Creditors' Rights Against Nonprobate Assets in Washington: Time for Reform

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CREDITORS' RIGHTS AGAINST NONPROBATE ASSETS IN WASHINGTON: TIME FOR REFORM

Thomas R. Andrews*

Abstract: The increasing popularity of nonprobate transfers of property at death has created a "revolution" in family wealth transmission. Yet the law on creditors' rights to reach such transfers is badly confused. In some cases, exemptions from creditors' claims are far broader than can be justified. In others, existing creditors' rights are protected but undefined. In still others, it is unclear whether creditors can reach the property at all. There is no procedure for the enforcement of such rights as creditors may have no specified time limit within which claims may be brought. This lack of system invites abuse and is especially hard on involuntary creditors. The Author examines each of the most widely used nonprobate transfer mechanisms: community property agreements, joint property, multi-party bank accounts, United States Savings Bonds, life insurance, deferred compensation benefits, trusts, and other transfers payable on death. Creditors' rights under each mechanism are examined, areas of confusion identified, and specific improvements recommended. The Author proposes that, excepting specific statutory exemptions, both probate and nonprobate property be available to satisfy creditors' claims. He further recommends that a procedure for providing notice to creditors be established in situations where a personal representative is unnecessary and that procedures be established providing for the appointment, when necessary, of a personal representative to handle claims against nonprobate property. Finally, he recommends an extended time period for the bringing of claims against nonprobate property. The Author supplies a draft statute incorporating his recommendations.

I. INTRODUCTION

Probate is the traditional method for winding up a person's financial affairs at death. The probate court establishes whether the decedent left a valid will and who is entitled to the decedent's property under such a will after debts and expenses are paid, or under the law of descent and distribution if there is no will, and issues any orders necessary to transfer title to the appropriate recipients.

Nevertheless, there are a variety of mechanisms available for transferring property at death that avoid the probate process altogether. The most common of these methods of transfer—usually lumped

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under the general heading of "will substitutes" or "nonprobate prop-
erty"—are life insurance, joint property held with right of survivor-
ship, joint and survivor bank accounts, payable on death bank
accounts, and pension plans. To these common will substitutes must
be added another of more local origin. Washington's pioneer statute,1
which has authorized for over one hundred years nonprobate transfer
of community property at death under a community property agree-
ment, appears to have been particularly popular in this state2 and to be
gaining acceptance elsewhere.3 Other variations on the same theme
continue to emerge.4 Use of these mechanisms has become so wide-
spread that they are said to have contributed to a "Revolution in Fam-
ily Wealth Transmission," the "Nonprobate Revolution."5

This nonprobate revolution poses a variety of challenges to
lawmakers who are concerned about fitting the law of decedents'
estates to contemporary reality. The probate code is an intricate web
of protections for decedents, family, heirs, legatees, and creditors.
Many—perhaps most—of these protections simply do not apply to
property passing outside the probate process.6 Each will substitute

2. Price, The Transmission of Wealth at Death in a Community Property Jurisdiction, 50
3. Recently similar provisions have been adopted in Idaho, Wisconsin and Texas. IDAHO
CODE § 15-6-201 (d)(1979); WISC. STAT. ANN. § 766.58 (3)(f)(West Supp. 1988); TEX. CONST.
by an undelivered deed under WASH. REV. CODE § 11.02.090, Washington's version of U.P.C.
§ 6-201). In another development that may usher in a whole new species of will substitute, one
corporation has recently made available a "transfer on death" form of security registration, and
the National Conference of Commissioners on Uniform State Laws has amended the Uniform
Probate Code so that it provides for such a will substitute expressly. Wellman, Transfer-on-
Death Securities Registration: A New Title Form, 21 GEORG. L. REV. 789 (1987); National
Conference of Commissioners on Uniform State Laws, Amendments to U.P.C. Article VI—Non-
Amendments to U.P.C.].
5. Langbein, The Twentieth-Century Revolution in Family Wealth Transmission, 86 MICH. L.
6. To name the most obvious examples: (1) The formal requirements for will execution
(WASH. REV. CODE § 11.12.020 (1989)) do not apply to will substitutes. O'Brien v. Robinson,
109 Wash. 2d 913, 749 P.2d 154 (1988); (2) The award in lieu of homestead (WASH. REV. CODE
§ 11.52.010 (1989)) is not available against nonprobate property because the court is only
authorized to make an award in lieu of homestead from "property of the estate," and "estate"
there, as elsewhere in the probate code, means "probate estate;" (3) The statutory revocation of
testamentary gifts to divorced spouses (id. § 11.12.050) does not affect nonprobate transfers
because it only purports to revoke gifts in "wills," and a will substitute is, by definition, not a
will; (4) The automatic intestate share for spouses or children omitted from a will (id.
§§ 11.12.030, 11.12.090) is not available against nonprobate property for reasons similar to those
in (3); (5) The antilapse statute (id. § 11.12.110) does not—in most cases—save nonprobate
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needs to be studied by lawmakers and commentators to determine if the expanded use of will substitutes requires amendment of Washington's present probate code to provide a more integrated approach.\(^7\) This Article examines one of the areas where probate traditionally has played a critical role: creditors' rights in the assets of a decedent.

A. **Scope of the Article**

Payment of the decedent's debts always has been one of the principal functions of the probate process. As Blackstone put it more than two hundred years ago: "[I]t is [the executor's] business first of all to see whether there is a sufficient fund left to pay the debts of the testator: the rule of equity being, that a man must be just, before he is permitted to be generous."\(^8\) The probate process protects creditors of the decedent by providing for notice and a mechanism for filing and paying claims. It protects the legatees or heirs of the decedent by barring creditors' claims that are not filed in a timely manner and by providing a mechanism for resolving contested claims.

How has the nonprobate revolution affected creditors' rights in decedents' estates?\(^9\) The answer should be of importance to estate planners, personal representatives, potential creditors, and those who expect to receive property by virtue of a decedent's death.\(^10\) This Article attempts to summarize and, where appropriate, to criticize Washington law on the subject. Where there is no clear Washington law,
law from other jurisdictions is offered to predict or flesh out the likely result in Washington. In some cases, even though there is law in Washington, law from other jurisdictions is discussed for purposes of comparison and criticism. Finally, proposals are made for reforming Washington law that could provide rationality and fairness to the system of creditors' rights at the death of a debtor.

The Article focuses primarily on the rights of a decedent's general unsecured creditors to reach property transferred by the decedent by means of a will substitute. It does not consider creditors who have acquired a lien on specific property during the debtor's life. Creditors who have bargained for and received a security interest in the nonprobate property should be entitled to assert their security interest against the property regardless of who would otherwise be entitled to receive the property under the nonprobate instrument in question. Creditors who have perfected liens of other kinds against the specific assets subject to a nonprobate instrument before the death of the debtor also should be entitled to assert those liens against the assets as if the debtor were still alive.

The Article also assumes that the debtor has not declared bankruptcy before death. If he has, then the property in the bankrupt's "estate" will include all property subject to a nonprobate transfer insofar as the bankrupt could have enjoyed it during his life or exercised a power over it in his own behalf.
Finally, the Article generally assumes that the decedent has attempted to transfer property *gratuitously* outside of probate. Insofar as the nonprobate transfer was made for consideration, those who bargained for and received the right to the decedent’s property through the nonprobate transfer should be entitled to that property without regard to probate.¹⁴ Other creditors of the decedent should not be able to reach the bargained for nonprobate property but should, instead, be expected to be able to reach the property—the consideration—in return for which the decedent agreed to the nonprobate transfer.¹⁵

### B. Community Debt System

While there is not much cause in this Article to discuss the distinction between community and separate property, the Article will take for granted the Washington “community debt” system under which obligations normally are classified as either “community” or “separate.” It may, therefore, be useful to summarize briefly the system’s basic principles as they impact the estate of a decedent debtor.¹⁶

A “community obligation” is one entered into on behalf of or for the benefit of the community of husband and wife.¹⁷ Debts incurred by a spouse during marriage are presumed to be community debts.¹⁸ All the community property, regardless of which spouse formally incurred the obligation, is ordinarily held to be subject to “community obligations” incurred by the couple during marriage.¹⁹ This liability of all the community property for the community obligations survives

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¹⁵. In some cases, of course, the consideration for which the decedent made a nonprobate transfer may be gone; or the consideration may have been services. If that is the case, the general creditors of the decedent have no cause to complain. The decedent purchased services or consumables during his life and parted with dominion or control over the purchase price at that time. As noted above, however, the vendor of the services or consumables should be entitled to enforce his or her rights to receive property through a nonprobate transfer, if that was agreed upon. *See supra* note 14.


¹⁸. *Id.*

¹⁹. *Id.*
the death of the first spouse, and in order to dispose of community liabilities, the whole of the community property is subject to probate in the estate of the first to die.\textsuperscript{20} Furthermore, all of a decedent's separate property is fully subject to the decedent's separate debts and liabilities.\textsuperscript{21} Any quasi-community property should be treated as the separate property of the earning spouse for purposes of creditors' claims.\textsuperscript{22} Finally, part of the community property also may be subject to the separate liabilities of a deceased spouse in two important situations. First, the deceased spouse's half of the community property is subject to his or her separate liabilities.\textsuperscript{23} Second, if one spouse enters marriage with a prenuptial "debt," that spouse's marital "earnings and accumulations" (even though the nonearning spouse owns half of these as community property) are (1) fully liable for that debt if the debt is a child support or maintenance obligation owed a former spouse, and (2) liable for all other prenuptial debts that are reduced to judgment within three years of marriage.\textsuperscript{24}

Where both community property and separate property are liable for the same obligation, Washington has adopted a "marshalling" approach. Community property must first be exhausted to satisfy a community liability before the separate property of the deceased debtor may be reached,\textsuperscript{25} and separate property must first be

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{20} WASH. REV. CODE §§ 4.20.046, 11.02.070 (1989).
\item \textsuperscript{21} Northern Bank & Trust Co. v. Graves, 79 Wash. 411, 140 P. 328 (1914); Vetter, \textit{Liens on Community Property}, WASHINGTON COMMUNITY PROPERTY DESKBOOK § 32-13 (1977).
\item \textsuperscript{22} WASH. REV. CODE § 26.16.250 (1989). Quasi-community property is property brought to Washington from a common law state that would have been community property had it been acquired while domiciled in Washington. \textit{Id.} § 26.16.220. It is treated as the separate property of the acquiring spouse until death, but at the death of the acquiring spouse, the surviving spouse is entitled to half of this property as if it had been community property. \textit{Id.} § 26.16.230; see Andrews, \textit{Washington's New Quasi-Community Property Act: Protecting the Immigrant Spouse}, 15 COMM. PROP. J. 50, 53 (1988). The statute makes clear, however, that characterization of property as quasi-community property "shall not affect the rights of the decedent's creditors." WASH. REV. CODE § 26.16.250 (1989). This can only mean that such property is to be considered the decedent spouse's separate property for purposes of creditors' claims, since this is what it would have been absent the recharacterization.
\item \textsuperscript{23} Estate of McHugh, 165 Wash. 123, 4 P.2d 834 (1931); Edmonds v. Ashe, 13 Wash. App. 690, 537 P.2d 812, review denied, 86 Wash. 2d 1001 (1975); Cross, 61 supra note 17, at 145-46. \textit{But see} Fletcher, supra note 9, at 291 n.119 (1972) (criticizing this rule). In addition to this "at death" exception, if one spouse commits a separate "tort" (i.e. one not for the benefit of the community), then the tortfeasor spouse's half of the community property is liable for the satisfaction of the tort claim even while the tortfeasor spouse remains living. deElche v. Jacobsen, 95 Wash. 2d 237, 622 P.2d 835 (1980). The \textit{deElche} exception, however, is of no importance where the tortfeasor spouse has died, since the same result would attach because of death.
\item \textsuperscript{24} WASH. REV. CODE § 26.16.200 (1989).
\item \textsuperscript{25} Estate of Schoenfeld, 56 Wash. 2d 197, 199, 351 P.2d 935, 936-37 (1960).
\end{enumerate}
\end{footnotesize}
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exhausted to satisfy a separate obligation of the deceased debtor before any community property may be reached.\textsuperscript{26}

C. Fraudulent Transfers

Some nonprobate “transfers” may be vulnerable to creditors because the transfers are in fraud of creditors’ rights. Under the Uniform Fraudulent Transfer Act (UFTA), enacted in Washington in 1987,\textsuperscript{27} a gratuitous transfer is fraudulent as to an existing creditor if the transferor was insolvent at the time of the transfer or became insolvent as a result of the transfer and did not receive “reasonably equivalent value in exchange for the transfer.”\textsuperscript{28} In addition, a transfer is fraudulent as to an existing or a future creditor (a) if made with actual intent to defraud the creditor or (b) the transfer is gratuitous and the transferor reasonably should have believed that he or she would incur debts beyond his or her ability to pay as they became due.\textsuperscript{29} Finally, even a transfer to satisfy a debt will be fraudulent if it is a preferential transfer by an insolvent person to an “insider” creditor (such as a relative) who had reasonable cause to believe the debtor to be insolvent.\textsuperscript{30} If a gratuitous transfer is fraudulent as to a creditor, under UFTA, a creditor may set aside the conveyance, or obtain any

\begin{itemize}
\item \textsuperscript{26} deElche, 95 Wash. 2d at 246, 622 P.2d at 840.
\item \textsuperscript{28} WASH. REV. CODE § 19.40.051(a)(1989):
\begin{itemize}
\item A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.
\end{itemize}
\item \textsuperscript{29} Id. § 19.40.041:
\begin{itemize}
\item (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
\begin{itemize}
\item (1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
\item (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
\begin{itemize}
\item (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
\item (ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.
\end{itemize}
\end{itemize}
\end{itemize}
\item \textsuperscript{30} Id. § 19.40.051:
\begin{itemize}
\item (b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider [relative, partner, controlled corporation] for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.
\end{itemize}
\end{itemize}
other relief the circumstances may require for up to four years after the transfer, or longer in some cases.\textsuperscript{31}

In order to determine whether a nonprobate transfer is in fraud of creditors under one of these tests, it is of considerable importance to determine \textit{when} the transfer is deemed to have occurred under the Act. For example, a key element of many nonprobate transfers is that the transferor retains beneficial enjoyment of the property (and sometimes the power to revoke the transfer) until death. Indeed, this is often what makes such mechanisms attractive as will substitutes. If a transfer of that retained beneficial interest is deemed to have occurred at the time of the transferor's death, then arguably any creditor of the decedent should be able to set aside a gratuitous nonprobate transfer that leaves the transferor's probate estate insufficient to meet his debts.

When is a transfer deemed to have been made for purposes of the UFTA? The primary test under the Act is based on the concept of "perfection." If a transfer can be "perfected" against creditors, then it is deemed made when "perfected."\textsuperscript{32} Ordinarily, transfers of real property will be "perfected" when recorded. If "perfection" is permitted, but not accomplished, then the transfer is not "made" until the creditor brings an action under UFTA. On the other hand, a transfer of personal property ordinarily cannot be "perfected" unless it is a security interest that is being taken in the personalty.

Where a transfer cannot be perfected, the statute says that it is deemed "made when it becomes effective between the debtor and the transferee."\textsuperscript{33} When is a transfer "effective?" The statute does not tell us, but it gives us a hint in the definition of "transfer," which is said to mean "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of \textit{disposing of or parting with an asset or an interest in an asset}."\textsuperscript{34} So a transfer of an interest in property is "effective" when the transferor "disposes of" or "parts with" the interest. When is that? It will depend on the particular kind of nonprobate transfer involved. Nonetheless, let me suggest the following generalization: As long as a transferor has retained the use of or power to revoke an

\textsuperscript{31} Id. \S\S 19.40.071, 19.40.091. An action for intentional fraud under section 19.40.041(a)(1) may be brought within four years of the transfer or, if later, within one year from the time the transfer reasonably could have been discovered. \textit{Id.} \S 19.40.091(a). An action challenging a fraudulent transfer to an "insider" under section 19.40.051(b), however, must be brought within one year of the transaction. \textit{Id.} \S 19.40.091(c).

\textsuperscript{32} Id. \S 19.40.061(1).

\textsuperscript{33} Id. \S 19.40.061(3).

\textsuperscript{34} Id. \S 19.40.011(12) (emphasis added).
interest in an asset, the transferor has not yet “disposed of” or “parted with” that interest.

Such an argument was relied upon by the New York Surrogate’s Court in In re Laundree’s Estate.\(^3\) Laundree had purchased United States Savings Bonds with a face value of $1950 and made them payable on death (POD) to his brother. At the time of his death, however, he owed the New York Department of Mental Hygiene $600 and his estate was insolvent. As the court analyzed the situation:

In view of the fact that the purchaser can redeem the bonds in his lifetime without the consent of the beneficiary it may be said that he remains the owner thereof. . . . Viewed in the light of the relative rights of the purchaser and the beneficiary it seems to me that there could be no effective or operative transfer of title to the bonds until the death of the purchaser. Up and until that time the transaction was ambulatory. Thus, at the time when he intended the transfer should and did become effective the transferor had thereby rendered himself insolvent. Where a debtor makes a voluntary conveyance of property without fair consideration while an indebtedness is outstanding . . . such a conveyance is fraudulent as to creditors without regard to actual intent.\(^3\)\(^6\)

Accordingly, the court held that the POD transfer at decedent’s death constituted a fraudulent transfer and ordered the brother to execute appropriate documents so that the proceeds could be paid to the estate.

Unfortunately, the Appellate Division reversed the lower court in Laundree.\(^\text{37}\) In a cursory opinion, it reasoned that under applicable federal regulations, the beneficiary had acquired a present interest and fixed right under the bonds at the time of their purchase.\(^\text{38}\) Since the purchaser was not insolvent at the time of the purchase, it concluded that there was no fraudulent conveyance at that time.\(^\text{39}\) What the Appellate Division apparently failed to discern was that the beneficiary’s acquisition of a “present and fixed right” in the bonds at the time of their purchase was not incompatible with retention of beneficial interests by the purchaser. What the beneficiary acquired at the time of purchase was, at most, a vested right subject to complete defeasance.

\(^{36}\) 91 N.Y.S.2d at 478-88.
\(^{38}\) 100 N.Y.S.2d at 147-48. The Appellate Division may have been reluctant to consider seriously the state fraudulent transfer argument because the rights to the bonds was controlled by federal law. This aspect of the case is considered infra text accompanying notes 132-39.
\(^{39}\) Laundree, 100 N.Y.S. 2d at 147-48. For a decision holding that no “conveyance” at all takes place when a purchaser buys POD Bonds, see Reynolds v. Danko, 134 N.J. Eq. 560, 36 A.2d 420 (1944).
by the purchaser were he to redeem the bonds before death. Thus, there was still an important beneficial interest retained by the purchaser and this was not transferred until his death. It was that transfer which was fraudulent as to his creditors. There are a variety of interests in any piece of property and some may be transferred fraudulently even though others were not.40

Even if it is legitimate to view some nonprobate transfers as not taking place until death, however, it does not necessarily follow that the transfer was fraudulent. Absent actual intent to defraud a creditor, to establish a fraudulent transfer under UFTA it is ordinarily necessary to show that the transferor failed to receive "reasonably equivalent value" for the property.41 This will be relatively easy for many nonprobate transfers. But some nonprobate transfers to surviving spouses, such as often occur pursuant to statutory community property agreements, may be made pursuant to a mutual exchange of promises. One spouse typically agrees that his or her share of the community property will vest in the other at death, in return for a like promise from the other spouse.42 Such promises may be considered "reasonably equivalent value," rendering the transfer non-fraudulent. Thus, in each case, it will be necessary to determine first whether there was an interest retained by the decedent until death, and second whether there was reasonably equivalent value received in return for that transferred interest. Illustration of the implications that the UFTA may have must wait until we look at the different kinds of nonprobate transfer.

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40. Further support for this argument can be found in the interpretation given to similar fraudulent transfer language in the Bankruptcy Code. A number of circuits have held that a fraudulent "transfer" may take place upon the foreclosure of a mortgage even though the recording of the mortgage was not fraudulent. E.g., In re Hulm, 738 F.2d 323, 326-27 (8th Cir.), cert. denied. First Fed. Sav. & Loan Ass'n v. Hulm, 469 U.S. 990 (1984); Durrett v. Washington Nat. Ins. Co., 621 F.2d 201, 204 (5th Cir. 1980). See generally 4 COLLIER ON BANKRUPTCY, supra note 13, at § 548.08 n.10. These cases recognize that different interests in the same piece of property may be transferred at different times, and that the transfer of one interest may be perfectly valid, while the transfer of another may be fraudulent.

41. Brit v. Damson, 334 F.2d 896 (9th Cir. 1964), cert. denied, 379 U.S. 966 (1965). Britt was a bankruptcy case dealing with an analogous provision of the federal bankruptcy code. The issue was whether the award of a disproportionate share of the community property to a spouse under a dissolution decree was a fraudulent transfer by the other spouse. The court held that a transfer did take place at the time of the decree insofar as the amount of property received by the spouse exceeded her vested one-half share. But it remanded the case for a determination of whether the debtor husband received fair consideration by virtue of the release from marriage and the limitation of future support obligations.

42. See infra note 68.
II. THE NONCLAIMS STATUTE

Washington, like most jurisdictions, has a special "nonclaims statute" that establishes a short time limit for the filing of claims against decedents' estates. As amended in 1989, the statute requires the personal representative (PR) to give actual notice to known or reasonably ascertainable creditors of the deceased, and also to publish a notice to creditors (with a copy to be filed with the court). Creditors are required to file claims within four months after the date of the first published notice or within four months after the date of the filing of a copy of the notice with the clerk, or within one month after the date of actual notice, whichever is later.

It is unlikely that this claims procedure can be used to bar creditors from reaching property that the decedent has transferred by means of a will substitute. The question is important in two separate kinds of situations. First, there is the situation of a decedent who has disposed of some property by a will substitute, outside of probate, but for whom a probate proceeding has been opened because there is some property that will pass either under a will or in intestacy. In this situation, a personal representative will ordinarily be appointed. Second, there is the case of a decedent who dies without probate property, having disposed of all his or her property by one or more will substitutes.


45. Decedent's Estate-Time for Filing Claims Against Estate, ch. 333, §§ 1, 4, 1989 Wash. Laws 1636, 1636-1639 (to be codified at WASH. REV. CODE §§ 11.40.010-013). Even if no notice is given to creditors, however, as a result of the 1989 amendments, the statute also bars claims by "any person having a claim against the decedent who has not filed a claim within eighteen months from the date of the decedent's death," provided that (a) a personal representative is appointed within one year of death and (b) the PR has not lulled the creditor into a false sense of security by partially performing on the obligation. Id. § 5, 1989 Wash. Laws at 1639 (emphasis added). As with the existing statute, this language could be interpreted as covering claims against both probate and nonprobate property. In addition, WASH. REV. CODE § 11.04.270, which provides that "[t]he estate of a deceased person shall not be liable for his debts unless letters testamentary or of administration be granted within six years from the date of the death of such decedent," survived the 1989 amendments. (emphasis added).

46. Strictly speaking, a probate proceeding may be opened without the appointment of a PR if no such appointment is requested. WASH. REV. CODE §§ 11.20.020, 11.28.110 (1989). In this case, the court makes an adjudication of testacy or intestacy. See infra text accompanying notes 56-57.
A. Where a Personal Representative Has Been Appointed

In the situation where a personal representative (PR) has been appointed, there is no question that the notice to creditors that is given by the PR will serve to bar creditors who do not respond in a timely fashion from sharing in the probate estate to the extent of their claims.\textsuperscript{47} The question is whether the failure of the creditor to respond to the PR's notice also will bar the creditor from pursuing nonprobate assets transferred by the decedent. The statute provides no clear answer to that question, although it does provide the basis for several inferences.

First, the statute literally seems to bar "all claims" not timely filed if creditors are given proper notice. The required notice instructs "[p]ersons having claims against the deceased" to file them, and purports to bar those "claims" not filed in a timely fashion.\textsuperscript{48} There is no attempt on the face of the statute to limit the claims barred to those "against" probate property. This can be explained fairly simply by the fact that most creditors' claims will not be limited to "probate" property. Nevertheless, the breadth of the instruction to all "persons having claims against the deceased" provides a basis for arguing that the statute absolutely cuts off all creditors' claims not timely filed, so that such creditors would not be entitled to pursue nonprobate property.

Nonetheless, there are counterarguments that can be raised. First, the nonclaims statute appears in Title 11, which purports to cover only "Probate and Trust Law." This suggests that the nonclaims procedure is only intended to cover probate and (perhaps) trust assets. Second, and more important, the section only provides for notice by and claims to be served upon the PR or his attorney. This implies that the nonclaims provision only applies to limit claims that could properly be disposed of by the PR. Under Washington's current system, the PR has control and authority only over probate property.\textsuperscript{49} It follows from this line of argument that those who have no interest in pursuing the probate property may not need to file claims in the probate proceeding.


\textsuperscript{48} Decedent's Estate—Time for Filing Claims Against Estate, ch. 333, § 6, 1989 Wash. Laws 1636, 1639-40 (to be codified at WASH. REV. CODE §§ 11.40.010-013); see also the analogous language in the eighteen month bar from date of death, \textit{id.} § 5, 1989 Wash. Laws at 1638.

\textsuperscript{49} WASH. REV. CODE § 11.48.010 (1989). The PR is given the duty of settling "the estate in his hands." Nonprobate property, by definition, is not "in the hands" of the PR.
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There seems to be no case law testing the applicability of the non-claims bar to creditors in this situation. But it would be relatively easy for the legislature to make clear that the bar was intended to operate in favor of both probate and nonprobate property owned by the decedent at the moment of death, and to provide a procedure for dealing with such property where a probate proceeding has been instituted. A proposed statute which would remedy the present uncertainty in this situation is contained in an Appendix to this Article.

B. Where No Personal Representative Is Appointed

The availability of the nonclaims bar is even more doubtful where no PR has been appointed. Certainly where no notice to creditors has been given, a claim against an estate is not barred by lapse of time. But may those entitled to the decedent's property by virtue of nonprobate dispositions take advantage of the nonclaims period by giving notice without first having a PR appointed? There are two circumstances under which this situation might arise. First, those interested in the estate may have sought and obtained an adjudication of testacy or intestacy, without the appointment of a PR. Second, those interested in the estate may have filed no application for such an adjudication, but may have filed a notice to creditors in the form required of PRs.

Read literally, section 11.40.010 does not appear to make the non-claims bar available in either situation. The nonclaims provision presupposes that there has been a PR appointed and imposes a duty on the PR to give notice to creditors. It does not authorize anyone else to give the notice, or to take advantage of the nonclaims period. Thus, in Estate of Collins, the court ordered appointment of a PR for an estate upon application by a debtor so that a notice to creditors could

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50. There is sweeping language in a few cases as to the effect of the creditors' claims procedure in the probate code. E.g., Ruth v. Dight, 75 Wash. 2d 660, 453 P.2d 631 (1969) (creditor of a community cannot recover against either the community or separate property of the surviving spouse when no claim was duly filed against the community assets of the deceased spouse); Graham v. Radford, 71 Wash. 2d at 755, 431 P.2d at 194 ("RCW 11.40.010 . . . contains complete provisions for the filing and disposition of claims against estates, and no claim can be enforced by suit unless a claim has been filed in accordance with the probate code."). But none of these cases seems to have involved an attempt to reach nonprobate property.

51. See infra Appendix, Section I.

52. In re Collin's Estate, 102 Wash. 697, 173 P. 1016 (1918). In Meyer v. Dempcy, 48 Wash. App. 798, 431 P.2d 383, review denied, 109 Wash. 2d 1009 (1987), failure to have recommended the probate of an estate (that passed under a revocable trust) so as to take advantage of the nonclaims period was alleged to have been malpractice by the probate attorney. Fortunately for the attorney, the plaintiff had suffered no loss and so the claim was dismissed.

53. 102 Wash. 697, 173 P. 1016 (1918).
be published. "[T]he fact of no debts can be established only by the appointment of an administrator and notice to creditors . . . ."54

Nonetheless, at least one trial court decision has allowed a notice to creditors without appointment of a PR.55 The case involved a creditor who sought to reach nonprobate assets after the parties had filed a community property agreement, obtained an Adjudication of Intestacy and Heirship under section 11.28.330, and then published a notice to creditors under section 11.40.010. The trial court held that the creditor, which was the state Department of Labor and Industries, was barred from claiming any interest in the estate for failure to have filed a claim against the estate under the nonclaims provision within four months.

It would be dangerous, however, to place much reliance on this case. The case was not appealed, and so there is no appellate authority on the issue. More important, the parties took the precaution in this case of obtaining an adjudication of intestacy, and there is some basis for arguing that those obtaining such an adjudication should be able to take advantage of the nonclaims procedure. Title 11 does contemplate that it may not always be necessary to appoint a PR, and authorizes an "adjudication" of "testacy" or "intestacy" where a PR is not necessary.56 In those situations, the person who has obtained the adjudication is required to give notice to heirs, legatees, and devisees of the decedent; and if there is no objection, the adjudication is deemed final after four months.57 While there is no analogous authorization in the statute for those obtaining adjudications of testacy or intestacy to give notice to creditors, it seems reasonable to conclude that the legislature would have extended the protection of section 11.40.010 to such adjudications if it had thought about it. Assuming that such an interpretation would not extend the statute beyond its likely intent, it would take a much greater interpretive leap to extend the same nonclaims protection to persons who have not obtained an adjudication of testacy or intestacy.

In any event, the issue is sufficiently in doubt to warrant legislative attention. At a minimum, the legislature should amend section 11.40.010 to authorize those obtaining an adjudication of testacy or intestacy to give notice to creditors and thereby to take advantage of

54. Id. at 699, 173 P. at 1016.
57. Id. §§ 11.28.330-.340.
the nonclaims bar. Ideally, a legislative procedure for notice to creditors and a concomitant nonclaim bar should be made available to those claiming property by reason of the decedent’s death regardless of whether a probate proceeding has been opened.\textsuperscript{58} If a specially short nonclaims period is appropriate for probate property, there is no reason to suppose it is not equally appropriate for nonprobate property. Statutory expansion of the nonclaims period to nonprobate property would enable the intended recipients of property to avoid probate without the ensuing uncertainty as to creditors’ rights that currently exists. A statutory proposal designed to accomplish this result is set out in the Appendix, and the proposal is discussed further in Section V below.\textsuperscript{59}

Until the availability of the nonclaims bar for nonprobate assets is clarified, however, we need to assume that creditors are free to pursue whatever nonprobate remedies they may have against such nonprobate property without regard to the nonclaims period that applies to probate proceedings.\textsuperscript{60} Depending on the kind of claim, of course, there will be other statutes of limitations that will eventually cut off even these creditors’ claims. The statute of limitations for some kinds of claims, however, may be tolled indefinitely by such well-established doctrines as fraudulent concealment, or the discovery rule. It is imperative, therefore, to consider what rights creditors may have to reach the common forms of nonprobate property.

\textsuperscript{58} A Missouri statute, for example, allows the trustee of a trust to publish notice to creditors of a decedent settlor and to thus take advantage of a nonclaims bar. Mo. Rev. Stat. § 456.610 (1983); see ABA Probate and Trust Committee, Rights of Creditors to Reach Assets of a Revocable Trust After the Death of the Grantor—The Missouri Approach, 20 REAL PROP. PROB. AND TR. J. 1189 (1985)[hereinafter Rights of Creditors]. Professor Fletcher has suggested that nonprobate property should be reachable only by a PR with whom creditors’ claims have been filed. Fletcher, supra note 9, at 295 n.131. The Nonprobate Transfers Law of Missouri, enacted in 1989, adopts such an approach for nonprobate transfers other than trusts. Nonprobate Transfers Law of Missouri, supra note 7, at § 40. This approach requires a personal representative to be appointed even where there are no probate assets. It has the advantage of centralizing (and unifying) the creditors’ claim process. But in many cases it would add a layer of unnecessary procedure in order to notify and bar creditors who did not respond to the notice in a timely fashion.

\textsuperscript{59} See infra Appendix, Section IV.

\textsuperscript{60} Such claims may, however, be barred after six years if no personal representative is appointed under Wash. Rev. Code § 11.04.270 (1989) (quoted in note 45 supra).
III. ANALYSIS OF CREDITORS’ RIGHTS IN COMMON NONPROBATE TRANSFERS

A. Community Property Agreements

For over a hundred years, marital partners in Washington have been permitted by community property agreement to provide that a disposition of some or all of their property shall take effect upon the death of either.

Nothing contained 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.61

This statute has this, and only this, to say about creditors: “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.”62

As (now Justice) Robert Brachtenbach has tersely observed, this language, in its “naive simplicity . . . does not define what rights the creditors have, nor does it provide any procedure for the creditor to enforce those rights.”63

How do we decide what rights have been preserved by this language? There are two possible interpretations. The first is what I would call the narrow interpretation. It depends on a literal reading of the provision and goes like this: The statute does no more than protect the rights of creditors in existence at the time the agreement is entered into. The statute literally says only that “such agreement shall not derogate from the rights of creditors.”64 Therefore, if creditors existing at the time of the agreement would have been entitled to reach the community property in the absence of the agreement, then the statute precludes a couple from making the creditors worse off by entering into a community property agreement.65 On the other hand, if the

61. Id. § 26.16.120 (1989).
62. Id.
64. WASH. REV. CODE § 26.16.120 (1989) (emphasis added).
65. Washington law seems clear that the rights of creditors existing at the time the spouses enter into an agreement to convert separate property to community property or vice versa cannot be prejudiced by such an agreement. Fisher v. Marsh, 69 Wash. 570, 125 P. 951 (1912); see Lanigan v. Miles, 102 Wash. 82, 172 P. 894 (1918). This is made clear by statute as to community real property converted to separate. WASH. REV. CODE § 26.16.050 (1989); see
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obligation is one incurred after execution of the community property agreement, the mere fact that the effect of the disposition at death portion of the agreement is to leave that much less property available at the death of the spouse does not necessarily "derogate" from the rights of such creditors. On this theory, the post-agreement creditor takes the debtor spouse as he finds him: with sheltered assets. This interpretation, it should be noted, is consistent with the treatment of the community property agreement as a true contract, bargained for between the spouses. At the time the agreement is entered into, each spouse releases his or her right to dispose of half of the community in some other way if he or she dies first, in return for a comparable release by the other spouse.

There are several reasons, however, why this narrow interpretation of the statute should be rejected. First, it fails to take account of the fact that a community property agreement is not an agreement entered into with a disinterested third party. Both parties to a community property agreement have an interest in avoiding their mutual creditors. In the absence of such an agreement, community creditors would be entitled to reach all the community at the death of one spouse, and separate creditors would be entitled to reach the deceased's half of the community without regard to when during the marriage their claims arose. Allowing spouses to shelter their assets from subsequent creditors by use of such an agreement—even if not in

Cross, supra note 17, at 101, 107. Smyser v. Smyser, 17 Wash. 2d 301, 135 P.2d 455 (1943), which might at first seem to the contrary, can be reconciled. There, the separate creditor (ex-wife) of the remarried spouse was precluded from reaching her ex-husband's separate property after he had converted it to community property upon remarriage. Id. at 308, 135 P.2d at 458. But the ex-wife did not directly seek to attack the community property agreement entered into by the husband on remarriage. Id. at 306, 135 P.2d at 458. Her loss in the case was a matter of pleading rather than a matter of substantive rights. Moreover, the court left open the possibility that the ex-wife might reach some of the property that had been converted to the community property of the new marriage if she recast her complaint. 17 Wash. 2d at 309, 135 P.2d at 459.

66. This interpretation is analogous to what has been done with regard to spouses' separate debts. Washington generally protects community property from the separate contractual liabilities of either spouse. But this works a potential hardship for creditors who extended credit to a person before marriage. A debt-encumbered person with only earning potential might avoid such creditors by getting married and converting his earnings to community property. To avoid this problem of "marital bankruptcy," Washington subjects (at least to a limited extent) the debtor spouse's marital "earnings and accumulations" to his separate prenuptial liabilities. Wash. Rev. Code § 26.16.200 (1989). But post-marital separate contract creditors must take the spouse as they find him. They may not reach the community property to satisfy their separate claims, even if the property was converted from separate to community property after marriage, but before the claim arose. Nichols Hill Bank v. McCool, 104 Wash. 2d 78, 85-87, 701 P.2d 114, 117-119 (1985); Colorado National Bank v. Merlino, 35 Wash. App. 610, 668 P.2d 1304 (1983).
actual fraud of existing creditors—therefore invites abuse. Second, allowing a community property agreement to preclude post-agreement creditors on the theory that such creditors take debtors as they find them fails to do justice to involuntary creditors, such as tort victims.

Finally, if such a narrow construction of the statute were allowed, it might make the quasi-testamentary feature of community property agreements a fraud on community creditors. In a very important sense, a spouse who enters into such an agreement does not part with most of her beneficial interest in the property until she dies, and even then, only if she dies first. The community property covered by the agreement remains fully available to the spouses for their use and enjoyment (and for their community creditors’ claims) while both spouses are alive. If the operation of the survivorship feature of the agreement is interpreted so as to permit the couple to avoid their community creditors upon the death of the first spouse, then the couple has worked a fraud on the creditors.

For these reasons, it seems to me that a broader interpretation of the statute is preferable. Since the main purpose of the statute seems to have been to provide a nonprobate method for disposing of community property at death, the proviso should be interpreted to preserve whatever rights creditors would have had against community property at the death of one spouse in the absence of the statute. Amendment of the proviso itself would ensure such an interpretation, and such an

67. For purposes of the fraudulent transfers act. WASH. REV. CODE § 19.40.061 (1989), the transfer involved when a community property agreement is executed would presumably take place upon recording the agreement (where it involves realty) or upon execution of the agreement (where recording is not possible). See supra text accompanying notes 32-40.

68. See discussion of the UFTA, supra text accompanying notes 27-42. Despite the intuitive force of the argument that this would constitute a fraud on community creditors, it would be difficult to establish that the survivorship feature of the agreement has worked a fraudulent transfer under the UFTA. It will be recalled that to establish a fraudulent transfer under that Act, absent actual fraudulent intent, it is necessary to show both that there was a “transfer” that left the transferor insolvent, and that the transferor did not receive “reasonably equivalent value” in return for the interest transferred. Even if we could establish that a decedent spouse with a community property agreement has retained a valuable property interest in his share of the community property which is not “transferred” until death, it will be difficult to show that this was a gratuitous transfer given its contractual nature. The decedent spouse who agrees to transfer his share of the community to a surviving spouse under such an agreement usually has received “reasonably equivalent value” for that transfer at the time the agreement was executed. He has received the other spouse’s binding promise to leave her half of the community to him if he survives. The existence of this exchanged value would ordinarily defeat any fraudulent transfer argument. In a few cases, however, there may have been no such reciprocal promise by the surviving spouse. In such cases, creditors could argue that the transfer to the surviving spouse would be fraudulent under the UFTA, and should be set aside by creditors.

69. See Aronson v. Murk, 67 Wash. 2d 1, 9-11, 406 P.2d 607, 612-13 (1965) (dictum suggesting that community creditors would be entitled to reach community property that passes
amendment is proposed in the Appendix. A further proposal that would establish a procedure for reaching such nonprobate transfers is discussed in Section V below.

Until such an amendment is adopted, it appears that creditors will need to file suit against those to whom the community property passed outside of probate on the basis of the existing proviso that community property agreements are not permitted to derogate from the rights of creditors.

B. Joint Property

Although joint tenancy with right of survivorship was abolished in Washington by statute in 1885, it was reinstated in 1961 by a Popular Initiative.

[T]here shall be a form of co-ownership of property, real and personal, known as joint tenancy. A joint tenancy shall have the incidents of survivorship and severability as at common law. Joint tenancy shall be created only by written instrument, which instrument shall expressly declare the interest created to be a joint tenancy. . . .

At common law, a person contributing property to a joint tenancy gives up a half interest in the property contributed; the non-contributing party receives a half interest. But after the joint tenancy is established, each joint tenant possesses (during the lives of both tenants) an undivided half interest in the whole and the right to sever the joint tenancy by conveyance, encumbrance, or action for partition. This right to enjoyment and to partition is lost only by the first to die, and not until death.

to a surviving spouse under a community property agreement); see also Brachtenbach, supra note 63, at 474.

70. See infra Appendix, Section II.

71. This section deals with joint tenancies as authorized by WASH. REV. CODE § 64.28.010 (1989). It does not deal with joint bank accounts, as authorized by § 30.22. Multi-party bank accounts are dealt with in the next section.

72. Initiative No. 208, codified as WASH. REV. CODE § 64.28.

73. WASH. REV. CODE § 64.28.010 (1989).


75. Id. at 209. But see Treadwell & Shulkin, Joint Tenancy—Creditor-Debtor Relations, 37 WASH. L. REV. 58, 59-62 (1962) (suggesting that if one joint tenant gives a mortgage interest in joint property, it may not cause a severance in Washington). Even if the joint tenancy is not severed automatically by an encumbrance, however, the joint tenant may institute an action for partition, and execution against the joint tenancy property would cause a severance. CUNNINGHAM, supra note 74, at 210.

76. CUNNINGHAM, supra note 74, at 231-39.
As with the community property agreement statute, the joint tenancy statute has this, and only this, to say about creditors: "Provided, That such transfer shall not derogate from the rights of creditors." This language also seems susceptible to both a narrow and a broad interpretation. At a minimum, it must protect the rights of creditors existing at the time the initial transfer into joint tenancy was made. Suppose that the owner of property retitles it as joint property with another. At common law, the owner has made a gift of a half interest in the property to the other joint tenant. If, at the time of the conveyance into joint tenancy, the contributing joint tenant was in debt, the existing creditors may be entitled to set the conveyance aside as a fraud on their rights. Provided that the conveyance to the other was not in fraud of existing creditors, however, an existing (or subsequent) creditor would thereafter only be able to reach the debtor joint tenant's proportionate interest in the joint tenancy property. The proviso must, at least, be intended to preserve these existing rights.

Possibly the statute was intended to provide greater protection to the existing creditors of the joint tenant who contributed the property. It might mean, for example, that existing creditors could ignore the initial creation of the joint tenancy by the debtor and treat the whole of the joint property as that of the debtor regardless of whether the initial transfer into joint tenancy can be shown to be in fraud of creditors.

The more difficult question is whether the proviso was intended to affect creditors' rights upon the death of a debtor joint tenant. At common law, a creditor's rights to a debtor's joint property were limited to the right to sever before the debtor joint tenant died. The creditor could then reach the debtor co-tenant's proportionate interest. If the debtor owning an interest in joint tenancy died before the creditor sought to reach the debtor's share, however, his interest was deemed to expire and the survivor held free of any claims against the

78. See discussion of the UFTA, supra notes 27-42 and accompanying text; see also In re Granwell, 20 N.Y.2d 91, 228 N.E.2d 779, 281 N.Y.S.2d 783 (1967) (son by first marriage allowed to reach 1/2 of assets put into joint tenancy with subsequent spouse on theory of fraudulent conveyance).
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decedent. This is still the prevailing rule. It is possible that the proviso was intended to change this common law result so as to make joint property in the hands of the surviving joint tenant available to satisfy claims against the deceased joint tenant, at least to the extent of the decedent's contributions to the joint property.

Insofar as the statute provides any guidance, however, it suggests that this was not the intent behind the proviso. The statute provides that joint tenancies shall have "the incidents of survivorship and severability as at common law." Moreover, the proviso preserves creditors' rights only as to "transfers," and a joint tenancy was not viewed as constituting a "transfer" at death at common law.

The Washington Supreme Court has not expressly addressed the scope of creditors' rights under the proviso, but several decisions provide some support for the conclusion that survivorship property cannot be reached to satisfy the decedent joint tenant's debts. In Anderson v. Anderson, although there was apparently enough probate property to pay all the decedent's debts, the executor sought to subject joint bank account assets to a proportionate share of the debts of the first joint tenant to die on the theory that the deceased joint tenant had intended this. The trial court held that the surviving joint tenant (decedent's spouse) had no obligation to pay part of the debts of the estate out of the joint property. On appeal, the supreme court affirmed this result, finding that the decedent's spouse had acquired a vested survivorship right in the account when the account was created and the decedent was deemed to have known this.

In Estate of Baxter, the court affirmed a trial court's conclusion that cash in a joint bank account with right of survivorship is "owned by the surviving joint owner and is not an asset of the estate available

81. 4A R. POWELL, THE LAW OF REAL PROPERTY 617 (rev. ed. 1982); Joint Tenancy, supra note 79, at 299.
82. WASH. REV. CODE § 64.28.010 (1989) (emphasis added).
83. Joint Tenancy, supra note 79, at 299. But see supra text accompanying notes 98-104 suggesting that joint tenancy may constitute a "transfer" at death for purposes of the UFTA.
84. All the cases in Washington have involved joint bank accounts, which differ from traditional joint tenancies in that they are usually viewed as revocable by the depositor up until death. But if creditors of a deceased joint depositor are barred from reaching funds in such an account, even though the account was revocable until death, it should follow a fortiori that creditors of a deceased joint tenant of a traditional joint tenancy would be barred.
85. 80 Wash. 2d 496, 495 P.2d 1037 (1972).
86. 68 Wash. 2d 294, 296, 412 P.2d 777 (1966).
for the payment of creditors claims in this estate." In *In re Peterson's Estate*, the state inheritance tax division sought to subject property in a joint survivorship account to tax at the death of one joint tenant. At the time, the tax statute reached only nonprobate property which passed "by deed, grant, sale or gift made in contemplation of death . . . or intended to take effect in possession after the death of the donor." The court held that the property was not subject to the tax since a surviving joint tenant "succeeds to no new title or right upon the death of his co-tenant, but is merely relieved thereby from the further interference of the co-tenant." These decisions are generally in accord with those from other jurisdictions. There has, however, been a widespread statutory modification of the common law rule for purposes of death taxes. For example, joint property held with someone other than a spouse is part of the decedent joint tenant's gross estate to the extent of the decedent's contributions and is subject to federal estate tax. But the fact that these changes occurred by express statutory modification confirms that a different rule exists at common law. Outside of the tax area, there is little evidence of any general movement to subject survivorship property to the debts of decedents.

In view of the well-established law that creditors' rights against joint property are extinguished at the death of the debtor joint tenant, if it is the legislature's intent to subject survivorship property to the claims of a decedent joint tenant's creditors, the legislature should make this

87. The probate estate was insufficient (after an award in lieu of homestead) to satisfy the creditor's claim, but the joint bank account assets had been listed on the inventory for inheritance tax purposes and had been relied upon by the executrix to obtain an order of solvency so she could proceed by non-intervention proceeding. The creditor argued that the inclusion of the nonprobate assets in the probate inventory had prejudiced his rights, but did not raise any argument under section 64.28.010. The supreme court affirmed the trial court's judgment that the joint property was not available to satisfy the creditor without discussion of section 64.28.010.

88. 182 Wash. 29, 45 P.2d 45 (1935).
89. Id. at 35, 45 P.2d at 49.
90. 182 Wash. at 36, 45 P.2d at 49; see also Nelson v. Olympia Fed. Savings & Loan Ass'n, 193 Wash. 222, 227, 74 P.2d 1019, 1021 (1938) (statute later amended to cover joint property).
91. The general rule elsewhere is that joint property is not subject to the debts of the decedent joint tenant. E.g., Schmidt v. Schmidt, 254 N.W.2d 102 (N.D. 1977); DeForge v. Patrick, 162 Neb. 568, 76 N.W.2d 733 (1956). See generally Effland, *supra* note 9, at 435-38.
93. "Only one state [Nebraska] has ever enacted legislation to allow creditors of a deceased joint tenant to proceed against the surviving tenant, and that state has repealed its legislation." Effland, *supra* note 9, at 437 & n.31.
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clear. The existing proviso simply is not enough, because the proviso
does not make clear what creditors' rights the legislature thought it
was protecting.94

Regardless of the legislature's intent in 1961, however, there is no
obvious reason why the joint tenancy form should be allowed to defeat
otherwise valid and enforceable claims against one of the joint tenants.
That it does so seems more a result of historical accident than reason.
To allow it to continue to do so may work a positive injustice to many
creditors. The arguments that are usually made to preclude creditors
from reaching certain kinds of property simply do not apply here.
Although a person who voluntarily extends credit with the knowledge
that the debtor’s property is held in joint tenancy may justifiably be
cut off if he understands that his rights against such property are cut
off if the debtor dies first, the statute is sufficiently unclear to raise
serious question as to whether it provides fair notice of this conse-
quence. More importantly, not all creditors (tort victims, for exam-
ple) have voluntarily entered into the role of creditor, so the question
of notice does not even arise. Finally, debtors may retitle property in
joint tenancy form after incurring debts without the knowledge of the
creditor. Some of these transfers may be voidable by the creditor as
fraudulent transfers, but it is unlikely that they all would be.95 The
legislature therefore should clarify the statute to provide that property
which passes to a surviving joint tenant by reason of one joint tenant’s
death should be subject to the claims against the decedent joint tenant.

This is not to say that all of the joint tenant’s contributions to the
joint tenancy should be available to his creditors at death. Insofar as
the contributing joint tenant has surrendered rights in the contributed
property by transfer into the joint tenancy form, this transfer should
be tested under conventional principles that would apply to any inter
vivos transfer. Was the transfer fraudulent as to creditors at the time
of transfer? If not, creditors have no cause to complain about the
transfer of those rights. If the contributing joint tenant dies first, his

94. If, as seems likely under the language discussed so far, joint property in the hands of a
survivor will generally be exempt from the claims of the decedent joint tenant’s creditors, what
are we to conclude with regard to the recent changes made with respect to spousal joint
tenancies, which raise a presumption that such tenancies are community property in a
survivorship form? WASH. REV. CODE § 64.28.040 (1989). There is no reason to suppose such
spousal joint tenancies would be treated differently than other kinds of joint property as far as
creditors are concerned. But this would be anomalous if property passing under a community
property agreement would be subjected to creditors’ claims under WASH. REV. CODE
§ 26.16.120 (1989); see supra Section III.A. Such spousal joint tenancies are virtually
indistinguishable in form from a survivorship community property agreement.
95. See supra text accompanying notes 27-42.
creditors should be entitled to reach only that tenant’s proportionate share in the property, just as they could have done up until the moment of his death.\textsuperscript{96} The converse, of course, is also true: insofar as a noncontributing joint tenant has obtained valuable rights to property by virtue of someone else’s transfer, the creditors of the recipient joint tenant should be entitled to reach that tenant’s proportionate share in the property if that tenant dies first, just as they could have reached it up until the moment of death. A suggested amendment of the proviso is included in the Appendix.\textsuperscript{97} A further proposal that would establish a procedure for handling creditors’ claims against such property is discussed in Section V below.

If a change of this sort is not made, the UFTA may provide an alternative basis for subjecting joint tenancy property to the claims of the creditors of a deceased joint tenant. As explained above,\textsuperscript{98} when the joint tenancy is first established, the person contributing the property transfers an undivided half interest in the property to the other joint tenant, along with a survivorship right. But the contributor also retains an undivided half interest, together with a right to sever. The other joint tenant receives similar rights. As a result, if a creditor of one joint tenant obtains a judgment against the tenant while still alive, the creditor can execute against the joint property to the extent of the debtor tenant’s proportionate share.\textsuperscript{99} Therefore, under the UFTA, it can be argued that the beneficial interest possessed by each joint tenant is not “transferred” until death.\textsuperscript{100} If that transfer—by means of the survivorship feature—leaves the estate of the first to die insolvent, and if the decedent joint tenant did not receive “reasonably equivalent value” in return for the survivorship right originally given,\textsuperscript{101} then it

\textsuperscript{96} The contrast between this proposal and the treatment under the I.R.C is noteworthy. The tax code subjects joint property to the transfer tax to the extent of the decedent’s contributions. I.R.C. § 2040(a) (West 1989). But, as explained in the text, protection of general creditors at death does not seem to require reference to the decedent’s contributions.

\textsuperscript{97} See infra Appendix, Section III.

\textsuperscript{98} See supra text accompanying notes 74-76.

\textsuperscript{99} Treadwell & Shulkin, supra note 75, at 64-66.

\textsuperscript{100} WASH REV. CODE § 19.40.011(12) (1989).

\textsuperscript{101} Where the property titled in joint form is community property, then the survivor may well be able to defeat a fraudulent transfer claim on the theory that “reasonably equivalent value” was given, in the form of a binding survivorship right given to the other spouse. See discussion of community property agreements, supra note 68 and accompanying text. Frequently, however, community property will not be involved and one person will have contributed all, or a disproportionate share of the property that is titled jointly. In those situations, creditors may be able to show that there was no “reasonably equivalent value” received in return for the survivorship right given to the survivor.
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should be possible for the creditors of that deceased joint tenant to set aside the testamentary "transfer" as fraudulent.

This reading of the UFTA is, of course, at odds with the common law view of joint tenancies, summarized above, because at common law, no "transfer" occurred at the death of the first joint tenant. But the definition of "transfer" in the UFTA, which depends upon the "disposition of" or "parting with" a beneficial interest, can be read as changing the common law of joint tenancies.

Whether the UFTA would require the creditor to file a claim in a probate proceeding is less clear. Ordinarily the creditor would need to do this to establish that the decedent was left "insolvent" as a result of the transfer. Even if no probate proceeding had been opened, the creditor is entitled to appointment as PR and could establish insolvency in that way. But if there is no probate property, this exercise seems somewhat pointless. If the creditor can show that there is no probate property, then this should establish insolvency without the need for a probate and the creditor should be able to proceed directly to set aside nonprobate fraudulent transfers.

C. Multi-Party Bank Accounts

Closely related to joint tenancies as authorized by Title 64 are joint bank accounts authorized by The Financial Institution Individual Account Deposit Act (FIIADA), enacted in 1982. Joint bank accounts are the most familiar of the multi-party bank accounts that can serve as will substitutes. The statute also authorizes trust accounts and payable on death (POD) accounts. Moreover, two kinds of joint bank accounts are authorized, one carrying the survivorship feature, the other not carrying it. Joint bank accounts without the right of survivorship are really a form of tenancy in common and will not function as a will substitute. But the statute makes clear that the three other types of multi-party accounts may be used to avoid probate:

102. See supra text accompanying notes 27-35.
104. Id. §§ 11.28.010-.120.
105. Under WASH. REV. CODE § 19.40.071(a)(1) (1989), a creditor will be entitled to set aside a fraudulent transfer to the extent necessary to satisfy his or her claim.
106. See generally McGovern, supra note 9.
108. Id. § 30.22.050(5).
109. Id. § 30.22.050(2), (3).
Any transfers to surviving depositors or to trust or P.O.D. account beneficiaries pursuant to the terms of this section are declared to be effective by reason of the provisions of the account contracts involved and this chapter and are not to be considered as testamentary dispositions. The rights of survivorship and of trust and P.O.D. account beneficiaries arise from the express terms of the contract of deposit and cannot, under any circumstances, be changed by the will of a depositor.\textsuperscript{110}

Unlike a traditional joint tenancy, a multi-party bank account is presumed to be revocable by the depositor up until death.\textsuperscript{111} Each depositor effectively retains ownership of his or her contributions to the account.\textsuperscript{112} At the death of a depositor, subject to community property rights, “[f]unds belonging to a deceased depositor which remain on deposit in a joint account with right of survivorship belong to the surviving depositors unless there is clear and convincing evidence of a contrary intent at the time the account was created.”\textsuperscript{113} Funds on deposit in a trust or POD account belong to the beneficiary designated by the deceased depositor.\textsuperscript{114}

What is the consequence for creditors of a deceased depositor of this statutory scheme? The statute says only that

the provisions [relating to ownership of funds] are relevant only as to controversies between [depositors and account beneficiaries] and their creditors, and other successors, and have no bearing on the power of any person to receive payment of funds . . . or the right of a financial institution to make payments to any person as provided by the terms of the contract of deposit.\textsuperscript{115}

Insofar as anything can be inferred from this passing reference to creditors, it seems to support a weak inference that creditors’ claims are barred. In the ordinary case, if a depositor to a joint, trust, or POD account has died, none of the funds remaining on deposit “belong” to

\textsuperscript{110} \textit{Id.} § 30.22.100(5) (emphasis added).

\textsuperscript{111} \textit{See} Morse v. Williams, 48 Wash. App. 734, 740 P.2d 884 (1987).

\textsuperscript{112} “Funds on deposit in a trust or P.O.D. account belong to the depositor and not to the trust or P.O.D. account beneficiary.” \textsc{Wash. Rev. Code} § 30.22.090(3). Funds on deposit in a joint account during the lives of the depositors belong to the depositors “in proportion to the net funds owned by each depositor on deposit in the account.” \textit{Id.} § 30.22.090(2). It is important to be able to document who made each withdrawal, and whose funds were withdrawn. Suppose that $A$ deposits $\$10,000$ and $B$ deposits $\$5,000$ to a joint account. Then they withdraw $\$5,000$ for a joint project. Who owns the balance? Presumably, each withdrew $\$2,500$ of “their” funds on deposit, provided the project is truly a 50/50 joint project. If so, $A$ owns $\$7,500$ and $B$ owns $\$2,500$ of the remainder.

\textsuperscript{113} \textit{Id.} § 30.22.100(3).

\textsuperscript{114} \textit{Id.} § 30.22.100(4) (there is a minor exception to this rule if the account has been designated as a joint account with right of survivorship).

\textsuperscript{115} \textit{Id.} § 30.22.110 (emphasis added).
him or her any longer. So the statute could be interpreted to mean that the decedent's creditors have no rights against the remaining funds.

Nonetheless, the statute hardly can be said to address the rights of creditors directly. Moreover, there is reason for questioning any interpretation that would cut off creditors of a deceased depositor. On the issue of trusts or POD accounts, there seems to be no case law in Washington as to the availability of the proceeds of these accounts to meet the claims of the decedent depositor's creditors. In other jurisdictions, however, tentative or "Totten" trust bank accounts, from which our trust or POD accounts are functionally indistinguishable, have generally been found subject to deceased depositors' creditors. On the issue of joint bank accounts, although what little case law there is in Washington suggests that creditors' claims against these accounts would be barred upon the death of a depositor, all of this case law predates the FIIADA.

The FIIADA offers a "fresh start" to the interpretation of the depositors' rights to multi-party bank accounts. As the Washington

116. The provision governing joint accounts with right of survivorship may affect creditors of the first to die in another respect, since it would allow creditors to show by "clear and convincing evidence" that survivorship was not intended. Id. § 30.22.100(3); see Estate of Randmel v. Pounds, 38 Wash. App. 401, 685 P.2d 638 (1984); Tripp v. Scott, 29 Wash. App. 869, 651 P.2d 973 (1981) (prior law); cf. Yakima Adjustment Serv. Inc. v. Durand, 28 Wash. App 180, 622 P.2d 408 (1981) (creditor of one joint tenant in survivorship bank account could not reach account funds where other joint tenant intervened and showed he had contributed all the funds and that it was an account for his convenience). If the showing that survivorship was not intended can be made, the funds would be probate property and available to creditors through the probate process.

117. The statute does authorize banks to pay funds remaining on deposit directly to creditors of a deceased depositor if the account balance is no more than $2,500 and no PR has been appointed, but only if the funds would be probate property of the decedent had a PR been appointed. WASH. REV. CODE § 30.22.190(2) (1989).

118. But see Decker v. Fowler, 199 Wash. 549, 92 P.2d 254 (1939), involving United States Savings Bonds with POD designation. The court held that such bonds must be turned over to estate of deceased purchaser on the theory that purchaser had not surrendered dominion or control over the bonds prior to death. The case is discussed infra text accompanying notes 220-22.

119. RESTATEMENT (SECOND) OF TRUSTS § 58, comment d (1959); 4 A. SCOTT & W. FRATCHER, THE LAW OF TRUSTS § 330.12, at 377-78 (4th ed. 1989); Cohen, The Rights of the Surviving Spouse and Creditors in the Proceeds of Savings Account Trusts, 50 CHI.-KENT L. REV. 159 (1973); Effland, supra note 9, at 445; McGovern, supra note 9, at 27. The rationale of the recent cases subjecting non-bank account revocable trusts to claims of creditors, discussed infra text accompanying notes 211-223, also would apply to trust or POD accounts as the accounts are revocable by the depositors.

120. See Anderson v. Anderson, 80 Wash. 2d 496, 495 P.2d 1037 (1972); In re Estate of Baxter, 68 Wash. 2d 294, 412 P.2d 777 (1966); In re Estate of Peterson, 182 Wash 29, 45 P.2d 45 (1935), discussed supra notes 85-90 and accompanying text.
court of appeals recognized recently when examining the FIIADA in another context, in adopting the FIIADA the legislature did not intend to characterize multi-party accounts as "nontestamentary" for all purposes, but only for the purpose of exempting them from the normal requirements for the execution of a valid will. Since such accounts are fully revocable during the life of the depositor and "do not give a nondepositing party any present interest in the account funds" until the death of the depositor, it is inappropriate to attach to them the legal consequences that would attach at common law to a true joint tenancy or irrevocable trust. In particular, it is inappropriate to deprive creditors of any opportunity to reach funds contributed by a deceased depositor simply because the depositor sought to avoid the delay and expense of probate as to these funds. Funds deposited in such accounts should be fully available to the creditors of the decedent depositor just as if they were disposed of under a will, even though the formal requirements for executing a will do not apply.

The Uniform Probate Code (UPC) makes this result explicit. It has expressly made amounts held in multi-party bank accounts available to satisfy claims of general creditors (and claims of the surviving


122. Id. at 740-41, 740 P.2d at 888. Further support for this conclusion is given by the decision in In re Estate of Button, 79 Wash. 2d 849, 490 P.2d 731 (1971), in which the court applied the anti-lapse statute to a gift under a revocable inter vivos trust that was supposed to take effect on the death of the settlor. "A gift to be enjoyed only upon or after the death of the donor is in practical effect a legacy, whether it is created in an inter vivos instrument or in a will." Id. at 854, 490 P.2d at 734.

123. Fletcher, supra note 9, at 295.

124. U.P.C. § 6-215 (1989). In August 1989, former section 6-107 of the UPC was recast and redesignated as section 6-215. 1989 Amendments to U.P.C., supra note 4. The only substantive change made was that creditors' claims must now be made within one year. In Morse v. Williams, 48 Wash. App. at 739, 740 P.2d at 882-88, the court of appeals relied heavily on the legislative history of the UPC to interpret analogous provisions of the FIIADA. The creditors' rights provision of the UPC may, therefore, be influential if the court is asked to determine if creditors can reach such accounts under our Act. But this cuts two ways. On the one hand, the UPC provision represents a considered approach to the problem. On the other, the drafters of the FIIADA were presumably aware of the UPC provision and did not include an analogous one in the FIIADA. There is no official legislative history for the FIIADA, but it appears that the creditors' claim provision found in U.P.C. § 6-107 (now § 6-215) was not proposed to, or considered by, the legislature in 1982. It is therefore difficult to attach much significance to this omission. U.P.C. § 6-107 was proposed to the Washington legislature in 1971, however, as part of a comprehensive bill that would have enacted the UPC as a whole. S. 313, 42d Reg. Sess., § 11A.6-107 (1971) (on file with Washington Law Review) [hereinafter S. 313]; see also infra note 229. See generally Fletcher, supra note 9, at 261 n.3. The comprehensive bill was never enacted, but it is unlikely that the creditors' claim provision was a reason for its defeat.
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spouse and minor children) "if other assets of the estate are insufficient." Under the UPC, the proceeds from such an account are paid to the surviving joint tenant, or to the POD beneficiary, who is then liable to account to the decedent’s PR for amounts owed beneficially by the decedent immediately before death to the extent necessary to discharge claims against the decedent's estate. Section 6-227 of the UPC also gives banks holding such multiple-party accounts a right to set-off against amounts due a survivor or POD beneficiary any amount owed the bank by the decedent depositor. The principal shortcoming of the UPC scheme is that it fails to provide for the settlement of claims without the appointment of a PR. A proposed statute modelled on the UPC scheme, but allowing for the amicable settlement of claims without appointment of a PR, is contained in the Appendix. It is discussed further in Section V below.

The UFTA again may provide an alternative route for arriving at the same conclusion. During the depositor’s life, the FIIADA provides that the depositor owns the funds in the account in proportion to his or her net contributions. Ordinarily, therefore, a depositor to such an account has not “parted with” any interest in his or her deposits until the depositor dies. Since a “transfer” does not take place under the UFTA until the owner “disposes of” or “parts with” a beneficial interest, it appears that a transfer of an interest in a multi-party bank account set up under the FIIADA does not take place until the depositor dies. If that transfer at death leaves the depositor’s estate insolvent, and again, if no “reasonably equivalent value” was

125. If other assets of the estate are insufficient, a transfer resulting from a right of survivorship or POD designated under this part is not effective against the estate of a deceased party to the extent needed to pay debts and expenses of administration, including statutory allowances to the surviving spouse, minor children and dependent children, if other assets of the estate are insufficient. U.P.C. § 6-215 (1989).
126. 1989 Amendments to the U.P.C., supra note 4. Section 6-227 was formerly designated section 6-272.
127. See infra Appendix, Section V.
128. WASH. REV. CODE § 30.22.090(2),(3).
129. Morse v. Williams, 48 Wash. App. 734, 741, 740 P.2d 884, 888 (1987). Where the account in question is a joint account, the statement in the text is something of an oversimplification. The nondepositing tenant may withdraw funds from the account. If that is done without the permission of the depositing joint tenant, the depositor apparently has a right to be reimbursed by the withdrawing party, even though the bank is protected from liability. WASH. REV. CODE §§ 30.22.090(2), 30.22.120-130 (1989). If the withdrawal is done with the permission of the depositor, then a “transfer” has been made to the withdrawing party at that time. In that event, of course, the amounts withdrawn will no longer be in the account and will be unavailable to creditors of the depositor for that reason (unless the gift was fraudulent at the time the withdrawal was made).
received in return for the at death "transfer," then it should be possible for the creditors of the depositor to set it aside as fraudulent.\textsuperscript{131}

\textbf{D. United States Savings Bonds}

Closely related to multi-party bank accounts are United States Savings Bonds held either in POD form or in co-owner form with right of survivorship.\textsuperscript{132} The federal regulations provide that during the life of the owner(s), the bond is redeemable by the registered owner(s) upon surrender.\textsuperscript{133} At the death of a co-owner, however, "the surviving co-owner will be recognized as [the bond's] sole and absolute owner," and at the death of a POD bond registered owner, "the beneficiary will be recognized as the sole and absolute owner of the bond."\textsuperscript{134}

It is clear that these regulations preempt inconsistent state laws, so that Washington cannot deny effect to the survivorship or POD designation made by the purchaser.\textsuperscript{135} But it does not follow that subjecting the proceeds of bonds to the decedent purchaser's debts would be inconsistent with the federal regulations. In \textit{Yiatchos v. Yiatchos}, the United States Supreme Court held, despite Washington state law to the contrary, that a spouse was entitled unilaterally to designate someone other that his surviving spouse to receive his half interest in U.S. Bonds purchased with community funds.\textsuperscript{136} But it qualified this holding by reciting its understanding that a decedent spouse's interest in the community property was chargeable with his separate debts and with one-half the community debts. It then went on to state that:

\textsuperscript{131} \textit{Id.} § 19.40.071.

\textsuperscript{132} 31 C.F.R. § 315.7 (1985).

\textsuperscript{133} If the bond is in co-owner form, either co-owner may redeem it. \textit{Id.} § 315.37. If the bond is in POD form, it is redeemable only by the registered owner while he/she is alive. \textit{Id.} § 315.38.

\textsuperscript{134} \textit{Id.} § 315.70(b)(1),(c) (1988).


\textsuperscript{136} 376 U.S. 306 (1964). A spouse had purchased United States Bonds with community property and made them payable to his brother. The purchaser then died, and his spouse sought to enforce her community property rights as to half of the bonds, and to include her husband's half in his probate estate. The Washington Supreme Court held that purchase of the bonds was void because beyond the decedent's authority, and held that the wife had a vested interest in 1/2 of the proceeds, and decedent's half was to be distributed under his will. The United States Supreme Court reversed as to the decedent's half of the community, holding that this was decedent's property which he was entitled to invest in the bonds. Washington could not order that this be turned over to his estate. The court remanded as to the wife's half for a determination of whether the wife had consented to the use of her community share for purchase of the bonds and therefore had given away a share of her community property. If not, use of her share of the community to purchase the bonds was fraudulent as to her and the POD designation as to her 1/2 need not be given effect.
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It would not contravene federal law as expressed in the applicable regulations to require the bonds to bear the same share of the debts that they would have borne if they had been passed to petitioner [brother] as a specific legacy under the will rather than by the survivorship provisions of the bonds.

The judgment of the Washington court is reversed insofar as it relates to one-half of the bonds, subject to the above remarks concerning the portion of the debts which may be allocable thereto.\footnote{137}

Apparently, then, it would not violate the Supremacy Clause for Washington to hold that the proceeds of co-owner bonds or POD bonds are subject to a decedent purchaser's debts.

No Washington decisions since Yiatchos have addressed the liability of United States co-owner or POD bonds for the purchaser's debts. The prevailing rule in other jurisdictions, at least prior to Yiatchos, had been that the proceeds of such bonds are not subject to the decedent purchaser's debts.\footnote{138} These cases, however, should be rejected on the basis of Yiatchos on the ground that they erroneously assume it would be inconsistent with federal law to subject bond proceeds to the debts of the decedent purchaser. There is no reason, therefore, not to subject the proceeds of savings bonds to the debts of a deceased purchaser unless and until federal law prohibits the state from doing so.\footnote{139}

As a matter of state law, creditors should have the same rights to reach such assets as they have against multi-party bank account funds because the nonprobate designation on such bonds is fully revocable by the purchaser until his or her death.

\textbf{E. Life Insurance}

Life insurance, of course, is one of the most common and popular kinds of will substitute. In general, so long as the owner of the policy designates a beneficiary \textit{other than himself} in the manner required by the insurance company, and the beneficiary survives the insured, the proceeds will be paid to the named beneficiary without regard to the probate of the insured's estate.

\footnote{137. \textit{Id.} at 313.}
\footnote{138. \textit{In re} Briley's Estate, 155 Fla. 748, 21 So. 2d 595 (Fla. 1945); Reynolds v. Danko, 134 N.J. Eq. 560, 36 A.2d 420 (1944); Application of Laundree, 277 A.2d 994, 100 N.Y.S.2d 145 (1950) (proceeds of POD bonds not available to pay decedent's liability for state cost of care), rev'g 195 Misc. 754, 91 N.Y.S.2d 482 (1949).}
\footnote{139. \textit{Cf.} Decker v. Fowler, 199 Wash. 549, 554, 92 P.2d 254, 256-57 (1939) (Beals, J., concurring) (suggesting that the rights of a POD beneficiary should not be superior to the purchaser's creditors).}
This is one area in which the rights of creditors are fairly well defined. Both the policy and the proceeds of life insurance are generally exempt from the claims of the owner's creditors.\textsuperscript{140} The exemption applies to group policies as well as individual policies.\textsuperscript{141}

In Washington there are four important exceptions, and one important caveat, to this broad exemption of life insurance. First, the exemption does not extend to the owner's federal gift and estate tax liability.\textsuperscript{142} Second, the exemption does not apply to the proceeds of individual life insurance where the proceeds are deliberately made payable primarily to the insured or to the estate of the insured.\textsuperscript{143} (The proceeds of group life policies, however, appear to be exempt from creditors even where payable to the insured or the estate of the insured, although the language of the statute is far from clear.)\textsuperscript{144} Third, the exemption does not apply to life insurance provided under

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\textsuperscript{140} WASH. REV. CODE § 48.18.410 (1989):
\begin{quote}
(1) The lawful beneficiary, assignee, or payee of a life insurance policy . . . heretofore or hereafter effected by any person on his own life, or on the life of another, in favor of a person other than himself, shall be entitled to the proceeds and avails of the policy against the creditors and representatives of the insured and of the person effecting the insurance, and such proceeds and avails shall also be exempt from all liability for any debt of such beneficiary, existing at the time the proceeds or avails are made available for his own use.
\end{quote}
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\textsuperscript{141} Id. § 48.18.420(1):
\begin{quote}
A policy of group life insurance or the proceeds thereof payable to the individual insured or to the beneficiary thereunder, shall not be liable, either before or after payment, to be applied to any legal or equitable process to pay any liability of any person having a right under the policy. The proceeds thereof, when not made payable to a named beneficiary or to a third person pursuant to a facility-of-payment clause, shall not constitute a part of the estate of the individual insured for the payment of his debts.
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\textsuperscript{143} WASH. REV. CODE § 48.18.410(1) (1989). If, however, the proceeds are payable to the insured or his estate only because the primary beneficiary has predeceased the insured, then the exemption remains in force. Id. § 48.18.410(2)(b); see Elsom v. Gadd, 93 Wash. 603, 161 P. 483 (1916); Estate of Blattner, 89 Wash. 412, 154 P. 796 (1916).
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\textsuperscript{144} The statute says:
\begin{quote}
A policy of group life insurance or the proceeds thereof payable to the individual insured or the beneficiary thereunder, shall not be liable . . . to pay any liability of any person having a right under the policy. The proceeds thereof, when not made payable to a named beneficiary or to a third person pursuant to a facility-of-payment clause, shall not constitute a part of the estate of the individual insured for the payment of his debts.
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federal law to federal employees, although a separate federal exemption covers such insurance.145 Finally, the exemption does not apply to the proceeds of insurance to the extent of any premiums paid with intent to defraud creditors,146 nor to "any claim to or interest in such proceeds . . . by . . . any person to whom rights thereto have been transferred with intent to defraud creditors."147

The caveat is that support claims by children and former spouses are not considered "creditors' claims" for purposes of this broad exemption. In Aetna Life Insurance v. Bunt,148 decided recently, the state supreme court held:

[T]he claims for child support, like those for spousal maintenance, are not equivalent to the claims of 'creditors' to which the insurance proceeds exemption statute is directed. The basis for child support is the natural obligation of a parent to support his or her children; the validity of their claim does not depend upon either contract or judgment.149

Apparently the holding of Bunt is not limited to the life insurance exemption provision, but would extend to any exemption of a decedent's assets from the claims of "creditors."150

Exemption of the proceeds of life insurance from creditors' claims is quite common throughout the country,151 as is the denial of that exemption for spousal and child support claims.152 Why there should

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145. See, e.g., 38 U.S.C.A. § 770(g) (West Supp. 1989) (concerning life insurance for federal armed service personnel). "[P]ayments shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." Id.; see also 38 C.F.R. § 9.16 (1988).


147. Id. § 48.18.410(3)(b). Ordinarily, the owner of an insurance policy retains the right to change the beneficiary until he dies. Suppose that he buys life insurance at a time when he is not insolvent. If he later designates a beneficiary (or fails to exercise his power to change the beneficiary) with the intent that this will exempt the proceeds from his creditors at his death and leave his estate insolvent, has he "transferred" rights to the proceeds with the intent to defraud his creditors?


150. The court based its holding on a case holding that spousal and child support claims are not "debts" or "liabilities" under an accident and health insurance exemption, Haakenson v. Coldron, 190 Wash. 627, 630, 70 P.2d 294, 295 (1937), and on cases refusing to give force to a statutory exemption of veterans' benefits from the claims and processes of creditors. Bunt, 110 Wash. 2d at 378-79, 754 P.2d at 999; Fishue v. Fishue, 37 Wash. 2d 750, 754-56, 203 P.2d 1070, 1073 (1949).

151. Effland, supra note 9, at 446-47.

152. E.g., Green v. Green, 13 Mass. App. 340, 433 N.E.2d 92 (1982); Sinsel v. Sinsel, 47 Or. App. 153, 614 P.2d 115 (Or. 1980); see Effland, supra note 9, at 447; Annotation, Enforcement of Claim for Alimony or Support, on or for Attorney Fees and Costs Incurred in Connection
be such a broad exemption is more difficult to understand. In *Bunt*, the court said that “[t]he purpose of exemption statutes such as RCW 48.18.410 is to protect the unfortunate debtor and save him a means of supporting his family.” 153 Why debtors who die with life insurance should be considered more “unfortunate” or entitled to more protection than other dead debtors is not explained. The suggestion that the exemption will “save him a means of supporting his family” seems to presuppose that the insured has made his family the beneficiary of the life insurance proceeds, either directly or indirectly. But the Washington exemption is not limited to such cases. It is fully available even if the proceeds of the insurance are left to friends, business associates, or paramours. Moreover, the proceeds of life insurance made payable to someone other than family are not only exempt from creditors’ claims; they also are exempt from the claims of a surviving spouse or children, no matter how needy, except insofar as they may be based on support claims that arose before the insured’s death or on community property rights in the surviving spouse.

Even if the assumption were valid that most insureds designate their families as beneficiaries of life insurance, there is no coordination of this exemption with the other statutory mechanisms that more expressly protect families of decedents. Thus, for example, a surviving spouse is entitled to as much as $30,000 worth of homestead or award in lieu of homestead free of most creditors’ claims, 154 as well as half of the community property. 155 If it is sound public policy that surviving spouses should be protected to that extent, then what rationale can there be for according the surviving spouse who has been fortuitously designated as the beneficiary of a life insurance policy an additional unlimited exemption from creditors’ claims for the insurance, whereas a spouse who receives the same value by will or intestacy has no such

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153. 110 Wash. 2d at 377, 754 P.2d at 998; see also In re Elliott, 74 Wash. 2d 600, 621, 446 P.2d 347, 360 (1968) (also suggesting that one of the rationales of the exemption is to secure “pecuniary aid and assistance to the beneficiary, usually someone who is dependent upon the insured for support”).


155. Id. § 26.16.030(1).
further exemption? If the rationale behind the statute is family protection, then at a minimum it could and should be much more narrowly crafted to achieve that result. Ideally, the exemption simply should be deleted and the problem of family protection be addressed fairly so as to protect all families, regardless of the form in which they receive a decedent’s property.

A more plausible rationale for the insurance exemption statutes is one given in an earlier Washington case: “[T]he creditor can claim no equity in a fund that had been in no way used as a basis for the credit.” This at least explains, and to some extent justifies, the broad exemption that exists. But it, too, suffers from problems of overbreadth. First, it ignores the involuntary creditor, such as the tort victim, who has not extended credit to the debtor but nevertheless may have a valid claim against him or his estate. Second, it also ignores the extent to which a voluntary creditor might extend credit based on assets that are transmuted into life insurance proceeds at death. Credit may be extended, for example, based on a debtor’s savings and earnings, and these assets may later be used to pay premiums on life insurance rather than to pay the debt. While the statute makes an exception for premiums paid with the intent to defraud creditors, it will be difficult to prove in most cases that any one premium or series of premiums was an intentional fraud on creditors. Nevertheless, the cumulative diversion of the assets may be significant. Similarly, a creditor could extend credit based on the paid-up cash value of life insurance, if the statute did not also exempt that from creditors’ claims.

The “reliance” rationale, therefore, at the most supports an exemption from the claims of voluntary creditors. Even voluntary creditors should not be precluded under that rationale to the extent they might have relied (in the absence of an exemption statute) on the assets used to purchase the policy or the cash value of the policy in extending

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156. The exemption could be narrowed, for example, to exempt only life insurance payable to spouse or dependents, and then only to the extent necessary to secure the $30,000 homestead or award in lieu of homestead to such a person. In other words, life insurance proceeds payable to spouse or dependents could be made subject to the family allowance statutes, and similarly limited.


158. But see Matter of Mehrer, 2 Bankr. 309 (Bankr. E.D. Wash. 1980), where an insolvent businessman liquidated many of his assets just before declaring bankruptcy and used some of the proceeds to purchase a paid-up $45,000 life insurance policy. The court held that the cash value of this policy was includible in the bankruptcy estate under section 48.18.410(3)(c) on the ground that the purchase of the policy was in fraud of his creditors.
credit.\textsuperscript{159} Since we do not require creditors to prove that they actually relied on other kinds of assets before we allow them to pursue them to satisfy their claims, I see no reason why we should do so in the case of life insurance. The exemption of life insurance proceeds from creditors' claims therefore should be abolished.\textsuperscript{160} Any family protection that is required should be addressed directly by a suitable statute that does not discriminate on the basis of the form of property transfer.

\section*{F. Deferred Compensation Benefits}

As with life insurance, death benefits under deferred compensation plans generally are exempted from the claims of the employee's creditors by statute. Pension benefits are, however, generally includable in the employee's gross estate and subject to federal estate tax.\textsuperscript{161}

\subsection*{I. ERISA Plans}

Broad protection from creditors has been included in the qualification requirements for private pension plans under the Employee Retirement Income Security Act (ERISA), originally enacted in 1974.\textsuperscript{162} ERISA requires that in order to be qualified, a pension plan "shall provide that benefits provided under the plan may not be assigned or alienated."\textsuperscript{163} Although these provisions arguably only prohibit voluntary alienation, the regulations make clear that they also prohibit involuntary alienation:

\begin{itemize}
\item \textsuperscript{159} Sometimes courts seem to be defending the life insurance exemption on the basis of blatantly circular reasoning. In \emph{In re Elliott}, 74 Wash. 2d 600, 621, 446 P.2d 347, 360 (1968), for example, the court argued that "[i]n no credit is extended to the insured on the faith of the insurance, for all persons dealing with him are bound to know the law, and that money to become due thereon when payable to a third person is exempt from their claims." (quoting \textit{Murphy v. Casey}, 150 Minn. 107, 109-110, 184 N.W. 783, 784 (1921)). While it is clearly true that a reasonable creditor will not rely on property that is exempt from their claims in extending credit, this is hardly a good reason for continuing the exemption. The issue is whether this property should be exempt from creditors' claims, and whether creditors should be able to rely on it in extending credit.
\item \textsuperscript{160} The Reader should not conclude that the Author is so naive as to suppose that this proposal would be easy to enact. The life insurance companies have been remarkably effective in securing creditors' exemptions for life insurance, and have marketed life insurance for years in part on the basis of such an exemption. Since the large institutions that extend credit do not seem particularly interested in changing the status quo, it may be very difficult to make any meaningful change in this area. Nevertheless, the irrationality of the existing situation remains, and it cries out for change as a simple matter of fairness.
\item \textsuperscript{161} \textit{I.R.C.} \S\ 2039 (West 1989).
\item \textsuperscript{163} 29 U.S.C.A. \S\ 1056(d)(1) (1985); \textit{see also} \textit{I.R.C.} \S\ 401(a)(13)(A) (West 1989).
\end{itemize}
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Under section 401(a)(13), a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process.\(^{164}\)

The regulation has been found to be dispositive of the meaning of the statute by the courts.\(^{165}\) Washington recently enacted a similar exemption provision for employee benefit plans covered by ERISA.\(^{166}\) Although this provision does not appear to be in conflict with ERISA, it nevertheless seems to be preempted by ERISA under a recent Supreme Court case.\(^{167}\)

Prior to 1985, an exception to the ERISA spendthrift provision had been judicially carved out for claims for alimony and child support on the theory that spouses and children are the very class that the provision was designed to protect.\(^{168}\) In 1984, however, Congress built such protection into the statute as part of the Retirement Equity Act (REA).\(^{169}\) REA authorizes payment of pension benefits to a “spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a

\(^{164}\) Treas. Reg. § 1.401(a)-13(b)(1) (1988). A plan may, however, allow voluntary assignment of up to 10% of benefits by plan members who have begun receiving benefits, and may allow vested benefits to be assigned as security for loans from the plan to the beneficiary. \(\text{Id.} \text{ § 1.401(a)-13(d); I.R.C. § 401(a)(13)(A) (West 1989).}\)

\(^{165}\) E.g., Tenneco, Inc. v. First Va. Bank, 698 F.2d 688 (4th Cir. 1983); General Motors Corp. v. Buha, 623 F.2d 455 (6th Cir. 1980).

\(^{166}\) WASH. REV. CODE § 6.15.010 (1989).

\(^{167}\) Mackey v. Lanier Collections Agency & Serv., Inc., 108 S. Ct. 2182, 2185 (1988). Interestingly, however, the Washington exemption provision appears to be broader than that in ERISA, which covers only pension plans, and not welfare plans. Compare WASH. REV. CODE § 6.15.020(2) (1989) with 29 U.S.C.A. § 1056(d)(1) (West 1985); see Mackey, 108 S. Ct. at 2185-91. The Washington statute appears to be preempted because it purports to cover only ERISA plans. Id. at 2185; see \(\text{In re Dyke}, 99 \text{Bankr. 343 (Bankr. S.D. Tex 1989);} \text{In re Hirsch}, 98 \text{Bankr. 1 (Bankr. D. Ariz. 1989).}\) Nonetheless, two recent bankruptcy court decisions in Washington have apparently held to the contrary. In re Hiddleston, No. 88-00336 (Bankr. W.D. Wash. 1989), discussed in Corbit, Retirement Funds, Are They Exempt from Creditors’ Claims?, 17 WSBA REAL PROP. PROB. & TR. SEC. NEWS. 1, 8 (Spring 1989); In re Eisenhart, 88-05361 (Bankr. W.D. Wash. 1989).


\(^{169}\) REA is Pub. L. No. 98-397, 98 Stat. 1433 (codified at 29 U.S.C.A. § 1056 (West 1985)).
portion of, the benefits payable under a plan with respect to such participant." 170 A "domestic relations order" includes "any judgment, decree, or order . . . which (i) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and (ii) is made pursuant to a State domestic relations law (including community property laws)." 171 Consequently, the Act clearly carves out an exception for child and spousal support claims from the broad creditor exemption that otherwise is required under ERISA.

2. State Pension Plans

State law controls plans established for state employees. 172 Typical is the provision for public employees:

[T]he right of a person to a pension, an annuity, or retirement allowance, any optional benefit, any other right accrued or accruing to any person under the provisions of this chapter . . . and all moneys and investments and income thereof, . . . shall not be subject to execution, garnishment, attachment, the operation of the bankruptcy or insolvency laws, or other process of law whatsoever, and shall be unassignable. 173

Although expressly exempting public pension benefits from "execution, garnishment, attachment . . . or other process of law," the statutes now uniformly except support claims of spouses, former spouses, and children from the exemption if they have become entitled to pension benefits pursuant to a mandatory benefits assignment order issued by a court or a child support order. 174

172. Employee benefit plans established by or maintained for the employees of any state or political subdivision are not covered by ERISA. 29 U.S.C.A. §§ 1003(b)(1), 1002(32) (West 1985).
173. WASH. REV. CODE § 41.40.380 (1989); see also § 2.10.180(1) (judges); § 2.12.090 (judges); § 41.20.180 (police in first-class cities); § 41.26.180 (law enforcement and fire fighters); § 41.32.590 (teachers); § 41.44.240 (state-wide city employees); § 43.43.310 (state patrol). Provisions exempting state government employee retirement benefits from creditors are common. See generally Effland, supra note 9, at 447-48. It is unclear, however, whether such pension benefits become subject to a decedent employee's creditors if they are paid to his estate (for lack of alternative designated beneficiary, or as a result of express designation). Unlike the life insurance exemption, this question is not addressed in pension plan statutes. The statutes can therefore be read to exempt such funds from all claims against the employee, no matter when or how asserted. Cf. Boronat v. Boronat, 13 Wash. App. 671, 537 P.2d 1050 (1975) (court is reluctant to carve out exceptions to the statute); see also Dickerson's Estate, 168 Misc. 54, 5 N.Y.S.2d 86 (1938).
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3. Federal Plans

Federal civil service and veterans retirement benefits also are expressly exempted from creditors' claims.\textsuperscript{175} Civil service retirement benefits are "not assignable . . . or subject to execution, levy, attachment, garnishment, or other legal process, except as otherwise may be provided by Federal laws."\textsuperscript{176} Veterans retirement benefits "shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary."\textsuperscript{177} Here, however, a statutory exception to these exemption statutes has been carved out for claims for both child support and alimony.\textsuperscript{178} Washington law expressly recognizes the federal exemption, although federal law would control even in the absence of such recognition.\textsuperscript{179}

4. Comment

The broad protection from creditors accorded to deferred compensation benefits generally has been justified on grounds that the employee or the employee's family should not be left destitute as a result of the employee's improvidence. Since we are concerned here only with the rights of creditors upon the death of the employee, concern for the employee's own well-being is irrelevant. Concern for the employee spouse's family is pertinent, as it is with life insurance, but

\textsuperscript{175} Employee benefit plans established by the federal government are also exempt from ERISA. 29 U.S.C.A. §§ 1003(b)(1), 1002(32) (West 1985).
\textsuperscript{176} 5 U.S.C.A. § 8346 (West 1985).
\textsuperscript{178} 42 U.S.C.A. § 659(a) (West 1983). Other kinds of claims may be barred even if the benefits are payable to the debtor's estate. In Dickerson's Estate, 168 Misc. 54, 5 N.Y.S.2d 86 (1938), creditors of a former Post Office employee sought to reach civil service retirement benefits that had been paid to his estate. The court rejected their claim, concluding that the exemption . . . includes every form of benefit, whether payable to the beneficiary himself in his lifetime or after his death . . . directly to beneficiaries who may have been designated in writing by the decedent, or, in the absence of a designation, to the administrator or executor of his estate. . . . the exemption attached to the fund itself and when paid to the estate of the decedent enured to the benefit of his sole next of kin . . . free from all claims against him or his estate. But compare Estate of McGreevy, 455 Pa. 318, 286 A.2d 355 (1971), which held that the state (as a care provider) was entitled to reach federal disability benefits which had been paid to decedent's guardian during his life. The court concluded that the federal statute only exempted the benefits until they passed into the hands of the beneficiary, or in the instant case, his guardian.
\textsuperscript{179} "Any money received by any citizen of the state of Washington as a pension from the government of the U.S. . . . shall be exempt from execution, attachment or seizure by or under any legal process whatever." WASH. REV. CODE § 6.11.030 (1989).
only in those instances where the employee has designated his or her family to receive the benefits.\textsuperscript{180} As with life insurance, however, protection of family from creditors under retirement plans seems overbroad since it is not coordinated with other family protection mechanisms such as the homestead exemption.\textsuperscript{181} Alternatively, insofar as the employee has designated someone other than family to receive the benefits, the purported justification for the broad exemption vanishes altogether.

While it is unlikely that the creditors’ protection provided by federal law can be dislodged, the same does not apply to that provided under state law. As with the life insurance provision, such protections should be recast to accomplish valid purposes, and no more.\textsuperscript{182}

\textbf{G. Trusts}

Norman Dacey must receive credit for popularizing the inter vivos trust as a mechanism for avoiding probate,\textsuperscript{183} although it has been in

\begin{footnotesize}
\textsuperscript{180} Under the REA, a surviving spouse of an employee spouse is now required to be given a survivor’s annuity unless he or she has waived that right. I.R.C. § 401 (a)(11)(A) (West 1988). Thus, to a large extent, Congress has taken care of protecting spouses regardless of whether the employee spouse does so voluntarily.

\textsuperscript{181} See related discussion involving life insurance exception, text accompanying notes 152–60.

\textsuperscript{182} Safeco Insurance Co. v. Skeen, 47 Wash. App. 196, 734 P.2d 41, \textit{review denied} 108 Wash. 2d 1019 (1987), although it did not involve a decedent's estate, has particularly disturbing implications for any effort to reform the existing statutory exemptions. In \textit{Skeen}, the court of appeals had before it the question whether stock appreciation rights, worth roughly $1.1 million, granted by Boeing to a senior vice-president, could be reached to satisfy a $300,000 judgment. \textit{Id.} at 198-99, 734 P.2d at 42. The court held that they could not, \textit{even though there was no statute exempting such rights from creditors}. \textit{Id.} at 202-03, 734 P.2d at 44. The court relied on the family protection rationale behind the life insurance exemption statutes (discussed earlier) and upon federal congressional intent behind restrictions on transfer imposed upon stock appreciation rights under the Internal Revenue Code. \textit{Id.} at 202, 734 P.2d at 44. In short, the court discovered a public policy favoring exemption of employee benefits that had not been exempted expressly by statute. Moreover, it seems to have found the family protection rationale persuasive despite the shortcomings of that rationale mentioned in the text.

\textsuperscript{183} N. DACEY, \textsc{How To Avoid Probate} (3d ed. 1985). This Article deals only with trusts created by the settlor as a will substitute for himself or herself. One kind of trust interest created by another may, however, be used as a will substitute by the beneficiary of the interest. If a trust gives a person other than the settlor a general power of appointment, this may be used as a will substitute by the power holder. The power holder of such a power is, of course, entitled to appoint the property to himself or herself, so that it becomes their property outright. But instead of doing this, the power holder may appoint the property to someone else, causing the property to pass to the appointees without being probated in the power holder's estate. If the power was exercised inter vivos by deed, then the power holder may avoid his or her creditors by doing this. The general rule is that the creditors of the power holder can only reach the property if the exercise of the power at that time was fraudulent as to the creditors. \textsc{Restatement (Second) of Property} (Donative Transfers) § 13.5 (1986). If the general power is exercised by will, however, there is a split of authority whether this will avoid the power holder’s creditors. Some
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use for centuries.\textsuperscript{184} A trust is one of the simplest of the will substitutes to employ, at least in theory, because by it a person can dispose of personal property at death without even a written instrument (provided the terms of the trust can be proved).\textsuperscript{185} All a person needs to do is to declare that he or she holds certain property in trust for specified beneficiaries and that it is to pass to those beneficiaries at the death of the declarant. What the declarant has done is to convey to the beneficiaries an equitable future interest, either a remainder or an executory interest, that will vest in possession following the life of the declarant. The future interest need not even be irrevocable: the declarant may retain the power to revoke the trust, or to consume the principal, or may make the vesting of the future interest contingent on satisfaction of any number of conditions.\textsuperscript{186} Nevertheless, the property will pass to the beneficiaries at the death of the settlor outside probate if the trust is properly declared.

What are the rights of a creditor of a decedent who has disposed of property by such a trust? A venerable Washington statute provides that “all deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against the existing or subsequent creditors of such person.”\textsuperscript{187} This statute derives from an English statute of 1487 that has been enacted in substantially the same form in sixteen other jurisdictions.\textsuperscript{188} As a practical matter, most settlors who establish inter vivos trusts will retain some beneficial interest in the trust estate during their lives. When this has been done, the statute clearly subjects the trust assets to claims against the settlor. Still, questions remain as to the scope of the statute.

\textsuperscript{185} G. Bogert, Trusts §§ 10-11 (6th ed. 1987). Transfers into trust, of course, must comply with the statute of frauds. In Washington, this means that all transfers of realty, including leases for more than one year, must be in writing. Wash. Rev. Code §§ 64.04.010-020; 59.04.010 (1989); see also id. § 19.36.010. Good practice, of course, dictates that all trusts should be written and contain terms specifying everyone who is to have an interest in the property until the trust terminates.

\textsuperscript{186} Farkas v. Williams, 5 Ill. 2d 417, 125 N.E.2d 600 (1955).
First, what kind of trust property does it cover? The answer to this should be straightforward. The phrase “goods, chattels or things in action” means all personal property. Nonetheless, at least one Washington case has applied the statute to a trust of real property without mention of the limiting language, but in circumstances where the transfer into trust also was found to be fraudulent as to creditors. Similarly, in *Leach v. Anderson*, applying a Utah statute identical to that in Washington, the Utah supreme court rejected an argument that the statute did not apply to the real estate in trust, reasoning that the statute “is but a codification of the common law, which . . . refused to give recognition to trusts of this character.”

Second, does the statute mean that a creditor may reach the entire trust estate, or only the settlor’s beneficial interest? There seems to be no Washington case deciding this. The *Leach* case, however, held that a trust which reserved for the grantor such income and principal as might be necessary to maintain her “in a reasonable standard of living,” with a remainder over to her children, was void in toto. The court concluded that the “entire res, income and principal, is committed to maintain” grantor.

The Utah court’s reading of the common law is only partially correct. In the absence of statute, the general rule at common law is that any beneficial interest in a trust that has been retained by the settlor may be reached by creditors. Thus, if the settlor was entitled to the net income and there is accumulated income at settlor’s death, settlor’s creditors may reach that income. If a settlor is entitled to discretionary payments of income or principal, the settlor’s creditors may reach the property to the full extent of the trustee’s discretion to pay. If the settlor has retained a future interest in the trust, the

191. 535 P.2d 1241 (Utah 1975)
192. *Id.* at 1244.
193. *Id.* at 1242.
194. *Id.* at 1243.
197. Greenwich Trust Co. v. Tyson, 129 Conn. 211, 27 A.2d 166 (1942) (deciding settlor’s right to discretionary payment of income; creditor held entitled to accumulated income at death of settlor); Deposit Guar. Nat’l Bank v. Walter E. Heller & Co., 204 So. 2d 856 (Miss. 1967) (settlor’s right to 25 percent of trust principal per year upon request and upon approval of advisor to trustee held subject to creditor’s claim at death of settlor); 2A SCOTT & FRATCHER, *supra* note 188, § 156.2.
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interest is subject to creditors' claims.\textsuperscript{198} If the settlor has retained a general power of appointment in trust property, the property subject to the power is available to the settlor's creditors regardless of whether it has been exercised.\textsuperscript{199} Finally, a spendthrift clause in a trust does not protect a settlor's trust interest from his creditors.\textsuperscript{200} Thus, the common law is careful not to invalidate the whole trust, but only to invalidate it to the extent of the retained interests.

If the statute is intended as a codification of the common law, then the Utah court's conclusion is in error. Insofar as the settlor has given away beneficial rights to the trust property irrevocably during his or her life, the settlor's creditors should not be entitled to reach those beneficial interests absent a showing of actual fraud at the time the settlor parted with them.\textsuperscript{201}

Suppose, however, that the settlor has retained no beneficial interest other than the power to revoke? One would suppose that this is as good as retaining a right to consume the whole of the trust principal. Nevertheless, one of the few Washington cases that construes this statute reaches a curious result on this question. In \textit{Van Stewart v. Townsend},\textsuperscript{202} the settlor of a trust for the benefit of his children reserved only the right to revoke the trust. A year later, after the settlor had apparently become insolvent, he relinquished the right to revoke. The question arose whether the settlor's creditors could reach the property while it was subject to the power to revoke, since the release of the power was fraudulent as to creditors. The court held that the reserved power to revoke, or power to direct investments, does \textit{not} constitute uses for the "benefit" of the settlor made void by the statute.\textsuperscript{203}

Interestingly, this was the common law rule. If the settlor had retained merely a power to revoke or amend the trust, the property generally was not subject to the settlor's creditors. The rule seems to

\textsuperscript{198} McKenna v. Seattle-First Nat'l Bank, 35 Wash. 2d 662, 214 P.2d 664 (1950) (settlor's reversionary interest in trust sold to satisfy creditor's claim).

\textsuperscript{199} 2A SCOTT & FRATCHER, supra note 188, at 169-71; \textsc{Restatement (Second) of Property (Donative Transfers)} § 13.3 (1986). If the settlor has retained only a special power of appointment in trust property, however, the property subject to the power is not available to the settlor's creditors. \textsc{Restatement (Second) of Property (Donative Transfers)} § 13.1 (1986).

\textsuperscript{200} 2A SCOTT & FRATCHER, supra note 188, § 156.1; \textsc{Restatement (Second) of Trusts} § 156 (1959).


\textsuperscript{202} 176 Wash. 311, 28 P.2d 999 (1934).

\textsuperscript{203} \textit{Contra} Herd v. Chambers, 158 Kan. 614, 149 P.2d 583 (1944).
have been based on the theory that a power is not property.\footnote{204} Nevertheless, there is no sound basis for this rule today, particularly when it is compared to the treatment of general powers of appointment.\footnote{205} At least where the effect of the exercise of the power would be to revest the property in the power holder, a power to revoke is tantamount to a general power of appointment. Happily, therefore, the common law rule appears to be on its way out.\footnote{206} The creditors of a person holding such a power would, under modern cases, be entitled to reach the property subject to the power at the power holder's death.\footnote{207} It is to be hoped that our courts would reach this result were they to be called upon to decide it today.\footnote{208} But there is no reason to wait for that day. Our statute should be amended to clarify the rights of creditors to such trust property, as have the statutes of many states.\footnote{209} A statutory proposal which is discussed further in Section V, below, would establish a procedure for processing creditors' claims against such trust

\begin{footnotes}
\footnote{204}{See Jones v. Clifton, 101 U.S. 225 (1880); 4 Scott & Fratcher, supra note 119, at 373; Restatement (Second) of Trusts § 330, comment o (1959).}
\footnote{205}{See generally Rights of Creditors, supra note 58, at 1192-94; Schuyler, Revocable Trusts — Spouses, Creditors and Other Predators, 8 Inst. on Est. Pl. 13-1, 13-19 to 13-21 (1974).}
\footnote{206}{The Internal Revenue Code, of course, includes property subject to a power to revoke in the taxable estate of the power holder. I.R.C. § 2038 (West 1989). The Bankruptcy Code would also include property subject to a power that can be exercised for the bankrupt's benefit in the bankruptcy estate. 11 U.S.C.A. § 541 (a)(1), (b) (West 1979 & Supp. 1989). The First Restatement of Property, section 318 (comment i), excluded powers of revocation from the definition of a general power of appointment. The Second Restatement, however, would now include the power to revoke under the definition, thus making property subject to a power of revocation subject to creditors under the Restatement. Restatement (Second) of Property (Donative Transfers) § 11.1, comment c (1984).}
\footnote{207}{Three recent cases have held that trust property subject to a power to revoke in the settlor is available to creditors' claims at the death of the settlor, and these may herald a trend. State St. Bank & Trust Co. v. Reiser, 7 Mass. App. Ct. 633, 389 N.E.2d 768 (1979); Estate of Kovalyshyn, 136 N.J. Super. 40, 343 A.2d 852 (1975) (creditor of insolvent estate allowed to reach revocable “Dacey” declaration of trust of mutual funds); Johnson v. Commercial Bank, 284 Or. 675, 588 P.2d 1096 (1978). Here again, the UFTA may provide relief for a creditor on the theory that a settlor who retained a power to revoke a trust has not “transferred” his beneficial interest to the property until the power to revoke is released or extinguished by death. See supra notes 27-42 for a discussion of fraudulent transfers.}
\footnote{208}{Safeco Insurance Co. v. Skeen, 47 Wash. App. 196, 734 P.2d 41, review denied 108 Wash. 2d 1019 (1987), however, raises some question about this. One of the grounds for rejecting the creditor's claim against the stock appreciation rights in that case was that the rights were not "property" subject to execution. Rather, they were "a species of option purely personal to the judgment debtor," id. at 200, 734 P.2d at 43, and were in no way binding on Boeing until the holder chose to exercise them. This reasoning that a power is not property is virtually indistinguishable from the traditional ground for refusing to expose property subject to an unexercised power to creditors' claims.}
\footnote{209}{4 Scott & Fratcher, supra note 119, § 330.12, at 374-76.}
\end{footnotes}
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assets. It includes language that would subject trust property over which the settlor has retained powers to creditors' claims.\textsuperscript{210}

\subsection*{H. Other Transfers Containing Payable on Death Provisions}

In addition to the kinds of will substitutes discussed so far, Washington has adopted an important provision from the UPC that is designed to facilitate the use of almost any kind of transfer as a will substitute.\textsuperscript{211} The statute declares that an instrument providing "that any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing" is deemed to be "nontestamentary" and is not invalidated for failure to comply with the formalities for executing wills.\textsuperscript{212} The provision covers almost any kind of property transfer imaginable.\textsuperscript{213} A recent decision by the Washington Supreme Court suggests that this provision may not only protect otherwise valid conveyances from invalidation for failure to comply with the wills act, but may breathe life into instruments that would not otherwise be valid conveyances.\textsuperscript{214}

In language that is reminiscent of that found in the joint tenancy and community property provisions, section 11.02.090 has this to say about creditors’ rights: "Nothing in this section limits the rights of creditors under other laws of this state."\textsuperscript{215} As with those other statutes, the same question arises: What are the "rights of creditors" preserved by this statute?

Apart from the kinds of POD conveyances already discussed—life insurance, pensions, POD bank accounts—there is little law in Washington on the rights of creditors where property passes under a POD provision. What authority there is suggests that creditors’ rights may

\textsuperscript{210} See infra Appendix, Section V.


\textsuperscript{212} WASH. REV. CODE § 11.02.090 (1989).

\textsuperscript{213} The "instruments" expressly contemplated by this provision are insurance policies, employment contracts, bonds, mortgages, promissory notes, deposit agreements, pension plans, joint tenancies, community property agreements, trust agreements, conveyances, or "any other written instrument effective as a contract, gift, conveyance, or trust." Id. § 11.02.090(1).

\textsuperscript{214} Estate of O'Brien, 109 Wash. 2d 913, 749 P.2d 154 (1988) (holding that an undelivered deed was effective to convey title to the named grantee at the death of the grantor under this section).

\textsuperscript{215} WASH. REV. CODE § 11.02.090(2) (1989).
turn on whether the POD designation was irrevocable when made and binding on the original owner at that time.

Two cases are illustrative. In *In re Lewis’ Estate*, 216 Lewis sold property to his son for a specified sum, part of which was payable in installments, with the obligation to pay secured by a second mortgage. The contract further provided that “if, at the time of [seller’s] death, there remains any sum due . . . in that event said note and mortgage shall be declared null and void and [seller] will provide for such cancellation in his Will.” 217 Lewis did execute a will directing his executors to cancel the note and satisfy the mortgage of record, reciting the agreement as the reason for this direction. The probate court authorized the executor to satisfy the mortgage as directed and creditors of the estate petitioned to vacate the order, seeking to have the mortgage retained as an asset of the estate. The supreme court rejected the creditors’ petition, holding that, as the contract created a “present enforceable and binding right over which the promisor has no control without the consent of the promisee,” 218 it constituted a valid non-testamentary disposition. The property right passed free of the creditors’ claims. 219

In *Decker v. Fowler*, 220 however, the court held that a POD designation on United States bonds was ineffective to transfer ownership at death since the purchaser “had the right, during his lifetime, to call for the payment of the bonds, and, . . . the proceeds of the bonds had not passed beyond his dominion and control during his lifetime.” 221 Although giving effect to the designation in that case apparently would not have left the estate insolvent, the holding was based, at least in part, on a concern that the rights of the POD beneficiary should not be superior to the purchaser’s creditors. “The right of the owner of property to give away his property is always subject to the rights of his creditors.” 222

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216. 2 Wash. 2d 458, 98 P.2d 654 (1940).
217.  Id. at 460, 98 P.2d at 654.
218.  Id. at 469, 98 P.2d at 658.
220. 190 Wash. 549, 92 P.2d 254 (1939).
221.  Id. at 552, 92 P.2d at 256. This case is almost certainly erroneous as to federal law, which governs U.S. bonds, and its holding that POD instruments are testamentary is moot as a matter of state law because of the omnibus statute. WASH. REV. CODE § 11.02.090 (1989); see also Toulouse v. New York Life Ins. Co, 40 Wash. 2d 538, 545-46, 245 P.2d 205, 209 (1952) (questioning Decker). But the concern expressed in the concurrence of Justice Beals that the rights of POD beneficiaries should not be superior to those of the purchaser’s creditors, discussed in the text, may have continuing vitality.
222. 199 Wash. at 552, 92 P.2d at 256 (Beals, J., concurring) (emphasis added).
These two cases differ in that the POD designation in *Lewis* was binding on the owner and irrevocable when made, but in *Decker* it was not. Where a person has made a complete surrender of a property interest during life, as the father did in *Lewis*, creditors should not be able to reach that property interest at the death of the transferor unless they can show it was fraudulent when made under the UFTA.\(^2\) If, however, the transferor has retained valuable property interests until death, then these should be reachable by creditors at the death of a debtor whose estate is left otherwise insolvent. The statutory proposal included in the Appendix retains this distinction by exposing only beneficial interests retained by the decedent up until death to the decedent's creditors.

**IV. GIFTS CAUSA MORTIS**

Although not very common, gifts causa mortis are recognized in Washington as a valid non-testamentary method of disposing of property "at death." To be valid, such gifts must be made (1) in apprehension of approaching death from sickness or peril, (2) the donor must die from the sickness or peril without revoking the gift, (3) there must be actual, constructive, or symbolic delivery, and (4) there must be an intent to pass title.\(^2\)

The case of *McCarton v. Watson*\(^2\) shows how potent gifts causa mortis may be as will substitutes. The decedent, Ms. Watson, had been befriended and cared for by her apartment manager, Mr. McCarton. Two days before she died, in the presence of a friend of Mr. McCarton's, she said she thought she was dying and asked McCarton to write down her wishes for the disposition of her assets. She directed that McCarton should receive her stocks and bonds, her sister the funds in a bank account, and the children of one of McCarton's siblings the rest of her property. McCarton read his transcription to Ms. Watson. She said it was fine but that she was unable to sign it. Two days later, Ms. Watson died, with a valid will which made dispositions quite different than those McCarton had transcribed. Nevertheless, the court held that her actions two days before she died constituted an effective gift causa mortis of her whole estate (which was valued at $589,600 at her death).

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There do not seem to be any cases in Washington on the question whether gifts causa mortis are subject to donor's creditors.\footnote{226. But see Phinney, 36 Wash. 236, 78 P. 927 (suggesting that the absence of creditors in that case made it easier to conclude that there was a valid gift causa mortis).} In other jurisdictions, however, gifts causa mortis generally are held to be subject to decedent's debts if the decedent's estate is otherwise insufficient to pay claims.\footnote{227. 1 PAGE ON WILLS § 7.18 (Bowe & Parker ed. 1960); T. ATKINSON, THE LAW OF WILLS § 116 (2d ed. 1953).} The PR may recover property in the hands of the donee, or the proceeds of such property, insofar as is necessary to satisfy claims of decedent's creditors.\footnote{228. 1 PAGE ON WILLS, supra note 227, § 7.18; T. ATKINSON, supra note 227, § 116.} Presumably, Washington courts would follow this rule if the question arose. Whether there needs to be a probate opened, and a PR appointed, to reach such gift property, however, is unclear. There is no reason why it should be necessary where, as in the \textit{McCarton} case, the decedent gave her whole estate away causa mortis.

V. A UNIFIED STATUTORY PROCEDURE FOR CREDITORS' CLAIMS AGAINST NONPROBATE ASSETS

Throughout the foregoing discussion, several piecemeal statutory reforms have been recommended: modification of the nonclaims statute to make clear that it will cut off claims against nonprobate assets, modification of the "creditors' provisos" in the community property agreement and joint tenancy statutes to clarify what creditors' rights have been preserved, and repeal of the unlimited exemption provided for creditors' claims against life insurance and retirement benefits. Suggested legislation that effectuates these recommendations is included in an Appendix to this Article.

In addition to these piecemeal reforms, however, some unified statutory procedure needs to be devised to handle claims by creditors against nonprobate assets. As it is presently structured, the existing probate code purports only to deal with "Probate and Trust Law," suggesting that only one type of nonprobate asset (assets held in inter vivos trusts) are covered. More important, there are no provisions made therein, or elsewhere, for the processing of creditors' claims against nonprobate assets. This situation needs to be remedied if the present state of confusion with regard to such claims is to be remedied.

The threshold question with regard to such a procedure is whether the processing of creditors' claims against nonprobate assets should be
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placed exclusively in the hands of a PR. A provision of a comprehensive bill introduced in Washington in 1971, for example, would have required the recipients of certain kinds of nonprobate assets to account to a PR insofar as necessary to satisfy the claims of creditors, provided that the creditors had filed claims with the PR.\textsuperscript{229} A similar provision was recently enacted in Missouri as part of a comprehensive bill on nonprobate transfers.\textsuperscript{230} Implicit in these provisions, which were modeled on the Uniform Probate Code section dealing with creditors'

\textsuperscript{229} S. 313, \textit{supra} note 124. Section 11A.6-301, in relevant part, provided as follows:
No joint tenancy existing under RCW 64.28.010 and no community property agreement existing under RCW 26.16.120 will be effective against the estate of a deceased joint tenant or deceased party to such agreement to vest in or transfer to a survivor property needed to pay debts, taxes, and expenses of administration, including statutory allowances to the surviving spouse, minor children and dependent children. Surviving joint tenants and a surviving party to such an agreement shall be liable to account to the [PR] for property beneficially owned by the decedent at the time of his death as his separate property or by the decedent and the surviving spouse as their community property. . . . No proceeding to assert this liability shall be commenced unless the [PR] has received written demand by a surviving spouse, a creditor or one acting for a minor or dependent child of the decedent, and no proceeding shall be commenced later than two years following the death of the decedent. Property recovered by the [PR] shall be administered as part of the decedent's estate.

Section 11A.6-107 of the same bill contained similar provisions for pursuing property held in multi-party bank accounts. These sections were modeled closely on the UPC, although the UPC provides for creditors' claims only against multi-party bank accounts. UPC § 6-107 (1983). Senate Bill 313 represented a comprehensive reform of the probate code that would have enacted the UPC in Washington. It was never enacted.

\textsuperscript{230} Nonprobate Transfers Law of Missouri, \textit{supra} note 7, at § 40. The section, in relevant part, reads as follows:
Section 40. 1. If a deceased owner's probate estate is not sufficient to pay claims, taxes and expenses of administration, including statutory allowances to the surviving spouse, minor children and dependent children, the beneficiaries that receive a nonprobate transfer of decedent's property . . . and the persons who receive other property of the decedent by a transfer other than from the administration of the decedent's probate estate that was subject to satisfaction of the decedent's debts during the decedent's lifetime, shall be liable to account to the decedent's personal representative for a pro rata share of the value received or forgiven of property that the decedent owned beneficially immediately before death to the extent necessary to discharge the claims and charges remaining unpaid after application of subsection shall not apply to a death benefit paid pursuant to life or accidental death insurance policy, contract, trust, plan or law; and it does not apply to survivorship rights in property held as tenants by the entireties.

2. Only decedent's personal representative may enforce the obligation of decedent's beneficiaries under subsection 1 of this section by bringing an action for accounting, but no proceeding to assert this liability shall be commenced unless the personal representative has received a written demand therefor by a creditor . . . and no proceeding shall be brought for accounting . . . more than two years following the decedent's death. Sums recovered by the personal representative shall be administered as part of the decedent's estate.

3. After an action for accounting has been commenced . . . any party to the proceeding may join and bring into the action . . . beneficiaries of other nonprobate transfers of the decedent.
rights against multi-party bank accounts, is the assumption that a PR is necessary to process such claims.

The argument for such a position is fairly easy to understand. Historically, it has been the job of a PR to provide a focus for the accommodation of a variety of potentially conflicting interests in the administration of an estate, among them the interests of heirs and devisees, the interests of family, and the interests of creditors. If nonprobate property is to be integrated into the estate administration process, it is only natural to assume that it will be the job of the PR to do this.

Clearly where a PR has been appointed, the position taken in the 1971 proposal and the Missouri statute is a sound one. Where a PR is appointed, it is obviously simpler and most efficient to authorize that person to draw on the nonprobate assets to satisfy valid claims. But suppose that those interested in the estate have, for whatever reason, concluded that appointment of a PR is not otherwise necessary. There may, for example, be no probate estate, or the amount of probate property may fall within the "small estate" procedure. At present, apparently, many creditors rely on voluntary measures to obtain payment of their claims because probate is too expensive. Many recipients of nonprobate property may be content to compromise claims without having a PR appointed, particularly where one person has received the bulk of the decedent's property. There is no obvious reason, under these circumstances, why creditors' rights to reach such assets should require the appointment of a PR. If creditors' claims can be settled amicably by those receiving nonprobate assets without the need for a probate administration, then there should be a mechanism in place to allow this. Even if an amicable settlement cannot be reached without the need for court intervention, it may be possible to resolve the dispute without the appointment of a PR, and the parties should be entitled to try to do so.

If a PR is not appointed at this stage, of course, then the risk is that there might be a multiplicity of suits and controversies, and no single person will be in a position to insist on a fair and uniform treatment of the competing claims. Historically it has been the function of the PR to perform that job. If it becomes clear that a PR needs to be

232. Estates with total probate property amounting to less than $30,000 may be administered without appointment of a PR under RCW chapter 11.62.
appointed to perform this role, the parties should be authorized to petition the court for such an appointment.

A statutory proposal that would accomplish this with regard to all forms of nonexempt nonprobate property is included in the Appendix. It contains two basic components. The first provides for notice to creditors; the second provides for the processing of claims that have been filed by creditors.

The notice provision establishes a procedure for notice to creditors where no PR has been appointed. Under this proposal, a person who has obtained an adjudication of testacy or intestacy, or a trustee having authority over the decedent's property, or any person who has received property by reason of the decedent's death, is authorized to give notice to creditors. All the duties imposed on a PR to give actual notice to 'known or reasonably ascertainable creditors should apply with equal force to any person seeking to bar such creditors' claims without the appointment of a PR. Otherwise, there could be due process questions. The proposed amendment accomplishes this by incorporating the kind of notice required by “RCW 11.40.010 and related sections.”

Technical changes to the form of notice will be required to reflect that no PR has been appointed, and these are set out in the proposal. The proposal also would require that the notice advise creditors of their right to seek appointment as PR for the decedent. This requirement seems reasonable given that others have not sought such appointment.

If the creditor does not wish to seek such appointment, the person giving notice should be required to allow or reject the claim in the same manner as would a PR. The parties should then be permitted to try to settle any claims still in dispute after this determination without triggering more formal court procedures. There is nothing in the

234. See infra Appendix, Sections IV and V.
235. See infra Appendix, Section IV. Where a PR has been appointed, the existing nonclaims procedure, with the proposed amendment to make clear that it will bar claims against nonprobate assets, should be sufficient. See infra Appendix, Section I.
236. See Tulsa Professional Collection Services v. Pope, 108 S. Ct. 1340 (1988). This is not the place to discuss whether Tulsa would apply where no PR has been appointed. It is quite possible that there would be insufficient state action to trigger due process protections under such circumstances. Id. at 1345-46. In that event, the legislature could decide to dispense with notice requirements altogether. Even if constitutional, however, this would not seem good public policy. Those wishing to avoid probate should not be given an opportunity to avoid creditors indirectly by having the advantage of reduced notice requirements.
237. See infra Appendix, Section IV, Proposed WASH. REV. CODE § 11.40.xxx(a).
238. Id.
239. Id. Proposed § 11.40.xxx(b).
proposal to preclude them from doing so. In most cases, these procedures should be sufficient to dispose of creditors' claims.

If, however, the parties are not willing or able to settle the claim by themselves, some more formal mechanism for settling the creditors' claims must be available. With suitable amendment of the probate code as proposed in the Appendix, both probate and (nonexempt) nonprobate property should be available to satisfy creditors' claims. The proposal therefore provides that a claimant should be entitled to bring suit for the payment of the claim against anyone believed to have received nonexempt property from the decedent.\footnote{Id.} If there are a variety of such transferees, however, this approach may be more complicated than would the existing probate procedure. For that reason, the proposed statute would authorize either the claimant or the notice-giver to petition the court for appointment of a personal representative,\footnote{Id. Proposed § 11.40.xxx(c).} who would then perform the role of processing creditors' claims as has been the practice in the past.

The second component of the unified procedure would establish that, except insofar as expressly exempted by statute from creditors' claims, nonprobate transfers will not be effective to transfer property of a decedent that is necessary to pay the decedent's debts, taxes, or expenses of administration. It also would establish a procedure for collecting from nonprobate transferees to satisfy creditors' claims. This statute is based largely on the 1971 proposal and the Missouri statute described earlier.\footnote{S. 313, supra note 124, at § 11A.6-301 (quoted supra note 229); Nonprobate Transfers Law of Missouri, supra note 7, at § 40 (quoted supra note 230).} In a number of respects, however, the proposed statute differs from these precursors.

First, as noted above, the 1971 proposal and the Missouri statute would require appointment of a PR before nonprobate property can be reached. For the reasons discussed earlier,\footnote{See supra text accompanying notes 231-234.} this seems unnecessarily restrictive, and the statute has been modified to require nonprobate transferees to account to a PR only if one has been appointed. Otherwise, such transferees must account directly to the decedent's creditors.

In those situations where a PR has been appointed, if a PR is to administer nonprobate property as part of the probate estate for purposes of paying creditors, it will be necessary to decide whether nonprobate property should be treated equally with the type of probate

\footnote{Id.}
property that it most closely resembles for purposes of abatement, or whether it should be preferred before all kinds of probate assets, so that it will only be liable if all probate property has been exhausted.

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

Failure to accord to nonprobate assets a preferred status above probate property will, however, add complexity to the scheme of creditors' rights and may expose many nonprobate transfers to creditors' claims, even though there are ample probate assets to satisfy such claims. But this is a complexity that seems demanded by fairness. For these reasons, it seems preferable to treat nonprobate property as if it were probate property for purposes of creditors' claims. This is the basic approach that has been followed in the proposal contained in the Appendix. If, however, the decedent wishes to have nonprobate property given a preferred status, this can be accomplished by a suitable expression of that intent in his or her will.

244. Presumably for that reason, the 1971 proposal and the Missouri statute would expose nonprobate assets to creditors' claims only if the probate assets had been exhausted. S. 313, supra note 124, at § 11A.3-917(b); Nonprobate Transfers Law of Missouri, supra note 7, § 40(1).

245. This is the judgment that has been made with regard to federal and state estate taxes, which are assessed without preference against both probate and nonprobate property, in proportion to the amount of each kind of property. I.R.C. § 2206 (West 1989) (life insurance); § 2207 (West 1989) (property subject to power of appointment); WASH. REV. CODE §§ 83.110.010-.904 (1989) (apportionment of state and federal estate taxes in Washington).

246. See infra Appendix, Section V, Proposed WASH. REV. CODE §§ 11.40.2zz(c). For purposes of abatement, it seems reasonable to treat nonprobate transfers as if they were specific bequests, which are ordinarily given a preferred status among probate assets. Nonprobate assets will either be akin to bequests of specific items of property, or they will be akin to demonstrative bequests, which are gifts charged on any specific property or fund. There is no clear reason for preferring specific bequests over demonstrative bequests, and so they should abate equally.
Second, the time period in the 1971 proposal and the Missouri statute (two years) seems difficult to justify. Certainly something beyond the four months allowed for creditors' claims under Washington law must be allowed to permit the notice-giver sufficient time to determine whether the probate estate is sufficient to satisfy the claims made. In many estates, it also will be necessary to calculate the federal and state estate tax liability before it can be determined whether the probate estate is sufficient to satisfy claims. Those taxes must be paid within nine months of death, but a final determination of the tax may not be obtained until some time after that.\textsuperscript{247} Washington's estate tax apportionment act does not impose on a fiduciary a duty to seek to recover tax from nonprobate transferees liable for the tax until three months after the final determination of tax.\textsuperscript{248} It seems practical, therefore, to adopt the same time limit for PR's who may wish to pursue nonprobate assets for other purposes. In those cases where no estate tax is due, the PR should therefore have precisely one year to institute action, which represents the nine month deadline for the filing of the estate tax return, plus the three month time allowed in the apportionment act.\textsuperscript{249} In some cases, however, there will be a dispute with creditors or taxing authorities as to final liability, or other good cause may exist for an extension. It seems advisable, therefore, to allow the PR, in such circumstances, to petition a court for an extension of time within which to pursue nonprobate assets.\textsuperscript{250}

Next, the 1971 proposal was limited to property passing under multi-party bank accounts, community property agreements or joint tenancies. These may be the most important kinds of nonprobate transfer that are not expressly exempted from creditors' claims by statute. Nevertheless, there is no obvious reason why other kinds of nonprobate transfers (such as inter vivos trusts) should be excluded by omission. A generic treatment of nonprobate transfers, with an exclusion for those expressly exempted from creditors' claims by statute, seems preferable. This is the approach taken by the recent Missouri statute.\textsuperscript{251} It will, therefore, be necessary to define "nonprobate transfers" and "nonprobate property." As any one who has attempted to

\textsuperscript{247} I.R.C. § 6075(a) (West 1989).
\textsuperscript{249} If using the final determination of tax as the trigger proves too complicated, then a flat one year would seem preferable to the two years in the 1971 proposal and the Missouri Act. Interestingly, the recent amendments of the UPC creditors' claim provision for multi-party bank accounts has replaced the former two year limit with one a year limit. 1989 Amendments to the UPC, \textit{supra} note 4, at § 6-215(b).
\textsuperscript{250} See infra Appendix, Section V, Proposed \textit{Wash. Rev. Code} § 11.40.zzz(a).
\textsuperscript{251} Nonprobate Transfers Law of Missouri, \textit{supra} note 7, § 40(1).
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explain the law of decedents' estates knows well, it is notoriously difficult to define the concept of "nonprobate property" except by reference to what is included in the probate estate. I have no illusion that my initial attempt is completely satisfactory. In addition to the generic definition, therefore, a non-exhaustive enumeration of the most common kinds of nonprobate transfers seems useful. A preliminary attempt has been made to draft such a description. It is, however, preliminary only.

Fourth, as explained in Section III.G. above, there is an ongoing uncertainty under Washington law whether the retention of certain kinds of powers over property, such as the power to revoke a disposition in trust, or the power to change a beneficiary of a trust, would expose the property subject to the power to the power holder's creditors at death. Where the retained power is tantamount to beneficial ownership, there is no reason the property subject to the power should be immune from creditors. The proposed statute makes it clear that property subject to such powers would be available to creditors. This would bring Washington law into conformity with the modern rule throughout the country, and with the approach taken by the federal government in the gift and estate tax area.

Finally, there is an important omission in this proposal which should be noted. Under the 1971 proposal and the Missouri statute, the liability of nonprobate transferees could be asserted not only to satisfy creditors, but also to satisfy the claims of surviving spouse, minor children and dependent children to statutory allowances. This would be an important change of the law as it exists in Washington. Today, nonprobate assets are not subject to the claims of spouses.

252. See infra Appendix, Section V, Proposed WASH. REV. CODE § 11.40.zz(b). The Nonprobate Transfers Law of Missouri defines "nonprobate transfer" to mean:

a transfer after death [by] one or more persons of money, benefits, or property owned or controlled by the decedent, pursuant to a beneficiary designation or a writing that is not a will, and includes forgiveness of a debt or a promise that ceases to be subject to an obligation to pay or be performed by reason of the death of one of the parties to the agreement. A nonprobate transfer . . . does not include survivorship rights in property held as joint tenants or tenants by the entirety, or a transfer to a remainderman on termination of a life tenancy, or a transfer made on death of a person who did not have the right to designate his or her estate as the beneficiary of the transfer.

Nonprobate Transfers Law of Missouri, supra note 7, at § 18(5). The exclusion of joint tenancies, remainder and trust interests seems unnecessarily restrictive and so the proposal contained in the Appendix is not similarly restricted.

253. See infra Appendix, Section V, Proposed WASH. REV. CODE § 11.40.zz(b).

254. See supra text accompanying notes 202–08.

255. See infra Appendix, Section V, Proposed WASH. REV. CODE § 11.40.zz(d).

256. See supra notes 229-230.
or dependents for statutory allowances. This, I believe, is unjustifiable. Moreover, any system that exposes nonprobate assets to the claims of creditors, but not to the rights of family, would be indefensible. Any adequate treatment of the problem of claims against nonprobate assets, therefore, should include provision for spousal and dependents' claims in addition to those of creditors. Nonetheless, such claims are outside the scope of this Article, and therefore have not been included as part of the proposal.

VI. CONCLUSION

The law on creditors' rights to reach nonprobate transfers at the death of a debtor is in a terrible state of confusion. In some cases (life insurance and pensions), the legislature has carved out exemptions from creditors' claims that are far broader than can be justified. In others (multi-party bank accounts, revocable trusts), there is no clear law in Washington as to whether creditors of the decedent transferor are entitled to reach the nonprobate property. In still other areas (joint property, community property agreements, section 11.02.090 transfers), the legislature has purported not to derogate from existing creditors' rights, but has failed to give any clear answer as to what those rights are. On top of all this, there is no established procedure under which creditors may seek to enforce what rights they do have to nonprobate property at the death of the debtor, and there is no fixed time limit under which those claims will be cut off. A careful interpretation of the UFTA may provide some relief to creditors in the case of some kinds of nonprobate property, but any prediction that the courts of this state would adopt such an interpretation of the Act would be speculative. Property owners, creditors, and estate planners should not need to wait for judicial clarification. The existing confusion should be remedied with legislation that attempts to deal with the problem in a unified and rational manner. This Article has made a start by proposing one form such legislation might take.

APPENDIX

PROPOSED STATUTES TO DEAL WITH CREDITORS' CLAIMS AGAINST NONPROBATE ASSETS

I. Nonclaims bar effective to protect nonprobate transferees.

Section 1. The last paragraph of RCW 11.40.010, as amended in 1989, shall be amended to read as follows:
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Except as otherwise provided in RCW 11.40.011 or section 4 of this act, any claim not filed within the four-month time limitation shall be forever barred, if not already barred by any otherwise applicable statute of limitations. This bar shall be effective to bar claims against both the probate estate of the decedent and any property received by means of a nonprobate transfer as defined in subsection 5(b) below. Proof by affidavit of the giving and publication of such notice shall be filed with the court by the personal representative.

II. Amendment of Creditors’ Proviso in RCW 26.16.120

Section 2. The language of RCW 26.16.120 following the word “Provided” shall be amended to read as follows:

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. Property subject to such an agreement shall be liable for the debts of a deceased spouse to the extent of the decedent’s ownership interest therein immediately prior to death.

III. Amendment of Joint Tenancy Proviso in RCW 64.28.010.

Section 3. The language of RCW 64.28.010 following the word “Provided” shall be amended to read as follows:

Provided, That such transfers shall not derogate from the rights of creditors. Property held in joint tenancy form with right of survivorship shall be subject to the debts of a deceased joint tenant upon the death of that joint tenant to the extent of the decedent’s ownership interest therein immediately prior to death.

IV. Nonclaims bar where no personal representative has been appointed.

Section 4. A new section is added to chapter 11.40 RCW to read as follows:

RCW 11.40.xxx. (a) Where an adjudication of testacy has been obtained under RCW 11.20.020, or an adjudication of intestacy under RCW 11.28.110, but no personal representative has been appointed, the person obtaining the adjudication of testacy or intestacy shall be entitled to give notice to the creditors of the deceased in the same manner as would a personal representative under RCW 11.40.010 and related sections. Where no adjudication of testacy or intestacy has been obtained, and no personal representative has been appointed, any trustee having authority over the decedent’s property or, in the absence of such trustee, any person who has received property by reason of the decedent’s death, shall be entitled to give notice to the creditors of the decedent in the same manner as would a personal representative under RCW 11.40.010 and related sections.
(b) The notice to creditors given by such persons shall be substantially in the form provided by RCW 11.40.015, except that the notice shall include the name, address, and date of death of the deceased, include the circumstances of the adjudication of testacy or intestacy, if any; and advise creditors to file any claims with the person giving the notice in lieu of a personal representative. The notice shall also inform creditors that no personal representative has been appointed and of their right to petition for appointment as personal representative of the estate under RCW 11.28.120(4). Any claim not filed with the person giving the notice within the time limitations under this chapter for serving and filing of claims shall be forever barred, as provided in RCW 11.40.010. Where a claim is timely filed under this section, the person giving notice shall allow or reject the claim within the time limits and in the same manner required of personal representatives under RCW 11.40.030. The claimant whose claim has been rejected shall be entitled to bring suit against any person who has received nonexempt property from the decedent within the time limit set out in RCW 11.40.030 for actions against the personal representative.

(c) If, at any time after notice has been given under this section, it should appear that appointment of a personal representative of the estate is necessary to settle or otherwise dispose of claims made, either the claimant or the person giving notice under this section may petition the court for appointment of a personal representative. Upon appointment of such a personal representative, the personal representative shall administer the decedent's estate to the extent, and under the conditions specified by the court.

V. Creditors' claims against nonprobate assets.

Section 5. A new section is added to chapter 11.40 RCW to read as follows:

RCW 11.40.zzz. (a) Except insofar as expressly exempted from creditors' claims by statute, a nonprobate transfer shall not be effective to vest in or transfer to a nonprobate transferee property that may be needed to pay debts, taxes, and expenses of administration of a decedent. A nonprobate transferee shall be liable to account to the personal representative or, if none, to the creditors of a decedent for property beneficially owned by the decedent immediately before death as separate property or by the decedent and the surviving spouse as their community property. No proceeding to assert this liability shall be commenced unless the [PR], or if there is none, the person giving notice under [section 2 above], has received a written claim by a creditor of the decedent. No proceeding to assert this liability shall be commenced later than three months after the final determination of tax for the decedent as provided under RCW 83.110.070 unless an extension of this time limit has been granted by the court for good cause.
(b) For purposes of this Act, “nonprobate transfer” means any transfer of an interest in property, other than by will, that is designed to take effect at or after the death of the person owning that interest. “Nonprobate transfer” includes, but is not limited to, transfer by means of community property agreement, joint tenancy with right of survivorship, joint bank account with right of survivorship, a payable on death or trust bank account, deed or conveyance where possession has been postponed until the death of the owner, inter vivos trust provision effective at the death of the settlor, or payable on death provision in a contract. “Nonprobate transfer” also includes forgiveness of a debt or a promise that ceases to be subject to an obligation to pay or to be performed by reason of the death of one of the parties to the agreement.

(c) Where a personal representative has been appointed and it has been determined under this section that nonprobate property is necessary to pay debts, taxes, or expenses of administration, nonprobate property recovered by the [PR] shall be administered as part of the decedent’s estate to the extent necessary to satisfy the claims needing to be paid. For purposes of abatement, such property shall be treated as if it had been a specific bequest, unless the decedent provides to the contrary by will.

(d) A decedent shall be deemed to have “beneficially owned” property immediately before death if and to the extent that the decedent retained until death the power to possess, enjoy, or consume the property, or to revoke, alter, or amend the disposition of the property.