THE RIGHTS OF THE DECEDENT'S CREDITORS

Presented By:
John A. Terrill, II, Esquire*
Heckscher, Teillon, Terrill & Sager, P.C.

Presented at:
2022 New England Fellows Institute
of The American College of Trust and Estate Counsel

September 15, 2022
Program 5, Newton, MA

*Drafted with assistance from the author's colleague, Ryan J. Ahrens, Esquire

Printed September 6, 2022

I. INTRODUCTION AND BACKGROUND

An important, and sometimes neglected, part of the estate planning process includes a focus on the impact of the planning with respect to the rights of a client's present and future creditors. This focus on what has become referred to as "asset protection planning" has continued to expand, as reflected in the development of legislative attempts to create safe harbor solutions such as self-settled asset protection trusts,[1] changes to the bankruptcy laws to reduce the effectiveness of certain techniques[2] and the expanded focus of professional organizations on asset protection planning as a recognized specialty and focus area.[3]

While asset protection planning continues to grow in importance, it is equally important for trust and estate lawyers to understand and anticipate the impact of creditor claims on the estates of deceased clients. Often, this requires the trust and estate lawyer to have a working knowledge of the pre-death rights of a decedent's creditors as the rules governing creditors' rights may change as a result of the debtor's death and certain rights can be protected, or lost, in the estate planning process.

The purpose of this outline is to highlight some of these issues.

II. A GENERAL UNDERSTANDING OF CREDITORS' RIGHTS DURING THE DEBTOR'S LIFETIME

This section provides an overview of the rights of creditors to different categories of assets, including, when relevant, the interplay between state law and federal bankruptcy law. The discussion below is limited to general summaries regarding these concepts, most of which, if not all, could be discussed in full-length outlines of their own.

a. <u>Overview</u>

The availability of assets for attachment (prior to judgment) or execution (subsequent to judgment) during the owner's lifetime is generally governed by two factors, ownership and category. The concept of domicile, which is not discussed in detail this outline, also may be relevant in determining which state law protections a debtor may seek to assert.

i. **Ownership.** The ownership of assets is most commonly a matter of registration or title. Some registration is a matter of public record, such as title to real estate, an automobile, boat or other vehicle. Other registration is more private, such as bank accounts or securities. Certain assets, such as cash and most tangible personal property, are unregistered, which does not mean that such property is not owned by anyone but instead that proof of ownership is more complex.

ii. **Category.** For purposes of availability for creditors, it is important to define a particular asset's category because certain categories of assets enjoy a special status *vis-a-vis* attachment or execution.

b. <u>Personally-Owned Assets</u>

i. **In General.** The class of assets most readily available for attachment or execution is that owned by an individual in his or her own name and not in a special category. These are the assets that an estate planner will think of as probate assets. They are titled and registered in the individual's own name and they would pass under the individual's will or according to the intestacy laws. Bank accounts, certificates of deposit, brokerage accounts, registered or bearer securities, real estate, vehicles, tangible personal property and the like are all potentially attachable if registered or titled in the debtor's sole name and otherwise unencumbered. In virtually every estate planning engagement, the client's personal financial statement will reflect sole ownership of unencumbered assets. This is also true of most married couples; either or both of the spouses typically owns assets in his or her sole name (e.g., gifts from family members, interests in closely-held businesses, assets brought into the marriage).

ii. **Exempt Categories.** The laws of every state and the District of Columbia identify certain specific assets that are exempt from attachment or execution by a judgment creditor.[4] These exemptions are relevant when a claim is made against the individual or when the individual contemplates bankruptcy. Under the Bankruptcy Code, a debtor must reside in a jurisdiction for at least 730 days (approximately two years) to take advantage of any state law bankruptcy exemption available there. If the debtor has moved from one state to another state within the 730-day look back period, then the debtor's domicile for purposes of available state exemptions will be based on the 180-day period (or longer portion thereof) immediately preceding the 730-day look back period.[5]

Alternatively, the debtor can elect to apply the federal exemptions under the Bankruptcy Code.[6] However, a state's legislature may "opt out" of the federal bankruptcy exemptions and substitute the state's own exemptions, so that there is no choice in the matter by the debtor.[7]

In the case of Pennsylvania, a fairly typical jurisdiction, the state exemptions are set forth in title 42, sections 8121 through 8127 of the Pennsylvania Consolidated Statutes.[8] Section 8122 prohibits a debtor from waiving the statutory exemptions from attachment by express or implied contract.[9] The specific exemptions are:

a. Property of the judgment debtor up to the value of $300.[10]

b. Certain personal property, including wearing apparel, bibles, school books, sewing machines and uniforms.[11]

c. Certain specified state retirement and pension plans.[12]

d. Any pension or annuity paid to a retired employee under a plan or contract that prohibits assignment.[13]

e. Any self-employed person's retirement or annuity fund to the extent the contributions were deductible and were made while solvent.[14]

f. Most retirement or annuity funds described in Sections 401, 403, 409 and 530 of the Internal Revenue Code[15] (such as IRAs, qualified pension and profit sharing plans and the like[16]), including appreciation and income earned in the fund, provided, however, that (a) amounts contributed by the debtor during the year preceding filing bankruptcy; (b) amounts in excess of $15,000 contributed to an IRA within any one-year period (other than by rollover); and (c) amounts deemed to be fraudulent transfers are not exempt.[17] A number of bankruptcy courts have determined, in applying the IRA laws of several states (not including Pennsylvania) that inherited IRAs are not protected by those states' statutes in bankruptcy.[18]

The Pennsylvania statutory exemption of certain IRAs is incorporated, together with other exemption provisions, into the bankruptcy proceeding of a Pennsylvania bankrupt who elects state law exemptions as opposed to the list of federal exemptions contained in the Bankruptcy Act. The bankrupt individual in *In re Davis*[19] had an IRA and elected federal, not Pennsylvania, exemptions. He attempted to exempt his IRA under a federal exemption pertaining to pension plans and the Bankruptcy Court, *sua sponte*, decided that the IRA was exempt under a wholly separate provision exempting spendthrift trusts (the District Court subsequently affirmed this decision). The Third Circuit's opinion is an interesting analysis of whether or not an IRA is a trust (one condition to the application of the spendthrift trust exemption).[20] Its most important lesson has to do with the sensible choice of federal versus state law exemptions.

In April 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act (the "2005 Bankruptcy Act")[21] adopted significant modifications to bankruptcy law. The 2005 Bankruptcy Act includes special rules for the treatment of IRAs in bankruptcy; the rules apply whether the bankrupt elects federal or state exemptions. The exemption is generally limited to $1 million in an IRA exclusive of rollover contributions (which continue to be wholly exempt), unless the Bankruptcy Court increases the limit "in the interests of justice."[22]

In 2014, the United States Supreme Court clarified in *Clark v. Rameker*,[23] that inherited IRAs, in contrast to IRAs established and held by the owner who originally deposited the funds, are not "retirement funds" for purposes of the federal exemptions under the Bankruptcy Act.[24]

It is important to note that *Clark* was decided based on the federal exemptions. Debtors who are domiciled in states like Florida, Ohio, Missouri, Alaska and Texas, which have statutory creditor protection for inherited IRAs,[25] will not be impacted by the decision in *Clark* if they qualify to file for bankruptcy in their state of domicile (by having been domiciled there for 730 days before filing a bankruptcy petition) and they elect out into the state law exemptions. Debtors who live in states that do not have statutes that protect inherited IRAs, or debtors who are domiciled in states that do have such statutes but have not lived there for 730 days and must file for bankruptcy based upon a previous state of domicile, will not be able to exempt inherited IRAs as qualified "retirement funds" as a result of *Clark*.

g. The Pennsylvania statute governing the creation and operation of Section 529 College Savings Accounts, provides specific protection of Pennsylvania plans from the creditors of the account owner and the beneficiary of the plan.[26] Other statutes reach similar results.[27]

h. Certain insurance benefits, including workers' compensation, small annuities, group life insurance, annuity, and life insurance policies payable to spouses, children and dependent relatives, accident, or disability insurance and life insurance cash values.[28]

i. Tangible personal property exhibited at international exhibitions.[29]

j. Tangible personal property in the custody of common carriers.[30]

k. Wages salaries and commissions of individuals while in the hands of the employer.[31]

iii. **Exemptions in Other Jurisdictions.** Every American jurisdiction has similar statutory exemptions serving similar purposes. Some of these are reflected in the footnotes: Delaware,[32] Maryland[33], New Jersey,[34] New York[35] and the District of Columbia[36]

iv. **Exception to Exemptions.** These exemptions may not apply to certain types of creditors whose claims are given special statutory protection. For example, wages, salaries and commissions may not be exempt from attachment for support judgments and restitution to crime victims.

c. **Tenancy by the Entireties**

i. **In General.** Property held by joint tenants or by tenants in common is liable to attachment and levy by creditors in whole or in part, depending on applicable local law. Assets owned by spouses as tenants by the entireties, however, are to a greater or lesser extent protected from the separate creditors of either spouse in a number of jurisdictions. Not all jurisdictions recognize ownership by tenancy by the entireties, and there are variations of application among those jurisdictions that do.

Tenancy by the entireties is a form of ownership available only between spouses. A creature of the common law, it assumes a notional entity, the marital union, owns the property. As a member of the union, each spouse owns an undivided half interest in the whole, possessing a present right to use the property and a survivorship right in the property. The entireties tenancy can terminate in the following ways: (1) Either spouse can convey his or her interest to the other spouse, making the recipient the sole owner; (2) both spouses can agree to terminate the entireties estate, dividing the property as they agree; (3) upon the death of the first spouse, the survivor becomes the sole owner; and (4) upon divorce, a tenancy by the entireties is commonly converted into a tenancy in common by operation of law, with each spouse owning a one-half interest. Significantly, however, in many cases creditors of one spouse may not force sale and/or partition of entireties property. Joint creditors of both spouses, however, can enforce payment out of assets held as entireties property.

Currently, twenty-four states and the District of Columbia recognize property held as tenancies by the entireties.[37] In New England, only Rhode Island, Massachusetts and Vermont recognize this form of ownership.[38] In some jurisdictions, such as Pennsylvania,[39] Delaware,[40] North Carolina,[41] Virginia[42] and Florida,[43] entireties assets are wholly safe from the claims of creditors and the creditors may literally do nothing to impose on the assets. Some of those jurisdictions, however, permit liens against a debtor spouse's interest in the property, which is subject to the non-debtor spouse's survivorship interest. Moreover, a creditor who can establish that his debtor transferred assets to a tenancy by the entireties with intent to defraud, may void the transaction and/or levy upon such assets.[44] In New York, property held by joint tenants or by tenants in common is liable to attachment by creditors in New York, but assets owned by husband and wife as tenants by the entireties are not reachable by the creditors of either.[45]

Nine states (including North Carolina[46] and Oregon[47]) limit the tenancy to real property (although in some cases, e.g., Indiana, traceable proceeds of sale of such property also enjoy the protection[48]). New York only permits real property and, in some cases, shares of stock of a cooperative apartment corporation, to be held in tenancy by the entireties.[49] In a few cases (e.g., Illinois[50] and Massachusetts[51]), the protection from creditors is further restricted to the couple's principal residence, i.e., it amounts to little more than an extension of the homestead exemption.

Some states (e.g., New Jersey[52]) also permit creditors to obtain liens against the debtor spouse's usufruct (use and enjoyment) and survivorship interests. Because such a creditor can at most obtain the same interest as the debtor spouse, those liens remain subject to the non-debtor spouse's survivorship interest, which means that the non-debtor spouse may retain possession of the property, and, if the debtor spouse dies first, the liens may be extinguished.[53] However, "it is within the equitable discretion of the court to deny partition to a purchaser of the [debtor spouse's] interest, leaving the creditor to resort to some other remedy."[54]

In most (but not all) jurisdictions with broader protection (e.g., Alaska,[55] Delaware,[56] District of Columbia,[57] Florida,[58] Maryland,[59] Missouri,[60] Pennsylvania,[61] and Tennessee[62] (but not Virginia[63])), real and personal property titled in the couple's joint names may be presumed to be held as a tenancy by the entireties. This presumption also exists in certain jurisdictions that limit tenancy by the entireties to real property (e.g. North Carolina[64]).

Note that under conflict of laws principles, title to movable property is established as of the time of the conveyance. Thus, moveable property (i.e., chattels, intangibles) acquired by a couple when they are domiciled in a state that favors tenancies by the entirety in personal property may continue to enjoy protection against the separate creditors of one spouse even if the couple subsequently moves to a state that does not recognize tenancy by the entireties.[65]

d. **Living Trusts and Self-Settled Irrevocable Trusts**

i. **In General.** In Pennsylvania and elsewhere it is quite common for an individual to transfer his or her assets to himself or another as trustee, with the direction that the trustee hold the assets in a fiduciary capacity and distribute the income and principal in accordance with the terms of the trust. This is often done for estate planning reasons (i.e., the avoidance of probate or to secure the benefits of someone else managing assets in a responsible way). Such trusts can contain a variety of assets, can be revocable or irrevocable and can have many different characteristics. Generally, however, such transfers have no pre-death benefit *vis-a-vis* creditors.

ii. **Spendthrift Trusts.** Most states deny creditor protection to self-settled spendthrift trusts because it is against public policy for an individual to be able to have access to assets while protecting them from proper creditors. Traditionally, this rule has been upheld pursuant to case law, not statutory law.[66] This rule has been codified as part of the Uniform Trust Code ("UTC").[67] In New England, some version of the UTC has been adopted by every state (Maine, New Hampshire, Vermont, Massachusetts and Connecticut) except Rhode Island. Many states have adopted one version or another of the Uniform Trust Code and for practitioners in those states, care must be taken to consider the impact of the applicable language. In particular, §505 of the Uniform Trust Code provides as follows:

> (a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:
>
> (1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.
>
> (2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. 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.
>
> (3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances.[68]

This statute should settle once and for all in jurisdictions adopting this part of the UTC the issue of whether a living trust provides creditor protection during the settlor's lifetime. Except to the extent that the settlor of an irrevocable trust is specifically limited as to the amount that the trustee may distribute to him or her (e.g. a trust providing that discretionary distributions to the settlor may not exceed one-half of the trust principal), all revocable and virtually all irrevocable trusts in which the settlor retains a right to distributions will be fully available for attachment and execution by the settlor's creditors during his or her lifetime.

In other jurisdictions, the rule set forth above appears either by statute or by case law.[69]

iii. **Domestic Protection Asset Trusts.** Eighteen American jurisdictions (including Indiana, effective as of July 1, 2019) have adopted some form of self-settled asset protection vehicle over the past two decades, including New Hampshire and Rode Island. While each jurisdiction has its own peculiarities, there are common threads to most.

In creating a domestic protection asset trust, it is crucial to adhere to the requirements set forth in the state statute under which the trust is created. Certain bankruptcy law considerations also must be addressed. Domestic protection asset trusts are not discussed in more detail in this outline.

e. **<u>Trusts Created by Others</u>.**

i. **In General.** It is generally the law of every United States jurisdiction that a creditor's rights to reach assets owned by a trust created not by the debtor but by someone else (often referred to as a "third party trust") are very circumscribed. For example, until 2006 when Pennsylvania adopted the Uniform Trust Code, the extent to which a creditor could reach the beneficiary's interest in a trust governed by Pennsylvania law and containing a spendthrift provision was based in part on a provision of the Probate Estate and Fiduciary Code (20 Pa. C.S. §§ 101-8815) and in part on case law.[70] As a result of the enactment of the Uniform Trust Code ("UTC"), Pennsylvania and many other jurisdictions now have a fairly clear statutory roadmap controlling the rights of a beneficiary's creditors to the beneficiary's interest in the trust.

ii. **Uniform Trust Code.** The UTC contains several provisions which bear on this analysis (§§ 501-507).[71]

1. Section 501 of the UTC provides that in the absence of a spendthrift provision, a beneficiary's creditors and assignees have very broad rights to access assets in the trust.[72]

2. Section 502 of the UTC further elaborates on the requirements of a spendthrift clause in order for it to be binding, providing, in part, that "[a] spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest. While subparagraph (b) of Section 502 appears to reduce the apparent strictness of subparagraph (a) (which suggests that specific terms must be included in the trust document for a spendthrift provision to be operative), it would seem sensible for every trust to contain words of restriction as suggested by subparagraph (a) in an abundance of caution.[73]

3. Section 503 of the UTC provides a list of exceptions to the general protection provided by a spendthrift provision, including, among others, child support and alimony. These exceptions to the protection otherwise afforded by a spendthrift provision are mostly similar to the exceptions under prior law. However, the language in §503(b)(3) is new and reflects a decision to permit a beneficiary's counsel fees to be paid from an otherwise spendthrift-protected trust.[74]

4. Section 504 of the UTC expands the potential rights of certain creditors even with regard to discretionary trusts but only if the creditor (a child, a spouse or former spouse or another person with a court-ordered support right) can demonstrate that the trustee has not complied with a standard of distribution or abused a discretion.[75]

5. Section 505 of the UTC is a wholly new provision in the law and sets forth when the creditors of a settlor and creditors of holders of powers of withdrawal may access the assets held trust created by the settlor. For example, there is no limit on the class of creditors who may reach assets subject to a power of withdrawal, even after lapse or waiver. Understanding the reach of this new provision requires an understanding of the definition of a power of withdrawal. For example, pursuant to § 505(b)(2), so-called "5 and 5" powers do not give rise to creditor rights when waived or lapsed. However, if a settlor's child has the right to withdraw 1/3 of the principal of a trust at any time after reaching age twenty-five, the child's assignees and all of the child's creditors have the same rights to reach the principal as would a creditor of the settlor of a revocable trust once the child reaches age twenty-five.[76]

6. Finally, Section 506 of the UTC that provides generally that defines "mandatory distribution." This is a wholly new provision in the law which may or may not reflect what a court might have done in certain circumstances. If, for example, a trust instrument provides that the a trust terminates when the settlor's child reaches age thirty-five, the child's creditors may reach the principal if the trustee does not distribute it within a reasonable time after that date. Note that this does not apply to distributions pursuant to a standard; the creditor in those situations is relegated to §504 and even then, only certain creditors have any rights.[77]

iii. **Other jurisdictions.** All American jurisdictions have laws pertaining to third party trusts and the rights of creditors of beneficiaries. Some have the Uniform Trust Code in one version or another. Some rely on statutory law and some on case law.[78]

III. A GENERAL UNDERSTANDING OF CREDITORS' RIGHTS FOLLOWING THE DEBTOR'S DEATH

Following a decedent's death, in most but not all cases an "estate" comes into existence which becomes, in effect, the clearing house for the disposition of the decedent's assets. To the extent that the decedent owned assets in his or her own name, they are assets of the estate subject to the applicable state and federal laws governing the rights of creditors, the payment of expenses of administration, and the disposition to those entitled to what is left under applicable law.

This section provides an overview of Pennsylvania law of creditors' rights following a debtor's death. A more general discussion follows for corresponding rules for Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. In addition, the discussions for these other jurisdictions focus primarily on creditors rights as they relate to estates, not trusts.

a. **Overview**

As during life, assets of a decedent held that would be subject to creditors during his or her life generally are subject to his or her creditors for at least some period time upon death. While it is generally accurate to say that pre-death creditors' rights (and exemption law) continues following death, this is not always the case (for example, life insurance proceeds made payable to the executor or the estate may lose their exemption). As a result, an important duty of an executor/personal representative or administrator of an estate is taking steps to pay proper debts an at the same time to limit creditor claims that could otherwise reduce or deplete the assets of an estate. Although the executor is barred from shielding "unprotected" estate assets from known creditors with valid claims, timely publication (in certain jurisdictions, at least) of notice of the decedent's death can cut off claims from unknown creditors once a certain period of time has passed since publication. An executor who distributes estate assets without properly cutting off creditor claims to assets can be subject to personal liability for the assets that otherwise would have been used to satisfy such claims.

The rest of this Section III is divided into three primary subsections: subsection b sets forth the notice requirements in Connecticut, Maine, Massachusetts, New Hampshire, Pennsylvania, Rhode Island and Vermont as they relate to limiting creditor claims against an estate. This subsection also discusses the IRS's role as a "super-creditor" that is not bound by state law limiting the claims of creditors generally, as well as deductions for creditor claims on a decedent's federal estate tax return. Subsection c sets forth the rules of abatement in those same jurisdictions with respect to insolvent estates, including the level of priority for IRS claims. Finally, subsection d briefly sets forth certain estate planning considerations with respect to the interplay of creditors' rights and the manner in which assets pass to a decedent's heirs/beneficiaries (i.e. wills vs. revocable trusts vs. intestacy vs. "transfer on death" designations).

b. **Notice to Limit Claims of Creditors and Executor/Trustee Liability**

i. **Pennsylvania.**

Under Pennsylvania law, persons to whom or organizations to which an estate owes or may owe money have one year from the estate's "first complete advertisement" of the grant of Letters Testamentary to notify the executor of a claim.

Pennsylvania law addresses the rights of claimants against the executor or beneficiaries of an estate in two circumstances: (1) "at risk" distributions made without the filing, audit or confirmation of an account, and (2) distributions made pursuant to a court's confirmation of an estate account. Claimants' rights against the estate are limited in both circumstances, but pursuant to different sets of rules.

Pennsylvania law permits an executor to publish notice of the grant of Letters Testamentary to the executor.[79] Advertising the grant of Letters is a necessary step in shielding an estate's executor and beneficiaries from future liability if the executor wishes to wrap up the estate informally by making "at risk" distributions, and it is also a requirement before filing an account with the Court.

Notice of the grant of Letters is directed to be published "immediately after the grant of letters," and must be published once a week for three successive weeks.[80] The "first complete advertisement" of the grant of Letters means, in the case of a county that has a legal publication, "when [the grant of letters] has been advertised, on at least one occasion, in both the newspaper and the legal publication."[81] If the county in question does not have a legal publication, then "first complete advertisement" means "the first of the three times that the grant of letters is advertised in a newspaper."[82] The published notice must contain;

(i) the name and address of the executor;

(ii) a request that all persons having a claim against the estate make the claims known to the executor or his or her attorney, and

(iii) a request that all persons indebted to the decedent to make payment to the executor without delay.[83]

Pennsylvania law further provides that if the executor makes an "at risk" distribution (which is a distribution made without prior court approval), and as a result there are insufficient assets to satisfy a creditor's claim, a claimant will nevertheless have no claim against the executor "unless the claim of such claimant is known to the personal representative *within one year after the first complete advertisement of the grant of letters* to such personal representative or thereafter but prior to such distribution."[84]

Accordingly, the only scenarios in which a creditor can hold the executor personally responsible for claim against the estate if there are no remaining assets in the estate to satisfy the claim are when: (1) the executor makes an at risk distribution <u>before</u> the one year advertising anniversary (regardless of whether the executor is aware of the claim); (2) the claimant has informed the executor of the claim <u>before</u> the first anniversary of the complete advertising and the executor makes an at risk distribution <u>after</u> the one year advertising anniversary; and (3) the claimant informs the executor of the claim <u>after</u> the one year anniversary of the complete advertising and assets are still held by the estate, and the executor thereafter makes an at risk distribution before the claim is resolved.

Rights of claimants against property received by the beneficiaries of an estate as an "at risk" distribution depends on the character of the property. With respect to personal property (which, in the context of this part of Pennsylvania law, includes <u>all</u> property that is not real estate), a claimant shall have no claim to the distributed property "unless the claim of such claimant is known to the personal representative within one year after the first complete advertisement of the grant of letters or thereafter but prior to such distribution."[85] This is the same rule as the rule that applies to executor liability for at risk distributions.

With respect to real property, claimants shall have no claim to distributed real property unless such claimant, within one year after the decedent's death, files a written notice of his claim with the clerk or the relevant division of the Court of Common Pleas. Such claim against real property shall expire at the end of five years after the decedent's death, unless within that time the personal representative files an account or the claimant files a petition to compel an accounting."[86]

In all events, if one year has passed since the first complete advertising of the grant of letters and the executors make "at risk" distributions thereafter, then a claimant (other than the US government, as addressed below) that brings a claim after such distribution is made cannot seek to hold the executors (or beneficiaries) liable for such claim.

If instead of settling an estate informally the executor files an account with the court with proper notice to known creditors, then the confirmation of such estate account cuts off the claims of any creditors of the estate. Pennsylvania law provides that "[a] personal representative shall be relieved of liability with respect *to all real and personal estate* distributed in conformity with a decree of court or in accordance with rule of court after confirmation of an account."[87]

Creditors making a claim against a Pennsylvania estate must do so pursuant to written notices or an act equivalent to written notice (such as filing to compel an account or bring an action against the executor).[88]

Another section of the PEF Code reaffirms this rule, providing that "[i]f any claimant whose claim is not reported to the court by the personal representative as an admitted claim shall fail to present it at the call for audit or confirmation, he shall not be entitled to receive any share of the real and personal estate distributed pursuant to such audit or confirmation, whether the estate of the decedent be solvent or insolvent."[89]

A similar set of rules applies with respect to the trustee of an *inter vivos* trust that holds assets of a Pennsylvania decedent. The rules applicable to trustees piggy-back on the rules applicable to executors, with the trustee of a living trust only obligated to act if the executor has not done so.

Pennsylvania's Uniform Trust Act (which is based on but not identical to the Uniform Trust Code), provides as a general matter that "[c]reditors of the settlor of a revocable trust shall have the same rights against the trust assets determined immediately before the settlor's death as they have against the settlor's estate, *but the assets of the settlor's estate shall be applied first toward satisfaction of the creditors' claims*."[90] This subsection further clarifies that any assets that would otherwise been exempt from the settlor's creditors do not lose such protection because they are held in trust.[91]

Creditors wishing to make a claim against assets held in a living trust are obligated to make a written claim to the settlor's executor, or, if none (so, if probate of the will is not necessary), to notify the trustee in the same manner.[92] If an executor is serving, then the executor must notify the trustee within twenty days of receiving notice from the creditor.[93]

A trustee's duty to advertise the settlor's death depends on whether an executor is serving. If there is an executor, then advertising is discretionary.[94] If no executor is appointed, advertisement shall occur within 90 days after the settlor's death and be done in the same manner as would be required of the advertising for the settlor's estate provided that the advertising in the case of a living trust must include "the fact of the trust's existence . . . [and] the trustee's name address."[95]

The trustee of a revocable trust must inform the executor of the settlor's estate of the existence of the settlor's trust.[96] So long as the trustee has done so, the executor is obligated to "promptly send copies of the proofs of [the] advertisement to the trustee."[97] If, in turn, the executor of the settlor's estate receives notice of a creditor's claim before the one-year advertisement of the "first complete advertisement" of the grant of Letters Testamentary and fails to notify the trustee of such claim will be personally liable to the extent "the creditor's interest is prejudiced thereby."[98]

Like the executor of an estate, a trustee may make distributions of trust property without court approval and without the risk of personal liability provided that the distribution occur 13 months after the "first complete advertisement" of the grant of letters by the executor, or, if there is no executor serving, after the "first complete advertisement" by the trustee.[99]

ii. **Connecticut.** *The Author thanks Laura A. Schuyler, Esq. & Danielle Ferrucci, Esq. of Shipman & Goodwin LLP for their contribution of this section.*

In Connecticut, the probate court is required to publish notice by newspaper within fourteen days of the first appointment of a fiduciary for an estate to inform all persons of the decedent's death, the name of the fiduciary, that any person with a claim against the decedent's estate should promptly present it to the fiduciary at the address listed, and that failure to do so could result in the loss of the creditor's right to recover on such claim.[100] Creditors then have 150 days (about <u>five months</u>) from the date of the fiduciary's appointment to present their claims to the fiduciary.[101]

In addition, a fiduciary may choose to provide notice to any anticipated creditors of their right to present a claim by a specified date (which cannot be fewer than ninety days from the date of the notice).[102] Any person so notified will be barred from presenting a claim outside of that timeframe and from recovering on such claim from the fiduciary, the decedent's estate, or any beneficiary of the estate.

Claims must be presented to the fiduciary in writing by personal delivery or by regular, certified, or registered mail, postage prepaid.[103] If the fiduciary resides outside of Connecticut, the creditor may present the claim by filing it with the probate court having jurisdiction over the estate.[104] The fiduciary may require the creditor to provide proof by affidavit that the claim is "justly due, that all payments thereon, if any, have been credited and that he knows of no offsets or evidence of indebtedness and holds no security, except as specifically described in the affidavit."[105]

Upon being presented with a claim, the fiduciary must assess its validity and notify the creditor of the fiduciary's decision to reject or allow the claim, in whole or in part, within ninety days of the receipt of the claim by the fiduciary (in the case of personal delivery), the mailing of the claim to the fiduciary, or the receipt of the claim by the probate court, as the case may be.[106] If the fiduciary has not acted upon the claim within ninety days, the creditor may submit an additional notice to the fiduciary, demanding that the fiduciary respond.[107] If the fiduciary fails to act within thirty days of this subsequent notice, the claim will be deemed to have been rejected.[108]

If the claim is rejected, the creditor will be barred from recovering on the rejected claim unless the creditor commences suit within 120 days (about four months) of the rejection or requests within thirty days that the probate court hear and decide the claim or refer the claim to a probate magistrate or attorney probate referee to hear the claim.[109]

Once the 150-day claims period expires, the fiduciary has sixty days to file a Return and List of Claims (Probate Court Form PC-237), listing all claims presented to the fiduciary during the claims period and whether the fiduciary rejected or allowed the claims, in whole or in part.[110]

A creditor who fails to present a claim within the initial 150-day claims period[111] (and who has not received the optional notice from the fiduciary described above) is not entirely without recourse. The fiduciary would not be held personally liable to the extent the fiduciary had already paid or distributed assets of the estate in good faith prior to the fiduciary's knowledge of such late-presented claim.[112] However, a beneficiary of the estate may be held liable for a proportionate share of the claim based on the value received by the beneficiary.[113] Nevertheless, no claim may be presented and no action may be brought against the fiduciary, the estate, or any creditor or beneficiary of the estate beyond the earlier of (1) two years from the decedent's death or (2) the expiration of the statute of limitations applicable to such claim.

iii. **Maine.** *The Author thanks Catherine Haynes Fenton, Esq., of Jones, Kuriloff & Sargent, LLC for her contribution to this section.*

In Maine, creditor claims are governed by sections 3-801 through 3-818 of the Maine Probate Code, Title 18-C of the Maine Revised Statutes.[114]

A personal representative is required to publish a notice to creditors announcing the appointment (with the address of the personal representative) in a newspaper of general circulation in the county in which the decedent was domiciled at the time of his death, although a personal representative is not liable to a creditor for failure to provide notice.[115] The personal representative may also provide actual notice by mail to a creditor, which should notify the creditor that they must present any claims within <u>four months</u> of the publication of notice, or within <u>60 days</u> of mailing of the notice, whichever is <u>later</u>, or be forever barred.[116] With respect to claims arising before death, limitations on the presentation of claims against the estate of the decedent are either nine months after the death of the decedent, or four months from the first publication of notice, whichever is earlier.[117]

If a claim is barred by a nonclaim statute in the state of the decedent's domicile, it is also barred in Maine.[118] Claims arising after the death of the decedent are barred within four months of first publication or within four months after the claim arises (or performance of the personal representative was due).[119] Exceptions include secured claims, claims covered by liability insurance up to the amount of the insurance, collection of compensation for services rendered to the estate and/or reimbursement for advances made by the personal representative, attorney, or accountant for the estate or the personal representative in that capacity, and Medicaid claims.[120]

Statutes of limitations are tolled for a period of 4 months after the decedent's death, but then resume as to claims not barred by other laws.[121] Presentation of a claim in the estate is sufficient to "commence a proceeding" for purposes of a statute of limitation.[122]

The personal representative may notify a claimant that its claim has been barred.[123] If so, the claimant must within sixty days of the mailing of the notice of disallowance (or partial disallowance) file a petition for allowance or comment a proceeding on the claim or else the claim is permanently barred.[124] In other actions against the decedent, the personal representative in an estate that is solvent may waive the defense of limitations with the consent of "all successors whose interests would be affected."[125] Without such a waiver, no claim barred by a statute of limitations at the time of the decedent's death may be allowed or paid.[126]

A creditor may present claims by written notice to the personal representative, and by filing the claim with the probate court.[127] The claim must be adequately described, including due date, any contingency on the claim, any secured property claimed, though the failure to include those items does not per se invalidate the claims.[128] The creditor may commence an action to collect on the claim in any court with jurisdiction, so long as it complies with the limitations periods in the probate code.[129] If an estate has not been opened with the probate court and a creditor wants to make a claim, the creditor may file a written statement of claim and demand for notice with the court, which will preserve the claim, and upon the appointment of a personal representative, the time periods for disallowance and filing an action on a claim apply.[130]

The personal representative may change the status of a claim allowed or disallowed up to the period of time when the claim is barred or deemed allowed.[131] The personal representative may change a disallowance to an allowance for a barred claim only if the estate is solvent and all successors whose interests would be affected consent.[132] If a petition is presented to the court to allow a claim, so long as the limitations period does not bar it, the court may allow a claim in whole or in part, and notice must be given to the personal representative, the claimant, and other persons interested in the estate as ordered by the court.[133] If another court has entered judgment against a personal representative to enforce a claim against the decedent's estate, this acts as an allowance of the claim.[134] Statutory interest is permitted on an allowed claim for the period starting 60 days after the time for original presentation of the claim has expired, unless there is a contract with a different provision, or if the estate is insolvent.[135]

Once the limitations period has expired, the personal representative is required to first make provision for the homestead, family, and support allowances under the statute, as well as claims presented that are not yet finally disallowed (e.g., claims under appeal), and any unbarred claims that may yet be presented.[136] After making this provision, the personal representative may then proceed to pay the claims allowed against the estate in the order of priority set forth in the statute. The personal representative may compromise any claims if it is in the best interest of the estate.[137]

The personal representative may be held personally liable only under certain circumstances; for example, if the personal representative pays claims before the period of limitation and another claimant is injured due to the payment, or if the personal representative was negligent or willfully deprives the injured claimant of priority. [138] The personal representative may also be personally liable if he or she fails to reveal the fiduciary capacity under which he or she is acting, and if personally at fault for obligations arising from control of the estate or for torts committed in the course of administration. Damages are limited to actual damage, such as the value of lost property.[139]

Secured claims are paid based on the amount allowed if the estate retains the property secured; otherwise, based on the amount allowed less the value of the security, whether or not the creditor has foreclosed.[140] Claims not due and contingent or unliquidated claims may either be paid based on a settlement amount between the personal representative and the creditor, or by providing the creditor with some security from the distributee(s).[141] A personal representative may also deduct the value of any counterclaim the estate has against a claimant.[142]

In an ancillary estate, the personal representative is required to honor all allowances to the extent possible, whether they originated in Maine or in the originating state.[143] However, local claims should be paid out of local assets, subject to the priorities established by the statute.[144]

If an estate has a value of less than $40,000 (indexed for inflation), the personal representative or heirs may elect to proceed by affidavit. In this case, publication or notice is not required.[145]

iv. **Massachusetts.** *The Author thanks Tracy A. Craig, Esq. of Mirick, O'Connell, DeMallie & Lougee, LLP for her contribution of this section.*

Generally, creditors have <u>one year</u> after the date of death of the decedent to initiate a claim for payment.[146] The creditor must (1) file the claim in a court of appropriate jurisdiction; and (2) give the Personal Representative notice of the claim.[147] The creditor must initiate the proceeding against the Personal Representative in any court where the Personal Representative may be subject to jurisdiction, to obtain payment of its claims against the estate, and the proceeding must occur within the time limited for presenting a claim.[148] The notice must state the name of the estate, the name and address of the creditor, the amount of the claim, and the court in which the action against the estate has been brought.[149] No presentation of a claim is required in regard to a matter in proceedings against the decedent which was pending at the time of his/her death.[150] If a Special Personal Representative is serving, a claim that is brought within the one year deadline satisfies the timing requirement, but the court action is stayed until the Personal Representative is appointed.[151] Similarly, a creditor must file a claim in the same fashion against the trustee of a revocable trust.[152]

Additionally, if a creditor has missed its one-year window, it may file a complaint in equity with the Supreme Judicial Court and a notice in the proper registry of probate, so long as the reason for missing the deadline was not due to its own neglect.[153] However, no proceeding to enforce a claim against the estate of a decedent or a decedent's successors may be revived or commenced before the appointment of a personal representative.[154] However, the court, on petition of creditors, may appoint any qualified person.[155]

The Personal Representative has no duty to provide notice to essentially any creditor about the debtor's death with the exception of the Massachusetts Division of Medical Assistance (the "Division"). *See Jackson v. Arooth*, 359 Mass. 721, 723-24 (1971). If the decedent received medical assistance from the Division because he/she was either over 55 years old or receiving care as an inpatient in a nursing facility or other medical institution, the Personal Representative must provide notice to the Division.[156] The Division may present claims against a decedent's estate as follows: (1) within four months after approval of the official bond of the personal representative, file a written statement of the amount claimed with the registry of probate where the petition was filed and deliver or mail a copy thereof to the personal representative.[157] However, despite G.L. c. 190B § 3-803(f) providing an exception to the one-year limitation on creditor actions for the Division, it is not exempt from the three-year time limit placed on the Personal Representative under G. L. c. 190B § 3-108(4). *See Matter of Estate of Kendall*, 486 Mass. 522 (2020).[158]

The Personal Representative may pay a properly presented claim, provided is it not barred by the one year deadline. However, the Personal Representative can be liable to other creditors depending on when the Personal Representative pays. Generally, a Personal Representative may, after the expiration of said six months, pay the debts due from the estate and shall not be personally liable to any creditor in consequence for such payments made before notice of such creditor's demand.[159] However, the Personal Representative may be liable in certain situations if: (1) payment was made before the expiration of the time limit stated in G.L. c. 190B § 3-807(a) and the personal representative failed to require the payee to give adequate security for the refund of any of the payment necessary to pay other claimants; or (2) payment was made, due to negligence or willful fault of the personal representative, in such manner as to deprive the injured claimant of priority.[160] A trustee shall have immunity from personal liability to a creditor of the deceased in the same manner as a personal representative.[161]

In Massachusetts, a voluntary administration of an estate can occur if the estate has a value of no greater than $25,000 in personal property and the decedent's vehicle. The Voluntary Personal Representative is responsible for paying the expenses and debts of the estate; however, there is no formal creditor process.[162]

Upon the decedent's death, the Uniform Probate Code provides for a certain amount of exempt property as well as a discretionary family allowance. Generally, "[a] surviving spouse is entitled to a value at date of death, not exceeding $10,000 in excess of any security interests therein, in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, the decedent's children are entitled jointly to the same Value." [163] If any property is encumbered, and the property is less than $10,000, the surviving spouse or children are entitled to other assets of the estate to make up the difference.[164] The statute clearly states that these benefits are "in addition to any benefit or share passing to the surviving spouse or children by the decedent's will, unless otherwise provided, by intestate succession, or by way of elective share."[165] Rights to exempt property and the assets needed to make up for any difference between the value of the property and the $10,000 exemption value have priority over all unsecured claims against the estate.[166] Massachusetts also permits the surviving spouse to remain in the house of the decedent for up to six months after the decedent's date of death without being charged rent.[167]

Additionally, "[t]he decedent's surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by the decedent are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than 1 year if the estate is inadequate to discharge allowed claims."[168] The discretionary income may be paid in one lump sum of $18,000, or in monthly payments not to exceed $1,500.[169] This payment should be made to the surviving spouse, to be used for the surviving spouse and minor and dependent children, or to the children or individuals taking care of the children. This allowance is exempt from and has priority over all unsecured claims.[170]

v. **New Hampshire.** *The Author thanks Patrick Collins, Esq. of McLane Middleton for his contribution to this section.*

In New Hampshire, when an executor is appointed the court clerk is required to publish notice of the appointment within 15 days of the appointment unless the estate has a gross value of $10,000 or less.[171] After this appointment, a creditor of an estate has <u>six months</u> to present a claim.[172] This six month period extends from the time of the "original grant of administration" and not when the notice of appointment as published by the court clerk.[173] The creditor's claim must be sent to the executor by registered mail, "setting forth the nature and amount of the claim and a demand for payment."[174]

During this first six-month period, a creditor may not make any claim against the estate in court.[175] This rule exists not to "deprive creditors of their rights, but to allow the administrator a sufficient amount of time to examine the estate, gather the assets, and pay just claims."[176] After the six-month period expires, a claim may be made in court if not yet paid.

If a creditor misses the window during which it may make a claim, then through a petition "setting forth all the facts" and only so long as the court finds that "justice and equity require it," the court may "extend the time for filing and prosecuting a claim . . . ."[177]

However, known and reasonably ascertainable creditors are entitled to actual notice of the opening of the estate and the deadlines for filing claims notwithstanding the provisions set forth in New Hampshire law.[178]

If a creditor makes a claim subject to a contingency, a judge may order the executor to retain a reserve sufficient to pay such claim or, otherwise, require the beneficiaries of the estate to "give bond to the judge for the payment thereof when due or when the contingency shall happen."[179]

vi. **Rhode Island.** *The Author thanks Laura A. Schuyle0, Esq. & Danielle Ferrucci, Esq. of Shipman & Goodwin LLP for their contribution of this section.*

In Rhode Island, within a reasonable time after the fiduciary has been appointed, the fiduciary of an estate is required to provide notice that the decedent's estate has been opened to any creditors of the decedent who are "known to or reasonably ascertainable" by the fiduciary.[180] The statutes provide a sample form for this notice in R.I. Gen. Laws § 33-11-5.1. Prior to closing an estate, the fiduciary must file with the probate court an Affidavit Regarding Notice to Creditors and to the Executive Office of Health and Human Services, attesting that the fiduciary provided notice to all known and reasonably ascertainable creditors of the estate and, if the decedent was fifty-five years old or older, to the executive office of health and human services.[181]

To present a claim, a creditor must file a written statement with the probate court stating the amount owed (if known) and the name and address of the creditor and the creditor's attorney (if any), and describing the basis for the claim, the due date (if not yet due), the nature of any condition or uncertainty if the claim is contingent or unliquidated, and the security, if any.[182] The claim must be personally delivered or mailed to the fiduciary.

After assessing the validity of a presented claim, if the fiduciary decides to reject it, in whole or in part, the fiduciary must file a statement in the probate court rejecting the claim and notify the creditor in writing of such disallowance by personal delivery or registered or certified mail.[183] If the fiduciary fails to disallow the claim within six months and thirty days of the first publication by the probate court of the notice of the initial fiduciary's appointment (the "first publication"), the claim can only be rejected with probate court approval, after notice and a hearing.[184]

If the fiduciary decides to allow the presented claim, the fiduciary may pay the claim once six months from the first publication have passed and the fiduciary has filed a statement of claims disallowed.[185]

The statute of limitations to present a claim is <u>six months</u> from the first publication; however, a creditor who, "by reason of accident, mistake, excusable neglect or lack of adequate notice of decedent's estate," failed to present a timely claim may petition the probate court for permission to present a claim if final distribution of the estate's assets has not yet occurred.[186] If the probate court allows the late-presented claim, the fiduciary has up to thirty days to reject it, in whole or in part.[187] The creditor could recover only from any assets remaining in the estate, not from any assets already distributed.[188]

Once rejected, a creditor has twenty days to request that the probate court review the decision to disallow the claim.[189] If the probate court affirms the fiduciary's decision to disallow the claim, the creditor may appeal the determination to the district or superior court prior to thirty days after the expiration of the six-month claims period (or, in the case of a claim disallowed after the expiration of the six-month claims period, thirty days after such disallowance).[190] If the creditor does not timely request review of the disallowed claim by the probate court or district or superior court, then the creditor will be forever barred from bringing further action on that claim.[191]

A creditor cannot sue a fiduciary with respect to a claim before the expiration of the six-month claims period or after two years have passed since the date of the first publication or after the court has issued an order of distribution.

vii. **Vermont.** *The Author thanks Mark A. Langan, Esq. of Dinse for his contribution of this section.*

In terms of probate administration, notice to creditors may be excused by the probate court when it appears to the court that (1) there are no debts existing against the decedent; (2) that the debts against the decedent are all known to the executor or administrator and there are funds to pay them; or (3) the value of the estate does not exceed the sum of $2,500.00 and is assigned for the support of the surviving spouse.[192] If notice by publication is made, then all claims against a decedent's estate <u>that arose before the death</u> of the decedent are barred against the estate, the executor or administrator, and the heirs and devisees of the decedent if presentation of the claim is not made within <u>four months</u> after the date of the first publication of notice to creditors.[193] If publication is excused (or is not made), then such claims are barred against the estate, the executor or administrator, and the heirs and devisees of the decedent if presentation of the claim is not made within one year after the decedent's death.[194]

In terms of claims arising at or after the death of the decedent, the claim will be barred unless presented as follows: (1) a claim based on a contract with the executor or administrator must be presented within four months after performance by the executor or administrator is due; and (2) all other claims must be presented four months after it arises.[195]

These statutes of limitations, whether four months after publication or one year after the decedent's death, do not apply to any proceeding (1) to enforce any mortgage, pledge, or other lien upon the property of the estate; nor (2) to any proceeding to establish liability of the decedent or the executor or administrator for which he or she is protected by liability insurance but only to the limits of the insurance coverage; nor (3) to the enforcement of any tax liability.[196]

The manner of the presentation of claims requires the claimant to deliver to the executor or administrator a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, and the claimant shall file a copy of the claim with the probate court.[197] The claim is deemed presented on the first to occur of receipt of the written statement of claim by the executor or administrator, or the filing of the copy of the claim with the probate court.[198] If a claim is not due, then the date when it will become due shall be stated.[199] If the claim is contingent or unliquidated, then the nature of the uncertainty shall be stated.[200] If the claim is secured, then the security shall be described.[201] Failure to describe correctly the security, the nature of any uncertainty, and the date of the claim not yet due does not invalidate the claim made.[202]

The claimant may commence a proceeding against the executor or administrator in any court where the executor or administrator may be subjected to jurisdiction, to obtain payment of the claim against the estate but the commencement of the proceeding must occur within the time limited for presenting the claim.[203] Thus, the claimant must make a decision whether to commence an action within the same time frames as presentment (*i.e.*, four months or one year depending on whether there was publication). No presentation of a claim is required in regard to matters claimed in proceeding against the decedent that were pending at the time of death.[204]

If a claim is presented, no proceeding thereon may be commenced more than 60 days after the executor or administrator has mailed a notice of disallowance.[205] An exception exists if the claim is contingent or unliquidated if the executor or administrator consents to an extension, or a court, on motion, may grant an extension to avoid an injustice but in no event shall the extension run beyond the applicable statute of limitations.[206] This is merely a limitation on commencing an action 60 days after disallowance. An action may commence before disallowance or within 60 days after disallowance.

Publication of the notice to creditors in a newspaper of general circulation is made by "the person directed by the court."[207] Typically, the executor or administrator is directed by the court to publish the notice of creditors in the newspaper of general circulation.[208]

If notice is excused by the probate court, any assets distributed by the administrator or executor [to the heirs and legatees] will be subject to any claims later established (if not barred by the statute of limitations or the affirmative defense is waived), and the administrators and executors will not be liable to distributees for losses to them when required to reimburse the creditors.[209]

The administrator or executor shall, if a claim has been disallowed, mail a notice to any claimant stating that the claim has been disallowed.[210] If, after allowing or disallowing a claim, the administrator or executor changes his or her decision concerning the claim, he or she shall notify the claimant.[211] The executor or administrator may not change a disallowance of a claim after the time for the claimant to file a petition for allowance or to commence a proceeding on the claim has run and the claim has been barred.[212] Every claim which is disallowed in whole or in part by the executor or administrator is barred so far as not allowed unless the claimant files a petition for allowance in the court or commences a proceeding against the executor or administrator not later then 60 days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar.[213] Failure of the executor or administrator to mail notice to a claimant of action on his claim for 60 days after the time for original presentation of the claim not otherwise barred has expired shall have the effect of allowance.[214]

Upon motion of the executor or administrator or petition by the claimant, the probate court may allow in whole or in part any claim timely presented.[215]

A judgment in a proceeding in another court against an executor or administrator to enforce a claim against the decedent's estate is an allowance of the claim.[216]

By agreement, the claimant and the executor or administrator may refer the claim to an arbitrator they select or, if they request, by the probate court. The decision of the arbitrator shall be final and binding.[217]

Allowed claims bear interest at the legal rate for the period commending 60 days after the time for original presentation of claim has expired unless based on a contract making a provision for interest, in which case they bear interest in accordance with that provision.[218]

viii. **The Federal Government as a "Super Creditor"**

Generally speaking, the Federal government operates as a "super creditor" whereby claims by the federal government are given priority over claims by a state or a non-government creditor. Claims of the federal government commonly arise in the context of unpaid taxes due to the IRS, although there are other circumstances in which a decedent might be liable to the federal government. The contours regarding the primacy of Federal claims are complex. This outline introduces these issues but does not address them in great detail.

In the Federal Claims Priority Act and Internal Revenue Code, the federal government and the IRS, respectively, are given the power to collect payment of unpaid debts of a decedent (including unpaid tax liability) from the personal representatives and, in some contexts, beneficiaries of the decedent's estate.

The Federal government is empowered under the Federal Claims Priority Act to demand payment from a fiduciary who distributed funds from a trust/estate thereby making the trust/estate unable to pay its debts to the United States government.[219] Section 3713 of the FCPA provides that a "claim of the United States Government shall be paid first when . . . the estate of a deceased debtor, in the custody of the [personal representative] or administrator, is not enough to pay all debts of the debtor."[220] The section further provides that "[a] representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of payment for unpaid claims of the Government."[221]

The elements for a debt to attach to a fiduciary are as follows: "(1) a fiduciary (2) make[s] a distribution which (3) leaves the estate with insufficient funds to pay (4) a debt owing the United States where (5) the fiduciary had knowledge or notice of the debt due to the United States at a time when the estate had sufficient assets with which to satisfy the debt owing to the United States."[222] The burden is on the fiduciary to show that these elements are not met.[223]

Federal cases, however, have permitted a carve out for reasonable funeral and estate administrative expenses.[224]

The IRS also may demand payment from the beneficiaries of an estate for any unpaid tax owed under Code Section 6901.[225] Under this Internal Revenue Code section, the IRS has the ability to exercise its general collection power to collect unpaid tax from a "transferee" of an estate.[226] That section provides that "transferee includes donee, heir, legatee, devisee, and distribute . . . ."[227] *United States v. MacIntyre*[228] is a chilling example of personal liability imposed on the fiduciary based on constructive notice of the federal claim for taxes due. The statute of limitation for federal claims is governed by federal, not state law.

The Author thanks Frederick Franke, Esq., for his contribution to this section.

ix. **Deductibility of Debts of an Estate.** If an executor files a federal estate tax return (Form 706), it is important to understand the interplay between IRC § 2053, which allows certain deductions to be taken in determining the amount of a decedent's taxable estate, and state law regarding the claims of creditors.

IRC § 2053 provides, in part:

> (a) **General Rule**
>
> For purposes of the [federal estate tax], the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts—
>
> > (1) for funeral expenses,
> > (2) for administration expenses,
> > (3) for claims against the estate, and
> > (4) for unpaid mortgages on, or any indebtedness in respect of, property where the value of the decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate,
>
> *as are allowable by the laws of the jurisdiction*, whether within or without the United States, *under which the estate is being administered*.[229]

Accordingly, an understanding of the limits of creditors' claims under *state* law impacts directly the size of (and, ultimately the tax due) a taxable estate for federal estate tax purposes. Note also that there may be a parallel set of rules with respect to state death taxes.

c. Insolvent Estates – Order of Priority for Claims

i. **Pennsylvania.** In the case of an insolvent estate for a Pennsylvania decedent, and without regard to claims of the U.S. government, claims are payable in the following order:

(1) The costs of administration.

(2) The family exemption.

(3) The costs of the decedent's funeral and burial, and the costs of medicines furnished to him within six months of his death, of medical or nursing services performed for him within that time, of hospital services including maintenance provided him within that time, of services provided under the medical assistance program provided within that time and of services performed for him by any of his employees within that time.

(4) The cost of a gravemarker.

(5) Rents for the occupancy of the decedent's residence for six months immediately prior to his death.

(5.1) Claims by the Commonwealth and the political subdivisions of the Commonwealth.

(6) All other claims.[230]

The order of priority for creditor claims in an insolvent estate should not be confused with the order of abatement of assets in a solvent estate that does not have sufficient assets to satisfy all bequests.[231]

ii. **Connecticut.** *The Author thanks Laura A. Schuyler, Esq. & Danielle Ferrucci, Esq. of Shipman & Goodwin LLP for their contribution of this section.*

If a probate court determines that an estate is insolvent, the court will order distribution of the estate's assets in accordance with the following order of priority. without regard to claims of the U.S. Government:

(1) funeral expenses;

(2) expenses of settling the estate;

(3) claims due for the last sickness of the decedent;

(4) all lawful taxes and all claims due the state of Connecticut and the United States;

(5) all claims due any labororor mechanic for personal wages for labor performed by such laborer or mechanic for the decedent within three months immediately before the decease of such person;

(6) other preferred claims; and

(7) all other claims allowed in proportion to their respective amounts."[232]

With respect to secured creditors, the creditor can collect against the security and then file a claim against the insolvent estate to the extent the amount owed exceeds the fair market value of the security (therefore, the secured creditor's interest in the security is, in fact, prior to all other claims against the estate).[233]

iii. **New Hampshire.** *The Author thanks Patrick Collins, Esq. of McLane Middleton for his contribution to this section.*

In the case of an insolvent estate for a New Hampshire decedent, and without regard to claims of the U.S. government, claims are payable in the following order:

(1) Costs and expenses of administration of the estate.

(2) Reasonable and necessary funeral, burial, and cremation expenses.

(3) Debts and taxes with preference under federal law.

(4) Claims made for financial and/or medical assistance provided to the deceased by the department of health and human services, debts collected by the state pursuant to RSA 126-A:34, and charges pursuant to RSA 166:19. The department of health and human services may distribute claims made in the following order: first, that assistance funded entirely by moneys from the general fund; and second, that assistance funded by a combination of state and federal funds.

(5) Just debts of the deceased.

(6) Legacies given by the will of the deceased or distribution to heirs according to law.[234]

No preference shall be given in the payment of any claim over any other claim of the same class, and no creditor of a lower class shall receive any payment until all those of the preceding class shall have been fully paid.[235]

iv. **Maine.** *The Author thanks Catherine Haynes Fenton, Esq., of Jones, Kuriloff & Sargent, LLC for her contribution to this section.*

In the case of an insolvent estate for a Maine decedent, and without regard to claims of the U.S. government, claims are payable in the following order:

(1) Costs and expenses of administration;

(2) Reasonable funeral expenses;

(3) Debts and taxes with preference under federal law;

(4) Medicaid benefits recoverable under Title 22, and reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending the decedent;

(5) Debts and taxes with preference under other laws of Maine; and

(6) All other claims.[236]

Preference may not be given within a class of claims or for claims due and payable over claims not due.[237]

v. **Massachusetts.** *The Author thanks Tracy A. Craig, Esq. of Mirick, O'Connell, DeMallie & Lougee, LLP for her contribution of this section.*

In the case of an insolvent estate for a Vermont decedent, and without regard to claims of the U.S. Government, claims are payable in the following order:

(1) Costs and expenses of administration;

(2) Reasonable funeral expenses;

(3) Debts and taxes with preference under federal law;

(4) Reasonable and necessary medical and hospital expenses of the last illness of the

decedent, including compensation of persons attending the decedent;

(5) Debts and taxes with preference under other laws of the commonwealth;

(6) Debts due to the division of medical assistance;

(7) All other claims.[238]

No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due.[239]

vi. **Rhode Island.** *The Author thanks Laura A. Schuyler, Esq. & Danielle Ferrucci, Esq. of Shipman & Goodwin LLP for their contribution of this section.*

If a probate court determines that an estate is insolvent, the probate court “shall hear and determine all disallowed claims and the priority of payment among all presented claims.”[240] Assets of the estate remaining after the administration expenses are paid will be distributed in accordance with the following order of priority, without regard to claims of the U.S. Government:

(1) The necessary funeral charges of the deceased.

(2) The necessary expenses of his or her last sickness.

> (3) Debts due to the United States.
>
> (4) Debts due to this state, and all state and town taxes.
>
> (5) Past and future child support obligations pursuant to § 33-11-51.
>
> (6) Wages of labor performed within six (6) months next prior to the death of the deceased person, not exceeding one thousand dollars ($1,000) to any one person.
>
> (7) Proceeds due the Rhode Island state lottery pursuant to § 42-61-6.2.
>
> (8) Other debts filed within six (6) months of the first notice.
>
> (9) All other debts.[241]

If there is not sufficient property to pay all the debts of any class, the creditors of that class shall be paid ratably upon their respective claims; and no payment shall be made to creditors of any class until all of those of the preceding class or classes have been paid in full.[242]

vii. **Vermont.** *The Author thanks Mark A. Langan, Esq. of Dinse for his contribution of this section.*

In the case of an insolvent estate for a Vermont decedent, and without regard to claims of the U.S. Government, claims are payable in the following order:

> (1) costs and expenses of administration;
>
> (2) reasonable funeral, burial, and headstone expenses, and perpetual care, not to exceed $3,800 exclusive of governmental payments, and reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him or her;
>
> (3) wages due employees which have been earned within three months prior to the death of the decedent, not to exceed $300 to each claimant;
>
> (4) all other claims; including the balance of wages due but unpaid under subdivision (3) of this subsection.[243]

No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall be prorated if there are insufficient assets to satisfy all claims within the class.[244]

d. **Claims With Respect to Other Non-Probate Assets**

Consideration must be given when considering the post-death liability of certain assets neither held in the decedent's own name (hence, probate assets) or in decedent's *inter vivos* trust. Generally, assets registered in "POD" (payable on death), "ITF" (in trust for) or similar titling pass outside of the probate process and directly to a named person or persons. Those assets are certainly subject to the claims of creditors, both pre-death and post-death. How are those claims made and collected? This may be a conspicuous gap in the statutory law governing post-death claims in that in many such cases there may be neither an executor nor a trustee charged with the responsibility of notice and appropriate payment.

IV. CONCLUSION

In an ideal world, the trust and estate attorney will have little or no contact with or concern about the client's creditors. Estates are planned, debts are paid when due and assets will pass after expenses and debts to designated beneficiaries. Regrettably, it is all too common that we must consider creditors' rights both in the planning and the post-death circumstances. In summary:

– the lawyer must be familiar with the laws governing the rights of their clients and their clients' creditors in the estate planning context;

– care must be taken to avoid inadvertent loss of exemptions such as entireties property, retirement assets, and the like;

– when advising a client to change the ownership of assets to accomplish planning goals, the lawyer must make clear to the client the potential consequences of the proposed change;

– after a client's death, the lawyer must be familiar with the laws and practice regarding the collection and distribution of the decedent's assets, whether in probate form, in a living trust or in some other non-probate structure;

– care must be taken to do necessary legal advertising, to conduct an appropriate search for information about the decedent's lifetime debts and to avoid actions that might leave the executor and/or trustee potentially liable for distributions to beneficiaries or payments that violate the applicable priority rules.

02163848.DOCX

APPENDIX A

Law Governing Estate Creditors in New York, New Jersey, Delaware, Maryland and the District of Columbia

a. Notice to Limit Claims of Creditors and Executor/Trustee Liability

i. **New York.** *The Author thanks Magdelen Gaynor, Esq., for her contribution to this section.*

The claims period in New York is seven months from date of the issuance of Letters to the fiduciary of the estate.[245] A creditor making a claim against an estate of a New York decedent must do so in writing, delivered by U.S. Certified Mail or in person, and "contain a statement of the facts upon which it is based and the amount thereof."[246] The estate's fiduciary "may require the claimant to present proof by affidavit that the amount of the claim is justly due, that all payments thereon, if any, have been credited, that the claimant knows of no offsets and no evidence of indebtedness and holds no security, except as specifically described in the affidavit."[247] Failure to adhere to these formalities bars enforcement of a creditor's claim unless the claim is "based upon a decree or order of the court or a valid judgment rendered by a court of competent jurisdiction."[248] In all events if a fiduciary knows of a claim, the fiduciary cannot wait until the seven-month period runs and then distribute the assets.[249] Accordingly, all distributions after the seven-month period must be made in good faith.

Until January 1, 1994, New York law allowed a fiduciary to publish notice to creditors, the result of which would shorten the creditor window from seven months to three months. This provision was rarely used because of the significant expense associated with publication. Accordingly, the provision was repealed. This means that unlike many other states, there is no provision in New York law compelling a fiduciary to publish notice to creditors to begin the period during which creditors can make claims.

Upon receipt of claims against the estate, the fiduciary "shall promptly give notice in writing to the claimant of the allowance of the claim or of its rejection or of the rejection of some part thereof which he specifies."[250] A rejection of a claim must include the reasons why the claim was rejected, whether in whole or in part.[251] If a claim is not allowed within 90 days upon receipt, then it is deemed to have been rejected.[252]

If the fiduciary "improperly" allows a claim against the estate or if the claim was "fraudulently" or "negligently" paid, "any party adversely affected thereby may file objections thereto in any proceeding for the judicial settlement of the account of the fiduciary."[253] The funds improperly paid may be required to be returned to the estate, and the fiduciary may be surcharged.

If a creditor makes a claim after the seven-month period but before the statute of limitations for the particular claim has run, it is not necessarily barred from collecting. Instead, it must pursue the beneficiaries of the estate. New York law provides, generally, that "distributees and testamentary beneficiaries are liable, in an action, to the extent of the value of any property received by them as such, for the debts and reasonable funeral expenses of a decedent, the expenses of administering his estate and all taxes for which the estate is liable, which have not previously been recovered from the personal representative."[254]

ii. **New Jersey.** *The Author thanks Steven K. Mignogna, Esq. Melissa Dibble Esq. and Timothy Horn Esq. of Archer & Greiner P.C for their contribution of this section.*

Creditors of a New Jersey decedent must present their claims to the estate's personal representative within nine months from the date of the decedent's death. New Jersey law states simply that the claim must be "in writing and under oath, specifying the amount claimed and the particulars of the claim."[255] If a claim is not so presented, the personal representative is not liable to the creditor with respect to any assets that the personal representative delivered or paid in satisfaction of devises or other claims, before the presentment of the creditor's claim. This provision dispenses with the procedure regarding an order to limit creditors.[256]

New Jersey law further provides that no actions, except for funeral expenses, can be brought against the personal representative of an estate without leave of court within six months of receiving letters testamentary or of administration. The policy behind this statute is to allow sufficient time for the personal representative to ascertain the assets and liabilities of the estate.[257]

The personal representative must also respond in writing to the creditor's presentation of claim within three months, either allowing or disputing the claim in full or in part, and give notice in writing to the creditor, his agent, or attorney of that which he allows or disputes.[258]

If a creditor's claim is disputed, the creditor must file an action to recover on the claim within three months of receiving notice that the claim is disputed.[259] Otherwise, the personal representative is not liable to the creditor with respect to any assets that he may have delivered or paid in satisfaction of any lawful claims, devises, or distributive shares before the commencement of the action.[260]

Certain remedies may still exist for creditors who fail to present their claims within the time limit. First, the creditor may have a viable claim against the personal representative if there are sufficient assets to pay the claims that were presented in a timely fashion. A claimant who has failed to present a timely claim may still present his claim at any time before the remaining assets of the estate shall have been distributed or paid over pursuant to law.[261]

The personal representative may accept or reject a creditor's claim.[262] If the personal representative is not satisfied with the correctness of a particular claim, he will notify the claimant or his representative to proceed with establishing the disputed claim by judgment. The personal representative must retain sufficient assets to pay the amount of the disputed claim, together with interest and costs, until the claimant has had an opportunity to establish his claim by judgment.[263] If a personal representative fails to pay a claim lawfully presented, the claimant may bring an action against the personal representative to recover on his claim in any court of competent jurisdiction.[264] If a creditor fails to commence an action upon his claim within one month after being notified to establish his claim by judgment, he shall be forever barred from any action against the personal representative to recover on the claim.[265]

Upon good cause shown, the court may compel a personal representative to pay a claim not timely presented, especially when the account has not yet been approved and the court has not yet directed him to make final distributions.[266] Accordingly, the personal representative's best practice is to obtain and file a refunding bond as part of the distribution process. In an action by a creditor against a personal representative, for the payment of a ratable proportion of his debt, it shall be presumed that the assets of the estate due a devisee or heir have not been paid over to him, if no refunding bond from the devisee or heir is on file. However, the presumption may be rebutted by proof that the devise or distributive share was actually paid over to him.[267]

To protect themselves as well as creditors of the estate, executors must require refunding bonds before making payment of shares of the estate to distributees.[268]

A decedent's real property is liable for the payment of debts for only one year after the decedent's death.[269]

iii. **Delaware.** *The Author thanks Joseph Bosik, Esq., of Gordon, Fournaris & Mammarella, P.A., for his contribution of this section.*

For claims arising prior to or at the death of the decedent, such claims are barred unless notice is presented within *eight months* of the decedent's death, regardless of whether notice of death has been given by the Register of Wills office.[270] For claims against an estate that arise after the death of the decedent, such claims are barred as follows: "(1) A claim based on a contract with the personal representative, within 6 months after performance by the personal representative is due; (2) Any other claim, within 6 months after it arises."[271] If a claim is not otherwise barred by 12 Del. C. §§ 2102(a)-(b), then the claim is barred if it has been rejected by a personal representative in a writing delivered to the claimant or mailed to the claimant's last known address, and an action or suit is not commenced on such claim within 3 months of the notice of rejection.[272]

Delaware law does not require notice of a decedent's death to start the running of a creditor's claim period. However, if an estate is required to be opened, i.e., Letters of Administration or Letters Testamentary granted, then the Register of Wills Office will publish notice that contains the date of death, the name and address of the personal representative, the date Letters were granted, and the name of the personal representative's counsel.[273] Notice is published once per week for three successive weeks in a newspaper approved by the Register of Wills.[274]

Notice of claims is presumed only as to mortgages, "but not of the bonds accompanying such mortgages," and of judgments that are liens against real estate, provided the mortgages and judgements are of record in the county where Letters are granted.[275] A claim may be presented (i) by delivery or mail to the personal representative of a written statement of claim "indicating its basis, the name and address of the claimant and the amount claimed" or by filing a claim with the Register of Wills in the prescribed form,[276] or (ii) by commencement of a legal proceeding.[277]

iv. **Maryland.** *The Author thanks Frederick Franke, Esq., of Franke Beckett LLC for his contribution of this section.*

In general, claims against the estate of a decedent must be filed within the earlier of (i) <u>two months</u> from when the personal representative mails or otherwise delivers notice to a known creditor or (ii) <u>six months</u> from the date of death (regardless of notice or even opening the estate).[278] Keying an absolute 6-months deadline from death instead of from notice of the appointment of a personal representative in a newspaper avoids the "state action" element of the due process requirement under the U.S. Constitution.[279]

As a general rule, other than if a proceeding for a small estate is instituted, property of a trust that was revocable at the death of the settlor is not subject to, and the trustee and beneficiaries of that trust may not be held liable for, claims of the creditors of the settlor that are not properly presented in the estate proceeding within the time periods specified in ET § 8-108.[280] Estates with probate assets of $50,000 or less may elect to be administered as a small estate which has fewer procedural requirements than for regular estate administrations. If no probate estate is opened or if only a small estate administration is conducted, a decedent's revocable trust does not enjoy the shortened statute of limitations unless notice is published similar to that required of regular estates.[281]

The limitations to estates and trusts do not apply to either claims by the state or by the United States. Medicaid reimbursement actions are state claims. ET § 8-103(f) governs Maryland Medical Assistance (i.e., Medicaid) claims. Its 6-month period runs from the date of the notice, not death. Specifically, Medicaid claims must be filed within the earlier of "(1) 6 months after publication of notice of the first appointment of a personal representative;" or (2) 2 months after the personal representative gives actual notice to the state. Federal claims are not so limited.

The "notice" of the appointment of the personal representative requires for notice to be published "in a newspaper of general circulation in the county of appointment once a week in 3 successive weeks." The issue in *Maryland Department of Health v. Myers*,[282] was whether the deadline for the filing of creditor claims runs from the publication of the first such notice, or from the date after all 3 required notices had run. Applying the plain meaning rule to the statute, the Court in Myers concluded that "the General Assembly made a policy determination that, to adequately provide notice to creditors and other interested parties of the decedent's death and the appointment of a personal representative, three successive weekly publications of the notice were required; anything less would be incomplete and partial." Accordingly, the running of the 6-month claims period for state Medicaid reimbursement claims under ET § 8-103 (f) does not commence with the first published notice; it begins to run only after the three required notices have published. (Note that claims of ordinary—non-state—claimants are governed by ET § 8-103 (a), not (f), and therefore the *Myers* holding does not apply).

With respect to non-probate assets, a spousal rollover IRA is treated as the surviving spouse's IRA. Maryland law exempts IRAs and Roth IRAs regardless of value.[283] Maryland has opted out of the federal bankruptcy exemptions.[284] Inherited IRAs, on the other hand, present a different issue. Inherited IRAs are not an exempt asset in any jurisdiction applying the federal bankruptcy exemptions.[285] There is no decision directly addressing whether the Maryland statute avoids the analysis in *Clark v. Rameker* (see endnotes 283, 284 and 285) but it is highly likely that the Maryland exemption protects inherited IRAs.[286]

v. **The District of Columbia** *The Author thanks John Erny IV, for his contribution of this section.*

All claims against a decedent's estate, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or other legal basis must presented within six months after the date of the first publication of notice of the appointment of a personal representative.[287] In effect, the notice of the appointment of a personal representative constitutes the notice to creditors. Claims against the decedent's estate based on the conduct of or a contract with a personal representative must be presented within 6 months of the date the claim arose.[288] Claims that have failed to be presented within the appropriate 6 month period shall be barred.[289]

The six month period for the presentation of claims will not apply to certain types of claims. Secured claims are not affected. These claims include any mortgage, pledge, judgment, or other recorded or otherwise perfected security interest on property of the estate.[290] Claims covered by insurance which survive the death of the decedent are not affected as well. These claims shall not be barred if the claimant commences an action against the estate within the period of limitations generally applicable to such causes of action; the decedent was covered by a liability insurance policy at the time of the occurrence on which the claim is based; the subject matter of the claim is within the scope of that policy; and the recovery sought is within the policy limits.[291]

Any action that was commenced against the decedent where the decedent had been duly served with process before death is not affected by the six-month limitation period.[292] A person representative who pays claims or distributes assets without the consideration of such an action may be personal liable unless at the time of payment or distribution, he or she had no actual knowledge of such claim, and the claimant had not timely presented such claim in the manner prescribed in the D.C. Code.[293]

Within 20 days after appointment, the personal representative shall publish a notice of the appointment in a newspaper of general circulation of the District of Columbia and any other publication the Court may order or provide by Rule once a week for 3 successive weeks.[294] The notice (1) shall announce the appointment and address of the personal representative, (2) state whether administration is supervised or unsupervised,[295] and (3) notify creditors of the estate to present their claims. The personal representative shall file with the Register[296] a certification specifying the date and content of the published notice.[297]

A distinct, but similar, set of rules applies to a "foreign" personal representative of a decedent with property located in the District of Columbia.[298]

The personal representative must provide notice directly to known creditors of a decedent. The notice shall include the text of the first newspaper notice of appointment and the following general information in a form developed by the Court:[299] (1) the typical duties of a personal representative in estate administration, including a description of the essential steps of estate administration;[300] (2) how fees for estate administration are determined in this jurisdiction and that the personal representative is to be provided as soon as feasible with an estimate of fees to be claimed against the estate;[301] (3) the rights of heirs or legatees, the assistance an heir or legatee may provide to the personal representative, and the role of the Register. The personal representative shall certify to the Register that notices under this subsection have been given;[302] and (4) if the administration is unsupervised,[303] the right of any interested person,[304] on petition to the Court duly presented and filed with the Register, to initiate a proceeding involving notice to interested persons and a hearing to impose Court supervision on the estate, or to seek any other court order necessary for protection of rights of the interested person.[305]

Within 90 days after the appointment of the personal representative, the personal representative (whether supervised or unsupervised) shall certify to the Register that these notices have been given.[306]

Failure to give specific notice to known creditors within the 20 day period is not addressed in the D.C. Code. However, such failure, considered with other factors, could void the entire probate proceeding. A standard probate proceeding may be reopened if an interested person makes a request to do so within 6 months after the notice of appointment of the personal representative. The request will succeed if the Court finds that the notice of the appointment of the personal representative was not given to such interested person, and such interested person did not have actual notice of the petition for probate.[307]

Claims that have been barred by a statute of limitations during a decedent's life may not be revived by the decedent's death unless a contrary intent is expressly indicated in the decedent's will.[308]

However, the D.C. Code addresses the circumstance for which a statute of limitations has not yet barred a claim at the time of the decedent's death. For such claims, the statute of limitations is tolled at the date of death for up to six months after the first publication of notice of the appointment of a personal representative (not to exceed 2 years).[309] This means that the time limit for suing prescribed by a statute of limitations will be legally suspended, and consequently creditors will have a longer opportunity to bring such claims. Regardless of the date of the first publication of notice of the appointment of a personal representative, the maximum amount of additional time is 2 years.

b. **<u>Insolvent Estates – Order of Priority for Claims</u>**

i. **New York.** In the case of an insolvent estate for a New York decedent, and without regard to claims of the U.S. government, claims are payable in the following order:

> (1) The reasonable funeral expenses of the decedent subject to the payment of expenses of administration shall be preferred to all debts and claims against his estate and shall be paid out of the first moneys received by his fiduciary.
>
> (2) Debts entitled to a preference under the laws of the United States and the state of New York.
>
> (3) Taxes assessed on property of the deceased previous to his death. Any taxes so paid by a fiduciary on real property which descends to a distributee or passes to a devisee shall be a charge thereon for which the beneficiary must reimburse the estate unless in the case of wills the testator has indicated expressly or by necessary implication that such taxes be otherwise paid.
>
> (4) Judgments docketed and decrees entered against the decedent according to the priority thereof respectively.

> (5) All recognizances, bonds, sealed instruments, notes, bills and unliquidated demands and accounts.[310]

New York law further provides that "[p]reference shall not be given in the payment of a debt over other debts of the same class."[311]

ii. **New Jersey.** *The Author thanks Steven K. Mignogna, Melissa Dibble and Timothy Horn of Archer & Greiner P.C for their contribution to this section.*

In the case of an insolvent estate for a New Jersey decedent, and without regard to claims of the U.S. government, claims are payable in the following order:

> (1) reasonable funeral expenses;
>
> (2) administration costs and expenses;
>
> (3) debts for the reasonable value of services rendered to the decedent by the Office of the Public Guardian for Elderly Adults;
>
> (4) debts and taxes with preference under federal law or the laws of this State;
>
> (5) reasonable medical and hospital expenses associated with the decedent's last illness, including compensation of persons attending him;
>
> (6) judgments entered against the decedent according to the priorities of their entries respectively; and
>
> (7) all other claims. In addition, under this statute, no preference is given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due.[312]

iv. **Delaware.** In the case of an insolvent estate for a Delaware decedent, and without regard to claims of the U.S. government, claims are payable in the following order:

> (1) Surviving spouse's allowance as provided in 12 Del. C. §2308;
>
> > a. The allowance provided for is cash up to $7,500, and such allowance does not affect any other rights that the spouse may be entitled to, either under the Will or under intestacy.[313]
> >
> > b. In order to make a valid claim for allowance, within the shorter of 9 months from the decedent's date of death or 6 months from the granting of Letters, the surviving spouse must notify the Register of Wills of the county where Letters were granted.[314]
> >
> > c. The allowance is considered a debt of the estate.[315]

(2) Funeral expenses;

(3) Child support arrears or retroactive support due as of the date of the decedent's death;

(4) The reasonable bills for medicine and medical attendance during the last sickness and for nursing and necessaries for the last sickness of the decedent;

(5) Wages of servants and laborers employed in household affairs or in the cultivation of a farm; but no servant or laborer shall be allowed this preference for more than 1 year's wages;

(6) Taxes imposed by the State;

(7) Rent for not exceeding 1 year; and this, at the election of the party entitled, may be of rent in arrear or rent growing due;

(8) Judgments against the decedent, which shall include judgments before justices of the peace and decrees of a court of equity against the decedent for the payment of money;

(9) Recognizances, mortgages and other obligations of record, for the payment of money;

(10) Obligations and contracts under seal;

(11) Contracts under hand for the payment of money, or delivery of goods, wares or merchandise;

(12) Other demands. [316]

No preference is given to claims in the same class.[317]

v. **Maryland.** In the case of an insolvent estate for a Maryland. decedent, and without regard to claims of the U.S. government, claims are payable in the following order:

(1) Fees due to the register;

(2) Costs and expenses of administration;

(3) Funeral expenses[318];

(4) Compensation of personal representatives[319], for legal services[320], and commissions of licensed real estate brokers;

(5) Family allowance[321];

(6) Taxes due by the decedent;

(7) Reasonable medical, hospital, and nursing expenses of the last illness of the decedent;

(8) Rent payable by the decedent for not more than three months in arrears;

> (9) Wages, salaries, or commission for services performed for the decedent within three months prior to death of the decedent;
>
> (10) Assistance paid under the Public Assistance to Adults Program,[322]
>
> (11) All other claims.[323]

With respect to claims in the same class, "[a] preference may not be given in the payment of a claim over another claim of the same class," and "[a] claim due and payable is not entitled to a preference over claims not yet due."[324]

vi. **The District of Columbia** In the case of an insolvent estate for a decedent of the District of Columbia, and without regard to claims of the U.S. government, claims are payable in the following order:

> (1) Court costs, publication costs, and bond premiums;
>
> (2) Funeral expenses, not exceeding $1,500;
>
> (3) Fiduciary and attorney's fees, not exceeding $1,000;
>
> (4) The "homestead allowance" and "family allowance";[325]
>
> (5) "Exempt property";[326]
>
> (6) Reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending the decedent;
>
> (7) Claims for rent in arrears for which an attachment might be levied by law;
>
> (8) Judgment and decrees of courts in the District of Columbia; and
>
> (9) All other just claims.[327]

The D.C. Code further provides that "[a]o preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to preference over claims not due."[328]

[1] For example, in 1997 Alaska adopted the Alaska Trust Act (the "Alaska Act"), which allows a person to set up a self-settled spendthrift trust, which is a trust for the settlor's own benefit that is immunized from creditors' claims. Shortly after Alaska enacted its asset protection trust law, Delaware responded with Delaware House Bill No. 356, titled the Qualified Dispositions in Trust Act (the "Delaware Act"), which provides similar creditor protection and estate planning opportunities to those in the Alaska statute described above.

[2] For example, the 2005 Bankruptcy Act includes special provisions pertaining to self-settled assets protection trusts, both foreign and domestic. Section 548 of the Bankruptcy Act sets forth detailed fraudulent transfer rules applicable to bankruptcy proceedings. *See* 11 U.S.C. § 548(e)(1). Under §548(e), the trustee in bankruptcy may look back ten years prior to the filing of the bankruptcy petition to void a transfer as follows:

> In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within 10 years before the date of the filing of the petition, if (a) such transfer was made to a self-settled trust or similar device; (b) such transfer was by the debtor; (c) the debtor is a beneficiary of such trust or similar device; and (d) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.
>
> *Id.*

[3] *See* John A. Terrill, II, Esquire, and Jennifer A. Kosteva, Esquire, Asset Protection Planning: Understanding the Links and the Conflicts Between Estate Planning and Debtor/Creditor Law (2019). ACTEC's "Asset Protection Committee" explores and reports on updates on this topic.

[4] These exemptions serve two purposes: First, they provide state law protection for a debtor from creditors. Second, they provide a structure of exemptions that may be applicable in a federal bankruptcy proceeding because federal bankruptcy law permits a bankrupt debtor to elect the available state-law exemptions or, alternatively, the so-called "federal exemptions" unless the state has "opted out" from this choice.

[5] 11 U.S.C. § 522(b)(3)(A).

[6] 11 U.S.C. § 533(b)(1).

[7] § 522(b)(2).

[8] 42 PA. C.S. §§ 8121-8127 (2014).

[9] § 8122.

[10] § 8123.

[11] § 8124(a).

[12] § 8124(b)(1)(i)-(vi).

[13] § 8124(b)(1)(vii).

[14] § 8124(b)(1)(viii).

[15] I.R.C. §§ 401, 403, 409, 530.

[16] ERISA qualified plans are protected from creditor claims under federal law as well. In *Patterson v. Shumate*, 504 U.S. 753 (1992), the United States Supreme Court unanimously held that section 541(c)(2) of the Bankruptcy Code (11 U.S.C. 541) applied to ERISA-qualified pension plans. Section 541(c)(2) excludes a beneficial interest in a trust from the bankruptcy estate when there is a restriction on transfer of the interest that is enforceable under applicable non-bankruptcy law. The Court found that the anti-alienation provisions required in ERISA-qualified plans satisfy §541(c)(2). *Patterson*, 504 U.S. at 760. Consequently, the Court concluded that the assets of an ERISA pension plan were not included in the debtor's bankruptcy estate. *Id.* at 765. The anti-alienation provision also protects ERISA qualified plans in non-bankruptcy situations.

[17] 42 PA. C.S. § 8124(b)(1)(ix) (2014). The exception of rollovers from the one year before bankruptcy and $15,000 per annum limitations was added to the statute in 1998 in reaction to a decision by the United States Court of Appeals for the Third Circuit. *See* 1998, Pa. Laws 170, 173-74; *In re Barshak*, 106 F.3d 501 (3d Cir. 1997). In *Barshak*, the debtor's employer had made contributions to an ERISA-qualified plan from 1974 to 1989. *Barshak*, 106 F.3d at 501-2. Mr. Barshak left his employment in 1989. *Id.* at 502. He received a distribution from the account in 1992, which he rolled over into an IRA within nine days. *Id.* More than two years later, Mr. Barshak filed for bankruptcy. *Id.* Referring to 42 Pa. Cons. Stat. § 8124(b)(1)(ix), which did not then include the exception for rollovers, the bankruptcy trustee sought to include $55,000 of the IRA in the bankruptcy estate as an amount in excess of $15,000 contributed to the fund within a one-year period. *Barshak*, 106 F.3d at 502-506. The Bankruptcy Court sided with the trustee. *Id.* at 501. The District Court reversed the bankruptcy court, but the Third Circuit reversed the District Court, emphasizing the plain language of the statute, which did not distinguish between "rollover contributions" and "contributions." *Id.* at 506. The Pennsylvania legislature responded with section 8124(b), expressly exempting transfers and rollovers between funds. *See* 42 PA. C.S. § 8124(b) (2014).

[18] *See e.g.*, *In re Jarboe*, 365 B.R. 717, 725 (Bankr. S.D. Tex. 2007); *In re Kirchen*, 344 B.R. 908, 914 (Bankr. E.D. Wis. 2006); *In re Taylor*, Bankruptcy No. 05-93559, 2006 WL 1275400, *2 (Bankr. C.D. Ill. May 9, 2006); *In re Navarre*, 332 B.R. 24, 31 (Bankr. M.D. Ala. 2004); *In re Greenfield*, 289 B.R. 146, 150 (Bankr. S.D. Cal. 2003). For an in-depth summary and analysis of bankruptcy cases involving inherited IRAs prior to 2010, see James L. Boring, et. al, *Protection of Inherited IRAs*, 36 ACTEC L.J. 577 (2010).

In *Jones v. McGreevy*, 2022 Pa. Super. 8 (2022), the Superior Court of Pennsylvania held that an inherited individual retirement account (IRA) owned by a Pennsylvania beneficiary is subject to the claims of the beneficiary's creditors.

In 2012, the Fifth Circuit held that funds in inherited IRAs constituted "retirement funds" within the meaning of § 522 of the Bankruptcy code and therefore were exempt from the bankrupt's bankruptcy estate. *In re Chilton*, 674 F.3d 486 (5th Cir. 2012), *abrogated by Clark v. Rameker*, 134 S. Ct. 2242 (2014). The Fifth Circuit examined lower courts' decisions and noted that "the statute does not explicitly limit 'retirement funds' to retirement funds that belong to the debtor." *Chilton*, 674 F.3d at 489. The court found the reasoning that "'retirement funds' can include the funds that others had originally set aside for their retirement" to be persuasive, and so held that funds contained in an inherited IRA constitute "retirement funds" under the bankruptcy code. *Id.*

In 2013, the Seventh Circuit disagreed, creating a split between the circuits which was resolved in favor of the Seventh Circuit's position by the Supreme Court in 2014. *In re Clark*, 714 F.3d 559 (7th Cir. 2013), *aff'd sub nom. Clark v. Rameker*, 134 S. Ct. 2242 (2014). The court, noting that the Bankruptcy Code does not define the term "retirement funds," determined that its plain language meaning controlled:

> The ordinary meaning of "fund[s]" is "sum[s] of money ... set aside for a specific purpose." American Heritage Dictionary 712 (4th ed. 2000). And "retirement" means "[w]ithdrawal from one's occupation, business, or office." Id., at 1489. Section 522(b)(3)(C)'s reference to "retirement funds" is therefore properly understood to mean sums of money set aside for the day an individual stops working.
>
> *Clark v. Rameker*, 134 S. Ct. 2242, 2246 (2014).

Therefore, because the owner of an inherited IRA cannot contribute to it, because they are required to withdraw money from it either yearly or within a year of inheriting it regardless of retirement status, and because they may withdraw the entire contents at any time, the Court held inherited IRAs do not satisfy this definition and are not exempt under the Bankruptcy code. *Id.* at 2244, 2247.

[19] 108 F. App'x 717 (3d Cir. 2004).

[20] *See id.* at 719-22.

[21] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, enacted April 20, 2005 (codified as amended in scattered sections of 11 U.S.C).

[22] *Id.*; *see also* 11 U.S.C. § 522(n).

[23] 134 S. Ct. 2242 (2014).

[24] *See* 11 U.S.C. § 522(b)(3)(C).

[25] *See* Fla. Stat. § 222.21(2)(c); Ohio Rev. Code § 2329.66(A)(10); Mo. Rev. Stat. § 513.430(1)(10)(f); Alaska Stat. § 09.38.017(a)(3)(A); V.T.C.A., Property Code § 42.0021(a).

[26] 24 PA. C.S. § 6901.309.2.

[27] *See*, *e.g.*, McKinney's CPLR 5205(j); R.C. § 2329.66(A)(10)(c).

[28] 42 PA. C.S. § 8124(c).

[29] § 8125. This exemption was added to the statute in 1876, presumably in anticipation of the Centennial Exhibition, where it would have been awkward to have items removed from exhibits by creditors.

[30] § 8126.

[31] § 8127.

[32] Delaware's exemptions include those set forth in § 4902 of Title 10 of the Delaware Code, as follows:

> (a) Every person residing within this State shall have exempt from execution or attachment process, or distress for rent, the following articles of personal property: The family Bible, school books and family library, family pictures, a seat or pew in any church or place of public worship, a lot in any burial ground, all the wearing apparel of the debtor and the debtor's family.
>
> (b) In addition to the articles specifically named in subsection (a) of this section, each person residing in this State shall have exempt the tools, implements and fixtures necessary for carrying on his or her trade or business, not exceeding in value $75 in New Castle and Sussex Counties, and $50 in Kent County.
>
> (c) All sewing machines owned and used by seamstresses or private families, shall be exempt from levy and sale on execution or attachment process and also from distress and sale for rent. This provision shall not apply to persons who keep sewing machines for sale or hire.
>
> (d) All pianos, piano playing attachments and organs leased or hired by any person residing in this State, shall be exempt from levy and sale on execution or from distress for rent due by such person so leasing or hiring any such piano, piano playing attachment, or organ in addition to other goods and chattels exempt by law. The owner of any such piano, piano playing attachment or organ or such owner's agent, or the person so leasing or hiring the same shall give notice to the landlord or the landlord's agent that the instrument is hired or leased.

A "head of family" exemption is also provided under § 4903:

Every person residing in this State, and being the head of a family, shall have exempt from execution or attachment process, in addition to the exemptions in § 4902 of this title, other personal property not exceeding $500, the articles to be selected by the debtor. The exemptions in this section shall not apply to goods or chattels of a merchantable character bought to be sold and trafficked in by the person in the prosecution of the person's regular business or occupation. No person shall have exempt from execution or attachment process any personal property, excepting that which is expressly exempted by § 4902 of this title when such exemption would prevent the collection according to law of any debt or claim that may be due or growing due for labor or services (other than professional services) rendered by any clerk, mechanic, laborer, or other employee of any person or persons against whom such execution or attachment process may be issued.

In addition to the exemptions provided in §§ 4902 and 4903, Delaware also exempts assets held or amounts payable under any retirement plan, life insurance contract or annuity contract, including eligible rollover distributions and rollover contributions as defined for federal tax purposes (including inherited IRAs).

[33] Maryland sets forth several classes of assets protected from the claims of creditors and types of income not subject to garnishment.

Assets not subject to the claims of creditors include:

(1) Wearing apparel, books, tools, instruments, or appliances, in an amount not to exceed $5,000 in value necessary for the practice of any trade or profession except those kept for sale, lease, or barter.
(2) [M[oney payable in the event of sickness, accident, injury, or death of any person, including compensation for loss of future earnings . . . . Disability income benefits are not exempt if the judgment is for necessities contracted for after the disability is incurred.
(3) Professionally prescribed health aids for the debtor or any dependent of the debtor.
(4) The debtor's interest, not to exceed $1,000 in value, in household furnishings, household goods, wearing apparel, appliances, books, animals kept as pets, and other items that are held primarily for the personal, family, or household use of the debtor or any dependent of the debtor.
(5) Cash or property of any kind equivalent in value to $6,000 is exempt, if within 30 days from the date of the attachment or the levy by the sheriff, the debtor elects to exempt cash or selected items of property in an amount not to exceed a cumulative value of $6,000.
(6) Money payable or paid in accordance with an agreement or court order for child support.
(7) [In certain cases] [m]oney payable or paid in accordance with an agreement or court order for alimony[.]
(8) The debtor's beneficial interest in any trust property that is immune from the claims of the debtor's creditors under [Maryland's statute tenancy by the entireties property transferred into trust.]

MD Code, Courts and Judicial Proceedings, § 11-504(b).

Maryland law sets forth additional exemptions with respect to a debtor domiciled in Maryland under a Title 11 bankruptcy proceeding, including:

(1) Personal property, up to $5,000; and
(2) In certain circumstances the debtor's personal residence.

§ 11-504(f)(1)(i).

And, like nearly every other jurisdiction, Maryland exempts "any money or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan qualified under" relevant portions of the Internal Revenue Code. *Id.* (h)(1) (providing, however, that these assets are exempt from creditors "other than claims by the Maryland Department of Health.").

Maryland also protects several classes of income from garnishment, including (but not limited to):

(1) Public assistance benefits (Md. Code Ann., Human Servs. § 5-407(a)(1));
(2) Workers compensation (MD Code, Labor and Employment, § 9-732);
(3) Life insurance or annuity proceeds (MD Code, Insurance, § 16-111)
(4) Unemployment insurance benefits (MD Code, Labor and Employment, § 8-106).

[34] New Jersey has a variety of statutes which set forth certain exemptions from attachment or execution by a judgment creditor.

The proceeds of life insurance on the debtor's life are exempt from the insured's debts when received by the beneficiary. N.J.S.A. § 17B:24-6. Notice that this provision does not appear to exempt the cash value of a policy in the policy in the hands of the insured. Health insurance benefits and the proceeds of group insurance plans are also exempt, as are payments from annuities to the extent that they do not exceed $500 per month. N.J.S.A. § 17B:24-7 to -9 (West 2015).

Certain specified "qualified trusts" which includes all manner of ERISA plans (§401(k) plans, pension and profit-sharing plans, Keogh Plans, ESOP's, etc.) and IRAs are exempt. N.J.S.A. § 25-2-1(b). Various other small exemptions are also available to New Jersey debtors, such as $1,000 of household goods and furniture (N.J.S.A. § 2A-26-4), "all wearing apparel" (N.J.S.A. § 2A-17-19), etc.

[35] The New York exemptions are set forth in Chapter 8, Article 52, Sections 5205 and 5206 of Civil Practice Law and Rules. Section 5205 exempts personal property from application to the satisfaction of money judgments. Section 5205(a) details the specific exempt tangible personal property, which are:

a. A sewing machine and all stoves kept in the judgment debtor's dwelling house and fuel for the stoves for one hundred twenty days;
b. The family religious text, pictures, and school books, and all other books not exceeding $500;
c. A seat or pew at the judgment debtor's place of worship;
d. Domesticated animals and sixty days' worth of food for the animals, the total not to exceed $1,000, and all necessary food for the judgment debtor or his or her family for one hundred twenty days;
e. All clothes, household furniture, health aids, a refrigerator, radio, television, cell phone, computer, crockery, tableware, and cooking utensils necessary for the judgment debtor and his family;
f. A watch, art, jewelry, and a wedding ring, the total not to exceed $1,000;
g. Necessary tools and implements for carrying out the judgment debtor's profession or calling, the total not to exceed $3,000 including food for a team for one hundred twenty days;
h. A car, not to exceed $4,000 (or $10,000 if the debtor is disabled);
i. If the debtor does not qualify for the homestead exception, $1,000 in cash or personal property.

New York exempts "all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from a person *other* than the judgment debtor" from judgment creditors.

In New York, "all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either a trust or plan" which qualifies as a retirement account under Sections 408, 408A, 401, and 457 of the Internal Revenue Code, including plans created as a result of rollovers pursuant to Sections 402(a)(5), 403(a)(4), 408(d)(3), and 408A (such as IRAs, qualified pension and profit sharing plans and the like) are considered exempt trusts. The exemption applies even if the judgment debtor is the settlor and depositor of an IRA, a self-employed individual, a partner in an entity sponsoring a Keogh (HR-10) plan, the shareholder of a corporation sponsoring a retirement plan, or a participant in a section 457 plan. McKinney's CPLR 5205(c)(2) (McKinney 2015).

A judgment debtor's right to accelerate payment of a death benefit or special surrender value under a life insurance policy is exempt from satisfaction of a judgment creditor. Similarly, settlements with life insurance companies are exempt from judgment creditors. *Id*. 5205(i).

Certain funds in a New York state college tuition savings program under Article Fourteen-A of Education Law are exempt from judgment creditors. *See* McKinney's Education Law § 695-A to –G. Funds in an account established in connection with a scholarship program or where the judgment debtor is the owner is a minor and the creator and beneficiary of the account are exempt, but if the judgment debtor is the owner of the account and is not a minor, then only the first $10,000 are exempt. *Id*. 5205(j).

Other exemptions include payments, pensions, horses, swords and medals (among other items) payable to a member of the armed forces; ninety percent of unpaid milk proceeds due to a judgment debtor; security deposits on rental units or utilities; certain funds of a convicted person; and, unless a court determines that it is unnecessary, service animals or "all medical and dental accessions to the human body" or medical equipment necessary "to assist in sustaining or maintaining one or more major life activities" or to provide mobility. *Id.* 5205(e), (f), (h).

If an individual recovers monetary damages for the taking or damaging of one of the above exempt items, the money recovered is itself exempt for one year if the individual subsequently becomes a judgment debtor. *Id*. 5205(b).

The value of New York's homestead exemption varies based on the county in which the real property (or mobile home) is located. In the counties of Kings, Queens, New York, Bronx, Richmond, Nassau, Suffolk, Rockland, Westchester, and Putnam, the exemption is $150,000; in Dutchess, Albany, Columbia, Orange, Saratoga and Ulster, $125,000, and $75,000 in all other counties. *Id.* 5206(a). New York allows the homestead exemption to apply to the following types of property; a lot of land with a dwelling on it, shares of stock in a cooperative apartment corporation, units of a condominium apartment, or a mobile home. *Id*. The homestead exemption continues after the death of the judgment debtor for the benefit of the debtor's spouse or surviving children until the spouse's death and children reach the age of majority. *Id*. 5206(b). The homestead exemption will end if the property ceases to be occupied as a residence by the judgment debtor, unless the debtor ceases occupancy as a result of damage or destruction to the property and the period is for less than one year. *Id*. 5206(c).

If the value of the property exceeds the homestead exemption amount, the judgment lien attaches to the home on the surplus. A judgment creditor with a lien on the surplus may commence a special proceeding for a sale of the homestead with court permission. Money from a sale of homestead property, up to the applicable homestead amount, paid to the judgment debtor is exempt from further judgments for up to one year. If the judgment debtor uses that money to purchase another exempt homestead within the year, any remaining money is no longer exempt, although the new homestead will remain exempt as to all creditors. *Id*. 5206(e).

"Land, set apart for a family or private burial ground" of no more than 1/4 of an acre is exempt from judgment creditors so long as a portion of the land has actually been used as a burial ground and there are no buildings, other than vaults or other "places of deposit for the dead, or mortuary monuments" on the property. *Id*. 5206(f).

New York has opted out of the federal bankruptcy exemptions. Therefore, New York bankruptcy debtors must rely on the exempt categories in Chapter 12, Article 10-A, Sections 282 through 283 of the Debtor and Creditor Law. Section 282 permits bankrupt debtors to exempt all the exempt property described above in Chapter 8, Article 52, sections 5205 and 5206 of Civil Practice Law and Rules. McKinney's Debtor and Creditor Law § 282. However, the aggregate exempt amount of property under Section 5205(a) (relating to personal tangible property) cannot exceed $10,000. § 283(1). If the debtor does not avail him or herself to the exemptions in Section 5206 (related to homestead) and the property exempted Section 283(1) does not reach the $10,000, then the debtor limit may exempt the difference between $5,000 and the amount of property already claimed for exemption or $5,000, whichever is less. § 283(2). Also exempt are:

a. Insurance policies and annuity contracts, as well as the proceeds from those policies (McKinney's Debtor and Creditor Law § 282(ii), however, certain annuity contracts are also limited by the $10,000 aggregate exemption limit described above (§ 283(1));
b. A motor vehicle not exceeding $4000 (§ 282(iii)(1));
c. Benefits from social security; unemployment; public assistance; veteran's benefits; disability, illness, or unemployment benefits; alimony and support to the extent reasonably necessary to support the debtor and dependents of the debtor; and stock bonus, pension, profit sharing plans on

account of illness, disability, death, age, or length of service. However, the plan is not exempt if the plan was established by the debtor (or under the auspices of an insider that employed the debtor at the time the debtor's rights to the plan arose), the plan was on account of age or length of service, and the plan does not qualify under Sections 401(a), 403(a), 403(b), 408, 408A, 409, or 457 of the Internal Revenue Code (§ 282(ii)(2)); and

d. The right to receive property that is traceable to an award under a crime victim's reparation law; a wrongful death payment to the dependent of a decedent; payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is a dependent, to the extent reasonably necessary to support the debtor and any dependent of the debtor; and, in an amount not to exceed $7,500, a personal injury payment not including pain and suffering or compensation for actual pecuniary loss (§ 282(iii)(3)).

As an asset under Section 5205(c)(2), IRAs are exempt from bankruptcy creditors under Section 282(i). Because New York residents must use New York exemptions, IRAs will generally be exempt in a New York bankruptcy. The 2005 Bankruptcy Act includes special rules for the treatment of IRAs in bankruptcy; the rules apply whether the bankrupt elects federal or state exemptions. The exemption is generally limited to $1 million in an IRA exclusive of rollover contributions (which continue to be wholly exempt), unless the Bankruptcy Court increases the limit "in the interests of justice." Bankruptcy Abuse Protection and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (enacted April 20, 2005) (codified as amended in scattered sections of 11 U.S.C.).

All trusts, custodial accounts, annuities, insurance contracts, or other interests described in Sections 5205(b)(1-2) are conclusively presumed to be spendthrift trusts, including cases arising under Sections 101 to 130 of the United States Bankruptcy Code. McKinney's CPLR 5205(c)(3).

However, any asset under Section 5205(c) will not be exempt to the extent that creditor has a right to the property under an order of support, alimony, or maintenance or under a qualified domestic relations order under Section 414(b) of the United States Internal Revenue Code. *Id.* 5205(c)(4). An asset will also not be exempt if the asset was made within ninety days of the claim, or if it is considered a fraudulent conveyance under New York's Uniform Fraudulent Conveyance Act. *Id*. 5205(c)(5).

[36] In the District of Columbia, assets for the "head of a family or householder" include the following:

(1) the debtor's interest, not to exceed $2,575 in value, in one motor vehicle;
(2) the debtor's interest, not to exceed $425 in value, in any particular item or $8,625 in aggregate value in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal family or household use of the debtor or a dependent of the debtor;
(3) the debtor's aggregate interest in any property, not to exceed $850 in value, plus up to $8,075 of any unused amount of the [personal residence exemption];
(4) the debtor's aggregate interest, not to exceed $1,625 in value, in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor (this exemption shall also apply to merchants);
(5) any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract;
(6) professionally prescribed health aids for the debtor or a dependent of the debtor;
(7) the debtor's right to receive:
  a. a social security benefit
  b. a veteran's benefit
  c. a disability, illness, or unemployment benefit
  d. alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor; and
  e. a payment under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor [subject to certain restrictions]

(8) all family pictures; and all the family library, not exceeding $400 in value;
(9) money or other assets payable to a participant or beneficiary from, or an interest of a participant or beneficiary in, a retirement plan qualified under [certain sections of the Internal Revenue Code];
(10) the interest of an alternate payee in [certain retirement plans];
(11) the debtor's right to receive property that is traceable to:
  a. an award under a crime victim's reparation law;
  b. a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;
  c. a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of the individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;
  d. a payment, including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or
  e. a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;
(12) provisions for 3 months support, whether provided or growing;
(13) the library, office furniture, and implements of a professional person or artist, not exceeding $300 in value;
(14) the debtor's aggregate interest in real property used as the residence of the debtor . . . except nothing relative to these exemptions shall impair the following debt instruments on real property: deed of trust, mortgage, mechanic's lien, or tax lien; and
(15) if the debtor is a notary public, the debtor's official seal, as defined in [§ 1-1231.01(11)], and official documents.

DC ST § 15-501 (2018).

[37] Alaska, Arkansas, Delaware, the District of Columbia, Florida, Hawaii, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio (for estates created before 1985), Oklahoma, Oregon, Rhode Island, Tennessee, Vermont, Virginia, and Wyoming.

[38] *See id*.

[39] *Patwardhan v. Brabant*, 439 A.2d 784, 785 (Pa. Super. Ct. 1982) ("It is well settled that entireties property is unavailable to satisfy the claims of the creditor of one of the tenants.").

[40] *Heitz v. Sayers*, 121 A. 225, 228 (Del. Super. Ct. 1923) ("nor can a judgment against one tenant become a lien on the entirety property or on any interest therein, during the joint lives of the husband and wife").

[41] *In re Knapp*, 285 B.R. 176, 178-79 (2002) (holding that under North Carolina law, real property held in tenancy by the entireties is not subject to a claim by a creditor of only one spouse); N.C.G.S.A. § 39-13.6 (neither spouse may encumber any real property held in tenancy by the entireties without the written joinder of the other spouse).

[42] *Vasilion v. Vasilion*, 192 Va. 735, 740, 66 S.E.2d 599, 602 (1951) (*cited in Rogers v. Rogers*, 512 S.E.2d 821 (Va. 1999)) (holding that real property held in tenancy by the entireties is exempt from the claims of creditors who do not have joint judgments against husband and wife).

[43] *Beal Bank, SSB v. Almand & Associates*, 780 So. 2d 45, 53 (Fla. 2001) ("[W]hen property is held as a tenancy by the entireties, only the creditors of both the husband and wife, jointly, may attach the tenancy by the

entireties property; the property is not divisible on behalf of one spouse alone, and therefore it cannot be reached to satisfy the obligation of only one spouse.”).

[44] *See, e.g.*, *Patterson v. Hopkins*, 371 A.2d 1378, 1382 (Pa. Super. Ct. 1977) (“Where a husband or wife conveys his or her individual property to a tenancy by the entireties in fraud of creditors, the defrauded creditors may execute on the property so transferred.”).

[45] *See e.g.,* In re Lyons, 177 B.R. 767, (Bankr. N.D.N.Y.1994).

[46] *See Bowling v. Bowling*, 91 S.E.2d 176, 180, 243 N.C. 515, 519 (1956) (holding that an estate by the entireties in personal property is not recognized in North Carolina); *See generally* N.C.G.S.A. § 39-13.6.

[47] *See Wilde v. Mounts*, 95 Or. App. 522, 769 P.2d 802 (1989). When a lien is placed on the debtor’s property, it is effectively placed on the entire property and the entire property is encumbered subject to the nondebtor’s right of survivorship. *Id.*

[48] *Whitlock v. Pub. Serv. Co. of Ind.*, 239 Ind. 680, 691, 159 N.E.2d 280, 285 (1959) (“If the proceeds from the sale are considered to be held by the entireties, as stated in the cases cited above, the principle is applicable only so long as the proceeds are intact and have not been divided or disbursed.”).

[49] McKinney’s EPTL § 6-2.2.

[50] Illinois recognizes tenancy by the entireties only for homestead property. 765 ILCS 1005/1c. However, Illinois recently passed a law that allows married couples to hold property in tenancy by the entireties and to use that property to fund a revocable inter vivos trust for estate planning purposes. *See* 765 ILCS 1005/1c, 735 ICLS 5/12-112.

[51] M.G.L.A. ch. 209, § 1 (West 2015) “The interest of a debtor spouse in property held as tenants by the entirety shall not be subject to seizure or execution by a creditor of such debtor spouse *so long as such property is the principal residence of the nondebtor spouse*.” *Id.* (emphasis added).

[52] *Freda v. Commercial Trust Co. of New Jersey*, 570 A.2d 409, 414 (1990).

[53] *Newman v. Chase*, 70 N.J. 254, 260 (1976)

[54] *Id.* at 266.

[55] *Faulk v. Estate of Haskins*, 714 P.2d 354, 354-56 (Alaska 1986).

[56] *Du Pont v. Du Pont*, 33 Del. Ch. 571, 576 (1953) (applying the presumption to personal property); *Fischer v. Fischer*, 864 A.2d 98, 103 (Del. Ch. 2005) (applying the presumption to real property).

[57] *Ridgely v. Ridgely*, 188 A.2d 296, 297 (D.C. 1963).

[58] *In re Estate of Suggs*, 405 So. 2d 1360, 1361 (Fla. 5th DCA 1981) (holding that “[a] conveyance to spouses as husband and wife creates an estate by the entirety in the absence of express language showing a contrary intent.”).

[59] *Diamond v. Diamond*, 298 Md. 24, 32 (1983).

[60] *Holdener v. Fieser*, 971 S.W.2d 946, 951 (Mo. Ct. App. 1998).

[61] *Clingerman v. Sadowski*, 513 Pa. 179, 183 (1986).

[62] *Lamberth v. S & L Plumbing Co.*, 935 S.W.2d 411, 412 (Tenn. Ct. App. 1996).

[63] *See*, *e.g.*, *In re Manicure*, 29 B.R. 248, 250 (Bankr. W.D. Va., 1983) (holding that where a deed to real property did not evidence intent to create tenancy by the entirety, the property was not, under Virginia law, held by the entireties).

[64] N.C.G.S.A. § 39-13.3(b), § 41-2(b).

[65] *See*, *e.g.*, *Lurie v. Blackwell*, 2002 WY 110, 51 P.3d 846 (Wyoming 2002); *In re Koesling*, 210 B.R. 487 (Bankr. N.D. Fla. 1997). For a detailed discussion of tenancy by the entirety's history and development, variations in treatment with respect to bankruptcy law and federal tax liens, and recommendations for tax planning, see Fred Frank, *Asset Protection and Tenancy by the Entirety*, 34 ACTEC L.J. 210 (2009).

[66] *See*, *e.g.*, *Morton v. Morton*, 147 A.2d 150 (Pa. 1959).

[67] The UTC was completed by the Uniform Law Commissioners in 2000, and amended in 2001, 2003, 2004, 2005 and 2010. The goal of the UTC was to "provide States with precise, comprehensive, and easily accessible guidance on trust law questions. On issues on which States diverge or on which the law is unclear or unknown, the Code will for the first time provide a uniform rule. The Code also contains a number of innovative provisions." UTC PREFATORY NOTE. Thirty-six jurisdictions have adopted versions of the UTC: Alabama, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin Wyoming. New York introduced the UTC in January 2022. "Enactment History, Trust Code," https://www.uniformlaws.org/committees/community-home?CommunityKey=193ff839-7955-4846-8f3c-ce74ac23938d.

[68] UTC § 505. *See* Ala. Code 1975 § 19-3B-505; West's F.S.A. § 736.0505; N.C.G.S.A.. § 36C-5-505; 20 PA. C.S. § 7745; S.C. ST. § 62-7-505; T. C. A. § 35-15-505; Va. Code Ann. § 55-545.05.

Although Ohio has adopted the Uniform Trust Code, it has also created a type of self-settled asset protection trust called a "legacy trust" and so has significantly changed its version of UTC § 505. Ohio splits its version into 2 sections, one addressing "Attachment of mandatory distributions absent spendthrift provision" and one entitled "right of settlor's creditors- right of withdrawal." R.C. §§ 5805.05-5805.06. Section 5805.05 allows courts to authorize creditor attachment of mandatory distributions or to reach a beneficiaries interest by other means, if a trust does not contain a spendthrift provision. The court also has the power to limit an award "to the relief that is appropriate under the circumstances". A court should consider factors including the support needs of the beneficiary, his or her spouse and or dependent children, and the supplemental needs of the beneficiary. § 5805.05 also allows for attachment regardless of whether a trust has a spendthrift provision is a distribution is mandatory and the trustee has not made the distribution within a reasonable time after the designated distribution date. § 5805.05(B).

5805.06 allows a creditor to attach to the property of a revocable trust during the lifetime of the settlor regardless of whether or not the trust contains a spendthrift provision. § 5805.06(A)(1). 5805.06(2) provides that except to the extent that a so-called "legacy trust" is established, a creditor of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. § 5805.06(A)(2). The holder of a power of withdrawal is treated the same as a settlor for the purposes of (A). § 5805.06.

[69] In California, the Probate Code denies protection against creditors to self-settled spendthrift trusts. CAL. PROB. CODE § 15304.

Georgia law provides that if a debtor creates a trust for his or her own benefit, the spendthrift provision is not valid with respect to the debtor to the extent of the proportion of the trust property attributed to his or her contribution. Ga. Code Ann. §53-12-80(f); *see also Street v. Street*, 263 Ga. 166, 430 S.E.2d 348 (1993). However, § 53-12-80(f) does not apply to self-settled special needs trusts created pursuant to 42 U.S.C. § 1396p(d)(4)(A) or pooled community trusts created pursuant to 42 U.S.C. § 1396p(d)(4)(C). Ga. Code Ann. §53-12-80(f).

In Idaho, self-settled spendthrift trusts are governed by IC 15-7-502. Paragraph (4) of the statute provides that "[i]f a person is both a settlor and beneficiary of the same trust, a provision restraining the voluntary or involuntary transfer of the settlor's beneficial interest in such trust does not prevent the settlor's creditors from satisfying claims from the settlor's interest in the trust estate that relates to the portion of the trust that was contributed by the settlor." This does not apply, however, to irrevocable trusts created by the settlor and taxed for federal income tax purposes pursuant to the grantor trust rules of the Internal Revenue Code, "if the settlor's only beneficial interest in such trust consists of the right to receive a distribution from such trust in an amount equal to or less than the amount of the federal and state income tax liability incurred by the settlor as a result of such trust being characterized as a grantor trust…."

In Illinois, self-settled spendthrift trusts are governed by 735 ILCS 5/2-1403; this section provides that self-settled spendthrift trusts are not valid under Illinois law.

In New Jersey it is quite clear that when an individual creates a trust for his or her own benefit, he or she cannot by that mechanism alone insulate the assets in the trust from the claims of his or her own creditors. *See* N.J.S.A. 3B:11-1, which provides "The right of any creator of a trust to receive either the income or the principal of the trust or any part of either thereof, presently or in the future, shall be freely alienable and shall be subject to the claims of his creditors, notwithstanding any provision to the contrary in the terms of the trust."

New York denies creditor protection to "self-settled spendthrift trusts" because it is against public policy for an individual to be able to have access to assets while protecting them from proper creditors: "A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator." McKinney's EPTL § 7-3.1 (McKinney 2007).The settlor's creditors can reach the full interest retained by the settlor in a self-settled trust without alleging or proving that the transfer to the trust was a fraudulent conveyance:

> "[W]hen a person creates for his own benefit a discretionary trust, his creditors can reach the maximum amount which the trustee under the terms of the trust *could* pay to him or apply for his benefit, even though the trustee in the exercise of his discretion wishes to pay nothing to the beneficiary or his creditors, and even though the beneficiary could not compel the trustee to pay him anything." *Vanderbilt Credit Corp v. Chase Manhattan Bank, NA*, 100 A.D.2d 544 (N.Y. App. Div. 1984).

Oregon's statue settles the issue of whether a living trust provides creditor protection during the settlor's lifetime. *See, e.g., id.* § 130.315. Except to the extent that the settlor of an irrevocable trust is specifically limited as to the amount that the trustee may distribute to him or her (e.g., a trust providing that discretionary distributions to the settlor may not exceed one-half of the trust principal), all revocable and virtually all irrevocable trusts in which the settlor retains a right to distributions will be fully available for attachment and execution by the settlor's creditors during his or her lifetime.

In Texas, when a settlor is also a beneficiary, "a provision restraining the voluntary or involuntary transfer of the settlor's beneficial interest does not prevent the settlor's creditors from satisfying claims from the settlor's interest in the trust estate." TEX. PROB. CODE 112.035(D). Texas specifically provides that a settlor is not considered a beneficiary "solely because a trustee who is not the settlor is authorized . . to pay . . any tax on trust income or principal that is payable by the settlor under the law imposing the tax. *Id*. Likewise, Texas law also provides that a beneficiary is not considered a settlor in certain situations, described in Tex. Prob. Code 112.035 (e) and (f).

In Washington, self-settled spendthrift trusts are governed by RCW 19.36.020. In a bankruptcy case in the Western District of Washington, the Bankruptcy Court found that where debtors executed a quit-claim deed transferring their residence to a self-settled spendthrift trust, not only was such transfer a fraudulent transfer and therefore void as to debtors' creditors, the transfer of an asset to a self-settled spendthrift trust of which debtors were settlors, trustees and beneficiaries was void as to debtors' creditors. *In re Wallaert*, 149 B.R. 665 (W.D. Wash. 1992).

70 *See Sproul-Bolton v. Sproul-Bolton*, 117 A.2d 688 (Pa. 1955). *See e.g.*, 20 Pa. C.S. § 6112 (providing that "[i]ncome of a trust subject to spendthrift or similar provisions shall nevertheless be liable for the support of anyone whom the income beneficiary shall be under a legal duty to support."); *See also Lippincott v. Lippincott*, 37 A.2d 741 (Pa. 1444)(holding that a predecessor to section 6112 applied only to support due an income beneficiary's existing family and not to alimony due an ex-wife). *In re Ware Trust*, 814 A.2d 725 (Pa. Super. Ct 2002); *Butcher*

Trusts, 20 Fid. Rep. 2d at 99, 101-02 (Mont. Cty, O. C. 2000) (citing 20 PA. CONS. STAT. § 6112 (2000); RESTATEMENT (SECOND) OF TRUSTS § 157 (1959).

71 *See* Ala. Code 1975 §§ 19-3B-501–19-3B-507; West's F.S.A. §§ 736.0501–736.0507; R.C. §§ 5805.01–5905.07; Code 1976 §§ 62-7-501–62-7-507; N.C.G.S.A. §§ 36C-5-501–36C-5-508; 20 PA. C.S. §§ 7741–7748; T. C. A. §§ 35-15-501–35-15-507; Va. Code Ann. §§ 55-545.01–55-545.07.

72 UTC § 501. Section 501 of the UTC provides as follows: "[t]o the extent a beneficiary's interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances."

73 § 502. Section 502 of the UTC provides as follows:

> (a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.
>
> (b) A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust," or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.
>
> (c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this [article], a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

74 § 503. Section 503 of the UTC provides in relevant part as follows:

> (a) . . .
>
> (b) A spendthrift provision is unenforceable against:
>
>> (1) a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance;
>>
>> (2) a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust; and
>>
>> (3) a claim of this State or the United States to the extent a statute of this State or federal law so provides.
>
> (c) A claimant against which a spendthrift provision cannot be enforced may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances.

Pennsylvania, for example, differentiates between the potential rights of a child with a judgment for support and maintenance to both income and principal from the creditor's trust (20 PA. C.S. § 7743(b)(1)) compared to the potential rights of a spouse (or any other party) with a judgment for support and maintenance only to the income from the creditor's trust (N.C.G.S.A. § 36-5-501(a)). North Carolina and South Carolina limit the exception from creditor protection only to a beneficiary's child who has a judgment or court order against a beneficiary for support and maintenance. N.C.G.S.A. § 36C-5-503(b); Code 1976 § 62-7-503(b) (in addition, South Carolina provides that the exception does not apply against a special needs trust or supplemental needs trust for a disabled beneficiary if the provision would invalidate the trust's exemption from consideration as a countable resource for Medicaid or Supplemental Security Income. § 62-7-503(c)). Ohio specifically provides that a spendthrift provision is enforceable against a former spouse. R.C. § 5805.02.

75 UTC § 504. Section 504 of the UTC provides as follows:

> (a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another State.

(b) Except as otherwise provided in subsection (c), whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:

(1) the discretion is expressed in the form of a standard of distribution; or

(2) the trustee has abused the discretion.

(c) To the extent a trustee has not complied with a standard of distribution or has abused a discretion:

(1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child, spouse, or former spouse; and

(2) the court shall direct the trustee to pay to the child, spouse, or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

(d) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

(e) If the trustee's or cotrustee's discretion to make distributions for the trustee's or cotrustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee or cotrustee.

Pennsylvania also permits income (but not principal) from a trust for the creditor's benefit to be used to satisfy a judgment against the creditor for the support and maintenance of any person other than the creditor's child. 20 PA. C.S. § 7744(c)(2). North Carolina, South Carolina and Virginia limit the ability of a court to compel distributions from a trust only to satisfy a court order against the creditor for the support and maintenance of the creditor's child. N.C.G.S.A. § 36C-5-504(d); Code 1976 § 62-7-504(d); Va. Code Ann. § 55-545.04(c). Florida omits subsection (c) of UTC § 504 altogether. West's F.S.A. § 736.0504.

[76] UTC § 505. Section 505 of the UTC provides as follows:

(a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. 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.

(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances.

(b) For purposes of this section:

(1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and

(2) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal

Revenue Code of 1986, or Section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on the effective date of this Code, or as later amended.

[77] § 506. Section 506 of the UTC provides as follows:

(a) In this section, "mandatory distribution" means a distribution of income or principal which the trustee is required to make to a beneficiary under the terms of the trust, including a distribution upon termination of the trust. The term does not include a distribution subject to the exercise of the trustee's discretion even if (1) the discretion is expressed in the form of a standard of distribution, or (2) the terms of the trust authorizing a distribution couple language of discretion with language of direction.

(b) Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

[78] The California Probate Code defines the scope of California's spendthrift protections and the exceptions thereto at §§ 15300 – 15309.

For Connecticut, see generally Section 321 of Chapter 904 (Attachments) of Title 52 (Civil Actions) of the General Statutes and related case law.

In Georgia, a creditor's ability to reach trust assets is generally limited to the beneficiary's vested interest. For example, if the trust instrument requires the trustee to distribute the income currently to the beneficiary or gives the beneficiary the unrestricted right to withdraw the principal, the creditor will likely be able to attach such an interest. If however, the trust instrument contains a spendthrift provision, the creditor cannot reach the beneficiary/debtor's interest until it is actually distributable to the beneficiary, subject to the significant exceptions. *See* Ga. Code Ann. §53-12-80. Another type of interest in which creditor's rights are severely limited is a legal life estate created by another where the beneficiary/debtor's interest is simply a right of use or occupancy. Under newly-enacted law, similar to UTC §505(b)(1), creditors may reach assets subject to the beneficiary's power of withdrawal. *Id.* at § 53-12-83. However, unlike UTC 505(b)(2), the lapse, release or waiver of a power of withdrawal shall *not* cause the holder to be treated as a settlor of the trust. *Id*.

In Idaho, spendthrift trusts are recognized and stating that a trust is a spendthrift trust is sufficient to invoke the spendthrift trust protection under I.C. §15-7-502. The statute further provides that a beneficiary is not considered the settlor of the trust merely because of a lapse, waiver or release of a power of appointment over the trust or the right to withdraw a part of the trust property greater than the amount specified in §§ 2041(b)(2), 2514(e) or 2503(b) of the Internal Revenue Code. § 15-7-502(5). Additionally, a beneficiary is not considered the settlor of a trust for his or her benefit if he or she has a special or testamentary power of appointment or has the power to use the trust assets for his or her own benefit subject to an ascertainable standard. § 5-17-502(6). Based on the foregoing, the Idaho Bankruptcy Court held that a creditor is entitled to the remainder of a debtor's interest in a trust for her benefit but not entitled to the debtor's interest in principal or income from the trust. *In re Dias*, 37 B.R. 584 (Bankr. D. Idaho 1984).

Illinois recognizes spendthrift trusts. *E.g. Geiger v. Geer*, 395 Ill. 367 (1946). "To determine whether a trust qualifies as a spendthrift trust under Illinois law, courts examine the following characteristics: (1) whether the trust restricts the beneficiary's ability to alienate and the beneficiary's creditors' ability to attach the trust corpus; (2) whether the beneficiary settled and retained the right to revoke the trust, and [3] whether the beneficiary has exclusive and effective dominion and control over the trust corpus, distribution of the trust corpus and termination of the trust. The degree of control which a beneficiary exercises over the trust corpus is the principal consideration under Illinois law." Matter of Perkins, 902 F.2d 1254, 1257 n.2 (7th Cir. 1990) (internal citations omitted).

While Illinois law provides for garnishment of wages to collect past-due child support *In re Matt*, 105 Ill. 2d 330, 735 ILCS 5/2-1403, it does not allow garnishment of wages for future support. *In re Marriage of Chapman*, 697 N.E.2d 365, 370 (Ill. App. 1998).

Practitioners should be mindful of the United States Bankruptcy Court's recent ruling in *In re Castellano*, 11 B.R. 46854 (N.D. Ill. 2014), in which the court applied Section 548(e) of the Bankruptcy Code to disregard a third-party trust containing spendthrift provisions created by the mother of a debtor for the benefit of the debtor. The court concluded that the debtor transferred assets to a "device" similar to a self-settled trust with the intent to delay or hinder creditors where, during the course of settlement of the mother's estate and trust following her death, the debtor's attorney wrote a letter to the trustee indicating that the debtor was insolvent and that the trustee should act in accordance with the spendthrift provisions of the mother's trust. The court reasoned that the debtor had effectuated an indirect transfer by refusing to accept a distribution of trust assets and directing the trustee to distribute assets to the spendthrift trust. At least one commentator has suggested that the bankruptcy court "got in wrong" in *Castellano* and notes that the case is not mandatory authority for any other court. *LISI* Asset Protection Planning Newsletter #259 (Sept. 10, 2014).

In New York, creditors' rights against a trust beneficiary are hindered by spendthrift provisions when the beneficiary is not the settlor of the trust. In fact, a beneficiary's rights cannot be "transferred by assignment or otherwise" unless a power to do so is given to the beneficiary by the trust instrument. McKinney's EPTL § 7-1.5 (McKinney 2007).

In Oregon, the relevant provisions can be found at O.R.S. § 130.300 *et seq*.

In Washington, trusts that contain express spendthrift provisions are governed by common law. Trusts that do not contain spendthrift provisions are exempted from seizure by judgment creditors so long as the trust is created by someone other than the debtor. West's RCWA § 6.32.250. Income created by a person other than the debtor will not be protected, however, against a child support order or claims for necessities or alimony. A trustee in bankruptcy may not reach the trust assets. *In re Finley*, 286 B.R. 163, 49 Collier Bankr. Cas. 2d 1233 (Bankr. W.D. Wash. 2002).

Where a trust does contain a spendthrift provision, the provision will be held valid unless it violates public policy. For example, in *Erickson v. Bank of California*, 97 Wash. 2d 246, 643 P.2d 670 (Wash. 1982), the Supreme Court of Washington found that claims for necessities, support of a spouse or child and claims for alimony can be recovered from a spendthrift trust. The court had already determined that even a spendthrift trust may be subjected to the support of a wife or child, and now determined that a bankruptcy trustee may invade a spendthrift trust in the place of creditors who furnished necessities to the beneficiary. *Knettle v. Knettle*, 197 Wash. 225, 84 P.2d 996 (1938). Spendthrift trusts are thereby sanctioned for the purpose of providing the beneficiary with living expenses which applies equally to suppliers of necessities. *Id.* The *Erickson* court also stated that unlike statutes in other states, West's RCWA § 6.32.250 has the effect of clothing "every active trust with statutory spendthrift provisions," thereby extending statutory protection to all trusts created for third parties.

In Texas, the Texas Property Code authorizes spendthrift trusts in section 112. V.T.C.A., Property Code § 112.035. A court may order a trustee of a spendthrift trust to make disbursements for the support of a child pursuant to Tex. Fam. Code § 154.005.

[79] *See* 20 Pa. C.S. § 3162(a). The full text of subsection (a) provides:

> (a) Notice generally. The personal representative, immediately after the grant of letters, shall cause notice thereof to be given in one newspaper of general circulation published at or near the place where the decedent resided or, in the case of a nonresident decedent, at or near the place where the letters were granted, and in the legal periodical, if any, designated by rule of court for the publication of legal notices, once a week for three successive weeks, together with his name and address; and in every such notice, he shall request all persons having claims against the estate of the decedent to make known the same to him or his attorney, and all persons indebted to the decedent to make payment to him without delay.

Id.

[80] *See id.*

[81] *See* 20 Pa. C.S. § 102.

[82] *Id.*

[83] *See* 20 Pa. C.S. § 3162(a).

[84] 20 Pa. C.S.§ 3532(a) (emphasis added).

[85] § 3532(b)(1).

[86] 20 Pa. C.S. § 3532(b)(2) (emphasis added).

[87] 20 Pa. C.S. § 3533.

[88] *See* 20 Pa. C.S. § 3384. Section 3384 provides:

> (a) Written notice.--Written notice of any claim against a decedent given to the personal representative or his attorney of record before the claim is barred shall toll the statute of limitations.
> (b) Acts equivalent to written notice.--Any of the following acts by a claimant shall be equivalent to the giving of written notice of a claim to the personal representative:
> (1) Instituting proceedings to compel the filing of an account.
> (2) Bringing an action against the personal representative in any court having jurisdiction of the claim and having the writ or pleading duly served on the personal representative.
> (3) Substituting the personal representative as a defendant in an action pending against the decedent.
> (4) Receiving a written acknowledgment by the personal representative or his attorney of record of the existence of the claim.

Id.

[89] 20 Pa.C.S. § 3386.

[90] 20 Pa. C.S. § 7755(a) (emphasis added).

[91] *See id.* Subsection (a) provides: "This subsection shall not expose to creditors' claims trust assets for which other provisions of substantive law provide exemption from the claims of the settlor's creditors." *Id.*

[92] *See* 20 Pa. C.S. § 7755(b).

[93] *See id.*

[94] *See* 20 Pa. C.S. § 7755(c).

[95] *Id.*

[96] *See* 20 Pa. C.S.§ 7780.3(c) ("No later than 30 days after the date on which the trustee of a revocable trust learns that the settlor has died, the trustee shall send the notice described in subsection (i) to . . . the settlor's personal representative . . . .").

[97] 20 Pa. C.S. § 3162(b). The Joint State Government Committee Comment from 2007 provides that "[b]ecause § 7755 (claims and distribution after settlor's death) allows the trustee to piggyback on the protection advertisement affords a personal representative and encourages the trustee to advertise when there is no personal representative or when the personal representative does not advertise, it is important that a personal representative who has advertised the grant of letters share proof of that fact with the trustee."

[98] 20 Pa. C.S. § 7755(d).

[99] *See* 20 Pa. C.S. § 7755(e).

[100] *See* Conn. Gen. Stat. § 45a-354.

[101] *See* Conn. Gen. Stat. § 45a-356(a).

[102] *See* Conn. Gen. Stat. § 45a-357.

[103] *See* Conn. Gen. Stat. § 45a-358(a) and (d).

[104] *See* Conn. Gen. Stat. § 45a-358(b).

[105] *See* Conn. Gen. Stat. § 45a-358(a).

[106] *See* Conn. Gen. Stat. §§ 45a-358(e), 45a-360(a) and (c).

[107] *See* Conn. Gen. Stat. § 45a-360(c).

[108] *See id*.

[109] *See* Conn. Gen. Stat. §§ 45a-363 and 45a-364. If the probate court denies the request to hear the claim or to refer the claim to a probate magistrate or attorney probate referee, the creditor will have 120 days from that denial to bring suit.

[110] *See* Conn. Gen. Stat. § 45a-361.

[111] Note: The 150-day period is not affected by a probate court's failure to properly provide newspaper notice pursuant to Conn. Gen. Stat. § 45a-354 or by a change in fiduciary; however, the period is tolled during the time that no fiduciary is serving. *See* Conn. Gen. Stat. § 45a-356(b).

[112] *See* Conn. Gen. Stat. § 45a-356(a).

[113] *See* Conn. Gen. Stat. §§ 45a-368 and 45a-370.

[114] *See* 18-C M.R.S. § 3-801 to 818.

[115] *See* 18-C M.R.S. § 3-801.1., 3.

[116] *See id*.

[117] *See* 18-C M.R.S. § 3-803.1.

[118] *See* 18-C M.R.S. § 3-803.2.

[119] *See* 18-C M.R.S. § 3-803.3.

[120] *See* 18-C M.R.S. § 3-803.4.

[121] *See* 18-C M.R.S. § 3-802.2.

[122] *See* 18-C M.R.S. § 3-802.3.

[123] *See* 18-C M.R.S. § 3-806.1.

[124] *See id.*

[125] *See* 18-C M.R.S. § 3-806.1.-2.

[126] *See* 18-C M.R.S. § 3-806.2.

[127] *See* 18-C M.R.S. § 3-804.1.

[128] *See id.*

[129] *See id.*

[130] *See* 18-C M.R.S. § 3-804.4.

[131] *See* 18-C M.R.S. § 3-806.2.

[132] *See id.*

[133] *See* 18-C M.R.S. § 3-806.3.

[134] *See* 18-C M.R.S. § 3-806.4.

[135] *See* 18-C M.R.S. § 3-806.5.

[136] *See* 18-C M.R.S. § 3-807.1.

[137] *See id.*

[138] *See* 18-C M.R.S. § 3-807.2.

[139] *See* 18-C M.R.S. § 3-808.

[140] *See* 18-C M.R.S. § 3-809.

[141] *See* 18-C M.R.S. § 3-810.

[142] *See* 18-C M.R.S. § 3-811.

[143] *See* 18-C M.R.S. § 3-815.

[144] *See id.*

[145] *See* 18-C M.R.S. § 3-817.

[146] *See* G.L. c. 190B § 3-803.

[147] *See* G.L. c. 190B § 3-804(1).

[148] *See* G.L. c. 190B § 3-804(2).

[149] *See* G.L. c. 190B § 3-803(a).

[150] *See* G.L. c. 190B § 3-804(2)

[151] *See* G.L. c. 190B § 3-804(3).

[152] *See* G.L. c. 190B § 3-803(b).

There are exceptions to the one year statute of limitation, which include:

(1) Any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate;

(2) An action for personal injury or death, if commenced more than 1 year after the date of death of the decedent, brought against the personal representative; provided further, that the action is commenced not later than 3 years after the cause of action accrues; and provided further, that a judgment recovered in that action shall only be satisfied from the proceeds of a policy of liability bond or liability insurance, if any, and not from the general assets of the estate; and provided further, that if a personal representative has not been appointed, then an action otherwise allowed pursuant to this chapter may be maintained without such appointment, and shall be maintained naming the decedent as the defendant; and provided further, that in that event any service of process that may be necessary shall be made upon the entity providing the insurance or bond; and

(3) Collection of compensation for services rendered and reimbursement for expenses advanced by the personal representative or by the attorney or accountant for the personal representative of the estate.G.L. c. 190B § 3-803(d)(1)-(3).

[153] *See* G.L. c. 190B § 3-803(e).

[154] *See* G.L. c. 190B § 3-104.

[155] *See* G.L. c. 190B § 3-203(b)

[156] *See* G.L. c. 190B § 3-803(f).

[157] *See* G.L. c. 118E § 32(b).

[158] *Matter of Estate of Kendall*, 486 Mass. 522, 523 (2020). In *Kendall*, the Decedent passed away on August 7, 2014, was older than fifty-five and had received $104,738.28 in benefits. On May 24, 2018, an heir filed a petition for late and limited formal testacy, and notified the Division as required. The Division notified the petitioner that it would be filing a claim, and in response, the Personal Representative informed the Division that she could not pay the Division pursuant to G.L. c. 190B § 3-108(4). *See id.* The court agreed with the Personal Representative, finding that the language of § 3-108(4) is plain and clear, and "reflects a strict rule against any possibility of creditor recovery from an estate in late and limited testacy." *Id.* at 528-29.

[159] *See* G.L. c. 190B § 3-807(c).

[160] *See* G.L. c. 190B § 3-807(g)(1)-(2).

[161] *See* G.L. c. 190B § 3-803(b).

[162] *See* G.L. c. 190B § 3-1201, generally.

[163] *See* G.L. c. 190B § 2-403(a)

[164] *See id*.

[165] *See* G.L. c. 190B § 2-403(a).

[166] *See id*.

[167] *See* G.L. c. 190B § 2-403(b)

[168] *See* G.L. c. 190B § 2-404(a)

169 *See* G.L. c. 190B § 2-405

170 *See id*.

With respect to creditors' rights during an individual's lifetime, in Massachusetts:

Exempt Categories of Property. G.L. c. 188 provides an automatic $125,000 homestead exemption. A $500,000 homestead exemption can be obtained if a declaration of homestead is written, executed, and recorded pursuant to G. L. c. 188 § 5. Alternatively, a $750,000 (single person) or $1,000,000 (married couple) homestead exemption can be obtained in event the declarants are elderly or disabled. *See* G.L. c. 188 §§ 1, 3, and 5.

In Massachusetts, the homestead exemption applies to the debtor's equity, not the property's value. *See* In re Giarrizzo, 128 .R. 321 (Bankr. D. Mass. 1991).

G.L. c. 235 § 34, provides the following specific exemptions for seizure by creditors:

1. The necessary wearing apparel, beds and bedding for the debtor and the debtor's family, 1 heating unit used for warming the dwelling house, 1 stove, 1 refrigerator, 1 freezer and 1 hot water heater used primarily for the personal, family or household use of the debtor or a debtor's family and the amount each month, not exceeding $500, reasonably necessary to pay for fuel, heat, refrigeration, water, hot water and light for the debtor and the debtor's family;

2. Other household furniture necessary for the debtor and the debtor's family, not exceeding $15,000 in value;

3. The bibles, schoolbooks and library used by the debtor or the debtor's family, not exceeding $500 in value;

4. 2 cows, 12 sheep, 2 swine and 4 tons of hay;

5. Tools, implements and fixtures necessary for carrying on the trade or business of the debtor, not exceeding $5,000 in value;

6. Materials and stock designed and procured by the debtor which is necessary for carrying on the trade or business of the debtor and intended to be used or wrought therein, not exceeding $5,000 in value;

7. Provisions necessary and procured and intended for the use of the debtor's family or the money necessary therefor, not exceeding $600 in value;

8. 1 pew occupied by the debtor or the debtor's family in a house of public worship; provided, however, that nothing herein shall prevent the sale of a pew for the nonpayment of a tax legally imposed thereon;

9. Boats, fishing tackle and nets of a debtor who is a fisherman and actually used by the debtor in the course of the debtor's business, not exceeding $1,500 in value;

10. The uniform of an officer or soldier in the militia and the arms and accoutrements required by law to be kept by the officer or soldier;

11. The rights of burial and tombs in use as repositories for the dead;

12. 1 sewing machine in actual use by each debtor or by his family, not exceeding $300 each in resale value, and 1 computer and 1 television, in actual use by each debtor's family;

13. Shares in co-operative associations subject to chapter 157, not exceeding $100 in value in the aggregate;

14. Estates of homestead as defined in chapter 188 or, in lieu thereof, the amount of money each rental period, not exceeding $2,500 per month, necessary to pay the rent for the dwelling unit occupied by the debtor and the debtor's family;

15. $2,500 in cash or savings or other deposits in a banking or investment institution, wages equal to the greater of 85 per cent of the debtor's gross wages or 50 times the greater of the federal or the Massachusetts hourly minimum wage for each week or portion thereof and the full amount owing or paid to a person as public assistance;

16. An automobile necessary for the debtor's personal transportation or to secure or maintain employment, not exceeding $7,500 of wholesale resale value; provided, however, that the equitable value of a vehicle owned or substantially used by debtor who is either a handicapped person or a person 60 years of age or older shall be exempt up to $15,000 in wholesale resale value;

17. The debtor's aggregate interest in any personal property, not to exceed $1,000 in value, plus up to $5,000 of any unused dollar amount of the aggregate exemptions provided under clauses Second, Fifth and Sixteenth; and

18. The debtor's aggregate interest, not to exceed $1,225 in value, in jewelry held primarily for the personal, family or household use of the debtor or the debtor's spouse or dependent.

Additionally, G.L. c. 235 § 34A, protects "[t]he right or interest of any person in an annuity, pension, profit sharing or other retirement plan subject to the federal Employee Retirement Income Security Act of 1974, in any plan maintained by one or more self-employed individuals as a Keogh Plan, so-called, in any plan maintained by a corporation or other business organization pursuant to section 401(a) of the Internal Revenue Code but not subject to the federal Employee Retirement Income Security Act of 1974, or in any Simplified Employee Plan, annuity plan to which the provisions of section 403(b) of the Internal Revenue Code apply or Individual Retirement Account or Annuity maintained by an individual, or in any annuity or similar contract distributed from or purchased with assets distributed from any of the foregoing, shall be exempt from the operation of any law relating to insolvency and shall not be attached or taken on execution or other process to satisfy any debt or liability of such person, except as may be necessary to satisfy (i) an order of a court of competent jurisdiction concerning divorce, separate maintenance or child support or (ii), in the event of the conviction of such person of a crime, an order of a court requiring such person to satisfy a monetary penalty or make restitution to the victim of such crime. The exemption in this section for plans maintained by an individual, whether or not self-employed, shall not apply to sums deposited, determined without regard to deposits pursuant to a rollover or transfer except to the extent protection under this section would be limited in the absence of a rollover or transfer, in said plans during the five year period preceding the individual's declaration of bankruptcy or entry of judgment in excess of 7 per cent of the total income of such individual for such period." *See* G.L. c. 235 § 34A.

Domestic Protection Asset Trusts. Massachusetts does not have Domestic Protection Asset Trusts.

Tenancy by the Entireties. In Massachusetts, "[t]he real and personal property of any person shall, upon marriage, remain the separate property of such person, and a married person may receive, receipt for, hold, manage and dispose of property, real and personal, in the same manner as if such person were sole. A husband and wife shall be equally entitled to the rents, products, income or profits and to the control, management and possession of property held by them as tenants by the entirety.

The interest of a debtor spouse in property held as tenants by the entirety shall not be subject to seizure or execution by a creditor of such debtor spouse so long as such property is the principal residence of the nondebtor spouse; provided, however, both spouses shall be liable jointly or severally for debts incurred on account of necessaries furnished to either spouse or to a member of their family." G.L. c. 209 § 1.

[171] *See* RSA § 553:16.

[172] *See* RSA § 556:3. However, "[i]f the estate has been represented insolvent within said six months no such exhibition shall be necessary to entitle the creditor to have the demand allowed by the commissioner." *See* RSA § 556:4.

[173] *See id.*

[174] RSA § 556:2.

[175] RSA § 556:1.

[176] *American Policyholder's Ins. Co. v. Baker*, 409 A.2d 1346, 1347-48 (N.H. 1979).

[177] RSA § 556:28.

[178] *See Tulsa Professional Collection Services v. Pope*, 108 S. Ct. 1340 (1988); *Stewart v. Farrel*, 131 N.H. 458, 464 (1989).

[179] RSA § 556:6.

[180] *See* R.I. Gen. Laws § 33-11-5.1.

[181] *See* R.I. Gen. Laws § 33-11-5.2.

[182] *See* R.I. Gen. Laws § 33-11-4(1).

[183] *See* R.I. Gen. Laws § 33-11-14.

[184] *See* R.I. Gen. Laws § 33-11-15.

[185] *See* R.I. Gen. Laws § 33-11-19.

[186] *See* R.I. Gen. Laws § 33-11-5.

[187] *See* R.I. Gen. Laws § 33-11-14.

[188] *See* R.I. Gen. Laws §§ 33-11-5(b), 33-11-19(b).

[189] *See* R.I. Gen. Laws § 33-11-16. If the probate court declines to review the disallowance because it determines that the issues would be more efficiently considered in district or superior court, the fiduciary may file a civil action within thirty days.

[190] *See* R.I. Gen. Laws §§ 33-11-42, 33-11-48. Note: The superior court has discretion to divide the costs of the appeal between the parties "as justice may require." R.I. Gen. Laws § 33-11-43.

[191] *See* R.I. Gen. Laws § 33-11-45.

[192] *See* 14 V.S.A. § 1201(a).

[193] *See* 14 V.S.A. § 1203(a)(1).

[194] *See* 14 V.S.A. § 1203(a)(2).

[195] *See* 14 V.S.A. § 1203(b)(1)-(2).

[196] *See* 14 V.S.A. § 1203(c).

[197] *See* 14 V.S.A. § 1204 (1).

[198] *See id.*

[199] *See id.*

[200] *See id.*

[201] *See id.*

[202] *See id.*

[203] *See* 14. V.S.A. § 1204(2).

[204] *See id*.

[205] *See* 14 V.S.A. § 1204(3).

[206] *See id.*

[207] *See* V.R.P.P. 4.(e).

[208] This is important because if the court clerk causes publication of the notice of creditors in the newspaper, then constitutional issues like those raised in *Tulsa Professional Association v. Pope,* 485 U.S. 478, 108 S.Ct. 1340 (1988) can be invoked having met the "state action" element required by the due process clause under the U.S. Constitution.

[209] *See* 14 V.S.A. § 1201 (b).

[210] *See* 14 V.S.A. § 1206.

[211] *See id*.

[212] *See id*.

[213] *See id*.

[214] *See id*.

[215] *See* 14 V.S.A. § 1206(b).

[216] *See* 14 V.S.A. § 1206(c).

[217] *See* 14 V.S.A. § 1206(d).

[218] *See* 14 V.S.A. § 1206(e).

[219] *See generally* 31 U.S.C. § 3713.

[220] *See* 31 U.S.C. § 3713(a)(1).

[221] 31 U.S.C. § 3713(b).

[222] *See, e.g., United States v. Bartlett*, 186 F.Supp.2d 875, 885 (C.D. Ill. 2002) (citing *United States v. First Midwest Bank/Ill., N.A.*, 1997 WL 675192, *13 (N.D. Ill. 1997) (internal quotation marks omitted).

[223] *See id.*

[224] *See United States v. Weisburn*, 48 F. Supp. 393 (E.D. Penn. 1943); *United States v. MacIntyre*, 2012 WL 2403491 (unreported 2012) for a list of cases supporting the carve out.

[225] *See* IRC § 6901(a)-(b).

[226] *See id.*

[227] *See* IRC § 6901(h).

[228] 2012 WL 2403491

[229] IRC § 2053(a) (emphasis added).

[230] 20 Pa. C.S. §3392.

[231] The order of abatement of a Pennsylvania estate—unless modified by will or other instrument—follows the order dictated in Pennsylvania law, which provides, in relevant part:

> [I]f the assets are insufficient to pay all claimants and distributees in full, the shares of distributees, without distinction between real and personal estate, shall have priority of distribution in the following order:
> . . .
> (2) Property specifically devised or bequeathed to or for the benefit of the decedent's issue . . .
> (4) Property disposed of by will in the form of a general bequest of cash, stocks or bonds . . .
> (5) Property disposed of by general devise or bequest and not included in a residuary clause.
> (6) Property devised or bequeathed in a residuary clause.
>
> 20 Pa. C.S. §3541(a).

This order of abatement also applies to trusts. 20 Pa. C.S. §7799.2.

[232] *See* Conn. Gen. Stat. § 45a-365.

[233] *See* Conn. Gen. Stat. § 45a-379.

[234] *See* N.H. Rev. Stat. § 554:19-I.

[235] *See* N.H. Rev. Stat. § 554:19-II to III.

[236] *See* 18-C M.R.S. §3-805.1.

[237] *See* 18-C M.R.S. §3-805.2.

[238] *See* G.L. c. 190B § 3-805(a).

[239] *See* G.L. c. 190B § 3-805(b).

[240] *See* R.I. Gen. Laws § 33-11-24.

[241] *See* R.I. Gen. Laws § 33-12-11(a).

[242] *See* R.I. Gen. Laws § 33-12-11(b).

[243] 14 V.S.A. § 1205.

[244] *See id.*

[245] *See* McKinney's SCPA § 1802. New York law with respect to this period provides:

> If any claim is not presented within 7 months from the date of issue of letters, the fiduciary shall not be chargeable for any assets or moneys that he may have paid in good faith in satisfaction of any lawful claims or of any legacies or distributions to the legatees or distributees of the decedent before such claim was presented. Such 7 month period shall begin on the date letters were first issued to any fiduciary, including a temporary administrator or a preliminary executor, and shall not be interrupted by any subsequent issue of letters, except that the time during which there is no fiduciary in office shall not be counted as part of such period.

Id.

[246] McKinney's SCPA § 1803(1) (2019).

[247] McKinney's SCPA § 1803(2) (2019).

[248] McKinney's SCPA § 1803(3) (2019).

[249] *See, e.g.*, *Matter of Segall*, 287 N.Y. 52, 38 (1941).

[250] McKinney's SCPA § 1806(1) (1993).

[251] *See* McKinney's SCPA § 1806(2) (1993).

[252] *See* McKinney's SCPA § 1806(3) (1993)

[253] McKinney's SCPA § 1807(1) (1993).

[254] *See* McKinney's EPTL § 12-1.1 (1968).

[255] N.J.S.A. § 3B:22-4.

[256] The revision of the Probate Code as of 2005 created different, and at times conflicting, rules as to the timing considerations that apply to third-party claims, especially claims by creditors.

Under N.J.S.A. § 3B:15-23 in effect until February 27, 2005, an order of discharge would not be entered in cases in which the fiduciary was an executor, administrator with the will annexed, substituted administrator with the will annexed, administrator or substituted administrator except upon proof that: (a) six months had elapsed after the entry of an order to limit creditors pursuant to N.J.S.A. § 3B:22-4; and (b) there were no remaining unpaid or pending claims of decedent's creditors. Under that same version of the code, N.J.S.A. § 3B:22-4 limited the time within which creditors were to present a claim. In fact, the court or Surrogate was authorized to order the personal representative to give public notice to creditors of the decedent to present their claims in writing and under oath, with specifics as to the amount claimed and the nature of the claim, within six months from the date of the order. N.J.S.A. § 3B:22-4.

[257] *See* N.J.S.A. § 3B:14-40.

Tension thus exists as to timing for creditors under these statutes. For example, where the time for filing claims had not expired, an executrix was found to have acted at her own risk when she mistakenly turned over assets to one who was supposed to be the sole creditor and was responsible for all such assets less dividends to which such person was entitled. *In re Winter's Estate*, 133 N.J. Eq. 245 (N.J. Prerog. Ct. 1943), *aff'd*, 136 N.J. Eq. 112 (E. & A. 1945)

[258] *See* N.J.S.A. § 3B:22-7. The purpose of this procedure is to expedite the settlement of estates. *Gordon v. Robinson*, 103 N.J. Super. 5 (App. Div. 1968)

[259] *See* N.J.S.A. § 3B:22-8.

[260] *See* § 3B:22-8.

[261] *See* N.J.S.A. § 3B:22-10.

[262] *See* N.J.S.A. § 3B:22-11.

[263] *See* § 3B:22-11.

[264] *See* N.J.S.A. § 3B:22-12.

[265] *See* N.J.S.A. § 3B:22-13.

[266] *See* N.J.S.A. § 3B:22-14.

[267] *See* N.J.S.A. § 3B:22-15.

[268] *See Keppelmann v. Keppelmann*, 89 N.J. Eq. 390 (Ch. 1918), *rev'd on other grounds*, 91 N.J. Eq. 67 (E. & A. 1919), cert. denied, 252 U.S. 581 (1920); *In re Estate of Collins*, No. A-3421-17T4, 2019 WL 573897 (App. Div. Feb. 13, 2019) (estate entitled to reimbursement from beneficiaries of their proportionate share of the inheritance taxes where the last will so provided and the beneficiaries had executed refunding bonds).

[269] *See* N.J.S.A. § 3B:22-22. This provisions provides that:

> The real property of any person who shall die seized thereof or entitled thereto shall be and remain liable for the payment of his debts for one year after his decease, but may be sold free from liability for payment of debts by his personal representative upon application to the court upon terms and conditions as the court may direct for the protection of creditors, any alienation or encumbrance made or attempted to be made by his heirs or devisee to the contrary notwithstanding.
>
> *Id.*

This statute, designed to permit the sale of property without liability, does not absolve the personal representative of the obligation to pay creditor claims (including using the proceeds of such a sale). The one-year period set by N.J.S.A. § 3B:22-22 shall not be deemed to be extended by any directions in a will that just debts be paid unless the will contains express language to the effect that the debts shall remain a lien upon the real property for a longer period. N.J.S.A. § 3B:22-23

[270] *See* 12 Del. C. § 2102(a). *See also Brockson v. Richardson Bros., Inc.*, 24 A.2d 537, 539 (Del. Super. 1942) ("The intent and purpose [of the "non-claim" statute] is to compel claimants with demands against decedent's estates other than those of which the personal representative is required to take notice, to present their claims within the specified time, and when their claims are rejected, to seek prompt enforcement thereof, so that decedent's estates can be settled within a reasonable time. This seems to us to be the logical and sole purpose of the statute.") (Note that this case was partially overruled, but not as to this portion of the holding); *Estate of Holton*, 1976 WL 5206, at *2 (Del. Ch. 1976) ("Prompt distribution of the assets of the estate is the ultimate goal of the statute.")

[271] 12 Del. C. § 2102(b).

[272] *See* 12 Del. C. § 2102(c).

[273] 12 Del. C. § 2101(a).

[274] 12 Del. C. § 2101(b).

[275] 12 Del. C. § 2103.

[276] 12 Del. C. § 2104(1). For example, the New Castle County form can be found at https://www.nccde.org/DocumentCenter/View/176/Form-No-NC-4-Statement-of-Claim-revised--1-9-19-PDF

[277] 12 Del. C. § 2104(1).

[278] *See* Md. Code Ann., Estates & Trusts § 8-103 (a).

[279] *See Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988); *Ohio Cas. Ins. Co. v. Hallowell*, 94 Md. App. 444 (1993).

[280] *See* Maryland Trust Act § 14.5-508 (b)(1).

[281] *See* § 14.5-508(b)(2).

[282] 248 Md. App. 631 (2020).

[283] *See* Md. Cts. & Jud. Proc. § 11-504(h).

[284] *See* Md. Cts. & Jud. Proc, § 11-504 (g).

In *In Re: Neil Solomon, M.D.*, 67 F.3d 1128 (4th Cir. 1995), the federal Court of Appeals held that an IRA was exempt and the debtor was not forced to consider non-mandatory withdrawals as potential income for Chapter 13 purposes. In that case, Dr. Solomon was facing $160 Million in potential tort liability – much of it non-dischargeable under Chapter 7 because it arose from “willful and malicious injury by the debtor.” The bankruptcy court denied a Chapter 13 plan, holding that the debtor needed to include as “disposable income” some part of his IRAs. The Court of Appeals reversed the bankruptcy court and preserved the IRA.

Rousey v. Jacoway, 544 U.S. 320, 125 S.Ct. 1561 (2005), held that IRAs were covered under the federal exemptions of § 522(d)(10)(E) of the Bankruptcy Code. Before *Rousey* there was an issue because IRAs are not ERISA plans. The Bankruptcy Act makes the federal IRA exemption explicit and adds a limit of $1 Million, inflation-adjusted, for IRAs (but no limit for 401(k)s; rollovers from 401(k)s, SEPs and SIMPLE-IRAs). Bankruptcy Act § 522(n). The $1 Million limit should not cover IRAs under state exemptions when the state opted out of the federal exemptions (like Maryland).

[285] *Clark v. Rameker*, 134 S. Ct. 2242 (2014).

[286] In *Clark*, the federal exemption was denied because the federal exemption only covered the debtor’s interest in the debtor’s retirement funds in specified qualified plans. An inherited IRA was held not to be the “retirement plan” of the subsequent beneficiary who, of course, had not established the fund initially.

The Maryland statute is materially different from that of the federal exemption. Cts. & jud. Proc. §11-11-504 (h) exempts “any money or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan qualified under” certain IRC provisions, including IRAs. Although there is no Maryland-specific ruling, the inclusion of a “beneficiary” of an IRA as well a the “participant” ought to make inherited IRAs exempt from bankruptcy proceedings and from Maryland attachment.

In re Pacheco, 537 B.R. 935 (2015) (Bankr. D. Ariz. 2015) held that an inherited IRA was exempt from creditors under its state exemption statute. Arizona had likewise opted out of the federal exemptions and its exemption was virtually identical to that of Maryland. A.R.S. § 33-1126 (B). The Arizona statute varies only in syntax from its Maryland counterpart: Arizona states "Any money or other assets payable to a participant in or beneficiary of, or any interest of any participant or beneficiary in, a retirement plan under…".

By including "beneficiary" to the protected class ought to sweep inherited IRAs into the Maryland exemption. "The inclusion of the term "beneficiary" likens the Maryland statute to state laws that have explicitly exempted inherited IRAs such as those in Arizona, Delaware and Florida. It may be likely that courts find that inherited IRAs are protected under Maryland law both in and out of bankruptcy." Robert E. Eggmann and Dormie Ko, Bringing Clarity to Inherited IRAS, 51 Loy. U. Chi. L. J. 1095, 1109 (2019).

[287] *See* DC ST § 20-903(a).

[288] *See id.*

[289] *See id*

[290] DC ST § 20-903(b).

[291] *See* § 20-903(d).

[292] § 20-903(c).

[293] *See* § 20-903(c).

[294] *See* § 20-704(a).

Under DC ST § 20-101(j), "Personal representative" means a person, other than a special administrator, who has been appointed by the Court to administer the estate of a decedent. Personal representatives are appointed in the order of priority listed in section 20-303(a)(1) (executors named in a will admitted to probate are given the highest priority).

Under DC ST §20-101(o), "Rules" means the rules promulgated by the Superior Court of the District of Columbia applicable to the Probate Division of that Court.

[295] *See* DC ST § 20-401(a). Supervised administration is a single in rem proceeding to secure complete administration and settlement of a descendant's estate under the continuing authority of the Court which extends until entry of an order approving distribution of the estate and discharging the personal representative (or other terminating order). A supervised personal representative has the same duties and powers as a personal representative who is not supervised (except as otherwise provided in this chapter, or as otherwise ordered by the Court).

In an unsupervised administration the personal representative is not required to file any inventories or accounts with the Court, is not subject to provisions of this title which expressly apply only in a supervised administration, and in general, is subject only to any order of the Court rendered upon a failure to satisfy filing requirements. DC ST § 20-401(b).

[296] DC ST § 20-101(m). "Register" means the Register of Wills
.

[297] *See* DC ST § 20-704(a).

[298] *See generally* DC ST § 20-343.

[299] *See* DC ST § 20-704(b).

[300] *See* § 20-704(b)(1).

[301] *See* § 20-704(b)(2).

[302] *See* DC ST §§ 20-704(b)(3) and -704(b-1).

[303] *See* DC ST § 20-704(b). (1) and (3) shall have distinct duties and rights depending on whether the personal representative is subject to continuing court supervision as provided in section 20-401 et seq.(supervised), or is an unsupervised personal representative.

[304] Under DC ST § 20-101(d)(1), "Interested person" means (A) any person named in the will to serve as personal representative, until the appointment of a personal representative; (B) a personal representative; (C) any legatee in being, whether such legatee's interest is vested or contingent, until the legacy is paid in full; (D) an heir, except that an heir ceases to be an interested person once a will has been admitted to probate; provided, that, an heir is an interested person for the purpose of any proceeding to contest the validity of the will and following any determination that the decedent died intestate as to some or all of the estate; and (E) Any creditor of the decedent, including those persons whose rights accrue at the time of death, who has timely presented a claim in excess of $500 that has not been barred or discharged.

[305] *See* DC ST § 20-704(b)(4).

[306] *See* § 20-704(b-2).

[307] *See* DC ST § 20-331(b)(A).

[308] *See* DC ST § 20-902.

[309] *See* DC ST §§ 12-305, 20-902.

[310] McKinney's SCPA § 1811(1) (1966).

[311] McKinney's SCPA § 1811(2) (1966).

[312] N.J.S.A. § 3B:22-2. In addition, under this statute, no preference is given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due. Id. *See generally In re Estate of Valmore J. Forgett, Jr., Deceased*, No. A-0443-17T4, 2019 WL 4165062 (N.J. Super. Ct. App. Div. Sept. 3, 2019).

N.J.S.A. § 3B:22-2 was amended effective 2005 to make clear that the commencement of an action shall not entitle the underlying debt or claim to preference over others of the same class.

Likewise, for abatement purposes, N.J.S.A. § 3B:22-3 sets the order in which a decedent's assets are to be abated in satisfying debts and claims: (a) property passing by intestacy; (b) residuary devises; (c) general devises; and (d) specific devises. Under the revised Probate Code in effect as of February 27, 2005, N.J.S.A. § 3B:22-3 remains the starting point for abatement analysis and maintains this same general priority, but does so by referring to N.J.S.A. § 3B:23-12, which maintains this general priority and makes clear that the abatement priority is subject to a surviving spouse's elective share. Further, under N.J.S.A. § 3B:23-14, the abatement procedure is subject to any order expressed in the will itself, and the priority may be altered "if the testamentary plan or the express or implied purpose of the devise would be defeated by the order" set forth in N.J.S.A. § 3B:23-12.

In any event, courts have consistently enforced this order of priority of claims. For instance, funeral expenses, physicians' and nurses' bills, administration expenses, debts due the United States, and judgments of record entered in the judgment debtor's lifetime are preferred claims against his personal property in the hands of the administrator of his estate after his death, and the balance or surplus after payment of such claims is available for payment of general creditors. *See Robinson v. Hodge*, 4 N.J. 397 (1950).

Where the decedent's estate was insolvent, funeral expenses, including burial plot and headstone, which were concededly proper in amount, executor's commissions and counsel fees, which were concededly proper in amount, and the claim of the United States government for income taxes, including a tax that became a lien before the death of the decedent, were entitled to priority in that order. In re Holmes' Estate, 16 N.J. Misc. 402 (Orphans' Ct. 1938).

In Bowes v. U.S., 127 N.J. Eq. 132 (Ch. 1940), an executor, in paying claims against the decedent's estate, was required to pay claims for administration expenses first, then claims for estate taxes due the United States, followed by claims for inheritance taxes due the State, then claims for municipal taxes, and finally claims of general creditors.

[313] 12 Del. C. §2308(a).

[314] 12 Del. C. §2308(b)

[315] 12 Del. C. §2308(c).

[316] 12 Del. C. § 2105(a).

[317] 12. Del. C. § 2105(b)

[318] As provided in MD Code, Estates and Trusts, § 8-106.

[319] As provided in MD Code, Estates and Trusts, § 7-601.

[320] As provided in MD Code, Estates and Trusts § 7-602.

[321] As provided in MD Code, Estates and Trusts § 3-201.

[322] As provided in MD Code, Human Services, § 5-407.

[323] MD Code, Estates and Trusts, § 8-105(a).

[324] MD Code, Estates and Trusts, § 8-105(b).

[325] As set forth in DC ST § 19-101.02 and 19-101.04, respectively.

[326] As defined in DC ST § 19-101.03.

[327] DC ST § 20-906(a).

[328] DC ST § 20-906(b).