



# The State Bar of California

## CALIFORNIA PARAPROFESSIONAL PROGRAM WORKING GROUP

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Date: June 30, 2020

To: California Paraprofessional Program Working Group

From: Elizabeth Olvera and Stephen Hamilton

Subject: Consideration of Estates and Trusts as a Practice Area to Be Included in a Paraprofessional Program

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### Executive Summary

The California Paraprofessional Program Working Group (CPPWG) is charged with developing recommendations for consideration by the Board of Trustees for the creation of a paraprofessional licensure/certification program to increase access to legal services in California. The CPPWG's charter is informed by the [California Justice Gap Study](#) and the [Task Force on Access Through Innovation of Legal Services](#). In carrying out its charge, the CPPWG must balance the dual goals of ensuring public protection and increasing access to legal services. The CPPWG's recommendations to the Board will include, among other topics, the selection of practice areas for inclusion in the program.

### Discussion

At its first meeting on April 21, 2020, the CPPWG discussed potential practice areas for program inclusion. While there was agreement with regard to including certain practice areas for additional consideration and excluding others, several practice areas were deemed “wobblers,” meaning that additional information was required before a decision could be made regarding their status. Members of the CPPWG volunteered to study each of the wobbler areas with the goal of generating recommendations regarding ongoing consideration for the program for review by the full body at its next meeting.

The present two-person team assessed the Estates and Trusts practice area. In generating our recommendations, outlined below, we considered the following data points:

- Estates and Trusts-related questions and responses included in the California Justice Gap Study;

- Survey and experiential data provided by the California Association of Legal Document Assistants (CALDA); and
- California Courts Data on Self-Represented Litigants.

### California Justice Gap Study

The California Justice Gap Study (CJGS) included questions regarding Estates and Trusts as follows:

- **Estates (Wills):** Questions asked about needing help making or changing a will, living will or advance directive, or setting up a trust or power of attorney.
- **Probate:** Questions asked about needing help with probate or administering an estate, trust or will.

CJGS results were generally categorized as follows:

Top 3 legal needs, all Californians	Top 3 legal needs, Californians at or below 125% of FPL	Top 3 legal needs, Californians above 125% of FPL
Top 3 areas for which legal help sought and received, all Californians	Top 3 legal needs for which legal help sought and received, Californians at or below 125% of FPL	Top 3 legal needs for which legal help sought and received, Californians above 125% of FPL
Top 3 legal needs with severe impact, all Californians	Top 3 legal needs with severe impact, Californians at or below 125% of FPL	Top 3 legal needs with severe, Californians above 125% of FPL

Estates and Trusts responses aligned with two of these categories: top 3 legal needs for which legal help sought and received, all Californians, and top 3 legal needs for which legal help sought and received, Californians above 125 percent of FPL. Specific California Justice Gap Study data points include:

- 216 of the survey respondents stated they “needed help making or changing a will, living will or advance directive, or setting up a trust or power of attorney.”
- 145 of the survey respondents stated they “needed help with probate or administering an estate, trust, or will.”
- Wills/Estate problems were 15 percent less likely to be rated as severe compared to other problem types. The wills/estate problems of those below 125 percent FPL were 16 percent less likely to be rated as severe compared to other types of problems. The wills/estate problems of those above 125 percent FPL were 14 percent less likely to be rated as severe compared to other types of problems.
- At all income levels, respondents were 37 percent more likely to seek and receive legal help for wills/trusts issues compared to other problem types. But those below 125

percent FPL were 40 percent less likely than those above 125 percent FPL to seek and receive legal help for wills/trusts issues. At all income levels, respondents who did not seek legal help for a will/trust issue were 21 percent less likely to cite not knowing whether it's a legal issue/where to look as a reason for not seeking legal help compared to other types of problems that they do not seek legal help for.

- Of all the wills/estate problems reported, 36 percent related to probate. This problem was more prevalent among those below 125 percent FPL, making up 47 percent of the wills/estate problems of those below 125 percent FPL and 34 percent of the wills/estates problems of those above 125 percent FPL. Those below 125 percent FPL were 17 percent more likely to seek and receive legal help for probate issues compared to other wills/trust issues they faced. However, those below 125 percent FPL are 38 percent less likely to seek and receive legal help for probate issues compared with those above 125 percent FPL.

#### **CALDA Survey Data**

The California Association of Legal Document Assistants (CALDA) is a nonprofit organization of California Legal Document Assistants, Bankruptcy Petition Preparers, Social Security Disability Advocates, and SSI Advocate that works to promote the growth, development, and recognition of the Legal Document Assistants' (LDA) profession as an integral partner in the delivery of legal services. The organization issued a survey on February 26 in an attempt to get additional information about the work of specific LDAs to support the CPPWG's deliberation process. Of 78 survey respondents, 50 respondents stated they provided "Probate & Estate Planning" services (64 percent). These services included conservatorships, guardianships, drafting of wills, adoptions (adult and stepparent), "settling estates" and trust administration.

#### **California Courts Self-Represented Litigant Data**

The Judicial Council, through its Judicial Branch Statistical Information System (JBSIS), collects data regarding the incidence of self-representation in the courts; detailed case type information is provided by some courts. However, not all courts report this data for the probate case type or all parties in probate proceedings, and the Judicial Council does not provide statistics by subtype, (i.e. estates, guardianships, and conservatorships) are included within the probate statistics. It is therefore unclear what percentage of unrepresented parties would benefit from the inclusion of probate and estate administration services within the scope of services which paraprofessionals could provide.

## Recommendations

Our recommendations, which diverge, are provided below.

### Elizabeth Olvera:

I recommend that probate, which includes, in most courts, decedent estates, conservatorships, and guardianships, be included in a paraprofessional program. The broader area of estate planning should be considered once the program has been in place for 2-3 years.

Californians below 125 percent of FPL don't earn very much income, but they still frequently are homeowners and may have assets, such as a house that serves not only as their home, but as a home for other family members as well. After the homeowner dies, predominantly in low income neighborhoods, many families don't know where to look for help because they are unfamiliar with probate issues. In addition, the court access center may turn Californians away because their assets exceed the threshold to be considered for free assistance. By using the traditional system of attorney assistance, these families are at great risk for losing their homes for no other reason than the need to pay "ordinary" attorney's fees at the end of probate. While it is true that Californians sought and received legal help for wills and estates issues, the California Justice Gap Study shows that those at or under 125 percent of FPL were less likely to seek and receive legal help for these problems. While limited, JBSIS data tells us that between 2 (Superior Court, County of Ventura) and 83 percent (Superior Court, County of Riverside) of plaintiffs are self-represented plaintiffs in probate matters – presumably many of these plaintiffs are low-income. Some low income litigants live in inherited paid off homes; just because most low-income people don't own property, doesn't mean that wills and estates services are not needed. The consequences of not helping these people can be detrimental. Often the family home is the sole family asset and source of wealth. Losing these homes results in displacement and gentrification.

### Case Studies Illustrate this Point

#### *"Darrell" Gets to Carry Out His Mother's Wishes*

- "Mom" was a low-income homeowner. She bought her house in a lower-income West Oakland neighborhood in the 1960s. By the time she died, it was worth \$800,000.
- Mom had no savings and lived on Social Security. She didn't have the money for an estate plan, so she wrote a Will with a Nolo Press Book.
- Mom gave the house to Darrell because she knew he'd continue to take care of his sister and his disabled brother.
- **Darrell would have had to sell the house if he had been forced to pay \$19,000 in attorney fees.**
- He paid \$4,500 to a Legal Document Assistant, which he could afford. Darrell got to carry out his mother's wishes.
- Everyone still has their home.

*“Agnes” and Her Family Became Homeless*

- Agnes’s husband was a low-income homeowner. He inherited their home from his mother. They and their five adult children lived together in the house.
- Because of their lower levels of education, income, and difficulty with English, they didn’t know to do estate planning. If they had known, it is unlikely they would have been able to afford it.
- Agnes was 60ish and worked at The Gap. Her kids were adults and working in other service occupations. The mortgage was entirely affordable to them together though.
- **They had to sell the house for no reason other than to pay the \$16,000 in attorney fees.**
- During the probate, after the house sold, they lived in motels.
- The kids collectively received 2/3 of the net estate, or about \$8,000 each. All of them together don’t have the down payment, income, and credit score to replace their home.

While LDAs do serve as a resource for these types of homeowners/families, the assistance they are able to provide is limited: LDAs help with form preparation, but without being able to select the forms, which causes a low level of entrants into the profession and a great deal of public mistrust that they are getting a service worth paying for.

- LDAs can file pleadings and other documents with the court, but they have:
  - No ability to interface with the court, especially Probate Examiners.
  - No ability to answer questions at hearings, which would be hugely useful to users of the system.
  - Under current rules, LDAs are normally unwilling to facilitate communication amongst the family because they would be perceived as representing the Personal Representative, which makes confusion and discord amongst the family more likely.

These limitations limit both professional and consumer “buy-in” to the LDA as a widespread solution.

**Paraprofessionals Can Perform the Tasks Related to Probate**

Unlike estate planning, probate is closely akin to family law because the process lends itself to forms, tasks, and judicial oversight, and thus can be performed by a paraprofessional. The Judicial Council has propagated and created mandatory probate forms and procedures for the process, and judges maintain a dedicated eye on probate estates making sure the process is done correctly. It really lends itself well to licensing a nonlawyer, and for those reasons, we recommend that the Probate, Trusts and Estates practice area be included in the pilot program where paraprofessionals can give legal advice.

In contrast to what LDAs are currently authorized to do, a licensed legal paraprofessional would be able to:

- Provide more direct guidance to the client.

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- Interface with court (communicate with Examiners directly and answer the Court's questions at uncontested hearings).
- Provide greater public protection because of the licensing and background check requirements.
- Provide direct and helpful communication with the family and others.

Greater buy-in from the public which would ensue from a State Bar licensed program would significantly expand the use of the service. The public would pay much less in fees and less housing loss would occur, which would mitigate one cause of displacement and gentrification.

Registered and bonded LDAs would be a natural fit in any new licensed paraprofessional program. Given their existing background, the educational gap and learning curve would be lessened. Another advantage of using LDAs, would be to shorten the time for when the paraprofessional program can transition beyond its initial pilot study thereby allowing increased access to justice for the Californians who need it the most.

### **Stephen Hamilton:**

It is the recommendation of the working group member Stephen D. Hamilton that the categories defined as wills, trusts, and probate should not be included in a paraprofessional program.

### **Summary of Basis for the Recommendation**

This recommendation is based on the following factors:

- No other state has incorporated wills, trusts, and probate within the scope of their paraprofessional programs.
- The actual need for assistance in the area of wills, trusts, and probate is questionable based on the California Justice Gap Study and statistical information available to our working group.
- Creation of a paraprofessional program for wills, trusts, and probate would result in an increase in the cost of services for those who already cannot afford to pay for the nonlegal services available in these areas.
- There are no statistics available which differentiate the probate filings within the State of California, (i.e., no breakdown between contested estates, guardianships, and conservatorships). The statistics that are available support the conclusion that wills, trusts, and probate do not present an access to justice issue.
- Wills, trusts, and probate are complex and multidiscipline areas of law drawing upon many areas of competency that licensed attorneys spend years learning.
- Guardianship, conservatorship, trust, and estate administration involves a fiduciary administering assets for the benefit of third parties. Failure of a fiduciary to obtain and heed sound legal advice from an attorney often harms the persons whom the law is intended to protect.

- The anecdotal information supplied in support of inclusion of wills, trusts, and probate do not address a fact acknowledged during a subgroup meeting: in all instances, the use of estate planning would have avoided the probate fees incurred and at a substantially lower costs. This issue is therefore one of education about currently available services, not an issue of access to justice.

### **California Would Be the First State to Include Wills, Trusts, and Probate**

While being on the forefront of a new strategy or solution is nothing new to Californians, it would be unwise not to consider anecdotal and program information from other states regarding the use of paraprofessionals to assist consumers in the area of wills, trusts, and probate. Unfortunately, there is no such anecdotal information from other states as California would be the first state to include wills, trusts, or probate within the scope of a paraprofessional program.

The following summary of the scope of paraprofessional services evidences this point, and was derived from the [“Overview of Existing Legal Paraprofessional Programs in Selected States”](#) provided for the April 21, 2020, meeting of the Paraprofessional Program Working Group:

#### **Washington State Limited License Legal Technician:**

On June 4, 2020, the Washington Supreme Court voted to sunset the Limited License Legal Technicians (LLLT) Program. As established prior to the sunset, LLLTs were permitted to render legal services in the following approved practice areas:

- Divorce and dissolution;
  - Parenting and support;
  - Parentage or paternity;
  - Child support modification;
  - Parenting plan modification;
  - Domestic violence protection orders;
  - Committed intimate relationships, only as they pertain to parenting and support issues;
  - Legal separation;
  - Non-parental and third party custody;
  - Other protection or restraining orders arising from a domestic relations case; and
  - Relocation.
- 
- An LLLT may seek admission in an additional practice area.
  - The Board of the Washington State Bar was considering Consumer Money and Debt Law as an approved LLT practice area.

### **Utah Licensed Paralegal Practitioner (LPP)**

LPPs may render legal services in the following approved practice areas:

- Temporary separation, divorce, parentage, cohabitant abuse, civil stalking, and custody and support;
- Forcible entry and detainer; and
- Debt collection matters in which the dollar amount in issue does not exceed the statutory limit for small claims.

RGLPP 14-802(c).

### **Other States**

Our working group has been provided with an [Excel spreadsheet](#) which summarizes the paraprofessional practice areas for all states, including those which have trial or pilot paraprofessional programs or recommendations for creation of a paraprofessional program. These states include Arizona, Colorado, Minnesota, Montana, New Mexico ,and Oregon. Each of those states, following Washington and Utah, have not included wills, trusts, or probate within the scope of services to be provided by paraprofessionals<sup>1</sup>.

While the fact that other states have chosen not to include wills, trusts, or probate in their paraprofessional programs is not in and of itself a barrier to inclusion in the California Paraprofessional Program, it does mean:

- We will not have curriculum information to draw from related to wills, trusts, or probate;
- We will not have examination materials to review when developing our paraprofessional testing protocols; and,
- We will not have anecdotal information to draw upon as to the benefits or detriments of allowing paraprofessionals to provide wills, trusts, or probate services.

The lack of such data and information should not be minimized. It is the position of this working group member that anecdotal information will be extremely helpful in crafting not only a successful paraprofessional program in California, but one that best serves the dual needs of providing access to justice *and* consumer protection.

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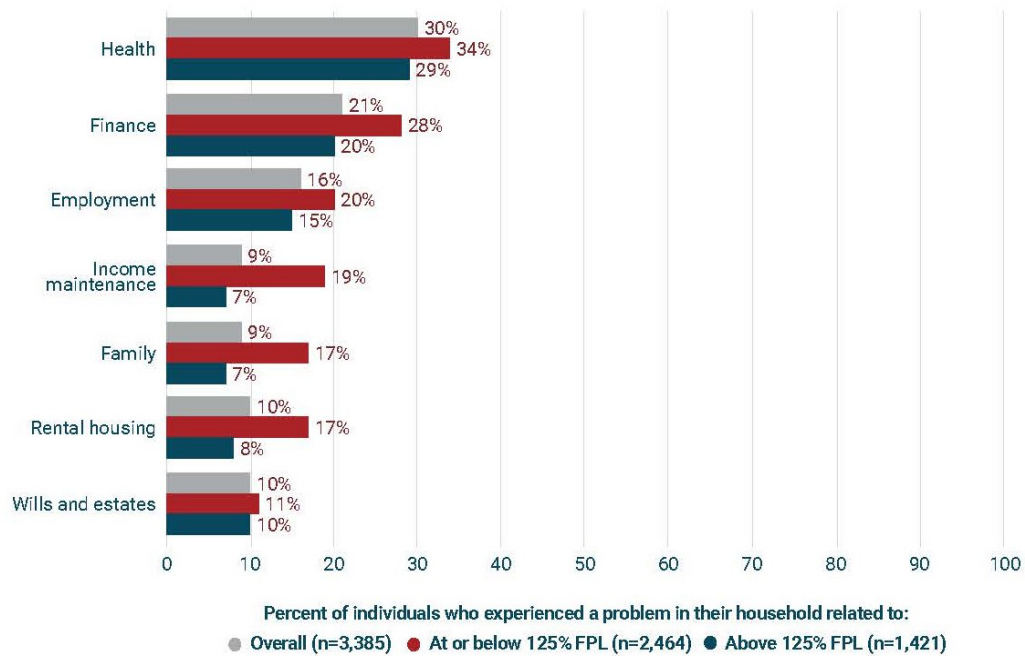
<sup>1</sup> Arizona's recommendations were quite broad but restricted to "all limited jurisdiction civil practice matters." The actual report does not specifically identify estates, trusts, or probate as approved practice areas.



## The California Justice Gap Report Establishes a Lack of Need for Inclusion of Wills, Trusts, and Probate

Wills and estates are reported to be the area for which the least amount of problems were reported in the California Justice Gap Report. Overall, only 10 percent of those surveyed reported having a problem involving Wills and Estates:

**Health, finance, and employment were the most common types of problems reported by Californians.**



Wills and trusts were also the area of law identified in the California Justice Gap study for which Californians were most likely to *seek* and *receive* legal help:

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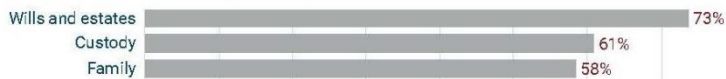
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**Californians were most likely to seek and receive legal help for issues related to wills and estates, custody, and family. This held for Californians with incomes above 125% FPL as well.**

Californians at or below 125% FPL, however, were most likely to seek and receive legal help for custody, homeownership, and immigration issues.<sup>7</sup>

### Frequency of seeking and receiving legal help by problem type.

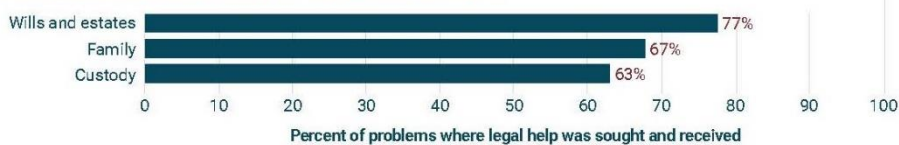
#### Among all Californians (n=4,969 problems)



#### Californians at or below 125% FPL (n=3,437 problems)

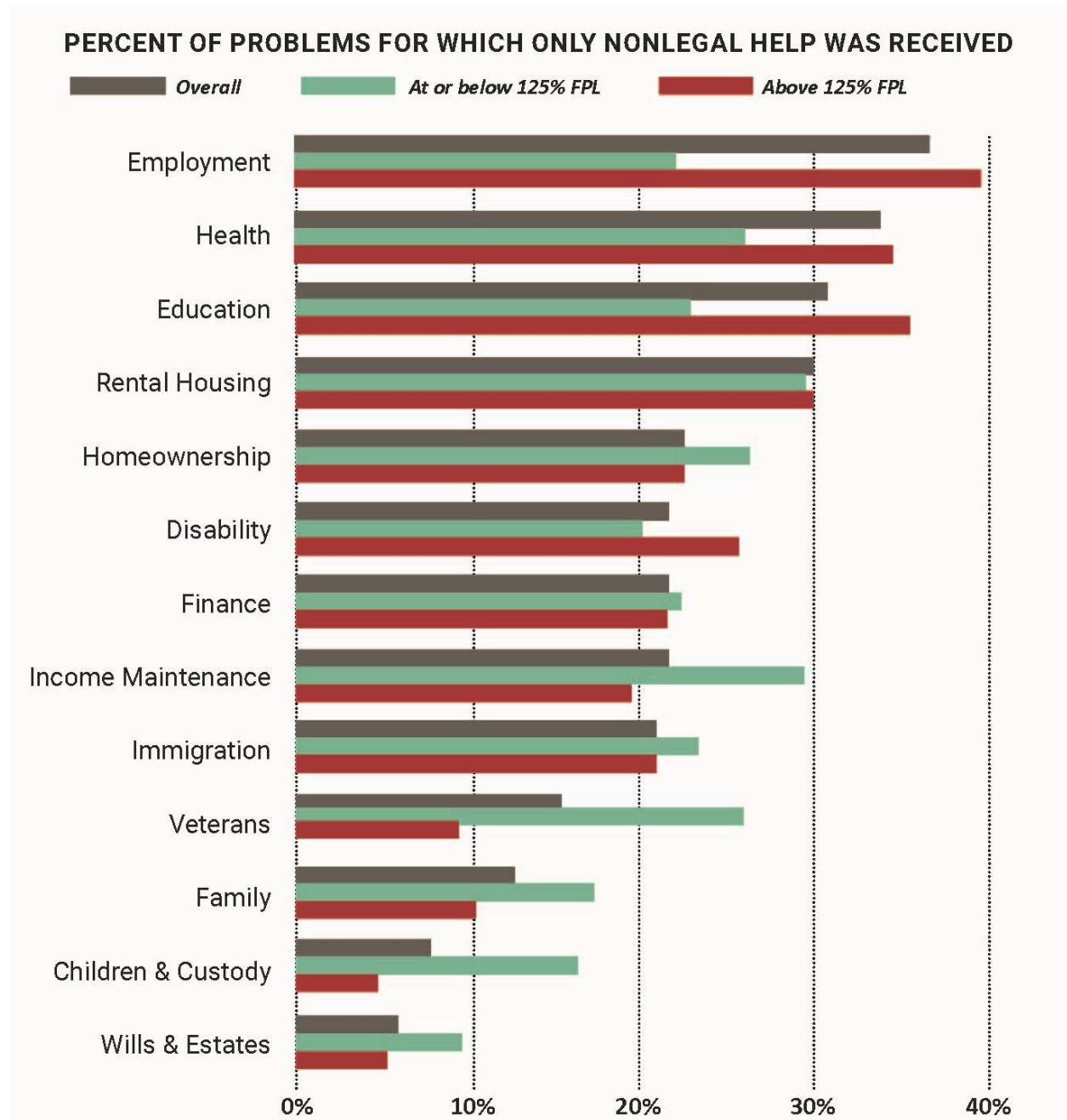


#### Among Californians above 125% FPL (n=1,532 problems), issues were



Although Californians at or below 125 percent of the FPL did not report receiving help in the area of Wills and Trusts, it is important to remember that only 11 percent of those surveyed reported having a problem in the area of Wills and Trusts.

Finally, a chart included within the California Justice Gap Study Executive Report highlights that “Wills and Estates” is the area of law for which consumers are least likely to rely on nonlegal help:



This data from the survey clearly establishes that less than 10 percent of all persons surveyed relied on nonlegal help to address “Wills and Estates” problems *regardless of financial resources*.

**Creation of a Paraprofessional Program for Wills, Trusts, and Probate Would Not Benefit Those Who Currently Rely on Nonlegal Help**

As discussed above, there is no demonstrated need for including wills, trusts, and probate in the Paraprofessional Program. Moreover, there is no indication that the small percent of Californians who did not seek and receive legal help in this area of practice would benefit in any way from creation of a new paraprofessional. The California Justice Gap Study notes that lack of knowledge, concern about legal costs, or a fear of pursuing legal action leads many Californians to deal with problems on their own rather than seek legal help for their otherwise actionable civil legal issues. There is no statistical data to support the hypothesis that creation of a paraprofessional program for wills, trusts, and probate would assist in resolving any of these issues.

According to the LDA survey, of 79 survey respondents, 59 respondents stated they provided “Probate & Estate Planning” services (75.6 percent). These services included conservatorships, guardianships, drafting of wills, adoptions (adult and stepparent), “settling estates,” and trust administration. Those who are concerned about costs today presumably could not afford or chose not to pay the current cost of these services provided by the LDAs. A new paraprofessional program beyond LDAs would include more expansive training, licensing, and regulatory requirements and would presumably increase potential liability based on the new services provided. All of this would add to the cost of doing business and result in an *increase* in the cost of services, with no benefit to those who already cannot afford to pay for these services.

#### **Probate Statistics are not Differentiated in California**

Analyzing the need for nonattorney legal assistance in wills, trusts, and probate based on California court statistics is problematic. The issue is that the subject “probate” includes the adjudication of estates, conservatorships, guardianships, and the termination of parental rights related to stepparent adoptions. Thus, a review of the statistics as to “self-represented” parties gives no meaningful data to assist this working group.

However, the California Superior Court statistics establish that “Probate” does not present the access to justice issues which exist in other subject areas. The working group was provided with an Excel spreadsheet with case filings in California by subject matter. The following filing statistics are available for 2017:

Total cases filed all counties, all subject type	5,935,517
Total probate filings, all counties	51,478
Total “Pro Per” Defendants/Respondents	931
Total “Pro Per” Plaintiffs/Petitioners	10,979

In other words, less than 1 percent (.00867) of all filings in California were in the “Probate” category. Only 1.8 percent of the respondents were self-represented and 21.3 percent of the petitioners were self-represented. Moreover, as noted above, this figure appears to include adjudication of estates, conservatorships, guardianships and the termination of parental rights

related to stepparent adoptions. A caveat needs to be made regarding this assessment (and that below), however. Not all counties report self-represented statistics or do so inconsistently. The percentages reported therefore are deflated as it is impossible to get an accurate determination of the self-represented statistics on a statewide basis.

Compare this to family law, a “nonwobbler” practice area:

Total family filings, all counties	355,644
Total “Pro Per” Defendants/Respondents	64,626
Total “Pro Per” Plaintiffs/Petitioners	146,322

Compared to the low number of self-represented litigants in probate matters, 18.17 percent of all family law respondents were self-represented and a staggering 41.14 percent of all family law petitioners were self-represented.

It is the position of this Committee Member that these statistics illustrate the difference between an area of law where paraprofessionals are needed (Family Law) and where they are not (Wills, Trusts, and Probate). This statistical information because even more distinguishing when committee members consider that the probate statistics include areas of law which do not lend themselves to paraprofessional services (i.e. conservatorships, guardianships and, in some cases, adoptions).

### **The Complexity of Wills, Trusts, and Probate Matters Does Not Lend Itself To Inclusion in the Paraprofessional Program**

Wills, trusts, and probate are an area of law made complex by the nature of the areas of law a competent attorney must understand. It is not an area of law where a one or two-year training program could sufficiently or adequately train a nonlawyer to perform services in that area.

Specifically, a competent trusts and estate attorney must be knowledgeable with and understand:

- The Probate Code.
- The Civil Code.
- The Code of Civil Procedure.
- The Corporations Code.
- The Evidence Code.
- The Family Code.
- The Financial Code.
- The Health and Safety Code.
- The Insurance Code.
- The Revenue and Taxation Code.
- The Federal Internal Revenue Code.

It is the opinion of this working group member that inclusion of wills, trusts, and probate in the Paraprofessional Program would increase the risk of consumer harm if the program were to allow others who had not had the significant training, experience and education required of current practitioners who provide services in the area of wills, trusts, and probate.

### **The Persons Whom the Law is Intended to Protect Are Harmed When the Fiduciary Does Not Obtain Sound Legal Advice from an Attorney**

Fiduciaries have important duties to the beneficiaries, and paraprofessionals are often not well-equipped to advise regarding those duties. Failure of a fiduciary to obtain and heed sound legal advice from an attorney often harms the very persons whom the law is intended to protect (i.e., the minor ward, conservatee, heirs and beneficiaries). These persons have no role in choosing the advisors who are representing the fiduciary; however, they benefit from the fiduciary's receiving legal advice from an attorney, and they stand to lose financially from missteps that a fiduciary might make in the absence of sound legal advice.

As discussed above, post-death administration of assets requires knowledge of diverse areas of the law, and is much more complicated than simply filling out Judicial Council forms. Failure of a paraprofessional to have a deep understanding of the law in general—and not just the “routine” procedural elements—can have severe adverse effects on the beneficiaries. Meritorious defenses to claims against an estate can be overlooked, important property tax exclusions that allow for family property to remain affordable can be lost, and avoidable income tax can be incurred (particularly in the area of retirement accounts, which is fraught with complicated issues). The training and experience of attorneys is necessary in order to protect not only the consumers themselves who might otherwise rely on paraprofessional advice, but also for the minor ward, conservatee, heirs and beneficiaries who also benefit from the attorney's legal advice.

### **The Anecdotal Information Provided by CALDA Does Not Support Inclusion of Wills, Trusts, and Probate**

During a subgroup meeting held on May 18, 2020, a presentation was made by Ian Duncan, past president of CALDA. Mr. Duncan presented two case studies to support his position that probate and contested estates should be included in the paraprofessional program. However, the following statements made by Mr. Duncan are both troubling and indicate the true nature of the problem which CALDA has presented in its case studies.

- "High probate attorney fees magnify the state's current housing crisis." No statistical information was provided to support this assertion.

- Currently, some LDA's are using a "workaround" to avoid the statutory attorney fees incurred during probate. However, Mr. Duncan stated this "workaround" could not be replicated to the point it would be helpful.
- "If probate system were just and fair, there would not be a whole industry devoted to avoid it." There are many reasons to avoid probate that have nothing to do with a "fair and just" system, including the time and money it can take to complete the court process and the fact that probate is a public process. Avoiding probate is often preferable by, for example, creating a living trust.

These statements should give committee members pause as to the assertions made in support of the request to include wills, trusts, and probate in the Paraprofessional Program.

Equally concerning is the fact that the "workaround" is still more expensive than the best solution to the problems and case studies presented by Mr. Duncan. Specifically, I engaged in the following exchange with Mr. Duncan:

*Q: Wouldn't the best solution for both cases be an estate plan?*

*A: Yes.*

In other words, the cost of estate planning in advance of death would yield better results and lower costs (even lower than the existing "workaround.")

No evidence or statistics were provided during the subgroup meetings to establish why estate planning is not currently being used. It is suggested by this working group member that the solution lies through education, not creation of a new licensed paraprofessional to address post-death estate division.

## **Conclusion**

It is respectfully submitted that the areas of wills, trusts, and probate should not be included within the proposed California Paraprofessional Program. Inclusion would minimally affect access to justice issues based on the findings of the California Justice Gap Study and the court filing statistics cited above.

Further, California could encounter significant consumer protection issues if we are the first state to include wills, trusts, or probate in a paraprofessional program in light of the complexities of those areas of law. This is not an access to justice issue—this is an access to information issue. The "case studies" presented would be more effectively addressed by informing the public about the benefits of estate planning.