Background Study

Liability of Nonprobate Transfer for Creditor Claims and Family Protections

authored by

Nathaniel Sterling

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LIABILITY OF NONPROBATE TRANSFER FOR CREDITOR CLAIMS AND FAMILY PROTECTIONS

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The last decades of the twentieth century witnessed a revolution in the manner of wealth transmission at death in California and throughout the nation. Until then, the classical means of transferring wealth at death was by will or intestate succession. The wealth transmission system was serviced by the process of probate administration.
The dominant trend in estate planning and administration over the past half century has been the rise of the nonprobate transfer. A nonprobate transfer is a transfer of property that occurs on the death of the decedent and that passes property to a beneficiary outside of regular probate channels.

PROBATE

Property transferred by will or intestate succession is subject to probate administration. The probate system evolved over centuries into a well-articulated scheme to service the classical wealth transmission process.

Probate administration is similar in effect to a bankruptcy proceeding. It is a judicial proceeding designed, among other functions, to marshal the decedent’s property, discharge the decedent’s debts, and pass the decedent’s property to beneficiaries with clear title and free of creditor claims. The system also provides family protections, such as a family allowance or a probate homestead, to ensure that the decedent’s dependents are not left destitute.

All this comes at a cost, both in time and expense. A probate estate can rarely be closed more quickly than six months after the decedent’s death. Even for a routine estate, nine months is more typical.

Probate fees include filing fees, personal representative and legal fees, and appraisal fees. The cost of probate administration is based on the value of the estate. A reasonable estimate is that probate costs consume 5 to 6 percent of a modest estate.

The probate system reached its apogee in the 1950’s. Even in the heyday of probate, major nonprobate wealth transmission techniques were used by persons seeking to avoid the cost and expense of probate, as well as the claims of creditors. Chief among the probate avoidance devices were joint tenancy and life insurance.

THE NONPROBATE REVOLUTION

Beginning in the 1960’s a major shift both in the manner of wealth transmission and in the nature of wealth itself began to occur. The change is chronicled by Langbein in his notable article, The Nonprobate Revolution and the Future of the Law of Succession.1

Beneficiary designations in financial instruments and other contract rights became commonplace. These devices enable a financial intermediary acting as a fiduciary to transfer title to the decedent’s beneficiary on the decedent’s death without probate intervention.

Likewise the inter vivos trust came to replace the will as the estate planning device of choice. The concept of the living trust was popularized in the 1960’s with the publication of Dacey, How to Avoid Probate (1965). Under a Dacey Trust a settlor would transfer all of the settlor’s property into a revocable trust with the

settlor as trustee. The settlor would have full use of the property during the settlor’s life. On the settlor’s death, the successor trustee would simply convey the property to the beneficiary designated in the trust.

The technique was viewed as an antidote to the delay and expense of probate. During the 1960’s that was a more significant issue than it is today, with the advent of independent administration and other techniques that have helped speed up the probate process and have somewhat limited its cost.

Trust instruments are now more sophisticated and the inter vivos trust has supplanted the will as the standard method of passing property at death. The expense of a trust may be significantly less than the expense of probate administration. A trust provides a more expeditious means of transferring property at death than a will or intestate succession.

California law now broadly authorizes and facilitates nonprobate transfer of a decedent’s wealth. Major types of nonprobate transfer include forms of title that pass property to a survivor by operation of law on the decedent’s death, contractual arrangements for the passage of property by an intermediary, and comprehensive management and passage of the decedent’s property in trust. Even today the nonprobate juggernaut continues its relentless course.²

The full extent of the nonprobate revolution in California has not been fully documented. However, over the course of the last two decades superior court probate filings have plummeted from about one for every three California decedents to about one for every six California decedents.

CREDITOR CLAIMS AND FAMILY PROTECTIONS

The probate system reflects policy choices and mechanics worked out over many years in fine detail. With respect to creditors of the decedent, for example, the probate system provides notice to creditors, a claims resolution mechanism, and a process for satisfying allowed claims.³ The probate system establishes a policy-based order of abatement to satisfy claims, and a hierarchy of priorities in case the decedent’s estate is insolvent.⁴

Likewise the probate system provides for the decedent’s dependents in the form of temporary possession of the family dwelling and exempt property, a probate homestead, a family allowance, and a small estate set-aside.⁵

The effort to disentangle these types of issues with respect to nonprobate transfers and to provide rational treatment of them is just beginning. The California trust law now addresses the matter directly.⁶

². See, e.g., the Uniform Real Property Transfer on Death Act (2009); Cf. Revocable Transfer on Death (TOD) Deed, 36 Cal. L. Revision Comm’n Reports 103 (2006).
But for the most part the nonprobate transfer system, if it can be called that, does not comprehensively deal with these types of concerns. Existing California law on liability of a nonprobate transfer for debts of a decedent and protection of the decedent’s dependents has evolved piecemeal. What little law there is on the subject is unclear, inconsistent, and haphazard.

The situation in California is not much different from that throughout the nation:

Firmly rooted in the English history of the law of succession is the notion that the rights of creditors should be protected. Handling the claims of creditors against a decedent’s estate has become a routine matter. Just as deeply entrenched is the sentiment of protecting the surviving spouse. However, the increasing use of will substitutes to dispose of a decedent’s property has also had the effect of removing many gifts which pass at death from the purview of the probate courts and the policies they impose. “The trend toward the use of nonprobate assets to pass wealth at death has increased so rapidly that it has outpaced the ability of states to deal with the situation.” Increased use of will substitutes has resulted in ad hoc judicial reform that is largely unsystematic. Although substantive policies restricting the disposition of property at death “would seem to make most sense if applicable as well to will substitutes, they are often expressed in narrow statutory language referring only to wills or to decedents’ estates.”

Even in circumstances where it is clear that a particular nonprobate transfer is liable for a decedent’s debts, there is no mechanism for ranking the priority of those debts or for apportioning their burden among beneficiaries. It is basically a free for all.

Some generalizations on the existing state of California law can be made:

1. A decedent’s creditor, but not a dependent family member, may be able to reach inter vivos trust property if the decedent’s estate is insufficient.
2. Apart from an inter vivos trust, other types of nonprobate transfer property are often immune from liability.
3. Liability of a nonprobate transfer may be established if it can be demonstrated that the transfer is made in fraud of creditors.
4. A secured creditor has rights against nonprobate property to the extent of the security; whether there is deficiency liability against the decedent’s estate depends on the type of property and type of debt.

“The puzzle in the story of the nonprobate revolution is not that transferors should have sought to avoid probate, but rather that other persons whose interests

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7. Schwickerath, Public Policy and the Probate Pariah: Confusion in the Law of Will Substitutes, 48 Drake L. Rev. 769, 770-771 (2000) (fn. omitted). See also Schoenmeyer, Claims Against a Decedent’s Non-Probate Property in Illinois, 18 Agric. Law 1 (No. 10, June 2009) (attorneys must rely on a “hodgepodge” of case law and statutes — “the question of how (or even whether) a creditor may pursue a claim against a decedent’s non-probate property can be a confusing one”).
probate was meant to serve — above all, creditors — should have allowed the protections of the probate system to slip away from them.”

The policy, if any, that supports immunization of nonprobate property from a decedent’s creditors and dependents is not obvious. It may be that in the ordinary case a decedent’s probate and nonprobate heirs, beneficiaries, and dependents are one and the same persons and they simply pay the decedent’s debts. It is only where the decedent’s estate is insolvent, or where interested persons are at odds with each other, that the issues become important. That circumstance must be taken into account in weighing the extent to which changes to the law governing nonprobate transfer liability may be desirable.

OUTLINE OF STUDY

This study first reviews existing California law governing the liability of a nonprobate transfer for debts of the decedent. It concludes that the law is sketchy, and what there is of it shows no coherent public policy but rather a pattern of haphazard development.

The study next reviews models in California and other jurisdictions for subjecting a nonprobate transfer to debts. In California, the experience with summary proceedings and with trusts is instructive. There is also experience applying federal estate tax liability to nonprobate transfers. Among other jurisdictions, the Missouri nonprobate transfer law, the Washington treatment of nonprobate transfers, and the Uniform Nonprobate Transfer on Death Act’s effort at a comprehensive approach are worth examining.

The study then reviews the policies involved in subjecting a nonprobate transfer to liability for debts. Key policy issues include (1) whether a nonprobate transfer should be subject to liability for a decedent’s debts, (2) if so, whether a nonprobate transfer should receive a preference over a probate transfer, (3) regardless of whether a nonprobate transfer receives a preference, whether there should be pro rata liability among nonprobate transfers, and (4) what procedures may be devised to deal with these issues simply and effectively, short of re-inventing probate.

The study then examines the law and policies with respect to liability of a nonprobate transfer for support of a decedent’s dependents. The family protection issues are similar to debt liability issues, but they are distinct and to some extent inimical to interests of creditors.

The study concludes with a proposed comprehensive treatment of the matter, together with suggested revisions that should be made whether or not comprehensive legislation is adopted.

8. Langbein, supra note 1, at 1117.
II. LIABILITY OF NONPROBATE TRANSFER FOR DEBTS

NONPROBATE TRANSFER DEVICES

California law broadly authorizes the use of nonprobate transfer devices. Probate Code Section 5000(a) provides:

A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is not invalid because the instrument does not comply with the requirements for execution of a will, and this code does not invalidate the instrument.

The law makes clear that use of these devices does not impair rights of the decedent’s creditors. “Nothing in this section limits the rights of creditors under any other law.” That provision is drawn from Section 6-201(b) of the Uniform Probate Code (pre-1989). The provision has never been construed, nor is there any commentary concerning it.

The rights of creditors under other law are far from clear. At a minimum those rights would include fraudulent transfer protection and, in the case of community property, community liability protection.

The Uniform Probate Code has since been revised to replace that perfunctory provision with a more substantive treatment. The Comment to Section 102 of the Uniform Nonprobate Transfers on Death Act notes, “Section 6-201(b) of the original Code and its 1989 sequel, 6-101(b), provided merely that the section did not limit any other rights that might exist. Neither section created any rights.”

COMMUNITY PROPERTY

Intersecting the law governing specific types of nonprobate transfer is the general law of community property that governs passage of property on the death of a married person. That section provides an overview; specific issues in nonprobate transfer liability of community property are addressed in detail throughout this study.


10. A reference in this study to the community property interest of a married person includes the community property interest of a registered domestic partner. See Fam. Code § 297.5 (registered domestic partner rights, protections, benefits, responsibilities, obligations, and duties the same as spouses).

PASSAGE OF COMMUNITY PROPERTY ON DEATH OF A SPOUSE

Each spouse has an equal and undivided one-half interest in community property. On the death of a spouse the community is severed; the decedent may dispose of the decedent’s one-half interest by will or nonprobate transfer. Absent any other disposition of the decedent’s interest in community property, the interest passes by intestate succession to the surviving spouse.

A nonprobate transfer of community property by a spouse applies only to the one-half interest of that spouse unless the other spouse consents to the transfer of both interests.

It is common for a decedent to pass the decedent’s community property interest to the surviving spouse, whether by will, intestate succession, trust, joint tenancy, or other form of nonprobate transfer. In addition, a relatively new title form — community property with right of survivorship — passes the decedent’s one-half interest to the surviving spouse in the same manner as joint tenancy.

While it is possible for a decedent to use various nonprobate transfer devices to pass a community property interest to the surviving spouse, it is often advantageous to retain the community property character of the property because of the significant tax advantages community property receives. In particular, community property receives a double step up in basis for capital gain taxation purposes.

Community property that passes to a surviving spouse by intestacy or will may be subject to summary administration. The surviving spouse may deal with the property without probate, subject to the obligation to restore the property or its value to the decedent’s estate if probate administration is later commenced. The law also enables simplified and expedited processing of the decedent’s separate and community property by the surviving spouse without probate.

RIGHTS OF CREDITORS

During marriage, each spouse’s interest in community property is liable for the debts of either spouse. The liability survives termination of the marriage by the

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13. Prob. Code §§ 5010-5032 (nonprobate transfers of community property). See also Prob. Code §§ 100(b) (agreement to item, as opposed to aggregate, allocation of community property interests), 140-147 (surviving spouse’s waiver of rights).
death of a spouse. Because the one-half interest of each spouse remains liable, the liability could be satisfied disproportionately from property in the decedent’s estate or from property of the surviving spouse. The law provides for an allocation of liability between the decedent and the survivor.

In the absence of probate, the surviving spouse is liable for the decedent’s debts to the extent of the value of any property received from the decedent. The converse is also true — the decedent’s half of community property is liable for the community debts of the surviving spouse. See *Dawes Family Trust v. Rich*.

Transfer of the decedent’s community property interest by means of a nonprobate transfer does not appear to change these rules. *Dawes* indicates that an inter vivos trust does not override community property liability rules.

**Community Property in Joint Tenancy Form**

Married persons may hold community property in joint tenancy form. Joint tenancy property passes to the survivor free of the debts of the decedent. An argument may be successfully made that the joint tenancy form was for convenience only and that community property tax rules should apply. It is not clear whether characterization of joint tenancy property as community for tax purposes would subject the property to community property creditor liability rules.


**Community Property with Right of Survivorship**

Community property with right of survivorship “shall, upon the death of one of the spouses, pass to the survivor, without administration, pursuant to the terms of the instrument, subject to the same procedures, as property held in joint tenancy.” Civ. Code § 682.1. That may mean that the property passes free of liability for the decedent’s debts.

Under classical joint tenancy theory, property passes by right of survivorship not from the decedent but from the transaction by which the joint tenancy was created. “While both joint tenants are alive each has a specialized form of a life estate, with what amounts to a contingent remainder in the fee, the contingency being

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22. 60 Cal. App. 4th 24, 70 Cal. Rptr. 2d 72 (1997) (community property held in inter vivos trust).
23. Cf. Estate of Petersen, 28 Cal. App. 4th 1742, 34 Cal. Rptr. 2d 449 (1994) (characterization of community property held as real property in joint tenancy form, as joint annuity contracts, and as joint money market accounts).
dependent upon which joint tenant survives.” As a consequence, a creditor’s right against the interest of a joint tenant is extinguished with the extinction of the contingency — the failure of that joint tenant to survive.

By parity of reasoning, the right of a creditor against community property with right of survivorship on the death of a spouse should be the same as the right of a creditor against joint tenancy on the death of a joint tenant. There is no case yet on point.

**GENERAL POWER OF APPOINTMENT**

Exercise of a general power of appointment by the decedent may have the effect of transferring property outside probate. Because a general power of appointment is the functional equivalent of ownership, the appointive property is included in the decedent’s gross estate for federal estate tax purposes. The property is subject to claims of the decedent’s creditors to the extent the estate is inadequate. See discussion below of “General Power of Appointment.”

**JOINT SAFE DEPOSIT BOX**

A commonly used device intended to pass property outside probate is rental of a safe deposit box in joint tenancy. Whether the contents of the box pass by joint tenancy or by another means is determined by the character of the property in the box, not by the manner of rental of the box.

**JOINT TENANCY**

A long-established means to pass real property to a beneficiary outside of probate is joint tenancy. Although personal property joint tenancies have also been used, the principal joint tenancy asset has been real property.

Joint tenancy is a form of common ownership of property, consisting of equal and undivided interests of the joint tenants during life. After death, the surviving joint tenant acquires ownership of the whole by right of survivorship; the property is not subject to administration in the decedent’s estate. The surviving joint tenant records an affidavit of death in order to establish ownership.

Generally, joint tenancy property passes to the survivor free of the claims of the decedent’s creditors. That rule applies to a secured as well as an unsecured creditor. The surviving joint tenant takes the property free of a lien or

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encumbrance on the decedent’s interest in the property.\textsuperscript{28} However, if the survivor is a co-obligor on a secured debt the security attaches to the survivor’s property, without right of exoneration from the decedent’s estate.\textsuperscript{29}

Although joint tenancy property generally passes free of creditor claims, that rule does not apply if the decedent’s transfer of the property into joint tenancy was fraudulent as to creditors.\textsuperscript{30}

Although the decedent’s share of joint tenancy property passes to the survivor free of creditor claims under California law, the same is not true under federal law. The decedent’s share of joint tenancy property is included in the decedent’s gross estate for estate tax purposes, and the survivor is subject to assessment for a proportionate share of the estate tax. See discussion below of “Federal Estate Tax.”

**LIFE ESTATE**

A decedent’s creditors may be able to proceed against property conveyed by the decedent subject to a retained life estate, if the transfer was in fraud of creditors.\textsuperscript{31} The property is included in decedent’s gross estate under federal law if it was a donative transfer.\textsuperscript{32}

**LIFE INSURANCE**

The beneficiary of an insurance policy on the decedent’s life takes the proceeds directly from the insurance company free of probate.\textsuperscript{33} The proceeds are includible in the decedent’s gross estate for estate tax purposes if at death the decedent possessed any incidents of ownership.\textsuperscript{34}

Life insurance proceeds are exempt from creditors to the extent reasonably necessary for support.\textsuperscript{35} However, a creditor may reach the proceeds of a fraudulently transferred life insurance policy in excess of the exemption.\textsuperscript{36}


\textsuperscript{29} Estate of Dolley, 265 Cal. App. 2d 63, 71 Cal. Rptr. 56 (1968).


\textsuperscript{33} Prob. Code § 5000(a); Estate of Burnett, 47 Cal. App. 2d 464, 118 P.2d 298 (1941).

\textsuperscript{34} Int. Rev. Code § 2042; Reg. § 20.2042-1(c).

\textsuperscript{35} Code Civ. Proc. § 704.100.

\textsuperscript{36} Headen v. Miller, 141 Cal. App. 3d 169, 190 Cal. Rptr. 198 (1983).
MULTIPLE PARTY ACCOUNT

A common means of passing property to a beneficiary without probate is by a multiple party account in a financial institution. The account may take the form of a joint account, an account with a pay on death beneficiary designation, or a Totten Trust account. Each type of account has distinct legal incidents. The rights of creditors are not spelled out by statute and are far from clear. A creditor may have rights if the transfer is fraudulent as to creditors.

PARTNERSHIP INTEREST

A partnership agreement may provide that on death of a partner, the partnership must purchase the decedent’s interest. The agreement may provide that payment is made to the decedent’s designated beneficiary, in which case the payment passes outside probate. The right of the decedent’s creditors to reach the payment is unclear.

RETIREMENT AND EMPLOYEE BENEFIT PLANS

A retirement or employee benefit plan may include a beneficiary designation that passes benefits outside probate. California law generally protects benefits of that type from creditor claims. A public retirement plan is fully exempt. A private retirement plan is exempt to the extent necessary for support of dependents.

The federal Employee Retirement Income Security Act of 1974 (ERISA) includes broad exemptions from creditor claims against a qualified plan in the form of anti- alienation provisions. However, a qualified plan may be subject to a child or spousal support claim under the Retirement Equity Act pursuant to a qualified domestic relations order.

The general protections against creditors do not preclude enforcement of a federal tax levy against the funds under Internal Revenue Code Section 6331. Moreover, death benefits payable under a qualified retirement plan are subject to estate tax allocation and enforcement.

44. 26 U.S.C. § 414(p).
REVOCABLE TRUST

The revocable inter vivos trust is now the principal estate planning device in California, in large part because it passes property to the decedent’s trust beneficiaries free of probate. Property passing under the trust is subject to the decedent’s debts to the extent the decedent’s probate estate is insufficient. See discussion below of “Trust Law.”

SECURITY REGISTERED IN TRANSFER ON DEATH FORM

A security may be registered with a transfer on death designation in the name of a beneficiary. Title to the security passes to the beneficiary on the owner’s death. The statute is silent on the rights of the decedent’s creditors, other than a cryptic note that the statute “does not limit the rights” of a creditor of the security owner against a beneficiary or other transferee under other laws of the state.

SOCIAL SECURITY BENEFITS

Family members of a social security recipient may be entitled to funeral benefits and survivors’ benefits under the Social Security Act. These are exempt from creditor claims by federal law.

UNITED STATES SAVINGS BOND

A United States saving bond may be issued in co-ownership form or in beneficiary form. A bond in that form passes to the survivor or beneficiary without probate on the death of the registered owner. A decedent’s creditor may reach the asset only if the transfer is fraudulent, and in that case may not reach it through the Treasury Department but must pursue bond proceeds in the hands of the surviving owner or beneficiary.

A co-ownership bond is considered joint tenancy property for federal estate tax purposes, and a beneficiary bond is considered property in which the decedent had an interest, and they are thus fully includible in the decedent’s gross estate.
VEHICLE, VESSEL, MOBILE HOME REGISTERED IN JOINT
OR BENEFICIARY FORM

A vehicle or vessel registered with the Department of Motor Vehicles may be
transferred outside of probate by various means.
(1) A vehicle or vessel registered solely in the decedent’s name may be claimed
by the decedent’s successor by an Affidavit for Transfer Without Probate. The
affidavit procedure may only be used if the successor states under penalty of
perjury that there are no unsecured creditors of the decedent whose claims have
not been paid or discharged. The successor remains liable for the decedent’s
unsecured debts to the same extent as a person who takes under the small estate
affidavit procedure. See discussion below of “Affidavit Procedure for Collection
or Transfer of Personal Property.”
(2) A vehicle or vessel may be registered in joint tenancy form and passes by
right of survivorship on the death of a joint owner. Presumably a creditor’s rights
in this situation are governed by general principles of joint tenancy law.
(3) A vehicle or vessel (as well as a mobile home) may be registered in transfer
on death form and passes to the named beneficiary on the death of the owner. The
transfer may be subjected to a creditor’s claim if the decedent’s probate estate
is insufficient. See discussion below of “Fraudulent Transfer, Gift Causa Mortis,
Nonprobate Transfer of Vehicle.”

WORKERS COMPENSATION BENEFITS

Worker’s compensation benefits, including death benefits, are exempt from
creditor claims.

PASSAGE OF SMALL ESTATE

California law enables passage of a small estate to successors without the
necessity of probate in a number of circumstances. Although this is not a
“nonprobate transfer” in the commonly understood sense of the term, it has the
same effect. Typically a successor that takes the decedent’s property without
probate pursuant to small estate authority remains liable for the decedent’s
unsecured debts. The operation of the small estate statutes is discussed below
under:
“Small Estate Set-Aside”
“Summary Disposition of Small Estates”

52. Veh. Code §§ 5910(a), 9916(a).
SUMMARY

The law governing liability of nonprobate transfer property or transferees for the
decedent’s debts is sketchy. The existing law shows no coherent policy but rather
a pattern of haphazard development.

Roughly speaking, the law either (1) exempts the nonprobate transfer from
liability, (2) subjects the nonprobate transfer to liability if the decedent’s probate
estate is inadequate, or (3) is silent. The most common basis for liability of a
nonprobate transfer under case law is that the transfer is fraudulent as to creditors
— i.e., the nonprobate transfer renders the decedent’s estate insolvent. While there
is nonprobate transfer liability in some circumstances, the procedural mechanisms
for imposing that liability are often unclear.

III. EXISTING NONPROBATE TRANSFER
DEBT ENFORCEMENT SCHEMES

California has some experience apportioning liability for a decedent’s debts
among nonprobate transferees, though on a limited basis. The existing California
procedures are discussed below under “California Law.”

A few other jurisdictions comprehensively treat probate and nonprobate
transferee debt liability. The granddaddy of all such schemes is the federal estate
tax system. See discussion below of “Federal Estate Tax.”

With respect to comprehensive state procedures, the seminal Missouri statute
has been in effect for 20 years and the Washington statute for 15 years. See
discussion below of “Missouri Statute” and “Washington Statute.” A more recent
effort, Section 102 of the Uniform Nonprobate Transfers Act (1998) (included in
the Uniform Probate Code as Section 6-102) has been enacted in six jurisdictions.
See discussion below of “Uniform Act.”

This study analyses each of the schemes, including a synopsis of how the statute
deals with some of the more common issues concerning nonprobate transfer
liability. They are:

(1) Insolvent estate. Many of the statutes provide for nonprobate transfer
liability only if the probate estate is insolvent.
(2) Enforcement by personal representative. A statute may require
appointment of a personal representative to enforce nonprobate transfer
liability.
(3) Enforcement by creditor. A statute may contemplate direct action by the
creditor in addition to or instead of by the personal representative.
(4) **Liability of transferee or of property.** Some schemes allow recapture of the transferred property, others provide personal liability of the transferee (typically limited by the value of the property).

(5) **Proportionate liability.** If a particular nonprobate transfer is targeted, may the transferee seek to have the liability spread among other nonprobate transfers?

(6) **Creditor priority.** If one creditor exhausts the nonprobate transfer liability, do others have a right to share in the proceeds?

(7) **Statute of limitations.** Many liability schemes impose a statute of limitations on nonprobate transfer liability of one year after the decedent’s death.

The analysis of each scheme concludes with a critique, including the scheme’s potential usefulness as a model for comprehensive treatment of nonprobate transfer liability in California.

### A. CALIFORNIA LAW

A number of California statutes enable a creditor to reach property that passes outside of probate. Those statutes apply only in limited circumstances and are not comprehensive, but they are worth examining both for their policy and their operation.

### SECURED DEBTS

Generally the existing California nonprobate transfer liability provisions address a decedent’s unsecured debts.\(^56\)

A secured creditor ordinarily does not have a collection problem. Property passes from a decedent to a beneficiary, whether by probate or nonprobate transfer, subject to liens and encumbrances on the property.\(^57\)

A lien holder may enforce the lien directly without filing a claim in probate if the lien holder waives recourse against other property in the estate; the one year statute of limitations of Code of Civil Procedure Section 366.2 for a cause of action against a decedent does not apply in the enforcement action.\(^58\)

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56. See, e.g., Prob. Code §§ 6611 (liability for unsecured debts in small estate set-aside), 7664 (liability for unsecured debts in summary disposition of small estate), 13109 (liability for unsecured debts in affidavit procedure for collection or transfer of personal property), 13156 (liability for unsecured debts in court order determining succession to property), 13204 (liability for unsecured debts in affidavit procedure for real property of small value), 19400 (liability of trust distributee for unsecured debts).

57. See, e.g., Prob. Code § 21131 (“A specific gift passes the property transferred subject to any mortgage, deed of trust, or other lien existing at the date of death, without right of exoneration, regardless of a general directive to pay debts contained in the instrument.”). See also Prob. Code § 11420 (priority for payment of obligation secured by mortgage, deed of trust, or other lien, including judgment lien).

A debt secured by nonprobate property is payable first from that property, without exoneration from the decedent’s estate. The creditor may waive the security and proceed against the decedent’s estate. In that case there is no suggestion in the law that the estate is entitled to reimbursement or contribution from the beneficiary of the encumbered property, unless the debt was a joint obligation.

If the encumbrance is a purchase money mortgage of real property, the creditor is limited to the security and may not go against the decedent’s estate. If the encumbrance is a pledge of personal property, the creditor is not so constrained but may waive the security and recover against the estate either directly or for a deficiency.

As a practical matter, the creditor ordinarily will go directly against the encumbered property because that is simpler and quicker. That is particularly true of a loan secured by assets that are liquid or are easily liquidated such as a joint account, a Totten trust account, or jointly owned securities.

Although property passes subject to liens and encumbrances, the decedent may direct that the debt be discharged out of other property. A creditor is not bound by the decedent’s direction and is entitled to realize on the security, leaving the beneficiaries to sort out their rights among themselves.

The principal exception to the law’s protection of a debt secured by nonprobate property is found in the law of joint tenancy. A surviving joint tenant takes the property free of a lien or encumbrance on the decedent’s interest in the property. See discussion above of “Joint Tenancy.”

## Synopsis

- Liability limited to insolvent estate: No
- Enforcement by personal representative if any: No
- Direct enforcement by creditor: Yes
- Liability of transferee or of property: Property
- Proportionate liability: No
- Priority among creditors: Secured creditor has priority
- One year statute of limitations: No

59. See, e.g., Estate of Dolley, 265 Cal. App. 2d 63, 71 Cal. Rptr. 56 (1968); Cj. Prob. Code § 11420(a)(2) (priority of secured debt in probate) and §§ 19001(b) and 19027 (incorporating the priority scheme of Section 11420 for trusts).


63. Prob. Code §§ 21102 (transferor’s intent controls), 21404 (instrument requiring exoneration of property encumbered by mortgage, deed of trust, or other lien, does not require abatement of other specific gifts).
Evaluation

The scheme of existing law, in which the apportionment of a secured obligation between probate and nonprobate property depends to a large extent on the creditor’s choice of enforcement remedies, is anomalous. However, the rules governing treatment of a secured obligation in probate and nonprobate transfers are generally comparable.\(^{64}\)

The rule that property passes to a beneficiary subject to liens on the property without exoneration from the estate is appropriate with respect to a voluntary lien such as a mortgage or deed of trust; that would accord with the decedent’s likely intent. The same rationale does not apply to a nonconsensual lien or a general lien not tied to a specific asset, such as a tax lien, judgment lien, or Medi-Cal lien.

Probate Code Section 21131 (property passes subject to encumbrance without right of exoneration) refers to a mortgage, deed of trust, “or other lien” existing at the date of death. There is no case interpreting whether that includes a nonconsensual or general lien. The wording of the provision differs from that of a number of statutes that refer to other liens “including judgment liens.”\(^{65}\)

The law should make clear that a beneficiary that discharges a general or nonconsensual lien against property received by that beneficiary should be entitled to exoneration from the estate, regardless of whether the beneficiary receives the property via a probate or a nonprobate transfer.

The rule that joint tenancy property passes free of a lien on the decedent’s interest has been widely criticized by commentators.\(^{66}\) That rule should be abrogated statutorily.

UNIFORM FRAUDULENT TRANSFER ACT

CIVIL CODE § 3439

The classic approach for a creditor to reach property that passes outside the probate estate is to attack its transfer as a fraud against creditors. A fraudulent transfer is one made without receiving a reasonably equivalent value in exchange, made either while the debtor is insolvent or with the intent to defraud creditors.\(^{67}\)

A gift or other donative transfer to a beneficiary by a decedent is made without a reasonably equivalent value in exchange. Thus a creditor may reach a decedent’s

\(^{64}\) See, e.g., Prob. Code §§ 9391 (enforcement of lien against encumbered property), 10361 (sale of encumbered property and application of proceeds), 11420 (priority of secured obligation), 21401 (abatement of gifts).

\(^{65}\) See, e.g., Prob. Code §§ 9391, 11420.


\(^{67}\) Civ. Code §§ 3439.04-3439.05.
joint tenancy interest if the transfer into joint tenancy was made in fraud of creditors.\textsuperscript{68}

The Probate Code does not preempt the fraudulent transfer remedy for creditors in the event of a nonprobate transfer.\textsuperscript{69}

The fraudulent transfer remedy may be enforced by a creditor directly against a nonprobate transfer. The Probate Code directs the decedent’s personal representative to use the remedy in some circumstances. See discussion below of “Fraudulent Transfer, Gift Causa Mortis, Nonprobate Transfer of Vehicle.”

\textbf{Synopsis}

Liability limited to insolvent estate: No
Enforcement by personal representative if any: In some circumstances
Direct enforcement by creditor: Yes
Liability of transferee or of property: Property
Proportionate liability: No
Priority among creditors: No
One year statute of limitations: Unclear

\textbf{Evaluation}

The fraudulent transfer remedy is at odds with more recent statutes designed to provide a creditor a remedy where a decedent’s nonprobate transfer has depleted the estate. For example, the general one year statute of limitations for creditor claims against a decedent is inconsistent with the four to seven year statute generally applicable under fraudulent transfer law. Compare Code of Procedure Section 366.2 (one year) with Civil Code Section 3439.09 (four to seven years). It is not clear whether Section 366.2 overrides Section 3439.09.

To some extent the fraudulent transfer law is dependent on a finding of fraudulent intent, whereas the nonprobate transfer liability statutes operate independently of intent.\textsuperscript{70} One basis of liability under the fraudulent transfer statute is that the transfer renders the transferor insolvent; that is consistent with various nonprobate transfer statutes that impose liability to the extent the decedent’s estate is inadequate.\textsuperscript{71} The issue under fraudulent transfer law is fraud at inception. Subsequent insolvency does not subject property to liability.\textsuperscript{72}

\begin{itemize}
\item \textsuperscript{68} Rupp v. Kahn, 246 Cal. App. 2d 188, 55 Cal. Rptr. 1008 (1962).
\item \textsuperscript{69} Prob. Code § 5202 (“Nothing in this part affects the law relating to transfers in fraud of creditors.”); Headen v. Miller, 141 Cal. App. 3d 169, 190 Cal. Rptr. 198 (1983) (creditor may reach life insurance proceeds in excess of exemption as fraudulent transfer).
\item \textsuperscript{70} Cf. Civ. Code § 3439.04 (intent to defraud creditors).
\item \textsuperscript{71} Cf. Civ. Code § 3439.05 (insolvency).
\item \textsuperscript{72} Citizens Action League v. Kizer, 887 F2d 1003 (9th Cir 1989).
\end{itemize}
Depending on the approach taken to comprehensive nonprobate transfer liability, its interrelation with fraudulent transfer law should be clarified.

ONE YEAR STATUTE OF LIMITATIONS FOR CLAIMS AGAINST DECEDENT

CODE OF CIVIL PROCEDURE § 366.2

A backstop to all the nonprobate liability schemes is the one year statute of limitations for debts of a decedent. Code of Civil Procedure Section 366.2 provides:

(a) If a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, and whether accrued or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply.

(b) The limitations period provided in this section for commencement of an action shall not be tolled or extended for any reason except as provided in any of the following, where applicable:

(1) Sections 12, 12a, and 12b of this code.

(2) Part 4 (commencing with Section 9000) of Division 7 of the Probate Code (creditor claims in administration of estates of decedents).

(3) Part 8 (commencing with Section 19000) of Division 9 of the Probate Code (payment of claims, debts, and expenses from revocable trust of deceased settlor).

(4) Part 3 (commencing with Section 21300) of Division 11 of the Probate Code (no contest clauses).

(c) This section applies to actions brought on liabilities of persons dying on or after January 1, 1993.

The Law Revision Commission’s Comment to this section indicates that it applies in “any” action on a liability of the decedent:

The one-year limitation of Section 366.2 applies in any action on a liability of the decedent, whether against a personal representative under Probate Code Sections 9350-9354 or against another person, such as a distributee under Probate Code Section 9392, a person who takes the decedent’s property and is liable for the decedent’s debts under Probate Code Sections 13109 (affidavit procedure for collection or transfer of personal property), 13156 (court order determining succession to real property), 13204 (affidavit procedure for real property of small value), or 13554 (passage of property to surviving spouse without administration), or a trustee.

The one year limitation period is expressly applicable in the following nonprobate proceedings:
• Liability of surviving spouse for debts of decedent

• Small estate set-aside

• Summary disposition of small estate

• Action by omitted creditor

• Affidavit procedure for collection or transfer of personal property

• Court order determining succession to property

• Affidavit procedure for real property of small value

• Passage of property to surviving spouse without administration

• Trust claim procedure

• Trust beneficiary liability

Cases have applied the one year limitation period to:

• A creditor’s effort to reach property in the decedent’s revocable living trust.

• A creditor’s effort to reach property distributed to a beneficiary of the decedent’s revocable living trust.

• A creditor’s effort to reach property in the decedent’s irrevocable trust.

• A creditor’s effort to reach the decedent’s community interest in property passing to the surviving spouse without probate.

• A creditor’s effort to reach the surviving spouse’s separate property and the surviving spouse’s community property interest in property taken without probate for a necessaries debt of the deceased spouse.

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73. Fam. Code § 914.
It is likely that the provision will be construed to apply to every creditor effort to reach nonprobate transfer property or to enforce nonprobate transferee liability, unless a statute expressly makes it inapplicable.  

The one year statute does not apply to a reimbursement action by the state to recover Medi-Cal expenses. Nor may a nonprobate transferee safely rely on the one year statute in a case where equitable estoppel may apply.

Evaluation

The battles have already been fought over the one year statute of limitations, and the short statute has won the day, constitutionally suspect though it may be. For consistency, the law should make clear that the statute applies to nonprobate transfer liability generally, saving the need to further litigate the issue on a case by case basis.

ACTION AGAINST RECIPIENT OF DECEDEDENT’S PROPERTY

CODE OF CIVIL PROCEDURE § 377.40

A claimant has a direct action against a recipient of the decedent’s property in limited circumstances.

The provision is narrow in its scope. The “decedent’s successor in interest” under the statute is limited to (1) a testate or intestate beneficiary or (2) another successor to a cause of action or to a particular item of property that is the subject of a cause of action. The provision does not apply to a general nonprobate transferee.

The statute does not provide an independent basis of liability against the successor in interest, but is derivative “to the extent provided by statute.” An independent basis for liability must be found elsewhere in the law.

Synopsis

Liability limited to insolvent estate: No
Enforcement by personal representative if any: No

88. See, e.g., Prob. Code §§ 551 (Section 366.2 inapplicable in creditor’s direct action against insurer), 9391 (Section 366.2 inapplicable in creditor’s direct action to enforce lien).
91. Code Civ. Proc. § 377.40 (cause asserted against decedent’s successor in interest “to the extent provided by statute”); see also Code Civ. Proc. § 377.41 (pending action or proceeding that does not abate may be continued against decedent’s successor in interest “to the extent provided by statute”). The text of these statutes is set out in the Appendix.
Direct enforcement by creditor: Yes
Liability of transferee or of property: Transferee
Proportionate liability: Unknown
Priority among creditors: Unknown
One year statute of limitations: Presumably

**Evaluation**

Section 377.40 has yielded little practical experience in apportioning general creditor liability among the decedent’s beneficiaries. Successor in interest liability under the statute is secondary to personal representative liability. Where there is successor in interest liability, the statute appears to allow the creditor a choice between action against the personal representative or against the successor. It is not clear whether the creditor may proceed against both, and if so whether any priority or apportionment is applicable.

A comprehensive nonprobate transfer statute could eclipse this provision. Depending on whether the comprehensive statute provided for liability of the nonprobate transferee or the nonprobate property, Section 377.40 might require conforming revision.

The basic statutory scheme for representation of a decedent on a cause of action by or against the decedent is in need of revision. See discussion below of “Survival of Causes of Action and Privileges.”

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**ENFORCEMENT AFTER DEATH OF JUDGMENT DEBTOR**

**CODE OF CIVIL PROCEDURE § 686.020**

Code of Civil Procedure Section 686.020 provides:

After the death of the judgment debtor, enforcement of a judgment against property in the judgment debtor’s estate is governed by the Probate Code.

It is not clear whether Section 686.020 is limited to the judgment debtor’s probate estate, or whether it broadly applies to all of the debtor’s property including that passing by nonprobate transfer. There is no case law interpreting the provision and the Law Revision Commission comments are equally ambiguous.

A companion provision — Probate Code Section 9300 — states that a judgment against a decedent is payable in estate administration and is not enforceable against property “in the estate” of the decedent under the enforcement of judgments law. But it is a question whether property that passes by nonprobate transfer is in the decedent’s “estate” for that purpose.

_Belshe v. Hope_ holds that the decedent’s “estate” includes the decedent’s revocable inter vivos trust for the purpose of enforcement of Welfare and

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Institutions Code Section 14009.5 (requiring Department of Health Services to recover Medi-Cal payments from the “estate” of the decedent).

Marriage of Perry95 reached a similar conclusion in construing the common law rule that a child support obligation is enforceable against the decedent’s “estate”:

If the word estate is to be given a broad meaning to implement the purposes of a Medicaid reimbursement statute, it should likewise be given such a meaning where child support is involved. Like the court in Belshé, we cannot countenance allowing the technical difference between a living trust and a will to protect property otherwise subject to a support obligation. To do so would be to allow Keith’s heirs — and we do not use the word “heirs” in its technical sense, but in its basic sense of those people on whom Keith would naturally want to bestow his property — to reap a windfall. Indeed, there is even more reason here than in Belshé, because the present case involves an equitable proceeding arising in the family law court, while the Belshé case involved a claim at law.96

The court allowed the child support creditor to proceed directly against trust property in the exercise of its civil, as opposed to probate, jurisdiction:

We are satisfied that the family law court was a correct forum. The subject matter jurisdiction of the probate court is set forth in Probate Code section 17000. The statute gives the probate court exclusive jurisdiction over the “internal affairs of trusts” (see Cal. Law Revision Com. cmt., West’s Annot. Prob. Code, § 17000, p. 182) but only gives it concurrent jurisdiction over “proceedings” by “creditors ... of trusts.” (See Prob. Code, § 17000, subd. (b)(2).)

The child support modification proceeding in the family law case here is — in substance — a proceeding by a creditor of the trust, not a proceeding confined to the trust’s internal affairs. Tammy’s claim involves what the trust owes a third party, independent of the trust’s internal terms of distribution. The family court thus had the jurisdictional authority to join Beverly to a dissolution proceeding and order payments from the trust corpus.97

It has been held that an individual retirement account or a bank deposit that passes to a beneficiary by nonprobate transfer is not part of the decedent’s “estate” for the purpose of enforcement of a judgment and may not be claimed by the estate:

The proceeds of such transfers do not become a part of the estate: “[T]he law of descent and distribution has no applicability to such cases. [Citations.]” ( Estate of Welfer (1952) 110 Cal. App. 2d 262, 265, 242 P.2d 655.) Had decedent named his estate as the beneficiary, as allowed by Treasury Regulation section 1.408-2(b)(8), title would have vested in his heirs subject to expenses of administration and payment of his debts. (Estate of MacMillan (1954) 43 Cal. 2d 437, 442, 274 P.2d 662.)98

96. Id. at 1108-09 (fn. omitted)
97. Id. at 1111.
The implication is that a judgment creditor may proceed directly against nonprobate property.

**Synopsis**

- Liability limited to insolvent estate: No
- Enforcement by personal representative if any: Probably not
- Direct enforcement by creditor: Apparently
- Liability of transferee or of property: Property
- Proportionate liability: No
- Priority among creditors: No
- One year statute of limitations: Unknown

**Evaluation**

The statutes are ambiguous; the implication of the case law is that a judgment creditor may enforce the judgment directly against nonprobate property, regardless of whether there is a probate proceeding pending. That should be stated directly. In addition, the statute may require integration with any comprehensive nonprobate transfer liability scheme that is adopted.

**LIABILITY OF MARITAL PROPERTY**

**FAMILY CODE § 900 ET SEQ.**

The Family Code prescribes a liability regimen of community property and separate property for debts incurred during marriage. Under this regimen, marital property of a surviving spouse may be liable for the debts of a deceased spouse. The one year statute of limitations for debts of a decedent applies to the liability of marital property. An exception is where the surviving spouse had actual knowledge of the debt within the one year period:

1. Except as provided in paragraph (2), the statute of limitations set forth in Section 366.2 of the Code of Civil Procedure shall apply if the spouse for whom the married person is personally liable dies.
2. If the surviving spouse had actual knowledge of the debt prior to expiration of the period set forth in Section 366.2 and the personal representative of the deceased spouse’s estate failed to provide the creditor asserting the claim under this section with a timely written notice of the probate administration of the estate.

in the manner provided for pursuant to Section 9050 of the Probate Code, the
statute of limitations set forth in Section 337 or 339, as applicable, shall apply.\textsuperscript{102}

Section 914(c)(2) conflicts with Probate Code Section 13554 (one year statute
applies). Under the rule of \textit{Collection Bureau of San Jose v. Rumsey},\textsuperscript{103} the Probate
Code prevails over the Family Code. But Family Code Section 914(c)(2) was
enacted in response to \textit{Rumsey}, suggesting an intent that the Family Code prevail
notwithstanding the Probate Code. Because Section 914(c)(2) is the later enacted
and more specific statute it will probably be held to be controlling.

If marital property liability is enforced in a probate proceeding or a trust
proceeding, statutory provisions for apportionment of liability between the spouses
apply.\textsuperscript{104} If marital property liability is enforced directly against property of the
surviving spouse outside of a probate or trust proceeding, the surviving spouse has
a reimbursement claim. It appears that the one year limitation period of Code of
Civil Procedure Section 366.2 applies to a reimbursement proceeding
notwithstanding the three year limitation period of Family Section 920(c).\textsuperscript{105}

As a general rule under \textit{Rumsey}, in case of a conflict the Probate Code liability
provision prevails over the Family Code liability provision.

\textbf{Synopsis}

- Liability limited to insolvent estate: No
- Enforcement by personal representative if any: Yes
- Direct enforcement by creditor: Yes
- Liability of transferee or of property: Property
- Proportionate liability: Yes
- Priority among creditors: Unknown
- One year statute of limitations: Yes

\textbf{Evaluation}

The Family Code provision for liability of the surviving spouse is limited in its
application. The broader spousal nonprobate transfer liability provisions are found
in Probate Code §§ 13550-13554. The conflicts between the Family Code and
Probate Code provisions need to be resolved by statute.

\textsuperscript{102}. Fam. Code § 914(c).
\textsuperscript{103}. 24 Cal. 4th 301, 6 P.3d 713 (2000).
\textsuperscript{104}. Prob. Code §§ 11444 (probate), 19320-19326 (trust).
LIABILITY OF DECEDEENT COVERED BY INSURANCE

PROBATE CODE § 550

An action to establish the decedent’s liability for which the decedent was protected by insurance may be commenced against the decedent’s “estate” without the need to join the decedent’s personal representative. The plaintiff need not file a claim in probate but must waive recourse against the estate in excess of the insurance coverage. The one year statute of limitations is inapplicable in the proceeding. The insurance company must be served, but on motion the court may order the appointment and substitution of a personal representative as the defendant. A judgment in the proceeding is enforceable only against the insurer and not against the estate.

Synopsis

Liability limited to insolvent estate: No
Enforcement by personal representative if any: No
Direct enforcement by creditor: Yes
Liability of transferee or of property: Property
Proportionate liability: No
Priority among creditors: No
One year statute of limitations: No

Evaluation

The insurance liability provision is useful due to its procedural detail but is limited in scope. It could be applied in a few other situations, such as an action by a creditor against the decedent’s guarantor. It is doubtful that the procedure could be generalized to apply to a third party holding nonprobate property, such as a fiduciary, because it is based on the adversarial nature of the relationship between the creditor and the insurer.

GENERAL POWER OF APPOINTMENT

PROBATE CODE § 682

Under Probate Code Section 682, a creditor of a decedent may reach property over which the decedent held a general power of appointment if the decedent’s estate is inadequate to cover claims of creditors and expenses of probate:

Upon the death of the donee, to the extent that the donee’s estate is inadequate to satisfy the claims of creditors of the estate and the expenses of administration of the estate, property subject to a general testamentary power of appointment or to a general power of appointment that was presently exercisable at the time of the donee’s death is subject to the claims and expenses to the same extent that it would be subject to the claims and expenses if the property had been owned by the donee.

The policy of the statute is that property subject to a general power of appointment is fully under the control of the decedent and therefore should be treated as property owned by the decedent for debt enforcement purposes. The federal estate tax takes the same approach to a general power of appointment.

Under Section 682 the property is liable only if the decedent’s estate is inadequate. But once it is determined that the estate is inadequate, the property is liable “to the same extent” as it would be if it were owned by the decedent. Thus the property is considered together with other estate property and liability assigned to it proportionately. That treatment should be contrasted with other liability schemes that make property liable only to the extent the estate is inadequate.

A question not answered by the power of appointment statute is how the liability of appointed property is to be enforced — whether a creditor may seek recovery directly against the appointed property, or only via a claim in probate. The wording of the statute suggests that probate is the appropriate mechanism, but that is far from clear. In Heywood the creditor proceeded directly against the appointive property after the parties stipulated the estate would be inadequate.

Synopsis

- Liability limited to insolvent estate: Yes
- Enforcement by personal representative if any: Apparently
- Direct enforcement by creditor: Unclear
- Liability of transferee or of property: Property
- Proportionate liability: Yes
- Priority among creditors: Unknown
- One year statute of limitations: Presumably

Evaluation

This is a rare provision for equal treatment of nonprobate property with other probate property. However, the equal treatment applies only when it has been determined that the estate is insolvent. If probate and nonprobate property is to be treated equally, it is not apparent why that should occur only where the probate estate is insolvent.

SMALL ESTATE SET-ASIDE

PROBATE CODE § 6611

If the decedent’s estate (excluding nonprobate transfer property) is less than $20,000, the estate may be set aside on court order without probate for the decedent’s surviving spouse and minor children.112 The spouse and minor children remain personally liable for the decedent’s unsecured debts not exceeding the value of the property set aside.113 The liability apparently may be enforced by direct action of a creditor, subject to the one year statute of limitations of Code of Civil Procedure Section 366.2.

Synopsis

Liability limited to insolvent estate: No
Enforcement by personal representative if any: No
Direct enforcement by creditor: Yes
Liability of transferee or of property: Transferee
Proportionate liability: No
Priority among creditors: No
One year statute of limitations: Yes

Evaluation

The applicable procedure for enforcing liability under Section 6611 is rudimentary. Liability is limited to the value of the property received, less “the amount of any liens and encumbrances on the property.” That is a useful qualification.

Although the statute limits liability to the value of the property received, that limit applies to all property received by the spouse and minor children from the decedent in the aggregate and not to an individual item of property. The limit excludes the value of property received by joint tenancy survivorship or multiple party account pay on death.

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113. Prob. Code § 6611. The text of Section 6611 is set out in the Appendix.
SUMMARY DISPOSITION OF SMALL ESTATES

PROBATE CODE § 7664

Probate Code Sections 7660 to 7666 provide a public administrator unique authority to summarily dispose of an estate under $30,000 or, with court authorization, under $100,000. No probate administration is necessary. Personal liability follows the property that is distributed:

A person to whom property is distributed under this procedure is personally liable for the unsecured debts of the decedent. Such a debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. In an action based on the debt, the person may assert any defenses available to the decedent if the decedent had not died. The aggregate personal liability of a person under this section shall not exceed the fair market value of the property distributed to the person, valued as of the date of the distribution, less the amount of any liens and encumbrances on the property on that date. Section 366.2 of the Code of Civil Procedure applies in an action under this section.114

Synopsis

Liability limited to insolvent estate: No
Enforcement by personal representative if any: No
Direct enforcement by creditor: Yes
Liability of transferee or of property: Transferee
Proportionate liability: No
Priority among creditors: No
One year statute of limitations: Yes

Evaluation

There is no reported case construing or applying this provision.

A person sued under this section may assert “any defenses available to the decedent if the decedent had not died.” That provision should include a cross-complaint or setoff, as many comparable California statutes do. The statute should also refer to assertion of a privilege that would have been available to the decedent. See discussion below of “Privileges.”

OMITTED CREDITOR

PROBATE CODE § 9392

California law imposes personal liability on a probate distributee where a creditor has been omitted from the normal probate claim processing procedure. The probate provision is worth examination because it allows direct action by a creditor in a more sophisticated way than most of the nonprobate transfer statutes do.

In a proper situation, the distributee may be personally liable to the omitted creditor, subject to the general one year statute of limitations. The personal liability is limited to a pro rata portion of the debt based on the value of the property received, and the liability may not exceed the value of the property received. The distributee is liable only to the extent the creditor cannot be satisfied out of the estate. The text of Probate Code Section 9392 is set out in the Appendix.

Synopsis

| Liability limited to insolvent estate: Yes |
| Enforcement by personal representative if any: No |
| Direct enforcement by creditor: Yes |
| Liability of transferee or of property: Transferee |
| Proportionate liability: Yes |
| Priority among creditors: No |
| One year statute of limitations: Yes |

Evaluation

There is no reported case construing or applying this provision. This is one of a handful of California statutes that provide liability of a distributee for “a pro rata portion of the claim of the creditor.” The apportionment of liability is based on the proportion that the value of the property received by the distributee from the estate bears to the total value of all property received by all persons from the estate.

A similar rule of proportionate liability might be considered for a nonprobate transferee, subject to abatement principles. The proportionate liability concept works readily for a probate distributee since the value of all distributions from the estate is known. For a nonprobate transferee the value of all nonprobate transfers from the decedent may not be readily ascertainable, except perhaps in an estate large enough to require a federal estate tax return.

Section 9392 protects a bona fide purchaser or encumbrancer of the beneficiary’s property:
Nothing in this section affects the rights of a purchaser or encumbrancer of property in good faith and for value from a person who is personally liable under this section.\textsuperscript{115}

That provision is anomalous, given that the liability imposed by Section 9392 is on the beneficiary personally, not on property that has been distributed. Bona fide purchaser protection is useful in a comprehensive nonprobate transfer liability scheme if the property, as opposed to the transferee, is subjected to debts.

FRAUDULENT TRANSFER, GIFT CAUSA MORTIS, NONPROBATE TRANSFER OF VEHICLE

PROBATE CODE § 9653

Probate Code Section 9653 directs the personal representative to recover certain nonprobate transfer property (as well as property fraudulently conveyed by the decedent or made as a gift in contemplation of death) if the decedent’s estate is insufficient to satisfy debts. The personal representative acts on demand of a creditor. Property recovered under authority of Section 9653 is liquidated and the proceeds applied first to the cost of recovery of the property, then to satisfy creditors’ claims, and the remainder returned to the transferee. The text of the statute is set out in the Appendix.

The cases suggest that direct action by a creditor will only be allowed where there is no process for bringing the fraudulently transferred property into the probate proceeding.\textsuperscript{116} “Thus [Section 9653] has as a secondary object the prevention of complications that would result if several creditors were to pursue the remedy and seek to apply the property to their individual claims.”\textsuperscript{117}

Section 9653 is not the exclusive procedure by which a creditor may reach fraudulently transferred property. A creditor may pursue a fraudulent transfer remedy directly, without the intermediary of the personal representative.\textsuperscript{118} Probate Code Section 850 (conveyance or transfer of property claimed to belong to decedent or other person) is also available.

Synopsis

Liability limited to insolvent estate: Yes
Enforcement by personal representative if any: Yes
Direct enforcement by creditor: No
Liability of transferee or of property: Property

\textsuperscript{115}. Prob. Code § 9392(c).
\textsuperscript{117}. Webb v. Pillsbury, 23 Cal. 2d 324, 144 P.2d 1 (1943).
\textsuperscript{118}. In re Estate of Myers, 139 Cal. App. 4th 434, 42 Cal. Rptr. 3d 753 (2006).
Proportionate liability: Yes
Priority among creditors: Yes
One year statute of limitations: Presumably

Evaluation
Section 9653 has been used almost exclusively to recover property conveyed in fraud of creditors. The remedy provided in the statute is not by its terms limited to creditors whose claims have been allowed in probate, but appears to be available to any creditor that makes an application to the personal representative. It is not clear why a creditor might do that when direct action under the fraudulent transfer statute would be more advantageous to the creditor.

There is no reported case involving use of Section 9653 to recover a gift made in view of impending death or a nonprobate vehicle transfer. The statute confirms the public policy to protect these types of transfers from a creditor except to the extent the probate estate is inadequate. The policy is derived from the analogy of the bequest of a specific asset, which is not subject to a decedent’s creditors except to the extent the estate is otherwise insufficient.\(^{119}\)

Property is recovered under this statute only if invoked by a creditor, and the creditor bears the risk of loss. Any recovery is applied to the benefit of all creditors.

Section 9653 is a rare California law that makes a nonprobate transfer part of the estate and treats it together with probate property for satisfaction of a creditor’s claim. There are undoubtedly many circumstances where it would benefit the estate and its beneficiaries to bring a nonprobate transfer into the proceeding and subject it to the obligations of the decedent, even though a creditor does not demand it.

Two major comprehensive nonprobate liability schemes in other jurisdictions are activated by the demand of a creditor:

No action for accounting under this section shall be commenced by any qualified claimant unless the personal representative has received a written demand therefor by a qualified claimant, within sixteen months following the decedent’s death.\(^{120}\)

A proceeding under this section may not be commenced unless the personal representative of the decedent’s estate has received a written demand for the proceeding from the surviving spouse or a child, to the extent that statutory allowances are affected, or a creditor.\(^{121}\)

\(^{119}\) Prob. Code § 21402 (abatement of shares of beneficiaries); Adams v. Prather, 176 Cal. 33, 167 P. 534 (1917).

\(^{120}\) Rev. Stat. Mo. § 461.300(2).

\(^{121}\) Unif. Prob. Code § 6-102(g).
The rationale is expressed in the Comment to 6-102(g) of the Uniform Act — “It reflects sensitivity for the dilemma confronting a probate fiduciary who, acting as required of a fiduciary, concludes that the costs and risks associated with a possible recovery from a nonprobate transferee outweigh the probable advantages to the estate and its claimants.”

**ALLOCATION OF DEBTS BETWEEN ESTATE AND SURVIVING SPOUSE**

**PROBATE CODE § 11440**

If the decedent was married, property of the surviving spouse may be subject to liability for the decedent’s debts. Both halves of the community property are generally liable for the debts of either spouse incurred during marriage.\(^{122}\) In addition, the surviving spouse may be personally liable for some debts of the decedent beyond the value of the community property.\(^{123}\)

If a creditor enforces a debt against the decedent’s surviving spouse, the surviving spouse may obtain reimbursement from the decedent’s estate. Probate Code Sections 11440 to 11446 provide a scheme for allocation of debts between the estate and the surviving spouse. The text of the statute is set out in the Appendix. A parallel procedure exists for allocation of debts between the decedent’s trust and the surviving spouse.\(^{124}\)

Under this scheme debts are characterized as community or separate in the same manner as on marital dissolution. A separate debt is allocated primarily to the spouse that incurred the debt and secondarily to the other spouse. A community debt is allocated primarily to community property and secondarily to the separate property of both spouses equally.\(^{125}\)

The allocation may take into consideration the existence of community property passing outside of probate.\(^{126}\) There is no reported case applying the apportionment process to a nonprobate transfer of community property.

**Synopsis**

- Liability limited to insolvent estate: Yes
- Enforcement by personal representative if any: Yes
- Direct enforcement by creditor: No
- Liability of transferee or of property: Transferee

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Proportionate liability: Yes
Priority among creditors: Yes
One year statute of limitations: Yes

Evaluation

The allocation procedure is applicable only in the context of a probate proceeding, or in the case of a trust, where the court’s jurisdiction is invoked by the trustee. The procedure is of interest for several reasons:

(1) The procedure gives the probate court jurisdiction over an owner of nonprobate property and treats the probate and nonprobate property in an integrated manner.

(2) Although the procedure occurs in the context of a probate proceeding, it could be generalized to allow court supervised apportionment on petition where there is no probate proceeding. That is the effect of the parallel trust procedure for apportionment of spousal liability.

(3) The procedure includes a mechanism for discovery of property not within the control of the personal representative. If the surviving spouse has not provided an inventory and appraisal of the spouse’s potentially liable property, the court makes an order to show cause why the information should not be provided.127

(4) The parties may agree to an allocation of liability, which the court must confirm if the agreement “substantially protects the rights of interested persons.”128 The court order confirming the allocation does not bind creditors but does affect rights as between the parties to the agreement.129 The court order should be made binding on creditors — it is made only after notice to interested persons and a determination that the allocation is equitable.130

AFFIDAVIT PROCEDURE FOR COLLECTION OR TRANSFER OF PERSONAL PROPERTY

PROBATE CODE §§ 13109-13112

If a decedent dies leaving a small estate (valued at under $100,000), a successor may, without probate, simply collect the decedent’s property.131 A successor who takes the property becomes personally liable for the decedent’s unsecured debts. The liability is enforceable in a direct action by a creditor, but is subject to general

130. Cf. Dawes v. Rich, 60 Cal. App. 4th at 31, 70 Cal. Rptr. 2d at 77 (“judicially approved allocation of debts … arguably might protect the trustees from the tenants’ claim under Probate Code section 11444”).
probate and nonprobate limitation periods.\textsuperscript{132} The successor may avoid liability if an estate proceeding is commenced and the successor restores the property to the estate.\textsuperscript{133} In any event, the successor’s liability is limited to the value of the property taken.\textsuperscript{134} The text of these statutes is set out in the Appendix.

**Synopsis**

- Liability limited to insolvent estate: No
- Enforcement by personal representative if any: No
- Direct enforcement by creditor: Yes
- Liability of transferee or of property: Transferee
- Proportionate liability: No
- Priority among creditors: No
- One year statute of limitations: Yes

**Evaluation**

This procedure applies exclusively to property that otherwise would be subject to probate — it does not apply to classical nonprobate transfer property.\textsuperscript{135} It provides a mechanism for direct action by a creditor where there is no probate. There is little experience under this statute, and there is no reported case construing or applying it. Noteworthy aspects of the procedure include:

1. Apportionment of liability is not required nor is contribution allowed for. Apparently creditors are satisfied on a first come, first served, basis — let the burden fall where it may.
2. The successor may pay more than the proportionate share attributable to the property that would have been assessed in a probate.\textsuperscript{136} Exoneration is not required.
3. If a probate proceeding is later commenced there is a sophisticated formula for recovery of the property or its value.\textsuperscript{137}
4. The liability of the transferee is limited to the value of the property under a thorough formula set out in Section 13112(b):
   (i) Fair market value, determined as of the time the transferee presents the affidavit for collection of the property.

\textsuperscript{132}. Prob. Code § 13109.
\textsuperscript{133}. Prob. Code § 13111.
\textsuperscript{134}. Prob. Code § 13112.
\textsuperscript{135}. Prob. Code §§ 13005, 13006, 13050.
\textsuperscript{137}. Prob. Code § 13111.
(ii) Minus the amount of liens and encumbrances on the property at that
time.

(iii) Plus the net income received from the property.

(iv) Plus, if the transferee has disposed of the property, interest on the fair
market value of the property accruing from the date of disposition at the
rate payable on a money judgment.

COURT ORDER DETERMINING SUCCESSION TO PROPERTY

PROBATE CODE § 13156

In the case of a small estate, a successor may, without probate, obtain a court
order determining the right to the decedent’s property. The court order does not
exempt the successor from liability for the decedent’s unsecured debts. The
successor is personally liable for the debts, not exceeding the value of the property
received. A creditor’s action is subject to the one year statute of limitations after
the decedent’s death.

Synopsis

Liability limited to insolvent estate: No
Enforcement by personal representative if any: No
Direct enforcement by creditor: Yes
Liability of transferee or of property: Transferee
Proportionate liability: No
Priority among creditors: No
One year statute of limitations: Yes

Evaluation

This statute is rudimentary and offers little procedural guidance. There is no
reported case construing or applying it.

AFFIDAVIT PROCEDURE FOR REAL PROPERTY
OF SMALL VALUE

PROBATE CODE §§ 13204-13207

If the value of real property in the decedent’s estate does not exceed $20,000
and there is no probate, the successor may claim the property by recording an

139. Prob. Code § 13156. The text of Section 13156 is set out in the Appendix.
appropriate affidavit.\textsuperscript{141} The successor in that case remains liable for the decedent’s unsecured debts, subject to the general one year statute of limitations. The successor’s liability is limited to the value of the property received. The successor may be required to restore the property or its value to the estate if administration proceedings are subsequently commenced, to the extent necessary to protect the interest of the decedent’s heirs, devisees, and creditors.\textsuperscript{142}

**Synopsis**

- Liability limited to insolvent estate: No
- Enforcement by personal representative if any: No
- Direct enforcement by creditor: Yes
- Liability of transferee or of property: Transferee
- Proportionate liability: No
- Priority among creditors: No
- One year statute of limitations: Yes

**Evaluation**

There is little experience under this statute, and there is no reported case construing or applying it. The statute is similar to the personal property liability statute. The real property statute includes a sophisticated provision for dealing with improvements made on property that is subsequently required to be restored to the probate estate.\textsuperscript{143}

**PASSAGE OF PROPERTY TO SURVIVING SPOUSE WITHOUT ADMINISTRATION**

**PROBATE CODE §§ 13550-13554**

A surviving spouse may take property that passes from the deceased spouse, including the decedent’s one half interest in community property that passes to the survivor, without administration.\textsuperscript{144} The surviving spouse may also obtain a court order confirming passage of title to the property.\textsuperscript{145} Alternatively, the surviving spouse may elect to have property that passes from the decedent administered, and may elect to include the survivor’s one half interest

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\textsuperscript{141} Prob. Code § 13200-13210.
\textsuperscript{142} Prob. Code § 13204-13207. The text of these statutes is set out in the Appendix.
\textsuperscript{143} Prob. Code § 13206.
\textsuperscript{144} Prob. Code § 13500.
\textsuperscript{145} Prob. Code § 13650.
in community property with the property being administered or with the
decedent’s trust.\textsuperscript{146}

If the surviving spouse takes property from the decedent without administration,
the survivor may deal with and dispose of the property free of the rights of others,
including the decedent’s creditors.\textsuperscript{147} The surviving spouse remains personally
liable for the decedent’s debts to the extent of the value of the property received.\textsuperscript{148}

A surviving spouse that takes the decedent’s property without probate may be
required to restore the property or its value to the estate if necessary to protect the
interests of heirs, devisees, and creditors of the decedent. Prob. Code §§ 13560-
13564.

The personal liability of the surviving spouse for the decedent’s debts is subject
to the general one year limitation period.\textsuperscript{149}

\begin{verbatim}
Synopsis
\end{verbatim}

Liability limited to insolvent estate: No
Enforcement by personal representative if any: No
Direct enforcement by creditor: Yes
Liability of transferee or of property: Transferee
Proportionate liability: No
Priority among creditors: No
One year statute of limitations: Yes

\begin{verbatim}
Evaluation
\end{verbatim}

The statutes that impose personal liability on a surviving spouse who takes the
decedent’s property without probate do not provide for allocation of the
decedent’s debts among other beneficiaries. In probate, by way of contrast, the
surviving spouse may have the burden of the decedent’s debts allocated among
beneficiaries.\textsuperscript{150} That allocation is made on court order but does not bind
creditors.\textsuperscript{151}

A summary court ordered allocation procedure, similar to the procedure
available in a probate proceeding, should be made available to a surviving spouse
that takes the decedent’s property without probate.

\textsuperscript{146}. Prob. Code §§ 13502, 13503.
\textsuperscript{147}. Prob. Code § 13540.
(1981). The text of these statutes is set out in the Appendix.
community property interest); Collection Bureau of San Jose v. Rumsey, 24 Cal. 4th 301, 6 P.3d 713
\textsuperscript{150}. Prob. Code §§ 11440-11446.
\textsuperscript{151}. Prob. Code § 11444.
TRUST LAW

PROBATE CODE § 19001

The newest and most significant of the California statutes attempting to allocate a decedent’s debts to a nonprobate transfer is found in the trust law, Probate Code Sections 19000 to 19403, in effect since 1992.

LIABILITY

The common law rule on liability of a trust for a decedent’s debts was based on fraudulent transfer law.152

Prior to the enactment of section [19001], the sole remedy available to a creditor after a deceased trust settlor had left the estate insolvent by transferring assets to a revocable inter vivos trust was a separate action for relief against the trust on the ground the conveyance was fraudulent. (Civ. Code, § 3439.07.) With respect to creditors’ claims which arose before the transfer to the trust, the transfer need not have been fraudulent in the literal sense, i.e., made with the intent of deceiving creditors. A transfer would be deemed fraudulent if it were made without consideration and left the transferor insolvent. (Id., § 3439.05; Estate of Heigho (1960) 186 Cal. App. 2d 360, 365-366, 9 Cal. Rptr. 196.) The transfer to an inter vivos trust of sufficient assets to render the settlor’s personal estate insolvent met this test, particularly when the settlor also was the beneficiary and retained the power of revocation. Thus, an action to set aside the conveyance to the trust almost invariably was successful. It was, however, a cumbersome, time-consuming procedure, and it was circumscribed by a restrictive limitations period. (Civ. Code § 3439.09.)

The enactment of Probate Code section [19001] removed these constraints and eliminated the necessity of proving the conveyance fraudulent. Section [19001] permitted a judgment creditor who establishes the inadequacy of estate assets to ignore the trust and reach directly those assets subject to the decedent settlor’s power of revocation. (See Law Revision Com. cmt, Prob. Code § 18200.) The judgment creditor of such a deceased settlor need only have established a judgment lien against the settlor; thereafter, the judgment creditor may levy a writ of execution directly on the trust assets which were subject to revocation during the settlor’s lifetime. (Heywood v. Municipal Court (1988) 198 Cal. App. 3d 1438, 1445-1446, 244 Cal. Rptr. 435.)153

The new law makes clear that property in the decedent’s revocable trust is liable for the decedent’s debts to the extent the decedent’s estate is inadequate. Probate Code Section 19001 provides:

19001. (a) Upon the death of a settlor, the property of the deceased settlor that was subject to the power of revocation at the time of the settlor’s death is subject


to the claims of creditors of the deceased settlor’s estate and to the expenses of administration of the estate to the extent that the deceased settlor’s estate is inadequate to satisfy those claims and expenses.

(b) The deceased settlor, by appropriate direction in the trust instrument, may direct the priority of sources of payment of debts among subtrusts or other gifts established by the trust at the deceased settlor’s death. Notwithstanding this subdivision, no direction by the settlor shall alter the priority of payment, from whatever source, of the matters set forth in Section 11420 which shall be applied to the trust as it applies to a probate estate.154

**OPTIONAL CREDITOR CLAIM PROCEDURE**

The statutory trust liability scheme includes an optional court supervised procedure under which the trustee may notify creditors, who then must file a claim with the trustee within four months or be barred from recovery from the trust. The scheme parallels that available in probate administration.155

This scheme coordinates the trust creditor claim procedure with the probate creditor claim procedure. Section 19006 provides:

19006. (a) If a trustee of a trust established by the deceased settlor files, publishes, and serves notice as provided in Section 19003 the protection from creditors afforded that trustee and trust shall also be afforded to any other trusts established by the deceased settlor and the trustees and beneficiaries of those trusts.

(b) If the personal representative of the deceased settlor’s estate has published notice under Section 8120 and given notice of administration of the estate of the deceased settlor under Chapter 2 (commencing with Section 9050) of Part 4 of Division 7, the protection from creditors afforded the personal representative of the deceased settlor’s estate shall be afforded to the trustee and to the beneficiaries of the trust.

(c) In the event that, following the filing and publication of the notice set forth in Section 19003, there shall be commenced any proceeding under which a notice pursuant to Section 8120 is required to be published, then the trustee shall have a right of collection against that estate to recover the amount of any debts paid from trust assets that would otherwise have been satisfied (whether by law or by direction in the deceased settlor’s will or trust) by the property subject to probate proceedings.

Section 19007 limits liability as between trusts and invokes the procedure of Section 19020 for determination of relative liability:

19007. Nothing in this part shall determine the liability of any trust established by the deceased settlor as against any other trust established by that settlor, except

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to the extent that the trustee of the other trust shall file, publish, and serve the
notice specified in Section 19003 and thereafter seek a determination of relative
liability pursuant to Chapter 2 (commencing with Section 19020).

Section 19020 provides for allocation of liability between trusts, which raises
the jurisdiction issue addressed by Section 19021:

19020. At any time after the filing and first publication of notice pursuant to
Chapter 3 (commencing with Section 19040), and after expiration of the time to
file claims provided in that chapter, a trustee or beneficiary may petition the court
under this chapter to approve either of the following:
(a) Allowance, compromise, or settlement of any claims that have not been
rejected by the trustee under the procedure provided in this part and for which
trust property may be liable.
(b) An allocation of any amounts due by reason of an action described in
subdivision (a) to two or more trusts which may be liable for the claims.

19021. The petition shall be filed in that county as may be determined pursuant
to Section 19003. In the event this action seeks approval of allocation to two or
more trusts for which the notice proceeding in Section 19003 would prescribe
superior courts for more than one county, the court located in the county so
prescribed for the trustee initiating the proceeding under this chapter shall have
jurisdiction.

Section 19027 picks up the debt priority provisions of Probate Code Section
11420 in case of an insolvent trust:

19027. (a) The court in its discretion may make any orders and take any other
action necessary or proper to dispose of the matters presented by the petition.
(b) If the court determines that the assets of the trust estate are insufficient to
pay all debts, then the court shall order payment in the manner specified by
Section 11420.

Section 19103 imposes liability where distribution is made without proper notice
to creditors, with limitations to protect distributees:

19103. … (c) The court may condition the claim on terms that are just and
 equitable. The court may deny the claimant’s petition if a distribution to trust
beneficiaries or payment to general creditors has been made and it appears the
filing or establishment of the claim would cause or tend to cause unequal
treatment among beneficiaries or creditors.
(d) Regardless of whether the claim is later established in whole or in part,
property distributed under the terms of the trust subsequent to an order settling
claims under Chapter 2 (commencing with Section 19020) and payments
otherwise properly made before a claim is filed under this section are not subject
to the claim. Except to the extent provided in Chapter 12 (commencing with
Section 19400) and subject to Section 19053, the trustee, distributee, or payee is
not liable on account of the prior distribution or payment. This subdivision does
not limit the liability of a person who receives a preliminary distribution of
property to restore to the trust an amount sufficient for payment of the
beneficiary’s proper share of the claim, not exceeding the amount distributed.
LIABILITY OF SURVIVING SPOUSE

The trust statute includes a mechanism for allocation of debts between the trust and the decedent’s surviving spouse in a case where the trust may be liable for the decedent’s debts.\(^\text{156}\) The mechanism is based on the probate administration allocation procedure.\(^\text{157}\) The allocation is determined by the nature of the debt and the characterization of property liable for the debt (Section 19324) and is enforceable by a court order directing the trustee to make the appropriate charges to the trust property (Section 19325). “To the extent that property or interests of the surviving spouse in the possession or control of the trustee are insufficient to satisfy the allocation, the court order shall summarily direct the surviving spouse to pay the allocation to the trustee.”\(^\text{158}\)

The surviving spouse’s share of the marital property is exempt from payment of the decedent’s funeral expenses and expenses of last illness.\(^\text{159}\)

The allocation of debts between spouses does not affect the rights of a creditor. If as a result either party is required to bear expense on account of a debt allocated to the other party, the injured party is entitled to reimbursement from the other party.\(^\text{160}\)

The trust law includes no procedure comparable to that available in probate whereby the surviving spouse may elect to probate both halves of the community property and thereby obtain spousal immunity.

CREDITOR REMEDIES

If trust property has been distributed without satisfaction of the decedent’s debts, an unsecured creditor may proceed directly against beneficiaries.\(^\text{161}\)

The probate estate must be exhausted before the creditor may proceed against a beneficiary.\(^\text{162}\) A trustee that makes distributions in accordance with the terms of the trust during the probate process is not personally liable to creditors.\(^\text{163}\)

A beneficiary is personally liable only to the extent the trust estate is inadequate and only to the extent of the proportionate value of property received from the

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157. Compare Sections 11440-11446 (probate allocation) with Sections 19320-19326 (trust allocation).
trust estate. The statute protects the rights of a good faith purchaser or encumbrancer of property received from a beneficiary.

A will or trust may include a direction that debts be paid out of particular property. Although that directive may bind the personal representative or trustee, it does not bind a creditor, who is not limited as to what property or beneficiaries the creditor may hold to account. If a creditor requires a beneficiary to satisfy a debt in a manner that goes against the decedent’s direction, the beneficiary should have a right of reimbursement from others in accordance with the decedent’s direction.

Synopsis

Liability limited to insolvent estate: Yes
Enforcement by personal representative if any: Unclear
Direct enforcement by creditor: Yes
Liability of transferee or of property: Transferee
Proportionate liability: Yes
Priority among creditors: Yes
One year statute of limitations: Yes

Evaluation

Because the inter vivos trust is now the preferred estate planning — and principal nonprobate transfer — mechanism in California, the trust law’s provisions governing liability for a decedent’s debts are of particular interest. The California statute has three basic components — (1) it addresses the liability of the trust, (2) it provides a trust claim procedure, and (3) it addresses the liability of trust beneficiaries. There are fundamental issues with respect to each of these functions.

Liability of Trust Property

Public Policy

The basic liability rule — the decedent’s trust estate is liable only to the extent the probate estate is inadequate — embodies two significant public policies:

167. Prob. Code § 19001(b) (incorporating the probate priority scheme of Probate Code Section 11420).
Background Study: Liability of Nonprobate Transfer • June 15, 2010

(1) The trust estate is subject to the decedent’s creditors — fraudulent intent is irrelevant.

(2) The trust estate is only secondarily liable — it is a protected form of nonprobate transfer.

Whether a decedent ordinarily intends that the trust estate be favored over the probate estate is debatable. Often the probate estate consists merely of property inadvertently omitted from the trust; there is no intent to favor the recipient of that property over the recipient of trust property. If the decedent’s will includes a pour over into the trust, the distinction is even more suspect.

A decedent’s estate plan may specify a fund for payment of debts (often the residue). The law honors that intent. Favoring a specific gift over a general gift makes sense in a case where the decedent’s estate is adequate. But where debts are large and property is limited, the residuary beneficiaries — often the main objects of the decedent’s bounty — may be harmed to the benefit of incidental specific legatees.

Nonetheless, the approach of the trust law is consistent with the general law on abatement, which favors a specific gift over a residual gift. The general abatement statute has been generalized and now applies to trusts and other instruments besides wills.

Determination That Probate Estate is Inadequate

The rule that a trust is liable only to the extent the deceased settlor’s estate is inadequate creates a practical problem. The determination of inadequacy may be problematic if there is no probate proceeding. Absent a probate proceeding, it is unclear whether a creditor may proceed directly against the trust. Perhaps a probate proceeding must first be commenced to establish the insufficiency of the probate estate.

It may not be enough simply to commence a probate proceeding in order to determine the adequacy of the deceased settlor’s “estate.” That term is undefined and it is not clear whether it refers to the settlor’s probate estate or to the settlor’s entire estate including nonprobate transfer items other than the trust, such as a multiple party bank account or a security registered in TOD (transfer on death) form.

Although the statute does not answer these questions, there may be an implication that a probate proceeding is prerequisite to liability of the trust. Section 19001(a) speaks in terms of the claim of a creditor of the deceased settlor’s estate; presumably a creditor “of the estate” is one whose claim has been

171. Prob. Code §§ 21400-21406 (shares of beneficiaries abate for all purposes, including payment of debts).
allowed in a probate proceeding. That is the interpretation of Conn, *The Need to Clarify Creditors’ Rights in Probate*, 32 L.A. Lawyer 80 (April 2009) (“it may be argued that the creditor must institute a probate proceeding, rather than suing the trustee, in order to establish the insufficiency of the probate estate”).

During the pendency of a probate proceeding the trust estate may be dissipated with impunity. A trustee’s only duty to creditors is to refrain from affirmative misconduct that defeats the creditors’ reasonable expectation for a recovery from trust property.¹⁷²

One antidote would be to allow a creditor to commence proceedings against a trust without waiting for the commencement or conclusion of probate. If a probate proceeding is commenced, the trust proceeding can be stayed pending the outcome of probate. “By allowing a creditor to file suit against a successor trustee of a revocable trust at any time following the initial trustor’s death, the creditor will be empowered to seek a prejudgment writ of attachment or preliminary injunction.”¹⁷³

An evolving practice is for a creditor to open a probate proceeding, file a claim, and commence litigation against the trustee without waiting for completion of the probate proceeding. That tolls the statute of limitations and enables use of prejudgment remedies.¹⁷⁴

An argument can be made that a probate proceeding is not a prerequisite to trust liability. Section 19008 states that if there is no proceeding to administer the estate and the trustee does not invoke the trust claim procedure, “then the liability of the trust to any creditor of the deceased settlor shall be as otherwise provided by law”, i.e., as provided in Section 19001.

It has also been suggested that a creditor may proceed directly against a beneficiary that receives a trust distribution during the pendency of probate proceedings, without waiting for the conclusion of those proceedings and the determination that the probate estate is inadequate.¹⁷⁵ The case could not be resolved until the probate proceeding is resolved.

Conflict of interest problems may arise in the interplay of probate and trust liability, particularly if the two estates have different fiduciaries and different beneficiaries. The decedent’s personal representative may not have the same motivation to preserve the trust estate that it has to preserve the probate estate. Where there is no probate estate, a creditor may commence a probate proceeding solely for purpose of filing and allowing the claim, and then proceed against the trust estate as the holder of an allowed claim against the decedent’s estate.

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If the trustee or a distributee makes payment to a creditor and it is later found that there is sufficient probate property, is the trustee entitled to exoneration from the probate estate? That question is answered in the affirmative for a trustee that invokes the trust claim procedure, but it is not answered where the trustee does not invoke the trust claim procedure.\(^{176}\)

A solution to these dilemmas is to allow a creditor to proceed immediately and directly against the trustee, and to make clear that the trustee is subrogated to the creditor’s claim. The trustee may then proceed against other property in the deceased settlor’s “estate” or commence a probate proceeding if that is called for.

**Insolvent Trust Estate**

If the trust is insufficient to satisfy all creditors, the same creditor priority provisions applicable in probate apply to the trust.\(^{177}\) The consistency makes sense.

That scheme is workable if the trustee invokes the trust claim procedure. But if the trustee does not invoke the trust claim procedure, it is not clear how the creditor priority scheme is implemented. Suppose a low priority creditor recovers directly from the trustee; may a higher priority creditor recover from the lower priority creditor? If so, what statute of limitations applies — the general one year statute for liability of a decedent or some other limitation period? The statute does not answer these questions.

**Trust Claim Procedure**

The trust claim procedure provides a systematic and well-articulated scheme for resolving creditor claims against a decedent. The procedure is voluntary and it is unclear how frequently it is invoked. A principal inducement for its use is that it bars claims not filed within four months of notification of creditors.\(^{178}\)

**Public Policy**

“Whatever the utility of the new creditors’ claims procedure for living trusts, the legislation demonstrates the possibility of separating the creditors’ claims procedure from the decedent estate administration procedure. Is the next step a creditors’ claims procedure for persons who take an estate without administration in the absence of a living trust?”\(^{179}\)

\(^{176}\). See Prob. Code § 19006(c).

\(^{177}\). Prob. Code § 19001(b).

\(^{178}\). Prob. Code §§ 19004, 19100.

Operational Issues

The trust claim procedure does not address what happens if the trustee initiates the claims proceeding, complies with the notice requirements, and then distributes the trust estate without retaining sufficient property to pay claims. “Presumably the beneficiaries are liable in this situation, but the language of the beneficiary liability provisions (Prob. Code § 19400) does not cover this situation and there are no provisions in the statute which require the trustee to retain assets to satisfy the creditors’ claims.”180 There is no express provision protecting the distributees of the trust, “although that is the very clear implication of the statute.”181

Case law has begun to flesh out the answers.182 It would help to address these issues statutorily.

Multiple Trusts

A trustee that invokes the trust claim procedure (or a beneficiary of the trust) may seek allocation of claims among two or more trusts that may be liable.183 Other than that, the liability rules as between trusts are unclear.184 The confusion should be cleared up.

Distributee Liability

A trust distributee is personally liable for the decedent’s debts if there has been neither a probate proceeding nor a trust claim proceeding, but only to the extent the trust estate is inadequate.185 It is not clear how it is determined that a creditor has a right to recover from a beneficiary in that circumstance since there will have been no determination of inadequacy of either the probate estate or the trust.186

Trust property is subject to a claim of a creditor “of the deceased settlor’s estate.”187 That implies there must have been some determination of estate liability.188

180. Id. at 69.
181. Id.
182. See Arluk Medical Center Industrial Group, Inc. v. Dobler, 116 Cal. App. 4th 1324, 1337, 11 Cal. Rptr. 3d 194, 202 (2004) (no duty on the trustee to retain property “even assuming a creditor may impose personal liability against a trustee who voluntarily initiates the optional trust claims procedures and then disregards the statutory scheme and distributes trust property before resolution of the disputed claim”).
184. Compare Section 19006 (creditor protection of trust claim procedure “shall also be afforded to any other trusts established by the deceased settlor”) with Section 19007 (except to extent allocation procedure is invoked, statute does not determine liability of any trust of the deceased settlor as against any other trust of that settlor).
Probably the intent of these provisions is to permit direct action by a creditor against a beneficiary. Section 19402 provides a rule of pro rata liability “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.” Either the creditor or the beneficiary should be able to join other distributees in the creditor’s enforcement action. Additional procedural detail is needed in the statute.

Direct action by the creditor against a beneficiary (or the trustee) may also help cope with the short one year limitation period. Conn argues that rather than require a creditor to institute a probate proceeding to preserve a claim from the bar of the statute of limitations, the state should maintain a statewide death registry where a creditor could file a claim. That would toll the statute of limitations pending assessment of the claim in probate or under the trust claim procedure.189

It is not clear whether a creditor that takes direct action to enforce beneficiary liability must join all beneficiaries, or whether the creditor may recover from any beneficiary and leave that beneficiary to seek contribution from others. It is likewise unclear whether each individual creditor is limited in the amount of recovery if claims of creditors exceed the value of the property received by a beneficiary. If individual claims are limited there must either be a means to determine the total number of creditor claims or a provision that makes a creditor liable for contribution to other creditors. Presumably the priority provision of Probate Code Section 11420 applies in this situation via Section 19001(b), but the mechanism for its implementation is not clear. Additional procedural detail is needed in the statute.

PRORATION OF TAXES

P RO B A T E C O D E §§ 20100-20125

Federal law requires that the federal estate tax be apportioned among the recipients of the decedent’s estate in proportion to the value of the property received. Implementing legislation in California is found at Probate Code Sections 20100 to 20125 (proration of estate taxes). The text of the statute is set out in the Appendix.190

The federal estate tax is based on the decedent’s gross estate, which includes all of a decedent’s property, both probate and nonprobate. State law gives the

188. See Arluk Medical Center Industrial Group, Inc. v. Dobler, 116 Cal. App. 4th 1324, 11 Cal. Rptr. 3d 194 (2004) (where no estate or trust proceeding, beneficiary personally liable “for any unsatisfied judgment obtained by a creditor against the decedent’s estate”).

189. Conn, supra note 171.

190. California law provides a comparable scheme for apportionment of taxes on a generation-skipping transfer. Prob. Code §§ 20200-20225. Only the estate tax proration scheme is discussed here because that is the more commonly invoked and the two statutes are parallel.
personal representative authority to assess beneficiaries or seize property in order
to spread the burden of the estate tax proportionately. The statute confers authority
on the personal representative, guardian, conservator, trustee, or other person
charged with the responsibility of paying the estate tax.\footnote{191}

If all property does not come into the possession of the personal representative,
the personal representative is entitled and has the duty to recover the proportionate
amount of the estate tax from persons who have received the decedent’s
property.\footnote{192} If necessary, the personal representative may obtain a court order
apportioning the estate tax obligation and ordering payment.\footnote{193}

The jurisdiction of the court and the authority of the personal representative do
not extend to an out of state recipient of the decedent’s property. Ancillary
proceedings in the other state may be necessary to obtain jurisdiction over the
person and property. A non-California personal representative may use ancillary
proceedings to assess a California resident.\footnote{194}

If there is no probate proceeding, apportionment may be made by any recipient
of the decedent’s property. It is difficult to imagine apportionment by a
nonprobate transferee, other than by the trustee of the decedent’s trust.

A more likely scenario is that a nonprobate transferee required to pay a
disproportionate share of the estate tax will seek reimbursement from other
recipients of the decedent’s property. Such a person has a right of reimbursement
from those who have underpaid, enforceable either through the personal
representative or directly against those who have underpaid, and may obtain a
court order to aid in collection.\footnote{195}

Reimbursement may be difficult if the person or property required to participate
is outside the state. Choice of law rules may be irrelevant if the other jurisdiction
also provides for reimbursement. It is possible that the person seeking
reimbursement may have to proceed under authority of federal rather than state
law.

The dispositive instrument may direct the personal representative to satisfy
debts, including the estate tax, out of specific property. In that case the intention of
the decedent is honored and the general rule of pro rata liability does not apply.\footnote{196}

If the property designated by the decedent is insufficient to pay the taxes, the
statutory proration scheme overrides the decedent’s directive.\footnote{197}
The estate tax apportionment statute reflects the federal and state policy to equitably allocate the tax burden so that it is borne commensurately by those whose gifts contribute to it. The policy of the law is sufficiently strong that a direction by the decedent contrary to equitable apportionment is strictly construed. The state enforcement mechanism requires that the personal representative distribute the burden among nonprobate as well as probate transferees.

**Synopsis**

- Liability limited to insolvent estate: No
- Enforcement by personal representative if any: Yes
- Direct enforcement by creditor: Yes
- Liability of transferee or of property: Transferee
- Proportionate liability: Yes
- Priority among creditors: No
- One year statute of limitations: No

**Evaluation**

The estate tax proration system has worked smoothly in the past; whether it will do so in the nonprobate era is not yet clear. California law contemplates at least that the trustee of an inter vivos trust may perform the apportionment function.

The estate tax apportionment scheme may be a useful model for a nonprobate transfer liability system that is run by the personal representative or trustee, if not by another person responsible.

**ABATEMENT**

**PROBATE CODE § 21400**

California provides a general order of abatement of a decedent’s property to satisfy debts. The abatement statute applies to all property of the decedent, probate and nonprobate. If the estate is insolvent, the order of abatement is irrelevant, since all property is applied to satisfy obligations, in the order of priority provided by law.

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199. See, e.g., In re Cummings’ Estate, 236 Cal. App. 2d 659, 46 Cal. Rptr. 491 (1965).


If the estate is solvent, the order of abatement determines which property will be used to satisfy debts. Absent a direction by the decedent, the residuary gift, general gift, specific gift sequence of Probate Code Section 21402 applies. Abatement is pro rata within each class of gift. 204

**Synopsis**

- Liability limited to insolvent estate: No
- Enforcement by personal representative if any: Unclear
- Direct enforcement by creditor: Unclear
- Liability of transferee or of property: Property
- Proportionate liability: Yes
- Priority among creditors: Unclear
- One year statute of limitations: Yes

**Evaluation**

The abatement statute (Part 4 of Division 11 of the Probate Code) is intended to apply broadly to both probate and nonprobate transfers. 205 But as a technical matter, Section 21101 has been amended and no longer prescribe the application of Division 11 (construction of wills, trusts and other instruments), only the application of Part 1 (rules for interpretation of instruments) of that division. Either Section 21101 should prescribe the application of the entire Division 11, or the abatement statute (Part 4) should clearly state its application to all instruments.

Although the abatement scheme is intended to apply to both probate and nonprobate transfers, it is not clear how that can actually work other than in administration proceedings. 206 A trustee could sensibly apply abatement principles during trust administration. 207

Given the wide variety of nonprobate transfer devices, characterization of the nature of a gift may not be obvious. Presumably a pay on death designation on a multiple party account is a specific gift rather than a general gift, but that is far from clear.

The statutory abatement scheme requires resort first to property not disposed of by “the instrument.” 208 Intestate property is used to satisfy a debt before testate property. The provision does not address property that passes not by will or

205. See Prob. Code § 21101 (application) and Law Revision Commission Comment to Prob. Code § 21400.
intestacy but by nonprobate transfer. For clarity, the statute should refer to property not disposed of by “an” instrument.209 A parallel change should also be made to Probate Code Section 21400 (if “the” instrument provides for abatement).

Probate Code Section 21401 excepts estate tax proration from its operation. The rationale of that exception to abatement principles is two-fold. The simple explanation is that federal law requires apportionment based on the value of the property received. More fundamentally, the estate tax is based on the value of property, so there is a direct correlation between the property received and the tax associated with it. The estate tax is apportioned to all property in the decedent’s estate, probate and nonprobate. Nonprobate transfer liability goes beyond trust property.

Probate Code Section 21401 also excepts an omitted spouse or child award from its operation. That is because the omitted spouse or child statute prescribes its own abatement schedule.210

If a creditor were to attempt to collect from the beneficiary of a nonprobate transfer, the transferee might commence abatement proceedings against other nonprobate transferees. In the abstract that would appear to be permissible under the statute, though as a practical matter such a proceeding would undoubtedly end in mass confusion.

MEDI-CAL ESTATE RECOVERY

WELFARE AND INSTITUTIONS CODE § 14009.5

There are special rules for recovery from distributees of amounts owed by the decedent to the state, principally for unpaid taxes.211 The most fully developed and intensely litigated recovery scheme is for reimbursement of Medi-Cal assistance provided to a decedent.212

The Medi-Cal Act, pursuant to federal mandate, requires state recovery of assistance provided to a decedent:

14009.5. (a) Notwithstanding any other provision of this chapter, the department shall claim against the estate of the decedent, or against any recipient of the property of that decedent by distribution or survival an amount equal to the payments for the health care services received or the value of the property received by any recipient from the decedent by distribution or survival, whichever is less.

(b) The department may not claim in any of the following circumstances:

209. See also Prob. Code § 45 (“instrument” defined).


211. See, e.g., Prob. Code §§ 9200-9205 (estate), 19200-19205 (trust).

(1) The decedent was under 55 when services were received, except in the case of an individual who had been an inpatient in a nursing facility.

(2) Where there is any of the following:

(A) A surviving spouse during his or her lifetime. However, upon the death of a surviving spouse, the department shall make a claim against the estate of the surviving spouse, or against any recipient of property from the surviving spouse obtained by distribution or survival, for either the amount paid for the medical assistance given to the decedent or the value of any of the decedent’s property received by the surviving spouse through distribution or survival, whichever is less. Any statute of limitations that purports to limit the ability to recover for medical assistance granted under this chapter shall not apply to any claim made for reimbursement.

(B) A surviving child who is under age 21.

(C) A surviving child who is blind or permanently and totally disabled, within the meaning of Section 1614 of the federal Social Security Act (42 U.S.C.A. Sec. 1382c).

(3) Any exemption described in paragraph (2) that restricts the department from filing a claim against a decedent’s property shall apply only to the proportionate share of the decedent’s estate or property that passes to those recipients, by survival or distribution, who qualify for an exemption under paragraph (2).

(c)(1) The department shall waive its claim, in whole or in part, if it determines that enforcement of the claim would result in substantial hardship to other dependents, heirs, or survivors of the individual against whose estate the claim exists.

(2) The department shall notify individuals of the waiver provision and the opportunity for a hearing to establish that a waiver should be granted.

(d) The following definitions shall govern the construction of this section:

(1) “Decedent” means a beneficiary who has received health care under this chapter or Chapter 8 (commencing with Section 14200) and who has died leaving property to others either through distribution or survival.

(2) “Dependents” includes, but is not limited to, immediate family or blood relatives of the decedent.

The provision appears to allow recovery directly from a nonprobate transferee — “any recipient of the property of that decedent by distribution or survival.” Initial efforts by the Department of Health Care Services to collect against joint tenancy or inter vivos trust property were held invalid as beyond the scope of the authorizing federal legislation. The federal statute allowed recovery only from the decedent’s “estate.”

The federal authorizing legislation was amended in 1993 to broaden the meaning of the term “estate”, and provide explicitly for recovery against living trust or joint tenancy property:

For purposes of this subsection, the term “estate”, with respect to a deceased individual—

(A) shall include all real and personal property and other assets included within the individual’s estate, as defined for purposes of State probate law; and

(B) may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.\(^{214}\)

Subsequent recovery practices of the Department of Health Care Services against two types of estate property authorized by the provision — annuities and property subject to a life estate — were held improper because conducted pursuant to policies and procedures that were in effect “underground regulations.”\(^{215}\)

California Medical Assistance Program regulations now define the “estate” of the decedent broadly:

50960.12. “Estate” means either:

(a) For individuals who die on or after October 1, 1993, and for payments made on or after October 1, 1993, “estate” is defined as all real and personal property and other assets in which the decedent had any legal title or interest at the time of death (to the extent of such interest), including assets conveyed to a dependent, heir, survivor, or assignee of the decedent through joint tenancy, tenancy in common, survivorship, life estate, living trust, annuities purchased on or after September 1, 2004, life insurance policy that names the estate as the beneficiary or reverts to the estate, or any retirement account that names the estate as the beneficiary or reverts to the estate;

(b) For individuals who died prior to October 1, 1993, “estate” is defined according to the common law. For purposes of this article, estate includes property that passes from a decedent to his or her heirs by way of a revocable inter vivos trust.\(^{216}\)

Under the current broad formulation, a revocable transfer of property subject to a retained life estate, of a type validated in Tennant v. John Tennant Memorial Home,\(^{217}\) would be subject to Medi-Cal reimbursement on the death of the life tenant, as would an annuity.\(^{218}\) Wilcox observes, however, that the state’s “complicated rules on recovery against life estates end up protecting life estate interest in most cases.”\(^{219}\)

\(^{214}\) 42 U.S.C. § 1396p(b)(4).


\(^{217}\) 167 Cal. 570, 140 P. 242 (1914).


\(^{219}\) Wilcox supra note 212, at § 12.26.
According to Wilcox, the state has rarely sought to recover against some typically exempt property that passes outside probate, such as life insurance and retirement accounts, or tangible personal property (which tends to be fairly small in amount).\(^{220}\)

The statutes and regulations are silent on whether a nonprobate distributee against whom the liability is enforced has contribution rights from a trust distributee. The statue provides for a proportionate exemption from liability for surviving dependents of the decedent.\(^{221}\) But that provision has been held to violate the authorizing federal legislation.\(^{222}\) Under the regulations, if there are surviving dependents there is an absolute, not a proportionate, exemption.\(^{223}\)

The Medi-Cal recovery act also includes exemptions for hardship cases based on the enabling federal law. These have also been subject to litigation based on regulatory improprieties.\(^{224}\)

Under the regulations the hardship exemption is proportionate.\(^{225}\) That appears to be authorized by the statute.\(^{226}\)

**Synopsis**

- Liability limited to insolvent estate: No
- Enforcement by personal representative if any: No
- Direct enforcement by creditor: Yes
- Liability of transferee or of property: Both
- Proportionate liability: Unknown
- Priority among creditors: No
- One year statute of limitations: No

**Evaluation**

The Medi-Cal Estate Recovery scheme has some elements in common with other provisions of California law that allow recovery for the decedent’s debts:

1. The statute allows recovery against either the property of the decedent or against the distributee.

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221. Section 14009.5(b)(3).
223. 22 Cal. Code Reg. § 50961(d).
225. 22 Cal. Code Regs. § 50961(e)-(f).
226. Welf. & Inst. Code § 14009.5(c)(1) (“department shall waive its claim, in whole or in part, if it determines that enforcement of the claim would result in substantial hardship to other dependents, heirs, or survivors”).
(2) The liability of a distributee is limited to the value of the property received.
(3) The value of the property received for the purpose of liability is valued as of the date of death, and is reduced by liens and encumbrances on the property.

Other provisions of the Medi-Cal Estate Recovery process are unique, such as:

1. The one year general statute of limitations is not recognized.
2. General exemptions from creditors are not recognized, nor is joint tenancy property immune from liability.
3. The policy of the law favors proportionate liability of distributees, but only where a hardship exemption is involved.

Finally, there are important lessons to be learned from this scheme:

1. A statute imposing liability on a nonprobate transfer must be crystal clear to withstand challenge.
2. A Medi-Cal recipient whose estate is potentially subject to state reimbursement may be advised and tempted to make transfers that will avoid liability. For that reason a “look back” at gifts made within a short time before death may be appropriate.
3. The hardship exemption and the exemption for a surviving spouse, minor children, and disabled adult children make better sense than an exemption based on the Enforcement of Judgments Law.
4. The Medi-Cal estate recovery process is an administrative process. It is cumbersome and is not a promising model for a general statute on nonprobate transfer liability.
5. If a comprehensive statute on nonprobate transfer liability is developed, the Medi-Cal claims recovery process should be excluded from it because it is largely a creature of federal law and is circumscribed by federal law.

SUMMARY

The California procedures described above arise in varied contexts and serve a variety of functions. Some general conclusions can be drawn from the review of the procedures. First, the law governing rights of secured creditors against nonprobate transfers is reasonably sound and complete. With respect to rights of unsecured creditors, there is no consistency among the procedures as to any of the major parameters, and the applicable rules are often unclear.

In general, most procedures apply whether or not the decedent’s probate estate is insolvent. Most do not involve enforcement by the personal representative, but allow direct enforcement by the creditor. Most provide for personal liability of the transferee rather than of the property, but are divided as to whether the liability must be apportioned among the transferees or property. Most do not impose a

227. See, e.g., Wilcox, supra note 212, at §§ 12.68-12.79 (planning strategies to minimize or avoid estate claims).
priority among creditors but do impose a one year statute of limitations on enforcement by or on behalf of a creditor.

The existing procedures provide some useful models which can be drawn upon for a comprehensive approach to nonprobate transfer liability. The existing procedures also have problems that should be corrected if they are not replaced by a comprehensive liability scheme.

B. OTHER JURISDICTIONS

FEDERAL ESTATE TAX

Federal tax authorities may enforce a decedent’s tax liability against a transferee that receives property of the decedent. There is some development of the law with respect to equitable liability based on fraudulent transfer law, the effect of liens, applicable statutes of limitations, and exemptions for joint tenancy and life insurance.228

The most comprehensive and longest standing scheme for apportionment and collection of debts against both probate and nonprobate transfers of a decedent is the federal estate tax law. There is now an extensive body of law on apportionment and collection of the federal estate tax.229

LIABILITY

The federal estate tax is based on the decedent’s gross estate, which includes all of a decedent’s property, both probate and nonprobate.230 That includes, for example:

- A lifetime gift made within 3 years of death.231
- A transfer with retained life estate.232
- A transfer that takes effect at death.233
- A revocable transfer, including the decedent’s revocable inter vivos trust.234
- An annuity.235

228. See generally discussion in Miller, Creditors’ Rights Against the Trust and Beneficiaries, California Trust Administration § 10A.33 (Cal. Cont. Ed. Bar 2009); see also Miller, “Not Only Can’t You Take It With You, You Leave Your Taxes Behind!”, Legal Specialization Digest (Fall/Winter 1996).

229. Selected provisions of the federal estate tax law are set out in the Appendix.

• A decedent’s interest in joint tenancy property.236
• Property over which a decedent held a general power of appointment.237
• Life insurance proceeds.238

The estate tax return must be prepared and paid by the “executor” of the
decedent’s estate; or, “if there is no executor or administrator appointed, qualified,
and acting within the United States, then any person in actual or constructive
possession of any property of the decedent.”239 Every recipient of property of the
decedent is personally liable for payment of the estate tax to the extent of the value
of the property, and the property is subject to a special estate tax lien.240 A
fiduciary who transfers property of the decedent to a beneficiary without
withholding the estate tax is personally liable to the extent of the value of the
property transferred.241

APPORTIONMENT

Federal law requires that the estate tax be apportioned among the recipients of
the decedent’s estate in proportion to the value of the property received. If
property in the possession of the personal representative is insufficient to satisfy
the tax obligation, the personal representative needs to consider other collection
alternatives. “The collection problems in this area generally arise when the
property in question passes outside of probate and therefore outside of the
possession of the executor.”242

There is extensive experience with the apportionment and collection process
under state law.243 The California apportionment statute is discussed above under
“Proration of Taxes.”

The issues relating to tax apportionment should be distinguished from issues
relating to the collection of the estate tax by the IRS. If the executor does not pay
the federal estate tax when due, the tax apportionment issue will have no impact
on the ability of the IRS to use its collection methods to collect the unpaid estate
tax; the IRS can collect against all beneficiaries, even if contrary to the method of
apportionment determined by applicable federal or state law. The primary

2003).
methods available to the IRS to collect unpaid estate taxes are transferee liability and the special estate tax lien.\textsuperscript{244}

\section*{FEDERAL ENFORCEMENT AUTHORITY}

If the estate tax is not paid, the Internal Revenue Service may act directly to collect it. The key enforcement mechanism is found in 26 U.S.C. § 6324:

\begin{enumerate}
\item The unpaid tax is a lien on the decedent’s gross estate for 10 years.
\item The decedent’s spouse, transferee, trustee, surviving tenant, appointee, or beneficiary who has or receives property in the decedent’s gross estate is personally liable for the tax to the extent of the value of the property received, measured as of the date of death.
\item If a person liable for the tax disposes of property that is subject to the estate tax lien, the property is divested of the lien and a like lien attaches to all that person’s property as well as to the property of the transferee.
\end{enumerate}

The special estate tax lien attaches to the entire gross estate at the moment of death and continues for 10 years. It attaches to property whether or not the property comes into possession of the personal representative. No assessment is required for the special estate tax lien to arise, nor must the Internal Revenue Service file a notice of lien for it to be effective with respect to a holder of the decedent’s property, including a bona fide purchaser of the property.\textsuperscript{245} If a transferee has received property subject to the special estate tax lien, the Internal Revenue Service may proceed directly against the property and is not required to first proceed against the initial recipients of estate property. Lien foreclosure proceedings are brought in federal court by civil action; no other collection attempt is prerequisite.\textsuperscript{246}

The Internal Revenue Service has not been shy about exercise of its authority under these provisions. Moreover, the liability is not conditioned on either exhaustion of remedies for collection against the estate or the estate’s insolvency.\textsuperscript{247} The Internal Revenue Service can proceed against a transferee even if the estate is solvent and even if other collection remedies are available against the estate.

Other collection remedies available to the Internal Revenue Service besides the special estate tax liability and lien system include the summary collection procedure that may be exercised against the transferee of the decedent’s property under 26 U.S.C. § 6901; Reg. § 301.6901-1. That procedure may be used for estate collection against the transferee of the decedent’s property.

\textsuperscript{244} Gopman & McCawley, \textit{supra} note 242, at A-50.
\textsuperscript{245} See, e.g., U.S. v. Vohland, 675 F.2d 1071 (9th Cir. 1982).
\textsuperscript{246} 26 U.S.C. § 7403.
\textsuperscript{247} See, e.g., Schuster v. Comm’r, 312 F.2d 311 (9th Cir. 1962).
tax collection but it is more limited than the special estate tax liability and lien system for a number of reasons, including:

- It is subject to a four year limitations period.\(^{248}\)
- It requires exhaustion of collection efforts against the decedent.\(^{249}\)
- It is subject to state exemption laws (unless the transfer is a fraudulent conveyance).

There is a division of authority among the federal circuits whether transferee liability for the estate tax is limited to the value of the property received.\(^{250}\)

Transferee tax liability, whether based upon equitable, statutory, or contractual grounds, is joint and several. (As the poor Baptiste Brothers found out!) The IRS or other tax authority can pursue just one of them; it cannot be forced to join all potentially liable sources of payment. [Annie Philips v. Comm’r, 283 US 589 (1931).] However, one of several transferees can bring an independent action for equitable contribution against the others who are liable. [Philips-Jones Corp. v. Parmley, 302 US 233 (1937)] If the tax authority should bring a collection lawsuit against one of several transferees (a rather unusual procedure since the passage of the administrative assessment procedures), then one could cross-complain against the others for contribution.\(^{251}\)

**REIMBURSEMENT**

Anyone whose share is diminished by payment of estate tax is entitled to reimbursement from the estate or equitable contribution from persons whose interest should have been subjected to it. “Accordingly, most of the federal statutes are concerned with tax attributable to property that would not be in the executor’s control.”\(^{252}\)

If a transferee of the decedent’s property is required to satisfy a greater than pro rata portion of the estate tax, the transferee may seek reimbursement from others liable.\(^{253}\) Note that federal law providing for reimbursement defers to state determination of this right, including state recognition of a provision in a will directing that debts be paid out of particular estate property.

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249. California Iron Yards Corp. v. Comm’r, 82 F2d 776 (9th Cir 1936).
252. 2 Drafting California Revocable Trusts § 15.6 (Cal. Cont. Ed. Bar 2003).
253. 26 U.S.C. § 2205 (“such person shall be entitled to reimbursement … by a just and equitable contribution by the persons … whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate”).
Federal law overrides state law governing reimbursement with respect to specific assets. These provisions govern the right of the personal representative to seek reimbursement and do not provide a direct right of recovery among the decedent’s beneficiaries.

**Synopsis**

- Liability limited to insolvent estate: No
- Enforcement by personal representative if any: Yes
- Direct enforcement by creditor: Yes
- Liability of transferee or of property: Transferee, or property via lien
- Proportionate liability: Yes
- Priority among creditors: No
- One year statute of limitations: No

**Evaluation**

The federal estate tax scheme is a comprehensive approach to assessing and enforcing the estate tax equitably among the decedent’s probate and nonprobate beneficiaries. The approach is heavy handed and relies ultimately on the federal tax lien authority. For that reason it is not an appropriate mechanism for dealing with private debts and family protections. The state law that facilitates apportionment of the estate tax provides more useful concepts.

**MISSOURI STATUTE**

Missouri since 1989 has provided comprehensive nonprobate transferee liability for a decedent’s debts and family allowance. Under the Missouri scheme a nonprobate transferee, including a trust beneficiary and a surviving joint tenant, is liable for a decedent’s debts and family allowance to the extent the decedent’s probate estate is inadequate. The liability is enforceable in an action for an accounting by the decedent’s personal representative on demand of a claimant or, failing that, by the claimant. The personal representative must disclose to the claimant information in its possession concerning nonprobate transfers. The action must be brought within 18 months after the decedent’s death. All nonprobate transferees may be joined in an action for an accounting. A transferee is liable pro rata based on the value of all property received.

254. See 26 U.S.C. §§ 2206 (life insurance beneficiaries), 2207 (recipients of power of appointment property), 2207B (retained life estate property), 2207A (surviving settlor right to recover from beneficiaries).


The Missouri statute may be used for collection of public as well as private debts, including Medicaid.\textsuperscript{257} The statute is retroactive with respect to deaths that occurred within two years before its enactment. The constitutionality of retroactive application has been upheld.\textsuperscript{258}

**Synopsis**

- Liability limited to insolvent estate: Yes
- Enforcement by personal representative if any: Yes
- Direct enforcement by creditor: No
- Liability of transferee or of property: Transferee
- Proportionate liability: Yes
- Priority among creditors: Unknown
- One year statute of limitations: 18 months

**Evaluation**

The Missouri statute was amended in 1995 to add clarifying operational detail and to give an enforcement right to the creditor if the personal representative fails to act. The statute was again amended in 2004, primarily to augment the provisions dealing with action by a claimant where the personal representative refuses to act. These amendments suggest the existence of an adversarial relationship between the personal representative and creditors, which would be aggravated where the personal representative is also a nonprobate transferee.\textsuperscript{259}

The Missouri scheme may provide useful procedural detail for a system based on personal representative enforcement of nonprobate transfer liability.

**WASHINGTON STATUTE**

The Washington statute has been in effect since 1994.\textsuperscript{260} The statute is based on the analysis and recommendations of Andrews, *Creditors’ Rights Against Nonprobate Assets in Washington: Time for Reform*.\textsuperscript{261}

Washington takes a two-pronged approach to nonprobate transfer liability — there is one procedure for use in a probate proceeding and a different procedure where there is no probate proceeding.

The probate procedure is found in Revised Code of Washington Section 11.18.200. The beneficiary of a nonprobate transfer is liable to account to the

\textsuperscript{257} In re Estate of Macormic; 244 S.W.3d 254 (2008); In re Estate of Jones, 2009 WL 62962 (2009).
\textsuperscript{258} In re Estate of Hayden, 258 S.W. 3d 505 (2008).
\textsuperscript{259} See, e.g., In re Hoffman, 23 S.W.3d 646 (2000).
\textsuperscript{260} Rev. Code Wash. §§ 11.18.200, 11.42.010-11.42.900. The text of the statute is set out in the Appendix.
\textsuperscript{261} 65 Wash. L. Rev. 73 (1990).
personal representative for liabilities, claims, estate taxes, and a fair share of the expenses of administration. Transfers covered by this provision include property passing to the beneficiary under a community property agreement, joint tenancy, pay on death designation, life estate, or trust. Life insurance and pension and retirement benefits are exempt. The liability of nonprobate transfers is treated together with the liability of probate transfers under general abatement principles.

The procedure where there is no probate proceeding is found in Revised Code of Washington Sections 11.42.010 to 11.42.900. The trustee of a trust, or a nonprobate transfer beneficiary, or group of beneficiaries, that receives substantially all of the decedent’s probate and nonprobate property, may act as a “notice agent” by opening a case file with the probate court and giving “nonprobate notice to creditors.” The creditor must present the claim to the notice agent and file it with the court within the same time and manner that a claim must be presented and filed in probate. Failure of a creditor to act in a timely fashion bars the claim as to both probate and nonprobate property. The notice agent must allow or reject claims in the same manner as a personal representative in probate. Both probate and nonprobate property (but only that received by the notice agent) may be used to satisfy allowed claims subject to the same order of priority as in probate. A creditor whose claim is rejected may bring an action to enforce the claim within 30 days after rejection.

**Synopsis**

- Liability limited to insolvent estate: No
- Enforcement by personal representative if any: Yes
- Direct enforcement by creditor: No
- Liability of transferee or of property: Transferee
- Proportionate liability: Yes
- Priority among creditors: Yes
- One year statute of limitations: Yes

**Evaluation**

This is a well articulated statute that treats nonprobate transfer liability comprehensively. There is no reported case construing or applying the statute.

It is unclear under the probate proceeding statute whether a nonprobate transferee may be held to account for a family allowance — the nonprobate transfer is subject to “liabilities, claims, estate taxes, and the fair share of expenses of administration”, whereas under Washington law the family allowance is a court “award.” It is also unclear whether the personal representative must seek out and proportionately apply the liability to all nonprobate transfer beneficiaries, or whether the personal representative may pick and choose. There also is a discrepancy between the concept of personal liability of the beneficiary and abatement of the transfer.
The nonprobate notice proceeding is similar to that available to a trustee under California law. It is broader than California law since it is made available to the major nonprobate beneficiary of the decedent and, by agreement, to a group that constitutes the major nonprobate beneficiary. Minor nonprobate beneficiaries are not allowed to conduct the notice proceeding; presumably their remedy, other than to wait for expiration of the statute of limitations, is to commence a probate proceeding.

**UNIFORM ACT**

The most recent major effort to provide comprehensive treatment of creditor issues involving nonprobate transfers is found in the Uniform Nonprobate Transfers on Death Act (1998), Section 102 (liability of nonprobate transferees for creditor claims and statutory allowances).\(^{262}\)

Six jurisdictions have enacted the provision: Arizona,\(^{263}\) Colorado,\(^{264}\) Idaho,\(^{265}\) Indiana,\(^{266}\) New Mexico,\(^{267}\) and the Virgin Islands.\(^{268}\)

Under the Uniform Act, the recipient of a nonprobate transfer can be required to contribute to pay allowed claims and statutory allowances to the extent the probate estate is inadequate. The maximum liability for a single nonprobate transferee is the value of the transfer. Value is determined as of the time when the benefit is “received or controlled by the transferee.” That is the date of the decedent’s death for a nonprobate transfer made by means of a revocable trust and date of receipt for other nonprobate transfers. Two or more transferees are severally liable for the proportion of the liability based on the value of the transfers received by each.\(^{269}\)

Under the Uniform Act the order of abatement to satisfy the liability is (1) a transfer identified by the decedent, (2) the decedent’s inter vivos trust, and (3) other nonprobate transfers. A creditor may commence an enforcement proceeding in the name of the estate if the personal representative does not. The proceeding is subject to a one year statute of limitations. A fiduciary that makes a distribution to a transferee may not be held liable unless the personal representative has given the

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\(^{262}\) The provision, with Official Comments, is set out in the Appendix. The provision is also included in the Uniform Probate Code as Section 6-102. In this study, references to Section 102 of the Uniform Nonprobate Transfers on Death Act and Section 6-102 of the Uniform Probate Code are used interchangeably.


\(^{266}\) Ind. Code § 32-17-13-1 (2002).


\(^{268}\) V.I. Act No. 7150 (2010)

fiduciary prior written notice. The Uniform Act applies to a nonprobate transfer at
death other than transfer by right of survivorship under joint tenancy.

SCAPE OF ACT

The Uniform Act extends liability to the beneficiary of a “nonprobate transfer.”

In this section, “nonprobate transfer” means a valid transfer effective at death,
other than a transfer of a survivorship interest in a joint tenancy of real estate, by a
transferor whose last domicile was in this State to the extent that the transferor
immediately before death had power, acting alone, to prevent the transfer by
revocation or withdrawal and instead to use the property for the benefit of the
transferor or apply it to discharge claims against the transferor’s probate estate.270

Its coverage is intended to encompass transfers at death by revocable trust, TOD
security registration agreements, and similar death benefits.271

The definition should refer to the authority, rather than the power, of the
transferor to act. See Comment 4 to the Section. (“The required ability to revoke
or otherwise prevent a nonprobate transfer at death that is vital to application of
subsection (a) is described as a ‘power,’ a word intended by the drafters to signify
legal authority rather than capacity or practical ability.”)

The definition is cumbersome in part because it includes a number of
substantive provisions and in part because it is intended to exclude a general
power of appointment from its coverage.

General Power of Appointment

Comment 3 explains that the definition of nonprobate transfer in Section 102(a)
excludes a general power of appointment from coverage of the section:

The definition of “nonprobate transfer” in subsection (a) includes revocable
transfers by a decedent; it does not include a transfer at death incident to a
decedent’s exercise or non-exercise of a presently exercisable general power of
appointment created by another person. The drafters decided against including
such powers even though presently exercisable general powers of appointment are
subject to the Code’s augmented estate provisions dealing with protection of a
surviving spouse from disinherition. Spousal protection against disinherition by
the other spouse supports the institution of marriage; creditors are better able to
fend for themselves than financially disadvantaged surviving spouses. In addition,
a presently exercisable general power of appointment created by another person is
commonly viewed as a provision in the trust creator’s instrument designed to
provide flexibility in the estate plan rather than as a gift to the donee.272

A better approach would be to exclude a general power of appointment directly, rather than developing a nonstandard and awkward definition. Compare, for example, the handling of joint tenancy property in the same paragraph.\textsuperscript{273}

California subjects a general power of appointment to the decedent’s debts. See discussion above of “General Power of Appointment.”

**Joint Tenancy**

Section 102(a) exempts from the operation of the statute the transfer of a survivorship interest in a real property joint tenancy. The Comment to the provision observes:

The exclusion of a “survivorship interest in joint tenancy of real estate” from the definition of “nonprobate transfer” in subsection (a) is contrary to the law of some states (e.g., South Dakota) that allow an insolvent decedent’s creditors to reach the share the decedent could have received prior to death by unilateral severance of the joint tenancy. The law in most other states is to the contrary. By excluding real estate joint tenancies, stability of title and ease of title examination is preserved. Moreover, real estate joint tenancies have served for generations to keep the share of a couples’ real estate owned by the first to die out of probate and away from estate creditors. This familiar arrangement need not be disturbed incident to expanding the ability of decedents’ creditors to reach newly recognized nonprobate transfers at death.\textsuperscript{274}

Both the federal estate tax law and the federal Medicaid reimbursement act subject the decedent’s joint tenancy interest to liability, as do the Missouri and Washington statutes.

The Uniform Act excludes only a real property joint tenancy:

No view is expressed as to whether a survivorship interest in personal or intangible property registered in two or more names as joint tenants with right of survivorship would come within 6-102(a). The outcome might depend on who originated the registration and whether severance by any co-owner acting alone was possible immediately preceding a co-owner’s death.\textsuperscript{275}

That is an unusual approach — to exempt a real property joint tenancy but to leave the treatment of a personal property joint tenancy to determination by the court depending of the facts of the particular case.

**Joint Bank Account**

According to the Comment, the “acting alone” provision of the definition is intended to protect a survivor beneficiary of a joint account from liability to the

\textsuperscript{273} See also Co. Rev. Stat. § 15-15-103(1)(b)(2) (exempting “Property transferred by the exercise or default in the exercise of a power of appointment, including a power of withdrawal, created by a person other than the transferor.”)

\textsuperscript{274} Unif. Prob. Code § 6-102, cmt. 5, ¶1.

\textsuperscript{275} Unif. Prob. Code § 6-102, cmt. 5, ¶2.
probate estate of a deceased co-depositor for funds in the account owned by the
survivor prior to the decedent’s death:

Subsection (a) continues this protection by use of the language “valid transfer
effective at death ... by a transferor ... [who] had power, acting alone, to prevent
the transfer by revocation or withdrawal and instead use the property for the
benefit of the transferor...” Section 6-211 and related sections of the Code make it
clear that parties to a joint and survivor account separately own values in the
account in proportion to net contributions. Hence, a surviving joint account
depositor who had contributed to the balance on deposit prior to the death of the
other party is subject to the remedies described in this section only to the extent of
new account values gained through survival of the decedent.276

It would be better that this be done by a substantive provision rather than by a
definition.

Exemptions

Section 102 is intended to exempt from its operation property that would be
exempt from a creditor’s claim under the state’s enforcement of judgments law. It
does this somewhat obscurely by imposing liability for debts and statutory
allowances “except as otherwise provided by statute.”277

The initial clause of subsection (b), “Except as otherwise provided by statute,“
is designed to prevent a conflict with and to clarify that this section does not
supersede existing legislation protecting death benefits in life insurance,
retirement plans or IRAs from claims by creditors.

If a state’s insurance laws do not exempt or protect a particular insurance death
benefit, the insured’s creditors would not be able to establish a “nonprobate
transfer” under (a) except to the extent of any cash surrender value generated by
premiums paid by the insured that the insured could have obtained immediately
before death.278

The applicability of exemptions should be stated expressly in the statute, not
relegated to commentary. In at least one state that enacted the Uniform Act, the
matter had to go to its supreme court for resolution.279

Indiana, in enacting the statute, stated the applicable exemptions expressly —
"transfer of a survivorship interest in a tenancy by the entireties real estate,
transfer of a life insurance policy or annuity, or payment of the death proceeds of a
life insurance policy or annuity.”280

Colorado exempts:

279.  See May v. Ellis, 208 Ariz. 229, 92 P.3d 859 (2004) (statute does not supersede existing legislation
protecting death benefits in life insurance, retirement plans, or IRAs from claims of creditors).
(3) Proceeds transferred pursuant to a beneficiary designation under a life insurance, accident insurance, or annuity policy contract.

(4) Property or funds held in or payable from a pension or retirement plan, individual retirement account, deferred compensation plan, internal revenue code section 529 plan, or other similar arrangement.\(^{281}\)

It is a policy question whether the exemptions from enforcement of a judgment generally applicable to a debtor should continue to apply after the debtor’s death.

**Jurisdiction**

Section 102(a) limits the application of the statute to debts of a transferor whose last domicile is in the state. That is consistent with the general probate principle that the domiciliary state of the decedent has primary jurisdiction.\(^{282}\) Indiana law specifies the venue for enforcement proceedings. The liability is enforceable in proceedings in Indiana in the county where:

- (1) the transfer occurred;
- (2) the transferee is located; or
- (3) the probate action is pending.\(^{283}\)

That is not the end of the discussion, since neither the nonprobate property nor the nonprobate transferee may be within the jurisdiction of the state. Indiana goes to some detail in specifying the reach of its jurisdiction with respect to particular nonprobate assets:

- (b) With respect to a security described in IC 32-17-9 “nonprobate transfer” means a transfer on death resulting from a registration in beneficiary form by an owner whose last domicile was in Indiana.
- (c) With respect to a nonprobate transfer involving a multiple party account, a nonprobate transfer occurs if the last domicile of the depositor whose interest is transferred under IC 32-17-11 was in Indiana.
- (d) With respect to a motor vehicle or a watercraft, a nonprobate transfer occurs if the transferee obtains a certificate of title in Indiana for:
  - (1) the motor vehicle under IC 9-17-2-2(b); or
  - (2) the watercraft as required by IC 9-31-2-16(a)(1)(C).\(^{284}\)

Jurisdictional and choice of law issues involving out of state transfers and transferees are discussed below under “Out of State Transferee.”

**LIABILITY**

The key liability provision of Section 102 states:

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\(^{282}\) See, e.g. Prob. Code § 7051.

\(^{283}\) Ind. Code § 32-17-13-6.

\(^{284}\) Ind. Code § 32-17-13-1(b)-(d).
Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against decedent’s probate that estate [sic] and statutory allowances to the decedent’s spouse and children to the extent the estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received or controlled by that transferee.\textsuperscript{285}

Noteworthy aspects of the provision include:

1. Liability extends both to creditors and to dependents given statutory protection. Statutory allowances apparently are not intended to include such non-monetary items as a probate homestead or other exempt property.\textsuperscript{286}

2. The nonprobate transferee’s liability is to the probate estate, rather than directly to a creditor or a dependent given statutory protection. A major debate in the development of the statute was whether to allow direct action by a creditor. The debate was resolved in favor of processing claims through the estate because that enables a regularized and standardized process.\textsuperscript{287}

3. Liability is limited to “allowed” claims. The allowance or proof of a claim is a standard procedure in probate. The Comment notes that if there is no probate property, a creditor or other person seeking to use Section 102 would first need to secure appointment of a personal representative to invoke procedures for establishing a creditor’s claim as “allowed.” The Comment opines that this works well in practice since the Uniform Probate Code procedures for opening estates, satisfying probate exemptions, and presenting claims are very efficient.\textsuperscript{287}

4. The liability applies only to the extent the probate estate is insufficient. Nonprobate transferees are preferred over probate transferees.

5. The liability of a nonprobate transferee is limited to the value of the property received or controlled by the transferee. The Comment notes that value is determined as of the time benefits are received or controlled by the transferee, which would be “the date of the decedent’s death for nonprobate transfers made by means of a revocable trust, and date of receipt for other nonprobate transfers.” It is not clear how the determination of value is made; if there is an estate tax return, that may establish value; otherwise, there is no easy method.\textsuperscript{288} In California a probate referee appraisal might suffice. Indiana adds a provision that liability of the nonprobate transferee does not include the net contributions of the nonprobate transferee.\textsuperscript{289} That may be inherent in the concept of value, but it should be spelled out in the statute.

\textsuperscript{285} Unif. Prob. Code § 102(b).


\textsuperscript{287} Unif. Prob. Code § 6-102, cmt. 1.


\textsuperscript{289} Ind. Code § 32-17-13-2(c).
It may not be clear what a transferee’s proportionate liability is, since that can only be determined if all the decedent’s nonprobate transfers are known. Gagliardi notes that the statute does not make clear whether the personal representative can join all potential nonprobate transferees in one proceeding, and whether apportionment of liability among nonprobate transferees (other than the trustee of the “principal nonprobate instrument”) is calculated based on property received only by those nonprobate transferees named in the proceeding or based on property received by all potential nonprobate transferees whether or not named.\textsuperscript{290}

**ABATEMENT**

Because Section 102 does not provide for direct liability of a nonprobate transferee to creditors but only through the mechanism of the probate estate, the basic liability scheme is expressed in terms of abatement:

Nonprobate transferees are liable for the insufficiency described in subsection (b) in the following order of priority:

1. a transferee designated in the decedent’s will or any other governing instrument, as provided in the instrument;
2. the trustee of a trust serving as the principal nonprobate instrument in the decedent’s estate plan as shown by its designation as devisee of the decedent’s residuary estate or by other facts or circumstances, to the extent of the value of the nonprobate transfer received or controlled;
3. other nonprobate transferees, in proportion to the values received.\textsuperscript{291}

Noteworthy features of this scheme include the ability of a decedent to specify the source of payment of debts, the primary liability of the decedent’s trust, and the proportionate liability of other nonprobate transferees.

The primary liability of the decedent’s trust is a significant innovation of Section 6-102. One of the debates in the development of the statute was whether all nonprobate transferees should be proportionately liable or whether they should be liable only after trust property is exhausted. The compromise reached was that a trust that functions as the principal will substitute (“the principal nonprobate instrument in the decedent’s estate plan”) should be primarily liable. That makes sense, but one might likewise ask whether the trust should only be liable if the estate is insolvent or whether it should be liable equally with the estate. That question may be moot if the decedent’s estate is subject to a pour over provision in the will, as is often the case.

Comment 8 to the Uniform Act suggests that if a decedent’s *irrevocable* trust is a pour over receptacle it could be liable for a decedent’s debts under Section 102(c)(2). That would be at odds with basic California law and policy. A pour over devise is a testamentary transfer and would be primarily liable for the

\textsuperscript{290} Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, Real Property, Probate and Trust Journal 819 (Winter 2007).

\textsuperscript{291} Unif. Prob. Code § 6-102(c).
decedent’s debts. It would be difficult to say that a decedent’s irrevocable trust, like any other gift made during a decedent’s lifetime, could be subject to liability if the estate is inadequate. Compare Indiana law, which expressly limits liability under this provision to “trusts that can be amended, modified, or revoked by the decedent during the decedent’s lifetime.”

Section 102 imposes no duty on the personal representative to track down all nonprobate transfer beneficiaries. Nor does it prescribe a reimbursement right if a transferee is required to pay more than its fair share of the decedent’s obligations. A reimbursement right is not necessary if the transferee’s liability is proportionate from the inception.

**ABATEMENT WITHIN TRUST**

In case of trust liability, Section 102(d) applies the same abatement principles that would be applicable within a probate estate. The abatement principle for trust liability is consistent with the California approach to trust beneficiary liability.

Comment 9 to the Uniform Act notes that the order of abatement among classes of beneficiaries of a trust applies to a trust whether or not it is the principal nonprobate instrument in the decedent’s estate plan. It is to be anticipated that complex coordination issues may arise in the case of multiple trusts with differing beneficiaries; a probate proceeding would be the forum for coordinating liabilities of trust beneficiaries.

The text of the Uniform Act and its Comment are inconsistent with each other. Although Section 102(c)(2) makes the principal trust primarily liable, Section 102(d) applies a rule of proportionate liability among all trusts. Indiana resolves the inconsistency by making all trusts, not just the decedent’s principal trust, liable together before other nonprobate transferees.

**INSTRUMENT DIRECTING APPORTIONMENT**

Section 102(e) elaborates the right of the decedent to specify the order of abatement to satisfy debts and allowances. The Comment to this provision observes that it permits a simple, last-minute override of earlier directions concerning a decedent’s wishes regarding priorities among successors. Thus, a will or trust amendment can correct or avoid liquidity and abatement problems discovered prior to death.

The expression “blockbuster will” was coined by estate planners in the mid 70’s to signal interest in legislation enabling a later will to override death benefits by

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292. Ind. Code § 32-17-13-3(2).
294. Ind. Code § 32-17-13-3(2).
any nonprobate transfer device. This subsection meets some of the goals of
advocates of this legislation.295

Although the statute allows an instrument to “direct apportionment”, the
direction may not ultimately impair a creditor’s rights. A better characterization
might be that the decedent is allowed to direct the “order of abatement” to satisfy
the liability.

OUT OF STATE TRANSFEREE

Section 102(f) provides that nonprobate transfer liability is enforceable on “due
notice” to the transferee, whether or not located in the state. The commentary to
the Uniform Act argues that the law of a decedent’s last domicile should be
controlling as to rules of public policies that override the decedent’s dispositional
freedom. “The principle is implemented by subjecting donee recipients of the
decedent to liability under the decedent’s domiciliary law, with the belief that
judgments recovered in that state following appropriate due process notice to
defendants in other states will be accorded full faith and credit by courts in other
states should collection proceedings be necessary.”296

“Due notice” to an out of state transferee doesn’t end the story. The ultimate
constitutional limitation is minimum contacts. Gagliardi, for one questions
whether the forum state can exercise jurisdiction over out of state transferees.297
But see Saler v. Irick,298 concluding that out of state distributees had minimum
contacts with Indiana sufficient to warrant exercise of jurisdiction in Indiana to
impose liability on them.

ENFORCEMENT

Enforcement of liability under Section 102 is by the personal representative in
probate, not directly by a creditor or family allowance recipient. Nor may the
personal representative act without a demand by the creditor or family allowance
recipient.299

Whether enforcement should be by the personal representative or by a creditor
directly was a major issue in the development of Section 102. Proponents of
enforcement by the personal representative noted the well developed and orderly
process available in probate, whereas proponents of direct enforcement by a
creditor noted the fiduciary conflict of the personal representative. Some were
concerned about the practicality of a creditor not privy to the decedent’s papers

297. Gagliardi, Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers, Real
and affairs attempting to ascertain and locate nonprobate transferees. The compromise approach of Section 102 is to give the personal representative primary enforcement authority and to give the creditor secondary authority to act “in the name of the decedent’s estate” in case of inaction by the personal representative.

The requirement of a demand on the personal representative by a creditor as a prerequisite to enforcement was the subject of litigation in *Saler v. Irick*:

Indiana Code § 32-4-1.5-7 states, “No proceeding to assert this liability shall be commenced unless the personal representative has received a written demand by a surviving spouse, a creditor or one acting for a dependent child of the decedent...” It is clear that Ruth had no surviving spouse or dependent child at her death. More importantly, there is no indication that any creditor of the estate requested that Nancy initiate this action. In fact, by her own argument, Nancy implies that no creditor filed such a written request. Consequently, this action cannot proceed with I.C. § 32-4-1.5-7 as its authority.

The policy that would require a demand by a creditor is not clear, nor is the reason a creditor’s claim in probate is not a sufficient demand in and of itself. The requirement of a claim followed by a demand is a trap. In some circumstances it may be appropriate for the personal representative to proceed against nonprobate property without a prior demand by a creditor.

The commentary to Section 102 states:

The second sentence [of Section 102(g)] reflects sensitivity for the dilemma confronting a probate fiduciary who, acting as required of a fiduciary, concludes that the costs and risks associated with a possible recovery from a nonprobate transferee outweigh the probable advantages to the estate and its claimants. A creditor whose claim has been allowed but remains unsatisfied and whose demand for a proceeding has been turned down by the estate fiduciary may proceed at personal risk in efforts to enforce the estate claim against the nonprobate beneficiary. This is so because the last two sentences of (g) shift the risk of unrecoverable costs from the decedent’s estate to the claimant who undertakes collection efforts on behalf of the decedent’s estate. Any recovery of costs should be used to reimburse the claimant who bore the risk of loss for the proceeding.

In the case of inaction by the personal representative, the statute does not indicate how long the creditor must wait before seeking enforcement. That should be clarified.

Suppose a creditor commences enforcement proceedings under this section “in the name of the decedent’s estate” and at the creditor’s own expense. Does the creditor have the ability to discover the whereabouts of all nonprobate transferees for purposes of apportionment? Does the personal representative have a duty to cooperate? Does any recovery belong to the estate even though the recovery is at

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300. 800 N.E.2d at 964.
the creditor’s own expense? May higher priority creditors take the recovery?
Neither the statute nor commentary provides guidance on these points, nor is there
any case law development in states that have enacted the provision. The
commentary implies that any collection goes to the estate since, “Any recovery of
costs should be used to reimburse the claimant who bore the risk of loss of the
proceeding.” That should be made explicit in the statute.

How does pro rata apportionment of liability among nonprobate transferees
work in a case where the personal representative, or a creditor, decides to go after
an individual transferee of a major asset? May the transferee join other nonprobate
transferees in the proceeding? Is there a way for the transferee to determine who
the other transferees may be? Should the personal representative or creditor be
made a party for that purpose? Again, neither the statute nor commentary provides
guidance on these points, nor is there any case law development in states that have
enacted the provision. These matters should be addressed.

STATUTE OF LIMITATIONS

Section 102(h) provides a one year statute of limitations for an enforcement
action, consistent with California’s general one year statute. Idaho provides a
longer statute — 2 years; Indiana provides a shorter statute — 9 months.

Section 102(h) also provides for an extension of the limitation period where a
creditor’s claim is allowed after proceedings challenging disallowance. An
extension might also be provided where the validity and amount of the claim
cannot be readily determined and the claim is not “finally allowed” until after
extended litigation.302 An argument can be made for a restraining order or another
interim remedy.

IMMUNITY OF FIDUCIARY

Notwithstanding the liability of a nonprobate transferee under Section 102, a
holder of property that distributes the property pursuant to a nonprobate
instrument is immunized from liability unless the holder has received a written
notice from the personal representative.303 According to Comment 14, the written
notice provided for in this section is a “warning of probable estate insolvency.”

Section 102(i) is a potent provision, since it provides a means of preserving
nonprobate property from dispersion. The deeper question is why it should matter
whether property is dispersed, since liability is against the distributee as opposed
to the property. The provision appears to be a relic of early drafts of Section 102 in

302. See, e.g., In re Estate of Headstream, 214 Ariz. 530, 155 P.3d 1054 (2007) (unliquidated claim); see
also Arluk Medical Center Industrial Group, Inc. v. Dobler, 116 Cal. App. 4th 1324, 11 Cal. Rptr. 3d 194

which the property, as opposed to the beneficiary, was liable for a creditor’s claim
against a nonprobate transfer.

Absent a statutory requirement to preserve property, the obligation of a fiduciary
is to nonprobate transfer beneficiaries and not to creditors.\textsuperscript{304}

Section 102(i) implies, but does not state, a duty on the holder to preserve
property when a written notice of insolvency of the estate is received. The
 provision is also silent on whether a creditor acting “in the name of the estate”
may give the notice, and whether a personal representative is liable for failure to
give the notice.

\textbf{Synopsis}

| Liability limited to insolvent estate: Yes |
| Enforcement by personal representative if any: Yes |
| Direct enforcement by creditor: No |
| Liability of transferee or of property: Transferee |
| Proportionate liability: Yes |
| Priority among creditors: Unclear |
| One year statute of limitations: Yes |

\textbf{Evaluation}

Section 102 of the Uniform Nonprobate Transfers on Death Act is a competent
effort to treat nonprobate transfer liability comprehensively. It is in the mainstream
of the existing statutory approaches to liability.

The provision has a number of problems, including:

\begin{enumerate}
\item [1] It excludes many types of nonprobate transfers from its operation, including
joint tenancy, general powers of appointment, and other types of exempt
property.\textsuperscript{304}
\item [2] It requires the opening of a probate proceeding for imposition of liability.
\item [3] It requires a separate demand from a creditor before enforcement will be
allowed.
\item [4] It favors non-trust transfers over transfers in trust.
\item [5] There is no enforcement mechanism for proportionate liability among
transferees if the personal representative enforces selectively.
\item [6] Basic features of enforcement by a creditor “in the name of the estate” are
unclear.
\item [7] Many basic operational principles are suggested in commentary rather than
in black letter law.
\end{enumerate}

\textsuperscript{304} Cf. Arluk Medical Center Industrial Group, Inc. v. Dobler, 116 Cal. App. 4th 1324, 11 Cal. Rptr. 3d
McCouch is skeptical that the approach of Section 102 will work. His points are twofold:

(1) A probate proceeding and the cooperation of the personal representative are necessary to its operation:

As a practical matter, this provision may be difficult to enforce, for it contemplates not only that probate proceedings will be opened and creditors’ claims will be allowed, but also that the personal representative (or, failing action by the personal representative, the creditors themselves at their own expense) will be able to track down the beneficiaries of nonprobate transfers and recover from each beneficiary a ratable share of the unpaid claims.\textsuperscript{305}

(2) The haphazard development of nonprobate transfer law makes a comprehensive approach to enforcement of debts difficult:

A more fundamental problem stems from the nature of nonprobate transfers. Vehicles for transferring assets outside the probate system have evolved in a haphazard, unsystematic way, often relying on customized administrative provisions drafted to suit the needs of a particular bank, corporate trustee, life insurance company, securities issuer, or other registering entity. The result is a patchwork of diverse, self-contained transfer mechanisms that function efficiently in routine cases and at the same time resist any attempt to impose standardized procedural requirements. Indeed, nonprobate transfers have flourished and proliferated precisely because of their flexibility and informality, but these characteristics fit uneasily with the goal of a unified, orderly process for enforcing creditors’ rights.\textsuperscript{306}

These concerns notwithstanding, there have not been significant problems in the operation of the statute in those states that have enacted it. That may be in part because the availability of the remedy makes its use unnecessary. A transferee of the decedent’s property in the ordinary case will either pay a proportionate share or relinquish the property rather than consume resources to resist the inevitable.

\textbf{SUMMARY}

The existing comprehensive enforcement schemes for unsecured debts against nonprobate transfers are divided between those that apply only if the decedent’s probate estate is insolvent and those that apply regardless of its solvency. All of the schemes depend on the personal representative to enforce liability, and they allow creditors to take action if the personal representative fails to act. All impose liability on the transferee rather than the property, and all impose a rule of proportionate liability among transferees. There is no consistent approach to priority among creditors, but generally the statutes apply a short limitation period.

\textsuperscript{306} Id. at 763.
The existing comprehensive schemes are reasonably consistent on the whole with many of the limited statutes in effect in California.

### IV. POLICY ISSUES

#### BASIS OF NONPROBATE TRANSFER LIABILITY

A major function of the probate system, besides determination of the decedent’s heirs and the validity of any will and the distribution of the decedent’s property, is satisfaction of the decedent’s debts and providing for the decedent’s dependents. Nonprobate transfer mechanisms have been helpful in expediting distribution of the decedent’s property, but at the expense of creditor and dependent protection.

It has been argued that is not a problem. “In general, creditors do not need or use probate.”[^307] Langbein reports that the decedent’s beneficiaries ordinarily pay the decedent’s retail credit debts voluntarily. Other types of obligations, such as medical debts and other unsecured debts, are largely discharged through insurance. Secured debts are ordinarily discharged by the security recipient out of court. For the remainder, the probate system of collection is too expensive to make it cost effective.

In the late twentieth century, creditor protection and probate have largely parted company. Had this development been otherwise, the rise of the will substitutes could not have occurred. If creditors had continued to rely significantly upon probate for the payment of decedents’ debts, creditors’ interests would have constituted an impossible obstacle to the nonprobate revolution. For — make no mistake about it — the will substitutes do impair the mechanism by which probate protects creditors. Even though the substantive law governing most of the major will substitutes usually recognizes the priority of creditors’ claims over the claims of gratuitous transferees (life insurance is sometimes an exception), the decentralized procedures of the nonprobate system materially disadvantage creditors. Whereas probate directs all assets and all claimants to a common pot, the nonprobate system disperses assets widely and facilitates transfer without creditors’ knowledge. If modern creditors had needed to use probate very much, they would have applied their considerable political muscle to suppress the nonprobate system. Instead, they have acquiesced without struggle, as have the most powerful of creditor-like agencies, the federal and state revenue authorities.[^308]

The issue is also raised in the Prefatory Note to Uniform Act:

The decision to generate more creditor protection against nonprobate transfers at death may be misguided. Some discussants question the need for new


[^308]: Langbein, 97 Harv. L. Rev. at 1124-5.
protections for unsecured creditors of decedents. Their skepticism is warranted because commercial creditors, by continuing to ignore the national trend towards streamlining probate by cutting creditor protections, have demonstrated lack of interest in probate law protections. Also, probate exemptions are a product of probate’s tradition of protecting decedents’ creditors that could come to be viewed as unwanted fetters on owner control of succession if creditor protection against transfers at death were to disappear.

It’s possible, therefore, that probate priorities for family exemptions and creditors will be found insufficiently rooted in current public policy to be reinvigorated in the setting of widespread probate avoidance. Nonetheless, a proposal to increase the importance of these priorities by extending them to nonprobate succession forms should stimulate meaningful discussion of the policy issue. Also, discussion of policy in the context of a proposal to expand a familiar UPC remedy should start with agreement that decedents’ creditors can be protected against popular forms of nonprobate transfers at death without jeopardizing the growing popularity of probate avoidance.309

The hypothesized lack of interest of commercial creditors is not evident in California. The extensive creditor collection efforts in nonprobate, as well as probate, transfer cases documented in the discussion above of “California Law” suggest heavy use of decedent debt collection mechanisms by creditors. The extensive legislation in California protecting rights of creditors in specific nonprobate transfers indicates not only that creditors have been legislatively active to protect their interests but also that public policy in California favors protection of those interests. These observations apply to both commercial and non-commercial creditors, including public creditors, which have aggressively pursued their interests.

The difficulties of enforcement may prove to be illusory, of course, if creditors are not interested in collecting claims through the probate system — in that case, the notion of extending existing creditor protection to nonprobate transfers may be misguided. Recent case law, however, belies any suggestion of indifference on the part of creditors, who continue to pursue remedies against probate and nonprobate assets.310

It is also likely that voluntary payment of a decedent’s creditor by a beneficiary is not primarily due to the beneficiary’s sense of moral obligation but to the existence of an enforcement mechanism that will be invoked if payment is not made, including attendant expenses that will diminish the estate.

The law should not condone a means by which a decedent’s beneficiary may avoid payment of the decedent’s just debts and obligations. True, a commercial creditor may be able to spread the risk of non-recovery among its customers (though it is questionable public policy to increase the cost of goods, services, and

credit for everyone in order to protect a debtor who uses estate planning devices
that avoid creditors). But a noncommercial creditor such as the decedent’s tort
victim or support obligee does not have the same ability to spread the risk of loss,
nor do the decedent’s dependents.

The law should provide a mechanism to enable a creditor of the decedent to
reach a nonprobate transfer of the decedent just as a creditor may reach a probate
transfer of the decedent. The mere fact of the existence of such a mechanism will
limit the need for its use. The issue in California is not whether creditor rights in a
nonprobate transfer should be protected, but whether a comprehensive, consistent,
workable, efficient, and fair scheme for protecting those rights can be devised.

SECURED DEBT

The law governing collection of a debt secured by a decedent’s property is
generally adequate to protect the interest of the creditor. There are some anomalies
in the treatment of secured debts.

Under existing law, a secured creditor may collect directly against a nonprobate
asset or may waive the security and file a claim against the decedent’s estate. The
choice of remedies may have differing consequences for the decedent’s
beneficiaries. If a creditor proceeds against the security, the beneficiary of the
secured property has no right of exoneration or reimbursement from the estate. If
the creditor waives the security and collects from the estate, that estate has no right
of reimbursement or exoneration from the beneficiary of the secured property.

The rule that property passes to a beneficiary subject to liens on the property
without exoneration from the estate is appropriate with respect to a voluntary lien
such as a mortgage or deed of trust; that would accord with the decedent’s likely
intent. But the same rationale does not necessarily apply to a nonconsensual lien or
a general lien not tied to a specific asset such as a tax lien, judgment lien, or Medi-
Cal lien.

It is tempting to statutorily address these anomalies in the law governing
enforcement of a secured debt against a nonprobate transfer. However, the rules
governing treatment of a secured obligation in a probate and a nonprobate transfer
are generally comparable. As a matter of policy, it is preferable to keep the rules
consistent. Although basic changes could be made to both the probate and
nonprobate systems, that is not the primary focus of this study.

SCOPE OF LIABILITY

The term “nonprobate transfer” is nebulous. At core it is a transfer that occurs
on the death of a decedent that passes property to a beneficiary without being
subject to jurisdiction of the personal representative and the probate court.

But many classically “probate” assets pass to the decedent’s successors without
probate. That is the case, for example, under the small estate and affidavit
procedures in existing California law.
In some cases the recipient of a nonprobate transfer, or a person who receives nothing from the decedent but who may be liable for the decedent’s debts, may elect to subject otherwise exempt property to probate.

Some types of transfers that occur during the decedent’s lifetime (rather than at the decedent’s death) are also considered “nonprobate transfers.” These are transfers that remain subject to control or revocation by the decedent at the time of death, such as a revocable inter vivos trust or a general power of appointment.

Finally, an unconditional transfer made by the decedent during lifetime may be classed as a nonprobate transfer for purposes of creditor access because it is made in contemplation of death.

**DEFINITION OF NONPROBATE TRANSFER**

The federal estate tax law expansively defines the decedent’s gross estate for tax purposes — it includes all property, real or personal, tangible or intangible, wherever situated in which the decedent had an interest at the time of death, including property subject to a life estate in the decedent, a transfer that takes effect at the decedent’s death, a revocable transfer including an inter vivos trust, an annuity, joint tenancy property, property subject to a general power of appointment, and life insurance proceeds.\^311\)

The Uniform Act focuses on the decedent’s incidents of ownership at death:

In this section, “nonprobate transfer” means a valid transfer effective at death, other than a transfer of a survivorship interest in a joint tenancy of real estate, by a transferor whose last domicile was in this State to the extent that the transferor immediately before death had power, acting alone, to prevent the transfer by revocation or withdrawal and instead to use the property for the benefit of the transferor or apply it to discharge claims against the transferor’s probate estate.\^312\)

The commentary to the Uniform Act indicates that the intended coverage of the provisions extends to “transfers at death by revocable trust, TOD security registration agreements and similar death benefits.”^313\)

The comprehensive Missouri statute addresses creditor rights with respect to a nonprobate transfer of property, defined classically as a transfer of property taking effect upon the death of the owner pursuant to a beneficiary designation, plus “any other transfer of a decedent’s property other than from the administration of the decedent’s probate estate that was subject to satisfaction of the decedent’s debts immediately prior to the decedent’s death, but only to the extent of the decedent’s contribution to the value of such property.”^314\)

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The comprehensive Washington statute defines nonprobate property as “those rights and interests of a person having beneficial ownership of an asset that pass on the person’s death under a written instrument or arrangement other than the person’s will.”\(^\text{315}\) The statute goes on to make an illustrative listing of nonprobate transfers included within the definition, similar to Section 5000 of the California Probate Code.

Existing California law makes a number of stabs at defining “nonprobate property” or a “nonprobate transfer” in different contexts. For example

**Nonprobate transfer authorized**

A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is not invalid because the instrument does not comply with the requirements for execution of a will, and this code does not invalidate the instrument.\(^\text{316}\)

**Nonprobate transfer to former spouse**

As used in this section, “nonprobate transfer” means a provision, other than a provision of a life insurance policy, of either of the following types:

1. A provision of a type described in Section 5000.
2. A provision in an instrument that operates on death, other than a will, conferring a power of appointment or naming a trustee.\(^\text{317}\)

**ATRO in marital dissolution proceeding**

“Nonprobate transfer” means an instrument, other than a will, that makes a transfer of property on death, including a revocable trust, pay on death account in a financial institution, Totten trust, transfer on death registration of personal property, or other instrument of a type described in Section 5000 of the Probate Code.\(^\text{318}\)

**Estate tax proration**

“Person interested in the estate” means any person, including a personal representative, entitled to receive, or who has received, from a decedent while alive or by reason of the death of the decedent any property or interest therein.\(^\text{319}\)

Each of the existing California definitions, limited by its context, is unduly narrow, except the simple and direct estate tax proration provision. For the purpose of subjecting a decedent’s nonprobate transfers to liability for the

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decedent’s debts, a nonprobate transfer should be broadly defined. Building on the existing definitions, a number of approaches are possible:

**All property other than probate estate**

Nonprobate property is property owned at death by the decedent, or in which decedent retained an interest at death, that is not subject to administration in the decedent’s estate.

**Piggyback on federal estate tax**

Nonprobate property is property that is part of the decedent’s gross estate for federal estate tax purposes.

*Note:* This would pick up a gift made within 3 years of death and would be subject to change with changes in the estate tax.

**Combination**

Nonprobate property is all property owned at death or transferred from the decedent to a beneficiary at death that is not otherwise subject to administration in the decedent’s estate, including but not limited to property in a living trust, property subject to a general power of appointment, property held as a joint tenant, life insurance proceeds, retirement benefits, and other property described in Section 5000 that is the subject of a beneficiary designation or contractual obligation for transfer on death.”

Depending on whether or not a nonprobate transfer is given priority over a probate transfer for debt collection purposes, it may be possible to lump all the decedent’s property together, probate and nonprobate, without having finely to distinguish a probate from a nonprobate transfer.

California authorizes passage of traditional “probate” property without probate in a number of circumstances. Each of these procedures makes provision for creditor claims. If a comprehensive liability procedure is developed, these schemes should be integrated into it.

**TRANSFER BEFORE DEATH**

Should liability extend to a non-classical nonprobate transfer, such as a completed gift made in contemplation of death or a transfer made within three years before death, as under federal estate tax law?

California law pulls a gift causa mortis into the decedent’s estate. See discussion above of “Fraudulent Transfer, Gift Causa Mortis, Nonprobate Transfer of Vehicle.” The existing law is limited, covering a gift in view of “impending” death; presumably that applies to a deathbed transfer rather than a routine estate

320. See, e.g., Prob. Code §§ 13100 (affidavit procedure for collection or transfer of personal property), 13200 (affidavit procedure for real property of small value), 13500 (passage of property to surviving spouses without administration).
planning disposition of property, although there is no case law construing the provision.\textsuperscript{321}

The policy of existing probate law that limits creditor access to a gift made in view of impending death is appropriate for a nonprobate transfer as well. Any other rule would subject a wide variety of estate planning mechanisms, such as an irrevocable trust, a gift within estate tax exemption limits, or a transfer for Medi-Cal qualification purposes, to the uncertainty of potential creditor liability.

The fraudulent transfer law is sufficient to handle a gift other than a gift causa mortis. If a gift made before death renders the decedent insolvent, or is made with intent to defraud creditors, the fraudulent transfer law applies.

**JOINT TENANCY**

Joint tenancy is unique among nonprobate transfers. It is a classic probate evasion device that defeats a decedent’s creditors, both secured and unsecured, based on technicalities of the form of tenure.

Although legal niceties support the common law treatment of joint tenancy, most of the major nonprobate transfer liability schemes include joint tenancy in their coverage. The federal estate tax applies to joint tenancy property, as do the Missouri and Washington nonprobate transfer liability statutes, and the California Medi-Cal Estate Recovery Act. The Uniform Act maintains the common law exclusion of joint tenancy.

The majority of joint tenancies are spousal. In California the spousal joint tenancy and community property have historically been intertwined. In most cases a spousal joint tenancy is held in that form “for convenience” (i.e., nonprobate transfer on death) and the property is actually community. The surviving spouse may make that case for the purpose of obtaining favorable community property income tax treatment — the so-called double step up in basis.

The concept of “community property in joint tenancy form” has now received statutory sanction in the relatively new form of marital property tenure, community property with right of survivorship.\textsuperscript{322} Whether that form of tenure will successfully evade liability for the deceased spouse’s debt on joint tenancy principles remains to be seen. Community property is generally liable for a decedent’s debts; passage of the property to the surviving spouse by right of survivorship rather than by testate or intestate succession should not be the occasion for evasion of that basic policy.

The case for subjecting joint tenancy property to a creditor’s claim is even stronger with respect to a secured debt. A creditor that obtains a security interest on the decedent’s interest in joint tenancy property during the decedent’s lifetime

\textsuperscript{321} See also Prob. Code § 5702 (gift in view of impending death is one made “in contemplation, fear, or peril of impending death, whether from illness or other cause, and with intent that it shall be revoked if the giver recovers from the illness or escapes the peril”).

\textsuperscript{322} Civ. Code § 682.1.
may protect that interest by requiring joinder of all joint tenants. But a creditor may not be aware of the perils of using joint tenancy property as security. If a creditor demands joinder of all joint tenants and a joint tenant refuses to join in the encumbrance, the creditor may refuse to extend credit or may force a severance of the joint tenancy before extending credit.

A creditor may not have the opportunity to obtain consent of all joint tenants. The creditor’s encumbrance may be a judgment lien for example, perhaps for family support owed by the decedent or for personal injury caused by the decedent.

By protecting a surviving joint tenant from the decedent’s creditors, whether secured or unsecured, the law requires those creditors to recover instead from the decedent’s estate or from other nonprobate transfers, if any. There is no apparent reason the decedent’s other beneficiaries should be required to bear the burden of the decedent’s liabilities to the benefit of the decedent’s joint tenants.

It is arguable that the decedent may have intended to favor the joint tenants by selecting that form of tenure. But that argument belies the fact that property often ends up in joint tenancy on the advice of a real estate broker without the owner’s full understanding of the consequences.

Generally speaking, property of which the decedent had ownership and control at the time of death should be liable for a decedent’s debts. Joint tenancy is property of that type. During the decedent’s life the decedent may sever the joint tenancy and the decedent’s tenancy in common interest is part of the decedent’s estate. During the decedent’s life a secured creditor may enforce the security against the property and an unsecured creditor may reduce the claim to judgment and levy on the property, in either case causing a severance of the joint tenancy.

Andrews observes:

[T]here is no obvious reason why the joint tenancy form should be allowed to defeat otherwise valid and enforceable claims against one of the joint tenants. That it does so seems more a result of historical accident than reason. To allow it to continue to do so may work a positive injustice to many creditors. The arguments that are usually made to preclude creditors from reaching certain kinds of property simply do not apply here. Although a person who voluntarily extends credit with the knowledge that the debtor’s property is held in joint tenancy may justifiably be cut off if he understands that his rights against such property are cut off if the debtor dies first, the statute is sufficiently unclear to raise serious question as to whether it provides fair notice of this consequence. More importantly, not all creditors (tort victims, for example) have voluntarily entered into the role of creditor, so the question of notice does not even arise. Finally, debtors may retitle property in joint tenancy form after incurring debts without the knowledge of the creditor. Some of these transfers may be voidable by the creditor as fraudulent transfers, but it is unlikely that they all would be. The legislature therefore should clarify the statute to provide that property which
passes to a surviving joint tenant by reason of one tenant’s death should be subject
to the claims against the decedent joint tenant.323

The law should make clear that the decedent’s interest in joint tenancy property
is liable for the decedent’s debts on the same basis as any other nonprobate
transfer.

There is an emotional component to joint tenancy property. Populist sentiment
may surface in the legislative process to maintain the preferred status of joint
tenancy property. If that occurs, a possible middle ground would be to make the
change to joint tenancy liability prospective only or to provide a grace period for
reconfiguring titles and estate plans. That would undoubtedly cause confusion for
a number of years but would be worth doing nonetheless.

PRIORITY OF NONPROBATE TRANSFER

It is common under existing California law, as well as the law of other
jurisdictions, to subject a nonprobate transfer to liability for debts only if the
decedent’s probate estate is insufficient.

It can be argued that a nonprobate transfer in the ordinary case reflects the
decedent’s intent that it not be subject to probate delays and expenses, including
debt collection procedures. A nonprobate transfer is akin to a specific devise of the
decedent’s property, which is given a preference by law over the decedent’s
residuary estate in abatement proceedings. Many forms of the most important
nonprobate property already receive either a common law or a statutory exemption
— for example life insurance. It may be presumed that the decedent is aware of
this when making a nonprobate transfer. Also, as a practical matter, a general
preference in favor of a nonprobate transfer would minimize the need to invoke
procedures for collecting against it, with the complications that may involve, since
in most cases the decedent’s estate is solvent.

On the other hand, it can be argued that it is unlikely that a decedent consciously
thinks about debt liability when making a nonprobate transfer, and in fact the law
governing nonprobate transfer liability is so confused that even if a decedent were
inclined to think about these issues, it would be difficult to do so rationally. If a
decedent believes it is important that a nonprobate transfer be protected from
creditor access, the decedent can, and often does, specify that other property be
primarily liable for payment of debts.

The argument that a nonprobate transfer should be given a preference because it
is analogous to a specific devise of property makes little sense when applied to the
decedent’s revocable inter vivos trust. The inter vivos trust has become the
principle estate planning instrument, supplanting the will which is often limited to
a pour over function for missed property. The trust may include specific, general,
and residuary gifts — all nonprobate transfers. The decedent’s inter vivos trust, at
least, should be the equivalent of the decedent’s probate estate for liability
purposes.

After reviewing the policies involved, Andrews concludes that a nonprobate
transfer should be treated on an equal basis with a probate transfer for purposes of
debt liability:

Absent some persuasive reason for preferring nonprobate property, our basic
societal commitment to equality would indicate that it should be treated the same
as probate property in responding to creditor’s claims. The only reason for
preferring nonprobate property that seems even plausible would be one based on
some presumed intent on the part of the decedent that these transfers should be the
last to be disturbed to satisfy debts. Perhaps some such intent on the part of the
transferor can be inferred from the decision to avoid probate as to such property,
on the theory that the transferor realized that it would be more difficult for
creditors to pursue property transferred outside of probate. But, this is scant basis
for such an inference given that there are good reasons to avoid probate that do
not relate to avoiding creditors. Moreover, a testator is free to express such an
intent if he or she wants to. Accordingly, I have concluded that equal treatment of
probate and nonprobate transfers is the fairest approach.324

This is a compelling argument. Despite some of the principal California statutes
such as the trust law that give a nonprobate transfer a preference, there are others
that do not, including the estate tax proration statute and the Medi-Cal recovery
statute.

Although the Uniform Act and the Missouri statute give a preference to
nonprobate over probate property, the federal estate tax law does not, nor does the
Washington statute.

An interesting intermediate approach to allocation of liability among probate
and nonprobate assets together is found in the California power of appointment
law. Under that law a general power of appointment may be reached to satisfy a
decedent’s creditors only if the decedent’s estate is insolvent. But if the estate is
insolvent, then all property, probate and nonprobate, is liable proportionately.

If nonprobate property is made proportionately liable with probate property for a
decedent’s debts, that would implicate many probate estates. The personal
representative would need to ascertain the decedent’s nonprobate transfers and
notify transferees. If a creditor’s claim is allowed, the personal representative must
value the probate and nonprobate property and apportion the claim appropriately.
A nonprobate transferee would have standing to contest the allowance of a claim
and its apportionment.

The personal representative would be required to collect a proportionate share
from a nonprobate transferee. That could be difficult if the property is not in the

L. Rev. 73, 125 (1990).
possession or control of the personal representative. On the other hand, if liability is clear, collection ordinarily would be straightforward — evasion would simply increase the nonprobate transferee’s liability for the collection expense.

The additional complexity of nonprobate transfer liability in many estate proceedings may seem daunting but that is the practice in at least one jurisdiction. The Washington scheme for nonprobate transfer liability has been in effect, and apparently operating smoothly, for the past 15 years.\footnote{The Washington scheme for nonprobate transfer liability has been in effect, and apparently operating smoothly, for the past 15 years.}

Andrews’ observation is apt:

Failure to accord to nonprobate assets a preferred status above probate property will, however, add complexity to the scheme of creditors’ rights and may expose many nonprobate transfers to creditor’s claims, even though there are ample probate assets to satisfy such claims. But this is a complexity that seems demanded by fairness.\footnote{Andrews’ observation is apt: Failure to accord to nonprobate assets a preferred status above probate property will, however, add complexity to the scheme of creditors’ rights and may expose many nonprobate transfers to creditor’s claims, even though there are ample probate assets to satisfy such claims. But this is a complexity that seems demanded by fairness.}

Note also that limiting nonprobate transfer liability to an insolvent estate would not eliminate the need for procedures to determine whether or not the estate is insolvent. Existing law does not specify procedures, but it is likely an estate proceeding will be necessary for that purpose in any event.

The approach that treats all the decedent’s property — probate and nonprobate — on an equal basis is the most appropriate. The policy reasons that favor one type of property over another are not compelling. There are complexities in collection from nonprobate transfers but those complexities exist even where liability is limited to an insolvent estate. The primary task should be to devise a fair, simple, consistent, and comprehensive enforcement scheme, not to perpetuate an existing system that has evolved haphazardly.

PROPORTIONATE LIABILITY AMONG NONPROBATE TRANSFERS

GENERAL PRINCIPLES

Whether or not a nonprobate transfer is given a preference, once a nonprobate transfer becomes liable, that liability should be shared among other nonprobate transfers of the same class. It would be inequitable, for example, if the decedent’s bank or brokerage account is paid on death to all of the decedent’s children equally, but only one child’s share is seized by a creditor or by the personal representative on behalf of creditors.

That could happen if the personal representative or a creditor were allowed to pick and choose among nonprobate transfer beneficiaries. In the ordinary case the personal representative or creditor could be expected to seek recovery from the

\footnote{325. See Rev. Code Wash. § 11.18.200 (liability of beneficiary of nonprobate asset — abatement).}

\footnote{326. Andrews, supra note 323, at 125.
transfer most sufficient and most readily accessible with least effort. The personal representative may have a conflict of interest and may favor one beneficiary over another.

A handful of existing California statutes apply a rule of proportionate liability for debts. That is the rule, for example, in allocation of estate tax liability. Liability is apportioned among beneficiaries based on the proportion that the value of the property received by each beneficiary bears to the total value of the estate.

Proportionate liability among nonprobate transfers is the rule under the comprehensive Missouri, Washington, and Uniform acts.

**ABATEMENT**

The proportionate liability principle applied by California law to a few types of nonprobate transfers is inconsistent with general abatement principles, and should be conformed to them.

In a probate proceeding an order of abatement is applied to satisfy the decedent’s debts. Absent a direction by the decedent specifying property from which debts are to be satisfied, shares of beneficiaries abate in the following order:

1. Property not disposed of by the instrument.
2. Residuary gifts.
3. General gifts to persons other than the transferor’s relatives.
4. General gifts to the transferor’s relatives.
5. Specific gifts to persons other than the transferor’s relatives.
6. Specific gifts to the transferor’s relatives.

California has adopted the policy that the abatement scheme should apply to nonprobate as well as to probate transfers. Those provisions apply to all transfers of the decedent’s property for all purposes, including payment of debts. Abatement is by class of transfer and is pro rata within each class.

If a debt is uniquely associated with a particular nonprobate transfer asset, that asset or its recipient should be primarily liable for the debt; the debt should not be apportioned among other assets.

The logistics of applying abatement principles and a rule of proportionality within abated classes of nonprobate transfers may be difficult, depending on the procedure adopted for applying a nonprobate transfer to a decedent’s debts. If debts are satisfied in probate, in trust, or via another mechanism for marshalling property and debts, implementation will be straightforward. But if enforcement is

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by an individual creditor, or against an individual nonprobate transferee, more
procedure may be necessary.

As a technical matter, either Probate Code Section 21101 should specify the
application of “this division” or a provision should be added to Section 21400, 21401, or 21406 to specify the application of “this part.” Probate Code Sections 21400 and 21402(a)(1) should refer to property not disposed of by “an” instrument rather than “the” instrument. See discussion above of “Abatement.”

INTER VIVOS TRUST

The Uniform Act subjects a decedent’s revocable inter vivos trust — the “trust serving as the principal nonprobate instrument in the decedent’s estate plan as shown by its designation as devisee of the decedent’s residuary estate or by other facts or circumstances” — to liability after the probate estate but before other nonprobate property. Within the trust, gifts abate in the same manner as in probate, with a residuary gift abating first, followed by a general gift, and finally by a specific gift.

That approach makes some sense in the context of a system in which probate property is primarily liable. The trust serving as the principal nonprobate instrument in the decedent’s estate plan is a will substitute and should be treated in the same manner as a residuary devise under a will, in contrast to a specific nonprobate transfer. Primary trust liability also makes sense from an administrative perspective — the trustee is in a position to ascertain creditors, make appropriate allocation of debts, and in general serve functions analogous to those of a personal representative in probate. Existing California law accomplishes something similar under its optional trust claim procedure.

While it makes administrative sense to have the trustee run the creditor claim procedure, it is not right to subject a trust beneficiary to liability for the decedent’s debts to the benefit of another nonprobate transferee. It is not apparent why a specific gift in trust should abate before a similar specific gift made by means of another nonprobate transfer device.

DECEDENT CONTROL

The existing abatement principles apply by default, i.e., only to the extent the decedent has not directed an order of abatement:

Notwithstanding any other provision of this part, if the instrument provides for abatement, or if the transferor’s plan or if the purpose of the transfer would be

defeated by abatement as provided in this part, the shares of beneficiaries abate as
is necessary to effectuate the instrument, plan, or purpose. 333

The comprehensive nonprobate transfer liability statutes recognize the
decedent’s right to specify which property should be primarily liable to satisfy the
decedent’s debts. The estate tax proration statute provides, for example:

(a) Except as provided in subdivision (b), any estate tax shall be equitably
prorated among the persons interested in the estate in the manner prescribed in
this article.

(b) This section does not apply:

(1) To the extent the decedent in a written inter vivos or testamentary
instrument disposing of property specifically directs that the property be applied
to the satisfaction of an estate tax or that an estate tax be prorated to the property
in the manner provided in the instrument. As used in this paragraph, an
“instrument disposing of property” includes an instrument that creates an interest
in property or an amendment to an instrument that disposes of property or creates
an interest in property.

(2) Where federal law directs otherwise. If federal law directs the manner of
proration of the federal estate tax, the California estate tax shall be prorated in the
same manner. 334

Many of the problems addressed in this study would be resolved or avoided by
the transferor’s properly drawn instrument directing the source of funds for
satisfaction of debts.

The decedent’s direction should determine rights as among beneficiaries. It
should not prejudice a creditor’s right to recover from any of the decedent’s
transfers or transferees if the property designated for payment of debts is
inadequate. If a debt is secured by nonprobate transfer property, the creditor
should be able to satisfy the debt from that property regardless of the decedent’s
designation of other property for payment. Where a creditor is satisfied out of
property other than that designated by the decedent, the beneficiary of the property
should be entitled to exoneration from that designated by the decedent. The law
should make these principles clear.

An abatement schedule mandated by the decedent may have unintended
consequences in some circumstances.

A proration clause that purports to charge all death taxes to the residue of an
estate or living trust can wipe out the residue if the residue is smaller than
expected — a potentially disastrous result if the person receiving the residue is the
favored beneficiary. See Lurie v. Commissioner (7th Cir 2005) 425 Fed 1021
(marital deduction trust wiped out and additional estate tax incurred because

333. Prob. Code § 21400. See also Prob. Code § 6324 (transfer in trust not subject to greater liability than
direct transfer to beneficiary “except as otherwise provided in the designator’s will”).
proration clause required payment of tax on after-discovered assets from trust).

See also Estate of Wathen (1997) 56 CA4th 48, 64 CR2d 805.335

The decedent may execute several different instruments — a will, a trust — with conflicting directions for payment of debts (and expenses of administration). In that case it will be necessary to determine the decedent’s “plan or purpose” under Probate Code Section 21400. That requires a court determination.

EXEMPTIONS FROM LIABILITY

POLICY CONSIDERATIONS

During life a debtor’s liability to creditors is limited by significant state and federal exemptions protecting a wide range of the debtor’s assets from enforcement of a money judgment.336 Major exemptions, many of which are monetarily restricted, include homestead, motor vehicle, tools of trade, bank account, social security proceeds, retirement benefits, life insurance, and health insurance benefit exemptions.

Exemptions are intended to ensure that a debtor keeps necessaries of life that enable the debtor to stay off relief rolls and continue to support dependents. At first blush, exemptions should cease on the debtor’s death since the debtor no longer needs to be shielded from destitution; the exemptions are personal to the debtor, not to the debtor’s beneficiaries.

But the debtor’s dependents may be left in a precarious and even more vulnerable situation. At least in theory the protection of the exemptions should extend to dependents, if not to the decedent’s other nonprobate transferees.

If a debtor’s exemptions are extended beyond death, the debtor during life may convert nonexempt into exempt property. That should not be a problem, since exemptions are limited and, if the policy of the exemptions is otherwise sound, conversion to exempt property fosters that policy. A debtor retains ownership of property converted into exempt form, and the exemption is subject to challenge by a creditor if the character, amount, or other incidents of the property do not satisfy the exemption limitations.

A debtor’s conversion of property into exempt form should be contrasted with the debtor’s creation of a self-settled trust, transmutation of marital property, or transfer of title to a relative, for the purpose of defeating creditors. Those actions remove property from the debtor’s ownership and the fraudulent transfer law is adequate to handle them.


EXISTING PROBATE LAW

Family protection provisions of the Probate Code serve a similar function to exemption statutes. They are designed to ensure basic support for a decedent’s dependents.

The decedent’s family is entitled to remain in possession of the family dwelling and other property of the decedent “exempt from enforcement of a money judgment” for a limited time after the decedent’s death. The probate court may permanently set aside exempt property for the decedent’s surviving spouse and minor children. And the court may set aside a probate homestead for the surviving spouse and minor children for a limited period.

With respect to a probate homestead, the property is exempt from the decedent’s debts to the same extent the homestead exemption would have been available to the decedent at the time of death.

If the decedent’s property was exempt from attachment by creditors during the decedent’s life as necessary for support of the decedent's family under Code of Civil Procedure Section 487.020, that exemption may be continued in probate after the decedent’s death.

If the decedent’s estate is small, the probate court may order it set aside for the surviving spouse and minor children. The recipients remain liable for the decedent’s debts, but may assert “any defense, cross-complaint, or setoff” against liability that would have been available to the decedent. The statute is silent concerning the applicability of any exemption from enforcement that would have been available to the decedent; that does not appear to be included within the meaning of Probate Code Section 6611(c).

For comprehensive treatment of these and other family protection statutes, and their integration with the exemption statutes, see discussion below of “Family Protections.”

EXISTING NONPROBATE TRANSFER LAW

The principles of existing law that extend some exemptions to the surviving spouse and children on a limited basis in probate should in theory apply equally to a nonprobate transfer of the decedent’s property. But the law governing application of exemptions to nonprobate transfer liability is even sketchier than that governing proceedings in probate.

The exemption from attachment by creditors of property necessary for support of the decedent’s family during the decedent’s life is continued after the decedent’s death with respect to trust property.  

Where the surviving spouse takes property that passes from a decedent without probate, the survivor’s liability for the decedent’s debts apparently is not protected by the decedent’s exemptions. Under Probate Code Section 13551, the survivor’s liability is reduced by exemptions of the survivor’s property but not by exemptions of the decedent’s property. The implication of Section 13551, at least for a nonprobate transfer under the statute, is that the decedent’s exemptions are not available.

A technical argument can be made that the decedent’s exemptions are more fully applicable to a nonprobate than to a probate transfer. Exemptions are limited in probate but the law is generally silent with respect to a nonprobate transfer. Thus a court might extend a decedent’s exemption to a nonprobate transfer on general principles such as tracing. Tracing could protect a nonprobate transfer of exempt property such as retirement benefits and insurance proceeds that might not otherwise be exempt in probate, although there is no case so holding.

OTHER JURISDICTIONS

Other jurisdictions that have grappled with the issue are mixed in their application of a decedent’s exemptions to a nonprobate transfer.

Federal estate tax apportionment statutes do not recognize the decedent’s exemptions.

The Missouri statute applies to a transfer of property “that was subject to satisfaction of the decedent’s debts immediately prior to the decedent’s death.” Whether that incorporates exemptions is not clear.

Washington, like Missouri, makes liable a nonprobate transfer of property that was subject to satisfaction of the decedent’s general liabilities immediately before the decedent’s death, but adds the qualification, “Unless expressly exempted by statute.” Whether that qualification can be read to incorporate the general exemption statutes is unclear. Washington deals expressly with the exemptions of life insurance and pension benefits, suggesting perhaps that other exemptions do not apply. See Rev. Code Wash. § 11.18.200(2)(h)-(i).

The Uniform Act applies to a nonprobate transfer “except as otherwise provided by statute.” The commentary to the Uniform Act states that this language is

345. See, e.g., Code Civ. Proc. § 703.080(a) (a fund that is exempt “remains exempt to the extent that it can be traced into deposit accounts or in the form of cash or its equivalent”).
intended “to clarify that this section does not supersede existing legislation
protecting death benefits in life insurance, retirement plans or IRAs from claims
by creditors.”\(^\text{348}\) It is unclear whether the Uniform Act intends to apply a state’s
general exemption statutes or only those statutes that expressly exempt a specific
asset from liability for a nonprobate transfer. In Arizona it has been held that the
general exemption for life insurance proceeds applies against nonprobate transfer
liability under the Uniform Act.\(^\text{349}\) In enacting the Uniform Act both Indiana and
Colorado expressly stated a few exemptions, e.g., life insurance process and
retirement benefits.\(^\text{350}\)

**LIFE INSURANCE**

Existing nonprobate transfer schemes most commonly incorporate the life
insurance exemption. The beneficiary of proceeds of an insurance policy on the
decedent’s life is not subject to liability for the decedent’s debts even though the
decedent may have diverted significant property into premium payments before
death.

Arguments in justification of this exemption traditionally are that a creditor has
no legitimate claim against life insurance since a creditor does not rely on it when
extending credit, and that the life insurance exemption is a form of family
protection for the decedent’s dependents.

The reliance rationale is weak when applied to a non-contractual creditor such as
the decedent’s tort victim. And a contractual creditor in extending credit may have
relied on the existence of other property of the decedent which the decedent later
converted into insurance premiums, thereby depleting the decedent’s estate.

The family protection rationale makes some sense. Under California law, the
exemption for benefits from a matured life insurance policy (including an
endowment or annuity policy) is limited. The proceeds are exempt to the extent
“reasonably necessary for the support of the judgment debtor and the spouse and
dependents of the judgment debtor.”\(^\text{351}\)

It might be asked why an amount paid to a surviving spouse in the form of life
insurance proceeds should be protected from the decedent’s debts when the same
amount paid to the surviving spouse by will or intestate succession would not be
so protected.

Andrews questions the rationale of the life insurance exemption. He concludes
that “The exemption of life insurance proceeds from creditors’ claims therefore
should be abolished. Any family protection that is required should be addressed


\(^{351}\) Code Civ. Proc. § 704.100.
directly by a suitable statute that does not discriminate on the basis of the form of property transfer.”

RETIREMENT BENEFITS

Federal law broadly immunizes a retirement plan covered by ERISA. With respect to a retirement plan not covered by ERISA, state law likewise provides a substantial exemption.

Andrews suggests that the state exemption should be coordinated with other family protections:

The broad protection from creditors accorded to deferred compensation benefits generally has been justified on grounds that the employee or the employee’s family should not be left destitute as a result of the employee’s improvidence. Since we are concerned here only with the rights of creditors upon the death of the employee, concern for the employee’s own well-being is irrelevant. Concern for the employee spouse’s family is pertinent, as it is with life insurance, but only in those instances where the employee has designated his or her family to receive the benefits. As with life insurance, however, protection of family from creditors under retirement plans seems overbroad since it is not coordinated with other family protection mechanisms such as the homestead exemption. Alternatively, insofar as the employee has designated someone other than family to receive the benefits, the purported justification for the broad exemption vanishes altogether.

While it is unlikely that the creditors’ protection provided by federal law can be dislodged, the same does not apply to that provided under state law. As with the life insurance provision, such protections should be recast to accomplish valid purposes, and no more.

HARDSHIP EXEMPTION

Existing California law includes an interesting variation on post-death exemption law. The Medi-Cal reimbursement program requires that after a Medi-Cal recipient’s death the Department of Health Services must recoup from recipients of the decedent’s property benefits given to the decedent. However, the law precludes reimbursement if the department determines that enforcement of the claim would result in substantial hardship to the decedent’s dependents, heirs, or survivors.

The department has adopted regulations for application of the hardship exemption:

353. 29 U.S.C. 1056(d).
In determining the existence of substantial hardship, the Department shall waive an applicant’s proportionate share of the claim if one or more of the following factors apply:

1. When allowing the applicant to receive the inheritance from the estate would enable the applicant to discontinue eligibility for public assistance payments and/or medical assistance programs; or,

2. When the estate property is part of an income-producing business, including a working farm or ranch, and recovery of medical assistance expenditures would result in the applicant losing his or her primary source of income; or,

3. When an aged, blind, or disabled applicant has continuously lived in the decedent’s home for at least one year prior to the decedent’s death and continues to reside there, and is unable to obtain financing to repay the State. The applicant shall apply to obtain financing, for an amount not to exceed his or her proportionate share of the claim, from a financial institution as defined in Probate Code Section 40. The applicant shall provide the Department with a denial letter(s) from the financial institution; or,

4. When the applicant provided care to the decedent for two or more years that prevented or delayed the decedent’s admission to a medical or long-term care institution. The applicant must have resided in the decedent’s home during the period care was provided and continue to reside in the decedent’s home. The applicant must provide written medical substantiation from a licensed health care provider(s), which clearly indicates that the level and duration of care provided prevented or delayed the decedent from being placed in a medical or long-term care institution; or,

5. When the applicant transferred the property to the decedent for no consideration; or,

6. When equity in the real property is needed by the applicant to make the property habitable, or to acquire the necessities of life, such as food, clothing, shelter or medical care.\textsuperscript{357}

An exemption for a nonprobate transfer based on substantial hardship to the recipient, such as that applicable in a Medi-Cal reimbursement claim, makes sense from a policy perspective. The policy supporting a decedent’s exemptions is not relevant to probate or nonprobate transfer liability except to the extent the exemptions are intended to protect the decedent’s dependents from hardship. The Medi-Cal approach does directly what some of the other exemptions do indirectly.

The Medi-Cal procedure is subject to administrative discretion and requires an administrative proceeding to implement. That makes it less useful for application to a decedent’s general creditors. But to the extent there is court involvement in the nonprobate transfer enforcement process, a hardship exemption that replaces the existing asset-specific exemptions could be implemented.

The concept of a court administered hardship exemption is not new. The existing life insurance exemption requires a court determination of the amount reasonably necessary for the support of the surviving spouse and dependents of the decedent. In exercising its discretion whether to make a small estate set-aside for

\textsuperscript{357} 22 Cal. Code Reg. § 50963(a).
the surviving spouse and minor children under Probate Code Section 6609(b), the court must consider “the needs of the surviving spouse and minor children, the liens and encumbrances on the property of the decedent’s estate, the claims of creditors, the needs of the heirs or devisees of the decedent, the intent of the decedent with respect to the property in the estate and the estate plan of the decedent as expressed in inter vivos and testamentary transfer or by other means, and any other relevant considerations.”

Existing policy is to exempt certain nonprobate transfers — life insurance policies and beneficiary designations on retirement benefits — from the decedent’s debts and to provide a limited shield for probate transfers through the mechanism of family protections. It would make more sense to replace the existing exemptions and family protections with a unified hardship exemption applicable to both probate and nonprobate transfers.

While that approach would be beneficial, it would require a major overhaul of probate law. It is a sufficient challenge for now simply to attempt to expand the coverage of existing probate law to include nonprobate transfers.

There is a political dimension that also must be considered. Historically the financial services industry has been protective of exemptions applicable to its products, including life insurance, pension benefits, and bank accounts. An effort to replace specific exemptions with a general hardship exemption would likely encounter significant resistance in the legislative process.

The Washington experience is instructive. The Washington nonprobate transfer liability as proposed would have subjected life insurance and retirement plans to its operation. But the statute as enacted specifically exempts life insurance and retirement plans.

SUMMARY

In principle, a decedent’s exemptions should not carry over to the decedent’s nonprobate transferees. The tools of the decedent’s trade, for example, should cease to be exempt when passed to a beneficiary for whom they are not tools of a trade but merely an asset. The family protections are the principle means of shielding a decedent’s beneficiaries in probate; they should be extended to a nonprobate transfer for purposes of parity. See discussion below of “Family Protections.”

LIABILITY OF PROPERTY OR TRANSFEREE

There are two basic approaches to nonprobate transfer liability for an unsecured debt of the decedent — in personam liability of the transferee or in rem subjection to liability of the property transferred. Existing law includes both approaches.

Most, but not all, of the California statutes provide for personal liability of the transferee rather than enforcement against the property. Of the comprehensive
models in other jurisdictions, all impose liability on the transferee rather than the property.

Presumptively a comprehensive nonprobate transfer liability scheme would impose liability on the recipient of the property rather than subjecting the property itself to enforcement. But it is worth a review of the merits of two approaches before coming to that conclusion. In a probate proceeding it is the property and not the beneficiary that is held to answer for the decedent’s debts.

LIABILITY OF PROPERTY

Enforcement against the property, rather than the transferee, would protect the transferee against decline in value of the property. If a transferee receives securities from the decedent by a TOD securities registration and is liable to the extent of their value, the transferee becomes essentially a guarantor of their value even though they may have since declined in value. If enforcement is against the property, the transferee is protected.

Real property can decline in value as well. The decline in value may be due to waste attributable to the transferee rather than to market conditions. If the property is to be liable, the transferee must be responsible for waste as well for insurance against hazards such as fire, flood, and earthquake. Probate Code Section 13111 (affidavit procedure for collection or transfer of personal property) includes a sophisticated formula for recovery of property or its value if a probate proceeding is later commenced.

If the transferee has improved the property, that also should be accounted for. The accounting could become complex.358

Protection of a bona fide purchaser or encumbrancer of the property would also be necessary. Otherwise marketability of the property would be impaired, undermining the nonprobate transfer as an effective mechanism for passing property at death.

A few existing California statutes address bona fide purchaser and encumbrancer protection. See, e.g.:

Nothing in this section affects the rights of a purchaser or encumbrancer of property in good faith and for value from a person who is personally liable under this section.359

Nothing in this chapter affects the rights of a purchaser or encumbrancer of property in good faith and for value from a person who is personally liable under this section.360

The Missouri statute adopts a functionally similar approach:

358. See, e.g., Prob. Code § 13206 (restitution to estate of real property taken under affidavit procedure).
359. Prob. Code § 9392(c) (liability of distributee to omitted creditor).
This section does not create a lien on any property that is the subject of a recoverable transfer, except as a lien may be perfected by the way of attachment, garnishment, or judgment in an accounting proceeding authorized by this section.\footnote{Rev. Stat. Mo. § 461.300(6).}

A middle ground might be to impose a freeze on marketability for a limited period of time — say 40 or 90 days — during which a creditor might make a claim. Thereafter the property would become marketable. That is the pattern of a few existing California procedures, such as those governing small estates and spousal succession without probate.

The complications that arise from attempting to impose in rem liability on a nonprobate transfer argue for imposition of liability on the transferee rather than on the property transferred.

**TRANSFEREE LIABILITY**

A transferee liability scheme would hold the transferee to account for the decedent’s unsecured debts to the extent of the value of the property received from the decedent. That is the approach of all the comprehensive attempts at nonprobate transfer liability as well as of a number of California statutes such as those governing passage of property without probate to a surviving spouse or by affidavit.

Liability of the person rather than the property avoids the problem of accounting for waste, as well as the problem of subsequent encumbrance or transfer of the property. It leaves the transferee at risk of decline in value, but once the transferee obtains control the transferee may dispose of the property or take other action to protect its value.

If the transferee does not wish to become personally liable, the transferee may disclaim and avoid any liability.\footnote{Prob. Code §§ 260-295 (disclaimer of testamentary and other interests).} That option should be emphasized in any liability statute.

Alternatively, provision could be made for return of the property to the estate, with adjustments.\footnote{See, e.g., Prob. Code § 13111 (affidavit procedure for collection or transfer of personal property).}

**LIABILITY LIMITED TO VALUE OF PROPERTY TRANSFERRED**

All the existing schemes for imposing liability for a decedent’s debts on a nonprobate transferee limit the liability to the value of the property received by the transferee. That is an appropriate limitation.
**Interest Transferred**

It is not the value of the property itself that is the measure of liability, but the value of the property interest that is transferred to the beneficiary. Thus a statute that imposes liability on a surviving joint tenant should make clear that survivor’s liability is limited to the interest in the joint tenancy property received from the decedent by right of survivorship.\(^{364}\)

**Date of Value**

The existing California statutes not only make clear that liability is limited to the value of the property received, but also that the value is determined as of the time of the transfer. See, for example, the statute governing liability under the small estate set-aside:

\[
\text{(a) Subject to the limitations and conditions specified in this section, the person or persons in whom title vested pursuant to Section 6009 are personally liable for the unsecured debts of the decedent.}
\]

\[
\text{(b) The personal liability of a person under this section does not exceed the fair market value at the date of the decedent’s death of the property title to which vested in that person pursuant to Section 6009, less the total of all of the following:}
\]

\[
\begin{align*}
&\text{(1) The amount of any liens and encumbrances on that property.} \\
&\text{(2) The value of any probate homestead interest set apart under Section 6520 out of that property.} \\
&\text{(3) The value of any other property set aside under Section 6510 out of that property.}^{365}
\end{align*}
\]

Date of death values should be used in determining the limit of a transferee’s liability, although the transferee may not actually receive possession or control of the property until some time after the decedent’s death. The delay may be critical since the transferee may be helpless to protect against waste or decline in value in the interim.

The commentary to the Uniform Act notes that valuation is determined as of the time benefits are received or controlled by the transferee, which would be “the date of the decedent’s death for nonprobate transfers made by means of a revocable trust, and date of receipt for other nonprobate transfers.”\(^{366}\)

Such clarifications are appropriate and should be incorporated into comprehensive legislation on the subject.

**Equity**

While the transferee’s liability is limited to the value of the property received from the decedent, that value must be reduced by liens and encumbrances on the

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decedent’s interest in the property. The limit of the transferee’s liability is the
equity interest received from the decedent.

That is an appropriate limitation in the usual case. The lien must be discharged,
and the charge on the property diminishes its value.

But the lienholder may waive the security and proceed against the decedent’s
estate. In that case the estate is not entitled to exoneration from the nonprobate
transferee even though the property is released from the burden of the lien.

In the case of a consensual lien placed on the property by the decedent, it would
make sense to require the transferee to reimburse other recipients of the decedent’s
property who have been made to answer for a proportionate share of the debt. The
nonprobate transferee has been the lucky beneficiary of a creditor’s waiver of
security and has received greater value than intended by the decedent, to the
detriment of other beneficiaries.

But that would create a different rule for liability of a beneficiary depending on
whether the encumbered property passed to the beneficiary by a probate or a
nonprobate transfer. As a matter of policy, the two rules should be harmonized.
Either the probate liability rules should allow exoneration from the recipient of the
property, or the nonprobate liability rules should excuse exoneration by the
transferee.

The situation is different where the property was transferred subject to a
nonconsensual general lien, such as a judgment lien or a tax lien, as opposed to a
consensual specific lien, such as a mortgage. Probate Code Section 21131 applies
the rule of nonexoneration to all liens, not just a voluntary lien. Although that
rule may not be satisfactory from a policy perspective, the better approach would
be for nonprobate transfer law to track probate transfer law.

Income

The limit of the transferee’s liability might be adjusted for income generated by
the property during the period of the transferee’s possession, including interest on
the proceeds of any sale of the property. Probate Code Section 13112(b)
incorporates these items in its determination of the transferee’s liability:

(1) Fair market value determined as of the time the transferee presents the
affidavit for collection of the property.
(2) Minus the amount of liens and encumbrances on the property at that time.
(3) Plus the net income received from the property.
(4) Plus, if the transferee has disposed of the property, interest on the fair
market value of the property accruing from the date of disposition at the rate
payable on a money judgment.

367. See, e.g., Prob. Code §§ 6611 (small estate set-aside), 13112(b) (affidavit procedure for collection or
transfer of personal property).

368. See Prob. Cod § 21131 & cmt. (“This section expands the rule stated in Section 2-609 (1987) of the
Uniform Probate Code to cover any lien.”)
It is not clear how far the income concept can be extended. Consider property the transferee has sold at a price greater than its value at the time of the transfer. It might be argued that the transferee should be held to account for that as well.

It is true that income generated during estate administration becomes subject to creditor claims. But the personal representative’s fiduciary duty includes preservation of estate property for discharge of the decedent’s debts before distribution to estate beneficiaries. It would be a significant and unwarranted burden to impose such a fiduciary duty on a nonprobate transferee. It would make more sense as a general rule to limit a transferee’s liability to the value of the property at the time of transfer from the decedent.

Improvements

If a nonprobate transferee’s liability is limited by the value of the property at the time of its transfer, subsequent improvements made by the transferee should not enter into the determination of value. The transferee’s contributions would be more relevant if property, as opposed to the transferee, were liable for the decedent’s debts. The Indiana version of the Uniform Act provides that liability of the nonprobate transferee does not include net contributions of the nonprobate transferee.\textsuperscript{369}

Valuation Procedure

Whether personal liability is imposed on a nonprobate transferee or on the property transferred, it is necessary to value the property. In the case of personal liability, the value of the property serves as the limit of the transferee’s liability. In either case valuation is required in order to determine proportionate liability.

A nonprobate transfer often is of a liquid asset such as a bank account or insurance proceeds, for which valuation is not an issue. In other cases the value of property transferred may not be obvious.

A transfer of publicly traded securities does not ordinarily pose a valuation problem. A transfer of real property, tangible personal property, business interests, or the like may present a significant valuation issue. It would not be a satisfactory solution to require liquidation of an asset merely for the purpose of ascertaining proportionate value. This is a particular concern since a forced sale may yield a depressed sale price.

If an estate tax return is filed, it would be advantageous to use the valuations in the return. It may be argued that an estate tax return valuation is not necessarily accurate since there is a disincentive for the filer to disclose full value. The estate tax return is made under penalty of perjury.\textsuperscript{370}

\textsuperscript{369}. Ind. Code § 32-17-13-2(c).
\textsuperscript{370}. See IRS Form 706 (United States Estate Tax Return).
The number of estates in which a return is required is relatively small. In 2005 — the most recent year for which good data are available — when the exempt amount was $1.5 million, estate tax returns were filed for fewer than 2% of estates. In 2009, with the estate tax exemption at $3.5 million, IRS has estimated a drop in filings by nearly two-thirds. These are national statistics and there may be more filings for California estates due to real estate values higher than the national average. But at the magnitudes involved here, the difference is not a significant factor.

Another possibility for valuation of nonprobate transfer property is use of the existing probate referee appraisal system. That system facilitates a relatively quick and inexpensive appraisal, although the appraisal is subject to challenge on grounds of accuracy. It is not uncommon for an estate to supplement the probate referee appraisal with an appraisal by an outside expert where there is a significant estate tax valuation issue.

None of the comprehensive liability schemes of other jurisdictions directly addresses the valuation problem. The question was raised in debates on adoption of the Uniform Act, with the response that if there is an estate tax return, that may establish value; otherwise, there is no easy method. In Missouri, issues concerning the obligation of a nonprobate transferee to account for the value of property received are resolved by the probate division of the circuit court.

The simplest approach would be to provide for an affidavit of value by a nonprobate transferee. If the personal representative, creditor, or other person entitled to assess and enforce the liability disagrees with that assessment, the probate court could be given jurisdiction on motion to resolve the dispute. Although there are some transactional costs in the scheme, it is likely that an assessment challenge would be relatively infrequent and thus unlikely to impose a significant burden on nonprobate transfer liability enforcement.

STATUTE OF LIMITATIONS

APPLICATION OF ONE YEAR STATUTE

The one year statute of limitations of Code of Civil Procedure Section 366.2 for an action on a liability of a decedent apparently applies to both probate liability and nonprobate transfer liability.

The Washington nonprobate transfer liability statute and the Uniform Act have a one year statute of limitations. Missouri has an 18-month statute.

374. Cf. Evid. Code § 813 (owner may testify as to value of real property).
One year is a short limitation period. It could well cut off a just claim if the
decedent’s beneficiaries simply do nothing for a year. The one year statute is
constitutionally suspect, but it applies in probate and there is support for it in case
law.

The rule should be the same for both probate and nonprobate transfer liability.
California should resolve any uncertainty by making clear that the one year statute
applies to nonprobate transfer liability.

SHORTENING THE STATUTE OF LIMITATIONS BY NOTICE

The probate system provides a means to effectively reduce the one year
limitation period to four months. The personal representative must give notice of
administration to creditors and a creditor is required to file a claim within four
months after appointment of the personal representative (or 60 days after notice to
creditors, whichever is later).375

A comparable means should be provided for limiting the creditor claim period
against a nonprobate transfer. “If a specially short nonclaims period is appropriate
for probate property, there is no reason to suppose it is not equally appropriate for
nonprobate property.”376

“Why is notice to creditors obligatory for decedent estate administrations, but
totally avoidable in the case of a living trust, joint tenancy, etc.?”377 It is true that
once a probate proceeding is commenced, notice to creditors is required. But
nothing in the law requires commencement of a probate proceeding. The
decedent’s heirs and devisees may avoid the obligation to the decedent’s creditors
by taking no action for a year.

Trust Claim Procedure

California provides a mechanism for notice to creditors and for shortening the
creditor claim period under a trust, the dominant form of nonprobate transfer. The
trustee may but is not required to give notice to creditors in the same manner as
probate notice. That shortens the creditor claim period against trust property in the
same way the probate claim period is shortened.378

The trust claim procedure is optional with the trustee.379 It requires court
supervision. It is infrequently used. A practitioner may well advise a trustee to
wait out the one year limitation period rather than call a creditor’s attention to the
need to make a claim.

L. Rev. 73, 87 (1990).
It would make sense to expand the trust claim procedure so that a trustee managing the procedure must act in a fiduciary capacity to allocate liability among all the decedent’s nonprobate transfers, not limited to the trust.\footnote{380}

Even if the trust claim procedure is not expanded to allocate liability among trust and nontrust property, at a minimum the statute should be recast so that a creditor’s claim barred under the trust procedure is also barred with respect to other nonprobate and probate transfers.

**Probate**

A practical way should be found to notify creditors and force prompt resolution of claims against a nonprobate transfer other than a trust. One approach is to expand the function of a probate proceeding.

If a decedent’s heirs and devisees open a probate proceeding, notice is given to creditors. A creditor may make a claim in the probate proceeding, but that does not give the creditor access to a nonprobate transfer, which is beyond the jurisdiction of the personal representative and the probate proceeding.

A creditor’s failure to make a claim in probate may also preclude the creditor from access to a nonprobate transfer.\footnote{381} The small estate set-aside statute is illustrative:

If proceedings are commenced in this state for the administration of the estate of the decedent and the time for filing claims has commenced, any action upon the personal liability of a person under this section is barred to the same extent as provided for claims under Part 4 (commencing with Section 9000) of Division 7, except as to the following:

1. Creditors who commence judicial proceedings for the enforcement of the debt and serve the person liable under this section with the complaint therein prior to the expiration of the time for filing claims.
2. Creditors who have or who secure an acknowledgment in writing of the person liable under this section that that person is liable for the debts.
3. Creditors who file a timely claim in the proceedings for the administration of the estate of the decedent.\footnote{382}

That rule should be generalized — if a creditor’s claim is barred in probate it should also be barred for the purpose of nonprobate transfer liability.

The converse should also be the rule — a creditor’s claim allowed in probate should be deemed allowed for the purpose of nonprobate transfer liability. That would be a straightforward way to validate the claim without the need for a special nonprobate procedure. As a matter of due process, notice to the nonprobate

381. See, e.g., Prob. Code §§ 13109 (affidavit procedure for collection or transfer of personal property), 13156(d) (court order determining succession to property), 13204 (affidavit procedure for real property of small value), 13552 (passage of property to surviving spouse without administration).
382. Prob. Code § 6611(d).}
transferee and an opportunity to participate in the proceeding would be necessary. The additional procedure required to allow for nonprobate transferee participation would be marginal. In many cases probate and nonprobate transferees are the same persons.

**Interested Person**

A nonprobate transferee should be allowed to commence a probate proceeding if the decedent’s heirs and devisees do not. That would enable the nonprobate transferee at least to shorten the creditor claim period, if not to allocate liability for the decedent’s debts. See discussion below of “Enforcement of Liability.”

Under existing law a person interested in the decedent’s estate may commence a probate proceeding. A nonprobate transferee would be an interested person for that purpose. It would be helpful to state the rule directly by statute to eliminate any doubt.

Use of the probate mechanism by a nonprobate transferee would tend to defeat the decedent’s purpose in making a nonprobate transfer in the first place. But it may be appropriate for a nonprobate transferee to invoke the probate procedure where the decedent was heavily indebted. If nothing else is done to establish an alternate creditor claims procedure, the law should at least make clear that the probate process is available for resolution of nonprobate transfer liability issues.

**Nonprobate Proceeding**

There should be a procedure for direct notice by a nonprobate transferee where there is otherwise no probate proceeding and no trust proceeding. A simple statute is proposed below that allows a nonprobate transferee to notify creditors. See discussion below of “Nonprobate Enforcement Procedure.” That statute should require the creditor to respond within four months in order to preserve the creditor’s claim.

**Internet Registry**

An alternative to the notice and claim process could involve an internet-based statewide registry.

Rather than requiring a creditor to institute a probate proceeding to preserve a claim from the bar of the statute of limitations, it would seem far more efficient for the state to maintain a statewide death registry in which creditors could file claims within one year of the reporting of a death. Filing a claim in the death registry would serve to toll any statute of limitations, pending receipt of a notice.

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384. Prob. Code §§ 48(b)(1) (“interested person” includes beneficiary or person having a right in or claim against the estate that may be affected by the proceeding), 24 (“beneficiary” defined). Cf. In re Kovacs’ Estate, 227 Cal. App. 2d 308, 38 Cal. Rptr. 612 (1964) (beneficiary of insurance policy interested in estate with respect to tax liability).
of rejection by a legally authorized successor, whether a personal representative in
probate or the successor trustee of an inter vivos trustee.\footnote{385}

Such a registry could be maintained by an appropriate governmental entity such as
the Judicial Council.

If a nonprobate transferee wished to shorten the one year statute of limitations,
the transferee could give notice to creditors and create a registry for claims against
the decedent. A creditor would be required to file the claim with the registry. That
would preserve the claim as to all nonprobate transfers — at least to satisfy the
four month claim filing requirement.

It can be expected that enactment of legislation to establish such a registry will
encounter opposition from the entity charged with its maintenance due to the cost,
as well as from the newspaper industry due to concern about possible erosion of
publication requirements. The maintenance issue could be addressed by an
appropriate filing fee. The publication issue could be assuaged by a provision
making clear that the registry supplements and does not replace any required
publication of notice. But historically the newspaper industry has resisted
incursion of the internet in the probate notice process.

It is also a question how useful such a simplified notice and filing procedure
would be, given the other available options and given the relatively short one year
statute of limitations. A nonprobate transferee may also notify creditors and satisfy
their claims directly. The nonprobate transferee might be ill-advised to do that if
there is a likelihood of other creditors and if there are other transferees that could
be held to account. A regularized process is preferable in all but the most
straightforward cases.

PRIORITY AMONG CREDITORS

The Probate Code prescribes an order of priority for satisfaction of debts in the
event the estate is insufficient to pay all debts.\footnote{386} The trust claim procedure
incorporates the probate priority scheme by reference.\footnote{387} The scheme should apply
to nonprobate transfer liability generally.

PROCEDURAL ISSUES

The most significant problem with extension of creditor priority principles to a
nonprobate transfer is that it implicates a centralized authority to marshal property,
rank debts, and apply property to debts — such as a personal representative in
probate or a trustee of a trust. A priority scheme would be difficult to implement
on a case by case basis for each nonprobate transfer.

\footnote{385. See Conn, The Need to Clarify Creditors’ Rights in Probate, 32 L.A. Lawyer 80 (April 2009).}
\footnote{386. Prob. Code § 11420.}
\footnote{387. Prob. Code §§ 19001(b), 19027.}
If a creditor were to satisfy a debt from a nonprobate transferee and if that were to exhaust the limit of the transferee’s liability, another creditor, even a higher priority creditor, would be precluded from further action against that transferee. The second creditor would have to seek satisfaction from the first creditor, either on a priority basis under Probate Code Section 11420(a) or on a proportionate basis under Probate Code Section 11420(b).

Allowing or requiring a creditor to join other known creditors in a proceeding to recover against a nonprobate transferee would generate a procedural and substantive quagmire. Even without joinder, application of res judicata and collateral estoppel in subsequent proceedings would be daunting.

The policy that favors a reasonable priority scheme among creditors, rather than a first come first served approach, demands some sort of administration, however minimal.

FUNERAL EXPENSES AND EXPENSES OF LAST ILLNESS

The surviving spouse’s share of marital property is exempt from payment of the decedent’s funeral expenses and expenses of last illness. Those debts are charged first to the decedent’s probate estate and then to the trust estate. Assuming the policy of existing law is sound, that priority should be extended to other nonprobate transfers.

EXPENSES OF ADMINISTRATION

Existing California statutes are inconsistent in their treatment of liability of a nonprobate transfer for expenses of administration. Although most do not address the issue, those that do generally make a nonprobate transfer liable for a proportionate share of expenses of administration.

A few key provisions limit the liability of a nonprobate transfer for administration expenses to expenses associated with enforcement against that transfer.


389. See, e.g., Prob. Code §§ 682 (to extent estate is inadequate, power of appointment subject to claims and expenses “to the same extent that it would be subject to the claims and expenses if the property had been owned by the donee”), 19001 (to extent estate inadequate to satisfy claims of creditors and expenses of administration, trust settlor’s revocable property subject to claims of creditors “and to the expenses of administration of the estate”), 21401 (shares of beneficiaries abate for all purposes, including “payment of the debts, expenses, and charges specified in Section 11420”).

390. See, e.g., Prob. Code §§ 9653 (nonprobate transfer recovered at request of creditor applied “first to payment of the costs and expenses of suit, including attorneys fees” and then to payment of decedent’s debts), 11420(a)(1) (with respect to a secured obligation “only those expenses of administration incurred that are reasonably related to the administration of that property by which obligations are secured shall be given priority over these obligations”).
In Missouri a nonprobate transferee is held to account only for the additional administrative expenses involved in obtaining enforcement against the nonprobate transfer:

The judgment in a proceeding authorized by this section shall take into account the expenses of administration of the estate including the cost of administering the additional assets obtained in the proceeding, and the costs of the proceeding to the extent authorized by this subsection. The court may order the costs of the proceeding, including attorney fees, to be treated as expenses of administration of the estate.\textsuperscript{391}

The approach of the California statutes, and of the Missouri and Washington statutes, that limits liability of a nonprobate transfer to administrative expenses related to the transfer, is sound. The state permits a nonprobate transfer to pass property directly to a beneficiary without probate primarily due to the cost and expense of probate administration. That public policy would be defeated by imposition of probate expenses on a nonprobate transfer.

Exposure of a nonprobate transfer to expenses of administration should be limited to those necessary for enforcement of liability.\textsuperscript{392}

ENFORCEMENT OF LIABILITY

The most difficult problem in applying a nonprobate transfer to a decedent’s debts is development of a practical enforcement process. A scheme that allows simple and direct creditor enforcement against a nonprobate transferee has significant drawbacks, yet to run all claims through probate, or to develop an alternate probate-like procedure for processing claims risks re-inventing probate or defeating the basic character and purpose of a nonprobate transfer.

To enforce a right of contribution against nonprobate assets, the spouse or creditor must invoke the procedural machinery of the probate system. Effective enforcement requires an orderly, centralized process to determine the amounts of various claims, classify them in order of priority, and identify the assets available to pay them. The probate system is uniquely suited to perform this function and therefore plays an indispensable role in protecting the rights of third parties. By contrast, nonprobate transfers flourish precisely because they provide no comparable protection. As Langbein observes, nonprobate transfers “execute easy transfers and shunt the hard ones over to probate.”\textsuperscript{393}

\textsuperscript{391} Rev. Stat. Mo. § 461.300(3). See also Rev. Code Wash. § 11.18.200 (“asset subject to liabilities, claims, estate taxes, and the fair share of expenses of administration reasonably incurred by the personal representative in the transfer of or administration upon the asset”).

\textsuperscript{392} See, e.g., Rev. Code Wash. § 11.42.090(2)(a) (nonprobate transfer may be assessed for “costs of administering the assets subject to the payment of claims, including a reasonable fee to the notice agent, any resident agent for the notice agent, reasonable attorneys’ fees for the attorney for each of them, filing fees, publication costs, mailing costs, and similar costs and fees”).

\textsuperscript{393} McCouch, A Comment on Unification, 43 Real Prop. Tr. & Est. L.J. 499 (2008).
The obvious range of choices for nonprobate transfer liability enforcement include:

1. Allow direct creditor enforcement against a nonprobate transferee, with or without contribution from other nonprobate transferees and with or without adjustment among other creditors.
2. Require enforcement through the probate mechanism. If there is no probate estate because all property passes by nonprobate transfer devices, a creditor seeking enforcement could commence a probate proceeding. This approach has the virtue of piggybacking on existing procedures. It would not necessarily require a probate in every case because beneficiaries voluntarily discharge the decedent’s obligations without dispute among each other in the ordinary case.
3. Allow enforcement through the decedent’s inter vivos trust. California law does this already on a limited basis. The procedure would have to be expanded to give the trustee jurisdiction over other probate and nonprobate transfers. It is not a complete solution because the decedent may not have an inter vivos trust.
4. Develop an alternate procedure designed exclusively for nonprobate transfer liability. The alternate procedure would come into play only where there is no probate or trust proceeding.

DIRECT CREDITOR ENFORCEMENT

Existing California law allows direct creditor enforcement against a nonprobate transfer in some circumstances. The statutes governing the small estate set-aside and the small estate affidavit procedure, for example, and for community property liability where a surviving spouse takes the property without probate, allow direct recovery by the decedent’s creditors. So does the trust law in circumstances where the trustee has elected not to use the optional trust claim procedure. The classic remedy of a creditor against a nonprobate transfer is direct enforcement under the Uniform Fraudulent Transfer Act.

Unfortunately there is little experience with direct creditor enforcement under the California statutes. Many practical questions are unanswered:

1. How does a nonprobate transferee know whether the creditor’s claim is valid?
2. In a case where a nonprobate transfer is liable to the extent the probate estate is inadequate, how does a nonprobate transferee know whether the estate is inadequate?
3. How does a nonprobate transferee know whether there are creditors entitled to a higher priority than the creditor seeking payment?

(4) Who apportions liability or determines abatement among nonprobate transfers?

(5) Does a nonprobate transferee that pays more than a pro rata share have a right to contribution from other nonprobate transferees?

(6) How is the creditor or transferee to learn of the existence of other nonprobate transfers?

Validity of Creditor’s Claim

In the case of direct creditor action, there is no administrative process for allowing or disallowing a creditor’s claim. Some statutes, to ensure that the creditor’s claim is legitimate, permit the nonprobate transferee to assert any defense, cross-complaint, or setoff that would have been available to the decedent if the decedent had not died. A court proceeding is required to determine the validity of the creditor’s claim.

A court proceeding is unnecessary if a nonprobate transferee concludes that the creditor’s claim is legitimate and pays it. However, if the nonprobate transferee seeks contribution from another nonprobate transferee and the other does not agree that the claim was legitimate, or objects to payment because contribution is not sought until after expiration of the general one year limitation period, or resists for another reason, a court proceeding is necessary.

Discovery

Apportionment among creditors and nonprobate transferees under a system of direct creditor enforcement is difficult. Whereas the value of all distributions from a probate estate is known, the value of all nonprobate transfers by a decedent may not be readily ascertainable. A creditor ordinarily does not have the ability to discover the whereabouts of all nonprobate transferees.

Most approaches to discovery of nonprobate transfer information presuppose a personal representative that has access to this type of information. Gagliardi suggests that a nonprobate transferee be required to disclose information to a creditor:

On the other hand, to the extent the nonprobate transferee receives an inquiry by the creditor regarding the whereabouts of decedent’s assets, the law should require the nonprobate transferee to provide a timely and complete answer to the creditor’s inquiry. Reforms should also treat any attempt to conceal the whereabouts of the asset by the nonprobate transferee as tolling the statute of

397. See, e.g., Prob. Code § 6611(c) (small estate set-aside).

398. See, e.g., Rev. Stat. Mo. § 461.300(2) (“the personal representative shall disclose to the qualified claimant or qualified claimants who made such written demand all material knowledge within the possession of the personal representative reasonably relating to the identity of any recipient of a recoverable transfer made by the decedent”). See also Gagliardi, Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers, Real Property, Probate and Trust Journal 819, 885 (Winter 2007).
limitations. Tolling of the statute would discourage nonprobate transferees from not paying outstanding debts of the decedent. Reform of this nature would place the burden on the creditor and would not delay the transfer of property at a decedent’s death.\textsuperscript{399} While such a provision might be useful, it is not a complete answer. An alternative is to rely on standard discovery practice, at least where a creditor’s effort to collect from a nonprobate transferee ends up in court.\textsuperscript{400} But without a personal representative on the receiving end of a discovery order, it is unlikely the order will generate much information.

**Procedure**

Direct creditor action against a nonprobate transferee must allow for intervention by other creditors and cross complaint against other nonprobate transferees. The costs, and the burden imposed on the judicial system, could be significant. As a practical matter the parties would likely restrict themselves to major creditors and major nonprobate transferees.

Imposition on a court of the technicalities of allowing and apportioning multiple claims against multiple nonprobate transfers is also problematic. The court would probably appoint a referee to do the work. That argues for an administrative type process ab initio.

**Interaction with Probate Process**

If a probate proceeding has been commenced, it would make sense to enforce a creditor’s claim against a nonprobate transfer through the mechanism of the personal representative, rather than allow direct action by a creditor against a nonprobate transferee. The personal representative is in the best position to learn of all the decedent’s debts, to discover all the decedent’s nonprobate transfers, and to apportion the obligation of the debts appropriately.

The federal estate tax liability is enforced principally through the personal representative. If there is no personal representative, the liability may be enforced directly against a nonprobate transferee, with provision for contribution among others. That is a unique case; the scheme works due to the enforcement power of the Internal Revenue Service as a creditor. That experience cannot be generalized to other types of creditors.

If direct creditor action is allowed, it should be limited to cases where there is no probate proceeding.

\textsuperscript{399} Gagliardi, *id.* at 887 (fns. omitted)

\textsuperscript{400} See, e.g., Prob. Code § 11442 (order to show cause why information should not be provided under surviving spouse apportionment procedure).
ENFORCEMENT THROUGH PROBATE

The major comprehensive approaches to liability of a nonprobate transfer for the decedent’s debts in other jurisdictions make use of the probate mechanism.\textsuperscript{401}

Under these schemes, nonprobate transfer liability is enforced exclusively through probate. Where a probate proceeding would not otherwise be required, a creditor must commence one in order to satisfy a claim against the decedent.

Existing California law requires processing of a creditor’s claim against a nonprobate transfer through probate in some circumstances.\textsuperscript{402}

Andrews observes:

The argument for such a position is fairly easy to understand. Historically, it has been the job of a PR to provide a focus for the accommodation of a variety of potentially conflicting interests in the administration of an estate, among them the interests of heirs and devisees, the interests of family, and the interests of creditors. If nonprobate property is to be integrated into the estate administration process, it is only natural to assume that it will be the job of the PR to do this.

If a PR is not appointed at this stage, of course, then the risk is that there might be a multiplicity of suits and controversies, and no single person will be in a position to insist on a fair and uniform treatment of the competing claims. Historically it has been the function of the PR to perform that job. If it becomes clear that a PR needs to be appointed to perform this role, the parties should be authorized to petition the court for such an appointment.\textsuperscript{403}

Funneling a creditor’s claim against a nonprobate transfer through probate would solve other problems as well, and would standardize procedures. For example, the probate process includes a notice procedure that satisfies due process requirements, has a time limit for filing a claim, includes an expeditious dispute resolution mechanism, prescribes priorities among classes of creditors, and provides ready access to the court in case of a dispute. The personal representative has access to the decedent’s information, which facilitates notification of creditors and marshalling of property; it also enables determination of the estate’s solvency and apportionment of the decedent’s debts.

The drawback is that a probate proceeding is just what the decedent has sought to avoid by making a nonprobate transfer to begin with. Where there is no other reason for probate, a probate proceeding would have to be commenced merely to enable a creditor to assert a claim against a nonprobate transferee. That is not particularly satisfactory.

\textsuperscript{401}. See Rev. Stat. Mo. § 461.300(10-(2) (nonprobate transferee may be held to account by personal representative or, failing personal representative action, by qualified claimant; any sums recovered are administered by personal representative as part of decedent’s estate); Unif. Prob. Code § 6-102(b) (nonprobate transferee liable to probate estate of the decedent).

\textsuperscript{402}. See, e.g., Prob. Code § 9654 (recovery of fraudulent transfer, gift causa mortis, nonprobate transfer of vehicle).

Under existing law, if the decedent’s heirs or devisees have not opened a probate, the mechanism available to a creditor to obtain satisfaction of the debt against probate property is commencement of a probate proceeding. A creditor is an interested person authorized to petition for probate of the decedent’s estate. Commencement of probate by a creditor ordinarily prompts an heir or devisee to seek appointment as personal representative.

Conflict of Interest

The personal representative in probate often has an interest adverse to that of a nonprobate transferee as well as to that of a creditor. The limits of a personal representative’s fiduciary obligation are tested by such conflicts of interest.

The conflict problems are illustrated by the Missouri statute, which has been amended to allow a creditor to step in and commence an action to hold a nonprobate transferee to account where the personal representative refuses to act, and to require the personal representative to cooperate with the creditor:

If the personal representative fails to commence an action within thirty days of the receipt of a written demand to do so, any qualified claimant may commence such action. If the personal representative fails to commence the action, the personal representative shall disclose to the qualified claimant or qualified claimants who made such written demand all material knowledge within the possession of the personal representative reasonably relating to the identity of any recipient of a recoverable transfer made by the decedent. In the event the personal representative fails to provide such information with respect to any recoverable transfer of the decedent’s property to the personal representative, the eighteen-month limitation is tolled for such recoverable transfer until such time as the personal representative provides such information. In the event the personal representative is alleged in a verified pleading to be a recipient of a recoverable transfer from the decedent, the court may appoint an administrator ad litem to represent the estate in any proceeding brought pursuant to this section. Sums recovered in an action for accounting under this section shall be administered by the personal representative as part of the decedent’s estate.

Under the Missouri scheme the creditor is allowed to stand in the place of the personal representative to collect from a nonprobate transferee, but the action is ex relatione and any recovery is administered in the estate.

Notice

The probate approach demands notice to nonprobate transferees and an opportunity to be heard. A nonprobate transferee needs to be able to question
allowance of the debt, challenge the proportionate valuation of transferred property, inquire whether an adequate search has been made for all chargeable transfers, question whether property liquidated by the estate to satisfy debts has been sold at fair value, assert an abatement priority or exemption, and the like.

The Missouri and Uniform acts refer obliquely to notice, but such minimal provisions need expansion.407

The Washington statute is more explicit. “Before making demand that a beneficiary of a nonprobate asset account to the personal representative, the personal representative shall give notice to the beneficiary, in the manner provided in chapter 11.96A RCW, that the beneficiary is liable to account under this section.”408

Jurisdiction

The probate approach demands expansion of the authority of the personal representative to reach a nonprobate transfer that would otherwise be beyond probate jurisdiction. An existing model is found in California’s estate tax proration statute:

If all property does not come into the possession of the personal representative, the personal representative is entitled, and has the duty, to recover from the persons interested in the estate the proportionate amount of the estate tax with which the persons are chargeable under this chapter.409

Role of Probate

Whether or not all nonprobate transfer liability is funneled through probate, probate enforcement should have a role. Even if a special procedure for nonprobate transfer liability is adopted, that procedure should yield to probate enforcement where there is a probate proceeding.

The law should make clear that a nonprobate transferee is liable proportionately with probate transferees. A nonprobate transferee is an interested party and the personal representative should seek out and give notice to nonprobate transferees. The law should make clear that the personal representative owes the same fiduciary obligation to a nonprobate transferee as it does to a probate transferee, and should apportion the decedent’s debts ratably among all recipients of the decedent’s property, both probate and nonprobate.

407. Cf. Rev. Stat. Mo. § 461.300(1) (“Before making demand that a beneficiary of a nonprobate asset account to the personal representative, the personal representative shall give notice to the beneficiary”); Unif. Prob. Code § 6-102(f) (“Upon due notice to a nonprobate transferee, the liability imposed by this section is enforceable in proceedings in this State”).


That is not a new concept, since it is already done routinely in estate tax
apportionment proceedings. That scheme provides a useful model for personal
representative (and court) jurisdiction with respect to a nonprobate transfer.

The personal representative’s duty to notify and assess nonprobate transferees
might be automatic or might be made contingent on request of a creditor. Both the
Missouri and the Uniform Acts are triggered by a creditor’s demand.410

It is not clear why a creditor should be required to make a demand in order to
initiate a liability proceeding. A personal representative must notify creditors
automatically. If all transferees, probate as well as nonprobate, are proportionately
liable, the personal representative should make the apportionment without special
demand by a creditor or by a transferee.

TRUST ENFORCEMENT

California has developed a regularized process for discharging debts from a
revocable inter vivos trust where the decedent’s probate estate is insufficient. Such
a trust often is a will substitute and the decedent’s entire estate may pass through
the trust. There may be no probate. It might make sense to try to manage general
nonprobate transfer liability for a decedent’s debts through the decedent’s trust.

The existing trust claim procedure is complete and parallels the probate creditor
claim procedure. The procedure provides a means of determining the “liability of
the trust for any debts of a deceased settlor” with special notice to creditors, but
the procedure is optional with the trustee and the statute does not give a creditor
standing to initiate it.411 Instead, a creditor is relegated to commencement of a
probate proceeding to obtain a determination that the probate estate is insufficient
and to impose liability on the trust estate, at the risk of dispersion of trust property
in the interim.412 A creditor might also attempt to access trust property under
Probate Code Section 850(a)(3)(C) (“Where the property of the trust is claimed to
be subject to a creditor of the settlor of the trust.”), but that procedure is not
primarily designed for resolving creditor claims.

As currently constituted, the trust claim procedure covers only liability of trust
property, not other probate or nonprobate property. It would be possible to expand
the existing procedure to make its use mandatory on demand of a creditor and to

410. Rev. Stat. Mo. § 461.300(2) (“no action for accounting under this section shall be commenced by
any qualified claimant unless the personal representative has received a written demand therefor by a
qualified claimant, within sixteen months following the decedent’s death”); Unif. Prob. Code § 6-102(g)
(“A proceeding under this section may not be commenced unless the personal representative of the
decedent’s estate has received a written demand for the proceeding from the surviving spouse or a child, to
the extent that statutory allowances are affected, or a creditor.”).
412. See Arluk Medical Center Industrial Group, Inc. v. Dobler, 116 Cal. App. 4th 1324, 11 Cal. Rptr. 3d
expand the trustee’s jurisdiction to other property. A trustee may already be
required to perform similar functions under the estate tax proration statute. 413
Whether such an expansion of the trust claim procedure would be desirable is
another matter. The trustee would be required to notify the decedent’s nontrust
heirs, devisees, and beneficiaries, discover and marshal nontrust property, and
involve the court in trust administration — all actions that a trust is ordinarily
intended to avoid.

In many cases the bulk of the decedent’s property passes through a revocable
inter vivos trust. The trustee may collect the little remaining property by means of
the affidavit procedure; a probate is never opened. The trustee may or may not run
the trust claim procedure under Probate Code Section 19000 et seq., depending on
the circumstances. If there is community property, debts may be allocated between
the trust and the surviving spouse under the procedure of Probate Code Section
19320 et seq.

In those circumstances it would be logical to use the trust claim procedure to
address nonprobate transfer liability generally. That would place the creditor
claims process initially in the hands of the fiduciary with primary control over
most of decedent’s property at death. Gagliardi argues in favor of that approach
since it would avoid the problem of the trustee disposing of the decedent’s
property while creditor claims are being litigated in probate to determine whether
or not the probate estate is sufficient. 414

The trust claim procedure is infrequently used. Under existing practice it is more
common that the trustee will pay the decedent’s known debts in the normal course
of trust administration and rely on the one year statute of limitations for unknown
creditors, without the cost of formal trust claim proceedings.

Not every decedent has a revocable inter vivos trust. Expansion of the existing
trust claim process for general nonprobate transfer liability would not take care of
all cases. A supplemental nonprobate enforcement procedure would still be
necessary.

Nonetheless, when a trustee does elect to use the trust claim procedure, it would
make sense to take the opportunity of that centralized, structured, procedure to
resolve all liability issues. The trust claim procedure should be expanded so that it
deals with all liability issues, not just those relating to trust property. Its existing
status as a voluntary procedure available to the trustee should be preserved,
understanding that the procedure will not be commonly used.

NONPROBATE ENFORCEMENT PROCEDURE

Direct creditor enforcement against a nonprobate transfer is problematic.
Enforcement of liability via the probate or trust mechanism is appropriate if there

414. Gagliardi, Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers, Real
is a probate proceeding or a trust. But if there would otherwise be no probate or
trust proceeding, it is not desirable to force a creditor to invoke such an elaborate
mechanism for the sole purpose of enforcing nonprobate transfer liability.

Instead, a simplified, free-standing nonprobate transfer enforcement procedure
should be developed. There are existing models of a free-standing nonprobate
transfer enforcement procedure in Washington and in California’s estate tax
proration procedure.

The availability of a simplified procedure for nonprobate transfer liability will
make it unnecessary for a creditor to commence probate in order to satisfy a debt,
particularly if probate as well as nonprobate property is included within the ambit
of the procedure. Concomitant with such a free-standing enforcement procedure,
the law should preclude a creditor from commencing a probate proceeding.

Washington Model

Washington has a nonprobate transfer liability procedure uniquely designed for
that purpose. It is analogous to the California trust claim procedure.

The Washington procedure, like the California trust claim procedure, is optional.
If no probate proceeding is commenced, the decedent’s beneficiary or trustee who
receives substantially all of the decedent’s probate and nonprobate property may
give notice to creditors and conduct a creditor claims procedure. If no single
beneficiary or trustee receives substantially all of the property, those who do
do receive substantially all of the property may agree to appoint a notice agent to act
on behalf of the group. 415

Another significant difference from the California trust claim procedure is that,
in addition to its broader application, the Washington statute applies proration
principles to all of the decedent’s property, both probate and nonprobate, that was
subject to satisfaction of the decedent’s general liabilities immediately before the
decedent’s death. 416

The most significant shortcoming of the Washington statute as a vehicle for
resolving nonprobate transfer liability issues is that it only comes into play if it is
invoked by a nonprobate transferee. The statute does not provide a remedy for the
decedent’s creditors. If a creditor wishes to apply a nonprobate transfer to satisfy
the decedent’s obligation, the creditor must invoke the probate process. 417

Estate Tax Proration Model

Existing California law includes a different model that is appropriate for
development as a comprehensive nonprobate liability enforcement scheme — the
estate tax proration statute. The existing procedure is a simple mechanism for

apportioning liability among all recipients — probate and nonprobate — of the
decedent’s property. It includes appropriate notice and jurisdictional provisions as
well as provisions for contribution and reimbursement, and it has an efficient
judicial dispute resolution mechanism.

The estate tax proration scheme is designed as a free-standing procedure that can
be invoked by any interested person, but it is to be used by the personal
representative if there is a probate proceeding. Where there is no probate estate,
a trustee or other person charged with the responsibility of paying the estate tax
may act to obtain a court order of proration. The estate tax scheme would have to be expanded to apply to all the decedent’s
debts rather than just the estate tax liability, an order of priority for payment of
debts incorporated, and other appropriate features added such as exemptions from
enforcement and a reimbursement right from an after-discovered transferee. But
the core is a sound basis for development as a comprehensive liability scheme.

Special Administrator

A mini-probate proceeding dedicated to the purpose of discharge of a decedent’s
debts where there is otherwise no probate or trust proceeding could also be
devised. The proceeding could build on the device of the special administrator. The duties of the special administrator would be so extensive — notification of
creditors, marshalling of property, allowance of claims, apportionment of liability,
satisfaction of debts — that statutory elaboration would be required. Rather than
device a unique special administrator procedure, it would be simpler to make a
special administrator one of the possible fiduciaries to act under an estate tax
proration type procedure.

SUMMARY

If a probate proceeding is commenced, that is the best forum for dealing with
nonprobate transfer liability. The statutes should make clear that the personal
representative has the authority and the duty to allocate liability to nonprobate
transfers in the regular course of administration of the estate, that nonprobate
transfer liability is proportionate with probate transfer liability, that a nonprobate
transferee is an interested person entitled to notice, and that the personal
representative must deal with the nonprobate transfer on the same basis as a
probate transfer, including the same fiduciary obligations.

The existing trust claim procedure should be left optional with the trustee, as it
is now. However, the law should make trust property liable on the same basis as

418. Prob. Code § 20120(c) (proration proceeding combined with estate administration proceeding if
any).
419. Prob. Code §§ 20100(c) (“personal representative” defined), 20120 (proration proceedings).
420. See Prob. Code §§ 8540-8547.
probate property and on the same basis as other nontrust property. If the trustee invokes the liability procedure, the trustee should include other probate and nonprobate property in the proceeding, just as the personal representative in probate should be required and authorized to do. The trustee in the exercise of that authority should have the same fiduciary obligations to probate and nonprobate transfers and transferees as it does to trust property and beneficiaries.

The existing probate and trust claim procedures should be supplemented by a procedure dedicated to discharge of the decedent’s debts where there is no probate or trust claim proceeding. The procedure should enable any interested person to invoke it, but should be suspended if a probate or trust claim proceeding is commenced. The procedure should require notice to creditors and to all the decedent’s probate and nonprobate transferees. It should provide for allocation of the decedent’s debts among probate and nonprobate transferees on the basis of the value of the property transferred. The probate creditor priority and general abatement schemes should apply. The Washington statute and the California trust claim and estate tax proration procedures should serve as models.

With the availability of an efficient probate and nonprobate transfer liability procedure, a creditor should be precluded from commencing a probate proceeding.

COLLECTION

Regardless of the approach to allocating a decedent’s debts to a nonprobate transfer, there is a practical problem of collection from a nonprobate transferee. Unlike a probate transfer, a nonprobate transfer is not ordinarily within the control of the decedent’s personal representative. A nonprobate transfer is subject to immediate dispersion.

DIRECT COLLECTION BY CREDITOR

Enforcement of liability against a nonprobate transferee could be left to direct action by a creditor. Once liability is allocated to a nonprobate transferee, the creditor could proceed against the transferee directly, taking advantage of standard civil procedures for enforcement and satisfaction of a judgment.

That approach has some superficial attraction. It would free the personal representative or other fiduciary from having to chase down property beyond its control. It would shift enforcement costs from the decedent’s estate and its beneficiaries to the creditor and recalcitrant transferee.

There are obvious problems with the direct enforcement approach. More than one creditor may be seeking enforcement. If debts exceed the amount of the transferee’s liability, a first come, first served, policy will be most manageable. But that may defeat the public policies both of abatement among transferees and priority among creditors.
UNENFORCEABLE ALLOCATION

The estate tax proration procedure takes into account the possibility that the allocation of liability may not be readily enforceable. If the personal representative is unable to collect from a person to whom tax liability has been apportioned, the uncollectible amount is equitably prorated among others liable for the tax.\textsuperscript{421} A person required to pay more as a result has a reimbursement right against a non-payer.\textsuperscript{422} The estate tax proration scheme is sensible and should be included in a nonprobate transfer allocation procedure.

An unaddressed question under the estate tax procedure is the applicable statute of limitations for enforcement of the reimbursement right. Possible candidates include the general one year statute for liability of a decedent, the ten year statute for enforcement of a money judgment, or another period.

The policy of the one year statute of limitations is to expedite processing of the decedent’s estate and facilitate passage of title and marketability of the property. That policy will have been satisfied for the nonprobate transferee who has received notice of the allocation proceeding and assessment of liability. Depending on the procedure for assessing liability, the assessment is either a court order, in which case standard enforcement of judgment procedures and limitations periods should apply, or is a cause of action that may be reduced to a judgment, in which case standard limitations periods should apply.

Multiple beneficiaries may have a reimbursement right against a nonpaying nonprobate transferee. Whether the transferee is likely to escape liability because the cost and trouble to each beneficiary of enforcement is excessive, whether beneficiaries pool their reimbursement rights to facilitate collection, and whether the transferee pays voluntarily out of concern about the costs of multiple enforcement proceedings, will depend on the circumstances.

DISPERSION OF NONPROBATE PROPERTY

A creditor may make its claim in a probate or nonprobate proceeding in a timely fashion but the proceeding may continue for some time before it becomes clear that a nonprobate transferee is liable. By that time the nonprobate transferee may have consumed the property or disposed of it, or assessment of the nonprobate transferee may be otherwise inequitable.

In Arluk Medical Center Industrial Group, Inc. v. Dobler,\textsuperscript{423} a creditor was precluded from reaching the decedent’s trust to satisfy the debt until a determination was first made that the probate estate was inadequate. Meanwhile the trustee distributed the trust property, to the detriment of the creditor. The court

\textsuperscript{421} Prob. Code § 20116.
\textsuperscript{422} Prob. Code § 20117.
held that a trustee owes no fiduciary duty to creditors, only to beneficiaries, and distribution is appropriate.

A number of devices may help protect a creditor against dispersion of nonprobate property:

1. Liability should be imposed on the transferee rather than on the property. Once the property is gone collection may be still difficult, but the risk of loss will be lessened.

2. Nonprobate transfer liability should be proportionate with probate transfer liability. That will make it unnecessary to wait for a determination of the adequacy of the probate estate.

3. A ready means of placing a hold on real property is available in the public record system. An example can be found in the statute governing the right of a surviving spouse to dispose of property subject to a recorded notice of claim.424

4. A creditor could be allowed to proceed immediately and directly against the decedent’s trustee, with the trustee subrogated to the creditor’s claim. Provisional remedies such as a temporary restraining order or attachment would be available in case of need.425 The trustee could thereafter proceed against other property in the deceased settlor’s estate or commence a probate proceeding if that appears called for. That form of direct enforcement by a creditor is disfavored due to the problems it causes.

5. The holder of nonprobate property could be precluded from transferring the property to the beneficiary for a short period, for example 40 days.426 The property could be released earlier than that on a showing that the property is reasonably necessary for support of the transferee. Whether 40 days is a sufficiently meaningful time to enable a creditor to learn of the decedent’s death and take action to protect against dispersion of nonprobate property is questionable.

6. A creditor could be authorized to notify a fiduciary holding nonprobate property of the potential claim against the property. That would be an effective remedy. See discussion below of “Protection of Nonprobate Transfer Fiduciary.”

PROTECTION OF NONPROBATE TRANSFER FIDUCIARY

A fiduciary such as a financial institution or insurance company that holds nonprobate transfer property must be protected from potential liability for making the transfer to the designated beneficiary. Otherwise the fiduciary will simply hold the property waiting for a court order authorizing the transfer. That will defeat the purpose of a nonprobate transfer.


426. See, e.g., Prob. Code § 13540 (40 day delay for surviving spouse to deal with and dispose of community real property); Veh. Code § 9916 (40 day delay for transfer of title to numbered vessel); Health & Safety Code § 18102 (40 day delay for transfer of title to manufactured home).
A competing concern is that nonprobate property will be dispersed to the
detriment of the decedent’s creditors. If nonprobate transfer liability is in
personam rather than in rem, transfer of the property is theoretically irrelevant. But
as a practical matter the transferee may dispose of the property and perhaps
become unable to respond to a creditor’s claim.

California statutes protect the transferring fiduciary from adverse claims in
various circumstances. An example is Probate Code Section 5003, which
immunizes a holder of nonprobate property that transfers the property in
accordance with the decedent’s instructions unless the holder has been served with
a written claim of an adverse interest in the property.

That provision should be broadened to protect the fiduciary against the claim of
a decedent’s creditor, and to allow the personal representative or other fiduciary
making an allocation of liability to notify the fiduciary of a claim against the
transferee. Similar provisions are found in both the Missouri nonprobate transfer
liability statute and in the Uniform Act:

This section shall not affect the right of any transferring entity, as defined in
section 461.005, to execute a direction of the decedent to make a payment or to
make a recoverable transfer on death of the decedent, or make the transferring
entity liable to the decedent’s estate, unless before the payment or transfer is made
the transferring entity has been served with process in a proceeding brought under
this section and the transferring entity has had a reasonable time to act on it.\textsuperscript{427}

Unless a written notice asserting that a decedent’s probate estate is nonexistent
or insufficient to pay allowed claims and statutory allowances has been received
from the decedent’s personal representative, the following rules apply:
(1) Payment or delivery of assets by a financial institution, registrar, or other
obligor, to a nonprobate transferee in accordance with the terms of the governing
instrument controlling the transfer releases the obligor from all claims for
amounts paid or assets delivered.
(2) A trustee receiving or controlling a nonprobate transfer is released from
liability under this section with respect to any assets distributed to the trust’s
beneficiaries. Each beneficiary to the extent of the distribution received becomes
liable for the amount of the trustee’s liability attributable to assets received by the
beneficiary.\textsuperscript{428}

The commentary to the Uniform Act observes about these provisions:

Subsection (i)(1) is designed to protect issuers of TOD security registrations
who make payments or delivery to designated death beneficiaries before receiving
notice from the decedent’s probate estate of a probable insolvency. These entities
are not “transferees” subject to liability under (b), but they might incur legal or
other costs if the beneficiaries request payment in spite of warning notices from
estate fiduciaries.

\textsuperscript{427}. Rev. Stat. Mo. § 461.300(5).
\textsuperscript{428}. Unif. Prob. Code § 6-102(i).
Subsection (i)(2) is designed to enable trustees handling nonprobate transfers to distribute trust assets in accordance with trust terms if a warning of probable estate insolvency has not been received. Beneficiaries receiving distributions from a trustee take subject to personal liability in the amount and priority of the trustee based on the value distributed.429

SURVIVAL OF CAUSES OF ACTION AND PRIVILEGES

The rules governing survival of causes of action and exercise of a decedent’s evidentiary privileges must be conformed with the rules governing liability of nonprobate transfers. The shift from a probate to a nonprobate transfer system affects both litigation on a cause of action against a decedent and litigation on a decedent’s cause of action. Under existing law those are assigned largely to the decedent’s personal representative. The existing statutes430 are set out in the Appendix.

SURVIVAL AND CONTINUATION

A cause of action may survive the decedent’s death.431 Under Code of Civil Procedure Sections 377.30 and 377.31, a decedent’s cause of action may be commenced or continued by the decedent’s personal representative or, if none, by the decedent’s successor in interest. A cause of action against a decedent may be asserted or continued against the decedent’s personal representative or, to the extent provided by statute, against the decedent’s successor in interest.432

A “successor in interest” within the meaning of the survival of actions statute is the beneficiary of the decedent’s estate by will or intestate succession or another person that succeeds to a cause of action or to a particular item of property that is the subject of the cause of action.433 This is straightforward enough in the case of a probate estate, but in the case of a nonprobate transfer it is necessary to determine who is the “other successor” to the decedent’s cause of action.

DECEDEENT’S CAUSE OF ACTION

If the decedent leaves a trust that captures all of the decedent’s property, that would include any of the decedent’s causes of action and the trust or trustee, rather than a trust beneficiary, should be an “other successor” for the purpose of asserting

431. Code Civ. Proc. § 377.20 (cause of action for or against person not lost by person’s death but survives, subject to applicable limitations period); see also § 377.20 cmt. (“The applicable limitations period may be affected by the death of a person. See Sections 366.1-366.2 (time of commencement of action after death of person).”)
a cause of action. Otherwise, the cause of action probably passes by intestate succession.

Perhaps where litigation on a decedent’s cause of action affects a particular item of property that is the subject of a nonprobate transfer the nonprobate transferee would be considered an “other successor.” The Law Revision Commission’s comment to Code of Civil Procedure Section 377.11 indicates that, “Other successors in interest include persons who take property at the decedent’s death by operation of law or a contract or account agreement.” That language suggests that such nonprobate transferees as a surviving joint tenant (operation of law) or a designated beneficiary under a written instrument (contract or account agreement) would be an other successor entitled to assert the decedent’s cause of action relating to that property.

Where there is no probate proceeding and no personal representative appointed, the decedent’s successor in interest is allowed to self-identify, at least for purposes of commencing or continuing an action. Suppose a creditor of the decedent seeks to recover for the benefit of the decedent’s estate (presumably so that the estate will be solvent and able to satisfy the creditor’s claim). There is no indication in the law that a creditor could be considered the decedent’s successor; the creditor’s remedy apparently is to commence a probate proceeding and seek appointment as personal representative.

The personal representative or other successor may not be an appropriate person to litigate the decedent’s cause of action. Either may well have a conflict with another interested person. In that case, the court may make orders to ensure proper administration of justice and may appoint a special administrator or guardian ad litem. The Law Revision Commission’s comment notes that, “The references to appointment of the successor in interest as a special administrator or guardian ad litem are intended to recognize that there may be a need to impose fiduciary duties on the successor to protect the interests of other potential beneficiaries.”

CAUSE OF ACTION AGAINST DECEDENT

Where a creditor seeks to commence or continue a proceeding on a cause of action against a decedent, things are not so straightforward. Appointment of a personal representative is required in all but a few cases under existing law. Code of Civil Procedure Section 377.41 authorizes the court to allow an action against the decedent’s successor in interest “to the extent provided by statute.”

436. See Prob. Code § 5000 (nonprobate transfer).
that provide expressly for liability of a transferee that takes property without
probate include: small estate set-aside,\textsuperscript{439} summary disposition of small estates,\textsuperscript{440}
transferee of property by affidavit,\textsuperscript{441} court order determining succession to
property,\textsuperscript{442} affidavit procedure for real property of small value,\textsuperscript{443} surviving
spouse who takes property without administration,\textsuperscript{444} and trust law.\textsuperscript{445}

The recitation of statutory authority is deceptively broad. Remember that in each
case the action may be brought only against the “decedent’s successor in interest”
— defined as a successor to a particular item of property that is the subject of the
cause of action.\textsuperscript{446}

The general action authorized by specific statutes, and the limited action
authorized by the survival of causes statute, are at odds. At a minimum, the unduly
narrow definition of “decedent’s successor in interest” in Code of Civil Procedure
Section 377.11 should be broadened consistent with the authorizing statutes.

The scope of Section 377.41 must be reviewed in the context of policy decisions
on nonprobate transfer liability. If a nonprobate transfer is to be liable for a
decedent’s debts to the same extent as a probate transfer, then the “extent provided
by statute” limitation should be eliminated.

**DEFENSE BY PERSONAL REPRESENTATIVE**

If a probate proceeding is commenced, the personal representative is authorized
to defend a cause of action against the decedent. Under existing law the normal
avenue for recovery by a decedent’s creditor is by a claim against the estate; if
there is no estate, the creditor may commence a probate proceeding and seek
appointment as personal representative. Ordinarily that will trigger an appearance
by the interested beneficiaries. But ultimately a personal representative is
appointed to represent the decedent’s interest.

A probate proceeding may be appropriate even though there is no property in the
probate estate. The probate mechanism provides a means for establishing the
validity of the creditor’s claim. In some cases, a nonprobate transfer is accessible
to a creditor only if it is first shown that the probate estate is inadequate.\textsuperscript{447}

\textsuperscript{439} Prob. Code § 6611.

\textsuperscript{440} Prob. Code § 7664.

\textsuperscript{441} Prob. Code § 13109.

\textsuperscript{442} Prob. Code § 13156.

\textsuperscript{443} Prob. Code §§ 13204-13207.

\textsuperscript{444} Prob. Code § 13550.

\textsuperscript{445} Prob. Code § 19001. See also Prob. Code §§ 550-555 (liability of decedent covered by insurance).

\textsuperscript{446} Code Civ. Proc. § 377.11.

\textsuperscript{447} See, e.g., Dobler v. Arluk Medical Center Industrial Group, Inc., 89 Cal. App. 4th 530, 107 Cal.
Rptr. 2d 478 (2001) (liability of trust if estate inadequate).
If the probate estate is insolvent, the personal representative may have no
incentive to defend vigorously, and has no fiduciary duty with respect to
nonprobate property such as the decedent’s trust or a retirement account that may
be at risk if the decedent’s liability is established. Either (1) the fiduciary duty of
the personal representative should be extended to a nonprobate transfer, (2) a
nonprobate transferee should be allowed to intervene, or (3) the court should be
authorized to substitute a nonprobate transferee as a party.

**DEFENSE BY ANOTHER PERSON**

Appointment of a personal representative is generally required to defend a cause
of action against a decedent even though all the decedent’s property passes by
nonprobate transfer.

Expenses in a probate proceeding commenced solely for the purpose of
litigation would be limited. The personal representative and attorney are
compensated on a percentage of the value of the estate.\textsuperscript{448} Where property passes
outside of probate, the value of the estate is diminished. But the source of payment
of the personal representative and attorney is problematic — if there is no probate
estate there is no fund for payment.

The comprehensive nonprobate transfer liability schemes of other jurisdictions
operate through the mechanism of an estate proceeding with accounting by
nonprobate transferees to the personal representative. If that approach is adopted
in California, then the remainder of this discussion is unnecessary. The proper
person to litigate the cause of action against the decedent, to exercise the
decedent’s evidentiary privileges, and to allocate liability among nonprobate
transferees would be the personal representative.

But if there is to be general nonprobate transfer liability without appointment of
a personal representative, then further statutory guidance is needed.

There is nothing unique about probate administration that suggests the need to
limit litigation to the personal representative. It might be said that the personal
representative is unique in being a neutral party with a fiduciary duty to all
interested persons and no conflict of interest, but in fact the personal
representative often has a stake in the proceedings and an interest adverse to that
of other interested persons.

It does not make sense to require commencement of probate and appointment of
a personal representative solely for the purpose of defending against the
decedent’s liability. It is better to provide another means of litigating the issue,
whether via the decedent’s successor in interest or another person appointed for
that purpose.

\textsuperscript{448} Prob. Code §§ 10800, 10810.
Transferee

Where a transferee takes the bulk of the decedent’s property, that person is an appropriate representative of the decedent for litigation on a cause of action against the decedent. The transferee has the motivation to adequately represent the decedent. The existing law, designating the transferee under specific nonprobate transfer devices, is sound as far as it goes.

The decedent may use a nonprobate transfer device with no single dominant transferee. If litigation relates to an individual transfer or property (e.g., to characterize the property or determine its ownership), the transferee is the logical representative.

Special Administrator or Guardian Ad Litem

With respect to a general liability of the decedent, not related to an individual transfer or piece of property, a special administrator or guardian ad litem may be called for. The appropriate appointee is a person that would have an interest in protecting the nonprobate property, or at least not have a significant conflict of interest with other beneficiaries.

To the extent the liability of beneficiaries is proportionate, conflicts of interest are minimized. A transferee of exempt property may not have the same motivation to contest a claim as other nonprobate transferees.

The court may name a guardian ad litem or special administrator to represent the decedent’s interest in litigation. The decedent’s beneficiaries should be given notice and an opportunity to be heard on the appointment of a representative. A beneficiary should be bound by actions of the representative, including any settlement of the litigation, subject, in the event of challenge, to court approval of an action that is not arbitrary, capricious, or fraudulent.

There is no single fund or source for compensation of the litigation representative where the decedent’s property passes in a fragmented manner by nonprobate transfer. Representation in litigation benefits all of the decedent’s transferees. Liability for reasonable expenses of the guardian ad litem or special administrator, as determined by the court, should be assessed among nonprobate transferees proportionately, on the same basis as their liability for the decedent’s debts.

An existing model is appointment of a guardian ad litem to represent a designated class, such as unascertained or unknown heirs:

373.5. If under the terms of a written instrument, or otherwise, a person or persons of a designated class who are not ascertained or who are not in being, or a person or persons who are unknown, may be or may become legally or equitably interested in any property, real or personal, the court in which any action, petition or proceeding of any kind relative to or affecting the property is pending, may, upon the representation of any party thereto, or of any person interested, appoint a suitable person to appear and act therein as guardian ad litem of the person or persons not ascertained, not in being, or who are unknown; and the judgment,
order or decree in the proceedings, made after the appointment, shall be
conclusive upon all persons for whom the guardian ad litem was appointed.

The guardian ad litem shall have power, with the approval of the court in which
the action, petition or proceeding is pending, to compromise the same, to agree to
the order or judgment to be entered therein for or against the persons for whom
the guardian ad litem was appointed, and to satisfy any judgment or order in favor
of the persons, or release, or discharge any claim of the persons pursuant to the
compromise. The court shall have the same power with respect to the money or
other property to be paid or delivered under such order or judgment as is provided
in Section 372 of this code.

The reasonable expenses of the guardian ad litem, including compensation and
counsel fees, shall be determined by the court and paid as it may order, either out
of the property or by plaintiff or petitioner. If the expenses are to be paid by the
plaintiff or petitioner, execution therefor may issue in the name of the guardian ad
litem.449

With appropriate adjustments, that approach could be made to work for litigation
on a cause of action against the decedent where there is no personal representative.

Alternatively, a special administrator could be appointed to defend a cause of
action against a decedent.450 The special administrator statute is more integrated
with general probate administration procedures and would require more adaptation
to be serviceable than the guardian ad litem statute.

FIDUCIARY OBLIGATION OF DECE décEN T’S REPRESENTATIVE

The fiduciary obligation of the decedent’s representative in litigation, whether a
transferee, guardian ad litem, or special administrator, should be broadened to
include protection of all the decedent’s property, probate and nonprobate.

PRIVILEGES

Resolution of issues concerning representation of the decedent in a cause of
action by or against the decedent will help address the evidentiary privilege
problem identified in Attorney-Client Privilege After Client’s Death.451

Under existing law the attorney-client privilege and some other privileges of the
decedent may only be exercised by the decedent’s personal representative.452

A logical question is why these particular privileges are singled out for
posthumous exercise. The policy behind survival of the lawyer-client privilege
after the client’s death is that its continuance will encourage the client to

450. See Prob. Code § 8540-8547 (special administrators).
452. Code Civ. Proc. §§ 377.10-377.62 (effect of death on survival and continuation of cause of action);
Evid. Code § 953 (lawyer-client privilege); HLC Properties, Ltd. v. Superior Court, 35 Cal. 4th 54, 105
privilege), 1035.6 (sexual assault victim-counselor privilege).
communicate fully and frankly with the client’s attorney without fear of embarrassing revelations to the client’s memory or to the client’s beneficiaries. But that consideration is applicable to other privileges as well. More likely is that the posthumous privilege is intended to protect the client’s beneficiaries over the client’s creditors.453

The lawyer-client privilege is the most important of the evidentiary privileges with respect to estate planning issues. For many types of estate planning litigation the privilege will be inapplicable.454 The text of the lawyer-client privilege statute is set out in the Appendix.

The person charged with representing the decedent in litigating a cause of action by or against a decedent should be the person entitled to exercise the decedent’s privileges.

In the case of a personal representative, the existing statutes follow that pattern — the personal representative both conducts the litigation on the decedent’s behalf and exercises the decedent’s evidentiary privileges that survive the decedent’s death.

The privilege statutes should provide that where the decedent’s successor in interest conducts litigation on the decedent’s behalf, the successor in interest is entitled to exercise the decedent’s evidentiary privileges that survive the decedent’s death with respect to that litigation. Likewise, if the court names a guardian ad litem or special administrator to represent the decedent’s interest in litigation, that person should be authorized to exercise the decedent’s evidentiary privileges.

Because more than one person may represent the decedent’s interest depending on the type of litigation, the law should make clear that each is a joint holder of the privilege. A waiver by one joint holder does not prejudice the right of another joint holder to claim the privilege.455

OUT OF STATE TRANSFEREE OR PROPERTY

A transferee, or the property transferred, may be situated in another state. Nonprobate property may be an intangible such as an insurance policy or a financial asset controlled by a financial institution located in another state. As part of a comprehensive nonprobate transfer liability scheme, California should seek to cover out of state property and out of state transferees to the extent permissible.

453. See also discussion at 38 Cal. L. Revision Comm’n Reports at 173-180.
454. See Evid. Code §§ 956 (fraud), 957 (issue between parties who claim through decedent), 959 (intention or competence of client in executing attested document), 960 (intention with respect to conveyance, will, or other writing affecting interest in property), 961 (validity of conveyance, will, or other writing purporting to affect interest in property).
455. See Evid. Code § 912(b).
Gagliardi questions whether the forum state can exercise jurisdiction over an out of state transferee.\textsuperscript{456} Under classic probate doctrine, a state may exercise jurisdiction over a domiciliary decedent. Conflict of law principles require recognition of a forum state determination relating to a domiciliary decedent’s out of state personal property. But the state where the decedent’s real property is located typically exercises authority to determine rights with respect to that property.\textsuperscript{457} Even with respect to personal property, ancillary administration proceedings may be necessary in the nondomiciliary state.\textsuperscript{458}

Although the forum state may not directly affect rights in real property located in another jurisdiction, the forum state may indirectly affect those rights by adjudicating liability of a domiciliary decedent’s transferees. That argues for in personam, rather than in rem, nonprobate transfer liability. Apportionment of liability to an out of state transferee may be enforceable in another jurisdiction based on minimum contacts in the forum jurisdiction, regardless of the forum jurisdiction’s direct authority over property of the transferee.

The Uniform Act applies its nonprobate transfer liability provisions to an out of state transferee of a domiciliary decedent.\textsuperscript{459} The commentary to the Uniform Act states the public policy supporting extension of liability to an out of state transferee:

The underlying principle is that the law of a decedent’s last domicile should be controlling as to rules of public policy that override the decedent’s power to devise the estate to anyone the decedent chooses. The principle is implemented by subjecting donee recipients of the decedent to liability under the decedent’s domiciliary law, with the belief that judgments recovered in that state following appropriate due process notice to defendants in other states will be accorded full faith and credit by courts in other states should collection proceedings be necessary.\textsuperscript{460}

A state may explicitly acknowledge the authority of an out of state determination of rights. California does that for estate tax proration by an out of state personal representative.\textsuperscript{461} California legislation on nonprobate transfer liability should include a general provision along those lines. That may encourage reciprocity among states without the need to litigate the matter.

\textsuperscript{456} Gagliardi, \textit{Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers}, Real Property, Probate and Trust Journal 819 (Winter 2007).


\textsuperscript{459} Unif. Prob. Code §§ 6-102(a) (“transferor whose last domicile was in this State”), 6-102(f) (“Upon due notice to a nonprobate transferee, the liability imposed by this section is enforceable in proceedings in this State, whether or not the transferee is located in this State.”).

\textsuperscript{460} Unif. Prob. Code § 6-102, cmt. 11.

\textsuperscript{461} Prob. Code § 20125.
RETROACTIVE OR PROSPECTIVE OPERATION

California has reserved authority to make changes to the laws governing exemption of property from debts and application of debt collection and probate procedures. As a consequence California has a fair amount of legislative leeway to make retroactive or prospective changes to the law governing nonprobate transfer liability.

A comprehensive nonprobate transfer liability scheme will affect substantive rights as well as procedures. A transitional period should be provided during which a transferor may adjust an estate plan. If a transferor is incapacitated during the transitional period there are means to effectuate appropriate adjustments.

A one year deferred operative date is adequate to allow a transferor to make estate plan changes in light of new law governing nonprobate transfer liability. The new law should apply to a nonprobate transfer that occurs on the death of a transferor thereafter.

V. FAMILY PROTECTIONS

OVERVIEW

The California probate system has developed family protections for the decedent’s dependents — primarily the surviving spouse and minor children.

In brief:

(1) Family dwelling and exempt property. During probate administration until the filing of the inventory (and for 60 days additionally), the decedent’s surviving spouse and minor children are entitled to remain in possession of the family dwelling, the wearing apparel of the family, the household furniture, and other property of the decedent exempt from enforcement of a money judgment.

(2) Setting aside exempt property. During probate administration after the filing of the inventory, the court in its discretion may set apart some or all of the decedent’s exempt property for the decedent’s surviving spouse and minor children. It appears this is a permanent award, notwithstanding claims of other beneficiaries or creditors.


463. See, e.g., Prob. Code §§ 2580 (substituted judgment by conservator), 3144 (community property transaction for spouse lacking legal capacity), 4264-4265 (authority of attorney in fact with respect to trust).


(3) Setting aside probate homestead. During probate administration after the filing of the inventory, the court in its discretion may set apart a probate homestead for the decedent’s surviving spouse and minor children.\(^{466}\) The probate homestead is a burden on the property for a limited period, not exceeding the life of the surviving spouse and the minority of the children.\(^{467}\)

(4) Family allowance. The decedent’s surviving spouse, minor children, and dependent adult children who are incapacitated are entitled to a reasonable family allowance during probate administration.\(^{468}\)

(5) Small estate set-aside. If the net value of the decedent’s estate (exclusive of nonprobate transfer property) does not exceed $20,000, the court may set it aside for the decedent’s surviving spouse and minor children.\(^ {469}\) A probate proceeding is not necessary.\(^{470}\) The court order must ensure that expenses of last illness, funeral charges, and expenses of administration are paid.\(^{471}\) Title to the decedent’s property vests in the surviving spouse and minor children absolutely.\(^{472}\) The set-aside prefers the decedent’s dependents over other beneficiaries, but not over the decedent’s creditors, who are required to be paid.\(^{473}\)

(6) Omitted spouse and children. If the decedent executed a will or trust before the decedent’s marriage to the surviving spouse and the will or trust does not provide for the surviving spouse, the surviving spouse is entitled to an intestate share of the decedent’s estate, unless it is shown that the omission was intentional.\(^{474}\) If the decedent executed a will or trust before the birth or adoption of the decedent’s child and the will or trust does not provide for the child, the child is entitled to an intestate share of the decedent’s estate unless it is shown that the omission was intentional.\(^{475}\)

The most significant California family protection is found not in the individual statutes listed above but in the community property system. While non-community property states have developed forced share schemes to protect the surviving spouse from destitution, California has been able to rely on the surviving spouse’s ownership of half the community and quasi-community property of the marriage.

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469. Prob. Code § 6600 et seq.
The community property protection applies equally to probate and nonprobate transfers, a feature not necessarily captured by the forced share statutes of other jurisdictions.\textsuperscript{476}

The family protections evolved to shield a decedent’s dependents from the decedent’s improvidence (creditor claims) and from the decedent’s intentional or inadvertent neglect of the decedent’s support obligation (claims of other beneficiaries). Most of the family protections require a probate proceeding for implementation. Exceptions are the small estate set-aside, which may be made on court order whether or not there is a probate, and the protections for an omitted spouse and children which may be applied to a trust as well as to a probate estate.

Otherwise, if there is no probate proceeding there is no mechanism to implement the protection. Nonprobate transfers were not intentionally excluded from the purview of the family protections. They were simply developed at a time when probate rather than nonprobate transfer was the primary mechanism for passing property at death.

\textbf{POLICY CONSIDERATIONS}

\textbf{DEPENDENCE OF FAMILY PROTECTIONS ON PROBATE}

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.

The family protection statutes also address the conflict between the interests of the decedent’s dependents and those of the decedent’s creditors. The family protection statutes provide exemptions, temporary or permanent, from claims of the decedent’s creditors. If a nonprobate transfer is made accessible to a decedent’s creditors, it should also be made accessible to the decedent’s family.

An increase in creditor access to a nonprobate transfer must be balanced by corresponding family protection.

Under existing law, a family allowance awarded in probate has priority over rights of a general creditor of the decedent.\textsuperscript{477} The decedent’s family should not lose that protection because the decedent chooses a nonprobate rather than a probate transfer to dispose of property.

Andrews has remarked on the interrelation:

Under the 1971 proposal and the Missouri statute, the liability of nonprobate transferees could be asserted not only to satisfy creditors, but also to satisfy the


\textsuperscript{477} Prob. Code §§ 11420-11421 (priority of family allowance).
claims of surviving spouse, minor children and dependent children to statutory
allowances. This would be an important change of law as it exists in Washington.
Today, nonprobate assets are not subject to the claims of spouses or dependents
for statutory allowances. This, I believe, is unjustifiable. Moreover, any system
that exposes nonprobate assets to the claims of creditors, but not to the rights of
family, would be indefensible. Any adequate treatment of the problem of claims
against nonprobate assets, therefore, should include provision for spousal and
dependents’ claims in addition to those of creditors.478

Under existing law if a decedent’s dependents require protection, they may
commence a probate proceeding. But where there is no property in the probate
estate because all passes by nonprobate transfer, it is not possible to implement
most of the family protections as presently constituted.

ABATEMENT

An argument can be made that a nonprobate transfer may already be subject to
family protection statutes in many circumstances. Abatement principles apparently
are intended to apply to nonprobate as well as probate transfers. Probate Code
Section 21401 provides:

21401. Except as provided in Sections 21612 (omitted spouse) and 21623
(omitted children) and in Division 10 (commencing with Section 20100)
(proration of taxes), shares of beneficiaries abate as provided in this part for all
purposes, including payment of the debts, expenses, and charges specified in
Section 11420, satisfaction of gifts, and payment of expenses on specifically
devised property pursuant to Section 12002, and without any priority as between
real and personal property.479

Under Section 21401 a nonprobate transfer abates for “all purposes”, including
payment of the debts, expenses, and charges specified in Probate Code Section
11420. The charges specified in Section 11420 include the family allowance. How
that concept is applied in practice where there is no probate proceeding is unclear.
Nor is it clear whether “all purposes” include family protections other than the
family allowance. Omitted spouse and children protections are specifically
excluded from coverage of Section 21401. By implication, other family
protections are included within the scope of Section 21401.

Whether the share of a nonprobate transfer beneficiary abates for exempt
property and homestead set asides, and how those are enforced absent a probate
proceeding, is unknown. The application of the abatement statute should be
expressly stated.

L. Rev. 73, 127-28 (1990) (fn. omitted)
479. See also Prob. Code § 21400 cmt. (“The provisions of this part apply to trusts and other instruments
as well as to wills. See Section 21101.”).
EXEMPTIONS

The family protections are in the nature of exemptions. Some of the family protections apply explicitly to property that would have been exempt from enforcement of a money judgment against the decedent.

The premise of the family protections is that they preserve from creditors and other beneficiaries an amount needed for support of the surviving spouse and children of the decedent. As such, they should be immune from creditor claims.

At least one of the family protections is not so limited — the omitted spouse and child protections apply regardless of need. (The small-estate set-aside is not overtly dependent on need but the court in exercising its discretion takes that into account in addition to other considerations.)

Property to which family protections are applied is impliedly exempt from enforcement by a decedent’s creditors, although the statutes do not state this explicitly. The same rules that govern the exemption of family protections in probate should govern nonprobate family protections.

APPLICATION OF NONPROBATE TRANSFER TO FAMILY PROTECTIONS

FAMILY DWELLING AND EXEMPT PROPERTY

Probate Code Section 6500 provides:

6500. Until the inventory is filed and for a period of 60 days thereafter, or for such other period as may be ordered by the court for good cause on petition therefor, the decedent’s surviving spouse and minor children are entitled to remain in possession of the family dwelling, the wearing apparel of the family, the household furniture, and the other property of the decedent exempt from enforcement of a money judgment.

The right of temporary possession of the family dwelling and exempt property extends to tangible personal property such as wearing apparel and household furnishings. The tenor of the provision is to ensure that the family is not left destitute during the period immediately following the decedent’s death.480

While Section 6500 is aimed at the family dwelling and tangible personal property, it is not limited to that property. “Other property of the decedent exempt from enforcement of a money judgment” includes a wide range of tangible and intangible property.481

Section 6500 must be read in conjunction with Section 6510 (setting aside exempt property) and Section 6520 (setting aside probate homestead). It is a

480. Robson v. Meder, 66 Cal. App. 2d 47, 151 P.2d 662 (1944) (policy is protection of family as social unit in the home against demands of creditors, heirs, and family’s own improvidence).

provisional remedy intended to preserve that property from dispersion pending the
court’s determination of the right of the dependents to have that property set aside
notwithstanding other claims to or against it.

While the provision applies exclusively to probate property in a probate
proceeding, it may encompass a nonprobate transfer such as a trust if there is a
dispute concerning disposition of the property.\textsuperscript{482}

It is difficult to conceive of a nonprobate transfer of most property of a type
targeted by this provision other than by means of a trust. It would make sense to
apply the principle of Section 6500 to a trust. That could be accomplished both by
expanding the scope of Section 6500 to include trust property and by making trust
administration subject to Section 6500.

Section 6500 requires a judicial mechanism for its operation. In the case of a
probate proceeding, expansion of probate jurisdiction to allow temporary control
of property that passes by trust would be straightforward. In the case of trust
administration, a court order could be obtained if the trustee fails to allow
continued possession of the dwelling and exempt property by the decedent’s
dependents.\textsuperscript{483}

\section*{SETTING APART EXEMPT PROPERTY}

In a probate proceeding the court has discretion to set apart some or all of the
decedent’s exempt property for the decedent’s dependents. Probate Code Section
6510 provides:

\begin{verbatim}
6510. Upon the filing of the inventory or at any subsequent time during the
administration of the estate, the court in its discretion may on petition therefor set
apart all or any part of the property of the decedent exempt from enforcement of a
money judgment, other than the family dwelling, to any one or more of the
following:
(a) The surviving spouse.
(b) The minor children of the decedent.
\end{verbatim}

Unlike temporary possession under Section 6500, an award under Section 6510 is
permanent.

The proceeds of life insurance — a form of nonprobate transfer — are exempt
from enforcement of a money judgment. This exemption has been the subject of
much litigation. The cases typically address the situation where the beneficiary of
the insurance policy is the decedent’s estate, conceptually rendering the insurance
proceeds probate rather than nonprobate property.\textsuperscript{484}

\begin{itemize}
\item [482.] \textit{Cf.} Myung Chang v. Lederman, 172 Cal. App. 4th 67, 87, 90 Cal. Rptr. 3d 774-775 (2009) (“Chang may have had some right to continued possession of the residence as Schumert’s surviving spouse under the homestead provisions of the Probate Code ...”).
\item [483.] See Prob. Code § 17000 \textit{et seq.}
\item [484.] See, e.g., Holmes v. Marshall, 145 Cal. 777, 79 P. 534 (1905).
\end{itemize}
Section 6510 allows the court, in exercising its discretion whether to set apart probate property, to take into consideration the existence of nonprobate transfers.\textsuperscript{485}

The award of exempt property to a dependent under Section 6510 may be made only in a probate proceeding. As a matter of policy, if not of practice, that protection should be extended to a nonprobate transfer.

Most married people would prefer to leave most, if not all, of their estate to their surviving spouse. One may choose to make this gift through the probate system or by nonprobate transfers. However, the question that has not yet been answered is whether exemptions in favor of the spouse or children would be applicable to transfers outside of probate. Although it would be more likely that such transfers in augmented estate jurisdictions might enjoy the protection as a matter of consistency, the answer is unclear in the UPC. In jurisdictions which have not adopted the 1990 revisions to the UPC, the answer is even more uncertain. This presents the real potential for unintentional disinheritance of a spouse in states where creditors have access to nonprobate transfers after the death of the decedent. Although the testator may have chosen to pass the bulk of his estate to his spouse outside of probate, she may or may not enjoy protection under these exemptions merely because of the form of the transfer, not its character.\textsuperscript{486}

The award of exempt property is not automatic but is discretionary with the court. Although it would require court implementation that can be done outside probate. The concept is not new — most exemptions are subject to court determination.\textsuperscript{487}

PROBATE HOMESTEAD

The court has discretion to award a probate homestead for occupancy by the decedent’s surviving spouse and minor children.\textsuperscript{488} The award of the family dwelling is not permanent but is a burden imposed on it for a limited period, not exceeding the life of the surviving spouse and the minority of the children.\textsuperscript{489} The probate homestead has generated an enormous amount of litigation, reflecting the

\textsuperscript{485} See, e.g., In re Jones’ Estate, 78 Cal. App. 2d 265, 267, 177 P.2d 372, 373 (1947) (“Deceased was a soldier and died while in the service. His widow was named as beneficiary in his insurance policies and has received payment of the death benefit in one issued by an insurance company and is receiving regular monthly payments from the Government. She is also the surviving co-owner of the Series E United States War Savings Bonds accumulated by the couple. Conrad v. Conrad, 66 Cal. App. 2d 280, 152 P.2d 221. The funeral expenses and some of the expenses of the last illness of deceased have not been paid which is also true of the expenses of administration of his estate. We can see no abuse of discretion on the part of the trial judge in retaining in the estate the small amount of exempt personal property in question here.”)

\textsuperscript{486} Schwickerath, Public Policy and the Probate Pariah: Confusion in the Law of Will Substitutes, 48 Drake L. Rev. 769, 807-08 (2000) (fns. omitted)

\textsuperscript{487} See Code Civ. Proc. § 703.010 et seq.

\textsuperscript{488} Prob. Code § 6520.

\textsuperscript{489} Prob. Code § 6524.
fact that formerly, and even to some extent today, the family home has been the
decedent’s major asset.

The probate homestead statute appears specifically to exclude a nonprobate
transfer from its operation.490

Thus only property before the probate court, which is included in the inventory,
qualifies for probate homestead treatment. Joint tenancy property or property
passing under summary administration procedures is not eligible because it is not
part of the decedent’s probate estate.491 Nor is property that passes under the
decedent’s trust. Only property that is subject to the jurisdiction of the probate
court, and not property that passes by operation of law outside probate, can be
impressed with a probate homestead.492

The only coherent policy that supports limiting the probate homestead to a
probate transfer is the practicality of court control.

Existing law governing trust liability has been criticized as inadequate for its
failure to provide for a probate (or rather, nonprobate) homestead.493 A trust is
subject to court jurisdiction over a wide range of issues, including determining the
liability of the trust for any debts of a deceased settlor.494 Particularly if the trustee
voluntarily invokes the trust claim procedure, it would make sense to allow
imposition of a probate homestead on trust property.

The case for a nonprobate homestead is less clear with respect to a form of
nonprobate transfer of real property other than by trust, such as joint tenancy
property. If title passes on the decedent’s death subject to the possibility of a
nonprobate homestead, marketability will be impaired during the period that the
homestead could be imposed. A reasonable limitation period for imposing the
nonprobate homestead, and bona fide purchaser and encumbrancer protection,
would be necessary. But if a comprehensive procedure for nonprobate transfer
liability is developed, that would provide a vehicle for application of a nonprobate
homestead.

490. See Prob. Code § 6522(b) (probate homestead shall not be selected out of property the right to
possession of which is vested in a third person who acquired the right at the decedent’s death by means
other than by testate or intestate succession from the decedent); see also § 6522(b) cmt. (“The probate
homestead can affect the possessory rights only of testate and intestate successors of the decedent.”)
App. 2d 440, 66 Cal. Rptr. 480 (1968).
492. Estate of Klumpke, 167 Cal. 415, 139 Pac. 1062 (1914).
FAMILY ALLOWANCE

The court may award a reasonable allowance for maintenance of the decedent’s dependents during administration of the estate.495 The family allowance in effect is a continuation of the decedent’s support obligation for a limited period after the decedent’s death.496

The amount of the family allowance may be significant and, if the estate is not closed promptly, the “temporary” allowance may exhaust the estate. The family allowance is a debt of the estate and is entitled to a priority over other creditor claims under Probate Code Sections 11420 and 11421.

Although the family allowance is available during probate administration, the law requires that property besides that in probate administration, including nonprobate property, be considered in determining the family allowance:

If a person otherwise eligible for family allowance has a reasonable maintenance from other sources and there are one or more other persons entitled to a family allowance, the family allowance shall be granted only to those who do not have a reasonable maintenance from other sources.497

The family allowance may only be awarded out of the probate estate. It may not be awarded out of the decedent’s revocable inter vivos trust, for example.498

If a family allowance is awarded out of the probate estate and the probate estate is inadequate to pay it, trust and other nonprobate property evidently may be assessed to cover it.499

The fact that the family allowance is a charge against the probate estate may result in manipulation of the election whether or not to probate certain property. For example, the surviving spouse may elect to probate property under Probate Code Sections 13502 to 13503 (election to administer marital property) that would be subject to the allowance, or elect to take property under Probate Code Sections 13650 to 13660 (determination or confirmation of property passing or belonging to surviving spouse) that would not be subject to the allowance.

The reasoning in Parson500 that a family allowance may not be awarded directly against a trust, but that a trust may be liable if a family allowance is awarded against the estate and the estate is inadequate, is technically correct. Where there is

497. Prob. Code § 6540(c)
499. See, e.g., Prob. Code §§ 19001 (trust liable to extent estate inadequate), 21401 (abatement of shares of beneficiaries for payment of debts, expenses, and charges specified in Section 11420).
500. See supra note 498.
no probate estate, or it is clear that the probate estate is inadequate, it makes little
sense to go through the charade of opening an estate, awarding the family
allowance, and then proceeding against the trust, which by then may be
exhausted.\(^{501}\)

Because the family allowance is, at least initially, limited to probate property, it
may be necessary to make a forced sale of estate property in order to satisfy the
award, even though appropriate liquid nonprobate property might be available to
the surviving spouse. If the law were expanded to allow for application of the
family allowance to nonprobate transfers, the award could be appropriately
distributed among the beneficiaries without having the entire burden of it fall
initially on the probate estate.

At a minimum, the trust law should allow an award of the family allowance
against the decedent’s trust; a similar approach has been taken to an award of the
share of an omitted spouse or child. More generally, the family allowance should
be classed with other debts that may be apportioned to nonprobate transfers under
general liability principles.

SMALL ESTATE SET-ASIDE

On court order a small estate (less than $20,000) may be set aside absolutely for
the decedent’s surviving spouse and minor children, subject to the decedent’s
debts. The set-aside statute prefers the decedent’s dependents over other
beneficiaries, but not over the decedent’s creditors.\(^{502}\)

Unlike most of the other family protections, the small estate set-aside does not
require a probate proceeding. The statute accepts the nonprobate environment; a
court order setting aside a small estate may be made within, or without, probate.\(^{503}\)

The statute defines the decedent’s “estate” in terms that distinguish probate from
nonprobate property:

6600. (a) Subject to subdivision (b), for the purposes of this chapter,
“decedent’s estate” means all the decedent’s personal property, wherever located,
and all the decedent’s real property located in this state.

(b) For the purposes of this chapter:
(1) Any property or interest or lien thereon which, at the time of the decedent’s
death, was held by the decedent as a joint tenant, or in which the decedent had a
life or other interest terminable upon the decedent’s death, shall be excluded in
determining the estate of the decedent or its value.

(2) A multiple-party account to which the decedent was a party at the time of
the decedent’s death shall be excluded in determining the estate of the decedent or
its value, whether or not all or a portion of the sums on deposit are community
property, to the extent that the sums on deposit belong after the death of the


\(^{502}\) See Prob. Code § 6600 et seq.

\(^{503}\) Prob. Code § 6605.
decedent to a surviving party, P.O.D. payee, or beneficiary. As used in this paragraph, the terms “multiple-party account,” “party,” “P.O.D. payee,” and “beneficiary” have the meanings given those terms in Article 2 (commencing with Section 5120) of Chapter 1 of Part 2 of Division 5.\(^{504}\)

The Law Revision Commission’s comment to this provision states:

As defined in subdivision (a), “decedent’s estate” is not limited to probate assets. The term includes all personal property, wherever located, and all real property located in this state, excluding the property described in subdivision (b). Subdivision (a) requires, for example, that the decedent’s one-half share of the community and quasi-community property be included in determining the decedent’s estate or its value, whether or not the decedent’s interest is set apart to the surviving spouse under Sections 13650-13660, unless the interest is excluded in determining the estate of the decedent under subdivision (b) as would be the case, for example, if the property is held in joint tenancy. This is consistent with prior law. Estate of Pezzola, 112 Cal. App. 3d 752, 169 Cal. Rptr. 464 (1980).

Subdivision (b) excludes any interest that terminates at death in determining the estate of the decedent or its value. If the interest is one that passes to another on the death of the decedent by virtue of a joint tenancy, a pay-on-death provision, or a contractual provision that provides that the interest is to be transferred or paid to another upon the death of the decedent, subdivision (b)(1) requires that the value of the interest be excluded in determining the estate of the decedent or its value. For example, if there is a policy of insurance on the decedent’s life and the proceeds are payable to a named beneficiary (not to the decedent’s estate), the insurance proceeds are excluded in determining the estate of the decedent or its value. Similarly, for example, if the decedent has a retirement plan that provides benefits to a surviving spouse, those benefits are excluded in determining the estate of the decedent or its value. Subdivision (b) also excludes, for example, life interests in trusts and life estates. See O. McCarroll, 1 California Decedent Estate Administration Supplement § 3.24, at 84-85 (Cal. Cont. Ed. Bar 1985).\(^{505}\)

The small estate set-aside statute serves a dual function — it provides family protection for the decedent’s dependents and it enables a small estate to pass without the need for probate.

The statute operates somewhat arbitrarily. If the decedent’s estate is $20,000, it may be set aside in its entirety. If the decedent’s estate is $20,001, none of it may be set aside under the statute.\(^{506}\) The court has discretion whether to make a set-aside order but the court’s discretion is limited to an all or nothing award. Prob. Code § 6609.

The court’s discretion is akin to application of a hardship exemption. In determining whether to make a set-aside order, the court must consider “the needs of the surviving spouse and minor children, the liens and encumbrances on the property of the decedent’s estate, the claims of creditors, the needs of the heirs or

\(^{504}\) Prob. Code § 6600.

\(^{505}\) Id. cmt.

\(^{506}\) Prob. Code § 6602.
devisees of the decedent, the intent of the decedent with respect to the property in
the estate and the estate plan of the decedent as expressed in inter vivos and
testamentary transfer or by other means, and any other relevant considerations.”

Although operation of the statute is somewhat arbitrary, it requires only minimal
adjustment for nonprobate transfer liability:

The non-traditional differentiation of a probate from a nonprobate transfer
should be conformed to standard nonprobate transfer categories.
The set-aside should be satisfied under standard abatement principles and should
be subject to creditor claims under standard priority principles.

If a comprehensive nonprobate transfer liability procedure is developed, that
procedure should be made available for enforcement of liability under the small
estate set-aside statute.

**OMITTED SPOUSE AND CHILDREN**

Pretermitted heir statutes historically have protected a spouse or child
inadvertently omitted from the decedent’s will. The California statute was revised
in 1997 to include a spouse or child omitted from the decedent’s trust.508

The share of a pretermitted heir is substantial. An omitted spouse may receive
all of the decedent’s interest in the community and quasi-community property and
an intestate share of the decedent’s separate property (not exceeding 50%).509 An
omitted child may receive an intestate share, which may be as much as the entire
estate, depending on whether the decedent leaves a surviving spouse or other
issue.510

The policy of the law is strong. Yet that policy is defeated by the decedent’s use
of a transfer instrument other than a will or trust.

The law protects the decedent’s intent to disinherit; the pretermitted heir statute
addresses only an unintended disinheritance. The law specifically recognizes the
possibility that the decedent may omit a spouse or child from the will but use a
nonprobate instrument to make alternate provision for the spouse or child.511

The decedent’s estate subject to a pretermitted heir claim does not include
property that passes by a nonprobate transfer such as a Totten trust account:

Under the statutory scheme, since the beneficiary of a Totten trust account may
not be changed by a will and since the Legislature has provided that funds
remaining in a Totten trust account belong to the named beneficiary of the
account when the trustee dies, it is clear the Legislature did not intend a Totten

508. Prob. Code § 21600 (“This part shall apply to property passing by will through a decedent’s estate or
by a trust, as defined in Section 82, that becomes irrevocable only on the death of the settlor.”).
511. Sections 21611(b), 21621(c) (no statutory share if decedent intentionally provided for surviving
spouse or child by transfer outside of “testamentary estate”).
trust account was to be included in a decedent’s estate for either the purposes of intestate succession or distribution by will. Thus, since the Legislature has stated in section 6560 that an omitted spouse is entitled to a share of the testator’s separate property “equal in value to that which the spouse would have received if the testator had died intestate” up to “one-half the value of the separate property in the estate” (emphasis added), an omitted spouse is not entitled to a share of any Totten trust accounts (or their equivalent value) because the spouse would not have received any portion of the accounts had the testator died intestate; the funds in the accounts, upon the testator’s death, belong to the beneficiary, not to the estate.\(^{512}\)

The 1997 extension of the pretermitted heir statute to the decedent’s revocable inter vivos trust significantly expanded its operation — the trust and will combination covers the bulk of estate plans. The statute now provides an omitted spouse or child a share in the decedent’s “estate” — defined as “a decedent’s probate estate and all property held in any revocable trust.”\(^{513}\)

The pretermitted share is to “first be taken from the decedent’s estate not disposed of by will or trust, if any.”\(^{514}\) Thus it is first taken from intestate property. In a well-planned estate there is likely to be little property not disposed of by the will or trust.

In the ordinary case it is the next tier that is relevant — “the share shall be taken from all beneficiaries of decedent’s testamentary instruments in proportion to the value they may respectively receive.”\(^{515}\) The statute provides no guidance as to whether the apportionment is to be made by the personal representative, the trustee, or a court.

Proportionate liability under the statute is based strictly on the value of property received. There is no abatement schedule (except for property not covered by the will or trust, if any). General abatement rules exempt liability for an omitted spouse or child from their operation.\(^ {516}\)

The rationale of the exception to abatement for an omitted spouse or child award may be that since the charge is against the entire estate, it should fall on all equally, or at least proportionately. But if that is the case, a nonprobate transfer other than the trust should not be exempt. Nor should the rule be different where a charge is imposed as a result of the decedent’s debts as opposed to the decedent’s inadvertent failure to provide for an omitted heir.

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512. Estate of Allen, 12 Cal. App. 4th 1762, 1767, 16 Cal. Rptr. 2d 352, 354 (1993). See also Prob. Code §§ 82 (“trust” does not include Totten trust), 21600 (pretermitted heir statute applies to property passing by a trust as defined in Section 82).


516. Prob. Code § 21401 (shares of beneficiaries abate in the order specified for all purposes “except as provided in Sections 21612 (omitted spouse) and 21623 (omitted children)”).
Despite problems with the omitted spouse and child protections, they go far beyond most of the other family protections by covering the decedent’s revocable inter vivos trust. Improvement is possible but should not be the highest priority.

SUMMARY

A statute that provides comprehensive nonprobate transfer liability for the decedent’s debts should make clear that the liability is subject to existing statutory protections in favor of the decedent’s family.

The family protection statutes vary widely in character. They are similar to a creditor’s claim in that they are a charge on the decedent’s estate but as a general rule do not extend to a nonprobate transfer. Assuming the policy of the statutes to provide support for a decedent’s dependents is sound, the family protections should be adjusted to reflect the ascendancy of the nonprobate transfer. This has already been done for the small estate set-aside and for omitted spouse and child protections; it should be done for other family protections as well.

States that have comprehensive legislation subjecting nonprobate transfers to liability for debts also subject nonprobate transfers to liability for the family allowance. For example, the Uniform Probate Code provides:

Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against decedent’s probate estate [sic] and statutory allowances to the decedent’s spouse and children to the extent the estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received or controlled by that transferee. 517

See also the Missouri statute:

Each recipient of a recoverable transfer of a decedent’s property shall be liable to account for a pro rata share of the value of all such property received, to the extent necessary to discharge the statutory allowances to the decedent’s surviving spouse and dependent children, and claims remaining unpaid after application of the decedent’s estate, including expenses of administration and costs as provided in subsection 3 of this section, and including estate or inheritance or other transfer taxes imposed by reason of the decedent’s death only where payment of those taxes is a prerequisite to satisfying unpaid claims which have a lower level of priority. 518

These statutes are noteworthy because they treat the family protections in the same manner as the decedent’s debts. Whatever procedure is developed for applying a nonprobate transfer to a decedent’s debts should also be used for family protections.

517. Unif. Prob. Code § 6-102(b)
A unique policy consideration for application of family protections to a nonprobate transfer is the interrelation of the family protections with creditor rights. It must be determined which class of obligation should have priority. Most of the family protections are in the nature of exemptions and should have priority over the decedent’s creditors. In extending the family protections to nonprobate transfers, it should be made clear that family protection of a nonprobate transfer is exempt to the same extent as a probate transfer.

VI. CONCLUSION

The move from a probate-based system for transfer of wealth at death to a nonprobate system has left California law in disarray. The policy of the law to require payment of a decedent’s just debts and to protect a decedent’s surviving spouse and children in probate has been shredded by the ad hoc development of nonprobate transfer law.

This study takes an overview of the law and policy governing liability of nonprobate transfers for creditor claims and family protections, with an eye to comprehensive legislative reform of the area. There are plenty of models in existing law that can be drawn from and generalized to create a workable legal framework.

OVERVIEW

The study envisions a regime where all of a decedent’s at death transfers, probate and nonprobate, are equally subject to liability for the decedent’s debts and for family protections. Liability would be imposed on the recipient of the property under general abatement principles, subject to the decedent’s direction of the source of payment. Liability would be limited to the value of property received; exemptions from liability would be via the family protection mechanism. Liability would be subject to the over-arching one year statute of limitations. In case of insufficiency, family protections, secured debts, and unsecured debts would be ranked in the same priority as in probate.

Implementation of this regime would be entrusted to the personal representative if there is a probate proceeding, otherwise to the trustee of the decedent’s revocable inter vivos trust if the trustee elects to act, otherwise to a special administrator or other person acting in a fiduciary capacity under an estate tax proration type procedure. The fiduciary would be charged with identifying probate and nonprobate property, notifying interested persons, allowing or disallowing claims, and allocating liability among transferees. Challenges would be resolved by the court on petition. Collection would be left to the creditor or protected family members.

The procedure to be followed would be based on the existing estate tax proration procedure that is in effect a truncated and narrowly focused version of probate; it
would be designed for the limited purpose of determining the liability of the
decedent’s probate and nonprobate transfers for debts and family protections. Its
availability would preclude a creditor from resorting to probate in order to satisfy
a debt.

PERSPECTIVE

Is it worth it to build all this complexity into the law — to complicate many
probate proceedings and burden many nonprobate transfers with notice and other
procedural mechanisms?

In the ordinary case a beneficiary voluntarily pays the decedent’s debts, calling
into question whether a nonprobate transfer liability scheme would actually be an
improvement over the current situation.

The relatively short one year limitation period may cause potential problems
simply to evaporate.

Most of the problems addressed in this study may be resolved or avoided by the
transferor’s properly drawn instrument directing the source of funds for
satisfaction of debts.

There will be cases where the decedent fails to designate a fund for satisfaction
of debts and family protections, or where the property is insufficient, or where
there are disagreements among interested parties. The law should at least provide
clarity, if not a reasonably effective remedy, for those cases. Such a remedy will
be useful if the debt is large enough to justify the expense of a nonprobate transfer
liability proceeding.

McCouch identifies advantages of a nonprobate liability procedural scheme:

Protecting the rights of third parties, such as spouse and creditors, may justify
invoking the procedural safeguards of the probate system and limiting the
advantages of probate avoidance. The same is true of federal estate tax
apportionment, which requires a centralized forum to identify the beneficiaries of
probate and nonprobate transfers, compute the values of their respective interests
and their shares of the tax, and enforce rights of contribution against them.519

The existence of clear rules and procedures will help make use of those
procedures unnecessary, just as a creditor’s access to the coercive powers of the
probate system has a deterrent effect that aids the creditor in the attempt to obtain
out of court satisfaction from a beneficiary. Andrews observes:

At present, apparently, many creditors rely on voluntary measures to obtain
payment of their claims because probate is too expensive. Many recipients of
nonprobate property may be content to compromise claims without having a PR
appointed, particularly where one person has received the bulk of the decedent’s
property. There is no obvious reason, under these circumstances, why creditors’
rights to reach such assets should require the appointment of a PR. If creditor’s

claims can be settled amicably by those receiving nonprobate assets without the need for a probate administration, then there should be a mechanism in place to allow this. Even if an amicable settlement cannot be reached without the need for court intervention, it may be possible to resolve the dispute without the appointment of a PR, and the parties should be entitled to try to do so.\(^{520}\)

**ALTERNATIVES**

If the vision of a comprehensive liability scheme outlined above cannot be realized for whatever reason, much could still be done that would be helpful.

At a minimum the law should clearly state the substantive liability of a nonprobate transfer for the decedent’s debts and family protections. That will save parties a trip to court to establish the rule. A clear rule will also facilitate out of court resolution of a liability dispute in the ordinary case.

In addition to establishing the principle of liability, it would help to make clear that standard abatement principles apply and to prescribe a rule of proportionality within abated classes. Abatement and proportionality principles would be difficult to implement without additional procedures, but at least the principles would be clear and the courts could devise appropriate remedies such as contribution and reimbursement.

A modest procedural revision that would go far would be an expansion of probate jurisdiction and the authority of the personal representative to make an enforceable allocation of liability to nonprobate transfers. That would entail expanded notice and an opportunity for a nonprobate transferee to be heard, but it would build incrementally on existing procedures. It would also enable a creditor or dependent to commence a probate proceeding in order to establish liability where there would otherwise be no enforcement mechanism.

California could profitably adopt the Uniform Act, with changes identified in this study. The Uniform Act makes clear the substantive liability of a nonprobate transfer, and relies on the existing probate administration mechanism to implement it. A creditor would have to commence a probate to obtain satisfaction, but that is no different from the situation today. Again, the availability of the remedy in many cases would make its use unnecessary.

The next step toward effective treatment of nonprobate transfer liability would be a simplified and abbreviated procedure — of the estate tax proration type — that would avoid the need to open a probate for the sole purpose of establishing liability or forcing prompt creditor claims.

An alternate approach that would simplify challenges presented by comprehensive treatment of nonprobate transfer liability is to limit coverage of the statute to the decedent’s inter vivos trust. An integrated approach to liability of the

decedent’s estate and trust for nonprobate transfers and family protections would
pick up the bulk of the decedent’s property in the ordinary case. The logistics of
such an approach would be straightforward, since the administrative mechanisms
are already in place in the probate and trust laws for dealing with creditor claims
systematically. Some nonprobate property would escape liability, but at least there
would be a greater measure of fairness in the system than at present.
Thus, even if the comprehensive treatment of liability proposed in this study is
not attainable, there are many improvements that may be made to the law in the
interest of clarity, uniformity, and fairness. Throughout this study worthwhile
procedures found in existing law are identified as possible models for
improvement of the law governing nonprobate transfer liability.
The study also identifies a few major reforms that would be desirable but that
are not recommended because they go beyond liability of a nonprobate transfer
and would affect the entire probate and nonprobate transfer system. Principal
among these is development of a hardship exemption to replace the existing
scheme of exemptions and family protections. This study takes the position that
the first priority should be to conform and integrate nonprobate transfer liability
with probate transfer liability. Other reforms can come later.

PRINCIPAL RECOMMENDATIONS

LIABILITY FOR DEBTS

- All nonprobate transfers, including the decedent’s interest in joint tenancy
  property, should be liable for a debt of the decedent.
- Probate and nonprobate transfers, including the decedent’s inter vivos trust,
  should be liable on an equal basis.
- Liability of a probate or nonprobate transfer should be subject to general
  abatement principles of residuary, general, and specific gifts.
- Liability within each class of gift should be proportionate, based on the
  value of the property transferred.
- The decedent should be allowed to direct which transfers are primarily liable
  for debts. The decedent’s direction should determine rights as between
  beneficiaries but should not prejudice a creditor’s right to recover against
  any of the decedent’s transfers.
- A secured creditor should be able to satisfy the debt from the security
  regardless of the decedent’s direction of transfers primarily liable.
- If a creditor is satisfied from a transfer other than that directed by the
  decedent, the beneficiary of the property should be entitled to exoneration
  from that directed by the decedent.
- Existing exemptions from liability of a probate transfer, implemented via the
  family protection mechanism, should be extended to nonprobate transfers.
• Liability should be imposed on the transferee rather than on the property transferred.
• Liability should be limited to the net value (over liens and encumbrances) of the property interest received by the transferee, valued as of the date of the transfer or receipt of the property.

ENFORCEMENT PROCEDURE

• The statutes should make clear that the personal representative has the authority and the duty to allocate liability to nonprobate transfers in the regular course of administration of the estate, that nonprobate transfer liability is proportionate with probate transfer liability, that a nonprobate transferee is an interested person entitled to notice, and that the personal representative must deal with the nonprobate transfer on the same basis as a probate transfer, including the same fiduciary obligations. A nonprobate transferee should be entitled to commence a probate proceeding. Valuation of a nonprobate transfer should be based on the transferee’s affidavit of value, subject to challenge by an interested person. The probate jurisdiction of the superior court should be expanded for the purpose of resolving a valuation dispute.
• The trust claim procedure should be expanded so that, if it is invoked by the trustee, the trustee will have the authority and duty to apportion liability among probate and nonprobate property. The trustee in the exercise of this authority should have the same fiduciary obligations to probate and nonprobate transfers and transferees as it does to trust property and beneficiaries.
• The probate and trust claim procedures should be supplemented by a procedure dedicated to discharge of the decedent’s debts where there is no probate or trust claim proceeding. The procedure should be modeled after the estate tax proration procedure. The procedure should be invoked by any interested person but should be suspended if a probate or trust claim proceeding is commenced; a creditor should be precluded from commencing a probate proceeding. The procedure should require notice to creditors and to all the decedent’s probate and nonprobate transferees. It should provide for allocation of the decedent’s debts among probate and nonprobate transferees.
• Expenses of administration should be assessed against a nonprobate transferee only to the extent the expenses were attributable to enforcement of the liability against that transferee.
• The one year statute of limitations for a decedent’s debts should apply to nonprobate transferee liability. A four month claim filing requirement should apply to a creditor notified under one of the liability allocation procedures.
• If the personal representative is unable to collect from a transferee to which liability has been apportioned, the uncollectible amount should be equitably prorated among others liable. A transferee required to pay a greater share should have a reimbursement right against a transferee that fails to pay its share. The statute of limitations for enforcement of the reimbursement right
should be the statute applicable to a cause of action or to enforcement of a judgment, depending on whether the proration was by court order or by fiduciary determination.

- The statute of limitations for enforcement of a liability assessment should be the statute applicable to enforcement of a judgment in the case of assessment by a court order and the statute applicable to a cause of action in the case of an assessment by administrative allocation.

- California should impose liability on a nonprobate transferee whether domiciled within or without the state and should recognize imposition of liability by a comparable procedure of an out of state court.

- The new law should have a one year deferred operative date and should apply to a nonprobate transfer that occurs on the death of a person thereafter.

**LIABILITY FOR FAMILY PROTECTIONS**

- The family protection statutes should be extended to nonprobate transfers. This has already been done for the small estate set-aside and to a limited extent for omitted spouse and child protections.

- The procedure for applying a nonprobate transfer to a decedent’s debts should also be used for family protection.

- It should be made clear that the abatement statute does not apply to exempt property and probate homestead set asides.

- It should be made clear that family protection of a nonprobate transfer is exempt to the same extent as a probate transfer.

**SECONDARY RECOMMENDATIONS**

**IMPLEMENTING RECOMMENDATIONS**

- “Nonprobate transfer” should be broadly defined for the purpose of applying liability and family protections. If probate and nonprobate transfers are treated together, a definition is unnecessary.

- A person representing the decedent in defending against a creditor’s claim or cause of action should be entitled to assert any defense, cross-complaint, or setoff that would have been available to the decedent.

- The rule of Probate Code Sections 11446 (probate) and 19326 (trust) exempting the surviving spouse’s share of marital property from payment of the decedent’s funeral expenses and expenses of last illness should be extended to other nonprobate transfers.

- The limitation on liability of a nonprobate transferee based on the value of the property should incorporate a formula derived from Probate Code Section 13112(b) that takes into account — in addition to fair market value — liens, encumbrances, income, and interest.

- If liability is imposed on nonprobate property rather than on a nonprobate transferee, bona fide purchaser protection should be added.
• If liability is imposed on nonprobate property rather than on a nonprobate transferee, the statute should include a formula for recovery of the property or its value if a probate proceeding is later commenced, based on Probate Code Section 13111.

• If liability is imposed on nonprobate property rather than on a nonprobate transferee, the statute should include a provision based on Probate Code Section 13206 for dealing with improvements made on property that is subsequently required to be restored to the probate estate.

• The spousal allocation of debts mechanism for discovery of property not within the control of the personal representative should be generalized for nonprobate liability.

• The family protections, including the possession of the family dwelling and exempt property and family allowance, should be extended to trust administration.

• Probate Code Section 5003 should be broadened to protect a fiduciary against claims of the decedent’s creditors and to allow the personal representative or other fiduciary making an allocation of liability to place a hold on the transfer.

**CONFORMING REVISIONS**

• The proportionate liability principle applied by California law to several types of nonprobate transfers should be conformed to general abatement principles.

• The rule of the trust law, power of appointment law, and other California statutes that make specific nonprobate transfers liable if the probate estate is insufficient should be conformed to the rule of equal liability among probate and nonprobate property.

• The Medi-Cal claim recovery process should be excluded from coverage of the general nonprobate liability statute.

• The various small estate and spousal nonprobate liability procedures — e.g., Prob. Code §§ 13100 (affidavit procedure for collection or transfer of personal property), 13200 (affidavit procedure for real property of small value), 13500 (passage of property to surviving spouses without administration) — should be integrated into the general nonprobate liability statute.

• The Uniform Fraudulent Transfer Law should make clear that liability of a nonprobate transfer for a decedent’s debts is based on statutory liability and not on fraudulent transfer law. That law should continue to apply to a transfer not covered by the nonprobate transfer liability scheme.

• Probate Code Section 9653, relating to recovery of a gift made in view of impending death or a nonprobate vehicle transfer for the benefit of creditors, should make property liable for debts and family protections on an equal basis with probate property.
• Code of Civil Procedure Section 377.40 should allow a cause of action to be asserted against the representative appointed to allocate nonprobate transfer liability.

• In Code of Civil Procedure Section 377.41 the “to the extent provided by statute” limitation should be replaced by a general provision imposing liability on a nonprobate transferee.

• The definition of “decedent’s successor in interest” in Code of Civil Procedure Section 377.11 should be conformed to revisions affecting litigation on a cause of action by or against a decedent.

• Code of Civil Procedure Section 366.2 should make clear it applies to all causes against a decedent, including nonprobate transfer liability.

• Code of Civil Procedure Section 686.020 and Probate Code Section 9300 should make clear enforcement is not limited to property in the decedent’s “estate.”

• Probate Code Section 5000 should cross-refer to the nonprobate transfer liability scheme.

OTHER RECOMMENDED REVISIONS

PROBATE LIABILITY STATUTES

• A court order allocating a debt between the decedent’s estate and surviving spouse under Probate Code Section 11444(b)(5) should bind creditors.

• The conflicts between Family Code and Probate Code provisions governing liability of probate and nonprobate marital property should be resolved by statute.

NONPROBATE LIABILITY STATUTES

Secured Debts

• A nonprobate beneficiary that discharges a general or nonconsensual lien against property received by that beneficiary should be entitled to exoneration from the estate.

• Joint tenancy property should pass subject to liens on the decedent’s interest.

Unsecured Debts

• Code of Civil Procedure Section 686.020 and Probate Code Section 9300 should make clear that a judgment creditor may not enforce the judgment directly against nonprobate property.

• Probate Code Section 7664 (summary disposition of small estate) should provide that a person subject to a creditor’s claim may assert any cross-complaint or setoff that would have been available to the decedent.
The proportionate liability principle applied by California law to a few types of nonprobate transfers (e.g., Prob. Cod §§ 682 (power of appointment), 19402 (trust)), should be conformed to general abatement principles.

A summary court procedure, similar to the procedure available in a probate proceeding for allocation of debts between the estate and surviving spouse, should be made available for allocation of debts between nonprobate transfers and the surviving spouse.

**General Provisions**

The one year statute of limitations should override the fraudulent transfer limitation period that would otherwise apply to nonprobate transfer liability.

The court should be authorized to name a guardian ad litem or special administrator to represent the decedent’s interests in litigation (including exercise of the decedent’s evidentiary privileges). The decedent’s beneficiaries should be given notice and an opportunity to be heard on the representative to be appointed. A beneficiary should be bound by actions of the representative, including any settlement of the litigation subject, in the event of challenge, to court approval of an action that is not arbitrary, capricious, or fraudulent. Liability for reasonable expenses of the guardian ad litem or special administrator, as determined by the court, should be assessed among nonprobate transferees proportionately, on the same basis as their liability for the decedent’s debts.

The privilege statutes should provide that where the decedent’s successor in interest conducts litigation on the decedent’s behalf, the successor in interest is entitled to exercise the decedent’s evidentiary privileges that survive the decedent’s death with respect to that litigation. If the court names a guardian ad litem or special administrator to represent the decedent’s interests in litigation, that person should be authorized to exercise the decedent’s evidentiary privileges and should be designated a joint holder of the privilege for purposes of waiver. The fiduciary obligation of the decedent’s representative should be broadened to include protection of all property, probate and nonprobate.

If probate and nonprobate property is not made equally liable, a creditor should be allowed to proceed immediately against a trustee, with the trustee subrogated to the creditor’s claim. The trustee should be authorized to proceed against other property in the decedent’s estate or commence a probate proceeding if none is pending.

A trustee or other fiduciary should have a duty to retain property if notified of a creditor’s claim.

The trust claim procedure should be clarified as to liabilities as between trusts.

Additional procedural detail is needed in the statute governing liability of trust distributees, particularly relating to joinder of other creditors and apportionment of debts among distributees.

Probate and trust property should be equally liable even if probate and nonprobate property generally is not made equally liable.
• Either Probate Code Section 21101 should prescribe the application of the entire Division 11, or the abatement statute (Part 4) should make clear its application to all instruments.

• Probate Code Section 21402(a)(1) (abatement) should refer to property not disposed of by “an” instrument. A parallel change should be made to Probate Code Section 21400 (if “the” instrument provides for abatement).

FAMILY PROTECTION STATUTES

• The non-traditional differentiation of a probate from a nonprobate transfer under the small estate set-aside should be conformed to standard nonprobate transfer categories. The set-aside should be satisfied under standard abatement principles and should be subject to creditor claims under standard priority principles. If a comprehensive nonprobate transfer liability procedure is developed, that procedure should be made available for enforcement of liability under the small estate set-aside statute.
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CALIFORNIA STATUTES

Code Civ. Proc. § 366.2. Statute of limitations for claims against decedent

366.2. (a) If a person against whom an action may be brought on a liability of
the person, whether arising in contract, tort, or otherwise, and whether accrued or
not accrued, dies before the expiration of the applicable limitations period, and the
cause of action survives, an action may be commenced within one year after the
date of death, and the limitations period that would have been applicable does not
apply.

(b) The limitations period provided in this section for commencement of an
action shall not be tolled or extended for any reason except as provided in any of
the following, where applicable:

(1) Sections 12, 12a, and 12b of this code.
(2) Part 4 (commencing with Section 9000) of Division 7 of the Probate Code
(creditor claims in administration of estates of decedents).
(3) Part 8 (commencing with Section 19000) of Division 9 of the Probate Code
(payments of claims, debts, and expenses from revocable trust of deceased settlor).
(4) Part 3 (commencing with Section 21300) of Division 11 of the Probate Code
(no contest clauses).
(c) This section applies to actions brought on liabilities of persons dying on or
after January 1, 1993.


Article 1. Definitions

377.10. (a) If the decedent died leaving a will, the sole beneficiary or all of the
beneficiaries who succeed to a cause of action, or to a particular item of property
that is the subject of a cause of action, under the decedent’s will.

(b) If the decedent died without leaving a will, the sole person or all of the
persons who succeed to a cause of action, or to a particular item of property that is
the subject of a cause of action, under Sections 6401 and 6402 of the Probate Code
or, if the law of a sister state or foreign nation governs succession to the cause of
action or particular item of property, under the law of the sister state or foreign
nation.

377.11. For the purposes of this chapter, “decedent’s successor in interest”
means the beneficiary of the decedent’s estate or other successor in interest who
succeeds to a cause of action or to a particular item of the property that is the
subject of a cause of action.
Article 2. Survival and Continuation

377.20. (a) Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person’s death, but survives subject to the applicable limitations period.

(b) This section applies even though a loss or damage occurs simultaneously with or after the death of a person who would have been liable if the person’s death had not preceded or occurred simultaneously with the loss or damage.

377.21. A pending action or proceeding does not abate by the death of a party if the cause of action survives.

377.22. Nothing in this chapter shall be construed as affecting the assignability of causes of action.

Article 3. Decedent’s Cause of Action

377.30. A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent’s successor in interest, subject to Chapter 1 (commencing with Section 7000) of Part 1 of Division 7 of the Probate Code, and an action may be commenced by the decedent’s personal representative or, if none, by the decedent’s successor in interest.

377.31. On motion after the death of a person who commenced an action or proceeding, the court shall allow a pending action or proceeding that does not abate to be continued by the decedent’s personal representative or, if none, by the decedent’s successor in interest.

377.32. (a) The person who seeks to commence an action or proceeding or to continue a pending action or proceeding as the decedent’s successor in interest under this article, shall execute and file an affidavit or a declaration under penalty of perjury under the laws of this state stating all of the following:

(1) The decedent’s name.

(2) The date and place of the decedent’s death.

(3) “No proceeding is now pending in California for administration of the decedent’s estate.”

(4) If the decedent’s estate was administered, a copy of the final order showing the distribution of the decedent’s cause of action to the successor in interest.

(5) Either of the following, as appropriate, with facts in support thereof:

(A) “The affiant or declarant is the decedent’s successor in interest (as defined in Section 377.11 of the California Code of Civil Procedure) and succeeds to the decedent’s interest in the action or proceeding.”

(B) “The affiant or declarant is authorized to act on behalf of the decedent’s successor in interest (as defined in Section 377.11 of the California Code of Civil Procedure) with respect to the decedent’s interest in the action or proceeding.”
(6) “No other person has a superior right to commence the action or proceeding or to be substituted for the decedent in the pending action or proceeding.”

(7) “The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct.”

(b) Where more than one person executes the affidavit or declaration under this section, the statements required by subdivision (a) shall be modified as appropriate to reflect that fact.

(c) A certified copy of the decedent’s death certificate shall be attached to the affidavit or declaration.

377.33. The court in which an action is commenced or continued under this article may make any order concerning parties that is appropriate to ensure proper administration of justice in the case, including appointment of the decedent’s successor in interest as a special administrator or guardian ad litem.

377.34. In an action or proceeding by a decedent’s personal representative or successor in interest on the decedent’s cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.

377.35. On or after January 1, 1993, this article applies to the commencement of an action or proceeding the decedent was entitled to commence, and to the continuation of an action or proceeding commenced by the decedent, regardless of whether the decedent died before, on, or after January 1, 1993.

Article 4. Cause of Action Against Decedent

377.40. Subject to Part 4 (commencing with Section 9000) of Division 7 of the Probate Code governing creditor claims, a cause of action against a decedent that survives may be asserted against the decedent’s personal representative or, to the extent provided by statute, against the decedent’s successor in interest.

377.41. On motion, the court shall allow a pending action or proceeding against the decedent that does not abate to be continued against the decedent’s personal representative or, to the extent provided by statute, against the decedent’s successor in interest, except that the court may not permit an action or proceeding to be continued against the personal representative unless proof of compliance with Part 4 (commencing with Section 9000) of Division 7 of the Probate Code governing creditor claims is first made.

377.42. In an action or proceeding against a decedent’s personal representative or, to the extent provided by statute, against the decedent’s successor in interest, on a cause of action against the decedent, all damages are recoverable that might
have been recovered against the decedent had the decedent lived except damages recoverable under Section 3294 of the Civil Code or other punitive or exemplary damages.

377.43. This article applies to the commencement on or after January 1, 1993, of an action or proceeding against the decedent’s personal representative or successor in interest, or to the making of a motion on or after January 1, 1993, to continue a pending action or proceeding against the decedent’s personal representative or successor in interest, regardless of whether the decedent died before, on, or after January 1, 1993.

Article 5. Insured Claims

377.50. An action to establish the decedent’s liability for which the decedent was protected by insurance may be commenced or continued against the decedent’s estate as provided in Chapter 1 (commencing with Section 550) of Part 13 of Division 2 of the Probate Code.

Article 6. Wrongful Death

377.60. A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent’s personal representative on their behalf:

(a) The decedent’s surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.

(b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, “putative spouse” means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

(c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent’s death, the minor resided for the previous 180 days in the decedent’s household and was dependent on the decedent for one-half or more of the minor’s support.

(d) This section applies to any cause of action arising on or after January 1, 1993.

(e) The addition of this section by Chapter 178 of the Statutes of 1992 was not intended to adversely affect the standing of any party having standing under prior law, and the standing of parties governed by that version of this section as added by Chapter 178 of the Statutes of 1992 shall be the same as specified herein as amended by Chapter 563 of the Statutes of 1996.
(f)(1) For the purpose of this section, “domestic partner” means a person who, at the time of the decedent’s death, was the domestic partner of the decedent in a registered domestic partnership established in accordance with subdivision (b) of Section 297 of the Family Code.

(2) Notwithstanding paragraph (1), for a death occurring prior to January 1, 2002, a person may maintain a cause of action pursuant to this section as a domestic partner of the decedent by establishing the factors listed in paragraphs (1) to (6), inclusive, of subdivision (b) of Section 297 of the Family Code, as it read pursuant to Section 3 of Chapter 893 of the Statutes of 2001, prior to its becoming inoperative on January 1, 2005.

(3) The amendments made to this subdivision during the 2003-04 Regular Session of the Legislature are not intended to revive any cause of action that has been fully and finally adjudicated by the courts, or that has been settled, or as to which the applicable limitations period has run.

377.61. In an action under this article, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under Section 377.34. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action.

377.62. (a) An action under Section 377.30 may be joined with an action under Section 377.60 arising out of the same wrongful act or neglect.

(b) An action under Section 377.60 and an action under Section 377.31 arising out of the same wrongful act or neglect may be consolidated for trial as provided in Section 1048.

Evid. Code §§ 950-962. Lawyer-client privilege

950. As used in this article, “lawyer” means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

951. As used in this article, “client” means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.

952. As used in this article, “confidential communication between client and lawyer” means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.
953. As used in this article, “holder of the privilege” means:
   (a) The client, if the client has no guardian or conservator.
   (b) A guardian or conservator of the client, if the client has a guardian or
        conservator.
   (c) The personal representative of the client if the client is dead, including a
        personal representative appointed pursuant to Section 12252 of the Probate Code.
   (d) A successor, assign, trustee in dissolution, or any similar representative of a
        firm, association, organization, partnership, business trust, corporation, or public
        entity that is no longer in existence.

954. Subject to Section 912 and except as otherwise provided in this article, the
client, whether or not a party, has a privilege to refuse to disclose, and to prevent
another from disclosing, a confidential communication between client and lawyer
if the privilege is claimed by:
   (a) The holder of the privilege;
   (b) A person who is authorized to claim the privilege by the holder of the
        privilege; or
   (c) The person who was the lawyer at the time of the confidential
        communication, but such person may not claim the privilege if there is no holder
        of the privilege in existence or if he is otherwise instructed by a person authorized
        to permit disclosure.

The relationship of attorney and client shall exist between a law corporation as
defined in Article 10 (commencing with Section 6160) of Chapter 4 of Division 3
of the Business and Professions Code and the persons to whom it renders
professional services, as well as between such persons and members of the State
Bar employed by such corporation to render services to such persons. The word
“persons” as used in this subdivision includes partnerships, corporations, limited
liability companies, associations and other groups and entities.

955. The lawyer who received or made a communication subject to the privilege
under this article shall claim the privilege whenever he is present when the
communication is sought to be disclosed and is authorized to claim the privilege
under subdivision (c) of Section 954.

956. There is no privilege under this article if the services of the lawyer were
sought or obtained to enable or aid anyone to commit or plan to commit a crime or
a fraud.

956.5. There is no privilege under this article if the lawyer reasonably believes
that disclosure of any confidential communication relating to representation of a
client is necessary to prevent a criminal act that the lawyer reasonably believes is
likely to result in the death of, or substantial bodily harm to, an individual.

957. There is no privilege under this article as to a communication relevant to an
issue between parties all of whom claim through a deceased client, regardless of
whether the claims are by testate or intestate succession, nonprobate transfer, or inter vivos transaction.

958. There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.

959. There is no privilege under this article as to a communication relevant to an issue concerning the intention or competence of a client executing an attested document of which the lawyer is an attesting witness, or concerning the execution or attestation of such a document.

960. There is no privilege under this article as to a communication relevant to an issue concerning the intention of a client, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the client, purporting to affect an interest in property.

961. There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a client, now deceased, purporting to affect an interest in property.

962. Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them, nor the successor in interest of any of them, may claim a privilege under this article as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between one of such clients (or his successor in interest) and another of such clients (or his successor in interest).

**Prob. Code §§ 550-555. Liability of decedent covered by insurance**

550. (a) Subject to the provisions of this chapter, an action to establish the decedent’s liability for which the decedent was protected by insurance may be commenced or continued against the decedent’s estate without the need to join as a party the decedent’s personal representative or successor in interest.

(b) The remedy provided in this chapter is cumulative and may be pursued concurrently with other remedies.

551. Notwithstanding Section 366.2 of the Code of Civil Procedure, if the limitations period otherwise applicable to the action has not expired at the time of the decedent’s death, an action under this chapter may be commenced within one year after the expiration of the limitations period otherwise applicable.

552. (a) An action under this chapter shall name as the defendant, “Estate of (name of decedent), Deceased.” Summons shall be served on a person designated in writing by the insurer or, if none, on the insurer. Further proceedings shall be in the name of the estate, but otherwise shall be conducted in the same manner as if the action were against the personal representative.
(b) On motion of an interested person, or on its own motion, the court in which
the action is pending may, for good cause, order the appointment and substitution
of a personal representative as the defendant.
(c) An action against the estate of the decedent under this chapter may be
consolidated with an action against the personal representative.

553. The insurer may deny or otherwise contest its liability in an action under
this chapter or by an independent action. Unless the personal representative is
joined as a party, a judgment in the action under this chapter or in the independent
action does not adjudicate rights by or against the estate.

554. (a) Except as provided in subdivision (b), either the damages sought in an
action under this chapter shall be within the limits and coverage of the insurance,
or recovery of damages outside the limits or coverage of the insurance shall be
waived. A judgment in favor of the plaintiff in the action is enforceable only from
the insurance coverage and not against property in the estate.
(b) Where the amount of damages sought in the action exceeds the coverage of
the insurance, subdivision (a) does not apply if both of the following conditions
are satisfied:
(1) The personal representative is joined as a party to the action.
(2) The plaintiff files a claim in compliance with Section 9390.

555. (a) This chapter does not apply to an action commenced before July 1,
1989.
(b) The applicable law in effect before July 1, 1989, continues to apply to an
action commenced before July 1, 1989, notwithstanding its repeal by Chapter

Prob. Code §§ 5000-5003. Nonprobate transfers
5000. (a) A provision for a nonprobate transfer on death in an insurance policy,
contract of employment, bond, mortgage, promissory note, certificated or
uncertificated security, account agreement, custodial agreement, deposit
agreement, compensation plan, pension plan, individual retirement plan, employee
benefit plan, trust, conveyance, deed of gift, marital property agreement, or other
written instrument of a similar nature is not invalid because the instrument does
not comply with the requirements for execution of a will, and this code does not
invalidate the instrument.
(b) Included within subdivision (a) are the following:
(1) A written provision that money or other benefits due to, controlled by, or
owned by a decedent before death shall be paid after the decedent’s death to a
person whom the decedent designates either in the instrument or in a separate
writing, including a will, executed either before or at the same time as the
instrument, or later.
(2) A written provision that money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promisor before payment or demand.

(3) A written provision that any property controlled by or owned by the decedent before death that is the subject of the instrument shall pass to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(c) Nothing in this section limits the rights of creditors under any other law.

5002. Notwithstanding any other provision of this part, a holder of property under an instrument of a type described in Section 5000 is not required to receive, hold, or transfer the property in compliance with a provision for a nonprobate transfer on death executed by a person who has an interest in the property if either (1) the person is not authorized by the terms of the instrument to execute a provision for transfer of the property, or (2) the provision for transfer of the property does not otherwise satisfy the terms of the instrument.

5003. (a) A holder of property under an instrument of a type described in Section 5000 may transfer the property in compliance with a provision for a nonprobate transfer on death that satisfies the terms of the instrument, whether or not the transfer is consistent with the beneficial ownership of the property as between the person who executed the provision for transfer of the property and other persons having an interest in the property or their successors, and whether or not the transfer is consistent with the rights of the person named as beneficiary.

(b) Except as provided in this subdivision, no notice or other information shown to have been available to the holder of the property affects the right of the holder to the protection provided by subdivision (a). The protection provided by subdivision (a) does not extend to a transfer made after either of the following events:

(1) The holder of the property has been served with a contrary court order.

(2) The holder of the property has been served with a written notice of a person claiming an adverse interest in the property. However, this paragraph does not apply to a pension plan to the extent the transfer is a periodic payment pursuant to the plan.

(c) The protection provided by this section does not affect the rights of the person who executed the provision for transfer of the property and other persons having an interest in the property or their successors in disputes among themselves concerning the beneficial ownership of the property.

(d) The protection provided by this section is not exclusive of any protection provided the holder of the property by any other provision of law.

(e) A person shall not serve notice under paragraph (2) of subdivision (b) in bad faith. If the court in an action or proceeding relating to the rights of the parties determines that a person has served notice under paragraph (2) of subdivision (b)
in bad faith, the court shall award against the person the cost of the action or proceeding, including a reasonable attorney’s fee, and the damages caused by the service.

**Prob. Code § 6611. Small estate set-aside**

6611. (a) Subject to the limitations and conditions specified in this section, the person or persons in whom title vested pursuant to Section 6009 are personally liable for the unsecured debts of the decedent.

(b) The personal liability of a person under this section does not exceed the fair market value at the date of the decedent’s death of the property title to which vested in that person pursuant to Section 6009, less the total of all of the following:

1. The amount of any liens and encumbrances on that property.
2. The value of any probate homestead interest set apart under Section 6520 out of that property.
3. The value of any other property set aside under Section 6510 out of that property.

(c) In any action or proceeding based upon an unsecured debt of the decedent, the surviving spouse of the decedent, the child or children of the decedent, or the guardian of the minor child or children of the decedent, may assert any defense, cross-complaint, or setoff which would have been available to the decedent if the decedent had not died.

(d) If proceedings are commenced in this state for the administration of the estate of the decedent and the time for filing claims has commenced, any action upon the personal liability of a person under this section is barred to the same extent as provided for claims under Part 4 (commencing with Section 9000) of Division 7, except as to the following:

1. Creditors who commence judicial proceedings for the enforcement of the debt and serve the person liable under this section with the complaint therein prior to the expiration of the time for filing claims.
2. Creditors who have or who secure an acknowledgment in writing of the person liable under this section that that person is liable for the debts.
3. Creditors who file a timely claim in the proceedings for the administration of the estate of the decedent.

(e) Section 366.2 of the Code of Civil Procedure applies in an action under this section.

**Prob. Code § 7664. Summary disposition of small estate**

7664. A person to whom property is distributed under this procedure is personally liable for the unsecured debts of the decedent. Such a debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. In an action based on the debt, the person may assert any defenses available to the decedent if the decedent had
not died. The aggregate personal liability of a person under this section shall not exceed the fair market value of the property distributed to the person, valued as of the date of the distribution, less the amount of any liens and encumbrances on the property on that date. Section 366.2 of the Code of Civil Procedure applies in an action under this section.

**Prob. Code § 9392. Omitted creditor**

9392. (a) Subject to subdivision (b), a person to whom property is distributed is personally liable for the claim of a creditor, without a claim first having been filed, if all of the following conditions are satisfied:

1. The identity of the creditor was known to, or reasonably ascertainable by, a general personal representative within four months after the date letters were first issued to the personal representative, and the claim of the creditor was not merely conjectural.
2. Notice of administration of the estate was not given to the creditor under Chapter 2 (commencing with Section 9050) and neither the creditor nor the attorney representing the creditor in the matter has actual knowledge of the administration of the estate before the time the court made an order for final distribution of the property.
3. The statute of limitations applicable to the claim under Section 366.2 of the Code of Civil Procedure has not expired at the time of commencement of an action under this section.

(b) Personal liability under this section is applicable only to the extent the claim of the creditor cannot be satisfied out of the estate of the decedent and 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 estate bears to the total value of all property distributed to all persons out of the estate. Personal liability under this section for all claims of all creditors shall not exceed the value of the property distributed to the person out of the estate. As used in this section, the value of property is the fair market value of the property on the date of the order for distribution, less the amount of any liens and encumbrances on the property at that time.

(c) Nothing in this section affects the rights of a purchaser or encumbrancer of property in good faith and for value from a person who is personally liable under this section.

**Prob. Code § 9653. Fraudulent transfer, gift causa mortis, nonprobate transfer of vehicle**

9653. (a) On application of a creditor of the decedent or the estate, the personal representative shall commence and prosecute an action for the recovery of real or personal property of the decedent for the benefit of creditors if the personal representative has insufficient assets to pay creditors and the decedent during lifetime did any of the following with respect to the property:
(1) Made a conveyance of the property, or any right or interest in the property, that is fraudulent as to creditors under the Uniform Fraudulent Transfer Act (Chapter 1 (commencing with Section 3439) of Title 2 of Part 2 of Division 4 of the Civil Code).

(2) Made a gift of the property in view of impending death.

(3) Made a direction to transfer a vehicle, undocumented vessel, manufactured home, mobilehome, commercial coach, truck camper, or floating home to a designated beneficiary on the decedent’s death pursuant to Section 18102.2 of the Health and Safety Code, or Section 5910.5 or 9916.5 of the Vehicle Code, and the property has been transferred as directed.

(b) A creditor making application under this section shall pay such part of the costs and expenses of the suit and attorney’s fees, or give an undertaking to the personal representative for that purpose, as the personal representative and the creditor agree, or, absent an agreement, as the court or judge orders.

(c) The property recovered under this section shall be sold for the payment of debts in the same manner as if the decedent had died seized or possessed of the property. The proceeds of the sale shall be applied first to payment of the costs and expenses of suit, including attorney’s fees, and then to payment of the debts of the decedent in the same manner as other property in possession of the personal representative. After all the debts of the decedent have been paid, the remainder of the proceeds shall be paid to the person from whom the property was recovered. The property may be sold in its entirety or in such portion as necessary to pay the debts.


11440. If it appears that a debt of the decedent has been paid or is payable in whole or in part by the surviving spouse, or that a debt of the surviving spouse has been paid or is payable in whole or in part from property in the decedent’s estate, the personal representative, the surviving spouse, or a beneficiary may, at any time before an order for final distribution is made, petition for an order to allocate the debt.

11441. The petition shall include a statement of all of the following:

(a) All debts of the decedent and surviving spouse known to the petitioner that are alleged to be subject to allocation and whether paid in whole or part or unpaid.

(b) The reason why the debts should be allocated.

(c) The proposed allocation and the basis for allocation alleged by the petitioner.

11442. If it appears from the petition that allocation would be affected by the value of the separate property of the surviving spouse and any community property and quasi-community property not administered in the estate and if an inventory and appraisal of the property has not been provided by the surviving spouse, the court shall make an order to show cause why the information should not be provided.
11443. The petitioner shall give notice of the hearing as provided in Section 1220, together with a copy of the petition and the order to show cause, if any.

11444. (a) The personal representative and the surviving spouse may provide for allocation by agreement and, on a determination by the court that the agreement substantially protects the rights of interested persons, the allocation provided in the agreement shall be ordered by the court.

(b) In the absence of an agreement, each debt subject to allocation shall first be characterized by the court as separate or community, in accordance with the laws of the state applicable to marital dissolution proceedings. Following that characterization, the debt or debts shall be allocated as follows:

(1) Separate debts of either spouse shall be allocated to that spouse’s separate property assets, and community debts shall be allocated to the spouses’ community property assets.

(2) If a separate property asset of either spouse is subject to a secured debt that is characterized as that spouse’s separate debt, and the net equity in that asset available to satisfy that secured debt is less than that secured debt, the unsatisfied portion of that secured debt shall be treated as an unsecured separate debt of that spouse and allocated to the net value of that spouse’s other separate property assets.

(3) If the net value of either spouse’s separate property assets is less than that spouse’s unsecured separate debt or debts, the unsatisfied portion of the debt or debts shall be allocated to the net value of that spouse’s one-half share of the community property assets. If the net value of that spouse’s one-half share of the community property assets is less than that spouse’s unsatisfied unsecured separate debt or debts, the remaining unsatisfied portion of the debt or debts shall be allocated to the net value of the other spouse’s one-half share of the community property assets.

(4) If a community property asset is subject to a secured debt that is characterized as a community debt, and the net equity in that asset available to satisfy that secured debt is less than that secured debt, the unsatisfied portion of that secured debt shall be treated as an unsecured community debt and allocated to the net value of the other community property assets.

(5) If the net value of the community property assets is less than the unsecured community debt or debts, the unsatisfied portion of the debt or debts shall be allocated equally between the separate property assets of the decedent and the surviving spouse. If the net value of either spouse’s separate property assets is less than that spouse’s share of the unsatisfied portion of the unsecured community debt or debts, the remaining unsatisfied portion of the debt or debts shall be allocated to the net value of the other spouse’s separate property assets.

(c) For purposes of this section:

(1) The net value of either spouse’s separate property asset shall refer to its fair market value as of the date of the decedent’s death, minus the date-of-death
balance of any liens and encumbrances on that asset that have been characterized as that spouse’s separate debts.

(2) The net value of a community property asset shall refer to its fair market value as of the date of the decedent’s death, minus the date-of-death balance of any liens and encumbrances on that asset that have been characterized as community debts.

(3) In the case of a nonrecourse debt, the amount of that debt shall be limited to the net equity in the collateral, based on the fair market value of the collateral as of the date of the decedent’s death, that is available to satisfy that debt. For the purposes of this paragraph, “nonrecourse debt” means a debt for which the debtor’s obligation to repay is limited to the collateral securing the debt, and for which a deficiency judgment against the debtor is not permitted by law.

(d) Notwithstanding the foregoing provisions of this section, the court may order a different allocation of debts between the decedent’s estate and the surviving spouse if the court finds a different allocation to be equitable under the circumstances.

(e) Nothing contained in this section is intended to impair or affect the rights of third parties. If a personal representative or the surviving spouse incurs any damages or expense, including attorney’s fees, on account of the nonpayment of a debt that was allocated to the other party pursuant to subdivision (b), or as the result of a debt being misallocated due to fraud or intentional misrepresentation by the other party, the party incurring damages shall be entitled to recover from the other party for damages or expense deemed reasonable by the court that made the allocation.

On making a determination as provided in this chapter, the court shall make an order that:

(a) Directs the personal representative to make payment of the amounts allocated to the estate by payment to the surviving spouse or creditors.

(b) Directs the personal representative to charge amounts allocated to the surviving spouse against any property or interests of the surviving spouse that are in the possession or control of the personal representative. To the extent that property or interests of the surviving spouse in the possession or control of the personal representative are insufficient to satisfy the allocation, the court order shall summarily direct the surviving spouse to pay the allocation to the personal representative.

Notwithstanding any other statute, funeral expenses and expenses of last illness shall be charged against the estate of the decedent and shall not be allocated to, or charged against the community share of, the surviving spouse, whether or not the surviving spouse is financially able to pay the expenses and whether or not the surviving spouse or any other person is also liable for the expenses.
Prob. Code §§ 13109-13112. Affidavit Procedure for Collection or Transfer of Personal Property

13109. A person to whom payment, delivery, or transfer of the decedent’s property is made under this chapter is personally liable, to the extent provided in Section 13112, for the unsecured debts of the decedent. Any such debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. In any action based upon the debt, the person may assert any defenses, cross-complaints, or setoffs that would have been available to the decedent if the decedent had not died. Nothing in this section permits enforcement of a claim that is barred under Part 4 (commencing with Section 9000) of Division 7. Section 366.2 of the Code of Civil Procedure applies in an action under this section.

13110. (a) Except as provided in subdivision (b), each person to whom payment, delivery, or transfer of the decedent’s property is made under this chapter is personally liable to the extent provided in Section 13112 to any person having a superior right by testate or intestate succession from the decedent.

(b) In addition to any other liability the person has under this section and Sections 13109, 13111, and 13112, any person who fraudulently secures the payment, delivery, or transfer of the decedent’s property under this chapter is liable to the person having such a superior right for three times the fair market value of the property. For the purposes of this subdivision, the “fair market value of the property” is the fair market value of the property paid, delivered, or transferred to the person liable under this subdivision, valued as of the time the person liable under this subdivision presents the affidavit or declaration under this chapter to the holder of the decedent’s property, less any liens and encumbrances on that property at that time.

(c) An action to impose liability under this section is forever barred three years after the affidavit or declaration is presented under this chapter to the holder of the decedent’s property, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

13111. (a) Subject to the provisions of this section, if proceedings for the administration of the decedent’s estate are commenced in this state, or if the decedent’s personal representative has consented to the payment, transfer, or delivery of the decedent’s property under this chapter and the personal representative later requests that the property be restored to the estate, each person to whom payment, delivery, or transfer of the decedent’s property is made under this chapter is liable for:

(1) The restitution of the property to the estate if the person still has the property, together with (A) the net income the person received from the property and (B) if the person encumbered the property after it was delivered or transferred
to the person, the amount necessary to satisfy the balance of the encumbrance as of the date the property is restored to the estate.

(2) The restitution to the estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from the property and (B) interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For the purposes of this subdivision, the “fair market value of the property” is the fair market value, determined as of the time of the disposition of the property, of the property paid, delivered, or transferred to the person under this chapter, less any liens and encumbrances on the property at that time.

(b) Subject to subdivision (c) and subject to any additional liability the person has under Sections 13109 to 13112, inclusive, if the person fraudulently secured the payment, delivery, or transfer of the decedent’s property under this chapter, the person is liable under this section for restitution to the decedent’s estate of three times the fair market value of the property. For the purposes of this subdivision, the “fair market value of the property” is the fair market value, determined as of the time the person liable under this subdivision presents the affidavit or declaration under this chapter, of the property paid, delivered, or transferred to the person under this chapter, less the amount of any liens and encumbrances on the property at that time.

(c) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Section 13109 or 13110.

(d) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. In an action to enforce the liability under this section, the court’s judgment may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

(e) An action to enforce the liability under this section is forever barred three years after presentation of the affidavit or declaration under this chapter to the holder of the decedent’s property, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

(f) In the case of a nondomiciliary decedent, restitution under this section shall be made to the estate in an ancillary administration proceeding.

13112. (a) A person to whom payment, delivery, or transfer of the decedent’s property has been made under this chapter is not liable under Section 13109 or 13110 if proceedings for the administration of the decedent’s estate are commenced in this state, and the person satisfies the requirements of Section 13111.

(b) Except as provided in subdivision (b) of Section 13110, the aggregate of the personal liability of a person under Sections 13109 and 13110 shall not exceed the
fair market value, valued as of the time the affidavit or declaration is presented under this chapter, of the property paid, delivered, or transferred to the person under this chapter, less the amount of any liens and encumbrances on that property at that time, together with the net income the person received from the property and, if the property has been disposed of, interest on the fair market value of the property accruing from the date of disposition at the rate payable on a money judgment. For the purposes of this subdivision, “fair market value of the property” has the same meaning as defined in paragraph (2) of subdivision (a) of Section 13111.

**Prob. Code § 13156. Court order determining succession to property**

13156. (a) Subject to subdivisions (b), (c), and (d), the petitioner who receives the decedent’s property pursuant to an order under this chapter is personally liable for the unsecured debts of the decedent.

(b) The personal liability of any petitioner shall not exceed the fair market value at the date of the decedent’s death of the property received by that petitioner pursuant to an order under this chapter, less the amount of any liens and encumbrances on the property.

(c) In any action or proceeding based upon an unsecured debt of the decedent, the petitioner may assert any defense, cross-complaint, or setoff which would have been available to the decedent if the decedent had not died.

(d) Nothing in this section permits enforcement of a claim that is barred under Part 4 (commencing with Section 9000) of Division 7.

(e) Section 366.2 of the Code of Civil Procedure applies in an action under this section.

**Prob. Code §§ 13204-13207. Affidavit procedure for real property of small value**

13204. Each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is personally liable to the extent provided in Section 13207 for the unsecured debts of the decedent. Any such debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. In any action based upon the debt, the person may assert any defense, cross-complaint, or setoff that would have been available to the decedent if the decedent had not died. Nothing in this section permits enforcement of a claim that is barred under Part 4 (commencing with Section 9000) of Division 7. Section 366.2 of the Code of Civil Procedure applies in an action under this section.

13205. (a) Except as provided in subdivision (b), each person who is designated as a successor of the decedent in a certified copy of any affidavit issued under Section 13202 is personally liable to the extent provided in Section 13207 to any person having a superior right by testate or intestate succession from the decedent.
(b) In addition to any other liability the person has under this section and Sections 13204, 13206, and 13207, if the person fraudulently executed or filed the affidavit under this chapter, the person is liable to the person having a superior right for three times the fair market value of the property. For the purposes of this subdivision, the “fair market value of the property” is the fair market value, determined as of the time the certified copy of the affidavit was issued under Section 13202, of the property the person liable took under the certified copy of the affidavit to which the other person has a superior right, less any liens and encumbrances on the property at that time.

(c) An action to impose liability under this section is forever barred three years after the certified copy of the affidavit is issued under Section 13202, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

13206. (a) Subject to subdivisions (b), (c), (d), and (e), if proceedings for the administration of the decedent’s estate are commenced, or if the decedent’s personal representative has consented to use of the procedure provided by this chapter and the personal representative later requests that the property be restored to the estate, each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is liable for:

(1) The restitution to the decedent’s estate of the property the person took under the certified copy of the affidavit if the person still has the property, together with (A) the net income the person received from the property and (B) if the person encumbered the property after the certified copy of the affidavit was issued, the amount necessary to satisfy the balance of the encumbrance as of the date the property is restored to the estate.

(2) The restitution to the decedent’s estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from the property prior to disposing of it and (B) interest from the date of disposition at the rate payable on a money judgment on the fair market value of the property. For the purposes of this paragraph, the “fair market value of the property” is the fair market value, determined as of the time of the disposition of the property, of the property the person took under the certified copy of the affidavit, less the amount of any liens and encumbrances on the property at the time the certified copy of the affidavit was issued.

(b) Subject to subdivision (d), if the person fraudulently executed or filed the affidavit under this chapter, the person is liable under this section for restitution to the decedent’s estate of three times the fair market value of the property. For the purposes of this subdivision, the “fair market value of the property” is the fair market value, determined as of the time the certified copy of the affidavit was issued, of the property the person took under the certified copy of the affidavit, less the amount of any liens and encumbrances on the property at that time.
(c) Subject to subdivision (d), if proceedings for the administration of the
decedent’s estate are commenced and a person designated as a successor of the
decedent in a certified copy of an affidavit issued under Section 13202 made a
significant improvement to the property taken by the person under the certified
copy of the affidavit in the good faith belief that the person was the successor of
the decedent to that property, the person is liable for whichever of the following
the decedent’s estate elects:

1. The restitution of the property, as improved, to the estate of the decedent
   upon the condition that the estate reimburse the person making restitution for (A)
   the amount by which the improvement increases the fair market value of the
   property restored, determined as of the time of restitution, and (B) the amount paid
   by the person for principal and interest on any liens or encumbrances that were on
   the property at the time the certified copy of the affidavit was issued.

2. The restoration to the decedent’s estate of the fair market value of the
   property, determined as of the time of the issuance of the certified copy of the
   affidavit under Section 13202, less the amount of any liens and encumbrances on
   the property at that time, together with interest on the net amount at the rate
   payable on a money judgment running from the date of the issuance of the
   certified copy of the affidavit.

(d) The property and amount required to be restored to the estate under this
section shall be reduced by any property or amount paid by the person to satisfy a
liability under Section 13204 or 13205.

(e) An action to enforce the liability under this section may be brought only by
the personal representative of the estate of the decedent. In an action to enforce the
liability under this section, the court’s judgment may enforce the liability only to
the extent necessary to protect the interests of the heirs, devisees, and creditors of
the decedent.

(f) An action to enforce the liability under this section is forever barred three
years after the certified copy of the affidavit is issued under Section 13202, or
three years after the discovery of the fraud, whichever is later. The three-year
period specified in this subdivision is not tolled for any reason.

13207. (a) A person designated as a successor of the decedent in a certified copy
of an affidavit issued under Section 13202 is not liable under Section 13204 or
13205 if proceedings for the administration of the decedent’s estate are
commenced, or if the decedent’s personal representative has consented to use of
the procedure provided by this chapter and the personal representative later
requests that the property be restored to the estate, and the person satisfies the
requirements of Section 13206.

(b) Except as provided in subdivision (b) of Section 13205, the aggregate of the
personal liability of a person under Sections 13204 and 13205 shall not exceed the
sum of the following:
(1) The fair market value at the time of the issuance of the certified copy of the affidavit under Section 13202 of the decedent’s property received by that person under this chapter, less the amount of any liens and encumbrances on the property at that time.

(2) The net income the person received from the property.

(3) If the property has been disposed of, interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For the purposes of this paragraph, “fair market value of the property” has the same meaning as defined in paragraph (2) of subdivision (a) of Section 13206.

**Prob. Code §§ 13550-13554. Passage of property to surviving spouse without administration**

13550. Except as provided in Sections 11446, 13552, 13553, and 13554, 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.

13552. If proceedings are commenced in this state for the administration of the estate of the deceased spouse and the time for filing claims has commenced, any action upon the liability of the surviving spouse pursuant to Section 13550 is barred to the same extent as provided for claims under Part 4 (commencing with Section 9000) of Division 7, except as to the following:

(a) Creditors who commence judicial proceedings for the enforcement of the debt and serve the surviving spouse with the complaint therein prior to the expiration of the time for filing claims.

(b) Creditors who have or who secure the surviving spouse’s acknowledgment in writing of the liability of the surviving spouse for the debts.

(c) Creditors who file a timely claim in the proceedings for the administration of the estate of the deceased spouse.
13553. The surviving spouse is not liable under this chapter if all the property
13554. (a) Except as otherwise provided in this chapter, any debt described in
Section 13550 may be enforced against the surviving spouse in the same manner
as it could have been enforced against the deceased spouse if the deceased spouse
had not died.
(b) In any action or proceeding based upon the debt, the surviving spouse may
assert any defense, cross-complaint, or setoff which would have been available to
the deceased spouse if the deceased spouse had not died.
(c) Section 366.2 of the Code of Civil Procedure applies in an action under this
section.


19400. Subject to Section 366.2 of the Code of Civil Procedure, if there is no
proceeding to administer the estate of the deceased settlor, and if the trustee does
not file a proposed notice to creditors pursuant to Section 19003 and does not
publish notice to creditors pursuant to Chapter 3 (commencing with Section
19040), then a beneficiary of the trust to whom payment, delivery, or transfer of
the deceased settlor’s property is made pursuant to the terms of the trust is
personally liable, to the extent provided in Section 19402, for the unsecured claims
of the creditors of the deceased settlor’s estate.

19401. Subject to Section 19402, if the trustee filed a proposed notice to
creditors pursuant to Section 19003 and published notice to creditors pursuant to
Section 19040, and if the identity of the creditor was known to, or reasonably
ascertainable by, the trustee within four months of the first publication of notice
pursuant to Section 19040, then a person to whom property is distributed is
personally liable for the claim of the creditor, without a claim first having been
filed, if all of the following conditions are satisfied:
(a) The claim of the creditor was not merely conjectural.
(b) Notice to the creditor was not given to the creditor under Chapter 4
(commencing with Section 19050) and neither the creditor nor the attorney
representing the creditor in the matter had actual knowledge of the administration
of the trust estate sooner than one year after the date of first publication of notice
pursuant to Section 19040.
(c) The statute of limitations applicable to the claim under Section 366.2 of the
Code of Civil Procedure has not expired at the time of commencement of an action
under this section.

19402. (a) In any action under this chapter, subject to Section 366.2 of the Code
of Civil Procedure, the distributee may assert any defenses, cross-complaints, or
setoffs that would have been available to the deceased settlor if the settlor had not died.

(b) Personal liability under this chapter is applicable only to the extent the claim of the creditor cannot be satisfied out of the trust estate of the deceased settlor and 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. Personal liability under this chapter for all claims of all creditors shall not exceed the value of the property distributed to the person out of the trust estate. As used in this chapter, the value of the property is the fair market value of the property on the date of its distribution, less the amount of any liens and encumbrances on the property at that time.

19403. Nothing in this chapter affects the rights of a purchaser or encumbrancer of property in good faith and for value from a person who is personally liable under this section.


20100. Except where the context otherwise requires, the following definitions shall govern the construction of this chapter:

(a) “Estate tax” means a tax imposed by any federal or California estate tax law, now existing or hereafter enacted, and includes interest and penalties on any deficiency.

(b) “Person interested in the estate” means any person, including a personal representative, entitled to receive, or who has received, from a decedent while alive or by reason of the death of the decedent any property or interest therein.

(c) “Personal representative” includes a guardian, conservator, trustee, or other person charged with the responsibility of paying the estate tax.

(d) “Property” means property included in the gross estate for federal estate tax purposes.

(e) “Value” means fair market value as determined for federal estate tax purposes.

20101. (a) This chapter does not apply to persons interested in the estate of a decedent who died before January 1, 1987.

(b) Notwithstanding the repeal of former Article 4a (commencing with Section 970) of Chapter 15 of Division 3 of the Probate Code by Chapter 783 of the Statutes of 1986, the provisions of that former article remain applicable where the decedent died before January 1, 1987. No inference as to the applicable law in effect before January 1, 1987, shall be drawn from the enactment of this chapter.
Article 2. Proration

20110. (a) Except as provided in subdivision (b), any estate tax shall be equitably prorated among the persons interested in the estate in the manner prescribed in this article.

(b) This section does not apply:

(1) To the extent the decedent in a written inter vivos or testamentary instrument disposing of property specifically directs that the property be applied to the satisfaction of an estate tax or that an estate tax be prorated to the property in the manner provided in the instrument. As used in this paragraph, an “instrument disposing of property” includes an instrument that creates an interest in property or an amendment to an instrument that disposes of property or creates an interest in property.

(2) Where federal law directs otherwise. If federal law directs the manner of proration of the federal estate tax, the California estate tax shall be prorated in the same manner.

20111. The proration required by this article shall be made in the proportion that the value of the property received by each person interested in the estate bears to the total value of all property received by all persons interested in the estate, subject to the provisions of this article.

20112. (a) In making a proration of the federal estate tax, allowances shall be made for credits allowed for state or foreign death taxes in determining the federal tax payable and for exemptions and deductions allowed for the purpose of determining the taxable estate.

(b) In making a proration of the California estate tax, allowances shall be made for (1) credits (other than the credit for state death taxes paid) allowed by the federal estate tax law and attributable to property located in this state, and (2) exemptions and deductions allowed by the federal estate tax law for the purpose of determining the taxable estate attributable to property located in this state.

(c) In making a proration of an estate tax, interest on extension of taxes and interest and penalties on any deficiency shall be charged to equitably reflect the benefits and burdens of the extension or deficiency and of any tax deductions associated with the interest and penalties.

20113. If a trust is created, or other provision made whereby a person is given an interest in the income of, an estate for years or for life in, or other temporary interest in, any property, the estate tax on both the temporary interest and on the remainder thereafter shall be charged against and paid out of the corpus of the property without apportionment between remainders and temporary estates.

20114. (a) As used in this section, “qualified real property” means qualified real property as defined in Section 2032A of the Internal Revenue Code (26 U.S.C. Sec. 2032A).
(b) If an election is made pursuant to Section 2032A of the Internal Revenue Code (26 U.S.C. Sec. 2032A), the proration shall be based upon the amount of federal estate tax that would be payable but for the election. The amount of the reduction in federal estate tax resulting from an election pursuant to Section 2032A of the Internal Revenue Code (26 U.S.C. Sec. 2032A) shall reduce the tax that is otherwise attributable to the qualified real property that is the subject of the election. If the tax that is otherwise attributable to the qualified real property is reduced to zero pursuant to this subdivision, any excess amount of reduction shall reduce the tax otherwise payable with respect to the other property, this amount to be equitably prorated in accordance with Section 20111.

(c) If additional federal estate tax is imposed under subsection (c) of Section 2032A of the Internal Revenue Code (26 U.S.C. Sec. 2032A) by reason of early disposition or cessation of qualified use, the additional tax shall be a charge against the portion of the qualified real property to which the additional tax is attributable, and shall be equitably prorated among the persons interested in that portion of the qualified real property in proportion to their interests.

20114.5. (a) As used in this section:


(2) “Excess retirement accumulation” has the meaning given it in paragraph (3) of subsection (d) of Section 4980A.

(b) If the federal estate tax is increased under subsection (d) of Section 4980A of the Internal Revenue Code, the amount of the increase shall be a charge against the persons who receive the excess retirement accumulation that gives rise to the increase, and shall be equitably prorated among all persons who receive interests in qualified employer plans and individual retirement plans to which the excess retirement accumulation is attributable.

20115. Where the payment of any portion of the federal estate tax is extended under the provisions of the federal estate tax law, the amount of extended tax shall be a charge against the persons who receive the specific property that gives rise to the extension.

20116. (a) If all property does not come into the possession of the personal representative, the personal representative is entitled, and has the duty, to recover from the persons interested in the estate the proportionate amount of the estate tax with which the persons are chargeable under this chapter.

(b) If the personal representative cannot collect from any person interested in the estate the amount of an estate tax apportioned to the person, the amount not recoverable shall be equitably prorated among the other persons interested in the estate who are subject to proration.
20117. (a) If a person is charged with or required to pay an estate tax greater than the amount prorated to that person because another person does not pay the amount of estate tax prorated to the other person, the person charged with or required to pay the greater amount has a right of reimbursement against the other person.

(b) The right of reimbursement may be enforced through the personal representative in the discretion of the personal representative, or may be enforced directly by the person charged with or required to pay the greater amount, and for the purpose of direct enforcement the person is subrogated to the position of the personal representative.

(c) The personal representative or person who has a right of reimbursement may commence a proceeding to have a court determine the right of reimbursement. The provisions of Article 3 (commencing with Section 20120) shall govern the proceeding, with changes necessary to make the provisions appropriate for application to the proceeding, and the court order determining the right of reimbursement is an enforceable judgment.

Article 3. Judicial Proceedings

20120. (a) The personal representative or any person interested in the estate may commence a proceeding to have a court determine the proration pursuant to this chapter.

(b) A proceeding under this article shall be commenced in the court in which the estate of the decedent was administered or, if no administration proceedings have been commenced [sic], in the superior court of any county in which the estate of the decedent may be administered.

(c) If proceedings for the administration of the decedent’s estate are pending, a proceeding under this article shall be combined with the administration proceedings. If a proceeding is commenced at any time before final distribution, there shall be no additional filing fee.

20121. A proceeding under this article shall be commenced by filing a petition that sets forth all of the following information:

(a) The jurisdictional facts.

(b) Other facts necessary for the court to determine the proration of estate taxes.

20122. Not less than 30 days before the hearing, the petitioner shall do both of the following:

(a) Cause notice of the hearing and a copy of the petition to be mailed to the personal representative and to each person interested in the estate against whom prorated amounts may be charged pursuant to paragraph (1) of subdivision (a) of Section 20123.

(b) Cause a summons and a copy of the petition to be served on each person interested in the estate who may be directed to make payment of prorated amounts.
pursuant to paragraph (2) of subdivision (a) of Section 20123. The summons shall be in the form and shall be served in the manner prescribed in Title 5 (commencing with Section 410.10) of Part 2 of the Code of Civil Procedure.

20123. (a) The court, upon making a determination as provided in this article, shall make an order:

(1) Directing the personal representative to charge the prorated amounts against the persons against whom an estate tax has been prorated insofar as the personal representative is in possession of any property or interests of the persons against whom the charge may be made.

(2) Summarily directing all other persons against whom an estate tax has been prorated to make payment of the prorated amounts to the personal representative.

(b) A court order made under this section is a judgment that may be enforced against the persons against whom an estate tax has been prorated.

20124. Upon petition by the personal representative or any person interested in the estate, the court shall modify an order made pursuant to this article whenever it appears that the amount of estate tax as actually determined is different from the amount of estate tax on which the court based the order.

20125. (a) A personal representative acting or resident in another state may commence an action in this state to recover from a person interested in the estate, who either is resident in this state or owns property in this state, the amount of the federal estate tax, or a state estate tax or death duty payable to another state, apportioned to the person.

(b) The action shall be commenced in the superior court of any county in which administration of the estate of the decedent would be proper or, if none, in which any defendant resides.

(c) For purposes of the action the apportionment by the court having jurisdiction of the administration of the decedent’s estate in the other state is prima facie correct.

Prob. Code §§ 21400-21406. Abatement

21400. Notwithstanding any other provision of this part, if the instrument provides for abatement, or if the transferor’s plan or if the purpose of the transfer would be defeated by abatement as provided in this part, the shares of beneficiaries abate as is necessary to effectuate the instrument, plan, or purpose.

21401. Except as provided in Sections 21612 (omitted spouse) and 21623 (omitted children) and in Division 10 (commencing with Section 20100) (proration of taxes), shares of beneficiaries abate as provided in this part for all purposes, including payment of the debts, expenses, and charges specified in Section 11420, satisfaction of gifts, and payment of expenses on specifically devised property pursuant to Section 12002, and without any priority as between real and personal property.
21402. (a) Shares of beneficiaries abate in the following order:

(1) Property not disposed of by the instrument.
(2) Residuary gifts.
(3) General gifts to persons other than the transferor’s relatives.
(4) General gifts to the transferor’s relatives.
(5) Specific gifts to persons other than the transferor’s relatives.
(6) Specific gifts to the transferor’s relatives.

(b) For purposes of this section, a “relative” of the transferor is a person to whom property would pass from the transferor under Section 6401 or 6402 (intestate succession) if the transferor died intestate and there were no other person having priority.

21403. (a) Subject to subdivision (b), shares of beneficiaries abate pro rata within each class specified in Section 21402.

(b) Gifts of annuities and demonstrative gifts are treated as specific gifts to the extent they are satisfied out of the fund or property specified in the gift and as general gifts to the extent they are satisfied out of property other than the fund or property specified in the gift.

21404. If an instrument requires property that is the subject of a specific gift to be exonerated from a mortgage, deed of trust, or other lien, a specific gift of other property does not abate for the purpose of exonerating the encumbered property.

21405. (a) In any case in which there is abatement when a distribution is made during estate administration, the court shall fix the amount each distributee must contribute for abatement. The personal representative shall reduce the distributee’s share by that amount.

(b) If a specific gift must be abated, the beneficiary of the specific gift may satisfy the contribution for abatement out of the beneficiary’s property other than the property that is the subject of the specific gift.

21406. (a) This part does not apply to a gift made before July 1, 1989. In the case of a gift made before July 1, 1989, the law that would have applied had this part not been enacted shall apply. (b) For purposes of this section a gift by will is made on the date of the decedent’s death.

MISSOURI STATUTE

Rev. Stat. Mo. § 461.300

461.300. 1. Each recipient of a recoverable transfer of a decedent’s property shall be liable to account for a pro rata share of the value of all such property received, to the extent necessary to discharge the statutory allowances to the decedent’s surviving spouse and dependent children, and claims remaining unpaid after application of the decedent’s estate, including expenses of administration and costs as provided in subsection 3 of this section, and including estate or
inheritance or other transfer taxes imposed by reason of the decedent’s death only where payment of those taxes is a prerequisite to satisfying unpaid claims which have a lower level of priority. No proceeding may be brought under this section when the deficiency described in this subsection is solely attributable to costs and expenses of administration.

2. The obligation of a recipient of a recoverable transfer may be enforced by an action for accounting commenced within eighteen months following the decedent’s death by the decedent’s personal representative or a qualified claimant, but no action for accounting under this section shall be commenced by any qualified claimant unless the personal representative has received a written demand therefor by a qualified claimant, within sixteen months following the decedent’s death. If the personal representative fails to commence an action within thirty days of the receipt of a written demand to do so, any qualified claimant may commence such action. If the personal representative fails to commence the action, the personal representative shall disclose to the qualified claimant or qualified claimants who made such written demand all material knowledge within the possession of the personal representative reasonably relating to the identity of any recipient of a recoverable transfer made by the decedent. In the event the personal representative fails to provide such information with respect to any recoverable transfer of the decedent’s property to the personal representative, the eighteen-month limitation is tolled for such recoverable transfer until such time as the personal representative provides such information. In the event the personal representative is alleged in a verified pleading to be a recipient of a recoverable transfer from the decedent, the court may appoint an administrator ad litem to represent the estate in any proceeding brought pursuant to this section. Sums recovered in an action for accounting under this section shall be administered by the personal representative as part of the decedent’s estate.

3. The judgment in a proceeding authorized by this section shall take into account the expenses of administration of the estate including the cost of administering the additional assets obtained in the proceeding, and the costs of the proceeding to the extent authorized by this subsection. The court may order the costs of the proceeding, including attorney fees, to be treated as expenses of administration of the estate.

4. If an action for accounting has been commenced under this section within eighteen months following the decedent’s death, then any party to the proceeding may join and bring into the action for accounting any other recipient of a recoverable transfer of the decedent’s property even if the other recipient is not joined until more than eighteen months following the decedent’s death. If an action for accounting has been commenced under this section more than eighteen months following the decedent’s death pursuant to the tolling provisions of subsection 2 of this section, then the personal representative, or former personal representative, who received a recoverable transfer of the decedent’s property shall be liable to account under the provisions of subsection 1 of this section for
the value of all such property received by such personal representative, or former personal representative, and no other recipient of a recoverable transfer of the decedent’s property may be joined or brought into the action, and in such case, full recovery, rather than pro rata recovery, may be had from the recoverable property received by such personal representative or former personal representative.

5. This section shall not affect the right of any transferring entity, as defined in section 461.005, to execute a direction of the decedent to make a payment or to make a recoverable transfer on death of the decedent, or make the transferring entity liable to the decedent’s estate, unless before the payment or transfer is made the transferring entity has been served with process in a proceeding brought under this section and the transferring entity has had a reasonable time to act on it.

6. This section does not create a lien on any property that is the subject of a recoverable transfer, except as a lien may be perfected by the way of attachment, garnishment, or judgment in an accounting proceeding authorized by this section.

7. An action for accounting under the provisions of this section may be filed in the probate division of the circuit court, and the probate division of the circuit court may hear and determine questions and issue appropriate orders in an action for accounting under this section. Any proceeding under this section and any statements by a personal representative in connection with any recoverable transfer shall be deemed to be proceedings or statements under the probate code that are subject to section 472.013, RSMo.

8. The recipient of any property held in trust that was subject to the satisfaction of the decedent’s debts immediately prior to the decedent’s death, and the recipient of any property held in joint tenancy with right of survivorship that was subject to the satisfaction of the decedent’s debts immediately prior to the decedent’s death, are subject to this section, but only to the extent of the decedent’s contribution to the value of the property.

9. The provisions of this section shall apply to all actions commenced after August 28, 1995, except that with respect to decedents dying prior to August 28, 1995, an action for accounting under this section may be commenced within two years following the decedent’s death.

10. As used in this section, the following terms mean:

(1) “Creditor”, any person to whom the decedent is liable, which liability survives whether arising in contract, tort, or otherwise, and any person to whom the decedent’s estate is liable for funeral expenses and the reasonable cost of a tombstone;

(2) “Dependent child”, the decedent’s minor children whom the decedent was obligated to support and the children who were in fact being supported by the decedent;

(3) “Qualified claimant”, a creditor, surviving spouse, dependent child, or a person acting for a dependent child of the decedent;

(4) “Recoverable transfer”, a nonprobate transfer of a decedent’s property under sections 461.003 to 461.081 and any other transfer of a decedent’s property other
than from the administration of the decedent’s probate estate that was subject to
satisfaction of the decedent’s debts immediately prior to the decedent’s death, but
only to the extent of the decedent’s contribution to the value of such property.

WASHINGTON STATUTES

(1) Unless expressly exempted by statute, a beneficiary of a nonprobate asset
that was subject to satisfaction of the decedent’s general liabilities immediately
before the decedent’s death takes the asset subject to liabilities, claims, estate
taxes, and the fair share of expenses of administration reasonably incurred by the
personal representative in the transfer of or administration upon the asset. The
beneficiary of such an asset is liable to account to the personal representative to
the extent necessary to satisfy liabilities, claims, the asset’s fair share of expenses
of administration, and the asset’s share of estate taxes under chapter 83.110 RCW.
Before making demand that a beneficiary of a nonprobate asset account to the
personal representative, the personal representative shall give notice to the
beneficiary, in the manner provided in chapter 11.96A RCW, that the beneficiary
is liable to account under this section.

(2) The following rules govern in applying subsection (1) of this section:
(a) A beneficiary of property passing at death under a community property
agreement takes the property subject to the decedent’s liabilities, claims, estate
taxes, and administration expenses as described in subsection (1) of this section.
However, assets existing as community or separate property immediately before
the decedent’s death under the community property agreement are subject to the
decedent’s liabilities and claims to the same extent that they would have been had
they been assets of the probate estate.
(b) A beneficiary of property held in joint tenancy form with right of
survivorship, including without limitation United States savings bonds or similar
obligations, takes the property subject to the decedent’s liabilities, claims, estate
taxes, and administration expenses as described in subsection (1) of this section to
the extent of the decedent’s beneficial ownership interest in the property
immediately before death.
(c) A beneficiary of payable-on-death or trust bank accounts, bonds, securities,
or similar obligations, including without limitation United States bonds or similar
obligations, takes the property subject to the decedent’s liabilities, claims, estate
taxes, and administration expenses as described in subsection (1) of this section, to
the extent of the decedent’s beneficial ownership interest in the property
immediately before death.
(d) A beneficiary of deeds or conveyances made by the decedent if possession
has been postponed until the death of the decedent takes the property subject to the
decedent’s liabilities, claims, estate taxes, and administration expenses as

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described in subsection (1) of this section, to the extent of the decedent’s beneficial ownership interest in the property immediately before death.

(e) A trust for the decedent’s use of which the decedent is the grantor is subject to the decedent’s liabilities, claims, estate taxes, and administration expenses as described in subsection (1) of this section, to the same extent as the trust was subject to claims of the decedent’s creditors immediately before death under RCW 19.36.020.

(f) A trust not for the use of the grantor but of which the decedent is the grantor and that becomes effective or irrevocable only upon the decedent’s death is subject to the decedent’s claims, liabilities, estate taxes, and expenses of administration as described in subsection (1) of this section.

(g) Anything in this section to the contrary notwithstanding, nonprobate assets that existed as community property immediately before the decedent’s death are subject to the decedent’s liabilities and claims to the same extent that they would have been had they been assets of the probate estate.

(h) The liability of a beneficiary of life insurance is governed by chapter 48.18 RCW.

(i) The liability of a beneficiary of pension or retirement employee benefits is governed by chapter 6.15 RCW.

(j) An inference may not be drawn from (a) through (i) of this subsection that a beneficiary of nonprobate assets other than those assets specifically described in (a) through (i) of this subsection does or does not take the assets subject to claims, liabilities, estate taxes, and administration expenses as described in subsection (1) of this section.

(3) Nothing in this section derogates from the rights of a person interested in the estate to recover tax under chapter 83.110 RCW or from the liability of any beneficiary for estate tax under chapter 83.110 RCW.

(4) Nonprobate assets that may be responsible for the satisfaction of the decedent’s general liabilities and claims abate together with the probate assets of the estate in accord with chapter 11.10 RCW.

Rev. Code Wash. §§ 11.42.010-.900. Settlement of creditor claims for estates passing without probate

11.42.010. Notice agent — Qualifications.

(1) Subject to the conditions stated in this chapter, and if no personal representative has been appointed in this state, a beneficiary or trustee who has received or is entitled to receive by reason of the decedent’s death substantially all of the decedent’s probate and nonprobate assets, is qualified to give nonprobate notice to creditors under this chapter.

If no one beneficiary or trustee has received or is entitled to receive substantially all of the assets, then those persons, who in the aggregate have received or are
entitled to receive substantially all of the assets, may, under an agreement under
RCW 11.96A.220, appoint a person who is then qualified to give nonprobate
notice to creditors under this chapter.

(2) A person or group of persons is deemed to have received substantially all of
the decedent’s probate and nonprobate assets if the person or the group, at the time
of the filing of the declaration and oath referred to in subsection (3) of this section,
in reasonable good faith believed that the person or the group had received, or was
entitled to receive by reason of the decedent’s death, substantially all of the
decedent’s probate and nonprobate assets.

(3)(a) The “notice agent” means the qualified person who:
   - Pays a filing fee to the clerk of the superior court in a county in which probate
     may be commenced regarding the decedent, the “notice county”, and receives a
     cause number; and
   - Files a declaration and oath with the clerk.

   (b) The declaration and oath must be made in affidavit form or under penalty of
       perjury and must state that the person making the declaration believes in
       reasonable good faith that the person is qualified under this chapter to act as the
       notice agent and that the person will faithfully execute the duties of the notice
       agent as provided in this chapter.

(4) The following persons are not qualified to act as notice agent:
   - Corporations, trust companies, and national banks, except: (i) Such entities
     as are authorized to do trust business in this state; and (ii) professional service
     corporations that are regularly organized under the laws of this state whose
     shareholder or shareholders are exclusively attorneys;
   - Minors;
   - Persons of unsound mind;
   - Persons who have been convicted of a felony or of a misdemeanor involving
     moral turpitude; and
   - Persons who have given notice under this chapter and who thereafter become
     of unsound mind or are convicted of a felony or misdemeanor involving moral
     turpitude. This disqualification does not bar another person, otherwise qualified,
     from acting as successor notice agent.

(5) A nonresident may act as notice agent if the nonresident appoints an agent
   who is a resident of the notice county or who is attorney of record for the notice
   agent upon whom service of all papers may be made. The appointment must be
   made in writing and filed with the court.

11.42.020. Notice to creditors — Manner — Filings — Publication

Subject to subsection (2) of this section, a notice agent may give nonprobate
notice to the creditors of the decedent if: (a) As of the date of the filing of the
notice to creditors with the court, the notice agent has no knowledge of another
person acting as notice agent or of the appointment of a personal representative in
the decedent’s estate in the state of Washington; and
(b) According to the records of the court as are available on the date of the filing
of the notice to creditors, no cause number regarding the decedent has been issued
to any other notice agent and no personal representative of the decedent’s estate
had been appointed.

(2) The notice agent must give notice to the creditors of the decedent, in
substantially the form set forth in RCW 11.42.030, announcing that the notice
agent has elected to give nonprobate notice to creditors and requiring that persons
having claims against the decedent present their claims within the time specified in
RCW 11.42.050 or be forever barred as to claims against the decedent’s probate
and nonprobate assets.

(a) The notice agent shall file the notice with the court.
(b) The notice agent shall cause the notice to be published once each week for
three successive weeks in a legal newspaper in the notice county.
(c) The notice agent may at any time give actual notice to creditors who become
known to the notice agent by serving the notice on the creditor or mailing the
notice to the creditor at the creditor’s last known address, by regular first-class
mail, postage prepaid.
(d) The notice agent shall also mail a copy of the notice, including the
decedent’s social security number, to the state of Washington department of social
and health services’ office of financial recovery.
(e) If the decedent was a resident of the state of Washington at the time of death
and the notice agent’s declaration and oath were filed in a county other than the
county of the decedent’s residence, then instead of the requirements in (a) and (b)
of this subsection, the notice agent shall cause the notice to creditors in
substantially the form set forth in RCW 11.42.030 to be published once each week
for three successive weeks in a legal newspaper in the county of the decedent’s
residence and shall file the notice with the superior court of the county in which
the notice agent’s declaration and oath were filed.

The notice agent shall file with the court proof by affidavit of the giving and
publication of the notice.

11.42.030. Notice to creditors — Form

Notice under RCW 11.42.020 must contain the following elements in
substantially the following form
The notice agent named below has elected to give notice to creditors of the above-named decedent. As of the date of the filing of a copy of this notice with the court, the notice agent has no knowledge of any other person acting as notice agent or of the appointment of a personal representative of the decedent’s estate in the state of Washington. According to the records of the court as are available on the date of the filing of this notice with the court, a cause number regarding the decedent has not been issued to any other notice agent and a personal representative of the decedent’s estate has not been appointed.

Any person having a claim against the decedent must, before the time the claim would be barred by any otherwise applicable statute of limitations, present the claim in the manner as provided in RCW 11.42.070 by serving on or mailing to the notice agent or the notice agent’s attorney at the address stated below a copy of the claim and filing the original of the claim with the court in which the notice agent’s declaration and oath were filed. The claim must be presented within the later of: (1) Thirty days after the notice agent served or mailed the notice to the creditor as provided under RCW 11.42.020(2)(c); or (2) four months after the date of first publication of the notice. If the claim is not presented within this time frame, the claim is forever barred, except as otherwise provided in RCW 11.42.050 and 11.42.060. This bar is effective as to claims against both the decedent’s probate and nonprobate assets.

Date of First Publication:

The notice agent declares under penalty of perjury under the laws of the state of Washington on __________, [year], at [city], [state] that the foregoing is true and correct.

______________________________
Signature of Notice Agent

Notice Agent:
Attorney for the Notice Agent:
Address for Mailing or Service:
Court of Notice Agent’s oath and declaration and cause number:
11.42.040. “Reasonably ascertainable” creditor — Definition —
Reasonable diligence — Presumptions — Petition for order

(1) For purposes of RCW 11.42.050, a “reasonably ascertainable” creditor of the
decedent is one that the notice agent would discover upon exercise of reasonable
diligence. The notice agent is deemed to have exercised reasonable diligence upon
conducting a reasonable review of the decedent’s correspondence, including
correspondence received after the date of death, and financial records, including
personal financial statements, loan documents, checkbooks, bank statements, and
income tax returns, that are in the possession of or reasonably available to the
notice agent.

(2) If the notice agent conducts the review, the notice agent is presumed to have
exercised reasonable diligence to ascertain creditors of the decedent and any
creditor not ascertained in the review is presumed not reasonably ascertainable
within the meaning of RCW 11.42.050. These presumptions may be rebutted only
by clear, cogent, and convincing evidence.

(3) The notice agent may evidence the review and resulting presumption by
filing with the court an affidavit regarding the facts referred to in this section. The
notice agent may petition the court for an order declaring that the notice agent has
made a review and that any creditors not known to the notice agent are not
reasonably ascertainable. The petition must be filed under RCW 11.96A.080, and
the notice specified under RCW 11.96A.110 must also be given by publication.

11.42.050. Claims against decedent — Time limits

(1) If a notice agent provides notice under RCW 11.42.020, any person having a
claim against the decedent is forever barred from making a claim or commencing
an action against the decedent if the claim or action is not already barred by an
otherwise applicable statute of limitations, unless the creditor presents the claim in
the manner provided in RCW 11.42.070 within the following time limitations:

(a) If the notice agent provided notice under RCW 11.42.020(2)(a) and (b) and
the creditor was given actual notice as provided in RCW 11.42.020(2)(c), the
creditor must present the claim within the later of: (i) Thirty days after the notice
agent’s service or mailing of notice to the creditor; and (ii) four months after the
date of first publication of the notice;

(b) If the notice agent provided notice under RCW 11.42.020(2)(a) and (b) and
the creditor was not given actual notice as provided in RCW 11.42.020(2)(c):

(i) If the creditor was not reasonably ascertainable, as defined in RCW
11.42.040, the creditor must present the claim within four months after the date of
first publication of the notice;

(ii) If the creditor was reasonably ascertainable, as defined in RCW 11.42.040,
the creditor must present the claim within twenty-four months after the decedent’s
date of death.
(2) Any otherwise applicable statute of limitations applies without regard to the tolling provisions of RCW 4.16.190.

(3) This bar is effective as to claims against both the decedent’s probate and nonprobate assets.

11.42.060. Claims involving liability or casualty insurance — Limitations — Exceptions to time limits

The time limitations for presenting claims under this chapter do not accrue to the benefit of any liability or casualty insurer. Claims against the decedent or the decedent’s marital community that can be fully satisfied by applicable insurance coverage or proceeds need not be presented within the time limitation of RCW 11.42.050, but the amount of recovery cannot exceed the amount of the insurance. If a notice agent provides notice under RCW 11.42.020, the claims may at any time be presented as provided in RCW 11.42.070, subject to the otherwise relevant statutes of limitations, and does not constitute a cloud, lien, or encumbrance upon the title to the decedent’s probate or nonprobate assets nor delay or prevent the transfer or distribution of the decedent’s assets. This section does not serve to extend any otherwise relevant statutes of limitations.

11.42.070. Claims — Form — Manner of presentation — Waiver of defects

(1) The claimant, the claimant’s attorney, or the claimant’s agent shall sign the claim and include in the claim the following information:

(a) The name and address of the claimant;
(b) The name, address, if different from that of the claimant, and nature of authority of an agent signing the claim on behalf of the claimant;
(c) A statement of the facts or circumstances constituting the basis of the claim;
(d) The amount of the claim; and
(e) If the claim is secured, unliquidated, contingent, or not yet due, the nature of the security, the nature of the uncertainty, or the date when it will become due.

Failure to describe correctly the information in (c), (d), or (e) of this subsection, if the failure is not substantially misleading, does not invalidate the claim.

(2) A claim does not need to be supported by affidavit.

(3) A claim must be presented within the time limits set forth in RCW 11.42.050 by: (a) Serving on or mailing to, by regular first-class mail, the notice agent or the notice agent’s attorney a copy of the signed claim; and (b) filing the original of the signed claim with the court in which the notice agent’s declaration and oath were filed. A claim is deemed presented upon the later of the date of postmark or service on the notice agent, or the notice agent’s attorney, and filing with the court.
(4) Notwithstanding any other provision of this chapter, if a claimant makes a written demand for payment within the time limits set forth in RCW 11.42.050, the notice agent may waive formal defects and elect to treat the demand as a claim properly filed under this chapter if: (a) The claim was due; (b) the amount paid was the amount of indebtedness over and above all payments and offsets; (c) the estate is solvent; and (d) the payment is made in good faith. Nothing in this chapter limits application of the doctrines of waiver, estoppel, or detrimental claims or any other equitable principle.

11.42.080. Claims — Duty to allow or reject — Notice of petition to allow — Attorneys’ fees

(1) The notice agent shall allow or reject all claims presented in the manner provided in RCW 11.42.070. The notice agent may allow or reject a claim, in whole or in part.

(2) If the notice agent has not allowed or rejected a claim within the later of four months from the date of first publication of the notice to creditors and thirty days from presentation of the claim, the claimant may serve written notice on the notice agent that the claimant will petition the court to have the claim allowed. If the notice agent fails to notify the claimant of the allowance or rejection of the claim within twenty days after the notice agent’s receipt of the claimant’s notice, the claimant may petition the court for a hearing to determine whether the claim should be allowed or rejected, in whole or in part. If the court substantially allows the claim, the court may allow the petitioner reasonable attorneys’ fees chargeable against the decedent’s assets received by the notice agent or by those appointing the notice agent.

11.42.085. Property liable for claims — Payment limits

(1) The decedent’s nonprobate and probate assets that were subject to the satisfaction of the decedent’s general liabilities immediately before the decedent’s death are liable for claims. The decedent’s probate assets may be liable, whether or not there is a probate administration of the decedent’s estate.

(2) The notice agent may pay a claim allowed by the notice agent or a judgment on a claim first prosecuted against a notice agent only out of assets received as a result of the death of the decedent by the notice agent or by those appointing the notice agent, except as may be provided by agreement under RCW 11.96A.220 or by court order issued in a judicial proceeding under RCW 11.96A.080.

11.42.090. Allowance of claims — Notice — Payment order

(1) If the notice agent allows a claim, the notice agent shall notify the claimant of the allowance by personal service or regular first-class mail to the address
stated on the claim. A claim may not be allowed if it is barred by a statute of
limitations.

(2) The notice agent shall pay claims allowed in the following order from the
assets of the decedent that are subject to the payment of claims as provided in
RCW 11.42.085:

(a) Costs of administering the assets subject to the payment of claims, including
a reasonable fee to the notice agent, any resident agent for the notice agent,
reasonable attorneys’ fees for the attorney for each of them, filing fees, publication
costs, mailing costs, and similar costs and fees;
(b) Funeral expenses in a reasonable amount;
(c) Expenses of the last sickness in a reasonable amount;
(d) Wages due for labor performed within sixty days immediately preceding the
death of the decedent;
(e) Debts having preference by the laws of the United States;
(f) Taxes, debts, or dues owing to the state;
(g) Judgments rendered against the decedent in the decedent’s lifetime that are
liens upon real estate on which executions might have been issued at the time of
the death of the decedent and debts secured by mortgages in the order of their
priority; and
(h) All other demands against the assets subject to the payment of cl

(3) The notice agent may not pay a claim of the notice agent or other person who
has received property by reason of the decedent’s death unless all other claims that
have been filed under this chapter, and all debts having priority to the claim, are
paid in full or otherwise settled by agreement, regardless of whether the other
claims are allowed or rejected.

11.42.100. Rejection of claim — Time limits — Notice — Time
limit for suit — Compromise of claim

(1) If the notice agent rejects a claim, in whole or in part, the claimant must
bring suit against the notice agent within thirty days after notification of rejection
or the claim is forever barred. The notice agent shall notify the claimant of the
rejection and file an affidavit with the court showing the notification and the date
of the notification. The notice agent shall notify the claimant of the rejection by
personal service or certified mail addressed to the claimant or claimant’s agent, if
applicable, at the address stated in the claim. The date of service or of the
postmark is the date of notification. The notification must advise the claimant that
the claimant must bring suit in the proper court against the notice agent within
thirty days after notification of rejection or the claim will be forever barred.

(2) If a claimant brings suit against the notice agent on a rejected claim and the
notice agent has not received substantially all assets of the decedent that are liable
for claims, the notice agent may only make an appearance in the action and may
not answer the action but must cause a petition to be filed for the appointment of a
personal representative within thirty days after service of the creditor’s action on
the notice agent. Under these circumstances, a judgment may not be entered in an
action brought by a creditor against the notice agent earlier than twenty days after
the personal representative has been substituted in that action for the notice agent.

(3) The notice agent may, before or after rejection of any claim, compromise the
claim, whether due or not, absolute or contingent, liquidated, or unliquidated.

11.42.110. Effect of judgment against notice agent

The effect of a judgment rendered against the notice agent shall be only to
establish the amount of the judgment as an allowed claim.

11.42.120. Execution barred upon decedent’s death — Presentation
— Sale of property

If a judgment was entered against the decedent during the decedent’s lifetime,
an execution may not issue on the judgment after the death of the decedent. If a
notice agent is acting, the judgment must be presented in the manner provided in
RCW 11.42.070, but if the judgment is a lien on any property of the decedent, the
property may be sold for the satisfaction of the judgment and the officer making
the sale shall account to the notice agent for any surplus.

11.42.125. Secured claim — Creditor’s right

If a creditor’s claim is secured by any property of the decedent, this chapter does
not affect the right of the creditor to realize on the creditor’s security, whether or
not the creditor presented the claim in the manner provided in RCW 11.42.070.

11.42.130. Claim of notice agent or beneficiary — Payment

A claim of the notice agent or other person who has received property by reason
of the decedent’s death must be paid as set forth in RCW 11.42.090(3).

11.42.140. Notice to creditors when notice agent resigns, dies, or is
removed — Limit tolled by vacancy

(1) If a notice agent has given notice under RCW 11.42.020 and the notice agent
resigns, dies, or is removed or a personal representative is appointed, the successor
notice agent or the personal representative shall:

(a) Publish notice of the vacancy and succession for two successive weeks in the
legal newspaper in which notice was published under RCW 11.42.020, if the
vacancy occurred within twenty-four months after the decedent’s date of death; and
(b) Provide actual notice of the vacancy and succession to a creditor if: (i) The creditor filed a claim and the claim had not been allowed or rejected by the prior notice agent; or (ii) the creditor’s claim was rejected and the vacancy occurred within thirty days after rejection of the claim.

(2) The time between the resignation, death, or removal of the notice agent or appointment of a personal representative and the first publication of the vacancy and succession or, in the case of actual notice, the mailing of the notice of vacancy and succession must be added to the time within which a claim must be presented or a suit on a rejected claim must be filed. This section does not extend the twenty-four-month self-executing bar under RCW 11.42.050.

11.42.150. Appointment of personal representative — Cessation of notice agent powers and authority — Notice not affected — Personal representative’s powers — Petition for reimbursement for allowance and payment of claims by notice agent

(1) The powers and authority of a notice agent immediately cease, and the office of notice agent becomes vacant, upon appointment of a personal representative for the estate of the decedent. Except as provided in RCW 11.42.140(2), the cessation of the powers and authority does not affect the filing and publication of notice to creditors and does not affect actual notice to creditors given by the notice agent.

(2) As set forth in RCW 11.40.160, a personal representative may adopt, ratify, nullify, or reject any actions of the notice agent.

(3) If a personal representative is appointed and the personal representative does not nullify the allowance of a claim that the notice agent allowed and paid, the person or persons whose assets were used to pay the claim may petition for reimbursement from the estate to the extent the payment was not in accordance with chapter 11.10 RCW.

11.42.900. Construction—Chapter applicable to state registered domestic partnerships

For the purposes of this chapter, the terms spouse, marriage, marital, husband, wife, widow, widower, next of kin, and family shall be interpreted as applying equally to state registered domestic partnerships or individuals in state registered domestic partnerships as well as to marital relationships and married persons, and references to dissolution of marriage shall apply equally to state registered domestic partnerships that have been terminated, dissolved, or invalidated, to the extent that such interpretation does not conflict with federal law. Where necessary to implement chapter 521, Laws of 2009, gender-specific terms such as husband and wife used in any statute, rule, or other law shall be construed to be gender neutral, and applicable to individuals in state registered domestic partnerships.
UNIFORM NONPROBATE TRANSFERS ON DEATH ACT
(Unif. Prob. Code § 6-102)

Sec. 102. Liability of Nonprobate Transferees for Creditor Claims and Statutory Allowances

(a) In this section, “nonprobate transfer” means a valid transfer effective at death, other than a transfer of a survivorship interest in a joint tenancy of real estate, by a transferor whose last domicile was in this State to the extent that the transferor immediately before death had power, acting alone, to prevent the transfer by revocation or withdrawal and instead to use the property for the benefit of the transferor or apply it to discharge claims against the transferor’s probate estate.

(b) Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against decedent’s probate that estate [sic] and statutory allowances to the decedent’s spouse and children to the extent the estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received or controlled by that transferee.

(c) Nonprobate transferees are liable for the insufficiency described in subsection (b) in the following order of priority:

(1) a transferee designated in the decedent’s will or any other governing instrument, as provided in the instrument;

(2) the trustee of a trust serving as the principal nonprobate instrument in the decedent’s estate plan as shown by its designation as devisee of the decedent’s residuary estate or by other facts or circumstances, to the extent of the value of the nonprobate transfer received or controlled;

(3) other nonprobate transferees, in proportion to the values received.

(d) Unless otherwise provided by the trust instrument, interests of beneficiaries in all trusts incurring liabilities under this section abate as necessary to satisfy the liability, as if all of the trust instruments were a single will and the interests were devises under it.

(e) A provision made in one instrument may direct the apportionment of the liability among the nonprobate transferees taking under that or any other governing instrument. If a provision in one instrument conflicts with a provision in another, the later one prevails.

(f) Upon due notice to a nonprobate transferee, the liability imposed by this section is enforceable in proceedings in this State, whether or not the transferee is located in this State.

(g) A proceeding under this section may not be commenced unless the personal representative of the decedent’s estate has received a written demand for the proceeding from the surviving spouse or a child, to the extent that statutory allowances are affected, or a creditor. If the personal representative declines or fails to commence a proceeding after demand, a person making demand may
commence the proceeding in the name of the decedent’s estate, at the expense of the person making the demand and not of the estate. A personal representative who declines in good faith to commence a requested proceeding incurs no personal liability for declining.

(h) A proceeding under this section must be commenced within one year after the decedent’s death, but a proceeding on behalf of a creditor whose claim was allowed after proceedings challenging disallowance of the claim may be commenced within 60 days after final allowance of the claim.

(i) Unless a written notice asserting that a decedent’s probate estate is nonexistent or insufficient to pay allowed claims and statutory allowances has been received from the decedent’s personal representative, the following rules apply:

1. Payment or delivery of assets by a financial institution, registrar, or other obligor, to a nonprobate transferee in accordance with the terms of the governing instrument controlling the transfer releases the obligor from all claims for amounts paid or assets delivered.

2. A trustee receiving or controlling a nonprobate transfer is released from liability under this section with respect to any assets distributed to the trust’s beneficiaries. Each beneficiary to the extent of the distribution received becomes liable for the amount of the trustee’s liability attributable to assets received by the beneficiary.

COMMENT

1. This section, which is similar to Section 6-102 of the UPC, was added to both this Code and this Act in 1998. This section clarifies that the recipients of nonprobate transfers can be required to contribute to pay allowed claims and statutory allowances to the extent the probate estate is inadequate. The maximum liability for a single nonprobate transferee is the value of the transfer. Values are determined under (b) as of the time when the benefits are “received or controlled by the transferee.” This would be the date of the decedent’s death for nonprobate transfers made by means of a revocable trust, and date of receipt for other nonprobate transfers. Two or more transferees are severally liable for the portion of the liability based on the value of transfers received by each.

This section replaces Section 6-107 of the original Code, and its 1989 sequel, 6-215 (Section 215 of this Act). To the extent a deceased party’s probate estate was insufficient, these sections made a deceased party’s interest in multiple-party accounts in financial institutions passing outside probate liable for the deceased party’s statutory allowances and creditor claims. Assets passing at death by revocable trust or TOD asset registration agreements were not covered by these sections. Also, Section 6-201(b) of the original Code and its sequel, 6-101(b) (Section 101(b) of this Act), provided merely that the section did not limit any other rights that might exist. Neither section created any rights.

If there are no probate assets, a creditor or other person seeking to use this section would first need to secure appointment of a personal representative to invoke probate procedures for establishing a creditor’s claim as “allowed.” The use of probate proceedings as a prerequisite to gaining rights for creditors against nonprobate transferees has been a feature of UPC Article VI since originally approved in 1969. Requiring that a probate proceeding be initiated works well in practice if procedures for opening estates, satisfying statutory allowances, and presenting claims, approximate UPC procedures.

2. Section 102 replaces Section 215 with coverage designed to extend the principle of Section 215 to transfers at death by revocable trust, TOD security registration agreements and similar
death benefits not insulated from decedents’ creditors by other legislation. The initial clause of
(b), “Except as otherwise provided by statute,” is designed to prevent a conflict with and to
clarify that this section does not supersede existing legislation protecting death benefits in life
insurance, retirement plans and IRAs from claims by creditors.

If a state’s insurance laws do not protect a particular insurance death benefit, the insured’s
creditors would not be able to establish a “nonprobate transfer” under (a) except to the extent of
any cash surrender value generated by premiums paid by the insured that the insured could have
obtained immediately before death. Note, also, that (i)(1) would protect a life insurance company
that paid a death benefit before receiving written notice from the decedent’s personal
representative.

3. The definition of “nonprobate transfer” in subsection (a) includes revocable transfers by a
decedent; it does not apply to a transfer at death incident to a decedent’s exercise or non-exercise
of a presently exercisable general power of appointment created by another person. The drafters
decided against including such powers even though presently exercisable general powers of
appointment are subject to the UPC’s augmented estate provisions dealing with intentional
disinheritance of a surviving spouse. Spousal protection against disinheritance by the other
spouse supports the institution of marriage; creditors are better able to fend for themselves than
financially disadvantaged surviving spouses. In addition, a presently exercisable general power of
appointment created by another person is commonly viewed as a provision in the trust creator’s
instrument designed to provide flexibility in the estate plan rather than as a gift to the donee.

4. The required ability to revoke or otherwise prevent a nonprobate transfer at death that is vital
to application of subsection (a) is described as a “power,” a word intended by the drafters to
signify legal authority rather than capacity or practical ability. This corresponds to the definition
in UPC Section 2-201(6).

5. The exclusion of “a survivorship interest in a joint tenancy of real estate” from the definition
of “nonprobate transfer” in subsection (a) is contrary to the law of some states (e.g., South
Dakota) that allow an insolvent decedent’s creditors to reach the share the decedent could have
received prior to death by unilateral severance of the joint tenancy. The law in most other states is
to the contrary. By excluding real estate joint tenancies, stability of title and ease of title
examination is preserved. Moreover, real estate joint tenancies have served for generations to
keep the share of a couple’s real estate owned by the first to die out of probate and away from
estate creditors. This familiar arrangement need not be disturbed incident to expanding the ability
of decedents’ creditors to reach newly recognized nonprobate transfers at death.

No view is expressed as to whether a survivorship interest in personal or intangible property
registered in two or more names as joint tenants with right of survivorship would come within
Section 102(a). The outcome might depend on who originated the registration and whether
severance by any co-owner acting alone was possible immediately preceding a co-owner’s death.

6. A feature of replaced Section 215 that was clarified by a 1991 technical amendment
protected a survivor beneficiary of a joint account from liability to the probate estate of a
deceased co-depositor for funds in the account owned by the survivor prior to decedent’s death.
Subsection (a) continues this protection by use of the language “valid transfer effective at death ...
by a transferor ... [who] had power, acting alone, to prevent the transfer by revocation or
withdrawal and instead use the property for the benefit of the transferor ....” Section 211 and
related sections of the Act make it clear that parties to a joint and survivor account separately own
values in the account in proportion to net contributions. Hence, a surviving joint account
depositor who had contributed to the balance on deposit prior to the death of the other party is
subject to the remedies described in this section only to the extent of new account values gained
through survival of the decedent.

7. Transferees of nonprobate transfers subject to the possible liability described in subsection
(b) include trustees of revocable trusts to the extent assets transferred to the trust before death
were subject to the decedent’s sole power to revoke. Such assets would be valued as of the date of
death. While the trustee of an irrevocable trust, or of a trust that may be revoked only by the
settlor and another person would ordinarily not be subject to this section, this section could apply
if the trust is named as a beneficiary of a nonprobate transfer, such as of securities registered in
TOD form. Under subsection (b), such a transfer would involve a possibility of trust liability based on the value of the TOD transfer as of the time of its receipt. Liability under this section incurred by a trustee is a trust liability for which the trustee does not incur personal liability.

8. Trusts and non-trust recipients of nonprobate transfers incur liability in the order prescribed in subsection (c). Note that either a revocable or an irrevocable trust might be designated devisee of a pour-over provision that would make the trust the “principal non-probate instrument in the decedent’s estate plan” and, consequently, make it liable under subsection (c)(2) ahead of other nonprobate transferees to the extent of values acquired by a transfer at death as described in subsection (a). Note, too, that nothing would pass to the receptacle trust by the pour-over devise if all probate estate assets are used to discharge statutory allowances and claims. However, the fact that the trust was designated to receive a pour-over devise signals that the trust probably includes the equivalent of a residuary clause measuring benefits by available assets and signaling probable intention of the settlor that residuary benefits should abate to pay the settlor’s debts prior to other trust gifts.

9. The abatement order among classes of beneficiaries of trusts specified by subsection (d) applies to all trusts subject to liability to the extent of nonprobate transfers received or administered whether or not the trust instrument is the principal nonprobate instrument in the decedent’s estate plan. The drafters decided against a cross-reference to the enacting jurisdiction’s abatement provision in part because those provisions usually deal with intestate and partially intestate estates as well as estates governed by wills. Note, too, that trusts for successive beneficiaries also will be governed by income and principal accounting rules that will serve to resolve some abatement issues.

10. Subsection (e) recognizes that a number of separate instruments and transactions, executed at different times and with or without internal references linking them to other documents, may constitute the paperwork describing succession to a decedent’s assets by probate and nonprobate methods. By authorizing control of abatement among gifts made by various transfers at death by the last executed instrument, the subsection permits a simple, last-minute override of earlier directions concerning a decedent’s wishes regarding priorities among successors. Thus, a will or trust amendment can correct or avoid liquidity and abatement problems discovered prior to death. The expression “block buster will” was coined by estate planners in the mid 70’s to refer to interest in legislation enabling a later will to override death benefits by any nonprobate transfer device. This subsection meets some of the goals of advocates of this legislation.

11. Subsection (f) builds on the principle employed in the Code’s augmented estate provisions (UPC §§ 2–201 — 2–214) in relation to nonprobate transfers made to persons in other states, possibly by transactions governed by laws of other states. The underlying principle is that the law of a decedent’s last domicile should be controlling as to rules of public policy that override the decedent’s power to devise the estate to anyone the decedent chooses. The principle is implemented by subjecting donee recipients of the decedent to liability under the decedent’s domiciliary law, with the belief that judgments recovered in that state following appropriate due process notice to defendants in other states will be accorded full faith and credit by courts in other states should collection proceedings be necessary.

12. The first and third sentences of subsection (g) are identical to sentences from former Section 215, which this section replaces. The second sentence is new. It reflects sensitivity for the dilemma confronting a probate fiduciary who, acting as required of a fiduciary, concludes that the costs and risks associated with a possible recovery from a nonprobate transferee outweigh the probable advantages to the estate and its claimants. A creditor whose claim has been allowed but remains unsatisfied and whose demand for a proceeding has been turned down by the estate fiduciary may proceed at personal risk in efforts to enforce the estate claim against the nonprobate beneficiary. This is so because the last two sentences of (g) shift the risk of unrecoverable costs from the decedent’s estate to the claimant who undertakes collection efforts on behalf of the decedent’s estate. Any recovery of costs should be used to reimburse the claimant who bore the risk of loss for the proceeding. A personal representative tempted to decline a demand for a proceeding should note that the “good faith” standard of this subsection must be determined in light of the fiduciary responsibility imposed by Section 3-703.
13. Subparagraph (h) meshes with time limits in the sections of the UPC governing allowance and disallowance of claims. See Sections 3-804 and 3-806.

14. Subsection (i)(1) is designed to protect issuers of TOD security registrations who make payments or delivery to designated death beneficiaries before receiving notice from the decedent’s probate estate of a probable insolvency. These entities are not “transferees” subject to liability under (b), but they might incur legal or other costs if the beneficiaries request payment in spite of warning notices from estate fiduciaries.

Subsection (i)(2) is designed to enable trustees handling nonprobate transfers to distribute trust assets in accordance with trust terms if a warning of probable estate insolvency has not been received. Beneficiaries receiving distributions from a trustee take subject to personal liability in the amount and priority of the trustee based on the value distributed.

FEDERAL ESTATE TAX


§ 2001. Imposition and rate of tax
(a) Imposition. — A tax is hereby imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

§ 2002. Liability for payment
The tax imposed by this chapter shall be paid by the executor.

§ 2031. Definition of gross estate
(a) General. — The value of the gross estate of the decedent shall be determined by including to the extent provided for in this part, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

§ 2033. Property in which the decedent had an interest
The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

§ 2035. Adjustments for certain gifts made within 3 years of decedent’s death
(a) Inclusion of certain property in gross estate. — If —
(1) the decedent made a transfer (by trust or otherwise) of an interest in any property, or relinquished a power with respect to any property, during the 3-year period ending on the date of the decedent’s death, and
(2) the value of such property (or an interest therein) would have been included in the decedent’s gross estate under section 2036, 2037, 2038, or 2042 if such transferred interest or relinquished power had been retained by the decedent on the date of his death,

the value of the gross estate shall include the value of any property (or interest therein) which would have been so included.

§ 2036. Transfers with retained life estate

(a) General rule. — The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money’s worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death —

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

§ 2037. Transfers taking effect at death

(a) General rule. — The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time after September 7, 1916, made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money’s worth), by trust or otherwise, if —

(1) possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent, and

(2) the decedent has retained a reversionary interest in the property (but in the case of a transfer made before October 8, 1949, only if such reversionary interest arose by the express terms of the instrument of transfer), and the value of such reversionary interest immediately before the death of the decedent exceeds 5 percent of the value of such property.

(b) Special rules. — For purposes of this section, the term “reversionary interest” includes a possibility that property transferred by the decedent —

(1) may return to him or his estate, or

(2) may be subject to a power of disposition by him,

but such term does not include a possibility that the income alone from such property may return to him or become subject to a power of disposition by him. The value of a reversionary interest immediately before the death of the decedent
shall be determined (without regard to the fact of the decedent’s death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, under regulations prescribed by the Secretary. In determining the value of a possibility that property may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such property may return to the decedent or his estate. Notwithstanding the foregoing, an interest so transferred shall not be included in the decedent’s gross estate under this section if possession or enjoyment of the property could have been obtained by any beneficiary during the decedent’s life through the exercise of a general power of appointment (as defined in section 2041) which in fact was exercisable immediately before the decedent’s death.

§ 2038. Revocable transfers

(a) In general. — The value of the gross estate shall include the value of all property —

(1) Transfers after June 22, 1936. — To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money’s worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished during the 3-year period ending on the date of the decedent’s death.

(2) Transfers on or before June 22, 1936. — To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money’s worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power during the 3-year period ending on the date of the decedent’s death. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph.

(b) Date of existence of power. — For purposes of this section, the power to alter, amend, revoke, or terminate shall be considered to exist on the date of the decedent’s death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, revocation, or termination takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent’s death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests which would have been excluded from the
power if the decedent had lived, and for such purpose, if the notice has not been
given or the power has not been exercised on or before the date of his death, such
notice shall be considered to have been given, or the power exercised, on the date
of his death.

§ 2039. Annuities

(a) General. — The gross estate shall include the value of an annuity or other
payment receivable by any beneficiary by reason of surviving the decedent under
any form of contract or agreement entered into after March 3, 1931 (other than as
insurance under policies on the life of the decedent), if, under such contract or
agreement, an annuity or other payment was payable to the decedent, or the
decedent possessed the right to receive such annuity or payment, either alone or in
conjunction with another for his life or for any period not ascertainable without
reference to his death or for any period which does not in fact end before his
death.

(b) Amount includible. — Subsection (a) shall apply to only such part of the
value of the annuity or other payment receivable under such contract or agreement
as is proportionate to that part of the purchase price therefor contributed by the
decedent. For purposes of this section, any contribution by the decedent’s
employer or former employer to the purchase price of such contract or agreement
(whether or not to an employee’s trust or fund forming part of a pension, annuity,
retirement, bonus or profit sharing plan) shall be considered to be contributed by
the decedent if made by reason of his employment.

§ 2040. Joint interests

(a) General rule. — The value of the gross estate shall include the value of all
property to the extent of the interest therein held as joint tenants with right of
survivorship by the decedent and any other person, or as tenants by the entirety by
the decedent and spouse, or deposited, with any person carrying on the banking
business, in their joint names and payable to either or the survivor, except such
part thereof as may be shown to have originally belonged to such other person and
never to have been received or acquired by the latter from the decedent for less
than an adequate and full consideration in money or money’s worth: Provided,
That where such property or any part thereof, or part of the consideration with
which such property was acquired, is shown to have been at any time acquired by
such other person from the decedent for less than an adequate and full
consideration in money or money’s worth, there shall be excepted only such part
of the value of such property as is proportionate to the consideration furnished by
such other person: Provided further, That where any property has been acquired by
gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent
and spouse, then to the extent of one-half of the value thereof, or, where so
acquired by the decedent and any other person as joint tenants with right of survivorship and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants with right of survivorship.

(b) Certain joint interests of husband and wife. —

(1) Interests of spouse excluded from gross estate. — Notwithstanding subsection (a), in the case of any qualified joint interest, the value included in the gross estate with respect to such interest by reason of this section is one-half of the value of such qualified joint interest.

(2) Qualified joint interest defined. — For purposes of paragraph (1), the term “qualified joint interest” means any interest in property held by the decedent and the decedent’s spouse as —

(A) tenants by the entirety, or

(B) joint tenants with right of survivorship, but only if the decedent and the spouse of the decedent are the only joint tenants.

§ 2041. Powers of appointment

(a) In general. — The value of the gross estate shall include the value of all property —

(1) Powers of appointment created on or before October 21, 1942. — To the extent of any property with respect to which a general power of appointment created on or before October 21, 1942, is exercised by the decedent —

(A) by will, or

(B) by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent’s gross estate under sections 2035 to 2038, inclusive;

but the failure to exercise such a power or the complete release of such a power shall not be deemed an exercise thereof. If a general power of appointment created on or before October 21, 1942, has been partially released so that it is no longer a general power of appointment, the exercise of such power shall not be deemed to be the exercise of a general power of appointment if —

(i) such partial release occurred before November 1, 1951, or

(ii) the donee of such power was under a legal disability to release such power on October 21, 1942, and such partial release occurred not later than 6 months after the termination of such legal disability.

(2) Powers created after October 21, 1942. — To the extent of any property with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942, or with respect to which the decedent has at any time exercised or released such a power of appointment by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent’s gross estate under sections 2035 to 2038, inclusive. For purposes of this paragraph (2), the power of
appointment shall be considered to exist on the date of the decedent’s death even though the exercise of the power is subject to a precedent giving of notice or even though the exercise of the power takes effect only on the expiration of a stated period after its exercise, whether or not on or before the date of the decedent’s death notice has been given or the power has been exercised.

(3) Creation of another power in certain cases. — To the extent of any property with respect to which the decedent —

(A) by will, or

(B) by a disposition which is of such nature that if it were a transfer of property owned by the decedent such property would be includible in the decedent’s gross estate under section 2035, 2036, or 2037, exercises a power of appointment created after October 21, 1942, by creating another power of appointment which under the applicable local law can be validly exercised so as to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such property, for a period ascertainable without regard to the date of the creation of the first power.

(b) Definitions. — For purposes of subsection (a) —

(1) General power of appointment. — The term “general power of appointment” means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that —

(A) A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.

(B) A power of appointment created on or before October 21, 1942, which is exercisable by the decedent only in conjunction with another person shall not be deemed a general power of appointment.

(C) In the case of a power of appointment created after October 21, 1942, which is exercisable by the decedent only in conjunction with another person —

(i) If the power is not exercisable by the decedent except in conjunction with the creator of the power — such power shall not be deemed a general power of appointment.

(ii) If the power is not exercisable by the decedent except in conjunction with a person having a substantial interest in the property, subject to the power, which is adverse to exercise of the power in favor of the decedent — such power shall not be deemed a general power of appointment. For the purposes of this clause a person who, after the death of the decedent, may be possessed of a power of appointment (with respect to the property subject to the decedent’s power) which he may exercise in his own favor shall be deemed as having an interest in the property and such interest shall be deemed adverse to such exercise of the decedent’s power.

(iii) If (after the application of clauses (i) and (ii)) the power is a general power of appointment and is exercisable in favor of such other person — such power
shall be deemed a general power of appointment only in respect of a fractional part of the property subject to such power, such part to be determined by dividing the value of such property by the number of such persons (including the decedent) in favor of whom such power is exercisable.

For purposes of clauses (ii) and (iii), a power shall be deemed to be exercisable in favor of a person if it is exercisable in favor of such person, his estate, his creditors, or the creditors of his estate.

(2) Lapse of power. — The lapse of a power of appointment created after October 21, 1942, during the life of the individual possessing the power shall be considered a release of such power. The preceding sentence shall apply with respect to the lapse of powers during any calendar year only to the extent that the property, which could have been appointed by exercise of such lapsed powers, exceeded in value, at the time of such lapse, the greater of the following amounts:

(A) $5,000, or
(B) 5 percent of the aggregate value, at the time of such lapse, of the assets out of which, or the proceeds of which, the exercise of the lapsed powers could have been satisfied.

(3) Date of creation of power. — For purposes of this section, a power of appointment created by a will executed on or before October 21, 1942, shall be considered a power created on or before such date if the person executing such will dies before July 1, 1949, without having republished such will, by codicil or otherwise, after October 21, 1942.

§ 2042. Proceeds of life insurance

The value of the gross estate shall include the value of all property —

(1) Receivable by the executor. — To the extent of the amount receivable by the executor as insurance under policies on the life of the decedent.

(2) Receivable by other beneficiaries. — To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For purposes of the preceding sentence, the term “incident of ownership” includes a reversionary interest (whether arising by the express terms of the policy or other instrument or by operation of law) only if the value of such reversionary interest exceeded 5 percent of the value of the policy immediately before the death of the decedent. As used in this paragraph, the term “reversionary interest” includes a possibility that the policy, or the proceeds of the policy, may return to the decedent or his estate, or may be subject to a power of disposition by him. The value of a reversionary interest at any time shall be determined (without regard to the fact of the decedent’s death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, pursuant to regulations prescribed by the Secretary. In determining the value of a possibility that the policy or proceeds
thereof may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such policy or proceeds may return to the decedent or his estate.

§ 2043. Transfers for insufficient consideration

(a) In general. — If any one of the transfers, trusts, interests, rights, or powers enumerated and described in sections 2035 to 2038, inclusive, and section 2041 is made, created, exercised, or relinquished for a consideration in money or money’s worth, but is not a bona fide sale for an adequate and full consideration in money or money’s worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

(b) Marital rights not treated as consideration. —

(1) In general. — For purposes of this chapter, a relinquishment or promised relinquishment of dower or curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent’s property or estate, shall not be considered to any extent a consideration “in money or money’s worth”.

(2) Exception. — For purposes of section 2053 (relating to expenses, indebtedness, and taxes), a transfer of property which satisfies the requirements of paragraph (1) of section 2516 (relating to certain property settlements) shall be considered to be made for an adequate and full consideration in money or money’s worth.

§ 2044. Certain property for which marital deduction was previously allowed

(a) General rule. — The value of the gross estate shall include the value of any property to which this section applies in which the decedent had a qualifying income interest for life.

(b) Property to which this section applies. — This section applies to any property if —

(1) a deduction was allowed with respect to the transfer of such property to the decedent —

(A) under section 2056 by reason of subsection (b)(7) thereof, or

(B) under section 2523 by reason of subsection (f) thereof, and

(2) section 2519 (relating to dispositions of certain life estates) did not apply with respect to a disposition by the decedent of part or all of such property.

(c) Property treated as having passed from decedent. — For purposes of this chapter and chapter 13, property includible in the gross estate of the decedent under subsection (a) shall be treated as property passing from the decedent.
§ 2045. Prior interests

Except as otherwise specifically provided by law, sections 2034 to 2042, inclusive, shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whenever made, created, arising, existing, exercised, or relinquished.

§ 2046. Disclaimers

For provisions relating to the effect of a qualified disclaimer for purposes of this chapter, see section 2518.

§ 2051. Definition of taxable estate

For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the deductions provided for in this part.

§ 2053. Expenses, indebtedness, and taxes

(a) General rule. — For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts —

(1) for funeral expenses,
(2) for administration expenses,
(3) for claims against the estate, and
(4) for unpaid mortgages on, or any indebtedness in respect of, property where the value of the decedent’s interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate,

as are allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.

(b) Other administration expenses. — Subject to the limitations in paragraph (1) of subsection (c), there shall be deducted in determining the taxable estate amounts representing expenses incurred in administering property not subject to claims which is included in the gross estate to the same extent such amounts would be allowable as a deduction under subsection (a) if such property were subject to claims, and such amounts are paid before the expiration of the period of limitation for assessment provided in section 6501.

(c) Limitations. —

(1) Limitations applicable to subsections (a) and (b). —

(A) Consideration for claims. — The deduction allowed by this section in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, when founded on a promise or agreement, be limited to the extent that they were
contracted bona fide and for an adequate and full consideration in money or money’s worth; except that in any case in which any such claim is founded on a promise or agreement of the decedent to make a contribution or gift to or for the use of any donee described in section 2055 for the purposes specified therein, the deduction for such claims shall not be so limited, but shall be limited to the extent that it would be allowable as a deduction under section 2055 if such promise or agreement constituted a bequest.

(B) Certain taxes. — Any income taxes on income received after the death of the decedent, or property taxes not accrued before his death, or any estate, succession, legacy, or inheritance taxes, shall not be deductible under this section.

(C) Certain claims by remaindermen. — No deduction shall be allowed under this section for a claim against the estate by a remainderman relating to any property described in section 2044.

(D) Section 6166 interest. — No deduction shall be allowed under this section for any interest payable under section 6601 on any unpaid portion of the tax imposed by section 2001 for the period during which an extension of time for payment of such tax is in effect under section 6166.

(2) Limitations applicable only to subsection (a). — In the case of the amounts described in subsection (a), there shall be disallowed the amount by which the deductions specified therein exceed the value, at the time of the decedent’s death, of property subject to claims, except to the extent that such deductions represent amounts paid before the date prescribed for the filing of the estate tax return. For purposes of this section, the term “property subject to claims” means property includible in the gross estate of the decedent which, or the avails of which, would under the applicable law, bear the burden of the payment of such deductions in the final adjustment and settlement of the estate, except that the value of the property shall be reduced by the amount of the deduction under section 2054 attributable to such property.

§ 2054. Losses

For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate losses incurred during the settlement of estates arising from fires, storms, shipwrecks, or other casualties, or from theft, when such losses are not compensated for by insurance or otherwise.

§ 2056. Bequests, etc., to surviving spouse

(a) Allowance of marital deduction. — For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsection (b), be determined by deducting from the value of the gross estate an amount equal
to the value of any interest in property which passes or has passed from the
decedent to his surviving spouse, but only to the extent that such interest is
included in determining the value of the gross estate.

...  

§ 2203. Definition of executor

The term “executor” wherever it is used in this title in connection with the estate
tax imposed by this chapter means the executor or administrator of the decedent,
or, if there is no executor or administrator appointed, qualified, and acting within
the United States, then any person in actual or constructive possession of any
property of the decedent.

§ 2204. Discharge of fiduciary from personal liability

(a) General rule. — If the executor makes written application to the Secretary
for determination of the amount of the tax and discharge from personal liability
therefor, the Secretary (as soon as possible, and in any event within 9 months after
the making of such application, or, if the application is made before the return is
filed, then within 9 months after the return is filed, but not after the expiration of
the period prescribed for the assessment of the tax in section 6501) shall notify the
executor of the amount of the tax. The executor, on payment of the amount of
which he is notified (other than any amount the time for payment of which is
extended under section 6161, 6163, or 6166), and on furnishing any bond which
may be required for any amount for which the time for payment is extended, shall
be discharged from personal liability for any deficiency in tax thereafter found to
be due and shall be entitled to a receipt or writing showing such discharge.

(b) Fiduciary other than the executor. — If a fiduciary (not including a fiduciary
in respect of the estate of a nonresident decedent) other than the executor makes
written application to the Secretary for determination of the amount of any estate
tax for which the fiduciary may be personally liable, and for discharge from
personal liability therefor, the Secretary upon the discharge of the executor from
personal liability under subsection (a), or upon the expiration of 6 months after the
making of such application by the fiduciary, if later, shall notify the fiduciary (1)
of the amount of such tax for which it has been determined the fiduciary is liable,
or (2) that it has been determined that the fiduciary is not liable for any such tax.
Such application shall be accompanied by a copy of the instrument, if any, under
which such fiduciary is acting, a description of the property held by the fiduciary,
and such other information for purposes of carrying out the provisions of this
section as the Secretary may require by regulations. On payment of the amount of
such tax for which it has been determined the fiduciary is liable (other than any
amount the time for payment of which has been extended under section 6161,
6163, or 6166), and on furnishing any bond which may be required for any amount
for which the time for payment has been extended, or on receipt by him of
notification of a determination that he is not liable for any such tax, the fiduciary
shall be discharged from personal liability for any deficiency in such tax thereafter
found to be due and shall be entitled to a receipt or writing evidencing such
discharge.

(c) Special lien under section 6324A. — For purposes of the second sentence of
subsection (a) and the last sentence of subsection (b), an agreement which meets
the requirements of section 6324A (relating to special lien for estate tax deferred
under section 6166) shall be treated as the furnishing of bond with respect to the
amount for which the time for payment has been extended under section 6166.

(d) Good faith reliance on gift tax returns. — If the executor in good faith relies
on gift tax returns furnished under section 6103(e)(3) for determining the
decedent’s adjusted taxable gifts, the executor shall be discharged from personal
liability with respect to any deficiency of the tax imposed by this chapter which is
attributable to adjusted taxable gifts which —

(1) are made more than 3 years before the date of the decedent’s death, and
(2) are not shown on such returns.

§ 2205. Reimbursement out of estate

If the tax or any part thereof is paid by, or collected out of, that part of the estate
passing to or in the possession of any person other than the executor in his
capacity as such, such person shall be entitled to reimbursement out of any part of
the estate still undistributed or by a just and equitable contribution by the persons
whose interest in the estate of the decedent would have been reduced if the tax had
been paid before the distribution of the estate or whose interest is subject to equal
or prior liability for the payment of taxes, debts, or other charges against the
estate, it being the purpose and intent of this chapter that so far as is practicable
and unless otherwise directed by the will of the decedent the tax shall be paid out
of the estate before its distribution.

§ 2206. Liability of life insurance beneficiaries

Unless the decedent directs otherwise in his will, if any part of the gross estate
on which tax has been paid consists of proceeds of policies of insurance on the life
of the decedent receivable by a beneficiary other than the executor, the executor
shall be entitled to recover from such beneficiary such portion of the total tax paid
as the proceeds of such policies bear to the taxable estate. If there is more than one
such beneficiary, the executor shall be entitled to recover from such beneficiaries
in the same ratio. In the case of such proceeds receivable by the surviving spouse
of the decedent for which a deduction is allowed under section 2056 (relating to
marital deduction), this section shall not apply to such proceeds except as to the
amount thereof in excess of the aggregate amount of the marital deductions
allowed under such section.

§ 2207. Liability of recipient of property over which decedent had
power of appointment

Unless the decedent directs otherwise in his will, if any part of the gross estate
on which the tax has been paid consists of the value of property included in the
gross estate under section 2041, the executor shall be entitled to recover from the
person receiving such property by reason of the exercise, nonexercise, or release
of a power of appointment such portion of the total tax paid as the value of such
property bears to the taxable estate. If there is more than one such person, the
executor shall be entitled to recover from such persons in the same ratio. In the
case of such property received by the surviving spouse of the decedent for which a
deduction is allowed under section 2056 (relating to marital deduction), this
section shall not apply to such property except as to the value thereof reduced by
an amount equal to the excess of the aggregate amount of the marital deductions
allowed under section 2056 over the amount of proceeds of insurance upon the life
of the decedent receivable by the surviving spouse for which proceeds a marital
deduction is allowed under such section.

§ 2207A. Right of recovery in the case of certain marital deduction
property

(a) Recovery with respect to estate tax. —
(1) In general. — If any part of the gross estate consists of property the value of
which is includible in the gross estate by reason of section 2044 (relating to certain
property for which marital deduction was previously allowed), the decedent’s
estate shall be entitled to recover from the person receiving the property the
amount by which —
(A) the total tax under this chapter which has been paid, exceeds
(B) the total tax under this chapter which would have been payable if the value
of such property had not been included in the gross estate.
(2) Decedent may otherwise direct. — Paragraph (1) shall not apply with respect
to any property to the extent that the decedent in his will (or a revocable trust)
specifically indicates an intent to waive any right of recovery under this
subchapter with respect to such property.
(b) Recovery with respect to gift tax. — If for any calendar year tax is paid
under chapter 12 with respect to any person by reason of property treated as
transferred by such person under section 2519, such person shall be entitled to
recover from the person receiving the property the amount by which —
(1) the total tax for such year under chapter 12, exceeds
(2) the total tax which would have been payable under such chapter for such
year if the value of such property had not been taken into account for purposes of
chapter 12.
(c) More than one recipient of property. — For purposes of this section, if there
is more than one person receiving the property, the right of recovery shall be
against each such person.
(d) Taxes and interest. — In the case of penalties and interest attributable to
additional taxes described in subsections (a) and (b), rules similar to subsections
(a), (b), and (c) shall apply.

§ 2207B. Right of recovery where decedent retained interest

(a) Estate tax. —
(1) In general. — If any part of the gross estate on which tax has been paid
consists of the value of property included in the gross estate by reason of section
2036 (relating to transfers with retained life estate), the decedent’s estate shall be
entitled to recover from the person receiving the property the amount which bears
the same ratio to the total tax under this chapter which has been paid as —
(A) the value of such property, bears to
(B) the taxable estate.
(2) Decedent may otherwise direct. — Paragraph (1) shall not apply with respect
to any property to the extent that the decedent in his will (or a revocable trust)
specifically indicates an intent to waive any right of recovery under this
subchapter with respect to such property.
(b) More than one recipient. — For purposes of this section, if there is more than
1 person receiving the property, the right of recovery shall be against each such
person.
(c) Penalties and interest. — In the case of penalties and interest attributable to
the additional taxes described in subsection (a), rules similar to the rules of
subsections (a) and (b) shall apply.
(d) No right of recovery against charitable remainder trusts. — No person shall
be entitled to recover any amount by reason of this section from a trust to which
section 664 applies (determined without regard to this section).