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A new section of the Revised Code of Washington, \(^1\) effective October 1, 1974, has the potential for making probate the exception in Washington rather than the rule. \(^2\) The statute, R.C.W. § 11.02.090, characterizes as nontestamentary certain provisions in a variety of written instruments and enables property to pass at death without compliance with the statute of wills. It may extend the concept of probate-avoidance, best exemplified by the community property agreement, \(^3\) to a broader range of circumstances than under prior Washington case law. \(^4\)

\(^1\) Ch. 117, § 54, [1974] Wash. Laws, 3d Ex. Sess. 206 (codified in WASH. REV. CODE § 11.02.090 (1974)). UNIFORM PROBATE CODE (UPC) § 6–201, part of a larger segment dealing with probate avoidance devices, was the original source of the new legislation. See note 9 infra.

\(^2\) A recent survey of decedents’ estates in Washington revealed that approximately 34.21% of the decedents passed their property through the use of probate-avoidance devices. The community property agreement was used by 27.19% of these decedents. Other will substitutes, such as survivorship bank accounts and joint tenancies, were used by the remaining 7.02% of the decedents. Price, The Transfer of Wealth at Death in a Community Property Jurisdiction, 50 WASH. L. REV. 277, 306–09 (1975).

Alternatively, the statute may be interpreted as adding little or nothing to existing case law. Wellman, The Uniform Probate Code: Blueprint for Reform in the 70’s, 2 CONN. L. REV. 453, 484 (1970).

\(^3\) WASH. REV. CODE § 26.16.120 (1974). See note 12 infra. A typical use of the community property agreement is to provide by contract that upon the death of one spouse, the decedent spouse’s community property interest passes to the surviving spouse, thereby avoiding probate. The community property agreement also can be used to convert existing and future acquired separate property into community property and to permit disposition to persons other than the survivor of the community. See Cross, The Community Property Law in Washington, 49 WASH. L. REV. 729, 798–802 (1974).

\(^4\) The Washington Supreme Court has considered a number of pay-on-death benefits in a variety of instruments. See, e.g., Levass v. Dewey, 33 Wn. 2d 232, 241, 213 P.2d 933 (1950) (on rehearing en banc) (creditor’s attempt to cancel balance due on debt at his death invalid since testamentary and not in proper form); In re Lewis’ Estate, 2 Wn. 2d 458, 98 P.2d 654 (1940) (contract providing that obligation to pay on note discharged on the payee’s death held valid); In re Murphy’s Estate, 193 Wash. 400, 75 P.2d 916 (1938) (on rehearing) (contract granting immediate leasehold followed by a fee on the lessor’s death held invalid since testamentary and not in proper form); Compton v. Westerman, 150 Wash. 391, 273 P. 524 (1928) (contract providing that obligation to pay loan discharged on lender’s death held valid).

Arguably not only a larger but a limitless assortment of probate-avoidance devices is now available. WASH. REV. CODE § 11.02.090 (1974) provides not only for the use of its provisions in the named instruments, but also in “any other written instrument effective as a contract, gift, conveyance, or trust . . . .” The more obvious uses of this statute include: (1) a promissory note payable to the decedent during his life and another payee upon the original payee’s death, (2) a land sale contract from father to
The statute provides:

(1) Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension plan, joint tenancy, community property agreement, trust agreement, conveyance, or any other written instrument effective as a contract, gift, conveyance, or trust is deemed to be nontestamentary, and this title does not invalidate the instrument or any provision:

(a) that any money or other benefits theretofore due to, controlled or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently;
(b) that any money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promisor before payment or demand; or
(c) that any property which is the subject of the instrument

son providing for payments to the father-grantor during his life, then to the mother for her life, and then forgiveness of the debt, and (3) if satisfactory tax treatment can be obtained, payment of non-probate benefits, such as pension and other benefits, to a person designated in a will. Greenfield & Vandivort, *Non-Probate Transfers Under the Uniform Probate Code*, 29 J. Mo. Bar 109, 138 (1973).

More novel uses of the statute have also been suggested:

The language of the section is broad enough to validate a variety of devices ranging from pay-on-death (POD) bank accounts (independent of other statutory permission such as UPC §§ 6-101 to -113) to invalidly executed (i.e. unacknowledged) community property agreements.

Price, *supra* note 2, at 285. The language of the statute may be broad enough to allow a “community property agreement” between parties to a meretricious or homosexual relationship. Joint holographic wills may also fall within the statute’s provisions. *But see* note 35 and accompanying text infra.


5. A third section of WASH. REV. CODE § 11.02.090 (1974), dealing with the ownership of safety deposit box contents, was also enacted but is not considered in this note. It reads:

Any provision in a lease of a safety deposit repository to the effect that two or more persons shall have access to the repository, or that purports to create a joint tenancy in the repository or in the contents of the repository, or that purports to vest ownership of the contents of the repository in the surviving lessee, is ineffective to create joint ownership of the contents of the repository or to transfer ownership at death of one of the lessees to the survivor. Ownership of the contents of the repository and devolution of title to those contents is determined according to rules of law without regard to the lease provisions.

Washington was apparently the second state to adopt this paragraph. Arizona was first to adopt it in 1973. ARIZ. REV. STAT. § 14-6201 (1974). More recently Utah has adopted it. UTAH CODE ANN. § 75-6-201(3) (1975). This section might have been placed more appropriately in WASH. REV. CODE ch. 30.20 (bank deposits, including joint deposit with right of survivorship) or ch. 64.28 (joint tenancies).
shall pass to a person designated by the decedent in either
the instrument or a separate writing, including a will, ex-
ecuted at the same time as the instrument or subsequently.
(2) Nothing in this section limits the rights of creditors under other
laws of this state.

Although this section makes the Washington law on probate-avoiding
instruments clearer and more consistent, as it was designed to do,6
problems will be encountered in its use. These problems7 and ways
of overcoming them will be discussed in this note. It will be shown that
further legislative action is needed before the full scope of R.C.W. §
11.02.090's provisions can be utilized.

I. THE STATUTE'S ORIGIN

The characterization of R.C.W. § 11.02.090 instruments as nontes-
tamentary raises important issues regarding rights of creditors after
the transferor's death, protection of the interests of the surviving
spouse, revocation of the instrument by the transferor, and disclaimer
of its provisions by the transferee. Examination of the statute's origin
aids the resolution of these issues. Although the Washington legislative
history is short and unenlightening,8 the origins of Uniform Probate
Code (UPC) § 6–201, of which R.C.W. § 11.02.090 is a modified ver-

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6. One of the purposes of the statute was to make the law more consistent by elim-
inating unwarranted distinctions between testamentary and nontestamentary instru-
ments:

This section authorizes [as nontestamentary] a variety of contractual arrange-
ments which have in the past been treated as testamentary. For example most
courts treat as testamentary a provision in a promissory note that if the payee
dies before payment is made the note shall be paid to another named person . . . .
The result of holding the provisions testamentary is usually to invalidate them
because not executed in accordance with the statute of wills. On the other hand
the same courts have for years upheld beneficiary designations in life insurance
contracts.

UPC § 6–201, Comment.

7. Income, estate, inheritance, and gift tax consequences of the use of instruments
authorized by the statute are not discussed in this note. For a discussion of tax impli-
cations of non-probate transfers see Randall, Community Property Agreements, Joint

8. Although there was legislative disagreement over the adoption of some of the
proposed 1974 amendments to the Washington probate code, there was apparently
unanimity as to ch. 117, § 54, which became WASH. REV. CODE § 11.02.090 (1974). See
Report of Judiciary Standing Committee of the Senate, Feb. 5, 1974, SENATE J. at 433–
51. The Legislature appeared primarily concerned that no conflict between § 11.02.090
and the community property agreement and joint tenancy agreement statutes existed.
Id. at 451.
sion,\textsuperscript{9} are helpful. Professor Richard V. Wellman, formerly chief reporter for the Uniform Probate Code,\textsuperscript{10} reported that UPC § 6–201 is derived from state statutes that insulate diverse insurance and pension benefits from attack under the statute of wills.\textsuperscript{11} As a further aid to understanding the statute, there is evidence that UPC § 6–201 would

\textsuperscript{9} The Washington provision differs from the uniform provision in that it explicitly adds "joint tenancy, community property agreement" to the list of instruments. Furthermore, § 11.02.090(3), dealing with the ownership of safety deposit box contents, is not a uniform provision. See note 5 supra.

\textsuperscript{10} Professor Wellman is currently educational director for the Joint Editorial Board for the Uniform Probate Code.

\textsuperscript{11} Wellman, supra note 2, at 484–85. See Zartman, An Illinois Critique of the Uniform Probate Code, 1970 U. Ill. L.F. 413. 463. Both authors specifically refer to the Illinois statute that served as a model for the uniform provision, ILL. ANN. STAT. ch. 3, § 601 (Smith-Hurd 1969). Connecticut and Nebraska have statutes similar to the Illinois provision. CONN. GEN. STAT. ANN. § 45–194 (1960); NEB. REV. STAT. § 30–244 (1969). Nebraska has recently adopted the UPC, including UPC § 6–201. It will go into effect there on January 1, 1977. The original version of the Illinois statute should be compared with UPC § 2–702, Third Working Draft (1967), which later became UPC § 6–201. The Illinois statute reads:

The designation in accordance with the terms of any insurance, annuity or endowment contract, or the designation in any agreement issued or entered into by an insurance company in connection therewith, supplemental thereto or in settlement thereof, or the designation under a pension, retirement, death benefit deferred compensation, employment, agency, stock bonus or profit sharing contract, plan, system or trust, of any person to be a beneficiary, payee or owner of any right, title or interest thereunder upon the death of another, or any assignment of rights under any of the foregoing, shall not be subject to or defeated or impaired by any statute or rule of law governing the transfer of property by will, gift or intestacy, [relating to the signing and attestation of wills] even though such desig-
receive an interpretation similar to that given the community property agreement statute. However, a question arises whether the Wash-

nation or assignment is revocable or the rights of such beneficiary, payee, or owner or assignee are otherwise subject to defeasance.


The Third Working Draft provision reads:

A provision in an insurance policy, contract, bond, mortgage, promissory note, deposit agreement, pension plan, trust agreement, conveyance or any other written instrument effective as a gift, conveyance, trust or contract reflecting the purpose and intention of the party or parties that money or other benefits theretofore due to, controlled by, or owned by one who has since died shall be paid, or that land or property shall pass to some person designated or to be designated to another party to the transaction in writing by the decedent, at or after the death of the decedent, or that money due under a contract shall cease to be due in the event of the death of the promisee or promissor before payment or demand, does not make the instrument a will and no provision in this Code shall invalidate it.

UPC § 2-702 (3d Working Draft 1967). The provision in the Fifth Working Draft is like UPC § 6-201 except that it has no provision protecting the rights of creditors.

UPC § 6-201 (5th Working Draft 1969).

Part of the impetus for the development of UPC § 6-201 was provided by an article that appeared in 1941 in which the authors advocated the characterization of certain transactions as nontestamentary transfers of property at death rather than testamentary transfers. Gulliver & Tilson, Classification of Gratuitous Transfers, 51 YALE L.J. 1 (1941). Twenty years later it was recommended that the Model Probate Code adopt some provisions based on the views expressed in the 1941 article. Soon after this later recommendation, the drive for revising the Model Probate Code was replaced by the desire to develop a Uniform Probate Code. Fratcher & Straus, Model Probate Code, 35 PA. BAR ASS'N Q. 206, 217 (1964); Wellman, supra note 2.

12. Justice Horowitz, in a 1969 speech, said:

Let me lead up to a description of the provision [UPC § 6-201] by telling you of a statute in Washington dealing with community property. Our statute (RCW 26.16.120) provides for the recognition of a community property agreement under which husband and wife may agree that upon the death of either, the estate shall vest in the survivor. This provision is without prejudice to the rights of creditors and is effective as a contract. No will is involved and the estate is not part of the probate estate. Accordingly, the estate may be settled without any probate proceeding at all. What the Code attempts to do is to generalize the principle implicit in our community property agreement statute and make it applicable to any kind of property, community or separate.

Address by Justice Charles Horowitz, Introduction to the Uniform Probate Code (text of speech to Pacific Coast Banking School) 38-39, September 16, 1969 (emphasis added). Justice Horowitz is currently a member of the Washington Supreme Court. He was co-chairman of the Special Committee on the Uniform Probate Code and is currently chairman of the Joint Editorial Board for the Uniform Probate Code.

Two of the four community property states that have adopted UPC § 6-201 had statutes allowing community property agreements prior to their acceptance of UPC § 6-201. See WASH. REV. CODE § 26.16.120 (1974); Peterson, Idaho's Uniform Probate Code, A Bird's Eye View, 9 IDAHO L. REV. 133, 144-45 (1973). Of the eight American community property jurisdictions—Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington—UPC § 6-201 has not yet been adopted by California, Louisiana, Nevada or Texas. See note 9 supra. The acceptance of UPC § 6-201 by a community property state, however, presumably makes it possible for the citizens of that state to enter into valid community property agreements. Effland, Estate Planning Under the New Arizona Probate Code, 1974 ARIZ. ST. L.J. 1, 19 & n.90. The Idaho version of UPC § 6-201 includes the full official text and adds "agreement to pass property at death to the surviving spouse" to the list of instruments in the
ingston Supreme Court would give more weight to the history of the development of UPC § 6–201 or to the fact that it is analogous to the community property agreement should the two references dictate different conclusions.

sections. IDAHO CODE § 15–6–201(a) (1971). The current Idaho provision includes the following sections dealing with the requirements of a community property agreement:

(c) In the case of agreements to pass property at death to the surviving spouse, such agreements shall be executed in writing, acknowledged or proved in the same manner as deeds to real property, contain a description of all real property, be altered or amended in the same way, and shall be revoked in the event husband and wife are subsequently divorced. The existence of such an agreement shall not affect the rights of creditors and any debt, cause of action or any obligation which could have been presented as a claim against the property of the decedent's estate shall survive against the other parties to the agreement; statutes of limitations on any such debts, causes of action, choses in action, or other legal obligations shall continue to run as though the deceased person had survived and any action brought against the persons succeeding to such property shall be brought within the period limited for the commencement of such action, provided that recovery against the person succeeding to such property shall be limited to the fair market value of the property at the time of the death of the decedent.

(d) No such agreement shall be effective to pass title to property until it has been recorded, prior to the death of any party thereto, in the recorder's office of the county of the domicile of the decedent and of each county in which real property described therein is located; nor shall any amendment to any such agreement be effective for any purpose until such amendment has been recorded in like manner prior to the death of any party thereto.

Id. The Idaho community property agreement statute, first enacted in 1970, was replaced in 1972 by the enactment of UPC § 6–201, but was reenacted and added onto the Idaho UPC § 6–201 provision in 1973. Peterson, supra. Through this series of enactments and revisions, two provisions originally in the 1970 enactment were deleted. The first provision deleted provided that nothing should prevent the surviving spouse "from electing to disregard the right of survivorship contained in the agreement and [have] the decedent's estate administered under the laws of Idaho." Ch. 93, § 1, [1970] Idaho Laws, 2d Reg. Sess. 235. The second provision deleted required the death certificate of the spouses to be recorded "in the recorder's offices of each county in which the agreement is recorded." Id. For a general discussion of the history of Idaho's community property agreement statute see Comment, A First Look at the Community Property Agreement in Idaho, 12 IDAHO L. REV. 41 (1975).

For comparison, see the Washington community property agreement statute, WASH. REV. CODE § 26.16.120 (1974):

Agreements as to status. Nothing contained in any of the provisions of this chapter or in any law of this state, shall prevent the husband and wife from jointly entering into any agreement concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterwards to be acquired, to take effect upon the death of either. But such agreement may be made at any time by the husband and wife by the execution of an instrument in writing under their hands and seals, and to be witnessed, acknowledged and certified in the same manner as deeds to real estate are required to be, under the laws of the state, and the same may at any time thereafter be altered or amended in the same manner: Provided, however, That such agreement shall not derogate from the right of creditors, nor be construed to curtail the powers of the superior court to set aside or cancel such agreement for fraud or under some other recognized head of equity jurisdiction, at the suit of either party.

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II. PROBLEMS PRESENTED BY THE STATUTE

A. The Rights of the Decedent's Creditors

R.C.W. § 11.02.090(2) provides that "[n]othing in this section limits the rights of creditors under other laws of this state." Therefore, secured and lien creditors should be able to enforce their interests in the property transferred if their interests antedate the transfer. Unsecured creditors may have a right of direct suit against the R.C.W. § 11.02.090 transferee if (1) the transfer of the property does not occur until death; (2) the right of direct suit against the transferee is available under the Washington community property statute; and (3) the transferee is not the surviving spouse under the agreement. Concerning creditors and will substitutes see generally McGovern, The Payable on Death Account and Other Will Substitutes, 67 Nw. U.L. Rev. 7, 26-29 (1972).


14. As to realty, as early as 1905 the rule was deemed "to be well settled that, where a mortgagor conveys mortgaged real estate, his grantee takes subject to the mortgage . . . ." Thornely v. Andrews, 40 Wash. 580, 583, 82 P. 899 (1905). A party with a security interest in personalty would also probably prevail, as the Article Nine provision of the Uniform Commercial Code states that "a security interest continues in collateral notwithstanding . . . disposition thereof by the debtor." WASH. REV. CODE § 62A.9-306(2) (1974). The Washington probate statute adopts the position that an encumbrance follows the property. Id. § 11.12.070.

15. If the transfer occurs before death the property is beyond the reach of unsecured creditors because the unsecured creditor cannot reach assets validly transferred inter vivos by his debtor unless such assets were transferred in fraud of creditors. See note 21 infra. WASH. REV. CODE § 11.02.090 (1974) can only preserve those rights the creditor would have had if the transferor had survived.

16. One commentator suggests that the creditor does have rights of direct suit against the transferee under the community property agreement statute: "Enforcement of the claim by an action directly against the heir (the surviving spouse under the agreement) has been recognized." Brachtenbach, Community Property Agreements—Many Questions, Few Answers, 37 Wash. L. Rev. 469, 474 (1962) (footnote omitted). Another author has written:

Under the community property agreement, probate is done away with, in theory at least; the rights of creditors, however, are specifically protected. Legally they have a right to have their claims paid from the property belonging to the deceased until the statute of limitations would bar recovery. Comment, The Community Property Agreement Statute, 25 Wash. L. Rev. 165, 176 (1950). But see Valenzuela v. Anchonda, 22 Ariz. App. 332, 527 P.2d 109 (1974), the only case yet to mention UPC § 6-201. In Valenzuela the court refused to allow a suit against the transferee by the executor of the deceased transferor's estate. The instrument involved was one in which there was forgiveness of the remainder of an installment sales contract debt at death.

Another uncertainty exists where several assets are transferred through one or more uses of WASH. REV. CODE § 11.02.090 (1974). It is unclear whether the creditor may pursue any asset thereby transferred or must pursue one particular asset before pursuing another as though proceeding according to an order of abatement under the probate code. Concerning abatement see WASH. REV. CODE § 11.56.150 (1974); In re Roth's Estate, 68 Wn. 2d 297, 412 P.2d 766 (1966); In re Cloninger's Estate, 8 Wn. 2d 348, 112 P.2d 139 (1941).
and (3) the fact that R.C.W. § 11.02.090 is analogous to the community property agreement statute is given more weight by the Washington Supreme Court than the actual history of UPC § 6–201.\textsuperscript{17} Whether R.C.W. § 11.02.090 permits creditors the use of the creditor provisions of the probate code against an asset passing outside of probate is unclear. The comment to UPC § 6–201 suggests their unavailability.\textsuperscript{18} However, since they may be available under the community property agreement statute\textsuperscript{19} and since similar language respecting the rights of creditors is found in both that statute and R.C.W. § 11.02.090\textsuperscript{20} the creditor provisions of the probate code may be available in the case of transfers pursuant to R.C.W. § 11.02.090. On appropriate facts, a creditor could void the transfer as a fraudulent conveyance thereby drawing the property back into the probate estate. The requirements for establishing a fraudulent conveyance,

\textsuperscript{17} The right of direct suit may not arise if the history of UPC § 6–201 is considered, for the earlier drafts of that section ignored creditors. See note 11 supra. See also Peterson, Idaho's Uniform Probate Code, A Bird's Eye View, 8 IDAHO L. REV. 289, 295 (1972). Under the Washington joint tenancy statute, WASH. REV. CODE § 64.28.010 (1974), the prevalent view is that the "creditor of a deceased joint owner has no right to the property held by the surviving joint owner." Comment, supra note 16, at 177. See In re Baxter's Estate, 68 Wn. 2d 294, 412 P.2d 777 (1966). See also McGovern, supra note 13, at 27; Treadwell & Shulkin, Joint Tenancy—Creditor-Debtor Relations, 37 WASH. L. REV. 58, 59 (1962).

\textsuperscript{18} A portion of the official comment to UPC § 6–201 reads:
Because the types of provisions described in the statute are characterized as non-testamentary, the instrument does not have to be executed in compliance with Section 2–502: nor does it have to be probated, nor does the personal representative have any power or duty with respect to the assets involved.

UPC § 6–201, Comment (emphasis added). However, if creditors are not otherwise provided for, some of the probate provisions may be applicable:
Bear in mind that if the nontestamentary route [under UPC § 6–201] is picked as the sole vehicle for the transmission of property, the successor will not be concerned with probate procedures as long as creditors are taken care of.

Horowitz, supra note 12, at 40 (emphasis added).

\textsuperscript{19} One commentator has concluded that, under the community property agreement statute, the unsecured creditors should have no fewer rights than would be available under intestate succession. Brachtenbach, supra note 16, at 474. If a decedent's property passes by intestacy, the statute provides that debts and enforceable claims against the estate are satisfied out of the real and personal property of the decedent. WASH. REV. CODE §§ 11.02.005(2), 11.04.250 (1974). These claims are enforceable either through direct suit against the transferee (see note 16 supra) or through the provisions of WASH. REV. CODE ch. 11.40 (1974), the probate code provisions dealing with claims against the estate of a decedent.

\textsuperscript{20} The Washington community property agreement statute provides "[t]hat such [community property] agreement shall not derogate from the rights of creditors . . . ." WASH. REV. CODE § 26.16.120 (1974). WASH. REV. CODE § 11.02.090(2) and UPC § 6–201(b) read: "Nothing in this section limits the rights of creditors under other laws of this state."
however, are quite rigorous. Regardless of the availability of other remedies, the creditor could present his claim to the transferor's personal representative and seek satisfaction on the transferor's personal obligation assumed by the estate out of the probate assets.

R.C.W. § 11.02.090 fails to specify a procedure for resolving claims of decedent's creditors. Due to the uncertainty this engenders it would not be surprising if attorneys fail to fully utilize this section for planning purposes. Nor would it be surprising if adverse collateral consequences, such as increased title insurance rates, result from use of the statute's provisions.

B. The Rights of the Surviving Spouse

R.C.W. § 11.02.090 has an inadequate provision governing creditor's rights, but it has no provision at all governing the rights of a surviving spouse. The rights of the surviving and the transferring spouse are relatively clear, however, under existing law. In Washington, a spouse transferring separate property is not required to obtain the consent of the other spouse. Unless the nonconsenting surviving spouse

21. Wash. Rev. Code ch. 19.40 (1974) provides for a fraudulent conveyance recovery. Transactions by certain parties without fair consideration are per se fraudulent, viz., those by one rendered insolvent by the conveyance (id. § 19.40.040), and those by one who thereby undercapitalizes his business (id. § 19.40.050). Other fraudulent conveyance recoveries are predicated on a showing of various beliefs or intents of the transferor. Id. §§ 19.40.060–.070. These are very difficult to prove. See Sparkman & McLean Co. v. Derber, 4 Wn. App. 341, 481 P.2d 385 (1971); Columbia Int'l Corp. v. Perry, 54 Wn. 2d 876, 344 P.2d 509 (1959).

22. Wash. Rev. Code § 11.40.020 (1974). It should be noted that the transferee is also in a quandary. The title of the asset received may be clouded. To remedy this, a transferee might seek appointment as personal representative under Wash. Rev. Code § 11.28.120 (1974). Creditors would then be allowed four months to present their claims. Id. § 11.40.010. Otherwise, the statute of limitations could run as long as six years. Id. §§ 4.16.040, 4.16.080. It is unclear, however, whether a personal representative can be appointed where there is no probate property. Brachtenbach, supra note 16, at 474. A transferee might also attempt a quiet title action under Wash. Rev. Code ch. 7.28. This remedy is not clearly available, however, and the cloud may not be removable by ch. 7.28 (see generally Annot. 78 A.L.R. 24 (1932), which attempts to define a cloud on a title for the purposes of a quiet title action). One commentator suggests a method for avoiding clouds on the title of real property conveyed under the Idaho community property agreement statute. Comment, supra note 12, at 51.

23. This was the initial response to the community property agreement statute, Wash. Rev. Code § 26.16.120 (1974), a statute closely analogous to Wash. Rev. Code § 11.02.090 (1974). Brachtenbach, supra note 16, at 478. See also Peterson, supra note 12, at 144; Comment, supra note 16, at 166. Similarly, Idaho experienced status of title problems during the period when recordation of community property agreements was not required. Comment, supra note 12, at 50–51 n.37.

spouse succeeds in employing the family support provisions of the probate code, the surviving spouse is powerless to stop an R.C.W. § 11.02.090 transfer of separate property. In contrast, because a spouse transferring community property is, in many instances, under constraint to seek the consent of the other spouse, a nonconsenting spouse need merely assert his or her rights in the property to invalidate the transfer. If the consent of the other spouse is required, the transfer is void without such consent. It should also be noted that if property is transferred either through a community property agreement or another of the R.C.W. § 11.02.090 instruments the surviving spouse has no rights against creditors such as the award in lieu of homestead.

C. Revocation of the Instrument

Two provisions of Section 11.02.090 include means of revocation. The statute states that money or property "shall be paid" or "shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time or sub-

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25. Provided the analogy to wills could be sustained, the nonconsenting spouse could seek either the separate or the community property that was transferred. The family support provisions, notably WASH. REV. CODE §§ 11.52.022, -.040 (1974), do not respect the distinctions between separate and community property. See also notes 56–67 and accompanying text infra. However, Horowitz, supra note 12, at 40, notes: Bear in mind that if the nontestamentary route is picked as the sole vehicle for the transmission of property, the successor will not be concerned with probate procedures . . . . By probate procedures I mean not only the admission of the will to probate by informal or formal proceedings, and whether the proceedings be unsupervised or supervised, but it thereby becomes unnecessary to be concerned with the problem of homestead, exempt property and family allowance provisions contemplated by the Code.

26. In addition to the requirement of the consent of both spouses to donative transfers, WASH. REV. CODE § 26.16.030 (1974) indicates that mutual consent is required in certain other instances involving community assets. These instances include the sale, conveyance or encumbrance of community real property, the purchase of real property, the creation of security interests in or the sale of household goods, and the purchase or sale of a community business.

27. Professor Harry Cross states that "inter vivos gifts of community property are void ab initio and in toto without the consent of both spouses." Cross, supra note 3, at 789 (footnote omitted). See also id. at 786.

28. If the deceased spouse had transferred his or her assets to the surviving spouse or a third party through either the community property agreement or another of the § 11.02.090 instruments, a creditor could pursue the assets (see notes 15–19 and accompanying text supra). The surviving spouse could not preserve rights in the assets through the award in lieu of homestead, WASH. REV. CODE § 11.52.010 (1974). The award in lieu of homestead assumes an estate which is in administration.
sequently."\textsuperscript{29} Thus by either modification or destruction of the written instrument presumably one can revoke the transfer.\textsuperscript{30}

An R.C.W. § 11.02.090 transferor would be reasonably well protected under these provisions if they are mandatory and not exclusive. If the provisions are mandatory, revocation occurs by operation of law when the transferor performs the acts required by the statute.\textsuperscript{31} If the provisions of the statute do not provide the exclusive manner in which a transfer can be revoked, a transferor could provide for protection of pretermitted heirs or a subsequent spouse by inserting automatically revoking conditions in the instrument used for the transfer.\textsuperscript{32}

In addition to the question of whether the revocation provisions of R.C.W. §§ 11.02.090(1)(a) & (c) are mandatory or exclusive, the section leaves ambiguous the permissible degree of revocability. At an early point the section requires "[a] written instrument effective as a contract, gift, conveyance or trust"\textsuperscript{33} under the existing common law. At a later point, however, the section may be interpreted to except its own revocability provisions from the limitations of the common law. The implication can be drawn that the transferor may unilaterally revoke the transfer,\textsuperscript{34} a power not normally accorded by the common law.

These uncertainties may be resolved through judicial interpretation. If the Washington Supreme Court interprets R.C.W. § 11.02.090 in a

\textsuperscript{29} WASH. REV. CODE § 11.02.090(1)(a), (c) (1974). It is unclear whether the "separate writing" must be signed, acknowledged, or witnessed. The other provision of the statute does not explicitly include a means of revocation. It, however, covers a distinctly different situation. Whereas the first and third provisions provide that money or property be given to a party on death (\textit{id.} § 11.02.090(1)(a), (c)) the second provision, \textit{id.} § 11.02.090(1)(b), extinguishes a liability between the two primary parties.

\textsuperscript{30} One commentator suggests that a power to amend an original instrument by a provision that deletes all property that the instrument formerly covered is tantamount to a power to revoke. Comment, \textit{supra} note 12, at 48 n.29 (discussing Idaho's prior community property agreement statute). Presumably a revocation could also be accomplished by substituting oneself for the party previously benefited by the original instrument.

\textsuperscript{31} The revocability of the instrument may depend also on the common or statutory law of the instrument. For example, it is doubtful that one could unilaterally revoke a contract. \textit{See} notes 35–36, 52–54 and accompanying text \textit{infra}.

\textsuperscript{32} This protection is afforded for wills by statute. Under WASH. REV. CODE § 11.12.090 (1974) children unnamed in a will take an intestate share in derogation of the provisions of the will. Under WASH. REV. CODE § 11.12.050 (1974), in the event of marriage or divorce, a will is deemed revoked as to the new or divorced spouse.

\textsuperscript{33} \textit{id.} § 11.02.090(1).

\textsuperscript{34} \textit{See} text accompanying notes 29 & 30 \textit{supra}.
manner consistent with the interpretation it has given the community property agreement statute, mutual intent would be necessary to revoke R.C.W. § 11.02.090 contracts. If the instrument is a gift or conveyance the presumption that the common law survives a statute suggests that it would not be revocable. The community property agreement statute, however, includes language indicating revocation of the instrument may be effected only by a writing. R.C.W. §

35. Mutual intent is required for revocation under the community property agreement statute because the community property agreement is a contract, governed by contract principles. In re Estate of Lyman, 7 Wn. App. 945, 948-49, 503 P.2d 1127, 1130 (1972), aff'd and opinion adopted, 82 Wn. 2d 693, 512 P.2d 1093 (1973).

WASH. REV. CODE § 26.16.120 (1974) provides:

But such agreement may be made at any time by the husband and wife by the execution of an instrument in writing under their hands and seals, and to be witnessed, acknowledged and certified in the same manner as deeds to real estate are required to be, under the laws of the state, and the same may at any time thereafter be altered or amended in the same manner . . . .

See In re Estate of Lyman, supra (one spouse alone cannot revoke the agreement); In re Wittman’s Estate, 58 Wn. 2d 841, 365 P.2d 17 (1961) (suggesting lesser formalities for revocation but not denigrating the requirement of mutuality); Brachtenbach, supra note 16, at 470.

It is also important to note that whereas the community property agreement statute (WASH. REV. CODE § 26.16.120 (1974)) provides that “[n]othing contained in . . . any law of this state” shall prevent a married couple from entering into an enforceable community property agreement, WASH. REV. CODE § 11.02.090 (1974) only provides that “this title [Title 11, Probate Law & Procedure] does not invalidate the instrument.” Therefore, although § 11.02.090 instruments need not comply with the statute of wills and other probate law under Title 11, other state law is not displaced so as to validate unilaterally revocable contracts. Furthermore, typically a subsequent statute does not impliedly amend a prior statute. See In re Lyon’s Estate, 83 Wn. 2d 105, 515 P.2d 1293 (1973). This rule and the limiting language of WASH. REV. CODE § 11.02.090 (1974) may indicate that the statute will not change existing law concerning community property agreements. Therefore the statute may not remedy defective community property agreements. See note 4 supra.

A bill has been proposed recently, however, that would change the common and statutory law to some extent. The bill would amend WASH. REV. CODE § 11.02.090 (1974) by adding a new section. It reads:

The legal effectiveness of a written instrument used pursuant to subsection (1) of this section which includes a provision for transfer of money or other property or benefit upon the death of a party shall not depend upon sufficiency of consideration or other measure of value, which may be nominal, to such party. However, evidence of force or coercion of any kind used in negotiating the instrument shall render such document void as far as such transfer after death is concerned.

H.B. 1285, 44th Legis., 2d Ex. Sess. § 25 (1976). This addition would allow a decedent to pass property on death without entering into a contract, such as a community property agreement. A holographic “will” would be sufficient to pass property at death. See State v. Berry, 200 Wash. 495, 93 P.2d 782 (1939); Irwin v. Rogers, 91 Wash. 284, 157 P. 690 (1916).


37. The community property agreement statute requires that the community property agreement and any alterations or amendments thereto be of like formality. See note 35 supra. This may mean that the community property agreement can be revoked only in writing. However, the analysis in In re Wittman’s Estate, 58 Wn. 2d 841, 845, 365 P.2d 17, 20 (1961) indicates that adequate mutuality of purpose of both spouses may be shown without a writing.
11.02.090 does not contain analogous language. Therefore, its revocation provisions may not be construed as narrowly as those of the community property agreement statute.

Alternatively, a strict reading of the revocability provisions may be accepted if the court gives more weight to the actual history of UPC § 6–201. The state statutes used as models for the uniform provision dealt with a limited series of instruments that are normally unilaterally revocable. Arguably, a court could conclude that the drafters of UPC § 6–201 intended to provide for similar revocability of the instruments listed.

D. Disclaimer of the Instrument

R.C.W. § 11.02.090 makes no provision for disclaiming interests received through its instruments. This omission would be of little interest except that the general disclaimer statute was not amended to include coverage of all the instruments listed in R.C.W. § 11.02.090. Currently only those R.C.W. § 11.02.090 instruments that are trusts or community property agreements or involve a right of survivorship provide their beneficiaries with the power to disclaim. This is a glaring inadequacy of the 1974 probate code amendments.

III. REMEDIES

A. Self-help Remedies

The uncertainties presented by R.C.W. § 11.02.090 can be approached in several ways. A party could employ the statute’s provi-
sions in disregard of the problems they may engender. Should controversy arise the party could attempt a settlement among the parties involved. Although uninspiring and risky, this approach may work, for it apparently has been effective with community property agreements. Preventive remedies would be preferable however. Inclusion of carefully worded provisions in the original document to deal with creditors, the surviving spouse, revocation and disclaimer could avoid many of the problems previously discussed.

I. Remedies for creditor problems

In order to preclude creditors whose claims arise between the execution of an R.C.W. § 11.02.090 instrument and the transferor's death from asserting a claim against the property, the R.C.W. § 11.02.090 instrument should be presently phrased to transfer the property on its execution. It is not possible, however, to list what language will transfer an interest immediately in each situation. The only rule is:

41. Not all commentators perceive the problems discussed in this note. A committee of the California State Bar, appointed to critique the UPC, found four faults with UPC § 6–201. In the committee's view the statute (1) fails to provide for the surviving spouse; (2) presents a minor tax problem; (3) encourages piecemeal estate planning; and (4) opens the way for fraud. The State Bar of California, The Uniform Probate Code: Analysis and Critique 190–91 (1973). Creditor and revocation problems therefore may not be as significant as they first appear.

42. The community property agreement statute, which appears to be closely related to Wash. Rev. Code § 11.02.090 (1974) (see notes 8 & 12 supra), suffers from some of the same infirmities as § 11.02.090. However, such problems have neither deterred its wide use (see note 2 supra) nor resulted in frequent litigation. It has been admitted "that creditors' problems seem to arise infrequently." Brachtenbach, supra note 16, at 480. In fact there are no reported decisions dealing with the creditor problems of Washington community property agreements that are relevant to this note's discussion, despite the fact the community property agreement has been in use in Washington for almost a century. (The Washington statute was enacted in 1879. An Act Relating to and Defining the Property Rights of Husband and Wife, § 29, [1879] Wash. Terr. Laws 77, 81). The question of revocation has arisen in only three cases: In re Lyman's Estate, 82 Wn. 2d 693, 512 P.2d 1093 (1973); In re Wittman's Estate, 58 Wn. 2d 841, 365 P.2d 17 (1961); and, In re Brown's Estate, 29 Wn. 2d 20, 185 P.2d 125 (1947). It is not surprising that there has been no problem under the community property agreement statute concerning transfers in derogation of the surviving spouse's rights because the surviving spouse is usually the transferee. See note 3 supra. Disclaimer has been provided for community property agreements by statute. Wash. Rev. Code § 11.86.010 (1974).

43. See note 15 and accompanying text supra.

44. In Young v. O'Donnell, 129 Wash. 219, 224 P. 682 (1924), acknowledging the uniqueness of each situation, the court stated that "[a] vast number of authorities have been examined . . . but many of them are based upon peculiar language of the conveyance or instrument involved . . . ." Id. at 222, 224 P. 683.

[An instrument] conveys no present interest . . . where [it] provides that it is effective only after the death of the grantor, that the grantor reserves absolute dominion and control during his life, and that [it] is to be null and void in the event of the death of the grantee prior to the decease of the grantor.

Beyond that, the Washington courts consider various indicia:

the name of the writing given by the parties to the instrument, the form of the instrument, the manner of execution of the instrument, the acknowledgment of the instrument, the recording of the instrument, the way in which the instrument has been treated by the parties, the fact that the powers of revocation of sale or modification are not reserved in the seller, the fact that the conveyance is not conditional upon the purchaser surviving the seller, the fact that there is no prohibition against recording the instrument until the seller's death, the fact that the possession of the instrument is not required to be retained by the seller.

The transferor may wish to provide for prior unsecured creditors whose remedies are otherwise uncertain and who therefore might be disposed to initiate costly litigation. The transferor thus may provide that the transferee assume some proportion of the debt of the transferror's estate or otherwise hold the property subject to creditors' reach.

2. Remedies for revocation, disclaimer, and surviving spouse problems

R.C.W. § 11.02.090 already may provide for full power to make a subsequent change of transferee in the instrument. Until that is ascertained, and in order to encourage the transferee's initial cooperation, a transferor should consider qualifying the power to revoke so that it conforms with an approved common law formulation for the instrument. A transferor should also consider adding automatic termination clauses in the event of remarriage, divorce, or the existence of pretermitted heirs. Finally, because most transfers of community property

47. See Part II–A supra.
48. All contracts, trusts, gifts, and conveyances are amenable to such conditions. Regarding contracts, see Adair v. Kona Corp., 51 Hawaii 104, 452 P.2d 449 (1969); United States v. Schaeffer, 319 F.2d 907 (9th Cir. 1963); Ross v. Bumstead, 65 Ariz. 61, 173 P.2d 765 (1946). Regarding trusts, see Hauser v. Catlett, 197 Okla. 668, 173 P.2d
require joint action, any R.C.W. § 11.02.090 transferor must obtain the consent of his or her spouse. To eliminate any risk, this consent should be clearly evidenced in the R.C.W. § 11.02.090 instrument.

There are several ways to qualify the power of revocation so that it conforms with an instrument's approved common law formulation yet provides the transferor with maximum power to revoke. For example, if the R.C.W. § 11.02.090 instrument is a contract in which the transferor agrees that on his death the property will pass to the transferee in exchange for the transferee's present payment of consideration, then the revocation provision could require the transferor to give the transferee ten days' notice if he wishes to revoke. The transferee may insist on a similar power. If the R.C.W. § 11.02.090 instrument is a trust, the transferor could explicitly reserve a common law power of revocation. If the instrument is a gift or conveyance, however, the transferor could do nothing; the common law is unrelenting in these instruments' irrevocability and the transferor must rely on the language of R.C.W. § 11.02.090 to alter this.


It is understood and agreed that application for this policy was made by Arlene G. Kern, wife of the Insured, designated as the applicant. It is further understood and agreed that the said applicant is the sole owner of this policy and may receive and exercise every right and privilege thereunder, if she be living, otherwise the Executors, Administrators or Assigns of the said applicant. Under this agreement, it is understood that neither the Insured nor his estate shall have any interest in this policy.

Id. at 438. 52. The promise to give such notice is sufficient consideration to support a common law contract. Restatement (Second) of Contracts § 79 (Tent. Draft No. 2, 1965).

B. Judicial Remedies

A court could remedy many of the defects of R.C.W. § 11.02.090 by applying selected portions of the probate code to instruments employing the new statute's provisions. If the creditor provisions of the probate code were carried over, the creditor would have a certain route for presentment and consideration of his claim. If the pretermitted heir statute and the statute in the probate code respecting subsequent marriage and divorce were deemed applicable, one of the striking inadequacies of the revocation provisions of R.C.W. § 11.02.090 would be remedied. If the statute according the spouse a power freely to dispose of his or her one-half of the community property by testament were carried over, the debilitating requirement of joint action would be gone. It also would be beneficial if the disclaimer statute were extended.

The instruments of R.C.W. § 11.02.090 may be employed as will substitutes. A policy question to be considered by the courts is whether these will substitutes will "be employed so as . . . to confer upon donees greater rights than they would have had if the devise had been in the form of a last will and testament." To avoid this result and provide adequate protection for creditors, surviving spouses, and pretermitted heirs, the quasi-testamentary character of the instruments should be recognized and appropriate extension of selected probate code sections should occur.

Washington has recognized the soundness of extending probate code provisions to nonprobate transfers. In In re Button's Estate, the Washington Supreme Court applied the anti-lapse provision of the probate code to an inter vivos trust. The trustor had created a revocable trust with income to himself for life and remainder to his mother. The trustor's mother predeceased the trustor. Of this situation and the anti-lapse statute, the court said:

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57. Id. § 11.12.090. Notably, however, the pretermitted heir statute has been held to be inapplicable to community property agreements. McKnight v. McDonald, 34 Wash. 98, 103, 74 P. 1060, 1061 (1904).
59. Id. § 26.16.030(1).
60. Id. ch. 11.86.
63. 79 Wn. 2d 849, 490 P.2d 731 (1971).
65. 79 Wn. 2d at 854, 490 P.2d at 734.
Of course, the gift to [his mother] was not made by will, but by inter vivos trust. If it were made by testamentary trust, we do not think that it could be seriously suggested that this statute was not meant to affect it, and the only difference between such a gift and that involved here is that the inter vivos trust disposes of property upon the death of the settlor without the necessity of complying with the statute of wills.

The court, after emphasizing that the gift was "in practical effect a legacy" and "that the policy of the law of this state . . . is against the lapsing of gifts to relatives of the deceased," applied the anti-lapse statute to the inter vivos trust.

C. Legislative Remedies

Although judicial remedies for the uncertainties of R.C.W. § 11.02.090 are conceivable, the judiciary, by its nature, does not provide comprehensive remedies. The legislature should therefore amend R.C.W. § 11.02.090 by specifying creditors' rights under the section or by at least requiring public recordation of the instruments, as Idaho has done, to give notice to creditors. The quality of the section's provisions, whether exclusive or mandatory or both, and

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66. Id. (emphasis added).
67. Id.
68. As Harvard professors Hart and Sacks indicated: "In the development of Anglo-American legal systems, courts have functioned characteristically as the place of initial resort for the settlement of problems which have failed of private solution . . . . H.M. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 185 (Tent. ed. 1958). The legislature, on the other hand, has the function "of revising for the future [the] comprehensive body of working arrangements . . . . In the American legal system final responsibility for making such changes is entrusted to the legislature." Id. at 187.
69. One commentator has suggested that UPC § 6–107 be added to UPC § 6–201 in order to protect creditors, the surviving spouse, and children. Robertson, supra note 4, at 42. UPC § 6–107 explains the rights of creditors, the surviving spouse, and children in certain multiple-party accounts in financial institutions. The accounts covered are joint accounts, Totten trust accounts, and accounts providing for the payment on death to persons who have no right to withdraw until the decedent's death. These devices allow property to be transferred without probate. Generally, UPC § 6–107 provides that if the probate assets are insufficient to satisfy certain claims of the creditors, the surviving spouse, or children of the decedent, such parties may petition the personal representative to pursue the property that was transferred outside probate to the extent of the claims. The personal representative must commence the action within two years of the transferor's death. The only dubious aspect of the provisions is that it assumes that a personal representative may be appointed even though no property passes through an estate. See Brachtenbach, supra note 16, at 474.
70. See note 12 supra.
the degree of revocability included in the provisions also should be made explicit. The legislature should either amend R.C.W. § 11.02.090 to include a disclaimer provision or amend the general disclaimer provision, R.C.W. ch. 11.86, to correlate with the instruments and provisions of R.C.W. § 11.02.090. Furthermore, the legislature should consider adopting pretermitted heir and subsequent marriage or divorce statutes for nonprobate wealth transfers, as, for example, Michigan has done for life insurance. Finally, the legislature should consider amending the community property laws to enable one to dispose of his or her portion of community property at death through instruments other than wills and amending the homestead laws to enable them to be used in nonprobate situations. If these corrections were made, R.C.W. § 11.02.090 would help implement a system of relatively trouble-free nontestamentary, nonprobate wealth disposition.

IV. CONCLUSION

With its uncertainties and inadequacies remedied by the legislature R.C.W. § 11.02.090 could compete seriously in use with wills. It would have the overall safety of a will insofar as the transferor, transferee, creditor, surviving spouse, and pretermitted heir were concerned. It would be quick and, compared with the costs of probate, inexpensive. Until the legislature acts, however, R.C.W. § 11.02.090 poses too many risks. Self-help and judicial remedies cannot adequately cover the section's uncertainties and inadequacies. Thus at this time, its greatest benefits will come from its use in remediating defective community property agreements and other similar instruments and from selective use with, not in lieu of, wills and probate.

Tom Graafstra

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71. Mich. Stat. Ann. § 25.131 (1974) (emphasis added) provides: Hereafter every decree of divorce shall determine all rights of the wife in and to the proceeds of any policy . . . in which she was named or designated as beneficiary . . . and unless otherwise ordered in said decree such policy . . . shall thereupon become and be payable to the estate of the husband or to such named beneficiary as he shall affirmatively designate.


73. See note 4 supra.