

Memorandum 2010-27

**Nonprobate Transfers: Creditor Claims and Family Protection
(Background Study)**

In December 2007, the Commission accepted an offer from its former Executive Secretary, Nathaniel Sterling, to prepare a background study on the status of creditor claims and family protections with respect to a decedent's assets that pass outside of probate. The staff has received Mr. Sterling's completed study. It is attached. The background study concludes with a lengthy appendix, which sets out many of the statutes that are discussed in the main body of the study.

The staff reformatted the study, in order to put it into the standard form used for published reports and recommendations. That involved converting over 500 in-line citations to footnotes. Although those changes should be entirely nonsubstantive, it is possible that some changes might have disrupted the narrative flow of the report. If so, the staff apologizes. We will invite Mr. Sterling to let us know whether there are any changes that he sees as problematic, before publishing a final version of the report.

The staff greatly appreciates the enormous effort involved in preparing the background study. It is both comprehensive in its scope and scholarly in its analysis — while remaining practical and attentive to detail in making specific recommendations for reform. Those qualities, combined with Mr. Sterling's seasoned policy judgment, should make the background study an extremely useful aid to the Commission in conducting its own study of the subject matter. The staff also wishes to acknowledge and thank Mr. Sterling for having prepared the background study as a public service, without any compensation.

Organization of Background Study

Mr. Sterling describes the organization of his background study as follows:

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

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.

See Attachment p. 10.

Major Policy Questions

The most fundamental policy question posed by the background study is whether a decedent's assets that pass outside of probate should be subject to creditor claims and liable for statutory allowances for the maintenance of the decedent's dependents.

If the answer is yes, then a long list of subsidiary questions must be answered, including (but not limited to) the following:

- (1) Should the law require that the decedent's probate estate be exhausted before nonprobate assets can be reached?
- (2) Should the law require that the decedent's revocable trust be exhausted before other nonprobate assets can be reached?

- (3) Should the existing creditor priority scheme that governs creditor claims in probate (Prob. Code § 11420) also govern claims against nonprobate assets?
- (4) Should the existing rules that specify an order in which different classes of gifts must be exhausted in satisfying creditor claims (Prob. Code § 21402 (abatement)) also govern claims against nonprobate assets?
- (5) If abatement rules apply, should the decedent be permitted to expressly override the statutory abatement order?
- (6) Should the liability of nonprobate assets be *in rem*, or should the recipients of nonprobate assets be personally liable to the extent of the value of the property received?
- (7) Should creditor claims be subject to judgment enforcement exemptions that would have been available to the decedent during life?
- (8) If family protections are applied to nonprobate transfers, should the protected property be exempt from creditor claims?
- (9) To what extent would California law governing creditor claims and family protections be preempted by ERISA as applied to employer-provided nonprobate assets?
- (10) Should there be a comprehensive proceeding for the marshaling of nonprobate assets and the allocation of liability?
- (11) If a probate proceeding is open, should that proceeding be the basis for a comprehensive claims process, reaching both probate and nonprobate assets?
- (12) If there is no open probate proceeding, should creditors or nonprobate beneficiaries be authorized to initiate probate proceedings for the sole purpose of resolving creditor claims?
- (13) Should creditors be authorized to enforce directly against individual nonprobate assets or beneficiaries?
- (14) If individual creditor enforcement is authorized, would a beneficiary whose gift is exhausted in satisfying a creditor claim have a right of contribution against other potentially liable nonprobate transfer beneficiaries?
- (15) If an individual creditor exhausts the decedent's nonprobate estate, should other creditors have a right of contribution against the creditor who initiated the enforcement action?
- (16) What statute of limitations should control?

With respect to many of the questions listed above, an answer of “yes” would immediately invite a follow-up question: how would that be accomplished?

Notably, many of the policies listed above would be difficult to implement outside of a comprehensive proceeding. For example, if an individual creditor is

authorized to enforce a debt against an individual recipient of nonprobate assets, how would it be possible to apply creditor priorities? Rules of abatement? Pro rata beneficiary liability? Priority of family protections? To fully implement those policies in a regime of individual creditor enforcement would seem to require an inefficient (and often incomplete and inequitable) multiplicity of individual enforcement and contribution actions.

By contrast, a comprehensive proceeding could marshal all of the decedent's transferred property (whether disposed of by probate or nonprobate mechanisms), implement family protections, and distribute the estate property to satisfy valid claims in a manner that is consistent with existing creditor priorities, order of abatement rules, and pro rata responsibility of beneficiaries in the same abatement class. On its face, that approach seems appealing. But how could a comprehensive procedure be implemented in a way that would not largely replicate probate (thereby defeating the decedent's goal of avoiding the cost and delay of probate)?

The background study proposes a comprehensive approach with the following features:

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.

See Attachment pp. 151-52.

Failing that, Mr. Sterling recommends a set of alternative reforms that he believes would still result in significant improvement in the law:

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.

See Attachment pp. 153-54.

Conclusion

In light of the broad scope, importance, and probable difficulty of this study, the staff recommends that the Commission proceed at a deliberate pace, with a sustained effort to involve interested groups at every stage of the process. It will be important for the Commission to receive the close and regular input of stakeholders and experts, to ensure that any proposed reforms will be workable, beneficial, and enactable.

As a first step, the attached background study should be distributed to the public, along with an express invitation to comment on its content and on Mr. Sterling's recommendations. A generous public comment period should be provided, perhaps as long as 120 days (longer periods are often necessary when a document is released in the summer months).

In addition to distributing the background study to our regular estate planning mailing list, the staff would actively solicit the involvement of interested groups such as the Executive Committee of the Trusts and Estates Section of the State Bar, debt collection groups, family protection groups, legal scholars, the California Judges Association, the Judicial Council, the Assembly and Senate Committees on Judiciary, and the Governor.

Once we have received the initial responses from interested groups, the Commission can develop a plan for how to proceed through the numerous issues that will need to be resolved and balanced in the course of the study.

The staff recommends that the Commission approve distribution of the attached background study for 120 days of public review and comment.

Respectfully submitted,

Brian Hebert
Executive Secretary

#L-4100

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Background Study

Liability of Nonprobate Transfer for Creditor Claims and Family Protections

authored by

Nathaniel Sterling

June 2010

The purpose of this background study is to solicit public comment on the contents of the study, including recommendations made by the study's author. A comment submitted to the Commission will be part of the public record. The Commission may consider the comment at a public meeting. It is just as important to advise the Commission that you approve of a recommendation made in this study as it is to advise the Commission that you have concerns about the recommendation.

COMMENTS ON THIS BACKGROUND STUDY SHOULD BE RECEIVED BY
THE COMMISSION NOT LATER THAN _____.

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LIABILITY OF NONPROBATE TRANSFER FOR CREDITOR CLAIMS AND FAMILY PROTECTIONS

Nathaniel Sterling

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This background study was prepared by the author to assist the California Law Revision Commission in its study of the liability of a nonprobate transfer for creditor claims and family protections. Any conclusion, opinion, or recommendation in this study is that of the author and does not necessarily represent or reflect the views of the California Law Revision Commission or its members.

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LIABILITY OF NONPROBATE TRANSFER FOR CREDITOR CLAIMS AND FAMILY PROTECTIONS

1

I. INTRODUCTION

2

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.

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1 The dominant trend in estate planning and administration over the past half
2 century has been the rise of the nonprobate transfer. A nonprobate transfer is a
3 transfer of property that occurs on the death of the decedent and that passes
4 property to a beneficiary outside of regular probate channels.

5 PROBATE

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

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

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

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

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

26 THE NONPROBATE REVOLUTION

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

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

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

1. 97 Harv. L. Rev. 1108 (1984).

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

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

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

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

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

23 CREDITOR CLAIMS AND FAMILY PROTECTIONS

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

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

33 The effort to disentangle these types of issues with respect to nonprobate
34 transfers and to provide rational treatment of them is just beginning. The
35 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).

3. Prob. Code §§ 9000-9399.

4. Prob. Code §§ 11400-11467 (priorities), 21400-21406 (abatement).

5. Prob. Code §§ 6500-6615 (family protections).

1 But for the most part the nonprobate transfer system, if it can be called that, does
2 not comprehensively deal with these types of concerns. Existing California law on
3 liability of a nonprobate transfer for debts of a decedent and protection of the
4 decedent’s dependents has evolved piecemeal. What little law there is on the
5 subject is unclear, inconsistent, and haphazard.

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

7 Firmly rooted in the English history of the law of succession is the notion that
8 the rights of creditors should be protected. Handling the claims of creditors
9 against a decedent’s estate has become a routine matter. Just as deeply entrenched
10 is the sentiment of protecting the surviving spouse. However, the increasing use
11 of will substitutes to dispose of a decedent’s property has also had the effect of
12 removing many gifts which pass at death from the purview of the probate courts
13 and the policies they impose. “The trend toward the use of nonprobate assets to
14 pass wealth at death has increased so rapidly that it has outpaced the ability of
15 states to deal with the situation.” Increased use of will substitutes has resulted in
16 ad hoc judicial reform that is largely unsystematic. Although substantive policies
17 restricting the disposition of property at death “would seem to make most sense if
18 applicable as well to will substitutes, they are often expressed in narrow statutory
19 language referring only to wills or to decedents’ estates.”⁷

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

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

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

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

6. Prob. Code §§ 19000-19403 (payment of claims, debts, and expenses from revocable trust of deceased settlor).

7. Schwickerath, *Public Policy and the Probate Pariah: Confusion in the Law of Will Substitutes*, 48 Drake L. Rev. 769, 770-771 (2000) (fns. 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”).

1 probate was meant to serve — above all, creditors — should have allowed the
2 protections of the probate system to slip away from them.”⁸

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

11 OUTLINE OF STUDY

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

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

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

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

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

8. Langbein, *supra* note 1, at 1117.

1 II. LIABILITY OF NONPROBATE TRANSFER FOR DEBTS

2 NONPROBATE TRANSFER DEVICES

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

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

13 The law makes clear that use of these devices does not impair rights of the
14 decedent’s creditors. “Nothing in this section limits the rights of creditors under
15 any other law.”⁹ That provision is drawn from Section 6-201(b) of the Uniform
16 Probate Code (pre-1989). The provision has never been construed, nor is there any
17 commentary concerning it.

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

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

26 COMMUNITY PROPERTY

27 Intersecting the law governing specific types of nonprobate transfer is the
28 general law of community property that governs passage of property on the death
29 of a married person.¹⁰

30 This section provides an overview; specific issues in nonprobate transfer
31 liability of community property are addressed in detail throughout this study.

9. Prob. Code § 5000(c).

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).

Additionally, this study does not generally distinguish treatment of quasi-community property from that of community property. Cf. Fam. Code §§ 125 (quasi-community property), 912 (liability of property for debts); Prob. Code §§ 66 (quasi-community property), 101 (disposition on death), 6101 (testamentary disposition).

1 **PASSAGE OF COMMUNITY PROPERTY ON DEATH OF A SPOUSE**

2 Each spouse has an equal and undivided one-half interest in community
3 property. On the death of a spouse the community is severed; the decedent may
4 dispose of the decedent's one-half interest by will or nonprobate transfer.¹¹ Absent
5 any other disposition of the decedent's interest in community property, the interest
6 passes by intestate succession to the surviving spouse.¹²

7 A nonprobate transfer of community property by a spouse applies only to the
8 one-half interest of that spouse unless the other spouse consents to the transfer of
9 both interests.¹³

10 It is common for a decedent to pass the decedent's community property interest
11 to the surviving spouse, whether by will, intestate succession, trust, joint tenancy,
12 or other form of nonprobate transfer. In addition, a relatively new title form —
13 community property with right of survivorship — passes the decedent's one-half
14 interest to the surviving spouse in the same manner as joint tenancy.¹⁴

15 While it is possible for a decedent to use various nonprobate transfer devices to
16 pass a community property interest to the surviving spouse, it is often
17 advantageous to retain the community property character of the property because
18 of the significant tax advantages community property receives. In particular,
19 community property receives a double step up in basis for capital gain taxation
20 purposes.¹⁵

21 Community property that passes to a surviving spouse by intestacy or will may
22 be subject to summary administration. The surviving spouse may deal with the
23 property without probate, subject to the obligation to restore the property or its
24 value to the decedent's estate if probate administration is later commenced.¹⁶ The
25 law also enables simplified and expedited processing of the decedent's separate
26 and community property by the surviving spouse without probate.¹⁷

27 **RIGHTS OF CREDITORS**

28 During marriage, each spouse's interest in community property is liable for the
29 debts of either spouse.¹⁸ The liability survives termination of the marriage by the

11. Prob. Code §§ 100 (effect of death), 6101 (right of testamentary disposition).

12. Prob. Code § 6401 (intestate succession).

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).

14. Civ. Code § 682.1.

15. 26 U.S.C. § 1014(b)(6) (basis).

16. Prob. Code §§ 13540-13545 (right of surviving spouse to dispose of property), 13560-13564 (liability for decedent's property).

17. Prob. Code §§ 13500-13504 (passage of property to surviving spouse without administration).

18. Fam. Code § 910 (liability of community property).

1 death of a spouse.¹⁹ Because the one-half interest of each spouse remains liable,
2 the liability could be satisfied disproportionately from property in the decedent’s
3 estate or from property of the surviving spouse. The law provides for an allocation
4 of liability between the decedent and the survivor.²⁰

5 In the absence of probate, the surviving spouse is liable for the decedent’s debts
6 to the extent of the value of any property received from the decedent.²¹ The
7 converse is also true — the decedent’s half of community property is liable for the
8 community debts of the surviving spouse. See *Dawes Family Trust v. Rich*.²²

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

12 **Community Property in Joint Tenancy Form**

13 Married persons may hold community property in joint tenancy form. Joint
14 tenancy property passes to the survivor free of the debts of the decedent. An
15 argument may be successfully made that the joint tenancy form was for
16 convenience only and that community property tax rules should apply. It is not
17 clear whether characterization of joint tenancy property as community for tax
18 purposes would subject the property to community property creditor liability
19 rules.²³

20 For a comparative analysis of the incidents of community property and joint
21 tenancy (written before the existence of community property with right of
22 survivorship), see Sterling, *Joint Tenancy and Community Property in California*,
23 14 Pac. L.J. 927 (1983).

24 **Community Property with Right of Survivorship**

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

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

19. See, e.g., *Marriage of Barnes*, 83 Cal. App. 3d 143, 147 Cal. Rptr. 710 (1978).

20. Prob. Code §§ 11440-11446 (allocation of debts between estate and surviving spouse).

21. Prob. Code §§ 13550-13554 (liability for debts of deceased spouse).

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).

1 dependent upon which joint tenant survives.”²⁴ As a consequence, a creditor’s
2 right against the interest of a joint tenant is extinguished with the extinction of the
3 contingency — the failure of that joint tenant to survive.

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

8 GENERAL POWER OF APPOINTMENT

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

15 JOINT SAFE DEPOSIT BOX

16 A commonly used device intended to pass property outside probate is rental of a
17 safe deposit box in joint tenancy. Whether the contents of the box pass by joint
18 tenancy or by another means is determined by the character of the property in the
19 box, not by the manner of rental of the box.²⁵

20 JOINT TENANCY

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

24 Joint tenancy is a form of common ownership of property, consisting of equal
25 and undivided interests of the joint tenants during life. After death, the surviving
26 joint tenant acquires ownership of the whole by right of survivorship; the property
27 is not subject to administration in the decedent’s estate.²⁶ The surviving joint
28 tenant records an affidavit of death in order to establish ownership.

29 Generally, joint tenancy property passes to the survivor free of the claims of the
30 decedent’s creditors.²⁷ That rule applies to a secured as well as an unsecured
31 creditor. The surviving joint tenant takes the property free of a lien or

24. *Hammond v. McArthur*, 30 Cal. 2d 512, 516, 183 P.2d 1 (1947).

25. Civ. Code § 683.1; *California Trust Co. v. Bennett*, 33 Cal. 2d 694, 204 P.2d 324 (1949).

26. See, e.g., *Estate of Zaring*, 93 Cal. App. 2d 577, 209 P.2d 642 (1949).

27. See, e.g., *Tenhet v. Boswell*, 18 Cal. 3d 150 (1976); *Zeigler v. Bonnell*, 52 Cal. App. 2d 217, 126 P.2d 118 (1942); *Citizens Action League v. Kizer*, 887 F.2d 1003 (9th Cir 1989).

1 encumbrance on the decedent's interest in the property.²⁸ However, if the survivor
2 is a co-obligor on a secured debt the security attaches to the survivor's property,
3 without right of exoneration from the decedent's estate.²⁹

4 Although joint tenancy property generally passes free of creditor claims, that
5 rule does not apply if the decedent's transfer of the property into joint tenancy was
6 fraudulent as to creditors.³⁰

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

13 LIFE ESTATE

14 A decedent's creditors may be able to proceed against property conveyed by the
15 decedent subject to a retained life estate, if the transfer was in fraud of creditors.³¹
16 The property is included in decedent's gross estate under federal law if it was a
17 donative transfer.³²

18 LIFE INSURANCE

19 The beneficiary of an insurance policy on the decedent's life takes the proceeds
20 directly from the insurance company free of probate.³³ The proceeds are includible
21 in the decedent's gross estate for estate tax purposes if at death the decedent
22 possessed any incidents of ownership.³⁴

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

28. See, e.g., *Zeigler v. Bonnell*, 52 Cal. App. 2d 217, 136 P.2d 118 (1942); *Hammond v. McArthur*, 30 Cal. 2d 512, 183 P.2d 1 (1947); *Hamel v. Gootkin*, 202 Cal. App. 2d 27, 20 Cal. Rptr. 372 (1962).

29. *Estate of Dolley*, 265 Cal. App. 2d 63, 71 Cal. Rptr. 56 (1968).

30. See Civ. Code § 3439; *Rupp v. Kahn*, 246 Cal. App. 2d 188, 55 Cal. Rptr. 108 (1966).

31. *Rupp v. Kahn*, 246 Cal. App. 2d 188, 55 Cal. Rptr. 108 (1966).

32. *United States v. Estate of Grace*, 395 US 316 (1969).

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

34. Int. Rev. Code § 2042; Reg. § 20.2042-1(c).

35. Code Civ. Proc. § 704.100.

36. *Headen v. Miller*, 141 Cal. App. 3d 169, 190 Cal. Rptr. 198 (1983).

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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.³⁷ 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.³⁸

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.³⁹ 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.⁴⁰ California law generally protects benefits of that type from creditor claims. A public retirement plan is fully exempt.⁴¹ A private retirement plan is exempt to the extent necessary for support of dependents.⁴²

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.⁴³ 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.⁴⁴

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.⁴⁵

37. See Prob. Code §§ 5100-5407.

38. Prob. Code § 5202 (“Nothing in this part affects the law relating to transfers in fraud of creditors.”).

39. See, e.g., Estate of Howe, 31 Cal. 2d 395, 189 P.2d 5 (1948).

40. See, e.g., Prob. Code § 5000(a); Estate of Davis, 171 Cal. App. 3d 854, 217 Cal. Rptr. 734 (1985).

41. Code Civ. Proc. § 704.110.

42. Code Civ. Proc. § 704.115.

43. 29 U.S.C. §§ 1001-1461.

44. 26 U.S.C. § 414(p).

45. Int. Rev. Code § 2039(c).

1

REVOCABLE TRUST

2

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."

6

7

SECURITY REGISTERED IN TRANSFER ON DEATH FORM

8

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.⁴⁶ 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.⁴⁷

12

13

SOCIAL SECURITY BENEFITS

14

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.⁴⁸

16

17

UNITED STATES SAVINGS BOND

18

A United States saving bond may be issued in co-ownership form or in beneficiary form.⁴⁹ 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.⁵⁰

23

24

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.⁵¹

26

46. Prob. Code §§ 5500-5512.

47. Prob. Code § 5509.

48. 42 U.S.C. § 407.

49. 31 Code Fed. Reg. § 315.7.

50. Katz v. Driscoll, 86 Cal. App. 2d 313, 194 P.2d 822 (1948).

51. Rev. Rul. 68-269, 1968-1 Cum. Bull. 399.

1 VEHICLE, VESSEL, MOBILE HOME REGISTERED IN JOINT
2 OR BENEFICIARY FORM

3 A vehicle or vessel registered with the Department of Motor Vehicles may be
4 transferred outside of probate by various means.

5 (1) A vehicle or vessel registered solely in the decedent’s name may be claimed
6 by the decedent’s successor by an Affidavit for Transfer Without Probate.⁵² The
7 affidavit procedure may only be used if the successor states under penalty of
8 perjury that there are no unsecured creditors of the decedent whose claims have
9 not been paid or discharged. The successor remains liable for the decedent’s
10 unsecured debts to the same extent as a person who takes under the small estate
11 affidavit procedure. See discussion below of “Affidavit Procedure for Collection
12 or Transfer of Personal Property.”

13 (2) A vehicle or vessel may be registered in joint tenancy form and passes by
14 right of survivorship on the death of a joint owner.⁵³ Presumably a creditor’s rights
15 in this situation are governed by general principles of joint tenancy law.

16 (3) A vehicle or vessel (as well as a mobile home) may be registered in transfer
17 on death form and passes to the named beneficiary on the death of the owner.⁵⁴
18 The transfer may be subjected to a creditor’s claim if the decedent’s probate estate
19 is insufficient. See discussion below of “Fraudulent Transfer, Gift Causa Mortis,
20 Nonprobate Transfer of Vehicle.”

21 WORKERS COMPENSATION BENEFITS

22 Worker’s compensation benefits, including death benefits, are exempt from
23 creditor claims.⁵⁵

24 PASSAGE OF SMALL ESTATE

25 California law enables passage of a small estate to successors without the
26 necessity of probate in a number of circumstances. Although this is not a
27 “nonprobate transfer” in the commonly understood sense of the term, it has the
28 same effect. Typically a successor that takes the decedent’s property without
29 probate pursuant to small estate authority remains liable for the decedent’s
30 unsecured debts. The operation of the small estate statutes is discussed below
31 under:

32 “Small Estate Set-Aside”

33 “Summary Disposition of Small Estates”

52. Veh. Code §§ 5910(a), 9916(a).

53. Veh. Code §§ 4150.5, 5600.5.

54. Veh. Code §§ 5910.5, 9916.5; Health & Safety Code § 18102.2.

55. Code Civ. Proc. § 704.160.

1 “Affidavit Procedure for Collection or Transfer of Personal Property”
2 “Court Order Determining Succession to Property”
3 “Affidavit Procedure for Real Property of Small Value”

4 SUMMARY

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

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

15 III. EXISTING NONPROBATE TRANSFER 16 DEBT ENFORCEMENT SCHEMES

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

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

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

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

- 32 (1) **Insolvent estate.** Many of the statutes provide for nonprobate transfer
33 liability only if the probate estate is insolvent.
- 34 (2) **Enforcement by personal representative.** A statute may require
35 appointment of a personal representative to enforce nonprobate transfer
36 liability.
- 37 (3) **Enforcement by creditor.** A statute may contemplate direct action by the
38 creditor in addition to or instead of by the personal representative.

1 A debt secured by nonprobate property is payable first from that property,
2 without exoneration from the decedent's estate.⁵⁹ The creditor may waive the
3 security and proceed against the decedent's estate. In that case there is no
4 suggestion in the law that the estate is entitled to reimbursement or contribution
5 from the beneficiary of the encumbered property, unless the debt was a joint
6 obligation.⁶⁰

7 If the encumbrance is a purchase money mortgage of real property, the creditor
8 is limited to the security and may not go against the decedent's estate.⁶¹ If the
9 encumbrance is a pledge of personal property, the creditor is not so constrained
10 but may waive the security and recover against the estate either directly or for a
11 deficiency.⁶²

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

16 Although property passes subject to liens and encumbrances, the decedent may
17 direct that the debt be discharged out of other property.⁶³ A creditor is not bound
18 by the decedent's direction and is entitled to realize on the security, leaving the
19 beneficiaries to sort out their rights among themselves.

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

24 **Synopsis**

25 Liability limited to insolvent estate: No

26 Enforcement by personal representative if any: No

27 Direct enforcement by creditor: Yes

28 Liability of transferee or of property: Property

29 Proportionate liability: No

30 Priority among creditors: Secured creditor has priority

31 One year statute of limitations: No

59. See, e.g., *Estate of Dolley*, 265 Cal. App. 2d 63, 71 Cal. Rptr. 56 (1968); *Cf.* 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).

60. See Civ. Code § 1432.

61. Code Civ. Proc. §§ 580b, 580d, 726(a).

62. Prob. Code §§ 9610, 9626.

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).

1 **Evaluation**

2 The scheme of existing law, in which the apportionment of a secured obligation
3 between probate and nonprobate property depends to a large extent on the
4 creditor's choice of enforcement remedies, is anomalous. However, the rules
5 governing treatment of a secured obligation in probate and nonprobate transfers
6 are generally comparable.⁶⁴

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

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

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

21 The rule that joint tenancy property passes free of a lien on the decedent's
22 interest has been widely criticized by commentators.⁶⁶ That rule should be
23 abrogated statutorily.

24 **UNIFORM FRAUDULENT TRANSFER ACT**

25 **CIVIL CODE § 3439**

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

30 A gift or other donative transfer to a beneficiary by a decedent is made without a
31 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.

66. See discussion in Sterling, *Joint Tenancy and Community Property in California*, 14 Pac. L.J. 927, 948-51 (1983).

67. Civ. Code §§ 3439.04-3439.05.

1 joint tenancy interest if the transfer into joint tenancy was made in fraud of
2 creditors.⁶⁸

3 The Probate Code does not preempt the fraudulent transfer remedy for creditors
4 in the event of a nonprobate transfer.⁶⁹

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

9 **Synopsis**

10 Liability limited to insolvent estate: No

11 Enforcement by personal representative if any: In some circumstances

12 Direct enforcement by creditor: Yes

13 Liability of transferee or of property: Property

14 Proportionate liability: No

15 Priority among creditors: No

16 One year statute of limitations: Unclear

17 **Evaluation**

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

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

68. Rupp v. Kahn, 246 Cal. App. 2d 188, 55 Cal. Rptr. 1008 (1962).

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).

70. Cf. Civ. Code § 3439.04 (intent to defraud creditors).

71. Cf. Civ. Code § 3439.05 (insolvency).

72. Citizens Action League v. Kizer, 887 F2d 1003 (9th Cir 1989).

1 Depending on the approach taken to comprehensive nonprobate transfer
2 liability, its interrelation with fraudulent transfer law should be clarified.

3 ONE YEAR STATUTE OF LIMITATIONS FOR CLAIMS
4 AGAINST DECEDENT

5 **CODE OF CIVIL PROCEDURE § 366.2**

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

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

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

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

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

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

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

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

27 The Law Revision Commission's Comment to this section indicates that it
28 applies in "any" action on a liability of the decedent:

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

38 The one year limitation period is expressly applicable in the following
39 nonprobate proceedings:

- 1 • Liability of surviving spouse for debts of decedent⁷³
- 2 • Small estate set-aside⁷⁴
- 3 • Summary disposition of small estate⁷⁵
- 4 • Action by omitted creditor⁷⁶
- 5 • Affidavit procedure for collection or transfer of personal property⁷⁷
- 6 • Court order determining succession to property⁷⁸
- 7 • Affidavit procedure for real property of small value⁷⁹
- 8 • Passage of property to surviving spouse without administration⁸⁰
- 9 • Trust claim procedure⁸¹
- 10 • Trust beneficiary liability⁸²

11 Cases have applied the one year limitation period to:

- 12 • A creditor's effort to reach property in the decedent's revocable living
13 trust.⁸³
- 14 • A creditor's effort to reach property distributed to a beneficiary of the
15 decedent's revocable living trust.⁸⁴
- 16 • A creditor's effort to reach property in the decedent's irrevocable trust.⁸⁵
- 17 • A creditor's effort to reach the decedent's community interest in property
18 passing to the surviving spouse without probate.⁸⁶
- 19 • A creditor's effort to reach the surviving spouse's separate property and the
20 surviving spouse's community property interest in property taken without
21 probate for a necessities debt of the deceased spouse.⁸⁷

73. Fam. Code § 914.

74. Prob. Code § 6611.

75. Prob. Code § 7664.

76. Prob. Code § 9392.

77. Prob. Code § 13109.

78. Prob. Code § 13156.

79. Prob. Code § 13204.

80. Prob. Code § 13554.

81. Prob. Code § 19100.

82. Prob. Code § 19400.

83. See, e.g., *Wagner v. Wagner*, 162 Cal. App. 4th 249, 75 Cal. Rptr. 3d 511 (2008).

84. See, e.g., *Embree v. Embree*, 125 Cal. App. 4th 487, 22 Cal. Rptr. 3d 782 (2004).

85. *Levine v. Levine*, 102 Cal. App. 4th 1256, 126 Cal. Rptr. 2d 255 (2002).

86. *Dawes v. Rich*, 60 Cal. App. 4th 24, 70 Cal. Rptr. 2d 72 (1997).

87. *Collection Bureau of San Jose v. Rumsey*, 24 Cal. 4th 301, 6 P.3d 713 (2000).

1 It is likely that the provision will be construed to apply to every creditor effort to
2 reach nonprobate transfer property or to enforce nonprobate transferee liability,
3 unless a statute expressly makes it inapplicable.⁸⁸

4 The one year statute does not apply to a reimbursement action by the state to
5 recover Medi-Cal expenses.⁸⁹ Nor may a nonprobate transferee safely rely on the
6 one year statute in a case where equitable estoppel may apply.⁹⁰

7 **Evaluation**

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

13 ACTION AGAINST RECIPIENT OF DECEDENT'S PROPERTY

14 **CODE OF CIVIL PROCEDURE § 377.40**

15 A claimant has a direct action against a recipient of the decedent's property in
16 limited circumstances.⁹¹

17 The provision is narrow in its scope. The "decedent's successor in interest"
18 under the statute is limited to (1) a testate or intestate beneficiary⁹² or (2) another
19 successor to a cause of action or to a particular item of property that is the subject
20 of a cause of action.⁹³ The provision does not apply to a general nonprobate
21 transferee.

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

25 **Synopsis**

26 Liability limited to insolvent estate: No

27 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).

89. *Shewry v. Begil*, 128 Cal. App. 4th 639, 27 Cal. Rptr. 3d 209 (2005).

90. See, e.g., *Battuello v. Battuello*, 64 Cal. App. 4th 842, 847, 75 Cal. Rptr. 2d 548 (1998).

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.

92. Code Civ. Proc. § 377.10.

93. Code Civ. Proc. § 377.11.

- 1 Direct enforcement by creditor: Yes
- 2 Liability of transferee or of property: Transferee
- 3 Proportionate liability: Unknown
- 4 Priority among creditors: Unknown
- 5 One year statute of limitations: Presumably

6 **Evaluation**

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

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

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

21 **ENFORCEMENT AFTER DEATH OF JUDGMENT DEBTOR**

22 **CODE OF CIVIL PROCEDURE § 686.020**

23 Code of Civil Procedure Section 686.020 provides:

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

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

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

35 *Belshé v. Hope*⁹⁴ holds that the decedent’s “estate” includes the decedent’s
36 revocable inter vivos trust for the purpose of enforcement of Welfare and

94. 33 Cal. App. 4th 161, 38 Cal. Rptr. 2d 917 (1995).

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

3 *Marriage of Perry*⁹⁵ reached a similar conclusion in construing the common law
4 rule that a child support obligation is enforceable against the decedent’s “estate”:

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

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

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

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

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

33 The proceeds of such transfers do not become a part of the estate: “[T]he law of
34 descent and distribution has no applicability to such cases. [Citations.]” (*Estate of*
35 *Welfer* (1952) 110 Cal. App. 2d 262, 265, 242 P.2d 655.) Had decedent named his
36 estate as the beneficiary, as allowed by Treasury Regulation section 1.408-
37 2(b)(8), title would have vested in his heirs subject to expenses of administration
38 and payment of his debts. (*Estate of MacMillan* (1954) 43 Cal. 2d 437, 442, 274
39 P.2d 662.)⁹⁸

95. 58 Cal. App. 4th 1104, 68 Cal. Rptr. 2d 445 (1997).

96. *Id.* at 1108-09 (fn. omitted)

97. *Id.* at 1111.

98. *Estate of Davis*, 171 Cal. App. 3d 854, 857-858, 217 Cal. Rptr. 734 (1985).

1 The implication is that a judgment creditor may proceed directly against
2 nonprobate property.

3 **Synopsis**

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

11 **Evaluation**

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

17 **LIABILITY OF MARITAL PROPERTY**

18 **FAMILY CODE § 900 ET SEQ.**

19 The Family Code prescribes a liability regimen of community property and
20 separate property for debts incurred during marriage.⁹⁹ Under this regimen, marital
21 property of a surviving spouse may be liable for the debts of a deceased spouse.¹⁰⁰

22 The one year statute of limitations for debts of a decedent applies to the liability
23 of marital property.¹⁰¹ An exception is where the surviving spouse had actual
24 knowledge of the debt within the one year period:

25 (1) Except as provided in paragraph (2), the statute of limitations set forth in
26 Section 366.2 of the Code of Civil Procedure shall apply if the spouse for whom
27 the married person is personally liable dies.

28 (2) If the surviving spouse had actual knowledge of the debt prior to expiration
29 of the period set forth in Section 366.2 and the personal representative of the
30 deceased spouse's estate failed to provide the creditor asserting the claim under
31 this section with a timely written notice of the probate administration of the estate

99. Fam. Code §§ 900-1000.

100. See, e.g., *Dawes v. Rich*, 60 Cal. App. 4th 24, 70 Cal. Rptr. 2d 72 (1997).

101. *Collection Bureau of San Jose v. Rumsey*, 24 Cal. 4th 301, 6 P.3d 713 (2000); Fam. Code § 914(c)(1).

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

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

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

16 As a general rule under *Rumsey*, in case of a conflict the Probate Code liability
17 provision prevails over the Family Code liability provision.

18 **Synopsis**

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

26 **Evaluation**

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

102. Fam. Code § 914(c).

103. 24 Cal. 4th 301, 6 P.3d 713 (2000).

104. Prob. Code §§ 11444 (probate), 19320-19326 (trust).

105. *Collection Bureau of San Jose v. Rumsey*, 24 Cal. 4th 301, 6 P.3d 713 (2000).

1 **LIABILITY OF DECEDENT COVERED BY INSURANCE**

2 **PROBATE CODE § 550**

3 An action to establish the decedent’s liability for which the decedent was
4 protected by insurance may be commenced against the decedent’s “estate” without
5 the need to join the decedent’s personal representative.¹⁰⁶ The plaintiff need not
6 file a claim in probate but must waive recourse against the estate in excess of the
7 insurance coverage.¹⁰⁷ The one year statute of limitations is inapplicable in the
8 proceeding.¹⁰⁸ The insurance company must be served, but on motion the court
9 may order the appointment and substitution of a personal representative as the
10 defendant.¹⁰⁹ A judgment in the proceeding is enforceable only against the insurer
11 and not against the estate.¹¹⁰

12 **Synopsis**

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

20 **Evaluation**

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

106. Prob. Code § 550. The text of the statute is set out in the Appendix.

107. Prob. Code § 9390.

108. Prob. Code § 551.

109. Prob. Code § 552.

110. Prob. Code §§ 553-554.

1 **Evaluation**

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

7 **SMALL ESTATE SET-ASIDE**

8 **PROBATE CODE § 6611**

9 If the decedent's estate (excluding nonprobate transfer property) is less than
10 \$20,000, the estate may be set aside on court order without probate for the
11 decedent's surviving spouse and minor children.¹¹² The spouse and minor children
12 remain personally liable for the decedent's unsecured debts not exceeding the
13 value of the property set aside.¹¹³ The liability apparently may be enforced by
14 direct action of a creditor, subject to the one year statute of limitations of Code of
15 Civil Procedure Section 366.2.

16 **Synopsis**

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

24 **Evaluation**

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

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

112. Prob. Code § 6600 *et seq.*

113. Prob. Code § 6611. The text of Section 6611 is set out in the Appendix.

1

SUMMARY DISPOSITION OF SMALL ESTATES

2

PROBATE CODE § 7664

3

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:

4

5

6

7

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

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Synopsis

18

Liability limited to insolvent estate: No

19

Enforcement by personal representative if any: No

20

Direct enforcement by creditor: Yes

21

Liability of transferee or of property: Transferee

22

Proportionate liability: No

23

Priority among creditors: No

24

One year statute of limitations: Yes

25

Evaluation

26

There is no reported case construing or applying this provision.

27

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.”

28

29

30

31

114. Prob. Code § 7664.

1 OMITTED CREDITOR

2 **PROBATE CODE § 9392**

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

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

14 **Synopsis**

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

22 **Evaluation**

23 There is no reported case construing or applying this provision.

24 This is one of a handful of California statutes that provide liability of a
25 distributee for “a pro rata portion of the claim of the creditor.” The apportionment
26 of liability is based on the proportion that the value of the property received by the
27 distributee from the estate bears to the total value of all property received by all
28 persons from the estate.

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

35 Section 9392 protects a bona fide purchaser or encumbrancer of the
36 beneficiary’s property:

1 Nothing in this section affects the rights of a purchaser or encumbrancer of
2 property in good faith and for value from a person who is personally liable under
3 this section.¹¹⁵

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

8 FRAUDULENT TRANSFER, GIFT CAUSA MORTIS,
9 NONPROBATE TRANSFER OF VEHICLE

10 **PROBATE CODE § 9653**

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

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

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

29 **Synopsis**

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

115. Prob. Code § 9392(c).

116. See, e.g., *Katz v. Driscoll*, 86 Cal. App. 2d 313, 194 P.2d 811 (1948).

117. *Webb v. Pillsbury*, 23 Cal. 2d 324, 144 P.2d 1 (1943).

118. *In re Estate of Myers*, 139 Cal. App. 4th 434, 42 Cal. Rptr. 3d 753 (2006).

- 1 Proportionate liability: Yes
- 2 Priority among creditors: Yes
- 3 One year statute of limitations: Presumably

4 **Evaluation**

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

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

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

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

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

28 No action for accounting under this section shall be commenced by any
29 qualified claimant unless the personal representative has received a written
30 demand therefor by a qualified claimant, within sixteen months following the
31 decedent's death.¹²⁰

32 A proceeding under this section may not be commenced unless the personal
33 representative of the decedent's estate has received a written demand for the
34 proceeding from the surviving spouse or a child, to the extent that statutory
35 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).

1 The rationale is expressed in the Comment to 6-102(g) of the Uniform Act — “It
2 reflects sensitivity for the dilemma confronting a probate fiduciary who, acting as
3 required of a fiduciary, concludes that the costs and risks associated with a
4 possible recovery from a nonprobate transferee outweigh the probable advantages
5 to the estate and its claimants.”

6 ALLOCATION OF DEBTS BETWEEN ESTATE AND
7 SURVIVING SPOUSE

8 **PROBATE CODE § 11440**

9 If the decedent was married, property of the surviving spouse may be subject to
10 liability for the decedent’s debts. Both halves of the community property are
11 generally liable for the debts of either spouse incurred during marriage.¹²² In
12 addition, the surviving spouse may be personally liable for some debts of the
13 decedent beyond the value of the community property.¹²³

14 If a creditor enforces a debt against the decedent’s surviving spouse, the
15 surviving spouse may obtain reimbursement from the decedent’s estate. Probate
16 Code Sections 11440 to 11446 provide a scheme for allocation of debts between
17 the estate and the surviving spouse. The text of the statute is set out in the
18 Appendix. A parallel procedure exists for allocation of debts between the
19 decedent’s trust and the surviving spouse.¹²⁴

20 Under this scheme debts are characterized as community or separate in the same
21 manner as on marital dissolution. A separate debt is allocated primarily to the
22 spouse that incurred the debt and secondarily to the other spouse. A community
23 debt is allocated primarily to community property and secondarily to the separate
24 property of both spouses equally.¹²⁵

25 The allocation may take into consideration the existence of community property
26 passing outside of probate.¹²⁶ There is no reported case applying the
27 apportionment process to a nonprobate transfer of community property.

28 **Synopsis**

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

122. Fam. Code § 910; *Dawes v. Rich*, 60 Cal. App. 4th 24, 70 Cal. Rptr. 2d 72 (1997).

123. Fam. Code § 914; *Collection Bureau of San Jose v. Rumsey*, 24 Cal. 4th 301, 6 P.3d 713 (2000).

124. Prob. Code §§ 19320-19326.

125. Prob. Code §§ 11444, 19324.

126. Prob. Code § 11442.

- 1 Proportionate liability: Yes
- 2 Priority among creditors: Yes
- 3 One year statute of limitations: Yes

4 **Evaluation**

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

- 8 (1) The procedure gives the probate court jurisdiction over an owner of
9 nonprobate property and treats the probate and nonprobate property in an
10 integrated manner.
- 11 (2) Although the procedure occurs in the context of a probate proceeding, it
12 could be generalized to allow court supervised apportionment on petition
13 where there is no probate proceeding. That is the effect of the parallel trust
14 procedure for apportionment of spousal liability.
- 15 (3) The procedure includes a mechanism for discovery of property not within
16 the control of the personal representative. If the surviving spouse has not
17 provided an inventory and appraisal of the spouse’s potentially liable
18 property, the court makes an order to show cause why the information
19 should not be provided.¹²⁷
- 20 (4) The parties may agree to an allocation of liability, which the court must
21 confirm if the agreement “substantially protects the rights of interested
22 persons.”¹²⁸ The court order confirming the allocation does not bind
23 creditors but does affect rights as between the parties to the agreement.¹²⁹
24 The court order should be made binding on creditors — it is made only after
25 notice to interested persons and a determination that the allocation is
26 equitable.¹³⁰

27 **AFFIDAVIT PROCEDURE FOR COLLECTION OR TRANSFER**
28 **OF PERSONAL PROPERTY**

29 **PROBATE CODE §§ 13109-13112**

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

127. Prob. Code § 11442.

128. Prob. Code § 11444(a).

129. Prob. Code § 11444(e).

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”).

131. Prob. Code § 13100 *et seq.*

1 probate and nonprobate limitation periods.¹³² The successor may avoid liability if
2 an estate proceeding is commenced and the successor restores the property to the
3 estate.¹³³ In any event, the successor's liability is limited to the value of the
4 property taken.¹³⁴ The text of these statutes is set out in the Appendix.

5 **Synopsis**

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

13 **Evaluation**

14 This procedure applies exclusively to property that otherwise would be subject
15 to probate — it does not apply to classical nonprobate transfer property.¹³⁵ It
16 provides a mechanism for direct action by a creditor where there is no probate.

17 There is little experience under this statute, and there is no reported case
18 construing or applying it. Noteworthy aspects of the procedure include:

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

132. Prob. Code § 13109.

133. Prob. Code § 13111.

134. Prob. Code § 13112.

135. Prob. Code §§ 13005, 13006, 13050.

136. See Madison, *Transfer of Personal and Real Property in Small Estates*, in California Decedent Estate Practice 2d § 3.10 (Cal. Cont. Ed. Bar 2009).

137. Prob. Code § 13111.

- 1 (ii) Minus the amount of liens and encumbrances on the property at that
2 time.
3 (iii) Plus the net income received from the property.
4 (iv) Plus, if the transferee has disposed of the property, interest on the fair
5 market value of the property accruing from the date of disposition at the
6 rate payable on a money judgment.

7 COURT ORDER DETERMINING SUCCESSION TO PROPERTY

8 **PROBATE CODE § 13156**

9 In the case of a small estate, a successor may, without probate, obtain a court
10 order determining the right to the decedent's property.¹³⁸ The court order does not
11 exempt the successor from liability for the decedent's unsecured debts. The
12 successor is personally liable for the debts, not exceeding the value of the property
13 received.¹³⁹ A creditor's action is subject to the one year statute of limitations after
14 the decedent's death.¹⁴⁰

15 **Synopsis**

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

23 **Evaluation**

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

26 **AFFIDAVIT PROCEDURE FOR REAL PROPERTY**
27 **OF SMALL VALUE**

28 **PROBATE CODE §§ 13204-13207**

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

138. Prob. Code § 13150 *et seq.*

139. Prob. Code § 13156. The text of Section 13156 is set out in the Appendix.

140. Code Civ. Proc. § 366.2.

1 appropriate affidavit.¹⁴¹ The successor in that case remains liable for the
2 decedent's unsecured debts, subject to the general one year statute of limitations.
3 The successor's liability is limited to the value of the property received. The
4 successor may be required to restore the property or its value to the estate if
5 administration proceedings are subsequently commenced, to the extent necessary
6 to protect the interest of the decedent's heirs, devisees, and creditors.¹⁴²

7 **Synopsis**

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

15 **Evaluation**

16 There is little experience under this statute, and there is no reported case
17 construing or applying it.

18 The statute is similar to the personal property liability statute. The real property
19 statute includes a sophisticated provision for dealing with improvements made on
20 property that is subsequently required to be restored to the probate estate.¹⁴³

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

23 **PROBATE CODE §§ 13550-13554**

24 A surviving spouse may take property that passes from the deceased spouse,
25 including the decedent's one half interest in community property that passes to the
26 survivor, without administration.¹⁴⁴ The surviving spouse may also obtain a court
27 order confirming passage of title to the property.¹⁴⁵

28 Alternatively, the surviving spouse may elect to have property that passes from
29 the decedent administered, and may elect to include the survivor's one half interest

141. Prob. Code § 13200-13210.

142. Prob. Code § 13204-13207. The text of these statutes is set out in the Appendix.

143. Prob. Code § 13206.

144. Prob. Code § 13500.

145. Prob. Code § 13650.

1 in community property with the property being administered or with the
2 decedent's trust.¹⁴⁶

3 If the surviving spouse takes property from the decedent without administration,
4 the survivor may deal with and dispose of the property free of the rights of others,
5 including the decedent's creditors.¹⁴⁷ The surviving spouse remains personally
6 liable for the decedent's debts to the extent of the value of the property received.¹⁴⁸

7 A surviving spouse that takes the decedent's property without probate may be
8 required to restore the property or its value to the estate if necessary to protect the
9 interests of heirs, devisees, and creditors of the decedent. Prob. Code §§ 13560-
10 13564.

11 The personal liability of the surviving spouse for the decedent's debts is subject
12 to the general one year limitation period.¹⁴⁹

13 **Synopsis**

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

21 **Evaluation**

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

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

146. Prob. Code §§ 13502, 13503.

147. Prob. Code § 13540.

148. Prob. Code §§ 13550-13554; *In re Marriage of D'Antoni*, 125 Cal. App. 3d 747, 178 Cal. Rptr. 285 (1981). The text of these statutes is set out in the Appendix.

149. Prob. Code § 13554; *Dawes v. Rich*, 60 Cal. App. 4th 24, 70 Cal. Rptr. 2d 72 (1997) (decedent's community property interest); *Collection Bureau of San Jose v. Rumsey*, 24 Cal. 4th 301, 6 P.3d 713 (2000) (survivor's community property interest).

150. Prob. Code §§ 11440-11446.

151. Prob. Code § 11444.

1 TRUST LAW

2 **PROBATE CODE § 19001**

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

6 **LIABILITY**

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

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

24 The enactment of Probate Code section [19001] removed these constraints and
25 eliminated the necessity of proving the conveyance fraudulent. Section [19001]
26 permitted a judgment creditor who establishes the inadequacy of estate assets to
27 ignore the trust and reach directly those assets subject to the decedent settlor's
28 power of revocation. (See Law Revision Com. cmt, Prob. Code § 18200.) The
29 judgment creditor of such a deceased settlor need only have established a
30 judgment lien against the settlor; thereafter, the judgment creditor may levy a writ
31 of execution directly on the trust assets which were subject to revocation during
32 the settlor's lifetime. (Heywood v. Municipal Court (1988) 198 Cal. App. 3d
33 1438, 1445-1446, 244 Cal. Rptr. 435.)¹⁵³

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

37 19001. (a) Upon the death of a settlor, the property of the deceased settlor that
38 was subject to the power of revocation at the time of the settlor's death is subject

152. Compare Estate of Heigho, 186 Cal. App. 2d 360, 9 Cal. Rptr. 196 (1960) (trust not liable) with Estate of Camm, 76 Cal. App. 2d 104, 172 P.2d 547 (1946) (trust liable).

153. Bank One Texas v. Pollack, 24 Cal. App. 4th 973, 29 Cal. Rptr. 2d 510 (1994).

1 to the claims of creditors of the deceased settlor's estate and to the expenses of
2 administration of the estate to the extent that the deceased settlor's estate is
3 inadequate to satisfy those claims and expenses.

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

10 **OPTIONAL CREDITOR CLAIM PROCEDURE**

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

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

17 19006. (a) If a trustee of a trust established by the deceased settlor files,
18 publishes, and serves notice as provided in Section 19003 the protection from
19 creditors afforded that trustee and trust shall also be afforded to any other trusts
20 established by the deceased settlor and the trustees and beneficiaries of those
21 trusts.

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

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

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

37 19007. Nothing in this part shall determine the liability of any trust established
38 by the deceased settlor as against any other trust established by that settlor, except

154. See Prob. Code § 19001. See also *Dobler v. Arluk Medical Center Industrial Group, Inc.*, 89 Cal. App. 4th 530, 107 Cal. Rptr. 2d 478 (2001) (probate estate inadequate); *In re Marriage of Perry*, 58 Cal. App. 4th 1104, 68 Cal. Rptr. 2d 445 (1997) (child support obligation).

155. Compare Prob. Code §§ 19000-19330 (payment of claims, debts, and expenses from revocable trust of deceased settlor) *with* Prob. Code §§ 9000-9399 (creditor claims in probate).

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

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

6 19020. At any time after the filing and first publication of notice pursuant to
7 Chapter 3 (commencing with Section 19040), and after expiration of the time to
8 file claims provided in that chapter, a trustee or beneficiary may petition the court
9 under this chapter to approve either of the following:

10 (a) Allowance, compromise, or settlement of any claims that have not been
11 rejected by the trustee under the procedure provided in this part and for which
12 trust property may be liable.

13 (b) An allocation of any amounts due by reason of an action described in
14 subdivision (a) to two or more trusts which may be liable for the claims.

15 19021. The petition shall be filed in that county as may be determined pursuant
16 to Section 19003. In the event this action seeks approval of allocation to two or
17 more trusts for which the notice proceeding in Section 19003 would prescribe
18 superior courts for more than one county, the court located in the county so
19 prescribed for the trustee initiating the proceeding under this chapter shall have
20 jurisdiction.

21 Section 19027 picks up the debt priority provisions of Probate Code Section
22 11420 in case of an insolvent trust:

23 19027. (a) The court in its discretion may make any orders and take any other
24 action necessary or proper to dispose of the matters presented by the petition.

25 (b) If the court determines that the assets of the trust estate are insufficient to
26 pay all debts, then the court shall order payment in the manner specified by
27 Section 11420.

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

30 19103. ... (c) The court may condition the claim on terms that are just and
31 equitable. The court may deny the claimant's petition if a distribution to trust
32 beneficiaries or payment to general creditors has been made and it appears the
33 filing or establishment of the claim would cause or tend to cause unequal
34 treatment among beneficiaries or creditors.

35 (d) Regardless of whether the claim is later established in whole or in part,
36 property distributed under the terms of the trust subsequent to an order settling
37 claims under Chapter 2 (commencing with Section 19020) and payments
38 otherwise properly made before a claim is filed under this section are not subject
39 to the claim. Except to the extent provided in Chapter 12 (commencing with
40 Section 19400) and subject to Section 19053, the trustee, distributee, or payee is
41 not liable on account of the prior distribution or payment. This subdivision does
42 not limit the liability of a person who receives a preliminary distribution of
43 property to restore to the trust an amount sufficient for payment of the
44 beneficiary's proper share of the claim, not exceeding the amount distributed.

1 **LIABILITY OF SURVIVING SPOUSE**

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

12 The surviving spouse’s share of the marital property is exempt from payment of
13 the decedent’s funeral expenses and expenses of last illness.¹⁵⁹

14 The allocation of debts between spouses does not affect the rights of a creditor.
15 If as a result either party is required to bear expense on account of a debt allocated
16 to the other party, the injured party is entitled to reimbursement from the other
17 party.¹⁶⁰

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

21 **CREDITOR REMEDIES**

22 If trust property has been distributed without satisfaction of the decedent’s debts,
23 an unsecured creditor may proceed directly against beneficiaries.¹⁶¹

24 The probate estate must be exhausted before the creditor may proceed against a
25 beneficiary.¹⁶² A trustee that makes distributions in accordance with the terms of
26 the trust during the probate process is not personally liable to creditors.¹⁶³

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

156. *Cf.* Fam. Code §§ 910-914; *Dawes v. Rich*, 60 Cal. App. 4th 24, 70 Cal. Rptr. 2d 72 (1997).
157. *Compare* Sections 11440-11446 (probate allocation) *with* Sections 19320-19326 (trust allocation).
158. Prob. Code § 19325(b).
159. Prob. Code § 19326; *Cf.* Estate of Bonanno, 165 Cal. App. 4th 7, 80 Cal. Rptr. 3d 560 (2008).
160. Prob. Code § 19324(e).
161. Prob. Code §§ 19400-19403. The text of the statute is set out in the Appendix.
162. *Dobler v. Arluk Medical Center Industrial Group, Inc.*, 89 Cal. App. 4th 530, 107 Cal. Rptr. 2d 478 (2001).
163. *Valentine v. Reed*, 50 Cal. App. 4th 787, 57 Cal. Rptr. 2d 836 (1996); *Arluk Medical Center Industrial Group, Inc. v. Dobler*, 116 Cal. App. 4th 1324, 11 Cal. Rptr. 3d 194 (2004).

1 trust estate.¹⁶⁴ The statute protects the rights of a good faith purchaser or
2 encumbrancer of property received from a beneficiary.¹⁶⁵

3 A will or trust may include a direction that debts be paid out of particular
4 property.¹⁶⁶ Although that directive may bind the personal representative or
5 trustee, it does not bind a creditor, who is not limited as to what property or
6 beneficiaries the creditor may hold to account.¹⁶⁷ If a creditor requires a
7 beneficiary to satisfy a debt in a manner that goes against the decedent's direction,
8 the beneficiary should have a right of reimbursement from others in accordance
9 with the decedent's direction.¹⁶⁸

10 **Synopsis**

- 11 Liability limited to insolvent estate: Yes
- 12 Enforcement by personal representative if any: Unclear
- 13 Direct enforcement by creditor: Yes
- 14 Liability of transferee or of property: Transferee
- 15 Proportionate liability: Yes
- 16 Priority among creditors: Yes
- 17 One year statute of limitations: Yes

18 **Evaluation**

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

26 **Liability of Trust Property**

27 *Public Policy*

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

164. Prob. Code § 19402.

165. Prob. Code § 19403.

166. See, e.g., *Hoover v. Hartman*, 136 Cal. App. 3d 1019, 186 Cal. Rptr. 669 (1982).

167. Prob. Code § 19001(b) (incorporating the probate priority scheme of Probate Code Section 11420).

168. See generally, *Valentine v. Reed*, 50 Cal. App. 4th 787, 57 Cal. Rptr. 2d 836 (1996).

- 1 (1) The trust estate is subject to the decedent’s creditors — fraudulent intent is
2 irrelevant.
- 3 (2) The trust estate is only secondarily liable — it is a protected form of
4 nonprobate transfer.

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

10 A decedent’s estate plan may specify a fund for payment of debts (often the
11 residue). The law honors that intent.¹⁶⁹ Favoring a specific gift over a general gift
12 makes sense in a case where the decedent’s estate is adequate. But where debts are
13 large and property is limited, the residuary beneficiaries — often the main objects
14 of the decedent’s bounty — may be harmed to the benefit of incidental specific
15 legatees.

16 Nonetheless, the approach of the trust law is consistent with the general law on
17 abatement, which favors a specific gift over a residual gift.¹⁷⁰ The general
18 abatement statute has been generalized and now applies to trusts and other
19 instruments besides wills.¹⁷¹

20 *Determination That Probate Estate is Inadequate*

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

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

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

169. Prob. Code § 19001(b).

170. Prob. Code § 21402.

171. Prob. Code §§ 21400-21406 (shares of beneficiaries abate for all purposes, including payment of debts).

1 allowed in a probate proceeding. That is the interpretation of Conn, *The Need to*
2 *Clarify Creditors' Rights in Probate*, 32 L.A. Lawyer 80 (April 2009) (“it may be
3 argued that the creditor must institute a probate proceeding, rather than suing the
4 trustee, in order to establish the insufficiency of the probate estate”).

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

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

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

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

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

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

172. *Arluk Medical Center Industrial Group, Inc. v. Dobler*, 116 Cal. App. 4th 1324, 11 Cal. Rptr. 3d 194 (2004).

173. Conn, *supra* note 171.

174. See, e.g., *Death, Debts and Taxes: Creditors' Claims Against a Decedent*, Audio Program ES 65781 (Cal. Cont. Ed. Bar, August 2009).

175. Miller, *Creditors' Rights Against the Trust and Beneficiaries*, in 1 California Trust Administration 2d § 10.10 (Cal. Cont. Ed. Bar 2009).

1 If the trustee or a distributee makes payment to a creditor and it is later found
2 that there is sufficient probate property, is the trustee entitled to exoneration from
3 the probate estate? That question is answered in the affirmative for a trustee that
4 invokes the trust claim procedure, but it is not answered where the trustee does not
5 invoke the trust claim procedure.¹⁷⁶

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

10 *Insolvent Trust Estate*

11 If the trust is insufficient to satisfy all creditors, the same creditor priority
12 provisions applicable in probate apply to the trust.¹⁷⁷ The consistency makes sense.

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

20 **Trust Claim Procedure**

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

25 *Public Policy*

26 "Whatever the utility of the new creditors' claims procedure for living trusts, the
27 legislation demonstrates the possibility of separating the creditors' claims
28 procedure from the decedent estate administration procedure. Is the next step a
29 creditors' claims procedure for persons who take an estate without administration
30 in the absence of a living trust?"¹⁷⁹

176. See Prob. Code § 19006(c).

177. Prob. Code § 19001(b).

178. Prob. Code §§ 19004, 19100.

179. Dennis-Strathmeyer, *Whither Probate?*, 1991 *California Legislation*, 13 Estate Planning & California Reporter 65, 66 (Cal. Cont. Ed. Bar Dec. 1991).

1 *Operational Issues*

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

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

12 *Multiple Trusts*

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

17 **Distributee Liability**

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

23 Trust property is subject to a claim of a creditor “of the deceased settlor’s
24 estate.”¹⁸⁷ That implies there must have been some determination of estate
25 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”).

183. Prob. Code § 19020.

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).

185. Prob. Code §§ 19400, 19402.

186. *Cf. Conn, The Need to Clarify Creditors’ Rights in Probate*, 32 L.A. Lawyer 80 (April 2009) (where no estate or trust proceeding, “recourse of the claimant is unclear”).

187. Prob. Code § 19001(a).

1 Probably the intent of these provisions is to permit direct action by a creditor
2 against a beneficiary. Section 19402 provides a rule of pro rata liability “based on
3 the proportion that the value of the property distributed to the person out of the
4 trust estate bears to the total value of all property distributed to all persons out of
5 the trust estate.” Either the creditor or the beneficiary should be able to join other
6 distributees in the creditor’s enforcement action. Additional procedural detail is
7 needed in the statute.

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

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

25 PRORATION OF TAXES

26 **PROBATE CODE §§ 20100-20125**

27 Federal law requires that the federal estate tax be apportioned among the
28 recipients of the decedent’s estate in proportion to the value of the property
29 received. Implementing legislation in California is found at Probate Code Sections
30 20100 to 20125 (proration of estate taxes). The text of the statute is set out in the
31 Appendix.¹⁹⁰

32 The federal estate tax is based on the decedent’s gross estate, which includes all
33 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.

1 personal representative authority to assess beneficiaries or seize property in order
2 to spread the burden of the estate tax proportionately. The statute confers authority
3 on the personal representative, guardian, conservator, trustee, or other person
4 charged with the responsibility of paying the estate tax.¹⁹¹

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

10 The jurisdiction of the court and the authority of the personal representative do
11 not extend to an out of state recipient of the decedent's property. Ancillary
12 proceedings in the other state may be necessary to obtain jurisdiction over the
13 person and property. A non-California personal representative may use ancillary
14 proceedings to assess a California resident.¹⁹⁴

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

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

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

29 The dispositive instrument may direct the personal representative to satisfy
30 debts, including the estate tax, out of specific property. In that case the intention of
31 the decedent is honored and the general rule of pro rata liability does not apply.¹⁹⁶
32 If the property designated by the decedent is insufficient to pay the taxes, the
33 statutory proration scheme overrides the decedent's directive.¹⁹⁷

191. Prob. Code § 20100(c) ("personal representative" defined).

192. Prob. Code § 20116(a).

193. Prob. Code § 20120; *Estate of Dark*, 38 Cal. App. 3d 890, 892, 113 Cal. Rptr. 727, 728 (1974).

194. Prob. Code § 20125.

195. Prob. Code § 20117.

196. Prob. Code § 20110; see *Simpson v. White*, 57 Cal. App. 4th 814, 67 Cal. Rptr. 2d 361 (1997). Federal law defers to state law in that respect. *Riggs v. Del Drago*, 317 U.S. 95 (1942); *Rogan v. Taylor*, 136 F.2d 598 (9th Cir. 1943).

197. See, e.g., *In re Cochran's Estate*, 106 Cal. Rptr. 700, 30 Cal. App. 3d 892 (1973).

1 The estate tax apportionment statute reflects the federal and state policy to
2 equitably allocate the tax burden so that it is borne commensurately by those
3 whose gifts contribute to it. The policy of the law is sufficiently strong that a
4 direction by the decedent contrary to equitable apportionment is strictly
5 construed.¹⁹⁸ The state enforcement mechanism requires that the personal
6 representative distribute the burden among nonprobate as well as probate
7 transferees.¹⁹⁹

8 **Synopsis**

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

16 **Evaluation**

17 The estate tax proration system has worked smoothly in the past; whether it will
18 do so in the nonprobate era is not yet clear. California law contemplates at least
19 that the trustee of an inter vivos trust may perform the apportionment function.²⁰⁰

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

23 ABATEMENT

24 **PROBATE CODE § 21400**

25 California provides a general order of abatement of a decedent's property to
26 satisfy debts.²⁰¹

27 The abatement statute applies to all property of the decedent, probate and
28 nonprobate.²⁰²

29 If the estate is insolvent, the order of abatement is irrelevant, since all property is
30 applied to satisfy obligations, in the order of priority provided by law.²⁰³

198. See, e.g., *In re Armstrong's Estate*, 56 Cal. 2d 796, 366 P.2d 490 (1961); *Simpson v. White*, 57 Cal. App. 4th 814, 67 Cal. Rptr. 2d 361 (1997).

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

200. Prob. Code § 16340(c)(3).

201. Prob. Code §§ 21400-21406. The text of the statute is set out in the Appendix.

202. Prob. Code § 21401; see also Prob. Code § 24 ("beneficiary" defined).

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

5 **Synopsis**

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

13 **Evaluation**

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

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

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

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

203. Prob. Code §§ 11420 (priority of debts), 19001 (application to trust).

204. Prob. Code § 21403.

205. See Prob. Code § 21101 (application) and Law Revision Commission Comment to Prob. Code § 21400.

206. Cf. Prob. Code § 21405(a) (contribution by distributees during estate administration).

207. See, e.g., *Burkett v. Capovilla*, 112 Cal. App. 4th 1444, 5 Cal. Rptr. 3d 817 (2003).

208. Prob. Code § 21402(a)(1).

1 intestacy but by nonprobate transfer. For clarity, the statute should refer to
2 property not disposed of by “an” instrument.²⁰⁹ A parallel change should also be
3 made to Probate Code Section 21400 (if “the” instrument provides for abatement).

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

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

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

20 MEDI-CAL ESTATE RECOVERY

21 WELFARE AND INSTITUTIONS CODE § 14009.5

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

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

28 14009.5. (a) Notwithstanding any other provision of this chapter, the
29 department shall claim against the estate of the decedent, or against any recipient
30 of the property of that decedent by distribution or survival an amount equal to the
31 payments for the health care services received or the value of the property
32 received by any recipient from the decedent by distribution or survival, whichever
33 is less.

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

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

210. Prob. Code §§ 21612 (omitted spouse), 21623 (omitted child).

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

212. See, e.g., Wilcox, *Medi-Cal Estate Recovery*, in California Elder Law Resources, Benefits, and Planning § 12.24 (2009) (“A major area of continuing controversy is the scope of property subject to estate recovery claims.”).

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

3 (2) Where there is any of the following:

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

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

14 (C) A surviving child who is blind or permanently and totally disabled, within
15 the meaning of Section 1614 of the federal Social Security Act (42 U.S.C.A. Sec.
16 1382c).

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

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

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

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

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

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

33 The provision appears to allow recovery directly from a nonprobate transferee
34 — "any recipient of the property of that decedent by distribution or survival."
35 Initial efforts by the Department of Health Care Services to collect against joint
36 tenancy or inter vivos trust property were held invalid as beyond the scope of the
37 authorizing federal legislation. The federal statute allowed recovery only from the
38 decedent's "estate."²¹³

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

213. Compare *Belshé v. Hope*, 33 Cal. App. 4th 161, 38 Cal. Rptr. 2d 917 (1995) (inter vivos trust) with *Citizens Action League v. Kizer*, 887 F.2d 1003 (9th Cir. 1989) (joint tenancy), *Bucholtz v. Belshé*, 114 F.3d 923 (9th Cir. 1997) (inter vivos trust).

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

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

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

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

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

17 50960.12. “Estate” means either:

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

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

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

214. 42 U.S.C. § 1396p(b)(4).

215. *California Advocates for Nursing Home Reform v. Bonta*, 106 Cal. App. 4th 498, 130 Cal. Rptr. 2d 823 (2003).

216. 22 Cal. Code Reg. § 50960.12.

217. 167 Cal. 570, 140 P. 242 (1914).

218. *Bonta v. Burke*, 98 Cal. App. 4th 788, 120 Cal. Rptr. 2d 72 (2002); 22 Cal. Code Reg. 50961(h)-(i).

219. Wilcox *supra* note 212, at § 12.26.

1 According to Wilcox, the state has rarely sought to recover against some
2 typically exempt property that passes outside probate, such as life insurance and
3 retirement accounts, or tangible personal property (which tends to be fairly small
4 in amount).²²⁰

5 The statutes and regulations are silent on whether a nonprobate distributee
6 against whom the liability is enforced has contribution rights from a trust
7 distributee. The statute provides for a proportionate exemption from liability for
8 surviving dependents of the decedent.²²¹ But that provision has been held to violate
9 the authorizing federal legislation.²²² Under the regulations, if there are surviving
10 dependents there is an absolute, not a proportionate, exemption.²²³

11 The Medi-Cal recovery act also includes exemptions for hardship cases based on
12 the enabling federal law. These have also been subject to litigation based on
13 regulatory improprieties.²²⁴

14 Under the regulations the hardship exemption is proportionate.²²⁵ That appears
15 to be authorized by the statute.²²⁶

16 **Synopsis**

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

24 **Evaluation**

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

- 27 (1) The statute allows recovery against either the property of the decedent or
28 against the distributee.

220. Wilcox, *supra* note 212, at §§ 12.32-12.33.

221. Section 14009.5(b)(3).

222. *Dalzin v. Belshé*, 993 F. Supp. 732 (N.D. Cal. 1997).

223. 22 Cal. Code Reg. § 50961(d).

224. *California Advocates for Nursing Home Reform v. Bonta*, 106 Cal. App. 4th 498, 130 Cal. Rptr. 2d 823 (2003).

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”).

- 1 (2) The liability of a distributee is limited to the value of the property received.
2 (3) The value of the property received for the purpose of liability is valued as of
3 the date of death, and is reduced by liens and encumbrances on the property.

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

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

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

- 11 (1) A statute imposing liability on a nonprobate transfer must be crystal clear to
12 withstand challenge.
13 (2) A Medi-Cal recipient whose estate is potentially subject to state
14 reimbursement may be advised and tempted to make transfers that will
15 avoid liability.²²⁷ For that reason a “look back” at gifts made within a short
16 time before death may be appropriate.
17 (3) The hardship exemption and the exemption for a surviving spouse, minor
18 children, and disabled adult children make better sense than an exemption
19 based on the Enforcement of Judgments Law.
20 (4) The Medi-Cal estate recovery process is an administrative process. It is
21 cumbersome and is not a promising model for a general statute on
22 nonprobate transfer liability.
23 (5) If a comprehensive statute on nonprobate transfer liability is developed, the
24 Medi-Cal claims recovery process should be excluded from it because it is
25 largely a creature of federal law and is circumscribed by federal law.

26

SUMMARY

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

33 In general, most procedures apply whether or not the decedent’s probate estate is
34 insolvent. Most do not involve enforcement by the personal representative, but
35 allow direct enforcement by the creditor. Most provide for personal liability of the
36 transferee rather than of the property, but are divided as to whether the liability
37 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).

1 priority among creditors but do impose a one year statute of limitations on
2 enforcement by or on behalf of a creditor.

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

7 B. OTHER JURISDICTIONS

8 FEDERAL ESTATE TAX

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

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

18 LIABILITY

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

- 22 • A lifetime gift made within 3 years of death.²³¹
- 23 • A transfer with retained life estate.²³²
- 24 • A transfer that takes effect at death.²³³
- 25 • A revocable transfer, including the decedent's revocable inter vivos trust.²³⁴
- 26 • 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.

230. 26 U.S.C. §§ 2031, 2033.

231. 26 U.S.C. § 2035.

232. 26 U.S.C. § 2036.

233. 26 U.S.C. § 2037.

234. 26 U.S.C. § 2038.

235. 26 U.S.C. § 2039.

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

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

13 **APPORTIONMENT**

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

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

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

236. 26 U.S.C. § 2040.

237. 26 U.S.C. § 2041.

238. 26 U.S.C. § 2042.

239. 26 U.S.C. § 2203.

240. 26 U.S.C. § 6324.

241. 31 U.S.C. § 3713.

242. Gopman & McCawley, *Estate Tax Payments and Liabilities*, 832 Tax Management A-53 (BNA 2003).

243. See, e.g., *Remedies and Practice Under Estate Tax Apportionment Statutes*, 71 A.L.R. 3d 371.

1 methods available to the IRS to collect unpaid estate taxes are transferee liability
2 and the special estate tax lien.²⁴⁴
3

4 **FEDERAL ENFORCEMENT AUTHORITY**

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

- 7 (1) The unpaid tax is a lien on the decedent's gross estate for 10 years.
- 8 (2) The decedent's spouse, transferee, trustee, surviving tenant, appointee, or
9 beneficiary who has or receives property in the decedent's gross estate is
10 personally liable for the tax to the extent of the value of the property
11 received, measured as of the date of death.
- 12 (3) If a person liable for the tax disposes of property that is subject to the estate
13 tax lien, the property is divested of the lien and a like lien attaches to all that
14 person's property as well as to the property of the transferee.

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

26 The Internal Revenue Service has not been shy about exercise of its authority
27 under these provisions. Moreover, the liability is not conditioned on either
28 exhaustion of remedies for collection against the estate or the estate's
29 insolvency.²⁴⁷ The Internal Revenue Service can proceed against a transferee even
30 if the estate is solvent and even if other collection remedies are available against
31 the estate.

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

244. Gopman & McCawley, *supra* note 242, at A-50.

245. See, e.g., *U.S. v. Vohland*, 675 F.2d 1071 (9th Cir. 1982).

246. 26 U.S.C. § 7403.

247. See, e.g., *Schuster v. Comm'r*, 312 F.2d 311 (9th Cir. 1962).

1 tax collection but it is more limited than the special estate tax liability and lien
2 system for a number of reasons, including:

- 3 • It is subject to a four year limitations period.²⁴⁸
- 4 • It requires exhaustion of collection efforts against the decedent.²⁴⁹
- 5 • It is subject to state exemption laws (unless the transfer is a fraudulent
6 conveyance).

7 There is a division of authority among the federal circuits whether transferee
8 liability for the estate tax is limited to the value of the property received.²⁵⁰

9 Transferee tax liability, whether based upon equitable, statutory, or contractual
10 grounds, is joint and several. (As the poor Baptiste Brothers found out!) The IRS
11 or other tax authority can pursue just one of them; it cannot be forced to join all
12 potentially liable sources of payment. [Annie Philips v. Comm’r, 283 US 589
13 (1931).] However, one of several transferees can bring an independent action for
14 equitable contribution against the others who are liable. [Philips-Jones Corp. v.
15 Parmley, 302 US 233 (1937)] If the tax authority should bring a collection lawsuit
16 against one of several transferees (a rather unusual procedure since the passage of
17 the administrative assessment procedures), then one could cross-complain against
18 the others for contribution.²⁵¹

19 REIMBURSEMENT

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

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

248. 26 U.S.C. § 6901(c).

249. California Iron Yards Corp. v. Comm’r, 82 F2d 776 (9th Cir 1936).

250. Compare Gabriel Baptiste, Jr. v. Comm’r 29 F.3d 433 (8th Cir. 1994), cert den., with Richard Baptiste v. Comm’r 29 F.3d 1533 (11th Cir. 1994).

251. Miller, *Death, Debts and Taxes: Creditors’ Claims Against a Decedent* 163 (Cal. Cont. Ed. Bar. 2004).

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”).

1 Federal law overrides state law governing reimbursement with respect to
2 specific assets.²⁵⁴ These provisions govern the right of the personal representative
3 to seek reimbursement and do not provide a direct right of recovery among the
4 decedent's beneficiaries.

5 **Synopsis**

6 Liability limited to insolvent estate: No

7 Enforcement by personal representative if any: Yes

8 Direct enforcement by creditor: Yes

9 Liability of transferee or of property: Transferee, or property via lien

10 Proportionate liability: Yes

11 Priority among creditors: No

12 One year statute of limitations: No

13 **Evaluation**

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

20 **MISSOURI STATUTE**

21 Missouri since 1989 has provided comprehensive nonprobate transferee liability
22 for a decedent's debts and family allowance.²⁵⁵

23 Under the Missouri scheme a nonprobate transferee, including a trust
24 beneficiary and a surviving joint tenant, is liable for a decedent's debts and family
25 allowance to the extent the decedent's probate estate is inadequate. The liability is
26 enforceable in an action for an accounting by the decedent's personal
27 representative on demand of a claimant or, failing that, by the claimant. The
28 personal representative must disclose to the claimant information in its possession
29 concerning nonprobate transfers. The action must be brought within 18 months
30 after the decedent's death. All nonprobate transferees may be joined in an action
31 for an accounting. A transferee is liable pro rata based on the value of all property
32 received.²⁵⁶

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).

255. Rev. Stat. Mo. § 461.300. The text of the statute is set out in the Appendix.

256. See, e.g., *Farris v. Cook*, 2007 WL 2482253 (2007) (effect of disclaimer by joint account holder).

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

5 **Synopsis**

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

13 **Evaluation**

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

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

23 **WASHINGTON STATUTE**

24 The Washington statute has been in effect since 1994.²⁶⁰ The statute is based on
25 the analysis and recommendations of Andrews, *Creditors' Rights Against*
26 *Nonprobate Assets in Washington: Time for Reform*.²⁶¹

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

30 The probate procedure is found in Revised Code of Washington Section
31 11.18.200. The beneficiary of a nonprobate transfer is liable to account to the

257. In re Estate of Macormic, 244 S.W.3d 254 (2008); In re Estate of Jones, 2009 WL 62962 (2009).

258. In re Estate of Hayden, 258 S.W. 3d 505 (2008).

259. See, e.g., In re Hoffman, 23 S.W.3d 646 (2000).

260. Rev. Code Wash. §§ 11.18.200, 11.42.010-11.42.900. The text of the statute is set out in the Appendix.

261. 65 Wash. L. Rev. 73 (1990).

1 personal representative for liabilities, claims, estate taxes, and a fair share of the
2 expenses of administration. Transfers covered by this provision include property
3 passing to the beneficiary under a community property agreement, joint tenancy,
4 pay on death designation, life estate, or trust. Life insurance and pension and
5 retirement benefits are exempt. The liability of nonprobate transfers is treated
6 together with the liability of probate transfers under general abatement principles.

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

21 **Synopsis**

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

29 **Evaluation**

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

32 It is unclear under the probate proceeding statute whether a nonprobate
33 transferee may be held to account for a family allowance — the nonprobate
34 transfer is subject to "liabilities, claims, estate taxes, and the fair share of expenses
35 of administration", whereas under Washington law the family allowance is a court
36 "award." It is also unclear whether the personal representative must seek out and
37 proportionately apply the liability to all nonprobate transfer beneficiaries, or
38 whether the personal representative may pick and choose. There also is a
39 discrepancy between the concept of personal liability of the beneficiary and
40 abatement of the transfer.

1 The nonprobate notice proceeding is similar to that available to a trustee under
2 California law. It is broader than California law since it is made available to the
3 major nonprobate beneficiary of the decedent and, by agreement, to a group that
4 constitutes the major nonprobate beneficiary. Minor nonprobate beneficiaries are
5 not allowed to conduct the notice proceeding; presumably their remedy, other than
6 to wait for expiration of the statute of limitations, is to commence a probate
7 proceeding.

8 UNIFORM ACT

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

13 Six jurisdictions have enacted the provision: Arizona,²⁶³ Colorado,²⁶⁴ Idaho,²⁶⁵
14 Indiana,²⁶⁶ New Mexico,²⁶⁷ and the Virgin Islands.²⁶⁸

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

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

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.

263. Ariz. Rev. Stat. § 14-6102 (2001).

264. Colo. Rev. Stat. § 15-15-103 (2006).

265. Idaho Code § 15-6-107 (2003).

266. Ind. Code § 32-17-13-1 (2002).

267. N.M. Stat. 1978, § 45-6-102 (2005).

268. V.I. Act No. 7150 (2010)

269. Unif. Prob. Code § 6-102, cmt. 1, ¶1.

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

3 **SCOPE OF ACT**

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

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

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

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

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

21 **General Power of Appointment**

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

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

270. Unif. Prob. Code § 6-102(a).

271. Unif. Prob. Code § 6-102, cmt. 2, ¶1.

272. Unif. Prob. Code § 6-102, cmt. 3.

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

4 California subjects a general power of appointment to the decedent's debts. See
5 discussion above of "General Power of Appointment."

6 **Joint Tenancy**

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

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

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

24 The Uniform Act excludes only a real property joint tenancy:

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

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

33 **Joint Bank Account**

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

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.")

274. Unif. Prob. Code § 6-102, cmt. 5, ¶1.

275. Unif. Prob. Code § 6-102, cmt. 5, ¶2.

1 probate estate of a deceased co-depositor for funds in the account owned by the
2 survivor prior to the decedent's death:

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

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

14 Exemptions

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

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

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

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

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

35 Colorado exempts:

276. Unif. Prob. Code § 6-102, cmt. 6.

277. Unif. Prob. Code § 6-102(b).

278. Unif. Prob. Code § 6-102, cmt. 2.

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).

280. Ind. Code § 32-17-13-1(a).

1 (3) Proceeds transferred pursuant to a beneficiary designation under a life
2 insurance, accident insurance, or annuity policy contract.

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

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

8 **Jurisdiction**

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

- 14 (1) the transfer occurred;
- 15 (2) the transferee is located; or
- 16 (3) the probate action is pending.²⁸³

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

21 (b) With respect to a security described in IC 32-17-9 “nonprobate transfer”
22 means a transfer on death resulting from a registration in beneficiary form by an
23 owner whose last domicile was in Indiana.

24 (c) With respect to a nonprobate transfer involving a multiple party account, a
25 nonprobate transfer occurs if the last domicile of the depositor whose interest is
26 transferred under IC 32-17-11 was in Indiana.

27 (d) With respect to a motor vehicle or a watercraft, a nonprobate transfer occurs
28 if the transferee obtains a certificate of title in Indiana for:

- 29 (1) the motor vehicle under IC 9-17-2-2(b); or
- 30 (2) the watercraft as required by IC 9-31-2-16(a)(1)(C).²⁸⁴

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

33 **LIABILITY**

34 The key liability provision of Section 102 states:

281. Colo. Rev. Stat. § 15-15-103(1)(b).

282. See, e.g. Prob. Code § 7051.

283. Ind. Code § 32-17-13-6.

284. Ind. Code § 32-17-13-1(b)-(d).

1 Except as otherwise provided by statute, a transferee of a nonprobate transfer is
2 subject to liability to any probate estate of the decedent for allowed claims against
3 decedent's probate that estate [*sic*] and statutory allowances to the decedent's
4 spouse and children to the extent the estate is insufficient to satisfy those claims
5 and allowances. The liability of a nonprobate transferee may not exceed the value
6 of nonprobate transfers received or controlled by that transferee.²⁸⁵

7 Noteworthy aspects of the provision include:

- 8 (1) Liability extends both to creditors and to dependents given statutory
9 protection. Statutory allowances apparently are not intended to include such
10 non-monetary items as a probate homestead or other exempt property.²⁸⁶
- 11 (2) The nonprobate transferee's liability is to the probate estate, rather than
12 directly to a creditor or a dependent given statutory protection. A major
13 debate in the development of the statute was whether to allow direct action
14 by a creditor. The debate was resolved in favor of processing claims through
15 the estate because that enables a regularized and standardized process.
- 16 (3) Liability is limited to "allowed" claims. The allowance or proof of a claim is
17 a standard procedure in probate. The Comment notes that if there is no
18 probate property, a creditor or other person seeking to use Section 102
19 would first need to secure appointment of a personal representative to
20 invoke procedures for establishing a creditor's claim as "allowed." The
21 Comment opines that this works well in practice since the Uniform Probate
22 Code procedures for opening estates, satisfying probate exemptions, and
23 presenting claims are very efficient.²⁸⁷
- 24 (4) The liability applies only to the extent the probate estate is insufficient.
25 Nonprobate transferees are preferred over probate transferees.
- 26 (5) The liability of a nonprobate transferee is limited to the value of the property
27 received or controlled by the transferee. The Comment notes that value is
28 determined as of the time benefits are received or controlled by the
29 transferee, which would be "the date of the decedent's death for nonprobate
30 transfers made by means of a revocable trust, and date of receipt for other
31 nonprobate transfers." It is not clear how the determination of value is made;
32 if there is an estate tax return, that may establish value; otherwise, there is
33 no easy method.²⁸⁸ In California a probate referee appraisal might suffice.
34 Indiana adds a provision that liability of the nonprobate transferee does not
35 include the net contributions of the nonprobate transferee.²⁸⁹ That may be
36 inherent in the concept of value, but it should be spelled out in the statute.

285. Unif. Prob. Code § 102(b).

286. See Transcript, Unif. Prob. Code § 6-102, Proceedings of NCCUSL (1st Sess., Fri. Morn., July 24, 1998).

287. Unif. Prob. Code § 6-102, cmt. 1.

288. See Transcript, Unif. Prob. Code § 6-102, Proceedings of NCCUSL (1st Sess., Fri. Morn., July 24, 1998).

289. Ind. Code § 32-17-13-2(c).

1 It may not be clear what a transferee's proportionate liability is, since that
2 can only be determined if all the decedent's nonprobate transfers are known.
3 Gagliardi notes that the statute does not make clear whether the personal
4 representative can join all potential nonprobate transferees in one
5 proceeding, and whether apportionment of liability among nonprobate
6 transferees (other than the trustee of the "principal nonprobate instrument")
7 is calculated based on property received only by those nonprobate
8 transferees named in the proceeding or based on property received by all
9 potential nonprobate transferees whether or not named.²⁹⁰

10 ABATEMENT

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

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

16 (1) a transferee designated in the decedent's will or any other governing
17 instrument, as provided in the instrument;

18 (2) the trustee of a trust serving as the principal nonprobate instrument in the
19 decedent's estate plan as shown by its designation as devisee of the decedent's
20 residuary estate or by other facts or circumstances, to the extent of the value of the
21 nonprobate transfer received or controlled;

22 (3) other nonprobate transferees, in proportion to the values received.²⁹¹

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

26 The primary liability of the decedent's trust is a significant innovation of Section
27 6-102. One of the debates in the development of the statute was whether all
28 nonprobate transferees should be proportionately liable or whether they should be
29 liable only after trust property is exhausted. The compromise reached was that a
30 trust that functions as the principal will substitute ("the principal nonprobate
31 instrument in the decedent's estate plan") should be primarily liable. That makes
32 sense, but one might likewise ask whether the trust should only be liable if the
33 estate is insolvent or whether it should be liable equally with the estate. That
34 question may be moot if the decedent's estate is subject to a pour over provision in
35 the will, as is often the case.

36 Comment 8 to the Uniform Act suggests that if a decedent's *irrevocable* trust is
37 a pour over receptacle it could be liable for a decedent's debts under Section
38 102(c)(2). That would be at odds with basic California law and policy. A pour
39 over devise is a testamentary transfer and would be primarily liable for the

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

291. Unif. Prob. Code § 6-102(c).

1 decedent’s debts. It would be difficult to say that a decedent’s irrevocable trust,
2 like any other gift made during a decedent’s lifetime, could be subject to liability
3 if the estate is inadequate. Compare Indiana law, which expressly limits liability
4 under this provision to “trusts that can be amended, modified, or revoked by the
5 decedent during the decedent’s lifetime.”²⁹²

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

11 **ABATEMENT WITHIN TRUST**

12 In case of trust liability, Section 102(d) applies the same abatement principles
13 that would be applicable within a probate estate. The abatement principle for trust
14 liability is consistent with the California approach to trust beneficiary liability.²⁹³

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

21 The text of the Uniform Act and its Comment are inconsistent with each other.
22 Although Section 102(c)(2) makes the principal trust primarily liable, Section
23 102(d) applies a rule of proportionate liability among all trusts. Indiana resolves
24 the inconsistency by making all trusts, not just the decedent’s principal trust, liable
25 together before other nonprobate transferees.²⁹⁴

26 **INSTRUMENT DIRECTING APPORTIONMENT**

27 Section 102(e) elaborates the right of the decedent to specify the order of
28 abatement to satisfy debts and allowances. The Comment to this provision
29 observes that it permits

30 a simple, last-minute override of earlier directions concerning a decedent’s
31 wishes regarding priorities among successors. Thus, a will or trust amendment
32 can correct or avoid liquidity and abatement problems discovered prior to death.
33 The expression “block buster will” was coined by estate planners in the mid 70’s
34 to signal interest in legislation enabling a later will to override death benefits by

292. Ind. Code § 32-17-13-3(2).

293. See Prob. Code §§ 21400-21406.

294. Ind. Code § 32-17-13-3(2).

1 any nonprobate transfer device. This subsection meets some of the goals of
2 advocates of this legislation.²⁹⁵

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

7 **OUT OF STATE TRANSFEREE**

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

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

23 **ENFORCEMENT**

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

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

295. Unif. Prob. Code § 6-102, cmt. 10.

296. Unif. Prob. Code § 6-102, cmt. 11.

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

298. 800 N.E.2d 960 (2003).

299. Unif. Prob. Code § 102(g).

1 and affairs attempting to ascertain and locate nonprobate transferees. The
2 compromise approach of Section 102 is to give the personal representative
3 primary enforcement authority and to give the creditor secondary authority to act
4 “in the name of the decedent’s estate” in case of inaction by the personal
5 representative.

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

8 Indiana Code § 32-4-1.5-7 states, “No proceeding to assert this liability shall be
9 commenced unless the personal representative has received a written demand by a
10 surviving spouse, a creditor or one acting for a dependent child of the
11 decedent....” It is clear that Ruth had no surviving spouse or dependent child at
12 her death. More importantly, there is no indication that any creditor of the estate
13 requested that Nancy initiate this action. In fact, by her own argument, Nancy
14 implies that no creditor filed such a written request. Consequently, this action
15 cannot proceed with I.C. § 32-4-1.5-7 as its authority.³⁰⁰

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

21 The commentary to Section 102 states:

22 The second sentence [of Section 102(g)] reflects sensitivity for the dilemma
23 confronting a probate fiduciary who, acting as required of a fiduciary, concludes
24 that the costs and risks associated with a possible recovery from a nonprobate
25 transferee outweigh the probable advantages to the estate and its claimants. A
26 creditor whose claim has been allowed but remains unsatisfied and whose demand
27 for a proceeding has been turned down by the estate fiduciary may proceed at
28 personal risk in efforts to enforce the estate claim against the nonprobate
29 beneficiary. This is so because the last two sentences of (g) shift the risk of
30 unrecoverable costs from the decedent’s estate to the claimant who undertakes
31 collection efforts on behalf of the decedent’s estate. Any recovery of costs should
32 be used to reimburse the claimant who bore the risk of loss for the proceeding.³⁰¹

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

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

300. 800 N.E.2d at 964.

301. Unif. Prob. Code § 6-102, cmt. 12.

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

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

15 **STATUTE OF LIMITATIONS**

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

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

25 **IMMUNITY OF FIDUCIARY**

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

31 Section 102(i) is a potent provision, since it provides a means of preserving
32 nonprobate property from dispersion. The deeper question is why it should matter
33 whether property is dispersed, since liability is against the distributee as opposed
34 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 (2004) (dispersion of trust estate during litigation to establish claim).

303. Unif. Prob. Code § 102(i).

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

3 Absent a statutory requirement to preserve property, the obligation of a fiduciary
4 is to nonprobate transfer beneficiaries and not to creditors.³⁰⁴

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

10 **Synopsis**

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

18 **Evaluation**

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

22 The provision has a number of problems, including:

- 23 (1) It excludes many types of nonprobate transfers from its operation, including
24 joint tenancy, general powers of appointment, and other types of exempt
25 property.
- 26 (2) It requires the opening of a probate proceeding for imposition of liability.
- 27 (3) It requires a separate demand from a creditor before enforcement will be
28 allowed.
- 29 (4) It favors non-trust transfers over transfers in trust.
- 30 (5) There is no enforcement mechanism for proportionate liability among
31 transferees if the personal representative enforces selectively.
- 32 (6) Basic features of enforcement by a creditor “in the name of the estate” are
33 unclear.
- 34 (7) Many basic operational principles are suggested in commentary rather than
35 in black letter law.

304. Cf. *Arluk Medical Center Industrial Group, Inc. v. Dobler*, 116 Cal. App. 4th 1324, 11 Cal. Rptr. 3d 194 (2004).

1 McCouch is skeptical that the approach of Section 102 will work. His points are
2 twofold:

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

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

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

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

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

29 SUMMARY

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

305. McCouch, *Probate Law Reform and Nonprobate Transfers*, 62 U. Miami L. Rev. 757, 762 (2008).

306. *Id.* at 763.

1 The existing comprehensive schemes are reasonably consistent on the whole
2 with many of the limited statutes in effect in California.

3 IV. POLICY ISSUES

4 BASIS OF NONPROBATE TRANSFER LIABILITY

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

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

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

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

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

307. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1120 (1984) (emphasis in original).

308. Langbein, 97 Harv. L. Rev. at 1124-5.

1 protections for unsecured creditors of decedents. Their skepticism is warranted
2 because commercial creditors, by continuing to ignore the national trend towards
3 streamlining probate by cutting creditor protections, have demonstrated lack of
4 interest in probate law protections. Also, probate exemptions are a product of
5 probate’s tradition of protecting decedents’ creditors that could come to be
6 viewed as unwanted fetters on owner control of succession if creditor protection
7 against transfers at death were to disappear.

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

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

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

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

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

309. Unif. Prob. Code § 6-102, Pref. Note ¶3-4.

310. McCouch, *Probate Law Reform and Nonprobate Transfers*, 62 U. Miami L. Rev. 757, 762-763 (2008) (fn. omitted).

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

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

11 SECURED DEBT

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

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

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

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

34 SCOPE OF LIABILITY

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

38 But many classically "probate" assets pass to the decedent's successors without
39 probate. That is the case, for example, under the small estate and affidavit
40 procedures in existing California law.

1 In some cases the recipient of a nonprobate transfer, or a person who receives
2 nothing from the decedent but who may be liable for the decedent’s debts, may
3 elect to subject otherwise exempt property to probate.

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

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

11 **DEFINITION OF NONPROBATE TRANSFER**

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

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

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

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

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

311. 26 U.S.C. §§ 3031-3042.

312. Unif. Prob. Code § 6-102(a).

313. Unif. Prob. Code § 6-102, cmt. 2, ¶1.

314. Rev. Stat. Mo. §§ 462.005(7), 461.300(10)(4).

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

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

9 **Nonprobate transfer authorized**

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

18 **Nonprobate transfer to former spouse**

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

21 (1) A provision of a type described in Section 5000.

22 (2) A provision in an instrument that operates on death, other than a will,
23 conferring a power of appointment or naming a trustee.³¹⁷

24 **ATRO in marital dissolution proceeding**

25 “Nonprobate transfer” means an instrument, other than a will, that makes a
26 transfer of property on death, including a revocable trust, pay on death account in
27 a financial institution, Totten trust, transfer on death registration of personal
28 property, or other instrument of a type described in Section 5000 of the Probate
29 Code.³¹⁸

30 **Estate tax proration**

31 “Person interested in the estate” means any person, including a personal
32 representative, entitled to receive, or who has received, from a decedent while
33 alive or by reason of the death of the decedent any property or interest therein.³¹⁹

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

315. Rev. Code Wash. § 11.02.005.

316. Prob. Code § 5000(a).

317. Prob. Code § 5600(e).

318. Fam. Code § 2040(d).

319. Prob. Code § 20100(b). See also Prob. Code §§ 6600(b)(1) & cmt. (small estate set-aside), 13050 & cmt. (disposition of estate without administration).

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

3 **All property other than probate estate**

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

7 **Piggyback on federal estate tax**

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

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

12 **Combination**

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

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

24 California authorizes passage of traditional "probate" property without probate
25 in a number of circumstances.³²⁰ Each of these procedures makes provision for
26 creditor claims. If a comprehensive liability procedure is developed, these schemes
27 should be integrated into it.

28 **TRANSFER BEFORE DEATH**

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

32 California law pulls a gift causa mortis into the decedent's estate. See discussion
33 above of "Fraudulent Transfer, Gift Causa Mortis, Nonprobate Transfer of
34 Vehicle." The existing law is limited, covering a gift in view of "impending"
35 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).

1 planning disposition of property, although there is no case law construing the
2 provision.³²¹

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

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

11 **JOINT TENANCY**

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

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

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

27 The concept of "community property in joint tenancy form" has now received
28 statutory sanction in the relatively new form of marital property tenure,
29 community property with right of survivorship.³²² Whether that form of tenure will
30 successfully evade liability for the deceased spouse's debt on joint tenancy
31 principles remains to be seen. Community property is generally liable for a
32 decedent's debts; passage of the property to the surviving spouse by right of
33 survivorship rather than by testate or intestate succession should not be the
34 occasion for evasion of that basic policy.

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

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").

322. Civ. Code § 682.1.

1 may protect that interest by requiring joinder of all joint tenants. But a creditor
2 may not be aware of the perils of using joint tenancy property as security. If a
3 creditor demands joinder of all joint tenants and a joint tenant refuses to join in the
4 encumbrance, the creditor may refuse to extend credit or may force a severance of
5 the joint tenancy before extending credit.

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

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

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

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

26 Andrews observes:

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

1 passes to a surviving joint tenant by reason of one tenant's death should be subject
2 to the claims against the decedent joint tenant.³²³

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

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

12 PRIORITY OF NONPROBATE TRANSFER

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

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

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

34 The argument that a nonprobate transfer should be given a preference because it
35 is analogous to a specific devise of property makes little sense when applied to the
36 decedent's revocable inter vivos trust. The inter vivos trust has become the
37 principle estate planning instrument, supplanting the will which is often limited to
38 a pour over function for missed property. The trust may include specific, general,

323. Andrews, *Creditors' Rights Against Nonprobate Assets in Washington: Time for Reform*, 65 Wash. L. Rev. 73, 95 (1990) (fn. omitted).

1 and residuary gifts — all nonprobate transfers. The decedent’s inter vivos trust, at
2 least, should be the equivalent of the decedent’s probate estate for liability
3 purposes.

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

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

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

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

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

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

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

324. Andrews, *Creditors’ Rights Against Nonprobate Assets in Washington: Time for Reform*, 65 Wash. L. Rev. 73, 125 (1990).

1 possession or control of the personal representative. On the other hand, if liability
2 is clear, collection ordinarily would be straightforward — evasion would simply
3 increase the nonprobate transferee’s liability for the collection expense.

4 The additional complexity of nonprobate transfer liability in many estate
5 proceedings may seem daunting but that is the practice in at least one jurisdiction.
6 The Washington scheme for nonprobate transfer liability has been in effect, and
7 apparently operating smoothly, for the past 15 years.³²⁵

8 Andrews’ observation is apt:

9 Failure to accord to nonprobate assets a preferred status above probate property
10 will, however, add complexity to the scheme of creditors’ rights and may expose
11 many nonprobate transfers to creditor’s claims, even though there are ample
12 probate assets to satisfy such claims. But this is a complexity that seems
13 demanded by fairness.³²⁶

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

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

25 **PROPORTIONATE LIABILITY AMONG**
26 **NONPROBATE TRANSFERS**

27 **GENERAL PRINCIPLES**

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

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

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

326. Andrews, *supra* note 323, at 125.

1 transfer most sufficient and most readily accessible with least effort. The personal
2 representative may have a conflict of interest and may favor one beneficiary over
3 another.

4 A handful of existing California statutes apply a rule of proportionate liability
5 for debts. That is the rule, for example, in allocation of estate tax liability.³²⁷
6 Liability is apportioned among beneficiaries based on the proportion that the value
7 of the property received by each beneficiary bears to the total value of the estate.

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

10 ABATEMENT

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

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

- 17 (1) Property not disposed of by the instrument.
- 18 (2) Residuary gifts.
- 19 (3) General gifts to persons other than the transferor's relatives.
- 20 (4) General gifts to the transferor's relatives.
- 21 (5) Specific gifts to persons other than the transferor's relatives.
- 22 (6) Specific gifts to the transferor's relatives.³²⁸

23 California has adopted the policy that the abatement scheme should apply to
24 nonprobate as well as to probate transfers.³²⁹ Those provisions apply to all
25 transfers of the decedent's property for all purposes, including payment of debts.
26 Abatement is by class of transfer and is pro rata within each class.

27 If a debt is uniquely associated with a particular nonprobate transfer asset, that
28 asset or its recipient should be primarily liable for the debt; the debt should not be
29 apportioned among other assets.³³⁰

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

327. Prob. Code § 20111.

328. Prob. Code § 21402(a).

329. Prob. Code §§ 21400-21406 (abatement).

330. See, e.g., Estate of Yush, 8 Cal. App. 3d 251, 87 Cal. Rptr. 222 (1970) (estate not obligated for tax on property passing outside probate).

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

3 As a technical matter, either Probate Code Section 21101 should specify the
4 application of “this division” or a provision should be added to Section 21400,
5 21401, or 21406 to specify the application of “this part.” Probate Code Sections
6 21400 and 21402(a)(1) should refer to property not disposed of by “an” instrument
7 rather than “the” instrument. See discussion above of “Abatement.”

8 **INTER VIVOS TRUST**

9 The Uniform Act subjects a decedent’s revocable inter vivos trust — the “trust
10 serving as the principal nonprobate instrument in the decedent’s estate plan as
11 shown by its designation as devisee of the decedent’s residuary estate or by other
12 facts or circumstances” — to liability after the probate estate but before other
13 nonprobate property.³³¹ Within the trust, gifts abate in the same manner as in
14 probate, with a residuary gift abating first, followed by a general gift, and finally
15 by a specific gift.³³²

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

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

30 **DECEDENT CONTROL**

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

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

331. Unif. Prob. Code § 6-102(c)(2).

332. Unif. Prob. Code § 6-102(d).

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

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

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

9 (b) This section does not apply:

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

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

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

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

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

34 A proration clause that purports to charge all death taxes to the residue of an
35 estate or living trust can wipe out the residue if the residue is smaller than
36 expected — a potentially disastrous result if the person receiving the residue is the
37 favored beneficiary. See *Lurie v. Commissioner* (7th Cir 2005) 425 Fed 1021
38 (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”).

334. Prob. Code § 20110.

1 proration clause required payment of tax on after-discovered assets from trust).
2 See also *Estate of Wathen* (1997) 56 CA4th 48, 64 CR2d 805.³³⁵

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

7 EXEMPTIONS FROM LIABILITY

8 POLICY CONSIDERATIONS

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

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

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

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

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

335. Reimann & McAvoy, *Nonprobate Transfers*, in California Decedent Estate Practice 2d § 2.85 (Cal. Cont. Ed. Bar 2009).

336. Code Civ. Proc. §§ 703.010-704.995.

1 **EXISTING PROBATE LAW**

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

5 The decedent's family is entitled to remain in possession of the family dwelling
6 and other property of the decedent "exempt from enforcement of a money
7 judgment" for a limited time after the decedent's death.³³⁷ The probate court may
8 permanently set aside exempt property for the decedent's surviving spouse and
9 minor children.³³⁸ And the court may set aside a probate homestead for the
10 surviving spouse and minor children for a limited period.³³⁹

11 With respect to a probate homestead, the property is exempt from the decedent's
12 debts to the same extent the homestead exemption would have been available to
13 the decedent at the time of death.³⁴⁰

14 If the decedent's property was exempt from attachment by creditors during the
15 decedent's life as necessary for support of the decedent's family under Code of
16 Civil Procedure Section 487.020, that exemption may be continued in probate
17 after the decedent's death.³⁴¹

18 If the decedent's estate is small, the probate court may order it set aside for the
19 surviving spouse and minor children. The recipients remain liable for the
20 decedent's debts, but may assert "any defense, cross-complaint, or setoff" against
21 liability that would have been available to the decedent.³⁴² The statute is silent
22 concerning the applicability of any exemption from enforcement that would have
23 been available to the decedent; that does not appear to be included within the
24 meaning of Probate Code Section 6611(c).

25 For comprehensive treatment of these and other family protection statutes, and
26 their integration with the exemption statutes, see discussion below of "Family
27 Protections."

28 **EXISTING NONPROBATE TRANSFER LAW**

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

337. Prob. Code § 6500.

338. Prob. Code § 6510.

339. Prob. Code § 6520.

340. Prob. Code § 6526.

341. Prob. Code § 9304.

342. Prob. Code § 6611(c).

1 The exemption from attachment by creditors of property necessary for support
2 of the decedent's family during the decedent's life is continued after the
3 decedent's death with respect to trust property.³⁴³

4 Where the surviving spouse takes property that passes from a decedent without
5 probate, the survivor's liability for the decedent's debts apparently is not protected
6 by the decedent's exemptions. Under Probate Code Section 13551, the survivor's
7 liability is reduced by exemptions of the survivor's property but not by exemptions
8 of the decedent's property.³⁴⁴ The implication of Section 13551, at least for a
9 nonprobate transfer under the statute, is that the decedent's exemptions are not
10 available.

11 A technical argument can be made that the decedent's exemptions are more fully
12 applicable to a nonprobate than to a probate transfer. Exemptions are limited in
13 probate but the law is generally silent with respect to a nonprobate transfer. Thus a
14 court might extend a decedent's exemption to a nonprobate transfer on general
15 principles such as tracing.³⁴⁵ Tracing could protect a nonprobate transfer of exempt
16 property such as retirement benefits and insurance proceeds that might not
17 otherwise be exempt in probate, although there is no case so holding.

18 EXEMPTIONS IN OTHER JURISDICTIONS

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

21 Federal estate tax apportionment statutes do not recognize the decedent's
22 exemptions.

23 The Missouri statute applies to a transfer of property "that was subject to
24 satisfaction of the decedent's debts immediately prior to the decedent's death."³⁴⁶
25 Whether that incorporates exemptions is not clear.

26 Washington, like Missouri, makes liable a nonprobate transfer of property that
27 was subject to satisfaction of the decedent's general liabilities immediately before
28 the decedent's death, but adds the qualification, "Unless expressly exempted by
29 statute." Rev. Code Wash. § 11.18.200(1). Whether that qualification can be read
30 to incorporate the general exemption statutes is unclear. Washington deals
31 expressly with the exemptions of life insurance and pension benefits, suggesting
32 perhaps that other exemptions do not apply. See Rev. Code Wash. §
33 11.18.200(2)(h)-(i).

34 The Uniform Act applies to a nonprobate transfer "except as otherwise provided
35 by statute."³⁴⁷ The commentary to the Uniform Act states that this language is

343. Code Civ. Proc. § 487.020; Prob. Code § 19304 (trust).

344. Compare Prob. Code § 13551(a) with Prob. Code § 13551(b)-(c).

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").

346. Rev. Stat. Mo. § 461.300(10)(4).

1 intended “to clarify that this section does not supersede existing legislation
2 protecting death benefits in life insurance, retirement plans or IRAs from claims
3 by creditors.”³⁴⁸ It is unclear whether the Uniform Act intends to apply a state’s
4 general exemption statutes or only those statutes that expressly exempt a specific
5 asset from liability for a nonprobate transfer. In Arizona it has been held that the
6 general exemption for life insurance proceeds applies against nonprobate transfer
7 liability under the Uniform Act.³⁴⁹ In enacting the Uniform Act both Indiana and
8 Colorado expressly stated a few exemptions, e.g., life insurance process and
9 retirement benefits.³⁵⁰

10 LIFE INSURANCE

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

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

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

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

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

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

347. Unif. Prob. Code § 6-102(b).

348. Unif. Prob. Code § 6-102, cmt. 2.

349. *May v. Ellis*, 208 Ariz. 229, 92 P.3d 859 (2004).

350. Ind. Code § 32-17-13-1(a); Colo. Rev. Stat. § 15-15-103(1)(b).

351. Code Civ. Proc. § 704.100.

1 directly by a suitable statute that does not discriminate on the basis of the form of
2 property transfer.”³⁵²

3 **RETIREMENT BENEFITS**

4 Federal law broadly immunizes a retirement plan covered by ERISA.³⁵³ With
5 respect to a retirement plan not covered by ERISA, state law likewise provides a
6 substantial exemption.³⁵⁴

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

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

21 While it is unlikely that the creditors’ protection provided by federal law can be
22 dislodged, the same does not apply to that provided under state law. As with the
23 life insurance provision, such protections should be recast to accomplish valid
24 purposes, and no more.³⁵⁵

25 **HARDSHIP EXEMPTION**

26 Existing California law includes an interesting variation on post-death
27 exemption law. The Medi-Cal reimbursement program requires that after a Medi-
28 Cal recipient’s death the Department of Health Services must recoup from
29 recipients of the decedent’s property benefits given the decedent. However, the
30 law precludes reimbursement if the department determines that enforcement of the
31 claim would result in substantial hardship to the decedent’s dependents, heirs, or
32 survivors.³⁵⁶

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

352. Andrews, *Creditors’ Rights Against Nonprobate Assets in Washington: Time for Reform*, 65 Wash. L. Rev. 73, 108 (1990) (fn. omitted).

353. 29 U.S.C. 1056(d).

354. Code Civ. Proc. §§ 704.110 (public plans), 704.115 (private plans).

355. Andrews, *Creditors’ Rights Against Nonprobate Assets in Washington: Time for Reform*, 65 Wash. L. Rev. 73, 111-12 (1990) (fns. omitted).

356. Welf. & Inst. Code § 14009.5(c).

1 In determining the existence of substantial hardship, the Department shall
2 waive an applicant's proportionate share of the claim if one or more of the
3 following factors apply:

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

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

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

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

25 (5) When the applicant transferred the property to the decedent for no
26 consideration; or,

27 (6) When equity in the real property is needed by the applicant to make the
28 property habitable, or to acquire the necessities of life, such as food, clothing,
29 shelter or medical care.³⁵⁷

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

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

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

357. 22 Cal. Code Reg. § 50963(a).

1 the surviving spouse and minor children under Probate Code Section 6609(b), the
2 court must consider “the needs of the surviving spouse and minor children, the
3 liens and encumbrances on the property of the decedent’s estate, the claims of
4 creditors, the needs of the heirs or devisees of the decedent, the intent of the
5 decedent with respect to the property in the estate and the estate plan of the
6 decedent as expressed in inter vivos and testamentary transfer or by other means,
7 and any other relevant considerations.”

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

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

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

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

26 **SUMMARY**

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

34 **LIABILITY OF PROPERTY OR TRANSFEREE**

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

38 Most, but not all, of the California statutes provide for personal liability of the
39 transferee rather than enforcement against the property. Of the comprehensive

1 models in other jurisdictions, all impose liability on the transferee rather than the
2 property.

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

8 **LIABILITY OF PROPERTY**

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

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

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

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

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

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

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

36 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).

360. Prob. Code § 19403 (trust liability).

1 This section does not create a lien on any property that is the subject of a
2 recoverable transfer, except as a lien may be perfected by the way of attachment,
3 garnishment, or judgment in an accounting proceeding authorized by this
4 section.³⁶¹

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

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

13 **TRANSFEEE LIABILITY**

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

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

25 If the transferee does not wish to become personally liable, the transferee may
26 disclaim and avoid any liability.³⁶² That option should be emphasized in any
27 liability statute.

28 Alternatively, provision could be made for return of the property to the estate,
29 with adjustments.³⁶³

30 **LIABILITY LIMITED TO VALUE OF PROPERTY TRANSFERRED**

31 All the existing schemes for imposing liability for a decedent's debts on a
32 nonprobate transferee limit the liability to the value of the property received by the
33 transferee. That is an appropriate limitation.

361. Rev. Stat. Mo. § 461.300(6).

362. Prob. Code §§ 260-295 (disclaimer of testamentary and other interests).

363. See, e.g., Prob. Code § 13111 (affidavit procedure for collection or transfer of personal property).

1 **Interest Transferred**

2 It is not the value of the property itself that is the measure of liability, but the
3 value of the property interest that is transferred to the beneficiary. Thus a statute
4 that imposes liability on a surviving joint tenant should make clear that survivor’s
5 liability is limited to the interest in the joint tenancy property received from the
6 decedent by right of survivorship.³⁶⁴

7 **Date of Value**

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

12 (a) Subject to the limitations and conditions specified in this section, the person
13 or persons in whom title vested pursuant to Section 6009 are personally liable for
14 the unsecured debts of the decedent.

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

19 (1) The amount of any liens and encumbrances on that property.

20 (2) The value of any probate homestead interest set apart under Section 6520
21 out of that property.

22 (3) The value of any other property set aside under Section 6510 out of that
23 property.³⁶⁵

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

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

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

35 **Equity**

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

364. See, e.g., Rev. Stat. Mo. § 461.300(8); Rev. Code Wash. § 11.18.200(2)(b).

365. Prob. Code § 6611.

366. Unif. Prob. Code § 6-102, cmt. 1, ¶1.

1 decedent's interest in the property.³⁶⁷ The limit of the transferee's liability is the
2 equity interest received from the decedent.

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

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

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

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

20 The situation is different where the property was transferred subject to a
21 nonconsensual general lien, such as a judgment lien or a tax lien, as opposed to a
22 consensual specific lien, such as a mortgage. Probate Code Section 21131 applies
23 the rule of nonexoneration to all liens, not just a voluntary lien.³⁶⁸ Although that
24 rule may not be satisfactory from a policy perspective, the better approach would
25 be for nonprobate transfer law to track probate transfer law.

26 **Income**

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

- 31 (1) Fair market value determined as of the time the transferee presents the
32 affidavit for collection of the property.
- 33 (2) Minus the amount of liens and encumbrances on the property at that time.
- 34 (3) Plus the net income received from the property.
- 35 (4) Plus, if the transferee has disposed of the property, interest on the fair
36 market value of the property accruing from the date of disposition at the rate
37 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.")

1 It is not clear how far the income concept can be extended. Consider property
2 the transferee has sold at a price greater than its value at the time of the transfer. It
3 might be argued that the transferee should be held to account for that as well.

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

11 **Improvements**

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

19 **Valuation Procedure**

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

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

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

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

369. Ind. Code § 32-17-13-2(c).

370. See IRS Form 706 (United States Estate Tax Return).

1 The number of estates in which a return is required is relatively small. In 2005
2 — the most recent year for which good data are available — when the exempt
3 amount was \$1.5 million, estate tax returns were filed for fewer than 2% of
4 estates. In 2009, with the estate tax exemption at \$3.5 million, IRS has estimated a
5 drop in filings by nearly two-thirds. These are national statistics and there may be
6 more filings for California estates due to real estate values higher than the national
7 average. But at the magnitudes involved here, the difference is not a significant
8 factor.

9 Another possibility for valuation of nonprobate transfer property is use of the
10 existing probate referee appraisal system.³⁷¹ That system facilitates a relatively
11 quick and inexpensive appraisal, although the appraisal is subject to challenge on
12 grounds of accuracy. It is not uncommon for an estate to supplement the probate
13 referee appraisal with an appraisal by an outside expert where there is a significant
14 estate tax valuation issue.

15 None of the comprehensive liability schemes of other jurisdictions directly
16 addresses the valuation problem. The question was raised in debates on adoption
17 of the Uniform Act, with the response that if there is an estate tax return, that may
18 establish value; otherwise, there is no easy method.³⁷² In Missouri, issues
19 concerning the obligation of a nonprobate transferee to account for the value of
20 property received are resolved by the probate division of the circuit court.³⁷³

21 The simplest approach would be to provide for an affidavit of value by a
22 nonprobate transferee.³⁷⁴ If the personal representative, creditor, or other person
23 entitled to assess and enforce the liability disagrees with that assessment, the
24 probate court could be given jurisdiction on motion to resolve the dispute.
25 Although there are some transactional costs in the scheme, it is likely that an
26 assessment challenge would be relatively infrequent and thus unlikely to impose a
27 significant burden on nonprobate transfer liability enforcement.

28 STATUTE OF LIMITATIONS

29 APPLICATION OF ONE YEAR STATUTE

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

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

371. See Prob. Code §§ 8900-8964.

372. Transcript, Unif. Prob. Code § 6-102, Proceedings of NCCUSL (1st Sess., Fri. Morn., July 24, 1998).

373. Rev. Stat. Mo. § 461.300(7).

374. Cf. Evid. Code § 813 (owner may testify as to value of real property).

1 One year is a short limitation period. It could well cut off a just claim if the
2 decedent's beneficiaries simply do nothing for a year. The one year statute is
3 constitutionally suspect, but it applies in probate and there is support for it in case
4 law.

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

8 **SHORTENING THE STATUTE OF LIMITATIONS BY NOTICE**

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

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

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

24 **Trust Claim Procedure**

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

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

375. Prob. Code §§ 8120 (published notice), 9050 (personal notice), 9100 (time for filing claim).

376. Andrews, *Creditors' Rights Against Nonprobate Assets in Washington: Time for Reform*, 65 Wash. L. Rev. 73, 87 (1990).

377. Dennis-Strathmeyer, *Whither Probate?*, 1991 *California Legislation*, 13 Estate Planning & California Reporter 65, 66 (Cal. Cont. Ed. Bar Dec. 1991).

378. Prob. Code §§ 19003 (notice by trustee), 19100 (creditor claim period against trust).

379. Prob. Code § 19010.

1 It would make sense to expand the trust claim procedure so that a trustee
2 managing the procedure must act in a fiduciary capacity to allocate liability among
3 all the decedent's nonprobate transfers, not limited to the trust.³⁸⁰

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

8 **Probate**

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

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

16 A creditor's failure to make a claim in probate may also preclude the creditor
17 from access to a nonprobate transfer.³⁸¹ The small estate set-aside statute is
18 illustrative:

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

24 (1) Creditors who commence judicial proceedings for the enforcement of the
25 debt and serve the person liable under this section with the complaint therein prior
26 to the expiration of the time for filing claims.

27 (2) Creditors who have or who secure an acknowledgment in writing of the
28 person liable under this section that that person is liable for the debts.

29 (3) Creditors who file a timely claim in the proceedings for the administration
30 of the estate of the decedent.³⁸²

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

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

380. Cf. Rev. Code Wash. §§ 11.42.020-11.42.030 (nonprobate notice).

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).

1 transferee and an opportunity to participate in the proceeding would be necessary.
2 The additional procedure required to allow for nonprobate transferee participation
3 would be marginal. In many cases probate and nonprobate transferees are the same
4 persons.

5 **Interested Person**

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

10 Under existing law a person interested in the decedent's estate may commence a
11 probate proceeding.³⁸³ A nonprobate transferee would be an interested person for
12 that purpose.³⁸⁴ It would be helpful to state the rule directly by statute to eliminate
13 any doubt.

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

20 **Nonprobate Proceeding**

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

27 **Internet Registry**

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

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

383. Prob. Code § 8000.

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).

1 of rejection by a legally authorized successor, whether a personal representative in
2 probate or the successor trustee of an inter vivos trustee.³⁸⁵

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

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

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

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

25 PRIORITY AMONG CREDITORS

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

30 PROCEDURAL ISSUES

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

385. See Conn, *The Need to Clarify Creditors' Rights in Probate*, 32 L.A. Lawyer 80 (April 2009).

386. Prob. Code § 11420.

387. Prob. Code §§ 19001(b), 19027.

1 If a creditor were to satisfy a debt from a nonprobate transferee and if that were
2 to exhaust the limit of the transferee’s liability, another creditor, even a higher
3 priority creditor, would be precluded from further action against that transferee.
4 The second creditor would have to seek satisfaction from the first creditor, either
5 on a priority basis under Probate Code Section 11420(a) or on a proportionate
6 basis under Probate Code Section 11420(b).

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

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

14 **FUNERAL EXPENSES AND EXPENSES OF LAST ILLNESS**

15 The surviving spouse’s share of marital property is exempt from payment of the
16 decedent’s funeral expenses and expenses of last illness. Those debts are charged
17 first to the decedent’s probate estate and then to the trust estate.³⁸⁸ Assuming the
18 policy of existing law is sound, that priority should be extended to other
19 nonprobate transfers.

20 **EXPENSES OF ADMINISTRATION**

21 Existing California statutes are inconsistent in their treatment of liability of a
22 nonprobate transfer for expenses of administration. Although most do not address
23 the issue, those that do generally make a nonprobate transfer liable for a
24 proportionate share of expenses of administration.³⁸⁹

25 A few key provisions limit the liability of a nonprobate transfer for
26 administration expenses to expenses associated with enforcement against that
27 transfer.³⁹⁰

388. Sections 11446 (probate), 19326 (trust); *Cf.* Estate of Bonanno, 165 Cal. App. 4th 7, 80 Cal. Rptr. 3d 560 (2008).

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”).

1 In Missouri a nonprobate transferee is held to account only for the additional
2 administrative expenses involved in obtaining enforcement against the nonprobate
3 transfer:

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

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

16 Exposure of a nonprobate transfer to expenses of administration should be
17 limited to those necessary for enforcement of liability.³⁹²

18 ENFORCEMENT OF LIABILITY

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

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

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").

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").

393. McCouch, *A Comment on Unification*, 43 Real Prop. Tr. & Est. L.J. 499 (2008).

1 The obvious range of choices for nonprobate transfer liability enforcement
2 include:

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

21 **DIRECT CREDITOR ENFORCEMENT**

22 Existing California law allows direct creditor enforcement against a nonprobate
23 transfer in some circumstances. The statutes governing the small estate set-aside
24 and the small estate affidavit procedure, for example, and for community property
25 liability where a surviving spouse takes the property without probate, allow direct
26 recovery by the decedent's creditors.³⁹⁴ So does the trust law in circumstances
27 where the trustee has elected not to use the optional trust claim procedure.³⁹⁵ The
28 classic remedy of a creditor against a nonprobate transfer is direct enforcement
29 under the Uniform Fraudulent Transfer Act.³⁹⁶

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

- 32 (1) How does a nonprobate transferee know whether the creditor's claim is
33 valid?
- 34 (2) In a case where a nonprobate transfer is liable to the extent the probate
35 estate is inadequate, how does a nonprobate transferee know whether the
36 estate is inadequate?
- 37 (3) How does a nonprobate transferee know whether there are creditors entitled
38 to a higher priority than the creditor seeking payment?

394. Prob. Code §§ 6611, 13109, 13550.

395. Prob. Code § 19400.

396. Civ. Code § 3439.

- 1 (4) Who apportions liability or determines abatement among nonprobate
2 transfers?
- 3 (5) Does a nonprobate transferee that pays more than a pro rata share have a
4 right to contribution from other nonprobate transferees?
- 5 (6) How is the creditor or transferee to learn of the existence of other
6 nonprobate transfers?

7 **Validity of Creditor's Claim**

8 In the case of direct creditor action, there is no administrative process for
9 allowing or disallowing a creditor's claim. Some statutes, to ensure that the
10 creditor's claim is legitimate, permit the nonprobate transferee to assert any
11 defense, cross-complaint, or setoff that would have been available to the decedent
12 if the decedent had not died.³⁹⁷ A court proceeding is required to determine the
13 validity of the creditor's claim.

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

20 **Discovery**

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

26 Most approaches to discovery of nonprobate transfer information presuppose a
27 personal representative that has access to this type of information.³⁹⁸

28 Gagliardi suggests that a nonprobate transferee be required to disclose
29 information to a creditor:

30 On the other hand, to the extent the nonprobate transferee receives an inquiry
31 by the creditor regarding the whereabouts of decedent's assets, the law should
32 require the nonprobate transferee to provide a timely and complete answer to the
33 creditor's inquiry. Reforms should also treat any attempt to conceal the
34 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).

1 limitations. Tolling of the statute would discourage nonprobate transferees from
2 not paying outstanding debts of the decedent. Reform of this nature would place
3 the burden on the creditor and would not delay the transfer of property at a
4 decedent's death.³⁹⁹

5 While such a provision might be useful, it is not a complete answer.

6 An alternative is to rely on standard discovery practice, at least where a
7 creditor's effort to collect from a nonprobate transferee ends up in court.⁴⁰⁰ But
8 without a personal representative on the receiving end of a discovery order, it is
9 unlikely the order will generate much information.

10 **Procedure**

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

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

20 **Interaction with Probate Process**

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

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

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

399. Gagliardi, *id.* at 887 (fns. omitted)

400. See, e.g., Prob. Code § 11442 (order to show cause why information should not be provided under surviving spouse apportionment procedure).

1 **ENFORCEMENT THROUGH PROBATE**

2 The major comprehensive approaches to liability of a nonprobate transfer for the
3 decedent's debts in other jurisdictions make use of the probate mechanism.⁴⁰¹

4 Under these schemes, nonprobate transfer liability is enforced exclusively
5 through probate. Where a probate proceeding would not otherwise be required, a
6 creditor must commence one in order to satisfy a claim against the decedent.

7 Existing California law requires processing of a creditor's claim against a
8 nonprobate transfer through probate in some circumstances.⁴⁰²

9 Andrews observes:

10 The argument for such a position is fairly easy to understand. Historically, it
11 has been the job of a PR to provide a focus for the accommodation of a variety of
12 potentially conflicting interests in the administration of an estate, among them the
13 interests of heirs and devisees, the interests of family, and the interests of
14 creditors. If nonprobate property is to be integrated into the estate administration
15 process, it is only natural to assume that it will be the job of the PR to do this.

16 If a PR is not appointed at this stage, of course, then the risk is that there might
17 be a multiplicity of suits and controversies, and no single person will be in a
18 position to insist on a fair and uniform treatment of the competing claims.
19 Historically it has been the function of the PR to perform that job. If it becomes
20 clear that a PR needs to be appointed to perform this role, the parties should be
21 authorized to petition the court for such an appointment.⁴⁰³

22 Funneling a creditor's claim against a nonprobate transfer through probate
23 would solve other problems as well, and would standardize procedures. For
24 example, the probate process includes a notice procedure that satisfies due process
25 requirements, has a time limit for filing a claim, includes an expeditious dispute
26 resolution mechanism, prescribes priorities among classes of creditors, and
27 provides ready access to the court in case of a dispute. The personal representative
28 has access to the decedent's information, which facilitates notification of creditors
29 and marshalling of property; it also enables determination of the estate's solvency
30 and apportionment of the decedent's debts.

31 The drawback is that a probate proceeding is just what the decedent has sought
32 to avoid by making a nonprobate transfer to begin with. Where there is no other
33 reason for probate, a probate proceeding would have to be commenced merely to
34 enable a creditor to assert a claim against a nonprobate transferee. That is not
35 particularly satisfactory.

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).

402. See, e.g., Prob. Code § 9654 (recovery of fraudulent transfer, gift causa mortis, nonprobate transfer of vehicle).

403. Andrews, *Creditors' Rights Against Nonprobate Assets in Washington: Time for Reform*, 65 Wash. L. Rev. 73, 122-3 (1990).

1 Under existing law, if the decedent’s heirs or devisees have not opened a
2 probate, the mechanism available to a creditor to obtain satisfaction of the debt
3 against probate property is commencement of a probate proceeding. A creditor is
4 an interested person authorized to petition for probate of the decedent’s estate.⁴⁰⁴
5 Commencement of probate by a creditor ordinarily prompts an heir or devisee to
6 seek appointment as personal representative.

7 **Conflict of Interest**

8 The personal representative in probate often has an interest adverse to that of a
9 nonprobate transferee as well as to that of a creditor. The limits of a personal
10 representative’s fiduciary obligation are tested by such conflicts of interest.

11 The conflict problems are illustrated by the Missouri statute, which has been
12 amended to allow a creditor to step in and commence an action to hold a
13 nonprobate transferee to account where the personal representative refuses to act,
14 and to require the personal representative to cooperate with the creditor:

15 If the personal representative fails to commence an action within thirty days of
16 the receipt of a written demand to do so, any qualified claimant may commence
17 such action. If the personal representative fails to commence the action, the
18 personal representative shall disclose to the qualified claimant or qualified
19 claimants who made such written demand all material knowledge within the
20 possession of the personal representative reasonably relating to the identity of any
21 recipient of a recoverable transfer made by the decedent. In the event the personal
22 representative fails to provide such information with respect to any recoverable
23 transfer of the decedent’s property to the personal representative, the eighteen-
24 month limitation is tolled for such recoverable transfer until such time as the
25 personal representative provides such information. In the event the personal
26 representative is alleged in a verified pleading to be a recipient of a recoverable
27 transfer from the decedent, the court may appoint an administrator ad litem to
28 represent the estate in any proceeding brought pursuant to this section. Sums
29 recovered in an action for accounting under this section shall be administered by
30 the personal representative as part of the decedent’s estate.⁴⁰⁵

31 Under the Missouri scheme the creditor is allowed to stand in the place of the
32 personal representative to collect from a nonprobate transferee, but the action is *ex*
33 *relatione* and any recovery is administered in the estate.⁴⁰⁶

34 **Notice**

35 The probate approach demands notice to nonprobate transferees and an
36 opportunity to be heard. A nonprobate transferee needs to be able to question

404. Prob. Code §§ 45, 8000, 8461(g).

405. Rev. Stat. Mo. § 461.300(2)

406. See also Unif. Prob. Code § 6-102(g) (“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.”).

1 allowance of the debt, challenge the proportionate valuation of transferred
2 property, inquire whether an adequate search has been made for all chargeable
3 transfers, question whether property liquidated by the estate to satisfy debts has
4 been sold at fair value, assert an abatement priority or exemption, and the like.

5 The Missouri and Uniform acts refer obliquely to notice, but such minimal
6 provisions need expansion.⁴⁰⁷

7 The Washington statute is more explicit. “Before making demand that a
8 beneficiary of a nonprobate asset account to the personal representative, the
9 personal representative shall give notice to the beneficiary, in the manner provided
10 in chapter 11.96A RCW, that the beneficiary is liable to account under this
11 section.”⁴⁰⁸

12 **Jurisdiction**

13 The probate approach demands expansion of the authority of the personal
14 representative to reach a nonprobate transfer that would otherwise be beyond
15 probate jurisdiction. An existing model is found in California’s estate tax proration
16 statute:

17 If all property does not come into the possession of the personal representative,
18 the personal representative is entitled, and has the duty, to recover from the
19 persons interested in the estate the proportionate amount of the estate tax with
20 which the persons are chargeable under this chapter.⁴⁰⁹

21 **Role of Probate**

22 Whether or not all nonprobate transfer liability is funneled through probate,
23 probate enforcement should have a role. Even if a special procedure for
24 nonprobate transfer liability is adopted, that procedure should yield to probate
25 enforcement where there is a probate proceeding.

26 The law should make clear that a nonprobate transferee is liable proportionately
27 with probate transferees. A nonprobate transferee is an interested party and the
28 personal representative should seek out and give notice to nonprobate transferees.
29 The law should make clear that the personal representative owes the same
30 fiduciary obligation to a nonprobate transferee as it does to a probate transferee,
31 and should apportion the decedent’s debts ratably among all recipients of the
32 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”).

408. Rev. Code Wash. § 11.18.200(1).

409. Prob. Code § 20116(a).

1 That is not a new concept, since it is already done routinely in estate tax
2 apportionment proceedings. That scheme provides a useful model for personal
3 representative (and court) jurisdiction with respect to a nonprobate transfer.

4 The personal representative's duty to notify and assess nonprobate transferees
5 might be automatic or might be made contingent on request of a creditor. Both the
6 Missouri and the Uniform Acts are triggered by a creditor's demand.⁴¹⁰

7 It is not clear why a creditor should be required to make a demand in order to
8 initiate a liability proceeding. A personal representative must notify creditors
9 automatically. If all transferees, probate as well as nonprobate, are proportionately
10 liable, the personal representative should make the apportionment without special
11 demand by a creditor or by a transferee.

12 TRUST ENFORCEMENT

13 California has developed a regularized process for discharging debts from a
14 revocable inter vivos trust where the decedent's probate estate is insufficient. Such
15 a trust often is a will substitute and the decedent's entire estate may pass through
16 the trust. There may be no probate. It might make sense to try to manage general
17 nonprobate transfer liability for a decedent's debts through the decedent's trust.

18 The existing trust claim procedure is complete and parallels the probate creditor
19 claim procedure. The procedure provides a means of determining the "liability of
20 the trust for any debts of a deceased settlor" with special notice to creditors, but
21 the procedure is optional with the trustee and the statute does not give a creditor
22 standing to initiate it.⁴¹¹ Instead, a creditor is relegated to commencement of a
23 probate proceeding to obtain a determination that the probate estate is insufficient
24 and to impose liability on the trust estate, at the risk of dispersion of trust property
25 in the interim.⁴¹² A creditor might also attempt to access trust property under
26 Probate Code Section 850(a)(3)(C) ("Where the property of the trust is claimed to
27 be subject to a creditor of the settlor of the trust."), but that procedure is not
28 primarily designed for resolving creditor claims.

29 As currently constituted, the trust claim procedure covers only liability of trust
30 property, not other probate or nonprobate property. It would be possible to expand
31 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.").

411. Cf. Prob. Code §§ 17200(b)(20), 17204(b).

412. See *Arluk Medical Center Industrial Group, Inc. v. Dobler*, 116 Cal. App. 4th 1324, 11 Cal. Rptr. 3d 194 (2004).

1 expand the trustee’s jurisdiction to other property. A trustee may already be
2 required to perform similar functions under the estate tax proration statute.⁴¹³

3 Whether such an expansion of the trust claim procedure would be desirable is
4 another matter. The trustee would be required to notify the decedent’s nontrust
5 heirs, devisees, and beneficiaries, discover and marshal nontrust property, and
6 involve the court in trust administration — all actions that a trust is ordinarily
7 intended to avoid.

8 In many cases the bulk of the decedent’s property passes through a revocable
9 inter vivos trust. The trustee may collect the little remaining property by means of
10 the affidavit procedure; a probate is never opened. The trustee may or may not run
11 the trust claim procedure under Probate Code Section 19000 *et seq.*, depending on
12 the circumstances. If there is community property, debts may be allocated between
13 the trust and the surviving spouse under the procedure of Probate Code Section
14 19320 *et seq.*

15 In those circumstances it would be logical to use the trust claim procedure to
16 address nonprobate transfer liability generally. That would place the creditor
17 claims process initially in the hands of the fiduciary with primary control over
18 most of decedent’s property at death. Gagliardi argues in favor of that approach
19 since it would avoid the problem of the trustee disposing of the decedent’s
20 property while creditor claims are being litigated in probate to determine whether
21 or not the probate estate is sufficient.⁴¹⁴

22 The trust claim procedure is infrequently used. Under existing practice it is more
23 common that the trustee will pay the decedent’s known debts in the normal course
24 of trust administration and rely on the one year statute of limitations for unknown
25 creditors, without the cost of formal trust claim proceedings.

26 Not every decedent has a revocable inter vivos trust. Expansion of the existing
27 trust claim process for general nonprobate transfer liability would not take care of
28 all cases. A supplemental nonprobate enforcement procedure would still be
29 necessary.

30 Nonetheless, when a trustee does elect to use the trust claim procedure, it would
31 make sense to take the opportunity of that centralized, structured, procedure to
32 resolve all liability issues. The trust claim procedure should be expanded so that it
33 deals with all liability issues, not just those relating to trust property. Its existing
34 status as a voluntary procedure available to the trustee should be preserved,
35 understanding that the procedure will not be commonly used.

36 **NONPROBATE ENFORCEMENT PROCEDURE**

37 Direct creditor enforcement against a nonprobate transfer is problematic.
38 Enforcement of liability via the probate or trust mechanism is appropriate if there

413. *Cf.* Prob. Code § 20100 (trustee as “personal representative” for purposes of estate tax proration).

414. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, Real Property, Probate and Trust Journal 819, 881 (Winter 2007).

1 is a probate proceeding or a trust. But if there would otherwise be no probate or
2 trust proceeding, it is not desirable to force a creditor to invoke such an elaborate
3 mechanism for the sole purpose of enforcing nonprobate transfer liability.

4 Instead, a simplified, free-standing nonprobate transfer enforcement procedure
5 should be developed. There are existing models of a free-standing nonprobate
6 transfer enforcement procedure in Washington and in California's estate tax
7 proration procedure.

8 The availability of a simplified procedure for nonprobate transfer liability will
9 make it unnecessary for a creditor to commence probate in order to satisfy a debt,
10 particularly if probate as well as nonprobate property is included within the ambit
11 of the procedure. Concomitant with such a free-standing enforcement procedure,
12 the law should preclude a creditor from commencing a probate proceeding.

13 **Washington Model**

14 Washington has a nonprobate transfer liability procedure uniquely designed for
15 that purpose. It is analogous to the California trust claim procedure.

16 The Washington procedure, like the California trust claim procedure, is optional.
17 If no probate proceeding is commenced, the decedent's beneficiary or trustee who
18 receives substantially all of the decedent's probate and nonprobate property may
19 give notice to creditors and conduct a creditor claims procedure. If no single
20 beneficiary or trustee receives substantially all of the property, those who do
21 receive substantially all of the property may agree to appoint a notice agent to act
22 on behalf of the group.⁴¹⁵

23 Another significant difference from the California trust claim procedure is that,
24 in addition to its broader application, the Washington statute applies proration
25 principles to all of the decedent's property, both probate and nonprobate, that was
26 subject to satisfaction of the decedent's general liabilities immediately before the
27 decedent's death.⁴¹⁶

28 The most significant shortcoming of the Washington statute as a vehicle for
29 resolving nonprobate transfer liability issues is that it only comes into play if it is
30 invoked by a nonprobate transferee. The statute does not provide a remedy for the
31 decedent's creditors. If a creditor wishes to apply a nonprobate transfer to satisfy
32 the decedent's obligation, the creditor must invoke the probate process.⁴¹⁷

33 **Estate Tax Proration Model**

34 Existing California law includes a different model that is appropriate for
35 development as a comprehensive nonprobate liability enforcement scheme — the
36 estate tax proration statute. The existing procedure is a simple mechanism for

415. Rev. Code Wash. § 11.42.010.

416. Rev. Code Wash. § 11.42.085.

417. See Rev. Code Wash. § 11.18.200.

1 apportioning liability among all recipients — probate and nonprobate — of the
2 decedent’s property. It includes appropriate notice and jurisdictional provisions as
3 well as provisions for contribution and reimbursement, and it has an efficient
4 judicial dispute resolution mechanism.

5 The estate tax proration scheme is designed as a free-standing procedure that can
6 be invoked by any interested person, but it is to be used by the personal
7 representative if there is a probate proceeding.⁴¹⁸ Where there is no probate estate,
8 a trustee or other person charged with the responsibility of paying the estate tax
9 may act to obtain a court order of proration.⁴¹⁹

10 The estate tax scheme would have to be expanded to apply to all the decedent’s
11 debts rather than just the estate tax liability, an order of priority for payment of
12 debts incorporated, and other appropriate features added such as exemptions from
13 enforcement and a reimbursement right from an after-discovered transferee. But
14 the core is a sound basis for development as a comprehensive liability scheme.

15 **Special Administrator**

16 A mini-probate proceeding dedicated to the purpose of discharge of a decedent’s
17 debts where there is otherwise no probate or trust proceeding could also be
18 devised. The proceeding could build on the device of the special administrator.⁴²⁰

19 The duties of the special administrator would be so extensive — notification of
20 creditors, marshalling of property, allowance of claims, apportionment of liability,
21 satisfaction of debts — that statutory elaboration would be required. Rather than
22 devise a unique special administrator procedure, it would be simpler to make a
23 special administrator one of the possible fiduciaries to act under an estate tax
24 proration type procedure.

25 **SUMMARY**

26 If a probate proceeding is commenced, that is the best forum for dealing with
27 nonprobate transfer liability. The statutes should make clear that the personal
28 representative has the authority and the duty to allocate liability to nonprobate
29 transfers in the regular course of administration of the estate, that nonprobate
30 transfer liability is proportionate with probate transfer liability, that a nonprobate
31 transferee is an interested person entitled to notice, and that the personal
32 representative must deal with the nonprobate transfer on the same basis as a
33 probate transfer, including the same fiduciary obligations.

34 The existing trust claim procedure should be left optional with the trustee, as it
35 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.

1 probate property and on the same basis as other nontrust property. If the trustee
2 invokes the liability procedure, the trustee should include other probate and
3 nonprobate property in the proceeding, just as the personal representative in
4 probate should be required and authorized to do. The trustee in the exercise of that
5 authority should have the same fiduciary obligations to probate and nonprobate
6 transfers and transferees as it does to trust property and beneficiaries.

7 The existing probate and trust claim procedures should be supplemented by a
8 procedure dedicated to discharge of the decedent's debts where there is no probate
9 or trust claim proceeding. The procedure should enable any interested person to
10 invoke it, but should be suspended if a probate or trust claim proceeding is
11 commenced. The procedure should require notice to creditors and to all the
12 decedent's probate and nonprobate transferees. It should provide for allocation of
13 the decedent's debts among probate and nonprobate transferees on the basis of the
14 value of the property transferred. The probate creditor priority and general
15 abatement schemes should apply. The Washington statute and the California trust
16 claim and estate tax proration procedures should serve as models.

17 With the availability of an efficient probate and nonprobate transfer liability
18 procedure, a creditor should be precluded from commencing a probate proceeding.

19 COLLECTION

20 Regardless of the approach to allocating a decedent's debts to a nonprobate
21 transfer, there is a practical problem of collection from a nonprobate transferee.
22 Unlike a probate transfer, a nonprobate transfer is not ordinarily within the control
23 of the decedent's personal representative. A nonprobate transfer is subject to
24 immediate dispersion.

25 **DIRECT COLLECTION BY CREDITOR**

26 Enforcement of liability against a nonprobate transferee could be left to direct
27 action by a creditor. Once liability is allocated to a nonprobate transferee, the
28 creditor could proceed against the transferee directly, taking advantage of standard
29 civil procedures for enforcement and satisfaction of a judgment.

30 That approach has some superficial attraction. It would free the personal
31 representative or other fiduciary from having to chase down property beyond its
32 control. It would shift enforcement costs from the decedent's estate and its
33 beneficiaries to the creditor and recalcitrant transferee.

34 There are obvious problems with the direct enforcement approach. More than
35 one creditor may be seeking enforcement. If debts exceed the amount of the
36 transferee's liability, a first come, first served, policy will be most manageable.
37 But that may defeat the public policies both of abatement among transferees and
38 priority among creditors.

1 **UNENFORCEABLE ALLOCATION**

2 The estate tax proration procedure takes into account the possibility that the
3 allocation of liability may not be readily enforceable. If the personal representative
4 is unable to collect from a person to whom tax liability has been apportioned, the
5 uncollectible amount is equitably prorated among others liable for the tax.⁴²¹ A
6 person required to pay more as a result has a reimbursement right against a non-
7 payer.⁴²² The estate tax proration scheme is sensible and should be included in a
8 nonprobate transfer allocation procedure.

9 An unaddressed question under the estate tax procedure is the applicable statute
10 of limitations for enforcement of the reimbursement right. Possible candidates
11 include the general one year statute for liability of a decedent, the ten year statute
12 for enforcement of a money judgment, or another period.

13 The policy of the one year statute of limitations is to expedite processing of the
14 decedent's estate and facilitate passage of title and marketability of the property.
15 That policy will have been satisfied for the nonprobate transferee who has
16 received notice of the allocation proceeding and assessment of liability.
17 Depending on the procedure for assessing liability, the assessment is either a court
18 order, in which case standard enforcement of judgment procedures and limitations
19 periods should apply, or is a cause of action that may be reduced to a judgment, in
20 which case standard limitations periods should apply.

21 Multiple beneficiaries may have a reimbursement right against a nonpaying
22 nonprobate transferee. Whether the transferee is likely to escape liability because
23 the cost and trouble to each beneficiary of enforcement is excessive, whether
24 beneficiaries pool their reimbursement rights to facilitate collection, and whether
25 the transferee pays voluntarily out of concern about the costs of multiple
26 enforcement proceedings, will depend on the circumstances.

27 **DISPERSION OF NONPROBATE PROPERTY**

28 A creditor may make its claim in a probate or nonprobate proceeding in a timely
29 fashion but the proceeding may continue for some time before it becomes clear
30 that a nonprobate transferee is liable. By that time the nonprobate transferee may
31 have consumed the property or disposed of it, or assessment of the nonprobate
32 transferee may be otherwise inequitable.

33 In *Arluk Medical Center Industrial Group, Inc. v. Dobler*,⁴²³ a creditor was
34 precluded from reaching the decedent's trust to satisfy the debt until a
35 determination was first made that the probate estate was inadequate. Meanwhile
36 the trustee distributed the trust property, to the detriment of the creditor. The court

421. Prob. Code § 20116.

422. Prob. Code § 20117.

423. 116 Cal. App. 4th 1324, 11 Cal. Rptr. 3d 194 (2004).

1 held that a trustee owes no fiduciary duty to creditors, only to beneficiaries, and
2 distribution is appropriate.

3 A number of devices may help protect a creditor against dispersion of
4 nonprobate property:

- 5 (1) Liability should be imposed on the transferee rather than on the property.
6 Once the property is gone collection may be still be difficult, but the risk of
7 loss will be lessened.
- 8 (2) Nonprobate transfer liability should be proportionate with probate transfer
9 liability. That will make it unnecessary to wait for a determination of the
10 adequacy of the probate estate.
- 11 (3) A ready means of placing a hold on real property is available in the public
12 record system. An example can be found in the statute governing the right of
13 a surviving spouse to dispose of property subject to a recorded notice of
14 claim.⁴²⁴
- 15 (4) A creditor could be allowed to proceed immediately and directly against the
16 decedent's trustee, with the trustee subrogated to the creditor's claim.
17 Provisional remedies such as a temporary restraining order or attachment
18 would be available in case of need.⁴²⁵ The trustee could thereafter proceed
19 against other property in the deceased settlor's estate or commence a probate
20 proceeding if that appears called for. That form of direct enforcement by a
21 creditor is disfavored due to the problems it causes.
- 22 (5) The holder of nonprobate property could be precluded from transferring the
23 property to the beneficiary for a short period, for example 40 days.⁴²⁶ The
24 property could be released earlier than that on a showing that the property is
25 reasonably necessary for support of the transferee. Whether 40 days is a
26 sufficiently meaningful time to enable a creditor to learn of the decedent's
27 death and take action to protect against dispersion of nonprobate property is
28 questionable.
- 29 (6) A creditor could be authorized to notify a fiduciary holding nonprobate
30 property of the potential claim against the property. That would be an
31 effective remedy. See discussion below of "Protection of Nonprobate
32 Transfer Fiduciary."

33 **PROTECTION OF NONPROBATE TRANSFER FIDUCIARY**

34 A fiduciary such as a financial institution or insurance company that holds
35 nonprobate transfer property must be protected from potential liability for making
36 the transfer to the designated beneficiary. Otherwise the fiduciary will simply hold
37 the property waiting for a court order authorizing the transfer. That will defeat the
38 purpose of a nonprobate transfer.

424. Prob. Code § 13541.

425. See Conn, *The Need to Clarify Creditors' Rights in Probate*, 32 L.A. Lawyer 80 (April 2009).

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).

1 A competing concern is that nonprobate property will be dispersed to the
2 detriment of the decedent’s creditors. If nonprobate transfer liability is in
3 personam rather than in rem, transfer of the property is theoretically irrelevant. But
4 as a practical matter the transferee may dispose of the property and perhaps
5 become unable to respond to a creditor’s claim.

6 California statutes protect the transferring fiduciary from adverse claims in
7 various circumstances. An example is Probate Code Section 5003, which
8 immunizes a holder of nonprobate property that transfers the property in
9 accordance with the decedent’s instructions unless the holder has been served with
10 a written claim of an adverse interest in the property.

11 That provision should be broadened to protect the fiduciary against the claim of
12 a decedent’s creditor, and to allow the personal representative or other fiduciary
13 making an allocation of liability to notify the fiduciary of a claim against the
14 transferee. Similar provisions are found in both the Missouri nonprobate transfer
15 liability statute and in the Uniform Act:

16 This section shall not affect the right of any transferring entity, as defined in
17 section 461.005, to execute a direction of the decedent to make a payment or to
18 make a recoverable transfer on death of the decedent, or make the transferring
19 entity liable to the decedent’s estate, unless before the payment or transfer is made
20 the transferring entity has been served with process in a proceeding brought under
21 this section and the transferring entity has had a reasonable time to act on it.⁴²⁷

22 Unless a written notice asserting that a decedent’s probate estate is nonexistent
23 or insufficient to pay allowed claims and statutory allowances has been received
24 from the decedent’s personal representative, the following rules apply:

25 (1) Payment or delivery of assets by a financial institution, registrar, or other
26 obligor, to a nonprobate transferee in accordance with the terms of the governing
27 instrument controlling the transfer releases the obligor from all claims for
28 amounts paid or assets delivered.

29 (2) A trustee receiving or controlling a nonprobate transfer is released from
30 liability under this section with respect to any assets distributed to the trust’s
31 beneficiaries. Each beneficiary to the extent of the distribution received becomes
32 liable for the amount of the trustee’s liability attributable to assets received by the
33 beneficiary.⁴²⁸

34 The commentary to the Uniform Act observes about these provisions:

35 Subsection (i)(1) is designed to protect issuers of TOD security registrations
36 who make payments or delivery to designated death beneficiaries before receiving
37 notice from the decedent’s probate estate of a probable insolvency. These entities
38 are not “transferees” subject to liability under (b), but they might incur legal or
39 other costs if the beneficiaries request payment in spite of warning notices from
40 estate fiduciaries.

427. Rev. Stat. Mo. § 461.300(5).

428. Unif. Prob. Code § 6-102(i).

1 Subsection (i)(2) is designed to enable trustees handling nonprobate transfers to
2 distribute trust assets in accordance with trust terms if a warning of probable
3 estate insolvency has not been received. Beneficiaries receiving distributions from
4 a trustee take subject to personal liability in the amount and priority of the trustee
5 based on the value distributed.⁴²⁹

6 SURVIVAL OF CAUSES OF ACTION AND PRIVILEGES

7 The rules governing survival of causes of action and exercise of a decedent's
8 evidentiary privileges must be conformed with the rules governing liability of
9 nonprobate transfers. The shift from a probate to a nonprobate transfer system
10 affects both litigation on a cause of action against a decedent and litigation on a
11 decedent's cause of action. Under existing law those are assigned largely to the
12 decedent's personal representative. The existing statutes⁴³⁰ are set out in the
13 Appendix.

14 SURVIVAL AND CONTINUATION

15 A cause of action may survive the decedent's death.⁴³¹

16 Under Code of Civil Procedure Sections 377.30 and 377.31, a decedent's cause
17 of action may be commenced or continued by the decedent's personal
18 representative or, if none, by the decedent's successor in interest. A cause of
19 action against a decedent may be asserted or continued against the decedent's
20 personal representative or, to the extent provided by statute, against the decedent's
21 successor in interest.⁴³²

22 A "successor in interest" within the meaning of the survival of actions statute is
23 the beneficiary of the decedent's estate by will or intestate succession or another
24 person that succeeds to a cause of action or to a particular item of property that is
25 the subject of the cause of action.⁴³³ This is straightforward enough in the case of a
26 probate estate, but in the case of a nonprobate transfer it is necessary to determine
27 who is the "other successor" to the decedent's cause of action.

28 DECEDENT'S CAUSE OF ACTION

29 If the decedent leaves a trust that captures all of the decedent's property, that
30 would include any of the decedent's causes of action and the trust or trustee, rather
31 than a trust beneficiary, should be an "other successor" for the purpose of asserting

429. Unif. Prob. Code § 6-102, cmt. 14.

430. Code Civ. Proc. §§ 377.10-377.62.

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).")

432. Code Civ. Proc. §§ 377.40, 377.41.

433. Code Civ. Proc. §§ 377.10-377.11.

1 a cause of action.⁴³⁴ Otherwise, the cause of action probably passes by intestate
2 succession.

3 Perhaps where litigation on a decedent’s cause of action affects a particular item
4 of property that is the subject of a nonprobate transfer the nonprobate transferee
5 would be considered an “other successor.”⁴³⁵ The Law Revision Commission’s
6 comment to Code of Civil Procedure Section 377.11 indicates that, “Other
7 successors in interest include persons who take property at the decedent’s death by
8 operation of law or a contract or account agreement.” That language suggests that
9 such nonprobate transferees as a surviving joint tenant (operation of law) or a
10 designated beneficiary under a written instrument (contract or account agreement)
11 would be an other successor entitled to assert the decedent’s cause of action
12 relating to that property.⁴³⁶

13 Where there is no probate proceeding and no personal representative appointed,
14 the decedent’s successor in interest is allowed to self-identify, at least for purposes
15 of commencing or continuing an action.⁴³⁷ Suppose a creditor of the decedent
16 seeks to recover for the benefit of the decedent’s estate (presumably so that the
17 estate will be solvent and able to satisfy the creditor’s claim). There is no
18 indication in the law that a creditor could be considered the decedent’s successor;
19 the creditor’s remedy apparently is to commence a probate proceeding and seek
20 appointment as personal representative.

21 The personal representative or other successor may not be an appropriate person
22 to litigate the decedent’s cause of action. Either may well have a conflict with
23 another interested person. In that case, the court may make orders to ensure proper
24 administration of justice and may appoint a special administrator or guardian ad
25 litem.⁴³⁸ The Law Revision Commission’s comment notes that, “The references to
26 appointment of the successor in interest as a special administrator or guardian ad
27 litem are intended to recognize that there may be a need to impose fiduciary duties
28 on the successor to protect the interests of other potential beneficiaries.”

29 CAUSE OF ACTION AGAINST DECEDENT

30 Where a creditor seeks to commence or continue a proceeding on a cause of
31 action against a decedent, things are not so straightforward. Appointment of a
32 personal representative is required in all but a few cases under existing law. Code
33 of Civil Procedure Section 377.41 authorizes the court to allow an action against
34 the decedent’s successor in interest “to the extent provided by statute.” Statutes

434. *Cf.* In re Marriage of Drake, 53 Cal. App. 4th 1139, 62 Cal. Rptr. 2d 466 (1997).

435. *Cf.* Exarhos v. Exarhos, 159 Cal. App. 4th 898, 72 Cal. Rptr. 3d (2008) (successor to bank account under terms of trust).

436. See Prob. Code § 5000 (nonprobate transfer).

437. Code Civ. Proc. § 377.32 (affidavit of decedent’s successor in interest).

438. Code Civ. Proc. § 377.33.

1 that provide expressly for liability of a transferee that takes property without
2 probate include: small estate set-aside,⁴³⁹ summary disposition of small estates,⁴⁴⁰
3 transferee of property by affidavit,⁴⁴¹ court order determining succession to
4 property,⁴⁴² affidavit procedure for real property of small value,⁴⁴³ surviving
5 spouse who takes property without administration,⁴⁴⁴ and trust law.⁴⁴⁵

6 The recitation of statutory authority is deceptively broad. Remember that in each
7 case the action may be brought only against the “decedent’s successor in interest”
8 — defined as a successor to a particular item of property that is the subject of the
9 cause of action.⁴⁴⁶

10 The general action authorized by specific statutes, and the limited action
11 authorized by the survival of causes statute, are at odds. At a minimum, the unduly
12 narrow definition of “decedent’s successor in interest” in Code of Civil Procedure
13 Section 377.11 should be broadened consistent with the authorizing statutes.

14 The scope of Section 377.41 must be reviewed in the context of policy decisions
15 on nonprobate transfer liability. If a nonprobate transfer is to be liable for a
16 decedent’s debts to the same extent as a probate transfer, then the “extent provided
17 by statute” limitation should be eliminated.

18 **DEFENSE BY PERSONAL REPRESENTATIVE**

19 If a probate proceeding is commenced, the personal representative is authorized
20 to defend a cause of action against the decedent. Under existing law the normal
21 avenue for recovery by a decedent’s creditor is by a claim against the estate; if
22 there is no estate, the creditor may commence a probate proceeding and seek
23 appointment as personal representative. Ordinarily that will trigger an appearance
24 by the interested beneficiaries. But ultimately a personal representative is
25 appointed to represent the decedent’s interest.

26 A probate proceeding may be appropriate even though there is no property in the
27 probate estate. The probate mechanism provides a means for establishing the
28 validity of the creditor’s claim. In some cases, a nonprobate transfer is accessible
29 to a creditor only if it is first shown that the probate estate is inadequate.⁴⁴⁷

439. Prob. Code § 6611.

440. Prob. Code § 7664.

441. Prob. Code § 13109.

442. Prob. Code § 13156.

443. Prob. Code §§ 13204-13207.

444. Prob. Code § 13550.

445. Prob. Code § 19001. See also Prob. Code §§ 550-555 (liability of decedent covered by insurance).

446. Code Civ. Proc. § 377.11.

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).

1 If the probate estate is insolvent, the personal representative may have no
2 incentive to defend vigorously, and has no fiduciary duty with respect to
3 nonprobate property such as the decedent's trust or a retirement account that may
4 be at risk if the decedent's liability is established. Either (1) the fiduciary duty of
5 the personal representative should be extended to a nonprobate transfer, (2) a
6 nonprobate transferee should be allowed to intervene, or (3) the court should be
7 authorized to substitute a nonprobate transferee as a party.

8 **DEFENSE BY ANOTHER PERSON**

9 Appointment of a personal representative is generally required to defend a cause
10 of action against a decedent even though all the decedent's property passes by
11 nonprobate transfer.

12 Expenses in a probate proceeding commenced solely for the purpose of
13 litigation would be limited. The personal representative and attorney are
14 compensated on a percentage of the value of the estate.⁴⁴⁸ Where property passes
15 outside of probate, the value of the estate is diminished. But the source of payment
16 of the personal representative and attorney is problematic — if there is no probate
17 estate there is no fund for payment.

18 The comprehensive nonprobate transfer liability schemes of other jurisdictions
19 operate through the mechanism of an estate proceeding with accounting by
20 nonprobate transferees to the personal representative. If that approach is adopted
21 in California, then the remainder of this discussion is unnecessary. The proper
22 person to litigate the cause of action against the decedent, to exercise the
23 decedent's evidentiary privileges, and to allocate liability among nonprobate
24 transferees would be the personal representative.

25 But if there is to be general nonprobate transfer liability without appointment of
26 a personal representative, then further statutory guidance is needed.

27 There is nothing unique about probate administration that suggests the need to
28 limit litigation to the personal representative. It might be said that the personal
29 representative is unique in being a neutral party with a fiduciary duty to all
30 interested persons and no conflict of interest, but in fact the personal
31 representative often has a stake in the proceedings and an interest adverse to that
32 of other interested persons.

33 It does not make sense to require commencement of probate and appointment of
34 a personal representative solely for the purpose of defending against the
35 decedent's liability. It is better to provide another means of litigating the issue,
36 whether via the decedent's successor in interest or another person appointed for
37 that purpose.

448. Prob. Code §§ 10800, 10810.

1 **Transferee**

2 Where a transferee takes the bulk of the decedent's property, that person is an
3 appropriate representative of the decedent for litigation on a cause of action
4 against the decedent. The transferee has the motivation to adequately represent the
5 decedent. The existing law, designating the transferee under specific nonprobate
6 transfer devices, is sound as far as it goes.

7 The decedent may use a nonprobate transfer device with no single dominant
8 transferee. If litigation relates to an individual transfer or property (e.g., to
9 characterize the property or determine its ownership), the transferee is the logical
10 representative.

11 **Special Administrator or Guardian Ad Litem**

12 With respect to a general liability of the decedent, not related to an individual
13 transfer or piece of property, a special administrator or guardian ad litem may be
14 called for. The appropriate appointee is a person that would have an interest in
15 protecting the nonprobate property, or at least not have a significant conflict of
16 interest with other beneficiaries.

17 To the extent the liability of beneficiaries is proportionate, conflicts of interest
18 are minimized. A transferee of exempt property may not have the same motivation
19 to contest a claim as other nonprobate transferees.

20 The court may name a guardian ad litem or special administrator to represent the
21 decedent's interest in litigation. The decedent's beneficiaries should be given
22 notice and an opportunity to be heard on the appointment of a representative. A
23 beneficiary should be bound by actions of the representative, including any
24 settlement of the litigation, subject, in the event of challenge, to court approval of
25 an action that is not arbitrary, capricious, or fraudulent.

26 There is no single fund or source for compensation of the litigation
27 representative where the decedent's property passes in a fragmented manner by
28 nonprobate transfer. Representation in litigation benefits all of the decedent's
29 transferees. Liability for reasonable expenses of the guardian ad litem or special
30 administrator, as determined by the court, should be assessed among nonprobate
31 transferees proportionately, on the same basis as their liability for the decedent's
32 debts.

33 An existing model is appointment of a guardian ad litem to represent a
34 designated class, such as unascertained or unknown heirs:

35 373.5. If under the terms of a written instrument, or otherwise, a person or
36 persons of a designated class who are not ascertained or who are not in being, or a
37 person or persons who are unknown, may be or may become legally or equitably
38 interested in any property, real or personal, the court in which any action, petition
39 or proceeding of any kind relative to or affecting the property is pending, may,
40 upon the representation of any party thereto, or of any person interested, appoint a
41 suitable person to appear and act therein as guardian ad litem of the person or
42 persons not ascertained, not in being, or who are unknown; and the judgment,

1 order or decree in the proceedings, made after the appointment, shall be
2 conclusive upon all persons for whom the guardian ad litem was appointed.

3 The guardian ad litem shall have power, with the approval of the court in which
4 the action, petition or proceeding is pending, to compromise the same, to agree to
5 the order or judgment to be entered therein for or against the persons for whom
6 the guardian ad litem was appointed, and to satisfy any judgment or order in favor
7 of the persons, or release, or discharge any claim of the persons pursuant to the
8 compromise. The court shall have the same power with respect to the money or
9 other property to be paid or delivered under such order or judgment as is provided
10 in Section 372 of this code.

11 The reasonable expenses of the guardian ad litem, including compensation and
12 counsel fees, shall be determined by the court and paid as it may order, either out
13 of the property or by plaintiff or petitioner. If the expenses are to be paid by the
14 plaintiff or petitioner, execution therefor may issue in the name of the guardian ad
15 litem.⁴⁴⁹

16 With appropriate adjustments, that approach could be made to work for litigation
17 on a cause of action against the decedent where there is no personal representative.

18 Alternatively, a special administrator could be appointed to defend a cause of
19 action against a decedent.⁴⁵⁰ The special administrator statute is more integrated
20 with general probate administration procedures and would require more adaptation
21 to be serviceable than the guardian ad litem statute.

22 **FIDUCIARY OBLIGATION OF DECEDENT'S REPRESENTATIVE**

23 The fiduciary obligation of the decedent's representative in litigation, whether a
24 transferee, guardian ad litem, or special administrator, should be broadened to
25 include protection of all the decedent's property, probate and nonprobate.

26 **PRIVILEGES**

27 Resolution of issues concerning representation of the decedent in a cause of
28 action by or against the decedent will help address the evidentiary privilege
29 problem identified in *Attorney-Client Privilege After Client's Death*.⁴⁵¹

30 Under existing law the attorney-client privilege and some other privileges of the
31 decedent may only be exercised by the decedent's personal representative.⁴⁵²

32 A logical question is why these particular privileges are singled out for
33 posthumous exercise. The policy behind survival of the lawyer-client privilege
34 after the client's death is that its continuance will encourage the client to

449. Code Civ. Proc. § 373.5.

450. See Prob. Code § 8540-8547 (special administrators).

451. 38 Cal. L. Revision Comm'n Reports 163 (2008)

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 P.3d 560 (2005). See also Evid. Code §§ 993 (physician-patient privilege), 1013 (psychotherapist-patient privilege), 1035.6 (sexual assault victim-counselor privilege).

1 communicate fully and frankly with the client’s attorney without fear of
2 embarrassing revelations to the client’s memory or to the client’s beneficiaries.
3 But that consideration is applicable to other privileges as well. More likely is that
4 the posthumous privilege is intended to protect the client’s beneficiaries over the
5 client’s creditors.⁴⁵³

6 The lawyer-client privilege is the most important of the evidentiary privileges
7 with respect to estate planning issues. For many types of estate planning litigation
8 the privilege will be inapplicable.⁴⁵⁴ The text of the lawyer-client privilege statute
9 is set out in the Appendix.

10 The person charged with representing the decedent in litigating a cause of action
11 by or against a decedent should be the person entitled to exercise the decedent’s
12 privileges.

13 In the case of a personal representative, the existing statutes follow that pattern
14 — the personal representative both conducts the litigation on the decedent’s behalf
15 and exercises the decedent’s evidentiary privileges that survive the decedent’s
16 death.

17 The privilege statutes should provide that where the decedent’s successor in
18 interest conducts litigation on the decedent’s behalf, the successor in interest is
19 entitled to exercise the decedent’s evidentiary privileges that survive the
20 decedent’s death with respect to that litigation. Likewise, if the court names a
21 guardian ad litem or special administrator to represent the decedent’s interest in
22 litigation, that person should be authorized to exercise the decedent’s evidentiary
23 privileges.

24 Because more than one person may represent the decedent’s interest depending
25 on the type of litigation, the law should make clear that each is a joint holder of the
26 privilege. A waiver by one joint holder does not prejudice the right of another joint
27 holder to claim the privilege.⁴⁵⁵

28 OUT OF STATE TRANSFEREE OR PROPERTY

29 A transferee, or the property transferred, may be situated in another state.
30 Nonprobate property may be an intangible such as an insurance policy or a
31 financial asset controlled by a financial institution located in another state. As part
32 of a comprehensive nonprobate transfer liability scheme, California should seek to
33 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).

1 Gagliardi questions whether the forum state can exercise jurisdiction over an out
2 of state transferee.⁴⁵⁶ Under classic probate doctrine, a state may exercise
3 jurisdiction over a domiciliary decedent. Conflict of law principles require
4 recognition of a forum state determination relating to a domiciliary decedent’s out
5 of state personal property. But the state where the decedent’s real property is
6 located typically exercises authority to determine rights with respect to that
7 property.⁴⁵⁷ Even with respect to personal property, ancillary administration
8 proceedings may be necessary in the nondomiciliary state.⁴⁵⁸

9 Although the forum state may not directly affect rights in real property located
10 in another jurisdiction, the forum state may indirectly affect those rights by
11 adjudicating liability of a domiciliary decedent’s transferees. That argues for in
12 personam, rather than in rem, nonprobate transfer liability. Apportionment of
13 liability to an out of state transferee may be enforceable in another jurisdiction
14 based on minimum contacts in the forum jurisdiction, regardless of the forum
15 jurisdiction’s direct authority over property of the transferee.

16 The Uniform Act applies its nonprobate transfer liability provisions to an out of
17 state transferee of a domiciliary decedent.⁴⁵⁹ The commentary to the Uniform Act
18 states the public policy supporting extension of liability to an out of state
19 transferee:

20 The underlying principle is that the law of a decedent’s last domicile should be
21 controlling as to rules of public policy that override the decedent’s power to
22 devise the estate to anyone the decedent chooses. The principle is implemented by
23 subjecting donee recipients of the decedent to liability under the decedent’s
24 domiciliary law, with the belief that judgments recovered in that state following
25 appropriate due process notice to defendants in other states will be accorded full
26 faith and credit by courts in other states should collection proceedings be
27 necessary.⁴⁶⁰

28 A state may explicitly acknowledge the authority of an out of state
29 determination of rights. California does that for estate tax proration by an out of
30 state personal representative.⁴⁶¹ California legislation on nonprobate transfer
31 liability should include a general provision along those lines. That may encourage
32 reciprocity among states without the need to litigate the matter.

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

457. See generally, 10 B. Witkin, *Wills and Probate* § 51 *et seq.* (conflict of laws), in Summary of California Law (10th ed. 2005).

458. *Cf.* Prob. Code §§ 12500-12591 (nondomiciliary decedents).

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.”).

460. Unif. Prob. Code § 6-102, cmt. 11.

461. Prob. Code § 20125.

1 RETROACTIVE OR PROSPECTIVE OPERATION

2 California has reserved authority to make changes to the laws governing
3 exemption of property from debts and application of debt collection and probate
4 procedures.⁴⁶² As a consequence California has a fair amount of legislative leeway
5 to make retroactive or prospective changes to the law governing nonprobate
6 transfer liability.

7 A comprehensive nonprobate transfer liability scheme will affect substantive
8 rights as well as procedures. A transitional period should be provided during
9 which a transferor may adjust an estate plan. If a transferor is incapacitated during
10 the transitional period there are means to effectuate appropriate adjustments.⁴⁶³

11 A one year deferred operative date is adequate to allow a transferor to make
12 estate plan changes in light of new law governing nonprobate transfer liability.
13 The new law should apply to a nonprobate transfer that occurs on the death of a
14 transferor thereafter.

15 V. FAMILY PROTECTIONS

16 OVERVIEW

17 The California probate system has developed family protections for the
18 decedent's dependents — primarily the surviving spouse and minor children.

19 In brief:

20 **(1) Family dwelling and exempt property.** During probate administration until
21 the filing of the inventory (and for 60 days additionally), the decedent's surviving
22 spouse and minor children are entitled to remain in possession of the family
23 dwelling, the wearing apparel of the family, the household furniture, and other
24 property of the decedent exempt from enforcement of a money judgment.⁴⁶⁴

25 **(2) Setting aside exempt property.** During probate administration after the
26 filing of the inventory, the court in its discretion may set apart some or all of the
27 decedent's exempt property for the decedent's surviving spouse and minor
28 children.⁴⁶⁵ It appears this is a permanent award, notwithstanding claims of other
29 beneficiaries or creditors.

462. Code Civ. Proc. § 703.060 (reservation of authority); Prob. Code § 3 (application of changes to Probate Code).

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).

464. Prob. Code § 6500.

465. Prob. Code § 6510.

1 **(3) Setting aside probate homestead.** During probate administration after the
2 filing of the inventory, the court in its discretion may set apart a probate
3 homestead for the decedent’s surviving spouse and minor children.⁴⁶⁶ The probate
4 homestead is a burden on the property for a limited period, not exceeding the life
5 of the surviving spouse and the minority of the children.⁴⁶⁷

6 **(4) Family allowance.** The decedent’s surviving spouse, minor children, and
7 dependent adult children who are incapacitated are entitled to a reasonable family
8 allowance during probate administration.⁴⁶⁸

9 **(5) Small estate set-aside.** If the net value of the decedent’s estate (exclusive of
10 nonprobate transfer property) does not exceed \$20,000, the court may set it aside
11 for the decedent’s surviving spouse and minor children.⁴⁶⁹ A probate proceeding is
12 not necessary.⁴⁷⁰ The court order must ensure that expenses of last illness, funeral
13 charges, and expenses of administration are paid.⁴⁷¹ Title to the decedent’s
14 property vests in the surviving spouse and minor children absolutely.⁴⁷² The set-
15 aside prefers the decedent’s dependents over other beneficiaries, but not over the
16 decedent’s creditors, who are required to be paid.⁴⁷³

17 **(6) Omitted spouse and children.** If the decedent executed a will or trust before
18 the decedent’s marriage to the surviving spouse and the will or trust does not
19 provide for the surviving spouse, the surviving spouse is entitled to an intestate
20 share of the decedent’s estate, unless it is shown that the omission was
21 intentional.⁴⁷⁴ If the decedent executed a will or trust before the birth or adoption
22 of the decedent’s child and the will or trust does not provide for the child, the child
23 is entitled to an intestate share of the decedent’s estate unless it is shown that the
24 omission was intentional.⁴⁷⁵

25 The most significant California family protection is found not in the individual
26 statutes listed above but in the community property system. While non-community
27 property states have developed forced share schemes to protect the surviving
28 spouse from destitution, California has been able to rely on the surviving spouse’s
29 ownership of half the community and quasi-community property of the marriage.

466. Prob. Code §§ 6520-6521.

467. Prob. Code § 6524.

468. Prob. Code §§ 6540, 6543.

469. Prob. Code § 6600 *et seq.*

470. Prob. Code § 6605.

471. Prob. Code § 6609(d).

472. Prob. Code § 6609(e).

473. Prob. Code § 6611.

474. Prob. Code §§ 21610-21611.

475. Prob. Code §§ 21620-21621.

1 The community property protection applies equally to probate and nonprobate
2 transfers, a feature not necessarily captured by the forced share statutes of other
3 jurisdictions.⁴⁷⁶

4 The family protections evolved to shield a decedent's dependents from the
5 decedent's improvidence (creditor claims) and from the decedent's intentional or
6 inadvertent neglect of the decedent's support obligation (claims of other
7 beneficiaries). Most of the family protections require a probate proceeding for
8 implementation. Exceptions are the small estate set-aside, which may be made on
9 court order whether or not there is a probate, and the protections for an omitted
10 spouse and children which may be applied to a trust as well as to a probate estate.

11 Otherwise, if there is no probate proceeding there is no mechanism to implement
12 the protection. Nonprobate transfers were not intentionally excluded from the
13 purview of the family protections. They were simply developed at a time when
14 probate rather than nonprobate transfer was the primary mechanism for passing
15 property at death.

16 POLICY CONSIDERATIONS

17 **DEPENDENCE OF FAMILY PROTECTIONS ON PROBATE**

18 California's limited family protection statutes address the conflict between the
19 right of a decedent to create an estate plan that is honored by the law and the
20 obligation of the decedent to dependents. The balance should not depend on the
21 decedent's choice of transfer mechanisms but on underlying public policies. The
22 existing statutes should be reviewed in that light.

23 The family protection statutes also address the conflict between the interests of
24 the decedent's dependents and those of the decedent's creditors. The family
25 protection statutes provide exemptions, temporary or permanent, from claims of
26 the decedent's creditors. If a nonprobate transfer is made accessible to a
27 decedent's creditors, it should also be made accessible to the decedent's family.
28 An increase in creditor access to a nonprobate transfer must be balanced by
29 corresponding family protection.

30 Under existing law, a family allowance awarded in probate has priority over
31 rights of a general creditor of the decedent.⁴⁷⁷ The decedent's family should not
32 lose that protection because the decedent chooses a nonprobate rather than a
33 probate transfer to dispose of property.

34 Andrews has remarked on the interrelation:

35 Under the 1971 proposal and the Missouri statute, the liability of nonprobate
36 transferees could be asserted not only to satisfy creditors, but also to satisfy the

476. See Schwickerath, *Public Policy and the Probate Pariah: Confusion in the Law of Will Substitutes*,
48 Drake L. Rev. 769 (2000).

477. Prob. Code §§ 11420-11421 (priority of family allowance).

1 claims of surviving spouse, minor children and dependent children to statutory
2 allowances. This would be an important change of law as it exists in Washington.
3 Today, nonprobate assets are not subject to the claims of spouses or dependents
4 for statutory allowances. This, I believe, is unjustifiable. Moreover, any system
5 that exposes nonprobate assets to the claims of creditors, but not to the rights of
6 family, would be indefensible. Any adequate treatment of the problem of claims
7 against nonprobate assets, therefore, should include provision for spousal and
8 dependents' claims in addition to those of creditors.⁴⁷⁸

9 Under existing law if a decedent's dependents require protection, they may
10 commence a probate proceeding. But where there is no property in the probate
11 estate because all passes by nonprobate transfer, it is not possible to implement
12 most of the family protections as presently constituted.

13 **ABATEMENT**

14 An argument can be made that a nonprobate transfer may already be subject to
15 family protection statutes in many circumstances. Abatement principles apparently
16 are intended to apply to nonprobate as well as probate transfers. Probate Code
17 Section 21401 provides:

18 21401. Except as provided in Sections 21612 (omitted spouse) and 21623
19 (omitted children) and in Division 10 (commencing with Section 20100)
20 (proration of taxes), shares of beneficiaries abate as provided in this part for all
21 purposes, including payment of the debts, expenses, and charges specified in
22 Section 11420, satisfaction of gifts, and payment of expenses on specifically
23 devised property pursuant to Section 12002, and without any priority as between
24 real and personal property.⁴⁷⁹

25 Under Section 21401 a nonprobate transfer abates for "all purposes", including
26 payment of the debts, expenses, and charges specified in Probate Code Section
27 11420. The charges specified in Section 11420 include the family allowance. How
28 that concept is applied in practice where there is no probate proceeding is unclear.

29 Nor is it clear whether "all purposes" include family protections other than the
30 family allowance. Omitted spouse and children protections are specifically
31 excluded from coverage of Section 21401. By implication, other family
32 protections are included within the scope of Section 21401.

33 Whether the share of a nonprobate transfer beneficiary abates for exempt
34 property and homestead set asides, and how those are enforced absent a probate
35 proceeding, is unknown. The application of the abatement statute should be
36 expressly stated.

478. Andrews, *Creditors' Rights Against Nonprobate Assets in Washington: Time for Reform*, 65 Wash. 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.").

1 **EXEMPTIONS**

2 The family protections are in the nature of exemptions. Some of the family
3 protections apply explicitly to property that would have been exempt from
4 enforcement of a money judgment against the decedent.

5 The premise of the family protections is that they preserve from creditors and
6 other beneficiaries an amount needed for support of the surviving spouse and
7 children of the decedent. As such, they should be immune from creditor claims.

8 At least one of the family protections is not so limited — the omitted spouse and
9 child protections apply regardless of need. (The small-estate set-aside is not
10 overtly dependent on need but the court in exercising its discretion takes that into
11 account in addition to other considerations.)

12 Property to which family protections are applied is impliedly exempt from
13 enforcement by a decedent’s creditors, although the statutes do not state this
14 explicitly. The same rules that govern the exemption of family protections in
15 probate should govern nonprobate family protections.

16 **APPLICATION OF NONPROBATE TRANSFER**
17 **TO FAMILY PROTECTIONS**

18 **FAMILY DWELLING AND EXEMPT PROPERTY**

19 Probate Code Section 6500 provides:

20 6500. Until the inventory is filed and for a period of 60 days thereafter, or for
21 such other period as may be ordered by the court for good cause on petition
22 therefor, the decedent’s surviving spouse and minor children are entitled to
23 remain in possession of the family dwelling, the wearing apparel of the family,
24 the household furniture, and the other property of the decedent exempt from
25 enforcement of a money judgment.

26 The right of temporary possession of the family dwelling and exempt property
27 extends to tangible personal property such as wearing apparel and household
28 furnishings. The tenor of the provision is to ensure that the family is not left
29 destitute during the period immediately following the decedent’s death.⁴⁸⁰

30 While Section 6500 is aimed at the family dwelling and tangible personal
31 property, it is not limited to that property. “Other property of the decedent exempt
32 from enforcement of a money judgment” includes a wide range of tangible and
33 intangible property.⁴⁸¹

34 Section 6500 must be read in conjunction with Section 6510 (setting aside
35 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).

481. See Code Civ. Proc. §§ 704.010-704.210 (exempt property).

1 provisional remedy intended to preserve that property from dispersion pending the
2 court's determination of the right of the dependents to have that property set aside
3 notwithstanding other claims to or against it.

4 While the provision applies exclusively to probate property in a probate
5 proceeding, it may encompass a nonprobate transfer such as a trust if there is a
6 dispute concerning disposition of the property.⁴⁸²

7 It is difficult to conceive of a nonprobate transfer of most property of a type
8 targeted by this provision other than by means of a trust. It would make sense to
9 apply the principle of Section 6500 to a trust. That could be accomplished both by
10 expanding the scope of Section 6500 to include trust property and by making trust
11 administration subject to Section 6500.

12 Section 6500 requires a judicial mechanism for its operation. In the case of a
13 probate proceeding, expansion of probate jurisdiction to allow temporary control
14 of property that passes by trust would be straightforward. In the case of trust
15 administration, a court order could be obtained if the trustee fails to allow
16 continued possession of the dwelling and exempt property by the decedent's
17 dependents.⁴⁸³

18 **SETTING APART EXEMPT PROPERTY**

19 In a probate proceeding the court has discretion to set apart some or all of the
20 decedent's exempt property for the decedent's dependents. Probate Code Section
21 6510 provides:

22 6510. Upon the filing of the inventory or at any subsequent time during the
23 administration of the estate, the court in its discretion may on petition therefor set
24 apart all or any part of the property of the decedent exempt from enforcement of a
25 money judgment, other than the family dwelling, to any one or more of the
26 following:

- 27 (a) The surviving spouse.
- 28 (b) The minor children of the decedent.

29 Unlike temporary possession under Section 6500, an award under Section 6510 is
30 permanent.

31 The proceeds of life insurance — a form of nonprobate transfer — are exempt
32 from enforcement of a money judgment. This exemption has been the subject of
33 much litigation. The cases typically address the situation where the beneficiary of
34 the insurance policy is the decedent's estate, conceptually rendering the insurance
35 proceeds probate rather than nonprobate property.⁴⁸⁴

482. *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 ...”).

483. See Prob. Code § 17000 *et seq.*

484. See, e.g., Holmes v. Marshall, 145 Cal. 777, 79 P. 534 (1905).

1 Section 6510 allows the court, in exercising its discretion whether to set apart
2 probate property, to take into consideration the existence of nonprobate
3 transfers.⁴⁸⁵

4 The award of exempt property to a dependent under Section 6510 may be made
5 only in a probate proceeding. As a matter of policy, if not of practice, that
6 protection should be extended to a nonprobate transfer.

7 Most married people would prefer to leave most, if not all, of their estate to
8 their surviving spouse. One may choose to make this gift through the probate
9 system or by nonprobate transfers. However, the question that has not yet been
10 answered is whether exemptions in favor of the spouse or children would be
11 applicable to transfers outside of probate. Although it would be more likely that
12 such transfers in augmented estate jurisdictions might enjoy the protection as a
13 matter of consistency, the answer is unclear in the UPC. In jurisdictions which
14 have not adopted the 1990 revisions to the UPC, the answer is even more
15 uncertain. This presents the real potential for unintentional disinheritance of a
16 spouse in states where creditors have access to nonprobate transfers after the
17 death of the decedent. Although the testator may have chosen to pass the bulk of
18 his estate to his spouse outside of probate, she may or may not enjoy protection
19 under these exemptions merely because of the form of the transfer, not its
20 character.⁴⁸⁶

21 The award of exempt property is not automatic but is discretionary with the court.
22 Although it would require court implementation that can be done outside probate.
23 The concept is not new — most exemptions are subject to court determination.⁴⁸⁷

24 **PROBATE HOMESTEAD**

25 The court has discretion to award a probate homestead for occupancy by the
26 decedent's surviving spouse and minor children.⁴⁸⁸ The award of the family
27 dwelling is not permanent but is a burden imposed on it for a limited period, not
28 exceeding the life of the surviving spouse and the minority of the children.⁴⁸⁹ The
29 probate homestead has generated an enormous amount of litigation, reflecting the

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.”)

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)

487. See Code Civ. Proc. § 703.010 *et seq.*

488. Prob. Code § 6520.

489. Prob. Code § 6524.

1 fact that formerly, and even to some extent today, the family home has been the
2 decedent's major asset.

3 The probate homestead statute appears specifically to exclude a nonprobate
4 transfer from its operation.⁴⁹⁰

5 Thus only property before the probate court, which is included in the inventory,
6 qualifies for probate homestead treatment. Joint tenancy property or property
7 passing under summary administration procedures is not eligible because it is not
8 part of the decedent's probate estate.⁴⁹¹ Nor is property that passes under the
9 decedent's trust. Only property that is subject to the jurisdiction of the probate
10 court, and not property that passes by operation of law outside probate, can be
11 impressed with a probate homestead.⁴⁹²

12 The only coherent policy that supports limiting the probate homestead to a
13 probate transfer is the practicality of court control.

14 Existing law governing trust liability has been criticized as inadequate for its
15 failure to provide for a probate (or rather, nonprobate) homestead.⁴⁹³ A trust is
16 subject to court jurisdiction over a wide range of issues, including determining the
17 liability of the trust for any debts of a deceased settlor.⁴⁹⁴ Particularly if the trustee
18 voluntarily invokes the trust claim procedure, it would make sense to allow
19 imposition of a probate homestead on trust property.

20 The case for a nonprobate homestead is less clear with respect to a form of
21 nonprobate transfer of real property other than by trust, such as joint tenancy
22 property. If title passes on the decedent's death subject to the possibility of a
23 nonprobate homestead, marketability will be impaired during the period that the
24 homestead could be imposed. A reasonable limitation period for imposing the
25 nonprobate homestead, and bona fide purchaser and encumbrancer protection,
26 would be necessary. But if a comprehensive procedure for nonprobate transfer
27 liability is developed, that would provide a vehicle for application of a nonprobate
28 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.")

491. Estate of Liccardo, 232 Cal. App. 3d 962, 283 Cal. Rptr. 839 (1991), Estate of Schmelz, 259 Cal. App. 2d 440, 66 Cal. Rptr. 480 (1968).

492. Estate of Klumpke, 167 Cal. 415, 139 Pac. 1062 (1914).

493. Dennis-Strathmeyer, *Whither Probate?*, 1991 California Legislation, 13 Estate Planning & California Reporter 65, 70 (Cal. Cont. Ed. Bar Dec. 1991).

494. See, e.g., Prob. Code § 17200(b)(20).

1 **FAMILY ALLOWANCE**

2 The court may award a reasonable allowance for maintenance of the decedent's
3 dependents during administration of the estate.⁴⁹⁵ The family allowance in effect is
4 a continuation of the decedent's support obligation for a limited period after the
5 decedent's death.⁴⁹⁶

6 The amount of the family allowance may be significant and, if the estate is not
7 closed promptly, the "temporary" allowance may exhaust the estate. The family
8 allowance is a debt of the estate and is entitled to a priority over other creditor
9 claims under Probate Code Sections 11420 and 11421.

10 Although the family allowance is available during probate administration, the
11 law requires that property besides that in probate administration, including
12 nonprobate property, be considered in determining the family allowance:

13 If a person otherwise eligible for family allowance has a reasonable
14 maintenance from other sources and there are one or more other persons entitled
15 to a family allowance, the family allowance shall be granted only to those who do
16 not have a reasonable maintenance from other sources.⁴⁹⁷

17 The family allowance may only be awarded out of the probate estate. It may not
18 be awarded out of the decedent's revocable inter vivos trust, for example.⁴⁹⁸

19 If a family allowance is awarded out of the probate estate and the probate estate
20 is inadequate to pay it, trust and other nonprobate property evidently may be
21 assessed to cover it.⁴⁹⁹

22 The fact that the family allowance is a charge against the probate estate may
23 result in manipulation of the election whether or not to probate certain property.
24 For example, the surviving spouse may elect to probate property under Probate
25 Code Sections 13502 to 13503 (election to administer marital property) that would
26 be subject to the allowance, or elect to take property under Probate Code Sections
27 13650 to 13660 (determination or confirmation of property passing or belonging
28 to surviving spouse) that would not be subject to the allowance.

29 The reasoning in *Parson*⁵⁰⁰ that a family allowance may not be awarded directly
30 against a trust, but that a trust may be liable if a family allowance is awarded
31 against the estate and the estate is inadequate, is technically correct. Where there is

495. Prob. Code §§ 6540, 6543.

496. Cf. Fam. Code § 4337 (spousal support obligation terminates on death).

497. Prob. Code § 6540(c)

498. See *Parson v. Parson*, 49 Cal. App. 4th 537, 541, 56 Cal. Rptr. 2d 686 (1996). See also Dennis-Strathmeyer, *Whither Probate?*, 1991 *California Legislation*, 13 Estate Planning & California Reporter 65, 70 (Cal. Cont. Ed. Bar Dec. 1991) (trust creditor scheme inadequate because no provision for family allowance).

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.

1 no probate estate, or it is clear that the probate estate is inadequate, it makes little
2 sense to go through the charade of opening an estate, awarding the family
3 allowance, and then proceeding against the trust, which by then may be
4 exhausted.⁵⁰¹

5 Because the family allowance is, at least initially, limited to probate property, it
6 may be necessary to make a forced sale of estate property in order to satisfy the
7 award, even though appropriate liquid nonprobate property might be available to
8 the surviving spouse. If the law were expanded to allow for application of the
9 family allowance to nonprobate transfers, the award could be appropriately
10 distributed among the beneficiaries without having the entire burden of it fall
11 initially on the probate estate.

12 At a minimum, the trust law should allow an award of the family allowance
13 against the decedent's trust; a similar approach has been taken to an award of the
14 share of an omitted spouse or child. More generally, the family allowance should
15 be classed with other debts that may be apportioned to nonprobate transfers under
16 general liability principles.

17 **SMALL ESTATE SET-ASIDE**

18 On court order a small estate (less than \$20,000) may be set aside absolutely for
19 the decedent's surviving spouse and minor children, subject to the decedent's
20 debts. The set-aside statute prefers the decedent's dependents over other
21 beneficiaries, but not over the decedent's creditors.⁵⁰²

22 Unlike most of the other family protections, the small estate set-aside does not
23 require a probate proceeding. The statute accepts the nonprobate environment; a
24 court order setting aside a small estate may be made within, or without, probate.⁵⁰³

25 The statute defines the decedent's "estate" in terms that distinguish probate from
26 nonprobate property:

27 6600. (a) Subject to subdivision (b), for the purposes of this chapter,
28 "decedent's estate" means all the decedent's personal property, wherever located,
29 and all the decedent's real property located in this state.

30 (b) For the purposes of this chapter:

31 (1) Any property or interest or lien thereon which, at the time of the decedent's
32 death, was held by the decedent as a joint tenant, or in which the decedent had a
33 life or other interest terminable upon the decedent's death, shall be excluded in
34 determining the estate of the decedent or its value.

35 (2) A multiple-party account to which the decedent was a party at the time of
36 the decedent's death shall be excluded in determining the estate of the decedent or
37 its value, whether or not all or a portion of the sums on deposit are community
38 property, to the extent that the sums on deposit belong after the death of the

501. Cf. *Dobler v. Arluk Medical Center Industrial Group, Inc.*, 89 Cal. App. 4th 530, 107 Cal. Rptr. 2d 478 (2001).

502. See Prob. Code § 6600 *et seq.*

503. Prob. Code § 6605.

1 decedent to a surviving party, P.O.D. payee, or beneficiary. As used in this
2 paragraph, the terms “multiple-party account,” “party,” “P.O.D. payee,” and
3 “beneficiary” have the meanings given those terms in Article 2 (commencing with
4 Section 5120) of Chapter 1 of Part 2 of Division 5.⁵⁰⁴

5 The Law Revision Commission’s comment to this provision states:

6 As defined in subdivision (a), “decedent’s estate” is not limited to probate
7 assets. The term includes all personal property, wherever located, and all real
8 property located in this state, excluding the property described in subdivision (b).
9 Subdivision (a) requires, for example, that the decedent’s one-half share of the
10 community and quasi-community property be included in determining the
11 decedent’s estate or its value, whether or not the decedent’s interest is set apart to
12 the surviving spouse under Sections 13650-13660, unless the interest is excluded
13 in determining the estate of the decedent under subdivision (b) as would be the
14 case, for example, if the property is held in joint tenancy. This is consistent with
15 prior law. Estate of Pezzola, 112 Cal. App. 3d 752, 169 Cal. Rptr. 464 (1980).

16 Subdivision (b) excludes any interest that terminates at death in determining the
17 estate of the decedent or its value. If the interest is one that passes to another on
18 the death of the decedent by virtue of a joint tenancy, a pay-on-death provision, or
19 a contractual provision that provides that the interest is to be transferred or paid to
20 another upon the death of the decedent, subdivision (b)(1) requires that the value
21 of the interest be excluded in determining the estate of the decedent or its value.
22 For example, if there is a policy of insurance on the decedent’s life and the
23 proceeds are payable to a named beneficiary (not to the decedent’s estate), the
24 insurance proceeds are excluded in determining the estate of the decedent or its
25 value. Similarly, for example, if the decedent has a retirement plan that provides
26 benefits to a surviving spouse, those benefits are excluded in determining the
27 estate of the decedent or its value. Subdivision (b) also excludes, for example, life
28 interests in trusts and life estates. See O. McCarroll, 1 California Decedent Estate
29 Administration Supplement § 3.24, at 84-85 (Cal. Cont. Ed. Bar 1985).⁵⁰⁵

30 The small estate set-aside statute serves a dual function — it provides family
31 protection for the decedent’s dependents and it enables a small estate to pass
32 without the need for probate.

33 The statute operates somewhat arbitrarily. If the decedent’s estate is \$20,000, it
34 may be set aside in its entirety. If the decedent’s estate is \$20,001, none of it may
35 be set aside under the statute.⁵⁰⁶ The court has discretion whether to make a set-
36 aside order but the court’s discretion is limited to an all or nothing award. Prob.
37 Code § 6609.

38 The court’s discretion is akin to application of a hardship exemption. In
39 determining whether to make a set-aside order, the court must consider “the needs
40 of the surviving spouse and minor children, the liens and encumbrances on the
41 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.

1 devisees of the decedent, the intent of the decedent with respect to the property in
2 the estate and the estate plan of the decedent as expressed in inter vivos and
3 testamentary transfer or by other means, and any other relevant considerations.”⁵⁰⁷

4 Although operation of the statute is somewhat arbitrary, it requires only minimal
5 adjustment for nonprobate transfer liability:

6 The non-traditional differentiation of a probate from a nonprobate transfer
7 should be conformed to standard nonprobate transfer categories.

8 The set-aside should be satisfied under standard abatement principles and should
9 be subject to creditor claims under standard priority principles.

10 If a comprehensive nonprobate transfer liability procedure is developed, that
11 procedure should be made available for enforcement of liability under the small
12 estate set-aside statute.

13 **OMITTED SPOUSE AND CHILDREN**

14 Pretermitted heir statutes historically have protected a spouse or child
15 inadvertently omitted from the decedent’s will. The California statute was revised
16 in 1997 to include a spouse or child omitted from the decedent’s trust.⁵⁰⁸

17 The share of a pretermitted heir is substantial. An omitted spouse may receive
18 all of the decedent’s interest in the community and quasi-community property and
19 an intestate share of the decedent’s separate property (not exceeding 50%).⁵⁰⁹ An
20 omitted child may receive an intestate share, which may be as much as the entire
21 estate, depending on whether the decedent leaves a surviving spouse or other
22 issue.⁵¹⁰

23 The policy of the law is strong. Yet that policy is defeated by the decedent’s use
24 of a transfer instrument other than a will or trust.

25 The law protects the decedent’s intent to disinherit; the pretermitted heir statute
26 addresses only an unintended disinheritance. The law specifically recognizes the
27 possibility that the decedent may omit a spouse or child from the will but use a
28 nonprobate instrument to make alternate provision for the spouse or child.⁵¹¹

29 The decedent’s estate subject to a pretermitted heir claim does not include
30 property that passes by a nonprobate transfer such as a Totten trust account:

31 Under the statutory scheme, since the beneficiary of a Totten trust account may
32 not be changed by a will and since the Legislature has provided that funds
33 remaining in a Totten trust account belong to the named beneficiary of the
34 account when the trustee dies, it is clear the Legislature did not intend a Totten

507. Prob. Code § 6609(b).

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.”).

509. Prob. Code §§ 6401, 21610.

510. Prob. Code §§ 6402, 21620.

511. Sections 21611(b), 21621(c) (no statutory share if decedent intentionally provided for surviving spouse or child by transfer outside of “testamentary estate”).

1 trust account was to be included in a decedent’s estate for either the purposes of
2 intestate succession or distribution by will. Thus, since the Legislature has stated
3 in section 6560 that an omitted spouse is entitled to a share of the testator’s
4 separate property “equal in value to that which the spouse *would have received if*
5 *the testator had died intestate* “ up to “one-half the value of the separate property
6 *in the estate* “ (emphasis added), an omitted spouse is not entitled to a share of
7 any Totten trust accounts (or their equivalent value) because the spouse would not
8 have received any portion of the accounts had the testator died intestate; the funds
9 in the accounts, upon the testator’s death, belong to the beneficiary, not to the
10 estate.⁵¹²

11 The 1997 extension of the pretermitted heir statute to the decedent’s revocable
12 inter vivos trust significantly expanded its operation — the trust and will
13 combination covers the bulk of estate plans. The statute now provides an omitted
14 spouse or child a share in the decedent’s “estate” — defined as “a decedent’s
15 probate estate and all property held in any revocable trust.”⁵¹³

16 The pretermitted share is to “first be taken from the decedent’s estate not
17 disposed of by will or trust, if any.”⁵¹⁴ Thus it is first taken from intestate property.
18 In a well-planned estate there is likely to be little property not disposed of by the
19 will or trust.

20 In the ordinary case it is the next tier that is relevant — “the share shall be taken
21 from all beneficiaries of decedent’s testamentary instruments in proportion to the
22 value they may respectively receive.”⁵¹⁵ The statute provides no guidance as to
23 whether the apportionment is to be made by the personal representative, the
24 trustee, or a court.

25 Proportionate liability under the statute is based strictly on the value of property
26 received. There is no abatement schedule (except for property not covered by the
27 will or trust, if any). General abatement rules exempt liability for an omitted
28 spouse or child from their operation.⁵¹⁶

29 The rationale of the exception to abatement for an omitted spouse or child award
30 may be that since the charge is against the entire estate, it should fall on all
31 equally, or at least proportionately. But if that is the case, a nonprobate transfer
32 other than the trust should not be exempt. Nor should the rule be different where a
33 charge is imposed as a result of the decedent’s debts as opposed to the decedent’s
34 inadvertent failure to provide for an omitted heir.

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).

513. Prob. Code §§ 21601 (“estate” defined), 21610 (share of omitted spouse), 21620 (share of omitted child).

514. Prob. Code §§ 21612(a)(1), 21623(a)(1).

515. Prob. Code §§ 21612(a)(2), 21623(a)(2).

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)”).

1 Despite problems with the omitted spouse and child protections, they go far
2 beyond most of the other family protections by covering the decedent's revocable
3 inter vivos trust. Improvement is possible but should not be the highest priority.

4 SUMMARY

5 A statute that provides comprehensive nonprobate transfer liability for the
6 decedent's debts should make clear that the liability is subject to existing statutory
7 protections in favor of the decedent's family.

8 The family protection statutes vary widely in character. They are similar to a
9 creditor's claim in that they are a charge on the decedent's estate but as a general
10 rule do not extend to a nonprobate transfer. Assuming the policy of the statutes to
11 provide support for a decedent's dependents is sound, the family protections
12 should be adjusted to reflect the ascendancy of the nonprobate transfer. This has
13 already been done for the small estate set-aside and for omitted spouse and child
14 protections; it should be done for other family protections as well.

15 States that have comprehensive legislation subjecting nonprobate transfers to
16 liability for debts also subject nonprobate transfers to liability for the family
17 allowance. For example, the Uniform Probate Code provides:

18 Except as otherwise provided by statute, a transferee of a nonprobate transfer is
19 subject to liability to any probate estate of the decedent for allowed claims against
20 decedent's probate that estate [*sic*] and statutory allowances to the decedent's
21 spouse and children to the extent the estate is insufficient to satisfy those claims
22 and allowances. The liability of a nonprobate transferee may not exceed the value
23 of nonprobate transfers received or controlled by that transferee.⁵¹⁷

24 See also the Missouri statute:

25 Each recipient of a recoverable transfer of a decedent's property shall be liable
26 to account for a pro rata share of the value of all such property received, to the
27 extent necessary to discharge the statutory allowances to the decedent's surviving
28 spouse and dependent children, and claims remaining unpaid after application of
29 the decedent's estate, including expenses of administration and costs as provided
30 in subsection 3 of this section, and including estate or inheritance or other transfer
31 taxes imposed by reason of the decedent's death only where payment of those
32 taxes is a prerequisite to satisfying unpaid claims which have a lower level of
33 priority.⁵¹⁸

34 These statutes are noteworthy because they treat the family protections in the
35 same manner as the decedent's debts. Whatever procedure is developed for
36 applying a nonprobate transfer to a decedent's debts should also be used for family
37 protections.

517. Unif. Prob. Code § 6-102(b)

518. Rev. Stat. Mo. § 461.300(1).

1 A unique policy consideration for application of family protections to a
2 nonprobate transfer is the interrelation of the family protections with creditor
3 rights. It must be determined which class of obligation should have priority. Most
4 of the family protections are in the nature of exemptions and should have priority
5 over the decedent's creditors. In extending the family protections to nonprobate
6 transfers, it should be made clear that family protection of a nonprobate transfer is
7 exempt to the same extent as a probate transfer.

8 VI. CONCLUSION

9 The move from a probate-based system for transfer of wealth at death to a
10 nonprobate system has left California law in disarray. The policy of the law to
11 require payment of a decedent's just debts and to protect a decedent's surviving
12 spouse and children in probate has been shredded by the ad hoc development of
13 nonprobate transfer law.

14 This study takes an overview of the law and policy governing liability of
15 nonprobate transfers for creditor claims and family protections, with an eye to
16 comprehensive legislative reform of the area. There are plenty of models in
17 existing law that can be drawn from and generalized to create a workable legal
18 framework.

19 OVERVIEW

20 The study envisions a regime where all of a decedent's at death transfers,
21 probate and nonprobate, are equally subject to liability for the decedent's debts
22 and for family protections. Liability would be imposed on the recipient of the
23 property under general abatement principles, subject to the decedent's direction of
24 the source of payment. Liability would be limited to the value of property
25 received; exemptions from liability would be via the family protection mechanism.
26 Liability would be subject to the over-arching one year statute of limitations. In
27 case of insufficiency, family protections, secured debts, and unsecured debts
28 would be ranked in the same priority as in probate.

29 Implementation of this regime would be entrusted to the personal representative
30 if there is a probate proceeding, otherwise to the trustee of the decedent's
31 revocable inter vivos trust if the trustee elects to act, otherwise to a special
32 administrator or other person acting in a fiduciary capacity under an estate tax
33 proration type procedure. The fiduciary would be charged with identifying probate
34 and nonprobate property, notifying interested persons, allowing or disallowing
35 claims, and allocating liability among transferees. Challenges would be resolved
36 by the court on petition. Collection would be left to the creditor or protected
37 family members.

38 The procedure to be followed would be based on the existing estate tax proration
39 procedure that is in effect a truncated and narrowly focused version of probate; it

1 would be designed for the limited purpose of determining the liability of the
2 decedent's probate and nonprobate transfers for debts and family protections. Its
3 availability would preclude a creditor from resorting to probate in order to satisfy
4 a debt.

5 PERSPECTIVE

6 Is it worth it to build all this complexity into the law — to complicate many
7 probate proceedings and burden many nonprobate transfers with notice and other
8 procedural mechanisms?

9 In the ordinary case a beneficiary voluntarily pays the decedent's debts, calling
10 into question whether a nonprobate transfer liability scheme would actually be an
11 improvement over the current situation.

12 The relatively short one year limitation period may cause potential problems
13 simply to evaporate.

14 Most of the problems addressed in this study may be resolved or avoided by the
15 transferor's properly drawn instrument directing the source of funds for
16 satisfaction of debts.

17 There will be cases where the decedent fails to designate a fund for satisfaction
18 of debts and family protections, or where the property is insufficient, or where
19 there are disagreements among interested parties. The law should at least provide
20 clarity, if not a reasonably effective remedy, for those cases. Such a remedy will
21 be useful if the debt is large enough to justify the expense of a nonprobate transfer
22 liability proceeding.

23 McCouch identifies advantages of a nonprobate liability procedural scheme:

24 Protecting the rights of third parties, such as spouse and creditors, may justify
25 invoking the procedural safeguards of the probate system and limiting the
26 advantages of probate avoidance. The same is true of federal estate tax
27 apportionment, which requires a centralized forum to identify the beneficiaries of
28 probate and nonprobate transfers, compute the values of their respective interests
29 and their shares of the tax, and enforce rights of contribution against them.⁵¹⁹

30 The existence of clear rules and procedures will help make use of those
31 procedures unnecessary, just as a creditor's access to the coercive powers of the
32 probate system has a deterrent effect that aids the creditor in the attempt to obtain
33 out of court satisfaction from a beneficiary. Andrews observes:

34 At present, apparently, many creditors rely on voluntary measures to obtain
35 payment of their claims because probate is too expensive. Many recipients of
36 nonprobate property may be content to compromise claims without having a PR
37 appointed, particularly where one person has received the bulk of the decedent's
38 property. There is no obvious reason, under these circumstances, why creditors'
39 rights to reach such assets should require the appointment of a PR. If creditor's

519. McCouch, *A Comment on Unification*, 43 Real Prop. Tr. & Est. L.J. 499 (2008).

1 claims can be settled amicably by those receiving nonprobate assets without the
2 need for a probate administration, then there should be a mechanism in place to
3 allow this. Even if an amicable settlement cannot be reached without the need for
4 court intervention, it may be possible to resolve the dispute without the
5 appointment of a PR, and the parties should be entitled to try to do so.⁵²⁰

6 ALTERNATIVES

7 If the vision of a comprehensive liability scheme outlined above cannot be
8 realized for whatever reason, much could still be done that would be helpful.

9 At a minimum the law should clearly state the substantive liability of a
10 nonprobate transfer for the decedent's debts and family protections. That will save
11 parties a trip to court to establish the rule. A clear rule will also facilitate out of
12 court resolution of a liability dispute in the ordinary case.

13 In addition to establishing the principle of liability, it would help to make clear
14 that standard abatement principles apply and to prescribe a rule of proportionality
15 within abated classes. Abatement and proportionality principles would be difficult
16 to implement without additional procedures, but at least the principles would be
17 clear and the courts could devise appropriate remedies such as contribution and
18 reimbursement.

19 A modest procedural revision that would go far would be an expansion of
20 probate jurisdiction and the authority of the personal representative to make an
21 enforceable allocation of liability to nonprobate transfers. That would entail
22 expanded notice and an opportunity for a nonprobate transferee to be heard, but it
23 would build incrementally on existing procedures. It would also enable a creditor
24 or dependent to commence a probate proceeding in order to establish liability
25 where there would otherwise be no enforcement mechanism.

26 California could profitably adopt the Uniform Act, with changes identified in
27 this study. The Uniform Act makes clear the substantive liability of a nonprobate
28 transfer, and relies on the existing probate administration mechanism to implement
29 it. A creditor would have to commence a probate to obtain satisfaction, but that is
30 no different from the situation today. Again, the availability of the remedy in
31 many cases would make its use unnecessary.

32 The next step toward effective treatment of nonprobate transfer liability would
33 be a simplified and abbreviated procedure — of the estate tax proration type —
34 that would avoid the need to open a probate for the sole purpose of establishing
35 liability or forcing prompt creditor claims.

36 An alternate approach that would simplify challenges presented by
37 comprehensive treatment of nonprobate transfer liability is to limit coverage of the
38 statute to the decedent's inter vivos trust. An integrated approach to liability of the

520. Andrews, *Creditors' Rights Against Nonprobate Assets in Washington: Time for Reform*, 65 Wash. L. Rev. 73, 122 (1990) (fn. omitted). See also Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1124 (1984).

1 decedent's estate and trust for nonprobate transfers and family protections would
2 pick up the bulk of the decedent's property in the ordinary case. The logistics of
3 such an approach would be straightforward, since the administrative mechanisms
4 are already in place in the probate and trust laws for dealing with creditor claims
5 systematically. Some nonprobate property would escape liability, but at least there
6 would be a greater measure of fairness in the system than at present.

7 Thus, even if the comprehensive treatment of liability proposed in this study is
8 not attainable, there are many improvements that may be made to the law in the
9 interest of clarity, uniformity, and fairness. Throughout this study worthwhile
10 procedures found in existing law are identified as possible models for
11 improvement of the law governing nonprobate transfer liability.

12 The study also identifies a few major reforms that would be desirable but that
13 are not recommended because they go beyond liability of a nonprobate transfer
14 and would affect the entire probate and nonprobate transfer system. Principal
15 among these is development of a hardship exemption to replace the existing
16 scheme of exemptions and family protections. This study takes the position that
17 the first priority should be to conform and integrate nonprobate transfer liability
18 with probate transfer liability. Other reforms can come later.

19 PRINCIPAL RECOMMENDATIONS

20 LIABILITY FOR DEBTS

- 21 • All nonprobate transfers, including the decedent's interest in joint tenancy
22 property, should be liable for a debt of the decedent.
- 23 • Probate and nonprobate transfers, including the decedent's inter vivos trust,
24 should be liable on an equal basis.
- 25 • Liability of a probate or nonprobate transfer should be subject to general
26 abatement principles of residuary, general, and specific gifts.
- 27 • Liability within each class of gift should be proportionate, based on the
28 value of the property transferred.
- 29 • The decedent should be allowed to direct which transfers are primarily liable
30 for debts. The decedent's direction should determine rights as between
31 beneficiaries but should not prejudice a creditor's right to recover against
32 any of the decedent's transfers.
- 33 • A secured creditor should be able to satisfy the debt from the security
34 regardless of the decedent's direction of transfers primarily liable.
- 35 • If a creditor is satisfied from a transfer other than that directed by the
36 decedent, the beneficiary of the property should be entitled to exoneration
37 from that directed by the decedent.
- 38 • Existing exemptions from liability of a probate transfer, implemented via the
39 family protection mechanism, should be extended to nonprobate transfers.

- 1 • Liability should be imposed on the transferee rather than on the property
2 transferred.
- 3 • Liability should be limited to the net value (over liens and encumbrances) of
4 the property interest received by the transferee, valued as of the date of the
5 transfer or receipt of the property.

6 **ENFORCEMENT PROCEDURE**

- 7 • The statutes should make clear that the personal representative has the
8 authority and the duty to allocate liability to nonprobate transfers in the
9 regular course of administration of the estate, that nonprobate transfer
10 liability is proportionate with probate transfer liability, that a nonprobate
11 transferee is an interested person entitled to notice, and that the personal
12 representative must deal with the nonprobate transfer on the same basis as a
13 probate transfer, including the same fiduciary obligations. A nonprobate
14 transferee should be entitled to commence a probate proceeding. Valuation
15 of a nonprobate transfer should be based on the transferee's affidavit of
16 value, subject to challenge by an interested person. The probate jurisdiction
17 of the superior court should be expanded for the purpose of resolving a
18 valuation dispute.
- 19 • The trust claim procedure should be expanded so that, if it is invoked by the
20 trustee, the trustee will have the authority and duty to apportion liability
21 among probate and nonprobate property. The trustee in the exercise of this
22 authority should have the same fiduciary obligations to probate and
23 nonprobate transfers and transferees as it does to trust property and
24 beneficiaries.
- 25 • The probate and trust claim procedures should be supplemented by a
26 procedure dedicated to discharge of the decedent's debts where there is no
27 probate or trust claim proceeding. The procedure should be modeled after
28 the estate tax proration procedure. The procedure should be invoked by any
29 interested person but should be suspended if a probate or trust claim
30 proceeding is commenced; a creditor should be precluded from commencing
31 a probate proceeding. The procedure should require notice to creditors and
32 to all the decedent's probate and nonprobate transferees. It should provide
33 for allocation of the decedent's debts among probate and nonprobate
34 transferees.
- 35 • Expenses of administration should be assessed against a nonprobate
36 transferee only to the extent the expenses were attributable to enforcement
37 of the liability against that transferee.
- 38 • The one year statute of limitations for a decedent's debts should apply to
39 nonprobate transferee liability. A four month claim filing requirement
40 should apply to a creditor notified under one of the liability allocation
41 procedures.
- 42 • If the personal representative is unable to collect from a transferee to which
43 liability has been apportioned, the uncollectible amount should be equitably
44 prorated among others liable. A transferee required to pay a greater share
45 should have a reimbursement right against a transferee that fails to pay its
46 share. The statute of limitations for enforcement of the reimbursement right

1 should be the statute applicable to a cause of action or to enforcement of a
2 judgment, depending on whether the proration was by court order or by
3 fiduciary determination.

- 4 • The statute of limitations for enforcement of a liability assessment should be
5 the statute applicable to enforcement of a judgment in the case of
6 assessment by a court order and the statute applicable to a cause of action in
7 the case of an assessment by administrative allocation.
- 8 • California should impose liability on a nonprobate transferee whether
9 domiciled within or without the state and should recognize imposition of
10 liability by a comparable procedure of an out of state court.
- 11 • The new law should have a one year deferred operative date and should
12 apply to a nonprobate transfer that occurs on the death of a person
13 thereafter.

14 **LIABILITY FOR FAMILY PROTECTIONS**

- 15 • The family protection statutes should be extended to nonprobate transfers.
16 This has already been done for the small estate set-aside and to a limited
17 extent for omitted spouse and child protections.
- 18 • The procedure for applying a nonprobate transfer to a decedent's debts
19 should also be used for family protection.
- 20 • It should be made clear that the abatement statute does not apply to exempt
21 property and probate homestead set asides.
- 22 • It should be made clear that family protection of a nonprobate transfer is
23 exempt to the same extent as a probate transfer.

24 **SECONDARY RECOMMENDATIONS**

25 **IMPLEMENTING RECOMMENDATIONS**

- 26 • “Nonprobate transfer” should be broadly defined for the purpose of applying
27 liability and family protections. If probate and nonprobate transfers are
28 treated together, a definition is unnecessary.
- 29 • A person representing the decedent in defending against a creditor's claim
30 or cause of action should be entitled to assert any defense, cross-complaint,
31 or setoff that would have been available to the decedent.
- 32 • The rule of Probate Code Sections 11446 (probate) and 19326 (trust)
33 exempting the surviving spouse's share of marital property from payment of
34 the decedent's funeral expenses and expenses of last illness should be
35 extended to other nonprobate transfers.
- 36 • The limitation on liability of a nonprobate transferee based on the value of
37 the property should incorporate a formula derived from Probate Code
38 Section 13112(b) that takes into account — in addition to fair market value
39 — liens, encumbrances, income, and interest.
- 40 • If liability is imposed on nonprobate property rather than on a nonprobate
41 transferee, bona fide purchaser protection should be added.

- 1 • If liability is imposed on nonprobate property rather than on a nonprobate
2 transferee, the statute should include a formula for recovery of the property
3 or its value if a probate proceeding is later commenced, based on Probate
4 Code Section 13111.
- 5 • If liability is imposed on nonprobate property rather than on a nonprobate
6 transferee, the statute should include a provision based on Probate Code
7 Section 13206 for dealing with improvements made on property that is
8 subsequently required to be restored to the probate estate.
- 9 • The spousal allocation of debts mechanism for discovery of property not
10 within the control of the personal representative should be generalized for
11 nonprobate liability.
- 12 • The family protections, including the possession of the family dwelling and
13 exempt property and family allowance, should be extended to trust
14 administration.
- 15 • Probate Code Section 5003 should be broadened to protect a fiduciary
16 against claims of the decedent's creditors and to allow the personal
17 representative or other fiduciary making an allocation of liability to place a
18 hold on the transfer.

19 **CONFORMING REVISIONS**

- 20 • The proportionate liability principle applied by California law to several
21 types of nonprobate transfers should be conformed to general abatement
22 principles.
- 23 • The rule of the trust law, power of appointment law, and other California
24 statutes that make specific nonprobate transfers liable if the probate estate is
25 insufficient should be conformed to the rule of equal liability among probate
26 and nonprobate property.
- 27 • The Medi-Cal claim recovery process should be excluded from coverage of
28 the general nonprobate liability statute.
- 29 • The various small estate and spousal nonprobate liability procedures — e.g.,
30 Prob. Code §§ 13100 (affidavit procedure for collection or transfer of
31 personal property), 13200 (affidavit procedure for real property of small
32 value), 13500 (passage of property to surviving spouses without
33 administration) — should be integrated into the general nonprobate liability
34 statute.
- 35 • The Uniform Fraudulent Transfer Law should make clear that liability of a
36 nonprobate transfer for a decedent's debts is based on statutory liability and
37 not on fraudulent transfer law. That law should continue to apply to a
38 transfer not covered by the nonprobate transfer liability scheme.
- 39 • Probate Code Section 9653, relating to recovery of a gift made in view of
40 impending death or a nonprobate vehicle transfer for the benefit of creditors,
41 should make property liable for debts and family protections on an equal
42 basis with probate property.

- 1 • Code of Civil Procedure Section 377.40 should allow a cause of action to be
2 asserted against the representative appointed to allocate nonprobate transfer
3 liability.
- 4 • In Code of Civil Procedure Section 377.41 the “to the extent provided by
5 statute” limitation should be replaced by a general provision imposing
6 liability on a nonprobate transferee.
- 7 • The definition of “decedent’s successor in interest” in Code of Civil
8 Procedure Section 377.11 should be conformed to revisions affecting
9 litigation on a cause of action by or against a decedent.
- 10 • Code of Civil Procedure Section 366.2 should make clear it applies to all
11 causes against a decedent, including nonprobate transfer liability.
- 12 • Code of Civil Procedure Section 686.020 and Probate Code Section 9300
13 should make clear enforcement is not limited to property in the decedent’s
14 “estate.”
- 15 • Probate Code Section 5000 should cross-refer to the nonprobate transfer
16 liability scheme.

17 OTHER RECOMMENDED REVISIONS

18 PROBATE LIABILITY STATUTES

- 19 • A court order allocating a debt between the decedent’s estate and surviving
20 spouse under Probate Code Section 11444(b)(5) should bind creditors.
- 21 • The conflicts between Family Code and Probate Code provisions governing
22 liability of probate and nonprobate marital property should be resolved by
23 statute.

24 NONPROBATE LIABILITY STATUTES

25 Secured Debts

- 26 • A nonprobate beneficiary that discharges a general or nonconsensual lien
27 against property received by that beneficiary should be entitled to
28 exoneration from the estate.
- 29 • Joint tenancy property should pass subject to liens on the decedent’s
30 interest.

31 Unsecured Debts

- 32 • Code of Civil Procedure Section 686.020 and Probate Code Section 9300
33 should make clear that a judgment creditor may not enforce the judgment
34 directly against nonprobate property.
- 35 • Probate Code Section 7664 (summary disposition of small estate) should
36 provide that a person subject to a creditor’s claim may assert any cross-
37 complaint or setoff that would have been available to the decedent.

- 1 • The proportionate liability principle applied by California law to a few types
2 of nonprobate transfers (e.g., Prob. Cod §§ 682 (power of appointment),
3 19402 (trust)), should be conformed to general abatement principles.
- 4 • A summary court procedure, similar to the procedure available in a probate
5 proceeding for allocation of debts between the estate and surviving spouse,
6 should be made available for allocation of debts between nonprobate
7 transfers and the surviving spouse.

8 **General Provisions**

- 9 • The one year statute of limitations should override the fraudulent transfer
10 limitation period that would otherwise apply to nonprobate transfer liability.
- 11 • The court should be authorized to name a guardian ad litem or special
12 administrator to represent the decedent's interests in litigation (including
13 exercise of the decedent's evidentiary privileges). The decedent's
14 beneficiaries should be given notice and an opportunity to be heard on the
15 representative to be appointed. A beneficiary should be bound by actions of
16 the representative, including any settlement of the litigation subject, in the
17 event of challenge, to court approval of an action that is not arbitrary,
18 capricious, or fraudulent. Liability for reasonable expenses of the guardian
19 ad litem or special administrator, as determined by the court, should be
20 assessed among nonprobate transferees proportionately, on the same basis as
21 their liability for the decedent's debts.
- 22 • The privilege statutes should provide that where the decedent's successor in
23 interest conducts litigation on the decedent's behalf, the successor in interest
24 is entitled to exercise the decedent's evidentiary privileges that survive the
25 decedent's death with respect to that litigation. If the court names a guardian
26 ad litem or special administrator to represent the decedent's interests in
27 litigation, that person should be authorized to exercise the decedent's
28 evidentiary privileges and should be designated a joint holder of the
29 privilege for purposes of waiver. The fiduciary obligation of the decedent's
30 representative should be broadened to include protection of all property,
31 probate and nonprobate.
- 32 • If probate and nonprobate property is not made equally liable, a creditor
33 should be allowed to proceed immediately against a trustee, with the trustee
34 subrogated to the creditor's claim. The trustee should be authorized to
35 proceed against other property in the decedent's estate or commence a
36 probate proceeding if none is pending.
- 37 • A trustee or other fiduciary should have a duty to retain property if notified
38 of a creditor's claim.
- 39 • The trust claim procedure should be clarified as to liabilities as between
40 trusts.
- 41 • Additional procedural detail is needed in the statute governing liability of
42 trust distributees, particularly relating to joinder of other creditors and
43 apportionment of debts among distributees.
- 44 • Probate and trust property should be equally liable even if probate and
45 nonprobate property generally is not made equally liable.

- 1 • Either Probate Code Section 21101 should prescribe the application of the
2 entire Division 11, or the abatement statute (Part 4) should make clear its
3 application to all instruments.
- 4 • Probate Code Section 21402(a)(1) (abatement) should refer to property not
5 disposed of by “an” instrument. A parallel change should be made to
6 Probate Code Section 21400 (if “the” instrument provides for abatement).

7 **FAMILY PROTECTION STATUTES**

- 8 • The non-traditional differentiation of a probate from a nonprobate transfer
9 under the small estate set-aside should be conformed to standard nonprobate
10 transfer categories. The set-aside should be satisfied under standard
11 abatement principles and should be subject to creditor claims under standard
12 priority principles. If a comprehensive nonprobate transfer liability
13 procedure is developed, that procedure should be made available for
14 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 (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.

Code Civ. Proc. §§ 377.10-377.62. Survival of causes of action

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.

1

Article 2. Survival and Continuation

2

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.

5

(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.

8

377.21. A pending action or proceeding does not abate by the death of a party if the cause of action survives.

10

377.22. Nothing in this chapter shall be construed as affecting the assignability of causes of action.

12

Article 3. Decedent's Cause of Action

13

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.

18

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.

22

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:

26

(1) The decedent's name.

27

(2) The date and place of the decedent's death.

28

(3) "No proceeding is now pending in California for administration of the decedent's estate."

29

(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.

32

(5) Either of the following, as appropriate, with facts in support thereof:

33

(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."

36

(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."

37

38

1 (6) “No other person has a superior right to commence the action or proceeding
2 or to be substituted for the decedent in the pending action or proceeding.”

3 (7) “The affiant or declarant affirms or declares under penalty of perjury under
4 the laws of the State of California that the foregoing is true and correct.”

5 (b) Where more than one person executes the affidavit or declaration under this
6 section, the statements required by subdivision (a) shall be modified as appropriate
7 to reflect that fact.

8 (c) A certified copy of the decedent’s death certificate shall be attached to the
9 affidavit or declaration.

10 377.33. The court in which an action is commenced or continued under this
11 article may make any order concerning parties that is appropriate to ensure proper
12 administration of justice in the case, including appointment of the decedent’s
13 successor in interest as a special administrator or guardian ad litem.

14 377.34. In an action or proceeding by a decedent’s personal representative or
15 successor in interest on the decedent’s cause of action, the damages recoverable
16 are limited to the loss or damage that the decedent sustained or incurred before
17 death, including any penalties or punitive or exemplary damages that the decedent
18 would have been entitled to recover had the decedent lived, and do not include
19 damages for pain, suffering, or disfigurement.

20 377.35. On or after January 1, 1993, this article applies to the commencement of
21 an action or proceeding the decedent was entitled to commence, and to the
22 continuation of an action or proceeding commenced by the decedent, regardless of
23 whether the decedent died before, on, or after January 1, 1993.

24 Article 4. Cause of Action Against Decedent

25 377.40. Subject to Part 4 (commencing with Section 9000) of Division 7 of the
26 Probate Code governing creditor claims, a cause of action against a decedent that
27 survives may be asserted against the decedent’s personal representative or, to the
28 extent provided by statute, against the decedent’s successor in interest.

29 377.41. On motion, the court shall allow a pending action or proceeding against
30 the decedent that does not abate to be continued against the decedent’s personal
31 representative or, to the extent provided by statute, against the decedent’s
32 successor in interest, except that the court may not permit an action or proceeding
33 to be continued against the personal representative unless proof of compliance
34 with Part 4 (commencing with Section 9000) of Division 7 of the Probate Code
35 governing creditor claims is first made.

36 377.42. In an action or proceeding against a decedent’s personal representative
37 or, to the extent provided by statute, against the decedent’s successor in interest,
38 on a cause of action against the decedent, all damages are recoverable that might

1 have been recovered against the decedent had the decedent lived except damages
2 recoverable under Section 3294 of the Civil Code or other punitive or exemplary
3 damages.

4 377.43. This article applies to the commencement on or after January 1, 1993, of
5 an action or proceeding against the decedent's personal representative or successor
6 in interest, or to the making of a motion on or after January 1, 1993, to continue a
7 pending action or proceeding against the decedent's personal representative or
8 successor in interest, regardless of whether the decedent died before, on, or after
9 January 1, 1993.

10 Article 5. Insured Claims

11 377.50. An action to establish the decedent's liability for which the decedent
12 was protected by insurance may be commenced or continued against the
13 decedent's estate as provided in Chapter 1 (commencing with Section 550) of Part
14 13 of Division 2 of the Probate Code.

15 Article 6. Wrongful Death

16 377.60. A cause of action for the death of a person caused by the wrongful act or
17 neglect of another may be asserted by any of the following persons or by the
18 decedent's personal representative on their behalf:

19 (a) The decedent's surviving spouse, domestic partner, children, and issue of
20 deceased children, or, if there is no surviving issue of the decedent, the persons,
21 including the surviving spouse or domestic partner, who would be entitled to the
22 property of the decedent by intestate succession.

23 (b) Whether or not qualified under subdivision (a), if they were dependent on the
24 decedent, the putative spouse, children of the putative spouse, stepchildren, or
25 parents. As used in this subdivision, "putative spouse" means the surviving spouse
26 of a void or voidable marriage who is found by the court to have believed in good
27 faith that the marriage to the decedent was valid.

28 (c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time
29 of the decedent's death, the minor resided for the previous 180 days in the
30 decedent's household and was dependent on the decedent for one-half or more of
31 the minor's support.

32 (d) This section applies to any cause of action arising on or after January 1,
33 1993.

34 (e) The addition of this section by Chapter 178 of the Statutes of 1992 was not
35 intended to adversely affect the standing of any party having standing under prior
36 law, and the standing of parties governed by that version of this section as added
37 by Chapter 178 of the Statutes of 1992 shall be the same as specified herein as
38 amended by Chapter 563 of the Statutes of 1996.

1 (f)(1) For the purpose of this section, “domestic partner” means a person who, at
2 the time of the decedent’s death, was the domestic partner of the decedent in a
3 registered domestic partnership established in accordance with subdivision (b) of
4 Section 297 of the Family Code.

5 (2) Notwithstanding paragraph (1), for a death occurring prior to January 1,
6 2002, a person may maintain a cause of action pursuant to this section as a
7 domestic partner of the decedent by establishing the factors listed in paragraphs
8 (1) to (6), inclusive, of subdivision (b) of Section 297 of the Family Code, as it
9 read pursuant to Section 3 of Chapter 893 of the Statutes of 2001, prior to its
10 becoming inoperative on January 1, 2005.

11 (3) The amendments made to this subdivision during the 2003-04 Regular
12 Session of the Legislature are not intended to revive any cause of action that has
13 been fully and finally adjudicated by the courts, or that has been settled, or as to
14 which the applicable limitations period has run.

15 377.61. In an action under this article, damages may be awarded that, under all
16 the circumstances of the case, may be just, but may not include damages
17 recoverable under Section 377.34. The court shall determine the respective rights
18 in an award of the persons entitled to assert the cause of action.

19 377.62. (a) An action under Section 377.30 may be joined with an action under
20 Section 377.60 arising out of the same wrongful act or neglect.

21 (b) An action under Section 377.60 and an action under Section 377.31 arising
22 out of the same wrongful act or neglect may be consolidated for trial as provided
23 in Section 1048.

24 **Evid. Code §§ 950-962. Lawyer-client privilege**

25 950. As used in this article, “lawyer” means a person authorized, or reasonably
26 believed by the client to be authorized, to practice law in any state or nation.

27 951. As used in this article, “client” means a person who, directly or through an
28 authorized representative, consults a lawyer for the purpose of retaining the lawyer
29 or securing legal service or advice from him in his professional capacity, and
30 includes an incompetent (a) who himself so consults the lawyer or (b) whose
31 guardian or conservator so consults the lawyer in behalf of the incompetent.

32 952. As used in this article, “confidential communication between client and
33 lawyer” means information transmitted between a client and his or her lawyer in
34 the course of that relationship and in confidence by a means which, so far as the
35 client is aware, discloses the information to no third persons other than those who
36 are present to further the interest of the client in the consultation or those to whom
37 disclosure is reasonably necessary for the transmission of the information or the
38 accomplishment of the purpose for which the lawyer is consulted, and includes a
39 legal opinion formed and the advice given by the lawyer in the course of that
40 relationship.

1 953. As used in this article, “holder of the privilege” means:

2 (a) The client, if the client has no guardian or conservator.

3 (b) A guardian or conservator of the client, if the client has a guardian or
4 conservator.

5 (c) The personal representative of the client if the client is dead, including a
6 personal representative appointed pursuant to Section 12252 of the Probate Code.

7 (d) A successor, assign, trustee in dissolution, or any similar representative of a
8 firm, association, organization, partnership, business trust, corporation, or public
9 entity that is no longer in existence.

10 954. Subject to Section 912 and except as otherwise provided in this article, the
11 client, whether or not a party, has a privilege to refuse to disclose, and to prevent
12 another from disclosing, a confidential communication between client and lawyer
13 if the privilege is claimed by:

14 (a) The holder of the privilege;

15 (b) A person who is authorized to claim the privilege by the holder of the
16 privilege; or

17 (c) The person who was the lawyer at the time of the confidential
18 communication, but such person may not claim the privilege if there is no holder
19 of the privilege in existence or if he is otherwise instructed by a person authorized
20 to permit disclosure.

21 The relationship of attorney and client shall exist between a law corporation as
22 defined in Article 10 (commencing with Section 6160) of Chapter 4 of Division 3
23 of the Business and Professions Code and the persons to whom it renders
24 professional services, as well as between such persons and members of the State
25 Bar employed by such corporation to render services to such persons. The word
26 “persons” as used in this subdivision includes partnerships, corporations, limited
27 liability companies, associations and other groups and entities.

28 955. The lawyer who received or made a communication subject to the privilege
29 under this article shall claim the privilege whenever he is present when the
30 communication is sought to be disclosed and is authorized to claim the privilege
31 under subdivision (c) of Section 954.

32 956. There is no privilege under this article if the services of the lawyer were
33 sought or obtained to enable or aid anyone to commit or plan to commit a crime or
34 a fraud.

35 956.5. There is no privilege under this article if the lawyer reasonably believes
36 that disclosure of any confidential communication relating to representation of a
37 client is necessary to prevent a criminal act that the lawyer reasonably believes is
38 likely to result in the death of, or substantial bodily harm to, an individual.

39 957. There is no privilege under this article as to a communication relevant to an
40 issue between parties all of whom claim through a deceased client, regardless of

1 whether the claims are by testate or intestate succession, nonprobate transfer, or
2 inter vivos transaction.

3 958. There is no privilege under this article as to a communication relevant to an
4 issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-
5 client relationship.

6 959. There is no privilege under this article as to a communication relevant to an
7 issue concerning the intention or competence of a client executing an attested
8 document of which the lawyer is an attesting witness, or concerning the execution
9 or attestation of such a document.

10 960. There is no privilege under this article as to a communication relevant to an
11 issue concerning the intention of a client, now deceased, with respect to a deed of
12 conveyance, will, or other writing, executed by the client, purporting to affect an
13 interest in property.

14 961. There is no privilege under this article as to a communication relevant to an
15 issue concerning the validity of a deed of conveyance, will, or other writing,
16 executed by a client, now deceased, purporting to affect an interest in property.

17 962. Where two or more clients have retained or consulted a lawyer upon a
18 matter of common interest, none of them, nor the successor in interest of any of
19 them, may claim a privilege under this article as to a communication made in the
20 course of that relationship when such communication is offered in a civil
21 proceeding between one of such clients (or his successor in interest) and another
22 of such clients (or his successor in interest).

23 **Prob. Code §§ 550-555. Liability of decedent covered by insurance**

24 550. (a) Subject to the provisions of this chapter, an action to establish the
25 decedent's liability for which the decedent was protected by insurance may be
26 commenced or continued against the decedent's estate without the need to join as
27 a party the decedent's personal representative or successor in interest.

28 (b) The remedy provided in this chapter is cumulative and may be pursued
29 concurrently with other remedies.

30 551. Notwithstanding Section 366.2 of the Code of Civil Procedure, if the
31 limitations period otherwise applicable to the action has not expired at the time of
32 the decedent's death, an action under this chapter may be commenced within one
33 year after the expiration of the limitations period otherwise applicable.

34 552. (a) An action under this chapter shall name as the defendant, "Estate of
35 (name of decedent), Deceased." Summons shall be served on a person designated
36 in writing by the insurer or, if none, on the insurer. Further proceedings shall be in
37 the name of the estate, but otherwise shall be conducted in the same manner as if
38 the action were against the personal representative.

1 (b) On motion of an interested person, or on its own motion, the court in which
2 the action is pending may, for good cause, order the appointment and substitution
3 of a personal representative as the defendant.

4 (c) An action against the estate of the decedent under this chapter may be
5 consolidated with an action against the personal representative.

6 553. The insurer may deny or otherwise contest its liability in an action under
7 this chapter or by an independent action. Unless the personal representative is
8 joined as a party, a judgment in the action under this chapter or in the independent
9 action does not adjudicate rights by or against the estate.

10 554. (a) Except as provided in subdivision (b), either the damages sought in an
11 action under this chapter shall be within the limits and coverage of the insurance,
12 or recovery of damages outside the limits or coverage of the insurance shall be
13 waived. A judgment in favor of the plaintiff in the action is enforceable only from
14 the insurance coverage and not against property in the estate.

15 (b) Where the amount of damages sought in the action exceeds the coverage of
16 the insurance, subdivision (a) does not apply if both of the following conditions
17 are satisfied:

18 (1) The personal representative is joined as a party to the action.

19 (2) The plaintiff files a claim in compliance with Section 9390.

20 555. (a) This chapter does not apply to an action commenced before July 1,
21 1989.

22 (b) The applicable law in effect before July 1, 1989, continues to apply to an
23 action commenced before July 1, 1989, notwithstanding its repeal by Chapter
24 1199 of the Statutes of 1988.

25 **Prob. Code §§ 5000-5003. Nonprobate transfers**

26 5000. (a) A provision for a nonprobate transfer on death in an insurance policy,
27 contract of employment, bond, mortgage, promissory note, certificated or
28 uncertificated security, account agreement, custodial agreement, deposit
29 agreement, compensation plan, pension plan, individual retirement plan, employee
30 benefit plan, trust, conveyance, deed of gift, marital property agreement, or other
31 written instrument of a similar nature is not invalid because the instrument does
32 not comply with the requirements for execution of a will, and this code does not
33 invalidate the instrument.

34 (b) Included within subdivision (a) are the following:

35 (1) A written provision that money or other benefits due to, controlled by, or
36 owned by a decedent before death shall be paid after the decedent's death to a
37 person whom the decedent designates either in the instrument or in a separate
38 writing, including a will, executed either before or at the same time as the
39 instrument, or later.

1 (2) A written provision that money due or to become due under the instrument
2 shall cease to be payable in event of the death of the promisee or the promisor
3 before payment or demand.

4 (3) A written provision that any property controlled by or owned by the
5 decedent before death that is the subject of the instrument shall pass to a person
6 whom the decedent designates either in the instrument or in a separate writing,
7 including a will, executed either before or at the same time as the instrument, or
8 later.

9 (c) Nothing in this section limits the rights of creditors under any other law.

10 5002. Notwithstanding any other provision of this part, a holder of property
11 under an instrument of a type described in Section 5000 is not required to receive,
12 hold, or transfer the property in compliance with a provision for a nonprobate
13 transfer on death executed by a person who has an interest in the property if either
14 (1) the person is not authorized by the terms of the instrument to execute a
15 provision for transfer of the property, or (2) the provision for transfer of the
16 property does not otherwise satisfy the terms of the instrument.

17 5003. (a) A holder of property under an instrument of a type described in
18 Section 5000 may transfer the property in compliance with a provision for a
19 nonprobate transfer on death that satisfies the terms of the instrument, whether or
20 not the transfer is consistent with the beneficial ownership of the property as
21 between the person who executed the provision for transfer of the property and
22 other persons having an interest in the property or their successors, and whether or
23 not the transfer is consistent with the rights of the person named as beneficiary.

24 (b) Except as provided in this subdivision, no notice or other information shown
25 to have been available to the holder of the property affects the right of the holder
26 to the protection provided by subdivision (a). The protection provided by
27 subdivision (a) does not extend to a transfer made after either of the following
28 events:

29 (1) The holder of the property has been served with a contrary court order.

30 (2) The holder of the property has been served with a written notice of a person
31 claiming an adverse interest in the property. However, this paragraph does not
32 apply to a pension plan to the extent the transfer is a periodic payment pursuant to
33 the plan.

34 (c) The protection provided by this section does not affect the rights of the
35 person who executed the provision for transfer of the property and other persons
36 having an interest in the property or their successors in disputes among themselves
37 concerning the beneficial ownership of the property.

38 (d) The protection provided by this section is not exclusive of any protection
39 provided the holder of the property by any other provision of law.

40 (e) A person shall not serve notice under paragraph (2) of subdivision (b) in bad
41 faith. If the court in an action or proceeding relating to the rights of the parties
42 determines that a person has served notice under paragraph (2) of subdivision (b)

1 in bad faith, the court shall award against the person the cost of the action or
2 proceeding, including a reasonable attorney's fee, and the damages caused by the
3 service.

4 **Prob. Code § 6611. Small estate set-aside**

5 6611. (a) Subject to the limitations and conditions specified in this section, the
6 person or persons in whom title vested pursuant to Section 6009 are personally
7 liable for the unsecured debts of the decedent.

8 (b) The personal liability of a person under this section does not exceed the fair
9 market value at the date of the decedent's death of the property title to which
10 vested in that person pursuant to Section 6009, less the total of all of the
11 following:

12 (1) The amount of any liens and encumbrances on that property.

13 (2) The value of any probate homestead interest set apart under Section 6520 out
14 of that property.

15 (3) The value of any other property set aside under Section 6510 out of that
16 property.

17 (c) In any action or proceeding based upon an unsecured debt of the decedent,
18 the surviving spouse of the decedent, the child or children of the decedent, or the
19 guardian of the minor child or children of the decedent, may assert any defense,
20 cross-complaint, or setoff which would have been available to the decedent if the
21 decedent had not died.

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

27 (1) Creditors who commence judicial proceedings for the enforcement of the
28 debt and serve the person liable under this section with the complaint therein prior
29 to the expiration of the time for filing claims.

30 (2) Creditors who have or who secure an acknowledgment in writing of the
31 person liable under this section that that person is liable for the debts.

32 (3) Creditors who file a timely claim in the proceedings for the administration of
33 the estate of the decedent.

34 (e) Section 366.2 of the Code of Civil Procedure applies in an action under this
35 section.

36 **Prob. Code § 7664. Summary disposition of small estate**

37 7664. A person to whom property is distributed under this procedure is
38 personally liable for the unsecured debts of the decedent. Such a debt may be
39 enforced against the person in the same manner as it could have been enforced
40 against the decedent if the decedent had not died. In an action based on the debt,
41 the person may assert any defenses available to the decedent if the decedent had

1 not died. The aggregate personal liability of a person under this section shall not
2 exceed the fair market value of the property distributed to the person, valued as of
3 the date of the distribution, less the amount of any liens and encumbrances on the
4 property on that date. Section 366.2 of the Code of Civil Procedure applies in an
5 action under this section.

6 **Prob. Code § 9392. Omitted creditor**

7 9392. (a) Subject to subdivision (b), a person to whom property is distributed is
8 personally liable for the claim of a creditor, without a claim first having been filed,
9 if all of the following conditions are satisfied:

10 (1) The identity of the creditor was known to, or reasonably ascertainable by, a
11 general personal representative within four months after the date letters were first
12 issued to the personal representative, and the claim of the creditor was not merely
13 conjectural.

14 (2) Notice of administration of the estate was not given to the creditor under
15 Chapter 2 (commencing with Section 9050) and neither the creditor nor the
16 attorney representing the creditor in the matter has actual knowledge of the
17 administration of the estate before the time the court made an order for final
18 distribution of the property.

19 (3) The statute of limitations applicable to the claim under Section 366.2 of the
20 Code of Civil Procedure has not expired at the time of commencement of an action
21 under this section.

22 (b) Personal liability under this section is applicable only to the extent the claim
23 of the creditor cannot be satisfied out of the estate of the decedent and is limited to
24 a pro rata portion of the claim of the creditor, based on the proportion that the
25 value of the property distributed to the person out of the estate bears to the total
26 value of all property distributed to all persons out of the estate. Personal liability
27 under this section for all claims of all creditors shall not exceed the value of the
28 property distributed to the person out of the estate. As used in this section, the
29 value of property is the fair market value of the property on the date of the order
30 for distribution, less the amount of any liens and encumbrances on the property at
31 that time.

32 (c) Nothing in this section affects the rights of a purchaser or encumbrancer of
33 property in good faith and for value from a person who is personally liable under
34 this section.

35 **Prob. Code § 9653. Fraudulent transfer, gift causa mortis, nonprobate transfer of vehicle**

36 9653. (a) On application of a creditor of the decedent or the estate, the personal
37 representative shall commence and prosecute an action for the recovery of real or
38 personal property of the decedent for the benefit of creditors if the personal
39 representative has insufficient assets to pay creditors and the decedent during
40 lifetime did any of the following with respect to the property:

1 (1) Made a conveyance of the property, or any right or interest in the property,
2 that is fraudulent as to creditors under the Uniform Fraudulent Transfer Act
3 (Chapter 1 (commencing with Section 3439) of Title 2 of Part 2 of Division 4 of
4 the Civil Code).

5 (2) Made a gift of the property in view of impending death.

6 (3) Made a direction to transfer a vehicle, undocumented vessel, manufactured
7 home, mobilehome, commercial coach, truck camper, or floating home to a
8 designated beneficiary on the decedent's death pursuant to Section 18102.2 of the
9 Health and Safety Code, or Section 5910.5 or 9916.5 of the Vehicle Code, and the
10 property has been transferred as directed.

11 (b) A creditor making application under this section shall pay such part of the
12 costs and expenses of the suit and attorney's fees, or give an undertaking to the
13 personal representative for that purpose, as the personal representative and the
14 creditor agree, or, absent an agreement, as the court or judge orders.

15 (c) The property recovered under this section shall be sold for the payment of
16 debts in the same manner as if the decedent had died seized or possessed of the
17 property. The proceeds of the sale shall be applied first to payment of the costs and
18 expenses of suit, including attorney's fees, and then to payment of the debts of the
19 decedent in the same manner as other property in possession of the personal
20 representative. After all the debts of the decedent have been paid, the remainder of
21 the proceeds shall be paid to the person from whom the property was recovered.
22 The property may be sold in its entirety or in such portion as necessary to pay the
23 debts.

24 **Prob. Code §§ 11440-11446. Allocation of debts between estate and surviving spouse**

25 11440. If it appears that a debt of the decedent has been paid or is payable in
26 whole or in part by the surviving spouse, or that a debt of the surviving spouse has
27 been paid or is payable in whole or in part from property in the decedent's estate,
28 the personal representative, the surviving spouse, or a beneficiary may, at any time
29 before an order for final distribution is made, petition for an order to allocate the
30 debt.

31 11441. The petition shall include a statement of all of the following:

32 (a) All debts of the decedent and surviving spouse known to the petitioner that
33 are alleged to be subject to allocation and whether paid in whole or part or unpaid.

34 (b) The reason why the debts should be allocated.

35 (c) The proposed allocation and the basis for allocation alleged by the petitioner.

36 11442. If it appears from the petition that allocation would be affected by the
37 value of the separate property of the surviving spouse and any community
38 property and quasi-community property not administered in the estate and if an
39 inventory and appraisal of the property has not been provided by the surviving
40 spouse, the court shall make an order to show cause why the information should
41 not be provided.

1 11443. The petitioner shall give notice of the hearing as provided in Section
2 1220, together with a copy of the petition and the order to show cause, if any.

3 11444. (a) The personal representative and the surviving spouse may provide for
4 allocation by agreement and, on a determination by the court that the agreement
5 substantially protects the rights of interested persons, the allocation provided in the
6 agreement shall be ordered by the court.

7 (b) In the absence of an agreement, each debt subject to allocation shall first be
8 characterized by the court as separate or community, in accordance with the laws
9 of the state applicable to marital dissolution proceedings. Following that
10 characterization, the debt or debts shall be allocated as follows:

11 (1) Separate debts of either spouse shall be allocated to that spouse's separate
12 property assets, and community debts shall be allocated to the spouses'
13 community property assets.

14 (2) If a separate property asset of either spouse is subject to a secured debt that is
15 characterized as that spouse's separate debt, and the net equity in that asset
16 available to satisfy that secured debt is less than that secured debt, the unsatisfied
17 portion of that secured debt shall be treated as an unsecured separate debt of that
18 spouse and allocated to the net value of that spouse's other separate property
19 assets.

20 (3) If the net value of either spouse's separate property assets is less than that
21 spouse's unsecured separate debt or debts, the unsatisfied portion of the debt or
22 debts shall be allocated to the net value of that spouse's one-half share of the
23 community property assets. If the net value of that spouse's one-half share of the
24 community property assets is less than that spouse's unsatisfied unsecured
25 separate debt or debts, the remaining unsatisfied portion of the debt or debts shall
26 be allocated to the net value of the other spouse's one-half share of the community
27 property assets.

28 (4) If a community property asset is subject to a secured debt that is
29 characterized as a community debt, and the net equity in that asset available to
30 satisfy that secured debt is less than that secured debt, the unsatisfied portion of
31 that secured debt shall be treated as an unsecured community debt and allocated to
32 the net value of the other community property assets.

33 (5) If the net value of the community property assets is less than the unsecured
34 community debt or debts, the unsatisfied portion of the debt or debts shall be
35 allocated equally between the separate property assets of the decedent and the
36 surviving spouse. If the net value of either spouse's separate property assets is less
37 than that spouse's share of the unsatisfied portion of the unsecured community
38 debt or debts, the remaining unsatisfied portion of the debt or debts shall be
39 allocated to the net value of the other spouse's separate property assets.

40 (c) For purposes of this section:

41 (1) The net value of either spouse's separate property asset shall refer to its fair
42 market value as of the date of the decedent's death, minus the date-of-death

1 balance of any liens and encumbrances on that asset that have been characterized
2 as that spouse's separate debts.

3 (2) The net value of a community property asset shall refer to its fair market
4 value as of the date of the decedent's death, minus the date-of-death balance of
5 any liens and encumbrances on that asset that have been characterized as
6 community debts.

7 (3) In the case of a nonrecourse debt, the amount of that debt shall be limited to
8 the net equity in the collateral, based on the fair market value of the collateral as of
9 the date of the decedent's death, that is available to satisfy that debt. For the
10 purposes of this paragraph, "nonrecourse debt" means a debt for which the
11 debtor's obligation to repay is limited to the collateral securing the debt, and for
12 which a deficiency judgment against the debtor is not permitted by law.

13 (d) Notwithstanding the foregoing provisions of this section, the court may order
14 a different allocation of debts between the decedent's estate and the surviving
15 spouse if the court finds a different allocation to be equitable under the
16 circumstances.

17 (e) Nothing contained in this section is intended to impair or affect the rights of
18 third parties. If a personal representative or the surviving spouse incurs any
19 damages or expense, including attorney's fees, on account of the nonpayment of a
20 debt that was allocated to the other party pursuant to subdivision (b), or as the
21 result of a debt being misallocated due to fraud or intentional misrepresentation by
22 the other party, the party incurring damages shall be entitled to recover from the
23 other party for damages or expense deemed reasonable by the court that made the
24 allocation.

25 11445. On making a determination as provided in this chapter, the court shall
26 make an order that:

27 (a) Directs the personal representative to make payment of the amounts
28 allocated to the estate by payment to the surviving spouse or creditors.

29 (b) Directs the personal representative to charge amounts allocated to the
30 surviving spouse against any property or interests of the surviving spouse that are
31 in the possession or control of the personal representative. To the extent that
32 property or interests of the surviving spouse in the possession or control of the
33 personal representative are insufficient to satisfy the allocation, the court order
34 shall summarily direct the surviving spouse to pay the allocation to the personal
35 representative.

36 11446. Notwithstanding any other statute, funeral expenses and expenses of last
37 illness shall be charged against the estate of the decedent and shall not be allocated
38 to, or charged against the community share of, the surviving spouse, whether or
39 not the surviving spouse is financially able to pay the expenses and whether or not
40 the surviving spouse or any other person is also liable for the expenses.

1 **Prob. Code §§ 13109-13112. Affidavit Procedure for Collection or Transfer of Personal**
2 **Property**

3 13109. A person to whom payment, delivery, or transfer of the decedent's
4 property is made under this chapter is personally liable, to the extent provided in
5 Section 13112, for the unsecured debts of the decedent. Any such debt may be
6 enforced against the person in the same manner as it could have been enforced
7 against the decedent if the decedent had not died. In any action based upon the
8 debt, the person may assert any defenses, cross-complaints, or setoffs that would
9 have been available to the decedent if the decedent had not died. Nothing in this
10 section permits enforcement of a claim that is barred under Part 4 (commencing
11 with Section 9000) of Division 7. Section 366.2 of the Code of Civil Procedure
12 applies in an action under this section.

13 13110. (a) Except as provided in subdivision (b), each person to whom payment,
14 delivery, or transfer of the decedent's property is made under this chapter is
15 personally liable to the extent provided in Section 13112 to any person having a
16 superior right by testate or intestate succession from the decedent.

17 (b) In addition to any other liability the person has under this section and
18 Sections 13109, 13111, and 13112, any person who fraudulently secures the
19 payment, delivery, or transfer of the decedent's property under this chapter is
20 liable to the person having such a superior right for three times the fair market
21 value of the property. For the purposes of this subdivision, the "fair market value
22 of the property" is the fair market value of the property paid, delivered, or
23 transferred to the person liable under this subdivision, valued as of the time the
24 person liable under this subdivision presents the affidavit or declaration under this
25 chapter to the holder of the decedent's property, less any liens and encumbrances
26 on that property at that time.

27 (c) An action to impose liability under this section is forever barred three years
28 after the affidavit or declaration is presented under this chapter to the holder of the
29 decedent's property, or three years after the discovery of the fraud, whichever is
30 later. The three-year period specified in this subdivision is not tolled for any
31 reason.

32 13111. (a) Subject to the provisions of this section, if proceedings for the
33 administration of the decedent's estate are commenced in this state, or if the
34 decedent's personal representative has consented to the payment, transfer, or
35 delivery of the decedent's property under this chapter and the personal
36 representative later requests that the property be restored to the estate, each person
37 to whom payment, delivery, or transfer of the decedent's property is made under
38 this chapter is liable for:

39 (1) The restitution of the property to the estate if the person still has the
40 property, together with (A) the net income the person received from the property
41 and (B) if the person encumbered the property after it was delivered or transferred

1 to the person, the amount necessary to satisfy the balance of the encumbrance as
2 of the date the property is restored to the estate.

3 (2) The restitution to the estate of the fair market value of the property if the
4 person no longer has the property, together with (A) the net income the person
5 received from the property and (B) interest on the fair market value of the property
6 from the date of disposition at the rate payable on a money judgment. For the
7 purposes of this subdivision, the “fair market value of the property” is the fair
8 market value, determined as of the time of the disposition of the property, of the
9 property paid, delivered, or transferred to the person under this chapter, less any
10 liens and encumbrances on the property at that time.

11 (b) Subject to subdivision (c) and subject to any additional liability the person
12 has under Sections 13109 to 13112, inclusive, if the person fraudulently secured
13 the payment, delivery, or transfer of the decedent’s property under this chapter, the
14 person is liable under this section for restitution to the decedent’s estate of three
15 times the fair market value of the property. For the purposes of this subdivision,
16 the “fair market value of the property” is the fair market value, determined as of
17 the time the person liable under this subdivision presents the affidavit or
18 declaration under this chapter, of the property paid, delivered, or transferred to the
19 person under this chapter, less the amount of any liens and encumbrances on the
20 property at that time.

21 (c) The property and amount required to be restored to the estate under this
22 section shall be reduced by any property or amount paid by the person to satisfy a
23 liability under Section 13109 or 13110.

24 (d) An action to enforce the liability under this section may be brought only by
25 the personal representative of the estate of the decedent. In an action to enforce the
26 liability under this section, the court’s judgment may enforce the liability only to
27 the extent necessary to protect the interests of the heirs, devisees, and creditors of
28 the decedent.

29 (e) An action to enforce the liability under this section is forever barred three
30 years after presentation of the affidavit or declaration under this chapter to the
31 holder of the decedent’s property, or three years after the discovery of the fraud,
32 whichever is later. The three-year period specified in this subdivision is not tolled
33 for any reason.

34 (f) In the case of a nondomiciliary decedent, restitution under this section shall
35 be made to the estate in an ancillary administration proceeding.

36 13112. (a) A person to whom payment, delivery, or transfer of the decedent’s
37 property has been made under this chapter is not liable under Section 13109 or
38 13110 if proceedings for the administration of the decedent’s estate are
39 commenced in this state, and the person satisfies the requirements of Section
40 13111.

41 (b) Except as provided in subdivision (b) of Section 13110, the aggregate of the
42 personal liability of a person under Sections 13109 and 13110 shall not exceed the

1 fair market value, valued as of the time the affidavit or declaration is presented
2 under this chapter, of the property paid, delivered, or transferred to the person
3 under this chapter, less the amount of any liens and encumbrances on that property
4 at that time, together with the net income the person received from the property
5 and, if the property has been disposed of, interest on the fair market value of the
6 property accruing from the date of disposition at the rate payable on a money
7 judgment. For the purposes of this subdivision, “fair market value of the property”
8 has the same meaning as defined in paragraph (2) of subdivision (a) of Section
9 13111.

10 **Prob. Code § 13156. Court order determining succession to property**

11 13156. (a) Subject to subdivisions (b), (c), and (d), the petitioner who receives
12 the decedent’s property pursuant to an order under this chapter is personally liable
13 for the unsecured debts of the decedent.

14 (b) The personal liability of any petitioner shall not exceed the fair market value
15 at the date of the decedent’s death of the property received by that petitioner
16 pursuant to an order under this chapter, less the amount of any liens and
17 encumbrances on the property.

18 (c) In any action or proceeding based upon an unsecured debt of the decedent,
19 the petitioner may assert any defense, cross-complaint, or setoff which would have
20 been available to the decedent if the decedent had not died.

21 (d) Nothing in this section permits enforcement of a claim that is barred under
22 Part 4 (commencing with Section 9000) of Division 7.

23 (e) Section 366.2 of the Code of Civil Procedure applies in an action under this
24 section.

25 **Prob. Code §§ 13204-13207. Affidavit procedure for real property of small value**

26 13204. Each person who is designated as a successor of the decedent in a
27 certified copy of an affidavit issued under Section 13202 is personally liable to the
28 extent provided in Section 13207 for the unsecured debts of the decedent. Any
29 such debt may be enforced against the person in the same manner as it could have
30 been enforced against the decedent if the decedent had not died. In any action
31 based upon the debt, the person may assert any defense, cross-complaint, or setoff
32 that would have been available to the decedent if the decedent had not died.
33 Nothing in this section permits enforcement of a claim that is barred under Part 4
34 (commencing with Section 9000) of Division 7. Section 366.2 of the Code of Civil
35 Procedure applies in an action under this section.

36 13205. (a) Except as provided in subdivision (b), each person who is designated
37 as a successor of the decedent in a certified copy of any affidavit issued under
38 Section 13202 is personally liable to the extent provided in Section 13207 to any
39 person having a superior right by testate or intestate succession from the decedent.

1 (b) In addition to any other liability the person has under this section and
2 Sections 13204, 13206, and 13207, if the person fraudulently executed or filed the
3 affidavit under this chapter, the person is liable to the person having a superior
4 right for three times the fair market value of the property. For the purposes of this
5 subdivision, the “fair market value of the property” is the fair market value,
6 determined as of the time the certified copy of the affidavit was issued under
7 Section 13202, of the property the person liable took under the certified copy of
8 the affidavit to which the other person has a superior right, less any liens and
9 encumbrances on the property at that time.

10 (c) An action to impose liability under this section is forever barred three years
11 after the certified copy of the affidavit is issued under Section 13202, or three
12 years after the discovery of the fraud, whichever is later. The three-year period
13 specified in this subdivision is not tolled for any reason.

14 13206. (a) Subject to subdivisions (b), (c), (d), and (e), if proceedings for the
15 administration of the decedent’s estate are commenced, or if the decedent’s
16 personal representative has consented to use of the procedure provided by this
17 chapter and the personal representative later requests that the property be restored
18 to the estate, each person who is designated as a successor of the decedent in a
19 certified copy of an affidavit issued under Section 13202 is liable for:

20 (1) The restitution to the decedent’s estate of the property the person took under
21 the certified copy of the affidavit if the person still has the property, together with
22 (A) the net income the person received from the property and (B) if the person
23 encumbered the property after the certified copy of the affidavit was issued, the
24 amount necessary to satisfy the balance of the encumbrance as of the date the
25 property is restored to the estate.

26 (2) The restitution to the decedent’s estate of the fair market value of the
27 property if the person no longer has the property, together with (A) the net income
28 the person received from the property prior to disposing of it and (B) interest from
29 the date of disposition at the rate payable on a money judgment on the fair market
30 value of the property. For the purposes of this paragraph, the “fair market value of
31 the property” is the fair market value, determined as of the time of the disposition
32 of the property, of the property the person took under the certified copy of the
33 affidavit, less the amount of any liens and encumbrances on the property at the
34 time the certified copy of the affidavit was issued.

35 (b) Subject to subdivision (d), if the person fraudulently executed or filed the
36 affidavit under this chapter, the person is liable under this section for restitution to
37 the decedent’s estate of three times the fair market value of the property. For the
38 purposes of this subdivision, the “fair market value of the property” is the fair
39 market value, determined as of the time the certified copy of the affidavit was
40 issued, of the property the person took under the certified copy of the affidavit,
41 less the amount of any liens and encumbrances on the property at that time.

1 (c) Subject to subdivision (d), if proceedings for the administration of the
2 decedent's estate are commenced and a person designated as a successor of the
3 decedent in a certified copy of an affidavit issued under Section 13202 made a
4 significant improvement to the property taken by the person under the certified
5 copy of the affidavit in the good faith belief that the person was the successor of
6 the decedent to that property, the person is liable for whichever of the following
7 the decedent's estate elects:

8 (1) The restitution of the property, as improved, to the estate of the decedent
9 upon the condition that the estate reimburse the person making restitution for (A)
10 the amount by which the improvement increases the fair market value of the
11 property restored, determined as of the time of restitution, and (B) the amount paid
12 by the person for principal and interest on any liens or encumbrances that were on
13 the property at the time the certified copy of the affidavit was issued.

14 (2) The restoration to the decedent's estate of the fair market value of the
15 property, determined as of the time of the issuance of the certified copy of the
16 affidavit under Section 13202, less the amount of any liens and encumbrances on
17 the property at that time, together with interest on the net amount at the rate
18 payable on a money judgment running from the date of the issuance of the
19 certified copy of the affidavit.

20 (d) The property and amount required to be restored to the estate under this
21 section shall be reduced by any property or amount paid by the person to satisfy a
22 liability under Section 13204 or 13205.

23 (e) An action to enforce the liability under this section may be brought only by
24 the personal representative of the estate of the decedent. In an action to enforce the
25 liability under this section, the court's judgment may enforce the liability only to
26 the extent necessary to protect the interests of the heirs, devisees, and creditors of
27 the decedent.

28 (f) An action to enforce the liability under this section is forever barred three
29 years after the certified copy of the affidavit is issued under Section 13202, or
30 three years after the discovery of the fraud, whichever is later. The three-year
31 period specified in this subdivision is not tolled for any reason.

32 13207. (a) A person designated as a successor of the decedent in a certified copy
33 of an affidavit issued under Section 13202 is not liable under Section 13204 or
34 13205 if proceedings for the administration of the decedent's estate are
35 commenced, or if the decedent's personal representative has consented to use of
36 the procedure provided by this chapter and the personal representative later
37 requests that the property be restored to the estate, and the person satisfies the
38 requirements of Section 13206.

39 (b) Except as provided in subdivision (b) of Section 13205, the aggregate of the
40 personal liability of a person under Sections 13204 and 13205 shall not exceed the
41 sum of the following:

1 (1) The fair market value at the time of the issuance of the certified copy of the
2 affidavit under Section 13202 of the decedent's property received by that person
3 under this chapter, less the amount of any liens and encumbrances on the property
4 at that time.

5 (2) The net income the person received from the property.

6 (3) If the property has been disposed of, interest on the fair market value of the
7 property from the date of disposition at the rate payable on a money judgment. For
8 the purposes of this paragraph, "fair market value of the property" has the same
9 meaning as defined in paragraph (2) of subdivision (a) of Section 13206.

10 **Prob. Code §§ 13550-13554. Passage of property to surviving spouse without administration**

11 13550. Except as provided in Sections 11446, 13552, 13553, and 13554, upon
12 the death of a married person, the surviving spouse is personally liable for the
13 debts of the deceased spouse chargeable against the property described in Section
14 13551 to the extent provided in Section 13551.

15 13551. The liability imposed by Section 13550 shall not exceed the fair market
16 value at the date of the decedent's death, less the amount of any liens and
17 encumbrances, of the total of the following:

18 (a) The portion of the one-half of the community and quasi-community property
19 belonging to the surviving spouse under Sections 100 and 101 that is not exempt
20 from enforcement of a money judgment and is not administered in the estate of the
21 deceased spouse.

22 (b) The portion of the one-half of the community and quasi-community property
23 belonging to the decedent under Sections 100 and 101 that passes to the surviving
24 spouse without administration.

25 (c) The separate property of the decedent that passes to the surviving spouse
26 without administration.

27 13552. If proceedings are commenced in this state for the administration of the
28 estate of the deceased spouse and the time for filing claims has commenced, any
29 action upon the liability of the surviving spouse pursuant to Section 13550 is
30 barred to the same extent as provided for claims under Part 4 (commencing with
31 Section 9000) of Division 7, except as to the following:

32 (a) Creditors who commence judicial proceedings for the enforcement of the
33 debt and serve the surviving spouse with the complaint therein prior to the
34 expiration of the time for filing claims.

35 (b) Creditors who have or who secure the surviving spouse's acknowledgment
36 in writing of the liability of the surviving spouse for the debts.

37 (c) Creditors who file a timely claim in the proceedings for the administration of
38 the estate of the deceased spouse.

1 13553. The surviving spouse is not liable under this chapter if all the property
2 described in paragraphs (1) and (2) of subdivision (a) of Section 13502 is
3 administered under this code.

4 13554. (a) Except as otherwise provided in this chapter, any debt described in
5 Section 13550 may be enforced against the surviving spouse in the same manner
6 as it could have been enforced against the deceased spouse if the deceased spouse
7 had not died.

8 (b) In any action or proceeding based upon the debt, the surviving spouse may
9 assert any defense, cross-complaint, or setoff which would have been available to
10 the deceased spouse if the deceased spouse had not died.

11 (c) Section 366.2 of the Code of Civil Procedure applies in an action under this
12 section.

13 **Prob. Code §§ 19400-19403. Trust distributee liability**

14 19400. Subject to Section 366.2 of the Code of Civil Procedure, if there is no
15 proceeding to administer the estate of the deceased settlor, and if the trustee does
16 not file a proposed notice to creditors pursuant to Section 19003 and does not
17 publish notice to creditors pursuant to Chapter 3 (commencing with Section
18 19040), then a beneficiary of the trust to whom payment, delivery, or transfer of
19 the deceased settlor's property is made pursuant to the terms of the trust is
20 personally liable, to the extent provided in Section 19402, for the unsecured claims
21 of the creditors of the deceased settlor's estate.

22 19401. Subject to Section 19402, if the trustee filed a proposed notice to
23 creditors pursuant to Section 19003 and published notice to creditors pursuant to
24 Section 19040, and if the identity of the creditor was known to, or reasonably
25 ascertainable by, the trustee within four months of the first publication of notice
26 pursuant to Section 19040, then a person to whom property is distributed is
27 personally liable for the claim of the creditor, without a claim first having been
28 filed, if all of the following conditions are satisfied:

29 (a) The claim of the creditor was not merely conjectural.

30 (b) Notice to the creditor was not given to the creditor under Chapter 4
31 (commencing with Section 19050) and neither the creditor nor the attorney
32 representing the creditor in the matter had actual knowledge of the administration
33 of the trust estate sooner than one year after the date of first publication of notice
34 pursuant to Section 19040.

35 (c) The statute of limitations applicable to the claim under Section 366.2 of the
36 Code of Civil Procedure has not expired at the time of commencement of an action
37 under this section.

38 19402. (a) In any action under this chapter, subject to Section 366.2 of the Code
39 of Civil Procedure, the distributee may assert any defenses, cross-complaints, or

1 setoffs that would have been available to the deceased settlor if the settlor had not
2 died.

3 (b) Personal liability under this chapter is applicable only to the extent the claim
4 of the creditor cannot be satisfied out of the trust estate of the deceased settlor and
5 is limited to a pro rata portion of the claim of the creditor, based on the proportion
6 that the value of the property distributed to the person out of the trust estate bears
7 to the total value of all property distributed to all persons out of the trust estate.
8 Personal liability under this chapter for all claims of all creditors shall not exceed
9 the value of the property distributed to the person out of the trust estate. As used in
10 this chapter, the value of the property is the fair market value of the property on
11 the date of its distribution, less the amount of any liens and encumbrances on the
12 property at that time.

13 19403. Nothing in this chapter affects the rights of a purchaser or encumbrancer
14 of property in good faith and for value from a person who is personally liable
15 under this section.

16 **Prob. Code §§ 20100-20125. Proration of estate taxes**

17 Article 1. General Provisions

18 20100. Except where the context otherwise requires, the following definitions
19 shall govern the construction of this chapter:

20 (a) “Estate tax” means a tax imposed by any federal or California estate tax law,
21 now existing or hereafter enacted, and includes interest and penalties on any
22 deficiency.

23 (b) “Person interested in the estate” means any person, including a personal
24 representative, entitled to receive, or who has received, from a decedent while
25 alive or by reason of the death of the decedent any property or interest therein.

26 (c) “Personal representative” includes a guardian, conservator, trustee, or other
27 person charged with the responsibility of paying the estate tax.

28 (d) “Property” means property included in the gross estate for federal estate tax
29 purposes.

30 (e) “Value” means fair market value as determined for federal estate tax
31 purposes.

32 20101. (a) This chapter does not apply to persons interested in the estate of a
33 decedent who died before January 1, 1987.

34 (b) Notwithstanding the repeal of former Article 4a (commencing with Section
35 970) of Chapter 15 of Division 3 of the Probate Code by Chapter 783 of the
36 Statutes of 1986, the provisions of that former article remain applicable where the
37 decedent died before January 1, 1987. No inference as to the applicable law in
38 effect before January 1, 1987, shall be drawn from the enactment of this chapter.

1 Article 2. Proration

2 20110. (a) Except as provided in subdivision (b), any estate tax shall be
3 equitably prorated among the persons interested in the estate in the manner
4 prescribed in this article.

5 (b) This section does not apply:

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

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

16 20111. The proration required by this article shall be made in the proportion that
17 the value of the property received by each person interested in the estate bears to
18 the total value of all property received by all persons interested in the estate,
19 subject to the provisions of this article.

20 20112. (a) In making a proration of the federal estate tax, allowances shall be
21 made for credits allowed for state or foreign death taxes in determining the federal
22 tax payable and for exemptions and deductions allowed for the purpose of
23 determining the taxable estate.

24 (b) In making a proration of the California estate tax, allowances shall be made
25 for (1) credits (other than the credit for state death taxes paid) allowed by the
26 federal estate tax law and attributable to property located in this state, and (2)
27 exemptions and deductions allowed by the federal estate tax law for the purpose of
28 determining the taxable estate attributable to property located in this state.

29 (c) In making a proration of an estate tax, interest on extension of taxes and
30 interest and penalties on any deficiency shall be charged to equitably reflect the
31 benefits and burdens of the extension or deficiency and of any tax deductions
32 associated with the interest and penalties.

33 20113. If a trust is created, or other provision made whereby a person is given
34 an interest in the income of, an estate for years or for life in, or other temporary
35 interest in, any property, the estate tax on both the temporary interest and on the
36 remainder thereafter shall be charged against and paid out of the corpus of the
37 property without apportionment between remainders and temporary estates.

38 20114. (a) As used in this section, “qualified real property” means qualified real
39 property as defined in Section 2032A of the Internal Revenue Code (26 U.S.C.
40 Sec. 2032A).

1 (b) If an election is made pursuant to Section 2032A of the Internal Revenue
2 Code (26 U.S.C. Sec. 2032A), the proration shall be based upon the amount of
3 federal estate tax that would be payable but for the election. The amount of the
4 reduction in federal estate tax resulting from an election pursuant to Section
5 2032A of the Internal Revenue Code (26 U.S.C. Sec. 2032A) shall reduce the tax
6 that is otherwise attributable to the qualified real property that is the subject of the
7 election. If the tax that is otherwise attributable to the qualified real property is
8 reduced to zero pursuant to this subdivision, any excess amount of reduction shall
9 reduce the tax otherwise payable with respect to the other property, this amount to
10 be equitably prorated in accordance with Section 20111.

11 (c) If additional federal estate tax is imposed under subsection (c) of Section
12 2032A of the Internal Revenue Code (26 U.S.C. Sec. 2032A) by reason of early
13 disposition or cessation of qualified use, the additional tax shall be a charge
14 against the portion of the qualified real property to which the additional tax is
15 attributable, and shall be equitably prorated among the persons interested in that
16 portion of the qualified real property in proportion to their interests.

17 20114.5. (a) As used in this section:

18 (1) A reference to Section 4980A of the Internal Revenue Code means Section
19 4980A of the federal Internal Revenue Code of 1986 as amended (26 U.S.C. Sec.
20 4980A) and also means former Section 4981A of the federal Internal Revenue
21 Code of 1986.

22 (2) “Excess retirement accumulation” has the meaning given it in paragraph (3)
23 of subsection (d) of Section 4980A.

24 (b) If the federal estate tax is increased under subsection (d) of Section 4980A of
25 the Internal Revenue Code, the amount of the increase shall be a charge against
26 the persons who receive the excess retirement accumulation that gives rise to the
27 increase, and shall be equitably prorated among all persons who receive interests
28 in qualified employer plans and individual retirement plans to which the excess
29 retirement accumulation is attributable.

30 20115. Where the payment of any portion of the federal estate tax is extended
31 under the provisions of the federal estate tax law, the amount of extended tax shall
32 be a charge against the persons who receive the specific property that gives rise to
33 the extension.

34 20116. (a) If all property does not come into the possession of the personal
35 representative, the personal representative is entitled, and has the duty, to recover
36 from the persons interested in the estate the proportionate amount of the estate tax
37 with which the persons are chargeable under this chapter.

38 (b) If the personal representative cannot collect from any person interested in the
39 estate the amount of an estate tax apportioned to the person, the amount not
40 recoverable shall be equitably prorated among the other persons interested in the
41 estate who are subject to proration.

1 20117. (a) If a person is charged with or required to pay an estate tax greater
2 than the amount prorated to that person because another person does not pay the
3 amount of estate tax prorated to the other person, the person charged with or
4 required to pay the greater amount has a right of reimbursement against the other
5 person.

6 (b) The right of reimbursement may be enforced through the personal
7 representative in the discretion of the personal representative, or may be enforced
8 directly by the person charged with or required to pay the greater amount, and for
9 the purpose of direct enforcement the person is subrogated to the position of the
10 personal representative.

11 (c) The personal representative or person who has a right of reimbursement may
12 commence a proceeding to have a court determine the right of reimbursement. The
13 provisions of Article 3 (commencing with Section 20120) shall govern the
14 proceeding, with changes necessary to make the provisions appropriate for
15 application to the proceeding, and the court order determining the right of
16 reimbursement is an enforceable judgment.

17 Article 3. Judicial Proceedings

18 20120. (a) The personal representative or any person interested in the estate may
19 commence a proceeding to have a court determine the proration pursuant to this
20 chapter.

21 (b) A proceeding under this article shall be commenced in the court in which the
22 estate of the decedent was administered or, if no administration proceedings have
23 been commenced [*sic*], in the superior court of any county in which the estate of
24 the decedent may be administered.

25 (c) If proceedings for the administration of the decedent's estate are pending, a
26 proceeding under this article shall be combined with the administration
27 proceedings. If a proceeding is commenced at any time before final distribution,
28 there shall be no additional filing fee.

29 20121. A proceeding under this article shall be commenced by filing a petition
30 that sets forth all of the following information:

31 (a) The jurisdictional facts.

32 (b) Other facts necessary for the court to determine the proration of estate taxes.

33 20122. Not less than 30 days before the hearing, the petitioner shall do both of
34 the following:

35 (a) Cause notice of the hearing and a copy of the petition to be mailed to the
36 personal representative and to each person interested in the estate against whom
37 prorated amounts may be charged pursuant to paragraph (1) of subdivision (a) of
38 Section 20123.

39 (b) Cause a summons and a copy of the petition to be served on each person
40 interested in the estate who may be directed to make payment of prorated amounts

1 pursuant to paragraph (2) of subdivision (a) of Section 20123. The summons shall
2 be in the form and shall be served in the manner prescribed in Title 5
3 (commencing with Section 410.10) of Part 2 of the Code of Civil Procedure.

4 20123. (a) The court, upon making a determination as provided in this article,
5 shall make an order:

6 (1) Directing the personal representative to charge the prorated amounts against
7 the persons against whom an estate tax has been prorated insofar as the personal
8 representative is in possession of any property or interests of the persons against
9 whom the charge may be made.

10 (2) Summarily directing all other persons against whom an estate tax has been
11 prorated to make payment of the prorated amounts to the personal representative.

12 (b) A court order made under this section is a judgment that may be enforced
13 against the persons against whom an estate tax has been prorated.

14 20124. Upon petition by the personal representative or any person interested in
15 the estate, the court shall modify an order made pursuant to this article whenever it
16 appears that the amount of estate tax as actually determined is different from the
17 amount of estate tax on which the court based the order.

18 20125. (a) A personal representative acting or resident in another state may
19 commence an action in this state to recover from a person interested in the estate,
20 who either is resident in this state or owns property in this state, the amount of the
21 federal estate tax, or an estate tax or death duty payable to another state,
22 apportioned to the person.

23 (b) The action shall be commenced in the superior court of any county in which
24 administration of the estate of the decedent would be proper or, if none, in which
25 any defendant resides.

26 (c) For purposes of the action the apportionment by the court having jurisdiction
27 of the administration of the decedent's estate in the other state is prima facie
28 correct.

29 **Prob. Code §§ 21400-21406. Abatement**

30 21400. Notwithstanding any other provision of this part, if the instrument
31 provides for abatement, or if the transferor's plan or if the purpose of the transfer
32 would be defeated by abatement as provided in this part, the shares of
33 beneficiaries abate as is necessary to effectuate the instrument, plan, or purpose.

34 21401. Except as provided in Sections 21612 (omitted spouse) and 21623
35 (omitted children) and in Division 10 (commencing with Section 20100)
36 (proration of taxes), shares of beneficiaries abate as provided in this part for all
37 purposes, including payment of the debts, expenses, and charges specified in
38 Section 11420, satisfaction of gifts, and payment of expenses on specifically
39 devised property pursuant to Section 12002, and without any priority as between
40 real and personal property.

1 21402. (a) Shares of beneficiaries abate in the following order:

2 (1) Property not disposed of by the instrument.

3 (2) Residuary gifts.

4 (3) General gifts to persons other than the transferor's relatives.

5 (4) General gifts to the transferor's relatives.

6 (5) Specific gifts to persons other than the transferor's relatives.

7 (6) Specific gifts to the transferor's relatives.

8 (b) For purposes of this section, a "relative" of the transferor is a person to
9 whom property would pass from the transferor under Section 6401 or 6402
10 (intestate succession) if the transferor died intestate and there were no other person
11 having priority.

12 21403. (a) Subject to subdivision (b), shares of beneficiaries abate pro rata
13 within each class specified in Section 21402.

14 (b) Gifts of annuities and demonstrative gifts are treated as specific gifts to the
15 extent they are satisfied out of the fund or property specified in the gift and as
16 general gifts to the extent they are satisfied out of property other than the fund or
17 property specified in the gift.

18 21404. If an instrument requires property that is the subject of a specific gift to
19 be exonerated from a mortgage, deed of trust, or other lien, a specific gift of other
20 property does not abate for the purpose of exonerating the encumbered property.

21 21405. (a) In any case in which there is abatement when a distribution is made
22 during estate administration, the court shall fix the amount each distributee must
23 contribute for abatement. The personal representative shall reduce the distributee's
24 share by that amount.

25 (b) If a specific gift must be abated, the beneficiary of the specific gift may
26 satisfy the contribution for abatement out of the beneficiary's property other than
27 the property that is the subject of the specific gift.

28 21406. (a) This part does not apply to a gift made before July 1, 1989. In the
29 case of a gift made before July 1, 1989, the law that would have applied had this
30 part not been enacted shall apply. (b) For purposes of this section a gift by will is
31 made on the date of the decedent's death.

32 **MISSOURI STATUTE**

33 **Rev. Stat. Mo. § 461.300**

34 461.300. 1. Each recipient of a recoverable transfer of a decedent's property
35 shall be liable to account for a pro rata share of the value of all such property
36 received, to the extent necessary to discharge the statutory allowances to the
37 decedent's surviving spouse and dependent children, and claims remaining unpaid
38 after application of the decedent's estate, including expenses of administration and
39 costs as provided in subsection 3 of this section, and including estate or

1 inheritance or other transfer taxes imposed by reason of the decedent's death only
2 where payment of those taxes is a prerequisite to satisfying unpaid claims which
3 have a lower level of priority. No proceeding may be brought under this section
4 when the deficiency described in this subsection is solely attributable to costs and
5 expenses of administration.

6 2. The obligation of a recipient of a recoverable transfer may be enforced by an
7 action for accounting commenced within eighteen months following the
8 decedent's death by the decedent's personal representative or a qualified claimant,
9 but no action for accounting under this section shall be commenced by any
10 qualified claimant unless the personal representative has received a written
11 demand therefor by a qualified claimant, within sixteen months following the
12 decedent's death. If the personal representative fails to commence an action within
13 thirty days of the receipt of a written demand to do so, any qualified claimant may
14 commence such action. If the personal representative fails to commence the
15 action, the personal representative shall disclose to the qualified claimant or
16 qualified claimants who made such written demand all material knowledge within
17 the possession of the personal representative reasonably relating to the identity of
18 any recipient of a recoverable transfer made by the decedent. In the event the
19 personal representative fails to provide such information with respect to any
20 recoverable transfer of the decedent's property to the personal representative, the
21 eighteen-month limitation is tolled for such recoverable transfer until such time as
22 the personal representative provides such information. In the event the personal
23 representative is alleged in a verified pleading to be a recipient of a recoverable
24 transfer from the decedent, the court may appoint an administrator ad litem to
25 represent the estate in any proceeding brought pursuant to this section. Sums
26 recovered in an action for accounting under this section shall be administered by
27 the personal representative as part of the decedent's estate.

28 3. The judgment in a proceeding authorized by this section shall take into
29 account the expenses of administration of the estate including the cost of
30 administering the additional assets obtained in the proceeding, and the costs of the
31 proceeding to the extent authorized by this subsection. The court may order the
32 costs of the proceeding, including attorney fees, to be treated as expenses of
33 administration of the estate.

34 4. If an action for accounting has been commenced under this section within
35 eighteen months following the decedent's death, then any party to the proceeding
36 may join and bring into the action for accounting any other recipient of a
37 recoverable transfer of the decedent's property even if the other recipient is not
38 joined until more than eighteen months following the decedent's death. If an
39 action for accounting has been commenced under this section more than eighteen
40 months following the decedent's death pursuant to the tolling provisions of
41 subsection 2 of this section, then the personal representative, or former personal
42 representative, who received a recoverable transfer of the decedent's property
43 shall be liable to account under the provisions of subsection 1 of this section for

1 the value of all such property received by such personal representative, or former
2 personal representative, and no other recipient of a recoverable transfer of the
3 decedent's property may be joined or brought into the action, and in such case, full
4 recovery, rather than pro rata recovery, may be had from the recoverable property
5 received by such personal representative or former personal representative.

6 5. This section shall not affect the right of any transferring entity, as defined in
7 section 461.005, to execute a direction of the decedent to make a payment or to
8 make a recoverable transfer on death of the decedent, or make the transferring
9 entity liable to the decedent's estate, unless before the payment or transfer is made
10 the transferring entity has been served with process in a proceeding brought under
11 this section and the transferring entity has had a reasonable time to act on it.

12 6. This section does not create a lien on any property that is the subject of a
13 recoverable transfer, except as a lien may be perfected by the way of attachment,
14 garnishment, or judgment in an accounting proceeding authorized by this section.

15 7. An action for accounting under the provisions of this section may be filed in
16 the probate division of the circuit court, and the probate division of the circuit
17 court may hear and determine questions and issue appropriate orders in an action
18 for accounting under this section. Any proceeding under this section and any
19 statements by a personal representative in connection with any recoverable
20 transfer shall be deemed to be proceedings or statements under the probate code
21 that are subject to section 472.013, RSMo.

22 8. The recipient of any property held in trust that was subject to the satisfaction
23 of the decedent's debts immediately prior to the decedent's death, and the
24 recipient of any property held in joint tenancy with right of survivorship that was
25 subject to the satisfaction of the decedent's debts immediately prior to the
26 decedent's death, are subject to this section, but only to the extent of the
27 decedent's contribution to the value of the property.

28 9. The provisions of this section shall apply to all actions commenced after
29 August 28, 1995, except that with respect to decedents dying prior to August 28,
30 1995, an action for accounting under this section may be commenced within two
31 years following the decedent's death.

32 10. As used in this section, the following terms mean:

33 (1) "Creditor", any person to whom the decedent is liable, which liability
34 survives whether arising in contract, tort, or otherwise, and any person to whom
35 the decedent's estate is liable for funeral expenses and the reasonable cost of a
36 tombstone;

37 (2) "Dependent child", the decedent's minor children whom the decedent was
38 obligated to support and the children who were in fact being supported by the
39 decedent;

40 (3) "Qualified claimant", a creditor, surviving spouse, dependent child, or a
41 person acting for a dependent child of the decedent;

42 (4) "Recoverable transfer", a nonprobate transfer of a decedent's property under
43 sections 461.003 to 461.081 and any other transfer of a decedent's property other

1 than from the administration of the decedent's probate estate that was subject to
2 satisfaction of the decedent's debts immediately prior to the decedent's death, but
3 only to the extent of the decedent's contribution to the value of such property.

4 WASHINGTON STATUTES

5 **Rev. Code Wash. § 11.18.200. Liability of beneficiary of nonprobate asset**

6 (1) Unless expressly exempted by statute, a beneficiary of a nonprobate asset
7 that was subject to satisfaction of the decedent's general liabilities immediately
8 before the decedent's death takes the asset subject to liabilities, claims, estate
9 taxes, and the fair share of expenses of administration reasonably incurred by the
10 personal representative in the transfer of or administration upon the asset. The
11 beneficiary of such an asset is liable to account to the personal representative to
12 the extent necessary to satisfy liabilities, claims, the asset's fair share of expenses
13 of administration, and the asset's share of estate taxes under chapter 83.110 RCW.
14 Before making demand that a beneficiary of a nonprobate asset account to the
15 personal representative, the personal representative shall give notice to the
16 beneficiary, in the manner provided in chapter 11.96A RCW, that the beneficiary
17 is liable to account under this section.

18 (2) The following rules govern in applying subsection (1) of this section:

19 (a) A beneficiary of property passing at death under a community property
20 agreement takes the property subject to the decedent's liabilities, claims, estate
21 taxes, and administration expenses as described in subsection (1) of this section.
22 However, assets existing as community or separate property immediately before
23 the decedent's death under the community property agreement are subject to the
24 decedent's liabilities and claims to the same extent that they would have been had
25 they been assets of the probate estate.

26 (b) A beneficiary of property held in joint tenancy form with right of
27 survivorship, including without limitation United States savings bonds or similar
28 obligations, takes the property subject to the decedent's liabilities, claims, estate
29 taxes, and administration expenses as described in subsection (1) of this section to
30 the extent of the decedent's beneficial ownership interest in the property
31 immediately before death.

32 (c) A beneficiary of payable-on-death or trust bank accounts, bonds, securities,
33 or similar obligations, including without limitation United States bonds or similar
34 obligations, takes the property subject to the decedent's liabilities, claims, estate
35 taxes, and administration expenses as described in subsection (1) of this section, to
36 the extent of the decedent's beneficial ownership interest in the property
37 immediately before death.

38 (d) A beneficiary of deeds or conveyances made by the decedent if possession
39 has been postponed until the death of the decedent takes the property subject to the
40 decedent's liabilities, claims, estate taxes, and administration expenses as

1 described in subsection (1) of this section, to the extent of the decedent's
2 beneficial ownership interest in the property immediately before death.

3 (e) A trust for the decedent's use of which the decedent is the grantor is subject
4 to the decedent's liabilities, claims, estate taxes, and administration expenses as
5 described in subsection (1) of this section, to the same extent as the trust was
6 subject to claims of the decedent's creditors immediately before death under RCW
7 19.36.020.

8 (f) A trust not for the use of the grantor but of which the decedent is the grantor
9 and that becomes effective or irrevocable only upon the decedent's death is subject
10 to the decedent's claims, liabilities, estate taxes, and expenses of administration as
11 described in subsection (1) of this section.

12 (g) Anything in this section to the contrary notwithstanding, nonprobate assets
13 that existed as community property immediately before the decedent's death are
14 subject to the decedent's liabilities and claims to the same extent that they would
15 have been had they been assets of the probate estate.

16 (h) The liability of a beneficiary of life insurance is governed by chapter 48.18
17 RCW.

18 (i) The liability of a beneficiary of pension or retirement employee benefits is
19 governed by chapter 6.15 RCW.

20 (j) An inference may not be drawn from (a) through (i) of this subsection that a
21 beneficiary of nonprobate assets other than those assets specifically described in
22 (a) through (i) of this subsection does or does not take the assets subject to claims,
23 liabilities, estate taxes, and administration expenses as described in subsection (1)
24 of this section.

25 (3) Nothing in this section derogates from the rights of a person interested in the
26 estate to recover tax under chapter 83.110 RCW or from the liability of any
27 beneficiary for estate tax under chapter 83.110 RCW.

28 (4) Nonprobate assets that may be responsible for the satisfaction of the
29 decedent's general liabilities and claims abate together with the probate assets of
30 the estate in accord with chapter 11.10 RCW.

31 **Rev. Code Wash. §§ 11.42.010-.900. Settlement of creditor claims for estates passing without**
32 **probate**

33 11.42.010. Notice agent — Qualifications.

34 (1) Subject to the conditions stated in this chapter, and if no personal
35 representative has been appointed in this state, a beneficiary or trustee who has
36 received or is entitled to receive by reason of the decedent's death substantially all
37 of the decedent's probate and nonprobate assets, is qualified to give nonprobate
38 notice to creditors under this chapter.

39 If no one beneficiary or trustee has received or is entitled to receive substantially
40 all of the assets, then those persons, who in the aggregate have received or are

1 entitled to receive substantially all of the assets, may, under an agreement under
2 RCW 11.96A.220, appoint a person who is then qualified to give nonprobate
3 notice to creditors under this chapter.

4 (2) A person or group of persons is deemed to have received substantially all of
5 the decedent's probate and nonprobate assets if the person or the group, at the time
6 of the filing of the declaration and oath referred to in subsection (3) of this section,
7 in reasonable good faith believed that the person or the group had received, or was
8 entitled to receive by reason of the decedent's death, substantially all of the
9 decedent's probate and nonprobate assets.

10 (3)(a) The "notice agent" means the qualified person who:

11 Pays a filing fee to the clerk of the superior court in a county in which probate
12 may be commenced regarding the decedent, the "notice county", and receives a
13 cause number; and

14 Files a declaration and oath with the clerk.

15 (b) The declaration and oath must be made in affidavit form or under penalty of
16 perjury and must state that the person making the declaration believes in
17 reasonable good faith that the person is qualified under this chapter to act as the
18 notice agent and that the person will faithfully execute the duties of the notice
19 agent as provided in this chapter.

20 (4) The following persons are not qualified to act as notice agent:

21 (a) Corporations, trust companies, and national banks, except: (i) Such entities
22 as are authorized to do trust business in this state; and (ii) professional service
23 corporations that are regularly organized under the laws of this state whose
24 shareholder or shareholders are exclusively attorneys;

25 (b) Minors;

26 (c) Persons of unsound mind;

27 (d) Persons who have been convicted of a felony or of a misdemeanor involving
28 moral turpitude; and

29 (e) Persons who have given notice under this chapter and who thereafter become
30 of unsound mind or are convicted of a felony or misdemeanor involving moral
31 turpitude. This disqualification does not bar another person, otherwise qualified,
32 from acting as successor notice agent.

33 (5) A nonresident may act as notice agent if the nonresident appoints an agent
34 who is a resident of the notice county or who is attorney of record for the notice
35 agent upon whom service of all papers may be made. The appointment must be
36 made in writing and filed with the court.

37 11.42.020. Notice to creditors — Manner — Filings — Publication

38 Subject to subsection (2) of this section, a notice agent may give nonprobate
39 notice to the creditors of the decedent if: (a) As of the date of the filing of the
40 notice to creditors with the court, the notice agent has no knowledge of another

1 person acting as notice agent or of the appointment of a personal representative in
2 the decedent's estate in the state of Washington; and

3 (b) According to the records of the court as are available on the date of the filing
4 of the notice to creditors, no cause number regarding the decedent has been issued
5 to any other notice agent and no personal representative of the decedent's estate
6 had been appointed.

7 (2) The notice agent must give notice to the creditors of the decedent, in
8 substantially the form set forth in RCW 11.42.030, announcing that the notice
9 agent has elected to give nonprobate notice to creditors and requiring that persons
10 having claims against the decedent present their claims within the time specified in
11 RCW 11.42.050 or be forever barred as to claims against the decedent's probate
12 and nonprobate assets.

13 (a) The notice agent shall file the notice with the court.

14 (b) The notice agent shall cause the notice to be published once each week for
15 three successive weeks in a legal newspaper in the notice county.

16 (c) The notice agent may at any time give actual notice to creditors who become
17 known to the notice agent by serving the notice on the creditor or mailing the
18 notice to the creditor at the creditor's last known address, by regular first-class
19 mail, postage prepaid.

20 (d) The notice agent shall also mail a copy of the notice, including the
21 decedent's social security number, to the state of Washington department of social
22 and health services' office of financial recovery.

23 (e) If the decedent was a resident of the state of Washington at the time of death
24 and the notice agent's declaration and oath were filed in a county other than the
25 county of the decedent's residence, then instead of the requirements in (a) and (b)
26 of this subsection, the notice agent shall cause the notice to creditors in
27 substantially the form set forth in RCW 11.42.030 to be published once each week
28 for three successive weeks in a legal newspaper in the county of the decedent's
29 residence and shall file the notice with the superior court of the county in which
30 the notice agent's declaration and oath were filed.

31 The notice agent shall file with the court proof by affidavit of the giving and
32 publication of the notice.

33 11.42.030. Notice to creditors — Form

34 Notice under RCW 11.42.020 must contain the following elements in
35 substantially the following form

1 11.42.040. “Reasonably ascertainable” creditor — Definition —
2 Reasonable diligence — Presumptions — Petition for order

3 (1) For purposes of RCW 11.42.050, a “reasonably ascertainable” creditor of the
4 decedent is one that the notice agent would discover upon exercise of reasonable
5 diligence. The notice agent is deemed to have exercised reasonable diligence upon
6 conducting a reasonable review of the decedent’s correspondence, including
7 correspondence received after the date of death, and financial records, including
8 personal financial statements, loan documents, checkbooks, bank statements, and
9 income tax returns, that are in the possession of or reasonably available to the
10 notice agent.

11 (2) If the notice agent conducts the review, the notice agent is presumed to have
12 exercised reasonable diligence to ascertain creditors of the decedent and any
13 creditor not ascertained in the review is presumed not reasonably ascertainable
14 within the meaning of RCW 11.42.050. These presumptions may be rebutted only
15 by clear, cogent, and convincing evidence.

16 (3) The notice agent may evidence the review and resulting presumption by
17 filing with the court an affidavit regarding the facts referred to in this section. The
18 notice agent may petition the court for an order declaring that the notice agent has
19 made a review and that any creditors not known to the notice agent are not
20 reasonably ascertainable. The petition must be filed under RCW 11.96A.080, and
21 the notice specified under RCW 11.96A.110 must also be given by publication.

22 11.42.050. Claims against decedent — Time limits

23 (1) If a notice agent provides notice under RCW 11.42.020, any person having a
24 claim against the decedent is forever barred from making a claim or commencing
25 an action against the decedent if the claim or action is not already barred by an
26 otherwise applicable statute of limitations, unless the creditor presents the claim in
27 the manner provided in RCW 11.42.070 within the following time limitations:

28 (a) If the notice agent provided notice under RCW 11.42.020(2) (a) and (b) and
29 the creditor was given actual notice as provided in RCW 11.42.020(2)(c), the
30 creditor must present the claim within the later of: (i) Thirty days after the notice
31 agent’s service or mailing of notice to the creditor; and (ii) four months after the
32 date of first publication of the notice;

33 (b) If the notice agent provided notice under RCW 11.42.020(2) (a) and (b) and
34 the creditor was not given actual notice as provided in RCW 11.42.020(2)(c):

35 (i) If the creditor was not reasonably ascertainable, as defined in RCW
36 11.42.040, the creditor must present the claim within four months after the date of
37 first publication of the notice;

38 (ii) If the creditor was reasonably ascertainable, as defined in RCW 11.42.040,
39 the creditor must present the claim within twenty-four months after the decedent’s
40 date of death.

1 (2) Any otherwise applicable statute of limitations applies without regard to the
2 tolling provisions of RCW 4.16.190.

3 (3) This bar is effective as to claims against both the decedent's probate and
4 nonprobate assets.

5 11.42.060. Claims involving liability or casualty insurance —
6 Limitations — Exceptions to time limits

7 The time limitations for presenting claims under this chapter do not accrue to the
8 benefit of any liability or casualty insurer. Claims against the decedent or the
9 decedent's marital community that can be fully satisfied by applicable insurance
10 coverage or proceeds need not be presented within the time limitation of RCW
11 11.42.050, but the amount of recovery cannot exceed the amount of the insurance.
12 If a notice agent provides notice under RCW 11.42.020, the claims may at any
13 time be presented as provided in RCW 11.42.070, subject to the otherwise relevant
14 statutes of limitations, and does not constitute a cloud, lien, or encumbrance upon
15 the title to the decedent's probate or nonprobate assets nor delay or prevent the
16 transfer or distribution of the decedent's assets. This section does not serve to
17 extend any otherwise relevant statutes of limitations.

18 11.42.070. Claims — Form — Manner of presentation — Waiver of
19 defects

20 (1) The claimant, the claimant's attorney, or the claimant's agent shall sign the
21 claim and include in the claim the following information:

- 22 (a) The name and address of the claimant;
23 (b) The name, address, if different from that of the claimant, and nature of
24 authority of an agent signing the claim on behalf of the claimant;
25 (c) A statement of the facts or circumstances constituting the basis of the claim;
26 (d) The amount of the claim; and
27 (e) If the claim is secured, unliquidated, contingent, or not yet due, the nature of
28 the security, the nature of the uncertainty, or the date when it will become due.

29 Failure to describe correctly the information in (c), (d), or (e) of this subsection,
30 if the failure is not substantially misleading, does not invalidate the claim.

31 (2) A claim does not need to be supported by affidavit.

32 (3) A claim must be presented within the time limits set forth in RCW 11.42.050
33 by: (a) Serving on or mailing to, by regular first-class mail, the notice agent or the
34 notice agent's attorney a copy of the signed claim; and (b) filing the original of the
35 signed claim with the court in which the notice agent's declaration and oath were
36 filed. A claim is deemed presented upon the later of the date of postmark or
37 service on the notice agent, or the notice agent's attorney, and filing with the
38 court.

1 (4) Notwithstanding any other provision of this chapter, if a claimant makes a
2 written demand for payment within the time limits set forth in RCW 11.42.050,
3 the notice agent may waive formal defects and elect to treat the demand as a claim
4 properly filed under this chapter if: (a) The claim was due; (b) the amount paid
5 was the amount of indebtedness over and above all payments and offsets; (c) the
6 estate is solvent; and (d) the payment is made in good faith. Nothing in this
7 chapter limits application of the doctrines of waiver, estoppel, or detrimental
8 claims or any other equitable principle.

9 11.42.080. Claims — Duty to allow or reject — Notice of petition to
10 allow — Attorneys' fees

11 (1) The notice agent shall allow or reject all claims presented in the manner
12 provided in RCW 11.42.070. The notice agent may allow or reject a claim, in
13 whole or in part.

14 (2) If the notice agent has not allowed or rejected a claim within the later of four
15 months from the date of first publication of the notice to creditors and thirty days
16 from presentation of the claim, the claimant may serve written notice on the notice
17 agent that the claimant will petition the court to have the claim allowed. If the
18 notice agent fails to notify the claimant of the allowance or rejection of the claim
19 within twenty days after the notice agent's receipt of the claimant's notice, the
20 claimant may petition the court for a hearing to determine whether the claim
21 should be allowed or rejected, in whole or in part. If the court substantially allows
22 the claim, the court may allow the petitioner reasonable attorneys' fees chargeable
23 against the decedent's assets received by the notice agent or by those appointing
24 the notice agent.

25 11.42.085. Property liable for claims — Payment limits

26 (1) The decedent's nonprobate and probate assets that were subject to the
27 satisfaction of the decedent's general liabilities immediately before the decedent's
28 death are liable for claims. The decedent's probate assets may be liable, whether
29 or not there is a probate administration of the decedent's estate.

30 (2) The notice agent may pay a claim allowed by the notice agent or a judgment
31 on a claim first prosecuted against a notice agent only out of assets received as a
32 result of the death of the decedent by the notice agent or by those appointing the
33 notice agent, except as may be provided by agreement under RCW 11.96A.220 or
34 by court order issued in a judicial proceeding under RCW 11.96A.080.

35 11.42.090. Allowance of claims — Notice — Payment order

36 (1) If the notice agent allows a claim, the notice agent shall notify the claimant
37 of the allowance by personal service or regular first-class mail to the address

1 stated on the claim. A claim may not be allowed if it is barred by a statute of
2 limitations.

3 (2) The notice agent shall pay claims allowed in the following order from the
4 assets of the decedent that are subject to the payment of claims as provided in
5 RCW 11.42.085:

6 (a) Costs of administering the assets subject to the payment of claims, including
7 a reasonable fee to the notice agent, any resident agent for the notice agent,
8 reasonable attorneys' fees for the attorney for each of them, filing fees, publication
9 costs, mailing costs, and similar costs and fees;

10 (b) Funeral expenses in a reasonable amount;

11 (c) Expenses of the last sickness in a reasonable amount;

12 (d) Wages due for labor performed within sixty days immediately preceding the
13 death of the decedent;

14 (e) Debts having preference by the laws of the United States;

15 (f) Taxes, debts, or dues owing to the state;

16 (g) Judgments rendered against the decedent in the decedent's lifetime that are
17 liens upon real estate on which executions might have been issued at the time of
18 the death of the decedent and debts secured by mortgages in the order of their
19 priority; and

20 (h) All other demands against the assets subject to the payment of claims.

21 (3) The notice agent may not pay a claim of the notice agent or other person who
22 has received property by reason of the decedent's death unless all other claims that
23 have been filed under this chapter, and all debts having priority to the claim, are
24 paid in full or otherwise settled by agreement, regardless of whether the other
25 claims are allowed or rejected.

26 11.42.100. Rejection of claim — Time limits — Notice — Time
27 limit for suit — Compromise of claim

28 (1) If the notice agent rejects a claim, in whole or in part, the claimant must
29 bring suit against the notice agent within thirty days after notification of rejection
30 or the claim is forever barred. The notice agent shall notify the claimant of the
31 rejection and file an affidavit with the court showing the notification and the date
32 of the notification. The notice agent shall notify the claimant of the rejection by
33 personal service or certified mail addressed to the claimant or claimant's agent, if
34 applicable, at the address stated in the claim. The date of service or of the
35 postmark is the date of notification. The notification must advise the claimant that
36 the claimant must bring suit in the proper court against the notice agent within
37 thirty days after notification of rejection or the claim will be forever barred.

38 (2) If a claimant brings suit against the notice agent on a rejected claim and the
39 notice agent has not received substantially all assets of the decedent that are liable
40 for claims, the notice agent may only make an appearance in the action and may
41 not answer the action but must cause a petition to be filed for the appointment of a

1 personal representative within thirty days after service of the creditor's action on
2 the notice agent. Under these circumstances, a judgment may not be entered in an
3 action brought by a creditor against the notice agent earlier than twenty days after
4 the personal representative has been substituted in that action for the notice agent.

5 (3) The notice agent may, before or after rejection of any claim, compromise the
6 claim, whether due or not, absolute or contingent, liquidated, or unliquidated.

7 11.42.110. Effect of judgment against notice agent

8 The effect of a judgment rendered against the notice agent shall be only to
9 establish the amount of the judgment as an allowed claim.

10 11.42.120. Execution barred upon decedent's death — Presentation
11 — Sale of property

12 If a judgment was entered against the decedent during the decedent's lifetime,
13 an execution may not issue on the judgment after the death of the decedent. If a
14 notice agent is acting, the judgment must be presented in the manner provided in
15 RCW 11.42.070, but if the judgment is a lien on any property of the decedent, the
16 property may be sold for the satisfaction of the judgment and the officer making
17 the sale shall account to the notice agent for any surplus.

18 11.42.125. Secured claim — Creditor's right

19 If a creditor's claim is secured by any property of the decedent, this chapter does
20 not affect the right of the creditor to realize on the creditor's security, whether or
21 not the creditor presented the claim in the manner provided in RCW 11.42.070.

22 11.42.130. Claim of notice agent or beneficiary — Payment

23 A claim of the notice agent or other person who has received property by reason
24 of the decedent's death must be paid as set forth in RCW 11.42.090(3).

25 11.42.140. Notice to creditors when notice agent resigns, dies, or is
26 removed — Limit tolled by vacancy

27 (1) If a notice agent has given notice under RCW 11.42.020 and the notice agent
28 resigns, dies, or is removed or a personal representative is appointed, the successor
29 notice agent or the personal representative shall:

30 (a) Publish notice of the vacancy and succession for two successive weeks in the
31 legal newspaper in which notice was published under RCW 11.42.020, if the
32 vacancy occurred within twenty-four months after the decedent's date of death;
33 and

1 (b) Provide actual notice of the vacancy and succession to a creditor if: (i) The
2 creditor filed a claim and the claim had not been allowed or rejected by the prior
3 notice agent; or (ii) the creditor's claim was rejected and the vacancy occurred
4 within thirty days after rejection of the claim.

5 (2) The time between the resignation, death, or removal of the notice agent or
6 appointment of a personal representative and the first publication of the vacancy
7 and succession or, in the case of actual notice, the mailing of the notice of vacancy
8 and succession must be added to the time within which a claim must be presented
9 or a suit on a rejected claim must be filed. This section does not extend the twenty-
10 four-month self-executing bar under RCW 11.42.050.

11 11.42.150. Appointment of personal representative — Cessation of
12 notice agent powers and authority — Notice not affected — Personal
13 representative's powers — Petition for reimbursement for
14 allowance and payment of claims by notice agent

15 (1) The powers and authority of a notice agent immediately cease, and the office
16 of notice agent becomes vacant, upon appointment of a personal representative for
17 the estate of the decedent. Except as provided in RCW 11.42.140(2), the cessation
18 of the powers and authority does not affect the filing and publication of notice to
19 creditors and does not affect actual notice to creditors given by the notice agent.

20 (2) As set forth in RCW 11.40.160, a personal representative may adopt, ratify,
21 nullify, or reject any actions of the notice agent.

22 (3) If a personal representative is appointed and the personal representative does
23 not nullify the allowance of a claim that the notice agent allowed and paid, the
24 person or persons whose assets were used to pay the claim may petition for
25 reimbursement from the estate to the extent the payment was not in accordance
26 with chapter 11.10 RCW.

27 11.42.900. Construction—Chapter applicable to state registered
28 domestic partnerships

29 For the purposes of this chapter, the terms spouse, marriage, marital, husband,
30 wife, widow, widower, next of kin, and family shall be interpreted as applying
31 equally to state registered domestic partnerships or individuals in state registered
32 domestic partnerships as well as to marital relationships and married persons, and
33 references to dissolution of marriage shall apply equally to state registered
34 domestic partnerships that have been terminated, dissolved, or invalidated, to the
35 extent that such interpretation does not conflict with federal law. Where necessary
36 to implement chapter 521, Laws of 2009, gender-specific terms such as husband
37 and wife used in any statute, rule, or other law shall be construed to be gender
38 neutral, and applicable to individuals in state registered domestic partnerships.

1 commence the proceeding in the name of the decedent's estate, at the expense of
2 the person making the demand and not of the estate. A personal representative
3 who declines in good faith to commence a requested proceeding incurs no
4 personal liability for declining.

5 (h) A proceeding under this section must be commenced within one year after
6 the decedent's death, but a proceeding on behalf of a creditor whose claim was
7 allowed after proceedings challenging disallowance of the claim may be
8 commenced within 60 days after final allowance of the claim.

9 (i) Unless a written notice asserting that a decedent's probate estate is
10 nonexistent or insufficient to pay allowed claims and statutory allowances has
11 been received from the decedent's personal representative, the following rules
12 apply:

13 (1) Payment or delivery of assets by a financial institution, registrar, or other
14 obligor, to a nonprobate transferee in accordance with the terms of the governing
15 instrument controlling the transfer releases the obligor from all claims for amounts
16 paid or assets delivered.

17 (2) A trustee receiving or controlling a nonprobate transfer is released from
18 liability under this section with respect to any assets distributed to the trust's
19 beneficiaries. Each beneficiary to the extent of the distribution received becomes
20 liable for the amount of the trustee's liability attributable to assets received by the
21 beneficiary.

22 COMMENT

23 1. This section, which is similar to Section 6-102 of the UPC, was added to both this Code and
24 this Act in 1998. This section clarifies that the recipients of nonprobate transfers can be required
25 to contribute to pay allowed claims and statutory allowances to the extent the probate estate is
26 inadequate. The maximum liability for a single nonprobate transferee is the value of the transfer.
27 Values are determined under (b) as of the time when the benefits are "received or controlled by
28 the transferee." This would be the date of the decedent's death for nonprobate transfers made by
29 means of a revocable trust, and date of receipt for other nonprobate transfers. Two or more
30 transferees are severally liable for the portion of the liability based on the value of transfers
31 received by each.

32 This section replaces Section 6-107 of the original Code, and its 1989 sequel, 6-215 (Section
33 215 of this Act). To the extent a deceased party's probate estate was insufficient, these sections
34 made a deceased party's interest in multiple-party accounts in financial institutions passing
35 outside probate liable for the deceased party's statutory allowances and creditor claims. Assets
36 passing at death by revocable trust or TOD asset registration agreements were not covered by
37 these sections. Also, Section 6-201(b) of the original Code and its sequel, 6-101(b) (Section
38 101(b) of this Act), provided merely that the section did not limit any other rights that might
39 exist. Neither section created any rights.

40 If there are no probate assets, a creditor or other person seeking to use this section would first
41 need to secure appointment of a personal representative to invoke probate procedures for
42 establishing a creditor's claim as "allowed." The use of probate proceedings as a prerequisite to
43 gaining rights for creditors against nonprobate transferees has been a feature of UPC Article VI
44 since originally approved in 1969. Requiring that a probate proceeding be initiated works well in
45 practice if procedures for opening estates, satisfying statutory allowances, and presenting claims,
46 approximate UPC procedures.

47 2. Section 102 replaces Section 215 with coverage designed to extend the principle of Section
48 215 to transfers at death by revocable trust, TOD security registration agreements and similar

1 death benefits not insulated from decedents' creditors by other legislation. The initial clause of
2 (b), "Except as otherwise provided by statute," is designed to prevent a conflict with and to
3 clarify that this section does not supersede existing legislation protecting death benefits in life
4 insurance, retirement plans and IRAs from claims by creditors.

5 If a state's insurance laws do not protect a particular insurance death benefit, the insured's
6 creditors would not be able to establish a "nonprobate transfer" under (a) except to the extent of
7 any cash surrender value generated by premiums paid by the insured that the insured could have
8 obtained immediately before death. Note, also, that (i)(1) would protect a life insurance company
9 that paid a death benefit before receiving written notice from the decedent's personal
10 representative.

11 3. The definition of "nonprobate transfer" in subsection (a) includes revocable transfers by a
12 decedent; it does not apply to a transfer at death incident to a decedent's exercise or non-exercise
13 of a presently exercisable general power of appointment created by another person. The drafters
14 decided against including such powers even though presently exercisable general powers of
15 appointment are subject to the UPC's augmented estate provisions dealing with intentional
16 disinheritance of a surviving spouse. Spousal protection against disinheritance by the other
17 spouse supports the institution of marriage; creditors are better able to fend for themselves than
18 financially disadvantaged surviving spouses. In addition, a presently exercisable general power of
19 appointment created by another person is commonly viewed as a provision in the trust creator's
20 instrument designed to provide flexibility in the estate plan rather than as a gift to the donee.

21 4. The required ability to revoke or otherwise prevent a nonprobate transfer at death that is vital
22 to application of subsection (a) is described as a "power," a word intended by the drafters to
23 signify legal authority rather than capacity or practical ability. This corresponds to the definition
24 in UPC Section 2-201(6).

25 5. The exclusion of "a survivorship interest in a joint tenancy of real estate" from the definition
26 of "nonprobate transfer" in subsection (a) is contrary to the law of some states (e.g., South
27 Dakota) that allow an insolvent decedent's creditors to reach the share the decedent could have
28 received prior to death by unilateral severance of the joint tenancy. The law in most other states is
29 to the contrary. By excluding real estate joint tenancies, stability of title and ease of title
30 examination is preserved. Moreover, real estate joint tenancies have served for generations to
31 keep the share of a couple's real estate owned by the first to die out of probate and away from
32 estate creditors. This familiar arrangement need not be disturbed incident to expanding the ability
33 of decedents' creditors to reach newly recognized nonprobate transfers at death.

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

38 6. A feature of replaced Section 215 that was clarified by a 1991 technical amendment
39 protected a survivor beneficiary of a joint account from liability to the probate estate of a
40 deceased co-depositor for funds in the account owned by the survivor prior to decedent's death.
41 Subsection (a) continues this protection by use of the language "valid transfer effective at death ...
42 by a transferor ... [who] had power, acting alone, to prevent the transfer by revocation or
43 withdrawal and instead use the property for the benefit of the transferor" Section 211 and
44 related sections of the Act make it clear that parties to a joint and survivor account separately own
45 values in the account in proportion to net contributions. Hence, a surviving joint account
46 depositor who had contributed to the balance on deposit prior to the death of the other party is
47 subject to the remedies described in this section only to the extent of new account values gained
48 through survival of the decedent.

49 7. Transferees of nonprobate transfers subject to the possible liability described in subsection
50 (b) include trustees of revocable trusts to the extent assets transferred to the trust before death
51 were subject to the decedent's sole power to revoke. Such assets would be valued as of the date of
52 death. While the trustee of an irrevocable trust, or of a trust that may be revoked only by the
53 settlor and another person would ordinarily not be subject to this section, this section could apply
54 if the trust is named as a beneficiary of a nonprobate transfer, such as of securities registered in

1 TOD form. Under subsection (b), such a transfer would involve a possibility of trust liability
2 based on the value of the TOD transfer as of the time of its receipt. Liability under this section
3 incurred by a trustee is a trust liability for which the trustee does not incur personal liability.

4 8. Trusts and non-trust recipients of nonprobate transfers incur liability in the order prescribed
5 in subsection (c). Note that either a revocable or an irrevocable trust might be designated devisee
6 of a pour-over provision that would make the trust the “principal non-probate instrument in the
7 decedent’s estate plan” and, consequently, make it liable under subsection (c)(2) ahead of other
8 nonprobate transferees to the extent of values acquired by a transfer at death as described in
9 subsection (a). Note, too, that nothing would pass to the receptacle trust by the pour-over devise if
10 all probate estate assets are used to discharge statutory allowances and claims. However, the fact
11 that the trust was designated to receive a pour-over devise signals that the trust probably includes
12 the equivalent of a residuary clause measuring benefits by available assets and signaling probable
13 intention of the settlor that residuary benefits should abate to pay the settlor’s debts prior to other
14 trust gifts.

15 9. The abatement order among classes of beneficiaries of trusts specified by subsection (d)
16 applies to all trusts subject to liability to the extent of nonprobate transfers received or
17 administered whether or not the trust instrument is the principal nonprobate instrument in the
18 decedent’s estate plan. The drafters decided against a cross-reference to the enacting
19 jurisdiction’s abatement provision in part because those provisions usually deal with intestate and
20 partially intestate estates as well as estates governed by wills. Note, too, that trusts for successive
21 beneficiaries also will be governed by income and principal accounting rules that will serve to
22 resolve some abatement issues.

23 10. Subsection (e) recognizes that a number of separate instruments and transactions, executed
24 at different times and with or without internal references linking them to other documents, may
25 constitute the paperwork describing succession to a decedent’s assets by probate and nonprobate
26 methods. By authorizing control of abatement among gifts made by various transfers at death by
27 the last executed instrument, the subsection permits a simple, last-minute override of earlier
28 directions concerning a decedent’s wishes regarding priorities among successors. Thus, a will or
29 trust amendment can correct or avoid liquidity and abatement problems discovered prior to death.
30 The expression “block buster will” was coined by estate planners in the mid 70’s to refer to
31 interest in legislation enabling a later will to override death benefits by any nonprobate transfer
32 device. This subsection meets some of the goals of advocates of this legislation.

33 11. Subsection (f) builds on the principle employed in the Code’s augmented estate provisions
34 (UPC §§ 2-201 — 2-214) in relation to nonprobate transfers made to persons in other states,
35 possibly by transactions governed by laws of other states. The underlying principle is that the law
36 of a decedent’s last domicile should be controlling as to rules of public policy that override the
37 decedent’s power to devise the estate to anyone the decedent chooses. The principle is
38 implemented by subjecting donee recipients of the decedent to liability under the decedent’s
39 domiciliary law, with the belief that judgments recovered in that state following appropriate due
40 process notice to defendants in other states will be accorded full faith and credit by courts in other
41 states should collection proceedings be necessary.

42 12. The first and third sentences of subsection (g) are identical to sentences from former
43 Section 215, which this section replaces. The second sentence is new. It reflects sensitivity for the
44 dilemma confronting a probate fiduciary who, acting as required of a fiduciary, concludes that the
45 costs and risks associated with a possible recovery from a nonprobate transferee outweigh the
46 probable advantages to the estate and its claimants. A creditor whose claim has been allowed but
47 remains unsatisfied and whose demand for a proceeding has been turned down by the estate
48 fiduciary may proceed at personal risk in efforts to enforce the estate claim against the
49 nonprobate beneficiary. This is so because the last two sentences of (g) shift the risk of
50 unrecoverable costs from the decedent’s estate to the claimant who undertakes collection efforts
51 on behalf of the decedent’s estate. Any recovery of costs should be used to reimburse the
52 claimant who bore the risk of loss for the proceeding. A personal representative tempted to
53 decline a demand for a proceeding should note that the “good faith” standard of this subsection
54 must be determined in light of the fiduciary responsibility imposed by Section 3-703.

1 13. Subparagraph (h) meshes with time limits in the sections of the UPC governing allowance
2 and disallowance of claims. See Sections 3-804 and 3-806.

3 14. Subsection (i)(1) is designed to protect issuers of TOD security registrations who make
4 payments or delivery to designated death beneficiaries before receiving notice from the
5 decedent's probate estate of a probable insolvency. These entities are not "transferees" subject to
6 liability under (b), but they might incur legal or other costs if the beneficiaries request payment in
7 spite of warning notices from estate fiduciaries.

8 Subsection (i)(2) is designed to enable trustees handling nonprobate transfers to distribute trust
9 assets in accordance with trust terms if a warning of probable estate insolvency has not been
10 received. Beneficiaries receiving distributions from a trustee take subject to personal liability in
11 the amount and priority of the trustee based on the value distributed.

12 FEDERAL ESTATE TAX

13 **26 U.S.C. § 2001 et seq. Selected Provisions**

14 § 2001. Imposition and rate of tax

15 (a) Imposition. — A tax is hereby imposed on the transfer of the taxable estate
16 of every decedent who is a citizen or resident of the United States.

17 ...

18 § 2002. Liability for payment

19 The tax imposed by this chapter shall be paid by the executor.

20 § 2031. Definition of gross estate

21 (a) General. — The value of the gross estate of the decedent shall be determined
22 by including to the extent provided for in this part, the value at the time of his
23 death of all property, real or personal, tangible or intangible, wherever situated.

24 ...

25 § 2033. Property in which the decedent had an interest

26 The value of the gross estate shall include the value of all property to the extent
27 of the interest therein of the decedent at the time of his death.

28 § 2035. Adjustments for certain gifts made within 3 years of 29 decedent's death

30 (a) Inclusion of certain property in gross estate. — If —

31 (1) the decedent made a transfer (by trust or otherwise) of an interest in any
32 property, or relinquished a power with respect to any property, during the 3-year
33 period ending on the date of the decedent's death, and

1 (2) the value of such property (or an interest therein) would have been included
2 in the decedent's gross estate under section 2036, 2037, 2038, or 2042 if such
3 transferred interest or relinquished power had been retained by the decedent on the
4 date of his death,

5 the value of the gross estate shall include the value of any property (or interest
6 therein) which would have been so included.

7 ...

8 § 2036. Transfers with retained life estate

9 (a) General rule. — The value of the gross estate shall include the value of all
10 property to the extent of any interest therein of which the decedent has at any time
11 made a transfer (except in case of a bona fide sale for an adequate and full
12 consideration in money or money's worth), by trust or otherwise, under which he
13 has retained for his life or for any period not ascertainable without reference to his
14 death or for any period which does not in fact end before his death —

15 (1) the possession or enjoyment of, or the right to the income from, the property,
16 or

17 (2) the right, either alone or in conjunction with any person, to designate the
18 persons who shall possess or enjoy the property or the income therefrom.

19 ...

20 § 2037. Transfers taking effect at death

21 (a) General rule. — The value of the gross estate shall include the value of all
22 property to the extent of any interest therein of which the decedent has at any time
23 after September 7, 1916, made a transfer (except in case of a bona fide sale for an
24 adequate and full consideration in money or money's worth), by trust or otherwise,
25 if —

26 (1) possession or enjoyment of the property can, through ownership of such
27 interest, be obtained only by surviving the decedent, and

28 (2) the decedent has retained a reversionary interest in the property (but in the
29 case of a transfer made before October 8, 1949, only if such reversionary interest
30 arose by the express terms of the instrument of transfer), and the value of such
31 reversionary interest immediately before the death of the decedent exceeds 5
32 percent of the value of such property.

33 (b) Special rules. — For purposes of this section, the term “reversionary
34 interest” includes a possibility that property transferred by the decedent —

35 (1) may return to him or his estate, or

36 (2) may be subject to a power of disposition by him,

37 but such term does not include a possibility that the income alone from such
38 property may return to him or become subject to a power of disposition by him.
39 The value of a reversionary interest immediately before the death of the decedent

1 shall be determined (without regard to the fact of the decedent's death) by usual
2 methods of valuation, including the use of tables of mortality and actuarial
3 principles, under regulations prescribed by the Secretary. In determining the value
4 of a possibility that property may be subject to a power of disposition by the
5 decedent, such possibility shall be valued as if it were a possibility that such
6 property may return to the decedent or his estate. Notwithstanding the foregoing,
7 an interest so transferred shall not be included in the decedent's gross estate under
8 this section if possession or enjoyment of the property could have been obtained
9 by any beneficiary during the decedent's life through the exercise of a general
10 power of appointment (as defined in section 2041) which in fact was exercisable
11 immediately before the decedent's death.

12 § 2038. Revocable transfers

13 (a) In general. — The value of the gross estate shall include the value of all
14 property —

15 (1) Transfers after June 22, 1936. — To the extent of any interest therein of
16 which the decedent has at any time made a transfer (except in case of a bona fide
17 sale for an adequate and full consideration in money or money's worth), by trust
18 or otherwise, where the enjoyment thereof was subject at the date of his death to
19 any change through the exercise of a power (in whatever capacity exercisable) by
20 the decedent alone or by the decedent in conjunction with any other person
21 (without regard to when or from what source the decedent acquired such power),
22 to alter, amend, revoke, or terminate, or where any such power is relinquished
23 during the 3-year period ending on the date of the decedent's death.

24 (2) Transfers on or before June 22, 1936. — To the extent of any interest therein
25 of which the decedent has at any time made a transfer (except in case of a bona
26 fide sale for an adequate and full consideration in money or money's worth), by
27 trust or otherwise, where the enjoyment thereof was subject at the date of his death
28 to any change through the exercise of a power, either by the decedent alone or in
29 conjunction with any person, to alter, amend, or revoke, or where the decedent
30 relinquished any such power during the 3-year period ending on the date of the
31 decedent's death. Except in the case of transfers made after June 22, 1936, no
32 interest of the decedent of which he has made a transfer shall be included in the
33 gross estate under paragraph (1) unless it is includible under this paragraph.

34 (b) Date of existence of power. — For purposes of this section, the power to
35 alter, amend, revoke, or terminate shall be considered to exist on the date of the
36 decedent's death even though the exercise of the power is subject to a precedent
37 giving of notice or even though the alteration, amendment, revocation, or
38 termination takes effect only on the expiration of a stated period after the exercise
39 of the power, whether or not on or before the date of the decedent's death notice
40 has been given or the power has been exercised. In such cases proper adjustment
41 shall be made representing the interests which would have been excluded from the

1 power if the decedent had lived, and for such purpose, if the notice has not been
2 given or the power has not been exercised on or before the date of his death, such
3 notice shall be considered to have been given, or the power exercised, on the date
4 of his death.

5 § 2039. Annuities

6 (a) General. — The gross estate shall include the value of an annuity or other
7 payment receivable by any beneficiary by reason of surviving the decedent under
8 any form of contract or agreement entered into after March 3, 1931 (other than as
9 insurance under policies on the life of the decedent), if, under such contract or
10 agreement, an annuity or other payment was payable to the decedent, or the
11 decedent possessed the right to receive such annuity or payment, either alone or in
12 conjunction with another for his life or for any period not ascertainable without
13 reference to his death or for any period which does not in fact end before his
14 death.

15 (b) Amount includible. — Subsection (a) shall apply to only such part of the
16 value of the annuity or other payment receivable under such contract or agreement
17 as is proportionate to that part of the purchase price therefor contributed by the
18 decedent. For purposes of this section, any contribution by the decedent's
19 employer or former employer to the purchase price of such contract or agreement
20 (whether or not to an employee's trust or fund forming part of a pension, annuity,
21 retirement, bonus or profit sharing plan) shall be considered to be contributed by
22 the decedent if made by reason of his employment.

23 § 2040. Joint interests

24 (a) General rule. — The value of the gross estate shall include the value of all
25 property to the extent of the interest therein held as joint tenants with right of
26 survivorship by the decedent and any other person, or as tenants by the entirety by
27 the decedent and spouse, or deposited, with any person carrying on the banking
28 business, in their joint names and payable to either or the survivor, except such
29 part thereof as may be shown to have originally belonged to such other person and
30 never to have been received or acquired by the latter from the decedent for less
31 than an adequate and full consideration in money or money's worth: Provided,
32 That where such property or any part thereof, or part of the consideration with
33 which such property was acquired, is shown to have been at any time acquired by
34 such other person from the decedent for less than an adequate and full
35 consideration in money or money's worth, there shall be excepted only such part
36 of the value of such property as is proportionate to the consideration furnished by
37 such other person: Provided further, That where any property has been acquired by
38 gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent
39 and spouse, then to the extent of one-half of the value thereof, or, where so

1 acquired by the decedent and any other person as joint tenants with right of
2 survivorship and their interests are not otherwise specified or fixed by law, then to
3 the extent of the value of a fractional part to be determined by dividing the value
4 of the property by the number of joint tenants with right of survivorship.

5 (b) Certain joint interests of husband and wife. —

6 (1) Interests of spouse excluded from gross estate. — Notwithstanding
7 subsection (a), in the case of any qualified joint interest, the value included in the
8 gross estate with respect to such interest by reason of this section is one-half of the
9 value of such qualified joint interest.

10 (2) Qualified joint interest defined. — For purposes of paragraph (1), the term
11 “qualified joint interest” means any interest in property held by the decedent and
12 the decedent’s spouse as —

13 (A) tenants by the entirety, or

14 (B) joint tenants with right of survivorship, but only if the decedent and the
15 spouse of the decedent are the only joint tenants.

16 § 2041. Powers of appointment

17 (a) In general. — The value of the gross estate shall include the value of all
18 property —

19 (1) Powers of appointment created on or before October 21, 1942. — To the
20 extent of any property with respect to which a general power of appointment
21 created on or before October 21, 1942, is exercised by the decedent —

22 (A) by will, or

23 (B) by a disposition which is of such nature that if it were a transfer of property
24 owned by the decedent, such property would be includible in the decedent’s gross
25 estate under sections 2035 to 2038, inclusive;

26 but the failure to exercise such a power or the complete release of such a power
27 shall not be deemed an exercise thereof. If a general power of appointment created
28 on or before October 21, 1942, has been partially released so that it is no longer a
29 general power of appointment, the exercise of such power shall not be deemed to
30 be the exercise of a general power of appointment if —

31 (i) such partial release occurred before November 1, 1951, or

32 (ii) the donee of such power was under a legal disability to release such power
33 on October 21, 1942, and such partial release occurred not later than 6 months
34 after the termination of such legal disability.

35 (2) Powers created after October 21, 1942. — To the extent of any property with
36 respect to which the decedent has at the time of his death a general power of
37 appointment created after October 21, 1942, or with respect to which the decedent
38 has at any time exercised or released such a power of appointment by a disposition
39 which is of such nature that if it were a transfer of property owned by the
40 decedent, such property would be includible in the decedent’s gross estate under
41 sections 2035 to 2038, inclusive. For purposes of this paragraph (2), the power of

1 appointment shall be considered to exist on the date of the decedent’s death even
2 though the exercise of the power is subject to a precedent giving of notice or even
3 though the exercise of the power takes effect only on the expiration of a stated
4 period after its exercise, whether or not on or before the date of the decedent’s
5 death notice has been given or the power has been exercised.

6 (3) Creation of another power in certain cases. — To the extent of any property
7 with respect to which the decedent —

8 (A) by will, or

9 (B) by a disposition which is of such nature that if it were a transfer of property
10 owned by the decedent such property would be includible in the decedent’s gross
11 estate under section 2035, 2036, or 2037,

12 exercises a power of appointment created after October 21, 1942, by creating
13 another power of appointment which under the applicable local law can be validly
14 exercised so as to postpone the vesting of any estate or interest in such property, or
15 suspend the absolute ownership or power of alienation of such property, for a
16 period ascertainable without regard to the date of the creation of the first power.

17 (b) Definitions. — For purposes of subsection (a) —

18 (1) General power of appointment. — The term “general power of appointment”
19 means a power which is exercisable in favor of the decedent, his estate, his
20 creditors, or the creditors of his estate; except that —

21 (A) A power to consume, invade, or appropriate property for the benefit of the
22 decedent which is limited by an ascertainable standard relating to the health,
23 education, support, or maintenance of the decedent shall not be deemed a general
24 power of appointment.

25 (B) A power of appointment created on or before October 21, 1942, which is
26 exercisable by the decedent only in conjunction with another person shall not be
27 deemed a general power of appointment.

28 (C) In the case of a power of appointment created after October 21, 1942, which
29 is exercisable by the decedent only in conjunction with another person —

30 (i) If the power is not exercisable by the decedent except in conjunction with the
31 creator of the power — such power shall not be deemed a general power of
32 appointment.

33 (ii) If the power is not exercisable by the decedent except in conjunction with a
34 person having a substantial interest in the property, subject to the power, which is
35 adverse to exercise of the power in favor of the decedent — such power shall not
36 be deemed a general power of appointment. For the purposes of this clause a
37 person who, after the death of the decedent, may be possessed of a power of
38 appointment (with respect to the property subject to the decedent’s power) which
39 he may exercise in his own favor shall be deemed as having an interest in the
40 property and such interest shall be deemed adverse to such exercise of the
41 decedent’s power.

42 (iii) If (after the application of clauses (i) and (ii)) the power is a general power
43 of appointment and is exercisable in favor of such other person — such power

1 shall be deemed a general power of appointment only in respect of a fractional part
2 of the property subject to such power, such part to be determined by dividing the
3 value of such property by the number of such persons (including the decedent) in
4 favor of whom such power is exercisable.

5 For purposes of clauses (ii) and (iii), a power shall be deemed to be exercisable
6 in favor of a person if it is exercisable in favor of such person, his estate, his
7 creditors, or the creditors of his estate.

8 (2) Lapse of power. — The lapse of a power of appointment created after
9 October 21, 1942, during the life of the individual possessing the power shall be
10 considered a release of such power. The preceding sentence shall apply with
11 respect to the lapse of powers during any calendar year only to the extent that the
12 property, which could have been appointed by exercise of such lapsed powers,
13 exceeded in value, at the time of such lapse, the greater of the following amounts:

14 (A) \$5,000, or

15 (B) 5 percent of the aggregate value, at the time of such lapse, of the assets out
16 of which, or the proceeds of which, the exercise of the lapsed powers could have
17 been satisfied.

18 (3) Date of creation of power. — For purposes of this section, a power of
19 appointment created by a will executed on or before October 21, 1942, shall be
20 considered a power created on or before such date if the person executing such
21 will dies before July 1, 1949, without having republished such will, by codicil or
22 otherwise, after October 21, 1942.

23 § 2042. Proceeds of life insurance

24 The value of the gross estate shall include the value of all property —

25 (1) Receivable by the executor. — To the extent of the amount receivable by the
26 executor as insurance under policies on the life of the decedent.

27 (2) Receivable by other beneficiaries. — To the extent of the amount receivable
28 by all other beneficiaries as insurance under policies on the life of the decedent
29 with respect to which the decedent possessed at his death any of the incidents of
30 ownership, exercisable either alone or in conjunction with any other person. For
31 purposes of the preceding sentence, the term “incident of ownership” includes a
32 reversionary interest (whether arising by the express terms of the policy or other
33 instrument or by operation of law) only if the value of such reversionary interest
34 exceeded 5 percent of the value of the policy immediately before the death of the
35 decedent. As used in this paragraph, the term “reversionary interest” includes a
36 possibility that the policy, or the proceeds of the policy, may return to the decedent
37 or his estate, or may be subject to a power of disposition by him. The value of a
38 reversionary interest at any time shall be determined (without regard to the fact of
39 the decedent’s death) by usual methods of valuation, including the use of tables of
40 mortality and actuarial principles, pursuant to regulations prescribed by the
41 Secretary. In determining the value of a possibility that the policy or proceeds

1 thereof may be subject to a power of disposition by the decedent, such possibility
2 shall be valued as if it were a possibility that such policy or proceeds may return to
3 the decedent or his estate.

4 § 2043. Transfers for insufficient consideration

5 (a) In general. — If any one of the transfers, trusts, interests, rights, or powers
6 enumerated and described in sections 2035 to 2038, inclusive, and section 2041 is
7 made, created, exercised, or relinquished for a consideration in money or money's
8 worth, but is not a bona fide sale for an adequate and full consideration in money
9 or money's worth, there shall be included in the gross estate only the excess of the
10 fair market value at the time of death of the property otherwise to be included on
11 account of such transaction, over the value of the consideration received therefor
12 by the decedent.

13 (b) Marital rights not treated as consideration. —

14 (1) In general. — For purposes of this chapter, a relinquishment or promised
15 relinquishment of dower or curtesy, or of a statutory estate created in lieu of dower
16 or curtesy, or of other marital rights in the decedent's property or estate, shall not
17 be considered to any extent a consideration "in money or money's worth".

18 (2) Exception. — For purposes of section 2053 (relating to expenses,
19 indebtedness, and taxes), a transfer of property which satisfies the requirements of
20 paragraph (1) of section 2516 (relating to certain property settlements) shall be
21 considered to be made for an adequate and full consideration in money or money's
22 worth.

23 § 2044. Certain property for which marital deduction was previously
24 allowed

25 (a) General rule. — The value of the gross estate shall include the value of any
26 property to which this section applies in which the decedent had a qualifying
27 income interest for life.

28 (b) Property to which this section applies. — This section applies to any
29 property if —

30 (1) a deduction was allowed with respect to the transfer of such property to the
31 decedent —

32 (A) under section 2056 by reason of subsection (b)(7) thereof, or

33 (B) under section 2523 by reason of subsection (f) thereof, and

34 (2) section 2519 (relating to dispositions of certain life estates) did not apply
35 with respect to a disposition by the decedent of part or all of such property.

36 (c) Property treated as having passed from decedent. — For purposes of this
37 chapter and chapter 13, property includible in the gross estate of the decedent
38 under subsection (a) shall be treated as property passing from the decedent.

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§ 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

1 contracted bona fide and for an adequate and full consideration in money or
2 money's worth; except that in any case in which any such claim is founded on a
3 promise or agreement of the decedent to make a contribution or gift to or for the
4 use of any donee described in section 2055 for the purposes specified therein, the
5 deduction for such claims shall not be so limited, but shall be limited to the extent
6 that it would be allowable as a deduction under section 2055 if such promise or
7 agreement constituted a bequest.

8 (B) Certain taxes. — Any income taxes on income received after the death of the
9 decedent, or property taxes not accrued before his death, or any estate, succession,
10 legacy, or inheritance taxes, shall not be deductible under this section.

11 (C) Certain claims by remaindermen. — No deduction shall be allowed under
12 this section for a claim against the estate by a remainderman relating to any
13 property described in section 2044.

14 (D) Section 6166 interest. — No deduction shall be allowed under this section
15 for any interest payable under section 6601 on any unpaid portion of the tax
16 imposed by section 2001 for the period during which an extension of time for
17 payment of such tax is in effect under section 6166.

18 (2) Limitations applicable only to subsection (a). — In the case of the amounts
19 described in subsection (a), there shall be disallowed the amount by which the
20 deductions specified therein exceed the value, at the time of the decedent's death,
21 of property subject to claims, except to the extent that such deductions represent
22 amounts paid before the date prescribed for the filing of the estate tax return. For
23 purposes of this section, the term "property subject to claims" means property
24 includible in the gross estate of the decedent which, or the avails of which, would
25 under the applicable law, bear the burden of the payment of such deductions in the
26 final adjustment and settlement of the estate, except that the value of the property
27 shall be reduced by the amount of the deduction under section 2054 attributable to
28 such property.

29 ...

30 § 2054. Losses

31 For purposes of the tax imposed by section 2001, the value of the taxable estate
32 shall be determined by deducting from the value of the gross estate losses incurred
33 during the settlement of estates arising from fires, storms, shipwrecks, or other
34 casualties, or from theft, when such losses are not compensated for by insurance or
35 otherwise.

36 § 2056. Bequests, etc., to surviving spouse

37 (a) Allowance of marital deduction. — For purposes of the tax imposed by
38 section 2001, the value of the taxable estate shall, except as limited by subsection
39 (b), be determined by deducting from the value of the gross estate an amount equal

1 to the value of any interest in property which passes or has passed from the
2 decedent to his surviving spouse, but only to the extent that such interest is
3 included in determining the value of the gross estate.

4 ...

5 § 2203. Definition of executor

6 The term “executor” wherever it is used in this title in connection with the estate
7 tax imposed by this chapter means the executor or administrator of the decedent,
8 or, if there is no executor or administrator appointed, qualified, and acting within
9 the United States, then any person in actual or constructive possession of any
10 property of the decedent.

11 § 2204. Discharge of fiduciary from personal liability

12 (a) General rule. — If the executor makes written application to the Secretary
13 for determination of the amount of the tax and discharge from personal liability
14 therefor, the Secretary (as soon as possible, and in any event within 9 months after
15 the making of such application, or, if the application is made before the return is
16 filed, then within 9 months after the return is filed, but not after the expiration of
17 the period prescribed for the assessment of the tax in section 6501) shall notify the
18 executor of the amount of the tax. The executor, on payment of the amount of
19 which he is notified (other than any amount the time for payment of which is
20 extended under section 6161, 6163, or 6166), and on furnishing any bond which
21 may be required for any amount for which the time for payment is extended, shall
22 be discharged from personal liability for any deficiency in tax thereafter found to
23 be due and shall be entitled to a receipt or writing showing such discharge.

24 (b) Fiduciary other than the executor. — If a fiduciary (not including a fiduciary
25 in respect of the estate of a nonresident decedent) other than the executor makes
26 written application to the Secretary for determination of the amount of any estate
27 tax for which the fiduciary may be personally liable, and for discharge from
28 personal liability therefor, the Secretary upon the discharge of the executor from
29 personal liability under subsection (a), or upon the expiration of 6 months after the
30 making of such application by the fiduciary, if later, shall notify the fiduciary (1)
31 of the amount of such tax for which it has been determined the fiduciary is liable,
32 or (2) that it has been determined that the fiduciary is not liable for any such tax.
33 Such application shall be accompanied by a copy of the instrument, if any, under
34 which such fiduciary is acting, a description of the property held by the fiduciary,
35 and such other information for purposes of carrying out the provisions of this
36 section as the Secretary may require by regulations. On payment of the amount of
37 such tax for which it has been determined the fiduciary is liable (other than any
38 amount the time for payment of which has been extended under section 6161,
39 6163, or 6166), and on furnishing any bond which may be required for any amount

1 for which the time for payment has been extended, or on receipt by him of
2 notification of a determination that he is not liable for any such tax, the fiduciary
3 shall be discharged from personal liability for any deficiency in such tax thereafter
4 found to be due and shall be entitled to a receipt or writing evidencing such
5 discharge.

6 (c) Special lien under section 6324A. — For purposes of the second sentence of
7 subsection (a) and the last sentence of subsection (b), an agreement which meets
8 the requirements of section 6324A (relating to special lien for estate tax deferred
9 under section 6166) shall be treated as the furnishing of bond with respect to the
10 amount for which the time for payment has been extended under section 6166.

11 (d) Good faith reliance on gift tax returns. — If the executor in good faith relies
12 on gift tax returns furnished under section 6103(e)(3) for determining the
13 decedent's adjusted taxable gifts, the executor shall be discharged from personal
14 liability with respect to any deficiency of the tax imposed by this chapter which is
15 attributable to adjusted taxable gifts which —

16 (1) are made more than 3 years before the date of the decedent's death, and

17 (2) are not shown on such returns.

18 § 2205. Reimbursement out of estate

19 If the tax or any part thereof is paid by, or collected out of, that part of the estate
20 passing to or in the possession of any person other than the executor in his
21 capacity as such, such person shall be entitled to reimbursement out of any part of
22 the estate still undistributed or by a just and equitable contribution by the persons
23 whose interest in the estate of the decedent would have been reduced if the tax had
24 been paid before the distribution of the estate or whose interest is subject to equal
25 or prior liability for the payment of taxes, debts, or other charges against the
26 estate, it being the purpose and intent of this chapter that so far as is practicable
27 and unless otherwise directed by the will of the decedent the tax shall be paid out
28 of the estate before its distribution.

29 § 2206. Liability of life insurance beneficiaries

30 Unless the decedent directs otherwise in his will, if any part of the gross estate
31 on which tax has been paid consists of proceeds of policies of insurance on the life
32 of the decedent receivable by a beneficiary other than the executor, the executor
33 shall be entitled to recover from such beneficiary such portion of the total tax paid
34 as the proceeds of such policies bear to the taxable estate. If there is more than one
35 such beneficiary, the executor shall be entitled to recover from such beneficiaries
36 in the same ratio. In the case of such proceeds receivable by the surviving spouse
37 of the decedent for which a deduction is allowed under section 2056 (relating to
38 marital deduction), this section shall not apply to such proceeds except as to the

1 (2) the total tax which would have been payable under such chapter for such
2 year if the value of such property had not been taken into account for purposes of
3 chapter 12.

4 (c) More than one recipient of property. — For purposes of this section, if there
5 is more than one person receiving the property, the right of recovery shall be
6 against each such person.

7 (d) Taxes and interest. — In the case of penalties and interest attributable to
8 additional taxes described in subsections (a) and (b), rules similar to subsections
9 (a), (b), and (c) shall apply.

10 § 2207B. Right of recovery where decedent retained interest

11 (a) Estate tax. —

12 (1) In general. — If any part of the gross estate on which tax has been paid
13 consists of the value of property included in the gross estate by reason of section
14 2036 (relating to transfers with retained life estate), the decedent's estate shall be
15 entitled to recover from the person receiving the property the amount which bears
16 the same ratio to the total tax under this chapter which has been paid as —

17 (A) the value of such property, bears to

18 (B) the taxable estate.

19 (2) Decedent may otherwise direct. — Paragraph (1) shall not apply with respect
20 to any property to the extent that the decedent in his will (or a revocable trust)
21 specifically indicates an intent to waive any right of recovery under this
22 subchapter with respect to such property.

23 (b) More than one recipient. — For purposes of this section, if there is more than
24 1 person receiving the property, the right of recovery shall be against each such
25 person.

26 (c) Penalties and interest. — In the case of penalties and interest attributable to
27 the additional taxes described in subsection (a), rules similar to the rules of
28 subsections (a) and (b) shall apply.

29 (d) No right of recovery against charitable remainder trusts. — No person shall
30 be entitled to recover any amount by reason of this section from a trust to which
31 section 664 applies (determined without regard to this section).