

First Supplement to Memorandum 2017-23

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

The Commission¹ has received a comment from Attorney Brian L. Shetler, which is attached as an Exhibit to this memorandum.

Mr. Shetler raises concern about the *Kircher v. Kircher*² court's expansive reading of the personal liability rule in Probate Code Sections 13550 and 13551. In particular, Mr. Shetler recommends that the Commission propose limiting the liability rule "consistent with the legislative history to [property that] would have passed by will or intestacy through probate ... 'in California.'" Mr. Shetler suggests that a creditor should litigate the liability of "assets ... passing outside of California ... in that/those other jurisdictions where the other assets are passing."

While Mr. Shetler's comment focuses on the scope of the spousal liability rule in Probate Code Sections 13550 and 13551 and the *Kircher* decision, the Commission will need to contend with a related, broader question in this study — which nonprobate assets can and should be governed by a California nonprobate liability rule?

This issue is a complex one, which the staff cannot fully explore before the Commission's upcoming meeting. It will be addressed in more detail in future memoranda.

Respectfully submitted,

Kristin Burford
Staff Counsel

1. Any California Law Revision Commission document referred to in this memorandum can be. 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. 189 Cal. App. 4th 1105 (2010), *rev. denied*, 2011 Cal. LEXIS 1437.

EMAIL FROM BRIAN L. SHETLER
(05/03/17)

More and more decedent estates that involve assets in California also involve assets outside of California. Many other US states and foreign countries provide for the passage of beneficial interests and legal interests under a variety of processes – some as simple as the transferee paying a transfer tax years later just before selling title.

If [*Kircher's*] expansive reading of Probate Code Sections 13550 and 13551 is allowed to continue without a bright-line rule that the limit to claims in California are the assets that would otherwise have passed by will or intestacy in California, California courts may end up more and more dealing with arguments about whether ancillary processes in other states or countries are more equivalent to non-probate transfers or probate transfers (not to mention the arguments over conflicts of laws and *renvoie*).

I agree with the memorandum's position that providing an expansive rule consistent with *Kircher* that allows creditors to proceeding against recipients of NPTs would likely give rise to more litigation that would be best served by a centralized administration. As stated in the memorandum, it [is] likely that such an expansive rule without centralized marshalling of assets would lead to inefficiencies and inequities.

In fact, I would urge the CLRC to propose a change in the law consistent with the legislative history to make it clear that the extent of the liability under Probate Code Section 13550 is only what would have passed by will or intestacy through probate AND add "in California." If a creditor wants to seek greater liability because assets are passing outside of California, that creditor should litigate in that/those other jurisdictions where the other assets are passing.