piece of property falls into that category. For example, the law exempts a personal vehicle; the exemption value is capped at \$3,325.²⁵ Suppose that a decedent died owning more than one vehicle and the decedent's vehicles are left in the family's possession. Which vehicle would be subject to the right of temporary possession?

Presumably, in probate, one could look to the court for answers to such questions. Even though court action is not required to establish the right to temporary possession, a court might be called on to adjudicate its scope.

However, given the temporary nature of this protection, it seems unlikely that the personal representative would petition the court to dispossess the family of possibly exempt property during the initial period of protection. During that time, it seems likely that any disagreement as to whether certain property is protected would be resolved, as a practical matter, in favor of the protected family members continuing in possession of the property.

For NPTs, it may be worthwhile to consider simplifying the rule. It may be difficult for laypeople to understand the effect of the existing temporary possession rule, because it depends on a technical determination of what property is exempt from the enforcement of a money judgment. Both the family and beneficiaries may benefit from clarity on what property is subject to this protection. If the Commission is concerned about this issue, it might be possible to avoid relying on the concept of "exempt property" for this protection. Rather than continue the exact scope of the existing protection, the protection could be recast in more understandable language. For example, the rule could apply to the "family dwelling, wearing apparel of the family, household furniture, the family's primary vehicle, and any tools of the trade." In this way, the protection could cover similar ground as the existing rule, but without as much scope for misunderstanding and dispute. If the Commission is interested in this approach, the staff will look more

24. See generally Tentative Recommendation Proposing The Enforcement of Judgments Law, 15 Cal. L. Revision Comm'n Reports 2001, 2075 (1980) ("In general, laws exempting property from the enforcement of a money judgment are intended to protect an amount of property sufficient to support the judgment debtor and the judgment debtor's family and to facilitate the financial rehabilitation of the judgment debtor."); Judicial Council of California, Current Dollar Amounts of Exemptions from Enforcement of Judgments, Form EJ-156 (rev. April 1, 2019), p. 2, available at <http://www.courts.ca.gov/documents/ej156.pdf>.

25. See Code Civ. Proc. § 704.010; see also *supra* note 24 (Form EJ-156).

closely at the exemptions from the enforcement of money judgment and discuss the composition of this list in a future memorandum.

Discussion

To extend this protection to cover exempt property subject to NPTs, the Commission will need to resolve some questions about the scope of the protection. For instance, it is unclear what the default duration of the protection should be in the absence of a probate proceeding. Should the family be allowed to seek extensions of the duration? If so, should there be a limit on how long the temporary protection can extend? Would the duration of the family's right to temporary possession of NPT property be different if there happens to be a probate (i.e., would the temporary possession right for NPTs run according to the probate timelines or the timelines applicable in the absence of a probate)?

If the Commission is interested in applying this protection to NPTs, the Commission may want to consider simplifying the scope of the kinds of property governed by the protection, as described above.

With all of those considerations in mind, the Commission should decide whether it wishes to pursue a reform to apply the temporary possession rule to NPT property. If so, it should try to address as many of the issues discussed above as is practicable at this time. The remainder would be brought back in a future memorandum.

Family Allowance

Certain family members are entitled to receive a "reasonable family allowance out of the estate as is necessary for their maintenance according to their circumstances."²⁶ "The family allowance in effect is a continuation of the decedent's support obligation for a limited period after the decedent's death."²⁷

In probate, the funds required to pay the family allowance would be drawn from the estate as a whole, following the general rules for abatement priority as between different statutory classes of gifts.²⁸ Notably, the family allowance is prioritized for payment before creditor claims in probate.²⁹

There is an argument that the family allowance is an inextricable component of the probate administration process — that its purpose is to provide support for

26. Section 6540(a).

27. NPT Report, p. 145 (citing Family Code Section 4337).

28. Sections 11420, 11421, 21400-21406; see also NPT Report, pp. 145-146.

29. See Section 11420; but see *In re Silverman's Estate*, 249 Cal. App. 2d 180 (1967) (family allowance paid to surviving spouse is not exempt from creditors of the surviving spouse).

protected family members while they are waiting for the end of probate and the distribution of their inheritance.³⁰

Viewed that way, the allowance may be understood as a cost of probate administration. If so, one could argue that NPTs should not be made liable for a share of the allowance.³¹ One of the key purposes of an NPT is to avoid burdening property with the cost of probate administration. If NPTs are not liable for general costs of probate administration, why should they be liable for the family allowance during probate?

The same basic issue was considered by the Commission in its recent studies of the revocable transfer on death deed and statutes that permit, in limited circumstances, estate property to pass without administration. In both cases, the Commission decided that property received outside of probate should not be liable for the family allowance, because the allowance is effectively a cost of administration.³²

The staff recommends that the Commission follow the same approach here. The family allowance should not be made applicable to NPT property. If the Commission agrees, then there is no need to resolve the various questions that would need to be answered if the protection were made applicable to NPTs. However, if the Commission would like to study the possibilities further, the staff will address the main issues in a future memorandum.

PROTECTIONS THAT EXTEND BEYOND PROBATE PROCEEDING

The protections that extend beyond the probate proceeding (i.e., the probate homestead and exempt property set-aside) can provide the family with more stability over time, helping to ensure that the family remains housed and receives other necessities of life over the long term.

For these protections, the court has discretion to weigh the equities and determine whether the protection should be granted at all.³³ The court can assess the family's situation and what application of the family protections might mean for other beneficiaries and creditors. Granting one of these protections may mean

30. See Memorandum 2020-4, pp. 16-17.

31. However, the NPT Report suggests that, under current law, a trust and other NPT property may be assessed to pay for the allowance where the probate estate is inadequate. See NPT Report, pp. 145-146.

32. See Minutes (Sept. 2019), p. 10; Minutes (Jan. 2020), pp. 4-5; see also Memorandum 2019-46, p. 18; Memorandum 2020-4, pp. 16-17.

33. See Sections 6510, 6520.

that a creditor does not get paid or a beneficiary does not receive the decedent's intended gift.

Exempt Property Set-Aside

The exempt property set-aside allows the court to set aside certain property to be transferred to protected family members, rather than the persons who would receive the property under the decedent's estate plan. This protection only applies to property that is exempt from the enforcement of a money judgment.³⁴

The protection "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."³⁵

The NPT Report notes that "an award under Section 6510 is permanent."³⁶ Given that, this set-aside would grant full ownership of such property to the family, over the rights of the people who would otherwise receive the decedent's property. Since this property is set aside from the probate estate, this property would presumably not be subject to claims made by the decedent's creditors.³⁷

Determining Whether the Family Should Receive Set-Aside

The existing exempt property set-aside statute does not establish standards for the court to use in deciding whether to exercise its discretion to set aside property.³⁸ The case law suggests that courts will consider whether the family received other property and whether the set-aside would impair payment of estate expenses or creditor claims.³⁹

34. Section 6510.

35. Section 6510 Comment.

36. NPT Report, p. 142.

37. See NPT Report, p. 137. This property would presumably only be protected from recipient's creditors to the extent of the exemptions from the enforcement of money judgments. See *supra* note 24.

38. See Sections 6510, 6511.

39. See, e.g., *In re Jones' Estate*, 78 Cal. App. 2d 265, 267 (1947) ("His widow was named as beneficiary in his insurance policies and has received payment of the death benefit in one issued by an insurance company and is receiving regular monthly payments from the Government. She is also the surviving co-owner of the Series E United States War Savings Bonds accumulated by the couple. The funeral expenses and some of the expenses of the last illness of deceased have not been paid which is also true of the expenses of administration of his estate. We can see no abuse of discretion on the part of the trial judge in retaining in the estate the small amount of exempt personal property in question here. This is especially true as it is probable that the allowance made to the widow will exhaust the major portion of the assets of the estate leaving little or nothing for distribution after the funeral expenses, the expenses of the last illness and the expenses of administration are paid.") (citation omitted); *In re Mattingly's Estate*, 19 Cal. App. 2d 550, 552 (1937) ("The testatrix bequeathed her personal property to petitioner with the exception of certain articles of furniture which she bequeathed to her two daughters. Petitioner asked the trial court to set apart to him as surviving spouse the articles of furniture which had been bequeathed to the daughters on the ground that the furniture was exempt from execution. The court, upon sufficient evidence,

In a probate proceeding, the probate court may have much of the decedent's estate before it, and it should be possible for the court to make the necessary assessment. Giving the court jurisdiction to reach beyond the probate estate and set aside NPT assets should not make it more difficult for the court to make its decision.

If the exempt property set-aside were made applicable wholly outside of probate administration, a court would need to order particular property to be set aside for the protected family members. Outside of a probate proceeding, the court's access to information about the decedent's overall property distribution may be very different. For a comprehensive trust, the court could look to the trust estate in assessing whether the equities support setting certain property aside for the protected family members. However, if the decedent's property is governed by an array of single-asset non-trust NPTs, it may be more difficult for the court to gain an understanding of the whole of the decedent's property distribution plan. Without that understanding, it could be more difficult for a court to assess whether a set-aside is appropriate.

Property Subject to Set-Aside

This protection allows for the set aside of "property of the decedent exempt from enforcement of a money judgment, other than the family dwelling."⁴⁰ Because the protection would be administered by a court, there should be no problem of uncertainty as to whether a particular asset is exempt property that could be subject to the protection. The court would make that determination.

As indicated, this set-aside only affects exempt property. The cost of the protection is not spread across the decedent's beneficiaries (as it would be in funding the family allowance). Instead, only the beneficiaries whose gifts included exempt property could be affected. For this reason, it would not be necessary to identify all NPT property, in order to avoid unfairly burdening some NPT beneficiaries at the expense of the other beneficiaries.

Discussion

The staff sees no obvious downside to extending the exempt property set-aside to apply to NPT property. Doing so would be consistent with the existing policy

found that petitioner's home 'is completely, adequately and conveniently furnished without the personal property' which is the subject of the petition.").

40. Section 6510.

of providing protected family members with certain important necessities, notwithstanding the effect on creditors and other beneficiaries.

However, in practice, a court may face difficult questions about whether the protection should be granted in situations where the bulk of the decedent's estate is governed by non-trust NPTs. The court could have difficulty determining the equity of setting aside particular property without a broader understanding of the decedent's overall estate and the protected family members' needs. That problem could perhaps be addressed by making clear that a court is free to decide against setting certain property aside, if it feels that it lacks enough information to determine the equitable effect of doing so. This would be less than a full implementation of the set-aside policy, but it would be an improvement over the status quo. At least in some cases, the protection could be applied to NPT property where doing so is clearly appropriate.

The Commission needs to decide whether to continue work on applying the exempt property set-aside to NPT property.

Probate Homestead

"The purpose of the probate homestead set-aside is to provide a place for the decedent's surviving family members to reside, *protected from creditor claims and the rights of heirs and legatees.*"⁴¹

The probate homestead does not convey permanent ownership of the property at issue, but rather an occupancy right for a limited, but potentially lengthy, period of time. The probate homestead right cannot extend beyond the life of the surviving spouse or, for a child, the minority of the child.⁴²

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.

Title to the property passes to the decedent's heir or devisee upon distribution of the estate, subject to the possession and use right created by the probate homestead.⁴³ In other words, the heir or devisee still receives title to that property, but it is burdened by a court-created use right, which can extend for many years.

41. Craig L. Judson, Sharon M. Nagle, & Ruth A. Phelps, *Statutory Protections for Family Members* § 17.18, in *California Decedent Estate Practice* 2d. ed. (Cal. Cont. Ed. Bar. 2020) (emphasis added).

42. Section 6524; NPT Report, p. 143.

43. See Section 6524.

Homestead Exemption Versus Probate Homestead

The probate homestead is not the only protection that the law offers for a homestead. The Code of Civil Procedure also provides an exemption from the enforcement of a money judgment for a homestead. However, the operation of a probate homestead is quite different from the homestead exemption offered in the Code of Civil Procedure. The differences in these two protections are discussed in more detail below.

The Code of Civil Procedure provides a homestead exemption for judgment debtors.⁴⁴ This homestead exemption is quite different from the probate homestead in that the exemption only protects a specified dollar amount of equity in the home. Effectively, a creditor with a lien cannot foreclose on a home unless the equity in the property exceeds the homestead exemption amount and the amount of the liens and encumbrances on the property.⁴⁵ Thus, the creditors must be able to have their claims fully satisfied from the property's proceeds after the homestead exemption amount is deducted.

The probate homestead, on the other hand, creates a use right in a particular piece of property. The use right is not absolute; it is liable for the secured claims against the property at the time of the decedent's death.⁴⁶ Other than that, however, the use right is *not* subject to creditor claims (including claims of the creditors of the decedent, the recipient of the probate homestead, and the successor to the property subject to the probate homestead).⁴⁷

If a probate homestead is granted over a property that the decedent sought to transfer by NPT to someone other than a protected family member, the burden on the intended recipient could be significant (i.e., a property that would have been owned outright is now subject to a potentially lengthy use right).

Properties That Could Be Subject to Probate Homestead

Existing law does not appear to limit probate homesteads to real property. It appears that a probate homestead could be granted over personal property that is

44. See Code Civ. Proc. § 704.730(a) (depending on the circumstances, the homestead exemption amount is either \$75,000, \$100,000, or \$175,000).

45. See Code Civ. Proc. § 704.800(a) ("If no bid is received at a sale of a homestead pursuant to a court order for sale that exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances on the property, including but not limited to any attachment or judgment lien, the homestead shall not be sold and shall be released and is not thereafter subject to a court order for sale upon subsequent application by the same judgment creditor for a period of one year.").

46. However, the use right is exempt to the extent of the homestead exemption amount provided in the Code of Civil Procedure. Section 6526(a).

47. Section 6526.

or could be used as a dwelling (e.g., a mobile home or boat). Thus, there are several kinds of NPTs that could be affected by a probate homestead, if it were made applicable to NPTs — a trust, revocable transfer on death deed, joint tenancy, or a vessel or mobile home registered in joint or beneficiary form.

If there is only a single property owned by the decedent that could serve as a probate homestead, the court can simply determine whether a probate homestead should be granted. This would be relatively straightforward.

If, however, there are multiple pieces of property that could serve as a probate homestead, existing law establishes a prioritization system to be used by the probate court in deciding which property should serve as the homestead.⁴⁸ In making this determination, the court considers the entirety of the decedent's probate estate, the liabilities associated with each of the properties that could serve as a homestead, creditor claims, the family's needs, and needs of other intended beneficiaries.⁴⁹

Selecting Between Multiple Properties

If the decedent owned multiple residences, the court must decide which one to burden with the probate homestead. Making that decision requires consideration of many factual questions. It is probably most straightforward to make that decision in a proceeding where the court has access to and information about the different properties held by the decedent.

As such, the court's determination would likely be easiest in a situation where the decedent had either a will or trust that served as a comprehensive estate plan. In this case, the court should have ready access to the information about all of the different properties that could serve as a homestead. If, for instance, the decedent's property is governed by a trust, the court could look to the different properties in the trust estate and evaluate which of those properties should be burdened with the homestead.

Where each of the candidate properties is governed by a different NPT, the court's decision-making would likely be more difficult. In that case, it might be

48. See Sections 6522 (first preference should be given to community, quasi-community, and other property owned in common by the decedent and the person for whom the probate homestead will be set aside), 6523 (the court shall take into account liens and encumbrances on the property and claims of creditors).

49. See Section 6523(a) ("In selecting and setting apart the probate homestead, the court shall consider the needs of the surviving spouse and minor children, the liens and 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.").

challenging for the court to gather enough information about the overall state of affairs. Of course, a beneficiary who stands to have a piece of property burdened by a probate homestead, potentially for decades, would have a strong incentive to locate information that weighs against burdening that beneficiary's property and providing it to the court. In this way, the adversarial process might work to provide the court with the information that it needs. However, using the adversarial process could impose considerable burdens and costs on an individual beneficiary, particularly considering that those costs would be in addition to the significant diminution in value of the beneficiary's gift if a homestead is imposed.

Conditions on Probate Homestead

In probate, a court that is creating a probate homestead may impose "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."⁵⁰ It is not clear whether a court could use this authority to make other changes to the decedent's intended dispositions, in order to lighten the burden created by the probate homestead (e.g., by taking some property from other heirs or devisees and giving it to the heir or devisee burdened by the probate homestead, in order to spread the burden across the decedent's estate). **The staff invites comment on whether that is a common or accepted practice.**

If that kind of burden spreading is permitted, it would be much easier to achieve when dealing with a trust that serves as a comprehensive estate plan (because all assets are administered together). It would be harder to achieve that kind of burden-spreading if a significant part of the decedent's property passes pursuant to a number of separate non-trust NPTs.

Discussion

Overall, the staff believes that the policy for providing a probate homestead would apply equally regardless of whether the property at issue passed through or outside of probate.

If the Commission wants to expand the scope of family protections, the expansion of the probate homestead would have the greatest impact. The probate homestead is, perhaps, the most significant family protection, both in terms of its economic impact and importance for the family's stability.

50. Section 6523(b)(2).

The Commission Comment to this section states that "[t]his section expressly authorizes the court to condition the homestead on any terms that appear proper to the court."

Allowing for this protection in the absence of an administration proceeding may require some adjustment to ensure that the court can reach any properties that could be subject to the probate homestead and determine which is best suited to serve as the homestead.

As noted earlier, the staff is unsure whether an administration proceeding may allow for the burden of the probate homestead to be distributed among other property recipients. If so, the Commission may need to consider whether the burden of this protection could somehow be allocated among NPT beneficiaries in the absence of an administration proceeding.

NEXT STEPS

The Commission needs to decide whether or not to work on applying each of the family protections discussed above to NPT property.

If so, the staff will develop the issues more fully, working toward language for inclusion in a tentative recommendation. It would be helpful if the Commission could make provisional decisions on the scope and implementation issues discussed above. That would give the staff a better foundation for its further work on these matters.

Respectfully submitted,

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