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BANKRUPTCY PROCEEDINGS FOR INSOLVENT DECEDENTS' ESTATES

Richard V. Wellman*

Under present law, bankruptcy proceedings cannot be instituted by or against insolvent decedents' estates. Creditors of insolvent decedents must look to state probate laws for satisfaction. But these laws are more concerned with the control of solvent estates than with the affairs of the impecunious. Also, transfers of wealth at death by nonprobate means are coming to be the rule rather than the exception, and it is frequently very difficult for creditors of decedents to obtain satisfaction of unsecured claims from nonprobate assets. This article advocates the extension of bankruptcy laws to insolvent decedents' estates and explores problems and solutions that might be involved if this recommendation is accepted.

I. AN OVERVIEW OF THE PROBLEM

Existing federal and state laws impact most curiously on the position of creditors of insolvent decedents. Unless the death of the debtor occurs after commencement of federal bankruptcy proceedings, federal courts have indicated that they lacked jurisdiction under the Bankruptcy Act.1 Furthermore, federal deci-

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1 In re Estate of Hiller, 240 F. Supp. 504 (N.D. Cal. 1965) (petition for voluntary bankruptcy dismissed on the ground that the purposes of bankruptcy do not require the application of bankruptcy proceedings to decedents' estates); In re Estate of Mulero, 143 F. Supp. 504 (D.P.R. 1956) (decedent's estate is not a "person" entitled to the benefits of voluntary bankruptcy); In re Morgan, 26 F.2d 90 (D. Mass. 1928) (petition for involuntary bankruptcy dismissed upon finding that decedent had committed suicide prior to filing of petition); Nadler, Bankruptcy Courts' Refusal to Assume Jurisdiction over Insolvent Decedents' Estates: A Rebuttal, 26 FORDHAM L. REV. 1, 2-9 (1957). Cf. White v. Cormier, 311 Mass. 537, 540, 42 N.E.2d 256, 258 (1942) (laws of the state govern settlement of insolvent estates of deceased persons).
sions establish that routine probate matters are not within the equity jurisdiction of the federal courts.\(^2\) To many, these authorities appear to block any attempt to use diversity of citizenship between persons interested in an estate as a basis for proceedings to marshal assets of a decedent in federal court. However, the historic probate jurisdiction of English ecclesiastical tribunals was limited to probate of wills and appointment of administrators; proceedings to settle insolvent estates were handled elsewhere. Hence, one may concede that federal courts lack probate jurisdiction but dispute the assumption that keeps them from proceedings to marshal assets of insolvent estates.\(^3\)

On the other hand, if the debtor's death occurs after bankruptcy proceedings have been commenced, there is no abatement.\(^4\) State law rights of his spouse and dependent children to step ahead of unsecured creditors in relation to property that would be exempt in the living debtor's hands are respected, but the estate remains subject to control of the federal court, and the normal arsenal of weapons continues to be available to the trustee in bankruptcy.\(^5\)

As with most legal phenomena, this improbable arrangement has not gone unsupported. In 1880, a federal judge wrote:

The two-fold purpose which the bankrupt act has in view, viz., the equal and just distribution of the bankrupt's estate among his creditors, and the discharge of the bankrupt from his debts, does not require the application of the law to the estate of the deceased person. The law of the states provide for an equitable and just distribution of the decedent's estate, and death has already discharged him of all personal liability. The bankrupt law could, in the case of a deceased person, accomplish nothing not already accomplished without it.\(^6\)

His honor did not need to explain why pending bankruptcy proceedings did not abate upon death of the debtor, because the federal statute with which he was familiar permitted abatement.\(^7\) His assessment of the relative utility of bankruptcy remedies and remedies available under state law may have been influenced by

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\(^2\) See, e.g., Byers v. McAuley, 149 U.S. 608, 619 (1893) (federal court has "no original jurisdiction in respect to the administration of a deceased person"); Underground Elec. Rys. v. Owsley, 176 F. 26, 28–37 (2d Cir. 1909) (while a federal court has no jurisdiction in purely probate proceedings or general administration of an estate, its equity jurisdiction nevertheless empowers it to appoint a receiver pending probate and appointment by a proper state court).

\(^3\) See generally Nadler, supra note 1.


\(^5\) 1A Collier on Bankruptcy §§ 8.01–.02 (J. Moore ed. 1972).


\(^7\) See the discussion of abatement provisions in bankruptcy legislation enacted in 1800, 1841, 1867, and 1898 in Hull v. Dicks, 235 U.S. 584, 587 (1915).
the circumstance that the bankruptcy statute controlling the case had been repealed at the time of decision. Certainly, his observations did not anticipate the development of the office and remedies of the trustee in bankruptcy since 1898, nor the stultifying effect that the development of federal bankruptcy law has had on the growth of state insolvency procedures.

The capriciousness of law that makes federal jurisdiction depend on the order in time of bankruptcy petition and death is magnified by the circumstance that state probate procedures are generally deficient insofar as creditors are concerned.\(^8\) Mechanisms for selecting personal representatives reflect the decedent's wishes and family considerations that are frequently in conflict with the interests of creditors. Only Massachusetts appears to have a statute subjecting predeath payments to preferred creditors to rights of recovery for the benefit of all creditors.\(^9\) Rights of probate representatives to recover fraudulent and other transfers by their decedents are not uniform among the states.\(^10\) These rights may be further complicated in regard to in-state actions against transferees by subject-matter limitations on the power of probate courts.\(^11\) Territorial restrictions on the powers of probate fiduciaries additionally cloud the process for recovery of fraudulent transfers to persons who must be sued in other states.\(^12\)

There may also be serious impediments to creditors' remedies in relation to assets that constitute the probate estate. If recovery proceedings are necessary, a personal representative, as an officer of the probate court, may seek court approval before beginning litigation in order to be sure that his expenses are covered. But the probate court to which he may apply for authority to sue may not be able to entertain the recovery proceedings.\(^13\) In many states, complicated land-sale proceedings still must be brought to subject land owned by the decedent to the claims of his credit-

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Finally, statutory fee schedules for personal representatives and customarily generous probate fees for attorneys of probate fiduciaries mean high costs of administration which, together with exemptions, funeral bills, and family allowances that are commonly entitled to priority, frequently leave very little for creditors of those assets that should be the primary fund for their satisfaction.

As if all of this were not enough, there is another facet of modern probate law that serves to harass creditors. Because of the modern tendency of property owners to arrange titles to assets so as to avoid probate, creditors are forced to resort to extraordinary remedies with increasing frequency in order to find assets for satisfaction of claims. Joint tenancies, tenancies by the entireties, deposit and savings contracts with death beneficiaries (including many forms of arrangements for deferred compensation), revocable trusts, and deeds framed to become effective at death, are the most commonly used devices for the avoidance of probate. Inheritance tax statistics from California indicate that for estates with values between $10,000 and $400,000, joint tenancies handle about 60 percent of all dollars moving by reason of death to survivors. Mere language in contracts and other legal instruments commonly validate these probate substitutes; it is unimportant that the decedent may have retained possession and full control until the moment of his death, and that the death beneficiary is a mere donee. Revocability does not uniformly make transfers voidable by creditors under state rules and attack via

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15 Lay and professional interest in probate avoidance can be identified by the number and notoriety of publications on the subject in recent years. The best known, of course, is N. Dacey, How To Avoid Probate (1966). This paperback, consisting of fifty-five pages of text and 280 pages of forms in duplicate and instructions, was described in late June of 1966 as being in its tenth week on national, nonfiction best seller lists. The Probate Bonanza, Newsweek, June 27, 1966, at 78. More than 673,000 copies had been sold by May, 1967. Advertisement, N.Y. Times, May 3, 1967, at 41. See also Editorial, Avoiding Probate, 52 A.B.A.J. 938 (1966); Taylor, You Can Avoid the Probate Trap, Reader's Digest, June, 1970, at 93. Articles warning readers of probate pitfalls also have been influential. See Time to Clean Up Our Probate Courts, Reader's Digest, Jan., 1970, at 112. The literature has not been limited to lay articles. See J. Corcoran, Alternatives to Probate (Ill. Institute for Continuing Legal Education 1971); Hines, Real Property Joint Tenancies: Law, Fact, and Fancy, 51 Iowa L. Rev. 582 (1966).

16 Computed from Table 22, Inheritance and Gift Tax Division, Office of State Controller, Statistics of California State Inheritance Tax: 1964 (1965).

17 One leading commentator has written:

In several other cases it has been held that the fact that a trust is revocable does not enable the settlor's creditors to reach the trust estate. In the absence of a statute otherwise providing, the courts have taken the view that the mere
the fraudulent transfer route involves difficulties in determining the time of the transfer and the decedent's solvency at that time.\(^8\)

Several circumstances may indicate that this curious vacuum of protection for creditors may not result in serious hardships and thus does not warrant complex solutions. The defects in state probate protections for creditors are not new, and the gap in federal law in relation to insolvent decedents’ estates has existed throughout the history of our bankruptcy rules.\(^9\) Nevertheless, no known statistical study suggests that creditors are being disappointed in relation to collections from estates. Furthermore, representatives of commercial creditors remained totally silent during the seven years of preliminary discussions and drafting of the Uniform Probate Code (UPC or Code). A provision in the first draft that would have enabled the probate court, on petition, to order estates into bankruptcy under certain conditions was dropped from the second draft because it invited complex discussions that would have distracted attention from more pressing matters.\(^20\) No creditor representatives indicated interest in this modification. The committees in charge of preparation of the Code were encouraged to assume that large unsecured debts were not likely to be owed by elderly persons and thus by decedents, and that commercial creditors relied on credit life insurance and voluntary payments by survivors who were anxious to maintain their own credit ratings, rather than relying on probate remedies.

Some of these signals are nonetheless patently misleading, and others are not persuasive on the question of whether federal law should be changed to remedy the theoretical problem. It is not surprising to find that studies of probate court records reveal few cases in which known claimants went unpaid.\(^21\) Creditors are unlikely to file claims when their information leads them to conclude that there will be insufficient assets to cover costs, priority claims, and family exemptions. Moreover, probate laws frequently permit release without administration of estates that are repre-

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9. Nadelmann, supra note 8, at 1138–44.


sented to be of small value above encumbrances, so that probate court files are useless as an indicator of the amount of unpaid bills in a significant number of estates.

The argument that emphasizes lack of demand for legal change by creditors is unpersuasive. If the social cost is tolerable, rules should be framed to anticipate and avoid clear hardships in isolated cases. The absence of organized creditor complaints regarding inadequate protection in insolvent decedents' estates suggests only that the problem is less concerning than others; it does not eliminate the certainty of avoidable loss for individual creditors in isolated cases.

Do community mores indicate that creditors should bear the risks of loss from death that are implicit in the present arrangement? A negative answer is suggested by informal surveys in the Chicago area by students of Professor Dunham which indicated that many merchants rely on voluntary payments by surviving household members more than on collection from personal representatives of deceased debtors. The defects of the probate system that tend to qualify the assumption that decedents' creditors come before inheritances clearly does not contradict it. Probate laws are notoriously insensitive to calls for change from any but regular members of the probate bureaucracy. Nothing significant can be derived from the fact that creditors have not sought changes or improvements in state laws, for creditors surely would seek desired changes through bankruptcy laws rather than attempt to struggle with fifty-one sets of probate laws.

Nevertheless, it may be asserted that opening bankruptcy proceedings to insolvent decedents' estates will result in turmoil and interference with settled state prerogatives that are not warranted by a speculative gain for creditors. To the extent that this point of view reflects an assumption that local probate officials and attorneys are happily in control of smoothly functioning systems which they will struggle to retain, it can be questioned. Probate procedures in most states are being challenged and changed under the pressures of probate avoidance and of the Uniform Probate Code. Probate officials have resisted change and have lost credibility.

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23 I must rely on my recollection of conversations with Professor Allison Dunham, of the University of Chicago, for this statement. The students making the surveys worked with Professor Dunham when he was preparing his article, The Method, Process and Frequency of Wealth Transmission at Death, 30 U. Chi. L. Rev. 241 (1963).
Fee schedules based on percentages of estates are being eliminated, along with the assumption that state courts should supervise settlement of decedents' estates. In short, there is good reason to believe that this is an especially opportune time to propose some shifts of authority to federal courts.

The recommendations that follow may appear to invite bankruptcy proceedings for many estates. But the risk may be exaggerated, for most decedents are elderly with few assets and fewer debts. Also, two key recommendations relating to a time limit on petitions for bankruptcy of decedents' estates and to other qualifications that must be met by petitioners in federal proceedings are designed to lessen state apprehensions concerning loss of control over large numbers of estates. Indeed, these restraints should encourage states to alter their probate rules so that the need for recourse to bankruptcy court may be reduced.

The major recommendations fall into seven groups. First, petitioners for bankruptcy proceedings for decedents' estates must either be or represent creditors. To qualify a petition for bankruptcy of a decedent's estate, the petitioner either should be a personal representative or one or more creditors having unsecured claims amounting to $1,000 or more. Also, the petition should indicate that substantial advantage for unsecured creditors will result from bankruptcy as opposed to state probate proceedings. The bankruptcy tribunal should have discretion to accept or decline a petition containing proper allegations. With minor exceptions, efforts to move a decedent's estate into bankruptcy must be commenced within six months after death.

Second, state law should be accepted for purposes of determining the existence and beneficiaries of exemptions given to the spouse and children of a decedent whose estate is bankrupt, but federal ceilings should be established on the amounts that will be allowed. State law quirks that sometimes require distinction for exemption purposes between "probate estate" assets and other assets subject to creditors' claims in cases of insolvency should be disregarded in bankruptcy.

Third, local nonclaim provisions operating to exclude some creditors from some assets should be ignored in bankruptcy; the short statute of limitations on bankruptcy proceedings should be

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26 This assumption is expressed by the General Comment to Article 3 of the Uniform Probate Code.

27 Dunham, supra note 23, at 247, 263-64.
relied upon to prevent the possibility of bankruptcy from clouding inheritances and delaying the closing of estates.

Fourth, federal laws should recognize reasonable funeral expenses of a decedent whose estate becomes bankrupt as a claim entitled to priority over all others except expenses of administration. When bankruptcy proceedings for estates supersede prior state probate proceedings, probate court orders allowing funeral expenses, fees for special administrators, appraisers, attorneys, and other expenses of administration should be subject to review for reasonableness by the bankruptcy tribunal in all cases except where the probate court order has been entered after notice and opportunity to be heard have been given to creditors. Claims perfected under state law proceedings probably should be proved again in bankruptcy. In any event, federal standards will govern allowance and classification. Save for quite small claims, amounts paid to claimants in prior probate administrations should be subject to refund to the trustee except where precluded by res judicata.

Fifth, the bankruptcy court should exercise the powers of a state probate court in instances where an order of the probate court is necessary in relation to a widow’s election or to the determination of family allowances, and in relation to distribution of any surplus.

Sixth, the title and rights of a trustee for an insolvent decedent’s estate should be substantially the same as those of a trustee for a living debtor. In order to accomplish this purpose vis-à-vis powers and other rights a debtor may have exercised for his own benefit, the title of a trustee for a bankrupt decedent’s estate should relate to the debtor’s interests as of a moment before death rather than to the date of the petition.

Seventh, rights available to a trustee for an insolvent decedent’s estate under Sections 60 and 67 of the present statute should be measured by a period of four months before death rather than four months prior to the petition for federal relief.

II. CONDITIONS RELATING TO INSTITUTION OF BANKRUPTCY PROCEEDINGS FOR INSOLVENT DECEDENTS’ ESTATES

A. Who May Petition

1. Creditors of the Decedent—Because postmortem bankruptcy proceedings will lack any purpose of debtor rehabilitation, only persons who have interests either as or on behalf of unse-
cured creditors of the decedent should be eligible to petition for bankruptcy. Thus, inheritors from the decedent, including even those close family members who may have rights to exempt property or to allowances having priority over unsecured creditors under state law, should be excluded.

2. Restrictions on Creditor-Petitioners—What restrictions, if any, should be placed on creditors who might petition for bankruptcy proceedings involving an estate? The threat of nuisance proceedings by small creditors is probably more fanciful than real, but the draftsmen of the Uniform Probate Code found it expedient to impose a minimum claim-size requirement at a point in the Code that presented a somewhat analogous question. Under the UPC, a personal representative does not need to post bond to guarantee performance of his duties unless bond is demanded by a person the value of whose apparent interest in the estate exceeds a stated statutory minimum. The Code suggests but does not prescribe $1,000 as the appropriate sum. Some similar restriction that appears to screen out small claims will calm fears that bankruptcy proceedings will be resorted to in routine cases. Hence, one or more creditors whose claims aggregate in excess of some figure, possibly $1,000, should be required to qualify a creditor petition. However, there is no reason to require approval of creditors having claims in excess of $1,000 before a personal representative may petition for bankruptcy.

3. Personal Representative Petitioners—Questions may be raised about whether a personal representative, frequently considered to be an officer of the probate court that appointed him, should be permitted to serve as a petitioner for a superseding bankruptcy proceeding. Although the picture will change as the Uniform Probate Code gradually spreads across the country, most probate laws treat the personal representative as a quasi-official of the probate court who is subject to the continuing supervision of the court until the estate is distributed and closed. The intrusion of federal law into the domain of a state court would be quite apparent if federal authority invites an officer of the local tribunal to act in a way that can be seen to contradict his obligation to his appointing authority. On the other hand, it is not always easy to know whether a personal representative is or is not considered to be an instrumentality of the authority that appointed him. A Texas executor appointed under a “nonintervention” will clearly is not subject to continuing control of the probate court,

28 UPC § 3-605.
differing from a Texas administrator in intestacy.\textsuperscript{30} In Georgia, something resembling "independent administration" is possible under a will that excuses an executor from making "returns" to the court of appointment.\textsuperscript{31} In view of this uncertainty, it is suggested that the bankruptcy court be authorized but not obliged to require personal representative petitioners to secure approval from the court of appointment. If creditors are permitted to act as petitioners for a bankruptcy takeover in any event, the role of the local probate court would not be an important one.

Should a petition in bankruptcy by a personal representative be subject to any restriction? Assuming that there will be no guarantee that former personal representatives have priority as bankruptcy trustees for insolvent estates that are accepted into bankruptcy, there should be no concern that personal representatives might find some personal advantage in moving estates into bankruptcy. Should personal representative petitioners be required to show demands for bankruptcy by creditors? The Uniform Probate Code uses this device in Section 6-107 in relation to the right of a personal representative to pursue surviving co-owners of survivorship bank accounts when the demands of creditors cannot be covered by the primary probate estate. Still, the scheme of Section 6-107 is rooted in a concern to keep personal representatives from taking unnecessary steps merely to increase the estate on which their fees may be calculated. With fee incentives neutralized by the possibility of a different federal fiduciary, there is no point to any restriction like that in Section 6-107 in new bankruptcy rules.

4. Person with Priority for Appointment as Personal Representative—Interest in starting bankruptcy proceedings may arise before the appointment of a personal representative by a state court, and before or after any will naming an executor may have been admitted to probate. Assuming, for the moment, that a duly appointed personal representative may be a suitable person to institute bankruptcy proceedings, the suitability of a person who is merely nominated by a will of the debtor that may or may not have been validated in state proceedings occurring after the debtor's death, but who has not been appointed or qualified as personal representative is less clear.\textsuperscript{32} Recognition as a suitable petitioner to such a person should be denied, for recognition would contradict local assumptions that letters are necessary to confer

\textsuperscript{32}Under English law, the probate of a will gave an executor named therein sufficient authority to act. In the United States, he must receive letters and otherwise qualify before he can act. 2 J. Woerner, supra note 29, at § 186.
any authority. Creditors can be protected without any incursion on this state law principle. Thus, creditors of a decedent should not be forced to await a state court appointment or to be dependent on the willingness of a state court appointee to act.

5. **Personal Representative Appointed by Domiciliary Court**—A state court appointee from a jurisdiction other than that of the decedent’s domicile probably should not be recognized, partially because creditors will be able to petition in bankruptcy even though there is no suitable state representative and partially because the lead of the Uniform Probate Code to discourage probate appointments in any state other than that of the decedent’s domicile should be followed.\(^{33}\) Surely federal proceedings for insolvent estates should embrace all of the property of the debtor and avoid the state law phenomenon that frequently results in separate probate administrations for each state in which a decedent may have left land.\(^{34}\) Hence, one petition should serve to supersede any number of separate state proceedings that may have been commenced. Only the personal representative from the principal place of probate administration should be granted the power to trigger bankruptcy for all segments of the estate. It is true that the Uniform Probate Code and most existing laws recognize the possibility that the only probate administration for a given decedent may occur in a state which was not the decedent’s domicile.\(^{35}\) In recognition of this, a petitioning personal representative should be required to state that he has been appointed by a proper authority either in the state of the decedent’s domicile or in a state selected by the decedent to control the principal administration of his estate. This requirement probably should not be jurisdictional.

6. **Creditors of the Personal Representative**—A decedent’s estate may be solvent at the date of his death, but subsequently become insolvent because of loss of asset values or the discovery of previously unknown claims. Also, continuing operation of the decedent’s business by the personal representative may result in postmortem insolvency. Postmortem insolvency from either of the first two causes probably should be lumped with cases in which the decedent died insolvent for purposes of bankruptcy remedies relating to estates. Insolvency resulting from postmortem debts incurred by the personal representative might fall in a different category as a result of the common law rule that estate fiduciaries


\(^{34}\) E.g., Clarke v. Clarke, 178 U.S. 186 (1900).

\(^{35}\) UPC §§ 2-602, 3-203(g).
Incur personal liability for obligations arising from the estate business. In practical effect, the rule means that postmortem creditors may have access to the personal liability of the personal representative in the event estate assets are insufficient to cover their claims. The rule, however, can be made inapplicable by the personal representative's contracts, and it is being reversed by statute for both contract and tort obligations. In any event, the estate should be the primary source of payment of debts incurred by a personal representative. The point should be disregarded insofar as it might be urged as a reason for preventing postmortem creditors from moving an estate into bankruptcy.

Postmortem creditors frequently take ahead of antemortem claimants because their claims represent expenses of administration. This distinction, however, does not appear to warrant disqualification of postmortem creditors as petitioners in bankruptcy for insolvent decedents' estates. Like antemortem creditors, they have interests in recovery of fraudulent and preferential transfers, and in bankruptcy standards regarding selection and control of the trustee.

B. Allegations and Findings Required for Bankruptcy of an Estate

Bankruptcy proceedings for decedents' estates should not be available unless unsecured creditors can show a substantial likelihood of greater recovery in bankruptcy than in probate court proceedings. This judgment is based on several considerations. First, the state courts can process many estate matters with approximately the same efficiency and degree of achievement as courts of bankruptcy. Second, federal remedies for important cases will both meet a clear present need and serve to induce states to repair their legislation, whereas the alternative assumption that creditors might move any decedent's estate into bankruptcy irrespective of need might stultify state law development. Third, state courts are probably more accessible to the public and more amenable to community needs than federal courts and thus should be used in preference to federal courts except where obvious injustice results. Finally, some form of state court proceedings are regularly instituted for most decedents' estates before solvency or insolvency is known, and removals to federal


37 See, e.g., UPC §§ 3-808, 7-306.
court at the suit of creditors, which would double the expense of legal proceedings in many cases, should not be routine.

Accordingly, petitioners for bankruptcy of a decedent's estate should be required to show (1) that the estate is insolvent at the time of the petition; and (2) that a greater return for creditors will probably be available if bankruptcy proceedings are approved. Additionally, the federal tribunal should possess discretion to deny a petition that contains all required allegations.

1. Insolvency—Should balance sheet or equity insolvency be required? Except where a decedent's estate continues the business of the decedent or otherwise engages in an on-going enterprise, there is no place for the equity test of inability to meet debts as they mature. Hence, the normal standard should be an excess of obligations over assets available for payment; use of the equity test should be restricted to petitioners who are creditors of a business being operated by an estate. This standard, as applied to estates, closely approximates the general standard of inability to pay all debts that is now applicable to all bankrupts. Moreover, because there is no reason to deny federal proceedings to creditors who become creditors of the estate after the decedent's death and because bankruptcy should be available to all creditors for use whenever the likelihood of debt payment becomes imperiled, this test of insolvency should be related to the time of initiation of the bankruptcy proceedings, rather than to the date of death.

Probate inventories might be conclusive or otherwise relied upon in establishing asset values in bankruptcy petitions. Regardless of what the rules say, probate inventories will be used by practical people who will accept them rather than invest time and money in other investigations. Hence, to attempt to preclude their use might not be practicable. It would be unwise, however, to attach any particular significance for bankruptcy purposes to probate value lists, either for purposes of identifying what assets are included in the estate or for determining the value of listed items. Probate appraisals are commonly disregarded for purposes of determining death taxes, even though they may have been approved by the court. Bankruptcy proceedings should not give them more credence.

If the state court were to determine that there are insufficient assets to cover funeral costs and family exemptions or to warrant probate administration, the effect of that court's order releasing the estate from probate administration either on the question of

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38 1 Collier on Bankruptcy ¶ 1.19, at 98-99 (J. Moore ed. 1971).
solvency or on the question of the need for bankruptcy is debatable. Res judicata may be involved, but these probate proceedings are so notoriously lacking in fair notice to creditors and useful examination by the probate judge that the federal posture should be to disregard them, subject to ad hoc instances where res judicata may be fairly asserted. The related question of the conclusiveness in bankruptcy of probate orders distributing estates, as distinguished from orders releasing estates from administration, probably will not arise if the recommendation for a six-month time limit after death on bankruptcy petitions is accepted.40

Probate records of filed claims may be offered in bankruptcy proceedings on the question of insolvency. There are several reasons why these should not be accorded much weight. These include: (1) the acknowledged tendency of creditors in some parts of the country to ignore state law filing requirements;41 (2) the probability that creditors will not file claims unless asset lists indicate the presence of enough estate to cover debts; and (3) the presence in many estate files of questionable claims based on family services for the decedent that may be tolerable for estate settlement proceedings where no creditors' rights are affected, but are unacceptable for any bankruptcy purpose.

What property should be included in the determination of insolvency? Should assets believed to be exempt from creditors’ claims be listed? What should be done concerning transfers made before probate that might or might not be available to creditors of insolvent estates under state law, but which would nevertheless be subject to claims in bankruptcy? What about assets in states other than the decedent's domicile where ancillary proceedings may or may not have been commenced?

Insolvency for bankruptcy purposes is best determined by including all personal estate remaining in the decedent's name in spite of his death without limitation in terms of location. Real estate in the decedent's name located in his domicile and all other assets previously received by, or conceded to be due to, any acting personal representative from other sources should be included. The asset total should be reduced by expenses of administration paid or incurred to date, funeral expenses, and family exemptions. If the total is less than the total of known claims, the estate should be deemed insolvent even though state laws may make other assets subject to creditors’ claims in cases of insolvency. Assets subject to outstanding security interests should

40 See text accompanying notes 44–45 infra.
41 See note 23 supra.
be treated so that only the excess of value over amount secured is used in computing total assets.

This computation omits some values represented by voidable or fraudulent transfers that might be, but have not yet been, collected by or conceded to be due to the personal representative. Recovery of these transfers through use of state procedures frequently will be so difficult, however, that bankruptcy procedures may be the preferred method of reaching them. In any event, assessment of the probable ease or difficulty to be expected in efforts to undo voidable transfers in state proceedings will occur because of the requirement that the petitioner show that some substantial advantage will follow approval of the bankruptcy proceeding.

Similarly, real property belonging to the decedent’s estate, but located in states other than that in which the principal administration of his estate is being had, should not be included in computations to determine insolvency unless applicable rules give the domiciliary representative easy access to them for purposes of meeting obligations of the estate. The standards of the Uniform Probate Code might be used to determine whether “easy” access exists. Under the UPC, real estate in a nondomiciliary location may be sold and the proceeds removed by the domiciliary personal representative if he files a copy of his appointment in a probate office of the place of location and so subjects himself to the jurisdiction of the courts of that state.42 This procedure, which must exist under the laws of the state of location in order to be available to a representative from a state having statutes like the UPC in effect, becomes unavailable if ancillary administration proceedings are commenced before the domiciliary representative acts. Again, however, a determination as to the ease or difficulty to be anticipated in reaching out-of-state real estate could be relevant in deciding whether cause for bankruptcy, in addition to insolvency, exists.

2. Additional Cause for Bankruptcy—In addition to proof of insolvency of the estate, a petitioner who seeks federal relief relating to a decedent’s estate should be required to show that unsecured creditors probably will receive substantially more in bankruptcy than they would receive if the state proceedings were allowed to continue. Showing that substantial values have been transferred outside of probate by transactions that are voidable by creditors, but cannot be reached under state law or may be reached only by expending substantially more time or money than

42 UPC §§ 4-204, 4-205. See also Wellman, supra note 33.
would be involved in a bankruptcy turnover proceeding should suffice. Alternatively, a case for federal relief would be presented if the assets of the estate are located in more than one jurisdiction and cannot be easily assembled without multiple state probate proceedings. If no state probate proceeding has been commenced prior to the filing of the federal petition, the showing that bankruptcy might be the more efficient method of marshalling assets and satisfying claims should be easier than where state probate expense already has been incurred.

Where applicable state law appears to give a personal representative all remedies vis-à-vis preferential or fraudulent transfers that would be available under federal law, bankruptcy should be available nonetheless if the probate representative refuses to pursue these remedies. This should be the case despite the availability of state remedies to compel performance by the personal representative. This posture would exert pressure on a foot-dragging personal representative to move in the interests of creditors.

3. Discretion to Refuse Bankruptcy Petitions for Estates—The foregoing discussion demonstrates that the range of questions that the bankruptcy court should consider in deciding whether to accept or refuse a petition for an estate proceeding is quite broad. Furthermore, the federal judgment may be influenced by factors relating to the local probate court such as are within the court’s general knowledge. These circumstances support the recommendation that the federal court should have discretion to accept or reject an estate bankruptcy and that its judgment should be entitled to great weight.

4. Overriding Time Limitations on Bankruptcy Proceedings for an Estate—Bankruptcy legislation relating to insolvent decedents’ estates must accommodate a variety of procedural possibilities that may bear on the desirability of a federal limitation period on bankruptcy proceedings: (1) no proceedings to probate the debtor’s estate may have been commenced, and the estate has or has not been released from administration; (2) probate administration has been commenced and a personal representative has been appointed but no distribution or release of assets to heirs has occurred; (3) probate administration has been opened and all assets of the estate have been disbursed by proper or improper payments, but no court order discharging the personal representative has been entered, and the powers and liabilities of the personal representative are still viable; and (4) probate administration has been closed by court order or statute.

Additional assets of the probate estate or the possibility of
recovery of fraudulent or preferential transfers may be discovered before or after any of these procedural stages. Moreover, although state nonclaim periods have run and some or all unpaid creditors have been barred from recourse to conventional probate assets, it is possible under some state law patterns that unpaid creditors will not be barred from participating in recoveries of fraudulent or preferential transfers.43

When, if ever, should it be too late to commence bankruptcy proceedings in relation to an insolvent estate? Federal law should include a relatively short, six-month, limitation period running from death, after which it would be too late for anyone to institute bankruptcy. This period would balance the need of creditors for a decent opportunity after learning of their debtor’s death to discover facts and plan strategies designed to minimize their losses against the legitimate concerns of those who are interested in an early end to questions about the decedent’s affairs. Six months from death also approximates the minimum time under current state law required for complete settlement of a decedent’s estate,44 and matches approximately the minimum period for safe distributions under the Uniform Probate Code.45 If this recommendation is accepted, there will be very little likelihood that petitions for bankruptcy will be filed after a probate administration has proceeded to completion.

A definite period running from death is recommended rather than a period keyed to distribution or closing of a probate estate because of the wide variety of conditions and events that may constitute distribution or closing under existing state laws. Moreover, there is little reason to make the federal limitation period depend on whether a probate proceeding has been commenced, for it is contemplated that unpaid creditors of a decedent will have standing to initiate bankruptcy whether or not a personal representative has been appointed.

Some exceptions to the proposed six-month period may be necessary to assure that creditors will not be precluded from resorting to bankruptcy proceedings in some difficult cases. One might be recognized for creditors of an estate operating a going business. This would be a troublesome exception, all the possible implications of which are difficult to foresee. Nevertheless, it involves cases where predeath creditors may not have the information necessary to let them determine whether bankruptcy

43 ILL. ANN. STAT. ch. 3, § 204 (Supp. 1972) (claims barred as to "inventoried" assets only).
44 Id.
45 UPC § 3-1003(a).
Insolvent Decedents' Estates should be commenced, and where postmortem creditors have been induced to rely for too long on their priority for expenses of administration. Hence, it appears worthy of notice. Another exception may be required for cases where creditors of the decedent are prevented by misrepresentation or neglect of a personal representative from learning of information bearing on the estate's solvency.

III. RECOMMENDED FEDERAL STANDARDS RELATING TO FAMILY EXEMPTIONS CREATED BY STATE LAW

A. Existing Homestead and Other Family Exemptions

Most state probate codes recognize specific or value exemptions that serve to put the decedent's spouse and dependent children ahead of unsecured creditors in relation to some portion of the probate estate. Homestead statutes constitute a major, although unpredictable, part of the story. Typically a homestead exemption is available only as to real estate occupied by the spouse or minor children at the death of the owner. Limitations in terms of dollar value and size or acreage vary widely. Sometimes no residence is required. In some states homestead is merged at death with a spouse's right to reject the provisions of a decedent's will and claim a statutory share. In at least seven states, no provision is made for homestead exemptions.

Homestead and dower are not, however, the only forms of exemptions. In some states, of which Ohio is an example, the spouse's exemption includes a percentage or an amount that is excluded from the probate inventory and thus from costs of administration. Other exempt rights or sums may be available in the form of quarantine (a widow's right to remain in the mansion house of the deceased for a year or other designated period), widow's allowance (an amount, usually fixed by the probate judge,
to support the surviving spouse and dependent children during the period of probate administration)\textsuperscript{53} or family exemptions relating to furniture, tools, clothing, or other specified kinds of assets of the deceased.\textsuperscript{54}

Community property rights of a surviving spouse, being derived from the spouse’s preexisting ownership interest in half of community property, normally would not be seen as exempt rights relating to a decedent’s estate. However, if some of the decedent’s debts, for example, those attributed to him as manager of the community, may be satisfied from the entire community estate, the entire community estate becomes subject to some claims and to probate administration. Consequently, homestead and other forms of exemption may become pertinent. About all that is predictable in community property states is that there will be no recognition of dower as a possible source of exemption.

\textbf{B. Family Exemptions Under the Uniform Probate Code}

The Uniform Probate Code recognizes three categories of family exemptions and abolishes dower. A homestead allowance in the suggested amount of $5,000 in value from any form of estate assets takes the place of specific exemptions that relate only to homestead real estate.\textsuperscript{55} Chattel property worth up to $3,500 is exempt, and if there is not that much in unencumbered value in chattels of the estate, dollars from any source in the estate may be used to make up the difference.\textsuperscript{56} A family allowance of up to $500 per month for one year may be awarded by the personal representative for the surviving spouse or dependent children, and higher allowances as needed for this purpose may be approved by the court.\textsuperscript{57} Like the family allowance, the homestead allowance is available only if a spouse or a minor or dependent child survives. The $3,500 chattel exemption is available to all children who survive when there is no spouse. The total of these categories, presumably $14,500 in most cases, is immediately distributable in kind or cash to the statutory beneficiaries and has explicit priority over costs of administration and creditors’ claims.


\textsuperscript{54}See, e.g., \textsc{N.Y. Est., Powers & Trusts Law} § 5-3.1 (McKinney Supp. 1972); \textsc{Alaska Stat.} § 13.11.125 (1972) (exempting house trailers as well).

\textsuperscript{55}UPC § 2-401.

\textsuperscript{56}\textit{Id.} § 2-402.

\textsuperscript{57}\textit{Id.} §§ 2-403, 2-404.
Also, transfers effective at death by multiple-party accounts (joint, payable on death, tentative trust accounts) are subject to recovery by the personal representative for beneficiaries of family exemptions and creditors.\(^{58}\) Other voidable transfers may generate assets for payment of creditors, but not for the satisfaction of family exemptions.\(^{59}\)

**C. Bankruptcy Act Policy**

Homestead exemptions allowed by the laws of states of established residency are preserved to debtors in bankruptcy by Section 6 of the Bankruptcy Act\(^{60}\) and are given to the surviving spouse and dependent children of the deceased debtor by Section 8\(^{61}\) when a bankrupt dies. Case authority relating to the pre-Chandler Act statute extended the concession for state exemptions to dower rights of a surviving spouse and to probate allowances for spouse and dependent children, exemptions which were not available to the debtor as of the filing of the petition.\(^{62}\)

The present statute appears to preclude these extensions.

Some exemptions for surviving spouses and minor children of debtors who leave bankrupt estates should be granted by federal law without restriction to those exemptions that could have been claimed by the debtor had he lived. A living debtor’s earnings during bankruptcy remain available for support of his spouse and minor children. Family exemptions and allowances created by state probate law have the effect of substituting a share of the decedent’s probate estate for the loss of earning power resulting from death. Further, existing probate law patterns that will be altered by the extension of bankruptcy to insolvent decedents’ estates feature exemptions for spouse and minor children that arise at death. If federal law restricts the exemptions available to survivors to those available to living debtors, state law would respond by expanding exemptions of the homestead type. This sort of countermove, which would unnecessarily jeopardize collection prospects against living debtors, would be unfortunate. Also, resistance to any extension of bankruptcy law into the domain of the states, would be greater if the proposal ignored state policy that protects a minimum “stake” for close survivors without reference to exemptions available to a living debtor.

\(^{58}\) *Id.* § 6-107.

\(^{59}\) *Id.* § 3-710.


\(^{61}\) *Id.* § 26.

\(^{62}\) Hull v. Dicks, 235 U.S. 584 (1915).
D. Remaining Considerations

Assuming that bankruptcy policy will respect state law exemptions for close family survivors, several questions remain. What state law should be accepted for purposes of determining allowable family exemptions? Should the bankruptcy court or the probate court function where applicable state law calls for a court order determining allowances? How should allowances be processed when there is no probate proceeding? If a state court has made an order concerning allowances before bankruptcy proceedings are commenced, must the order be respected in bankruptcy even though it grants more than might have been awarded in the federal court? Should probate allowances come ahead of creditors’ claims in values recovered by avoiding preferential or fraudulent transfers? Should bankruptcy law be framed with a view to coercing states to enact uniform laws relating to family exemptions?

Some of these questions would be eliminated or reduced if federal rather than state law were made controlling in relation to the recognition of family exemptions in insolvent decedents’ estates. There are compelling reasons for establishing federal ceilings on state exemptions that will be recognized in bankruptcy. If these reasons are accepted, it might be felt that it would be simpler merely to substitute federal exemptions.

The most obvious reason for a ceiling on state law exemptions recognized in bankruptcy of insolvent decedents’ estates is to free interstate commerce of the effects of wide disparity in state exemption laws. There is no dollar ceiling on the value of improvements that may be involved when a Florida widow takes up to a half-acre of urban residential property in the decedent’s name away from his creditors as a homestead.63 There is no dollar ceiling on the amount a Michigan probate judge may allow to a widow by way of support during probate administration.64

Additionally, probate exemption statutes tend to include higher amounts than general exemption provisions. There has been great pressure in recent years to reduce inheritance costs and delays that are caused by the ancient assumption that all estates must be court-administered for the benefit of creditors. Lawyers and probate judges generally are more willing to adjust the probate net so that estates which are too small to warrant their time and atten-

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63 FLA. CONST. art. 10, § 4; FLA. STAT. ANN. § 731.34 (1964).

64 MICH. COMP. LAWS ANN. § 702.68(1) (1968) grants the widow and minor children "such reasonable allowances...as the probate court shall judge necessary for their maintenance..."
tion are exempt from administration than they are to concede that court administration may be needed only in cases involving actual disputes. Consequently, the amounts currently being recommended in the states for homestead exemptions, or as the ceilings on estates that may be exempted from administration, are running higher. For example, the state bar in California may renew recent efforts to secure enactment of legislation that will increase exempt estates to $10,000 when there is no land, and to $30,000 if land is involved. In Colorado, a bar association bill that might bring the Uniform Probate Code to the state uses $10,000 rather than $5,000 as the amount of homestead allowance. The enacted version of the Code in Idaho increases the homestead allowance from $5,000 to $14,000 when a spouse and minor children survive, and in Alaska the new law uses $12,000 as the homestead allowance figure and permits a possible additional exemption for a house trailer worth up to $8,000. Recent legislation in Wisconsin now exempts estates consisting of $10,000 or less in unencumbered value from probate if a spouse survives, and in Michigan, estates of up to $7,500 are exempt if a spouse or minor child survives.

Arguably, the conditions and recent developments outlined above should lead those responsible for the shape of federal bankruptcy laws to adhere to the existing formulation that would give survivors of deceased debtors only those exemptions that were available to the decedents. As indicated earlier, however, there are sound substantive and political reasons for recognizing survivors' exemptions in bankruptcy. Further, the higher that state probate law exemptions become, the greater the inducement to creditors to seek relief in bankruptcy. Correlatively, if the proposed extension of bankruptcy to insolvent decedents' estates follows a hard line on the matter of survivors' exemptions, opposition to it in Congress surely will increase.

There are considerations weighing both for and against the idea that federal legislation should be the source of survivors' exemptions in bankrupt estates. On the plus side, there would be uniformity rather than ceilings that would leave creditors better

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66 Information taken from Probate and Trust Law Section, Committee on Uniform Probate Code, Suggested Changes to Official Text, received from Colorado State Bar Association.
68 See note 54 supra.
71 See part III A supra.
off in states where the debtor’s law provided lower exemptions. Also, some simplicity in administration should result if federal trustees could disregard substantive and procedural subtleties relating to exemptions. Problems of choice of law relating to exemptions would be avoided. Some troublesome problems caused by different priorities between beneficiaries of exemptions and creditors vis-à-vis probate and nonprobate assets subject to claims would be sidestepped.

The case for a federal ceiling on survivors’ exemptions that would limit rather than replace state law on exemptions is less clear. A ceiling, particularly a fairly generous one, would involve a less dramatic incursion of federal law in an area traditionally left for state control. Creditors who required and obtained priority over survivors’ rights under state law might be (or feel) jeopardized by a federal replacement for the state exemption system. Future developments in state law relating to administration of insolvent decedents’ estates would be encouraged to a greater extent by a policy of federal ceilings that made it possible for states to adjust their rules so as to reduce the attractiveness of bankruptcy to creditors.

On balance, however, a policy of federal ceilings rather than creation of a new federal system of survivors’ exemptions would be more desirable. This choice requires at least some treatment of the several problems of detail that were posited earlier.

Present bankruptcy law identifies the law of the state where the debtor resided for at least six months prior to the filing of the bankruptcy proceeding as controlling in determining exemptions.72 The Uniform Probate Code directs reference to the state of domicile at death for purposes of determining family exemptions.73 In spite of the greater definiteness provided by the present bankruptcy rule, the UPC’s resolution on this point may be preferable. A debtor may not have resided in any state for six months before his death or the filing of the petition, yet it would be capricious to deny his survivors some exemptions from creditors’ claims as an offset for the shock and loss of earning power caused by death.

Where applicable state law calls for a probate court order to fix family allowances, the court of bankruptcy should perform the function of the probate court unless the state court has acted before the personal representative received notice of the bank-

73 UPC § 2-401 et seq.
ruptcy petition. This arrangement would cover the situation in which a bankruptcy proceeding for an estate is commenced by creditors before any probate proceeding occurs.

If a probate court has made a determination concerning a family exemption prior to bankruptcy, it should be accepted in the later federal proceeding in all but the most unusual cases, such as those involving mistake concerning, or concealment of, facts bearing on the probable solvency of the estate. Local magistrates should be trusted to be fair to both family and creditors. Therefore the federal legislation should not be drawn in a way that would encourage creditors to resort to bankruptcy merely to obtain a new determination of exemptions.

One point of considerable difficulty remains. Probate exemptions and priorities for members of the decedent's close family are usually related to the so-called "probate estate." Usually the "probate estate" does not embrace assets that were transferred by the decedent by gift transfers which are avoidable only at the insistence of creditors because of insolvency. It is less clear, however, whether the estate for purposes of family exemptions includes other assets which some state statutes enable a personal representative to recover in cases where probate assets are inadequate to satisfy all claims.

For example, in states in which land passes to the heirs or devisees and may not be sold or possessed by the personal representative unless statutory conditions for land-sale proceedings exist, one will usually find allowances for the widow and dependent children included among the charges that are relevant to determining cause for sale.\(^\text{74}\) Similarly, Section 6-107 of the UPC expressly includes family allowances with creditors' claims as items for which recovery of balances received by surviving parties or beneficiaries of multiple-party accounts may be permitted. On the other hand, other rights given personal representatives of insolvent estates appear to be restricted to instances involving unpaid creditors.\(^\text{75}\)

It is apparent that there is considerable confusion in state law in this area. Variance in statutory language, fuzziness about the role of personal representatives and probate courts in relation to exemptions and voidable transfers, and the capriciousness of giving families priority over creditors as to some assets passing at death but not as to others dominate the scene. Moreover, the

\(^{74}\) See, e.g., Ohio Rev. Code Ann. § 2127.02 (1968).

\(^{75}\) Examples may be found in Mich. Comp. Laws Ann. § 556.123 (Supp. 1972).
relationships between family exemptions and creditors can depend on whether the decedent’s assets are located in one state or are found in several.\textsuperscript{76}

Bankruptcy should disregard state law subtleties with reference to the relative priorities in bankruptcy of family exemptions and creditors in probate estate assets, power of appointment assets, multiple-party account assets, and assets recovered from recipients of fraudulent transfers. State law should be accepted as controlling in relation to who may be entitled to family exemptions and possibly for determining the maximum amount. It will, however, overly complicate bankruptcy administration of decedents’ estates to force trustees to respect and keep track of all categories of assets in which family survivors and creditors may have different priorities under state law. Family survivors will gain rather than lose from this recommendation, for it would mean that all funds available to the trustee for satisfaction of unsecured claims are treated as if they were part of the probate estate from which the family may receive full allowances before creditors are paid. Creditors should gain enough through new assets and remedies available for their protection in bankruptcy to warrant yielding something to family allowances on this point.

The issue thus becomes what standards should federal law encourage by an exemption ceiling policy or establish by provisions designed to replace state law exemptions for survivors. Because they were fixed with a view to eliminating probate administration for many small estates presently caught in the probate net, the exemption levels recommended by the Uniform Probate Code are somewhat higher than those presently prevailing in many states. They may be too high from the standpoint of creditors. Nevertheless, death is not a significant factor in many bankruptcies, and creditors might be willing to yield more than they must now by way of exemptions from probate estates for spouses and dependent children in exchange for new remedies and uniformity of laws respecting claims against decedents.

Accordingly, survivors’ exemptions for spouse and minor or dependent children should be allowed in accordance with applicable state law in amounts not to exceed a total of $14,500 per estate. There is little point to recognizing any exemption to other survivors. The UPC’s exempt chattel provision of $3,500 to be taken in kind or cash, which is available for nondependent adult children-survivors, makes some sense in solvent estates but should not be recognized in bankruptcy.

\textsuperscript{76} See Scoles, Conflict of Laws and Nonbarrable Interests in Administration of Decedents’ Estates, 8 U. Fla. L. Rev. 151 (1955).
IV. STATE NONCLAIM STATUTES AND OTHER STATUTES OF LIMITATION

Should creditors who are barred from enforcing claims against a decedent's probate estate by nonclaim statutes gain "new life" if bankruptcy proceedings supercede the principal probate administration? The question seems simple, but there is no short answer.

In the first place, nonclaim statutes must be distinguished from general statutes of limitation. The latter normally begin to run upon accrual of causes of action and reflect a general policy of barring stale claims. Nonclaim statutes running from death of the debtor, from the commencement of administration of his estate, or from notice to creditors warning them that administration is under way reflect a policy of prompt settlement of decedents' estates. For creditors without knowledge of a debtor's death who do not notice obscure legal notices possibly published in places that may have little connection to their information about the debtor, the operation of nonclaim statutes can be quite harsh.

Second, nonclaim statutes are notoriously short and appear to be getting shorter as the probate establishment seeks ways of expediting probate administrations. For example, Wisconsin now bars creditors who do not present claims within three months after a court order prescribing such limits.\(^7\)

Third, one must notice some circumstances that may operate independently of the short time limits of nonclaim statutes to create inequitable results for creditors. Creditors of decedents may refrain from filing claims in probate where probate inventories indicate that the estate available to claimants is quite small. It is unclear whether such creditors should be barred from participating in proceedings to recover fraudulently transferred assets that are not considered as part of probate estates. Also, nonclaim statutes in the several states vary in many important particulars including starting point and length of time for nonclaim,\(^7\) type of claims subject to nonclaim,\(^7\) importance to non-

\(^7\)Ill. Ann. Stat. ch. 3, § 204 (Supp. 1972) (upon issuance of letters—seven months); Fla. Stat. Ann. § 733.16 (Supp. 1972) (upon first publication of notice to creditors—six months); Cal. Prob. Code § 707 (West Supp. 1972) (upon first publication of notice to creditors—four months); Mass. Ann. Laws ch. 197, § 9 (Supp. 1972) (upon issuance of letters and posting of bond—six months); N.Y. Surr. Ct. Proc. § 1801 (McKinney 1967), § 1802 (McKinney Supp. 1972) (upon first publication of notice to creditors—three months); id. § 1802 (upon issuance of letters, if no notice is published—seven months); Ohio Rev. Code Ann. § 2117.06 (Supp. 1972) (upon issuance of letters—four months); Wis. Stat. Ann. § 859.05 (1971) (upon application for administration, the court by order sets time—three months); UPC §§ 3-801, 3-803 (upon first publication of notice to creditors—four months).
claim provisions of probate court findings and orders,\textsuperscript{80} and relevance of nonclaim provisions to assets not inventoried as part of the probate estate.\textsuperscript{81} This array of distinctions and procedures probably contributes to an attitude of indifference to probate machinery on the part of commercial creditors. Finally, the running of nonclaim provisions in one state usually does not bar creditors from pursuing claims against portions of the same estate that may be located in another state.

The bars created by probate nonclaim statutes should be ignored when bankruptcy proceedings supercede probate administrations.

It may be argued that this position will create a powerful inducement for creditors to seek bankruptcy takeover of estates and create havoc in relation to the condition of inherited titles. There are good answers to both points.

The principal answer to the first argument is that nonclaim statutes rarely will have run before the expiration of the six months from death suggested above as a limit on commencement of bankruptcy proceedings. Nonclaim bars cannot operate under the Uniform Probate Code until four months from the first advertisement for claims have passed.\textsuperscript{82} Advertisement cannot occur until appointment and qualification of a personal representative, which cannot occur until some time after death.\textsuperscript{83} Hence, the difference between the nonclaim time and six months from death is not likely to be great. Further, nonclaim will not operate in the minimum period under the UPC except as to creditors who have not even taken the trouble to mail a bill to the personal representative or to the court.\textsuperscript{84} Perhaps these creditors will not have learned of the debtor's death, but unsecured creditors who are so lax in keeping track of their debtors as to be unaware of death for more than four months after it occurs should not be the center of legislative concern. Neither are they likely to wake up and dash for bankruptcy court in the interval between nonclaim and six months.

Further, the principal reason for bankruptcy of an estate will be to create an administration that can consolidate probate and nonprobate assets as well as assets in several jurisdictions for equi-

\textsuperscript{80} \textit{Wis. Stat. Ann.} § 859.05 (1971) (court order required for commencement of nonclaim period); \textit{Mich. Comp. Laws Ann.} § 708.16 (1968) (time limited for payment of claims is subject to court order).


\textsuperscript{82} \textit{UPC} § 3-803.

\textsuperscript{83} \textit{Id.} § 3-103.

\textsuperscript{84} \textit{Id.} § 3-804.
table distribution to creditors. Probate nonclaim statutes which may have run before bankruptcy frequently create bars relating only to the assets inventoried in the local administration in question. Practically speaking, nonclaim bars would be relatively meaningless as to many assets coming into bankruptcy administration even if state law were meticulously respected in bankruptcy.

The proposed six-month limitation on commencement of bankruptcy proceedings running from death provides an adequate answer to the argument that nonclaim bars must be respected so that the prospect of bankruptcy will not cloud or unsettle inherited titles.

Another aspect of state law bearing on relative rights among unsecured and nonpreferred creditors might be noted briefly. It relates to two kinds of cases in which creditors may have different rights to different portions of a decedent's estate. One involves the relatively rare case in which creditors of a personal representative, whose claims are based on transactions incident to proper continuation of the business, receive the priority of expenses of administration in relation to the portion of the estate involved in the business. The other involves multistate estates where creditors who have claims against the portion of an estate in one state may be preferred as to such assets over creditors who filed their claims elsewhere.

The first case appears to be one in which the priority of the business creditors should be respected. Presumably, the federal law will respect the priority of expenses of previous administration. If it does, business creditors of a probate representative should not be jeopardized by bankruptcy. On the other hand, the second case clearly is one where the bankruptcy administration should ignore the varying rights of creditors to different parts of the estate. This is implicit in the recommendation that state nonclaim statutes be ignored.

V. CLAIMS HAVING PRIORITY UNDER STATE LAW AND OTHER CLAIM QUESTIONS

A typical state probate code gives priority in distribution of assets to expenses of administration. These may include bills of

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creditors for postmortem transactions with a personal representative who properly continues a business of the decedent. Invariably, administration expenses will include compensation for the personal representative, usually determined by reference to statutory schedules establishing minimum amounts, and for attorneys employed by the personal representative as allowed by the probate court. Bond premiums, appraisers’ fees, filing and inventory fees, publication costs, and other obvious expenses of a personal representative also are included.

Reasonable funeral expenses as allowed by the probate court in cases of insolvency typically have second priority even though such expenses are often secured or guaranteed by contractual obligations of survivors who may have made the arrangements before appointment of a personal representative. Federal law puts debts due the federal government ahead of all debts of the decedent, including those that may have been owed to state government. Bills incurred by the decedent as expenses of the last illness typically come ahead of other debts due from the decedent including possible obligations to the state.

Putting secured claims and family exemptions and priorities to one side, it seems safe to assume that the only pressures for special coverage of priorities in insolvent decedents’ estates will relate to costs of administration of prior probate administrations and allowances for funerals.

A. Costs of Prior Probate Administration

Many, possibly most, insolvent decedents’ estates will come to the federal courts from prior probate administrations. This will be the case because families will have first information about death in most cases and commonly are enabled under state law to move very quickly to obtain appointment of temporary or regular personal representatives. Under the Uniform Probate Code, routine appointments may occur as soon as five days after death, and procedures are provided for eliminating even this period of delay.

Except where a prior probate administration has involved a court order allowing fees for the personal representative or attorney prior to the filing of a bankruptcy petition, there is little reason for burdening creditors in bankruptcy with state rates for partially completed services. On the other hand, there is no reason to deny compensation for services rendered to an estate prior

\[90\] UPC §§ 3-301, 3-307(a).
to the time it is taken over by bankruptcy. Control of the rates, however, clearly should lie with the bankruptcy court.

Where payment of a fee to a temporary administrator, to his attorney, or to appraisers has been approved by probate court order, the bankruptcy administration should be bound only if notice to creditors and opportunity to be heard were part of the proceedings leading to the award. Historically, state probate proceedings have been known for frequency of court orders, many resting on dubious assumptions regarding the need for notice in *in rem* proceedings. The public would be well served by federal legislation that creates new opportunities for creditors of insolvent decedents to exert pressure against probate court orders of dubious validity that have long appeared to seal off opportunities to raise questions about fees.

**B. Funeral Allowances**

The nation's funeral industry probably would offer strong protests against federal bankruptcy legislation that threatened the time-honored assumption that reasonable funeral costs are entitled to priority over dividends to unsecured creditors. The present statute does not give any special recognition to funeral expenses of a debtor who dies after bankruptcy proceedings have been commenced. Nevertheless, undertakers are able to protect themselves from losses in relation to funerals for known bankrupts in ways that would not occur to them in connection with decedents having known estates and unknown debts that later resulted in bankruptcy.

It would be appropriate to give reasonable funeral expenses priority in distribution of insolvent decedents' estates. There is, however, no reason to change present law in relation to funeral expenses for debtors who die after proceedings are commenced. The determination of reasonableness should be left to local referees. Bankruptcy court review and redetermination of funeral expenses previously allowed by probate court order should be permitted unless creditors were given notice and an opportunity to contest the allowance.

**C. Administration of Claims**

Because state standards regarding proof of claims will differ from bankruptcy standards, creditors probably should be required to reprove claims when bankruptcy proceedings are commenced. It may be possible, however, to give referees discretion to accept
claims which have been previously filed with a probate representative. Claims that have been paid in a previous state administration should be subject to recovery in all cases where they are not protected by a prior court order following notice to creditors and an opportunity to be heard. This net may catch many small merchant creditors who normally succeed in getting premature payment of small claims from family members serving as personal representatives. Because the turmoil of recovery of small payments may be more costly than the gain for other creditors, and because it would be unfortunate if the cloud of possible bankruptcy were to lead cautious fiduciaries in apparently solvent estates to delay payment of small claims, the bankruptcy law should be framed so as to permit creditors who received payment of claims of less than $100 from a prior probate fiduciary to keep their payments. The suggestion would be more palatable to many if it were qualified to protect payments made by a personal representative who was unaware that the estate was insolvent when the small bills were paid.

There is little persuasive basis for respecting more significant payments to claimants by a prior probate representative that may have occurred before institution of bankruptcy, unless the principles of res judicata apply. Nor is there any reason to approach the question of recovery of these payments from the viewpoint of the present statute's cumbersome definition of voidable preferences. Probate representatives should represent all creditors, and should be put under the pressures of federal and state law to ascertain with some care the probable solvency of estates before making payments to creditors. The hypothetical possibility of bankruptcy probably will not deter risk-taking settlements of clearly solvent estates or small estates. This also means that there will be some hard cases. Nevertheless, standards of the Uniform Probate Code clearly subject personal representatives and claimants receiving payment from them to risks of personal liability to estates if payments jeopardize the right of all creditors to prorata participation in assets available for claims. Federal law should be to the same effect.

VI. OTHER FEDERAL USE OF STATE LAW

Once bankruptcy proceedings have been commenced, there is no compelling reason for revitalizing any state probate proceedings that may have been superceded. State law and functions normally performed by state courts may need to be applied and

performed by federal authorities, but this presents no insurmountable problem provided the legislation makes it clear that the bankruptcy tribunal or agency is to exercise powers of a state probate court where necessary to carry out the purposes of the legislation. Saying this assumes that the federal statute will continue to permit a bankruptcy trustee to initiate state court proceedings when a matter requires determination of an unresolved point of state law.

One area where the federal authority will need to apply state law and exercise authority normally handled by the local probate court relates to dower and family allowances. Although the Uniform Probate Code eliminates dower and the need for court participation in determination of family allowances, extant law in many states puts the probate court in the middle of these procedures.

Many state codes require probate court orders to confirm titles or distribute assets representing inheritances. Occasionally, a bankruptcy administration for a decedent’s estate may leave a residue for distribution to inheritors. There appears to be no obstacle to the federal court’s performing the role of the probate court in distributing surplus assets.

A theoretical difficulty may attend distribution of a multistate estate involving land in two or more states. The situation is that in which inheritance rights traditionally are determined by the laws of the places where the land of the decedent was owned at death. The Uniform Probate Code, if uniformly enacted, would practically eliminate the problem by coercing uniform application of the law of the decedent’s domicile in cases involving wills. In intestacies, however, the law of the situs of land would still determine heirs, and if the inheritors are the spouse and children, their shares may be affected by the fact that several states are involved.

In view of the possible relevance of different rules of inheritance for different parts of an estate, the federal statute should direct the trustee or the federal tribunal to distribute surplus in accordance with applicable state law.

VII. TITLE OF THE TRUSTEE OF AN INSOLVENT ESTATE

A. Background—Abatement of Action by Death

Death of an obligor abates actions pending against him. All but suits on personal liabilities that do not survive may, however, be
revived against his personal representative.\textsuperscript{92} Liens obtained by attachments prior to death may be preserved through revived actions against the personal representative. Where no attachment lien has been obtained before death, judgments frequently may be obtained against personal representatives even though procedures for presentment of claims in probate are not observed. Nevertheless, state statutes usually make it clear that no liens can be obtained after death, for then the probate process governs the marshaling of assets.\textsuperscript{93}

\textbf{B. Background—Assets Available to Claimants}

\textit{1. Primary Probate Estate}—This subdivision relates to property standing in the decedent’s name at the time of his death that is unaffected by rights of survivorship or future interests in others which become possessory at his death. This property can be called the primary probate estate even though it may embrace land which may become available for payment of claims only after personal assets have been exhausted.

There are wide variations in state laws regarding the title and power of a personal representative to assets constituting the primary probate estate. For example, in many states, title and the right to possess personal estate of a decedent vests in the personal representative upon his appointment and qualification, while title to real estate descends to heirs or devisees, subject to being sequestered in land-sale proceedings where necessary to meet debts and expenses.\textsuperscript{94} In Wisconsin, title to real and personal property vests in the personal representative,\textsuperscript{95} while in California, title to both classes of property passes to devisees or heirs subject to administration and a statutory duty on the personal representative to possess the entire estate.\textsuperscript{96} In many states, title to land and personality still follow their divergent common-law paths, but the personal representative’s right to possess and administer the estate relates to both classes of property without important differences.\textsuperscript{97} Also, state laws vary markedly in relation

\textsuperscript{92}T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 693 (2d ed. 1953); ILL. ANN. STAT. ch. 110, § 54 (1968); CAL. CIV. PRO. CODE § 385 (West Supp. 1972); MASS. ANN. LAWS ch. 228, § 4 (1955); OHIO REV. CODE ANN. § 2311.21 (Supp. 1972); WIS. STAT. ANN. §§ 269.16 (1957), 859.03 (1971).

\textsuperscript{93}2 J. WOERNER, supra note 29, at § 410.

\textsuperscript{94}OHIO REV. CODE ANN. § 2127.01 et seq. (1968); MASS. ANN. LAWS ch. 202, § 1 et seq. (1969); ILL. ANN. STAT. ch. 3, §§ 225–252 (Supp. 1972).

\textsuperscript{95}WIS. STAT. ANN. §§ 857.01, .27 (1971).

\textsuperscript{96}CAL. PROB. CODE § 300 (West 1956).

\textsuperscript{97}MICH. COMP. LAWS ANN. § 707.1 (1968).
to the ability of probate fiduciaries to sell, lease, exchange, or otherwise administer assets of the estate. Typically, different powers relate to personal and real assets, and there is also variance in the degree to which probate court orders approving or confirming sales are necessary. The terms of the decedent's will are frequently important in this regard.

2. Powers of Revocation and Appointment—Rights of creditors, either acting directly or through the representation of a personal representative, to reach assets outside those constituting the primary probate estate are found in various legal compartments. Rules governing fraudulent transfers and the law of future interests normally determine rights of creditors to property in which the decedent held an unexercised power of revocation or appointment at his death. Under common-law decisions, gift transfers in which the decedent reserved a life estate and a power of revocation can be reached by personal representatives when normal probate assets were insufficient to meet all claims. On the other hand, representatives of decedents who held donated general powers of appointment frequently cannot reach the property subject to the power unless the decedent exercised the power in favor of volunteers. In some states, however, the technical line between powers and property is observed notwithstanding the exercise of a general power, and in Maryland not even appointment to the estate of the donee of a power aids his creditors. The trend in newer state statutes, like those in effect in Michigan and California, is to treat every general power held by a decedent at the time of his death as an asset available to creditors when normal probate assets are insufficient. Nevertheless, even though the substantive authority of personal representatives under these statutes is clear, it still may be useful for them to obtain probate court orders determining insolvency and authorizing suit against whoever has the property subject to the decedent's power. Also, these statutes would not give creditors much assistance in cases where the decedent had exercised or released a general

98 Compare Cal. Prob. Code § 755 (West Supp. 1972) (With few exceptions "all sales of property must be reported to ... and confirmed by the court before title of property passes . . . .") with UPC §§ 3-711, 3-715(23) (personal representative has title to the decedent's property and broad powers of sale).


100 Restatement of Property § 330 (1940); 5 American Law of Property § 23.17 (A. Casner ed. 1952).


power prior to death, thereby forcing collectors to rely on general rules governing fraudulent transfers.

3. Interest of Debtor in Joint Tenancies—Conceivably, the ability of a joint tenant to transform his relationship with fellow joint tenants into a tenancy in common without right of survivorship is a form of power of appointment. If it is a power, then modern statutes on powers of appointment might make the control over his fractional interest, as of the moment before death, a basis for subjecting the interest in the hands of the survivors to the creditors in the event the primary probate estate is insufficient. Yet the ability of a joint tenant to sever the tenancy traditionally has not been considered to be a power of appointment and, even if it were so classified, it would be of little help to creditors in states where general powers must be exercised in order to make property available to creditors of the donee. Hence it is quite unlikely that lapse of this ability upon death would be equated with the making of a gift at death for purposes of creditors’ rights. If the joint tenancy arose from a donation by the decedent-debtor to the other joint tenants, the transaction might be vulnerable as a fraudulent conveyance; but the traditional theory of this relationship makes the survivor’s rights to his portion and the decedent’s retained portion date from the creation of the tenancy. Hence, the tests for fraudulent transfers normally must be met as of the time when the joint tenancy was established.

4. Interests of Debtor in Other Will Substitutes—According to the Second Restatement of Trusts, the interest of one who establishes a bank account in his name as “trustee” for another, where there is no other evidence of intention to make an irrevocable donation, is subject to the claims of his creditors if his estate is insufficient to cover claims. Under this view, the trustee in bankruptcy of the estate of the settlor of one of these “tentative trusts,” would be able to reach account balances as of death if he has the rights of an unpaid creditor. Other forms of multiple-party accounts include accounts that are payable to the debtor while alive and to another in the event of death, and accounts payable to two or more and to the survivor. The rights of creditors of insolvent decedents who established these forms of accounts are

104 See Hayes v. Schaefer, 399 F.2d 300 (6th Cir. 1968) (denying bankrupt one-half of proceeds of entirety property when bankrupt’s spouse died eight months after commencement of bankruptcy, court applied the common law view that the rights of the survivor of such a tenancy date back to the creation of the estate).

105 RESTATEMENT (SECOND) OF TRUSTS § 58, Comment (d) (1959); G. PALMER, TRUSTS AND SUCCESSION 346–47 (1968).

106 See, e.g., OHIO REV. CODE ANN. §§ 1107.08, 2131.10–.11 (1968) (provisions fail to mention rights of creditors of depositor in the account upon his death).
uncertain under present state law. In many states, the assumption would be that the survivor's rights accrued as of the time when the account was established and that lapse of the decedent's power to withdraw during his lifetime would not be an event that creditors could treat as a transfer occurring at death.

Under Section 6-107 of the Uniform Probate Code, a personal representative who has received a written demand from an unpaid creditor or a beneficiary of family exemptions who has not received full satisfaction, may proceed against surviving beneficiaries of deposit accounts serving as will substitutes for balances at death. This provision of the Code resembles and extends rules recognized in New York and by Second Restatement of Trusts relating to accounts in the name of a decedent as trustee for another where there is no other evidence of an inter vivos trust.

5. Creditors' Remedies Against Fraudulent Transfers—Personal representatives have varying relationships to transfers by a decedent which are voidable by creditors for reasons other than the character of interests retained by the debtor at his death. Section 3-710 of the UPC, following Section 125 of the Model Probate Code and state legislation in a few states, places the exclusive right to recover fraudulent transfers in the personal representative, "so far as necessary for the payment of debts of the decedent." In states without explicit legislation on the point, the authority of a personal representative is less clear.

C. Title of Trustee of Insolvent Estates—Recommendations

1. In General—Presumably, a trustee for an insolvent decedent's estate will acquire the title and power over the decedent's assets that are, under applicable state law, available to the probate court and personal representative incident to administration of the decedent's estate. Also, the trustee should get the power of a creditor of the estate, whose claim has been duly proved and allowed but is unpaid because of insufficiency of assets in the probate estate, to set aside or otherwise to enforce a right created

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108 See note 105 supra.

109 Compare Wis. Stat. Ann. §§ 859.40-.41 (1971) (although not expressly authorized to sue, a personal representative apparently has authority to bring suit) with Kent v. Lyon, 4 Fla. 474, 56 Am. Dec. 404 (1852) (a personal representative lacks power to impeach transfers by his decedent).
by federal or state law to payment from assets in the hands of donees of the decedent which are subject to recovery on behalf of creditors in cases of insolvency.

Finally, the trustee who is appointed to succeed a probate representative should receive all powers given by law or possible through probate court order for a successor personal representative. The purpose of this addition is to ensure that a trustee in bankruptcy will have the ability to pursue prior representatives of the estate or their bondsmen to recover sums lost through defalcation or actionable neglect.

2. Problems Relating to 70a(3) and 70a(5) Rights — This array would leave the trustee short in at least two important respects of having title and authority presently available to trustees of living debtors. These relate to items within Subsection 70a(5)\(^1\) and powers available to the trustee under Subsection 70a(3).\(^2\) The problem relating to the application of both of these provisions to insolvent decedents' estates is that the debtor's death will have ended his powers of appointment, his ability to sever joint tenancies, and possibly his right relating to various other relationships. One example of the latter would be the right, usually personal, of a surviving spouse to reject the provisions of the will of the other spouse and to receive a capital share of his estate as measured by various kinds of statutes preventing disinheritance of a spouse.

The inability of a trustee of an insolvent decedent to reach any interest of the decedent in property held in joint tenancy with another who survived would constitute a serious qualification on the effort to design federal remedies for creditors of insolvent decedents' estates that will eliminate the disparity that now exists where a debtor's death precedes insolvency proceedings. The California statistics described earlier indicate the extent to which joint tenancies were used in 1965 to avoid probate.\(^3\) The extent is probably higher now because the last several years have been marked by an increase in public criticisms of probate procedures and, in all likelihood, an increase in use of probate avoidance devices like joint tenancies. Joint tenancies do not embarrass bankruptcy proceedings against living debtors, because Subsection 70a(5) gives the trustee the undivided interest that a debtor who is a joint tenant might have transferred to another.\(^4\) Death, how-

\(^{11}\) Id. § 110(a)(3).
\(^{12}\) See text accompanying note 16 supra.
\(^{13}\) 4A COLLIER ON BANKRUPTCY ¶ 70.17(10) (J. Moore ed. 1972).
ever, ends the ability of a joint tenant or his creditors to sever his interest.

Similarly, death before exercise frequently results in lapse of powers of appointment that might have been exercised by a person for his own benefit. State law concerning the rights of creditors of persons holding powers to revoke gifts or to appoint trust or other estates to themselves under powers created by others is not a satisfactory substitute for Subsection 70a(3) of the present bankruptcy statute. Transfers from which a donor retains a life estate and a power of revocation are commonly insufficient to remove assets from the reach of the transferor's creditors, and local power of appointment or fraudulent transfer law may make assets so transferred available to creditors of the transferor's estate. Where, however, a mere power to revoke is retained, or where the decedent's general power of appointment was created by a gift from another, creditors' rights under state laws are in disarray. The trend of modern statutes is to equate powers exercisable in favor of a donee with property owned by the donee, but the common-law rule, which made creditors' rights depend on whether the donee had exercised the power, still has wide acceptance. Also, in a substantial number of states, property passing by virtue of exercise of a general power of appointment is deemed to have been given to the appointee by the donor, so that creditors of the donee are without a remedy.

In passing, it should be noted that creditors' remedies against fraudulent transfers will be of no avail to creditors of persons who held general powers of appointment created by others. Hence, the policy of Subsection 70a(3) must be extended to a proceeding instituted against the estate of one whose death caused the lapse of a general power, if bankruptcy proceedings against estates are to be framed to avoid the impact of death on creditors' rights.

3. Recommendation to Prevent Loss of 70a(3) and 70a(5) Rights in Insolvent Decedents' Estates — No sufficient reason appears why property that a debtor might have made his own as of a moment before his death, and so a part of his estate, should not be included in his estate for bankruptcy purposes. Technical tests of title, rather than substantive ability to control wealth, have been accepted by state law to determine the extent of probate estates. This approach reflects the public's strong antipathy for mandatory procedures that serve to place every probate estate in court even


\[115\] See notes 100–03 and accompanying text supra.
though no creditors or heirs desire the proceeding. Some local developments recognize that creditors should have rights in some probate-avoiding transfers, but the trend is weak because creditors are on the outside of the typical circle that controls local probate and property law. Further, creditors have placed principal reliance on bankruptcy rules and these rules now should afford some offset to state patterns relating to decedents' estates that are hostile to the interest of unsecured creditors.

The question remains as to how to shape bankruptcy law applicable to estates so as to prevent loss of 70a(3) and 70a(5) rights. Arguably, the title of a trustee for an insolvent decedent's estate should be related back to a moment before the decedent's death, rather than be timed to coincide with the filing of the petition. Because death freezes a decedent's property rights and because provisions normally applicable when a bankruptcy proceeding supersedes a state insolvency proceeding would protect rights based on acts of a probate representative who functioned before bankruptcy, there appear to be no insurmountable problems in relating the Section 70 rights of a trustee back to the moment preceding death. It is true that if insolvency did not exist at the time of death, but developed because of loss of asset value after death, the relation-back idea appears to jeopardize the interests of persons holding nonprobate assets who were not recipients of a fraudulent transfer or of property that was entwined with the estate that declined in value after death. Nevertheless, it can be argued that fault should be assigned to decedents who fail to exercise powers available to them so as to provide financing adequate to protect unsecured creditors of their estates against postmortem losses. If this is accepted, no inequity would attend recovery from persons who become donees because of the decedent's failure to exercise his powers.

It would not be necessary to say that the petition must be deemed to be filed as of a moment before the decedent's death in order to reach the goal that must be reached. Elsewhere in this article, it is argued that persons who may have received preferential transfers or liens within four months before death should not be given the benefit of time running after death and before the filing of a bankruptcy petition. This is a separate point, however, which can be accepted or rejected without regard to whether a

116 See discussion in Wellman, Law Teachers and The Uniform Probate Code, 24 J. LEGAL EDUCATION 180, 183-84 (1972), of the process in New York leading to estate and probate law studies and changes.

117 See text accompanying notes 122-24 infra.
trustee's title under Section 70 can be related to the moment before death in cases where the proceeding involves an insolvent decedent's estate.

There are other ways of accomplishing some of the purposes that would be served by the relation-back idea, but none seem as adequate. For example, federal law might include a test of transfer keyed to the time when the transferor ceased to have the ability to recall the property for his own use. Transfers as of this moment would stand or fall depending on whether other elements that would make an absolute transfer voidable at the instance of creditors were present. Under this test, one-half of joint tenancies created by a debtor would be recoverable for his creditors if the transferor proved to be insolvent at the moment of death. Other forms of revocable transfers also could be reached under state standards for fraudulent transfers. Nevertheless, this approach has drawbacks. First, it assumes a complex mix of federal law and state law elements vis-à-vis the identification of certain voidable transfers that might be impractical. Second, it would not help creditors of a joint tenancy that had been created by someone other than the debtor, and it would not help creditors who sought to reach property subject to a donated general power held by a debtor at his death. Finally, it would not help in a variety of cases that could not be classified as involving an incomplete or fraudulent transfer, but which involve an ability on the part of a deceased to make assets available to himself and his estate.

4. Problem and Recommendation Relating to Tenancies by the Entireties—If tenancies by the entireties were merely severed by the bankruptcy of one of the parties, the trustee of the estate in bankruptcy of a living debtor would obtain the debtor's interest in one-half for life, and his interest in the whole if he survives the other. The right of the other tenant to take the entire estate in the event he proves to be the survivor would not be affected. Yet this position would not assist creditors of a tenant by the entireties who died leaving an insolvent estate. If bankruptcy of a tenant by the entireties transforms the estate into a tenancy in common, creditors of a deceased tenant would receive adequate protection from the proposal to relate a bankruptcy trustee's title to a moment before death. In any event, treatment of entireties property should be the same in cases involving living debtors and insolvent decedents.

5. Transfers by Debtor with Retained Life Estate—Federal and state estate tax statutes treat gift transfers by one who retains a life estate in the transferred property as transfers at death for
tax purposes. Present bankruptcy rules do not take any special account of retained life estates unless state law characterizes the transaction giving rise to them as fraudulent. If a power to revoke is also retained, the bankruptcy statute permits creditors to avoid the transaction. In irrevocable transfers, the value of a retained life estate is subject to creditors' claims. One who retained an interest conditioned to shift to another in the event of bankruptcy presumably would be held to have made a fraudulent transfer. Clearly, efforts to impose direct restraints on the alienability of retained interests would be ineffective. Overall, therefore, there is little inducement to persons who may worry about bankruptcy at some future date to enter into gift transfers with retained life interests.

Arguably, the situation is somewhat different when death without sufficient assets to meet debts is conceived to be an occasion for bankruptcy. A debtor who might plan suicide in the event of bankruptcy might find advantage in reducing his titles to life estates so that his spouse or children could assert remainder interests against his estate and his creditors.

Unless concealed, however, titles to irrevocable successive estates mean loss of management ability. If management powers are retained, as might be accomplished through use of a self-declared trust, state courts could invalidate the transaction at the suit of creditors on grounds of fraud. The same result might follow where an owner attempts to turn himself into a managing trustee for his family without reserving any explicit, beneficial interest for himself. Accordingly, there is little reason for recommending any new bankruptcy standards on the subject of retained life estates.

Some thought might be given, however, to a special bankruptcy rule regarding powers of rescission, revocation, or appointment, exercisable in favor of a debtor-decedent with the concurrence of another person who is a trustee of a trust created by the debtor or a member of the debtor's household. These powers might be equated with general powers of appointment exercisable solely by the decedent-debtor for bankruptcy purposes. The rule should be applied only to powers over property which were created in a transfer or other transaction attributable to consideration moving from the debtor. The objective of the rule would be to give creditors access to property which, in view of practical consid-

120 See id. § 110(a)(3).
erations operating among closely related persons or as between settlor and trustee, is commonly available to a debtor for payment of debts if he chooses to make it so.

Like any new federal rule regarding tenancies by the entiretys, however, the suggestion should be made applicable to living debtors as well as to decedents who left insolvent estates. Also, it should be made applicable only to transactions occurring after the effective date of a new bankruptcy act.

6. Life Insurance—Opening bankruptcy proceedings to decedents' estates may be the occasion for new interest in the impact of bankruptcy of an insured on his life policies. It is believed, however, that it should not be the occasion for significant changes in the present rules determining the relationship of bankruptcy to life insurance on the debtor's life. New rules relating to bankrupt estates may encounter difficulty in the political arena merely because they will reflect a new incursion of federal law on state procedures. Any attempt to change the rules relating to creditors' rights to life insurance would involve disregard for state exemptions for insurance and would involve complex extensions to a variety of contracts involving creditor beneficiary insurance, and insurance serving as inducements for accounts in credit unions and other savings arrangements. If the life insurance industry is moved to oppose the new development the chances of realizing any progress would become slim indeed.

Hence, premiums paid by a debtor for life insurance shortly before bankruptcy might be recoverable only if state rules for fraudulent transfers so dictate and if the values acquired are not otherwise exempt. Death benefits received by creditor beneficiaries should not constitute preferences to any greater extent than that attributable to consideration paid by the debtor during the four months preceding death. Other death benefits should constitute assets for creditors only if they would be subject to creditors' claims under state law.

VIII. Liens and Preferences Acquired Within Four Months of Death

Arguably, the date of the decedent's death rather than the date of the bankruptcy petition should be used as the point of time from which to measure periods within which preferences can be avoided. Preferred creditors may assert that the debtor's death should not toll the running of a period that may protect

\[\text{122 Cf. 11 U.S.C. § 96(a) (1970).}\]
them. Nevertheless the death of a prospective defendant inevitably confuses and delays the institution of proceedings against him. It would be unfair to other creditors to give preferred creditors the advantage of this hiatus. Hence, the analogy to general statutes of limitation which are regularly tolled by death is appropriate.\(^{123}\) Further, an idea that the magic, four-month period should resume running after, say, sixty days from death or upon appointment of a personal representative, is not acceptable because creditors may be lulled into inaction as they await performance by the personal representative. It follows that creditors who gained voluntary or involuntary preferences within four months before death would not be secure with their payments or liens until the period of limitations on filing of bankruptcy petitions for insolvent estates has run.

As indicated earlier,\(^{124}\) this suggestion is separate from the suggestion that title of a bankruptcy trustee for an insolvent decedent under Section 70 should be related to the decedent's affairs as of a moment before death. It is also less important because preferences will probably not be very important in relation to insolvent decedents' estates. This guess work is based on a belief that persons contemplating death are more likely to make probate-avoiding gifts to their families than they are to make preferential payments to creditors. Nevertheless, persons become decedents without planning for the event. Hence, preferences should not be ignored.

### IX. Summary of Recommendations

The application of federal bankruptcy law is necessary to protect creditors from the vagaries of local law as complicated by the increasing tendency of individuals to arrange for transfers at death via nonprobate means. The recommended extension requires some significant adjustments to the present Bankruptcy Act. First, bankruptcy proceedings for insolvent decedents' estates should be restricted to minimize the risk that probate proceedings routinely will be superceded by federal proceedings and to encourage improvement of local law. Second, although state law would determine the existence and beneficiaries of exemptions given to the surviving spouse and children, federal law should


\(^{124}\) See part VII C 3 supra.
establish ceilings on the amounts that will be allowed as exemptions. Third, local nonclaim provisions should be disregarded in bankruptcy, but bankruptcy proceedings for estates should be subject to a short period of limitations running from death to keep the risk of bankruptcy from unduly prolonging estate settlement. Fourth, federal law should give reasonable funeral expenses the same priority as other expenses of administration. Fifth, where necessary, the bankruptcy court should exercise the powers of a state probate court in relation to an insolvent decedent's estate. Sixth, to give the trustee for an insolvent decedent's estate substantially the same title and rights as the trustee for the bankruptcy estate of a living debtor, the title of the former should be related back to a moment before death. Finally, the rights of a trustee of an insolvent decedent's estate under Sections 60 and 67 should be measured by a period of four months before death rather than four months prior to the filing of the petition.

This is an especially opportune time for extension of bankruptcy to insolvent decedents' estates. Even if it were to be generally adopted by the states, the Uniform Probate Code would not provide the complete relief that creditors would receive through an extension of bankruptcy law. Like the state codes from which it is derived, the UPC is keyed to the usual decedent's estate where creditors' claims are a minor concern. But, the Code is spreading the concept that a probate fiduciary is a statutory trustee who represents a quasi-entity. This concept should lower conceptual barriers that may have deterred earlier efforts to extend bankruptcy to its logical limits. Also, the realization that this new "ideal" state law leaves creditors without the protections that have come to be taken for granted in insolvency cases should ease the process of rounding out the bankruptcy remedy. As suggested by the foregoing discussion, the process will involve some problems, but none that seem beyond the reach of relatively simple resolution.