

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

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I. Introduction

The somber funeral had come to an end, and so the hour had come to mount the distasteful task of distributing the plentiful estate to the bereaved. An air of polite but respectful festivity crept over the assembled beneficiaries as it was revealed by the attorney for the decedent that all assets had been neatly placed into a revocable trust sometime prior to death, and that there would be no necessity for a long, messy probate of the estate.

Felicity, a trust beneficiary, famous for her high regard for convention and honor, inquired about several debtors of the deceased, feeling somewhere deep in her soul that perhaps they too should be satisfied. The lawyer remarked that the creditors were entitled to be made whole out of the trust estate, but added that no one really by law had the responsibility for notifying the creditors of the decedent's untimely demise. The beneficiaries glanced knowingly each to the other, secure that such a little secret was safe as among them all. He that dies pays all debts.¹

In 1988, the United States Supreme Court, in *Tulsa Professional Collection Services v. Pope*,² ruled that known or reasonably ascertainable creditors of a decedent's estate were entitled to actual notice of probate proceedings in order to present a claim for payment in the due course of administration.³ The *Pope* decision led to the revision of probate statutes throughout the country to comply with the Fourteenth Amendment Due Process mandate as articulated by the Court. This article will in part explore the varied state statutory responses to *Pope*.

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¹ WILLIAM SHAKESPEARE, *THE TEMPEST*, Act III, Scene II, Line 143 (1611).

² 485 U.S. 478 (1988).

³ *Id.* at 490-91.

As the quoted passage above suggests, the notice requirement to the decedent's creditors where the assets of the deceased are transferred into a revocable, inter vivos trust prior to death is quite different from the *Pope* holding. Although there exists ample authority to support the rights of creditors to pursue those trust assets, there is scant corresponding authority supporting the right of such a known creditor to receive actual notice of the existence of a trust if the settlor dies. The same concerns, however, are raised by the creditor in the revocable trust situation. There has not been a corresponding response as is found in the *Pope* situation. This article attempts to review current authority which affords creditors the right to receive notice of the existence of a revocable trust upon the death of the settlor.

II. *Pope and Beyond*

The decision in *Tulsa Professional Collection Services v. Pope*⁴ held that a nonclaim statute, which barred claims of creditors not filed within two months following notice by publication only, was unconstitutional as to known or reasonably ascertainable creditors.⁵ The *Pope* facts involve a decedent whose wife, as the appointed personal representative of his estate, published notice for two consecutive weeks, as required by provisions of the Oklahoma statute.⁶ Due to the failure of one creditor to file its claim within the statutory time allotment, the claim was barred by operation of the statute. The plaintiff, a collection agency and subsidiary of the creditor, filed suit in the probate court for payment of the debt. The Probate Court and then the District Court of Tulsa County rejected Tulsa Professional Collection Services' claim and ruled that the claim was subject to the statutory time limit. The collection agency then sought review of its rejected claim in the Oklahoma Court of Appeals, where it was once again rejected.

The Oklahoma Supreme Court affirmed the creditor's claim as barred by the two-month period.⁷ The United States Supreme Court reversed and remanded, finding the Oklahoma statute viola-

⁴ 485 U.S. 478 (1988).

⁵ *Id.* at 491.

⁶ *Id.* at 480. The decedent died at St. John's Medical Center in Tulsa, Oklahoma. The hospital is the creditor that failed to file a timely notice of claim against the estate. *Id.*

⁷ *Tulsa Professional Collection Services v. Pope*, 733 P.2d 396 (Okla. 1986), *rev'd*, 485 U.S. 478 (1988).

tive of due process rights. The Court found sufficient state involvement in probate administration to invoke the Fourteenth Amendment.⁸ The Court reasoned that a creditor, secured or unsecured, has a sufficient property interest in an estate so as to be entitled to protection afforded by the Fourteenth Amendment.⁹ This protection applies not only to known creditors but to "reasonably ascertainable" creditors as well. The Court, however, failed to define "reasonably ascertainable."¹⁰

In 1989, the Uniform Probate Code (UPC)¹¹ was amended consistent with the *Pope* decision. The code was amended despite the drafters' belief that this decision had no impact upon notice procedures under the code, as the code was a self-implementing statute of limitations.¹²

Under the revised code, the drafters provided a one-year period within which creditors' claims may be presented. After the

⁸ *Pope*, 485 U.S. at 487. The Court detailed significant government involvement, stating that the probate court is involved throughout the administration of the estate. *Id.*

⁹ *Id.*

¹⁰ *Id.* at 490. The Court rejected "any intent to require 'impracticable and extended searches . . . in the name of due process.'" *Id.* (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317-18 (1950)).

¹¹ UNIF. PROB. CODE § 3-801 U.L.A. 313-14 (1989).

¹² *Id.* Appendix IV. This comment states:

Unless supervised administration under UPC Sections 3-501 et seq. is involved (a rare occurrence in states that have enacted UPC Article III), it is arguable that UPC Sections 3-801 (describing notice by publication to creditors) and 3-803(a)(1) read with 3-806(a) (barring claims not presented within four months of first publication) describe a self-implementing statute of limitations that functions solely by force of statute and described statutory events. A UPC personal representative (UPC) operates independently of any provision by, or need to report to, the probate office that issues letters of authority (3-703, 3-704). . . .

Under a majority of probate codes, assurance that all known creditors have been satisfied or barred is vitally important to the complete effectiveness of distributive orders by supervising courts of probate. . . . By invalidating non-claim statutes keyed to creditor failure to present claims before the expiration of a set period following publication of general notice to creditors, *Pope* forces probate lawmakers in many states to add new procedures and duties for executors and administrators designed to eliminate risks of known or knowable unbarred claims.

Also, UPC has become the standard by which probate laws in general are assessed and revised when some need for change develops. Hence many believe that UPC should reflect careful attention to the World of Probate's most recent calamity, the *Pope* case.

expiration of this one-year period, all pre-death claims are barred whether notice was provided or not.¹³

The UPC also contains two sections relevant to notice procedures which may impact the nonclaim period. Section 3-801 covers notice to creditors:

(a) Unless notice has already been given under this section, a personal representative under appointment [may] [shall]¹⁴ publish a notice to creditors once a week for three successive weeks in a newspaper of general circulation on the [county] announcing the appointment of the personal representative's address and notifying creditors of the estate to present their claims within four months after the date of the first publication of the notice or be forever barred.

(b) A personal representative may give written notice by mail or other delivery to a creditor, notifying the creditor to present his [or her] claim within four months after the published notice, if given as provided in subsection (a), or within 60 days after the mailing or other delivery of the notice, whichever is later, or be forever barred. Written notice must be the notice described in subsection (a) above or a similar notice. . . .¹⁵

III. *Statutory Response to Pope*

The response to *Pope* was immediate and widespread, indicating in some instances prompt statutory compliance. For purposes of this article, states have been divided into five basic groups. The largest group of twenty-two states followed recommendations of the Uniform Probate Code and the *Pope* case, in varying degrees. Variations on the UPC recommendations included: providing for

¹³ *Id.* § 3-803(a)(1).

¹⁴ *Id.* Appendix IV. Comment to this section states:

In 1989, the Joint Editorial Board recommended replacement of the word "shall" with "[may] [shall]" in (a) to signal its approval of a choice between mandatory publication and optional publication of notice to creditors to be made by the legislature in the enacting state. Publication of notice to creditors is quite expensive in populous areas of the country and, if [*Pope*] applies to this code, is useless except to bar unknown creditors. Even if *Pope* does not apply, personal representatives for estates involving successors willing to assume the risk of unbarred claims should have (and have had under the code as a practical consequence of absence of court supervision and mandatory closings) the option of failing to publish.

Id.

¹⁵ *Id.*

notice by publication to unknown creditors; actual notice to known or reasonably ascertainable creditors; and a statute of limitations. These states are Alabama,¹⁶ Arizona,¹⁷ Arkansas,¹⁸ Florida,¹⁹ Hawaii,²⁰ Illinois,²¹ Indiana,²² Iowa,²³ Kansas,²⁴ Maryland,²⁵ Missis-

¹⁶ ALA. CODE § 43-2-61 (1993). The personal representative must publish notice once a week for three successive weeks, with mail notice to all persons known or reasonably ascertainable that have a claim against the estate. *Id.* All claims against the estate must be filed within six months of the grant of letters or within five months of the first publication, whichever is later. *Id.* § 43-2-350. However, anyone entitled to receive actual notice must be allowed 30 days after notice to present claims or be barred. *Id.* § 43-2-350. Failure by the personal representative to give required notice subjects the personal representative to loss of any compensation for his duties and liability to any creditor for the amount lost. *Id.* § 43-2-62.

¹⁷ The statute provides for notice by publication for three successive weeks and notice shall be mailed to all creditors known or reasonably ascertainable. ARIZ. REV. STAT. ANN. § 14-3801 (1993). The statute of limitations for filing by the creditor if the creditor was unknown or could not be ascertained is four months from the date of first publication. If the creditor received actual notification — four months from the first publication or four months from the notice, whichever is later. If the creditor was known or ascertainable, but received no notice — two years from the date of death. *Id.* § 14-3803.

¹⁸ The personal representative shall publish notice. Within one month after first publication, a copy of the notice shall be served upon all known or reasonably ascertainable creditors. The burden of proof as to known or reasonably ascertainable is upon the creditor making the claim. ARK. CODE ANN. § 28-40-111 (Michie 1993). Claims not presented within three months from the notice are forever barred. Excepted from this rule are claims for injury or death caused by the negligence of the decedent, where the period is extended to six months from the date of publication. *Id.* § 28-50-101. This period may be extended depending on several factors. *Id.*

¹⁹ The personal representative must publish newspaper notice once a week for two consecutive weeks and shall make a diligent search to determine known or reasonably ascertainable creditors and serve notice upon them within three months of the first published notice. The personal representative is not liable to any person for failure to give notice if a good faith effort has been made. FLA. STAT. ANN. § 733.212 (West 1994). The statute of limitations for filing a claim is the later of three months after the first publication; or if it was a creditor required to be served with notice, 30 days after the service. *Id.* § 733.702.

²⁰ The statute is similar to Florida's in terms of procedure, but places on the personal representative the duty to undertake a reasonable review of the records to ascertain the creditors. The personal representative, however, is not liable to a creditor for failure to give notice. The statute of limitations for filing a claim is the later of four months after the first publication or sixty days after the receipt of written notice. If there has been no notice published or delivered, the statute of limitations period is three years after death. HAW. REV. STAT. § 560:3-801 (1993).

²¹ The representative has a duty to publish notice once a week for three successive weeks and to notify each known or reasonably ascertainable creditor by mail or delivery. The statute of limitations shall be not less than six months from the first publication or three months from the date of mailing or delivery, whichever is later. ILL. REV. STAT. ch. 755 para. 5/18-3 (1993). All claims not filed within two years of death are

sippi,²⁶ Nevada,²⁷ New Jersey,²⁸ New Mexico,²⁹ North Carolina,³⁰

barred. Where notice is given to the claimant, her claims are barred if not filed within the time specified in the notice. If the identity or address of the claimant is not known or reasonably ascertainable, her claims will be barred if not filed within the time provided in the published notice. *Id.* para. 5/18-12. The personal representative is accountable to all interested persons and is not discharged until he has filed a report with the court verifying, among other things, that all known creditors have been notified, that reasonable efforts have been made to identify all creditors, and that notice has been published. *Id.* para. 5/28-11.

²² The clerk of the court shall publish notice in a newspaper once a week for two consecutive weeks. The personal representative shall provide copies of the published notice, prepared for mailing, and shall mail to all known creditors. The personal representative shall serve notice on each reasonably ascertainable creditor within three months after the first publication. Failure to give notice within the three-month period described above extends the time for filing a claim to two months after receipt of notice by creditor. However, no claim may be filed more than one year after death. IND. CODE ANN. § 29-1-7-7 (West 1994). Claims will be forever barred unless filed within five months after the first publication if there was no publication of notice one year after death. *Id.* § 29-1-14-1.

²³ The personal representative shall publish notice in a newspaper once a week for two consecutive weeks. The personal representative shall send actual notice to all known creditors and any person the personal representative believes may have a claim that may not be paid or fully satisfied including the time period to make a claim. IOWA CODE ANN. § 633.304 (West 1994). The personal representative shall, as soon as practicable, make reasonably diligent efforts to ascertain all persons believed to have claims and shall pay all known claims upon the later of four months after the date of second publication or one month after the service of notice by mail. *Id.* § 633.434.

²⁴ The personal representative shall give actual notice to known and reasonably ascertainable creditors before the expiration of the nonclaim statute. Notice shall also be published in a newspaper once a week for three consecutive weeks. KAN. PROB. CODE ANN. § 59-709 (Vernon 1994). Creditors must present their claims within four months from the first published notice or be forever barred. *Id.* § 59-2236(a).

²⁵ The court register shall publish notice once a week for three successive weeks. MD. CODE ANN. EST. & TR. § 7-103 (1993). Promptly after appointments, the personal representative shall make a reasonably diligent effort to ascertain creditors and mail or deliver a notice to them. The creditor must present his claim within six months after the date of death. The personal representative shall not be liable for failure to ascertain or notify a creditor. Claims will be forever barred unless presented within the earlier of six months from the date of death or two months after delivery of notice. *Id.* § 8-103.

²⁶ The executor shall make reasonably diligent efforts to identify persons having claims against the estate. The executor shall file an affidavit with the court stating reasonable efforts have been made to identify all claims and then shall publish notice for three consecutive weeks in a newspaper informing creditors that they have 90 days from the date letters were granted to file a claim or be barred thereafter. The executor shall also mail a notice to every person that was identified as having a claim that they have 90 days from the date letters were granted to file a claim or be forever barred. MISS. CODE ANN. § 91-7-145 (1993).

²⁷ The personal representative shall publish and mail notice to creditors. NEV. REV. STAT. § 147.010 (1993). Creditors whose names and addresses are not readily

North Dakota,³¹ Oklahoma,³² Oregon,³³ Tennessee,³⁴ Vermont,³⁵

ascertainable are notified by publication in a newspaper on three dates over at least a 10-day period. *Id.* § 155.020. The statute of limitations for presentment of claims is 90 days from the date of first publication if the name or address of the creditor was unknown and she was not notified or the date of the mailing of notice to a creditor if she was known. However, even after 90 days, a claim may be filed if the creditor can prove no notice was given or published and the final account has not been filed. *Id.* § 147.040.

²⁸ The personal representative shall publish notice in one or more newspapers as the court may direct. The personal representative shall make reasonable inquiries to ascertain creditors and shall mail notice to each creditor within 20 days after the court order. Additional notice shall be given as the court directs. N.J. STAT. ANN. § 4:80-8 (West 1993). Claims must be presented within six months from the date of the grant of letters. Valid claims presented after that date will only be paid after all other claims are paid and only if the remaining assets have not been distributed. *Id.* § 3B:22-4.

²⁹ The personal representative may publish notice in a newspaper once a week for two successive weeks. The personal representative shall give written notice to all known and reasonably ascertainable creditors within three months of his appointment. The notice shall include notification that the claim must be filed either two months after publication of the notice or within two months of delivery of notice. After these time periods expire, the claim is forever barred. The personal representative who makes reasonable efforts but fails to identify and notify a creditor or successor to the decedent shall have no liability to them. N.M. STAT. ANN. § 45-3-801 (Michie 1994).

³⁰ The personal representative shall publish a notice in a newspaper once a week for four consecutive weeks. The personal representative shall mail or deliver written notice to every known or reasonably ascertainable creditor within 75 days after the granting of letters. The published and written notice shall include a final date for the presentment of claims, which must be at least three months after the first publication. If the personal representative in good faith fails to give written notice, he is not liable to any person for the failure. N.C. GEN. STAT. § 28A-14-1 (1993). The statute of limitations for presentment of claims is the later of the date stated in the notice or 90 days after delivery or mailing of an actual notice. *Id.* § 28A-19-3.

³¹ The personal representative may publish notice in a newspaper once a week for three successive weeks. However, failure to publish will extend the period for claims from three weeks after first publication to three years after death. The personal representative shall mail all notice to all known and reasonably ascertainable creditors. A reasonably ascertainable creditor is identified as (including but not limited to) a creditor who regularly submits bills to the decedent and the personal representative has had access to those records. N.D. CENT. CODE § 30.1-19-01 (3-801) (1993). The statute of limitation for claims arising before death is as follows: If notice has been both published and mailed to creditors, then three months after first publication. Failure to do either one of the above extends the period to three years after the time of death. *Id.* § 30.1-19-03 (3-803).

³² The personal representative shall publish notice in a newspaper once a week for two consecutive weeks. The personal representative shall mail a notice to all known creditors. OKLA. STAT. ANN. tit. 58, § 331 (West 1994). Effective with proceedings commenced after November 1, 1988, "known creditors" was defined to include reasonably ascertainable creditors that could be determined by reasonably diligent efforts by the personal representative. The final date for the presentment of claims

Washington,³⁶ and Wyoming.³⁷

The second group of four states follows *Pope* to a degree; how-

shall be determined by the personal representative and stated in the notice, and it must be at least two months after the first publication. After that date, all claims are barred. *Id. tit. 58 § 331.1.*

³³ The personal representative shall publish in a newspaper once a week for three consecutive weeks. OR. REV. STAT. § 113.155 (1993). The personal representative shall make reasonably diligent efforts during the three months following appointment to ascertain every person who has a claim upon the estate. More time may be granted by the court if the personal representative requests. Within 30 days after the expiration of the investigation period, the personal representative shall deliver or mail notice to each known person having a claim against the estate. *Id. § 115.003.* Claims are barred if not presented before the later of four months after the first publication or 30 days after actual notice is delivered or mailed. Claims presented within two years of the date of death shall be paid if all the following requirements are met:

- (1) The claim is presented before the final account is filed by the personal representative;
- (2) The claimant did not receive notice prior to 30 days before filing the claim;
- (3) The claim does not prejudice other claims or expenses having priority.

Id. § 115.005.

³⁴ The court clerk, within 30 days after issuance of letters testamentary or of administration, shall publish a notice in a newspaper for two consecutive weeks. The personal representative shall mail or deliver written notice to all known and reasonably ascertainable creditors. All claims must be presented within six months after the date of first publication or be forever barred. TENN. CODE ANN. § 30-2-306 (1993).

³⁵ The executor shall publish notice in a newspaper once a week for two successive weeks. The executor shall mail a notice to all known or reasonably ascertainable creditors. VT. STAT. ANN. PROB. P. RULE 64 (1992). The statute of limitations for the presentment of claims is four months from the date of first publication. VT. STAT. ANN. tit. 14 § 1203 (1992).

³⁶ The personal representative shall publish notice in a newspaper once a week for three successive weeks, shall give actual notice to all creditors who become known to the personal representative during the four months following the first publication, and shall file a copy of the notice with the clerk of the court. WASH. REV. CODE ANN. § 11.40.010 (West 1994). The personal representative shall exercise reasonable diligence in search of creditors including a review of all available records and inquiry of all heirs. Completion of this review provides a rebuttable presumption that all reasonably ascertainable creditors have been identified. *Id. § 11.40.012.* Claims must be presented within the later of four months from the first publication, or 30 days after actual notice. *Id. § 11.40.013.* However, where the personal representative is required to give actual notice and fails to do so, the creditor has 18 months from the date of death to file his claim. *Id. § 11.40.014.*

³⁷ The personal representative shall publish notice in a newspaper once a week for three consecutive weeks. WYO. STAT. § 2-7-201 (1994). Notice shall be mailed to each creditor known or reasonably ascertainable by the personal representative not later than 30 days prior to the expiration of three months after the first publication. *Id. § 2-7-205.* Claims not filed within three months of the first publication are barred forever. *Id. § 2-2-201.*

ever, the actual notice requirements of these states is either less definitive or comprehensive than the UPC provision, or not as strongly worded so as to specifically pertain to "known" or "reasonably ascertainable" creditors. These states are Montana,³⁸ Nebraska,³⁹ South Dakota,⁴⁰ and Wisconsin.⁴¹

The third group of states responds to *Pope*; however, there is

³⁸ The representative has a duty to publish newspaper notice once a week for three successive weeks. The personal representative *may* (emphasis added) give written notice to any creditor. The code sets out a statute of limitations of four months from first publication date if published; with written notice — four months from first publication or 30 days after delivery of notice, whichever is later. MONT. CODE ANN. § 72-3-801 (1993). Without notice, claims are limited to one year following the death. *Id.* § 72-3-803. The personal representative is not liable to any creditor or the decedent's successor for failing to give notice. *Id.* § 72-3-801. However, it is a breach of duty to fail to advertise for claims, and if a claim is asserted at a later time against a distributee, the personal representative may be held liable for the cost related to the discharge of the claim. *Id.* § 72-3-1012.

³⁹ On appointment of the personal representative, the court clerk shall publish notice in a newspaper once a week for three weeks that creditor claims must be presented within two months from the first publication or be forever barred. NEB. REV. STAT. § 30-2483 (1993). Where the personal representative is the party initiating or maintaining the action, that representative is required to mail a copy of the publication to all parties with a direct legal interest in the action. *Id.* § 25-5201.01. The statute is found in the state civil procedure as it applies to probate matters. It lacks a provision for a reasonable search to determine all parties which might claim a direct legal interest.

⁴⁰ When a petition for letters of administration is filed, the judge or clerk must publish notice once a week for three successive weeks. S.D. CODIFIED LAWS ANN. § 30-9-12 (1994). If within four months after appointment, the executor or administrator learns of a creditor who was not named in the probate petition, the executor or administrator shall mail notice to that creditor. *Id.* § 30-21-13.1. The code defines knowledge of the creditor as being aware that the creditor has demanded payment or that an obligation exists. *Id.* § 30-21-13.1. There is no liability for the representative's failure to give notice so long as the failure is non-negligent or non-willful. *Id.* § 30-21-13.4. The representative is required to file an affidavit describing the extent of the reasonably diligent search for creditors. *Id.* § 30-21-13.5. Claims not filed within the later of four months after first publication or 30 days after receipt of actual notice are barred. *Id.* § 30-21-17.

⁴¹ Notice to creditors under chapter 865 for informal probate administration is given in accordance with WIS. STAT. ANN. § 859.07 (West 1993). Notice of the filing deadline for a claim shall be by newspaper publication with the first insertion made within 15 days of the date of the order fixing the time for presentment (three to four months) of the claim. *Id.* §§ 859.07, 859.01. Notice by certified or registered mail is required to certain creditors who provided care to a patient or inmate of a state or county hospital or institution, and to creditors having provided certain medical assistance, *id.* § 859.02, or creditors represented by the Department of Health, Social Services or the Department of Corrections. *See id.* § 859.07. Claims are barred within this three to four month period unless the personal representative, through reasonable diligence, knew or should have known of the claim; failed to give actual notice 30 days

either no requirement or there is a discretionary requirement to conduct a search for creditors, and actual notice is required for creditors that are known to the representative. These states include California,⁴² Maine,⁴³ Michigan,⁴⁴ Minnesota,⁴⁵ Rhode Is-

prior to the final day; and at least three days preceding the final day, the claimant did not have actual notice. *Id.* § 859.02(2)(b).

⁴² The personal representative is required to give notice to creditors if he had actual (not constructive) knowledge of a creditor or is aware that a creditor has demanded payment. CAL. PROB. CODE § 9050(a) (West 1994). There is no duty to search for creditors, and there is no liability to any person for failure to give notice unless all of the following exist:

- (1) the failure was in bad faith;
- (2) the creditor had no actual notice of the administration of the will;
- (3) within 16 months after letters were first issued to the personal representative the creditor

(a) filed a petition requesting the court determine liability on the part of the personal representative, and

(b) served notice on the personal representative of this liability hearing at least 30 days prior to the hearing.

Id. § 9053.

An applicant must file a petition for a hearing to be appointed personal representative for an estate and must publish newspaper notice three times during the 15-day period prior to the hearing. *Id.* § 8121.

The statute of limitations is the later of four months after letters are issued to the personal representative; 30 days after actual notice is given to the creditor; or 30 days after publication of the hearing for appointment of the personal representative. *Id.* § 9100(a).

In the event a creditor is entitled to actual notice but does not receive it until after the claim period has expired, there is no extension, but the creditor may petition to file a late claim. *Id.* § 9103.

⁴³ The personal representative is required to publish notice once a week for two successive weeks. The personal representative may give written notice to a creditor but is not liable to creditors for failing to give notice. ME. REV. STAT. ANN. tit. 18-A § 3-801 (West 1993). However, if the personal representative fails to give notice by publication advertising for claims, this would constitute a breach of duty, and if a claim is later asserted against a distributee, the personal representative may be liable to the distributee for costs related to discharge of the claim. *Id.* tit. 18-A § 3-1004.

The statute of limitations for claims arising prior to death under published notice is four months from the date of first publication. Under direct written notice — the later of four months after the first publication or 60 days after delivery of the notice. *Id.* § 3-801.

If there has been no notice, the statute of limitations is nine months after death. *Id.* § 3-803(a)(2).

⁴⁴ The personal representative shall publish notice and also send a copy of the notice to a known creditor within four months of the publication of notice. A known creditor is defined as one the personal representative is aware of as having demanded payment for the decedent or from his estate. A creditor must present a claim within four months from the date of publication or be forever barred. MICH. COMP. LAWS ANN. § 700.703 (West 1994). The personal representative is not personally liable if

land,⁴⁶ and Texas.⁴⁷

The fourth group requires only published notice and not actual notice to any creditors by the personal representative. The response time for a creditor to file a claim varies from three months to two years, although some statutes provide for a shortened statute of limitations if actual notice is provided. There are also varying degrees of liability imposed upon a personal representative for failure to adequately notify creditors. This group is comprised of the following fourteen states and the District of

there was a good faith failure to give notice. Liability, if any, falls on the estate. The personal representative has no duty to search for creditors. *Id.* § 700.704.

⁴⁵ The court administrator shall publish notice once a week for two successive weeks. Creditors must present their claims within four months of publication unless entitled to further service. It is within the discretion of the personal representative to determine if a reasonably diligent search for creditors should be conducted. The personal representative shall, within three months after the first publication, serve a copy of the notice upon each known creditor. A creditor is "known" if the personal representative has knowledge that the creditor has asserted a claim that arose during the decedent's life or if financial records, accessible and available to the personal representative, clearly disclose the existence of a creditor. MINN. STAT. ANN. § 524.3-801 (West 1994).

The statute of limitations for presentation of claims for creditors who are not known to the personal representative and therefore receive no actual notice is four months from the court-published notice; for creditors who receive notice from the personal representative, the later of four months after publication or one month after service. *Id.* § 524.3-803.

⁴⁶ Upon qualification of the executor, the probate clerk shall publish notice in a newspaper as often as the court directs. R.I. GEN. LAWS § 33-18-1 (1994). Claims shall be filed within six months of the first publication or be barred. However, if by reason of accident or mistake a creditor fails to make a timely claim, she may still petition the court, and the claim will be evaluated by the court if the late claim is made prior to distribution of the estate. The executor is under no duty to notify creditors. *Id.* § 33-11-5. However, the courts have held that this is not a self-executing statute of limitation. If a creditor's identity is known or reasonably ascertainable, then Fourteenth Amendment due process requires actual notice. In re Estate of Santoro, 572 A.2d 298 (R.I. 1990).

⁴⁷ Within one month after receiving letters, the personal representative shall publish notice in a newspaper. TEX. PROB. CODE ANN. § 294(a) (West 1994). Within four months after receiving letters, the personal representative shall give notice by certified mail, return receipt requested, to each person having a claim against the estate if the personal representative has actual knowledge of the claim. *Id.* § 295(b). If the personal representative fails to give the required notice, he shall be liable for any damage as a result of such negligence. *Id.* § 297. Claims not presented within six months of the letters testamentary will be postponed until all claims presented within that first six-month period have been satisfied. *Id.* § 298(a). The estate cannot be closed until all known debts have been paid so long as there are assets available to do so. *Id.* § 404.

Columbia: Alaska,⁴⁸ Colorado,⁴⁹ Connecticut,⁵⁰ Delaware,⁵¹ District of Columbia,⁵² Georgia,⁵³ Idaho,⁵⁴ Louisiana,⁵⁵ Missouri,⁵⁶

⁴⁸ The personal representative is required to publish notice once a week for three successive weeks. ALASKA STAT. § 13.16.450 (1993). Creditors have four months from the first publication to present claims or be forever barred. *Id.* § 13.16.460.

⁴⁹ Unless one year has passed since the date of death, a personal representative shall publish a notice once a week for three successive weeks. The personal representative may give written notice to any creditor. Claims will be forever barred unless presented before the later of four months from the date of the first publication, or one year from the date of death, whichever comes first, or within 60 days from the delivery of notice, but not later than one year from the date of death. The personal representative shall not be liable to any creditor for failure to give notice. COLO. REV. STAT. ANN. § 15-12-801 (West 1994).

⁵⁰ The probate court shall publish notice in a newspaper at least once. CONN. GEN. STAT. ANN. § 45a-354(a) (West 1994). After 150 days from the date of appointment, a fiduciary may pay or distribute assets in satisfaction of any claims presented or to any beneficiary and so long as the fiduciary was acting in good faith, she shall not be chargeable for any claims made after that time. The burden of proof of bad faith is upon the creditor making the claim. *Id.* § 45a-356(a). The fiduciary may give notice to anyone she believes may have a claim against the estate. *Id.* § 45a-357(a).

⁵¹ The Register of Wills shall give notice, within 40 days of the grant of letters, by advertisements posted in the county courthouse and published in a newspaper approved by the Register of Wills at least three times, once a week for three successive weeks. DEL. CODE ANN. tit. 12 § 2101 (1993). The executor shall be deemed to have notice only to mortgages and other debts which would be secured by liens against real estate and the liens must be filed of record. *Id.* § 2103. All claims except those secured by liens on real estate must be presented within eight months after death or be forever barred. *Id.* § 2102.

⁵² Within 20 days of appointment, the personal representative shall publish notice in a newspaper once a week for three successive weeks. D.C. CODE ANN. § 20-704 (1993). The personal representative is charged with carrying out the terms of the will, any orders of the court, and the equitable principles applicable to fiduciaries fairly considering the interests of all interested persons including creditors. *Id.* § 20-701. All claims shall be barred unless presented within six months after the first publication. *Id.* § 20-903.

⁵³ The executor is required to give notice by newspaper publication for four weeks within 60 days of appointment. Creditors must render an account of their demands. Failure to file a claim within three months of the first publication causes the creditor to lose "all rights to an equal participation with creditors of equal dignity and will be paid only if assets are available." GA. CODE ANN. § 53-7-92 (1994).

⁵⁴ The personal representative may give published newspaper notice once a week for three successive weeks. The personal representative may give written notice to any creditor but is not liable to any creditor for failure to give notice. With publication or notice, the statute of limitations for presentment of a claim is the later of four months from the first publication or 60 days after the mailing or delivery of the notice. IDAHO CODE § 15-3-801 (1994). However, failure to advertise for claims would be a breach of duty by the personal representative, and if as a result of the breach a claim is later asserted against a distributee, the personal representative may be liable to the distributee for costs related to the discharge of the claim. *Id.* § 15-3-1004. Where there is no

New Hampshire,⁵⁷ Ohio,⁵⁸ Pennsylvania,⁵⁹ South Carolina,⁶⁰ Utah,⁶¹ and West Virginia.⁶²

notice or publication, the statute of limitations is two years from date of death if the claim arose before death. *Id.* § 15-3-803(a)(1).

⁵⁵ Notice shall be published once stating that the petition can be homologated (officially confirmed) seven days after publication. LA. CODE CIV. PRO. ANN. art. 3304 (West 1994). The Succession Representative can pay debts only with court approval, except where the estate is an ongoing business, and shall pay the debts after three months from the date of death. *Id.* art. 3301, 3302. The Succession Representative must petition the court with a list of (Tableau of Distribution) debts requesting authority to pay, and this notice of the petition shall be published. *Id.* art. 3303, 3304. Any interested party, including creditors, may petition the court to be notified of any filing by the Succession Representative of a list of debts. *Id.* art. 3305. The only recourse for a creditor is to appeal a judgment homologating a tableau of distribution before the money is paid out to other parties. *Id.* art. 3308.

⁵⁶ As soon as letters testamentary are issued, the court clerk shall publish a notice in a newspaper once a week for four consecutive weeks. MO. ANN. STAT. § 473.033 (Vernon 1994). The statute of limitations for presentment of a claim is six months from the date of the first publication. *Id.* § 473.360. Effective July 13, 1989, all claims are barred if not filed within one year following the date of death, whether or not administration of the estate begins or whether or not any notice is given of the decedent's death. *Id.* § 473.444.

⁵⁷ Notice of the appointment of an administrator of an estate shall be published in a newspaper in Concord and in the county in which the deceased had last lived for one year. N.H. REV. STAT. ANN. § 553:19 (1993). No action shall be sustained unless demand was made on the administrator within six months of his appointment. *Id.* § 556:3.

⁵⁸ The probate judge shall, within one month after appointing an administrator, publish newspaper notice for three consecutive weeks. OHIO REV. CODE ANN. § 2113.08 (Anderson 1993), repealed eff. 5/31/90. Claims not presented within one year from the date of death are forever barred. *Id.* § 2117.06. Where there has been a failure to give published notice, a claim by a person having an interest in real estate, the title to which is adversely affected, will have a period of 21 years from the date of appointment to commence action. *Id.* § 2113.09.

⁵⁹ The personal representative shall publish notice in a newspaper once a week for three successive weeks. 20 PA. CONS. STAT. ANN. § 3162 (1993). Claims not received within one year of death are forever barred. *Id.* § 3383.

⁶⁰ The personal representative shall publish newspaper notice once a week for three successive weeks. The personal representative may give written notice to any creditor. The personal representative is not liable to any party for failure to give notice. S.C. CODE ANN. § 62-3-801 (Law. Co-op. 1991). The statute of limitations for presentment of pre-death claims without any notice is one year after death; with published notice, eight months after date of first publication; with actual written notice and publication, the later of eight months after publication or 60 days after mailing of actual notice. *Id.* § 62-3-803.

⁶¹ The personal representative shall publish notice in a newspaper once a week for three successive weeks. The personal representative may give written notice to any creditor and shall not be liable for failure to give notice. UTAH CODE ANN. § 75-3-801 (1994). The statute of limitations for claims arising before death without any notice is one year after death; where notice is published, three months from the first publica-

The fifth group of four states has provisions which are dissimilar to the collective provisions of the other groups. These are the states of Kentucky,⁶³ Massachusetts,⁶⁴ New York,⁶⁵ and Virginia.⁶⁶

tion; where actual notice is given, the later of 90 days after the first publication or 60 days after delivery of the actual notice. *Id.* § 75-3-803. In 1989 the legislature amended § 75-3-801(1), adding the following sentence: "The personal representative shall after making reasonable efforts to ascertain creditors, also mail notice to all known creditors." In 1992, an amendment deleted that same sentence.

⁶² The fiduciary commissioner (an agent of the court) shall publish notice in a newspaper once a week for two successive weeks. Such notice will designate a time, to be no less than two months nor more than three months from the date of first publication, to present claims. "The publication of such notice shall be equivalent to personal service on the creditors. . . ." W. VA. CODE § 44-2-2 (1993). The personal representative shall provide the fiduciary commissioner with a list of all names and addresses of known creditors, and the commissioner will mail a copy of the notice to each one. Failure to mail or receive a notice does not release the creditor of her duty to present her claim at the appointed time. *Id.* § 44-2-4. A report of all claims is prepared and actual notice is sent to all interested parties that a hearing will be conducted by the county commission, where the report will be confirmed or adjusted to satisfy exceptions. *Id.* § 44-2-18. Any appeal on this decision will be heard in the circuit court where the finding will be forever binding and final. *Id.* § 44-2-19.

⁶³ Publication of notice is not required under the Probate Code but is located under the general section on legal notice. The county clerk shall publish, in a newspaper at least once a month, a notice setting out all of the fiduciaries appointed since the last publication. KY. REV. STAT. ANN. § 424.340 (Michi/Bobbs-Merrill 1993). The only other notice required (and it is possible that the notice above would suffice) is, not less than 10 days prior to settlement or hearing date, the county clerk shall publish a notice in the newspaper; except that with court approval the personal representative may, in lieu of publication, send written notice to all unpaid creditors. *Id.* § 395.625. All claims against the estate and the personal representative are barred if not presented within six months of the appointment of the personal representative. If no personal representative was appointed, then two years after death. *Id.* § 396.011.

⁶⁴ There appears to be no requirement for either publication of notice or actual notice of the probate process. Only in the case where the assets of the estate are insufficient to meet all of the claims presented is actual notice to creditors required, advising them of the time and place their claims will be examined. MASS. GEN. LAWS ANN. ch. 198, § 5 (West 1994). The probate court may order notice be given to interested parties for a hearing which will decide final distribution of the estate. *Id.* ch. 198, § 24.

⁶⁵ The 1993 legislature repealed N.Y. Surr. Ct. Pro. Act Law § 1801 (McKinney 1994) effective January 1, 1994, which had provided that a fiduciary may publish notice once a week for three consecutive months. This notice directed all claimants to present their claims on or before a date stated at least three months after the first publication. There was no new section enacted to replace this. The rationale given in the official comments was that this section was rarely used and, because of increasing cost of publication, was unlikely to be used in the future. The effect of repealing this section is interesting because of the impact upon § 1802, which was not changed. If any claim is not presented pursuant to the previous section (SCPA § 1801) or within seven months from the issuance of letters, the fiduciary is not chargeable with the distribution of assets made in good faith. N.Y. Surr. Ct. Pro. Act Law § 1802 (Mc-

The importance of these provisions can be inferred from the fact that a majority of jurisdictions have enumerated the rights of creditors to receive actual notification of the death of a debtor. Acknowledging that the right to notice is viable and deserving of statutory safeguards, protection must be established to prevent the use of other testamentary or estate planning vehicles to circumvent such notice provisions.⁶⁷

One of the more problematic statutory loopholes is the revocable trust vehicle, resulting in the proliferation of do-it-yourself, throw-down living trust kits and popular living trust seminars. The following Uniform Probate Code Comment expresses appropriate concern over this dilemma:

Modestly endowed persons who are turning to inter vivos trusts to avoid probate are of more immediate concern. Lawyers in all parts of the country are aware of the trend toward reliance on revocable trusts as total substitutes for wills which recent controversies about probate procedures have stimulated. There would be little need or concern about this development if it could be assumed also that the people involved are seeking and

Kinney 1994). It appears that one effect of the repeal is to extend the claim period from a possible minimum of three months to seven months. It is important to note that the official comments clearly state that § 1802 is not a statute of limitations against claims, but simply provides protection against liability for a fiduciary who in good faith distributes assets after the period expires. The creditor can still collect from the beneficiaries.

⁶⁶ Upon qualification as executor, the party will receive from the court a statement of responsibilities, which is a very general statement about filing tax returns and an accounting of the estate. This instruction is silent on any responsibility to give notice. VA. CODE ANN. § 64.1-122.1 (Michie 1994). The section on required notice to interested parties was revised in 1993. It specifically requires notice to certain parties. Absent from this list is any mention of creditors. VA. CODE ANN. § 64.1-122.2 (Michie 1994). When the personal representative files with the court an accounting of debts, the court may, after six months from the qualification of the personal representative, make an order for creditors to present their demands. This order shall be published once a week for two successive weeks. After expiration of the date specified, the court may order distribution of the estate. However, every distributee shall be subject to refund a due portion of any valid claims brought within five years. *Id.* § 64.1-179.

⁶⁷ See Thomas R. Andrews, *Creditors' Rights Against Nonprobate Assets in Washington: Time for Reform*, 65 WASH. L. REV. 73, 87-120 (1990), discussing the rights creditors have to reach recognized forms of nonprobate property including community property agreements, joint property, multi-party bank accounts, United States Savings Bonds, life insurance, deferred compensation benefits, ERISA plans, state pension plans, federal plans, trusts, other transfers containing payable-on-death provisions, and gifts *causa mortis*. See also Martin J. Placke, *Creditors' Rights in Non-Probate Assets in Texas*, 42 BAYLOR L. REV. 141 (1990).

getting competent advice and fiduciary assistance. But there are indications that many people are neither seeking nor receiving adequate information about trusts they are using. Moreover, professional fiduciaries are often not available as trustees for small estates. Consequently, neither settlors nor trustees of "do-it-yourself" trusts have much idea of what they are getting into. As a result, there are corresponding dangers to beneficiaries who are frequently uniformed or baffled by formidable difficulties in obtaining relief or information.⁶⁸

As the hypothetical situation at the beginning of this article suggests, such a loophole may well exist in the form of the revocable trust, to avoid actual notification of creditors in the event of a death. Any settlor is entitled to set up a revocable trust, leaving assets to named beneficiaries who will take their shares either in trust or outright upon the death of the settlor. An inter vivos trust created in this manner is not included in the decedent's estate due to its classification as a non-probate asset, and may, in fact, serve to avoid the probate process altogether. The result is to bypass the requisite creditor-notification mechanism established by *Pope*. The beneficiaries are under no statutory duty to notify creditors of the death of the deceased so that their claims may be satisfied out of the trust assets. Under a probate administration, these assets would be otherwise available for payment of such debts.

In consideration of the dilemma posed by this loophole, it has been succinctly stated that "whatever objectives a revocable trust might accomplish for its settlor, avoiding the legitimate claims of the settlor's creditors . . . is not one of them."⁶⁹ It has long been established that a creditor has the right to reach the assets of a revocable trust both during the lifetime of the settlor and after the settlor has died. However, this is a hollow privilege unless the creditor has a right, consistent with the dictates of *Pope*, to receive actual notice if the settlor dies.⁷⁰

⁶⁸ UNIF. PROBATE CODE 7 U.L.A. 101 (comment) (1993).

⁶⁹ See generally Kruse, *Revocable Trusts: Creditors' Rights After Settlor-Debtor's Death*, 7 PROBATE AND PROPERTY 40, Nov./Dec. 1993. Kruse approaches the issue of notification of creditors of a revocable trust by tracing the historical authority supporting the creditor's right to reach the assets before and after the death of the settlor.

⁷⁰ *Id.* at 40, citing the RESTATEMENT (SECOND) OF TRUSTS § 156 (1959), stating that "where a person creates for his [or her] own benefit a trust with a provision restraining the voluntary or involuntary transfer of his [or her] interest . . . creditors can reach [the trust estate]." The author also cites Deposit Guaranty Nat'l Bank v. Walter E. Heller & Co., 204 So. 2d 856 (Miss. 1967); State Bank and Trust Co. v.

Many of the justifications under *Pope* are reciprocally applicable to the revocable trust situation if creditors of a deceased settlor are known or reasonably ascertainable by a trustee. The court noted in *Pope* that

[a]s a class, creditors may not be aware of a debtor's death or of the institution of probate proceedings. Moreover, the executor . . . will often be . . . a party with a beneficial interest in the estate. This could diminish the executor's . . . inclination to call attention to the potential expiration of a creditor's claim. Thus there is a substantial practical need for actual notice in this setting.⁷¹

However, the *Pope* decision was grounded in the constitutionality of the notice statute.⁷² Unlike the statute in *Pope*, the elements establishing traditional state action are missing in the context of the revocable trust.⁷³ In the management of a revocable trust, there is no pervasive or substantial involvement by the court; therefore, there is no direct corollary to the decision rendered in *Pope* other than the coincidence of fact pattern.

IV. *Statutory Precedents*

Although there is statutory authority requiring publication notice by the trustee,⁷⁴ the response has been slow to address the necessity for legislation designed to dictate a solution to the problem of *actual* notice to a decedent's creditor in the revocable trust context. The Uniform Probate Code has been criticized for "failure to

Reiser, 389 N.E.2d 768 (Mass. App. 1979); Johnson v. Commercial Bank, 588 P.2d 1096, (Or. 1978); and Matter of Estate of Kovalyshyn, 343 A.2d 852 (Hudson County Ct., N.J. 1975) in support of subjecting the assets of a revocable trust to the claims of creditors of the deceased settlor.

⁷¹ Tulsa Professional Collection Services v. Pope, 108 S.Ct. at 1347.

⁷² *Id.*

⁷³ See Mark Reutlinger, *State Action, Due Process, and the New Nonclaim Statutes: Can No Notice Be Good Notice if Some Notice is Not?*, 24 REAL PROPERTY, PROBATE AND TRUST JOURNAL 433, 444 (1990). The author lists ". . . four ways that an alleged deprivation of rights under the Fourteenth Amendment can involve state action: (1) the state itself, through its officials, performs the act; (2) a private party performs a 'public (or governmental) function'; (3) the state subsidizes the private activity or otherwise acts in concert with the private party; and (4) an otherwise private action is compelled, regulated, and authorized or encouraged by the state."

⁷⁴ See, e.g., MO. REV. STAT. § 456.610 (Vernon 1994), providing that a trustee who has a duty to pay debts of a decedent may publish newspaper notice once a week for four consecutive weeks, and giving the creditor six months from publication to present a claim or be barred.

address creditors' rights with respect to non-probate assets other than multiple-person accounts. . . ."⁷⁵ However, there are two state statutes which directly respond to the issue, with at least one placing the revocable trust creditor on the same actual notice pedestal as the estate creditor following *Pope*.

The Florida legislature has promulgated a comprehensive statute which rings with the language of *Pope* and adopts the essence of the decision into the estates and trust provisions. Under the provision setting forth the duties of the trustee, there is a requirement for publication of notice to creditors under certain conditions.⁷⁶ The trustee is required to make a diligent search to determine the names and addresses of the reasonably ascertainable creditors of the settlor. The trustee is to serve notice on those creditors within three months after notice is published. "Impracticable and extended searches are not required," nor is notice required where a creditor has filed or served a claim or been paid in full.⁷⁷ There is a section setting forth in detail the manner in which the claims are to be paid if an administration of the estate is initiated and an order of abatement is issued.⁷⁸

⁷⁵ Grayson M.P. McCough, *Will Substitutes Under the Revised Uniform Probate Code*, 58 BROOK. L. REV. 1123, 1124 (1993).

⁷⁶ FLA. STAT. ANN. § 737.3057(1)(a) (West 1994).

⁷⁷ *Id.* § 737.3057(c). There is at least one authority which advocates a thorough investigation to comply with the "reasonable diligence" requirement, stating that:

Reasonable diligence would include: a timely search of the decedent's home office, and safe deposit box; an investigation of the books and records uncovered by the search, including the decedent's tax returns; and an inquiry of those of the decedent's relatives, acquaintances, business associates, and professional advisers whom the representative believes to be fertile sources of information. The concept of reasonable diligence would charge the personal representative with the actual knowledge of the decedent's heirs, devisees, and acquaintances.

Debra A. Falender, *Notice to Creditors in Estate Proceedings: What Process is Due?*, 63 N.C.L. L. REV. 659, 695 (1985).

⁷⁸ "Creditors to be paid . . . shall be paid from the property of the trust in the following order:

(a) Property of the residue of the trust remaining after all distributions which are to be satisfied by reference to a specific property or type of property, fund, sum, or statutory amount.

(b) Property which is not to be distributed out of specified or identified property or a specified or identified item of property.

(c) Property which is to be distributed out of specified or identified property or a specified or identified item of property."

Id. § 737.3056(2)(a)(b)(c). See also *id.* § 737.3056(3).

The privilege of the creditor to look to the assets of a revocable trust is established in another section. The trust is subject to estate debts where the grantor's assets under administration are insufficient to satisfy claims against the estate.⁷⁹

The California Probate Code has a lengthy provision that requires the trustee of a revocable trust who has knowledge of a creditor of a deceased settlor to notice the creditor.⁸⁰ The definition of "having knowledge" is when the trustee is aware that the creditor has demanded payment from the deceased settlor or the trust estate.⁸¹

If, after the death of the settlor of a trust, the trustee has no knowledge that an administration of the decedent's estate has been initiated, the trustee may file with the court a "Proposed Notice to Creditors."⁸² The court assigns a number and the trustee is to publish and serve notice on the creditors of the deceased settlor.⁸³ The filing for purposes of notice is made in the county in California where the deceased settlor resided at the time of death or where the trust property was located at the time of death or, if none, then in the county where the administration of the trust was on the settlor's death.⁸⁴

The time limitations for publication are set out in the statute and vary according to when the trustee becomes aware of the creditor.⁸⁵ The statute sets out in complete detail the form recommended for Notice to Creditors and contingent creditors.⁸⁶

One of the most comprehensive provisions of this statute de-

⁷⁹ *Id.* § 733.707(3).

⁸⁰ CAL. PROB. CODE § 19050 (West 1994).

⁸¹ *Id.*

⁸² *Id.* § 19003(a).

⁸³ *Id.* This section establishes the publication procedure:

(a) Publication of notice pursuant to this section shall be for at least 15 days. Three publications in a newspaper published once a week or more often, with at least five days intervening between the first and last publication dates, not counting the first and last publication dates as part of the five-day period, are sufficient. The remainder of the provision establishes where notice is to be published according to the date and residence of death or location of the trust property. There is a suggested statutory form provided for notice to creditors.

Id.

⁸⁴ *Id.* § 19003(b).

⁸⁵ *Id.* § 19051.

⁸⁶ CAL. PROB. CODE § 19052 (West 1994).

finer and limits the liability of the trustee for failure to give notice as well as limiting liability where notice was given but not required. It also exonerates the trustee from liability where notice is not given unless the creditor can establish a complete list of articulated factors.⁸⁷ Additionally, there is no duty imposed on the trustee to search for creditors of the deceased settlor.⁸⁸ A trustee is afforded the same protection as the personal representative of a decedent's estate, if the statutory requirements are adhered to.⁸⁹

The trustee is under no obligation to give notice to the known creditor if the creditor has either filed a claim, or has demanded payment and the trustee elects to regard the demand as a claim.⁹⁰ If there is no administration of the decedent's estate and no notice to creditors filed or published by the trustee, then a trust beneficiary who has received trust property is personally liable for the unsecured claims to the deceased settlor's estate.⁹¹ If the trustee has filed a notice to creditors, has published notice, and if the creditor was known or reasonably ascertainable by the trustee within four months of the first publication of notice, then one to whom trust property was distributed is personally liable for the creditor's claim if such claim was not filed. This is the case if the claim was not merely conjectural, if notice to the creditor was not given to the creditor under § 19050 with neither the creditor nor the creditor's attorney having actual knowledge of the trust administration sooner than one year after the date of first publication, and if the regular statute of limitations has not expired.⁹²

The remaining provisions of this act identify the defenses to

⁸⁷ The requisite factors are all of the following:

(1) The failure was in bad faith. (2) Neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the proceedings . . . [under this section on payment of claims from revocable trust] sooner than one year after publication of notice to creditors under § 19050, and payment would have been made on the creditor's claim if the claim has been properly filed. (3) Within 16 months after the first publication of notice under § 19050, the creditor ". . . did both file a petition requesting the court to determine the liability of the trustee and serve notice on the trustee for a hearing at least 30 days prior to the hearing."

Id. § 19053(b).

⁸⁸ *Id.* § 19053(d).

⁸⁹ *See id.* § 19006 discussing protection for trustee and beneficiary.

⁹⁰ *Id.* § 19054.

⁹¹ *Id.* § 19400.

⁹² CAL. PROB. CODE § 19401 (West 1994).

the payment of creditor claims of the settlor including cross-claims and set-offs that would have been available to the deceased settlor.⁹³ It also identifies the limits of liability considering any and all pro-rata considerations and adjustments that would have to be made taking into consideration the settlor's probate and the availability of assets there for the payment of debts.⁹⁴

The Florida legislature responded to the problem of satisfying the debts of the deceased settlor by promulgating a statute which directly and more compactly disposes of the problem. The first section established an implicit duty on the trustee to pay expenses and obligations of the settlor's estate whether it is represented or not.⁹⁵ A subpart of this section offers an order of abatement to be followed beginning with the residue moving up to specified or identified items of property.⁹⁶

In the event there is no administration of the settlor's estate or appointed representative, the trustee is charged with the duty to publish notice to unknown creditors and serve notice on creditors that are known or reasonably ascertainable.⁹⁷ This statute also has a provision for exoneration of the trustee and beneficiaries if there was good faith compliance or if two years have passed since the death of the settlor.⁹⁸

V. Conclusion

One may argue that a creditor is not without remedy if property is transferred into a trust vehicle, which will afford the creditor

⁹³ *Id.* § 19402(a).

⁹⁴ *Id.* § 19402(b).

⁹⁵ "A trustee of a trust . . . upon whom a copy of the notice of administration in the estate of the settlor of such trust has been served . . . shall pay over to the personal representative of a settlor's estate such amounts from time to time as the personal representative shall certify in writing to the trustee as required to pay the expenses of the administration of the settlor's estate and . . . claims of the settlor's creditors. In the event the settlor's estate is not represented . . . the trustee shall pay enforceable and timely served claims of the settlor's creditors directly to such creditors. . . ." FLA. STAT. ANN. § 737.3056(1) (West 1994).

⁹⁶ *Id.* § 737.3056(3).

⁹⁷ *Id.* § 737.3057 (1)(a-e). Section (c) calls for the trustee to ". . . promptly make a diligent search to determine the names and addresses of creditors of the settlor who are reasonably ascertainable and shall serve on those creditors a copy of the notice within three months after the first publication of the notice. Impracticable and extended searches are not required."

⁹⁸ *Id.* § 737.3056(3)(3a).

no notice of the death of the settlor. For example, a creditor may attempt to reach a revocable trust upon the death of the deceased settlor by asserting the transfer into the trust to be in violation of the Uniform Fraudulent Transfer Act.⁹⁹ However, the thrust of the argument here is not that there exists other avenues which may still be available to the creditor two, three, or four years down the line. The crux of persuasion in favor of actual notification of the creditor by the trustee or beneficiary is in the prompt and orderly administration of the decedent's affairs and the equitable disposition of creditor claims before the assets potentially splinter and disperse to beneficiaries far and near upon the death of the settlor.

The body of law representing debtor-creditor relations encouraging the emergence of the kind of common-sense logic that the *Pope* case brought to the fore was so many years coming to fruition. This was true even though it was sheer horse sense which dictated that a creditor who was known to an estate representative should not have to be apprised of the death of this individual by scouring published probate notices daily for news of deceased debtors, when the bill from American Express is nestled right inside the deceased's incoming mail.

Armed with the knowledge that a revocable trust might well serve as a convenient vehicle to avoid the payment of claims against a deceased settlor, hopefully it will not take as long as it did in reaching the *Pope* decision for states to enact legislation modeling that of California and Florida to address the problem. It is not a complex task for the trustee of a revocable trust to notify known or reasonably ascertainable creditors of the death of a settlor, and the response should be forthcoming to accordingly give well-rounded respect to the purpose and tenor of *Pope*.

⁹⁹ UNIF. FRAUDULENT TRANSFER ACT, 74 U.L.A. 639. See Helen B. Jenkins, *Rights of Unsecured Estate Creditors Under the Uniform Fraudulent Transfer Act in Property Transferred Prior to Death*, 45 OKLA. L. REV. 275, 279 (1992), providing an illustration of a transfer into an inter vivos trust prior to the death of the settlor and the factors which the court may consider in determining whether the transfer was fraudulent: ". . . (1) the transferee was an 'insider' under the statute by virtue of her relationship as a relative of the debtor, (2) the transfer was of substantially all of the debtor's assets, (3) there was no consideration for the transfer, and (4) the transfer rendered the debtor virtually insolvent to pay unsecured claims."