Title

Judge Alice M. Batchelder endeavors to limit via a dissenting opinion the damage one federal appellate court has surely done to the institution of the trust.

Text

The foundation of the federal appellate court's holding in *JPMorgan Chase Bank v. Winget* (6th Cir., 2022) is the false premise that an inter vivos trust under which its settlor has reserved a right of revocation (hereinafter "revocable trust") and the settlor personally are autonomous when it comes to affording the settlor's creditors access to the entrusted property. Throughout the court's opinion the trust is referred to as an "entity." First, a trust is a fiduciary relationship with respect to property title to which is in the trustee. It is not an entity. Second, equity deems property subject to a revocable trust to be owned outright by the settlor for creditor access purposes. Just as moving funds from one's checking account to one's savings account alone cannot be a fraudulent conveyance, so also revoking one's revocable trust alone cannot be one. In neither situation is economic value relinquished or alienated.

Judge Alice M. Batchelder dissented "in the perhaps vain hope that this small gesture might help restrain the opinions and holdings in this case to just this case." She bemoaned the 15 years of unnecessary litigation that had been fueled by the early muddling of basic trust law by an ever-unrepentant appellate court. There had already been eight appeals, not to mention 40 federal district court opinions.

Here is the trust law that should have been applied throughout: During the lifetime of the settlor of a revocable trust, the trust property is subject to the claims of the settlor's creditors. *In equity, the right of revocation is an ownership-equivalent power*. While such a trust is a true trust and not an agency, see National Shawmut Bank v. Joy, 53 N.E.2d 113 (Mass. 1944), *functionally* the trustee, for all intents and purposes, is an agent of the settlor. Thus, as is the case with the relationship of principal and agent, it cannot be said that the settlor of a revocable trust and the trust relationship itself are autonomous. As to a revocable declaration of trust, where the settlor and the trustee are one and the same, even the agency analogy breaks down as one cannot enter into an agency relationship with oneself. The Winget trust was just such a trust.

Here is what happened: Venture, Mr. Winget's company, became insolvent. Venture owed lenders $450 million. In exchange for Winget's personal guarantee of $50 million, Chase, the lenders' administrative agent, held off accelerating the debt. As per the unfortunate documentation, the "trust" ostensibly was a co-guarantor. Lacking, however, was any language applying to the "trust" the $50 million cap. The trial judge had found this omission to have been a mutual mistake. Venture filed for bankruptcy. Winget paid the $50 million. Chase then endeavored to reach and apply the assets subject to his revocable trust in satisfaction of the "rest of the debt." At some point Winget revoked the trust. In 2022 the appellate court held that the revocation had been a fraudulent conveyance in that the $50 million cap applied only to Winget personally: "Today, we address whether Winget can revoke the Trust, making the trust assets unreachable to Chase. He cannot." Judge Batchelder dissented: The entrusted assets had always been reachable by Chase, but subject to the $50 million cap, this because from the outset the

reserved right of revocation, in equity, had been a power equivalent in substance to outright and unrestricted ownership of the entrusted property.

For some basic trust law ignored in this litigation see §5.3.3.1 of *Loring and Rounds: A Trustee's Handbook* (2022), which section is reproduced in its entirety in the Appendix A below. The Handbook is available for purchase at https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP.

For a full transcription of Judge Batchelder's dissent, see Appendix B below.

Appendix A

§5.3.3.1 Reaching Settlor's Reserved Beneficial Interest or Even the Entrusted Property Itself [from *Loring and Rounds: A Trustee's Handbook* (2022), available for purchase at https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP].

The settlor-beneficiary's inter vivos creditors. In the United States, for public policy reasons, a settlor[124] cannot place property in trust for the settlor's own benefit and keep it and/or the equitable interest beyond the reach of the settlor's[125] creditors.[126] (It has been likewise in England, at least as far back as the reign of Henry VII, and perhaps as far back as even the reign of Edward III.)[127] In other words, on public policy grounds, a spendthrift provision in a trust

[124]The beneficiary need not have made the actual transfer of the property to the trustee. *See generally* §8.43 of this handbook (determining the trust's true settlor). A beneficiary who had paid consideration in return for which someone else made the transfer would be deemed the settlor with the result that the beneficiary's creditors would have access to the constructively retained interest. Restatement (Third) of Trusts §58 cmt. f. Also, "[a] life beneficiary of a spendthrift trust created by another who pays off encumbrances on the trust property becomes to that extent settlor of the trust." Restatement (Third) of Trusts §58 cmt. f.

[125]*See* Restatement (Third) of Trusts §58 cmt. e (confirming that the policy would not necessarily negate a spendthrift restraint with respect to the interests of persons other than the settlor).

[126]"Such interest will pass to the settlor's trustee in bankruptcy as 'a beneficial interest…in a trust that' is not subject to a restriction on transfer 'that is enforceable under applicable nonbankruptcy law' under the terms of Bankruptcy Code §541(c)(2)." Restatement (Third) of Trusts §58 cmt. e.

[127]73 Hen. VII, c. 4 (1487); 50 Edw. III, c. 6 (1376). *See generally* Erwin N. Griswold, *Spendthrift Trusts Created in Whole or in Part for the Benefit of the Settlor*, 44 Harv. L. Rev. 203 (1930). *See also* 1 Scott & Ascher §1.1 (noting that "for six hundred years, people have resorted to trusts to evade creditors' claims, but, until very recently, it has always been recognized that permitting them to do so was contrary to sound policy"); 3 Scott & Ascher §15.4 (noting that these English statutes were also interpreted as "enabling the settlor's creditors to

established for the settlor's own benefit is unenforceable, at least as against the settlor-beneficiary's creditors, *even if the conveyance in trust had not been fraudulent*.[128] In the United States, however, there are apparently no relevant cases dealing with whether a forfeiture provision in such a trust would violate public policy.[129] In England, "a provision requiring the forfeiture of a settlor's interest upon bankruptcy is invalid as a fraud on the bankruptcy law. But a provision for the forfeiture of the settlor's right to income upon voluntary alienation or if creditors attempt to reach it is valid."[130]

The reservation of a general inter vivos power of appointment exposes the entrusted property itself to creditor attack. If the settlor retains the right during his or her lifetime[131] to revoke the trust, or retains an unrestricted right to amend it, the subject property will be reachable by the settlor's creditors, and later by the creditors of the settlor's estate, to the extent the property would be reachable were the settlor to own the property outright and free of trust.[132]

What if the settlor reserves no beneficial interest, only a naked right of revocation? Until relatively recently, the common law has held that an unexercised,[133] naked reserved right of revocation will not expose the principal, *i.e.*, the underlying trust property, to attack by the settlor's

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reach the settlor's beneficial interest by a proceeding at common law, without the expense of a creditor's suit in Chancery").

[128]*See* 3 Scott & Ascher §15.4. *See generally* The Fraudulent Conveyances Act 1571 (13 Eliz. 1, c5), otherwise known as the Statute of 13 Elizabeth (regulating fraudulent conveyances generally) [England].

[129]*See* 3 Scott & Ascher §15.1.1. By forfeiture provision, we mean a provision that terminates the interest of a beneficiary "upon an attempt by the beneficiary to alienate the interest or an attempt by the beneficiary's creditors to reach it." 3 Scott & Ascher §15.1.1.

[130]3 Scott & Ascher §15.1.1.

[131]*Cf.* Restatement (Third) of Trusts §58 cmt. e (providing that if the settlor reserves not only a right to receive the income of a trust for life but also a general power to appoint the entrusted property by will, neither the life interest nor the property subject to the right to appoint can be protected from the creditors of the settlor by a spendthrift restraint). "The settlor's creditors can reach the principal of the trust, provided there are no interests in others who can receive benefits during the settlor's lifetime." Restatement (Third) of Trusts §58 cmt. e.

[132]Restatement (Third) of Trusts §25 cmt. e; UTC §505(a)(1); 3 Scott & Ascher §§14.11.3, 15.4.1.

[133]*See generally* 3 Scott & Ascher §14.11.3 (noting that "[t]here is authority for the proposition that if the donee of a general power exercises it, and if the donee's other assets are insufficient to pay the donee's debts, the donee's creditors can reach the appointed property, but…[that] …there is also…[some]…authority to the contrary").

creditors.[134] It was reasonable to expect, however, that form would give way to substance sooner rather than later.[135] That process is well under way,[136] and probably was inevitable after *In re Totten*.[137] More and more, courts and legislatures are hard pressed to justify why, as a matter of public policy, the settlor's creditors should be thwarted by naked reserved rights of revocation under which settlors retain rights of consumption over the subject properties—rights that are the functional equivalent of ownership—but should not be thwarted by reserved beneficial interests in discretionary trusts where control is transferred to independent trustees. After all, a naked retained right of revocation enables a competent settlor to destroy the contingent equitable interests of all ostensible beneficiaries.[138] While in form the settlor may have only a personal right of disposition, in substance he is a beneficiary—in fact the primary beneficiary.[139] This is because the interests of the ostensible beneficiaries are subordinate to the settlor's right to get back the entrusted property.[140] It should be noted that the UTC would afford the creditors of the holder of a naked right of revocation access to the trust principal.[141] The Restatement (Third) of Trusts is in accord.[142] On the other hand, the reservation of a general testamentary power of appointment in and of itself will not subject the underlying trust property to the claims of the settlor's creditors during the settlor's lifetime.[143]

The self-settled discretionary trust and the vulnerability of the entrusted property itself. Assume that the settlor is both the sole trustee and the sole permissible beneficiary of a discretionary trust that terminates in favor of the settlor’s probate estate. The subject property is

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[134]*See* Restatement (Second) of Trusts §330 cmt. o; Jones v. Clifton, 101 U.S. 225, 230–231 (1879). For statutes providing otherwise, *see* 4 Scott on Trusts §330.12. *See also* UTC §505(a)(1) (during the lifetime of the settlor, the property of a revocable trust is subject to the claims of the settlor's creditors).

[135]*See generally* Alan Newman, *Spendthrift and Discretionary Trusts: Alive and Well Under the Uniform Trust Code*, 40 Real Prop. Prob. & Tr. J. 567, 591–592 (Fall 2005).

[136]3 Scott & Ascher §§14.11.3, 15.4.2.

[137]179 N.Y. 112, 71 N.E. 748 (1904). *See generally* §9.8.5 of this handbook (the Totten or tentative trust).

[138]*See generally* 3 Scott & Ascher §§15.4.1, 15.4.2.

[139]*See generally* 3 Scott & Ascher §§15.4.1, 15.4.2.

[140]*See* UTC §505(a)(1) (providing that the settlor's possession of a naked reserved right of revocation alone will subject the trust property to the claims of the settlor's creditors). *See also* UTC §603(b) (providing that to the extent a trust is revocable and the settlor has capacity to revoke the trust, the rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor).

[141]UTC §505(a)(1).

[142]Restatement (Third) of Trusts §25 cmt. e.

[143]*See generally* 3 Scott & Ascher §15.4.1.

reachable by the settlor's creditors because the property is owned outright and free of trust due to merger. Merger is taken up generally in §8.7 of this handbook.

But what if there is no merger, if, say, persons other than the settlor are designated remaindermen? The subject property of a trust under which the trustee has full discretion to use income and/or *principal* to or for the benefit of the settlor is still reachable by the settlor's creditors, even though the reserved equitable interest is a contingent property interest (the condition precedent being the trustee's exercise of discretion). Even if the trust instrument contains a spendthrift clause, even if the remaindermen and the settlor-beneficiary are strangers, and even if the inception transfer had not been procured by fraud,[144] the settlor's creditors will still be afforded access.[145] It is the trustee's mere possession of a fiduciary power of appointment exercisable for the benefit of the settlor-beneficiary that is critical. The principal is vulnerable even if the trustee is truly independent and whether or not the trustee ever actually exercises his discretion to make distributions. The Restatement (Third) of Trusts is in accord,[146] as is the UTC.[147] The trail, however, had already been well-blazed by §156(2) of the Restatement (Second) of Trusts.[148] It provided that "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."[149]

It is safe to say that the spirit of §156(2) is now settled equity doctrine, doctrine that now can be abrogated, at least in the near term, only by statute.[150] "First, the rule grants to creditors greater

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[144]*See generally* 3 Scott & Ascher §15.4. *See* Hickory Point Bank & Tr., FSB v. Natural Concepts, Inc., 2017 IL App (3d) 160260-U (Ill. App. Ct. 2017) (unpublished) ("The Illinois Supreme Court found that the common law rule was still valid, noting that 'it is not a fraudulent transfer of funds that renders the trust void as to creditors under the common law, but rather it is the spendthrift provision in the self-settled trust and the settlor's retention of the benefits that renders the trust void as to creditors.'"). The UTC does not address possible rights against a settlor who was insolvent at the time of the trust's creation or was rendered insolvent by the transfer of property to the trust, the subject instead being left to state fraudulent transfer law. UTC §505 cmt.

[145]*See* Restatement (Second) of Trusts §156. *See, e.g.*, Spenlinhauer v. Spencer Press, Inc., 195 B.R. 543 (Bankr. D. Me. 1996), *aff'd*, 103 F.3d 106 (1st Cir. 1996). *See generally* Alan Newman, *Spendthrift and Discretionary Trusts: Alive and Well Under the Uniform Trust Code*, 40 Real Prop. Prob. & Tr. J. 567, 590 (Fall 2005).

[146]Restatement (Third) of Trusts §58 cmt. e & §60 cmt. f.

[147]UTC §505(a)(2).

[148]*See, e.g.,* Ware v. Gulda, 331 Mass. 68, 117 N.E.2d 137 (1954) ("The rule we apply is found in Restatement: Trusts, §156(2)….").

[149]*See* Restatement (Second) of Trusts §156 appendix. *See also* UTC §505(a)(2).

[150]*See* 2A Scott on Trusts §156 n.1; 3 Scott & Ascher §15.4.3 (Discretionary Trust for the Settlor).

rights than those retained by the settlor himself or herself: the settlor cannot…[directly]…compel trust distributions, but the settlor's creditors can. Second, the rule applies notwithstanding that allowing the settlor's creditors to reach the assets of the trust may defeat not just the settlor's interests, but also the interests of other beneficiaries."[151]

What about the mere reservation of a contingent equitable remainder? Would that render the entrusted property reachable by the settlor's creditors? At least one court has held that it would not.[152]

Would a retained income interest plus a general testamentary power of appointment render the entrusted property, i.e., the principal, vulnerable to the settlor's creditors? The Restatement (Third) of Trusts would allow the settlor's creditors during his lifetime to reach the entire principal of a purported spendthrift trust in which the settlor has reserved a life interest and a general power to appoint the entrusted property at death.[153] Georgia equity doctrine is in accord.[154]

Vulnerability of a retained income or unitrust interest without more. While the entrusted property itself may not be vulnerable to the settlor creditors, a retained vested equitable property interest would be. A retained equitable or beneficial interest, such as a right to all net trust accounting income or a right to periodic unitrust distributions,[155] for example, would be accessible to the settlor's creditors.

Is principal safe from attack by the settlor's creditors when the settlor creates an income-only spendthrift trust for the settlor's own benefit, notwithstanding the fact that the spendthrift clause cannot protect the income stream itself from the reach of the settlor's creditors?[156] Probably yes—at least for the foreseeable future.[157] There is a counterargument, however: The principal—the engine that generates the income—is employed for the benefit of the settlor. Thus, because the entire principal is dedicated to the benefit of the settlor, the spirit and letter of §156(2) dictates that

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[151]Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 Hastings L.J. 287, 294, 301 (2002).

[152]*See* Hickory Point Bank & Tr., FSB v. Natural Concepts, Inc., 2017 IL App (3d) 160260-U (Ill. App. Ct. 2017) (unpublished) (asserting that for the assets of a self-settled trust to be reachable by the settlor's creditors, the settlor must be the "primary beneficiary").

[153]*See* Restatement (Third) of Trusts §58 cmt. e.

[154]*See* Phillips v. Moore, 286 Ga. 619, 690 S.E.2d 620 (2010) (a reserved income interest coupled with a reserved testamentary power of appointment renders the entrusted property accessible to the settlor's inter vivos creditors even in the face of a spendthrift clause, even though there are designated takers in default of the power's exercise, and even though the settlor himself lacks access to the entrusted principal during his lifetime).

[155]*See* 3 Scott & Ascher §15.4.

[156]*See generally* 3 Scott & Ascher §15.4.

[157]*See generally* 2A Scott on Trusts §156 n.2 and accompanying text.

the principal itself should be vulnerable to creditor attack.[158] While the engine argument is essentially Congress' rationale for including property subject to a reserved life estate in the Federal Gross Estate for estate tax purposes,[159] it has so far proven of little utility to the settlor's creditors.[160] Note, however, that a self-settled income-only trust containing a reserved general power of appointment, be it inter vivos or testamentary, may well be creditor-vulnerable.[161] *The reservation of a nongeneral power without more will not expose the entrusted property to attack by the settlor's creditors.* The reservation of a special/limited/nongeneral inter vivos power of appointment, in and of itself, will *not* subject the underlying trust property to the claims of the settlor's creditors, as the power may be exercised neither in favor of the settlor nor in favor of the settlor's creditors.[162] This is the case even though an exercise of the power could bring about the trust's termination.

The tax implications of creditor accessibility in the self-settled-trust context. Creditor accessibility can have gift and estate tax consequences as well. The settlor-beneficiary of a fully discretionary trust,[163] for example, may have failed to relinquish dominion and control over the trust property sufficient to have made a completed gift for gift tax purposes.[164] On the other hand, the "settlor's ability to secure the economic benefit of the trust assets by borrowing and relegating creditors to those assets for repayment may well trigger inclusion of the property in the settlor's gross estate under secs. 2036(a)(1) or 2038(a)(1)…[of the Internal Revenue Code]…."[165]

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[158]*See generally* Charles E. Rounds, Jr., *The Vulnerability of Trust Assets to Attack by the Deceased Settlors Creditors, by the Commonwealth Should It Seek Reimbursement for Medicaid Payments, and by the Spouse*, 73 Mass. L. Rev. 67, 70 (1988).

[159]I.R.C. §2036(a)(1) (1978), *rev'g* May v. Heiner, 281 U.S. 238 (1930). *See also* Omnibus Budget Reconciliation Act of 1993 §13611 (1993) (making the principal of self-settled income-only trusts countable for Medicaid eligibility purposes).

[160]*See, e.g*., Restatement (Third) of Trusts §58 cmt. e, illus. 8.

[161]Restatement (Third) of Trusts §58 cmt. e; Restatement (Second) of Trusts §156 cmt., illus. 1.c. *See, e.g*., Phillips v. Moore, 286 Ga. 619, 690 S.E.2d 620 (2010) (holding that a reserved income interest under a trust, coupled with a reserved general *testamentary* power of appointment, will subject trust principal to the reach of the settlor's *inter vivos* creditors).

[162]3 Scott & Ascher §14.11.3. *See generally* §8.1 of this handbook (powers of appointment). Likewise, the reservation of a special/limited/nongeneral testamentary power of appointment, in and of itself, will not subject the underlying trust property to the claims of the settlor's creditors, as the power, by its terms, may not be exercised in favor of the settlor, the settlor's creditors, the settlor's probate estate, or the creditors of the settlor's probate estate.

[163]That is a trust under which the trustee alone has full discretion to use income and/or principal to or for the benefit of the settlor.

[164]Outwin v. Comm'r, 76 T.C. 153, 164–165 (1981). *See generally* §4.1.3 of this handbook (creditor accessibility as a general inter vivos power of appointment).

[165]Outwin v. Comm'r, 76 T.C. 153, n.5 (1981).

When there are multiple settlors. Under the UTC, if a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.[166] In one case, a husband and his wife owning property as tenants by the entireties transferred the property into an irrevocable self-settled spendthrift trust.[167] A judgment creditor of the husband tried unsuccessfully to reach the trust assets. The court reasoned that had the judgment been against the husband and wife jointly and severally, the creditor's claim would have been valid. The judgment, however, was against the husband only. Just as the creditor would have had no legal right to levy against the real estate before they conveyed it to the trustee, the legal title to the real estate having been held by them as tenants by the entireties, so it "stands to reason" that the creditor could not have access to it after the conveyance.

Crummey trusts. The UTC provides that a lapse, release, or waiver of a power of withdrawal, whether the power was reserved by or granted to the holder, will cause the holder to be treated as the settlor of the trust for creditor accessibility purposes only to the extent the value of the property affected by the lapse, release, or waiver exceeds the *Crummey* or "5 and 5" power.[168] For a discussion of the "5 and 5" power, see §9.18 of this handbook.

The Special Power of Appointment Trust (SPAT): An asset-protection scheme problematic as to form as well as substance. A settlor-beneficiary's creditors may reach the maximum amount that the trustee could have paid to the settlor-beneficiary. The UTC, specifically §505(a)(2), is in accord, and then some. According to the UTC, the creditors may capture all distributions, not just distributions made by the trustee. In any case, it has been suggested that a settlor's creditors can be kept at bay if the settlor bestows on a third party a nonfiduciary special power of appointment under which the settlor is a permissible appointee, expressly reserving no equitable interest and no powers. Arguably SPAT distributions would not be coming *from the trustee*. But that cannot be. Legal title is in the trustee. Any distribution triggered by a power exercise would entail the passage of legal title *from the trustee* to the settlor-appointee. So much for form. Now to substance. In equity's world, substance trumps form.[169] Thus, there is the real risk that equity would consider the powerholder the settlor's common-law agent, deeming any distributions as coming not from the trustee and not from the powerholder but from settlor himself. There would go the SPAT's asset-protection feature

The settlor-beneficiary's postmortem creditors. It is self-evident that the legitimate postmortem creditors of the settlor of a testamentary trust will have access to that portion of the settlor's probate estate that is destined to fund the trust, *i.e.*, to the extent their lawful claims have not been or cannot be satisfied from other estate assets. Whether by statute or decision, the probate estate is generally where postmortem creditors are expected to look to first. Under certain circumstances, however, the postmortem creditors also may have access to the underlying property

[166]UTC §505(a)(2).

[167]Bolton Roofing Co. v. Hedrick, 701 S.W.2d 183 (Mo. Ct. App. 1985).

[168]UTC §505(b)(2). *See generally* Kevin D. Millard, *Rights of a Trust Beneficiary's Creditors under the Uniform Trust Code*, 34 ACTEC L.J. 58, 65–66 (2008).

[169]*See generally* §8.12 of this handbook (equity's maxims).

of a trust that the decedent had established during his or her lifetime. This is likely to be the case if the settlor had reserved a general inter vivos power of appointment, such as a right of revocation, or possibly even a general testamentary power of appointment. Finally, the proceeds of any insurance on the life of a settlor of a revocable inter vivos trust that are paid to the trustee also might be vulnerable to the claims of the settlor's postmortem creditors, unless there is a statute that provides otherwise.

The postmortem implications for creditor access if the deceased settlor-beneficiary had held a general inter vivos power of appointment. Although the "traditional thinking" was otherwise,[170] the current trend of the law favors allowing the settlor's postmortem creditors, as well as the surviving spouse, access to the principal of an inter vivos trust if the settlor reserved a personal power to consume[171] the underlying property *at the time of the settlor's death.*[172] By power to consume, we mean an express or constructive general inter vivos power of appointment. This should be contrasted with the lot of the inter vivos creditor where the focus traditionally was on

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[170]*See* 3 Scott & Ascher §14.11.3.

[171]*See generally* Unif. Nonprobate Transfers on Death Act §102(a) (defining a nonprobate transfer to include "a valid transfer effective at death by a transferor…to the extent that the transferor immediately before death had power, acting alone, to prevent the transfer by…withdrawal and instead to use the property for the benefit of the transferor or apply it to discharge claims against the transferor's probate estate." The Act provides that retention alone of a general testamentary power of appointment would not expose the subject property to attack by the settlor's postmortem creditors. Unif. Nonprobate Transfers on Death Act §102(a).

[172]Restatement (Third) of Trusts §25(2) cmt. e. *See, e.g.*, *In re* Est. of Nagel, 580 N.W.2d 810 (Iowa 1998); State St. Bank & Tr. Co. v. Reiser, 7 Mass. App. Ct. 633, 389 N.E.2d 768 (1979) (creditor access because of power of consumption at time of debtor's death); Sullivan v. Burkin, 390 Mass. 864, 460 N.E.2d 572 (1984) (spousal access because of power of consumption during marriage). *See* Clifton B. Kruse, Jr. (compiler), *Summary of Case Law: Rights of Creditors Following Death of Settlor-Beneficiaries of Revocable Trusts*, 23 ACTEC Notes 155 (1997). *See also* UTC §505(a)(3) (providing that "[a]fter the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances"); Restatement (Second) of Property (Wills and Other Donative Transfers) §34.3 (rejecting the principle of Jones v. Clifton, 101 U.S. 225 (1879), that a trust settlor's reserved power to revoke is not an asset subject to creditors' claims and instead providing that a settlor's creditors may reach the assets of a revocable trust even when the trust transfer to the trustee was not fraudulent); UPC §6-102(b) (Revised 1998) (establishing liability of nonprobate transferees for creditor claims and statutory allowances). *See generally* Wellman & Brucken, *NCCUSL To Your Rescue: New UPC Sec. 6-102*, 26 ACTEC Notes 361 (2001).

the retention of a beneficial interest, rather than a power to consume.[173] Thus, we traditionally had such anomalies as the naked reserved right of revocation exposing trust assets to the reach of the settlor's postmortem creditors, but not the inter vivos ones;[174] or the property of a self-settled "irrevocable" discretionary trust being subject to the reach of the settlor's inter vivos creditors, but not the postmortem ones.[175] (In the latter case, surely it can be said that the trust, as a practical matter, was actually not irrevocable at the time of the settlor's death, a topic we take up in §4.1.3 of this handbook.) In any case, the law is now quickly evolving to the point where the settlor-beneficiary's inter vivos and postmortem creditors have coextensive access to the property of an inter vivos trust.[176] The Restatement (Third) of Property is fully there, in letter and in spirit.[177] Until this process is complete, however, such subtle divergences in the law will continue to complicate the already complicated life of the trustee.[178]

The UTC would provide that 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.[179] The UTC defines "revocable" as meaning "revocable" by the settlor "without the consent of the trustee or a person holding an adverse interest."[180] The settlor, of course, would retain the right to direct in his or her estate planning documents the source from

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[173]*See* 4 Scott on Trusts §330.12; Restatement (Second) of Trusts §330 cmt. o.

[174]*See* State St. Bank & Tr. Co. v. Reiser, 7 Mass. App. Ct. 633, 638, 389 N.E.2d 768, 771 (1979) (in the postmortem context, a reserved general inter vivos power may be enough to expose trust property to creditor attack); Restatement (Second) of Trusts §330 cmt. o (in inter vivos context a naked reserved general inter vivos power may not be enough to expose property to creditor attack).

[175]*See generally* Elaine H. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, 41 Real Prop. Prob. & Tr. J. 819, 858–859 (2007).

[176]*See, e.g*., De Prins v. Michaeles, 486 Mass. 41, 154 N.E.3d 921 (2020) (In which Massachusetts' version of the Uniform Trust Code having failed to "address the situation at issue," its Supreme Judicial Court articulates an equitable principle of Massachusetts equity, namely that the assets of a self-settled, discretionary, spendthrift, ostensibly "irrevocable," inter vivos trust are nonetheless accessible to the deceased settlor's creditors via equitable reach and apply action). *See generally* Elaine H. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, 41 Real Prop. Prob. & Tr. J. 819 (2007).

[177]*See* Restatement (Third) of Property (Wills and Other Donative Transfers) §22.2, cmt. f.

[178]*See, e.g.*, UTC §505(a)(1) (providing that during the lifetime of the settlor, the property of a revocable trust is subject to the claims of the settlor's creditors).

[179]UTC §505(a)(3).

[180]UTC §103(14).

which postmortem liabilities will be paid.[181] On the other hand, the UPC (specifically §6-102(a)) and the Uniform Nonprobate Transfers on Death Act (specifically §102(a)) are somewhat less creditor-friendly. They provide by implication that if the settlor at the time of death possessed a right of revocation jointly *with a nonadverse party*, his or her postmortem creditors will not have access to the subject property. One "puzzled" commentator explains how easily "Section 102" can be "manipulated to avoid creditors":

> To avoid the reach of Section 102, the trustor simply could require that to revoke the trust the nonadverse party must join the trustor in making the revocation. The trust could then give the trustor the power to replace at will the joint powerholder with another powerholder of the trustor's own choosing. As a result, the trustor could remove and replace the joint powerholder until the trustor found one willing to agree with trustor that the trust should be revoked. Such a provision would be no more than a minor inconvenience in light of the greater benefit bestowed by the possibility of avoiding creditor claims following death.[182]

Because procedures for affording a decedent's postmortem creditors access to nonprobate assets, such as those in the hands of trustee transferees, are state specific, one is loath to generalize. With that caveat, it is probably safe to say that in most U.S. jurisdictions, the current state of the default procedural law is that the postmortem creditors of a decedent must (1) "pursue probate administration, even in the absence of probate assets, prior to pursuing the nonprobate transferee[s] directly" and (2) "pursue probate assets before pursuing nonprobate transferees."[183] The UPC is in accord.[1] This two-step process can pose a real problem for the postmortem creditor: "At times, the creditor's search for a decedent's assets resembles a game of hide-the-ball, with the trustee distributing assets before being notified of any judgment on the creditor's claim, as was the case in *Dobler v. Arluk Center Industrial Group*. In that case, the trustee of decedent's revocable trust was able to evade creditors by transferring assets to beneficiaries prior to a judgment being issued

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[181]UTC §505(a)(3).

[182]Elaine H. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, 41 Real Prop. Prob. & Tr. J. 819, 856 (2007). "The comments to Section 102…[of the Uniform Nonprobate Transfers on Death Act]…indicate, however, that liability under Section 102 might attach regardless of whether the decedent holds the sole power to revoke 'if the trust is named as beneficiary of a nonprobate transfer, such as of securities registered in [transfer-on-death] form.'" *Id.* at 855–856 (citing to Uniform Nonprobate Transfers on Death Act §102 cmt. 7).

[183]Elaine H. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, 41 Real Prop. Prob. & Tr. J. 819, 822–823 (2007). *See, e.g.*, State St. Bank & Tr. Co. v. Reiser, 7 Mass. App. Ct. 633, 389 N.E.2d 768 (1979) (the court requiring an exhaustion of the probate estate before affording creditors access to the assets of a trust over which the decedent held a general inter vivos power of appointment at the time of death).

[1] *See* UPC §6-102(b) and cmt. 1.

in the probate court."[184]

The post mortem implications for creditor access if the deceased settlor-beneficiary had held a general testamentary power of appointment. If a settlor establishes an inter vivos trust, reserving only a naked general testamentary power of appointment over the underlying trust property, then would the settlor's postmortem creditors have access to the property were the settlor to die not having exercised the power? The traditional answer was no. Only to the extent that the power was actually exercised by the terms of the settlor's will would the subject property become vulnerable to the claims of the settlor's postmortem creditors.[185] Thus, if the deceased settlor by the terms of a valid will were to actually exercise the power over, say, 50 percent of the subject property, then the settlor's postmortem creditors would have access to that 50 percent, and only that 50 percent. What was left over from that 50 percent would then pass to the appointees. It should be borne in mind that the postmortem creditors would have had no need to turn to the assets of the inter vivos trust had there been sufficient assets in the settlor's probate estate to satisfy their claims in the first place. It should also be noted that the law may be trending in the direction of affording the settlor's postmortem creditors access to *all* property subject to the reserved general testamentary power of appointment, *whether or not there had been an actual exercise*.[186] The Restatement (Third) of Property (Wills and Other Donative Transfers) is already there.[187] Section 22.2 provides that "[p]roperty subject to a general power of appointment that was created by the donee is subject to the payment of the claims of the donee's creditors to the same extent that it would be subject to those claims if the property were owned by the donee."

The Restatement (Third), however, muddles its explanation of the mechanics of reaching entrusted appointive property. It suggests in an illustration supporting §22.2 that on the donor-donee's death, the claims against the donor-donee's estate "can be satisfied *out of the remainder*…to the same extent as if the Donor-Donee owned the remainder interest at Donor-Donee's death."[188] Because the *full legal title* to entrusted appointive property is in the trustee, it is the entire legal interest in the hands of the trustee *at the time of the donor-donee's death*, not just the equitable quasi-remainder, that is vulnerable to the claims of the donor-donee's postmortem creditors. That the underlying trust property itself is vulnerable to the claims of the donor-donee's creditors is buttressed by the wording of §22.2: It is the property that is "subject to a general power of appointment" that is vulnerable to external claims. There is nothing about going after the equitable property interests. Nor can there be a legal remainder in the traditional sense,

[184]Elaine H. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, 41 Real Prop. Prob. & Tr. J. 819, 881 (2007) (citing to Dobler v. Arluk Med. Ctr. Indus. Grp., 107 Cal. Rptr. 2d 478 (Ct. App. 2001), *aff'd*, 11 Cal. Rptr. 3d 194 (Ct. App. 2004)).

[185]*Cf.* State St. Tr. Co. v. Kissel, 302 Mass. 328, 19 N.E.2d 25 (1939) (involving the actual exercise of a general testamentary power of appointment under a trust established by someone other than the deceased powerholder).

[186]*See generally* 3 Scott & Ascher §15.4.1.

[187]*See* Restatement (Third) of Property (Wills and Other Donative Transfers) §22.1, cmt. a.

[188]*See* Restatement (Third) of Property (Wills and Other Donative Transfers) §22.2, illus. 4.

full legal title to the entrusted appointive property, as we said before, being in the trustee.[189] The bottom line: The Restatement (Third) appears to have conflated and confused reaching entrusted property subject to an equitable power of appointment and attaching the equitable property interests that are thrown off incident to the trust relationship itself.

Life insurance proceeds. Life insurance proceeds paid to the insured's revocable inter vivos trust upon the death of the insured may, by statute, be beyond the reach of the settlor's postmortem creditors.[190] Prior to paying the settlor's postmortem creditors from life insurance proceeds payable to the trustee by reason of the settlor's death, the trustee should consult counsel.

Domestic asset protection havens. *The Domestic Asset Protection Trust (DAPT) is taken up in §9.28 of this handbook.*

Appendix B

ALICE M. BATCHELDER, Circuit Judge, dissenting in JPMorgan Chase Bank, N.A. v. Winget, 2022 WL 2389287 (6th Cir., July 1, 2022)].

During the past 15 years, this dispute has generated over 50 judicial opinions: nine in this court and more than 40 in the district court. Almost all are sound. Several are very good, even excellent. One, however, is rotten. And at least the way I see it, this one bad apple spoils the whole bunch.

Rather than continue to accept, and work around, that rotten opinion-and the obstacles that continue to sprout from its holding-I would prefer to correct that decision, apply the law in plain terms, and end this litigation in the way that Judge Cohn decided ten years ago. Therefore, despite my concession that the majority has written a legally sound and rather good opinion, and my recognition of the importance of finality, I will respectfully dissent.

I.

A word about revocable trusts. "Under Michigan law, a revocable trust is not a separate legal entity with regard to the rights of creditors." *Mickam v. Joseph Louis Palace Tr.*, 849 F.Supp. 516, 523 (E.D. Mich. 1993) (relying on M.C.L. § 556.128); *accord* M.C.L. § 700.7506(1)(a) ("During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors."); *see also In re Hertsberg Inter Vivos Tr.*, 578 N.W.2d 289, 291 (Mich. 1998).

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[189] *See generally* §8.27 of this handbook (comparing and contrasting legal and equitable property interests).

[190] *See generally* 5 Scott on Trusts §508.4; Bogert §243. *Cf. In re* Est. of Clotworthy, 742 N.Y.S.2d 168 (App. Div. 2002) (involving a commercial structured settlement annuity).

A revocable (or living) trust is just a conceptual way for a person (the settlor or grantor) to organize or manage his or her assets. The settlor transfers title to the assets to the revocable trust but retains full ownership and control over those assets. To the extent that the trustee has any role, the trustee acts at the will of the settlor and owes a fiduciary duty to the settlor. While the settlor is alive, the beneficiary has no rights whatsoever. The settlor can change the terms, change the contents, or even dissolve a revocable trust at any time, for any reason. Accordingly, the settlor's creditors can reach the assets held in the trust. And the settlor must pay the taxes incurred by assets held in the trust-the trust does not have a tax-identification number or file a tax return.

The real benefits of a revocable trust take effect only after the settlor dies, at which point the settlor-being dead- is no longer able to revoke the trust and it passes (i.e., its contents pass) to the beneficiary(-ies). The most significant benefit is that, by passing via the trust, the transfer of assets avoids probate. The trust might also provide the settlor an easier means of managing the assets after death or during the transition, and in some cases might reduce or defer estate taxes, particularly if some assets are domiciled in another state. Therefore, a revocable trust is almost always used as an estate planning tool-namely, as a will substitute-and is commonly referred to as a *living trust*.

In stark contrast, a settlor who creates an *irrevocable* trust relinquishes control of the assets to the trustee, who manages the trust under a fiduciary duty to the *beneficiary*. The irrevocable trust becomes its own separate legal entity. The settlor cannot change the terms, change the contents, or dissolve the trust. The settlor's creditors cannot reach the trust assets. And the trustee would file a tax return for the irrevocable trust using a tax-identification number for the trust.

In conceptual terms, opening a revocable trust is like renting a storage unit at the local selfstorage facility. You rent a unit and put some of your belongings in there. Over time, you might move any number of things to and from, in and out of the storage unit. That is how it works. You can theoretically put *all* your belongings in there if you want. Or you can empty it and close it, and terminate the lease. So it goes with a revocable trust: fill it, change it, empty it, close it. That is the promise of a revocable trust: you, as settlor, can revoke it at any time. The tradeoff is that your placing of your assets in a revocable trust does not protect your assets from your creditors. But neither do you risk ever losing control over your assets in a revocable trust. Like a self-storage unit, a revocable trust is fundamentally just a place where a settlor keeps his or her assets.

This case involves Larry Winget's revocable trust, which "held most, if not all, of Winget's assets." *JP Morgan Chase Bank, N.A. v. Winget*, 901 F.Supp.2d 955, 961 (E.D. Mich. 2012). As if to make this even easier, Winget is the Trust's settlor, trustee, and sole beneficiary. The key point is that Winget owns the assets, *all of them*, and happens to keep them in his revocable trust. The Trust does not own any assets. As settlor, Winget can move his assets to and from, in and out, of his revocable trust

at any time, for any reason. He can put *all* his assets in it if he wants. Or he can empty it and close it. The revocable trust is a storage place, not a distinct legal entity.

II.

The short story. Winget's company, Venture, borrowed $450 million from Chase and defaulted on the loan with about $350 million outstanding. With Venture facing likely bankruptcy, Chase was left facing a cents-on-the dollar collection. Rather than call the loan, force liquidation, and suffer a substantial ($300-plus million) loss on this loan, Chase and Winget negotiated a loan forbearance agreement in which Chase would continue to extend the $350 million loan in exchange for Winget's new personal Guaranty of certain collateral, with a $50 million limit.

Thereafter ensued a back-and-forth negotiation to finalize the draft written agreement. In one of the proposed edits, Chase added Winget's Trust to the designation of Guarantor because Winget kept the pledged assets in the Trust. Note that, legally, this edit did not change anything: Winget-not the Trust-owned and controlled the assets; Chase, as creditor, could reach those assets in the Trust as if Winget owned them himself; and Winget could remove those assets from the Trust (or even close the Trust) at any time, for any reason. Even at this late date, Chase concedes as much. *See* Chase Br. at 6, (Dkt. No. 19, Sept. 17, 2021) ("Indeed, [Chase] agrees that Mr. Winget had the right to move property in and out of his trust as he saw fit, both before and after the Guaranty was signed."). Because the Trust is revocable, the pledge of assets by Winget-and-Trust is no different from the pledge of assets by Winget alone insofar as Chase's claim to those assets. The Trust did not-and could not-make a Guaranty pledge that was distinct from Winget's. Reciprocally, Winget could not have substituted the Trust as Guarantor to protect himself personally from Chase's claims; Chase could reach through the Trust to collect from Winget in the same way it could reach through Winget to collect from the Trust. Winget is the owner. The revocable Trust is a storage space for Winget's assets, not a distinct legal entity.

But, during that back-and-forth exchange of the countless proposed edits to the draft written agreement, the parties made a mistake: the editors changed the provision listing the Guarantor to include both Winget and the Trust, but they did not similarly change the provision for the $50-million limit, which was left naming only Winget (not the Trust). We know this was a mistake because the district court held an eight-day trial, heard witnesses, scrutinized evidence, and considered the competing claims. Chase claimed that Winget and the Trust had each given a separate guaranty and, while Winget had limited his guaranty to $50 million, the Trust had given Chase an unlimited guaranty. Winget countered that such an outcome was not their agreement, but was a mistake; that both parties had intended and agreed that the Guaranty was

limited to $50 million and the inclusion of the reference to the Trust did not change that. Judge Cohn issued a thorough and meticulous opinion finding as a factual certainty and explaining beyond any doubt that the final version's failure to include the Trust in the limitation provision was a mistake:

The Winget Trust for purposes of this case is no different than Larry Winget individually. A living, or inter vivos trust, is a common estate planning tool which is often used to control the distribution of assets. *See* Restatement (Third) of Trusts § 25 Validity and Effect of Revocable Inter Vivos Trust (2003). Here, Winget was the settlor, trustee, and beneficiary of the Winget Trust. As settlor, Winget owned the assets in the Winget Trust. *See* M.C.L. § 556.128. The Winget Trust was essentially Winget's alter ego. Winget used the Winget Trust to hold ownership of many of his assets, including the pledged stock. It had no special significance for purposes of this case.

The Winget Trust was purposely added to the [Guaranty] and related documents to secure ownership of the pledged stock. It was not added to secure any additional liability. As such, the failure to include the Winget Trust under [the limitation provision] was a mistake. It was a mistake that was overlooked by both parties. It is a mistake that the Court has the power to correct.

Winget, 901 F.Supp.2d at 972 (minor edits to capitalization). The court held that the $50-million limitation applied to Winget and the Trust together. Winget wired a $50 million payment to Chase. *JP Morgan Chase Bank, NA v. Winget*, No. 08-13845, 2014 WL 320686, at *1 n.1 (E.D. Mich. Jan. 29, 2014). Thus, while certain collateral claims and issues remained, this effectively ended Chase's claim to recover against Winget or the Trust under the terms of the Guaranty.

III.

Now the bad apple. When Chase claimed on appeal that the parties had not been mistaken, the panel agreed and held that "[t]he agreement executed by Winget, the Trust, and Chase reflected the parties' intent as a matter of law," such that the parties necessarily intended that Winget and the Trust were separate entities with "Winget, and only Winget [alone], as having limited exposure." *JPMorgan Chase Bank, N.A. v. Winget*, 602 Fed.Appx. 246, 258-59 (6th Cir. 2015). Not only does that proposition fail as a matter of common sense, it is fundamentally flawed as a matter of trust law. The Trust, being a revocable trust, is not a distinct legal entity separate from Winget; it is just a place for Winget to store his assets. The only aspect of the analysis with which I can agree is the off-the-cuff statement that "the district court should never have held a trial in the first instance." *Id.* at 258. That is true, but not for the reasons stated in the opinion. Rather, a trial was unnecessary because the "mistake" theory

was unnecessary. For purposes of Chase's creditor claim, Winget and the Trust necessarily merged into Winget alone; they are not separate entities, they are both just Winget as the one and only true owner of the assets. Winget pledged the assets to guaranty the loan and the agreement limited that pledge to $50 million.

The opinion's proffered analysis of this issue is specious. After characterizing the district court's decision as based on a "scrivener's error" (in which parties reach an agreement, or meeting of the minds, but then make a mistake when memorializing that agreement, i.e., reducing it to written form), the opinion rejects and completely discards the district court's trial-based findings of fact in favor of its own factual finding: "We disagree with the district court's interpretation and conclude that there was no prior agreement between the parties." *Id*. at 258. The opinion offers three reasons: (1) there was no "binding contract" until the parties signed the final version; (2) the pre-agreement documents were not a binding agreement; and (3) the agreement contained an integration clause. *Id*. The first two "reasons" do not disprove a scrivener's error, they are universal circumstances underlying a scrivener's error: the parties reached a mutual understanding but, during the back-and-forth bickering over the written specifics, committed a mutual mistake that was erroneously included in the final, binding document.

Reliance on the integration clause is equally wrong. Once it is established (as the district court did here) that the parties were mistaken about the substantive terms of the document (i.e., the important parts), the only reasonable corollary is that those same parties were equally mistaken about the integration clause. If this purported "reason" were valid, and the inclusion of a boilerplate integration clause necessarily overcomes any and all mutual mistakes in the formation of a contract (meeting of the minds), then the doctrine of mutual mistake would cease to exist.

Instead, "[i]t is widely agreed that oral testimony is admissible to prove fraud or misrepresentation, mistake or illegality. [And] [t]his exception to the parol evidence rule applies even if the testimony contradicts the terms of a completely integrated writing." 6 Peter Linzer, *Corbin on Contracts* § 25.20, at 277 (2010). As for Michigan law, parol evidence is generally not admissible to vary the terms of a contract which is clear, unambiguous, and fully integrated, but this "overlooks the prerequisite to the application of the parol evidence rule: there must be a finding that the parties intended the written instrument to be a complete expression of their agreement as to the matters covered." *NAG Enterprises, Inc. v. All State Indus., Inc.*, 285 N.W.2d 770, 771 (Mich. 1979). Thus, it is well settled that parties may submit parol evidence to prove that an agreement was the product of mistake. *Goldberg v. Cities Service Oil Co.*, 266 N.W. 321, 325 (Mich. 1936); *Scott v. Grow*, 3 N.W.2d 254, 258 (Mich. 1942) ("It is not necessary . . . [to show] that particular words were misunderstood. It is sufficient that the parties had agreed to accomplish a particular object by the instrument to be

executed, and that the instrument as executed is insufficient to effectuate their intention." (quoting 5 Williston on Contracts, Rev. Ed., § 1585)).

We were wrong in *Winget*, 602 Fed.Appx. at 257-59. The district court was right in *Winget*, 901 F.Supp.2d at 972. And this case should have ended with the determination that Winget and the Trust were one and the same, with the $50 million limitation applicable to both.

Instead, because we held that Winget and the Trust are separate entities and the Trust agreed to an unlimited guaranty, Chase has pursued litigation against the Trust in an effort to take assets that the Trust does not own, could not have pledged, and did not agree to pledge.

IV.

This brings us to the present appeal and the majority opinion, which confronts and decides certain needlessly complicated questions. These questions are "needlessly complicated" because our prior (incorrect) holding compels the majority to proceed from the flawed premise that Winget's revocable Trust is something other than an ordinary revocable trust.

Consider the "transfer" question-whether Winget "transferred" assets when he removed assets from his revocable Trust (i.e., revoked his revocable trust). *See* Maj. Op. § II.A. In any other case-every other case-this is a simple question with a simple answer: because this is a *revocable* trust, there was no transfer. Winget owned the assets, regardless of where he kept them. *See* M.C.L. § 556.128 ("When the grantor in a conveyance reserves to himself an unqualified power of revocation, he is thereafter deemed still to be the absolute owner of the estate conveyed, so far as the rights of his creditors and purchasers are concerned."). Winget's act of closing the Trust did not "dispose of or part with" any assets. The Michigan Uniform Fraudulent Transfers Act (MUFTA) defines "transfer" as: "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, *of disposing of or parting with* an asset or an interest in an asset." M.C.L. § 566.31(q) (emphasis added). Here, Winget owned the assets both before and after he closed the Trust. As a matter of Michigan trust law, Winget's movement of the assets out of his *revocable* Trust did not affect Chase's rights at all. *See* M.C.L. § 700.7506(1)(a) ("During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.").

It is only due to our faulty holding in *Winget*, 602 Fed.Appx. at 257-59-contrary to Michigan law, *see Mickam*, 849 F.Supp. at 523-that this revocable Trust is not a normal revocable trust, but is instead treated as a distinct legal entity that pledged to Chase the assets therein. This requires that the Trust-not Winget-own the assets,

inasmuch as the word "assets" involves ownership. *See*, *e.g.*, Merriam-Webster Online (offering a definition of "assets" as "the entire property of a person, association, corporation, or estate applicable or subject to the payment of debts"); Dictionary.com ("items or resources owned by a person, business, or government"). If the Trust does not own these items, then they would hardly qualify as the Trust's "assets."

The majority navigates this complication by proposing that "ownership is irrelevant" to the fraudulent transfer; the act of moving the assets beyond Chase's reach makes this a "transfer." If ownership mattered, and Winget owned the assets (unequivocally the situation under ordinary Michigan trust law), then Winget's act of closing the Trust did not transfer (dispose of or part with) any assets, *see* M.C.L. § 566.31(q). Therefore, the Trust entity must have disposed of or parted with the assets (by returning them from whence they came, namely, Winget's personal ownership and possession), thus moving them beyond Chase's reach. Of course, if this were an ordinary revocable trust, this movement of assets would not put them beyond Chase's reach.

The question of "fraudulent" is similarly convoluted. *See* Maj. Op. § II.B. Under ordinary trust law, the assets held in the Trust are entirely Winget's assets, so Chase's claim against the Trust would just fold back into a claim against Winget, whether Winget placed the assets in the Trust or not. *See* M.C.L. §§ 556.128 &700.7506(1)(a). Of course, Chase agreed to limit its recovery from Winget to $50 million. But, otherwise, Winget could not avoid Chase's claim by transferring assets to or from his Trust, and therefore could not commit a "fraudulent" transfer.

Our prior faulty opinion in *Winget*, 602 Fed.Appx. at 257-59, again complicates this by holding that the Trust is its own entity, and it owns the assets. The majority declares that the Trust is the "debtor," and finds that "the Trust was insolvent after the revocation," inasmuch as "its assets were zero." This presupposes that the Trust-not Winget-owned the assets; if Winget owned the assets and simply stored them in his revocable trust, then the "Trust's assets" were zero all along. Similarly, a finding that the Trust did not receive reasonably equivalent value in exchange for the revocation also presupposes that the Trust owned the assets. If the Trust "owned" nothing, then it *did* receive equivalent value. Namely, nothing. Of course, on this same reasoning, Winget received nothing when he placed his assets into the Trust, certainly unaware that he was "transferring ownership" and could not recover his assets from his revocable trust without paying equivalent value in exchange (i.e., buying his own property back from his own Trust).

On Winget's argument that as the settlor of a revocable trust he has a fundamental right revoke the trust at any time, the majority answers that his right is not unlimited: the Trust's contractual obligation to its creditor prevents the settlor from revoking the

revocable trust. Thus, as a practical matter, this means a trustee can convert a revocable trust into an irrevocable trust by entering a contract with a third-party, effectively making the third-party the trust beneficiary, and can do so, apparently, without the settlor's agreement or participation. In fact, the majority suggests that a settlor who removes his encumbered assets from his revocable trust does not just assume the obligations against those assets, *see* M.C.L. §§ 556.128 & 700.7506(1)(a), that settlor commits an intentional-interference-with-contract tort. That is far afield from ordinary trust law.

Finally, consider the taxes. *See* Maj. Op. at § III.A.2. Under ordinary trust principles, the settlor of a revocable trust pays any incurred taxes-a revocable trust does not even have a taxidentification number, much less a means of filing or paying taxes. Again, the basic principle of revocable trusts is that the trust does not own anything, it is just a place for the settlor to store his assets. Because the settlor owns the assets placed in the trust, the settlor pays the taxes. Again, considering this question under ordinary trust law, Winget-the settlor-owned the assets held in the trust, including the LLC distributions, so Winget was obliged to report the income on his personal income tax returns and was responsible for paying the taxes incurred by the LLCs.

The majority recognizes that "the typical rules for revocable trusts may not apply" and suggests that the Trust may have been responsible for paying its own taxes. As a practical matter, this would require the Trust (i.e., the trustee, Winget, I suppose) to formally convert the Trust to an irrevocable trust, to obtain a tax-identification number from the IRS, prepare and file a tax return, and pay the requisite taxes to the IRS. Of course, the IRS was expecting Winget-as the settlor of the revocable Trust-to pay the taxes, so this new undertaking might involve a filing amendment (reducing Winget's personal taxable income and, correspondingly, his tax liability), a refund of Winget's $79 million overpayment, or a repayment by the Trust to Winget for the taxes he erroneously paid on the Trust's behalf (perhaps with its own tax consequences).

All of this is merely to demonstrate, or emphasize, how very far we have ranged from ordinary trust law. And to submit that, along these lines, things are getting worse, not better.

V.

Our prior faulty opinion in *Winget*, 602 Fed.Appx. at 257-59, stated or necessarily implied three findings or conclusions that have served as premises for all of the judicial decisions that have followed: (1) the revocable Winget Trust is a separate legal entity, distinct from its settlor, Larry Winget; (2) the Trust entity-not the settlor, Winget-owns the assets held in the revocable Trust; and (3) the trustee of this Trust

entity (Winget) pledged the "Trust's assets" as an unlimited Guaranty on Chase's entire loan. I find all three to be legally unsound and factually untrue.

The majority's opinion, like other judicial opinions since *Winget*, 602 Fed.Appx. at 257-59, accepts these premises and ingeniously builds its analysis around them, leading to certain new propositions that will likely serve as premises for future judicial decisions: (1) the Trust's pledge of assets converted Winget's revocable trust to an irrevocable trust, forfeiting Winget's ownership and control of the assets (and eliminating his tax obligation); and (2) Winget's attempt to control his assets (i.e., revoke his revocable trust) under ordinary principles of revocable trusts was not only a fraudulent transfer, but possibly an intentional-interference-with-contract tort.

For all of my criticism here, I recognize that the majority here, like others before, has diligently and thoroughly built its analysis around the given premises to reach a justifiable and defensible conclusion. But I also recognize that, in so doing, with every successive judicial opinion in this case, or application of these opinions as precedent, we do further damage to trust law.

Rather than continue to craft new, and increasingly creative, proclamations about the law of revocable trusts, I would prefer to admit our mistake in *Winget*, 602 Fed.Appx. at 257-59, correct it, and apply plain and ordinary revocable-trust principles in a plain and ordinary way.

I believe that Judge Cohn was correct: "The Winget Trust for purposes of this case is no different than Larry Winget individually." *Winget*, 901 F.Supp.2d at 972. Therefore, the $50-million limitation applied to Winget and the Trust together, Winget has paid Chase that $50 million, and Chase has no further recourse against Winget (or the Trust) on the Guaranty.

Moreover, I believe that the Trust and Winget are not separate entities; the Trust, being a revocable trust, is just a place for Winget to put his assets and Winget had every right to fill it, change it, empty it, or close it however he saw fit. Winget owns all the assets, the Trust "owns" nothing. Winget's revocation of the revocable Trust was not a fraudulent transfer-indeed was not a transfer at all-nor was it an intentional-interference-with-contract tort. And Winget is personally liable for the taxes incurred by the Trust.

Given the importance of finality-and the majority's compelling defense of it, *see* Maj. Op. at § IV-I should concur. But in the perhaps vain hope that this small gesture might help restrain the opinions and holdings in this case to just this case, I will respectfully dissent.