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RIGHTS OF CREDITORS IN NONPROBATE ASSETS

RICHARD W. EFFLAND*

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I. INTRODUCTION: THE PROBLEM OF WILL SUBSTITUTES

The purpose of this Article is to raise what seems to be a neglected area in the law of decedents' estates. What are the rights of creditors in assets which shift ownership or enjoyment of property at death by various will substitutes? These are sometimes called nonprobate assets because they are not subject to administration in the decedent's probate estate. Increasingly, a major portion of decedents' wealth is being transmitted to others not through the probate process but through a variety of devices which have acquired the label "nontestamentary." Some of these devices, like joint tenancy and gifts causa mortis, have long been legally accepted. Others, like revocable living trusts (with extreme variations, such as Totten bank accounts and Dacey trusts) and contractual benefits payable on death to designated beneficiaries, are developments of relatively recent origin.

At the outset, one must wonder why creditor groups have not been vocal about the drain of available assets from the probate estate. One possible explanation is that concern for creditors is misplaced. Contract creditors rely on security arrangements; retail organizations protect themselves by purchasing insurance against the risk of death of debtors or are content to write losses off on income tax returns; tort creditors sue primarily for the amount of insurance coverage. Interesting is the fact that during the preparation of the Uniform Probate Code (the Code) no credit organization voiced any comments on proposed claims procedures with the single exception of the American Association of Trial Lawyers, which was concerned

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only with tort liability.¹ With regard to nonprobate assets, joint tenancy has long been a device that defeats unsecured creditors of the joint tenant who dies first; yet the one state which had legislation to protect such creditors has repealed the statute.² Of course, one major creditor at death, the United States Government, has enacted its own procedure to reach taxable will substitutes if the probate estate is insufficient to pay estate taxes.³

Institutional creditors therefore are likely to be able to protect themselves. It is the individual creditor who may be hurt most and who has no organization to speak on his behalf. The cases that are likely to occur with increasing frequency involve the divorced wife or child who has a claim by reason of a property settlement, separation agreement, or divorce decree.⁴ The divorced husband may remarry and arrange his property to pass to a

1. Langrock, *Uniform Probate Code: What Price Certainty?*, TRIAL, Aug.-Sept. 1970, at 23.

2. See note 31 *infra*.

3. Although the Internal Revenue Code places primary responsibility for payment of the estate tax on the "executor" (the personal representative), any person in actual or constructive possession of any of the decedent's property is treated by statutory definition as an executor if none is appointed. I.R.C. §§ 2002, 2203 (1976). Moreover, the government may rely on its general tax lien or the special estate tax lien on the gross estate. See C. LOWNDES, R. KRAMER & J. MCCORD, FEDERAL ESTATE AND GIFT TAXES §§ 21.15, .20 (1974).

4. The concept that a divorced spouse's duty to pay alimony or support ends with his death is eroding rapidly. The divorce court can order one spouse to pay alimony or support to the other spouse until the latter's death or remarriage, even if the former dies first. See, e.g., *Cross v. Cross*, 5 Ill. 2d 456, 125 N.E.2d 488 (1955); *Dogu v. Dogu*, 652 P.2d 1308 (Utah 1982); *DeRiemer v. Old Nat'l Bank*, 60 Wash. 2d 686, 374 P.2d 973 (1962). The obligation may be made a charge upon the estate of the obligor. See, e.g., *Wilson v. Wilson*, 5 Utah 2d 79, 296 P.2d 977 (1956). Support of a minor child may be made an obligation extending beyond the death of the divorced parent. For example, ARIZ. REV. STAT. ANN. § 25-327 (Supp. 1982-1983) provides:

C. Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a minor child are not terminated by the death of a parent obligated to support the child. When a parent obligated to pay support dies, the amount of future support may be modified, revoked or commuted to a lump sum payment to the extent just and appropriate in the circumstances and shall have priority equal to the right for family allowance in § 14-2403. Past due support shall have priority equal to claims provided for in § 14-3805, subsection A, paragraph 6.

Property division rights clearly survive the death of the obligor. Frequently, an order for property division will provide for installment payments by one spouse to the other, but unless made a lien on specific property, the right to payments would constitute only a general obligation, normally payable out of the probate estate. If the obligor puts property in joint tenancy with a second spouse, creates a revocable trust, or makes other nontestamentary arrangements in favor of the second spouse for the purpose of defeating that obligation, the courts should on petition of the first spouse set aside the particular transfer as a fraudulent conveyance.

second wife by nonprobate devices. *In re Granwell*,⁵ a New York Court of Appeals case, is illustrative. Under a separation agreement between Leslie Granwell and his first wife, their son was entitled to half of Leslie's estate and also to the proceeds of certain life insurance policies. Subsequent to the divorce, Leslie remarried. He later changed the beneficiary on some of the life insurance policies, purchased mutual funds in joint tenancy with his second wife, and established revocable trusts designating the second wife as remainderman. The purchase of the mutual funds did not render the husband insolvent at that time. His estate was administered by the second wife as executrix. After payment of funeral expenses and other debts the probate assets were nominal. The son sought to hold the second wife liable for unpaid support payments from the date of death until he reached majority and for half of the mutual funds.⁶ As for the trusts, the son was fortunate because New York statutory law protects creditors of revocable trusts.⁷ The mutual funds were a different problem, involving joint ownership with right of survivorship, but the court of appeals treated half the funds as passing at death and hence as a conveyance fraudulent at that time as to the son as a creditor.⁸ Because the son received more life insurance proceeds than the agreement called for, there was no issue as to the life insurance. Obviously, a "creditor" such as the decedent's son may receive more judicial help, for policy reasons, than other general creditors.

Still another explanation for the lack of creditor interest may be that in the majority of decedents' estates there are sufficient probate assets to meet claims of unsecured creditors. Only if the probate estate is inadequate for creditors is there a problem. A system that permits nonprobate assets to pass free of creditor claims therefore may be tolerable to creditors. Unfortunately, we have no empirical data to assess the validity of this explanation.

In the preparation of the Uniform Probate Code, the draftsmen early raised the policy question whether the Code was to deal only with the probate estate or with nonprobate assets as well. The decision was made to generally cover only the probate estate. Hence in most Code sections no attempt was made to deal with correlative problems regarding nonprobate assets. For example, divorce operates to revoke will provisions for the divorced spouse.⁹ There is a similar problem as to life insurance payable to the divorced spouse or bank accounts "in trust for" or "payable on death to" the divorced spouse, but there is no Code provision. The Code provides a nonexoneration rule for specific devises¹⁰ but does not deal with the same

5. 20 N.Y.2d 91, 228 N.E.2d 779, 281 N.Y.S.2d 783 (1967).

6. *Id.* at 94, 228 N.E.2d at 781, 281 N.Y.S.2d at 785.

7. N.Y. EST. POWERS & TRUSTS LAW § 10-7.2 (McKinney 1967). *See City Bank Farmers Trust Co. v. Cannon*, 291 N.Y. 125, 51 N.E.2d 674 (1943) (construing the earlier New York provision, N.Y. REAL PROP. LAW § 145 (repealed 1964)).

8. 20 N.Y.2d at 97, 228 N.E.2d at 783, 281 N.Y.S.2d at 788.

9. UNIF. PROBATE CODE § 2-508 (1975).

10. *Id.* § 2-609.

problem where life insurance is pledged. When specifically devised property is destroyed, insurance proceeds payable after death belong to the devisee under the Code's nonademption rule,¹¹ but the Code does not extend to proceeds of insurance on joint tenancy property. The Code does not cover powers of appointment, except for the single section relating to exercise by a general devise of the whole estate or of the residue.¹²

Exceptions to the general policy limiting the Code to probate assets can be found in sections 2-801¹³ (disclaimer), 2-803¹⁴ (effect of homicide on succession), and 2-202¹⁵ (the "augmented estate"). Late in the preparation of the Code it was decided to add an article on nonprobate transfers, but this was limited to multiple-party accounts in financial institutions and to a single section on contractual provisions for payment or transfer at death.¹⁶ The last section may well prove to be a sleeper because of its broad wording, although to date it has not been widely used so far as I know. Finally, a skeleton article on trusts was added to the Code,¹⁷ with the hope that enacting states would add other relevant uniform laws such as the Uniform Trustees' Powers Act.¹⁸

In development of the numerous devices to bypass probate, litigation has centered on alleged violations of the statute of wills. If the arrangements seem to provide safeguards against fraud similar to those in the statute of wills, courts have been willing to hold the arrangement nontestamentary.¹⁹ But probate, used in the broad sense of administration of a decedent's estate, serves other purposes than assuring succession to the persons intended by the decedent. Protecting the family against disinheritance is one; providing a convenient forum for creditors is another. Removing assets from the probate estate by will substitutes has posed a problem for the surviving spouse in those states where marital rights at death are defined in terms of an elective share in the probate estate.²⁰ Significantly, the trend toward transmitting wealth by will substitutes led first to frequent

11. *Id.* § 2-608.

12. *Id.* § 2-610.

13. *Id.* § 2-801.

14. *Id.* § 2-803.

15. *Id.* § 2-202.

16. *Id.* §§ 6-101 to 6-113, 6-201.

17. *Id.* §§ 7-101 to 7-307.

18. UNIF. TRUSTEES' POWERS ACT §§ 1-13 (1964).

19. Professor Browder has noted the inadequacy of this approach:

It may be argued that modern creditors do not really need the kind of protection suggested here. If there is such a policy, courts can assert it without distorting the law respecting the testamentary effect of transfers that purport to be inter vivos. Again, a conveyance can be testamentary with respect to creditors without being testamentary for all purposes.

Browder, *Giving or Leaving—What is a Will?*, 75 MICH. L. REV. 845, 885 (1977).

20. The classic study is W. MACDONALD, *FRAUD ON THE WIDOW'S SHARE* (1960).

litigation and judicial development of various concepts to extend spousal protection to the nonprobate assets and later in many states to legislation defining the share in terms of both the probate estate and the nonprobate assets passing by will substitutes.²¹ Lack of extensive creditor litigation may therefore mean that there is no corresponding need for creditor protection.

One subsidiary problem relates to the effect of nonclaim statutes on the right of creditors to pursue nonprobate assets. For example, section 3-803 of the Uniform Probate Code bars unrepresented claims "against the estate, the personal representative, and the heirs and devisees of the decedent."²² There is no bar against the takers of nonprobate assets unless the courts would extend the statute by analogy. Some practicing lawyers therefore recommend against use of will substitutes where potential claims may be outstanding after death,²³ as use of probate serves to cut off such claims if they are not presented in the administration of the estate and thus insulates the probate assets when distributed to the successors.

II. EXISTING LAW.

A. *Joint Tenancy*

Included here are all of the forms of joint ownership that pass complete ownership to the survivor: ordinary joint tenancy, tenancy by the entirety (in states still permitting such a tenancy), tenancy with express survivorship (in states which have legislation abolishing joint tenancy but whose courts have permitted a right of survivorship to be grafted onto a tenancy in common by express wording in the creating instrument), and joint life estates with a contingent remainder in the survivor. Probably because the right of survivorship in joint tenancy antedates the first Statute of Wills in 1540,²⁴ it has never been questioned as a violation of that statute.

The ancient theory of joint tenancy is that each of the joint tenants owns the whole and that when one dies, his interest ceases and the survivor or survivors merely continue to own what was held before. Hence the creditor of the deceased joint tenant is left with no right against the joint tenancy property, his debtor's interest having ceased at death.²⁵ Even if the creditor had a judgment lien on the debtor's real property, his lien is on the debtor's interest which ceases at death.²⁶ Only if the creditor forces a sale of the

21. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 1981 & Supp. 1982-1983).

22. UNIF. PROBATE CODE § 3-803 (1975).

23. Moore, *The Advantages of Probate*, 10 INST. ON EST. PLAN. ¶ 416.1 (1976).

24. 32 Hen. 8, ch. 1.

25. See, e.g., *De Forge v. Patrick*, 162 Neb. 568, 76 N.W.2d 733 (1956); *In re Estate of Harris*, 88 Misc. 2d 60, 387 N.Y.S.2d 796 (Sur. Ct. 1976), *aff'd*, 61 A.D.2d 881, 402 N.Y.S.2d 978 (1978). See also 4A R. POWELL, REAL PROPERTY ¶ 618, at 676 (1982); 4 G. THOMPSON, REAL PROPERTY § 1790 (1961 & Supp. 1978).

26. *People's Trust & Sav. Bank v. Haas*, 328 Ill. 468, 469, 160 N.E. 85, 86 (1927); *Elder v. Rothamel*, 202 Md. 189, 192, 95 A.2d 860, 862 (1953), *noted in* 14

debtor's interest by levy of execution during his debtor's lifetime, and thereby effects a severance of the joint tenancy, can the creditor prevail.²⁷

Although the creation of the joint tenancy may itself be a fraudulent conveyance, the creator usually is solvent at that time. Moreover, creation of the joint tenancy still leaves the creator with a half interest which he can sever and which creditors can reach during his lifetime. Technically, when the joint tenant debtor dies, nothing "passes" to the survivor by his survivorship right; before the death of one, the other joint tenant could only convey half, but after the death he can convey the whole. The New York Court of Appeals in the *Granwell* decision,²⁸ discussed earlier, allowed the creditor of the deceased creator of the joint tenancy to reach half.²⁹ To do otherwise, Chief Judge Fuld stated, "would violate the spirit and purpose of both the Surrogate's Court Act and the Uniform Fraudulent Conveyances Act."³⁰ The cases holding that a judgment lien against the interest of the deceased joint tenant is lost at death can be distinguished; those cases were not argued on the theory that there was a fraudulent conveyance at the

MD. L. REV. 151 (1954); *Musa v. Segelke & Kohlhaus Co.*, 224 Wis. 432, 433, 272 N.W. 657, 658 (1937). In states which follow the lien theory of mortgages, in the absence of statute a mortgage by one joint tenant does not sever the joint tenancy, and on the death of the mortgagor the surviving joint tenant owns the whole free of the mortgage lien. *See, e.g.*, *People v. Nogarr*, 164 Cal. App. 2d 291, 294, 330 P.2d 858, 860-61 (1958), *noted in* 47 KY. L.J. 565 (1959). Liens may be preserved by special statute, so that the surviving joint tenant takes the interest which the deceased joint tenant could have transferred prior to death subject to the lien. *See, e.g.*, WIS. STAT. ANN. § 700.24 (West 1981). In protecting the surviving joint tenant against creditors of the other deceased joint tenant, courts have rejected a theory of unjust enrichment. *See Schlichenmayer v. Luithle*, 221 N.W.2d 77 (N.D. 1974).

27. *See, e.g.*, *Van Antwerp v. Horan*, 390 Ill. App. 449, 453, 61 N.E.2d 358, 360 (1945); *Chavez v. Chavez*, 56 N.M. 393, 394, 244 P.2d 781, 782 (1952). The point at which severance takes place in the process of levy is itself an issue of litigation. The extreme position is that no severance takes place even at the time of sale, but only when the sheriff has executed a deed of conveyance. *See Jackson v. Lacey*, 408 Ill. 530, 531, 97 N.E.2d 839, 840 (1951).

28. *In re Granwell*, 20 N.Y.2d 91, 228 N.E.2d 779, 281 N.Y.S.2d 783 (1967).

29. *Id.* at 95, 228 N.E.2d at 782, 281 N.Y.S.2d at 786. The court relied on an early English case, *Stileman v. Ashdown*, 2 Atk. 477, 26 Eng. Rep. 688 (1742), but may have misread it. An English source treats *Stileman* as a case in which the original purchase of land was impeachable as a fraudulent conveyance because "made for the purpose of safeguarding the transferor, or his family, at a time when he is about to enter upon a speculative business, or one of which he has no special knowledge," even though the debt was incurred later. 18 HALSBURY'S LAWS OF ENGLAND ¶ 367 (4th ed. 1977). At the time *Stileman* was decided, the statute governing the writ of *elegit*, which the creditor chose to use in that case, provided that only half of the land could be reached. This accounts for the result in *Stileman*. See the opinion on rehearing.

30. 20 N.Y.2d at 95, 228 N.E.2d at 782, 281 N.Y.S.2d at 786.

time of death. However, they are inconsistent in theory with the concept that there is a conveyance or transfer at death. Only one state ever enacted legislation to allow creditors of a deceased joint tenant to proceed against the surviving tenant, and that state has repealed its legislation.³¹ In view of the high frequency of joint tenancy as a form of ownership, it is both odd and perhaps significant that similar legislation has not been enacted elsewhere.³²

Tenancies by the entirety still exist in a number of common law states, but the legal effect of such tenancies during the marriage varies widely.³³ In some states a creditor of one spouse may not reach property held as tenant by the entirety with the other spouse. In other states the creditor can levy only on the life interest of the spouse and on that spouse's right as survivor (in effect a contingent remainder) or only on the right to take as survivor.³⁴ However, at the death of one spouse a tenancy by the entirety has the same survivorship feature as traditional joint tenancy and would belong to the surviving spouse free of claims of creditors of the decedent. Only if the debt were a joint obligation of both could the property be reached in the hands of the survivor.

The other variant on joint tenancy is the joint life estate with contingent remainder to the survivor. This closely resembles tenancy by the entirety but is not limited to the husband-wife situation. Again the creditors

31. In 1955, the Nebraska legislature enacted NEB. REV. STAT. § 30-624 (1956) (repealed 1977). Although the original bill would have made the jointly owned property subject to the creditor claim, the act as passed provided only for personal liability of the survivor, within stated limits (notably the amount contributed to the jointly owned property by the decedent). For a review of the statute, see Comment, *Liability of Surviving Joint Tenant for Debts of Deceased Joint Owner*, 40 NEB. L. REV. 153 (1960). The statute was repealed in 1977 when Nebraska adopted the Uniform Probate Code. The repeal was deliberate and was not an oversight. See Nebraska Comment to L.B. 354, § 288 (1973). Attempts to broaden the present NEB. REV. STAT. § 30-2707 (1979), which corresponds to UNIF. PROBATE CODE § 6-107 (1975), to empower the personal representative of an insolvent estate to proceed against surviving joint tenants of real and personal property as well as survivors on multiple-party financial accounts have been unsuccessful, mainly due to opposition from women's groups. Letter from Professor John M. Grawohl, University of Nebraska, to the author (Mar. 1, 1982).

32. In 1962, as part of a project to revise the Wisconsin property statutes, the author suggested a statutory change to provide a remedy for creditors. R. Effland, Study Memorandum on Joint Tenancies in Real Property (Oct. 1, 1962). The Wisconsin State Bar Committee was not receptive.

33. The present status of tenancy by the entirety in the United States, and the legal consequences of such tenancies, are summarized in 4A R. POWELL, *supra* note 25, ¶¶ 620-624.1. The power of creditors to reach such tenancies is discussed at length in G. THOMPSON, *supra* note 25, § 1790.

34. See, e.g., *In re Dawson*, 10 Bankr. 680 (D. Tenn. 1981) (only debtor's right of survivorship could be sold by trustee, debtor having power to elect to claim exemptions under local law, here Tennessee law on tenancies by the entirety).

of one of the co-owners can only reach that owner's interest, which is a life estate (as tenant in common) plus a contingent remainder. On the death of the debtor his interest ceases and the survivor's contingent remainder vests.³⁵ The creditor is left out in the cold.

B. *Gifts Causa Mortis*

Of all the will substitutes, this is both the most flagrant and one of the most ancient. Such gifts are confined to personal property but can apply to choses in action as well as tangible personalty. Because of the similarity between gifts causa mortis, which require an imminent peril of death, and nuncupative wills, some courts have imposed strict requirements on gifts causa mortis. Other courts seem willing to allow gifts causa mortis on meager evidence of delivery. In *Scherer v. Hyland*,³⁶ the donor endorsed a check payable to her and left it with two handwritten notes, one of which "bequeathed" to the donee all her possessions specifically including the check. The donor then left her apartment and committed suicide. The New Jersey Supreme Court found that these acts constituted sufficient delivery and sustained the gift causa mortis.³⁷ The transaction would have been treated as a valid holographic will in a jurisdiction recognizing such wills. Here the line between a will and a gift causa mortis was in reality nonexistent.

In theory, the gift causa mortis passes title upon delivery of the chattel but is subject to revocation by the donor and is automatically revoked if the donor survives the peril which motivated the gift.³⁸ Realistically, it is only fully effective upon the death of the donor. But even if immediately effective, the transfer itself renders the donor insolvent in cases where the estate remaining for probate is inadequate; hence it would be fraudulent as to creditors and the property should be reachable.³⁹

C. *Revocable Living Trusts*

Widespread use of the revocable living trust in the last several decades seems to provide a major loophole in the protection afforded creditors by the probate process.⁴⁰ The settlor of the trust normally retains both the full income for life and the power to revoke, alter, or amend the trust. If only

35. See *Hughes v. Fairfield Lumber & Supply Co.*, 143 Conn. 427, 123 A.2d 195 (1956) ("survivorship" deed; interest of one tenant dies with him, so survivor takes free of claim even if land is attached during lifetime).

36. 75 N.J. 127, 380 A.2d 698 (1977).

37. *Id.* at 135, 380 A.2d at 702.

38. R. BROWN, *PERSONAL PROPERTY* § 7.19 (3d ed. 1975).

39. "It is well recognized that a gift causa mortis will not be permitted to defeat the claims of creditors of the decedent, and that any part of such gift necessary for the payment of debts must be surrendered." *Rayley v. Rayley*, 30 F. Supp. 121, 123 (D.D.C. 1939).

40. Not all living trusts operate to defeat creditors. Some trust instruments contain a direction to the trustee to pay funeral expenses, taxes, and debts if the

the income is reserved, with no power to revoke, alter, or amend, the settlor is subject to an immediate gift tax on the value of the trust minus his life interest.⁴¹ At death, the trust corpus is included in his gross estate for estate tax purposes, with credit for the gift tax.⁴² If no income is reserved but only a power to revoke, the trust income is nevertheless taxed to the settlor.⁴³ There is no completed gift because of the power to revoke, and hence no gift tax,⁴⁴ but the corpus is included in the settlor's estate at death.⁴⁵ The settlor obtains no tax advantage by either arrangement alone, only tax disadvantage. Revocable trusts with reserved income are therefore created for non-tax reasons; one principal reason is to minimize the delay and cost of probate.

Modern law permits the settlor to retain not only income for life and a power to revoke, but various lesser powers such as the power to withdraw principal or trust corpus, to control changes in trust investments, and to exercise other administrative powers.⁴⁶ The settlor can even create the trust by a declaration making himself sole trustee.⁴⁷ All that has been transferred by the declaration of trust is an equitable future interest which can be revoked or altered at will by the settlor in the exercise of his reserved powers. The interest of the other trust beneficiaries is tenuous at best, but it is enough to justify the courts in holding the trust nontestamentary.⁴⁸ Again the courts have been concerned not with creditors but with formalities of execution. Some of the early attacks on revocable living trusts were by disappointed spouses who simply wanted to bring the trust assets into the probate estate in order to elect a share; attorneys for the disappointed spouses later developed more sophisticated theories in their effort to reach the trust despite its nonprobate status.⁴⁹

What of creditors?⁵⁰ Here the law has been dominated strongly by the

probate estate is insufficient, although it is more common to give the trustee a discretionary rather than mandatory power.

41. Treas. Reg. § 25.2511-1(e) (1973).

42. I.R.C. § 2036 (Supp. V 1981).

43. *Id.* §§ 671, 674 (1976).

44. *See* *Burnet v. Guggenheim*, 288 U.S. 280, 283 (1933).

45. I.R.C. § 2038 (1976).

46. RESTATEMENT (SECOND) OF TRUSTS § 57 (1959); G. BOGERT, TRUSTS AND TRUSTEES §§ 103, 104 (2d ed. 1965); 1 A. SCOTT, THE LAW OF TRUSTS § 57 (3d ed. 1967).

47. RESTATEMENT (SECOND) OF TRUSTS § 100 (1959).

48. *See, e.g.*, *Farkas v. Williams*, 5 Ill. 2d 417, 125 N.E.2d 600 (1955). Even "Dacey" trusts have been upheld. *See* *Barnette v. McNulty*, 21 Ariz. App. 127, 516 P.2d 583 (1973).

49. The concepts of the illusory trust and of constructive fraud have been variously used. *See* W. MACDONALD, *supra* note 20, at 125-26.

50. A number of commentaries deal with rights of creditors in revocable trusts. *See* Alexander, *Certain Problems Confronting Creditors When a Revocable Trust Accomplishes Testamentary Succession*, 31 MICH. L. REV. 449 (1933); Goldman, *Rights of the Spouse*

Restatement of Trusts position that a power to revoke is only a "power" and not "property."⁵¹ Hence, in the absence of statute, creditors cannot reach the principal of a revocable trust either during the settlor's lifetime or after his death.⁵² While one can appreciate the utility of Hohfeldian terminology, the distinction here is completely unrealistic. To say that the settlor, who can obtain possession and title to the trust corpus by executing and delivering to the trustee a document of revocation, has no "property" would shock a non-lawyer. If the same person has money on deposit with a bank which he can withdraw on proper application to the bank, the law has no hesitance in saying that he has property. That a settlor who has a right to all the income from the trust assets and a power to shift the benefit of corpus to himself or others at will is treated as having only a limited income interest, a life estate, is anomalous.

Note the glaring inconsistency of the Restatement position on two comparable problems. If the same settlor had no power to revoke but gave the trustee a discretionary power to pay the principal to the settlor, the settlor's creditors could reach the principal.⁵³ If the same settlor reserved not a power to revoke but a general power of appointment, again the creditors could reach the principal.⁵⁴ Why should a power to revoke, which is a greater power, mean that the creditors are left with no rights?

The Restatement position for years was not a complete bar to creditors during the settlor's lifetime because the federal Bankruptcy Act contained a provision giving the trustee in bankruptcy all the powers of the bankrupt.⁵⁵ Hence in the extreme case the creditor could throw the settlor into bankruptcy and thereby make the trust assets available to satisfy claims. Unfortunately, the recent revision of the Bankruptcy Act eliminates this particular provision, and the Act is now phrased in terms of "property."⁵⁶ If the Restatement is used in interpreting the new Act, the principal of the trust will be exempt. The federal courts hopefully will give a broader inter-

and the Creditor in Inter Vivos Trusts, 17 U. CIN. L. REV. 1 (1948); Schuyler, *Revocable Trusts—Spouses, Creditors and Other Predators*, 8 INST. ON EST. PLAN. ¶¶ 74.1300-.1304 (1974).

51. RESTATEMENT (SECOND) OF TRUSTS § 330 comment o (1959). Courts have tended to follow and cite the Restatement. *See, e.g.*, *Murphy v. C.I.T. Corp.*, 347 Pa. 591, 33 A.2d 16 (1943).

52. The leading case is *Jones v. Clifton*, 101 U.S. 225 (1879).

53. RESTATEMENT (SECOND) OF TRUSTS § 156(2) (1959). For an illustrative case, see *Ware v. Gulda*, 331 Mass. 68, 117 N.E.2d 137 (1954).

54. RESTATEMENT OF PROPERTY § 328 (1940). A recent case applying the rule is *United States v. Ritter*, 558 F.2d 1165 (4th Cir. 1977). *See Note, Trusts—Powers—Rights of Subsequent Creditors in Corpus of Trust Fund Set Up by Debtor Reserving Life Estate and General Power of Appointment*, 19 MINN. L. REV. 328 (1935).

55. Bankruptcy Act of 1898, ch. 541, § 70(a)(3), 30 Stat. 544, 564 (1898) (codified at 11 U.S.C. § 110(a)(3) (1976) (repealed 1978)).

56. 11 U.S.C. § 541 (Supp. V 1981).

pretation.⁵⁷ But on the settlor's death, the bankruptcy remedy is worthless anyway. Bankruptcy is not available against a decedent. Moreover, the power to revoke is not exercisable after the settlor's death.

With death of the settlor, his life income interest (which is available to creditors despite any spendthrift clause) and his power to revoke end. The usual clause reserving the power to revoke requires that it be exercised by an instrument executed by the settlor and delivered to the trustee during the settlor's lifetime; it cannot be exercised by will.⁵⁸ The trust assets do not become part of the probate estate. Ownership has been effectively shifted from the decedent.

One theory for reaching the revocable trust after death is simply that such a trust remains the property of the settlor. The law should give effect to realities.⁵⁹ The difficulty is that a court may accept the argument of the beneficiaries and the trustee that if the settlor's interest is property during his lifetime, it ceases at death, just as a life estate ceases. How can a creditor meet this argument? One response might be that if there is no completed transfer of the beneficial interest during the settlor's lifetime, the transfer takes place at death. Since it results in making insolvent the probate estate available for creditors, the transfer at death is a fraudulent conveyance which the personal representative can sue to set aside. The law does treat a revocable trust as effective during lifetime so far as the need to comply with the statute of wills is concerned. But the same trust is treated as not effective until death for most other purposes: inclusion in the gross taxable estate for federal estate tax purposes,⁶⁰ computation of the beginning of the period of the Rule Against Perpetuities,⁶¹ and inclusion in the augmented estate available for the elective share under the Uniform Probate Code⁶² and similar statutory schemes to protect the disinherited spouse.⁶³ If the revocable trust is realistically viewed as a transfer at death, and it leaves the assets available for creditors through the probate process inadequate to meet claims, it should be a transfer in fraud of existing creditors under the Uniform Fraudulent Conveyance Act, which is in force in twenty-six

57. The relevant section now provides: "Property of the estate does not include any power that the debtor may only exercise solely for the benefit of an entity other than the debtor." *Id.* The clear implication is that "property" does include a power to revoke.

58. RESTATEMENT (SECOND) OF TRUSTS § 330 comment j (1959). *See* Connecticut Gen. Life Ins. Co. v. First Nat'l Bank of Minneapolis, 262 N.W.2d 403 (Minn. 1977).

59. As Mr. Justice Brandeis put it, "[T]he logic of words should yield to the logic of realities." *Di Santo v. Pennsylvania*, 273 U.S. 34, 43 (1927).

60. I.R.C. § 2038 (1976).

61. *See* A. SIMES & L. SMITH, *THE LAW OF FUTURE INTERESTS* § 1252 (2d ed. 1956). *See also* *Cook v. Horn*, 214 Ga. 289, 104 S.E.2d 461 (1958).

62. UNIF. PROBATE CODE § 2-202 (1975) (inclusion in "augmented estate").

63. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(1)(E) (McKinney 1981).

states.⁶⁴ Moreover, under many probate codes,⁶⁵ including the Uniform Probate Code,⁶⁶ the personal representative has the exclusive right to recover this property to the extent necessary to pay unsecured debts of the decedent. Hence troublesome questions about how and when the claimant should proceed to establish his claim are avoided by channeling all claims through the regular administration process.

If two cases can be considered a modern trend, a new judicial rule may be developing. In *State Street Bank and Trust Co. v. Reiser*,⁶⁷ a 1979 case, the Massachusetts Appeals Court allowed an unsecured creditor to reach assets in a revocable living trust after the death of a settlor whose probate estate was insufficient to satisfy the creditor's claim. The court pointed out the Restatement position that creditors can reach property transferred in trust if the settlor reserves a life estate and a general power of appointment and if the probate estate is insufficient to meet the claims of creditors.⁶⁸ Justice Kass reasoned:

There has developed, however, another thread of decisions which takes cognizance of, and gives effect to, the power which a person exercises in life over property. When a person has a general power of appointment, exercisable by will or by deed, and exercises that power, any property so appointed is, in equity, considered part of his assets and becomes available to his creditors in preference to the claims of his voluntary appointees or legatees. . . . These decisions rest on the theory that as to property which a person could appoint to himself or his executors, the property could have been devoted to the payment of debts and, therefore, creditors have an equitable right to reach that property. It taxes the imagination to invent reasons why the same analysis and policy should not apply to trust property over which the settlor retains dominion at least as great as a power of appointment. The Restatement of Property has, in fact, translated the doctrine applicable to powers of appointment to trusts: "When a person transfers property in trust for himself for life and reserves a general power to appoint the remainder and creates no other beneficial interests which he cannot destroy by exercising the power, the property, though the power is unexercised, can be subjected to the payment of the claims of creditors of such person and claims against his estate to whatever extent other available property is insufficient for that purpose." . . .

. . . It is excessive obeisance to the form in which property is held to prevent creditors from reaching property placed in trust under such terms.⁶⁹

64. UNIF. FRAUDULENT CONVEYANCE ACT §§ 1-14 (1918).

65. See 2 BANCROFT'S PROBATE PRACTICE § 475 (1950).

66. UNIF. PROBATE CODE § 3-710 (1975).

67. 389 N.E.2d 768 (Mass. App. Ct. 1979).

68. *Id.* at 770.

69. *Id.* at 771 (quoting RESTATEMENT OF PROPERTY § 328 (1940)).

The Supreme Court of Oregon reached a similar result where the debtors had transferred all of their assets into a revocable living trust.⁷⁰ Although the plaintiff's claim for wages for nursing services was allowed in probate, there were no assets in the probate estate. The plaintiff, who had been appointed personal representative, brought a creditor's suit in her individual capacity and as personal representative against the trustee and the trust beneficiaries. Her theory was that creation of the trust was a fraudulent conveyance.⁷¹ Although the court could have relied on an old Oregon statute,⁷² it chose instead to use the analogy of the life-estate-general-power-of-appointment cases; like the Massachusetts court, the Oregon court saw no real difference between the power to revoke and a power to appoint.⁷³

The inadequacy of common law doctrine is demonstrated by a number of state statutes intended to provide creditors of the settlor of a revocable trust with a remedy against the trust assets. These statutes are basically of two types. One is patterned on a 1487 English statute,⁷⁴ while the other is based on a New York statute, originally enacted as part of the 1830 Revised Statutes of New York.⁷⁵

Unfortunately, the existing statutes fail to deal expressly with the problem of the creditor after the holder of the power of revocation dies. The result is that a court may construe a statute as applicable during the life of the settlor, but not after death when the power is no longer exercisable.⁷⁶ Even the modern revision of the Wisconsin statute,⁷⁷ which I plead guilty to

70. *Johnson v. Commercial Bank*, 284 Or. 675, 588 P.2d 1096 (1978).

71. *Id.* at 679, 588 P.2d at 1098.

72. OR. REV. STAT. § 95.060 (1981).

73. 284 Or. at 681, 588 P.2d at 1099.

74. 3 Hen. 8, ch. 4 (1487). It is only fitting that an English statute enacted in 1487 be cited in an article which is part of a symposium dedicated to Professor William Fratcher. His extensive knowledge of English legal history and his love for the old statutes that make up part of the lore of ancient English land law are well known to his professional friends and former students. Henry's statute provided: "All deeds of gift of goods and chattels made or to be made of trust, to the use of that person or persons that made the same deed of gift be void and of none effect." American statutes based on this English model are listed in 2 A. SCOTT, *supra* note 46, § 156 n.5.

75. The section, which is now repealed, read, "Where the grantor in a conveyance reserves to himself for his own benefit, an absolute power of revocation, he is thereafter deemed still to be the absolute owner of the estate conveyed, so far as the rights of his creditors and purchasers are concerned." N.Y. REAL PROP. LAW § 163 (1964) (current version at N.Y. EST. POWERS & TRUSTS LAW § 10-10.6 (McKinney 1967)). Statutes based on this New York prototype are collected in 4 A. SCOTT, *supra* note 46, § 330.12 n.8.

76. *See, e.g., Schofield v. Cleveland Trust Co.*, 135 Ohio St. 328, 21 N.E.2d 119 (1939) (based in part on wording of Ohio statute).

77. WIS. STAT. ANN. § 701.07(3) (West 1981) provides:

If a settlor retains a power to revoke, modify or terminate which is exercisable in his own favor, except when such power is exercisable only in

drafting, is not explicit on this point. Because the creditor can reach the property in a revocable trust to the extent that the property "is subject to such power," an argument can be made that after death of the settlor the trust is no longer subject to the power and hence is immune from creditors. This was certainly not the intent behind such a provision, and a court should not yield to so technical an argument in modern times.

D. *Multiple-Party Bank Accounts*

Three forms of bank accounts have been utilized to shift ownership of the account at death from the depositor to another person or persons:

(1) The account may be opened in the name of the depositor "in trust for" another person. These are often called Totten trusts after the early New York case in which such accounts were held permissible as will substitutes.⁷⁸ The Restatement labels these "tentative" trusts;⁷⁹ I call them "maybe" trusts. Depending on what the evidence proves regarding the depositor's intent in creating the form of the account, there may be no trust at all, a revocable trust, or an irrevocable trust.⁸⁰ Most courts resort to a presumption that such an account constitutes a revocable trust.

(2) The account may be opened in the names of the depositor and one or more additional persons. The usual form is "A or B," often adding "or the survivor." Such accounts are called "joint" and are a frequent source of litigation.⁸¹ They may be created merely for the convenience of the depositor, to allow the other party to withdraw funds as agent to pay bills for the depositor. Or they may be intended to create a true joint tenancy with each party presently owning part of the account with a right of survivorship in the whole account. Or the depositor may intend to create no ownership interest in the other party during his lifetime but to shift ownership to the other party if the latter survives the depositor.

(3) The account may be an obvious will substitute, opened in the name of the depositor but payable on death to another person or persons. When this P.O.D. account, patterned on the same form of registration of ownership as United States Savings Bonds, was first challenged in litigation, most courts held the account testamentary and required the balance to be

conjunction with a person having a substantial adverse interest, the trust property to the extent it is subject to such power is also subject to the claim of a creditor of the settlor. This subsection shall not apply to trust property to the extent it is exempt from claims of creditors under other statutes.

78. *In re Totten*, 179 N.Y. 112, 71 N.E. 748 (1904).

79. RESTATEMENT (SECOND) OF TRUSTS § 58 comment a (1959).

80. *See generally* Comment, *Missouri's Totten Trust Doctrine*, 48 MO. L. REV. 495 (1983).

81. Because the literature and case law relating to joint accounts is so voluminous, with the law differing from state to state, no attempt is made here to collect the authorities!

included in the probate estate.⁸² More recently, courts have permitted this form of account to bypass probate.⁸³ Article 6 of the Uniform Probate Code, which has been adopted in several states that have rejected other parts of the Code, expressly authorizes creation of accounts in this form.⁸⁴

In the absence of statute, what are the rights of the creditors of the original depositor after his death? As to Totten trusts, creditors can reach the balance in the account unless the trust is held to have been irrevocable from the creation of the account.⁸⁵ P.O.D. accounts are too new to have been the subject of much creditor litigation.⁸⁶ Joint bank accounts pose a more difficult problem.

The theory on which survivorship in a joint bank account is based varies from state to state and may, in turn, affect rights of creditors. Some states view the joint bank account as a form of joint tenancy. In such states the traditional concept that creditors of a deceased joint tenant cannot pursue property owned by another joint tenant by reason of survivorship may carry over to joint accounts.⁸⁷ In other states, the theory may rest in contract. The deposit agreement with the bank creates a contractual right in the survivor, which may enable the creditors of a deceased depositor to fare better. At death, the deceased depositor's interest passes to the survivor; theoretically, at that point the estate becomes insolvent and the transfer is fraudulent as to creditors. A similar argument may be made in states where the courts base survivorship solely on statutes that protect banks in making payment to the survivor on the joint account.

The Uniform Probate Code expressly protects creditors in all three forms of accounts. Section 6-107 provides:

82. See, e.g., *Tucker v. Simrow*, 248 Wis. 143, 21 N.W.2d 252 (1946).

83. See, e.g., *Virginia Nat'l Bank v. Harris*, 220 Va. 336, 257 S.E.2d 867 (1979) (treating provision in banking code as creating exception to statute of wills).

84. UNIF. PROBATE CODE §§ 6-101 to 6-113, 6-201 (1975).

85. Creditors of the original depositor can reach the balance in the account at death under the Restatement view. RESTATEMENT (SECOND) OF TRUSTS § 58 comment d (1959). See *In re Reich*, 146 Misc. 616, 262 N.Y.S. 623 (1933); see also *In re Estate of Kovalyshin*, 136 N.J. Super. 40, 343 A.2d 852 (1975) (creditor of insolvent estate allowed to reach "Dacey" type trust of mutual funds on analogy to Totten trust rule).

86. In his excellent article on P.O.D. accounts, Professor McGovern reasons that creditors of the depositor should be able to recover the balance at death. McGovern, *The Payable on Death Account and Other Will Substitutes*, 67 NW. U.L. REV. 7, 26 (1972).

87. A typical case is *Casagrande v. Donahue*, 178 Mont. 479, 585 P.2d 1286 (1978). The Montana Supreme Court treated the creation of a joint bank account, not the death of the depositor, as the time at which the fraudulent nature of the transfer was to be tested. Since death, not the creation of the joint account, put the property out of reach of the creditor, the court refused to apply a statute governing fraudulent conveyances even though the probate estate had no assets to pay even funeral and burial expenses. *Id.* at 486, 585 P.2d at 1290.

No multiple-party account will be effective against an estate of a deceased party to transfer to a survivor sums needed to pay debts, taxes, and expenses of administration, including statutory allowances to the surviving spouse, minor children and dependent children, if other assets of the estate are insufficient. A surviving party, P.O.D. payee, or beneficiary who receives payment from a multiple-party account after the death of a deceased party shall be liable to account to his personal representative for amounts the decedent owned beneficially immediately before his death to the extent necessary to discharge the claims and charges mentioned above remaining unpaid after application of the decedent's estate. No proceeding to assert this liability shall be commenced unless the personal representative has received a written demand by a surviving spouse, a creditor or one acting for a minor or dependent child of the decedent, and no proceeding shall be commenced later than two years following the death of the decedent. Sums recovered by the personal representative shall be administered as part of the decedent's estate. This section shall not affect the right of a financial institution to make payment on multiple-party accounts according to the terms thereof, or make it liable to the estate of a deceased party unless before payment the institution has been served with process in a proceeding by the personal representative.⁸⁸

Wider adoption of this part of the Code will at least settle any doubt as to the rights of a deceased party's creditors to such accounts.

E. *Contractual Provisions for Payment of Funds or Transfer of Property at Death*

The average middle-class American has three principal forms of wealth: a home (usually owned in joint tenancy with the spouse), a life insurance policy payable to named beneficiaries, and benefits under a pension or profit-sharing plan which typically provides for payment of benefits at the death of the employee to a beneficiary or beneficiaries designated by the employee. All three forms of wealth bypass probate.

Assume a debtor dies. He owned at death life insurance payable to his spouse. He also had death benefits under a qualified retirement plan to which he and his employer both contributed; the benefits also are payable to his spouse. His probate estate is insufficient to pay claims. Can creditors, or the personal representative suing on their behalf, reach either of these items?

Life insurance has always enjoyed a special position. Except for challenges to life insurance trusts by disappointed spouses,⁸⁹ life insurance has not been questioned as testamentary. Moreover, because of the early property approach to life insurance, an approach which treated the named ben-

88. UNIF. PROBATE CODE § 6-107 (1975).

89. *See, e.g.*, *Gordon v. Portland Trust Bank*, 201 Or. 648, 271 P.2d 633 (1954) (trust held nontestamentary).

eficiary as owner of an interest in the property even during the insured's lifetime, the beneficiary has been preferred over creditors of the insured at the latter's death.⁹⁰ There is, of course, no problem if the insurance was assigned to the creditor as security or if the policy is payable to the estate. The preference for the named beneficiary has sometimes been justified on the ground of protection of the widow and children.⁹¹ But this is, in reality, an exemption from creditors' claims. Creation of such an exemption should be for the legislature, not the courts, and should have a dollar limit rather than be open-ended.⁹² Where a separation agreement provides that life insurance policies shall remain payable to the divorced spouse and the insured wrongfully changes the beneficiary designation, the divorced spouse has an ownership interest in the proceeds, not just a general claim as a creditor. In such a case the divorced spouse may get a constructive trust imposed on the proceeds in the hands of the beneficiary, or the insurer if the proceeds have not been paid over.⁹³ Hence the normal exemption of proceeds from creditors' claims is inapplicable.

Like life insurance, retirement plan benefits seem to have a preferred position in American law. They have special tax advantages, if the plan is qualified. ERISA⁹⁴ was enacted to assure protection for the employee's interest; among other provisions, it mandates that an employee's interest must be non-transferable and hence exempt from creditors.⁹⁵ Similar provisions are found in many state government employee retirement statutes,⁹⁶ and general statutory exemptions for private pension and retirement plans exist

90. 2A J. APPLEMAN, *INSURANCE LAW AND PRACTICE* §§ 1341-1352 (1966); 5 R. ANDERSON, *COUCH CYCLOPEDIA ON INSURANCE LAW* §§ 29:113-164 (2d ed. 1960); W. VANCE, *INSURANCE* §§ 122, 124 (3d ed. 1951).

91. See 2A J. APPLEMAN, *supra* note 90, §§ 1341-1342.

92. Existing statutes often exempt insurance proceeds but have no dollar limit. See, e.g., ARIZ. REV. STAT. ANN. § 20-1131 (1975). See also R. ANDERSON, *supra* note 90, § 29:117.

93. See *McKissick v. McKissick*, 93 Nev. 139, 560 P.2d 1366 (1977); *Simonds v. Simonds*, 45 N.Y.2d 233, 380 N.E.2d 189, 408 N.Y.S.2d 359 (1978); *Richards v. Richards*, 58 Wis. 2d 290, 206 N.W.2d 134 (1973). Unfortunately, servicemen's group life insurance cannot be subjected to such a constructive trust because of the federal preemption doctrine. *Ridgway v. Ridgway*, 454 U.S. 46 (1981).

94. Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1381 (1976).

95. 29 U.S.C. § 1056(d)(1) (1976). A provision in the Internal Revenue Code contains a comparable requirement in order for the plan to qualify for preferred tax treatment. See I.R.C. § 401(a)(13) (1976). Although the statutes only require that benefits under the plan "may not be assigned or alienated," the regulations concerning the comparable tax provision interpret such wording to include a spend-thrift clause. See 26 C.F.R. § 1.401(a)-13(b)(1) (1982).

96. See, e.g., ARIZ. REV. STAT. ANN. §§ 38-781.16C, -781.22 (1974); CAL. GOV'T CODE §§ 21201 (West 1980).

in some states.⁹⁷ Courts usually treat claims for alimony and support as exceptions to such statutes.⁹⁸ Does the same exemption extend to a spouse or other person acquiring contractual benefits as a result of the employee's death? The benefits may be payable because of death before retirement or because the employee at retirement elected a joint and survivor annuity or an annuity with a guaranteed number of years. In either case, a third party beneficiary acquires plan payments by reason of the contract, and death shifts benefits from the deceased employee to the beneficiary designated by the decedent. Whether creditors of the deceased employee should be able to reach those benefits is a policy issue. Usually, the family of the employee is within the scope of any applicable exemption statute.

Contracts may shift other kinds of ownership interests at death. Suppose a father sells a business, or a farm or ranch, to a son on a contract providing that the son will pay an agreed price in installments. The contract further provides that either (1) on the death of the father any balance then owing on the contract will be deemed cancelled and full title will vest in the son, a deed or instrument of conveyance having been placed in escrow to complete the transfer of title; or (2) that on death of the father all future installments of the purchase price shall be paid to the mother if then surviving, and if not, or in any event upon her death, to all of the children equally. Although in the absence of a statute courts have divided in deciding whether such a provision is testamentary, the modern trend is to uphold the contract and avoid probate of the assets which are transferred at death under the contract.⁹⁹ No doubt the business context of many of these contracts has influenced the courts.

Section 6-201 of the Uniform Probate Code was designed to assure the nontestamentary nature of these various transactions. It provides:

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

(1) that money or other benefits theretofore due to, controlled or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently;

(2) that any money due or to become due under the instru-

97. See, e.g., WIS. STAT. ANN. § 815.18(31) (West Supp. 1982-1983). See generally Vukowich, *Debtors' Exemption Rights*, 62 GEO. L.J. 779, 822-24 (1974).

98. Cases are collected in 1979 WIS. L. REV. 277, 280 n.14. Courts have treated support claims as an implied exception to the ERISA anti-assignment statute. See *A.T.&T. v. Merry*, 592 F.2d 118 (2d Cir. 1979); *Senco of Florida, Inc. v. Clark*, 473 F. Supp. 902 (M.D. Fla. 1979).

99. See, e.g., *Valenzuela v. Anchonda*, 22 Ariz. App. 332, 527 P.2d 109 (1974).

ment shall cease to be payable in event of the death of the promisee or the promisor before payment or demand; or

(3) 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, including a will, executed at the same time as the instrument or subsequently.

(b) Nothing in this section limits the right of creditors under other laws of this state.¹⁰⁰

The issue is what rights subsection (b) preserves. Note that the subsection does not itself purport to create rights. What subsection (a) does, however, is to eliminate those assets from the probate estate where legal process for presenting and paying claims is provided. By another section, the Code bars levy of execution on estate assets but not on nonprobate assets.¹⁰¹ But if prior to the debtor's death a creditor has not reduced his claim to judgment, whom can he sue? Only the personal representative, and the judgment would be against the representative in his representative capacity. How could it then be collected out of nonprobate assets? What "other laws" confer rights on creditors? The Code provides no answers.

III. CONCLUSION

There are two options. One is to do nothing and leave the law in its present uncertain and unsatisfactory state, in hope that courts will eventually work out a theory along the lines suggested in this Article: that effect should be given to the realities of nonprobate arrangements rather than to technical property doctrine; that realistically these arrangements shift economic benefits at death and a transfer therefore takes effect at that time; and that any such transfer is necessarily fraudulent as to creditors if the probate estate is insufficient to meet their claims.

The other option is to construct and enact a statutory solution along the lines of section 6-107 of the Uniform Probate Code, with a delineation of nonprobate assets which should be available to the personal representative to satisfy presented claims if estate assets are insufficient. This would require appointment of a personal representative even if there are no probate assets to administer. In this latter case the lack of probate assets to pay administration expenses means that these in turn must be recovered from nonprobate assets. The statute should include either some system for equitable apportionment among recipients of nonprobate assets or a statutory scheme like abatement to determine the order in which nonprobate assets can be reached.

Joint tenancies pose special problems, because the original contribution for the purchase of the property may have come from the decedent, from the surviving joint tenant, or partly from each. Whether to treat the transfer at death as a transfer of a half interest or of the interest attributable

100. UNIF. PROBATE CODE § 6-201 (1975).

101. *Id.* § 3-812.

to the decedent's contribution is the same issue involved in estate taxation. There is much to be said for the simple rule that a transfer at death involves in reality a half interest (or the appropriate fraction if there are more than two joint tenants) regardless of contribution, because that is the interest the creditor could reach immediately prior to the death of the debtor, unless the joint tenancy itself was a fraudulent conveyance.

The purpose of this Article has been to call attention to what I perceive as a basic problem in the growth of nonprobate arrangements: the removal of assets from the administration process designed to provide a remedy for creditors at the debtor's death. I have also suggested what I believe is a viable theory by which creditors can pursue such nonprobate assets, despite existing precedent which often seems to limit recovery to the probate estate. Finally, I have advanced the basic outline of a possible statute, although I confess that I am not optimistic about support for such a statute. My good friend Bill Fratcher, whom we honor with this issue, would no doubt remind me that the problems are ancient and will still be with us long into the future.