

RE-THINKING THE SURVIVORSHIP INTEREST EXCLUSION FOR JOINT TENANCIES OF REAL ESTATE UNDER UPC 6-102

I. INTRODUCTION

In 1998, the National Conference of Commissioners on Uniform State Laws amended the Uniform Probate Code by adding Section 6-102, making nonprobate transferees liable to certain creditors' claims.¹ Embedded in this provision, however, is a gaping exception: the definition of "nonprobate transfer" does not include "a transfer of a survivorship interest in a joint tenancy of real estate."² Thus the UPC allows creditors to reach some personal property that passes outside of probate, while joint tenancies of real property remain untouched.

Certainly, the UPC drafters walk a fine line between policies that shield survivors' interests on the one hand, and a slowly-emerging trend to make nonprobate transfers available to satisfy a decedent's debts on the other. Tenancies by the entirety and homestead exemptions exemplify a widespread acceptance that homes and surviving spouses should be protected. Married couples in nearly every state have access to some form of real estate ownership that offers security from creditors after the first spouse passes, and this security is what the UPC drafters aimed to protect by excluding joint tenancy survivorship real estate interests from 6-102's reach.³ However, 6-102 also evidences an interest in allowing claims to be satisfied out of assets a decedent had control over during life, and a joint tenancy of real estate arguably falls into that category.

This paper examines whether 6-102 should include survivorship interests in joint tenancies of real estate. Part II discusses 6-102 and the exception for the joint tenancy survivorship interest. Part III examines joint tenancy as a unique form of ownership, first by reviewing the basics of joint tenancy and survivorship, then by comparing the joint tenancy

interest with that of other nonprobate transfers, and finally by looking back at the history of joint tenancy to determine exactly how deep its roots go and what effect the history should have on current policy. Finally, Part IV surveys the few jurisdictions that do allow creditors to reach a survivorship interest in a joint tenancy of real estate. It notes the strong policies in favor of surviving spouses and personal residences and offers a possibility for amending 6-102's definition of "nonprobate transfer" to both accommodate these values and make some of a decedent's former joint tenancy real estate interests available to satisfy debts.

II. UPC 6-102 AND "A SURVIVORSHIP INTEREST IN A JOINT TENANCY OF REAL ESTATE"

Section 6-102, "Liability of Nonprobate Transferees for Creditor Claims and Statutory Allowances," states that "except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against decedent's probate estate . . . to the extent the estate is insufficient to satisfy those claims and allowances," but only to the extent of the value of the nonprobate transfer received.⁴ The rest of the section details the circumstances and procedures under which this can occur.⁵

Whether creditors will be able to reach a nonprobate asset under 6-102 depends on whether the transfer qualifies as a "nonprobate transfer" under 6-102's definition. Subsection (a) sets forth the following elements for a "nonprobate transfer":⁶

- 1) The transfer was valid,
- 2) The transfer was effective at death,
- 3) Immediately before death, the transferor could act alone to prevent the transfer, either by
 - a) revocation, or
 - b) withdrawal,
- 4) The transferor could have used the property either
 - a) for his own benefit, or
 - b) to discharge claims against his probate estate, and

5) *The transfer was not a survivorship interest in a joint tenancy of real estate.*⁷

The UPC does not explicitly define “joint tenancy of real estate,” but it does define “joint tenants with right of survivorship.”⁸ Under that definition, the terms “joint tenancy with right of survivorship” and “community property with right of survivorship” include “co-owners of property held under circumstances that entitle one or more to the whole property on the death of the other or others”⁹ This definition would arguably embrace tenancy by the entirety as well, even though that form of ownership is not specifically named. However, it seems clear that both community property with right of survivorship and tenancy by the entirety would fall outside 6-102’s definition of nonprobate transfer, because neither form of ownership allows a tenant to act alone to sever the tenancy. Therefore, “joint tenancy of real estate” as used in 6-102 must mean exactly that—real estate held in actual joint tenancy.

It is especially important to note that 6-102 says “except as provided by statute.”¹⁰ The drafters explain that this provision “is designed to prevent a conflict with and to clarify that [6-102] does not supersede existing legislation protecting death benefits in life insurance, retirement plans or IRAs from claims by creditors.”¹¹ Although the drafters specified these three types of nonprobate transfers, the Arizona Supreme Court—the only court to have passed on this issue—has dubbed this a “critical phrase,” holding that “§ 14-6102(A), which allows a decedent’s creditors to look to non-probate transfers to satisfy their claims, only applies when there is no other ‘law’ to the contrary.”¹² The Arizona case did involve life insurance, but the language of the holding indicates that the phrase would be applied the same way to other types of nonprobate transfers as well, and it is a reasonable prediction that other courts would follow Arizona’s interpretation. This “critical phrase” will be an important factor in any attempt to expand 6-102

to include survivorship interests in joint tenancies of real estate, because of legislation such as homestead exemptions that exist in many states and affect countless joint tenancies.¹³

The UPC's drafters did not intend for 6-102 to give creditors an unchecked reach into nonprobate assets. Section 6-102 replaces and expands on a prior section that allowed creditors to access joint bank accounts to satisfy claims but did not protect creditors where the decedent had assets in a transfer-on-death securities account or in a revocable trust.¹⁴ While 6-102 does expand creditor's access to some nonprobate personal property, it should be noted that nothing about 6-102 limits its reach to personal property.

III. IS A JOINT TENANCY OF REAL ESTATE SPECIAL?

In general, it could be said that 6-102 allows creditors to reach nonprobate transfers of property over which the decedent had control during his lifetime and with which he could have benefited himself or his estate. This description arguably applies to joint tenancy real estate interests, so why leave them out? Is there something special about a joint tenant's interest that makes it innately more deserving of asset protection than, say, assets in the form of securities?

A) Joint Tenancy—It's All About Survivorship

Joint tenancy is a form of co-ownership that depends on four "unities": time, title, interest, and possession.¹⁵ In order to form a joint tenancy, each tenant's interest must vest at the same *time*; the same instrument must give all tenants *title*; each tenant must have an equal, undivided *interest*; and each tenant must have an equal right of *possession*.¹⁶ Each tenant is regarded as a single owner and theoretically owns both his own share and the entire property.¹⁷

The most important part of a joint tenancy from a practical standpoint, however, is the right of survivorship it creates. In basic terms, the joint tenancy right of survivorship means that when one joint tenant dies, his interest vests automatically in any remaining joint tenants. In a certain sense, however, this is not a “transfer,” because the surviving tenants do not secure this survivorship right from the deceased tenant, “but from the devise or conveyance by which the joint tenancy was first created.”¹⁸ Thus the survivorship interest is “not considered a type of future interest,” but rather is “based on the concept that the estate is held by the fictitious entity made up of the cotenants collectively and that the ‘entity’ continues so long as any of the joint tenants survive.”¹⁹ This means when a joint tenant dies, nothing gets passed by devise or descent—his interest in the tenancy simply vanishes, reappearing instantly as a vested interest in the remaining tenants.²⁰

Arguably, then, a survivorship interest in a joint tenancy of real estate would not come under 6-102’s definition of “nonprobate transfer,” because it is not technically a “transfer.” However, the drafters may not have contemplated such a technical reading of the word “transfer,” and even in the case of a joint tenancy right of survivorship, from a practical standpoint, something starts out in the hands of one person and ends up in the hands of another. This common sense approach, plus the drafters’ specific exclusion of joint tenancy survivorship interests from the definition of “nonprobate transfer,” form the basis of this paper’s assumption that, for purposes of 6-102, the survivorship interest in a joint tenancy of real estate is a “transfer.”

Survivorship, plus the lack of limitation as to who can be a joint tenant, is what makes joint tenancy unique compared to other forms of ownership that include survivorship.²¹ Unlike tenancy by the entirety, joint tenants do not have to be married.²² Two or more completely

unrelated individuals could take real estate as joint tenants and the survivorship aspect would operate. Also unlike tenancy by the entirety, joint tenants hold the property both by the share and by the whole, so each tenant's share is severable at the very least by a conveyance to a third party.²³ Survivorship also exists in the form of ownership known as "community property with right of survivorship," which blends the survivorship attributes of joint tenancy with the benefits of holding real estate as community property.²⁴ But this form of ownership is only available in a few community property states, and again, only to married couples.²⁵

An essential part of any form of survivorship is that the death of a joint tenant extinguishes not only his interest in the tenancy, but also any possible liens against his interest.²⁶ This is because under joint tenancy theory, after a joint tenant dies, he has no interest left for a creditor to attach.²⁷ During life, this is not the case. Generally, a creditor can proceed against a living joint tenant to force a severance of the tenant's interest.²⁸ But if the joint tenancy is not severed during the tenant's lifetime, any remedy the creditor had in the property vanishes with the tenant's interest.²⁹ Most jurisdictions hold that without execution or sale, a judgment lien dies with the tenant.³⁰

B) Joint Tenancy of Real Estate vs. Other Nonprobate Interests

The extinguished-upon-death characteristic of a joint tenancy interest makes it innately different from the types of nonprobate transfers that would come under 6-102. Of course, there are other fundamental differences as well. If nonprobate assets may be grouped according to those the drafters intended for creditors to reach under 6-102 and those they did not, joint tenancies of real estate obviously fall into the latter category. But do they belong there?

1) Nonprobate Transfers Covered by 6-102

The comments indicate that revocable trusts, transfer-on-death accounts, and joint bank accounts would all be accessible to creditors under 6-102 as long as they meet the definition of “nonprobate transfer.”³¹

In a revocable trust, a settlor grants legal title of the trust property to a trustee, who holds it for a beneficiary who has the beneficial interest in the property.³² At the settlor’s death, the trust property passes directly to the beneficiary.³³ During the settlor’s life, however, the settlor retains the power to change the beneficiary or terminate the trust entirely, taking back the assets.³⁴ Whether a revocable trust would come under 6-102 would depend on whether the decedent could act alone to revoke the trust.³⁵ If he could not, then the trust would not meet the definition of “nonprobate transfer.”

The interests involved in a revocable trust are very different from those involved in a joint tenancy of real estate. Whereas joint tenants each possess equal rights in the tenancy property, a trustee and beneficiary of a trust do not possess equal rights in the trust property. The beneficiary does not have the right to manage the trust property, for example.³⁶ In addition, “an equitable interest in a thing is traditionally extinguished by the transfer of the legal interest in it to a bona fide purchaser when a legal interest in the thing would not be so extinguished.”³⁷ Thus a trustee can extinguish a beneficiary’s interest in trust property by selling the property, but a joint tenant cannot extinguish the interest of the other tenants by selling his interest.

Another nonprobate transfer contemplated by 6-102 is the transfer-on-death account (“TOD account”), such as a brokerage account, that is held with a financial institution.³⁸ With a TOD account, the owner designates a beneficiary who will receive the account proceeds on the

death of the owner.³⁹ The financial institution transfers the account proceeds directly to the beneficiary outside of probate.⁴⁰

During life, the account owner usually has full power to change the beneficiary at will.⁴¹ This amounts to a power of revocation, causing such an account to be included within 6-102 as a nonprobate transfer.⁴² Generally, however, the beneficiary will not have any rights to the account while the account owner is alive.⁴³ Thus little about this setup is similar to the interests held by joint tenants.

Finally, bank accounts are often held as joint tenancies, passing to the survivor on the death of the first tenant.⁴⁴ Although this is a joint tenancy, in practice it differs from a joint tenancy of real estate because each tenant has the right to withdraw all the money from the account.⁴⁵ Thus a single tenant can “gain entire ownership of the property”⁴⁶—something that cannot happen with a joint tenancy of real estate. Certainly, under joint tenancy theory, the real estate joint tenants are each seized of the whole. But even though they are theoretically possessed of the whole, any attempt to sell would simply result in a severance of the joint tenancy into a tenancy in common, with each tenant owning an undivided share.

What each of these instruments—revocable trusts, TOD accounts, and bank accounts—has in common is asset accessibility. In each case, the decedent would have had unrestricted access to the assets contained in the trust or account and, as the 6-102 definition of “nonprobate transfer” says, could have used the assets for his own benefit or to pay off creditors. An interest in a joint tenancy of real estate is an asset, and during life a joint tenant could access this asset by sale to a third party and use the proceeds to discharge debt. Given the practical difficulties of selling an undivided interest held with others, however, the joint tenancy interest in reality is

nowhere near as freely accessible as the other nonprobate forms contemplated by 6-102. Even so, a joint tenancy of real estate could fall in this category despite its fundamental differences.

2) *Nonprobate Transfers Excluded by 6-102*

The comments indicate the drafters' intent that life insurance and retirement benefits would not be available to creditors under 6-102.⁴⁷ Thus the drafters have lumped a joint tenancy of real estate in the same category as these nonprobate forms—but even more strongly, as there is no explicit exemption for life insurance or retirement benefits.

Under a life insurance contract, the policy owner pays premiums to the insurance company, which agrees to pay a set amount to a beneficiary when the policy owner dies.⁴⁸ During life, the policy owner may change the beneficiary and may even convey the policy to someone else.⁴⁹ If the policy has a cash surrender value, the owner may also cash in the policy.⁵⁰ The beneficiary, however, has no power over the policy and “has no property interest in a life insurance policy before the death of the insured.”⁵¹

Although the comments show that the drafters contemplated that most states would have statutes exempting life insurance from creditors,⁵² there is some question whether life insurance proceeds could come under 6-102 in certain circumstances.⁵³ If the decedent owned a policy and named his estate as beneficiary, retaining the right to change that beneficiary, then the policy would meet the definition of “nonprobate transfer.”⁵⁴ The comments say that without protective state legislation, “the insured’s creditors would not be able to establish a ‘nonprobate transfer’ . . . except to the extent of any cash surrender value . . . that the insured could have obtained immediately before death.”⁵⁵ However, it is doubtful that this is the only possible interpretation of how 6-102(a) would affect life insurance proceeds. If courts follow the drafters’

interpretation, then the only types of life insurance policies susceptible to 6-102 are those with an immediate accessibility characteristic.

Comparing life insurance and a joint tenancy of real estate is a bit of an apples-to-oranges exercise. Not only do the owner and beneficiary of a life insurance policy not share an equal interest in the policy, the owner himself never has an interest in the policy to the extent of the face value. In that sense, there is never a “transfer” of the policy amount from the policy owner to the beneficiary. Moreover, a life insurance policy is even less accessible than a joint tenancy interest in real estate because the policy owner cannot ever enjoy the benefit during his lifetime. At the same time, the insurance benefit might be thought of as “semi-accessible” to the policy owner, because he could designate his estate as the beneficiary.

Retirement plans are another form of nonprobate transfer that is largely kept away from creditors under 6-102, mainly because 6-102 does not supercede existing state or federal laws.⁵⁶ Qualified retirement plans are government-regulated plans subject to federal laws that generally protect them from creditors.⁵⁷ The plan participant designates a beneficiary who will receive funds from the plan in the event of the participant’s death.⁵⁸ Participant can change the beneficiary, who has no rights in the plan before the participant’s death.⁵⁹ However, some plans covered under the Retirement Equity Act of 1984 require spousal consent before anyone other than the spouse can be named as a beneficiary.⁶⁰ In this sense, a spouse does have a property right in a qualified retirement plan, and this gives such a plan something in common with a joint tenancy of real estate.

Because most retirement plans carry a penalty for early withdrawal,⁶¹ these too could be thought of as “semi-accessible” assets. Even a decedent who had reached the age limit where the penalty disappears might still balk at taking a large distribution because of tax considerations.

Thus in a strict sense these funds are accessible during life, but the decedent would likely have taken a hit by accessing them, in the same way that someone who successfully sells an interest in a joint tenancy of real estate would most likely receive less for that share than if all of the tenants had acted together to sell the property.

Thus one thing these protected nonprobate assets have in common is that they are “semi-accessible.” But there is something more afoot here. Even more importantly, what life insurance, retirement plans, and joint tenancies of real estate have in common is the function they serve to protect a decedent’s family, particularly the surviving spouse. Of course, this requires an assumption that the decedent held his joint tenancy real estate with his spouse. But this is exactly what the drafters appear to have assumed when they said that “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.”⁶² Clearly, this is not the only purpose joint tenancies serve, because there is no marital element to a strict joint tenancy. But to the extent that the drafters believed they were safeguarding a generations-old method of spousal protection, this would begin to explain why joint tenancies of real estate are lumped with the inaccessible interests instead of with the accessible assets.

C) Joint Tenancy: Used by Couples “for Generations,” or Disapproved for Generations?

Joint tenancy has long roots in history. In 13th century England, the only forms of co-ownership were coparceny, which could only result from inheritance, and joint tenancy.⁶³ At that time, the law favored joint tenancy precisely because of its right of survivorship.⁶⁴ It was the height of feudalism, and general policy favored keeping feudal tenures intact rather than dividing them.⁶⁵ This was because they did not want to dilute feudal relationships by

fragmenting the services tenants owed as the result of the feudal connection.⁶⁶ These services included “useful services, such as military or agricultural services, or rent, and . . . the merely honorary services, such as fealty.”⁶⁷ Joint tenancy kept these feudal interests unified because under joint tenancy, “the grantees . . . were treated as though they constituted one person—a fictitious unity.”⁶⁸

Joint tenancy could also be seen during that time through the system of “uses,” whereby a person enfeoffed land to a group of others (feoffees), who then held legal title in joint tenancy with the understanding that they would re-enfeoff the original feoffor upon request.⁶⁹ By doing this, the feoffor could effectively bypass the prohibitions against alienating or devising land.⁷⁰ The idea was that conveying to a group in joint tenancy eliminated the risk of granting the land away, because if one joint tenant died, the rest would take by survivorship and carry on the agreement.⁷¹ Interestingly for this discussion, people also used the use system as a mechanism to place land out of the reach of creditors.⁷² For example, in 1374 a man and his wife enfeoffed some tenements to a group of three men and then left the region to avoid a creditor.⁷³ When the creditor had the rents stopped, the three feoffees tried to argue in court that they held the tenements in fee simple.⁷⁴ However, one finally admitted he had been “enfeoffed together with the others” and that the three of them held it for the benefit of the absent debtors/feoffors.⁷⁵ Two years later, a 1376 statute dealt with exactly this situation, addressing the issue of people who “borrowing divers Goods in Money or in Merchandise of divers People of this Realm, do give their Tenements and Chattels to their Friends, by Collusion thereof to have the Profits at their Will, and after do flee” to other places, in order to avoid execution of judgments.⁷⁶

With the end of feudalism, however, came the end of joint tenancy’s favor. The laws had changed, and the need for the use was gone. By the 18th century, “the survivorship incident

came to be regarded as an ‘odious thing’ that too often deprived a man’s heirs of their rightful inheritance.”⁷⁷ Lord Chancellor Hardwicke explained this attitude in 1747 when he affirmed that “[i]t is true, that joint-tenancies are not favoured here; as introducing inconvenient estates, and making no provision for families: and now courts of law also lean against them; though formerly it was said by *C. J. Holt*, that they were favoured, which was on a technical reason, because the law was averse to multiplication of tenures and services,” but with the change of the law, that was no longer true.⁷⁸

A 1903 case from the United States quotes from a variety of contemporary sources affirming that this was the attitude throughout the 19th century in this country as well.⁷⁹ That court quotes *Smith on Personal Property* as explaining that “[t]he operation of survivorship in diverting the interest of a deceased owner from his next of kin, to whom it naturally belongs, is generally regarded as unreasonable and unjust, and hence is not favored by courts or legislatures.”⁸⁰ The court also quotes *Shouler’s Personal Property* as saying the “right of survivorship is the great clog upon property vested in joint owners as distinguished from those who own in common”⁸¹ An independent check of a 1907 *Encyclopedia Britannica* entry for “Joint” confirms the bias against joint tenancy laid out so thoroughly in *Johnson v. Johnson*: “when one of the joint-tenants dies his share, instead of going to his own heirs, lapses to his co-tenants by survivorship.”⁸²

Moreover, it would appear that joint tenancy may not have been widely used for real estate in the United States until the first half of the 20th century.⁸³ Although there is little hard data, one sampling of five Iowa counties showed almost zero recorded joint tenancies until 1938, when 6% of recorded deeds were joint tenancies.⁸⁴ By 1942 the number was 13%, by 1944 it was 31%, and “in 1964 an average of 52 per cent of all Iowa land transfers created joint

tenancies.”⁸⁵ Making these observations in 1966, Professor Hines remarked at a Washington State initiative expressly recognizing the joint tenancy estate and a Connecticut law allowing a grantor to convey a joint tenancy with himself as one of the tenants.⁸⁶ These two instances, he marveled, seemed “to manifest a favorable attitude toward joint tenancy.”⁸⁷ When Professor Hines wrote his article, he could not have known that at about the same time it was published in the Spring 1966 issue of the Iowa Law Journal, Norman Dacey’s book *How to Avoid Probate* would hit the New York Times bestseller list and stay there for months,⁸⁸ spurring a nonprobate craze that would only increase peoples’ desire to hold property in joint tenancy.⁸⁹

A modern layperson might be surprised to learn that the general disfavor of joint tenancy still persists. Today, the idea of joint tenancy as a way for spouses to pass property to each other outside of probate is almost ubiquitous.⁹⁰ However, the common law presumption is still against the joint tenancy and in favor of the tenancy in common, and joint tenancy will only be found where the instrument creating it evidences the intention to form a joint tenancy.⁹¹ But it is especially important for this discussion that the centuries-old disfavor of joint tenancy had little, if anything, to do with disapproval of the idea of a surviving spouse taking by survivorship. In 1903, the court in *Johnson v. Johnson* that so clearly displayed its distaste for joint tenancies also quoted from the fourteenth edition of Chancellor Kent’s treatise, which said that “[t]he destruction of joint tenancies . . . does not apply to conveyances to husband and wife, which, in legal construction, by reason of the unity of husband and wife, are not strictly joint tenancies, but conveyances to one person. They can not take by moieties, but they are both seised of the entirety, and the survivor takes the whole”⁹² Today, tenancy by the entirety is available in 24 states.⁹³ Adding the eight states that allow for some form of community property with right

of survivorship,⁹⁴ that makes 32 out of 50 states that currently recognize some form of marital property survivorship arrangement.

Thus there appears to be a disconnect between what the drafters meant when they said couples had been using joint tenancies for generations to keep real estate away from creditors, and what kinds of “joint tenancies” they feared might fall under 6-102 without an explicit exclusion. That they held this concern is evident in the comments, which say “[t]his familiar arrangement [couples’ use of joint tenancies] need not be disturbed incident to expanding the ability of decedents’ creditors to reach newly recognized nonprobate transfers at death.”⁹⁵

Certainly, couples have use tenancies by the entirety this way for generations. The same cannot be said of community property with right of survivorship arrangements, which are fairly new on the scene.⁹⁶ However, neither of these would meet the definition of “nonprobate transfer” even without the exception for joint tenancies of real estate. Yet if the drafters were referring to strict joint tenancies, there is little basis for the assertion that couples have used these “for generations,” unless the drafters used the plural of “generation” in its strictest sense, meaning “more than one.”

Regardless of this inconsistency, one thing is clear: the drafters wanted to maintain protection for surviving spouses by shielding the spouses’ survivorship interests in real estate from the decedent’s creditors.

IV. JOINT TENANCIES OF REAL ESTATE, CREDITORS’ RIGHTS, AND PROTECTING THE SURVIVING SPOUSE

There appear to be two ideas at work behind 6-102: protecting the surviving spouse, and making a decedent debtor’s assets available to creditors to the extent the decedent could have accessed them during life to discharge debt. But how much real estate should be protected?

A) Reaching the Survivorship Interest

In most states, a decedent's creditors cannot reach a survivorship interest in a joint tenancy of real estate because the decedent has no interest left to attach.⁹⁷ However, the joint tenancy survivorship interest is not as sacrosanct as it might seem. For example, in Arizona, a state that has adopted 6-102, the legislature modified the homestead allowance statute so that “[t]o determine the homestead allowance . . . , a survivorship interest in a joint tenancy of real estate is considered a nonprobate transfer pursuant to section 14-6102 [the section codifying UPC 6-102 in the Arizona Revised Statutes].”⁹⁸

The UPC also embraces the concept of invading the survivorship right to benefit the surviving spouse. UPC 2-205, dealing with decedent's nonprobate transfers includable in the augmented estate for purposes of determining the spousal elective share, specifically brings “[t]he decedent's fractional interest in property held by the decedent in joint tenancy with the right of survivorship” into the augmented estate.⁹⁹ This is true whether or not, under local law, the decedent could have severed his interest unilaterally.¹⁰⁰ Of course, this provision only applies to the extent that someone other than the surviving spouse received a survivorship interest in the property.¹⁰¹

To justify including these survivorship interests in the augmented estate, the drafters point to the rights the decedent could have had in the property, explaining that joint tenancies are

. . . a type of asset of which the decedent could have become the full, technical owner by merely exercising his or her . . . right of severance or withdrawal. Had the decedent exercised these powers or rights to become the full, technical owner, the decedent could have controlled the devolution of these assets by his or her will; by not exercising these powers or rights, the decedent allowed the assets to pass outside probate to persons other than the surviving spouse.¹⁰²

Some states have apparently decided that the same reasoning should apply to a decedent's creditors. In Missouri, recipients of a "recoverable transfer of a decedent's property" are liable, pro rata, for discharging "claims remaining unpaid after application of the decedent's estate" ¹⁰³ The statute specifically provides that this applies to "the recipient of any property held in joint tenancy with right of survivorship that was subject to the satisfaction of the decedent's debts immediately prior to the decedent's death . . . but only to the extent of the decedent's contribution to the value of the property." ¹⁰⁴

In South Dakota, the law provides that when one joint tenant dies, "the surviving joint owner or owners shall be liable for the debts and obligations of the deceased joint owner, or owners" ¹⁰⁵ If a creditor can prove there are not enough assets in the decedent's own name to cover the debt, the creditor may proceed against surviving tenants within six months of the deceased tenant's death. ¹⁰⁶

The UPC drafters specifically mention South Dakota's laws, recognizing that not all states shield joint tenancies of real estate. ¹⁰⁷ Thus they intentionally avoided rules like these. However, it may be possible to accomplish the two objectives—protecting the surviving spouse and allowing creditors access to assets available to the decedent during life—in a balanced way.

B) Keeping a Roof over the Surviving Spouse's Head

While the laws in Missouri and South Dakota may seem extreme, these two states have one thing in common that puts their laws in perspective: Both states have generous real estate protections for the surviving spouse.

Missouri is a tenancy by the entirety state. Tenancy by the entirety is a uniquely common-law-state form of tenancy, whereby a husband and wife hold property "as one

person.”¹⁰⁸ Tenancy by the entirety is identical to joint tenancy in that it requires the same “four unities,” but it also requires the tenants to be a married couple.¹⁰⁹ As with joint tenancy, spouses holding property as tenants by the entirety enjoy a right of survivorship.¹¹⁰ In some states that allow tenancy by the entirety, “a creditor of one spouse does not acquire an attachable interest in the entirety property.”¹¹¹ This is because “[n]either husband nor wife has a separate divisible interest in the property held by the entirety that can be conveyed or reached by execution.”¹¹² Missouri falls in this category. That means even though Missouri allows creditors to reach survivorship interests in joint tenancy property, this would not apply to property spouses held by the entirety. Something like a family home, for example, would be protected if it was held by the entirety.

South Dakota does not have tenancy by the entirety. What it does have is a generous homestead exemption. In its traditional sense, a homestead is a residence that has been placed out of the reach of creditors, either by statute or under the terms of a state’s constitution.¹¹³ While these exemptions do protect the homestead from a wide variety of creditors, the exemptions generally do not apply to certain kinds of debts, such as taxes, mortgages on the homestead, and mechanics’ liens connected with the homestead.¹¹⁴ Nearly all states—both common law and community property—offer some form of homestead protection, although in some states the amount of the exemption is too small to cover the value of an actual home.¹¹⁵ While homestead exemptions are generally intended to protect homes from creditors during the homeowners’ lives, most states also extend this protection to a surviving spouse.¹¹⁶

South Dakota’s laws allowing creditors to reach survivorship interests in a decedent’s joint tenancy property explicitly state that this reach is “subject to all homestead and legal exemptions in such decedent’s jointly owned property.”¹¹⁷ South Dakota’s homestead

exemption exempts a principal residence by size of the land on which it sits.¹¹⁸ Unlike most states, which define the homestead exemption by the value of the residence (for example, Arizona's limit is \$150,000¹¹⁹), South Dakota has no value limit.¹²⁰ Thus South Dakota, with its creditor-friendly policies, tempers those policies with liberal protection of the personal residence.

Clearly, then, even among those states seeking to make joint tenancy survivorship interests available to discharge decedents' debts, the interests of the surviving spouse—especially to the extent that he or she occupies the family residence—take precedence over the interests of creditors.

C) Possibilities for the UPC

The UPC, likewise, could strike a balance between creditors' interests and those of the surviving spouse in a personal residence. This could be achieved by recognizing that, in certain situations, a joint tenancy of real estate—even one held with a spouse—may reasonably be seen as an accessible asset that should be available to creditors, while in other situations the joint tenancy of real estate may be a family home that deserves protection.¹²¹

Because of the wide variety of homestead exemptions in effect throughout the United States, it would be difficult for the UPC to promulgate a rule giving creditors access to survivorship interests in joint tenancies of real estate, subject to a “principal residence only”-type of exception. Although this might be ideal, because it would protect the family home without protecting an imagined husband-wife real estate mogulship, few states would probably want to hassle with the changes to existing statutes that such a rule would likely require.¹²²

Another possibility would be to exempt only survivorship interests held by a surviving spouse. This would require less tinkering with existing statutes, although it would also exempt

more property than creditors might prefer. This option would change the definition of “nonprobate transfer” in 6-102 by borrowing from language already used in the UPC’s elective share provisions and using a similar idea to open up survivorship interests to creditors:

(a) In this section, “nonprobate transfer” means a valid transfer effective at death, ~~other than a transfer 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. *“Nonprobate transfer” includes a survivorship interest in a joint tenancy of real estate to the extent the survivorship interest passed by right of survivorship at the decedent’s death to a surviving joint tenant other than the decedent’s surviving spouse. Such surviving joint tenants are liable for an amount equal to the value of the fractional interest, as defined in Section 2-201(2), that the decedent held in the joint tenancy immediately before death.*

This change would achieve the drafters’ stated goal of not disturbing property arrangements that keep “the share of a couples’ real estate owned by the first to die . . . away from estate creditors,” and would also further the goal of allowing creditors’ claims to be satisfied with assets that were accessible to a decedent during life. It maintains consistency by drawing on policies already in place elsewhere in the UPC.

In addition, this change would minimize interference with existing state statutes. The “except as otherwise provided by statute” clause in 6-102’s main provision would continue to let state law have precedence, so statutes such as homestead exemptions would still protect family residences. Also, tenancy by the entirety and community property with right of survivorship would remain unaffected. Even if they could be interpreted as joint tenancies with right of survivorship, they would continue to fall outside the definition because the survivor in those forms of ownership is always the surviving spouse. Finally, legislatures uncomfortable with a

greater expansion of creditors' rights could easily adopt 6-102 with its original definition of "nonprobate transfer."

V. CONCLUSION

To date, only four states—Arizona, Idaho, Colorado, and New Mexico—have adopted UPC 6-102. Perhaps the slow acceptance of UPC 6-102 demonstrates states' reluctance to expand creditors' access to nonprobate transfers. This may mean that expanding creditors' reach into nonprobate transfers would make 6-102 less popular instead of increasing its appeal. In the Prefatory Note to the 1998 draft adding 6-102 to the UPC, the drafters seem to recognize that 6-102 may not be well-received, but express the hope that, at the very least, it will spur "meaningful discussion."¹²³ Part of any such discussion should include the extent to which joint tenancies of real estate should reasonably be included among the assets available to satisfy a decedent's debts. Because reaching the survivorship interest essentially destroys the foundation of joint tenancy itself, this may be a hard sell. But the fact that statutes already exist allowing invasion of a joint tenancy survivorship interest for limited purposes shows that this door is already open, and that perhaps it can be nudged a little wider.

ENDNOTES

¹ UNIF. PROBATE CODE § 6-102 (amended 2008).

² *Id.* Although the UPC 6-102 is not limited to joint tenancy interests of surviving spouses, this paper focuses on the surviving spouse's interest.

³ *Id.* at cmt. 5.

⁴ *Id.*

⁵ *Id.*

⁶ The residency requirement has been removed for sake of clarity of the other elements.

⁷ UNIF. PROBATE CODE § 6-102(a) (amended 2008) (emphasis added).

⁸ *Id.* § 1-201(25).

⁹ *Id.*

¹⁰ *Id.* § 6-102(b).

¹¹ *Id.* § 6-102 cmt. 2.

¹² *May v. Ellis*, 208 Ariz. 229, 231, 92 P.3d 859, 861 (2004).

¹³ *See infra* Part III(B)(1).

¹⁴ National conference of Commissioners on Uniform State Laws, *Amendments to Uniform Probate Code by Adding Section 6-102 and Deleting Sections 6-125 and 6-309(b) and to Make Conforming Changes in Free Standing Acts Derived from Uniform Probate Code Article 6*, Prefatory Note (1998).

¹⁵ JESSE DUKEMINIER, JAMES E. KRIER, GERGORY S. ALEXANDER, & MICHAEL H. SCHILL, PROPERTY 276 (6th ed. 2006).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ John W. Fisher, II, *Creditors of a Joint Tenant: Is There a Lien After Death?*, 99 W. VA. L. REV. 637, 673 fn 175 (1997) (quoting *Ziegler v. Bonnell*, 126 P.2d 118 (Cal. Dist. Ct. App. 1942)).

¹⁹ John W. Fisher, II, *If Judgment Creditors Cannot Set Asunder a Debtor Spouse's Interest in the Marital Home, What Can They Do?*, 97 W. VA. L. REV. 339, 343 (1995).

²⁰ *Id.*

²¹ DUKEMINIER, KRIER, *supra* note 15, at 276–77.

²² *Id.*

²³ *Id.*

²⁴ JESSE DUKEMINIER, STANLEY M. JOHANSON, JAMES LINDGREN, & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 460–61 (7th ed. 2005).

²⁵ *Id.* at 461.

²⁶ 48A C.J.S. *Joint Tenancy* § 2 (2009).

²⁷ *Id.*

²⁸ *See* Francis M. Dougherty, Annotation, *Judgment lien or levy of execution on one joint tenant's share or interest as severing joint tenancy*, 51 A.L.R. 4th 906 (1987).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at cmt. 2.

³² RAY D. MADOFF, CORNELIA R. TENNEY, MARTIN A. HALL, & LISA N. MINGOLLA, PRACTICAL GUIDE TO ESTATE PLANNING 2010 EDITION § 4.02 (2009).

- ³³ *Id.* § 4.05[A].
- ³⁴ *Id.* § 4.05[B].
- ³⁵ Elaine H. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, 41 REAL PROP. PROB. & TR. J. 819, 855 (2007).
- ³⁶ MADOFF, *supra* note 32, § 4.02.
- ³⁷ RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. d (2003).
- ³⁸ MADOFF, *supra* note 32, § 2.05[B][6].
- ³⁹ *Id.*
- ⁴⁰ Gagliardi, *supra* note 35, at 861.
- ⁴¹ MADOFF, *supra* note 32, § 2.05[B][6].
- ⁴² Gagliardi, *supra* note 35, at 861.
- ⁴³ MADOFF, *supra* note 32, § 2.05[B][6].
- ⁴⁴ MADOFF, *supra* note 32, § 2.04[B][1][c].
- ⁴⁵ *Id.*
- ⁴⁶ *Id.*
- ⁴⁷ UNIF. PROBATE CODE § 6-102 cmt. 2 (amended 2008).
- ⁴⁸ MADOFF, *supra* note 32, § 12.02[A].
- ⁴⁹ *Id.*
- ⁵⁰ *Id.*
- ⁵¹ *Id.*
- ⁵² UNIF. PROBATE CODE § 6-102 cmt. 2 (amended 2008).
- ⁵³ *See* Gagliardi, *supra* note 35, at 863.
- ⁵⁴ *Id.*
- ⁵⁵ UNIF. PROBATE CODE § 6-102 cmt. 2 (amended 2008).
- ⁵⁶ Gagliardi, *supra* note 35, at 864.
- ⁵⁷ MADOFF, *supra* note 32, § 13.04[A][1].
- ⁵⁸ *Id.* § 13.01.
- ⁵⁹ *Id.* § 13.05[B][1][b].
- ⁶⁰ *Id.*
- ⁶¹ MADOFF, *supra* note 32, § 13.05[A][1].
- ⁶² UNIF. PROBATE CODE § 6-102 cmt. 5 (amended 2008).
- ⁶³ Fisher, *supra* note 19, at 342.
- ⁶⁴ Johnson v. Johnson, 173 Mo. 91, 107, 73 S.W. 202, 206 (1903) (quoting CHANCELLOR JAMES KENT, 4 KENT'S COMMENTARIES ON AMERICAN LAW at 360 (14th Ed.)). Chancellor Kent's *Commentaries* were originally published in the 1820's.
- ⁶⁵ *Id.*
- ⁶⁶ *Id.*
- ⁶⁷ Fisher, *supra* note 19, at 342 fn 16 (quoting 2 MINOR ON REAL PROPERTY § 838 (2d ed. 1929)).
- ⁶⁸ Fisher, *supra* note 19, at 342.
- ⁶⁹ J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 252 (4th Ed. 2007).
- ⁷⁰ *Id.* at 249.
- ⁷¹ *Id.* at 252.
- ⁷² *Id.* at 249.
- ⁷³ Langdon v. Stratton (1374), Calendar of Plea and Memoranda Rolls Preserved Among the Archives of the City of London, Vol. 9, Membrane 9 (A. H. Thomas, ed. 1929) *available at*

<http://www.british-history.ac.uk/report.aspx?compid=36683#s18> (cited in BAKER, *supra* note 69, at 249 fn 6).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Stat. 50 Edw. III, c. 6 (cited in BAKER, *supra* note 69, at 249 fn 6).

⁷⁷ N. William Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 IOWA L. REV. 582, 585 (1966) (citing *York v. Stone*, 1 Salk. 158, 91 Eng. Rep. 146 (Ch. 1709)).

⁷⁸ *Hawes v. Hawes*, 1 Ves. Sen. 13, 13–14, 27 Eng. Rep. 859, 860 (1747).

⁷⁹ *Johnson v. Johnson*, 173 Mo. 91, 73 S.W. 202 (1903).

⁸⁰ *Johnson*, 173 Mo. at 111, 73 S.W. at 207 (quoting SMITH ON PERSONAL PROPERTY, sec. 26, p. 33).

⁸¹ *Johnson*, 173 Mo. at 109, 73 S.W. at 207 (quoting 1 SCHOULER'S PERSONAL PROPERTY 191 (3d Ed.)).

⁸² 13 ENCYCLOPAEDIA BRITANNICA 741 (1907).

⁸³ See Hines, *supra* note 77, at 593–94.

⁸⁴ *Id.* at 596 fn 16.

⁸⁵ *Id.* at 586 fn 16, 587.

⁸⁶ *Id.* at 593 fn 46, 594.

⁸⁷ *Id.* at 594.

⁸⁸ “The New York Times Best Seller List,” available at <http://www.hawes.com/1966/1966-09-25.pdf>.

⁸⁹ John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1116 (1984).

⁹⁰ See *id.*

⁹¹ 2 TIFFANY REAL PROPERTY § 419 (1939) (updated September 2009, Westlaw).

⁹² *Johnson v. Johnson*, 173 Mo. 91, 108, 73 S.W. 202, 206 (1903) (quoting CHANCELLOR JAMES KENT, 4 KENT'S COMMENTARIES ON AMERICAN LAW at 360 (14th Ed.))

⁹³ see Fred Franke, *Asset Protection and Tenancy by the Entirety*, 34 AM. C. TRUST & ESTATE COUNS. J. 210, 222 (2009).

⁹⁴ DUKEMINIER, JOHANSON, *supra* note 24, at 461.

⁹⁵ UNIF. PROBATE CODE § 6-102 cmt. 5 (amended 2008).

⁹⁶ DUKEMINIER, JOHANSON, *supra* note 24, at 461.

⁹⁷ See discussion *supra* Part III A.

⁹⁸ ARIZ. REV. STAT. § 14-2402 (LexisNexis 2010).

⁹⁹ UNIF. PROBATE CODE § 2-205 (amended 2008).

¹⁰⁰ UNIF. PROBATE CODE § 2-201(2) (amended 2008) (defining “fraction interest in property held in joint tenancy with right of survivorship”).

¹⁰¹ UNIF. PROBATE CODE § 2-205 (amended 2008).

¹⁰² UNIF. PROBATE CODE § 2-205 cmt. (amended 2008).

¹⁰³ MO. REV. STAT. § 461.300(1) (2009).

¹⁰⁴ *Id.* § 461.300(8).

¹⁰⁵ S.D. CODIFIED LAWS § 43-46-1 (2009).

¹⁰⁶ *Id.* § 43-46-2, 3.

¹⁰⁷ UNIF. PROBATE CODE § 6-102 cmt. 5 (amended 2008).

¹⁰⁸ Tanya L. Bower, *Guarding the Nest Egg: Protecting Assets from the Claws of Creditors*, 8 J. PRAC. EST. PLAN. 35, 39 (2006).

¹⁰⁹ 41 C.J.S. *Husband and Wife* § 20 (2009).

¹¹⁰ *Id.*

¹¹¹ Franke, *supra* note 93, at 212.

¹¹² *Swada v. Endo*, 561 P.2d 1291 (Haw. 1977) (quoted in Franke, *supra* note 93, at 212).

¹¹³ George L. Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289, 1289 (1950).

¹¹⁴ *See, e.g.*, N.H. REV. STAT. ANN. § 480:4 (LexisNexis 2009); *see also* KAN. STAT. ANN. § 59:401 (2009).

¹¹⁵ Philip R. Rupprecht, *Homestead Declarations in the Fifty States*, in *ASSET PROTECTION STRATEGIES: PLANNING WITH DOMESTIC AND OFFSHORE ENTITIES* 175, 177 (Alexander A. Bove, Jr., ed. 2002).

¹¹⁶ *Id.* at 188–89, Table B.

¹¹⁷ S.D. CODIFIED LAWS § 43-46-4 (2009).

¹¹⁸ S.D. CODIFIED LAWS § 43-31-1, 2, 4 (2009).

¹¹⁹ ARIZ. REV. STAT. § 33-1101 (LexisNexis 2010).

¹²⁰ *See* S.D. CODIFIED LAWS § 43-31-1, 2, 4 (2009).

¹²¹ There is much debate about whether a “home,” by its nature, deserves creditor protection. *See, e.g.*, D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006); Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093 (2009). This debate is beyond the scope of this paper, as the UPC drafters evidence the opinion that a home should be protected.

¹²² It must be acknowledged, of course, that spouses could invest their assets into one very valuable residence. However, the temptation toward this course of action would likely be tempered by a desire to diversify.

¹²³ National conference of Commissioners on Uniform State Laws, *Amendments to Uniform Probate Code by Adding Section 6-102 and Deleting Sections 6-125 and 6-309(b) and to Make Conforming Changes in Free Standing Acts Derived from Uniform Probate Code Article 6*, Prefatory Note (1998).