

Memorandum 2020-37

**Nonprobate Transfers: Creditor Claims and Family Protections
(Stakeholder Comment)**

In 2018, the Commission¹ decided to “consider the possible application of family protections to nonprobate transfers [or NPTs²].”³ This topic was introduced at the Commission’s May 2020 meeting in Memorandum 2020-17. When considering that memorandum, the Commission decided to defer consideration of the ultimate question of whether to proceed in earnest with work on the topic and “directed the staff to seek comment from stakeholder groups on the need for and practical consequences of extending the application of probate family protections to nonprobate transfers.”⁴

This memorandum first briefly describes key concepts for this topic and then presents the stakeholder comment received. Finally, the memorandum presents questions for the Commission about whether and how to proceed with work on this topic.

Unless otherwise indicated, all citations to statutory provisions are to the Probate Code.

INTRODUCTION

In probate, the law provides certain protections for the family that can override the decedent’s plans or the rights of the decedent’s creditors.⁵

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. For the purposes of this memorandum, “NPT” refers to transfers of property owned or controlled by a decedent 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 probate estate without administration. See Prob. Code §§ 13000-13660.

3. See Minutes (Apr. 2018), p. 3.

4. See Minutes (May 2020), p. 6.

5. The Commission previously decided to limit its work on family protections, excluding the small estate set-aside and the omitted spouse/child share from its reform effort. See Minutes (Sept. 2017), pp. 5-6.

In some cases, the family protections provide the family with temporary relief during the course of the probate proceeding, ensuring that the family can remain in possession of certain property for a specified period or can receive a monetary allowance during the course of the probate proceeding.⁶ Other protections grant the family certain property (either outright or as recipients of a long-term use right) over the rights of other beneficiaries or creditors.⁷

Family protections can operate in a variety of different circumstances. Effectively, these protections, particularly the long-term protections, prevent the decedent's family from being left in a financially precarious position, due to the decedent's failure to adequately provide for the family (either intentionally or through neglect) or the decedent's creditor liability. In either case, the family can seek protections so that the family can receive property that would otherwise go to other beneficiaries or to pay creditors,⁸ but that is needed by the family to preserve its stability and financial well-being.

Outside of probate, however, those same family protections are not currently available. Where the decedent uses NPT instruments to convey certain property, those instruments result in the property being beyond the reach of the probate court and, in turn, the family, if they are in need of protections.

The study was prompted by a 2010 background report ("NPT Report") prepared by the Commission's former Executive Secretary, Nathaniel Sterling.⁹ With regard to the application of family protections to NPTs, the NPT Report provides:

California's limited family protection statutes address the conflict between the right of a decedent to create an estate plan that is honored by the law and the obligation of the decedent to dependents. The balance should not depend on the decedent's choice of transfer mechanisms but on underlying public policies. The existing statutes should be reviewed in that light.¹⁰

The fundamental question for the Commission is whether to proceed with a study with the goal of proposing a reform to apply probate family protections to NPTs.

6. See Sections 6500-6501 (temporary possession of family dwelling and exempt property); 6540-6545 (family allowance).

7. See Sections 6510-6511 (setting aside exempt property other than family dwelling); 6520-6528 (setting aside probate homestead).

8. The surviving spouse's ability to seek family protections could be limited if the surviving spouse has executed a valid waiver of the right to seek those protections. See Section 141(a).

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

10. *Id.* at p. 139.

STAKEHOLDER COMMENT

When the Commission last discussed this topic, the Commission raised questions about the practical effects of a reform applying family protections to nonprobate transfers. Concretely, the Commission was wondering whether the costs and consequences of the reform might outweigh its benefits.

The Commission directed the staff to seek comment on this issue to assist the Commission in determining whether to proceed with work on this study.

The Commission received informal input from the California Judges Association Probate Committee (“CJA Probate Committee”), the Executive Committee of the Trusts and Estates Section of the California Lawyers Association (“TEXCOM”), and the Probate and Mental Health Advisory Committee¹¹ of the Judicial Council (“Judicial Council Probate Committee”).¹² The comment received from the stakeholders is described below.

Frequency of Family Protections Being Sought in Probate Proceedings

The CJA Probate Committee noted that the court is “rarely asked” to provide family protections. The Committee queries why the availability of such little-used tools would be expanded.¹³

Similarly, TEXCOM conducted a poll of its members to determine how many of the practitioners had experience with family protections being sought. Just over a quarter of the practitioners, many of whom have decades of estate planning and probate experience, had ever dealt with family protections in their practice.

General Comment on the Value of the Reform

Generally, the CJA Probate Committee does not see the need for this reform.¹⁴ The CJA Probate Committee also points out that California law has been moving away from formality and court involvement in probate matters. Extending the current probate family protections to NPTs would require court involvement.

11. The Probate and Mental Health Advisory Committee members include “superior court judges; probate court attorneys, examiners, and investigators; attorneys who practice primarily decedents’ estate, trust, guardianship, conservatorship, or elder abuse law; persons knowledgeable in mental health or developmental disability law; a private fiduciary; and a county counsel, public guardian, or similar public officer familiar with guardianship and conservatorship issues.” See <https://www.courts.ca.gov/pm hac.htm#panel26344>.

12. The CJA Probate Committee provided their comments in a letter, which is attached as an Exhibit to this memorandum. See Exhibit pp. 1-2. TEXCOM and the Judicial Council Probate Committee provided their comments to the staff by phone.

13. See Exhibit p. 1.

14. See *id.*

The Judicial Council Probate Committee was uniformly opposed to applying family protections to NPTs. A major reason for the opposition is that the members of the committee view this reform as not necessary, noting that NPTs are often given to family members and that existing law provides adequate protections. Committee members also raised concerns that this reform would create more problems than it solves. They view it as likely to increase litigation, thereby burdening the courts and increasing probate costs, with little benefit to offset those costs and burdens.

Specific Concerns

The CJA Probate Committee was particularly concerned about the application of family protections to trusts, noting that most trusts provide sufficient support for the family.¹⁵ The Committee also noted that forcing the trust into court would defeat the trustor's intention to avoid probate.

The practitioners of TEXCOM did not raise concerns about the principle of applying family protections to NPTs. In one instance, a TEXCOM member identified a situation from their practice, with a trust as the primary estate planning device, where the availability of family protections would have been beneficial.

Some members of TEXCOM noted that there could be implementation challenges encountered in crafting a reform to apply family protections to NPTs.

The Judicial Council Probate Committee raised concerns about disrupting the decedent's estate plan. For example, the availability of family protections might allow the surviving spouse to seek NPT property specifically intended for other beneficiaries even if the decedent provided generously for the surviving spouse.

The committee members also pointed out transitional problems that could arise if the availability of family protections is expanded. The reforms could upend existing estate plans, requiring additional planning to be undertaken to ensure that the plans can achieve their intended result.

COMMISSION DECISION

The staff is seeking guidance from the Commission on a threshold question. Does the Commission want to continue work on this study or should it be shelved?

15. See *id.*

If the Commission concludes that the work should continue, then it would be helpful to know whether the Commission wants to proceed with a broad reform initially or take an incremental approach to address the issue.

For example, the study could focus on an initial, narrower reform, limited to giving a probate court authority to reach NPT assets in fashioning a family protection. Or, the reform could focus on a single type of NPT (e.g., a revocable trust) or family protection (e.g., the probate homestead).

How would the Commission like to proceed?

Respectfully submitted,

Kristin Burford
Staff Counsel



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NICOLE VIRGA BAUTISTA
EXECUTIVE DIRECTOR & CEO

August 6, 2020

To: California Law Revision Commission

From: California Judges Association

RE: Study L-4100

The California Judges Association Probate Committee met on August 3, 2020, to discuss a proposal from the Law Revision Commission regarding the expansion of probate family protections to nonprobate transfers.

The Committee had a number of concerns and questions. Because the Commission needs the Committee's response quickly, the Committee response is summarized below, in no particular order.

First, the Committee is interested in the need for such expansion. In the experience of the Committee members (cumulatively at least two dozen years in probate), the court is rarely asked to order a family allowance or homestead set-aside. Why would California expand such little-used tools?

Second, the Committee notes that the law of California has inexorably moved towards less formality and less involvement of the court in probate matters. Expanding family allowance and homestead matters would require more court involvement, because the court is called upon to exercise substantial discretion in setting amounts and terms for these matters. The end result is a process that delays non-probate post-death distributions and adds cost and complexity to what is supposed to be a straightforward matter. (Such provisions might also expand the workload of the court, raising the specter of an unfunded mandate.)

Third, it would be problematic to extend such family protections to trusts. Well-drafted trusts almost always provide for spouses and minor beneficiaries, so separate protections would not be needed; but if the trust failed to so provide, the trust would be forced into court to get the necessary ruling (and would defeat the intent of the trustor).

The Committee noted that if the proposed statutes simply provided an automatic homestead; or a delay in transfer of the Deed for a Revocable Transfer on Death for a specific period of time; or a set aside for a specific period of time expressly set forth in the statute, some of the concerns with the proposed legislation would be avoided.

The Committee did not focus on creditor's concerns, but noted that current law has creditor protections in place with regard to non-probate transfers

We thank you for reaching out to us for our feedback and we welcome any questions and further discussion.

Sincerely,

A handwritten signature in cursive script that reads "Erinn Ryberg".

Erinn Ryberg, Legislative Director
California Judges Association