

**JUSTICE BEFORE GENEROSITY: CREDITORS’  
CLAIM TO ASSETS OF A REVOCABLE TRUST  
AFTER THE DEATH OF THE SETTLOR**

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## I. INTRODUCTION

The use of will substitutes, in general, and revocable trusts, in particular, are on the rise.<sup>1</sup> Revocable trusts permit settlors to make *inter vivos* asset transfers that provide for the disposition of those assets at their death outside the probate system yet also enable them to retain ultimate control of those assets during life through the power of revocation.<sup>2</sup> The trend toward probate avoidance, however, has left one group scrambling to find its place: creditors.<sup>3</sup> Traditionally, discharging a decedent's debts was an essential function of the probate process, and creditor protection, one of its primary goals.<sup>4</sup> As Blackstone explained more than two hundred years ago, "[I]t is [the executor's] business first of all to see whether there is a sufficient fund left to pay the debts of the testator: the rule of equity being, that a man must be just before he is permitted to be generous."<sup>5</sup> Creditor protection, however, has not been built into the law of trusts as into the law of succession, although states

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1. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109-15 (1984) (noting that the use of will substitutes has become common in the United States and outlining four primary types); David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 186 (2002) (noting that revocable trusts are the most common trusts in the United States and are used primarily as will substitutes).

2. Alan Newman, *Revocable Trusts and the Law of Wills: An Imperfect Fit*, 43 REAL PROP. TR. & EST. L.J. 523, 524 (2008) (describing the operation of revocable trusts).

3. Nathaniel W. Schwickerath, Note, *Public Policy and the Probate Pariah: Confusion in the Law of Will Substitutes*, 48 DRAKE L. REV. 769, 796-97 (2000) (noting the trend toward probate avoidance).

4. Langbein, *supra* note 1, at 1117 (discussing the three essential functions of probate: "(1) making property owned at death marketable again (title-clearing); (2) paying off the decedent's debts (creditor protection); and (3) implementing the decedent's donative intent respecting the property that remains once the claims of creditors have been discharged (distribution)"); Schwickerath, *supra* note 3, at 770 (noting that the law of succession has long valued creditor protection); *see also* Richard J. Ruebel, *Planning for the Impact of Creditors' Claims Against a Client's Nonprobate Property*, 15 EST. PLAN. 38, 38 (1988) (noting that handling claims against a decedent's probate estate is now a matter of routine).

5. WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES ABRIDGED 283 (William C. Sprague ed., 9th ed. 1915) (1892).

have recently begun to address some of the creditors' rights issues arising from the use of revocable trusts.<sup>6</sup>

Ohio is among them. The Ohio legislature recently passed the Ohio Trust Code, which primarily codified existing trust law.<sup>7</sup> In keeping with the operation of revocable trusts and the principle that settlors should not be able to use such trusts to avoid creditors, it provides that creditors may claim the assets of a revocable trust during the lifetime of the settlor.<sup>8</sup> It is, however, silent as to creditors' ability to access trust funds after the settlor's death.<sup>9</sup> Two Ohio appellate courts have discussed the statute, only to arrive at different conclusions regarding its operation and significance in light of case precedent.<sup>10</sup>

This Article will argue that the Ohio legislature should amend the statute to permit creditors access to the assets of a revocable trust to satisfy the settlor's debts upon his death under certain limited circumstances. Part II will discuss pertinent background, including the nature and use of the revocable trust, creditors' access to trust funds in the past, and the development of Ohio's statutory law on the subject. Part III will set forth the conflict between the Ohio appellate courts in more detail, framing the relevant issues. Part IV will consider the arguments in favor of permitting creditors access to revocable trust funds after the settlor's death, while also proposing a method for so doing by showing the following: first, it is in keeping with the principles of Ohio law and public policy; second, it is in keeping with persuasive authority; third, it is a question of statutory amendment for the legislature; fourth, potential pitfalls can be avoided with careful drafting.

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6. Ruebel, *supra* note 4, at 39 (discussing the nature of revocable trusts and recently adopted statutes addressing creditors' claims on their assets).

7. Alan Newman, *The Uniform Trust Code: An Analysis of Ohio's Version*, 34 OHIO N.U. L. REV. 135, 136 (2008). The Ohio Trust Code became effective January 1, 2007. *Id.*

8. OHIO REV. CODE ANN. § 5805.06(A) (West, Westlaw through the 130th GA (2013-2014)) ("Whether or not the terms of the trust contain a spendthrift provision, all of the following apply: (1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.").

9. *Id.*

10. *Sowers v. Luginbill*, 175 Ohio App. 3d 745, 889 N.E.2d 172, 2008-Ohio-1486, at ¶¶ 13, 27-29 (concluding that O.R.C. § 5805.06(A)(1) does not permit subsequent creditors to file claims to a settlor's revocable trust and defining subsequent creditor as a person who files his claim after the settlor's death); *Watterson v. Burnard*, 986 N.E.2d 604, 608-11 (Ohio Ct. App. 2013) (concluding that O.R.C. § 5805.06(A)(1) permits all claims filed before the settlor's death, even if the settlor dies while the claim is pending, regardless of whether the claimant is a subsequent creditor and declining to determine whether the claim must be filed before the settlor's death).

## II. DEVELOPMENT OF OHIO LAW ON CREDITORS' ACCESS TO REVOCABLE TRUST FUNDS

### A. *Revocable Trusts*

A revocable trust is created when the settlor transfers assets into the trust but reserves an equitable life interest<sup>11</sup> and retains the power of revocation and amendment.<sup>12</sup> With appropriate drafting, a revocable trust “can replicate the incidents of a will.”<sup>13</sup> The settlor typically names remainder beneficiaries for whose benefit trust assets will be held or to whom trust assets will be distributed upon the settlor’s death.<sup>14</sup> Because the settlor, while living, can alter the terms of the trust, including its beneficiary designations, the trustee owes the remainder beneficiaries no duties until the trust becomes irrevocable upon the settlor’s death.<sup>15</sup> The remainder beneficiaries of a revocable trust may not even be aware of their interests in the trust.<sup>16</sup> Thus, although remainder beneficiaries technically receive a beneficiary interest in trust property, this interest is increasingly treated like an expectancy while the settlor is still living.<sup>17</sup> In sum, the revocable trust functions like a will but manages to avoid the “cumbersome, time-consuming, and expensive” process of estate administration.<sup>18</sup> It is unsurprising that revocable trusts have become popular estate planning devices in recent years.<sup>19</sup>

### B. *Precedent on Creditor Access to Revocable Trusts*

Creditor avoidance has been another, though perhaps unintended, advantage of employing a revocable trust as a will substitute.<sup>20</sup> Traditionally under Ohio law, after the death of a settlor of a revocable trust, creditors of the settlor could not access assets placed in trust absent

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11. A trust beneficiary does not hold legal title to trust assets but maintains an interest enforceable in equity. See BLACK’S LAW DICTIONARY 885 (9th ed. 2009).

12. Newman, *supra* note 2, at 524; Langbein, *supra* note 1, at 1113.

13. Langbein, *supra* note 1, at 1113.

14. Newman, *supra* note 2, at 524.

15. *Id.* at 532-33.

16. *Id.* at 532.

17. *Id.* at 531-32.

18. *Id.* at 524.

19. English, *supra* note 1, at 186 (noting that “the extensive use of revocable trusts is a recent phenomenon”).

20. Ruebel, *supra* note 4, at 41 (“Revocable trusts, of course, are not usually created to defeat the claims of creditors, although they lend themselves well to that purpose.”). This is further evidenced by scholarship recommending trust-drafting techniques to maximize asset protection from creditors. See Dennis M. Sandoval, *Drafting Trusts for Maximum Asset Protection from Creditors*, 17 NAELA, no. 5, 2004, at 10.

intent to defraud.<sup>21</sup> As early as 1853, the Ohio Supreme Court addressed asset transfers intended to defraud creditors in *Crumbaugh v. Kugler*.<sup>22</sup> It cautioned that “[w]herever a person, largely indebted, gives away a large amount of his property, without amply providing for the payment of his debts, a suspicion of fraud will generally attach to the transaction.”<sup>23</sup> It concluded that such transfers were invalid with respect to previous creditors but valid with respect to subsequent creditors, absent intent to defraud.<sup>24</sup> Ultimately, it held that no intent to defraud was present in *Crumbaugh*, and the transfer did not prejudice the subsequent creditors.<sup>25</sup>

In 1880, the United States Supreme Court expounded on the implication of fraud arising from the power of revocation in *Jones v. Clifton*.<sup>26</sup> In that case, Clifton transferred land estates to his wife via a deed in which he reserved the power of revocation and appointment to other uses.<sup>27</sup> Subsequently, he filed for bankruptcy.<sup>28</sup> Jones, the assignee in the bankruptcy, sought to include this property among his assets, arguing that Clifton intended to defraud his future creditors while retaining control and enjoyment of the property.<sup>29</sup> The Supreme Court held that reserving the power of revocation and appointment to other uses did not invalidate the transfer or demonstrate intent to defraud:

The insertion of the power of revocation and new appointment. . .tends to show the contrary. Should he revoke the settlements, the property would revert to him, and, of course, be liable for his debts; and should he exercise the power of appointment for the benefit of others, the estate appointed would be liable in equity for his debts.<sup>30</sup>

Thus, the Court did not consider the power of revocation to be a property interest against which creditors could levy a claim.

Finally, in 1939, the Ohio Supreme Court established the following rule respecting revocable trusts in *Schofield v. Cleveland Trust Co.*:

Where the owner of property has conveyed it to another under a trust

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21. See *Schofield v. Cleveland Trust Co.*, 21 N.E.2d 119 (Ohio 1939) (holding that, absent intent to defraud, a revocable trust is not voidable by subsequent creditors).

22. *Crumbaugh v. Kugler*, 2 Ohio St. 373, 376-78 (1853) (discussing intent to defraud creditors through a donative transfer).

23. *Id.* at 376.

24. *Id.* at 373.

25. *Id.* at 379.

26. See *Jones v. Clifton*, 101 U.S. 225 (1880).

27. *Id.* at 226.

28. *Id.* at 227.

29. *Id.*

30. *Id.* at 230.

instrument, containing a power of revocation, to hold such property for the benefit and enjoyment of the settlor during his life and at his death to distribute the same among designated beneficiaries, such trust, lacking fraud, is not voidable by subsequent creditors.<sup>31</sup>

The court did not explicitly define “subsequent creditor,” a term lifted from *Crumbaugh v. Kugler*.<sup>32</sup> It cited *Crumbaugh* in explaining the rationale for the rule.<sup>33</sup> Future creditors provide credit on the basis of the debtor’s present assets, not on the basis of his or her past assets.<sup>34</sup> This reiterates that the settlor of a revocable trust does not retain a property interest in its assets. Thus, creditors whose claims arise after its creation cannot access its funds.

This understanding is supported by the facts in *Schofield*. While completely solvent, Ehert created and funded a revocable trust, reserving the rights to receive any net income from the trust, occupy any real estate included in the trust, and approve or deny sale of property connected with the trust.<sup>35</sup> Upon his death, the trustee was to distribute the property to Ehert’s wife and daughter.<sup>36</sup> Subsequently, Ehert defaulted on rental payments to the plaintiff.<sup>37</sup> Shortly thereafter, he died intestate.<sup>38</sup> The court held that the plaintiff had no claim to the trust funds, because the trust was created before Ehert incurred the debt.<sup>39</sup> It rejected the persuasive authorities cited by the plaintiff, noting that those decisions were rendered under statutes which explicitly permitted creditors to claim trust assets.<sup>40</sup> A settlor who reserved the power of revocation or established the trust for personal use and enjoyment was “deemed the absolute owner of the estate conveyed as regards (to) the

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31. *Schofield v. Cleveland Trust Co.*, 21 N.E.2d 119 (Ohio 1939). This remains the rule under Ohio law today. Newman, *supra* note 7, at 175.

32. See *Crumbaugh v. Kugler*, 2 Ohio St. 373, 378-79 (1853) (distinguishing between prior creditors and subsequent creditors); *Schofield*, 21 N.E.2d at 121 (noting that the rule in Ohio has been that subsequent creditors may not set aside a transfer made by one while solvent). The Ohio appellate districts have disagreed regarding the meaning and significance of “subsequent creditor” in *Schofield*. Compare *Sowers v. Luginbill*, 175 Ohio App. 3d 745, 889 N.E.2d 172, 2008-Ohio-1486, at ¶ 13 (holding that a subsequent creditor is one who files his claim after the settlor’s death), with *Watterson v. Burnard*, 986 N.E.2d 604, 609 (Ohio Ct. App. 2013) (holding that a subsequent creditor is one whose claim arises after creation of the trust, regardless of when he files his claim). This disagreement will be discussed in Part III.

33. See *Schofield*, 21 N.E.2d at 122.

34. *Id.*

35. *Id.* at 120.

36. *Id.* at 121.

37. *Id.*

38. *Id.*

39. *Id.* at 121-23.

40. *Id.* at 123.

right of creditors” by such statutes.<sup>41</sup> They treated a revocable trust as a property interest held by the settlor even after death.<sup>42</sup> The court emphasized that Ohio law does not permit such claims, absent fraud.<sup>43</sup> Thus, although present creditors may have a claim to trust assets, creating a revocable trust can protect assets from future creditors. The rule announced in *Schofield* placed the burden on creditors to ensure that debtors could repay regardless of whether they had income from, or access to, the assets of a revocable trust.

### C. *Statutory Law on Creditor Access to Revocable Trusts*

This burden, however, was complicated by Ohio statutory law, which appeared to afford creditors some protection. The Ohio legislature passed a law explicitly addressing creditors’ rights to revocable trust assets in 1921, eighteen years prior to *Schofield*, in an amendment to section 8617 of the General Code.<sup>44</sup> It provided some protection for creditors:

All deeds of gifts and conveyance of real or personal property made in trust for the exclusive use of the person or persons making the same shall be void and of no effect, but the creator of a trust may reserve to himself any use or power, beneficial or in trust, which he might lawfully grant to another, including the power to alter, amend or revoke such trust, and such trust shall be valid as to all persons, except that any beneficial interest reserved to such creator shall be subject to be reached by the creditors of such creator, and except that where the creator of such trust reserves to himself for his own benefit a power of revocation, a court of equity, at the suit of any creditor or creditors of the creator, may compel the exercise of such power of revocation so reserved, to the same extent and under the same conditions that such creator could have exercised the same.<sup>45</sup>

This statute explicitly endorsed revocable trusts but created a cause of action for creditors against indebted settlors to reach the assets of such trusts.<sup>46</sup> It did not stipulate whether this cause of action was available to

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41. *Id.* at 122.

42. *Id.* (noting that other jurisdictions permit creditors to claim trust assets even after the settlor’s death).

43. *Id.* (“[A]fter the settlor’s death, if the trust was in reality fraudulent as to creditors, a remedy would doubtless be available to the administrator or the creditors to subject the trust property to the satisfaction of the settlor’s indebtedness.”).

44. *See id.* at 122.

45. *Id.*

46. *See Cleveland Trust Co. v. White*, 15 N.E.2d 627, 631 (Ohio 1938) (recognizing that revocable trusts were valid because of section 8617 of the General Code); *see also Union Trust Co. v. Hawkins*, 167 N.E. 389, 394-95 (Ohio 1929) (discussing the effect of the amendment to this

subsequent creditors, and the plain language suggested no limitation to creditors whose claims arose prior to trust creation. The plaintiff in *Schofield* was a subsequent creditor, but the court did not reach the question of whether this status would bar his claim under section 8617 of the General Code.<sup>47</sup> Instead, the court noted the statutory language enabling creditors to compel exercise of the power of revocation “to the same extent and under the same conditions” as the settlor could have done.<sup>48</sup> The settlor’s power is personal: it ceases to exist upon his death, and the trust becomes irrevocable.<sup>49</sup> If the settlor cannot revoke the trust after his death, his creditors cannot either. The court concluded that the legislature would have provided differently if it had intended to permit creditors to revoke a trust after the settlor’s death.<sup>50</sup> The plaintiff failed to act while Ehert was living, and the statute was inapplicable to him for that reason.<sup>51</sup> Thus, the court did not determine whether it was inapplicable to him because he was a subsequent creditor.<sup>52</sup> Following the court’s reasoning, it seems that, if the legislature had intended to distinguish the rights of prior creditors from those of subsequent creditors, it would have done so explicitly. This suggests that the statute recognized a present property interest in the assets of a revocable trust. If the settlor retains a property interest in trust funds, creditors could include that interest in determining how much credit to extend.<sup>53</sup> Nevertheless, the *Schofield* court established that creditors must act during the settlor’s lifetime to succeed in making a claim.<sup>54</sup> Thus, the

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section which mentioned creditors).

47. See *Schofield*, 21 N.E.2d at 122.

48. See *id.*

49. *Id.*; see also *Goldstein v. United States*, No. 1:91CV0969, 1992 WL 402944, at \*3 (N.D. Ohio Sept. 2, 1992) (noting that a deceased settlor had no property rights in trust assets when the IRS issued a notice of assessment three years after his death because the trust became irrevocable at that point).

50. *Schofield*, 21 N.E.2d at 122.

51. *Id.* at 123.

52. In *Individual Business Services v. Carmack*, the Second Appellate District interpreted the subsequent version of this statute, O.R.C. § 1335.01(A), as permitting subsequent creditors to compel revocation of the trust. See *Individual Bus. Servs. v. Carmack*, No. 24085, 2011-Ohio-1824, ¶ 62 (Ohio Ct. App. Apr. 15, 2011) (“Under the trust terms, Danies retained the power to revoke the trust, and R.C. 1335.01(A) would have allowed IBS and CMC to compel her to revoke the trust and subject the property in the trust to creditors’ claims. Accordingly, even if Danies did not have existing creditors when the trust was created in 1998, or when the Mad River Property was placed in the trust, future creditors could compel Danies to revoke the trust and allow assets to be used to pay the creditors’ claims.”).

53. See Isabelle V. Taylor, Comment, *Creditor Rights and the Missing Link in the Arkansas Trust Code: Is Death Strong Enough “To Break the Chain?”*, 65 ARK. L. REV. 433, 451 (2012) (discussing views on the nature of the interest passed to beneficiaries when a revocable trust is created and their implications for creditors).

54. *Schofield*, 21 N.E.2d at 122.



protection extended by the statute was limited, and the burden remained on creditors to assert claims as quickly as possible to keep them from being barred by the settlor's death.

The provisions of section 8617 of the General Code were included in Ohio Revised Code ("O.R.C.") section 1335.01 when it was passed in 1953.<sup>55</sup> It contained identical language and remained in effect until January 1, 2007, when it was repealed by House Bill 416.<sup>56</sup> House Bill 416 included the new Ohio Trust Code, a modified version of the Uniform Trust Code.<sup>57</sup> The Ohio Trust Code addressed "many issues that formerly were either not addressed by Ohio law or were addressed only in difficult to find case law."<sup>58</sup> Its primary function regarding creditors' claims against settlors of revocable trusts was to codify existing statutes and case law.<sup>59</sup> Thus, O.R.C. section 5805.06 provides, "Whether or not the terms of the trust contain a spendthrift provision . . . [d]uring the lifetime of the settlor, the property of a revocable trust is subject to the claims of the settlor's creditors."<sup>60</sup> It remains silent as to creditors' ability to access trust assets after the settlor's death, notably omitting section 505(a)(3) of the Uniform Trust Code.<sup>61</sup> Therefore, the

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55. *Prestige Vacations, Inc. v. Kozak*, 471 F. Supp. 410, 411 (N.D. Ohio. 1979) (quoting the language of O.R.C. § 1335.01 and applying the *Schofield* court's analysis of the "predecessor statute"); OHIO REV. CODE ANN. § 1335.01 (West, Westlaw through the 130th GA (2013-2014)) (noting it was enacted by House Bill 1 in 1953).

56. *See Prestige*, 471 F. Supp. at 411 (quoting O.R.C. § 1335.01); OHIO REV. CODE ANN. § 1335.01 (noting the statute's repeal in 2007).

57. Newman, *supra* note 7, at 136; *see also* English, *supra* note 1, at 144-52 (discussing creation of the Uniform Trust Code). Regarding the Ohio Trust Code's relation to the Uniform Trust Code, Prof. Newman explains, "Shortly after the National Conference of Commissioners on Uniform State Laws approved the Uniform Trust Code ('UTC') in August of 2000, members of the Estate Planning, Trust, and Probate Law ('EPTPL') Section of the Ohio State Bar Association, and members of the Legal, Legislative, and Regulatory ('LLR') Committee of the Ohio Bankers League, began studying it. In 2003, a joint committee of members of the EPTPL Section and the LLR Committee (the 'Joint Committee') was formed to continue that study. Over the next three years, the Joint Committee worked on a modified version of the UTC that resulted in the enactment in 2006 of House Bill 416, which includes the new Ohio Trust Code (the 'OTC,' or the 'Code')." Newman, *supra* note 7, at 135-36.

58. Newman, *supra* note 7, at 136.

59. *Id.* at 172-73.

60. OHIO REV. CODE ANN. § 5805.06(A)(1).

61. Newman, *supra* note 7, at 175. *See* OHIO REV. CODE ANN. § 5805.06(A)(1). Uniform Trust Code § 505(a)(3) provides that creditors may assert claims against revocable trust assets after the death of the settlor when his probate estate is insufficient to satisfy them: "Whether or not the terms of a trust contain a spendthrift provision . . . [a]fter the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and [statutory allowances] to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and [allowances]." UNIF. TRUST CODE § 505(a)(3) (West 2013).

rule announced in *Schofield* remains intact.<sup>62</sup>

### III. SHOULD CREDITORS BE ABLE TO ACCESS THE ASSETS OF REVOCABLE TRUSTS AFTER THE DEATH OF THE SETTLOR UNDER OHIO LAW

#### A. *The Third Appellate District*

The Ohio Supreme Court has not had opportunity to examine section 5805.06 of the Ohio Trust Code. Two appellate courts, however, have addressed it and have taken different positions regarding its interpretation and significance. In *Sowers v. Luginbill*, the Third Appellate District attempted to reconcile section 5805.06(A)(1) with the Ohio Supreme Court's holding in *Schofield*.<sup>63</sup> Gordon Sowers caused an automobile accident, which injured Melanie Luginbill.<sup>64</sup> Luginbill subsequently filed a negligence suit against him.<sup>65</sup> After the suit was filed, Sowers died unexpectedly.<sup>66</sup> John Sowers, Gordon's brother, was executor of his estate, and he filed an action for declaratory judgment, arguing that the assets of his brother's revocable trust could not be used to satisfy Luginbill's personal injury claims.<sup>67</sup> The trial court ruled in Luginbill's favor on the negligence claims and held that she could satisfy those claims from the trust assets.<sup>68</sup> Sowers appealed, but the appellate court ultimately affirmed the trial court.<sup>69</sup>

The Third Appellate District first defined "subsequent creditor" in a manner that reconciled it with the *Schofield* holding and the plain language of the present statute. According to the appellate court, a subsequent creditor is one "whose claim comes into existence *after a given fact or transaction*."<sup>70</sup> The relevant fact or transaction to determine subsequent creditor status is the death of the settlor.<sup>71</sup> The appellate court pointed out that the *Schofield* court emphasized that the plaintiff failed to file his claim before Ehert's death even though his claim arose

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62. Newman, *supra* note 7, at 175.

63. *Sowers v. Luginbill*, 175 Ohio App. 3d 745, 889 N.E.2d 172, 2008-Ohio-1486, at ¶¶ 12, 17-29. See generally Michael A. Oglino, *Sowers v. Luginbill: A Chink in the Schofield Armor?*, 19 OHIO PROB. L.J. 15 (2008) (analyzing the *Sowers* court's approach to *Schofield*).

64. *Sowers*, 2008-Ohio-1486 at ¶ 2.

65. *Id.* at ¶ 3.

66. *Id.* at ¶ 4.

67. *Id.* at ¶¶ 4-5.

68. *Id.* at ¶ 7.

69. *Id.* at ¶ 46.

70. *Id.* at ¶ 13.

71. *Id.*

during Ehert's lifetime.<sup>72</sup> Thus, the statute was inapplicable to him.<sup>73</sup> It distinguished the present case from *Schofield* because Luginbill filed her claim prior to Sowers' death.<sup>74</sup> This characterization of subsequent creditor status does not strictly fit within the definition offered by the *Schofield* court, as it does not depend on when the claim comes into existence but rather on when the claim is filed.<sup>75</sup> It further ignores the discussion in *Schofield* regarding the *Crumbaugh* precedent and the fact that Ehert was solvent when he created the trust.<sup>76</sup> It does, however, succeed in clarifying the *Schofield* opinion in light of the present statute and clearly bars all claims not filed before the settlor's death.<sup>77</sup>

The Third Appellate District noted that the present statute promotes creditor protection.<sup>78</sup> First, it permits creditors to reach funds of an *irrevocable* trust to the degree that the settlor retains an interest in them.<sup>79</sup> The court explained, "By providing protection for creditors in either circumstance, it is evident that the legislature sought to provide comprehensive creditor protection."<sup>80</sup> Second, the court cited the Official Comment to section 5805.06(A)(1) of the Uniform Trust Code, which also emphasized that the purpose of the section is creditor protection.<sup>81</sup> Thus, the court rejected Sowers' argument that the definitive event regarding creditor status was the creation and funding of the trust.<sup>82</sup> This would conflict with the legislature's purpose of comprehensive creditor protection by unnecessarily limiting trust access to creditors whose claims were filed before its creation or funding.<sup>83</sup> Once again, this understanding depends on the date the claim was filed rather than the date on which the claim arose. Nevertheless, a bright line rule prevents the court from engaging in potentially complicated

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72. *Id.* at ¶ 16.

73. *Id.*

74. *Id.* at ¶ 17.

75. *See supra* note 68 and accompanying text.

76. *See supra* notes 31-38 and accompanying text.

77. *See supra* notes 38-50 and accompanying text. The Third Appellate District cites three policy considerations which support its "finding that the settlor's death is the event that determines a creditor's status for the purposes of accessing trust property." *Sowers*, 2008-Ohio-1486 at ¶ 23. First, the date of death is a time certain. *Id.* Second, the date of death is expedient, permitting interests to vest immediately and encouraging the prompt filing of claims. *Id.* Third, the date of death promotes judicial economy. *Id.*

78. *Sowers*, 2008-Ohio-1486 at ¶ 40.

79. OHIO REV. CODE ANN. § 5805.06(A)(2) (West, Westlaw through the 130th GA (2013-2014)).

80. *Sowers*, 2008-Ohio-1486 at ¶ 40.

81. *Id.* at ¶ 41.

82. *Id.* at ¶¶ 27-28.

83. *Id.* at ¶ 28.

analysis.<sup>84</sup>

### B. *The Sixth Appellate District*

The clear implication of the holding in *Sowers* is, under O.R.C. section 5805.06(A)(1), a revocable trust becomes irrevocable upon the settlor's death, and in order to reach its funds, creditors must file their claim prior to the settlor's death, regardless of when their claim arose and regardless of whether the settlor dies while the claim is still pending. The Sixth Appellate District, on the other hand, found O.R.C. section 5805.06(A)(1) more ambiguous, on nearly identical facts. In *Watterson v. Burnard*, Brad Watterson was injured in an automobile accident caused by Barthel Burnard and filed a negligence suit.<sup>85</sup> Burnard, who had created a revocable trust during her lifetime, passed away while the lawsuit was pending.<sup>86</sup> Upon Burnard's death, Watterson filed a complaint seeking declaratory judgment that Burnard's trust assets could be used to satisfy his personal injury claims and injunctive relief prohibiting the successor trustee from transferring assets out of the trust.<sup>87</sup> The trial court held that Watterson, as Burnard's creditor, lost all rights to access trust funds upon Burnard's death.<sup>88</sup> The Sixth Appellate District disagreed and reversed the trial court's holding.<sup>89</sup>

It first analyzed the Ohio Supreme Court's opinion in *Schofield*, noting its interpretation of section 8617 of the General Code and the facts upon which it was based.<sup>90</sup> It then considered the Third District's discussion of *Schofield* in *Sowers*.<sup>91</sup> The Sixth District rejected the Third District's understanding of what "subsequent creditor" means but agreed that the purpose of O.R.C. section 5805.06(A)(1) is creditor protection.<sup>92</sup> It emphasized:

The term "subsequent creditor" was not defined in the *Schofield* decision. Rather, the term was used in the context of explaining that creditors seeking to set aside a voluntary conveyance or declaration of a trust, made before their claim arose and while the debtor was solvent, cannot reach the trust's assets without a showing of "actual intent to

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84. See *id.* at ¶ 27 (discussing trusts created by multiple fund transfers).

85. *Watterson v. Burnard*, 986 N.E.2d 604, 605 (Ohio Ct. App. 2013); see generally Michael A. O'gline, *Watterson v. Burnard: Is Schofield Still Relevant?*, 23 OHIO PROB. L.J. NL 6, no. 5, 2013 (comparing the *Watterson* opinion with the *Schofield* opinion).

86. *Watterson*, 986 N.E.2d at 605.

87. *Id.*

88. *Id.* at 606.

89. *Id.* at 611.

90. See *id.* at 606-07 (discussing the *Schofield* opinion).

91. See *id.* at 607-09 (discussing the *Sowers* opinion).

92. *Id.* at 610.

defraud such creditors.” *Schofield*, 135 Ohio St. 328, 21 N.E.2d 119, at paragraph two of the syllabus. This reference to a “subsequent creditor” does not even come close to suggesting that the date of the settlor’s death should be determinative of whether or not an individual claimant is or is not a “subsequent creditor.”<sup>93</sup>

Thus, according to the Sixth District, to determine whether a creditor is subsequent, the date on which the claim arose should be compared with the date on which the trust was created or funded.<sup>94</sup> If the claim arose after the trust was created or after certain assets were transferred into it, the creditor is subsequent.<sup>95</sup> This is in keeping with well-established Ohio law that tort claimants become creditors at the moment their cause of action accrues.<sup>96</sup> The court admitted that, according to this definition, Watterson was a subsequent creditor.<sup>97</sup> It did not, however, find this troubling, even in light of the *Schofield* holding.<sup>98</sup> The *Schofield* court based its decision on section 8617 of the General Code, finding that this statute required that claims be brought during the lifetime of the settlor.<sup>99</sup> Watterson filed his claim while Burnard was still living, as required by the *Schofield* court under the General Code and clearly within the confines of O.R.C. section 5805.06(A)(1).<sup>100</sup>

The Sixth District considered this further evidence of the legislature’s intent to increase creditor protection by allowing even subsequent creditors to access revocable trust funds.<sup>101</sup> It confirmed that the settlor should not be permitted to use a revocable trust to shield himself from creditor claims.<sup>102</sup> An arbitrary event during pending litigation, such as the settlor’s death, should not prevent creditors from satisfying a judgment from trust assets if the settlor could have accessed those assets while living.<sup>103</sup> Furthermore, the court explicitly declined to decide whether a creditor must file his claim during the settlor’s lifetime in order to access trust assets under O.R.C. section 5805.06(A)(1).<sup>104</sup> Thus, unlike in the Third Appellate District, the question whether

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93. *Id.* at 609.

94. *Id.* at 610.

95. *Id.*

96. *See id.* at 609.

97. *Id.* at 610.

98. *See id.* at 610-11.

99. *Id.* at 610.

100. *Id.*

101. *Id.*

102. *See id.* at 609-11.

103. *Id.* at 611.

104. *Id.* at 611 n.5.

creditors can reach revocable trust assets after the settlor's death remains unanswered in the Sixth District. More expansive creditor protection may be available under O.R.C. section 5805.06(A)(1).

The Sixth District, therefore, essentially dismissed the *Schofield* court's discussion of subsequent creditors as *dicta*, instead focusing on the similarities between the previous statute and the present one and distinguishing the cases based on the facts. However, this fails to account for the presence of the term "subsequent creditor" in the rule announced by the *Schofield* court. Furthermore, if the prior statute permitted creditors' access to trust funds during the settlor's lifetime but not after, the same analysis should apply to the present statute. Nevertheless, the Sixth District hesitated to draw that conclusion on the facts before it and did not consider whether the *Schofield* holding applies to Ohio's new trust code in light of its increased emphasis on creditor protection.<sup>105</sup>

### C. *Resolving the Conflict*

Even under the recently enacted Ohio Trust Code, Ohio law remains undecided regarding whether the assets of a revocable trust are subject to creditors' claims filed after the death of the settlor. The opinions in *Schofield* and *Sowers* suggest they are not, but the *Watterson* court casts doubt on that conclusion. Either way, creditors find themselves in a difficult position, uncertain of their rights or hurrying to file their claims before an unexpected death. To address whether creditors should be able to reach revocable trust funds after the settlor's death, it is necessary to consider the purposes and policies underlying the enactment of the Ohio Trust Code. Persuasive authority also sheds light on the issue. If creditors should be permitted access to trust assets after the settlor's death, it becomes necessary to consider how that is best accomplished: Must the legislature amend the statute? Under what circumstances may trust funds be accessed? Does the trustee owe creditors any duties? How soon must claims be filed?

Discussion of these issues will conclude that the legislature should amend the statute to:

- (1) permit creditors access to the assets of a revocable trust after the settlor's death to satisfy his debts
- (2) regardless of when their claims arose
- (3) provided that the probate estate is insufficient,

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105. See *id.* at 610-11.

- (4) the trustee meets certain, limited duties,
- (5) and creditors file their claims within a reasonable statute of limitations.

#### IV. CREDITORS SHOULD BE ABLE TO ACCESS THE ASSETS OF A REVOCABLE TRUST AFTER THE DEATH OF THE SETTLOR

The Ohio legislature should amend the statute to permit creditors access to the assets of a revocable trust to satisfy the settlor's debts upon his or her death under certain, limited, circumstances. Such an amendment is in keeping with the principles of Ohio law, public policy, and persuasive authority. Finally, the carefully drafted amendment should define "creditor," recognize circumstances in which creditors should be permitted to access revocable trust funds, and outline trustees' duties respecting creditors and creditors' obligations respecting claims.

##### A. *Permitting Creditors Access to the Assets of a Revocable Trust is in Keeping with the Principles of Ohio Law and Public Policy*

Ohio courts agree that settlors should not be able to use revocable trusts to protect themselves from creditors. As early as 1853, precedent established that debtors must consider their creditors before giving away their property: "[A] man largely indebted . . . cannot make a gift of his property without the most careful regard to the rights of his creditors. And such gift is never upheld, unless property, clearly and beyond doubt, is retained sufficient to pay all the donor's debts."<sup>106</sup> Both the Third and the Sixth Appellate Districts cited the Official Comments to the Uniform Trust Code section 5805.06(A), as well as relevant sections of the Restatement of Trusts.<sup>107</sup> The Official Comment to the Uniform Trust Code section 5805.06(A) maintains that permitting creditors access to trust funds is "now a well accepted conclusion," although this was not always the case under common law.<sup>108</sup> The Ohio Trust Code thus advances the principle that settlors may not simultaneously enjoy the benefits of trust assets and shield those assets from creditors.<sup>109</sup> This is in keeping with the trend noted in *The Restatement of Trusts*: case and statutory law increasingly recognizes that the testator's creditors and the settlor's creditors are in the same position "because both the testator and

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106. *Crumbaugh v. Kugler*, 2 Ohio St. 373, 378 (1853).

107. See *Sowers v. Luginbill*, 175 Ohio App. 3d 745, 889 N.E.2d 172, 2008-Ohio-1486, at ¶ 41 (quoting the Official Comment to O.R.C. § 5805.06(A) and the Restatement); *Watterson*, 986 N.E.2d at 608-09 (quoting the Official Comment to O.R.C. § 5805.06(A) and the Restatement).

108. *Sowers*, 2008-Ohio-1486 at ¶ 41.

109. *Id.* at ¶ 42.

the settlor have retained . . . complete control over the property . . . subject to the will or trust instrument.”<sup>110</sup> The natural conclusion is that they be afforded the same protections. In fact, the one point on which the Third and Sixth Appellate Districts agree is that the ultimate purpose of O.R.C. section 5805.06(A) is creditor protection.<sup>111</sup> Permitting creditors access to revocable trust assets upon the settlor’s death ensures that settlors cannot employ the revocable trust as a shield.

Ohio statutory law recognized that the settlor’s interest in a revocable trust is real and substantial when it first permitted creditors to compel settlors to exercise their power of revocation.<sup>112</sup> Although the common law held that the settlor of a revocable trust conveyed to the remainder beneficiaries a present interest subject to defeasance,<sup>113</sup> this interest actually operates like an expectancy.<sup>114</sup> The settlor creates a revocable trust to retain control over his or her property, and the adjective “nontestamentary” does not necessarily indicate the nature of the interest created.<sup>115</sup> When the Ohio legislature created a cause of action for creditors of settlors of revocable trusts, it essentially endorsed inclusion of trust funds in creditors’ risk assessment. This right has little meaning, however, unless creditors can claim trust assets after the settlor’s death, as it can be lost most unexpectedly. This is more of a concern now, as the use of revocable trusts as will substitutes has increased in popularity.<sup>116</sup> Because assets can be transferred without probate, decedents’ probate estates may not contain sufficient funds to satisfy creditors.<sup>117</sup> Ohio law should adapt to reflect this reality, just as it adapted to reflect the reality of the settlor’s interest in the trust. Allowing creditors to reach trust funds after the settlor’s death acknowledges the true nature of the settlor’s interest in the funds and guards creditors’ rights without disturbing the use of revocable trusts for probate avoidance purposes.

*B. Permitting Creditors Access to the Assets of a Revocable Trust is in*

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110. RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. a (2003).

111. See *Sowers*, 2008-Ohio-1486 at ¶ 40 (stating that the purpose of the statute is creditor protection); *Watterson*, 986 N.E.2d at 610 (agreeing with the Third District’s analysis of the policy and purpose underlying the statute).

112. See *Schofield v. Cleveland Trust Co.*, 21 N.E.2d 119, 120, 122 (Ohio 1939) (quoting section 8617 of the General Code).

113. A defeasible interest is one that “the holder may enjoy until the occurrence of a condition.” BLACK’S LAW DICTIONARY 885 (9th ed. 2009).

114. Taylor, *supra* note 53, at 451; Newman, *supra* note 2, at 531.

115. RESTATEMENT (THIRD) OF TRUSTS, *supra* note 110, § 25 cmt b.

116. Newman, *supra* note 2, at 524.

117. Ruebel, *supra* note 4, at 41.



### *Keeping with Persuasive Authorities*

#### 1. The Uniform Trust Code

Many other jurisdictions have recognized the need to draft statutes that specifically address creditors' rights in the context of the increased use of will substitutes, like the revocable trust. State courts have handed down judgments addressing creditors' rights in absence of statutory authority<sup>118</sup> and have interpreted statutory law in favor of creditors' rights.<sup>119</sup> State legislatures have passed laws that address creditor access to revocable trust assets in some detail.<sup>120</sup> Perhaps the most significant step was the creation of the Uniform Trust Code. The Uniform Trust Code was approved by the National Conference of Commissioners on Uniform State Laws in 2000 and by the American Bar Association's House of Delegates in 2001.<sup>121</sup> Its drafting "was prompted by the much greater use of trusts in recent years" and the "recognition . . . that the trust law in most states is thin, with many gaps between the often few statutes and reported cases."<sup>122</sup> Section 505(a)(3) answers the question of whether creditors may claim revocable trust assets upon the settlor's death in the affirmative.<sup>123</sup> Its reasoning is simple: "Because a revocable trust is usually employed as a will substitute, it is appropriate to subject trust assets at the settlor's death to the claims of the settlor's creditors and other estate-related expenses."<sup>124</sup> The Uniform Trust Code provides that creditors may recover trust assets only to the degree that the settlor's probate estate is insufficient, and it does not establish guidelines for statutes of limitations or trustee duties.<sup>125</sup> "The appropriate answers to these questions will depend on the particulars of the state's probate code."<sup>126</sup> Since its creation in 2000, twenty-five states and Washington, D.C. have adopted the Uniform Trust Code.<sup>127</sup> Of those twenty-six, only

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118. See *infra* notes 129, 142, and 154 and accompanying text.

119. See *infra* notes 161, 173, and 183 and accompanying text.

120. See *infra* notes 201, 203, and 208 and accompanying text.

121. English, *supra* note 1, at 144.

122. *Id.*

123. See UNIF. TRUST CODE ANN. § 505(a)(3) (West 2013).

124. English, *supra* note 1, at 193.

125. *Id.*

126. *Id.*

127. The Uniform Trust Code states are Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming. Legislation to enact the Uniform Trust Code has been introduced in New Jersey. *Legislative Fact Sheet – Trust Code*, UNIFORM LAW COMM'N, <http://uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Code> (last visited Feb. 11, 2015).

three states, Ohio among them, have declined to include some version of section 505(a)(3) to address creditors' claims after the settlor's death.<sup>128</sup> Most states, however, adopted either the exact language used by the drafters of the Uniform Trust Code<sup>129</sup> or a modified version, addressing details left unanswered by the Uniform Trust Code provision.<sup>130</sup>

## 2. State Court Decisions

The Uniform Trust Code was not the first authority to acknowledge creditor claims against a deceased settlor's revocable trust. State courts had begun to address creditor rights long before, even in the absence of statutory law. In *State Street Bank and Trust Co. v. Reiser*, a Massachusetts appellate court permitted a creditor to reach trust assets after the settlor's death.<sup>131</sup> In that case, Wilfred Dunnebie executed a revocable trust instrument, reserving the right to direct the disposition of principal and income, and transferred the capital stock of five corporations into it.<sup>132</sup> Immediately following, he executed a will leaving his residuary estate to the trust.<sup>133</sup> Subsequently, he applied to the plaintiff bank for a loan of \$75,000, which the bank approved partly on the basis of the corporate stock.<sup>134</sup> Four months later, Dunnebie was killed in an accident.<sup>135</sup> His probate estate was insufficient to repay his debt.<sup>136</sup> The court first remarked that, according to Massachusetts common law, the plaintiff bank could have reached Dunnebie's trust assets while he was living.<sup>137</sup> It also noted the holding of the *Schofield* court and commented that Massachusetts courts have always given full effect to the terms of a revocable trust, even when this resulted in the

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128. Taylor, *supra* note 53, at 438-39; see MO. ANN. STAT. § 456.5-505 (West, Westlaw through the 97th GA (2014)) (omitting § 505(a)(3)); ARK. CODE ANN. § 28-73-505 (West, Westlaw through the 2d Ex. Sess. (2014)) (omitting § 505(a)(3)); OHIO REV. CODE ANN. § 5805.06 (West, Westlaw through the 130th GA (2013-2014)) (omitting § 505(a)(3)).

129. See ARIZ. REV. STAT. ANN. § 14-10505(A)(3) (West, Westlaw through the 2015 legislation of the 52nd legislature) (adopting § 505(a)(3) as is); D.C. CODE § 19-1305.05(a)(3) (West, Westlaw through Feb. 18, 2015) (adopting § 505(a)(3) as is); NEB. REV. STAT. ANN. § 30-3850(a)(3) (West, Westlaw through 2014 Sess.) (adopting § 505(a)(3) as is).

130. See FLA. STAT. ANN. § 736.05053 (West, Westlaw through chapter 255 of the 2014 Sess. and Spec. "A" Sess. of the 23rd legislature) (adopting a modified version of § 505(a)(3)); UTAH CODE ANN. § 75-7-505(1)(c) (West, Westlaw through 2014 Sess.) (adopting a modified version of § 505(a)(3)); MICH. COMP. LAWS ANN. § 700.7605 (West, Westlaw through P.A. 2015, No. 4, of the 2015 Sess., 98th legislature) (adopting a modified version of § 505(a)(3)).

131. *State St. Bank & Trust Co. v. Reiser*, 389 N.E.2d 768, 771 (Mass. 1979).

132. *Id.* at 769.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 770.

disinheritance of a spouse or child in contravention of statutory policies.<sup>138</sup> Revocable trusts that operate to creditors' disadvantage, absent fraud, may be no different.<sup>139</sup> Ultimately, however, the court announced the following rule:

Where a person places property in trust and reserves the right to amend and revoke, or to direct disposition of principal and income, the settlor's creditors may, following the death of the settlor, reach in satisfaction of the settlor's debts to them, to the extent not satisfied by the settlor's estate, those assets owned by the trust over which the settlor had such control at the time of his death as would have enabled the settlor to use the trust assets for his own benefit.<sup>140</sup>

The court cited several considerations in support of its holding. First, the power of appointment, under which property constitutes an asset available to creditors, is similar to the creation of a revocable trust, suggesting that the same principle applies to the latter.<sup>141</sup> Second, revocable trusts function most commonly as estate planning devices, and thus, less attention ought to be paid to the form of the property than the purpose it serves.<sup>142</sup> Finally, it is a violation of public policy to allow "an individual to have an estate to live on, but not an estate to pay his debts with."<sup>143</sup>

Similarly, in *Matter of Kovalyshyn's Estate*, a New Jersey probate court ruled that a decedent-settlor's trust assets could be used to pay his debts and estate administration costs.<sup>144</sup> Kovalyshyn's probate estate was insufficient to discharge the debts incurred during his final illness and funeral arrangements.<sup>145</sup> Prior to his death, however, Kovalyshyn had invested in some mutual funds and placed the shares in trust, reserving the power of revocation to himself and naming his son as the beneficiary upon his death.<sup>146</sup> The value of the mutual fund shares was sufficient to pay the debts of his estate.<sup>147</sup> The issue before the court was whether the trust assets could be used to pay the decedent's debts.<sup>148</sup> The court first noted that there was no evidence of intent to defraud in the trust

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138. *Id.*

139. *Id.*

140. *Id.* at 771.

141. *Id.*

142. *Id.*

143. *Id.*

144. *In re Estate of Kovalyshyn*, 343 A.2d 852, 852 (N.J. Super. Ct. Pr. Div. 1975).

145. *Id.* at 854.

146. *Id.*

147. *Id.*

148. *Id.* at 854-55.

creation.<sup>149</sup> It then compared the decedent's revocable trust to a savings account trust or a Totten trust, noting that both permit settlors to retain control over their assets.<sup>150</sup> In New Jersey, creditors can claim savings account trust funds during the settlor's lifetime.<sup>151</sup> The court cited the persuasive authority of New York law as a guide, which also permits settlor-decedents' debts and funeral expenses to be discharged from a savings account trust.<sup>152</sup> It reasoned that revocable trusts should also be applied to settlor-decedents' probate obligations, explaining that Kovalyshyn "did not intend to strip himself of control . . . of these funds during his lifetime."<sup>153</sup> He merely intended to give the beneficiary whatever remained, if anything, at his death.<sup>154</sup> The court held that death should not "[cheat] the settlor and his creditors of their opportunity to settle these just debts."<sup>155</sup>

The Iowa Supreme Court also noted the arbitrary effect of a rule that permits creditors access to revocable trust funds prior to the settlor's death but not after it.<sup>156</sup> In *Phillips v. Roe*, Malcom and Lenore Roe created two revocable trusts.<sup>157</sup> They were subsequently killed in an automobile collision, which also killed Barbara Nagel.<sup>158</sup> The estate of Nagel filed a wrongful death suit and sought a declaratory judgment that the Roes' trust assets could be used to satisfy the judgment.<sup>159</sup> The court agreed that the judgment could be satisfied from the trust assets, remarking, "[I]t would be inequitable to shield the assets from the plaintiff's contingent claim only because the Roes died . . . ."<sup>160</sup> If the Roes had survived the crash, they could have accessed those funds to pay the judgment.<sup>161</sup> The court noted that a settlor's power to revoke the trust technically expires upon his death but rejected the *Schofield* precedent, concluding, "We however think the better authority is to the contrary."<sup>162</sup> Thus, as revocable trusts began to increase in popularity,

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149. *Id.* at 858.

150. *Id.* at 858-59. See Kara Peischl Marcus, *Totten Trusts: Pragmatic Pre-Death Planning or Post-Mortem Plunder?*, 69 TEMP. L. REV. 861, 865-69 (1996) (discussing Totten trusts in more detail).

151. In re *Kovalyshyn*, 343 A.2d at 858.

152. *Id.* at 858-59.

153. *Id.* at 859.

154. *Id.*

155. *Id.*

156. *Phillips v. Roe (In re Estate of Nagel)*, 580 N.W.2d 810, 812 (Iowa 1998).

157. *Id.* at 811.

158. *Id.*

159. *Id.*

160. *Id.* at 812.

161. *Id.*

162. *Id.*

courts began to recognize the need for law addressing creditor access to trust assets after the death of the settlor even in the absence of legislative action.

Courts also looked to statutory authority, such as fraudulent transfer laws, to guide their discussion of creditor rights, frequently interpreting statutory provisions in creditors' favor. For instance, in *Johnson v. Commercial Bank*, the Oregon Supreme Court held settlors' deaths did not defeat their creditors' claim under Oregon Revised Statute ("O.R.S.") section 95.060.<sup>163</sup> Elmer White created a revocable trust, and he and his wife, Ruth, transferred all of their assets into it.<sup>164</sup> Mr. White, who was in ill health, hired the plaintiff, a nurse, to care for him at home.<sup>165</sup> Subsequently, Mrs. White fell ill too, and the plaintiff agreed to care for her, as well, for an additional wage.<sup>166</sup> The plaintiff, however, never received the additional wages.<sup>167</sup> She filed a claim against the Whites' probate estates after their deaths.<sup>168</sup> The probate estates were bankrupt, so the plaintiff sought to satisfy her claim from the revocable trust assets on the authority of O.R.S. section 95.060: "All deeds of gift, all conveyances and all verbal or written transfers or assignments of goods, chattels or things in action, are void as against the creditors, existing or subsequent, of such person."<sup>169</sup>

Finding no Oregon authority on point, the court looked to a Kansas opinion construing a similar statute for guidance.<sup>170</sup> It dealt with a settlor who created a life estate for himself but attempted to retain the right to control distribution of trust assets.<sup>171</sup> The Oregon court agreed with the holding of the Kansas court: a settlor's "property 'should be subject to the payment of his debts, although he has vested nominal title thereto in some other persons.'"<sup>172</sup> The defendants attempted to argue that the plaintiff should have filed her claim prior to the Whites' deaths.<sup>173</sup> The court disagreed and held that "creditors may reach such assets even after the settlor dies, subject only to the rule of laches."<sup>174</sup>

The Supreme Court of Alabama came to the same conclusion after

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163. *Johnson v. Commercial Bank*, 588 P.2d 1096, 1100 (Or. 1978). Oregon Revised Statute § 95.060 was repealed in 1985. OR. REV. STAT. ANN. § 95.060 (West, Westlaw through 2014 Sess.).

164. *Johnson*, 588 P.2d at 1097.

165. *Id.* at 1098.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 1098, 1099.

171. *Id.* at 1099.

172. *Id.* (quoting *Herd v. Chambers*, 149 P.2d 583, 589 (Kan. 1944)).

173. *Id.* at 1100.

174. *Id.*

examining a similar statute.<sup>175</sup> Alabama Code section 8-9-7 provided, “All deeds of gift, conveyances, transfers and assignments, verbal or written of goods, chattels or things in actions, made in trust for the use of the person making the same, are void against creditors, existing or subsequent, of such a person.”<sup>176</sup> Thus, this statute specifically applied to revocable trusts, although it does not use that language. In *Giles v. Ingram*, Lillie Mae Jones created a revocable trust and later died in an automobile collision.<sup>177</sup> The driver and passenger of the other vehicle involved obtained a judgment against her estate, which they assigned to Charles Ingram.<sup>178</sup> Ingram sought to satisfy his judgment from the assets of Jones’ trust.<sup>179</sup> The court agreed that he could do so, citing the legislature’s comments to section 8-9-7: “The reason for this section is clear; a debtor cannot be allowed to defeat the legitimate claims of his creditors, whether existing or subsequent, by transferring his property to another while continuing to enjoy the use and benefit of that property.”<sup>180</sup> The court did not even mention the issue of whether Jones’ death should bar Ingram’s access to trust assets.<sup>181</sup> Ingram did not receive the judgment until at least two years after Jones’ death;<sup>182</sup> nevertheless, the court found the trust was void and could be used to satisfy his claim.<sup>183</sup> Apparently, it did not consider Jones’ death a problem.<sup>184</sup>

A recent opinion from the Illinois Supreme Court, *Rush University Medical Center v. Sessions*, came down strongly in favor of creditors’ rights in the face of potentially contradictory legislative authority.<sup>185</sup> The

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175. See *Giles v. Ingram*, 583 So.2d 1287, 1289 (Ala. 1991).

176. *Id.* at 1288. Alabama Code § 8-9-7 was repealed in 1989. *Id.*

177. *Id.* at 1287-88.

178. *Id.* at 1288.

179. *Id.* at 1287.

180. *Id.* at 1288-89.

181. See *id.*

182. *Id.* at 1288.

183. *Id.* at 1290.

184. Neither did the Supreme Court of Mississippi in *Deposit Guaranty National Bank v. Walter E. Heller & Co.*, 204 So.2d 856, 862 (Miss. 1967). There, the court concluded, “In our opinion the creditors had a claim against this trust before the death of the grantor. We cannot conceive that his death would bar their claim; and we hold that a claim of creditors against said property is not defeated merely by the death of the debtor.” *Id.*

185. *Rush Univ. Med. Ctr. v. Sessions*, 980 N.E.2d 45, 58 (Ill. 2012). Illinois has no statutory provisions specifically addressing creditor rights to trust assets after the settlor’s death, so this case remains the authority in Illinois. See 760 ILL. COMP. STAT. ANN. 5/1-5/21 (West, Westlaw through 2014 Sess.) (the Trust and Trustees Act does not discuss creditors’ claims against a deceased settlor). 735 ILL. COMP. STAT. 5/2 2-1403, however, states, “No court, except as otherwise provided in this Section, shall order the satisfaction of a judgment out of any property held in trust for the judgment debtor if such trust has, in good faith, been created by, or the fund so held in trust has

facts and procedural history are as follows: Robert Sessions established two trusts during his lifetime, the “Sessions Family Trust” and the “Robert W. Sessions Revocable Living Trust.”<sup>186</sup> He also pledged \$1.5 million to Rush University Medical Center for new construction on campus.<sup>187</sup> Rush University, in reliance on his pledge, began and completed the building project, dedicating the new structure to Sessions.<sup>188</sup> Sessions, however, failed to make any payments on the pledge in the next ten years before his death.<sup>189</sup> After his death, Rush University filed a claim in probate court to enforce the pledge only to discover Sessions’ estate contained less than \$100,000.<sup>190</sup> The trial court ruled that Rush University could satisfy the pledge from the trusts’ assets based on the common law principle that self-settled trusts are void as to creditors, but the appellate court reversed.<sup>191</sup> It held that Illinois’ Fraudulent Transfer Act, which required certain findings to invalidate a transfer, superseded the common law rule.<sup>192</sup>

The Illinois Supreme Court reversed the appellate court’s judgment

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proceeded from, a person *other than the judgment debtor*.” (Emphasis added.) The negative implication of this statute is that a court may order satisfaction of a judgment from property held in trust for a judgment debtor who created the trust.

186. *Rush Univ.*, 980 N.E.2d at 48. The “Sessions Family Trust” was irrevocable, but Sessions was its lifetime beneficiary and retained absolute power to appoint and remove trustees and veto their discretionary actions. *Id.* The court did not distinguish between the revocable and irrevocable trusts throughout the opinion. *See id.* at 49-56. Revocable trusts and irrevocable, self-settled trusts operate according to the same principle, permitting the settlor-beneficiary to control or use their assets. Thus, both follow the public policy prohibiting creditor avoidance. In fact, most states, including Ohio, permit creditors to reach irrevocable trust assets to the same degree that settlors can reach them. *See* OHIO REV. CODE ANN. § 5805.06(A)(2) (West, Westlaw through the 130th GA (2013-2014)); ME. REV. STAT. tit. 18-B, § 505(1)(B) (West, Westlaw through chapter 1 of the 2015 first session of the 127th legislature).

187. *Rush Univ.*, 980 N.E.2d at 48.

188. *Id.* at 49.

189. *Id.*

190. *Id.*

191. *Id.* at 50.

192. *Id.* The relevant portion of the Illinois Fraudulent Transfer Act provided the following:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or  
 (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

740 ILL. COMP..STAT. 160/5(a) (West, Westlaw through 2014 Sess.).

and affirmed the ruling of the trial court.<sup>193</sup> First, noting that both laws served to protect creditors, it held the common law rule invalidating self-settled trusts supplemented rather than contradicted the Fraudulent Transfer Act.<sup>194</sup> The court then turned to the defendants' argument that the common law rule applies only to creditors who file claims within the settlor's lifetime.<sup>195</sup> The relevant inquiry was, contrary to the defendants' supposition, whether and to what degree trust assets could have been accessed by the settlor during his lifetime.<sup>196</sup> In this instance, the trustees, who could be removed and reappointed by Sessions, were to distribute both principal and income to Sessions "in unlimited amounts."<sup>197</sup> "Sessions' interest extended to the entire trust," and creditors could reach that interest.<sup>198</sup> The fact that Rush University failed to obtain a judgment prior to Sessions' death was immaterial.<sup>199</sup> The court cited persuasive authority in support of its holding, including *Johnson and Phillips*.<sup>200</sup> Sessions was a debtor of Rush University, and Rush University, a creditor of Sessions.<sup>201</sup> As such, the court required Sessions "to be just before he was generous," even after death: Rush University could satisfy its claims from the trust assets.<sup>202</sup>

### 3. Statutory Law

Courts were not alone in recognizing the necessity of requiring justice before generosity. Even before creation of the Uniform Trust Code, several state legislatures drafted statutes permitting creditors to access trust assets after the settlor's death in certain circumstances. For instance, in 1985, the Nevada legislature passed a provision permitting

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193. *Rush Univ.*, 980 N.E.2d at 58.

194. *Id.* at 51-54.

195. *Id.* at 54-55.

196. *Id.* at 55.

197. *Id.*

198. *Id.*

199. *See id.* at 56 ("Thus, we believe that if the settlor's interest in a self-settled trust is 'void' as to the settlor's creditors, there is no sound reason to treat the creditors' rights as suddenly defeated at the moment the settlor dies, thereby giving the commensurate economic benefit to the settlor's heirs. All of the relevant precedent that we have examined seems to support our conclusion. *See, e.g., In re Morris*, 151 B.R. 900, 906-07 (C.D.Ill.1993); *Johnson v. Commercial Bank*, 284 Or. 675, 588 P.2d 1096, 1100 (1978); *Deposit Guaranty National Bank v. Walter E. Heller & Co.*, 204 So.2d 856, 862 (Miss.1967); *Nolan v. Nolan*, 218 Pa. 135, 67 A. 52, 53 (1907); *see also In re Estate of Nagel*, 580 N.W.2d 810, 812 (Iowa 1998); *State Street Bank & Trust Co. v. Reiser*, 7 Mass. App. Ct. 633, 389 N.E.2d 768, 771-72 (1979); *Greenwich Trust Co. v. Tyson*, 129 Conn. 211, 27 A.2d 166 (1942).").

200. *Id.* at 57-58. *See supra* notes 160 and 161 and accompanying text.

201. *Id.* at 58.

202. *Id.* at 56.



trustees to publish notice of the settlor's death to creditors to insulate themselves from liability for creditor claims.<sup>203</sup> Any claim not filed within ninety days after notice had been published was barred.<sup>204</sup> This statute did not explicitly state that creditors could satisfy claims from trust assets, but it impliedly recognized their ability to file a claim after the settlor's death.

In 1986, the California Law Revision Commission was charged with drafting a comprehensive trust code.<sup>205</sup> The California legislature enacted the proposed trust code in 1990.<sup>206</sup> California Probate Code Section 19001 provided:

Upon the death of a settlor, the property of the deceased settlor that was subject to the power of revocation at the time of the settlor's death is subject to the claims of creditors of the deceased settlor's estate and to the expenses of administration of the estate to the extent that the deceased settlor's estate is inadequate to satisfy those claims and expenses.

The California Law Revision Commission patterned this provision after statutes governing creditor claims under the power of appointment because the powers of revocation and appointment effect a similar degree of control over trust assets.<sup>207</sup> Since the power to revoke is actually greater than the power to appoint, creditors' rights should be greater, not less.<sup>208</sup> Sections 19002-19012 then established the claims procedure, including the effect of notifying creditors of the settlor's death, the necessity of filing a claim in probate court, and the ability of the trustee to pay, reject, contest or settle claims against the deceased.<sup>209</sup>

Iowa followed California's lead in 1994 and created the Trust Code Committee to overhaul the state's trust law.<sup>210</sup> The Trust Code Committee codified the rule announced by the Iowa Supreme Court in

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203. NEV. REV. STAT. ANN. § 164.025 (West, Westlaw through the 28th Spec. Sess. (2014)); S.B. 355, 63d Nev. Leg. (Nev. 1985).

204. *Id.*

205. CAL. LAW REVISION COMM'N, RECOMMENDATION PROPOSING THE TRUST LAW 501 (1986).

206. CAL. PROB. CODE Div. 9 Com. (West 2013).

207. CAL. LAW REVISION COMM'N, *supra* note 205, at 595; *see also* *Rush Univ.*, 980 N.E.2d at 48 (settlor retained power of appointment, and court followed similar reasoning).

208. *Rush Univ.*, 980 N.E.2d at 48. CAL. LAW REVISION COMM'N, *supra* note 205, at 595 n.384 (citing Richard W. Effland, *Rights of Creditors in Nonprobate Assets*, 48 MO. L. REV. 431, 440 (1983)).

209. *See* CAL. PROB. CODE §§ 19002-12 (West, Westlaw through 2014 Sess.). Some find California's claims procedure unnecessarily complicated. *See* Richard S. Conn, *The Need to Clarify Creditors' Rights in Probate*, L.A. LAW., Apr. 2009, at 80.

210. Martin D. Begleiter, *In the Code We Trust – Some Trust Law for Iowa at Last*, 49 DRAKE L. REV. 165, 172 (2001).

*Phillips v. Roe* but introduced two additional elements.<sup>211</sup> First, in addition to creditor claims, “the trust is subject to the costs of administration of the settlor’s (probate) estate.”<sup>212</sup> Second, the trust is subject to estate administrative costs and creditor claims only to the degree that the settlor’s probate estate is insufficient.<sup>213</sup> Subsequent sections established notice provisions and a statute of limitations in which to file claims.<sup>214</sup> Thus, lawmakers came to realize what the court had already realized: trust law was in need of attention, particularly law governing revocable trusts and creditors’ claims against settlors.

Other states that have not adopted the Uniform Trust Code have passed legislation regarding this issue. In 2003, Idaho updated its probate code to include a provision regarding the “liability of nonprobate transferees for creditor claims.”<sup>215</sup> A “nonprobate transfer” is a transfer effective at death, over which the transferor had the power of revocation immediately before death.<sup>216</sup> Thus, by definition, this statute governs revocable trusts. It permits certain claims against the transfer recipients, when the probate estate is insufficient.<sup>217</sup> In 2006, Alaska passed Alaska Statute section 13.36.268, permitting creditors to satisfy claims from assets in a trust that was revocable by the settlor at his death to the degree that the settlor’s probate estate is insufficient. In 2010, Georgia and South Dakota added similar provisions.<sup>218</sup> Thus, in addition to the states that have enacted versions of the Uniform Trust Code, the trend in recent legislation in other states favors creditor rights after the settlor’s death.

The statistical weight of persuasive authority favors creditor rights. Out of the forty-four jurisdictions that have enacted statutes governing trusts and creditors’ rights against settlors, thirty-one, including Washington, D.C., expressly permit creditors to access revocable trust funds after the settlor’s death.<sup>219</sup> Four of the thirteen remaining states

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211. *Id.* at 218. See *Phillips v. Roe (In re Estate of Nagel)*, 580 N.W.2d 810, 812 (Iowa 1998) (announcing the rule that revocable trusts are subject to creditors’ claims even after the settlor’s death). The relevant provision was Iowa Code § 633.3104, which was transferred to Iowa Code § 633A.3104 in 2005.

212. Begleiter, *supra* note 210, at 218.

213. *Id.*

214. See IOWA CODE ANN. § 633.3109 (West, Westlaw through 2015 Sess.). Iowa Code Ann. § 633.3109 was transferred to Iowa Code Ann. § 633A.3109 in 2005.

215. IDAHO CODE ANN. § 15-6-107 (West, Westlaw through the 2014 2nd Sess. of the 62nd legislature).

216. *Id.*

217. *Id.*

218. See GA. CODE ANN. § 53-12-82(3) (West, Westlaw through act 2 of 2015 Sess.); S.D. CODIFIED LAWS § 55-4-58(a) (West, Westlaw through 2014 Sess.).

219. See ALA. CODE § 19-3B-505(a)(3) (West, Westlaw through the 2014 Sess. and 2015

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Organizational Sess.) (access after death permitted); ALASKA STAT. ANN. § 13.36.368(a)(2) (West, Westlaw through the 2014 2nd Sess. of the 28th Legis.) (access after death permitted); ARIZ. REV. STAT. ANN. § 14-10505(A)(3) (West, Westlaw through the 2015 legislation of the 52nd legislature) (access after death permitted); ARK. CODE ANN. § 28-73-505 (West, Westlaw through the 2d Ex. Sess. (2014)) (does not expressly permit access after death); CAL. PROB. CODE § 19001(a) (West, Westlaw through 2014 Sess.) (access after death permitted); DEL. CODE ANN. tit. 12, § 3572 (West, Westlaw through 80 Laws 2015, chapter 3) (does not expressly permit access after death); D.C. CODE § 19-1305.05(a)(3) (West, Westlaw through Feb. 18, 2015) (access after death permitted); COLO. REV. STAT. ANN. § 38-10-111 (West, Westlaw through chapter 2 of the first regular session of the 70th GA (2015)) (does not expressly permit access after death); FLA. STAT. ANN. § 736.05053(1) (West, Westlaw through chapter 255 of the 2014 Sess. and Spec. “A” Sess. of the 23rd legislature) (access after death permitted); GA. CODE ANN. § 53-12-82(3) (access after death permitted); IDAHO CODE ANN. § 15-6-107(2) (access after death permitted); IND. CODE ANN. § 30-4-3-2(b) (West, Westlaw through Feb. 23, 2015) (access after death permitted); IOWA CODE § 633A.3109(2) ) (access after death permitted); KAN. STAT. ANN. § 58a-505(a)(3) (West, Westlaw through the 2014 Sess. and chapter 1 of the 2015 Sess.) (access after death permitted); LA. REV. STAT. ANN. § 9:2004 (West, Westlaw through 2014 Sess.) (does not expressly permit access after death); ME. REV. STAT. tit. 18-B, § 505(1)(C) (West, Westlaw through chapter 1 of the 2015 first session of the 127th legislature) (access after death permitted); MASS. GEN. LAWS ANN. ch. 203E, § 505(a)(3) (West, Westlaw through chapters 1 to 505 of the 2014 2nd Annual Sess.) (access after death permitted); MICH. COMP. LAWS ANN. § 700.7506(1)(b) (West, Westlaw through P.A. 2015, No. 4, of the 2015 Sess., 98th legislature) (access after death permitted); MINN. STAT. ANN. § 502.76 (West, Westlaw through 2015 Sess., chapter 3) (does not expressly permit access after death); MO. ANN. STAT. § 456.5-505 (West, Westlaw through the 97th GA (2014)) (does not expressly permit access after death); Adopt the Montana Uniform Trust Code, ch. 264, sec. 70(1)(c), § 72-36-302 (West, Westlaw through the 2013 Session, and the 2014 general election) (access after death permitted); NEB. REV. STAT. ANN. § 30-3850(a)(3) (West, Westlaw through 2014 Sess.) (access after death permitted); NEV. REV. STAT. ANN. § 163.5559 (West, Westlaw through the 28th Spec. Sess. (2014)) (does not expressly permit access after death); N.H. REV. STAT. ANN. § 564-B:5-505(a)(3) (West, Westlaw through chapter 330 of the 2014 Sess.) (access after death permitted); N.J. STAT. ANN. § 3B:11-1 (West, Westlaw through L.2015, chapter 21) (does not expressly permit access after death); N.M. STAT. ANN. § 46A-5-505(A)(3) (West, Westlaw through 2nd Sess., 51st legislature (2014)) (access after death permitted); N.Y. EST. POWER & TRUSTS LAW § 7-3.1 (McKinney 2014) (does not expressly permit access after death); N.C. GEN. STAT. ANN. § 36C-5-505(A)(3) (West, Westlaw through 2014 Sess. of the GA) (access after death permitted); N.D. CENT. CODE ANN. § 59-13-05(1) (2013) (access after death permitted); OHIO REV. CODE ANN. § 5805.06(A)(1) (West, Westlaw through the 130th GA (2013-2014)) (does not expressly permit access after death); OKLA. STAT. tit. 60, § 175.92(1)(a) (West, Westlaw through chapter 430 of the 2nd Sess., 54th legislature (2014)) (does not expressly permit access after death); OR. REV. STAT. ANN. § 130.315(1)(c) (West, Westlaw through 2014 Sess.) (access after death permitted); 20 PA. STAT. ANN. § 7745(3) (West, Westlaw through 2014 Sess.) (access after death permitted); S.C. CODE ANN. § 62-7-505(a)(3) (West, Westlaw through 2014 Sess.) (access after death permitted); S.D. CODIFIED LAWS § 55-4-58(a) (access after death permitted); TENN. CODE ANN. § 35-15-505(A)(6) (West, Westlaw through 2014 2d Sess.) (access after death permitted); TEX. PROP. CODE ANN. § 112.035(d) (West, Westlaw through the 2013 3rd Sess., 83rd legislature) (does not expressly permit access after death); UTAH CODE ANN. § 75-7-505(1)(c) (West, Westlaw through 2014 Sess.) (access after death permitted); VT. STAT. ANN. tit. 14A, § 505(a)(3) (West, Westlaw through 2013-2014 GA (2014)) (access after death permitted); VA. CODE ANN. § 64.2-747(A)(3) (West, Westlaw through 2014 Sess.) (access after death permitted); WASH. REV. CODE ANN. § 19.36.020 (West, Westlaw through chapter 4 of 2015 Sess.) (does not expressly permit access after death); W. VA. CODE ANN. § 44D-5-505(a)(3) (West, Westlaw through 2015 Sess.) (access after death permitted); WIS. STAT. ANN. § 701.0505(1)(a)(3) (West, Westlaw through 2013 Act 380) (effective July 1, 2014) (access after death permitted); WYO. STAT. ANN. § 4-10-506(d) (West, Westlaw through

specifically address revocable trusts, while six address trusts in which the settlor retains a beneficiary interest.<sup>220</sup> All of those are silent as to creditors' rights *after* the settlor's death.<sup>221</sup> Trust codes in the three remaining states, Missouri, New York, and New Jersey, are also silent as to creditors' rights after the settlor's death,<sup>222</sup> but other statutes and case law indicate that creditors can reach trust assets after the settlor's death in those jurisdictions.<sup>223</sup> Missouri has a statute outlining creditors' rights when a probate estate is bankrupt, and Missouri courts have held that revocable trust assets can be expended to cover their claims.<sup>224</sup> New York's statute governing the general power of revocation provides,

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2014 Budget Sess.) (access after death permitted).

220. See ARK. CODE ANN. § 28-73-505 (specifically addresses creditors and revocable trusts); MINN. STAT. ANN. § 502.76 (specifically addresses creditors and revocable trusts); OHIO REV. CODE ANN. § 5805.06(A)(1) (specifically addresses creditors and revocable trusts); OKLA. STAT. tit. 60, § 175.92(1)(a) (specifically addresses creditors and revocable trusts); COLO. REV. STAT. ANN. § 38-10-111 (addresses settlor's beneficiary interest); DEL. CODE ANN. tit. 12, § 3572 (addresses settlor's beneficiary interest); LA. REV. STAT. ANN. § 9:2004 (addresses settlor's beneficiary interest); NEV. REV. STAT. ANN. § 163.5559 (addresses settlor's beneficiary interest); TEX. PROP. CODE ANN. § 112.035(d) (addresses settlor's beneficiary interest); WASH. REV. CODE ANN. § 19.36.020 (addresses settlor's beneficiary interest).

221. See ARK. CODE ANN. § 28-73-505 (permits access to revocable trust assets during settlor's lifetime); COLO. REV. STAT. ANN. § 38-10-111 (transfer of property into trust for the use of the settlor void as to settlor's creditors); DEL. CODE ANN. tit. 12, § 3572 (prohibits select creditor claims against "qualified dispositions" in trust, which must be irrevocable); LA. REV. STAT. ANN. § 9:2004 (permits access to a beneficiary's interest in income and principal to the extent that the beneficiary donated property to the trust); MINN. STAT. ANN. § 502.76 (settlor is deemed absolute owner of transferred property in so far as creditors are concerned when reserves power of revocation); MO. ANN. STAT. § 456.5-505 (permits access to revocable trusts during settlor's lifetime and outlines procedure to notify settlor's creditors of settlor's death when trustee has power or duty to pay deceased settlor's debts); NEV. REV. STAT. ANN. § 163.5559 (prohibits creditors from satisfying claims from trust assets if settlor's sole interest in trust is the existence of a discretionary power granted to a person other than the settlor unless the transfer was fraudulent); OHIO REV. CODE ANN. § 5805.06(A)(1) (permits access to revocable trust during settlor's lifetime); OKLA. STAT. tit. 60, § 175.92(1)(a) (permits access to revocable trusts during settlor's lifetime and invalidates spendthrift provisions while trust is revocable); TEX. PROP. CODE ANN. § 112.035(d) (provides that a spendthrift provision will not prevent creditors from satisfying claims from interest in trust when settlor is also beneficiary); WASH. REV. CODE ANN. § 19.36.020 (West, Westlaw through chapter 4 of 2015 Sess.) (transfer of property into trust for the use of the settlor void as to settlor's creditors).

222. See MO. ANN. STAT. § 456.5-505 (permits access to revocable trusts during settlor's lifetime and outlines procedure to notify settlor's creditors of settlor's death when trustee has power or duty to pay deceased settlor's debts); N.J. STAT. ANN. § 3B:11-1 (provides that settlor's interest in trust income and principal is subject to creditors' claims regardless of a spendthrift provision); N.Y. EST. POWER & TRUSTS LAW § 7-3.1 (McKinney 2014) (provides that disposition in trust for settlor's use is void as to creditors).

223. See MO. ANN. STAT. § 461.300; *Anderson v. Fischer* (*In re Estate of Fischer*), 901 S.W.2d 239, 240 (Mo. Ct. App. 1995); N.Y. EST. POWER & TRUSTS LAW § 10-10.6 (McKinney 2014); *In re Estate of Martin*, 686 N.Y.S.2d 195, 197 (N.Y. App. Div. 1999); *In re Estate of Kovalyshyn*, 343 A.2d 852, 858-59 (N.J. Sup. Ct. Pr. Div. 1975).

224. See MO. ANN. STAT. § 461.300; *Anderson*, 901 S.W.2d at 240.

“Where a creator reserves an unqualified power of revocation, he remains the absolute owner of the property disposed of so far as the rights of his creditors or purchasers are concerned.”<sup>225</sup> New York courts have held that this statute encompasses revocable trusts and claims asserted against deceased settlors.<sup>226</sup> New Jersey common law has also authorized creditors to claim revocable trust funds after the settlor’s death.<sup>227</sup> None of the six remaining states have considered the effect of the settlor’s death on creditor claims to revocable trust assets,<sup>228</sup> except for Illinois, which protects creditor rights through its common law.<sup>229</sup> Thus, approximately 78% of jurisdictions with laws addressing creditors’ claims to trust assets allow access after the settlor’s death, while none expressly prohibit it.<sup>230</sup> More important than the statistical trend, however, is the reasoning provided by other jurisdictions in

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225. N.Y. EST. POWER & TRUSTS LAW § 10-10.6 (McKinney 2014).

226. See *In re Martin*, 686 N.Y.S.2d at 196-97 (applying § 10-10.6 to a revocable trust at the settlor’s death).

227. See *In re Kovalyshyn*, 343 A.2d at 858-59 (allowing creditors to satisfy decedent’s debts from trust assets, noting that “[d]ecedent did not intend to strip himself of control of or access to these funds during his lifetime, intending only to give to the beneficiary what was left, if anything, at his death. If he had terminated the trust during his lifetime in order to pay his debts, no one could have complained.”).

228. These states include Connecticut, Hawaii, Kentucky, Maryland, and Rhode Island. A Connecticut court sitting in probate jurisdiction was faced with this issue but held that it lacked subject-matter jurisdiction over the trust and did not reach the merits. See *LeFevre v. LeFevre*, No. CV064006595, 2012 WL 3264051, at \*8 (Conn. Super. Ct. July 16, 2012); see also *Greenwich Trust Co. v. Tyson*, 27 A.2d 166, 173 (Conn. 1942) (holding that, after the settlor’s death, his creditors were entitled to satisfy his debts from trust income to which settlor was entitled while living). Hawaii common law has established that creditors can satisfy a settlor’s debts from revocable trust assets but has not decided whether this applies to a deceased settlor. See *Holualoa Aloha, LLC v. Anekona Aloha, LLC*, No. 30068, 2013 Haw. App. LEXIS 134, at \*4 (Feb. 27, 2013) (holding that creditors could reach revocable trust funds to fulfill living settlor’s debt); *Cooke Trust Co. v. Lord*, 41 Haw. 198, 201 (1955) (same). Kentucky has no statutory or common law precisely on point. See KY. REV. STAT. ANN. § 386A (West, Westlaw through 2014 legislation) (no provisions governing revocable trusts and settlor’s creditors); *Farmers Nat’l Bank of Danville, Ky. v. Young*, 179 S.W.2d 229, 235 (Ky. Ct. App. 1944) (remanding case involving distribution of trust assets after settlor’s death to advertise for creditor’s claims in order to protect trustee from liability). The Kentucky legislature, however, did recently introduce its version of the Uniform Trust Code, which would permit creditors access after death. See H.B. 78, 2014 Leg., Reg. Sess. (Ky. 2014) (proposing Kentucky Revised Statute § 386B.5-43(1)(c)). Maryland has no statutory or case law precisely on point. See MD. CODE ANN., EST. & TRUSTS § 14 (West 2014) (no provisions governing revocable trusts and settlor’s creditors); *Mercantile Trust Co. of Baltimore v. Bergdorf & Goodman Co.*, 173 A.3d 31 (Md. 1934) (holding that creditors could not claim trust assets after settlor’s death when settlor had exercised her power of revocation to extent permitted under trust instrument, rendering it irrevocable). Similarly, Rhode Island has no statutory or case law precisely on point. See R.I. GEN. LAWS ANN. § 18 (West, Westlaw through 2014 Sess.) (no provisions governing revocable trusts and settlor’s creditors); *Hunt v. Citizens Trust Co.*, 519 A.2d 1120 (R.I. 1987) (construing provision of revocable trust instrument).

229. See *Rush Univ. Med. Ctr. v. Sessions*, 980 N.E.2d 45, 58 (Ill. 2012).

230. See *supra* notes 217-27 and accompanying text.

support of that trend. As more individuals use revocable trusts in their estate plans and pass their assets on without going through probate, the law must adapt.

*C. Permitting Creditors Access to the Assets of a Revocable Trust is a Question of Statutory Amendment for the Legislature*

If Ohio is to permit creditors to satisfy claims from revocable trust assets after the settlor's death, the question arises whether the judiciary or the legislature is the more appropriate body for establishing such a rule. In order to answer that question, it is necessary to determine whether current provisions of the Ohio Revised Code permit courts to incorporate this rule into the common law. If the new rule supplements current law, the judiciary could adopt it.<sup>231</sup> If, however, it contradicts current statutory law, the legislature must adopt it.

The Ohio Revised Code currently states, "Whether or not the terms of the trust contain a spendthrift provision . . . [d]uring the lifetime of the settlor, the property of a revocable trust is subject to the claims of the settlor's creditors."<sup>232</sup> "During the lifetime of the settlor" is the operative phrase. Does it indicate that creditors' claims to trust funds are extinguished once the settlor's lifetime is over? The Sixth Appellate District was uncertain and reserved the question for a later date.<sup>233</sup>

Nevertheless, legislative intent, supported by canons of statutory construction, point to the conclusion that the legislature must amend Ohio's Trust Code. In this instance, legislative intent may be inferred from what the Ohio legislature did *not* do. The Ohio Trust Code is based on the Uniform Trust Code.<sup>234</sup> From 2000 to 2006, "members of the Estate Planning, Trust, and Probate Law Section of the Ohio State Bar Association, and members of the Legal, Legislative, and Regulatory Committee of the Ohio Bankers League" carefully studied the Uniform Trust Code and prepared a modified version for Ohio.<sup>235</sup> Notably, this version omitted the provision enabling creditors' access to trust funds after the settlor's death.<sup>236</sup> Had the legislature intended to protect

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231. See *Rush Univ.*, 980 N.E.2d at 51-54 (the court found that a common law rule supplemented statutory authority and was thus able to adopt it as the rule in Illinois). This does not necessarily suggest that the judiciary is the best body for establishing the rule but merely that the judiciary is capable of establishing the rule.

232. OHIO REV. CODE ANN. § 5805.06(A)(1) (West, Westlaw through the 130th GA (2013-2014)).

233. *Watterson v. Burnard*, 986 N.E.2d 604, 611 n.5. (Ohio. Ct. App. 2013).

234. Newman, *supra* note 7, at 135-36.

235. *Id.*

236. Compare OHIO REV. CODE ANN. § 5805.06(A), with UNIF. TRUST CODE ANN. § 505(a) (West 2013).

creditor rights after the settlor's lifetime, it would have been a simple matter of adopting that section of the Uniform Trust Code as is.<sup>237</sup> The modified version speaks to the legislature's intent to bar creditor claims upon the settlor's death, and legislative intent is paramount in statutory construction.<sup>238</sup> Canons of statutory construction further evidence the legislature's intent to prevent creditors from accessing trust assets after the settlor's death. *Expressio unius est exclusio alterius* suggests that, by qualifying the statute with "during the lifetime of the settlor," its alternative, "after the lifetime of the settlor," cannot be within legislative intent.<sup>239</sup> Likewise, should courts permit creditors access to revocable trust funds after the settlor's death, they would render the phrase "during the lifetime of the settlor" meaningless. This violates the "cardinal rule of statutory construction that significance and effect should if possible be accorded every word, phrase, sentence and part of an act."<sup>240</sup> Thus, any rule that subjects the property of a revocable trust to creditor claims upon the death of the settlor contradicts current Ohio law, and the courts have no power to adopt such a rule.

Policy considerations also suggest that the legislative amendment is the better method. An effective law will be comprehensive, addressing potential problems before they arise. It should enable settlors to make accurate estate plans, provide clear guidance to creditors regarding how and when to file claims, and outline the trustee's duties in this situation. Judicial opinions are ill suited to this sort of detail. For example, the Iowa Supreme Court announced the rule that revocable trust property is subject to creditor claims even after the settlor's death, provided that the probate estate is insufficient to satisfy them.<sup>241</sup> Even so, the Iowa legislature found it essential to draft clarifying legislation in the face of increased use of revocable trusts as estate planning devices.<sup>242</sup> Similarly, the comments to the Uniform Trust Code provision emphasized the gaps left by its general rule:

This section does not attempt to address the procedural issues raised by the need first to exhaust the decedent's probate estate before reaching the assets of the revocable trust. Nor does this section address the priority of creditor claims or liability of the decedent's other nonprobate

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237. Oglie, *supra* note 85, at 6.

238. Wachendorf v. Shaver, 78 N.E.2d 370, 374 (Ohio 1948).

239. "Where a statute expressly and specifically mentions certain things, other things belonging to the same class or occurring at the same time are excluded under the maxim, '*Expressio unius est exclusio alterius*.'" Weirick v. Mansfield Lumber Co., 117 N.E. 362, 363 (Ohio 1917).

240. Wachendorf, 78 N.E.2d at 374.

241. Phillips v. Roe (*In re Estate of Nagel*), 580 N.W.2d 810, 812 (Iowa 1998).

242. See IOWA CODE § 633A.3104 (West, Westlaw through 2015 Sess.).

assets for the decedent's debts and other charges.<sup>243</sup>

Filling in these gaps is a task better left to the legislature, and it is the legislature that should draft Ohio's new law governing creditor access to assets of revocable trusts.

#### *D. Potential Pitfalls Can Be Avoided with Careful Drafting*

The final issue is how to draft a statute that does justice to creditor rights but also gives effect to the settlor's intent, preserves some benefits of avoiding probate, and protects beneficiaries from becoming embroiled in the settlor's failure to satisfy his obligation. First, it is essential to define "creditor." Those seeking to limit creditor access to trust funds have argued that "creditor" means someone who has obtained a monetary judgment against the settlor.<sup>244</sup> Defining creditor as "judgment creditor," however, contradicts its use in everyday language, persuasive authority, and Ohio precedent. "Creditor" is simply "[o]ne to whom a debt is owed,"<sup>245</sup> while a "debtor" is "[o]ne who owes an obligation to another, esp[ecially] an obligation to pay money."<sup>246</sup> None of the cases in other jurisdictions that allowed creditors access to revocable trusts required them to have obtained a judgment or even filed a claim prior to the settlor's death.<sup>247</sup> In fact, under current Ohio law, "judgment creditors" are permitted to satisfy their claims from trust assets. Both the Third and Sixth Appellate Districts agreed that merely initiating litigation to obtain a judgment was sufficient to meet the requirements of O.R.C. section 5805.06.<sup>248</sup> Thus, any other definition would actually restrict creditor rights more than the status quo. "Creditor," furthermore, includes existing and subsequent creditors, i.e., those whose claims arose prior to the trust's creation and those whose claims arose after its creation. The *Schofield* court distinguished between the two: it noted that creditors lend on the basis of what someone has – not what someone used to have – suggesting that only existing creditors can challenge a

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243. UNIF. TRUST CODE ANN. § 505(a)(3) cmt. (West 2013).

244. See *Rush Univ. Med. Ctr. v. Sessions*, 980 N.E.2d 45, 54-55 (Ill. 2012) (defendant argued that "creditor" meant judgment creditor).

245. BLACK'S LAW DICTIONARY 396 (8th ed. 2004).

246. BLACK'S LAW DICTIONARY 433 (8th ed. 2004).

247. See *State St. Bank & Trust Co. v. Reiser*, 389 N.E.2d 768, 771 (Mass. 1979); *In re Estate of Kovalyshyn*, 343 A.2d 852, 859 (N.J. Super. Ct. Pr. Div. 1975); *Phillips v. Roe (In re Estate of Nagel)*, 580 N.W.2d 810, 812 (Iowa 1998); *Johnson v. Commercial Bank*, 683 P.2d 1096, 1100 (Or. 1978); *Giles v. Ingram*, 583 So.2d 1287, 1288 (Ala. 1991); *Rush Univ.*, 980 N.E.2d at 58.

248. See *Sowers v. Luginbill*, 175 Ohio App. 3d 745, 889 N.E.2d 172, 2008-Ohio-1486, at ¶ 28; *Watterson v. Burnard*, 986 N.E.2d 604, 610 (Ohio Ct. App. 2013).



trust.<sup>249</sup> This distinction, however, is no longer relevant, as trust assets can be accessed regardless of fraud and as O.R.C. section 5805.06 does not differentiate between existing and subsequent creditors.<sup>250</sup> Thus, preserving this distinction would restrict rather than expand creditor rights.

Second, it is necessary to inquire under what circumstances creditors should be permitted access to revocable trust funds. The answer to that inquiry is simple: creditors should be permitted access to revocable trust funds when the probate estate is insufficient to satisfy their claims. Probate procedure was designed to handle just these sorts of issues and has always emphasized creditor protection.<sup>251</sup> Initiating other procedures unnecessarily would only complicate and prolong an already complicated and prolonged probate process. This approach is in keeping with Ohio precedent in an analogous case, *In re Howald's Trust*.<sup>252</sup> In that case, the Tenth Appellate District construed a will and a trust agreement to determine how the decedent's debts should be paid.<sup>253</sup> It concluded, "[T]he personal estate of the donee must be exhausted in payment of her debts before calling on the trustee for a contribution out of the appointed property."<sup>254</sup> Every jurisdiction that allows creditors to file claims against revocable trusts does so only when the probate estate is exhausted, further confirming the wisdom of this approach.<sup>255</sup> The

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249. See *Schofield v. Cleveland Trust Co.*, 21 N.E.2d 119 (Ohio 1939).

250. See OHIO REV. CODE ANN. § 5805.06(a)(1) (West, Westlaw through the 130th GA (2013-2014)).

251. Schwickerath, *supra* note 3, at 770.

252. Ohio Nat'l Bank of Columbus v. Shawan (*In re Howald's Trust*), 29 N.E.2d 575, 583 (Ohio Ct. App. 1940).

253. *Id.* at 577-80.

254. *Id.* at 576.

255. See ALA. CODE § 19-3B-505(a)(3) (2014); ALASKA STAT. ANN. § 13.36.368(a)(2) (2014); ARIZ. REV. STAT. ANN. § 14-10505(A)(3) (West, Westlaw through the 2015 legislation of the 52nd legislature); CAL. PROB. CODE § 19001(a) (West, Westlaw through 2014 Sess.) (access after death permitted); D.C. CODE § 19-1305.05(a)(3) (West, Westlaw through Feb. 18, 2015); FLA. STAT. ANN. § 736.05053(1) (West, Westlaw through chapter 255 of the 2014 Sess. and Spec. "A" Sess. of the 23rd legislature); GA. CODE ANN. § 53-12-82(3) (West, Westlaw through act 2 of 2015 Sess.); IDAHO CODE ANN. § 15-6-107(2) (West, Westlaw through the 2014 2d Sess. of the 62nd legislature); IND. CODE ANN. § 30-4-3-2(b) (West, Westlaw through February 23, 2015); Rush Univ. Med. Ctr. v. Sessions, 980 N.E.2d 45, 49 (Ill. 2012); IOWA CODE § 633A.3109 (West, Westlaw through 2015 Sess.); KAN. STAT. ANN. § 58a-505(a)(3) (West, Westlaw through the 2014 Sess. and chapter 1 of the 2015 Sess.); ME. REV. STAT. tit. 18-B, § 505(1)(C) (West, Westlaw through chapter 1 of the 2015 first session of the 127th legislature); MASS. GEN. LAWS ANN. ch. 203E, § 505(a)(3) (West, Westlaw through chapters 1 to 505 of the 2014 2d Annual Sess.); MICH. COMP. LAWS ANN. § 700.7506(1)(b) (West, Westlaw through P.A. 2015, No. 4, of the 2015 Sess., 98th legislature); MO. ANN. STAT. § 461.300 (West, Westlaw through the 97th GA (2014)); *Anderson v. Fischer (In re Estate of Fischer)*, 901 S.W.2d 239, 240 (Mo. Ct. App. 1995); Adopt the Montana Uniform Trust Code, ch. 264, sec. 70(1)(c), § 72-36-302 (2013); NEB. REV. STAT. ANN. § 30-3850(a)(3) (West, Westlaw through 2014 Sess.); N.H. REV. STAT. ANN. § 564-B:5-505(a)(3)

trustee's obligation to the probate estate would arise only after the executor provided notice that the probate estate was inadequate, insulating the trustee from liability for good faith distributions to the trust beneficiaries.<sup>256</sup>

Third, the trustee's duties respecting creditors, and creditors' obligations respecting claims, must be outlined. Scholarship suggests that trustees should provide notice of the settlor's death to creditors.<sup>257</sup> Many statutes that provide for notice emphasize that the trustee is under no obligation to publish notice.<sup>258</sup> Instead, providing notice serves to insulate the trust and trustee from liability for untimely or improperly filed claims.<sup>259</sup> The solution is to establish degrees of obligation commensurate to the degree of the trustee's knowledge of each creditor and potential claims, with a general publication of notice as a fall back.<sup>260</sup> For instance, South Dakota's statute outlines notification procedures for unknown creditors, known creditors, and creditors who have already filed claims: notice by publication, actual notice, and no notice.<sup>261</sup> Creditors must notify the trustee of their claims and file their claims within a limited time period, not longer than one year.<sup>262</sup> The

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(West, Westlaw through chapter 330 of the 2014 Sess.); *In re Estate of Kovalyshyn*, 343 A.2d 852,858-59 (N.J. Super. Ct. Pr. Div. 1975); N.M. STAT. ANN. § 46A-5-505(A)(3) (West, Westlaw through 2nd Sess., 51st legislature (2014)); N.Y. EST. POWER & TRUSTS LAW § 10-10.6 (McKinney 2014); *In re Estate of Martin*, 686 N.Y.S.2d 195, 197 (N.Y. App. Div. 1999); N.C. GEN. STAT. ANN. § 36C-5-505(A)(3) (West, Westlaw through 2014 Sess. of the GA); N.D. CENT. CODE ANN. § 59-13-05(1) (West 2013); OR. REV. STAT. ANN. § 130.315(1)(c) (West, Westlaw through 2014 Sess.); 20 PA. STAT. ANN. § 7745(3) (West, Westlaw through 2014 Sess.); S.C. CODE ANN. § 62-7-505(a)(3) (West, Westlaw through 2014 Sess.); S.D. CODIFIED LAWS § 55-4-58(a) (West, Westlaw through 2014 Sess.); TENN. CODE ANN. § 35-15-505(A)(6) (West, Westlaw through 2014 2nd Sess.); UTAH CODE ANN. § 75-7-505(1)(c) (West, Westlaw through 2014 Sess.); VT. STAT. ANN. tit. 14A, § 505(a)(3) (West, Westlaw through 2013-2014 GA (2014)); VA. CODE ANN. § 64.2-747(A)(3) (West, Westlaw through 2014 Sess.); W. VA. CODE ANN. § 44D-5-505(a)(3) (West, Westlaw through 2015 Sess.); WIS. STAT. ANN. § 701.0505(1)(a)(3) (West, Westlaw through 2013 Act 380) (effective July 1, 2014); WYO. STAT. ANN. § 4-10-506(d) (West, Westlaw through 2014 Budget Sess.).

256. See, e.g., NEB. REV. STAT. ANN. § 30-3850(a)(5).

257. See Helen B. Jenkins, *Creditors' Rights to Actual Notice of Revocable Trust on Death of Settlor in the Aftermath of Pope: The Blessing of Change, the Sin of Avoidance, and the Forgiving Solution*, 19 SETON HALL LEGIS. J. 453, 474 (1995).

258. See CAL. PROB. CODE § 19003-08 (noting that the trustee *may* provide notice and the effects of doing so); D.C. CODE § 19-1305.05(d)-(e) (noting that the trustee *may* provide notice and the effects of doing so); IOWA CODE § 633A.3109-10 (noting that the trustee *may* provide notice and the effects of doing so).

259. See *supra* note 258.

260. Jenkins, *supra* note 257, at 469-73.

261. See S.D. CODIFIED LAWS § 55-4-58(b)-(l) (West, Westlaw through 2014 Sess.) (also noting that a trustee will *not* be liable for proceeding with the payment of claims according to statutory instruction or trust provision *unless* the trustee has actual knowledge of a contest or claim).

262. See IOWA CODE § 633A.3109 (barring claims not filed within one year of settlor's death); see also D.C. CODE § 19-1305.05(d) (barring claims not brought within six months of notice of

trustee could further limit this time period by providing notice, thus accelerating the claims process.<sup>263</sup>

## V. CONCLUSION

The Ohio legislature should amend the Ohio Trust Code to permit creditors to access the assets of a revocable trust to satisfy the settlor's debts after his or her death, regardless of when their claim arose, provided the settlor's probate estate is insufficient. Trustees should provide notice under certain circumstances, and creditors should file their claims in a timely manner to avoid delaying the trustee's duties. The implementation of this rule is supported by persuasive authority. As issues regarding creditor claims to revocable trust assets arose, state courts favored creditor claims even after the settlor's death and looked to statutory law for support. State legislatures soon fell into line, particularly after the Uniform Trust Code was drafted, and enacted legislation solidifying creditor rights. The implementation of this rule is also in keeping with the long-settled principles of Ohio law and underlying policy, including protection of creditor rights. A settlor cannot retain complete control over the property, enjoy its benefits, and avoid his creditors. The fact that a settlor's power of revocation technically expires upon his death should not interfere with this principle under the limited circumstances previously discussed. Especially as revocable trusts grow more popular as estate planning devices, Ohio law should reflect the reality of the situation and require the settlor to be just before he is generous.

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publication).

263. See IOWA CODE § 633A.3109-10 (providing that the one year statute of limitations can be reduced to four months for notice by publication and thirty days for notice by mail).