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Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers

Elaine H. Gagliardi
Alexander Blewett III School of Law at the University of Montana, elaine.gagliardi@umontana.edu

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REMEMBERING THE CREDITOR AT DEATH: ALIGNING PROBATE AND NONPROBATE TRANSFERS

Elaine H. Gagliardi*

Editors' Synopsis: As more people choose to avoid the cost and time involved with probate administration by using nonprobate transfers, creditors of decedents face increased procedural challenges and practical difficulties in collecting debts. In this Article, the author proposes legislative reforms that would unify the creditor claims procedure for probate and nonprobate transfers when beneficiaries are unwilling to pay claims. The author argues that a more unified claims procedure would still allow efficient passage of property at death and would encourage fair treatment of all beneficiaries and creditors.

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* Professor of Law, The University of Montana School of Law. Also, formerly practiced with the law firms of Day, Berry and Howard, Hartford, Connecticut, and Perkins Coie, Seattle, Washington; and served as Chair of the Montana State Bar Business, Estates, Trust and Real Estate Section and Chair of the ABA Real Property, Probate and Trust Section Task Force on the American Indian Probate Reform Act.

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I. INTRODUCTION

Decedent’s creditors face procedural challenges and practical difficulties in collecting amounts owed to them. These difficulties have been magnified as an increasing number of clients have chosen to avoid the time delays and costs associated with probate administration. The law has become even more complex as wealthy clients have actively planned to avoid creditor claims by using asset-protection techniques. This Article explores the impact of these evolving planning techniques on the collection of claims by decedent’s creditors as against nonprobate transfers.

The increased use of nonprobate transfers exacerbates the difficulties faced by decedent’s creditors. Dissatisfaction with the cost and time involved in probate administration leads many estate planning clients to use alternative forms of transferring property at death, commonly referred to as “nonprobate transfers” or “testamentary substitutes.” Probate procedures generally do not apply to nonprobate transfers. As a result, one set of laws, often referred to as probate procedures, control those assets passing pursuant to decedent’s will, or if decedent does not have a will, pursuant to intestacy. Different laws govern nonprobate assets passing pursuant to beneficiary designation on assets such as life insurance, trusts, bank accounts, brokerage accounts, and retirement plans, and those assets passing pursuant to joint tenancy designations with right of survivorship. While the developing law with regard to nonprobate transfers has successfully minimized the cost and time involved in passing property at death, it has been slow to address comprehensively the payment of decedent’s creditors. In fact, instead of addressing creditor needs, the developing law has moved in the opposite

1 “Probate” technically refers to the determination by the court that a document is in fact a decedent’s will. Estate planners often use the term to refer to the entire process of estate administration, including the marshaling of assets, the payment of creditors, and the distribution to beneficiaries named in decedent’s will. This Article refers generally to the process of administering assets passing pursuant to a will or intestacy statutes as “probate administration” or “probate procedures.”

2 Not all assets pass under a will. The Uniform Probate Code recognizes that contracts or deeds may serve to pass property at death outside the terms of a will. See UNIF. PROBATE CODE § 6-101 (amended 1998), 8 Part II U.L.A. 173 (Supp. 2006). The Uniform Probate Code is also available at http://www.law.upenn.edu/bl/lulc/upc/final2005.htm. Estate planners refer to assets that pass automatically at death pursuant to a contract or deed as “nontestamentary” or “nonprobate” transfers. Only those assets owned by decedent at death and not automatically passing pursuant to the terms of a deed or other contract pass under a will.
direction. Courts have recognized that "[t]he proliferation of testamentary substitutes . . . has left the law in a state of confusion over the rights of creditors to other assets that do not pass under the will or as part of intestate administration."  

Fragmentation of the law applicable to transfers at death increases the time and cost incurred by decedent’s creditors. Creditors face delays because they often must pursue probate administration, even in the absence of probate assets, prior to pursuing the nonprobate transferee directly. In addition, the law completely protects certain types of nonprobate transfers from pursuit by creditors. The legal rules governing nonprobate transfers at death depend in large part on the type of nonprobate asset and the manner in which decedent held title to the asset. The creditor must navigate these different rules prior to collecting the debt owed. This fragmented system stands in stark contrast to the comprehensive, orderly rules for resolving creditor claims historically provided by probate procedures. Avoidance of probate often leaves the decedent’s creditors in an untenable position.

This Article focuses solely on creditor claims arising prior to death that remain unpaid as of death. Part II highlights through examples the difficulties the fragmented system causes for creditors. Part III examines key probate procedures governing creditor claims, and Part IV contrasts those procedures with the procedures for collecting creditor claims from nonprobate assets. Part IV also explores the ability of creditors to reach specific types of nonprobate assets. With this background, Part V then

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3 An entire body of literature has developed regarding asset protection planning. See Robert T. Danforth, Rethinking the Law of Creditors’ Rights in Trusts, 53 HASTINGS L.J. 287 (2002); Henry J. Lischer Jr., Domestic Asset Protection Trusts: Pallbearers to Liability, 35 REAL PROP. PROB. & TR. J. 479 (2000); John E. Sullivan III, Gutting the Rule Against Self-Settled Trusts: How the Delaware Trust Law Competes with Offshore Trusts, 23 DEL. J. CORP. L. 423 (1998). Asset protection planning relies principally on the use of trusts and other nonprobate transfers. Some states have enacted statutes allowing for asset protection trusts in which a trustor can transfer assets in trust, grant the trustee discretion to make payments to trustor, and provide for protection of trust assets from creditors. See, e.g., ALASKA STAT. § 34.40.110 (2005); DEL. CODE ANN. tit. 12, § 3572 (2006).


5 All references to “claims” in this Article refer to claims arising prior to decedent’s death. Different procedures may apply to claims arising at or after a decedent’s death. Compare UNIF. PROBATE CODE § 3-803(a) with § 3-803(c) (amended 1997), 8 Part II U.L.A. 39–40 (Supp. 2006) (giving one year for presenting claims arising before death of decedent but only four months for presenting claims arising at or after decedent’s death).
suggests legislative reforms that would better balance both the interests of beneficiaries and the interests of a decedent's creditors.

The legislative reforms proposed in this Article urge unification of the creditor claims procedure for all probate and nonprobate transfers to the extent feasible, thereby avoiding the cascading effect of currently enacted legislative solutions. The provision of one forum, in which all assets are equally subject to the claims of creditors, furthers the policy of efficient passage of property at death and encourages fair treatment of all creditors and beneficiaries. The legislative reforms strive to accommodate those clients who wish to avoid the cost and time involved in probate administration, and at the same time provide a minimally intrusive, but comprehensive, system for resolving creditor claims. The proposed legislative reforms achieve these goals by triggering a unified claims procedure only when beneficiaries of probate and nonprobate assets are unwilling to apportion and pay known creditor claims.

II. THE PLIGHT OF CREDITORS IN A FRAGMENTED SYSTEM

A. Examples of Procedural Hurdles

Creditors face a number of difficulties when attempting to collect against probate and nonprobate assets. States often require the creditor to pursue probate assets before pursuing nonprobate transferees. Some states protect certain types of assets over other assets. These requirements translate into unnecessary time delays and increased costs to the creditor. The following examples specifically demonstrate these difficulties.

**Example 1:** Prior to her death, decedent had made charges on her credit card up to her credit limit. At her death, decedent owned a bank account with only a minimal balance naming her sister as pay-on-death beneficiary and a modest brokerage account naming her sister as transfer-on-death beneficiary. The beneficiary designations automatically passed the value of the accounts at decedent’s death to her sister. Because the sister received the account balances immediately on decedent’s death, the sister did not open a probate. Each time a creditor letter requesting payment was received, decedent’s sister replied by sending a death certificate and a letter indicating no probate had been opened and no personal representative had been appointed. After responding to each creditor once, the

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6 State law likely protected the creditors of the decedent by subjecting both the bank
sister made no further reply to follow-up letters sent to the decedent's address (which was the same address as the sister's) and returned the letters to sender. Eventually the creditors ceased collection efforts, and the sister retained the balances received as named beneficiary. It can be assumed that the creditor rejected further collection efforts because the costs of finding decedent's assets could prove to be greater than the amount of debt owed any single creditor. Thus, the creditors of decedent remained unpaid, and decedent's sister retained the amounts in the two accounts even though creditors were legally entitled to the value of those accounts.

Example 2: Decedent died in California having placed a substantial portion of his assets in a revocable trust. The assets subject to probate procedures were insufficient to pay all creditor claims. The creditor claim at issue involved a dispute over a buy-sell agreement. Pursuant to California law, the creditor filed a claim in probate and pursued protracted litigation, eventually proving the claim. Prior to a judgment being issued in the litigation, the trustee of the revocable trust distributed the trust assets to the beneficiaries named in the trust. The creditor then sued to surcharge the trustee and hold the trustee personally liable for making distribution of trust assets while the probate claim was still being litigated. The California court ruled that the trustee owed a duty only to beneficiaries of the trust, and because the trustee made the distributions prior to the creditor obtaining its judgment, the trustee did not breach any duty owed and could not be surcharged. The creditor was then left to pursue the distributees of the revocable trust. This example demonstrates the

and the brokerage account to the claims of decedent's creditors. The sister should have used the money received to pay the creditor claims once the creditor followed the appropriate procedure to collect on the claim.

These are essentially the facts as related to the author in a 2003 conversation with decedent’s sister long after decedent’s death. Had the sister received legal advice at the time of decedent’s death, it is hoped that she would have responded differently to the creditors. It was clear in the conversation with the sister, however, that she wanted to keep the money she received on the death of her sister to the extent that she could.

increased costs and time facing the creditor when attempting to collect against nonprobate transfers.

**Example 3:** An unsecured creditor of decedent followed its normal collection procedures against debtor. The creditor, owner of a small business, was unaware that debtor had died. The personal representative of decedent’s estate chose not to initiate a probate proceeding until one year after decedent’s death. The applicable state statute of limitations for pursuing a creditor claim was one year. By the time the creditor discovered the death of decedent and a probate was opened, all creditor claims as against both probate and nonprobate assets effectively had been barred by the statute of limitations. The creditor believed the personal representative waited to initiate probate proceedings for the specific purpose of letting the statute of limitations run. This example highlights the need for diligence on the part of a decedent’s creditors.

**Example 4:** As part of a structured settlement involving her mother’s prior death, decedent was the beneficiary of an annuity owned by Hartford Insurance Company. The annuity specified that on her death, the amounts owed to decedent would pass to her heirs. Decedent died owing substantial sums to creditors. The creditors attempted to collect their claims against the proceeds of the annuity policy. A New York court held that by law the proceeds of the annuity could not be made subject to creditor claims. This is an example of certain statutory protections that preclude creditors from asserting claims against specific types of nonprobate transfers.

These examples aptly point out cost and time hurdles facing a decedent’s creditors when pursuing claims against probate and nonprobate assets.

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9 This example derives from a 2002 conversation with a creditor discussing legal options available to pursue its creditor claim. The comment to Uniform Probate Code section 3-803 discusses the choice of a one-year statute of limitations similar to the one applicable to the creditor in the example and states in part: “Successors who are willing to delay receipt and enjoyment of inheritances may consider waiting out the non-claim period running from death simply to avoid any public record of an administration that might alert known and unknown creditors to pursue their claims.” UNIF. PROBATE CODE § 3-803 cmt. (amended 1997), 8 Part II U.L.A. 41 (Supp. 2006). The successors in this example chose to avail themselves of this choice.

It is important, however, to place these examples in perspective and to recognize that not all creditors face these hurdles. Probate lawyers find that many beneficiaries choose to pay decedent’s creditors. They do this for a number of reasons, including the need to obtain further credit, the feeling of moral obligation, and the maintenance of their reputation in the community. Creditors generally find this to be true as well. The problem arises when beneficiaries use the law to make it difficult for creditors to collect the debt owed to them. The law, as it develops with regard to nonprobate transfers, ideally should provide the same cost and time efficiencies to creditors as it has done for beneficiaries. To the extent that the law subjects assets to debts of a decedent, procedural rules should support the creditor’s right to be paid. Adoption of procedural rules that fairly balance the interests of creditors and beneficiaries will lead to greater cost and time efficiencies for both parties and will minimize the burden on judicial resources by decreasing the need to involve courts in the resolution of a prolonged series of judicial proceedings.

B. Policy Implications of Procedural Hurdles

These four examples highlight the tension between the two overriding policies that guide development of procedures related to passing a decedent’s property at death. Those two policies are (1) to facilitate the passage of a decedent’s property to beneficiaries in the most time and cost efficient manner, and (2) to promote economic efficiency.

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11 Very seldom has the author had a client actively resist payment of creditor claims when assets could have been made available from nonprobate assets to pay claims. The comments to the Uniform Probate Code reflect this experience: “[T]he vast majority of [estates] are routinely applied to quick payment of the decedents’ bills and distributed without any creditor controversy.” UNIF. PROBATE CODE § 3-803 cmt. (amended 1997), 8 Part II U.L.A. 41 (Supp. 2006). The author’s recent conversations with other attorneys and with creditors, however, indicate this general willingness to pay may not be as pervasive now as in the past.

12 See John H. Langbein, The Nonprobate Revolution and the Future of the Law of Succession, 97 HARV. L. REV. 1108, 1121 (1984). In his article, Langbein states: “In the vast majority of cases, survivors pay off decedents’ debts voluntarily and rapidly.” Id. Langbein bases his conclusion on discussions with the credit officers at a number of major department stores.

13 See 1 JAMES HENDERSON, BANCROFT’S PROBATE PRACTICE §14, at 35 (Bancroft-Whitney Co., 2d ed. 1950) (1923) (citing Dennis v. Bint, 54 P. 378 (Cal. 1898) and Hilliard v. McCrory, 134 P.2d 1057 (Colo. 1943)); see also MONT. CODE ANN. § 72-3-1015 (2005) (providing that a personal representative who has not distributed estate within two years must appear before court and show cause for continued administration);
by encouraging debtors to pay their debts.\textsuperscript{14} Similar policies should underlie development of the law regarding nonprobate transfers. Arguably, the minimization of any specific procedural rights allowing decedent's creditors to pursue nonprobate transferees on the same basis as probate transferees decreases both the time and costs incurred by nonprobate transferees, and for that reason is preferred by beneficiaries. At the same time, the minimization of those rights often increases the time and costs incurred by decedent's creditors holding valid claims. The lack of clear procedural safeguards for creditors also encourages beneficiaries and fiduciaries to take steps to avoid payment of creditor claims even though assets received by them are legally subject to such claims. As a result, this lack of safeguards undercuts the policy goal of encouraging debtors to pay debts. Balancing these policies suggests the need for procedural safeguards sufficient to allow timely payment of claims by fiduciaries, and by probate and nonprobate transferees, without unnecessarily increasing time and costs of administration.

Good policy dictates that, to the extent the law makes an asset available for payment of a creditor's claims, the law also should provide clear and simple procedures for collecting claims as against that asset. The current lack of clear and simple procedures, as demonstrated by the examples, increases the cost and time of debt collection to both creditors and beneficiaries and runs counter to the longstanding policies underlying legal rules for transferring property on a decedent's death. The examples demonstrate the need for specific legislative changes.

As indicated in the first example, to the extent an asset is subject to creditor claims, creditor claim procedures should provide a timely and efficient method for discovering the location and ownership of assets subject to claims. In that example the surviving sister refused to provide information regarding assets. Specifically, creditors need to be able to discover the whereabouts and ownership of available assets in a cost efficient manner. Procedural rules should not allow beneficiaries to hide assets that the law otherwise makes available for payment of the claims of decedent's creditors. The policy favoring payment of creditor claims,

however, must be balanced with the need of beneficiaries to maintain privacy as to assets received and owned. In order to balance these competing interests, any legislative reform should provide information regarding available assets only to creditors with valid claims against a decedent’s assets.

The second example demonstrates the need to unify probate and nonprobate procedures for the collection of claims by a decedent’s creditors. In that example, the creditor has to bring more than one action to collect on its claim. Any legislative proposal should require that all creditor claims be decided in one forum and, in addition, should add provisions to adjudicate the rights of all concerned—creditors, probate beneficiaries, and nonprobate beneficiaries—at one time. Unification of procedures so that all interested parties may be joined in one proceeding promotes the policy of efficiently using judicial resources. Any legislative change of this nature, however, should consider the interests of nonprobate beneficiaries. Persons choose to pass property by nonprobate transfers to avoid the time and costs of probate administration. Nonprobate assets pass immediately to named beneficiaries on the death of the decedent. Thus, any legislative reform should require a hearing that joins nonprobate transferees only when those transferees, who receive assets otherwise subject to the claims of decedent’s creditors, decline to pay creditor claims voluntarily.

The one-year statute of limitations for the collection of creditor claims, as imposed by state law in the third example, requires creditors to pursue collection of claims in a diligent and time efficient manner. While any statute of limitations should allow creditors ample opportunity to file claims, it should not unreasonably prolong the passage of clear title following decedent’s death. Any legislative change should consider both current business practices for the collection of claims and the need for timely resolution of all claims so that beneficiaries hold clear title.

Finally, the fourth example highlights the fact that the law exempts certain assets such as certain annuities from the claims of a decedent’s creditors. As evidenced by the need for litigation in the example, it is not always clear whether an asset is subject to payment of creditor claims. Any legislative change should clarify which assets are available and those assets which are not available for payment of a decedent’s creditors. Increased clarity as to whether an asset may be used to satisfy the claims of decedent’s creditors would lead to more efficient use of judicial
resources and more efficient administration of the passage of decedent’s probate and nonprobate assets.

Although to date legislative reforms tend to favor beneficiaries, creditors likely will take a more active role in changing the law to favor creditor interests should the balance shift too far in the direction of favoring beneficiaries. For example, as states have begun to adopt laws protecting certain self-settled trusts from creditors of the settlor, steps were taken as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005\textsuperscript{15} to minimize the ability to use self-settled trusts to avoid payment of claims in bankruptcy. The Act allows the bankruptcy trustee to avoid transfers to certain self-settled trusts made on or within ten years of filing the bankruptcy petition.\textsuperscript{16} As was done with the bankruptcy rules, creditors likely will begin to present state law legislation that favors their interests.\textsuperscript{17} It is important that any future legislative reforms balance the interests of all parties—creditors and beneficiaries alike.

\textbf{III. PROBATE PROCEDURES FOR RESOLUTION OF CREDITOR CLAIMS}

Historically, probate procedures have governed the ability of a decedent’s creditors to collect claims. Not surprisingly, legislative changes to accommodate the payment of claims from nonprobate transferees have built on these historic probate procedures. Probate procedures are state specific. The law of each state varies as to treatment of claims by decedent’s creditors. Generally, state law sets forth rules for notification and presentment of a claim within a specific time period and delineates the order for payment of claims in the event of an insolvent estate.

\textbf{A. The Uniform Probate Code}

The Uniform Law Commission promulgated the Uniform Probate Code to serve as a model for the administration and passage of a

\textsuperscript{17} During the last two years, the author has had occasion to comment on and review legislation proposed by creditors to allow more time to collect claims against nonprobate transfers. The proposed legislation reviewed was extreme in its protection of creditors, and the creditors were unable to find a legislator to sponsor the bill. The tenor of the proposed legislation, however, indicates that creditors likely will become more active as claims go unpaid because of the use of nonprobate transfers.
It is the only comprehensive model act to specify procedures for the administration of both probate and nonprobate assets. Its adoption by the legislatures of seventeen states is evidence of the widespread approval of its procedures. Because the Uniform Probate Code serves as the primary model for legislative change, this Article principally focuses on the provisions of that code. Although considerable variation exists among the several states concerning the details of the procedures for filing claims by decedent’s creditors, basic creditor procedures of most states resemble, at least in part, the procedures set forth in the Uniform Probate Code.

Recent amendments to the Uniform Probate Code, adopted in 1997 and 1998, address some of the issues faced by creditors with regard to nonprobate property. However, not all states that have adopted the Uniform Probate Code have adopted these recent amendments, and creditors in those states remain subject to probate procedures that fail to address directly the changing landscape between probate and nonprobate transfers of assets at death.

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20 For examples of states that have adopted section 6-102 of the Uniform Probate Code (also codified as section 102 of the Uniform Nonprobate Transfers on Death Act) and incorporated its provisions as part of their respective probate codes, see, e.g., ARIZ. REV. STAT. ANN. § 14-6102 (West 2005), IDAHO CODE ANN. § 15-6-107 (2005), IND. CODE 32-17-13-3 (West 2005), N.M. STAT. § 45-6-102 (LexisNexis 2005), OKLA. STAT. tit. 71, § 910 (West 2005), VT. STAT. ANN. tit. 9, § 4359 (2005). For examples of states that have adopted the amendments to Uniform Probate Code section 3-803, see, e.g., HAW. REV. STAT. § 560:3-803 (LexisNexis 2005) (adopting a reference to “decedent’s trustee” instead of “nonprobate transferees”), MICH. COMP. LAWS ANN. § 700.3803 (West 2005), N.D. CENT. CODE § 30.1-19-03 (2005). For examples of states that have not adopted the amendments to Uniform Probate Code section 3-803, see, e.g., ALASKA STAT. § 13.16.450 (LexisNexis 2005), ARIZ. REV. STAT. ANN. § 14-3803 (West 2005), Colo. REV. STAT. § 15-12-803 (2005), IDAHO CODE ANN. § 75-3-803 (2005), ME. REV. STAT. ANN. tit. 18-A, § 3-803 (2005), MINN. STAT. § 524.3-803 (West 2005), MONT. CODE ANN. § 72-3-803 (2005), NEB. REV. STAT. § 30-2485 (LexisNexis 2005), S.D. CODIFIED LAWS § 29A-3-803 (2005), UTAH CODE ANN. § 75-3-803 (West 2005).
The recent amendments to the Uniform Probate Code addressing the impact of nonprobate transfers on creditor claims essentially were two-pronged. First, in 1997, the nonclaim statute that works to bar collection of creditor claims not presented within one year from the date of decedent’s death was made specifically applicable to nonprobate transfers. This amendment followed the 1989 Uniform Probate Code amendments reducing the ultimate time bar of the nonclaim statute from three years to one year and allowing optional (as opposed to mandatory) publication of notice and actual notice to creditors. Second, the 1998 Uniform Probate Code amendments set forth new rules regarding the liability of nonprobate transferees for claims of decedent’s creditors. While the 1998 amendments provide welcome procedures for collection of claims against nonprobate transferees, the amendments, taken as a whole, have forced creditors to be more diligent. Creditors rarely receive any public or actual notice of death and must make their own inquiry. Creditors also must act more quickly to preserve their right to collect and must act, if at all, within one year of death. The practical impact of these amendments to the Uniform Probate Code is to place a greater burden on creditors.

B. General Procedure for Filing and Paying Creditor Claims.

Probate procedures often affect whether a decedent’s creditor may pursue its claim as against both probate and nonprobate assets. The Uniform Probate Code forces creditors initially to pursue claims through the probate process. Prior to the 1989 amendments, the personal

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22 See id. The statute prior to its amendment barred creditor claims arising prior to death as against a decedent’s estate “unless presented as follows: (1) within 4 months after the date of the first publication of notice to creditors if notice is given in compliance with Section 3-801. . . . (2) within [3] years after the decedent’s death, if notice to creditors has not been published.” Id. § 3-803 (prior to 1989 amendment), 8 Part II U.L.A. 218 (1998).
23 See id. § 3-801 (amended 1989), 8 Part II U.L.A. 208 (1998). The statute now provides that before adopting Uniform Probate Code section 3-801, the state must choose between mandatory and optional publication notice to creditors.
25 See Unif. Probate Code § 3-803(a) (amended 1997), 8 Part II U.L.A. 39 (Supp. 2006); see also id. § 3-104, 8 Part II U.L.A. 36 (1998) (“No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. . . . [A]ll proceedings and actions to enforce a
representative was required to publish notice to creditors, and publication of notice began the creditor claim process. The amendments now provide for the optional giving of notice to creditors. Thus, the creditor claims procedures might begin with publication of notice to creditors announcing that claims must be filed with the personal representative within four months of the date of publication, but such notice is not


Pursuant to SCPA 1803(3) a claimant may not enforce payment of a claim in the Surrogate's Court unless the claim is presented to the fiduciary in accordance with the provisions of SCPA 1803 or unless it is based upon a decree or order of the court or a valid judgment. As this section implies, and as SCPA 1810 makes clear, a creditor of an estate may pursue an action on his claim in another court without ever presenting his claim to the fiduciary or taking any action in the Surrogate's Court. However, if a claimant wishes to proceed in the Surrogate's Court pursuant to SCPA Article 18, he is required to follow the dictates of SCPA 1803.

(emphasis omitted) (footnote omitted).

California requires that claims be presented within the one-year statute of limitations. See Levine v. Levine, 126 Cal. Rptr. 2d 255, 261–62 (Ct. App. 2002). Claims may be presented as part of probate proceedings or pursuant to alternative creditor claim procedures to be initiated at the option of the trustee of decedent's revocable trust. See Cal. Prob. Code § 19003 (West 2006).

required. Creditors, thus, may never receive notice that claims must be filed.

Regardless of whether notice is provided, creditors must present their claims within the time allowed or be barred from thereafter collecting on the claim. Generally, claims may be presented to the personal representative or filed with the probate court. The personal representative then will disallow or allow a claim. If the claim is disallowed, the creditor

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27 See UNIF. PROBATE CODE § 3-801 (amended 1989), 8 Part II U.L.A. 208 (1998) (allowing states the option of making publication notice optional and providing for permissive actual notice). Some states, like New York, have repealed any requirement for publication of notice on the basis that the shorter time limitation triggered by notice publication was not widely used. 4 HEATON, supra note 25, § 71.02 (noting the 1993 Legislature repealed former New York Surrogate's Court Procedure Act section 1801).

28 See UNIF. PROBATE CODE § 3-803 (amended 1997), 8 Part II U.L.A. 39–40 (Supp. 2006). Upon publication notice, if given, creditors must file any claims “within four months after the date of the first publication of notice or be forever barred.” Id. § 3-801 (amended 1989), 8 Part II U.L.A. 208 (1998). The personal representative also may provide actual notice to a creditor and require claims be filed “within four months after the published notice, if given . . . , or within 60 days after the mailing or other delivery of the notice, whichever is later.” Id. § 3-801(b). If no notice is given, then claims must be presented within one year from the date of decedent’s death. See id. § 3-803(a)(1) (amended 1997), 8 Part II U.L.A. 39–40 (Supp. 2006).

California requires publication of notice of commencement of probate proceedings, but does not have a specific requirement for publication notice to creditors. See CAL. PROB. CODE § 8125 (West 2006). California also requires the personal representative to notify known and reasonably ascertainable creditors as to estate administration. See id. § 9050. In the event of such notice, the creditor must present the claim within sixty days of delivery of the notice. See id. § 9052. California law provides the personal representative some immunity for failure to give notice under certain circumstances in which the personal representative does not act in bad faith. See id. § 9053.

New York requires claims be presented within seven months from the date letters are issued to the fiduciary. See N.Y. SURR. CT. PROC. ACT LAW § 1802 (McKinney 2006). The seven-month limitation serves to protect the fiduciary. Upon passage of the seven-month time period, a creditor may not charge the fiduciary for assets distributed to beneficiaries in good faith. See id. The “good faith” requirement means that to the extent a fiduciary has knowledge, actual or constructive, of a claim not formally presented, the fiduciary cannot avoid liability if the fiduciary distributes assets before satisfying the claim. See id; see also In re Lukin’s Estate, 207 N.Y.S.2d 318, 320 (Sur. Ct. 1960).

29 See UNIF. PROBATE CODE § 3-804 (amended 1997), 8 Part II U.L.A. 47 (Supp. 2006). A creditor also may commence a proceeding against the personal representative within the time limit for presenting claims. See id.

30 See id. § 3-806 (amended 1987), 8 Part II U.L.A. 242–43 (1998). This section requires the personal representative to disallow a claim within sixty days after the time for presentation of the claim has expired. Absent a disallowance, the claim is deemed allowed. The section also provides some ability for the personal representative to change an
must commence a proceeding contesting the disallowance to preserve its claim.\textsuperscript{31}

The personal representative pays the claims in a certain order of priority depending on the class of claim.\textsuperscript{32} Generally, administration expenses, funeral expenses, debts owed to the federal and state governments, and expenses of the last illness take priority over other claims. The personal representative may pay these claims from estate assets.\textsuperscript{33} The order of payment becomes important when an estate is insolvent. Prior to the 1998 amendments, the Uniform Probate Code did not specifically address procedures for collection of claims as against nonprobate transferees in the event estate assets are insufficient to pay all claims.

When a decedent's probate estate has sufficient assets to pay creditors, probate procedures adequately protect creditors' interests. Creditors generally can determine where to file the claim by reviewing court records in the place of decedent's last domicile. Once the creditor timely presents a claim, the personal representative must use probate assets to pay the claim. Probate procedures give priority to payment of creditor claims and only allow distribution to beneficiaries of those assets remaining after full payment of creditor claims.

The difficulty arises for creditors when a decedent leaves an insolvent estate. Insolvency occurs when insufficient probate assets exist to

allowance or disallowance. The personal representative only may change a disallowance to an allowance if she does so prior to the date that is "60 days after the mailing of the notice of disallowance," assuming the notice warns the creditor of the time bar. \textit{Id.} (noting that if the estate is insolvent and all "successors" who would be affected by the change consent, the personal representative could still pay the claim following the sixty-day time period). The personal representative only may change an allowance to a disallowance before payment of the claim or before a court order or judgment indicates allowance or payment. \textit{See id.}

\textsuperscript{31} \textit{See id.} (allowing the creditor sixty days after disallowance to commence an action on its claim).

\textsuperscript{32} \textit{See id.} \S 3-805, 8 Part II U.L.A. 240–41 (1998). State law varies as to the order of payment of claims. \textit{Compare id. with} N.Y. Surr. Ct. Proc. Act Law \S 1811 (McKinney 2005), and \textit{Mont. Code Ann.} \S 72-3-807 (2005). The federal super priority statute also comes into play and requires payment of claims to the federal government to be made before payment of claims other than administration and funeral expenses. \textit{See 31 U.S.C.} \S 3713 (2006) ("A claim of the United States Government shall be paid first when ... the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor."); \textit{see In re} Estate of Funk, 849 N.E.2d 366, 373 (Ill. 2006).

pay fully all creditor claims. If an individual chooses to pass all assets by means of nonprobate transfer, then upon death, the individual will leave an insolvent estate. In that event, the decedent’s beneficiaries often decline to initiate probate proceedings. Consequently, to present its claims in a timely manner, the creditor must incur the cost of initiating probate proceedings. A creditor may do so under the Uniform Probate Code because a creditor falls within the definition of an “interested person.” The creditor bears the costs and burdens of appointment with the knowledge that insufficient estate assets exist to pay the creditor’s claim. For the creditor, this is a costly but necessary first step in the collection process as against nonprobate transferees.

C. Purpose of the Creditor Claims Procedures

Historically, probate procedures have provided for, as one of their purposes, a single forum within which to resolve all claims against a decedent’s estate prior to its distribution to beneficiaries. Providing a single forum promotes the policy of minimizing costs and time involved in transferring property at death. Courts recognize that the creditor claim procedures have the primary goal of “expeditious and orderly processing”

34 See id. § 1-201(24) (amended 1990), 8 Part I U.L.A. 11 (Supp. 2006) (defining “interested person” to include “creditors . . . and any others having a property right in or claim against . . . the estate of a decedent”); id. § 3-203(a)(6), 8 Part II U.L.A. 49 (1998) (indicating a creditor may be appointed “45 days after the death of the decedent” if no one else willing to serve has a prior right to appointment); see also CAL. PROB. CODE § 8461(q) (West 2006) (allowing appointment of creditor absent willingness of any other person with higher priority to serve as administrator); id. § 9150 (allowing creditors to bring direct petition to recover assets).

35 Commentators have long recognized the payment of decedent’s creditors as being a primary purpose served by the probate process.

[Probate] administration is designed to secure payment of debts, and thereafter to distribute any residue to the persons entitled thereto; to gather and to preserve the property, to pay debts, and to distribute the balance to the persons entitled. It has been said, in fact, that there is no other method whereby the existence of creditors or heirs of a decedent can be conclusively established. Where one dies insolvent, his estate is essentially a trust fund for the benefit of creditors. The entire procedure, in effect, is essentially a winding up or dissolution, and one of the most important elements is the marshaling of assets so that debts may promptly be paid and the remaining assets just as promptly distributed to those entitled to them.

1 HENDERSON, supra note 13, §14, at 34 (footnotes omitted).
of estate administration. The Uniform Probate Code bolsters the policy of minimizing costs and time involved in transferring property at death in three ways. First, it requires that claimants present their claims either to the probate court or to the personal representative of decedent’s estate. Second, it broadly defines the term “claim.” Finally, it subjects all claims to similar time periods for presentment, regardless of whether the claim is to be collected from probate or nonprobate assets. The relatively short time frame for presenting claims leads to settlement of a decedent’s estate in an expeditious manner.

D. Property to Which Probate Procedures Apply

Although creditors must preserve claims through probate administration, the fact that the probate court generally has jurisdiction only over probate assets causes difficulties when those assets are insufficient to pay all outstanding claims. Following the 1997 Uniform Probate Code amendments, claims as against both probate and nonprobate transferees are barred within one year from death, but the amendments do not extend the jurisdiction of the probate courts to allow collection of claims from nonprobate assets without institution of a separate proceeding as against the nonprobate transferee. Jurisdiction of the probate court extends only to a decedent’s estate. Except for the specific reference in the nonclaim statute to nonprobate property, other references in the Uniform Probate Code indicate that creditor claim procedures apply to property subject to probate proceedings. The Uniform Probate Code refers to the term “estate” in relation to “the property of the decedent ... as originally constituted and as it exists from time to time during administration.” The Code also implies that probate procedures regarding rights of creditors apply only to property passing pursuant to decedent’s will, or in the absence of the will, to decedent’s

36 Murphy v. Murphy, 1999 ND 118 ¶ 24, 595 N.W.2d 571, 578.
intestate heirs.\textsuperscript{40} If the personal representative distributes property of the estate prior to payment of creditors, the creditors, whose claims are not barred, may pursue their claims against the distributees of the estate.\textsuperscript{41} Distributees of the estate do not include nonprobate transferees.

Procedures for asserting claims against nonprobate transferees were added to the Uniform Probate Code in 1998.\textsuperscript{42} The drafters did not codify these procedures as part of the probate administration procedures. Rather, the procedures are included under the separate Uniform Probate Code provisions addressing "Nonprobate Transfers on Death," and as part of the separate free-standing Uniform Nonprobate Transfers on Death Act.\textsuperscript{43} These nonprobate procedures for payment of creditor claims adhere to the goal of providing a single forum for resolving claims against the estate. Pursuant to these procedures, the forum for deciding creditor claims remains the probate estate. Nonprobate transferees bear liability for claims only to the extent the probate estate is insufficient. The liability of the nonprobate transferee is to the probate estate, as opposed to the claimant.\textsuperscript{44} These provisions direct that claims first be resolved as part of the probate administration and, to the extent the probate estate is insufficient, require institution of a separate proceeding as against the nonprobate transferee. The separate proceeding adds cost and time to the ultimate resolution and payment of creditor claims, and allows beneficiaries to take steps to make it more difficult for creditors to proceed. This result undermines both policies important to development of the law regarding the collection of claims by decedent's creditors.

E. Claims Subject to Presentment

The Uniform Probate Code also promotes the goal of having a single forum to decide creditor claims by using an expansive definition of the

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\textsuperscript{40} See id. § 3-101, 8 Part II U.L.A. 29 (1998); see also Gartley v. Gartley, 622 So. 2d 77 (Fla. Dist. Ct. App. 1993) (finding that a claim against life insurance policy was not subject to probate procedures regarding creditor claims because life insurance is nonprobate asset).


\textsuperscript{44} See UNIF. PROBATE CODE § 6-102(b) (amended 1998), 8 Part II U.L.A. 174 (Supp. 2006).
term "claim." It broadly refers to "claims against a decedent's estate" as including all claims "whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis." Even unmatured claims and disputed claims fall within the definition of claims subject to procedures. This expansive definition ensures that all those who might have a claim of any kind may pursue the claim and be eligible for payment, in conjunction with and subject to priority of all other claims.

The Uniform Probate Code requires unsecured claimants to present their claims to the personal representative appointed to administer the estate so that all claims can be resolved in one forum.46

45 Id. § 3-803 (amended 1997), 8 Part II U.L.A. 39–40 (Supp. 2006). See also id. § 1-201 (amended 1990), 8 Part I U.L.A. 10 (1998) (defining "claim" to include "liabilities of the decedent or protected person, whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent . . . including funeral expenses and expenses of administration"). The definition specifically excludes "estate or inheritance taxes, or demands or disputes regarding title of a decedent . . . to specific assets alleged to be included in the estate." Id. California defines "claim" similarly but specifically includes claims for taxes other than property taxes and assessments secured by liens on real property and funeral expenses of decedent. See CAL. PROB. CODE § 9000 (West 2006). New York does not specifically define "debt," but provides a procedure for contingent and unliquidated debts. See 2-28 N.Y. PRACTICE GUIDE: PROB. AND EST. ADMIN. § 28.01[2] (Matthew Bender & Co. 2004); N.Y. SUR. CT. PROC. ACT LAW § 1804 (McKinney 2005).

46 See UNIF. PROBATE CODE § 3-104, 8 Part II U.L.A. 36 (1998) ("No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this Article.") Note, however, that Uniform Probate Code section 3-1004 recognizes: "After assets of an estate have been distributed . . . an undischarged claim not barred may be prosecuted in a proceeding against one or more distributees." UNIF. PROBATE CODE § 3-1004, 8 Part II U.L.A. 297 (1998). Also, if probate procedures have not been commenced, then successors of a decedent's estate take subject to the claims of creditors pursuant to section 3-901. See id. § 3-901, 8 Part II U.L.A. 267 (1998). Non-Uniform Probate Code states generally follow this same approach. See, e.g., CAL. PROB. CODE § 9002 (West 2006). Note, however, that California provides an alternative procedure for presenting claims to trustee pursuant to California Probate Code section 19003. Even those states that permissively allow creditors to file claims as part of the probate administration induce creditors to do so by allowing claimants who have filed their claims priority access to probate assets prior to distribution to beneficiaries. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 12-2.1 (McKinney 2006) ("The failure of the plaintiff to present his claim to the personal representative as prescribed by law shall not impair his right to maintain an action against distributees or testamentary beneficiaries . . . .")
creditors and those with pending claims do not have to comply with this requirement. Also excepted are claims regarding title of a decedent to an asset. The presentment of a claim apprises the personal representative that an amount may be owed to the creditor. It also allows the personal representative to prioritize and to pay out estate assets proportionately among creditors in the event estate assets are insufficient to pay all claims.

The presentment of all claims in one forum benefits creditors by ensuring fair treatment of all in the event estate assets are insufficient to pay all claims. In the absence of any nonprobate transfers, this

47 Under the Uniform Probate Code, a secured creditor generally need not present its claim in order to enforce its security. See UNIF. PROBATE CODE §§ 3-104, 8 Part II U.L.A. 36 (1998), 3-803(d)(1) (amended 1997), 8 Part II U.L.A. 39-40 (Supp. 2006). However, if the secured creditor wishes to preserve a right to a deficiency judgement enforceable against the estate, the creditor generally must present its claim within the required period of time. See UNIF. PROBATE CODE § 3-802, 8 Part II U.L.A. 261 (1998).

48 The Uniform Probate Code also allows an exception to the presentment requirement for those claims pending at the time of death. See UNIF. PROBATE CODE § 3-804(2), 8 Part II U.L.A. 47 (Supp. 2006) ("No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of his death.") Some non-Uniform Probate Code states also have provided an exception for pending claims. See, e.g., CAL. PROB. CODE § 9350 (West 2006). Contra American & Foreign Ins. Co. v. Dimson, 645 So. 2d 45, 47 (Fla. Dist. Ct. App. 1994); Babbitt v. Hronik, 623 N.W.2d 700, 704 ¶ 7 (Neb. 2001) (failure to name personal representative as defendant caused claim to be untimely). The exception recognizes that the personal representative is aware of claims pending in court at a decedent’s death and that presentment of the claim would be unnecessarily repetitive. See Lovell v. One Bancorp, 755 F. Supp. 466, 468 (D. Me. 1991) (quoting In re Estate of Brown, 421 So. 2d 752, 753 (Fla. Dist. Ct. App. 1982) (finding creditor had presented the claim, but ignored the procedure for contesting the personal representative’s disallowance of the claim)); see also Reese v. Reese, 637 P.2d 1183 (Mont. 1981).

49 Courts also have held that claims regarding title fall outside the presentment requirement of the Uniform Probate Code because disputes regarding title address whether an asset belongs in an estate, as opposed to whether an amount is owing. See Murphy v. Murphy, 1999 ND 118 ¶ 29, 595 N.W.2d 571, 579 (citing Estate of Powers, 552 N.W.2d 785, 787 (N.D. 1996)). For example, when a surviving joint tenant asserts a survivorship interest and argues the asset belongs to her and not the estate, the claim of the surviving joint tenant does not amount to a creditor claim. See id; see also UNIF. PROBATE CODE § 1-201(6) (amended 1990), 8 Part I U.L.A. 10 (1998) (defining “claim” so as to exclude “demands or disputes regarding title of a decedent . . . to specific assets alleged to be included in the estate”).

50 See UNIF. PROBATE CODE § 3-805, 8 Part II U.L.A. 240-41 (1998) (listing the order in which claims should be paid and requiring proportionate treatment of creditors in the same class).
requirement also aids beneficiaries by spreading the cost of claims proportionately among beneficiaries and by allowing the passage of remaining estate assets to beneficiaries free of all creditor claims. Because nonprobate transferees bear liability only to the extent that the assets subject to probate administration are insufficient, the current system favors nonprobate transferees to the detriment of those beneficiaries taking under the will of decedent.

F. Notification of Creditors and Time for Presentation of Claims

Given the broad application of probate procedures to claims of decedent’s creditors, it is paramount that creditors present claims as part of probate administration in a timely manner. A creditor, however, may not receive notice in time to present its claim. The recent amendments to the creditor claims procedures of the Uniform Probate Code changed the rules regarding publication of notice, as well as the rules regarding when the nonclaim statute bars creditor claims. As amended, the Uniform Probate Code no longer requires publication of notice to creditors, but instead permissively allows a personal representative to publish notice to creditors, to give actual written notice to known creditors, or to forgo providing any notice to creditors. Also, as amended, the Uniform Probate Code specifies that regardless of whether probate procedures have been initiated, creditors must present claims within one year of decedent’s death. These amendments, made in 1989, were enacted in reaction to the Supreme Court’s decision in *Tulsa Professional Collection Services v. Pope.*

The Uniform Probate Code, prior to these amendments, required publication of notice to creditors. Upon publication of notice, creditors were required to present all claims within four months or be forever

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barred from bringing the claim. In addition to this nonclaim statute, in the event notice was not published, the Uniform Probate Code provided for a three-year statute of limitations running from the date of decedent's death.

The Supreme Court in Pope addressed a nonclaim statute similar to the four-month limitation found in the Uniform Probate Code that begins to run on publication of notice in a newspaper. The time bar in Pope, however, was two months after notice by publication. The Supreme Court held that the nonclaim statute at issue in Pope violated the due process protections of the Fourteenth Amendment. The Court found the unsecured claim qualified as a "species of property protected by the Fourteenth Amendment's Due Process Clause." The Court also found state action sufficient to invoke the Fourteenth Amendment. The Court distinguished the nonclaim statute involved in Pope from a self-executing statute of limitations that does not rise to the level of state action. It stated: "Here, in contrast, there is significant state action. The probate court is intimately involved throughout, and without that involvement the

56 See Pope, 485 U.S. at 479. The Court noted:

  Nonclaim statutes come in two basic forms. Some provide a relatively short time period, generally two to six months, that begins to run after the commencement of probate proceedings. Others call for a longer period, generally one to five years, that runs from the decedent's death. Most States include both types of nonclaim statutes in their probate codes, typically providing that if probate proceedings are not commenced and the shorter period therefore never is triggered, then claims nonetheless may be barred by the longer period.

Id. at 480 (citation omitted). Oklahoma provided only for the shorter two-month time period. See id. Oklahoma's statute contrasts with the nonclaim statute of the Uniform Probate Code, which also provides for a longer period that runs from the decedent's death. That time period is now one year, and before it was three years. This one-year time limit acts as a statute of limitations because it runs regardless of any action on the part of courts or the personal representative. Compare UNIF. PROBATE CODE § 3-803 (amended 1997), 8 Part II U.L.A. 39–40 (Supp. 2006) with UNIF. PROBATE CODE § 3-803 (prior to 1989 amendment), 8 Part II U.L.A. 218 (1998).
58 See id.
59 See id. at 487.
time bar is never activated." Because the nonclaim statute can adversely affect protected property interests, the Supreme Court found publication notice inadequate. Balancing important state interests with the needs of creditors, the Court required "actual notice to . . . reasonably ascertainable creditors."

The Supreme Court holding in Pope created the need to reexamine the nonclaim statute of the Uniform Probate Code. The question became whether the four-month time bar running from the date of publication served to bar any claims at all. The drafters of the Uniform Probate Code were uncertain whether or not the holding of Pope applied to the Code’s nonclaim statute. However, they concluded in their comments: "[I]f [Pope] applies to this code, [the four-month time bar] is useless except to bar unknown creditors." This conclusion served as the basis for the amendments made in response to Pope, which were three-fold: (1) publication notice became permissive, as opposed to mandatory; (2) provisions for actual notice were inserted; and (3) the prior three-year limitation period in the absence of publication notice was reduced to a one-year period running from the date of decedent’s death. Unlike the nonclaim statute addressed in Pope, the one-year statute of limitations begins to run without any action on the part of the personal representative or probate court.

The drafters of these amendments concluded that permissive, as opposed to mandatory, publication furthered the efficient administration of estates. The comments to the Uniform Probate Code acknowledge that "[p]ublication of notice to creditors is quite expensive in some populous areas of the country." In addition, the Supreme Court in Pope found publication notice ineffective, stating:

Creditors . . . are particularly unlikely to benefit from publication notice. As a class, creditors may not be aware of a debtor’s death or of the institution of probate

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60 Id.
61 See id. at 490.
62 Id. at 490.
65 Id.
67 Id.
Remembering the Creditor at Death

proceedings. Moreover, the executor or executrix will often be, as is the case here, a party with a beneficial interest in the estate. This could diminish an executor’s or executrix’s inclination to call attention to the potential expiration of a creditor’s claim. There is thus a substantial practical need for actual notice in this setting.\(^{69}\)

Given the Supreme Court’s assessment of the ineffectiveness of publication notice and the expense involved in providing such notice, states should strongly consider allowing permissive publication.

Actual notice raises different issues. The Supreme Court in *Pope* found that actual notice to reasonably ascertifiable creditors is an effective and inexpensive means of apprising creditors of the need to present any outstanding claims.\(^{70}\) It stated: “Providing actual notice to known or reasonably ascertifiable creditors . . . is not inconsistent with the goals reflected in nonclaim states. Actual notice need not be inefficient or burdensome. We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice.”\(^{71}\) The 1998 Uniform Probate Code amendments nevertheless treat actual notice similarly to publication notice and allow the personal representative to forgo actual notice. For the same reasons stated by the Supreme Court (and noted in the preceding paragraph), personal representatives, given the choice, will unlikely provide actual notice. To do so almost ensures the filing of a claim. In contrast, the claim might be avoided completely if actual notice is not given and the one-year limitations period were to run without presentment of the claim. Given that many estates, especially larger ones, remain open for more than one year, from the point of view of estate beneficiaries, there is little to be gained by providing actual notice and much to be lost.

The comments to the Uniform Probate Code do not directly address the reasoning behind allowing permissive actual notice. With regard to publication notice, however, the comments discourage states from choosing mandatory publication notice by highlighting that a failure on the part of a personal representative to publish notice would result in a breach of duty, and consequently make the personal representative potentially liable


\(^{70}\) See id. at 489–90.

\(^{71}\) Id.
for costs of discharging the claim and enforcing contribution from beneficiaries.72 One can speculate that this also may have been a determinative factor in choosing to make actual notice permissive. In fact, the Uniform Probate Code section providing for publication and actual notice directly addresses this fear by absolving the personal representative of liability for failure to publish notice.73 It would not make sense to require a personal representative to give actual notice and in the next sentence to make the duty meaningless by absolving her from liability.74

Although the cost of mailing actual notice might be minimal, the practical ramifications of requiring such notice (after taking into account the costs associated with making the determination of who is a reasonably ascertainable creditor and the attendant costs if the wrong determination is made) could lead one to conclude that the costs of mandatory actual notice are inordinately high. Case law addressing such breach of duty claims in states that have adopted mandatory actual notice proves these costs are a valid concern.75 Other states, like New York, responded to the concerns in Pope by no longer requiring publication notice and by eliminating the possibility of shortening the time period before a fiduciary may distribute assets to beneficiaries. New York, however, holds the fiduciary to a "good faith" standard that precludes the fiduciary from distributing assets to beneficiaries without first paying claims of which the fiduciary had actual or constructive notice.76

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74 Note, however, that California requires actual notice and has struck a balance by providing some liability protection for personal representatives. The California Probate Code requires the giving of notice to known or reasonably ascertainable creditors. See Cal. Prob. Code § 9050 (West 1991). It also protects the personal representative from liability "[i]f the personal representative believes that notice to a particular creditor is or may be required by this chapter and gives notice based on that belief." Id. § 9053. It also protects the personal representative from failing to give notice unless it is established, among other things, that the personal representative acted in bad faith. See id.
76 See 5 New York Estate Administration § 5.03 (Matthew Bender & Co. 2005) (citing, among other cases, In re Matter of Segall, 38 N.E.2d 126 (N.Y. 1941), and In re Matter of Smith, N.Y.L.J., April 9, 1987, at 15, col. 2 (Sur. Ct. Bronx County), and stating, "The seven-month rule protects only fiduciaries acting in good faith. . . . If the fiduciary knows (or should have known) of a claim, he cannot distribute the assets without paying the claim, even if the claimant did not present it formally.").
The Supreme Court in *Pope* found that the costs of determining "reasonably ascertainable creditors" was in fact not high. It noted that "impracticable and extended searches" were not required and that all the personal representative needed to do was use "reasonably diligent efforts" to determine creditors entitled to actual notice. The potential costs in relation to beneficiaries and personal representatives should be balanced against the policy favoring payment of debts so that the economy is not required to internalize costs of nonpayment. Balancing these interests leads to the conclusion that actual notice should be given to reasonably ascertainable creditors.

If, upon balancing the interests of beneficiaries and creditors, a choice instead is made to avoid the costs associated with providing actual notice to creditors, the disadvantages to creditors of such a choice could be lessened by providing a longer time period to file claims in the absence of notice. A longer limitations period would make it more likely that a creditor would become aware of the death of a debtor and, once the creditor decided to take legal action to enforce its claim, it would have sufficient remaining time to do so. However, the drafters of the 1989 amendments, in addition to not requiring actual notice, chose not to provide a longer limitations period. Instead, the 1989 amendments to the Uniform Probate Code shortened the limitations period in the absence of notice from a suggested three years to one year.

The comments to the Uniform Probate Code acknowledge the disadvantages of the one-year limitations period as to creditors and respond by explaining the policy reasons that underlie the reduction of the time period:

The Joint Editorial Board recognized that the new bar running one year after death may be used by some sets of successors to avoid payment of claims against their decedents of which they are aware. Successors who are willing to delay receipt and enjoyment of inheritances may consider waiting out the non-claim period running from

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death simply to avoid any public record of an administration that might alert known and unknown creditors to pursue their claims. The scenario was deemed to be unlikely, however, for unpaid creditors of a decedent are interested persons who are qualified to force the opening of an estate for purposes of presenting and enforcing claims. Further, successors who delay opening an administration will suffer from lack of proof of title to estate assets and attendant inability to enjoy their inheritances. Finally, the odds that holders of important claims against the decedent will need help in learning of the death and proper place of administration is rather small. Any benefit to such claimants of additional procedures designed to compel administrations and to locate and warn claimants of an impending non-claim bar, is quite likely to be heavily outweighed by the costs such procedures would impose on all estates, the vast majority of which are routinely applied to quick payment of the decedents’ bills and distributed without any creditor controversy.\footnote{Unif. Probate Code § 3-803 cmt. (amended 1997), 8 part II U.L.A. 216–17 (1998) (citation omitted)}. 

The comments assume that creditors will act quickly to enforce claims and that beneficiaries in most cases will want to pay outstanding claims. The comments also interpret Pope to require actual notice only with respect to enforcement of a nonclaim statute that shortens the time limit for bringing claims upon publication notice, as opposed to a statute of limitations that automatically runs from the date of death.

A recent Montana case demonstrates that creditors may not take legal action to enforce a claim as quickly as one year after death.\footnote{See In re Estate of Taylor, 2002 MT 1393, 2002 Mont. Dist. LEXIS 2366.} In that case, Deaconess Billings Clinic provided health care to decedent. Decedent died on January 24, 1998. Deaconess Billings Clinic did not take steps to have itself appointed as personal representative until March 22, 2000, well after the one year nonclaim period had run. The district court held the clinic’s claim time barred.\footnote{See id.} This is one of a number of cases that has enforced the time bar of an applicable nonclaim statute.\footnote{See, e.g., Levine v. Levine, 126 Cal. Rptr. 2d 255 (Ct. App. 2002); Wishbone, Inc.}
G. Applicability of One-Year Limitation Period to Nonprobate Transfers

Some of the states that originally adopted the Uniform Probate Code have not adopted the recent amendment making this one-year limitation period applicable to both probate and nonprobate transfers. In these states, the issue arises as to whether the nonclaim statute serves to bar claims as against both probate and nonprobate transfers. The comments classify the 1997 amendment applying the nonclaim statute to both probate and nonprobate transfers as merely "technical." The comments explain that the amendment eliminates any implication raised by a former section of the Uniform Probate Code that creditors may reach nonprobate transferees in payment of claims with no imposition of a time bar. The fact that the 1997 amendment was deemed to be only "technical" in nature indicates the lack of any widespread acceptance of such an implication.

v. Eppinger, 829 P.2d 434 (Colo. Ct. App. 1991) overruled by In re Estate of Hall, 948 P.2d 539 (Colo. 1997); In re Estate of Mayfield, 771 P.2d 179 (N.M. 1989); In re Estate of Oney, 624 P.2d 1037 (N.M. Ct. App. 1981). 84 See discussion supra note 20; see also ALASKA STAT. § 13.16.460 (LexisNexis 2004); ARIZ. REV. STAT. ANN. § 14-3803 (West 2005); COLO. REV. STAT. § 15-12-803 (2006); IDAHO CODE ANN. § 15-3-803 (2001 & Supp. 2006); N.M. STAT. § 45-3-803 (LexisNexis 2004); S.C. CODE ANN. § 62-3-803 (2005); UTAH CODE ANN. § 75-3-803 (West 1993). 85 See UNIF. PROBATE CODE § 3-803 cmt. (amended 1997), 8 Part II U.L.A. 41 (Supp. 2006). 86 See id.: [T]he words "and nonprobate transferees" were added to subsection (a) to clarify that the Code's non-claim bar protects probate as well as nonprobate successors against claims of unsatisfied creditors of the decedent. Section 6-101(b) of the original Code, which was replaced by Section 6-102 in 1998, implied that unsatisfied creditors of the decedent had rights to reach nonprobate transferees in payment of allowed claims but imposed no time bar.

Section 6-101(a) addresses nonprobate transfers on death and states that those transfers are nontestamentary. See id. § 6-101(a) (amended 1998), 8 Part II U.L.A. 173 (Supp. 2006). Former section 6-101(b), now deleted in its entirety, simply stated: "This section does not limit rights of creditors under other laws of this State." Id. § 6-101 (prior to 1998 amendment), 8 Part II U.L.A. 430 (1998). 87 This implication was alluded to in Brown v. Delaney, 840 N.E.2d 6, 10 (Ind. Ct. App. 2005). Although the appellate court reversed and held the claims barred by the nonclaim statute, it noted: "Prior to the enactment [of the statute specifically setting a time limit to assert claims as against trust property], claims brought by creditors of a decedent against the decedent's trust property were not subject to any time constraints under the
The statutes of some states avoid any confusion regarding the issue of whether the nonclaim statute applies to both probate and nonprobate property by statutorily imposing a similar nonclaim time bar as against certain nonprobate transfers. Other states have avoided this issue in the same manner adopted by the 1998 amendments to the Uniform Probate Code by specifically requiring all claims be resolved as part of the probate proceedings. Some courts impliedly subject all creditor claims to the nonclaim statute by allowing the personal representative to compel the nonprobate transferee to contribute to the satisfaction of the estate’s claimants. By requiring all claims against a decedent’s estate to be subject to probate procedures and to be resolved in one forum, the overriding policy of efficient administration of estates is furthered.

H. Personal Representative Duties and Choices

Upon advising the personal representative of the choices regarding the giving of notice pursuant to the Uniform Probate Code and the impact on the limitations periods of the different choices, it is not clear whether a personal representative, having the beneficiaries’ interests in mind, would make the choice to provide publication notice. It is also not clear whether a personal representative, with the consent of the estate beneficiaries, would choose to provide actual notice to those creditors with large claims prior to the running of the one-year limitation period.

An attorney must analyze for her client the advantages and disadvantages of providing notice to begin the running of an alternative limitations period under the Uniform Probate Code. The client’s choices under the Uniform Probate Code essentially are as follows:

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91 This discussion assumes that the amendments to the Uniform Probate Code properly interpreted the holding of the Supreme Court in Pope regarding the giving of actual notice. See supra text accompanying notes 53–71.
(1) Publish notice to creditors so that unknown creditors will be barred from bringing a claim four months from date of first publication of notice;\(^{92}\)

(2) Provide actual notice to creditors to bar specific claims after the latter of (I) four months from the date of first publication of notice, or (ii) sixty days following actual notice;\(^{93}\)

(3) Provide no notice and all claims will be barred on the earlier to occur of (I) one year after decedent’s death,\(^{94}\) or (ii) the running of another statute of limitations applicable to the specific claim after a four-month suspension following decedent’s death.\(^{95}\)

These choices are not mutually exclusive.

When analyzing these three options, attorneys should keep in mind the Uniform Probate Code exceptions to the running of the one-year limitations period. Specifically, mortgages, pledges, or other liens upon property of the estate escape the limitations period.\(^{96}\) If liability insurance protects the decedent or personal representative against a claim, the one-year limitation does not apply to the extent of the insurance protection provided.\(^{97}\) Finally, claims for personal representative, attorney, or accountant fees incurred by the personal representative in administering the

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\(^{92}\) See Unif. Probate Code § 3-803(a)(2) (amended 1997), 8 Part II U.L.A. 39 (Supp. 2006). Given the holding in Pope, it is unclear whether publication notice could ever serve to bar claims within the four-month period adopted by the Uniform Probate Code with respect to reasonably ascertainable creditors. See supra text accompanying notes 53–71.

\(^{93}\) See Unif. Probate Code § 3-803(a)(2) (amended 1997), 8 Part II U.L.A. 39 (Supp. 2006). It could be argued that the reasoning of Pope requires actual notice to reasonably ascertainable creditors as a matter of due process. However, that is not the interpretation underlying the amendments to the Uniform Probate Code. The Uniform Probate Code presupposes that a one-year limitation period that automatically runs from decedent’s death without any further action on the part of a representative of the estate does not require the giving of any notice. Id.


\(^{95}\) See id. § 3-802(b) (amended 1989), 8 Part II U.L.A. 211 (1998).


\(^{97}\) See id. § 3-803(d)(2) (amended 1997), 8 Part II U.L.A. 40 (Supp. 2006); see Wagg v. Estate of Dunham, 42 P.3d 968 (Wash. 2002) (addressing statute similar to Uniform Probate Code section 3-803(d)(2)).
The time limits of nonclaim statutes clearly promote the efficient passage of property at death. If barred, the creditor can no longer pursue its claim as against "the personal representative, the heirs and devisees,
and nonprobate transferees of the decedent."\textsuperscript{103} The bar applies whether or not an estate has been opened for administration.\textsuperscript{104} In an insolvent estate, once the time limit for presentation has passed, the personal representative must pay presented claims based on priority among classes of claimants and proportionate distribution within a class.\textsuperscript{105}

**IV. COLLECTING CREDITOR CLAIMS FROM NONPROBATE TRANSFERS**

A. History of Uniform Probate Code Claims Procedures for Collecting Nonprobate Property

While probate procedures regarding creditor claims for the most part have changed very little in overall structure since initial enactment of the Uniform Probate Code, the law of nonprobate transfers has changed greatly. Originally separate procedures dealt with multiple-person bank accounts and with security or brokerage accounts, and neither the separate rules applicable to bank accounts nor those applicable to security accounts set forth the process for asserting creditor claims as against nonprobate transfers.\textsuperscript{106} These separate rules treated the ability of creditors to reach the subject property differently.\textsuperscript{107} In 1998, the Uniform

\textsuperscript{103} \textit{UNIF. PROBATE CODE} § 3-803 (amended 1997), 8 Part II U.L.A. 39–40 (Supp. 2006) (clarifying that the bar is not only against heirs and devisees of the assets subject to probate but that it also applies as against nonprobate transferees).

\textsuperscript{104} See id. § 3-803 cmt. (amended 1997), 8 Part II U.L.A. 40 (Supp. 2006).

\textsuperscript{105} See id. § 3-805 (amended 1975), 8 Part II U.L.A. 240–41 (1998). This section directs the personal representative to pay claims in the following order:

1. costs and expenses of administration;
2. reasonable funeral expenses;
3. debts and taxes with preference under federal law;
4. reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him;
5. debts and taxes with preference under other laws of this state;
6. all other claims.

\textit{Id.} Section 3-807 further directs the personal representative to pay claims only after "making provision for homestead, family and support allowances." \textit{Id.} § 3-807(a) (amended 1989), 8 Part II U.L.A. 257 (1998).


\textsuperscript{107} The Uniform Probate Code addresses separately rights (1) to multiple-person
Law Commission amended these rules to add a new section, addressing in a single section, (i) the ability to satisfy claims from nonprobate transferees, including beneficiaries of bank and brokerage accounts, and (ii) the procedures for asserting creditor claims as against nonprobate transferees.108 This section appears both as section 102 of the Uniform Nonprobate Transfers on Death Act and section 6-102 of the Uniform Probate Code ("Section 102"), which incorporates in total the Uniform Nonprobate Transfers on Death Act, a separate, free-standing act.109

Section 102 sets forth procedures allowing creditors access to certain nonprobate transfers at death.110 The Prefatory Note to the addition of this section indicates that the impetus for the addition came after a spate of legislation in California, Florida, and Missouri, allowing for creditors to satisfy claims from nonprobate property. The Prefatory Note also indicates the amendments were made with some feelings of ambivalence, and states:

accounts pursuant to the Uniform Multiple Person Accounts Act, UNIF. PROBATE CODE §§ 6-201 to -227 (1989 version), 8 Part II U.L.A. 433–48 (2001); and (2) certain securities subject to the Uniform Transfer on Death Securities Registration Act, UNIF. PROBATE CODE §§ 6-301 to -311 (1989 version), 8B U.L.A. 449–57 (2001). Former section 6-215(a) of the Uniform Multiple Person Accounts Act indicated:

If other assets of the estate are insufficient, a transfer resulting from a right of survivorship or POD designation under this part is not effective against the estate of a deceased party to the extent needed to pay claims against the estate and statutory allowances to the surviving spouse and children.


In contrast, former section 6-309(b) of the Uniform Transfers on Death Securities Registration Act indicated only: "This part does not limit the rights of creditors of security owners against beneficiaries and other transferees under other laws of this State." UNIF. PROBATE CODE § 6-309(b) (prior to 1998 amendment), 8 Part II U.L.A. 455–56 (1998). In 1998, both former sections 6-215 and 6-309(b) were removed and superseded by the rules set forth in section 6-102 of the Uniform Nonprobate Transfers on Death Act, 8B U.L.A. 85–86, 114–15 (2001). This is a welcome change, if for no other reason than that it reflects the trend for banks and brokerage houses to provide overlapping financial services, and it is eminently reasonable that similar rules apply to both types of accounts.


109 Id.

The decision to generate more creditor protection against nonprobate transfers at death may be misguided. Some discussants question the need for new protections for unsecured creditors of decedents. Their skepticism is warranted because commercial creditors, by continuing to ignore the national trend towards streamlining probate by cutting creditor protections, have demonstrated lack of interest in probate law protections. Also, probate exemptions are a product of probate's tradition of protecting decedents' creditors that could come to be viewed as unwanted fetters on owner control of succession if creditor protection against transfers at death were to disappear.

It's possible, therefore, that probate priorities for family exemptions and creditors will be found to be insufficiently rooted in current public policy to be re-invigorated in the setting of widespread probate avoidance. Nonetheless, a proposal to increase the importance of these priorities by extending them to nonprobate succession forms should stimulate meaningful discussion of the policy issue. Also, discussion of policy in the context of a proposal to expand a familiar UPC remedy should start with agreement that decedents' creditors can be protected against popular forms of nonprobate transfers at death without jeopardizing the growing popularity of probate avoidance.\footnote{Contrary to the comments of the Prefatory Note, creditors are interested in assuring the ability to collect claims against a decedent's property, whether probate or nonprobate.\footnote{The author has had occasion to review proposed legislation drafted by creditors' counsel to provide more protection on a debtor's death.} The legislation passed in California, Florida, and Missouri prior to the amendments to the 1998 Uniform Probate Code also indicate such an interest in creditor protection.\footnote{See discussion infra Part IV.O.}}

\footnote{National Conference of Commissioners on Uniform State Laws, Amendments to Uniform Probate Code by Adding Section 6-102 and Deleting Sections 6-215 and 6-309(b) and to Make Conforming Changes in Free Standing Acts Derived from Uniform Probate Code Article VI, Prefatory Note, http://www.law.upenn.edu/bll/ulc/upc/upc6102.htm [hereinafter UPC Amendments] (last visited Feb. 9, 2007).}
Section 102 sets forth substantive rules subjecting certain nonprobate transferees to liability for claims against the decedent's estate. It also sets forth procedural rules for enforcing the liability of nonprobate transferees. As indicated in the discussion below, Section 102 reflects the ambivalence toward protecting creditors noted in its accompanying Prefatory Note.

B. Liability of Nonprobate Transferees

The substantive rules of Section 102 appear to address comprehensively the ability of creditors to reach nonprobate transfers, but to subject only certain nonprobate transferees to liability for claims against a decedent's estate. The substantive reach of Section 102 does not necessarily coincide with the law of other uniform acts or the restatements. It provides:

Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against decedent's probate . . . estate and statutory allowances to the decedent's spouse and children to the extent the estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received or controlled by that transferee.\(^{114}\)

This language affirmatively makes certain nonprobate transferees liable for creditor claims and quantifies the maximum liability of each nonprobate transferee. The question becomes whether Section 102 changes existing rules as to the liability of certain nonprobate transferees.

C. Transferee of Nonprobate Transfer

Liability generally extends to "a transferee of a nonprobate transfer."\(^{115}\) Section 102 defines "nonprobate" transfer as follows:

In this section, "nonprobate transfer" means a valid transfer effective at death, other than a transfer of a survivorship interest in a joint tenancy of real estate, by a


\(^{115}\) Id.
transferor whose last domicile was in this State to the extent that the transferor immediately before death had power, acting alone, to prevent the transfer by revocation or withdrawal and instead to use the property for the benefit of the transferor or apply it to discharge claims against the transferor’s probate estate.\textsuperscript{116}

In order to determine the scope of this definition, each type of nonprobate transfer must be analyzed separately. Once the scope of this definition is determined, the definition can be evaluated in terms of its impact on existing law. Common types of nonprobate transfers include trusts, pay-on-death bank accounts, joint tenancy bank accounts, transfer-on-death brokerage accounts, joint tenancy real estate, life insurance, and retirement accounts.\textsuperscript{117} As indicated in the following analysis, in many instances Section 102 changes the liability of nonprobate transferees, sometimes expanding and sometimes limiting the liability, as compared to the law as it otherwise has developed. The inconsistency in treatment under Section 102 and other applicable law raises many issues, and in light of those issues, such inconsistency may unnecessarily increase the cost and time involved in resolving claims.

D. Revocable Trusts

Revocable trusts clearly fall within the Section 102 definition of nonprobate transfers if the decedent holds the sole power to revoke the trust. A corollary to this rule is that, to the extent the power of revocation must be exercised in conjunction with another person, the assets of the trust generally will not be subject to creditor claims under Section 102.\textsuperscript{118} The comments to Section 102 indicate, however, that liability under

\textsuperscript{116} Id. § 102(a) (amended 1998), 8B U.L.A. 62 (2001).

\textsuperscript{117} Section 102 specifically defines “nonprobate transfer” as it is to be used in that section. Section 101 broadly references nonprobate transfers. In contrast, section 101 declares as nontestamentary any “nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature.” Id. § 101 (amended 1998), 8B U.L.A. 58 (2001).

\textsuperscript{118} See UNIF. NONPROBATE TRANSFERS ON DEATH ACT § 102 cmt. 7, 8B U.L.A. 65 (2001) (“[T]he trustee of an irrevocable trust, or of a trust that may be revoked only by the settlor and another person would ordinarily not be subject to this section . . . .”) .
Section 102 might attach regardless of whether the decedent holds the sole power to revoke "if the trust is named as beneficiary of a nonprobate transfer, such as of securities registered in [transfer-on-death] form."\(^{19}\)

It is puzzling why the drafters of Section 102 would have drafted the plain wording of the statute in a manner that can be easily manipulated to avoid creditors. To avoid the reach of Section 102, the trustor simply could require that to revoke the trust a nonadverse party must join the trustor in making the revocation. The trust could then give the trustor the power to replace at will the joint powerholder with another powerholder of the trustor's own choosing. As a result, the trustor could remove and replace the joint powerholder until the trustor found one willing to agree with trustor that the trust should be revoked. Such a provision would be no more than a minor inconvenience in light of the greater benefit bestowed by the possibility of avoiding creditor claims following death.

Section 102 also does not coincide with the law as it has developed with regard to revocable trusts. After some initial victories by decedents' estates, the law has become well settled that an individual may not avoid creditors, during life or at death, by placing the individual's property in a revocable trust.\(^{120}\) Unlike Section 102, the spendthrift provisions of the Uniform Trust Code would, at the trustor's death, subject any trust assets over which the trustor holds a joint power of revocation with a nonadverse party to the trustor's creditors, as in the example provided in the preceding paragraph.\(^{121}\) The Uniform Trust Code defines "revocable" as meaning "revocable by the settlor without the consent of the trustee or a person holding an adverse interest."\(^{122}\) The definition of "revocable" provided by the Uniform Trust Code is not susceptible to the same easy avoidance as is the definition of Section 102. A joint powerholder who is also trustee would owe fiduciary duties to the other trust beneficiaries and thus be less likely to agree to revocation. Likewise, an adverse party

\(^{19}\) Id.

[T]raditional doctrine [provides] that a settlor who is also a beneficiary may not use the trust as a shield against the settlor's creditors. . . . [A] revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges.


\(^{122}\) Id. § 103(14), 7C U.L.A. 414 (2006).
would be unlikely to agree to a revocation that did not pay a portion of
the trust assets to the adverse party.

Because Section 102 does not coincide with the law as it has other-
wise developed with respect to trusts, the question becomes whether
Section 102 would trump case law or other statutory law of a state that is
contrary to the rule of Section 102. The answer is not clear. A creditor
could argue that while Section 102 might not apply, liability still remains
pursuant to case law. Also, if statutory law conflicts with the narrow
applicability of Section 102 to revocable trusts, arguably the broader
liability imposed by statute would trump Section 102. Section 102(b)
begins: “Except as otherwise provided by statute, a transferee of a
nonprobate transfer is subject to liability to any probate estate. . . .”123
The broader liability imposed on the revocable trust by other statutes
could be viewed as falling under the exception. On the other hand, courts
could construe the exception of Section 102(b) narrowly to refer only to
those statutes excepting an asset from claims. It is also possible for the
court in such a case to apply a substance-over-form analysis to reach an
appropriate conclusion. The variety of answers to this question raise the
broader issue of whether Section 102 should be amended.

The questions raised by this incongruous treatment of revocable
trusts as between Section 102 and other case and statutory law defeats the
policy goal of probate procedures and Section 102 to provide a cost and
time efficient resolution of creditor claims against a decedent’s estate.
Rather than go against the weight of authority, consideration should be
given to revising the application of Section 102 to coincide with already
developed law.

E. Irrevocable Trusts Created by Transferor

A decedent’s interest in an irrevocable trust created by decedent
should not fall within the reach of Section 102 and therefore generally
should avoid liability for the claims of decedent’s creditors, unless under
the trust terms decedent retained a power of withdrawal exercisable
alone. The comment to Section 102 clarifies: “While the trustee of an
irrevocable trust . . . would ordinarily not be subject to this section, this
section could apply if the trust is named as a beneficiary of a nonprobate

123 Unif. Nonprobate Transfers on Death Act § 102(b) (amended 1998), 8B
transfer, such as of securities registered in [transfer-on-death] form.'\textsuperscript{124} Thus, the assets of an irrevocable trust at the death of trustor generally avoid claims of trustor’s creditors under Section 102.

Again, application of Section 102 does not coincide with the spendthrift provisions of the Uniform Trust Code applicable to irrevocable trusts created by a decedent. Section 505(a)(2) of the Uniform Trust Code allows creditors to reach assets of an irrevocable trust up to the “maximum amount that can be distributed to or for the settlor’s benefit.”\textsuperscript{125} Unlike the other subsections of Uniform Trust Code section 505, this subsection fails to indicate specifically whether it applies only during life or both during life and after death. Although the vast majority of cases addressing this situation deal with claims against irrevocable trusts during the trustor’s life, at least one case indicates that the ability of creditors to reach trust assets during life should survive a creditor’s death.\textsuperscript{126} The court in that case indicated:

> If this trust, as to the accrued and accumulated income to which the settlor was entitled before death could be upheld as against this creditor’s claim, it would be possible for anyone to create a trust for his benefit, in which he retained the right to receive and use all income during his life, with remainder to another at the moment of death, free from claims of creditors, and then keep large credit accounts running and die leaving his debts unpaid, thus cheating his creditors.\textsuperscript{127}

The court further stated: “In our opinion the creditors had a claim against this trust before the death of the grantor. We cannot conceive that his death would bar their claim; and we hold that a claim of creditors against said property is not defeated merely by the death of the debtor.”\textsuperscript{128} In light

\textsuperscript{127} Deposit Guar. Nat’l Bank, 204 So. 2d at 862 (quoting, \textit{In re Camm’s Estate}, 172 P.2d 547 (Cal. Ct. App. 1946)).
\textsuperscript{128} \textit{Id.}
of this potential difference between the Uniform Trust Code and the Uniform Nonprobate Transfers on Death Act, consideration also should be given to revision of Section 102 so as to be consistent with the ability of creditors under the Uniform Trust Code to reach assets of an irrevocable trust that could have been distributed for the settlor’s benefit.

Section 102, however, does coincide with the treatment of creditors in states that have adopted legislation allowing self-settled trusts to avoid creditor claims. Alaska and Delaware are among the states that afford certain self-settled trusts creditor protection. Generally, the statutes of those states protect property transferred to spendthrift trusts from creditor claims, even though the trustee may use trust property in the trustee’s discretion for the benefit of trustor.

If the decedent retained a power to withdraw property from the irrevocable trust during the decedent’s life, Section 102 should subject the property of such an irrevocable trust to creditor claims. The Section 102 definition of “nonprobate transfer” specifically includes “a valid transfer effective at death by a transferor . . . to the extent that the transferor immediately before death had power, acting alone, to prevent the transfer by . . . withdrawal and instead to use the property for the benefit of the transferor or apply it to discharge claims against the transferor’s probate estate.” In the instance of a retained power to withdraw, which is the substantive equivalent of a lifetime general power of appointment, the spendthrift provisions of the Uniform Trust Code should lead to a similar result, as should the provisions of the Restatement (Third) of Trusts. Section 102, however, would not apply specifically to a retained testamentary general power of appointment, as opposed to a lifetime power of appointment.

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130 See, e.g., ALASKA STAT. § 34.40.110 (LexisNexis 2005); DEL. CODE ANN. tit. 12, § 3570 (2005).
132 See UNIF. TRUST CODE § 505(b), 7C U.L.A. 535 (2006); RESTATEMENT (THIRD) OF TRUSTS § 56 cmt. b (2003). Note, however, that upon lapse of a power of withdrawal the UNIF. TRUST CODE § 505(b)(2) treats the powerholder as settlor only to the extent the value of the trust exceeds the greater of (i) $5,000, (ii) 5% of the trust assets or, (iii) the gift tax annual exclusion amount.
F. Irrevocable Trusts Created by Another

Irrevocable trusts created for the benefit of someone other than the transferor fall outside the definition of nonprobate transfer under Section 102. Even if the beneficiary holds a general power of appointment, the irrevocable trust avoids application of Section 102. The comment to Section 102 explains:

The definition of “nonprobate transfer” does not apply to a transfer at death incident to a decedent’s exercise or non-exercise of a presently exercisable general power of appointment created by another person. . . . [A] presently exercisable general power of appointment created by another person is commonly viewed as a provision in the trust creator’s instrument designed to provide flexibility in the estate plan rather than as a gift to the donee.

Essentially, the interest of a nontransferor beneficiary in an irrevocable trust escapes liability for the beneficiary’s debts under Section 102.

Again, the application of Section 102 differs from the Uniform Trust Code and may differ from the law of a state that has enacted spendthrift provisions. The Uniform Trust Code allows certain creditors of a beneficiary access to irrevocable trusts that provide for discretionary distributions to the beneficiary. Whether a beneficiary’s creditors can access irrevocable trust assets depends in large part on whether the trust contains an enforceable spendthrift provision under state law. Section 102 also differs with respect to treatment of exercised general powers of appointment held by a beneficiary. Generally, the creditors of a beneficiary who has exercised her general power of appointment may collect against the assets passing subject to the power.

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134 Id. § 102 cmt. 3, 8B U.L.A. 64 (2001).
136 See In re Estate of Breault, 211 N.E.2d 424, 434 (Ill. App. Ct. 1965) (implying that unexercised powers are treated differently); see also Unif. Trust Code § 505(b) 7C U.L.A. 535 (2006). Addressing a beneficiary’s power of withdrawal in a trust created by another person, Restatement (Third) of Trusts indicates:

Furthermore, assets that were subject to a presently exercisable general power of appointment immediately preceding the donee’s
G. Pay-on-Death Accounts

Accounts held by financial institutions often permit an account owner to pass the property held in the account at the owner’s death to a named beneficiary. These are often referred to as pay-on-death accounts, transfer-on-death accounts, or Totten trusts. The contract with the financial institution generally controls the ability of the account owner and the named beneficiary to access the account and to make changes to the account terms. These contracts often allow the owner unilaterally to change the named beneficiary. This right is the equivalent of a power of revocation, which would cause the account to fall within the definition of “nonprobate transfer” for purposes of Section 102.137

Prior to enactment of Section 102, the Uniform Nonprobate Transfers on Death Act subjected bank accounts payable by beneficiary designation on death to the claims of decedent’s creditors up to the decedent’s “own- ership amount.”138 The comment indicates that Section 102 expands this principle to “transfer on death security registration agreements,” and to other similar accounts.139 The application of Section 102 also codifies case law in jurisdictions that have not adopted a version of the Uniform Nonprobate Transfers on Death Act.140

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death thereafter remain subject to the satisfaction of claims against the donee’s estate, including expenses of estate administration.

A general power to appoint only by will . . . does not give the donee the equivalent of ownership of the appointive assets. Hence, it does not enable creditors of the donee to reach the trust remainder during the donee’s lifetime. The advantages of such a power, however, are sufficiently close to beneficial ownership when the power becomes exercisable upon the donee’s death that the appointive assets can then be reached to satisfy creditors’ claims and other obligations of the deceased donee’s estate.

**Restatement (Third) of Trusts** § 56 cmt. b (2003).


H. Joint Tenancy Bank and Brokerage Accounts

As with all financial institution accounts, the account contract will indicate whether the property transferred falls within the definition of nonprobate transfer. The comment to Section 102 emphasizes this point and states:

No view is expressed as to whether a survivorship interest in personal or intangible property registered in two or more names as joint tenants with right of survivorship would come within section 102(a). The outcome might depend on who originated the registration and whether severance by any co-owner acting alone was possible immediately preceding a co-owner's death.\textsuperscript{141}

The comment also notes that a survivor’s portion of the account will not be liable for a decedent’s debts to the extent of the survivor’s contributions to the joint account.\textsuperscript{142} The survivor will bear liability only to the extent of the account values “gained through survival of the decedent.”\textsuperscript{143} This interpretation continues to make prior law applicable to multiple-person accounts under the Uniform Probate Code and extends application to brokerage and similar accounts.

I. Joint Tenancy Real Property

Specifically excluded from the definition of nonprobate transfer is “a survivorship interest in a joint tenancy of real estate.”\textsuperscript{144} The comment to Section 102 outlines the law in states that have not adopted the section and explains the choice to exclude such interests as follows:

The exclusion of “a survivorship interest in a joint tenancy of real estate” from the definition of “nonprobate transfer” of subsection (a) is contrary to the law of some states (e.g., South Dakota) that allow an insolvent decedent’s creditors to reach the share the decedent could have received prior to death by unilateral severance of the joint tenancy. The law in most other states is to the

\textsuperscript{142} See id. § 102 cmt. 6 (amended 1998), 8B U.L.A. 65 (Supp. 2006).
\textsuperscript{143} Id.
\textsuperscript{144} Id. § 102(a) (amended 1998), 8B U.L.A. 62 (Supp. 2006).
contrary. By excluding real estate joint tenancies, stability of title and ease of title examination is preserved. Moreover, real estate joint tenancies have served for generations to keep the share of a couple’s real estate owned by the first to die out of probate and away from estate creditors. This familiar arrangement need not be disturbed incident to expanding the ability of decedents’ creditors to reach newly recognized nonprobate transfers at death.¹⁴⁵

The exclusion of survivorship interests in joint tenancy real estate clarifies the law in a manner that preserves its treatment under the law of most states as indicated in the comment to Section 102.

J. Life Insurance and Retirement Accounts

Absent a specific exception in Section 102, the transfer of life insurance and retirement plans likely would fall within the meaning of nonprobate transfer because the owner may change the beneficiary designation up until death.¹⁴⁶ Of course, contracts govern these benefits and may provide different terms. Section 102, however, states, “Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability . . . .”¹⁴⁷ The comment to Section 102 indicates this exception “is designed to prevent a conflict with and to clarify that this section does not supersede existing legislation protecting death benefits in life insurance, retirement plans and IRAs from claims by creditors.”¹⁴⁸ At least one court has adopted this interpretation.¹⁴⁹ The comment to Section 102 clarifies that in the absence of legislation protecting life insurance from creditor claims, “the insured’s creditors would not be able to establish a ‘nonprobate transfer’ . . . except to the extent of any cash surrender value generated by premiums paid by the insured that the insured could have obtained immediately before death.”¹⁵⁰

¹⁴⁵ Id. § 102 cmt. 5 (amended 1998), 8B U.L.A. 64 (Supp. 2006).
¹⁴⁶ In the event the owner of a qualified retirement plan is married, the owner must obtain the spouse’s consent prior to changing from a joint-and-survivor annuity benefiting the spouse. See I.R.C. § 417(a)(2); 29 U.S.C. § 1055(c) (2006).
¹⁴⁸ Id. § 102 cmt. 2 (amended 1998), 8B U.L.A. 64 (Supp. 2006).
¹⁵⁰ UNIF. NONPROBATE TRANSFERS ON DEATH ACT § 102 cmt.2 (amended 1998), 8B
Most states have enacted legislation protecting the proceeds of life insurance paid to a beneficiary other than decedent’s estate from the claim of decedent’s creditors. Courts generally enforce this legislation absent a showing of fraudulent transfer at the time premiums were paid. The exception built into Section 102, although not explicitly referring to these exemption statutes, should ensure that its provisions do not override the statutory exemptions for life insurance.

Retirement plans also may be protected from creditor claims by statute. Federal law controls the ability of creditors to reach qualified retirement plans and exempts such plans from the claims of creditors. State law will often provide statutory protection for other types of retirement plans not protected by federal law. The law among states varies substantially regarding whether the state offers complete or partial protection for retirement plans. Again, the exception built into Section 102, although not explicitly referring to the exemption of retirement benefits from creditor claims, should result practically in an exemption consonant with applicable federal and state law.

K. Limitations on Liability of Nonprobate Transferee

Section 102 quantifies the aggregate liability of nonprobate transferees in relation to the liability of the probate estate. Nonprobate transferees bear liability for claims against a decedent’s estate only to the

151 U.L.A. 64 (Supp. 2006).
152 Although not an exhaustive list, see, for example, ARK. CODE ANN. § 23-79-131 (West 2006); CONN. GEN. STAT. § 38a-453 (West 2005); DEL. CODE ANN. tit. 18, § 2725 (2006); D.C. CODE § 31-4716 (LexisNexis 2006); GA. CODE ANN. § 33-25-11 (West 2006); IDAHO CODE ANN. § 41-1833 (2005); KY. REV. STAT. ANN. § 304.14-300 (West 2006); ME. REV. STAT. ANN. tit. 24, § 2428 (2006); MASS. Gen. LAWS ch. 175, § 125 (West 2006); MONT. CODE. ANN. § 33-15-511 (2005); NEV. REV. STAT. ANN. § 687B.260 (LexisNexis 2005); N.J. STAT. ANN. § 17B:24-6 (West 2006); N.C. GEN. STAT. § 58-15-115 (West 2006); VT. STAT. ANN. tit. 8, § 3706 (2006); VA. CODE ANN. 38.2-3122 (West 2006); WASH. REV. CODE § 48.18.410 (West 2005); W. VA. CODE ANN. § 33-6-27 (LexisNexis 2006); WYO. STAT. ANN. § 26-15-129 (2006).
153 See, e.g., May, 92 P.3d at 859; Portwood v. Minkler (In re Milton), 294 P.2d 412 (Wash. 1956).
154 See, e.g., ARIZ. REV. STAT. ANN. § 38-850 (West 2006); CONN. GEN. STAT. § 52-321a (West 2005); DEL. CODE ANN. tit. 10, § 4915 (2006); IDAHO CODE ANN. § 55-1011 (2005); IOWA CODE ANN. § 627.6 (West 2006); MO. REV. STAT. § 456.014 (West 2006); OKLA. STAT. tit. 60, § 328 (West 2006); TENN. CODE ANN. § 26-2-105 (West 2006).
extent that probate assets are insufficient to pay the claims in full.\textsuperscript{155} The personal representative of a decedent’s estate must fully use any existing probate assets before turning to nonprobate transferees for contribution. Thus, only in the event the probate estate becomes insolvent will a nonprobate transferee bear any liability for the claims of decedent’s creditors. This generally coincides with the result in those states that have not adopted special rules for nonprobate transfers when the state requires all claims to be filed as part of the probate estate.

In addition, Section 102 places a maximum limit on the amount of the aggregate nonprobate transferee liability that an individual nonprobate transferee will bear. It states, “The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received or controlled by that transferee.”\textsuperscript{156} The comment to Section 102 outlines the manner for determining the value of nonprobate transfers as follows: “Values are determined . . . as of the time when the benefits are ‘received or controlled by that transferee.’ This would be the date of the decedent’s death for nonprobate transfers made by means of a revocable trust, and date of receipt for other nonprobate transfers.”\textsuperscript{157} Thus, while the maximum liability depends on the value of the nonprobate transfers received, the assets passing to the nonprobate transferee need not be traced. Rather, the liability is that of the nonprobate transferee.

L. Priority of Nonprobate Transferees

The actual liability of a nonprobate transferee under Section 102 depends on priority, abatement, and apportionment rules. A decedent can direct in a governing instrument, including a will, the apportionment of liability for the decedent’s debts among all probate and nonprobate transferees.\textsuperscript{158} In the event a decedent makes conflicting directions as to

\textsuperscript{155} See UNIF. NONPROBATE TRANSFERS ON DEATH ACT § 102(b) (amended 1998), 8B U.L.A. 62 (2001). In addition to claims against the decedent’s estate, nonprobate transferees may bear liability for the “statutory allowances to the decedent’s spouse and children.” Id. Statutory allowances generally include a family allowance, exempt property allowance, and a homestead allowance. See UNIF. PROBATE CODE §§ 2-401 to -405, 8 Part I U.L.A. 139–43 (1998).


apportionment, the most recent direction takes precedence over a prior conflicting direction.\textsuperscript{159}

Absent a specific direction in a governing instrument by the decedent,\textsuperscript{160} transferees of the decedent bear liability for creditor claims in the following order of priority:

(1) the personal representative of decedent’s estate, or if property has been distributed by the personal representative prior to payment of all creditor claims, the transferees of decedent’s probate estate;\textsuperscript{161}
(2) “the trustee of [the] trust serving as the principal nonprobate instrument in the decedent’s estate,”\textsuperscript{162} or if the trustee has distributed trust assets, the beneficiary receiving those trust assets “becomes liable for the amount of the trustee’s liability attributable to assets received by the beneficiary”;\textsuperscript{163}

\textsuperscript{159} See id. The comment to Section 102 explains:
By authorizing control of abatement among gifts made by various transfers at death by the last executed instrument, the subsection permits a simple, last-minute override of earlier directions concerning a decedent’s wishes regarding priorities among successors. Thus, a will or trust amendment can correct or avoid liquidity and abatement problems discovered prior to death.
\textsuperscript{162} UNIF. NONPROBATE TRANSFERS ON DEATH ACT § 102(c)(2) (amended 1998), 8B U.L.A. 62 (2001). This subsection raises the possibility of needing to determine which of several trusts may be deemed to be “the principal nonprobate instrument.” Id. The lack of clear factors leads to the prospect of increased costs and time involved in requiring a court to decide this issue.
\textsuperscript{163} Id. § 102(i)(2) (amended 1998), 8B U.L.A. 63 (2001). The comment to Section 102 explains:
Subsection (i)(2) is designed to enable trustees handling nonprobate transfers to distribute trust assets in accordance with trust terms if a warning of probable estate insolvency has not been received. Beneficiaries receiving distributions from a trustee take subject to personal liability in the amount and priority of the trustee based on the value distributed.
Id. § 102 cmt. 14 (amended 1998), 8B U.L.A. 66 (2001). The practical effect of this provision is to make the creditor spend considerably more time and effort chasing down the beneficiary. See supra text accompanying note 8.
(3) "other nonprobate transferees, in proportion to the values received."\textsuperscript{164}

It should be noted, however, that the provisions in Section 102 directing the abatement of beneficial interests in trust raise an ambiguity as to priority. The priority provision directs payment out of the "trust serving as the principal nonprobate instrument" before any payment by other nonprobate transferees.\textsuperscript{165} However, the abatement provisions direct that the "interests of beneficiaries in all trusts incurring liabilities under this section abate as necessary..."\textsuperscript{166} It is difficult to make the priority and abatement provisions coincide because the priority provisions make the "trust serving as the principal nonprobate instrument"\textsuperscript{167} bear liability before any other trusts bear liability; yet, the abatement provision abates interests of beneficiaries in all trusts "as if all of the trust instruments were a single will and the interests were devises under it."\textsuperscript{168} The comment to Section 102 perpetuates this ambiguity by stating, "The abatement order among classes of beneficiaries of trusts... applies to all trusts subject to liability to the extent of nonprobate transfers received or administered whether or not the trust instrument is the principal nonprobate instrument in the decedent's estate plan."\textsuperscript{169}

The order of priority outlined by Section 102 reflects the historic notion that claims should first be paid out of the probate estate. By placing the trustee of the "trust serving as the principal nonprobate instrument"\textsuperscript{170} as second in priority, the statute recognizes that such trusts today take the place of the will, as it was historically used, and take the place of the traditional probate estate. The comment to Section 102 notes that "the trust serving as the principal nonprobate instrument"\textsuperscript{171} may be an irrevocable trust.\textsuperscript{172} The comment assumes that the trustee of any such irrevocable trust qualifies as a transferee of a nonprobate transfer. Thus, only after the assets of the principal governing instrument directing

\textsuperscript{165} Id. § 102(c)(2) (amended 1998), 8B U.L.A. 62 (2001).
\textsuperscript{166} Id. § 102(d) (amended 1998), 8B U.L.A. 62 (2001) (emphasis added).
\textsuperscript{167} Id.
\textsuperscript{169} Id. § 102 cmt. 9, 8B U.L.A. 65 (2001).
\textsuperscript{171} Id.
\textsuperscript{172} See id. § 102 cmt. 8, 8B U.L.A. 65 (2001).
passage of decedent’s property are exhausted do other nonprobate transferees bear any liability. If most of decedent’s assets pass pursuant to one trust (as is often the case), and that trust is determined to be "the principal nonprobate instrument," the decision to make that trust bear liability before other nonprobate transferees leads to efficiencies by allowing creditors to focus on just one transferee—the trust serving as the principal nonprobate instrument—rather than facing the need to track down several nonprobate transferees in order to recover the debt owed to them. At the same time, it does not treat all beneficiaries of a decedent fairly because it makes some beneficiaries bear a disproportionate burden of the creditor claims.

Of concern to estate planners is whether an apportionment clause for debts should be provided in the same manner as for taxes. Historically, many tax clauses and statutes apportioning taxes directed that the residuary estate pay taxes. With the proliferation of nonprobate transfers, both tax clauses and tax apportionment statutes typically have changed to an equitable apportionment scheme. Equitable apportionment assesses tax proportionately based on the value of each asset. Equitable apportionment clauses and statutes allocate the benefit of the marital and charitable deductions to the property generating the deduction in determining the apportionment of tax. Estate planners favor equitable apportionment clauses because all beneficiaries are treated fairly and proportionately. Such clauses avoid the surprise of an unknown asset passing tax free to a person who is not a member of the family. As with tax clauses, any apportionment of debts should protect property for which a marital or charitable estate tax deduction is claimed from bearing any portion of the liability so as to avoid adverse federal estate tax consequences.

M. Procedural Rules for Asserting Liability Against a Nonprobate Transferee

Pursuant to the Uniform Nonprobate Transfers on Death Act, before a creditor may collect against a nonprobate transferee, the creditor, if another interested person has not already done so, must first open a

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173 Id.
175 See id. § 3-9A-103(b)(2).
176 See, e.g., In re Estate of Kuralt, 68 P.3d 662 (Mont. 2003).
probate administration and must do so in sufficient time to file a claim before the time bar of the one-year statute of limitations that runs from the date of decedent’s death.\footnote{See \textit{Unif. Probate Code} § 3-803(a)(1) (amended 1997), 8 Part II U.L.A. 39–40 (Supp. 2006).} Probate administration must be opened regardless of whether the decedent owned any assets subject to probate because the proceeding must be initiated by presenting the claim and giving notice to the personal representative.\footnote{See \textit{Unif. Nonprobate Transfers on Death Act} § 102(g) (amended 1998), 8B U.L.A. 63 (2001) (“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.”).} The creditor must proceed to have the claim determined as part of the probate administration.

If the claim remains unpaid after the creditor has established her claim as part of the probate proceeding, Section 102 requires that the creditor take steps to ensure a further proceeding is brought to enforce the claims as against nonprobate transferees. The unpaid creditor must first make a written demand on the personal representative to bring a proceeding to enforce the liability as against nonprobate transferees. The personal representative may choose to bring such a proceeding or may decline to do so. Section 102 absolves the personal representative from any liability provided she declines in good faith. The comment to Section 102 indicates the importance of providing the personal representative a choice: “It reflects sensitivity for the dilemma confronting a probate fiduciary who, acting as required of a fiduciary, concludes that the costs and risks associated with a possible recovery from a nonprobate transferee outweigh the probable advantages to the estate and its claimants.”\footnote{\textit{Id.} § 102 cmt. 12, 8B U.L.A. 66 (2001).}

Should the personal representative decline to pursue nonprobate transferees, the creditor may choose to do so.\footnote{\textit{Id.} § 102(g) (amended 1998), 8B U.L.A. 63 (2001).} In that event, the creditor would do so in the name of the decedent’s estate.\footnote{\textit{Id.} \textit{Id.}} The creditor would bear all expenses associated with bringing the action.\footnote{\textit{Id.}} Although not specifically provided for in the statute, the comment to Section 102 indicates, “Any recovery of costs should be used to reimburse the claimant who bore the risk of loss for the proceeding.”\footnote{\textit{Id.} § 102 cmt. 12, 8B U.L.A. 66 (2001).}
exceedingly costly if several nonprobate transferees needed to be involved.

N. Evaluating the Procedural Rules of Section 102

From a policy perspective, the question becomes whether the procedures provided by Section 102 for the collection of claims as against nonprobate transferees promote a cost efficient and timely resolution of unpaid creditor claims and passage of clear title to decedent's beneficiaries. Section 102 requires the resolution of claims within the probate proceeding by requiring any proceeding against a nonprobate transferee to be taken in the name of decedent's estate. The use of one forum to resolve claims clearly promotes efficiency. Even greater efficiencies could result, however, if all nonprobate transferees and creditors could be made parties to one proceeding. Also, clarification of some of the issues Section 102 raises could lead to greater efficiencies and fairness as between and among beneficiaries and creditors.

Section 102 leaves some procedural questions unanswered. Among the issues that Section 102 does not specifically address are (1) whether the personal representative can join all potential nonprobate transferees in one proceeding; (2) whether apportionment of liability among nonprobate transferees other than the trustee of the "principal nonprobate instrument" is calculated based on assets received only by those nonprobate transferees named in the proceeding or based on assets received by all potential nonprobate transferees whether or not named; and (3) whether the creditor has sufficient ability to discover the whereabouts of all nonprobate transferees. There also exists the broader question of whether the probate court order can be enforced against beneficiaries and assets located in other states.

Section 102 addresses this enforcement issue. It provides, "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."184 This statement contemplates that not all trusts will have a situs in, nor will all beneficiaries reside in, the state where decedent’s estate is probated. The comment to Section 102 explains in part:

184 Id. § 102(f), 8B U.L.A. 63 (2001).
The underlying principle is that the law of a decedent’s last domicile should be controlling as to rules of public policy that override the decedent’s power to devise the estate to anyone the decedent chooses. The principle is implemented by subjecting donee recipients of the decedent to liability under the decedent’s domiciliary law, with the belief that judgments recovered in that state following appropriate due process notice to defendants in other states will be accorded full faith and credit by courts in other states should collection proceedings be necessary.185

Essentially, Section 102 relies on probate court jurisdiction and appears to conclude that nonprobate transferees are not indispensable parties.186 The accompanying comment also urges resolution of the choice of law issue in favor of the law of the domiciliary probate estate on public policy grounds. The comment recognizes the due process issues involved

185 Id. § 102 cmt. 11, 8B U.L.A. 66 (2001).

[When one court is exercising in rem jurisdiction over a res, a second court will not assume in rem jurisdiction over the same res. Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent’s estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.

The Supreme Court in Marshall narrowly construed the probate court exception and allowed federal court jurisdiction over a tortious interference with an expected gift claim. Id. The court reviewed its earlier decision in Markham v. Allen, 326 U.S. 490 (1946), and noted that that decision “observed that federal courts have jurisdiction to entertain suits to determine the rights of creditors, legatees, heirs, and other claimants against a decedent’s estate, ‘so long as the federal court does not interfere with the probate proceedings.’” Marshall, 126 S. Ct. at 1748. Based on the reasoning of the Supreme Court in Marshall, the pursuit of an estate’s claim as against a nonprobate transferee residing in another jurisdiction may allow a federal court to exercise diversity jurisdiction. Id. Commentators note: “From the creditor’s point of view, the federal court judgment certainly provides an advantage over a state judgment, in that the former is easily transferred from one court to another.” A. Mechelle Dickerson, Richard B. Hagedorn & Frank W. Smith Jr., 1 The Law of Debtors and Creditors § 6:80 (2006).
and the need to obtain personal jurisdiction over a nonprobate transferee residing in another state before enforcement of the judgment.\textsuperscript{187} Although it is not certain whether, if challenged, a court would enforce the probate court order against a nonprobate transferee residing in another state, Section 102 provides perhaps the only practical solution to this issue.

The Supreme Court addressed a similar, but not identical, enforcement issue in \textit{Hanson v. Denckla}.\textsuperscript{188} In that case, the will of a testatrix was probated in Florida, the state of her domicile at death. Before her death, she had executed and funded a trust, naming a Delaware trust company trustee, and had retained a power of appointment over the trust assets. A Florida court held the trust invalid as testamentary but found it lacked jurisdiction over the nonresident trustees, who were indispensable parties. The Delaware court, with regard to the same matter, issued a declaratory judgment finding the trust valid. The Supreme Court held that the Florida court lacked jurisdiction both in rem and in personam. Its holding was premised on the assumption that the trust assets were located in Delaware and not in Florida.\textsuperscript{189} With regard to in rem jurisdiction, the Court stated:

\begin{quote}
[A] State acquires no \textit{in rem} jurisdiction to adjudicate the validity of \textit{inter vivos} dispositions simply because its decision might augment an estate passing under a will probated in its courts. If such a basis of jurisdiction were sustained, probate courts would enjoy nationwide service of process to adjudicate interests in property with which neither the State nor the decedent could claim any affiliation. The settlor-decedent's Florida domicile is equally unavailing as a basis for jurisdiction over the trust assets. For the purpose of jurisdiction \textit{in rem} the maxim that personalty has its situs at the domicile of its owner is a fiction of limited utility. The maxim is no less suspect when the domicile is that of a decedent. In analogous cases, this Court has rejected the suggestion that the
\end{quote}

\textsuperscript{187} Before full faith and credit is accorded an out-of-state judgment, the state issuing the judgment must have jurisdiction over the defendants satisfactory under the Due Process Clause of the Fourteenth Amendment. See \textit{Hanson v. Denckla}, 357 U.S. 235 (1958); \textit{see also} \textit{Baker v. Gen. Motors Corp.}, 522 U.S. 222, 232 (1998).

\textsuperscript{188} 357 U.S. 235 (1958).

\textsuperscript{189} \textit{See id.} at 247.
probate decree of the State where decedent was domiciled has an in rem effect on personalty outside the forum State that could render it conclusive on the interests of nonresidents over whom there was no personal jurisdiction.\textsuperscript{190}

The Supreme Court also held in personam jurisdiction did not apply because the trustee did not have the requisite minimum contacts.\textsuperscript{191} The Court assumed the trustee was an indispensable party and determined that, because the Florida court lacked jurisdiction, Delaware was not obligated to give full faith and credit to the Florida judgment.\textsuperscript{192} This holding demonstrates the difficulty of asserting probate court jurisdiction over nonprobate transferees. The analysis of the Supreme Court's holding in \textit{Hanson} raises an issue regarding whether a court may exercise jurisdiction over nonprobate transferees pursuant to Section 102. The fact distinguishing this case from Section 102 is that under Section 102 the nonprobate transferees do not appear to be indispensable parties. The enforceability of Section 102, in light of \textit{Hanson}, also will likely depend on an analysis of where the nonprobate asset at issue is located and the extent of the particular nonprobate transferee's contacts with the state exercising probate jurisdiction.

O. Overview of Procedures Adopted by Other States

The Prefatory Note to the Uniform Probate Code amendments regarding nonprobate transfers indicated that the impetus for the addition of Section 102 came from legislation passed in Missouri, California, and Florida.\textsuperscript{193} Like the Uniform Nonprobate Transfers on Death Act, each of these three states requires the decedent's creditors to look for payment first from the assets subject to probate administration. The technical procedural rules for collection of debts from certain nonprobate transfers, however, vary among the three States.

\textsuperscript{190} \textit{Id.} at 248–49 (citations omitted).
\textsuperscript{191} See \textit{id.} at 251. The court rejected a specific analysis of quasi in rem jurisdiction and analyzed based on in rem jurisdiction. \textit{Id.} at 246 n.12. In a later case, \textit{Shaffer v. Heitner}, 433 U.S. 186 (1977), the Supreme Court concluded that due process requires state jurisdiction to be evaluated according to whether the requisite minimum contacts as required for personal jurisdiction have been met regardless of whether it is in rem, quasi in rem, or personal jurisdiction that is being asserted. \textit{Id.} at 212.
\textsuperscript{192} See \textit{Hanson}, 357 U.S. at 255.
\textsuperscript{193} See \textit{UPC Amendments}, supra note 111.
1. Missouri Procedures

In Missouri, claims may be enforced against beneficiaries who receive “recoverable property.”[^94^] This term essentially includes certain listed nonprobate transfers and other property that was “subject to satisfaction of the decedents’ debts immediately prior to the decedent’s death.”[^95^] The qualification focusing on whether the asset was liable for debts immediately before death provides a simple way to eliminate the possibility of creating any inconsistency with prior law as to whether an asset is subject to creditor claims of decedent. Rather, the qualification effectively references the law as it has developed with respect to a specific asset transferred on decedent’s death.

The procedure for enforcing claims against recipients of recoverable transfers in Missouri involves the commencement of an accounting.[^196^] The written demand for an accounting must be made within sixteen months of the date of decedent’s death, and the accounting must be commenced within eighteen months of the date of decedent’s death. If the personal representative fails to commence an accounting within thirty days of the demand, the creditor may do so. This gives the creditor thirty days to proceed before the eighteen-month statute of limitations runs on claims arising before death. These time periods work well in that, in the event the personal representative declines to commence an accounting, time will remain for the creditor to do so.[^197^]

The Missouri procedure also addresses issues not contemplated by the Uniform Nonprobate Transfers on Death Act. The Missouri statute specifically allows for other recipients of recoverable transfers to be

[^95^]: Id. § 461.300.10(4).
[^196^]: Id. § 461.300.10(2).
[^197^]: The staggered timing of the Missouri statute avoids a possible timing issue raised by Section 102. Section 102 requires that the proceeding against a nonprobate transferee “must be commenced within one year after the decedent’s death, but a proceeding on behalf of a creditor whose claim was allowed after proceedings challenging disallowance of the claim may be commenced within 60 days of the final allowance of the claim.” Unif. Nonprobate Transfers on Death Act § 102(h) (amended 1998), 8B U.L.A. 63 (2001). Section 102, however, does not specifically contemplate a claim allowed by the personal representative after or just before the running of the one-year limitation period. See id. In that case, the question becomes whether that claimant would also receive further time to pursue the nonprobate transfer. Some courts have indicated that the claimant should be able to pursue its claims. See, e.g., Hall v. Hartley (In re Estate of Hall), 948 P.2d 539, 541 (Colo. 1997); Peterson v. Marston, 362 N.W.2d 309, 312 (Minn. 1985).
joined and made parties to the accounting. So long as the action for accounting is commenced prior to the eighteen-month statute of limitations on claims, recipients of recoverable transfers may be joined even after eighteen months. In addition, the Missouri statute addresses the ability of the creditor to discover the recipients of recoverable transfers. It requires the personal representative to disclose to the creditors making a demand “all material knowledge within the possession of the personal representative reasonably relating to the identity of any recipient of a recoverable transfer.” Failure on the part of the personal representative to divulge such knowledge tolls the eighteen-month statute of limitations as to the undisclosed recoverable transfer. This disclosure provision directly addresses one of the most difficult hurdles faced by a creditor: discovering who holds the nonprobate transfers. In addition, the Missouri statute acknowledges the likely conflict of interest faced by a personal representative who wears the dual hat of fiduciary and beneficiary. Missouri law allows the court to appoint an “administrator ad litem” to represent the estate in any proceeding brought to commence an accounting. In contrast to the Uniform Nonprobate Transfers on Death Act, the Missouri statute provides answers to critical questions, and does so in a manner protective of the creditor.

2. Florida Procedures

Florida law recognizes that the bulk of nonprobate transfers, other than life insurance and retirement accounts (which are often unavailable to creditors), occur through a revocable trust. The personal representative may certify to the trustee the amount needed to pay creditor claims in excess of available probate assets. The trust assets of any trust subject

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199 See id.
200 Id. § 461.300.2.
201 See id.
202 Id.

[I]f, after providing for statutory entitlements and all devises other than residuary devises, the assets of the decedent’s estate are insufficient to pay the expenses of the administration and obligations of the decedent’s estate, the personal representative is entitled to payment from the trustee of a trust described in section 733.707(3), in the amount the personal representative certifies in writing to be
to revocation by decedent "either alone or in conjunction with any other person" are subject to payment of claims by decedent's creditors upon certification by the personal representative.\textsuperscript{204} The certification process avoids the additional costs of a separate proceeding as required in some other states and under Section 102, and increases the efficiency of the probate process.

Florida also has adopted notice and time limitations favorable to the creditor. Claims in Florida must be brought within two years of the date of decedent's death, as opposed to the shorter one-year period adopted by the Uniform Probate Code.\textsuperscript{205} If the statute of limitations has not yet run, the personal representative also must publish notice and provide actual notice to creditors who are reasonably ascertainable.\textsuperscript{206} In comparison to the Uniform Probate Code, these provisions are more likely to result in the equitable payment of creditor claims.

3. California Procedures

California law sets forth creditor claims procedures in the event of probate administration.\textsuperscript{207} It also provides optional creditor claims procedures for the trustee of a revocable trust to follow in the event a probate administration has not been undertaken.\textsuperscript{208} The option available to the trustee to pursue creditor claims increases efficiency by providing the opportunity to avoid the costs of probate administration. Notably, creditor claims procedures are at the option of the fiduciary.\textsuperscript{209} The trustee bears

\textsuperscript{204} Id. § 733.707(3). This definition contrasts with that chosen by the Uniform Nonprobate Transfers on Death Act, which only makes the trust assets liable if the power to revoke could be exercised by the decedent alone. \textit{See UNIF. NONPROBATE TRANSFERS ON DEATH ACT} § 102(a) (amended 1998), 8B U.L.A. 62 (2001).

\textsuperscript{205} \textit{See FLA. STAT. ANN.} § 733.710 (West 2006).

\textsuperscript{206} \textit{See FLA. PROB. R. RULE} § 5.241(a) (West 2006).

\textsuperscript{207} \textit{See CAL. PROB. CODE} §§ 9000–9399 (West 2006).

\textsuperscript{208} \textit{See id.} § 19003; see also \textit{id.} §§ 19000–19403 (providing creditor procedures applicable to revocable trusts). The trust creditor procedures may only be pursued in the absence of a probate proceeding. If pursued, the trustee must give notice but is not liable except when failure to give notice was in bad faith. \textit{See id.} § 19053(b).

\textsuperscript{209} \textit{See id.} § 19008: If there is no proceeding to administer the estate of the deceased settlor, and if the trustee does not file a proposed notice to creditors pursuant to Section 19003 and does not publish notice to creditors pursuant to Chapter 3 (commencing with Section 19040), then the liability of the trust to any creditor shall be as otherwise provided by
no duty to initiate proceedings for notice to creditors. California courts have noted that the trustee has no duty "to prefer a claimant with an unresolved claim against the estate to the interests of the trust’s beneficiaries." Once initiated, however, the procedure potentially requires payment of claims from trust assets.

The California creditor claims procedures specifically state that creditors can reach property subject to a power of revocation by decedent at the time of death. Should the trustee distribute property without providing notice to creditors, the distributee continues to bear liability for the claims of the decedent’s estate. The statute of limitations for such claims generally requires an action be commenced within one year of death.

California law now allows a creditor, whose claim was allowed as part of the probate proceeding, to maintain an action directly to recover fraudulently transferred assets on behalf of the estate. The California Court of Appeal held that when insolvency caused a substantial creditor’s allowed claim to be only partially satisfied, the creditor had standing to sue on behalf of the estate. In light of the personal representative’s conflict of interest in bringing the action, the court rejected an argument that the creditor first had to make a demand on the personal representative to pursue the action. The California court noted:

> When the creditor seeks to pursue the fraudulent conveyance claim within the probate proceeding itself, as section 850 now permits, it not only fulfills the primary purpose—to obtain the asset for the benefit of estate creditors—but it also avoids the “complications” which

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210 See id. § 19010.
212 See CAL. PROB. CODE § 19001 (West 2006).
213 See id. § 19400. Note that when notice is published, the distributee may be liable if certain conditions are met. See id. § 19401.
214 See CAL. CIV. PROC. CODE § 366.2 (West 2006).
215 See CAL. PROB. CODE § 850 (West 2006) (amended in 2001); Myers v. Leach, 42 Cal. Rptr. 3d 753, 757–61 (Ct. App. 2006) (holding that an action by a creditor to recover property fraudulently conveyed falls within those actions that may be brought pursuant to California Probate Code section 850).
216 See Myers, 42 Cal. Rptr. 3d at 757–61.
[a prior] court was concerned would be presented if creditors were allowed to proceed individually.\(^{217}\)

4. States Without Specific Procedures

Many states have not adopted clear procedures addressing the ability of creditors to satisfy a decedent’s claims from nonprobate property. In those states, creditors have pursued different approaches. Some attack nonprobate transfers as fraudulent conveyances and petition for the transferred property to be brought back into the estate and made available for creditor claims.\(^{218}\) This action may be pursued in the form of a creditor’s bill.\(^{219}\) Generally, the creditor must have presented a timely claim as against the decedent’s estate in order to prevail.\(^{220}\) Without a timely presented claim allowed by the personal representative, the creditor does not have a “judgment” that the creditor may enforce.

V. Suggestions for Reform of Procedures Allowing Decedent’s Creditors to Enforce Claims Against Nonprobate Assets

A. Basis of the Need for Further Reform

The policies that historically have formed the basis for probate procedures addressing creditor claims apply with equal force to the transfer of decedent’s property outside of probate by nonprobate transfer. The procedures for collection of creditor claims as against nonprobate transferees should promote the policy of transferring clear and settled title to the nonprobate transferee in a timely and cost efficient manner. As a corollary, the rules should provide a method for timely and cost efficient payment of debts owed by decedent to the extent nonprobate assets by law are subject to a decedent’s debts. The procedures should

\(^{217}\) Id. at 759.

\(^{218}\) See Zok v. Estate of Collins, 84 P.3d 1005 (Alaska 2004) (demonstrating the difficulty faced by creditors asserting claims against assets asserted to be fraudulently conveyed); First Wis. Nat’l Bank of Milwaukee v. Schwab, 194 So. 307 (Fla. 1940) (asserting transfer to trust was fraudulent); see also CAL. PROB. CODE § 9653(a)(1) (West 2006) (allowing a creditor to commence an action for recovery of fraudulently conveyed property when estate was insolvent).


\(^{220}\) See Love, 167 So. 703; Rupp, 55 Cal. Rptr. 108.
also promote the policy of encouraging debtors to pay existing debts to the extent of available assets subject to those debts. This policy provides the underpinnings of the Uniform Fraudulent Transfer Act, as indicated by the Uniform Law Commissioner’s summary, which, after discussing secured creditors, states:

A less clear category, but important to the maintenance of credit, is that of the unsecured creditor-debtor relationship in which the debtor manipulates property to defeat the creditor’s interest solely for that purpose and for no other. Perhaps the debtor foresees insolvency and tries to conceal property that a creditor might use to satisfy the debt. Perhaps the debtor never intends to satisfy the debt and manipulates property to make himself judgment-proof. Should the creditor be without recourse, and should the debtor’s rights to deal with property be unrestricted in these kinds of cases?

The National Conference of Commissioners on Uniform State Laws . . . proposed the Uniform Fraudulent Conveyance Act . . . in 1918 as an answer to that question. . . .

In 1984, this 1918 Act was revised and renamed the Uniform Fraudulent Transfer Act (UFTA). The intent of the UFTA is the same . . . — it classifies a category of transfers as fraudulent to creditors and provides creditors with a remedy for such transfers. The fundamental remedy is the recovery of the property for the creditor.\(^{221}\)

Modern bankruptcy rules reflect this policy,\(^{222}\) as do historic probate procedures requiring the personal representative to give priority to payment of creditors before making distributions to a decedent’s beneficiaries. Creditor procedures for recovery of a decedent’s debts from nonprobate transfers should heed this policy and discourage debtors from


manipulating or making property difficult for creditors to find for the sole purpose of defeating the creditor’s rights.

The amendments to the Uniform Probate Code and the Uniform Nonprobate Transfers on Death Act as discussed above tend to favor a decedent’s beneficiaries. The Prefatory Note to the uniform law amendments adding Section 102 expresses an inclination to favor beneficiaries:

The decision to generate more creditor protection against nonprobate transfers at death may be misguided. Some discussants question the need for new protections for unsecured creditors of the decedents. Their skepticism is warranted because commercial creditors, by continuing to ignore the national trend towards streamlining probate by cutting creditor protections, have demonstrated lack of interest in probate law protections.223

The recent amendments to the Uniform Probate Code and the Uniform Nonprobate Transfers on Death Act favor the decedent’s probate and nonprobate beneficiaries by (1) allowing the fiduciary to avoid providing notice to creditors and, as a result, conceal the whereabouts of assets; (2) setting forth a relatively short limitations period within which creditors must assert claims; and (3) in some cases, requiring more than one proceeding to collect against nonprobate transferees. The amendments also cause some confusion regarding the types of assets that are subject to creditor claims. For states whose legislatures wish to preserve some ability on the part of beneficiaries to take steps for the purpose of avoiding payment of creditor claims, the recent amendments to these uniform acts serve this goal, and arguably still meet basic due process requirements.

The strong policy favoring payment of creditor claims when assets exist, however, supports the adoption of timely and efficient procedures for collection of a decedent’s debts as against nonprobate transferees. The suggested reforms set forth below attempt to balance fairly the interests of both creditors and beneficiaries with respect to the passage of probate and nonprobate transfers at death. They encourage the giving of notice and the disclosure of nonprobate transfers, and promote greater unification of claims procedures in an effort to increase cost and time efficiencies. They also suggest clarification of certain procedures to

223 See UPC Amendments, supra note 111.
conserve judicial resources. The suggested reforms serve the policy of encouraging timely payment of debts, and attempt to do so without decreasing efficiency in estate administration.

B. Need for Clear Information Regarding Notice of Administration of Decedent’s Assets

As evidenced by the examples in Part II of this Article, the greatest hurdle a creditor faces is the cost involved in determining who controls the decedent’s assets. The simple answer should be the personal representative of the decedent’s estate. In reality, however, probate administration often is never opened, and thus, personal representatives are never appointed. It is more common for a trustee of decedent’s revocable trust to control the decedent’s property prior to death. At times, the creditor’s search for a decedent’s assets resembles a game of hide-the-ball, with the trustee distributing assets before being notified of any judgement on the creditor’s claim, as was the case in Dobler v. Arluk Medical Center Industrial Group. In that case, the trustee of decedent’s revocable trust was able to evade creditors by transferring assets to beneficiaries prior to a judgment being issued in the probate court. In order to restrict the ability of nonprobate transferees to increase unduly the cost of collection and the time involved by making transfers that require yet another action on the part of the creditor, reforms should allow the creditor claims process to occur initially in the hands of the fiduciary with primary control over most of decedent’s assets at death.

In many estate plans, the revocable trust has replaced the will as the principal method of transferring assets. For estates too small to justify the drafting of a revocable trust, beneficiary designations on bank and brokerage accounts and joint tenancy arrangements serve to transfer assets in lieu of a will. This tendency to avoid probate proceedings results in a lack of any public record regarding who controls and receives the decedent’s assets other than real property. The lack of any public record as to the administration of assets subject to claims makes it exceedingly difficult for the unsecured creditor to discover the whereabouts and ownership of nonprobate transfers.

224 107 Cal. Rptr. 2d 478 (Ct. App. 2001), aff’d, 11 Cal. Rptr. 3d 194 (Ct. App. 2004).
225 See id. at 479–80.
One possibility for remedying this lack of public record is to require the trustee, or other person who has principal responsibility for the administration of the assets subject to creditor claims following decedent's death, to register or, in effect, to file public notice. The concept of trust registration initially appeared in the Uniform Probate Code.226 Requiring registration, however, defeats one of the principal advantages of using nonprobate transfers at death. One of the primary reasons cited for using a revocable trust or other nonprobate transfer is the privacy afforded to the client. In addition, as a practical matter, enforcing registration would be difficult in light of the ability to move the trust situs and the mobility of individual nonprobate transferees. Given this mobility, a registration requirement would need to be made uniform among the states for it to work effectively. For these reasons, legislative reforms should reject the option of registration in favor of options that maintain privacy with regard to nonprobate transfers.

A better option is to require actual notice to reasonably ascertainable creditors by the person principally responsible for administering the assets passing as a result of decedent’s death and subject to creditor claims. The Supreme Court in Tulsa Professional Collection Services v. Pope227 found that in order for a two-month nonclaim period to be effective to bar claims, due process requires that the personal representative provide actual notice to reasonably ascertainable creditors. The Supreme Court balanced the interests of the state and creditors and found the costs of actual notice to be reasonable.228 A requirement of giving actual notice to reasonably ascertainable creditors does not unduly intrude on the privacy concerns of decedent or decedent’s beneficiaries, and it fulfills any due process requirements. It also promotes the policy of ensuring prompt and efficient payment of debts by giving the creditor sufficient opportunity to present its claim.

Any legislative reform in this regard could require the personal representative, if one is appointed, to provide such actual notice.229 In the absence of a personal representative, “the trustee of the trust serving as

228 See id. at 490.
229 To accomplish this objective, Uniform Probate Code section 3-801(b) would need to be changed so that the personal representative “shall” give notice to “reasonably ascertainable” creditors. See UNIFORM PROBATE CODE § 3-801(b) (amended 1989), 8 Part II U.L.A. 208 (1998).
the principal nonprobate instrument” could be required to provide such notice. Similar to what is done in California, any such requirement placed on the fiduciary could be made subject to a “good faith” standard. A good faith standard preserves judicial resources by providing a reasonable amount of latitude to the fiduciary to make decisions regarding notice so that disgruntled beneficiaries and creditors cannot unduly complain. The Supreme Court’s statement in *Pope*, which requires that provision of actual notice be given to reasonably ascertainable creditors and which does not require “impracticable and extended searches,” also protects fiduciaries. Upon provision of actual notice, the time period for filing any claim may be shortened to sixty days. In addition, a longer one-year statute of limitations could run to avoid the necessity of publication notice for the benefit of unknown creditors. Following the sixty-day notice period to reasonably ascertainable creditors, the court could allow the fiduciary to distribute assets without further personal liability.

In the event a revocable trust serves as the principal instrument transferring decedent’s assets, consideration should be given to requiring the creditor claims procedure to proceed as part of the trust administration, similar to the manner allowed in California. Allowing the creditor claims procedure to proceed as part of the trust administration eliminates any due process concerns regarding the ability

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230 UNIF. NONPROBATE TRANSFERS ON DEATH ACT § 102(c)(2) (amended 1998), 8B U.L.A. 62 (2001). The reference to “trustee of a trust serving as the principal nonprobate instrument” borrows from the reference in Section 102 making such trustee liable for any insufficiency of the estate to pay debts.

231 See CAL. PROB. CODE § 19053(b) (West 2006). Under California law, once a trustee chooses to initiate creditor claims procedures, the trustee “shall” give notice to creditors. See id. § 19050. However, pursuant to California Probate Code section 19053, the trustee cannot be held liable unless its failure to give notice was done in “bad faith.” The creditor must also show that neither the creditor nor the creditor’s attorney had knowledge of the probate proceedings sooner than one year after publication of the first notice to creditors and that the creditor took specified steps within sixteen months after the first publication. This section also expressly relieves the trustee of any duty to search for creditors. See id.


233 In *Pope*, the Supreme Court indicated that with actual notice to reasonably ascertainable creditors a two-month nonclaim period would meet the requirements of due process. See id. at 490–91.

to obtain personal jurisdiction over the trustee, who likely holds the bulk of assets subject to claims. As demonstrated in *Hanson v. Denckla*, when the domicile of decedent and the situs of the trust differ, it may be difficult to assert jurisdiction over the trust in the state of decedent's domicile. Allowing the creditor claims procedure to proceed as part of the trust administration also eliminates an often unnecessary probate proceeding and thereby avoids the dual cascading procedures that made it so difficult for the creditor to collect in the examples set forth in Part II of this Article.

The drawback for the trust and the beneficiaries is the additional time involved in providing an extended, but short, period within which reasonably ascertainable creditors may file claims upon receipt of actual notice. On balance, an additional sixty-day time period, like the one now provided under the Uniform Probate Code, does not unduly lengthen the time for administration of the trust and passage of clear title to beneficiaries of the trust property, and it does much to promote timely payment of creditor claims. Also, reforms should dispense with the need for actual notice to reasonably ascertainable creditors and formal presentation of a claim upon voluntary payment of all outstanding bills of reasonably ascertainable creditors by the fiduciary. Any creditor dissatisfied with the lack of notice should bear the burden of proving that the creditor was reasonably ascertainable and that the trustee acted in bad faith in failing to provide notice or, alternatively, pay its bill.

At the same time that these suggested reforms encourage payment of creditor claims, they preserve efficiency in the administration of decedents' estates by triggering notice to creditors only in the event the fiduciary decides it is inappropriate to pay a claim without requiring formal presentation, or in the event of insolvency. The reforms also eliminate the need for the personal representative to pursue the trustee in a second hearing, thereby promoting unification of creditor claim procedures.

If probate administration has been initiated or if, in the absence of any proceedings, the creditor chooses to initiate such procedures, the resolution of creditor claims should then remain with the probate court.

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236 See supra text accompanying note 8.
237 See UNIF. PROBATE CODE § 3-801(b) (amended 1989), 8 Part II U.L.A. 208 (1998) (stating that upon actual notice a creditor has "sixty days after the mailing or other delivery of the notice" to file its claim or be forever barred).
and proceed through the personal representative. The personal representative would need to take further action to pursue nonprobate transferees. Pursuant to the Uniform Nonprobate Transfers on Death Act, the personal representative may do so on the grounds that, by law, the nonprobate assets remain liable for the debts of decedent. The personal representative also may pursue assets on the grounds that a fraudulent transfer occurred. The Uniform Probate Code grants the personal representative the right to recover property transferred by a decedent "by any means which is in law void or voidable as against [decedent’s] creditors." Retaining the option to pursue creditors through probate administration provides a safety net if a trustee fails to commence creditor claims procedures appropriately or if the decedent employs other types of nonprobate transfers.

C. Need for Additional Powers of Discovery

If insufficient assets exist in the probate or trust estate to pay all creditors and the fiduciary declines to proceed as against other nonprobate transferees, reforms also should provide more assistance to creditors in discovering the whereabouts of other nonprobate transferees. The simplest resolution of this issue would be to grant the personal representative the power and right to require that third parties, such as banks and brokerage companies, provide all available information regarding the whereabouts of the named nonprobate beneficiaries. Unfortunately, because ownership of nonprobate assets transfer immediately on death, this seemingly simple resolution is not a viable option. Consideration should instead be given to adding protections similar to those added in Missouri.

In Missouri, when either the creditor or a named administrator must pursue nonprobate transferees because the personal representative declines to do so, the personal representative must disclose "all material knowledge within the possession of the personal representative

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239 Unif. Probate Code § 3-710, 8 Part II U.L.A. 158 (1998). Note that this section of the Uniform Probate Code grants the personal representative the exclusive right to pursue fraudulent transfers, whereas Section 102 allows the creditor to proceed against the nonprobate transferee in the name of the estate.
240 In some states, the state constitutional right to privacy protects financial privacy. See, e.g., Valley Bank of Nev. v. Super. Ct., 542 P.2d 977, 979 (Cal. 1975).
reasonably relating to the identity of any recipient of a recoverable transfer." 241 Often the personal representative, or a person related to the personal representative, is also the named beneficiary of other nonprobate transfers. This fact scenario raises a conflict of interest and the prospect of passive concealment. Requiring disclosure, as opposed to allowing passive concealment, promotes the policy of encouraging the payment of creditor claims. 242 Such reforms, which could require disclosure by the personal representative or the trustee, would make the claims procedure more efficient and less costly for the creditor. Granting these additional rights also has the collateral impact of more efficiently passing clear title to those assets in excess of that needed to pay debts to the beneficiaries so entitled.

These suggested reforms address the issues arising when decedent’s assets pass by will or by a funded revocable trust. They do not address the difficulties faced by creditors when the bulk of decedent’s assets pass by other nonprobate transfers—as in the example outlined in Part II of this Article in which the woman refused to provide any information to potential creditors other than the fact of death. 243 The principle advantage of these other types of nonprobate transfers is the ability to avoid the time and cost of procedural requirements involved in probate or trust administration. However, to the extent the law subjects the nonprobate transfer to the claims of decedent’s creditors, the law also should prohibit the nonprobate transferee from so easily avoiding payment. 244 Any reform

242 In addition, Missouri law tolls the statute of limitations as to those assets received by the personal representative in the event the personal representative fails to provide information regarding recoverable transfers. See Mo. Rev. Stat. § 461.300.2 (West Supp. 2006). In that event, it also makes the value of the nonprobate assets received by the personal representative fully recoverable, as opposed to bearing a pro rata share of liability, in an action for accounting. See id. § 461.300.4.
243 See supra text accompanying notes 6–7.
244 See Unif. Nonprobate Transfers on Death Act § 102(a), 8B U.L.A. 62 (2001). Comment 1 to Section 102 indicates: This section replaces Section 6-107 of the original Code, and its 1989 sequel, 6-215 (Section 215 of this Act). To the extent a deceased party’s probate estate was insufficient, these sections made a deceased party’s interest in multiple-party accounts in financial institutions passing outside probate liable for the deceased party’s statutory allowances and creditor claims. Id. § 102 cmt. 1, 8B U.L.A. 63–64 (2001). Comment 2 goes on to clarify: “Section 102 replaces Section 215 with coverage designed to extend the principle of Section 215 to
should strike a balance between the need to allow nonprobate transfers to pass immediately on death and the need to encourage the payment of decedent’s debts. For that reason, reforms should avoid placing procedural requirements on the nonprobate transferee such as providing actual notice to creditors. On the other hand, to the extent the nonprobate transferee receives an inquiry by the creditor regarding the whereabouts of decedent’s assets, the law should require the nonprobate transferee to provide a timely and complete answer to the creditor’s inquiry. Reforms should also treat any attempt to conceal the whereabouts of the asset by the nonprobate transferee as tolling the statute of limitations. Tolling of the statute would discourage nonprobate transferees from not paying outstanding debts of the decedent. Reform of this nature would place the burden on the creditor and would not delay the transfer of property at a decedent’s death.

D. Need for All Interested Beneficiaries and Creditors to Participate in Hearing

A single, unified hearing, if one is necessary because of the insolvency of decedent’s combined probate and trust estates, promotes the policy of cost and time-efficient administration. Reforms should provide for a single hearing, in which all transferees who have received assets subject to the claims of decedent’s creditors are joined as parties, and all creditors should be notified that they must present claims. Missouri law allows for such procedure in the form of an accounting. Upon initiation of an action for an accounting, Missouri law provides, “[A]ny party to the proceeding may join and bring into the action for accounting any other recipient of a recoverable transfer of the decedent’s transfers at death by revocable trust, [transfer-on-death] security registration agreements and similar death benefits not insulated from decedents’ creditors by other legislation.” Id. § 102 cmt. 2, 8B U.L.A. 64 (2001).

Similar to this suggested reform is the provision of the Internal Revenue Code indicating that, in the absence of the existence of a fiduciary relationship, notice of estate tax deficiency addressed “in the name of decedent or other person subject to liability” and mailed to the last known address suffices for purposes of a notice of deficiency. See I.R.C. § 6212(b)(3).

Similarly regarding the assessment of estate tax, upon the filing of a false return or the failure to file a return, the Service may assess and collect tax at any time, and the three-year limitations period does not apply. See id. § 6501(c)(1), (3).

See MO. REV. STAT. § 461.300 (West Supp. 2006).
property even if the other recipient is not joined. . . ."\textsuperscript{248} Reforms can encourage joinder of nonprobate transferees by making those joined bear a pro rata portion of decedent's debt up to the value of the amount received by the nonprobate transferee. The reforms could then allow a right of reimbursement as against nonprobate transferees not joined in the proceeding. Allowing for the possibility of a single action promotes efficiency of administration. Keeping the interests of beneficiaries in mind, the hearing would be triggered only if creditors with valid claims could not be fully paid from the assets of the probate or trust estate.

E. Need to Allow Sufficient Time for Creditor to Pursue Nonprobate Transferee

The time limitations for asserting claims by decedent's creditors also should be sufficiently long to allow creditors a reasonable possibility of successfully collecting claims from nonprobate transferees. With regard to California's one-year limitations period for bringing creditor claims, the California Court of Appeals has stated:

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\text{[T]he drafters of . . . [the] Code of Civil Procedure section 366.2 believed the limitation period the statute imposes serves "the strong public policies of expeditious estate administration and security of title for distributees, and is consistent with the concept that a creditor has some obligation to keep informed of the status of the debtor."}\textsuperscript{249}
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\textsuperscript{248} \textit{Id.} § 461.300.4. Joinder of a nonprobate transferee implies the court exercises personal jurisdiction over the transferee. In that regard, the statute states:

The recipient of any property held in trust that was subject to the satisfaction of the decedent's debts immediately prior to the decedent's death, and the recipient of any property held in joint tenancy with right of survivorship that was subject to the satisfaction of the decedent's debts immediately prior to the decedent's death, are subject to this section, but only to the extent of the decedent's contribution to the value of the property.

\textit{Id.} § 461.300.8. A plain reading of the statute implies an assertion of quasi in rem jurisdiction. It is arguably necessary that assertion of such jurisdiction requires sufficient minimum contacts on the part of the nonprobate transferee. \textit{See supra} text accompanying notes 188–92. The Missouri statute grants the probate court jurisdiction to hear the accounting. \textit{See} \textit{Mo. Rev. Stat.} § 461.300.7 (West Supp. 2006).

\textsuperscript{249} Levine v. Levine, 126 Cal. Rptr. 2d 255, 261 (Ct. App. 2002).
Thus, policy militates against the adoption of a longer statute of limitations.

A one-year statute of limitations works well, assuming that a reasonable chance of notice to creditors exists. As demonstrated in example 3 discussed in Part II, however, the one-year limitation makes debt collection exceedingly difficult when creditors are not apprised of the debtor's death and are not provided opportunity to discover the whereabouts of decedent's assets. The need for expeditious settlement of a decedent's estate supports a one-year statute of limitations, if the law includes a corresponding requirement of actual notice to reasonably ascertainable creditors. Absent a notice requirement, the policy promoting payment of one's debts leads to the conclusion that a shortened one-year limitations period does not provide ample opportunity for creditors to complete the process currently required for collection of claims by decedent's creditors. Reform requiring notice to reasonably ascertainable creditors in conjunction with a one-year limitations period strikes a necessary balance between the needs of creditors and beneficiaries.

F. Need to Coordinate Imposition of Liability Imposed on Nonprobate Transferees with Other Applicable Law

The law provides protection for certain types of assets from decedent's creditors. For example, many states protect insurance proceeds paid to beneficiaries other than decedent's estate from the claims of decedent's creditors, as demonstrated in the example 4 highlighted in Part II. Some states also have taken steps to protect self-settled trusts from creditors. As currently drafted, however, the provisions imposing liability on nonprobate transferees under the Uniform Nonprobate Transfers on Death Act often conflict with laws protecting assets from claims. In order to eliminate conflicting provisions, states could amend the provisions imposing liability to coincide specifically with existing law addressing the ability of creditors to reach certain assets upon death of the debtor. A clear and consistent statutory

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250 See supra text accompanying note 9; see also In re Estate of Taylor, 2002 MT 1393, 2002 Mont. Dist. LEXIS 2366.
251 See supra text accompanying note 10.
252 See, e.g., ALASKA STAT. § 34.40.110 (LexisNexis 2006); DEL. CODE ANN. tit. 12, § 3570 (2006).
253 See supra detailed analysis provided in Part III.
imposition of liability would increase efficiency. Any changes to the imposition of liability should respect state spendthrift rules and other protections currently provided to creditors under state law.

G. Summary

The addition of these simple procedures and clarifications to the Uniform Probate Code and the Uniform Nonprobate Transfers on Death Act as adopted by the various states effectively would increase the efficiency of probate administration. By increasing the transparency of nonprobate transfers and providing for a single hearing, both creditors and beneficiaries would benefit from the timely resolution of outstanding claims. These reforms promote the dual policies of the efficient passage of title from the decedent to decedent's beneficiaries and of encouraging timely payment of one's debts.

The suggested reforms also respect the interests of beneficiaries and maintain the primary benefits of nonprobate transfers. Privacy as to assets is maintained by avoiding any need for public notice and by requiring actual notice only to reasonably ascertainable creditors. The reforms also protect the ability to transfer title immediately and to avoid more elaborate administration procedures by nonprobate transfer. Creditor procedures would be triggered, if at all, only in the event of estate or trust insolvency or in the event of other nonpayment upon informal presentation of a bill by the creditor. The reforms would preserve and clarify the ability to protect certain assets from creditor claims. At the same time, creditors would have fair opportunity to learn of the need to present outstanding claims and would be encouraged to proceed expeditiously.