

D R A F T

FOR APPROVAL

**AMENDMENTS TO UNIFORM PROBATE CODE BY ADDING
SECTION 6-102 AND DELETING SECTIONS 6-215 AND 6-309(b)
AND TO MAKE CONFORMING CHANGES IN FREE STANDING
ACTS DERIVED FROM UNIFORM PROBATE CODE ARTICLE 6**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-SEVENTH YEAR
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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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**DRAFTING COMMITTEE TO ADD
UNIFORM PROBATE CODE SECTION 6-102**

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1 probate's tradition of protecting decedents' creditors that could come to be viewed
2 as unwanted fetters on owner control of succession if creditor protection against
3 transfers at death were to disappear.

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

13 Moreover, the proposed addition corrects a UPC anomaly of creditor
14 protection against probate avoidance by a bank's CD naming a p.o.d. beneficiary,
15 and lack of similar protection when probate avoidance occurs via a TOD security
16 registration of some other investment form, or by use of a funded revocable trust.

17 Addition of new Section 6-102 to the Uniform Probate Code would expand
18 the classes of nonprobate transferees subject to remedies available to insolvent
19 decedents' estates to include beneficiaries of funded revocable trusts and recipients
20 (including trustees) of TOD registration benefits. The remedies proposed are
21 virtually identical to those provided since 1969 by UPC in what is now Section
22 6-215. The new section (Section 6-102 in the Uniform Probate Code and Section
23 102 in the Uniform Nonprobate Transfers at Death Act) would replace Sections
24 6-215 and 215 in these Conference products. Section 15 (Section 215) of the free-
25 standing Multiple-Person Accounts Act and Section 9 (Section 309) of the TOD
26 Security Registration Act also would be revised to conform to Section 6-102.

1 **AMENDMENTS TO UNIFORM PROBATE CODE**
2 **BY ADDING SECTION 6-102 AND DELETING**
3 **SECTIONS 6-215 AND 6-309(b) AND TO MAKE**
4 **CONFORMING CHANGES IN FREE STANDING ACTS**
5 **DERIVED FROM UNIFORM PROBATE CODE ARTICLE 6**

6 **NEW UNIFORM PROBATE CODE SECTION 6-102 AND**
7 **NONPROBATE TRANSFERS ON DEATH ACT SECTION 102**

8 **SECTION 6-102. LIABILITY OF NONPROBATE TRANSFEREES FOR**
9 **CREDITOR CLAIMS AND STATUTORY ALLOWANCES.**

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

16 (b) Except as otherwise provided by statute, a transferee of a nonprobate
17 transfer is subject to liability to the decedent’s probate estate for allowed claims
18 against the decedent’s probate estate and statutory allowances to the decedent’s
19 spouse and children to the extent the decedent’s probate estate is insufficient to
20 satisfy those claims and allowances. The liability of a nonprobate transferee may
21 not exceed the value of nonprobate transfers received or controlled by that
22 transferee.

1 (c) Nonprobate transferees are liable for the insufficiency described in
2 subsection (b) in the following order:

3 (1) as provided in the decedent's will or any other governing instrument;

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

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

9 (d) Unless otherwise provided by the trust instrument, interests of
10 beneficiaries in all trusts incurring liabilities under this section shall abate as
11 necessary to satisfy the liability, as if all of the trust instruments were a single will
12 and the interests were devised under it.

13 (e) A provision made in one instrument may direct the apportionment of the
14 liability among the nonprobate transferees taking under that or any other governing
15 instrument. If a provision in one instrument conflicts with a provision in another,
16 the later one prevails.

17 (f) Upon due notice to a nonprobate transferee, the liability imposed by this
18 section is enforceable in proceedings in this State, wherever the transferee is
19 located.

20 (g) A proceeding under this section may not be commenced unless the
21 personal representative of the decedent's estate has received from the surviving
22 spouse or a child to the extent that statutory allowances are affected or a creditor, a

1 written demand for the proceeding. If the personal representative declines or fails
2 to commence a proceeding after demand, a person making demand may commence
3 the proceeding in the name of the decedent's estate, at the expense of the person
4 making the demand and not of the estate. A personal representative who declines
5 in good faith to commence a requested proceeding incurs no personal liability for
6 declining.

7 (h) A proceeding under this section must be commenced within one year
8 after the decedent's death, but a proceeding on behalf of a creditor whose claim was
9 allowed after proceedings challenging disallowance of the claim may be
10 commenced within 60 days after final allowance of the claim.

11 (i) Unless a written notice asserting that a decedent's probate estate is
12 insufficient to pay allowed claims and statutory allowances has been received from
13 the decedent's personal representative, the following rules apply:

14 (1) Payment or delivery of assets by a financial institution, registrar, or
15 other obligor, to a nonprobate transferee in accordance with the terms of the
16 governing instrument controlling the transfer releases the obligor from all claims
17 for amounts paid or assets delivered.

18 (2) A trustee receiving or controlling a nonprobate transfer is released
19 from liability under this section on any assets distributed to the trust's beneficiaries.
20 Each beneficiary to the extent of the distribution received becomes liable for the
21 amount of the trustee's liability attributable to that asset imposed by subsections (b)
22 and (c).

1 **Comment**

2 1. Added to the Code in 199__, this section extends protections for family
3 exemption beneficiaries and creditors of decedents to new categories of non-
4 probate transferees of decedents. However, unlike conventional and cumbersome
5 probate protections, the remedy contemplated by this section is to enforce a duty
6 placed on nonprobate transferees to contribute as necessary to satisfy family
7 exemptions and duly allowed creditors' claims remaining unpaid because of
8 inadequate probate estate values. The maximum liability for a single nonprobate
9 transferee is the value of the transfer. Values are determined under subsection (b)
10 as of the time when the benefits are "received or controlled by the transferee." This
11 would be the date of the decedent's death for nonprobate transfers via a revocable
12 trust, and date of receipt for other nonprobate transfers. Two or more transferees
13 are severally liable for proportions of the liability based on the value of transfers
14 received by each.

15 Original UPC included Section 6-107 and its 1989 sequel, Section 6-215.
16 Both were designed to extend probate protections for exemption beneficiaries and
17 unsecured creditors of insolvent estates to values in multiple-name accounts in
18 financial institutions passing outside probate at death. Assets passing at death by
19 revocable trust or TOD asset registration agreements were not covered. Original
20 Section 6-201(b) and Section 6-101(b) as revised in 1989 mention creditors rights
21 against nonprobate transfers at death, but provide only against invalidation of other
22 possible remedies by implication from UPC's failure to deal with the problem.

23 2. New Section 6-102 replaces Section 6-215 (in the Code, but not its
24 counterpart in the free-standing Multiple-Person Accounts Act) with coverage
25 designed to extend the principle of Section 6-215 to transfers at death by revocable
26 trust, TOD security registration agreements and similar death benefits not insulated
27 from decedents' creditors by other legislation. The initial clause of subsection (b),
28 "Unless otherwise provided by statute," is designed to prevent the section from
29 colliding with existing legislation protecting death benefits in life insurance,
30 retirement plans and IRAs from claims by creditors.

31 3. Subsection (a)(1)'s definition of "nonprobate transfer" reaches revocable
32 transfers by a decedent; it does not apply to a transfer at death incident to a
33 decedent's exercise or non-exercise of a presently exercisable general power of
34 appointment created by another person. The drafters decided against creating a
35 remedy for exemption beneficiaries and decedents' creditors based on the idea that
36 a presently exercisable general power of appointment is the equivalent of ownership
37 even though that concept is accepted in the Code's augmented estate provisions
38 dealing with intentional disinheritance of a surviving spouse. Spousal protection
39 against disinheritance by the other spouse supports the institution of marriage;
40 creditors are better able to fend for themselves than financially disadvantaged mates

1 of inconsiderate persons likely to disinherit their spouse. Also, a presently
2 exercisable general power of appointment created by another person is commonly
3 viewed as a provision in the trust creator’s instrument designed to provide
4 flexibility in the estate plan rather than as a gift to the donee. Also, creditors of a
5 deceased donee of such a power are likely to confront spendthrift trust provisions
6 designed to protect trust assets from the reach of creditors of beneficiaries, meaning
7 that they may be without recourse whether or not a general power is viewed as
8 ownership for purposes of creditors’ rights.

9 4. The required ability to revoke or otherwise prevent a nonprobate transfer
10 at death that is vital to application of subsection (a)(1) is described as a “power,” a
11 word intended by the drafters to signify legal authority rather than capacity or
12 practical ability. This corresponds to the definition in Code Section 2-201(6).

13 5. A feature of replaced Section 6-215 that was clarified by 1991 technical
14 amendment protects a survivor beneficiary of a joint account from liability to the
15 probate estate of a deceased co-depositor for funds in the account owned by the
16 survivor prior to decedent’s death. The proposed replacement section continues
17 this protection by language in subsection (a)(1), *i.e.*, “valid transfer effective at
18 death . . . by a transferor . . . [who] had power, acting alone, to prevent the transfer
19 by revocation or withdrawal and instead use the property for the benefit of the
20 transferor . . . Section 6-211 and related sections of the Code make it clear that
21 parties to a joint and survivor account separately own values in the account in
22 proportion to net contributions. Hence, a surviving joint account depositor who had
23 contributed to the balance on deposit prior to the death of the other party is subject
24 to the remedies described in this section only to the extent of new account values
25 gained through survival of the decedent.

26 6. Transferees of nonprobate transfers subject to the possible liability
27 described in subsection (b) include trustees of revocable trusts to the extent of
28 assets transferred to the trust before death that were subject to the decedent’s sole
29 power to revoke. Such assets would be valued as of the date of death when the
30 trustee gains full control. The trustee of an irrevocable trust, or of a trust that may
31 be revoked only by the settlor and another person or otherwise fails to meet the
32 conditions prescribe by subsection (a)(1), might receive a transfer at death by TOD
33 registration. Such a transfer would involve a possibility of trust liability based on
34 the value of the TOD transfer as of the time of receipt as provided in subsection (b).
35 Liability under this section incurred by a trustee is a trust liability for which the
36 trustee incurs no personal liability other than as provided by UPC Section 3-808(b).

37 7. Trusts and non-trust recipients of nonprobate transfers incur liability in
38 the order described in subsection (c). Note that either a revocable or an irrevocable
39 trust might be designated devisee of a pour-over provision that would make the

1 trust the “principal non-probate instrument in the decedent’s estate plan” and, so,
2 liable under subsection (c)(2) ahead of other nonprobate transferees to the extent of
3 values acquired by a transfer at death as described in subsection (a)(1); *i.e.*, a TOD
4 registration benefit payable to the trust in the case of an irrevocable trust. Note,
5 too, that nothing would pass to the receptacle trust by the pour-over devise if all
6 probate estate assets are used to discharge exemptions and claims. Still, the fact
7 that the trust was designated to receive a pour-over devise signals that the trust
8 probably includes the equivalent of a residuary clause measuring benefits by
9 available assets and signaling probable intention of the settlor that residuary
10 benefits should abate before other trust gifts if necessary because of settlor’s debts.

11 8. The abatement order among classes of beneficiaries of trusts specified by
12 subsection (d) applies to all trusts subject to liability to the extent of nonprobate
13 transfers received or administered whether or not the trust instrument is the
14 principal nonprobate instrument in the decedent’s estate plan. The Drafting
15 Committee decided against use in subsection (d) of a reference to UPC’s abatement
16 section, Section 3-902, in part because that section deals with intestate and partially
17 intestate estates as well as estates governed by wills. Note, too, that trusts for
18 successive beneficiaries also will be governed by income and principal accounting
19 principles that will serve to resolve some abatement problems.

20 9. The exclusion of “a survivorship interest in a joint tenancy of real estate”
21 from subsection (a)’s definition of “nonprobate transfer” ignores that some States
22 (*e.g.*, South Dakota) presently enable an insolvent decedent’s creditors to reach the
23 share the decedent could have received prior to death by severance of the joint
24 tenancy. The law in most other States is to the contrary, meaning that title
25 examiners and others would be affected if the new section were enacted without the
26 exclusion. Moreover, real estate joint tenancies have served for generations to keep
27 the share of a couple’s real estate owned by the first to die out of probate and away
28 from estate creditors. This familiar arrangement needs not be disturbed incident to
29 expanding protections of decedents’ creditors against newly recognized nonprobate
30 transfers at death.

31 10. Subsection (e) recognizes that a number of separate instruments and
32 transactions, executed at different times and with or without internal references
33 linking them to other documents, may constitute the paperwork describing
34 succession to a decedent’s assets by probate and nonprobate methods. By
35 authorizing control of abatement among gifts made by various transfers at death by
36 the last executed instrument, the subsection permits a simple, last-minute override
37 of earlier directions concerning a decedent’s wishes regarding priorities among
38 successors. Thus, a will or trust amendment can correct or avoid liquidity and
39 abatement problems discovered prior to death. The expression “block buster will”
40 was coined by estate planners in the mid-70’s to signal interest in legislation

1 enabling a later will to override death benefits by any nonprobate transfer device.
2 This subsection meets some of those concerns.

3 11. Subsection (f) builds on the principle employed in UPC’s Augmented
4 Estate Elective Share remedy (UPC Sections 2-201 – 2-214) in relation to
5 nonprobate transfers made to persons in other States, possibly by transactions
6 governed by laws of other States. The underlying principle is that the law of a
7 decedent’s last domicile should be controlling as to rules of public policy that
8 override the decedent’s power to devise the estate to anyone he or she chooses. The
9 principle is implemented by subjecting donee recipients of the decedent’s largesse
10 to liability under the decedent’s domiciliary law, with the belief that judgments
11 recovered in that State following appropriate due process notice to defendants in
12 other States will be accorded full faith and credit by courts in other States should
13 collection proceedings be necessary.

14 12. The first and third sentences of subsection (g) are identical to sentences
15 now appearing in UPC Section 6-215. The second sentence is new. It reflects
16 sensitivity for the dilemma confronting a probate fiduciary who, acting as required
17 of a fiduciary, concludes that the costs and risks associated with a possible recovery
18 from a nonprobate transferee outweigh the probable advantages to the estate and its
19 claimants. A creditor whose claim has been allowed but remains unsatisfied and
20 whose demand for a proceeding has been turned down by the estate fiduciary may
21 proceed at personal risk in efforts to enforce the estate claim against the nonprobate
22 beneficiary. This is so because the last two sentences of subsection (g) shift the risk
23 of unrecoverable costs from the decedent’s estate to the claimant who undertakes
24 collection efforts on behalf of the decedent’s estate. Any recovery of costs should
25 be used to reimburse the claimant who bore the risk of loss for the proceeding. A
26 p.r. tempted to decline a demand for a proceeding should note that the “good faith”
27 standard of this section must be determined in light of the fiduciary responsibility
28 imposed by UPC Section 3-703.

29 13. Subparagraph (h) meshes with time limits in UPC sections governing
30 allowance and disallowance of claims. See Sections 3-804 and 3-806.

31 14. Subsection (i)(1) is designed to protect issuers of TOD security
32 registrations who make payments or delivery to designated death beneficiaries
33 before receiving notice from the decedent’s probate estate of a probable insolvency.
34 These entities are not “transferees” subject to liability under subsection (b), but they
35 might be subjected to legal expense or criticism if invited to pass values along to
36 beneficiaries in spite of warning notices from estate fiduciaries.

37 Subsection (i)(2) is designed to enable trustees handling nonprobate
38 transfers to distribute trust assets in accordance with trust terms if no warning of

1 probable estate insolvency has been received. Beneficiaries receiving distributions
2 from a trustee take subject to personal liability in the amount and priority of the
3 trustee based on the value distributed.

1 claims of the personal representative or estate of a deceased party provided in
2 Section 6-226 for a financial institution that makes payment in accordance with the
3 terms of the account.

4 **New text of Section 15 (UPC Section 6-215) of Uniform Multiple-Person**
5 **Accounts Act (underlined language indicates variance from UPC Section 6-102**
6 **text):**

7 (a) For the purpose of this section, a “nonprobate transfer” occurs if the last
8 domicile of a depositor whose interest is transferred under Section 6-212 was in this
9 State.

10 (b) A transferee of a nonprobate transfer is subject to liability to the
11 decedent’s probate estate for allowed claims against the decedent’s probate estate
12 and statutory allowances to the decedent’s spouse and children to the extent the
13 decedent’s probate estate is insufficient to satisfy those claims and allowances. The
14 liability of a nonprobate transferee may not exceed the value of nonprobate
15 transfers received by that transferee.

16 (c) Nonprobate transferees are liable for the insufficiency described in
17 subsection (b) in the following order:

18 (1) as provided in the decedent’s will or any other governing instrument;

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

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

2 (d) A provision made in one instrument may direct the apportionment of
3 the liability among the nonprobate transferees taking under that or any other
4 governing instrument. If a provision in one instrument conflicts with a provision in
5 another, the later one prevails.

6 (e) Upon due notice to a nonprobate transferee, the liability imposed by this
7 section is enforceable in proceedings in this State, wherever the transferee is
8 located.

9 (f) A proceeding under this section may not be commenced unless the
10 personal representative of the decedent's estate has received from the surviving
11 spouse or a child to the extent that statutory allowances are affected, or a creditor, a
12 written demand for the proceeding. If the personal representative declines or fails
13 to commence a proceeding after demand, a person making demand may commence
14 the proceeding in the name of the decedent's estate, at the expense of the person
15 making the demand and not of the estate. A personal representative who declines
16 in good faith to commence a requested proceeding incurs no personal liability for
17 declining.

18 (g) A proceeding under this section must be commenced within one year
19 after the decedent's death, but a proceeding on behalf of a creditor whose claim was
20 allowed after proceedings challenging disallowance of the claim may be
21 commenced within 60 days after final allowance of the claim.

1 (h) Unless a written notice asserting that a decedent's estate is insufficient
2 to pay allowed claims and statutory allowances has been received from the
3 decedent's personal representative, a trustee receiving a nonprobate transfer is
4 released from liability under this section on any assets distributed to the trust's
5 beneficiaries. Each beneficiary to the extent of the distribution received becomes
6 liable for the amount of the trustee's liability attributable to that asset imposed by
7 subsections (b) and (c).

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