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Death is Certain but Probate is Optional: How to Transfer Wealth and Dodge Creditors Using a Revocable Trust

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DEATH IS CERTAIN BUT PROBATE IS OPTIONAL: HOW TO TRANSFER WEALTH AND DODGE CREDITORS USING A REVOCABLE TRUST

ABSTRACT

This article explores the impact on creditors of two common methods of wealth transfer at death in the state of Missouri: the revocable inter vivos trust and the traditional probate estate administration process. In the former, the trustee will administer the property in the trust in accordance with its terms, thus circumventing the probate process for the assets placed in the trust. In the latter, a personal representative is appointed to manage the decedent's final affairs through the probate courts in accordance with probate rules. The trustee and the personal representative play very similar roles but are held to different standards when it comes to their responsibility under the law. Each will step into the shoes of the decedent when it comes to managing affairs, but only of them can be held personally liable for mismanagement with respect to the decedent's creditors.

A personal representative is charged with payment of the decedent's debts before distributing any remaining assets to beneficiaries, but the trustee has no such duty. Nor will the trustee of a revocable trust be held liable for not doing so. The statutory remedy is instead to chase after the trust beneficiaries individually for their pro rata share of the debt rather than have debts paid prior to distribution; an outcome that can prove to be fruitless in many cases due to the cost of litigation if the beneficiaries choose not to pay. The law is clear that during the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors, which includes claims existing at death. Heirs are simply not entitled to any assets until the indebtedness of the decedent is discharged by proper management of the estate. The law as to creditors' rights needs to be revisited and carefully harmonized to clearly define rights and procedures in all assets at death to avoid such inconsistent results.

TABLE OF CONTENTS

I. INTRODUCTION

Today's creditors face significant challenges when it comes to collection of debts after their debtors pass away.[1] These challenges have grown even more complex since the adoption of revocable trusts as will substitutes,[2] as well as the ever-so-increasing use of non-probate transfers as an additional means of probate avoidance.[3] As Kent Schenkel so eloquently put it, "Death is certain but probate is optional."[4] Gone are the days where the typical creditor would have a one-stop-shop at probate to collect its debts. Now, a creditor must file a claim with the estate, and if the probate estate is insufficient, hunt down any assets that were transferred as non-probate transfers, and search for any potential revocable trusts the decedent may have had. It is apparent how difficult it can be for a creditor to even discover that information, especially within the statutory time limitations.[5] It becomes even more problematic when the decedent leaves behind an insolvent estate. Insolvency occurs when the decedent's probate estate is insufficient to cover claims of all the decedent's creditors; when the estate is insolvent, claims are then paid in proportion to their amounts.[6]

The revocable inter vivos trust has been the tool of choice for estate planning and probate avoidance purposes for decades.[7] The revocable trust is generally used these days as an estate planning vehicle that primarily operates as a will substitute.[8] A revocable trust is a trust in which the settlor retains control over and access to the assets during life; conversely, an irrevocable trust is one in which the settlor relinquishes control over and access to the assets and thus can no longer revoke the trust or amend its terms (outside of a non-judicial settlement agreement).[9] Titling assets in a revocable trust has no practical effect on ownership and control, whereas titling assets in an irrevocable trust is in a sense gifting away the assets within the trust; consequently, the property no longer belongs to the settlor. The law in Missouri is such that unless the terms of a trust expressly provide that the trust is irrevocable,[10] the settlor may revoke

1. Elaine H. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, 41 REAL PROP. PROB. & TRUST J. 819, 821 (2007).

2. *Id.*

3. *Id.*

4. Kent D. Schenkel, *The Trust-As-Will Portmanteau: Trill or Spork?*, 27 QUINNIPIAC PROB. L.J. 40, 40 (2013).

5. *See generally*, *id*.

6. 5B MO. PRAC. 3D, *Probate Law and Practice* § 980 (2020); MO. ANN. STAT. § 473.430 (West 1981).

7. A. James Casner, *Estate Planning - Avoidance of Probate*, 60 COLUM. L. REV. 108, 109 (1960).

8. MO. REV. STAT. § 456.6-601 (2005); 4A MO. PRAC. 2D, *Probate and Surrogate Laws Manual* § 456.6-601 (2020).

9. MO. REV. STAT. § 456.1-111 (2004).

10. A trust that is not irrevocable is a revocable trust in Missouri.

or amend the trust, thus making the trust revocable.[11] This paper is primarily concerned with the effect on creditors in the revocable trust context. The difference becomes relevant in that under Missouri law, a creditor may only reach the maximum amount that can be distributed to or for the settlor's benefit, if any, in an irrevocable trust.[12] Because irrevocable trusts are not primarily used as a will substitute, they are outside the scope of the issues raised by this paper.

The settlor, or trust creator, typically has the primary objective to direct who will receive the trust assets upon the settlor's death.[13] The settlor will also ordinarily execute a device called a pour-over will, which ensures that property not transferred into the revocable trust during the settlor's lifetime will make it in and thus be combined with the property in the revocable trust to be distributed to the intended beneficiaries.[14] Trust-based estate plans are used more frequently than will-based estate plans in Missouri due to considerable expense and delay associated with probate administration.[15] A revocable trust serving as a will substitute becomes a preventative measure for estate planning purposes, whereas the probate process is what results by operation of law when there is otherwise no such plan in place.

There are several other reasons why an individual might wish to avoid the cumbersome probate process. Many people prefer to keep their affairs private rather than having the state get involved in their affairs.[16] The delay can be considerable, as well as the expenses of paying for an attorney and a personal representative's fee schedule. Despite the similarities amongst the goals of a trust-based estate plan and a will-based estate plan, the law controlling the disposition of assets, especially as it relates to a settlor's (or decedent's) debts, is quite different. Creditors' rights are clearly defined in the context of the probate estate, as will be discussed below. The problem is that outside the well-regulated probate world, particularly in the revocable trust context, creditors are very poorly protected by law because revocable trust assets do not require probate administration and thus such assets may escape regulation.

II. ROADMAP

The purpose of this paper is to analyze whether a creditor may recover from a trustee of a revocable trust after the death of a settlor when the trustee subsequently distributes assets to the beneficiaries with full knowledge of the

11. MO. ANN. STAT. § 456.6-602 (2005); 4A MO. PRAC. 2D, *Probate and Surrogate Laws Manual* § 456.6-602 (2020).

12. MO. REV. STAT. § 456.5-505 (2011).

13. *Id.*

14. *Id.*

15. Courtney M. Conrad & Justin W. Whitney, *Revocable Trusts: Missouri*, WESTLAW, https://www.westlaw.com/w-016-3594?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 [https://perma.cc/24CY-KBWZ] (last updated Nov. 16, 2020).

16. RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. a (AM. L. INST. 2003).

decedent's debt. This paper will also discuss the duties of personal representatives of estates as they compare to duties of trustees of revocable trusts. It will then illuminate what appears to be a hole in the law, which seems to result in no consequences for "bad-acting" trustees of revocable trusts, referring to distributing assets to beneficiaries despite knowledge of legitimate claims. This paper will then present a sample case, focusing on applying initially the law in the state of Missouri, and later will expand to other jurisdictions to assess the varying positions on this issue. It will proceed to offer suggestions for changes in the law to remedy the issues discussed here and will address the consequences of the status quo.

III. A CASE FOR CONTEXT

The client is a commercial real estate company which extended a lease to a local restaurant in the Saint Louis area. The decedent passed away during the lease term with a debt remaining outstanding at the time of his death (roughly $500,000) which could have been satisfied by the assets in the revocable trust (an estimated $600,000) had the debt been paid prior to distribution. The client filed a claim within one year after the death of the decedent as required by Missouri Revised Statute ("RSMo") § 473.444.[17] The claim was filed with claimant's Petition to Require Administration,[18] pursuant to RSMo § 473.020, filed at the appropriate time.[19] The claim was provided in writing, supported by Affidavit and the Lease and Guarantee, as is required by RSMo § 473.380.[20]

Shortly after the decedent's death, the attorney representing the client telephoned the trustee of the decedent's revocable trust to notify him that: (1) the client has filed a claim against the decedent's estate with a petition to require administration, and (2) assuming that there were insufficient probate assets to satisfy the claim, that the client would pursue collection of the amount owed under the claim via the decedent's trust(s) or any other non-probate asset. Soon after, the attorney for the client sent the trustee a letter by email and regular mail including a copy of the claim. The personal representative of the estate (also the attorney for the client) filed an inventory representing there were no assets of the estate, thus the assets of the estate were insufficient to pay the claim.

17. MO. REV. STAT. § 473.444 (West 1989) (providing that, unless otherwise provided by law, claims not brought within one year of the decedent's death are forever barred).

18. A petition to require administration is when a creditor petitions the court to require that a probate estate be opened when there is otherwise no probate proceeding pending so that the creditor may assert its rights to collect within the statutory period. *See generally*, MO. REV. STAT. § 473.020 (1996); 4 MO. PRAC. 2D, *Probate Code Manual* § 473.020 (2019).

19. MO. REV. STAT. § 473.020 (West 1996) (providing that if no one has filed an application for letters testamentary or letters of administration within twenty days of the decedent's death, then any interested person can apply to the court for administration within one year of the decedent's death).

20. MO. REV. STAT. § 473.380 (West 1981) (setting forth requirements for claims).

The trustee allegedly distributed all the trust assets (an estimated $200,000 to each of three trust beneficiaries, the decedent's children), after the attorney spoke with the trustee to inform him of the claim that was filed against the estate of the decedent. In this case, the beneficiaries (and descendants of the decedent) have decided that it is in their best interest to litigate the matter rather than pay the debt and lose most of their "inheritance." What is a creditor to do when the beneficiaries do not voluntarily pay? Should a trustee be able to ignore valid claims against the trust when the law clearly says that the assets of a revocable trust available at the time of the settlor's death are subject to satisfaction of those debts?[21]

IV. THE LAW IN MISSOURI

Creditors may generally reach the settlor's estate and revocable trust assets to satisfy the settlor's debts after death.[22] However, creditors must do so within specific timelines. In accordance with traditional doctrine, the assets of the settlor's probate estate must normally first be exhausted before the assets of the revocable trust can be reached.[23] In Missouri, a creditor may file a claim against a decedent's probate estate up to one year after the decedent's death, otherwise the claim is barred under RSMo § 473.444.[24] If an asset that is not subject to probate administration is subject to the satisfaction of a decedent's debts[25] immediately prior to death, it can be pulled back into the probate estate to satisfy such claims as they are identified in the statute.[26] This is referred to as a recoverable transfer. A "recoverable transfer" is defined as:

> [A] non-probate transfer of a decedent's property under sections 461.003 to 461.081 and any other transfer of a decedent's property other than from the administration of the decedent's probate estate that was subject to satisfaction of the decedent's debts immediately prior to the decedent's death, but only to the extent of the decedent's contribution to the value of such property.[27]

A "non-probate transfer" is defined as: "a transfer of property taking effect upon the death of the owner, pursuant to a beneficiary designation."[28] An

21. MO. REV. STAT. § 456.5-505(1) (2011).

22. *Id.*

23. MO. REV. STAT. § 456.5-505 (2011); 4C MO. PRAC., *Trust Code and Law Manual* § 456.5-505 (2019 ed).

24. Courtney M. Conrad & Justin W. Whitney, *Revocable Trusts: Missouri*, WESTLAW, https://www.westlaw.com/w-016-3594?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 [https://perma.cc/24CY-KBWZ] (last updated Sept. 6, 2019).

25. It is this category that a revocable trust would fall under.

26. MO. ANN. STAT. § 456.5-505 (2011); 4C MO. PRAC., *Trust Code and Law Manual* § 456.5-505 (2019 ed).

27. In re Estate of Hayden, 258 S.W.3d 505, 508 (Mo. Ct. App. 2008).

28. *Id.*

example of this would be something akin to a beneficiary deed,[29] or "Transfer on Death" or "Payable on Death" designations on bank accounts or vehicle titles. These are the types of assets that typically avoid probate but are still recoverable assets subject to satisfaction of the debts of the decedent.

It follows then, that during the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.[30] Uniform Trust Code ("UTC") § 505(a)(1) supports this assertion.[31] This makes sense, because the property of a revocable trust is property that still belongs to the settlor and is under his control.[32] The settlor has the same access to and control of the assets in a revocable trust as he would have with regard to property that would otherwise pass by will.[33] There is no difference, then, between property held in a revocable trust and funds in the settlor's personal bank account. In fact, the settlor's personal bank account could very well be titled in the name of the settlor's revocable trust.

Thus, the property in the revocable trust at the time of death is subject to the claims of the creditor up to that moment. After death, the revocable trust becomes irrevocable and any income earned after the snapshot taken at death is not subject to the rules described above. This makes sense *because* the revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges. To the extent the probate estate is able to satisfy the debts of the decedent, there is a well-established process for doing so and there is no need to reach further to non-probate transfers in order to satisfy claims.[34] The problem arises when the probate estate is insufficient, and the well-established probate procedures for asserting claims are not available to creditors. As will be established below, there

29. A beneficiary deed is a deed in which at death, by the operation of law, title passes to the individual listed as the beneficiary on the deed. This is a common practice to keep a principal residence out of probate.

30. MO. REV. STAT. § 456.5-505(1) (2011).

31. UNIF. TRUST CODE § 505 (UNIF. L. COMM'N 2000) ("During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors."). Section (a)(3) provides further instruction:

> "After 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]."

Id.

32. The pronouns "he/him/his" will be used throughout this paper for ease of reading.

33. Alan Newman, *Revocable Trusts and the Law of Wills: An Imperfect Fit*, 43 REAL PROP. TR. & EST. L.J. 523, 551 (2008).

34. In the case above, the assets of the estate were completely exhausted, leaving only the assets of the decedent's revocable trust available to pay his debts remaining at the time of his death.

is little hope for the creditor in this unexceptional scenario to collect debts unless the beneficiaries choose to pay the decedent's claim out of their respective shares.

There is no question in the example case above that the assets were available to satisfy the debt. The question therefore becomes, what is the remedy of the creditor who wishes to collect a debt against such assets when that creditor has a claim against the settlor? The statutory scheme in Missouri tends to indicate that, at a minimum, the recipients of the assets (such as the beneficiaries of the trust) will be liable for the claim against the assets.[35] However, one might ask, should the creditor have to track down the recipients/beneficiaries, or should the trustee have a duty to settle claims against the settlor prior to such distribution? Common sense dictates that the trustee should be obligated to at least allow for the opportunity for such claims to be settled prior to distributing assets, at least for some statutorily imposed minimum period. It would certainly ease administrability of creditor claims at very little cost to interested parties. However, there seems to be a void in both statutory and case law in the state of Missouri to that effect.

V. THE NOTICE REQUIREMENT

Missouri law provides that any trustee who has the duty or power to pay the debts of a deceased settlor *may* publish a notice in a newspaper once a week for four consecutive weeks in substantially the following form:

> To all persons interested in the estate of [John Doe], decedent. The undersigned [Jane Doe] is acting as Trustee under a trust the terms of which provide that the debts of the decedent may be paid by the Trustee(s) upon receipt of proper proof thereof. The address of the Trustee is [Jane Doe's address]. All creditors of the decedent are noticed to present their claims to the undersigned within six (6) months from the date of the first publication of this notice or be forever barred.[36]

The interesting part about this is that the law provides that the trustee *may* provide notice to creditors that they must bring any and all claims to the trustee, but if he does, there is no requirement to even consider any of them, let alone retain any assets during the six-month notice period. Because the statute uses the word *may*—as opposed to must—the trustee is free to ignore those claims and to simply distribute the assets to the beneficiaries. The trustee, as a result, accomplishes nothing aside from giving the runaround to creditors, causing them to chase down these beneficiaries and attempt to collect using the recoverable transfer statute. That is, if the claim is even worth the legal fees associated with it. There is little, if anything, achieved by a statute that provides that a trustee *may* provide notice, without any corresponding requirement that he must follow

35. MO. REV. STAT. § 456.5-505 (2011).
36. MO. REV. STAT. § 456.5-505(5) (2011).

through after receiving such notice of claims. This further illuminates the issues that arise when the law lacks a clear and straightforward remedy.

An even bigger problem with the statute above[37] is that it assumes that creditors of a decedent can in some way reach assets in a revocable trust. That statute's application is in effect limited to only those trusts which provide language indicating that the trustee has a duty or power to pay debts of the decedent.[38] The statute's applicability thus depends on the wording of the trust and whether it grants such a power to the trustee.[39] In the event such language is absent from the trust, RSMo § 456.5-505(5) is entirely optional and publishing notice becomes pointless. This clearly further complicates the situation for creditors because the statute confers very little power unless the drafting attorney included the language in the document that would activate subsection five.[40]

VI. DUTIES OF TRUSTEES

In Missouri, the trustee of a revocable trust owes a duty to administer the trust in "good faith, in accordance with its terms and purposes and the interests of the beneficiaries."[41] A trustee "shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust."[42] To satisfy such a standard, the trustee "shall exercise reasonable care, skill, and caution."[43] This standard has been described as administering a trust as a "man of ordinary prudence [would exercise] in dealing with his own property," regardless of the type or purposes of the trust.[44] The trustee is charged with exercising care and skill to preserve the trust property until distribution.[45]

To sum up the basic duties of a trustee, one could say that he has a duty to administer the trust in such a manner that accomplishes the wishes of the settlor of the trust in such a way that the person would administer his own affairs. It is unlikely that the conduct of the reasonable person described above would include avoiding paying one's debts when managing personal affairs. However, this is likely to be the result without a clear remedy in the law for creditors in a case like this.

37. *Id.*

38. J. Rodney Johnson, *Rights of Creditors to Reach Assets of a Revocable Trust after the Death of the Grantor - The Missouri Approach*, 20 REAL PROP. PROB. & TR. J. 1189, 1190 (1985).

39. *Id.*

40. *See id.*

41. MO. REV. STAT. § 456.8-801 (2004).

42. MO. REV. STAT. § 456.8-804 (2004).

43. *Id*.

44. *See* RESTATEMENT (SECOND) OF TRUSTS § 174 cmt. a (AM. LAW INST. 1959).

45. Am. Cancer Soc'y, St. Louis Div. v. Hammerstein, 631 S.W.2d 858, 864–65 (Mo. Ct. App. 1981).

UTC § 603(b) provides the general rule that "rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor."[46] This is of course during the lifetime of the settlor, as well as while carrying out the settlor's wishes in death as evidenced by the trust document itself. Great deference is given by courts to the intent of the settlor in the context of trust documents and has been compared to the rules of construction in the domain of contract law.[47] It makes sense that a trustee should have a duty to the settlor, but there is no reason that a trustee could not accomplish the goals set forth in the trust by having, in addition, a duty to creditors. This is especially so when the law provides that the assets should be available to settle the debts of the settlor when the estate is insolvent and unable to do so.

After the death of the settlor, the trustee then is under a duty to the beneficiaries to administer the trust solely in their interests.[48] It could be argued that it is in the best interests of the beneficiaries to take only the distributions that are rightfully theirs—meaning only the net figure after debts have been paid. Otherwise, the beneficiary could be subject to an action for accounting, and not only would the beneficiary lose out by receiving a lower distribution (even though it is not rightfully theirs to receive in the first place), but they would then be subject to the cost of defending themselves in a suit brought by creditors to collect the debt.

The law clearly does not support a duty to creditors on behalf of trustees, but should it? As of the time of this paper, there are no statutes or cases in Missouri explicitly stating that the trustee of a revocable trust owes a duty to creditors. This is somewhat problematic for the example case above. The following research, however, indicates compelling parallels between the function of a trustee of a revocable trust and a personal representative of an estate; thus, the argument could be made that a trustee is very much like the personal representative of an estate and stands in the same fiduciary capacity. And if a personal representative of an estate has a duty to creditors, so too should a trustee of a revocable trust if the law supports the fact that assets in a revocable trust available at the time of a decedent's death are subject to the claims of creditors.

46. UNIF. TRUST CODE § 603(b) (UNIF. L. COMM'N 2000).

47. *See* Rouner v. Wise, 446 S.W.3d 242, 258 (Mo. 2014) (showing that extrinsic evidence will not be admitted to contradict terms of an express trust that are set forth in an unambiguous writing the settlor intends to be complete); *See also* First Nat'l Bank of Kansas City v. Hyde, 363 S.W.2d 647, 653 (Mo. 1962) ("Where the language used is clear and of well-defined force and meaning, it must stand as written and extrinsic evidence of what was intended in fact cannot be adduced to qualify, explain, enlarge, or contradict the language."). This is sometimes referred to as the four corners rule, though it has its roots in the same policies that gave rise to the parol evidence rule that governs the use of extrinsic evidence in the construction of written contracts. *Rouner*, 446 S.W.3d at 258.

48. 5A MO. PRAC. 3D, *Probate Law and Practice* § 641 (2020).

VII. SIMILARITIES TO PERSONAL REPRESENTATIVES

The trustee of a revocable trust is in many ways like the personal representative of an estate. As discussed above, a revocable trust is commonly used as a substitute for a will to avoid the burdensome and exorbitant probate process in which the personal representative is charged with oversight. As previously established, because a revocable trust is usually employed as a will substitute, it is appropriate to subject the trust assets at the settlor's death to the claims of a settlor's creditors.[49] The UTC makes clear that the assets of a revocable trust are liable for such charges to the extent the probate estate is insufficient.[50] A trustee should thus have the responsibility to administer a revocable trust in the same way a personal representative of an estate has the responsibility to administer the estate.

In many UTC states, the personal representative must perform a diligent search of the decedent's records to determine the identities of any known or reasonably ascertainable creditors of the decedent, even if their claims are unmatured, contingent, or unliquidated.[51] It makes little sense, given the similar fiduciary capacities shared by the trustee and personal representative, that a trustee of a revocable trust has no such corresponding duty. The state of Florida, a UTC state, considers the personal representative a fiduciary that must abide by the same standard of care as is applicable to trustees.[52] The general duties of the personal representative include acting efficiently and in the best interests of the estate and the persons interested in the estate (such persons interested in the estate include creditors), and settling and distributing the estate according to the will, or if there is no will, according to the Probate Code, including the statutes of intestate succession.[53]

The function of a personal representative is narrower in scope and in time than the function of a trustee. This is because personal representatives of estates can typically conclude the affairs of the decedent in a relatively short period of time, such as in a year or so, depending on the complexity of the estate. However, a trustee may be obligated for many years to the trust in which he is the trustee, which can be as long as a lifetime. The traditional duties of a personal representative are to (1) take possession of the personal assets of the decedent;

49. "Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit." RESTATEMENT (SECOND) OF TRUSTS § 156 (AM. L. INST. 1959).

50. David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 193 (2002).

51. Practical Law Trusts & Estates, *Understanding Probate: Creditor Claims in Probate (FL)*, WESTLAW, https://www.westlaw.com/w-014-8968?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 [https://perma.cc/KMK7-SGEE] (last visited Sept. 14, 2020).

52. *Id.*

53. *Id.*

(2) pay the decedent's legitimate debts, taxes, and expenses of administration; (3) pay legacies and distribute specific bequests; and (4) distribute the remaining estate among the decedent's heirs or devisees.[54]

The duties and responsibilities of a trustee are broader and more flexible, but typically include following similar wishes of the settlor based on instructions in the trust document—the main difference being avoiding the probate process which, as has been established, can be particularly expensive.[55] "The power and authority of a testamentary trustee ordinarily will be more extensive both in scope and time than that of an independent personal representative, even though . . . the powers of an independent personal representative are closely analogous to those of a trustee."[56] An "independent personal representative has wide [discretion] and administrative authority without court supervision."[57] The trustee is typically given powers by the settlor in the trust document itself, to act based on the settlor's wishes. However, if a decedent had no trust, but only had a will devising assets, the personal representative would be under a duty and obligated by law to resolve debts owed to creditors for up to one year after the decedent's death. Were the personal representative not to pay certain debts properly, as required by the probate process, he could be held personally liable. Missouri law provides that "a personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate . . . if . . . personally at fault."[58] If a personal representative were to pay a claim without permission of the court and the estate turned out not to be liable for the claim, the personal representative would be.[59] There have also been instances where a personal representative failed to maintain a reasonable reserve in the estate to pay claims and the entire burden of the claim was placed on the personal representative.[60] If a creditor is harmed by a personal representative's failure to put forth reasonable effort to notify creditors that an estate has been opened, the creditor is entitled to relief from the personal representative.[61] Why should it be any different in the case of the trust, where a person wishes to manage affairs such that assets may pass to beneficiaries while circumventing the costly and invasive probate process? When the ultimate goal is the same—to pass assets to beneficiaries—the law that governs such transfers should be uniform.

In the case of *Merritt v. Merritt*, the court elaborated on the position of a personal representative by stating that it has long been understood that a personal

54. 4 MO. PRAC. 2D, *Pro. Code Manual* § 473.803 (2000)
55. *Id.*
56. *Id.*
57. *Id.*
58. MO. ANN. STAT. § 473.820 (1981).
59. 5B MO. PRAC. 3D, *Prob. L. & Prac.* § 942 (2000)
60. 5B MO. PRAC. 3D, *Prob. L. & Prac.* § 916 (2000)
61. *Id.*

representative under a will serves in a fiduciary capacity and stands in the position of a trustee to those interested in the estate and is liable for want of due care and skill in the management of the estate, measured by the care and skill a prudent person would exercise in the direction and management of his own affairs.[62] The court in *Kahmann v. Buck* further explained the personal representative's duty to include looking after the interests of and to act for and on behalf of all those with an interest in the estate.[63] This would appear to include creditors of the estate.[64] The court in *In re Estate of Chrisman* drew parallels between the position of the personal representative and the trustee when deciding to extend liability rules of trustees to personal representatives.[65] The court stated, "We see no logical reason why the law pertaining to joint and several liability of co-trustees should not be extended to co-personal representatives. Each occupy a position of trust and serve in a fiduciary capacity for the beneficial interests of others."[66] It would not be unrealistic or unreasonable to extend this same logic to the issue of liability and duties of trustees and personal representatives in this case.

VIII. A TRUSTEE'S DUTY TO PRESERVE ASSETS?

There are no statutes or cases that point to trustee liability for distributing trust assets to the beneficiaries with knowledge of pending claims against the settlor of the trust. A trustee does have a duty to distribute assets at the appropriate time to the beneficiaries, however.[67] In Missouri, upon the occurrence of an event terminating or partially terminating a trust, "the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes."[68] Missouri has codified this section of the UTC in RSMo § 456.8-817 (2005).[69] The fact that the statute mentions the trustee has a "right" to retain a reasonable reserve for the payments of debt suggests that there is no duty or obligation on behalf of the trustee to retain funds for this purpose; thus, the only duty is to the beneficiaries.[70] This illuminates the weak statutory protection for the rights of creditors. The Uniform Probate Code even takes the position that "[a] trustee receiving or controlling a non-probate transfer is released from liability . . . with respect to any assets distributed to the

62. Merritt's Estate v. Merritt, 62 Mo. 150, 157 (Mo. 1876).

63. Kahmann v. Buck, 446 S.W.2d 457, 460 (Mo. Ct. App. 1969).

64. *See id.*

65. In re Estate of Chrisman*,* 746 S.W.2d 131, 135 (Mo. Ct. App. E.D. 1988).

66. *Id*.

67. UNIF. TRUST CODE § 817 (UNIF. LAW COMM'N 2000).

68. *Id.*

69. MO. REV. STAT. § 456.8-817 (2004); 4A MO. PRAC. 2D, *Prob. & Surrogate L. Manual* § 456.8-817 (2020).

70. After the death of the settlor of course.

trust's beneficiaries[; e]ach beneficiary to the extent of the distribution received becomes liable for the amount of the trustee's liability attributable to assets received by the beneficiary."[71] This further supports the proposition that the remedy is pursuit of the beneficiaries, which will often lead to litigation far exceeding the cost of the claim, or simply a write off of debt as uncollectible. This is not a desirable outcome.

In Missouri, the remedy lies in chasing down the beneficiaries, and allows for recipients of recoverable transfers to be joined and made parties to the action for accounting.[72] Recall that a recoverable transfer is defined in Missouri as:

> A non-probate transfer of a decedent's property under sections 461.003 to 461.081 and any other transfer of a decedent's property other than from the administration of the decedent's probate estate that was subject to satisfaction of the decedent's debts immediately prior to the decedent's death[.][73]

Under RSMo § 461.300, recipients of recoverable transfer are required to pay the pro rata share of all property received to cover statutory allowances and claims due the estate, which is enforced by an action for accounting.[74] This is a procedure that creditors may use which involves the commencement of accounting in a written demand to the personal representative of the decedent's estate.[75] However, a most obvious problem arises when the decedent has transferred most or all of his assets to a trust,[76] while leaving nothing in the estate to pay debts rightfully owed.

In the case of *In re Estate of Fisher*, the court points to the consequences when there are insufficient assets in the probate estate.[77] The court reasoned that "while a major purpose of Chapter 461 is to promote *inter vivos* transfers, [RSMo §] 461.071, entitled 'Rights of Creditors,' makes it clear that the legislature wishes to place reasonable limits on such transfers."[78] RSMo § 461.071 states that "a deceased owner's creditors . . . shall have the rights set forth in section 461.300 with respect to the value of property passing by nonprobate transfer."[79] Section 461.300 requires that recipients of recoverable transfer are to pay their pro rata share of all property received to cover statutory

71. UNIF. PROBATE CODE § 6-102 (amended 1998) (2013).

72. *Id.*; *See also* Est. of Merriott v. Merriott, 439 S.W.3d 259 (Mo. Ct. App. W.D. 2014) (discussing in action for accounting by creditor against debtor's estate to recover value of non-probate transfers, the proper remedy was a money judgment in amount of value of recoverable transfers, and in calculating amount recoverable by creditor, time for valuing property is date of debtor's death).

73. *Merriott*, 439 S.W.3d at 263.

74. MO. REV. STAT. § 461.300 (2004).

75. Gagliardi, *supra* note 1, at 819, 874–75.

76. Likely through a pour-over will.

77. In re Estate of Fisher, 901 S.W.2d 239, 241 (Mo. Ct. App. E.D. 1995).

78. *Id.*

79. MO. REV. STAT. § 461.071 (1995).

allowances and claims due the estate, which will be enforced by an action for accounting.[80] Thus, it appears the only clear remedy captured in a statutory scheme in Missouri for recovery of non-probate transfers is through the recipients of such transfers. This contention is further supported by "the 'trust fund' theory [that] the heirs are not entitled to any assets until the indebtedness of the decedent is discharged by the administration" of the estate.[81]

The court in *Fisher* claimed that a person wishing to use an inter vivos device (such as a revocable trust) must leave sufficient assets in the probate estate to cover anticipated claims and expenses.[82] Otherwise, the "transferees will be subject to [an] accounting and possible contribution to satisfy [the] unpaid claims and expenses."[83] The court described this practice as "good and fair public policy."[84] Although, there is still an issue when insufficient assets remain in the probate estate. If the transferees were to take property without the corresponding liabilities charged against that property, it would seem apparent that the transferees would receive a windfall in the amount of the claim. Such a windfall could well be regarded as a form of unjust enrichment. Because the trustee in our example case above had already distributed the assets that were transferred to him as trustee and he received none himself, there is no such windfall that would result in unjust enrichment as experienced by the beneficiaries in this case. Therefore, there would have to be a different theory upon which to seek a remedy from the trustee.

The law tends to consistently point to a remedy for creditors, although it lacks a clear and established method for securing it. It is unlikely then, with an established "remedy" at law (pursuing claims against the beneficiaries through a recoverable transfer),[85] that the courts will place liability on a trustee of a revocable trust who makes a distribution of assets to the intended beneficiaries.[86]

IX. OTHER JURISDICTIONS

In the California case of *Arluk Medical Center Industrial Group, Inc. v. Dobler*, by the time the creditor filed its claim in the probate court, proved the claim, and was issued a judgment, the trustee of the revocable trust had already distributed the assets to the beneficiaries.[87] The court stated that, "[p]ursuant to

80. MO. REV. STAT. § 461.300 (2004).

81. 5B MO. PRAC. 3D, *Prob. L. & Prac.* § 916 (2000); *see also* State ex rel. Brouse v. Burnes, 107 S.W. 1094, 1096 (Mo. App. 1908) ("[When] personalty descends to the heirs, it is charged with the debts and liabilities of the deceased . . . ").

82. *Fisher*, 901 S.W.2d at 241.

83. *Id.* at 239.

84. *Id.* at 241.

85. Est. of Merriott v. Merriott, 439 S.W.3d 259, 263 (Mo. Ct. App. W.D. 2014) .

86. The remedy at law being Missouri's recoverable transfer statute, placing the burden on creditors to chase down beneficiaries to collect the debt.

87. Arluk Med. Ctr. Indus. Grp., Inc. v. Dobler, 11 Cal. Rptr. 3d 194, 196 (Cal. Ct. App. 2004).

[California] Probate Code § 19001, the assets in a revocable living trust of a deceased settlor [were] subject to the claims of the creditors of his . . . probate estate to the extent the estate itself [was] inadequate to satisfy those claims."[88] However, the court found that the pendency of a probate proceeding did not alter the trustees' statutory duty to administer the trust solely for the benefit of trust beneficiaries.[89] Thus, the court affirmed the trial court's decision, stating that, "[a]bsent affirmative wrongdoing amounting to a violation of some other legally cognizable duty, . . . there [was] no legal authority for subjecting the trustee[s] to personal liability for distributing assets to the trust beneficiaries to the potential detriment of a disputed claimant who later [obtained] a judgment against the decedent's estate."[90]

In our sample case introduced in the beginning of this paper, as in the *Arluk* case immediately above, trust distributions were made based on a pending claim prior to the claim being reduced to a judgment, causing the trust to become insolvent for purposes of settling the decedent's debts in the estate. Even though the assets of the trust are subject to the claims of the decedent's creditors, in the absence of a statutory scheme in the state of Missouri supporting trustee liability or the duty of a trustee to reserve assets for creditors, it is unlikely a court will find a trustee personally liable for the debts of the decedent in a case such as this.

Courts in Florida treat trustee duties quite differently. One court in particular took the position that "[a]lthough a trust instrument directs termination of the trust and the distribution of the principal to the beneficiaries upon the settlor's death, the trustee cannot make complete distribution until [provisions have] been made for all the expenses, claims, and taxes the trust may be obligated to pay . . . ."[91] The court also made clear that distribution certainly could not be made "before these amounts have been fully ascertained."[92] The court held further that "when the trust is the beneficiary of the grantor's probate estate and is charged with the duty to pay the expenses, claims, and taxes imposed on the probate estate, the trustee cannot make complete distribution of the trust until the probate proceeding has been substantially concluded . . . ."[93] This is good policy. The holes in the law are largely eliminated by placing a requirement on the trustee to postpone distributions until the probate proceeding has been substantially concluded. Creditors in Missouri would have much to gain by a simple addition to the law, with little to lose even on the part of the beneficiaries. Sure, they may have a slight delay (a maximum of a 6-month notice period) in receiving a full

88. *Id*. at 195.
89. *Id.* at 201.
90. *Id.* at 206.
91. First Union Nat'l Bank v. Jones, 768 So. 2d 1213, 1215 (Fla. Dist. Ct. App. 2000).
92. *Id*.
93. *Id.*

distribution of property that is rightfully theirs (to the extent that proper debts have been settled). However, they avoid lawsuits brought by creditors to collect debts after the fact. This can be viewed as an absolute win for the creditor and beneficiary.

The trustee in Missouri appears to have "no personal liability when distributions are made pursuant to the trust terms 'before the creditor has taken appropriate steps to reach the trust assets.'"[94] These "certain steps" seem to be obtaining a judgment against the estate.[95] "In certain exceptional circumstances, however, secondary liability for unpaid taxes may be imposed personally on the fiduciary [(including a trustee)] or on the beneficiaries of the trust or estate."[96] A trustee can also be liable personally for taxes owed by the decedent if they are not paid under the Internal Revenue Code.

> If the estate tax . . . is not paid when due, then the spouse, transferee, trustee . . . surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under sections 2034 to 2042, inclusive, to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax."[97]

The significance here is that there are certain exceptions for when a trustee will be held personally liable for certain actions—such as failure to ensure proper payment of taxes. If the Federal Government is comfortable placing trustees in a position of personal liability when it comes to debts owed in this case, why not extend that liability to all legitimate debts of the decedent when a trustee fails to handle the affairs of the trust in a prudent manner? Spades have been broken here; it is not as if there are presently no circumstances upon which a trustee may be held personally liable for acts in his fiduciary capacity. A pecking order can be established to determine what types of claims have priority, but at least there will be rights to legitimate claims—even if not every creditor can be made whole in the case of an insolvent estate.

X. POSSIBLE SOLUTIONS

Good policy demands that, if the law is going to supply a remedy and make assets available to satisfy creditor's claims at death, the law also should provide clear and simple procedures for realizing that remedy.[98] Along with that, the law should provide a single forum for a creditor to assert claims and a single procedure for timely and effective methods for discovering assets to which the

94. Schenkel, *supra* note 4, at 47.

95. *See id.*

96. Jeffrey G. Sherman, *All You Really Need to Know About Subchapter J You Learned from This Article*, 63 MO. L. REV. 1, 7 (1998).

97. 26 U.S.C.A. § 6324 (1970).

98. Gagliardi, *supra* note 1, at 819, 827.

creditor may have rights to.[99] The current process in which a creditor must resort to—if it ever wishes to collect on its debts—is time consuming and costly not only for the creditors, but to all involved in the administration of a trust or in probate proceedings. This of course includes the beneficiaries. The lack of clear procedures in the law for a consistent method for administering the rights of creditors must be remedied; thus, a comprehensive statutory solution is in order.

A potential solution to these issues would be to change the "may" language to "must" in the notice statute for trustees. This way they will be held to the same standard as their counterpart fiduciaries in the probate realm (personal representatives). There would be little additional burden on the trustees for such a requirement aside from a little bit of due diligence in discovering potential creditors. A quick evaluation of a decedent's finance records will typically reveal all relevant information for this purpose. The companion proposal would be that the trustees may not distribute assets, until either the notice period runs, or until the probate matters are substantially concluded. "Substantially concluded" can be defined in a number of ways, but the general idea would be that the trustee will have gone through reasonable efforts to identify potential creditors and will have communicated and worked with the personal representative in good faith to ensure that there will be no additional claims against the assets in the revocable trust. Only then may the trustee distribute assets to the beneficiaries. There can clearly be some exceptions in the cases where there are substantial resources available to satisfy the debts, and in such a case an early distribution would be harmless. To reach this level of certainty, however, necessitates that all creditors and debt records have been ascertained and evaluated. This is a just result, and again, there is very little administrative burden on behalf of trustees as many probate proceedings are concluded within one year. The typical trustee is often obligated to perform his duties under the trust for much longer terms than one year. The only potential burden would be on beneficiaries who would have to wait to receive distributions to the same degree and extent as they would if the assets were to pass through the probate process. The main goals of using a revocable trust as a will substitute is still achieved as one still avoids the expense and publicity. A notice statute would additionally have wider appeal if it applied to all revocable trusts upon death of the grantor, even if the trust lacks a provision granting such power.

It could also be proposed to amend the Missouri statute from granting the trustee a "right" to retain a reasonable reserve for the payments of debt, to requiring the trustee to have a "duty" to retain a reasonable reserve. This is consistent with the above proposal which suggests no distributions are to be made until probate matters are substantially concluded. In addition, a statute conferring power to the personal representative to recover on behalf of the probate estate to satisfy claims of creditors would be beneficial, to the extent the

99. *Id.* at 827.

probate estate is insufficient to satisfy such claims of course.[100] This would apply regardless of whether the personal representative was appointed through traditional means, or in cases where there is no probate estate and the creditor must petition the court to open one via a Petition to Require Administration.

As a deterrent, if the trustee distributes assets to the beneficiaries without complying with the requirements above, they would be liable for the loss of each creditor with a legitimate claim against the decedent's estate. A preemptive measure such as this would likely prevent such transfers from occurring altogether, eliminating the need to seek a remedy from the trustee at all. It would encourage careful conduct on the part of the trustee, truly causing him to exercise management of the estate, measured by the care and skill a prudent person would exercise in the direction and management of his own affairs.[101] This is what the law requires.[102] If a trustee is held to a standard that requires him to manage the trust in a manner consistent with the care and skill that one manages his own affairs, this would reasonably include managing one's debts in a just and fair manner. As discussed above, the law already places the potential for liability on trustees who fail to pay taxes due in the case of the settlor of a trust. It follows then that the trustee can and should be held liable for failure to comply with the above proposals when it comes to managing the settlor's other affairs.

It might also be proposed that an amendment to Missouri's fraudulent transfer statute be made to include circumstances where the decedent leaves no assets in the probate estate and does not direct the trustee to manage debts in the trust document's powers conferred to the trustee. Missouri's current statute states that:

> 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 with actual intent to hinder, delay, or defraud any creditor of the debtor.[103]

The conduct in the example case above can be viewed as an attempt to hinder, delay, or defraud creditors when an individual has debts outstanding but leaves no method for paying those debts. There is at least an argument that transferring all of one's assets to a revocable trust without granting power to the trustee to affirmatively manage the decedent's debts is evidence of "constructive intent" to hinder, delay, or defraud creditors. The statute could be amended to provide specifically for this situation to resolve the debate. This would of course not be the case where an individual has no estate plan at all, as in those cases the probate court would govern. This is only to include those situations where an individual

100. Johnson, *supra,* note 38, at 1196.
101. Merritt's Estate v. Merritt, 62 Mo. 150 (Mo. 1876).
102. *See id.*
103. MO. ANN. STAT. § 428.024 (West 1992).

effectuates an elaborate estate plan that neglects to put into place proper devices for management of that individual's debts.

XI. CONSEQUENCES

The consequences of such a void in the law are significant. While the debt owed in some cases may justify pursuing litigation against beneficiaries, in most cases it will not. The effect of this is the debts must be written off. The result of such write offs is lower taxable income on businesses due to lower revenues. And when debts go unpaid, the cost of the goods and services in that industry increase. The healthcare industry provides a particularly revealing example. An article by Jilian Mincer, published by Reuters, indicated that "[t]he largest publicly-traded hospital chain, HCA Holdings Inc., reported in the fourth quarter of 2016 that its ratio of bad debt to gross revenues of more than $11 billion was 7.5 percent."[104] Compared to the overall inflation rate of 2.10% during this same period, inflation for medical care was significantly higher and thus outpaced the standard inflation rate of currency.[105] A correlation therefore exists between bad debt and an increase in cost of goods and services.

When a business doesn't collect all its debt, it must write off that debt as bad debt expense and compensate by increased prices, which everyone else must pay. This can also lead to slowed growth, decline, and even failed businesses, in turn less jobs, higher unemployment, and less money in the pockets of consumers in the economy to purchase additional goods and services. Bad debt can also lead to more conservative lending practices. Banks and other businesses will have more strict requirements for who they will lend to if the rate of default rises due to uncollectible debt upon the death of their customers. Lending is otherwise good for and boosts the economy. It is what allows businesses to have the capital to thrive and grow and create new jobs; in turn producing more currency flow in the economy. Bank lending declines often in times of what is known as a credit crunch which is commonly associated with recessions.[106] "A credit crunch refers to a decline in lending activity by financial institutions brought on by a sudden shortage of funds."[107] "Often an extension of a recession, a credit crunch makes it nearly impossible for businesses to borrow because

104. Jilian Mincer, *Ballooning bills: More U.S. hospitals pushing patients to pay before care*, REUTERS (Sept. 12, 2020), https://www.reuters.com/article/us-usa-healthcare-hospital-payments-idUSKBN17F1CM [https://perma.cc/2DQR-ALE7]. "Between 2000 and 2019, medical care experienced an average inflation rate of 3.47% per year. This rate of change indicates significant inflation. In other words, medical care costing $1,000 in the year 2000 would cost $1,911.49 in 2019 for an equivalent purchase." *Id*.

105. *CPI Inflation Calculator* (Sept. 12, 2020), https://www.in2013dollars.com/Medical-care/price-inflation/2000-to-2019?amount=1000 [https://perma.cc/XB4C-CRTG].

106. Akhilesh Ganti, *Credit Crunch*, INVESTOPEDIA (Sept. 15, 2020), https://www.investopedia.com/terms/c/creditcrunch.asp [https://perma.cc/YZ38-WGJ6].

107. *Id*.

lenders fear bankruptcies or defaults, resulting in higher rates."[108] If banks and other businesses are unable to collect their debts on a large scale due to a poorly established legal remedy for debt collection, these effects become inevitable. Businesses are then less able to grow and hire and may even engage in layoffs because they are forced to trim their workforce.[109] Productivity declines in the economy and unemployment begins to rise which leads to a worsening recession.[110] We must protect business to ensure the free flow of capital in our national economy by enforcing good debt collection practices at a local level.

Moreover, businesses expend time, energy, and financial resources to go through a vetting process when deciding to engage into a contractual relationship with or to extend credit to an individual or business. Whether it be for credit or other financial verifications, or careful contractual drafting to protect itself, all those protections and preemptive measures are meaningless when the business no longer deals with the individual it initially had the relationship with. A creditor under the current law must hope to collect from the beneficiaries if a trustee of a revocable trust is not authorized and chooses not to pay the decedent's debts before distribution. A beneficiary of a revocable trust does not have the same moral obligation—or legal for that matter—as the decedent did as an initial party to the contract. The beneficiary is therefore not as obliged to uphold the decedent's end of the bargain as the decedent may have been in life. This magnifies the risk of collection efforts that end in litigation, severe delay, and great expense. Where, as here in our example case, a beneficiary sees an opportunity at a large payday, he may choose to simply "write off," so to speak, the fact that the debt exists and roll the dice on whether the creditor will determine it is worthwhile to pursue litigation to collect. To further illustrate, imagine a simple situation in which there are four beneficiaries—each one is only legally responsible for the pro rata share which further complicates matters.[111] One beneficiary may be willing to pay his pro rata portion, while three others choose not to. There is little incentive for a beneficiary to pay more than his respective share, thus, the creditor could be subject to litigation against multiple beneficiaries to collect pieces of what could have been one claim against the trust. Therefore, the law should step in to eliminate the possibility of this outcome altogether.

108. *Id*.

109. *Id.*

110. *Id*.

111. In a complex (but not uncommon) estate plan for an individual who wishes to transfer assets to grandchildren as well as children with a decent size family there can be many more individuals that would be beneficiaries and thus subject to such litigation. Imagine a couple has three children, each of which has three children as well. Now you have twelve beneficiaries between only two generations. Must a creditor initiate twelve lawsuits?

XII. CONCLUSION

There are no cases or statutes in Missouri that clearly assert that a trustee of a revocable trust has a duty to creditors of a decedent's estate, or that a trustee may be personally liable for debts in the case of ordinary creditors. There are also no cases or statutes in this state that absolve trustees of personal liability for situations such as the case here. There is simply not enough established law on the topic in Missouri. It defies logic to have a statutory scheme so elaborate that provides for such a duty and personal liability in the case of a personal representative of an estate, but for the same to be absent in the case of a trustee of a revocable trust that manages the decedent's assets that were available for satisfaction of his debts at the time of death. This is especially so with how similar the roles are for the trustee and personal representative. Both the trustee and the personal representative "step into the shoes" of the decedent and are charged with managing the decedent's affairs. Only one of those fiduciaries may dodge creditors based on current law without consequence. This is an inconsistency that cannot go unanswered. With how commonplace it is in the estate planning practice to use the revocable trust as an estate planning vehicle, it is astonishing how this issue has not arisen in case law. Although one theory is that it just hasn't made it to the appellate level as of yet. This sort of inconsistency in the law allows individuals merely to choose whether a particular law applies to them by restricting the freedom of decision only as to probate assets, ultimately resulting in a windfall in the form of unjust enrichment to the beneficiaries at the expense of the rights of legitimate creditors. As the law stands in the state of Missouri at the time of this paper, an individual can simply place all his assets into a revocable trust, withholding the authority of the trustee to pay his debts, thereby directing the trustee to distribute those assets at death without paying the corresponding debts. All with no consequence whatsoever to trustees, thus, placing an undue burden on creditors to collect from beneficiaries, which may never happen. The laws as to creditors' rights in probate assets, in revocable trust assets, and in non-probate assets should be carefully harmonized to clearly define rights and procedures in all assets at death.[112] This is simply not the case in Missouri. The best it has done is put forth RSMo § 456.5-505(1) stating that "during the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors."[113] The law goes no further to provide clear remedies or procedures for the creditor which has and surely will continue to lead to injustice. The revocable trust is a fantastic tool for estate planning purposes; however, additional coordinated regulation is in order to prevent its misuse as a means to sidestep creditors at death and pass on gross assets to beneficiaries. The heirs are simply not entitled to any assets

112. Johnson, *supra* note 38, at 1196.

113. MO. REV. STAT. § 456.5-505(1) (2011).

until the indebtedness of the decedent is discharged by the administration of the estate.[114]

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114. Brouse v. Burnes, 107 S.W. 1094, 1096 (Mo. App. 1908).

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