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

WITH PREFATORY NOTE AND COMMENTS

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DRAFTING COMMITTEE TO ADD
UNIFORM PROBATE CODE SECTION 6-102

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PREFATORY NOTE

Since original approval in 1969, UPC Article VI has recognized and
couraged nonprobate transfers at death, giving particular emphasis to death
benefits built into bank accounts. Probate avoidance through UPC’s treatment of
survivors’ benefits in bank accounts has not contradicted the probate law principle
that family exemptions and decedents’ creditors have priority over successors in
estate distributions. Original UPC Section 6-107 (Section 6-215 in the 1989
revision), expanding case law on so-called “Totten trusts,” creates a qualified right
in fiduciaries of insolvent decedents’ estates to recover contribution from recipients
of bank account death benefits as necessary to satisfy probate exemptions and estate
creditors. The qualification, designed to enable family survivors to avoid or
minimize the need for estate administration by voluntary payment of decedent’s
creditors, conditions the fiduciary’s right to sue on prior receipt of written demand
for the proceeding by an unsatisfied exemption beneficiary or unpaid creditor. Now
enacted in more than 25 States, the arrangement provides a working demonstration
that the probate law principle favoring exemption beneficiaries and decedents’
creditors over estate successors can be applied to nonprobate transfers without
routinely subjecting these transfers to procedural tangles.

Noting recent legislative activity in California, Florida and Missouri
subjecting revocable trusts to claims of decedents’ creditors and the wide popularity
of the Uniform TOD Security Registration Act, JEB/UPC decided that UPC
Section 6-215 should be replaced by a broader version embracing most popular
forms of nonprobate transfers. Several JEB/UPC meetings were devoted to drafting
efforts later turned over to ULC’s special Drafting Committee that was formed to
prepare the proposal for consideration by the Conference after JEB/UPC’s proposal
to treat the matter as a technical amendment to UPC was voted down by the
Executive Committee.

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

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

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

Addition of new Section 6-102 to the Uniform Probate Code would expand
the classes of nonprobate transferees subject to remedies available to insolvent
decedents’ estates to include beneficiaries of funded revocable trusts and recipients
(including trustees) of TOD registration benefits. The remedies proposed are
virtually identical to those provided since 1969 by UPC in what is now Section
6-215. The new section (Section 6-102 in the Uniform Probate Code and Section
102 in the Uniform Nonprobate Transfers at Death Act) would replace Sections
6-215 and 215 in these Conference products. Section 15 (Section 215) of the free-
standing Multiple-Person Accounts Act and Section 9 (Section 309) of the TOD
Security Registration Act also would be revised to conform to Section 6-102.
SECTION 6-102. LIABILITY OF NONPROBATE TRANSFEREEs FOR CREDITOR CLAIMS AND STATUTORY ALLOWANCES.

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

(b) Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to the decedent’s probate estate for allowed claims against the decedent’s probate estate and statutory allowances to the decedent’s spouse and children to the extent the decedent’s probate estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received or controlled by that transferee.
(c) Nonprobate transferees are liable for the insufficiency described in subsection (b) in the following order:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Subsection (a)(1)’s definition of “nonprobate transfer” reaches revocable transfers by a decedent; it does not apply to a transfer at death incident to a decedent’s exercise or non-exercise of a presently exercisable general power of appointment created by another person. The drafters decided against creating a remedy for exemption beneficiaries and decedents’ creditors based on the idea that a presently exercisable general power of appointment is the equivalent of ownership even though that concept is accepted in the Code’s augmented estate provisions dealing with intentional disinherintance of a surviving spouse. Spousal protection against disinheritance by the other spouse supports the institution of marriage; creditors are better able to fend for themselves than financially disadvantaged mates.
of inconsiderate persons likely to disinherit their spouse. Also, a presently
exercisable general power of appointment created by another person is commonly
viewed as a provision in the trust creator’s instrument designed to provide
flexibility in the estate plan rather than as a gift to the donee. Also, creditors of a
deceased donee of such a power are likely to confront spendthrift trust provisions
designed to protect trust assets from the reach of creditors of beneficiaries, meaning
that they may be without recourse whether or not a general power is viewed as
ownership for purposes of creditors’ rights.

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

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

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

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

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

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

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

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

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

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

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

Subsection (i)(2) is designed to enable trustees handling nonprobate transfers to distribute trust assets in accordance with trust terms if no warning of
probable estate insolvency has been received. Beneficiaries receiving distributions from a trustee take subject to personal liability in the amount and priority of the trustee based on the value distributed.
Present text to be deleted:

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

(b) A surviving party or beneficiary who receives payment from an account after death of a party is liable to account to the personal representative of the decedent for a proportionate share of the amount received to which the decedent, immediately before death, was beneficially entitled under Section 6-211, to the extent necessary to discharge the claims and allowances described in subsection (a) remaining unpaid after application of the decedent’s estate. A proceeding to assert the liability may not be commenced unless the personal representative has received a written demand by the surviving spouse, a creditor, a child, or a person acting for a child of the decedent. The proceeding must be commenced within one year after death of the decedent.

(c) A surviving party or beneficiary against whom a proceeding to account is brought may join as a party to the proceeding a surviving party or beneficiary of any other account of the decedent.

(d) Sums recovered by the personal representative must be administered as part of the decedent’s estate. This section does not affect the protecting from
claims of the personal representative or estate of a deceased party provided in
Section 6-226 for a financial institution that makes payment in accordance with the
terms of the account.

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

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

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

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

(1) as provided in the decedent’s will or any other governing instrument;
(2) to the extent of the value of the nonprobate transfer received by the
trustee of a trust serving as the principal nonprobate instrument in the decedent’s
estate plan as shown by its designation as devisee of the decedent’s residuary estate
or by other facts or circumstances;
(3) other nonprobate transferees, in proportion to the values received.

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

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

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

g) A proceeding under this section must be commenced within one year
after the decedent’s death, but a proceeding on behalf of a creditor whose claim was
allowed after proceedings challenging disallowance of the claim may be
commenced within 60 days after final allowance of the claim.
(h) Unless a written notice asserting that a decedent’s estate is insufficient
to pay allowed claims and statutory allowances has been received from the
decedent’s personal representative, a trustee receiving a nonprobate transfer is
released from liability under this section on any assets distributed to the trust’s
beneficiaries. Each beneficiary to the extent of the distribution received becomes
liable for the amount of the trustee’s liability attributable to that asset imposed by
subsections (b) and (c).
REVISION OF SECTION 9 (UPC SECTION 6-309) OF
UNIFORM TOD SECURITY REGISTRATION ACT

Present text to be deleted:

(a) A transfer on death resulting from a registration in beneficiary form is
effective by reasons of the contract regarding the registration between the owner
and the registering entity and this party and is not testamentary.

(b) This part does not limit the rights of creditors of security owners against
beneficiaries and other transferees under other laws of this State.

New text of Section 9 (UPC Section 6-309) of Uniform TOD Security
Registration Act (underlined language indicates variance from UPC Section
6-102 text):

(a) A transfer on death resulting from a registration in beneficiary form by
an owner whose last domicile was in this State is effective by reason of the contract
regarding the registration between the owner and the registering entity and this act
and is not testamentary. As used in this section, “nonprobate transfer” means a
transfer described in the preceding sentence.

(b) A transferee of a nonprobate transfer is subject to liability to the
decedent’s probate estate for allowed claims against the decedent’s probate estate
and statutory allowances to the decedent’s spouse and children to the extent the
decedent’s probate estate is insufficient to satisfy those claims and allowances. The
liability of a nonprobate transferee may not exceed the value of nonprobate
transfers received by that transferee.
(c) Nonprobate transferees are liable for the insufficiency described in subsection (b) in the following order:

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

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

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

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

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

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

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

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