

First Supplement to Memorandum 2018-15

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

The Commission¹ has received a comment from the Commission's former Executive Secretary Nathaniel Sterling² regarding Memorandum 2018-15 and the attached comments of TEXCOM. Mr. Sterling's comment is attached as an Exhibit to this supplement.

Briefly, Mr. Sterling suggests that, given the concerns TEXCOM has raised about pursuing a comprehensive liability approach, the Commission concentrate on incremental reform.

Mr. Sterling thinks that it would be helpful "to make clear, in the cases where it is now unclear, whether a particular [NPT] is or is not subject to liability for a decedent's debts." Mr. Sterling points out that the questions about procedure for enforcing NPT liability and the scope of NPT liability already exist. And, enacting a liability principle would at least avoid litigation of the initial question of *whether* an NPT is liable.

Mr. Sterling notes that, while many creditors would be in a position to protect themselves during the decedent's lifetime, the decedent's family members would not be. Thus, application of family protections to NPTs may be an appropriate focus for reform.

Respectfully submitted,

Kristin Burford
Staff Counsel

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. Mr. Sterling's background report for this study, *Liability of Nonprobate Transfer for Creditor Claims and Family Protections* (June 2010), is available at <http://www.clrc.ca.gov/pub/BKST/BKST-L4100-NPT-Creditors.pdf>.

EMAIL FROM NATHANIEL STERLING
(APRIL 6, 2018)

Kristin, I have read Memorandum 2018-15, including the attached letter from TEXCOM, and have a few thoughts. You should feel free to share these with the Commission as you see fit.

1. The Commission's initial idea of looking to the uniform act as a model for a comprehensive treatment of the nonprobate transfer/creditor rights/family protection problem I felt was ambitious as a first step, but worth the effort if there were buy-in from the probate community. Since the TEXCOM letter indicates concern about going that direction, I wouldn't push it further (at least for now), but would concentrate on more narrowly focused baby steps. That was also my recommendation in the background study. Reform in this area I think needs to be done incrementally.

2. I certainly agree with TEXCOM that in the ordinary case, the kinds of issues we've been talking about are not a problem. Debts get paid, property gets distributed, everything works. So in the example they give of a \$1M estate consisting of a \$950K trust, a \$40K TOD account, and a \$10K probate estate, there is no problem satisfying the \$2K medical debt out of the probate estate, and everyone is happy (except of course beneficiaries of the probate estate, if they are not the same as beneficiaries of the other transfers). Or unless the creditor decides to go for the bank account first — in which case things are unclear. Or unless there is an additional \$100K tort claim against the decedent — in which case you end up in a quagmire. (I won't elaborate but the problems are fairly obvious, and have been the source of litigation in California.)

3. The challenge for the law, as always, is to cure the occasional problem case without unduly burdening the great number of ordinary cases. I had always thought as a simple first step it would be helpful to make clear, in the cases where it is now unclear, whether a particular nonprobate asset is or is not subject to liability for a decedent's debts. Granted, this doesn't solve the procedural problem as to how the asset is reached and whether apportionment rules are applicable. But those problems are there already, and at least clarification would avoid having to litigate the basic liability question.

4. Finally, as a general policy matter, I agree with the TEXCOM observation that creditors are generally in a position to protect themselves during the decedent's lifetime and therefore it is appropriate for them to bear the burden of any loss resulting from the decedent's death. Before extending credit a creditor may seek security; or may establish a price structure for its transactions that will spread the risk of loss. But of course that does not help a tort claimant injured by the decedent. Nor does it help a dependent of the decedent. So at least to the extent the Commission decides to focus on applying family protections to nonprobate transfers, I think that is completely appropriate.