

## Memorandum 2018-38

**Nonprobate Transfers: Creditor Claims and Family Protections  
(Liability for Debts of Deceased Spouse (Probate Code §§ 13550-13554))**

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Earlier in this study, Memorandum 2017-23<sup>1</sup> discussed a case, *Kircher v. Kircher*,<sup>2</sup> related to nonprobate transfer (“NPT”) liability. The *Kircher* case was originally raised in this study because the decision was released after the preparation of the background report in the study.<sup>3</sup> In Memorandum 2017-23, the primary goal of presenting the *Kircher* decision was to provide an update on changes to the legal landscape regarding NPT liability.

The *Kircher* decision interpreted a statutory rule (found in Probate Code Sections 13550 and 13551) that imposes liability on a surviving spouse for a decedent’s debts.<sup>4</sup> Memorandum 2017-23 discussed some criticism and concern about the *Kircher* court’s broad reading of this liability rule’s scope.<sup>5</sup> In light of these issues, the Commission decided to “consider whether to recommend any statutory reforms to address *Kircher v. Kircher*....”<sup>6</sup>

This memorandum discusses whether the Probate Code’s statutory liability rule for a surviving spouse should be read broadly or narrowly, and whether the statute should be revised to avoid misunderstanding.

**This memorandum seeks a Commission decision on whether to proceed with a reform to clarify the scope of the liability rule in Probate Code Sections 13550 and 13551.**

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

3. The background report was prepared by former Executive Secretary Nathaniel Sterling and entitled *Liability of Nonprobate Transfer for Creditor Claims and Family Protections*. This report will be referred to as the “NPT Report” in this memorandum. The NPT Report is available at <http://www.clrc.ca.gov/pub/BKST/BKST-L4100-NPT-Creditors.pdf>.

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

5. See Memorandum 2017-23, pp. 3-4; see also First Supplement to Memorandum 2017-23.

6. See Minutes (Jun. 2017), p. 6.

Unless otherwise indicated, every statutory citation in this memorandum is to the Probate Code. Also, 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.<sup>7</sup>

#### SURVIVING SPOUSE LIABILITY RULE

Sections 13550 and 13551 set forth the surviving spouse liability rule at issue in the *Kircher* opinion:

13550. Except as provided in Sections 11446 [regarding spousal liability for funeral expenses and expenses of last illness], 13552 [regarding timeliness of claims], 13553 [declaring spouse not liable if specified property is administered in probate], and 13554 [allowing spouse to assert defenses, cross-claims, and setoffs available to the decedent], upon the death of a married person, the surviving spouse is personally liable for the debts of the deceased spouse chargeable against the property described in Section 13551 to the extent provided in Section 13551.

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.

(c) The separate property of the decedent that passes to the surviving spouse without administration.<sup>8</sup>

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7. Sections 13000-13660.

8. In the interests of simplification, this memorandum does not generally distinguish between community property and quasi-community property. That distinction does not materially affect the analysis that follows.

In addition, this memorandum focuses primarily on the surviving spouse’s liability for property received from the decedent. Under Sections 13550 and 13551, the surviving spouse’s liability also extends to the surviving spouse’s *own half of the community property*. See Section 13551(a). The surviving spouse has the option of probating the surviving spouse’s own share of the community property. See Section 13502(a)(2).

A key issue in the *Kircher* case is a question of statutory interpretation — what property falls within the scope of the liability rule in Sections 13550 and 13551? More specifically, does this liability rule apply to property that the surviving spouse owns as a surviving joint tenant?

### **Statutory Context**

Sections 13550 and 13551 are located in a part of the Probate Code that provides special rules for the surviving spouse to receive a decedent’s property without probate administration — “Part 2. Passage of Property to Surviving Spouse Without Administration” (hereafter, “Part 2”).

Part 2 is in a division containing several special procedures for disposition of a decedent’s estate without probate administration — “Division 8. Disposition of Estate Without Administration.” While statutory headings do not affect the meaning of the law,<sup>9</sup> the grouping of these statutes together does suggest that the statutes all share a common purpose, providing procedures for avoiding probate in particular circumstances.

The first section of Part 2, Section 13500, provides that probate administration is not required for the disposition of property that would otherwise pass to a surviving spouse *by will or intestacy*:

13500. Except as provided in this chapter, when a spouse dies intestate leaving property that passes to the surviving spouse under Section 6401 [intestacy], or dies testate and by his or her will devises all or a part of his or her property to the surviving spouse, the property passes to the survivor subject to the provisions of Chapter 2 (commencing with Section 13540) and Chapter 3 (commencing with Section 13550), and no administration is necessary.<sup>10</sup>

This language specifically notes that property passing pursuant to Section 13500 is subject to the liability rules provided in Sections 13550 and 13551 (which are located in Chapter 3).

### **Broad Scope vs. Narrow Scope**

The staff sees two ways to understand the scope of the liability rule in Sections 13550 and 13551. Those provisions can be read broadly or narrowly.

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9. See Section 4.

10. See also Section 13600 (authorizing surviving spouse to collect unpaid salary or other compensation from decedent’s employer by affidavit without probate administration).

As discussed later in this memorandum, the *Kircher* court reads Sections 13550 and 13551 broadly, as stating a general rule of liability for *all* property received by a surviving spouse outside of probate. Under this broad reading, liability extends to *both* property that passes without administration pursuant to Part 2 *and* property that passes without administration because it is received by operation of an NPT (e.g., joint tenancy, revocable trust, or POD account).

This broad reading requires Section 13550 and 13551 to be read in isolation, effectively establishing a stand-alone rule that *any* property of the decedent received by a surviving spouse without probate administration is liable for the decedent's debts.

Sections 13550 and 13551 can also be read narrowly, as only applying to property that passes without administration *pursuant to Part 2* (i.e., property that would otherwise have passed by will or intestacy). The narrow reading construes these sections as being a component of the statutory procedures provided in Part 2, which allow a surviving spouse to avoid probate for property that would otherwise be subject to probate. In probate, such property would be liable for the decedent's debts. Sections 13550 and 13551 ensure that a surviving spouse's choice to avoid probate does not result in avoidance of the obligation to pay claims of the decedent's creditors. Regardless of whether the property is probated or claimed by the spouse under Part 2, the value of the property would be available to satisfy creditor claims.

Under the narrow reading, Sections 13550 and 13551 would *not* impose liability on the surviving spouse for property received by NPT.

**A key question for the Commission to decide is whether the liability rule should be read narrowly or broadly. Whichever reading the Commission finds appropriate, the law should probably be revised to clarify and better implement the intended meaning.**

#### *KIRCHER V. KIRCHER*

The *Kircher* case was decided by a California appellate court in 2010.<sup>11</sup> California Supreme Court review was sought, but denied.

The staff did not find any significant post-*Kircher* case law addressing the relevant statutory provisions.

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

## Background

The *Kircher* case involved a dispute between a decedent's surviving spouse (Adelaide) and the decedent's ex-spouse (Bonnie).<sup>12</sup> As the litigants and the decedent (Vincent) all have the same last name, this memorandum refers to the individuals by their first names, as the court does in its opinion.

The question in the litigation was whether Adelaide was liable to Bonnie for Vincent's spousal support obligation.<sup>13</sup> The spousal support obligation at issue required Vincent to pay Bonnie:

\$2,000 per month commencing February 1, 1987, as and for spousal support, and continuing with monthly installments thereafter "until the death of [Bonnie] or until the remarriage of [Bonnie] or proof that [Bonnie] has lived with another person in a marital-like relationship for thirty or more consecutive days."<sup>14</sup>

Bonnie argued that Adelaide was personally liable for payment of this obligation under Sections 13550 and 13551.<sup>15</sup> She also argued that the scope of Adelaide's personal liability included the value of joint tenancy property that Adelaide owned after Vincent's death as the surviving joint tenant.<sup>16</sup>

## Court Decision

Focusing specifically on the language of Probate Code Sections 13550 and 13551, the *Kircher* court concluded that these statutes impose broad liability for *any* property that a surviving spouse receives from a decedent without probate administration.<sup>17</sup>

The court noted that, "[u]nder the Family Code, *all property interests* held by a husband and wife must be characterized as separate, community, or quasi-

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12. See generally *Kircher*, 189 Cal. App. 4th 1105.

13. Both halves of the community property may be liable to pay certain debts after the death of a member of the community. See generally, e.g., Section 11444.

As a general matter, community property is liable for spousal and child support obligations from a prior marriage. However, the law prioritizes use of the obligor's separate property for the payment of such obligations, where such property is available. See generally Fam. Code §§ 910, 915; see also *In re Marriage of D'Antoni*, 125 Cal. App. 3d 747, 750-51 (1981); *In re Marriage of Barnes*, 83 Cal. App. 3d 143, 149 (1978).

14. *Kircher*, 189 Cal. App. 4th at 1109.

15. *Kircher*, 189 Cal. App. 4th at 1110.

16. See *Kircher*, 189 Cal. App. 4th at 1112 ("Adelaide contends that the trial court erred in its conclusion that the property she held with Vincent in joint tenancy could be considered in determining the extent of her personal liability under section 13551.").

17. See *Kircher*, 189 Cal. App. 4th at 1113-14 (noting "the Legislature's intent to capture within section 13551 the value of all property which is characterized, at the time of the decedent's death, as community property or the decedent's separate property...." (emphasis omitted)).

community property for purposes of the division of property upon marital dissolution.”<sup>18</sup> The court concluded that:

The Legislature's utilization, in section 13551, of terms pertaining to the characterization and disposition of all property held by spouses at the time of dissolution, manifests, in our view, a clear intent that the scope of a surviving spouse's personal liability encompasses all property which, at the time of the decedent's death, is characterized as community property or the decedent's separate property.<sup>19</sup>

Given this, the court decided that the scope of Adelaide's personal liability under Sections 13550 and 13551 includes the value of property that Adelaide and Vincent owned in joint tenancy.<sup>20</sup> At Vincent's death, the joint tenancy property “was either community property or it was Vincent's separate property.”<sup>21</sup> And, Adelaide owned the property, without probate administration, as the surviving joint tenant. Thus, the court concluded that the property falls within the scope of the liability rule in Sections 13550 and 13551.<sup>22</sup>

The court considered Adelaide's argument that property held in joint tenancy should not be considered in the scope of liability under Sections 13550 and 13551.<sup>23</sup> On this issue, the *Kircher* court concluded that joint tenancy does not preclude the imposition of *personal* liability on a surviving joint tenant for a decedent's debts:

[C]ase law on the question of whether a surviving *joint tenant* takes a property free of an encumbrance placed upon it by the deceased *joint tenant* does not speak to the question of whether a *surviving spouse* may be held *personally liable* for the debts of the *deceased spouse* pursuant to the California statutory [liability rule in Probate Code Sections 13550 and 13551].”<sup>24</sup>

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18. *Kircher*, 189 Cal. App. 4th at 1113 (citation omitted, emphasis as in original).

19. *Kircher*, 189 Cal. App. 4th at 1113.

20. *Kircher*, 189 Cal. App. 4th at 1115-16 (“Given the Legislature's clear intent to broadly define the scope of a surviving spouse's personal liability for debts of a deceased spouse, and having examined the evidence presented by the parties at trial, we find no error in the trial court's legal conclusion that the property held in joint tenancy falls within the ambit of section 13551.”).

21. *Id.* at 1114.

This conclusion was arguably erroneous. It may be that Vincent's decision to place his separate property in joint tenancy with Adelaide transmuted the property into jointly-owned *separate* property. See Fam. Code § 850(c). In this case, Adelaide would have owned half of the joint tenancy property as her separate property prior to Vincent's death. Adelaide's separate property is not subject to liability under Sections 13550 and 13551. See also CEB, 32 *Estate Planning & California Probate Reporter* 65, 86 (Dec. 2010).

22. *Kircher*, 189 Cal. App. 4th at 1114.

23. See *Kircher*, 189 Cal. App. 4th 1114-15.

24. *Kircher*, 189 Cal. App. 4th at 1115 (emphasis in original).

In short, the *Kircher* court found that Adelaide's personal liability for Vincent's debts under Sections 13550 and 13551 includes the value of property that she owned as the surviving joint tenant.

### **CEB Criticism**

The *Kircher* decision was discussed in the Continuing Education of the Bar's ("CEB") *Estate Planning & California Probate Reporter* ("CEB Comment").<sup>25</sup> According to the CEB Comment, "a careful review of the history of [Probate Code] § 13551, including its historical and textual context, indicates that the legislature never intended that the statute would apply with respect to joint tenancy property."<sup>26</sup>

Although the CEB Comment is responding to the *Kircher* decision, the analysis seems to support a narrow reading of the liability rule.

### ANALYSIS

Despite being located in Part 2, which provides special procedures for probate avoidance, the *Kircher* court found that the liability rule applies broadly, imposing liability for a deceased spouse's debts on a surviving spouse who receives property by NPT.

For the reasons discussed below, the staff believes that the Legislature probably intended for Sections 13550 and 13551 to be read narrowly (i.e., NPT property would *not* be liable under those provisions).

The staff also believes that the narrow reading is the better policy. While there is a good argument for establishing a general rule of liability for NPT property, the imposition of such liability only on a surviving spouse seems unfair and at odds with the family protections offered in probate.

### **Statutory Context**

Based on their location within the Probate Code, Sections 13550 and 13551 can be understood as supporting and implementing the spouse's right under Part 2<sup>27</sup> to receive property *that would otherwise be probated*, without probate administration.

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25. See CEB, 32 *Estate Planning & California Probate Reporter* 65, 85-88 (Dec. 2010) (hereafter, "CEB Comment").

26. *Id.* at 86.

27. Sections 13500, 13600.

Under that reading, Sections 13550 and 13551 do not impose broad liability for all property received by a surviving spouse outside of probate. Rather, those provisions establish narrow liability for property *received under Part 2* (i.e., property that would otherwise pass by will or intestacy). This would not include property received by the operation of NPTs, such as joint tenancy, trusts, or POD bank accounts.

The narrow reading of Sections 13550 and 13551 is reinforced by the fact these provisions are located in “Division 8. Disposition of Estate Without Administration.”<sup>28</sup> That division contains other special procedures for the transfer of a decedent’s property without probate administration.<sup>29</sup> Under these other procedures, the decedent’s “successor” (i.e., the person who would have received the property by will or intestacy<sup>30</sup>) may choose to take the property under the simplified statutory procedure, avoiding probate.<sup>31</sup> In probate, such property would be liable for debts. If the recipient elects to take the property under the statutory procedures, thereby avoiding probate, the statutes make the recipient liable for the decedent’s debts, up to the value of the property received under the special procedure.<sup>32</sup> Those provisions do *not* impose liability for property received by operation of NPTs generally. The recipient is only liable for property that would have been probated (had the recipient not used the statutory procedure to collect the property).<sup>33</sup>

It is reasonable to believe that the Legislature intended for Sections 13550 and 13551 to serve the same general purpose as the liability rules in the other procedures located in Division 8 — ensuring that property that would have been liable for creditor claims in probate remains available to creditors if that property is instead collected using a statutory probate avoidance procedure.

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28. See Sections 13000-13659.

29. See Sections 13100-13116 (affidavit procedure for personal property), 13150-13158 (court order for succession to property), 13200-13210 (affidavit procedure for real property of small value).

30. See Section 13006.

31. For Section 13500, the default is that the surviving spouse would receive the property without probate and must elect to probate the property, whereas for other simplified administration procedures, the default would be probate administration, unless the decedent’s successor takes affirmative steps to receive the property without administration. Compare Section 13500 with, e.g., Sections 13100, 13101, 13108.

32. See Sections 13110, 13112, 13156, 13205, 13207.

33. See *supra* note 32.

These other liability provisions expressly limit liability to property received under the statutory probate avoidance procedure at issue. So, it seems natural to ask why liability was not expressly limited in Sections 13550 and 13551. One possibility is that the surviving spouse liability provision had to be phrased somewhat differently because the surviving spouse can use different procedures to hold or collect the decedent’s property. See Sections 13500, 13600, 13650.



## No Evidence of Intent to Extend Liability Rule to Joint Tenancy Property

Generally, under California law, joint tenancy and community property are incompatible.<sup>34</sup> The case law suggests that a true joint tenancy is jointly-held *separate* property.<sup>35</sup>

In its earlier form, the liability rule applied only to community property.<sup>36</sup> Thus, the early liability rule would not have applied to a joint tenancy held by spouses, because the rule did not apply to either spouse's separate property.<sup>37</sup>

Part 2 was made applicable to the decedent's separate property on the Commission's recommendation.<sup>38</sup> The primary purpose of that recommendation appears to have been expanding the surviving spouse's right to receive property without probate under Section 13500 to include the decedent's separate property.<sup>39</sup>

There is nothing in the Commission's recommendation that indicates an intention to broaden the liability under Sections 13550 and 13551 to cover joint tenancy property (or other NPTs of separate property). It is unlikely the Commission would have recommended such a significant substantive change without discussion.<sup>40</sup>

Nor did the staff find any other legislative history suggesting an intention to broaden the scope of the liability rule to include joint tenancy property.

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34. See generally Civ. Code § 682; NPT Report, pp. 13-15; Nathaniel Sterling, *Joint Tenancy and Community Property in California*, 14 Pac. L. J. 927 (1983); CEB Comment, *supra* note 25, at 87, *citing* *Siberell v. Siberell*, 214 Cal. 767 (1932).

A husband and wife may co-own property as joint tenants, tenants in common, or community property. Property cannot be held both as community property and in either a joint tenancy or a tenancy in common at the same time. Accordingly, each spouse's interest in a joint tenancy or a tenancy in common is his or her own separate property.

*Estate of Mitchell*, 76 Cal. App. 4th 1378, 1385 (1999).

35. See *supra* note 34; but see NPT Report, p. 13 (discussing community property in joint tenancy form).

36. See, e.g., former Section 205, as amended by 1976 Cal. Stat. ch. 1079, § 59.

37. See *supra* note 36.

38. *Recommendation Relating to Distribution of Estates Without Administration*, 17 Cal. L. Revision Comm'n Reports 421 (1984).

39. See *id.* at 425-27.

40. See generally *Recommendation Relating to Distribution of Estates Without Administration*, 17 Cal. L. Revision Comm'n Reports 421 (1984); Memoranda 83-18, 83-39, 83-58; CEB Comment, *supra* note 25, at 88 (at the time of the its recommendation, the Commission's prior work on the topic of joint tenancy suggests that the Commission "was very aware of California law concerning the rights of creditors of joint tenants and also aware that a proposal to change that law might be controversial."); see also *supra* note 20.

## **Possible Policy Purposes Served by Different Liability Rules**

In determining whether the liability rule should be read narrowly or broadly, the staff considered the policies that might justify those alternative readings. They are discussed below.

### *Policy Purpose Served by Narrow Liability Rule*

As discussed above, a narrow liability rule could be understood as merely a component of the special procedure that allows a surviving spouse to receive property that would otherwise have been probated, without probate administration.<sup>41</sup> Where the surviving spouse receives the decedent's property under that statutory procedure, the imposition of liability under Sections 13550 and 13551 ensures that creditors are not harmed by the surviving spouse's avoidance of probate.

Under the narrow reading, the liability is simply a consequence of the surviving spouse's choice to avoid probate administration. This policy seems straightforward and reasonable.

### *Policy Purpose Served by Broad Liability Rule*

The key distinction between the narrow reading and broad reading of Sections 13550 and 13551 is that, under the broad reading, the rule imposes liability for NPTs; under the narrow reading, the rule does not. So any policy justification for a broad reading must explain why joint tenancy and other types of NPT property should be liable.

Earlier in this study, the Commission considered the benefits of a broad-based liability rule for a decedent's debts that applies to NPTs. Such a rule could ensure that the decedent's creditors can get paid regardless of whether the decedent uses NPTs to convey much of the decedent's property. Such a rule could be crafted to ensure that the decedent's debts are allocated equitably among all recipients of the decedent's property (regardless of how the asset is transferred). Such a rule could also ensure that probate protections for the decedent's family are available for property transferred outside of probate.

The history of this liability rule suggests that it was originally crafted to ensure that the community property was fully available to pay the debts that were chargeable against that property after the decedent's death.<sup>42</sup> Under the

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41. See Sections 13500, 13600.

42. See, e.g., former Section 205, as amended by 1974 Cal. Stat. ch. 752 § 8; CEB Comment, *supra* note 25, at 86-87.

broad reading, the liability rule could achieve this goal *if the surviving spouse were the only person who could receive property without probate*. However, NPTs, which can allow non-spouse recipients to receive community property, have become increasingly common.<sup>43</sup> Now, a non-spouse recipient can receive community property by NPT without being subject to a liability rule. Thus, the rule does not ensure that *all* community property is subject to liability.

Moreover, a broad reading of the liability rule could create some serious inequities among the recipients of the decedent's property. The liability rule *imposes liability for NPTs only when they are received by the surviving spouse*. While such a rule may help the creditors get paid,<sup>44</sup> this rule effectively accords preferential treatment to non-spouse NPT beneficiaries, who are not subject to liability. Furthermore, the liability rule does not seem to permit a surviving spouse to seek family protections for property that is conveyed by NPT.

For instance, take a situation in which the decedent's wealth is largely comprised of two parcels of real property, of roughly equal value (each \$500,000). Both properties are held in joint tenancy; one property is held by the decedent and the surviving spouse, while the other property is held by the decedent and the decedent's only child. If the decedent dies with a debt of \$250,000, the decedent's creditor can recover the full value of the debt from the surviving spouse and the child does not appear to have any liability. Thus, the full value of the debt is paid out of only half of the property. Moreover, if the property owned by the spouses was a family home, the surviving spouse does not appear to have the ability to seek a probate homestead over such property.<sup>45</sup>

In short, the liability rule in Sections 13550 and 13551 could in many situations produce unfair results, by imposing liability on the surviving spouse for receiving property in a situation where no other recipient would be liable. This treatment would seem to be at odds with preferred treatment typically accorded to the surviving spouse in the Probate Code. And, the staff has not been able to identify a persuasive justification that explains why this unfavorable

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43. See generally Fam. Code §§ 900-1000.

Before the growth of NPTs, the decedent's property would generally either pass through probate or be received under the statutory alternatives to probate (which impose liability). Joint tenancy is a notable exception to this general rule, but, as indicated previously, joint tenancy is traditionally understood as jointly-owned separate property. See *supra* note 34.

44. The surviving spouse also has liability for the value of the surviving spouse's own half of the community property that is not exempt from enforcement of a money judgment and was not administered in the estate of the decedent. See Section 13551(a).

45. The surviving spouse could presumably take advantage of applicable protections for homesteads under the Code of Civil Procedure. See generally Code Civ. Proc. §§ 704.710-704.995.

treatment of the surviving spouse is appropriate in this specific context (receiving NPTs), nor has the staff come across any evidence that these inequitable consequences were intended, or even considered, by the Legislature or the Commission in its prior work on these provisions.

To the extent that the goal is to ensure that the decedent's property remains liable to creditors after death, the appropriate mechanism to achieve that policy goal is a NPT liability rule that applies regardless of who receives the property. A broad reading of Sections 13550 and 13551 falls well short of that mark.

#### REFORMS TO CLARIFY THE SCOPE OF LIABILITY

In general, the reforms needed to clarify the scope of the liability rule will differ significantly depending on whether the Commission concludes that the scope of liability under Sections 13550 and 13551 should be broad or narrow.

Amending the statutes to provide for narrow liability would be a relatively simple reform. The statutes could simply be amended to limit the scope of the surviving spouse's liability to the decedent's property that the spouse receives under Part 2 (rather than property that passes "without administration"). A surviving spouse who receives property by NPT would be subject to the same law on liability that applies to anyone receiving such NPT property.

Amending the statutes to provide for a broad liability rule would be more complicated. As discussed below, there are several issues that would need to be addressed. If the Commission decides to proceed with reforms codifying a broad liability rule, further study would be required.

#### **Location of Rule**

If the liability rule is intended to be read broadly, it should perhaps be relocated. The current location and context imply a narrower scope of liability.

Specifically, it might be helpful to move the liability rule out of the Probate Code division governing "Disposition of Estate Without Administration." This division primarily involves property that would otherwise go through probate, but for the statutory provisions that allow a person to receive the property without administration. A broad rule would impose liability for any property transferred by NPT<sup>46</sup> and, thus, a more general location in the Probate Code might be more appropriate. The staff would need to consider the possibilities.

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46. NPTs are governed by a separate division of the Probate Code. See Sections 5000 *et seq.* (Division 5).

## Conflicting Liability Rules

In some cases, a broad reading of Sections 13550 and 13551 might be in conflict with the liability rule for a particular form of NPT.

For example, it is not clear how the broad reading would apply to property held in a trust and distributed to a surviving spouse. The Trust Law has its own statutory rules for the payment of a deceased settlor's debts, including rules for the liability of trust beneficiaries.<sup>47</sup> Under the Trust Law, a beneficiary's liability for the settlor's debts is different (and in some ways narrower) than the surviving spouse's liability under the broad reading of Sections 13550 and 13551.<sup>48</sup>

If a surviving spouse receives property from a deceased spouse by means of a trust, which liability rule applies?<sup>49</sup>

## Reconciling Laws of Different Jurisdictions

Generally, the estate of a decedent who dies domiciled in California would be subject to probate administration in California.<sup>50</sup> California courts also have jurisdiction over property of a non-domiciliary decedent that is located in this state.<sup>51</sup> It is unclear whether a broad reading of the liability rule in Sections 13550 and 13551 should be subject to similar limitations.

Attorney Brian L. Shetler raised concerns about this issue in a letter he wrote to the Commission in response to the earlier memorandum discussing the *Kircher* decision.<sup>52</sup> Mr. Shetler stated, in part:

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.

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47. See Sections 19000-19402.

48. See Section 19402(b) (beneficiary of trust can be held personally liable “only to the extent the claim of the creditor cannot be satisfied out of the trust estate of the deceased settlor and [such liability] is limited to a pro rata portion of the claim of the creditor, based on the proportion that the value of the property distributed to the person out of the trust estate bears to the total value of all property distributed to all persons out of the trust estate.”).

49. As a trust beneficiary, the surviving spouse could seemingly be liable under Sections 19400-19403, which impose liability on trust beneficiary who received property in the absence of either a probate or trust creditor notification process. Under those sections, the beneficiary's liability is limited to a pro rata share. See Section 19402(b). A creditor could, perhaps, instead seek to impose liability on a surviving spouse trust beneficiary under Sections 13550 and 13551, thereby avoiding the pro rata liability limitation.

50. See Section 8005(b)(1)(B); see also CEB, California Decedent Estate Practice § 5.2 (2017).

51. See *supra* note 50.

52. See First Supplement to Memorandum 2017-23.

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).<sup>53</sup>

For these reasons, Mr. Shetler requests that the Commission recommend changes to limit the scope of liability to include only property that "would have passed by will or intestacy through probate ... 'in California.'"<sup>54</sup> Mr. Shetler's concern would seem to be addressed by reforms limiting liability to property that the surviving spouse receives under Part 2 (i.e., the narrow rule).

If the Commission decides to proceed with a broad rule, Mr. Shetler's concern would need to be thoroughly researched and considered.

#### NEXT STEPS

As described in this memorandum, the scope of the current liability rule in Probate Code Sections 13550 and 13551 is not sufficiently clear.

The staff is seeking a Commission decision on whether to clarify the scope of the liability rule and, if so, whether the liability rule should be read narrowly (as covering only property that is received under Part 2) or broadly (as covering all property that the surviving spouse receives from the decedent without probate administration, including by operation of an NPT).

If the Commission favors the narrow approach, the staff should be able to prepare implementing language fairly quickly and can bring it back for consideration at a future meeting. If the broad approach is chosen, the staff will need to do further research and analysis for the Commission's consideration.

#### **How would the Commission like to proceed?**

Respectfully submitted,

Kristin Burford  
Staff Counsel

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53. *Id.* at Exhibit p. 1.

54. *Id.*