A Changing World Calls for Iowa to Apply the Alter Ego Doctrine to Irrevocable Trusts

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ABSTRACT: Over the past couple of decades there has been an increase in people taking more active steps to protect their financial security due to outside events like the 2008 Recession and increased aggression from creditors. Because of this trend, irrevocable trusts have grown in popularity around the country as a way to best protect assets from creditors. This increased usage has opened up the possibility of these irrevocable trusts being used for abusive practices by their settlors. This susceptibility to abuse is partially because many courts have begun to apply the alter ego doctrine, a form of veil piercing traditionally applied to corporations, to irrevocable trusts in allowing creditors to access the assets in those trusts when the circumstances would deem not doing so unjust. The alter ego doctrine gives judges wide discretion when deciding whether to apply the doctrine, which creates uncertainty in the application of the law. This uncertainty then creates a situation where individual settlors do not know what the law actually is, which in turn could lead to more irrevocable trusts being used in such a way that could end up constituting abuse. This is particularly true in Iowa where the courts have yet to recognize that this kind of application is possible, and it is likely they will have to face this question sooner rather than later. This Note argues that Iowa should regulate this application of the alter ego doctrine through statute. This approach will limit judicial discretion and, in doing so, will allow for citizens of Iowa to understand the law regarding irrevocable trusts while using them. This Note also proposes an example of such a statute, which is inspired by other states and current Iowa alter ego law.

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I. INTRODUCTION

Imagine the following situation about a fictional character named John Smith and his financial situation. John is in his sixties and is happily married with three children who are all fully grown and financially independent. John has done very well for himself throughout his career as a doctor and is now currently a multi-millionaire. Because his career is one that is fraught with potential liability, John's attorney advises him and his wife to restructure their estate plan in a way that will end up protecting large amounts of their assets for their children's sakes. Thus, John and his wife place their house, their vacation home, their three cars, John's rare stamp collection, and small chunk of their savings into an irrevocable trust with their three children listed as the beneficiaries of the trust and the eldest child named as the sole trustee.[1]

1. This situation of having the same person be the trustee of a trust as well as one of the beneficiaries is generally allowed under current trust law. Mary F. Radford & Clarissa Bryan, *Irrevocability of Special Needs Trusts: The Tangled Web That is Woven When English Feudal Law is Imported into Modern Determinations of Medicaid Eligibility*, 8 NAELA J. 1, 13–15 (2012) (finding that the merger doctrine is designed to prevent all of the interests of the trustee and beneficiary being found in one individual person); *see* John J. Barnosky, *The Incredible Revocable Living Trust*, 10 J. SUFFOLK ACAD. L. 1, 7–8 (1995) (explaining how the doctrine of merger, which completely extinguishes a trust's existence, only comes into play when the same person is both the *sole*

However, John and his wife still live in and use the two houses and three cars in the same way that they did before those assets were transferred to the irrevocable trust. Funds from the trust are also used to pay for things like property taxes and insurance on the houses and cars.

Unfortunately for his patients, John grows more reckless with age and a build-up of malpractice claims and bad business deals have led to a number of creditors trying to recover from him personally on his liabilities. John's medical malpractice insurance plan does not adequately cover those liabilities. However, thanks to the nature of the irrevocable trust,[2] the creditors will not actually be able to gain access to those personal-use assets that John and his wife placed in the irrevocable trust. The Smiths technically do not own those assets anymore, and the structure of the irrevocable trust provides a measure of asset protection even though they are still using some of the assets as if they own them.[3] John has essentially been able to protect a good part of his assets from creditors without practically losing control over them. He is getting all of the benefits of an irrevocable trust without much of the downside. This leads one to ask: Is this a just outcome?

Many courts throughout the country have answered this question in the negative by applying the alter ego doctrine to the irrevocable trust so as to hold the assets of the trust liable for the debts of, in this case, the settlor.[4] In a nutshell, the alter ego doctrine looks at whether an individual controls an entity to such an extent that it negates the personality of the entity.[5] The alter ego doctrine is also an equitable doctrine that is supposed to only be used sparingly in circumstances where it is necessary to stop an injustice, such as a fraudulent conveyance or an attempt to hide assets from creditors,[6] from occurring, thus making it an appropriate scheme to use in John Smith's

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beneficiary and trustee of a trust: This threat "is easily avoided by appointing a co-trustee, or more simply, by adding additional beneficiaries").

2. Julie Garber, *What Is an Irrevocable Trust?: Definition and Examples of Irrevocable Trust*, BALANCE (Aug. 5, 2020), https://www.thebalance.com/what-is-an-irrevocable-trust-3505400 [https://perma.cc/ZZ4W-VLN9] (explaining that "[a]n irrevocable trust is one that generally cannot be amended, modified, or revoked" and that those trust assets are protected from the creditors of the settlor and the beneficiaries, at least until beneficiaries end up taking control of the trust assets in question).

3. This is true even though the settlor has "legally remove[d] all of their rights of ownership to the assets and the trust." Julia Kagan, *Irrevocable Trust*, INVESTOPEDIA (Apr. 5, 2020), https://www.investopedia.com/terms/i/irrevocabletrust.asp [https://perma.cc/X8JA-4RY9].

4. Courts in Iowa have yet to address the question of whether the alter ego doctrine can be applied to irrevocable trusts, but they have found that the doctrine applies to a variety of different types of business entities. *See, e.g.*, Benson v. Richardson, 537 N.W.2d 748, 762 (Iowa 1995); *see also infra* Section II.B (discussing Iowa law regarding the alter ego theory).

5. 18 C.J.S. *Corporations* § 23 (2020) (explaining that the entity "is a mere instrumentality" of the individual such that they are alter egos of each other).

6. For a more thorough analysis of a fraudulent conveyance and an attempt to hide assets from creditors being considered an injustice, see *infra* notes 169–70 and accompanying text.

situation.[7] While the idea of applying the alter ego theory to trusts is one that more and more courts around the country accept, it is still a controversial application of a theory that has traditionally only been applied in the context of corporations.[8] Those against applying the alter ego theory to trusts believe that the theory should *only* apply to entities, such as corporations, not trusts as trusts are not separate entities but rather just relationships between individuals (i.e., the relationship between the trustee and beneficiary of a trust).[9] Instead, some commentators argue that the proper remedy is a breach of fiduciary duty claim as it relates to the personal-relationship aspect of the trust.[10] However, jurisdictions that view actions like John Smith's as unjust are unlikely to be satisfied with this approach. This is because a breach of fiduciary duty claim would not reach John's actions as it is unclear how he breached his duty to the beneficiaries of the trust, his children.[11]

Due to the increased complexity and effectiveness of trusts, as well as the desire of individuals to protect their assets—namely their personal-use assets—from creditors, there are likely going to be many more instances in the future of individuals using irrevocable trusts in a similar way to that of John Smith.[12] Because of this increased use of irrevocable trusts around the

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7. *See* 18 C.J.S. *Corporations* § 15 (2020) (stating how the alter ego doctrine "is an extraordinary act to be taken only when necessary to promote justice"); *see also* ELIZABETH S. MILLER, THE LIMITS OF LIMITED LIABILITY: VEIL PIERCING AND OTHER BASES OF PERSONAL LIABILITY OF OWNERS, GOVERNING PERSONS, AND AGENTS OF TEXAS BUSINESS ENTITIES 3 (2019), https://www.baylor.edu/content/services/document.php/187922.pdf [https://perma.cc/B3CL-QELL] (discussing how the alter ego theory "has traditionally been predicated on notions of justice and fairness"); Edward P. Yankelunas, *The Alter Ego Article Doctrine in New York*, N.Y. ST. BAR ASS'N J., May 2015, at 10, 11–12 (explaining how the alter ego theory is an equitable doctrine used to achieve the most just result).

8. *See* Amy P. Jetel, *Voidable Transactions*, *in* 1 ASSET PROTECTION: DOMESTIC AND INTERNATIONAL LAW AND TACTICS § 2:11 (2020) (explaining that the law on trusts and the law on corporations is not analogous to the point that one can claim legal remedies appropriate for one are suitable for the other).

9. *See id.* (finding that even though there is case law supporting the application of the alter ego theory to trusts, doing so "is incorrect and ignores the proper legal treatment of a trust relationship").

10. *See id.*

11. Since the settlor no longer has any ownership interest in or control over the irrevocable trust once it is created, he owes no fiduciary duties to the beneficiaries. *See* Justin C. Duft, *Trends in Estate Planning: How Safe Are Irrevocable Trust Assets?*, COMMONWEALTH (Mar. 14, 2018), https://blog.commonwealth.com/trends-in-estate-planning-how-safe-are-irrevocable-trust-assets [https://perma.cc/M8DZ-SXAA] ("[T]he irrevocable trust requires the full relinquishment [of] control over transferred assets."); *see supra* note 3 and accompanying text; *see also* David J. Feder & Robert H. Sitkoff, *Revocable Trusts and Incapacity Planning: More than Just a Will Substitute*, 24 ELDER L.J. 1, 2 (2016) (explaining how the trustee of an irrevocable trust only owes fiduciary duties to the beneficiaries of said trust).

12. *See* David J. Zumpano, *"Irrevocable Pure Grantor Trusts": The Estate Planning Landscape Has Changed*, 61 SYRACUSE L. REV. 119, 143 (2010) (explaining that new types of irrevocable trusts are becoming much more attractive as the amount of lawsuits that threaten people's assets has increased over the years); *see also* Scott M. McCullough, *Uncovering the Potential of an Irrevocable*

country,[13] it is likely that the State of Iowa will soon have to face the question of whether its courts should apply the alter ego theory to irrevocable trusts, even as the theory has previously only been applied to in-state corporations. This approach will involve treating irrevocable trusts in those circumstances as something closer to separate entities, as opposed to simply the establishment of different fiduciary relationships.[14]

This Note argues that, to preemptively respond to this eventuality, Iowa should have its courts apply the alter ego theory to irrevocable trusts. In doing so, Part II of this Note will explore the appropriate background material necessary to fully understand the issue at hand. Specifically, Part II will examine (1) irrevocable trusts and how they work, (2) how the alter ego theory works and how it has thus far been applied in the State of Iowa to corporations, and (3) how other state courts around the country have applied the alter ego theory to irrevocable trusts. Part III analyzes how the estate planning landscape around the country has changed, such that irrevocable trusts are becoming a more attractive option for many people. The increased use of irrevocable trusts, when paired with the uncertainty brought about in the law by a broad range of judicial discretion, will potentially lead to an increase in individuals abusing the use of irrevocable trusts. This abuse, in turn, increases the need for the alter ego doctrine. Finally, Part IV will argue that not only that Iowa should apply the alter ego theory to irrevocable trusts, but it should also statutorily adopt the application of this doctrine as a part of the Iowa Trust Code.[15] By statutorily limiting judicial discretion, other states have ended up having a more uniform application of the alter ego theory as applied to irrevocable trusts. Limiting judicial discretion—which as a consequence limits the uncertainty in the law on the subject—is desirable from a public-policy perspective as it allows for individuals to know what the law is. This reduced uncertainty gives individuals a better idea about how to structure their irrevocable trusts such that it does not violate the alter ego doctrine.

II. BACKGROUND

How the alter ego doctrine would apply to an irrevocable trust would be a case of first impression for the courts of Iowa as there is currently no case

Trust, UTAH BAR J., Nov.–Dec. 2015, at 36, 36 (discussing the multiple tax benefits and asset protection benefits of irrevocable trusts that are becoming more attractive to potential clients).

13. *See infra* Section III.A (explaining why irrevocable trusts are increasing in popularity).

14. *See* Jetel, *supra* note 8, § 2:11; 18 C.J.S. *Corporations* § 23 (2020) (noting that in the context of a corporation "[w]hen [it] is the mere alter ego of a person, it may be disregarded, and the existence of a corporation as an *entity* apart from the actual persons comprising it will be disregarded" (emphasis added)).

15. *See* IOWA CODE §§ 633A.1101–633A.6308 (2020). As there is no section of the Iowa Trust Code explicitly devoted to irrevocable trusts, it is unclear specifically where within the Code such a statute would go.

law or statutory authority on the matter. To figure out what either the courts or the state legislature, through any potential legislation, might say on the matter, it is necessary to fully understand (1) what an irrevocable trust is; (2) what the alter ego theory is; and (3) what the law currently says about the alter ego theory applying to an irrevocable trust. Unfortunately, there is not a lot of case law around the country on the third issue, as most states have not yet considered the application of the alter ego doctrine to irrevocable trusts.[16]

A. *UNDERSTANDING IRREVOCABLE TRUSTS*

1. General Overview of Trusts

To understand this novel problem in the law, it is first necessary to have a basic understanding of the age-old trust doctrines underlying it. *Black's Law Dictionary* generally defines a trust as "[t]he right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*)."[17] Trusts, unlike corporations, are usually not considered to be completely separate legal entities.[18] A trust is also different from a will, with which it is commonly confused, in that it immediately comes into effect when it is established.[19] A will, by contrast, does not come into effect until the death of the testator.[20] There are a variety of different reasons why one might choose to put their assets in a trust as opposed to a will, most notably to reduce tax consequences (potentially regarding estate, inheritance, and gift taxes) and to avoid a lengthy probate process upon a testator's death.[21]

While the overall basic idea and structure is generally the same for most trusts, they can be classified according to several different criteria that are helpful in differentiating between them.[22] The key criteria are whether a trust is living or testamentary, whether a trust is funded or unfunded, and whether a trust is revocable or irrevocable.[23] A living trust, also called an *inter vivos*

16. Even though a limited number of states have considered the issue so far, this issue is likely to be one that most states will need to face eventually. *See infra* Sections III.A–.B.

17. *Trust*, BLACK'S LAW DICTIONARY (11th ed. 2019).

18. 90 C.J.S. *Trusts* § 6 (2020).

19. *Id.* § 1.

20. *Id.*

21. *See* James Royal, *What is a Trust?*, BANKRATE (May 28, 2020), https://www.bankrate.com/investing/what-is-a-trust [https://perma.cc/YAV7-87X5]; *see also* Julia Kagan, *Trust*, INVESTOPEDIA (Oct. 19, 2020), https://www.investopedia.com/terms/t/trust.asp [https://perma.cc/V3WR-GYLA] (noting that a trust is beneficial because it allows for asset protection, control of asset distribution, time and paperwork reductions, tax reductions etc.).

22. *See* Anne Sraders, *What Is a Trust? A Guide to Different Types and Their Uses*, THESTREET (July 31, 2019, 10:44 AM), https://www.thestreet.com/personal-finance/what-is-a-trust-14644964 [https://perma.cc/4DCK-QKPY].

23. *Id.*

trust, is created during the settlor's life with the trustee controlling the assets placed in the trust during their life.[24] A testamentary trust is created at the moment of the settlor's death and is usually prescribed by the settlor's will.[25] Each of these trust forms offers different pros and cons, but the living trust is generally better for avoiding probate since the testamentary trust is created at the settlor's death.[26] The difference between a funded and unfunded trust is in the name: The first has assets put into it during the settlor's life and the second does not (even as it could potentially become funded upon the death of the settlor).[27] Lastly, the difference between revocable and irrevocable trusts will not be explained in this Section, but will be explained in more detail in Section II.A.2 below.[28] However, it is worth noting here that "a living trust can be either revocable or irrevocable," while a testamentary trust can only be irrevocable.[29]

2. Choosing an Irrevocable Trust over a Revocable Trust

The basic idea behind an irrevocable trust is that it "cannot be amended, modified, or revoked."[30] Once a settlor puts assets into an irrevocable trust, he or she is no longer considered to own or control those assets, meaning that those assets are protected from his or her creditors.[31] This means personal-use assets, like a house or car, that the settlor still intends to personally use are not supposed to be put into an irrevocable trust. It defeats the whole idea behind giving up ownership and control.[32] Once placed in an irrevocable trust, the trust assets can now only be controlled by whoever has been designated as the trustee.[33] By comparison, a revocable trust allows the settlor to change the trust in whatever way he or she wants while still alive, thus

24. *Id.*; Kagan, *supra* note 21.

25. Sraders, *supra* note 22; *see also* Joshua Kennon, *Testamentary and Inter Vivos Trusts*, BALANCE (Jan. 18, 2020), https://www.thebalance.com/testamentary-vs-inter-vivos-trust-funds-357251 [https://perma.cc/Z4TJ-TD2U] (discussing the differences between *inter vivos* and testamentary trusts).

26. Sraders, *supra* note 22 (explaining how a living trust that is funded generally allows one to avoid probate); Kennon, *supra* note 25 (explaining how assets in a testamentary trust are very likely to go through the probate process).

27. Sraders, *supra* note 22; Kennon, *supra* note 25; Kagan, *supra* note 21.

28. *See infra* Section II.A.2.

29. Sraders, *supra* note 22 (noting additionally that when the grantor of a living trust dies, the trust automatically becomes irrevocable); *see infra* Section II.A.2.

30. Garber, *supra* note 2.

31. *See id.* (explaining those assets are protected from creditors of both the settlor and any beneficiaries of the trust, until such a time as the beneficiaries take control of the assets); *see also* Duft, *supra* note 11 (explaining the nuances of trust ownership).

32. This scenario also opens up an individual to potential liability through the application of the alter ego theory. *See infra* Section II.C.

33. Belle Wong, *Pros and Cons of an Asset Protection Trust*, LEGALZOOM (Sept. 17, 2020), https://www.legalzoom.com/articles/pros-and-cons-of-an-asset-protection-trust [https://perma.cc/AV6R-LL82].

making the assets reachable by creditors.[34] This distinction makes irrevocable trusts popular among people with large estates who want to fully protect some of their assets for their beneficiaries, such as any children they might have, especially because the federal estate tax does not apply to assets held in an irrevocable trust.[35] There are also a variety of other reasons why an individual might choose to put his or her assets in an irrevocable trust, such as avoiding capital gains tax, qualifying for a tax deduction on account of charity, and protecting assets from nursing homes in particular.[36]

Unfortunately, even with all of these benefits many individuals eventually "end up needing the assets they've given to an irrevocable trust," which is why an attorney should fully make sure settlors understand the consequences of putting assets into an irrevocable trust before so doing.[37] If planned correctly, a good example of an asset commonly put into an irrevocable trust is non-voting equity in a company, as the individual would not need to maintain any active control over that asset. By contrast, voting equity owned by an individual should either be held personally or in a revocable trust. In that case, the individual would have active control over that asset when voting rights are exercised.

A caveat to all of this is that full creditor protection is usually not extended to irrevocable trusts if the settlor keeps some sort of beneficial interest in the trust for themselves (i.e., "a self-settled trust").[38] Self-settled trusts are usually spendthrift trusts set up in a way in which the settlor and the beneficiary are the same person.[39] The settlor is thus able to protect his or her assets from creditors by placing them in an irrevocable trust and still receive income distributions from the principal of the trust, plus potential use of assets owned by trust.[40] In a sense then, the settlor would get the best of both

34. *See* Garber, *supra* note 2.

35. *Id.*; Tom Nawrocki, *Revocable Trusts vs. Irrevocable Trusts: Which Trust Is Right for Your Clients?*, THINKADVISOR (Aug. 9, 2013, 8:16 AM), https://www.thinkadvisor.com/2013/08/09/revocable-vs-irrevocable-which-trust-is-right-for/?slreturn=20190822141022 [https://perma.cc/2Q82-PDSJ] ("[A]ssets remain in the grantor's estate in a revocable trust but move out of the estate in an irrevocable trust.").

36. Nawrocki, *supra* note 35 (explaining that asset protection, avoiding taxes (both capital gains and estate), charitable giving, and protecting assets from nursing homes if a resident is unable to fully pay the costs of said nursing home, are the most common reasons for setting up an irrevocable trust).

37. *See id.* (implying changed financial conditions will cause settlors to need or want assets that he or she no longer technically owns).

38. RESTATEMENT (SECOND) OF TRS. § 156 (AM. L. INST. 1959) ("Where a person creates [a trust] for his own benefit . . . his transferee or creditors can reach his interest."); *see also Trust*, BLACK'S LAW DICTIONARY (11th ed. 2019) (finding that "[i]n most states, such a trust will not protect trust assets from the settlor's creditors").

39. *Self Settled Trust Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/s/self-settled-trust [https://perma.cc/77CV-JDSC].

40. *See* Phyllis C. Smith, *The Estate and Gift Tax Implications of Self-Settled Domestic Asset Protection Trusts: Can You Really Have Your Cake and Eat It Too?*, 44 NEW ENG. L. REV. 25, 31 (2009)

worlds, which is why most states are opposed to this type of self-settled trust. It is worth noting that a spendthrift trust or spendthrift provision in a trust generally does two things: (1) It does not let a beneficiary assign the principal of the trust to a third party such as a creditor, and (2) it helps to protect beneficiaries from their creditors by allowing for distributions to said beneficiary from the trust while keeping their interest in the principal of trust safe and removed.[41] As one might be able to guess, these spendthrift trusts or provisions were created to somewhat control certain beneficiaries from irresponsibly wasting their interest in a trust.[42] However, creditors do have access to the *distributions* from the principal of the trust to the beneficiary once they have been received.[43] Spendthrift trusts have generally been upheld as valid, unless the settlor is really the beneficiary of the trust.[44] This is because states usually want to honor the intention of the settlor in honoring the limits they set when creating the trust, except in the case of a self-settled trust.[45] Overall, though, while these trusts used to be controversial, every state now recognizes spendthrift trusts or provisions in some way, including Iowa.[46] However, it is sometimes tough to tell when a settlor actually retains a beneficial interest in his or her irrevocable trust, meaning that a state that does not allow self-settled trusts would potentially have grounds to strike the trust down.

(explaining that a trust is typically considered to be one that is self-settled "if the settlor was a beneficiary of the trust, retained dominion and control" of the trust itself and assets within the trust "and/or retained a right to financial support from the trust").

41. Kellsie J. Nienhuser, Comment, *Developing Trust in the Self-Settled Spendthrift Trust*, 15 WYO. L. REV. 551, 555 (2015); Timothy Lee, Note, *Alaska on the Asset Protection Trust Map: Not Far Enough for a Regulatory Advantage, But Too Far for Convenience?*, 29 ALASKA L. REV. 149, 152 (2012); *see* Rob Clarfeld, *Protect Your Children from Themselves with a Spendthrift Trust*, FORBES (Oct. 4, 2017, 11:22 AM), https://www.forbes.com/sites/robclarfeld/2017/10/04/protect-your-children-from-themselves-with-a-spendthrift-trust [https://perma.cc/LP6E-QJRL]; *see also Trust*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a spendthrift trust as "[a] trust that prohibits the beneficiary's interest from being assigned and also prevents a creditor from attaching that interest; a trust by the terms of which a valid restraint is imposed on the voluntary or involuntary transfer of the beneficiary's interest").

42. *See Spendthrift*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a spendthrift as "[s]omeone who spends lavishly and wastefully").

43. Nienhuser, *supra* note 41, at 555.

44. 90 C.J.S. *Trusts* § 26 (2020); Smith, *supra* note 40, at 29 (explaining that spendthrift provisions have historically only been allowed for third party beneficiaries, not for the benefit of the settlor such as in a self-settled trust).

45. Smith, *supra* note 40, at 29–30.

46. Nienhuser, *supra* note 41, at 554; *see* IOWA CODE § 633A.2302 (2020) (explaining that creditors cannot reach the principal interest of a beneficiary to a spendthrift trust except in the case of distributions received by the beneficiary from the principal of the trust or certain tax claims which allow a degree of access to the trust).

Additionally, courts will void a transfer of assets to an irrevocable trust if the transfer was for fraudulent purposes.[47] Oftentimes, courts find some fraudulent purpose when assets were transferred into an irrevocable trust at a time when creditors are currently pursuing the assets.[48] If the main purpose of the irrevocable trust is found to be legitimate, such as setting it up for the benefit of a settlor's children, then courts will normally allow it.[49] Typically, the rule is that creditors cannot touch those assets as long as the settlor did not retain a beneficial interest in them and the conveyance was not fraudulent in some way.[50]

3. A New Type of Self-Settled Irrevocable Trust: The Asset-Protection Trust

As estate planning, and the use of irrevocable trusts, becomes more complex in the effort to protect an individual's assets, it can often be tough to tell if an irrevocable trust is considered a self-settled trust—especially if the assets were conveyed fraudulently. A prime example of this difficulty is seen in a fairly new type of irrevocable trust called an asset-protection trust, which is essentially a special kind of self-settled spendthrift trust.[51] Asset-protection trusts were first introduced in the United States in Alaska in 1997 and have since been used in a variety of other states as well.[52] Due to their origin, these asset-protection trusts are commonly known as "Alaska Trusts."[53]

Before 1997, U.S. citizens could only get access to the equivalent of an Alaska Trust outside of the country in offshore asset-protection trusts.[54] Alaska and the states that followed its lead decided to allow these previously-banned trusts for a variety of different reasons, but their primary aim was to help stimulate their local economies by convincing U.S. citizens to create their

47. 37 C.J.S. *Fraudulent Conveyances* § 110 (2020) (explaining that courts will not honor the transfer of assets from a revocable trust to an irrevocable trust, while still retaining use of the assets, when the settlor is under pressure from creditors).

48. Kevin J. Tillson, *Fraudulent Transfers and Irrevocable Living Trusts*, AVVO (Feb. 23, 2011), https://www.avvo.com/legal-guides/ugc/fraudulent-transfers-and-irrevocable-living-trusts [https://perma.cc/AAG6-ME3V].

49. *See id.*

50. *See* 37 C.J.S. *Fraudulent Conveyances* § 110 (2020); Duft, *supra* note 11 (explaining assets in an irrevocable trust are normally going to be protected from creditors); *cf.* 76 AM. JUR. 2D *Trusts* § 103 (2020) (explaining when the settlor keeps a beneficial interest, it is understood that "[a]s a rule, spendthrift trusts for the benefit of the settlor are invalid and do not protect a settlor-beneficiary from creditors . . . regardless of whether the settlor intends to defraud his or her creditors" (footnotes omitted)).

51. Wong, *supra* note 33; *see* Nienhuser, *supra* note 41, at 556.

52. Lee, *supra* note 41, at 150.

53. *See Trust*, BLACK'S LAW DICTIONARY (11th ed. 2019) (referring to the definition of an asset-protection trust under the definition of an Alaska Trust). *See generally* Lee, *supra* note 41 (explaining the background of the Alaska Trust Act and how this first kind of domestic asset-protection trust in the United States works).

54. Lee, *supra* note 41, at 153.

asset-protection trust in their state instead of overseas.[55] Asset-protection trusts are just self-settled spendthrift trusts allowed by law where one is able to retain some benefit from his or her assets while still shielding their assets from creditors.[56] Individuals are able to maintain some use of their personal-use assets held by the trust while retaining the creditor protection brought about the irrevocable trust. Normally, states that recognize an asset-protection trust will allow for a certain number of years after the assets are placed in the trust in which creditors can still access them.[57] After that, however, the trust's assets will be protected.[58] Even though Iowa is not one of the limited number of states to have allowed for the creation of an asset-protection trust,[59] the enforceability of such trusts is a question that could arise if Iowa residents establish asset-protection trusts in those states that do allow for them.[60]

In a world where people are always looking for new ways to protect their assets, an asset-protection trust is but one example, albeit a legal one in some states, that helps to show the potential for abuse irrevocable trusts have as an asset-protection tool in helping individuals hide assets from creditors.[61] Moreover, the impact of asset-protection trusts is unlikely to just be limited to the states that legalize them. This will prove to be a potential challenge to all the other states once the relationship between asset-protection trusts and the Full Faith and Credit Clause is examined later in Section III.B of this Note.[62]

While most of the states who allow for asset-protection trusts were inspired by either Alaska or Delaware (which enacted legislation allowing

55. *Id.* at 156.

56. *See id.* at 150; *see also* Thomas O. Wells, *Domestic Asset Protection Trusts—A Viable Estate and Wealth Preservation Alternative*, FLA. BAR J., May 2003, at 44, 44 (finding that the laws allowing such trusts do away with the traditional common-law approach of not allowing self-settled trusts).

57. *See* Wong, *supra* note 33.

58. *See id.*

59. Currently there are currently 19 states that allow for asset-protection trusts in at least some way, which includes Alaska, Connecticut, Delaware, Hawaii, Indiana, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming. ALASKA STAT. § 34.40.110 (2020); CONN. GEN. STAT. §§ 45a-487j to 45a-487s (2020); DEL. CODE ANN. tit. 12, §§ 3570–3576 (2020); HAW. REV. STAT. §§ 544G-1 to 544G-11 (2020); IND. CODE §§ 30-4-8-1 to 30-4-8-16 (2020); MICH. COMP. LAWS §§ 700.1041–700.1050 (2020); MISS. CODE ANN. §§ 91-9-701 to 91-9-723 (2020); MO. REV. STAT. § 456.5-505(3) (2020); NEV. REV. STAT. §§ 166.010–166.180 (2020); N.H. REV. STAT. ANN. §§ 564-B:5-505A to 564-B:5-505B (2020); OHIO REV. CODE ANN. §§ 5816.01–5816.14 (West 2020); OKLA. STAT. tit. 31, §§ 10–18 (2020); 18 R.I. GEN. LAWS §§ 18-9.2-1 to 18-9.2-7 (2020); S.D. CODIFIED LAWS §§ 55-16-1 to 55-16-16 (2020); TENN. CODE ANN. §§ 35-16-101 to 35-16-112 (2020); UTAH CODE ANN. § 25-6-502 (West 2020); VA. CODE ANN. §§ 64.2-745.1–64.2-745.2 (2020); W. VA. CODE §§ 44D-5-503a to 44D-5-503d (2020); WYO. STAT. ANN. §§ 4-10-510 to 4-10-523 (2020); *see also* Nicole F. Stowell, Erik Johanson & Carl Pacini, *The Use of Wills and Asset Protection Trusts in Fraud and Other Financial Crimes*, 65 DRAKE L. REV. 509, 542 n.263 (2017) (listing 16 of the 19 states allowing for asset-protection trusts).

60. For a more in-depth discussion of this choice of law issue, see *infra* Section III.B.

61. *See infra* Section III.B.

62. *See infra* Section III.B.

them shortly after Alaska),[63] they are not all exactly the same. Beyond the advantages already discussed, an Alaska Trust also does not allow a creditor to win on a claim against a beneficiary of that trust, unless the creditor was already a creditor of said beneficiary at the time the trust was established.[64] While there are not many exceptions to the Alaska Trust, Alaska does provide for limited exceptions in the case of child-support and divorce proceedings, as well as clearly fraudulent transfers.[65] Alaska, like most other states recognizing asset-protection trusts, also requires the trust to actually contain a spendthrift clause and be irrevocable.[66] Today, the number of states allowing asset-protection trusts has grown, though the rights that are available to settlors who establish these trusts can vary from state to state.[67] Regardless, the overall goal of protecting one's assets from creditors while retaining access to and maintaining some control over the trust is, or will be, uniform in every state.[68]

B. CURRENT IOWA LAW ON THE ALTER EGO THEORY

To dig into the application of the alter ego theory to irrevocable trusts, it is important to first have a basic understanding of how the theory works as traditionally applied to corporations. The alter ego theory is a one of the most common ways used to "pierce the corporate veil."[69] While applying this veil-piercing theory to irrevocable trusts is still a relatively new phenomenon, it has been applied to corporations since the early twentieth century, meaning there is a plethora of case law on the subject across the country.[70] Piercing the

63. *See* Nienhuser, *supra* note 41, at 558. *Compare* H.B. 101, 1997 Leg., 1st Reg. Sess. (Alaska 1997) (showing the Alaska bill was signed into law on April 1, 1997), *with* H.B. 356, 139th Gen. Assemb., 1st Reg. Sess. (Del. 1997) (showing the Delaware bill was signed into law on July 9, 1997).

64. Smith, *supra* note 40, at 39; *see also* Lee, *supra* note 41, at 163 ("The Act provides that 'the transfer restriction prevents a creditor existing when the trust is created or a person who subsequently becomes a creditor from satisfying a claim out of the beneficiary's interest in the trust.'" (quoting ALASKA STAT. § 34.40.110(b) (2011))).

65. Nienhuser, *supra* note 41, at 559.

66. *See id.* at 559–60 (finding an exception for the State of Oklahoma, however, which seemingly allows for asset-protection trusts to be either irrevocable or revocable).

67. JOSHUA S. RUBENSTEIN & DIANE B. BURKS, SELF-SETTLED ASSET PROTECTION TRUSTS, BASIC STRUCTURE OF A SELF-SETTLED ASSET PROTECTION TRUST (2020), Westlaw Practical Law W-004-9387 (listing the following as among the interests and powers the settlor may potentially retain depending on the jurisdiction: the right to income; the right to distributions of the principal of the trust; interests in charitable remainder trusts; interests in grantor retained annuity trusts and grantor retained unitrusts; interests in total return trusts; right to reimbursement for income taxes on account of the trust; right to have debts or taxes owed by the settlor's estate paid for; right to serve as the trust's investment advisor; right to veto trust distributions; right to remove/replace trustees; a right to a power of appointment; and others).

68. *See* Nienhuser, *supra* note 41, at 558.

69. 18 C.J.S. *Corporations* § 23 (2020); *see* MILLER, *supra* note 7, at 1.

70. *See* Yankelunas, *supra* note 7, at 11 (discussing the impact of Judge Cardozo's decision in *Berkey v. Third Avenue Railway Co.*, 155 N.E. 58 (N.Y. 1926)); *see also* Douglas C. Michael, *To*

corporate veil is almost universally accepted by states today in some way, shape, or form.[71] The ways in which this theory is applied differs by jurisdiction, but the applicable law of the state of incorporation is generally controlling.[72] It is thus pertinent to explore Iowa law on the subject. This is duly important in the future context of applying the alter ego theory to irrevocable trusts under Iowa law.

To begin, the idea behind piercing the corporate veil came about because "[a] corporation is ordinarily considered by law to be an entity separate from its shareholders."[73] Thus, for example, when creditors want to impose personal liability on the shareholders of a corporation to help settle that corporation's debts, they are not able to do so because the shareholders have limited liability.[74] When courts deem that this "corporate privilege" of limited liability has been abused they tend to do away with the corporate form and allow for individual shareholders to be held liable.[75] In other words, courts will "pierce" the shield of limited liability previously held by the shareholders when it is appropriate.[76] When the corporate form has been done away with, all shareholders who actively participate or hold important positions can usually be held liable.[77] Iowa recognizes two reasons for piercing the corporate veil and holding individuals liable: One is if the corporation is being used to perpetuate fraud,[78] and the other is the alter ego theory.[79]

Starting with the perpetuation of fraud, piercing the corporate veil is an equitable solution traditionally held to be reserved for exceptional circumstances, and something that constitutes a fraud or injustice is exceptional enough to qualify.[80] Thus, the majority of Iowa case law on the subject will pierce the corporate veil because the corporation has, in some

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Know a Veil, 26 J. CORP. L. 41, 43 (2000) (finding that the idea behind piercing the corporate veil has potentially been around since 1912).

71. *See* Mark L. Prager & Jonathan A. Backman, *Pursuing Alter-Ego Liability Against Non-Bankrupt Third Parties: Structuring a Comprehensive Conceptual Framework*, 35 ST. LOUIS U. L.J. 657, 685–86 (1991).

72. 18 C.J.S. *Corporations* § 14 (2020); *see* Loving Saviour Church v. United States, 728 F.2d 1085, 1086 (8th Cir. 1984) (using South Dakota law in applying the alter ego theory to a trust).

73. Antoinette Sedillo Lopez, Comment, *The Alter Ego Doctrine: Alternative Challenges to the Corporate Form*, 30 UCLA L. REV. 129, 129 (1982).

74. *See id.* at 129–30.

75. MILLER, *supra* note 7, at 1 (citing Castleberry v. Branscum, 721 S.W.2d 270, 272 (Tex. 1986)).

76. *See id.*

77. 5 MATTHEW G. DORE, IOWA PRACTICE SERIES: BUSINESS ORGANIZATIONS § 15:4 (2019) (citing Briggs Transp. Co. v. Starr Sales Co., 262 N.W.2d 805 (Iowa 1978)).

78. Benson v. Richardson, 537 N.W.2d 748, 761 (Iowa 1995) ("We will set aside the corporate fiction if [it] . . . sanction[s] a fraud or promote[s] injustice.").

79. *Id.* ("Where a corporation is merely an instrumentality or device set up to ensure the avoidance of the legal obligations of shareholders, courts may ignore the corporate form.").

80. *Briggs Transp.*, 262 N.W.2d at 810; 18 C.J.S. *Corporations* § 15 (2020).

way, been deemed to have "perpetuate[d] fraud or promote[d] injustice."[81] This fraud or injustice prong asks if "there is adequate justification to invoke the equitable power of the court," in giving courts flexibility to determine if there is an overall unfairness.[82] This equitable theme is inherent in the six factors Iowa courts look to when undertaking the analysis of whether or not to pierce the corporate veil:

> whether (1) the corporation is undercapitalized, (2) the corporation lacks separate books, (3) its finances are not kept separate from individual finances, or individual obligations are paid by the corporation, (4) the corporation is used to promote fraud or illegality, (5) corporate formalities are not followed, or (6) the corporation is a mere sham.[83]

This six-factor test is really a totality-of-the-circumstances test that does not necessarily make any one of the factors essential to piercing the corporate veil, and it also does not limit the number of factors considered to just those six listed.[84] It just so happens that the perpetuation of fraud happens to be present when any of the factors are violated, thus making it a general focus of the inquiry.[85] Such a test is helpful when applying the alter ego doctrine because the court will examine these factors regardless of whether it pierces the corporate veil because of the alter ego theory or because of a perpetuation of fraud.[86]

The main idea behind the alter ego theory is that an individual dominates a corporation to such an extent that the corporation is simply an instrumentality of the individual.[87] The separate personality that a corporation would ordinarily have is gone. The individual and company are one and the same, hence the term "alter ego."[88] Just as with fraud, courts try to find some aspect of bad faith in the situation, which makes the

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81. DORE, *supra* note 77, § 15:4 (quoting *In re* Marriage of Ballstaedt, 606 N.W.2d 345, 349 (Iowa 2000)). See *infra* notes 170–71 and accompanying text for a more thorough analysis of what fraud and injustice mean in the context of this Note.

82. Env't Dynamics, Inc. v. Robert Tyer & Assocs., Inc., 929 F. Supp. 1212, 1235 (N.D. Iowa 1996) (quoting NLRB v. Greater Kan. City Roofing, 2 F.3d 1047, 1052 (10th Cir. 1993)). The Northern District of Iowa recognized that the fraud or injustice prong is satisfied through either fraudulent intent in forming a corporation or unjustly misusing the corporate form after formation. *Id.* at 1236–37 (citing Bd. of Trs. of Mill Cabinet Pension Tr. Fund for N. Cal. v. Valley Cabinet & Mfg. Co., 877 F.2d 769, 773 (9th Cir. 1989)).

83. *Briggs Transp.*, 262 N.W.2d at 810.

84. *See* Keith Smith Co. v. Bushman, No. 15-0347, 2015 WL 8364910, at *7 (Iowa Ct. App. Dec. 9, 2015) (citing Boyd v. Boyd & Boyd, 386 N.W.2d 540, 544 (Iowa Ct. App. 1986)).

85. *See* DORE, *supra* note 77, § 15:4.

86. *Id.* ("[I]t is difficult to make sense of the case law governing disregard of the corporate entity . . . ."); *see, e.g.*, Benson v. Richardson, 537 N.W.2d 748, 761–62 (Iowa 1995); HOK Sport, Inc. v. FC Des Moines, L.C., 495 F.3d 927, 935–36 (8th Cir. 2007).

87. 18 C.J.S. *Corporations* § 23 (2020); *see Benson*, 537 N.W.2d at 761.

88. *See* 18 C.J.S. *Corporations* § 23 (2020).

circumstance exceptional enough to allow for veil piercing.[89] However, since it is usually more difficult to find bad faith in alter ego cases than in cases where the corporation is being used to perpetuate fraud (when bad faith is often apparent), courts are more reluctant to use the alter ego theory to pierce the corporate veil.[90]

While applying Iowa law, the Eighth Circuit applied a three-part test for determining if an individual is the alter ego of a corporation:

> (1) [T]he person influences and governs the entity; (2) a unity of interest and ownership exists such that the corporate entity and the person cannot be separated; and (3) giving legal effect to the fictional separation between the corporate entity and the person would "sanction a fraud or promote injustice."[91]

After spelling out the test, the court made clear that its purpose was to "prevent . . . injustice," which seems to indicate that the third prong of the test is a necessity to establish one as an alter ego of a corporation.[92] As a whole, though, Iowa courts are not bound by the above criteria alone. Instead, courts will often look at the totality of the circumstances to find out what is actually going on in a specific situation and decide if piercing the corporate veil is appropriate.[93] In other words, the test involves an extremely fact-specific inquiry.

As discussed above, "courts traditionally pierce the corporate veil to hold [some] shareholder[s] . . . liable for [the debts of the corporation]."[94] However, courts will occasionally work this theory in reverse in the context of "the alter ego doctrine to characterize the assets of a corporation as the assets of its shareholder."[95] This idea is known as "reverse piercing," and is allowed as long as the corporation and the individual are found to be alter egos of one another.[96] Iowa courts have used and recognized this method of reverse

89. *See* Lopez, *supra* note 73, at 138 (finding courts implicitly find some aspect of bad faith when applying the alter ego theory).

90. 18 C.J.S. *Corporations* § 24 (2020).

91. *HOK Sport*, 495 F.3d at 935 (quoting Frank McCleary Cattle Co. v. Sewell, 317 P.2d 957, 959 (Nev. 1957)) (finding a non-profit corporation to be the alter ego of the individual).

92. *See id.*

93. Cent. Fibre Prods. Co. v. Lorenz, 66 N.W.2d 30, 33 (Iowa 1954) ("[W]here equity is required to review a situation where the purpose of a corporation is in question it will not be bound by forms, fiction, or technical rules but will seek and determine the true situation.").

94. Yankelunas, *supra* note 7, at 14.

95. MILLER, *supra* note 7, at 8.

96. Yankelunas, *supra* note 7, at 14 (finding that as long as the parties are alter egos of one another, "the direction of the piercing [traditional or reverse] is immaterial" and that once parties are alter egos of one another, they are "two sides of the same coin," meaning both can both be held liable for the debts and obligations of the other (alteration in original)).

piercing to get at the assets of a corporation to satisfy the debts of the individual shareholder.[97]

When applying the alter ego theory to irrevocable trusts, it is the concept of reverse piercing that will be in play. In these cases, the aim is to pierce the protective veil of the irrevocable trust (the "entity") to satisfy any liabilities of an individual with a relationship to that trust. The irrevocable trust itself does not have debts that creditors will want to hold its settlor liable for; it is usually going to be the other way around. Both state and federal courts applying Iowa law are also becoming increasingly receptive to applying a veil-piercing analysis outside of the context of a corporation.[98] Additionally, if there is an explicit applicable statutory authority to pierce the veil of a particular entity, as this Note suggests for Iowa, then courts will find that statutory law controlling when deciding to pierce the veil of the entity.[99]

C. THE ALTER EGO THEORY APPLIED TO IRREVOCABLE TRUSTS IN OTHER STATES

This reverse-piercing application of the alter ego theory is becoming an increasingly attractive option to access certain assets held in an irrevocable trust. But there are still a variety of more traditional paths for creditors to obtain access to assets that are put into an irrevocable trust for the purpose of asset protection.[100] The two easiest and most straightforward ways are to establish that either there was a fraudulent conveyance in the transfer of assets to the trust or to find that the trust was self-settled in a state that does not allow for that kind of trust. But these two pitfalls can be easily avoided with enough planning.[101]

That being said, some states have recognized that there needs to be another way for creditors to access assets, usually personal-use assets, in certain irrevocable trusts when they have been enacted cleverly enough in order to hide those assets in bad faith. This has led to some states applying the alter ego theory, which has traditionally been applied to corporations, to

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97. *See* Benson v. Richardson, 537 N.W.2d 748, 762 (Iowa 1995) (finding that, although without explicitly using the phrase "reverse piercing," since the corporation was the alter ego of the individual and its main purpose was to shield assets from creditors, the assets of the corporation could be used to satisfy the debts of the individual).

98. *See, e.g.*, HOK Sport, Inc. v. FC Des Moines, L.C., 495 F.3d 927, 935–36 (8th Cir. 2007) (applying veil-piercing analysis to a nonprofit corporation); Hawkeye Land Co. v. ITC Midwest LLC, 125 F. Supp. 3d 885, 901–02 (N.D. Iowa 2015) (applying veil-piercing analysis to an LLC).

99. DORE, *supra* note 77, § 15:5.

100. *See How to Attack an Asset Protection Trust and How to Defend Against Such an Attack*, MCCULLOUGH SPARKS [hereinafter MCCULLOUGH SPARKS], https://mccullоughsparks.com/52-how-to-attack-an-asset-protection-trust-and-how-to-defend-against-such-an-attack [https://perma.cc/WN7V-HTBA].

101. *See id.* (explaining how "[i]t is easy to completely avoid and prevent an attack based on a fraudulent transfer theory" if you plan accordingly, and how one is able to still receive beneficial interest from an irrevocable trust without it being considered a self-settled trust by being creative in the creation of said trust).

irrevocable trusts.[102] This trend is significant. Courts usually treat trusts as separate legal entities that are capable of holding title to assets, which would make the alter ego theory a necessary way to reach those assets.[103] Here, courts are usually going to look at whether an individual so controls an irrevocable trust in a way where the individual will be deemed the owner of the assets in the eyes of his or her creditors.[104] There is usually no specification as to what kind of relationship an individual must have with the trust for it to be considered his or her alter ego; it could be the settlor, trustee, beneficiary, or someone else.[105] While Iowa courts have not yet looked at the question of whether the alter ego theory is able to be applied to an irrevocable trust, case law from other states that have looked at the issue offers insight into what Iowa courts would potentially hold if presented with the question.

As mentioned earlier, the applicable state law determines the alter ego analysis used, which in this case is usually going to be the state where the trust was established—the exception being if there is a choice of law provision within the trust document.[106] The state of establishment will usually be the state with the greatest interest in the proceeding, unless countervailing considerations, such as where the creditor is located or where the debtor is located, are deemed to be dominant in the inquiry.[107] Iowa law reflects this understanding in making clear that, in the absence of a choice of law provision, the jurisdiction with the most "significant relationship" to the trust will be the governing law.[108] The applicable law for any real property contained in the trust will be the law in accordance with the situs of that real property.[109] However, if the trust is considered to be completely invalid, then a court will undergo a traditional choice of law analysis to determine which

102. *Id.*; George F. Bearup, *Alter Ego: An Asset Protection Trust's Achilles Heel?*, GREENLEAF TR., https://greenleaftrust.com/news/alter-ego-an-asset-protection-trusts-achilles-heel [https://perma.cc/4ZNQ-QAA6].

103. *See* Bearup, *supra* note 102 (explaining how such treatment is significant because technically "a Trust is a fiduciary relationship and not a separate entity under the common law").

104. *Id.* (finding that in such a case, the irrevocable trust will be disregarded as an entity if the link between the individual and the irrevocable is strong enough in the eyes of a court).

105. *See, e.g.*, MCCULLOUGH SPARKS, *supra* note 100 (citing a variety of different cases that applied the alter ego analysis to either the beneficiary, settlor or trustee of the trust if the relevant party exerted a certain amount of control over it); *see also* Vaughn v. Sexton, 975 F.2d 498, 504 (8th Cir. 1992) (applying the alter ego analysis to the trustee); Dean v. United States, 987 F. Supp. 1160, 1164–65 (W.D. Mo. 1997) (applying the alter ego analysis to the settlor).

106. *See* Loving Saviour Church v. United States, 728 F.2d 1085, 1086 (8th Cir. 1984) (applying South Dakota law); 10 AM. JUR. 2D *Banks and Financial Institutions* § 691 (2020).

107. *See, e.g.*, Aquilino v. United States, 363 U.S. 509, 512–13 (1960); *see also* RESTATEMENT (SECOND) OF CONFLICT OF L. § 132 cmt. a (AM. L. INST. 1971) (explaining how the state with overall dominant interest in the proceeding determines the applicable state law, which is usually going to be where the property is located).

108. IOWA CODE § 633A.1108(2)(b) (2020). Oftentimes this decision will point to the jurisdiction that the settlor likely wanted to serve as the applicable law. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 268(2)(b) (AM. L. INST. 1971).

109. IOWA CODE § 633A.1108(2)(c).

state has the largest interest in the proceeding in order to decide the applicable state law.[110] Additionally, even though a lot of the case law comes about in federal courts, "often lower state courts will nonetheless give those decisions considerable weight," which supports the idea that Iowa will strongly look at what other courts have done if faced with a similar question.[111]

Indeed, most of the states that actually have considered the question have found that the alter ego doctrine can apply to irrevocable trusts, but not all have done so.[112] The bar is still relatively high for a trust to be labeled as an alter ego as "court[s] will generally uphold an irrevocable trust as a separate and distinct legal entity unless the debtor exerts so much dominion over the trust that it has no separate legal identity."[113] This line of thinking is in line with the idea that the alter ego theory should only be applied to irrevocable trusts in exceptional circumstances, just as is the case with corporations.[114] Even though the test may potentially differ across states, courts usually have a range of discretion over whether there is enough in the facts presented to them to apply the alter ego theory to an irrevocable trust.

As a result, any alter ego analysis is going to be a very fact-specific inquiry that lends judges a large amount of discretion over whether or not the facts fall within that state's specific alter ego test. This discretion allowed to judges can lead to uncertainty in the law on application of the alter ego theory to a particular irrevocable trust. As an example, consider *Dean v. United States*, where a federal district court applied Missouri alter ego law to the settlors of the irrevocable trust.[115] In *Dean*, the Western District of Missouri found that there was not enough control of the trust by the settlors to justify application of the alter ego theory.[116] The settlors put a large number of their assets into an irrevocable trust with their children as the trustees.[117] But the settlors still

110. *See* F.P.P. Enters. v. United States, 830 F.2d 114, 116–17 (8th Cir. 1987) (applying Nebraska law once the court decided that: (1) the irrevocable trust established under Wyoming law was an invalid trust, and (2) the property at issue in the case was located in Nebraska).

111. *See* Bearup, *supra* note 102.

112. *Compare id.* (explaining how most courts who have looked at the issue have found "that alter ego liability should apply to trusts to the same extent it applies to other legally created fictions" (quoting Bash v. Williams, No. 5:16 CV 257, 2016 WL 1592445, at *3 (N.D. Ohio Apr. 20, 2016))), *with Bash*, 2016 WL 1592445, at *5 (accepting prior decisions saying the Florida Trust Code does not allow the alter ego theory to be applied to irrevocable trusts), *and* Eddy v. Brothers Mill, Ltd. (*In re* Eddy), No. 6:12-bk-04736-CCJ, 2015 WL 1585513, at *4 (M.D. Fla. Apr. 3, 2015) (finding that the Florida Trust Code does not allow the alter ego theory to be applied to irrevocable trusts).

113. MCCULLOUGH SPARKS, *supra* note 100.

114. *See* 18 C.J.S. *Corporations* § 15 (2020).

115. *See generally* Dean v. United States, 987 F. Supp. 1160 (W.D. Mo. 1997) (demonstrating federal application of Missouri alter ego law).

116. *Id.* at 1166 ("[T]he 1990 Irrevocable Trust is a valid trust instrument, created for a valid purpose, comports with economic reality, and the trustees, in most aspects, have respected the terms of the trust.").

117. *Id.* at 1162.

were allowed to retain control of some personal-use assets owned by the trust, including the family house, a couple of cars, and the family vacation house.[118] The court found that even though the settlors still had some practical control of trust assets, the handling of those assets changed when they were put into the irrevocable trust.[119] After that point, the trustees handled any legal logistics involved, such as paying taxes or buying insurance. In addition, the court found that the case should be looked at through a different lens since the transaction was within the family.[120] Finally, the settlors received no monetary benefit from the trust outside of minimal reimbursements for the cars or houses.[121]

In comparison, the Bankruptcy Court in the Eastern District of New York reached the opposite result in the case of *In re Maghazeh*. There, the court applied the alter ego theory to an irrevocable trust while applying New York law.[122] In this case, the settlor set up an irrevocable trust for the benefit of his children, and it originally only held the asset of a life-insurance policy on the life of the settlor.[123] Eventually, the trust took ownership of various property interests and other personal-use assets of the settlor.[124] It soon got to the point where it was hard to tell apart the records of the settlor and the trust.[125] The court found that, even though the trust was originally created for legitimate purposes, it had transformed into a vehicle used "to insulate [the settlor's] assets . . . from his creditors."[126] Looking at all of the circumstances, the court found that the settlor exerted so much control over the trust that it was no longer a separate entity under the law, even though he technically did not have any legal relationship to the trust after he placed the assets in trust.[127]

In re Maghazeh, in conjunction with *Dean v. United States*, shows that an alter ego analysis, when applied to an irrevocable trust, can come out either way depending on the circumstances. That is relevant here as Iowa has yet to consider the application of the alter ego to irrevocable trusts, and Iowa courts will inevitably look to what other courts have done in a similar situation if faced with such a question.[128] While any such analysis is naturally going to be

118. *Id.* at 1163.

119. *Id.* at 1165.

120. *Id.*

121. *Id.*

122. Pergament v. Maghazeh Fam. Tr. (*In re* Maghazeh), 310 B.R. 5, 15–19 (Bankr. E.D.N.Y. 2004).

123. *Id.* at 8.

124. *Id.* at 8–9.

125. *See id.* ("[T]he [settlor's] personal records are commingled with the records of the Maghazeh Trust.").

126. *Id.* at 18.

127. *Id.* The lack of "legal relationship" refers to how the settlor no longer had any legal ownership of the assets in the trust and was not serving as a trustee of the trust. *See supra* text accompanying note 3.

128. *See* Gierum v. Glick (*In re* Glick), 568 B.R. 634, 665–66 (Bankr. N.D. Ill. 2017).

extremely fact-dependent, both *Maghazeh* and *Dean* involved the continued use of personal-use assets held in an irrevocable trust but with differing end results.[129] Iowa will similarly want to take their own alter ego case law as applied to corporations into account. This is a result of the large uncertainty surrounding any potential application of the alter ego theory to irrevocable trusts by Iowa courts, which in turn harms individuals who want to know how Iowa might treat their irrevocable trust in the future.

III. IOWA NEEDS TO ADDRESS HOW THE ALTER EGO THEORY APPLIES TO IRREVOCABLE TRUSTS SOONER RATHER THAN LATER

Recently, asset-protection planning has become a much bigger part of the estate-planning landscape than it had been in the past.[130] This change is due to an increased sensitivity to different claims that creditors can make, meaning individuals make more of an effort to protect themselves from creditors.[131] At the same time, the number of lawsuits brought by creditors to try and lay claim to people's assets has skyrocketed since the mid-2000s.[132] Because of this growth in suits, irrevocable trusts, along with a variety of other options, are growing in popularity among those wanting to protect their assets.[133]

This increased usage of irrevocable trusts will thus increase the likelihood that irrevocable trusts will be used in such a way that justice will require the application of the alter ego theory in certain situations. Such access will allow some creditors access to the assets of a trust when necessary. There is significant uncertainty surrounding the application of the alter ego theory due to the broad range of judicial discretion it affords, particularly in Iowa.[134] This uncertainty lends itself to creating more situations where irrevocable trusts could potentially be abused, as individuals do not know what the law says about irrevocable trusts when they set one up. The alter ego doctrine should be applied in a way that is *predictable* to account for these issues. Part

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129. *Compare* Dean v. United States, 987 F. Supp. 1160, 1166 (W.D. Mo. 1997), *with In re Maghazeh*, 310 B.R. at 16.

130. Zumpano, *supra* note 12, at 143 (explaining that the use of "trusts to protect . . . assets [and] avoid taxes has become commonplace").

131. *See* DUNCAN E. OSBORNE, *Introduction* to 1 ASSET PROTECTION: DOMESTIC AND INTERNATIONAL LAW & TACTICS, *supra* note 8, § 1:5 (explaining that clients are wanting to reduce the overall risk to their assets because of creditors increased aggressiveness).

132. Zumpano, *supra* note 12, at 127 ("[M]ore than 103 million [such] lawsuits were filed . . . in 2007 alone . . . .").

133. *Id.* (explaining how revocable trusts usually will not meet a person's needs in terms of asset protection); McCullough, *supra* note 12, at 36 (stating how irrevocable trusts can today be used to meet most of a person's needs with regards to asset protection).

134. *See* Jonathan A. Marcantel, *Because Judges Are Not Angels Either: Limiting Judicial Discretion by Introducing Objectivity into Piercing Doctrine*, 59 U. KAN. L. REV. 191, 230 (2011) (noting that even in the "somewhat" more certain application of the alter ego doctrine to corporations, it "is the archetype of mechanisms permitting unwieldy judicial discretion and thus inconsistency and a lack of predictability in judgments"); *see supra* Sections II.B–.C.

III will thus first analyze how the estate-planning landscape has changed such that irrevocable trusts are more likely to be used to protect assets, specifically in the State of Iowa. Next, this Part examines why irrevocable trusts are more susceptible to abuse such that application of the alter ego theory to the trust is necessary to promote justice and fairness. Finally, Part III will explore how, as a public-policy matter, it is desirable that the broad judicial discretion used in applying the alter ego doctrine be limited so the law is more certain and predictable.

A. *THE INCREASED VIABILITY OF IRREVOCABLE TRUSTS DUE TO THE CHANGING ESTATE PLANNING LANDSCAPE*

Application of the alter ego theory to irrevocable trusts is likely a question that will confront the courts of Iowa as the usage of such trusts increases in popularity. Partially because of the way in which irrevocable trusts help to protect one's assets while potentially still allowing for some benefit and control, and also partially because of the potential tax advantages that come along with irrevocable trusts, such trusts "ha[ve] become commonplace" in the United States today.[135] There has been a cultural shift over the last two decades due to a variety of different events in the United States that has caused many Americans to value their financial security to a much higher degree than previously.[136] This has, not unexpectedly, led many to turn to estate-planning tools like irrevocable trusts, which have a strong ability to protect assets from creditors.[137]

Individuals are so attracted to the creditor protection offered by irrevocable trusts because losing those assets that one would typically place in trust could jeopardize a person's current and future lifestyle.[138] As a result, settlors understandably want to find a solution that offers both asset protection and some access to those personal-use assets so that one can maintain their lifestyle. A self-settled asset-protection trust ideally reflects this balance, but most states still do not recognize these trusts.[139] But, even though the majority of states still do not allow self-settled spendthrift trusts,[140] a trust that is well-drafted could set up someone like the settlor's spouse as the primary beneficiary of an irrevocable trust with a spendthrift provision.[141] That way, the settlor could enjoy spillover benefits from the trust assets

135. *See* Zumpano, *supra* note 12, at 143.

136. *Id.* at 127 (explaining how events like the stock market crash in 2001, 9/11, the Enron scandal and other large corporate failures, the housing market crash, and the 2008 Recession have helped to contribute to people, as a whole, not feeling as secure both personally and financially as they did prior to those events).

137. *Id.*

138. *See* Paul J. Barton, *Asset Protection—Another Tool*, UTAH BAR J., Nov. 1993, at 14, 14.

139. *See* discussion *supra* Section II.A.3.

140. *See supra* note 59 and accompanying text.

141. Barton, *supra* note 138, at 14–15.

to preserve their current and future lifestyle.[142] This is a similar idea to the qualified terminal interest property ("QTIP") trust, which creates an irrevocable trust upon the death of a spouse to take full advantage of the martial deduction and grants the surviving spouse a lifetime interest in that irrevocable QTIP trust—including control of the personal-use assets held by the trust.[143] Additionally, in an irrevocable trust with a spendthrift provision, how the trustee acts when giving out payment from the trust to the beneficiary is incredibly important for preserving the principal of the trust.[144] Thus, with proper planning, it is possible to both maintain the benefit of asset protection offered by an irrevocable trust and maintain some level benefit and control,[145] without actually crossing the potentially dangerous line of becoming a self-settled trust. Moreover, even if one is more concerned with the estate-planning side of protecting assets for their children or other beneficiaries, and thus does not care as much about the control and benefit of the assets themselves, irrevocable trusts are still the most sure way to protect those assets for future generations from creditors.[146]

Outside of asset protection, the tax benefits (specifically, under the federal estate tax) for irrevocable trusts have caused an increase in the usage of irrevocable trusts in the United States.[147] As mentioned earlier, irrevocable trusts take assets out of the settlor's estate for estate-tax purposes, meaning that if the settlor has a large estate that is close to the current exclusion amount, the estate tax could potentially be avoided with the use of an irrevocable trust.[148] Even though this tax only affects a relatively small amount of people,[149] the amount of money involved at the levels that actually qualify

142. *Id.* (conceding, however, that if each spouse just sets up *identical* trusts with each other as the primary beneficiary, then the IRS will likely not recognize the validity of the trusts in such a situation).

143. *See* I.R.C. § 2056(b)(7) (2018).

144. Barton, *supra* note 138, at 16 ("Giving an independent trustee the 'sole' and 'absolute' discretion may be 'the ultimate in creditor and divorce claims protection even in a state that restricts so-called "spendthrift trusts"—since the beneficiary himself has no enforceable rights against the [trust principal].'" (quoting Frederick R. Keydel, *Trustee Selection and Removal: Way to Blend Expertise with Family Control*, 23 U. MIA. HECKERLING INST. ON EST. PLAN. ¶ 409.1 (1989))).

145. Note that this scenario seems to be partially dependent on who is selected as the trustee of the trust in question since if it is someone close to the settlor, like another family member, it is arguable that the settlor may still have some control over the trust.

146. *See* McCullough, *supra* note 12, at 39 (noting that in certain states where the Rule Against Perpetuities has either been abolished or extended to a significantly long time, a settlor is able to protect assets for the sake of the trust's beneficiaries significantly far into the future if he or she wants to).

147. This Section only skims the surface of the full tax benefits and consequences of using an irrevocable trust; a full analysis of such benefits and consequences is outside of the scope of this Note.

148. *See* Nawrocki, *supra* note 35.

149. Zumpano, *supra* note 12, at 125–26 (explaining that in 2010 the estate tax only actually affected about 0.33 percent of Americans when the exclusion amount was set at $3.5 million per person, and if the exclusion amount was actually reduced to $1 million it would still only affect

for the tax is so substantial that it ends up producing a huge amount of tax dollars for the government. In 2019, the federal estate tax exclusion amount was the highest it had ever been at $11.4 million per person, meaning that a married couple would be able to get an exclusion amount of $22.8 million in total.[150] Any amount of the estate above the applicable exclusion amount is currently subject to a 40 percent tax.[151] Additionally, 17 states, including Iowa, have implemented their own estate taxes, or essentially equivalent inheritance taxes, that will add to the amount of taxes to which an estate will be subject.[152]

However, the 2020 election could potentially spell the end for the record-high federal estate-tax exclusion amount. As more people have been affected by the tax, it stands to reason that more people will want to use something like an irrevocable trust to avoid paying it.[153]

While the recently-elected President Joe Biden has not explicitly taken a stance on the estate-tax exclusion amount, a number of the former Democratic presidential candidates, most notably Senator Bernie Sanders and Senator Elizabeth Warren, proposed lowering the exclusion to $3.5 million per person, with a gradually increasing estate tax level for the higher one's estate is.[154] This approach would be similar to the way in which an income tax works.[155] Many have suggested that this plan—or one similar—is likely to be implemented if a Democrat wins the presidential election.[156] Since the federal

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1.76 percent of Americans); Ashlea Ebeling, *IRS Announces Higher 2019 Estate Tax and Gift Tax Limits*, FORBES (Nov. 15, 2018, 12:07 PM) [hereinafter *Ebeling 1*], https://www.forbes.com/sites/ashleaebeling/2018/11/15/irs-announces-higher-2019-estate-and-gift-tax-limits [https://perma.cc/FV37-6NW8] (explaining that in 2018 with an exclusion amount set at $11.18 million per person, only 1,890 estates in the United States ended up being subject to the estate tax).

150. *Ebeling 1*, *supra* note 149; *What's New—Estate and Gift Tax*, IRS [hereinafter IRS], https://www.irs.gov/businesses/small-businesses-self-employed/whats-new-estate-and-gift-tax [https://perma.cc/4N4N-QELW] (last updated Oct. 28, 2020).

151. IRS, *supra* note 150.

152. *Ebeling 1*, *supra* note 149; *see, e.g.*, IOWA CODE § 450B.3 (2020).

153. *See* Ashlea Ebeling, *Why the Rich Need to Plan for a Tougher Estate Tax, Not a Wealth Tax*, FORBES (Sept. 25, 2019, 4:04 PM) [hereinafter *Ebeling 2*], https://www.forbes.com/sites/ashleaebeling/2019/09/25/plan-for-a-tougher-estate-tax-not-a-wealth-tax [https://perma.cc/A632-2R2T]; Martin Shenkman, *Sanders Estate Tax Proposal: Estate Planning Steps to Take Now*, FORBES (Mar. 21, 2019, 9:57 AM), https://www.forbes.com/sites/martinshenkman/2019/03/21/sanders-estate-tax-proposal-estate-planning-steps-to-take-now [https://perma.cc/A8DC-XJHQ].

154. *See Ebeling 2*, *supra* note 153; Matthew Erskine, *Use It or Lose It: Locking in the $11.58 Million Unified Credit*, FORBES (July 17, 2020, 11:54 AM), https://www.forbes.com/sites/matthewerskine/2020/07/17/use-it-or-lose-it-locking-in-the-1158-million-unified-credit [https://perma.cc/QW4C-YWHM].

155. *See Ebeling 2*, *supra* note 153.

156. *See id.* (explaining that the current exemption amount is not likely to continue much longer into the future as it "has risen astronomically," perhaps "too high"); Blank Rome LLP, *The Perfect Storm for Estate Planning Before Year End*, JDSUPRA (May 22, 2020), https://www.jdsupra.com/legalnews/the-perfect-storm-for-estate-planning-91436 [https://perma.cc/3TUT-LUF9] (noting that, in addition lowering of the exemption amount, the base tax rate for estates over that exemption amount could be increased from the current 40 percent rate).

estate-tax exclusion amount is at risk of being lowered during Joe Biden's presidency, a greater number of people in the country could soon have estates that are now either above the exemption level or close to it. Even if the exclusion amount is not changed during Joe Biden's presidency, the current level is set to expire at the end of 2025, with the exclusion amount set to revert back to $5 million, plus adjustments for inflation.[157] Thus, it is not a stretch to suggest that, within the next few years, more people will want to avoid the estate-tax by using an irrevocable trust.

In addition to the estate-tax benefits that an irrevocable trust brings, certain kinds of irrevocable trusts—known as grantor trusts—provide special income-tax benefits that make them very attractive.[158] One of the more common types of grantor irrevocable trusts currently in use today is the intentionally defective grantor trust ("IDGT").[159] Any income-producing assets sold or put into an IDGT (usually in exchange for a promissory note) do not trigger a taxable capital gain upon the transaction, since the one paying the income tax is still ultimately the same person.[160] "The . . . value of the asset" now owned by the IDGT "is frozen" and able to appreciate tax free to the benefit of the beneficiaries.[161] This appreciated value is essentially transferred to the beneficiaries. Additionally, with the right planning it is possible for an IDGT achieve similar goals for the grantor as a self-settled trust.[162]

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157. I.R.C. § 2010(c)(3)(B) (2018).

158. *Abusive Trust Tax Evasion Schemes—Questions and Answers*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-questions-and-answers [https://perma.cc/XU4M-U2RC] (last updated Feb. 11, 2020) (explaining that while all revocable trusts are grantor trusts, some irrevocable trusts will be considered such in disregarding the trust as a separate entity and taxing the grantor on all trust income); *see* I.R.C. §§ 671–679.

159. G.P. Diminich & Halsey O. Schreier, *Bottling Lightning: Utilizing the Intentionally Defective Grantor Trust to Turbocharge Estate Tax Planning and Protect Assets from Creditors*, S.C. LAW., Sept. 2012, at 35, 35; *see also* Beau C.T. Barrett, Note, *Grantor Trusts in South Dakota: Preserving a Planning Tool to Maintain the State's Trust Friendly Status*, 58 S.D. L. REV. 89, 109–11 (2013) ("Because of its versatility, the IDGT has become an indispensable estate planning tool.").

160. *See* Diminich & Schreier, *supra* note 159, at 36 ("[B]ecause the grantor is the owner of the IDGT assets for income tax purposes, the sale of an appreciated asset by a grantor to the IDGT will not trigger gain."); *see also* Rev. Rul. 85-13, 1985-1 C.B. 184 ("A grantor who acquires the corpus of a trust in exchange for . . . [a] promissory note will" not be taxed "as a sale for federal income tax purpose[s]."). Alternatively, one is also able to gift the asset to the IDGT, but such a gift could potentially trigger a gift tax if it's over the annual exemption amount, which in 2020 is $15,000, unless part of the applicable tax credit is applied to the gift tax (which could decrease the estate tax exclusion amount). *See Survivors, Executors, and Administrators*, I.R.S. Pub. 559, Cat. No. 15107U (Feb. 4, 2020), https://www.irs.gov/pub/irs-pdf/p559.pdf [https://perma.cc/W7JE-N5A9]; *Frequently Asked Questions on Gift Taxes*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/frequently-asked-questions-on-gift-taxes [https://perma.cc/3CLW-CRHN] (last updated Aug. 6, 2020).

161. Barrett, *supra* note 159, at 110.

162. *See* Diminich & Schreier, *supra* note 159, at 40–41 (noting this result is potentially possible by including the grantor as a permissible appointee of a special power of attorney).

Specifically in Iowa, there is still an overall desire to protect one's assets via trust.[163] Naturally, an irrevocable trust with some sort of spendthrift provision—allowed under Iowa law[164]—has become a popular choice among many in Iowa to protect their assets, including personal-use assets.[165] Even though self-settled irrevocable trusts with a spendthrift clause are currently not allowed under Iowa law,[166] it is unclear how the Iowa Supreme Court would treat an asset-protection trust that either an Iowa resident, or potentially even someone who does business in Iowa, creates in another state that allows such a trust.[167] Overall, though, it seems clear that Iowa is going to have to deal with an increase in the amount of people using irrevocable trusts, which is going to increase the likelihood that notions of justice and fairness will require the eventual application of the alter ego doctrine to some of those trusts.

B. A Greater Potential for Abuse Makes the Alter Ego Doctrine Appropriate

As the amount of overall trusts, specifically irrevocable trusts, in use by individuals over the past few years has increased,[168] there has also been a corresponding increase in abusive estate-planning tactics.[169] For purposes of this Note, an "abuse" or "injustice" in the context of an irrevocable trust will typically mean a fraudulent conveyance wherein there was an "actual intent to hinder, delay, or defraud any creditor of the debtor"[170] or an intent to

163. David M. Repp, *Asset Protection (For the Rich and Not) in Iowa*, 56 DRAKE L. REV. 105, 106–08 (2007) ("[M]any individuals may perceive a growing threat to their wealth from creditors rather than taxes.").

164. IOWA CODE § 633A.2301 (2020).

165. *See* Repp, *supra* note 163, at 113–14.

166. IOWA CODE § 633A.2302.

167. Repp, *supra* note 163, at 121 ("Because self-settled spendthrift trust legislation is relatively new, there have been few cases that have tested the various provisions.").

168. *See supra* Section III.A.

169. Stowell et al., *supra* note 59, at 510.

170. IOWA CODE § 684.4(1)(a). The "intent" aspect of the statute often considers the following factors in determining if there was fraud in the transfer:

> *a.* The transfer or obligation was to an insider[;] *b.* The debtor retained possession or control of the property transferred after the transfer[;] *c.* The transfer or obligation was disclosed or concealed[;] *d.* Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit[;] *e.* The transfer was of substantially all the debtor's assets[;] *f.* The debtor absconded[;] *g.* The debtor removed or concealed assets[;] *h.* The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred[;] *i.* The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred[;] *j.* The transfer occurred shortly before or shortly after a substantial debt was incurred [; and] *k.* The debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor.

insulate assets from creditors while still maintaining practical use of those assets.[171] Unfortunately, there has been a huge increase in the amount of trusts created specifically for the purpose of asset protection, such as asset-protection trusts or Alaska Trusts, and they are unusually susceptible to such abuse.[172] Traditionally, creditors are entitled to payment before the debtor provides for their own comfort, but self-settled spendthrift trusts like asset-protection trusts are able to circumvent this traditional rule.[173] Asset-protection trusts, in particular, are likely to be accompanied by "badges of fraud" that create a fraudulent conveyance or a large enough showing of bad faith such that the alter ego theory should be applied.[174] While asset-protection trusts can still be used for legitimate purposes, it has been shown that they are more *likely* to be abused than other types of trusts.[175] Since the amount of irrevocable trusts—including asset-protection trusts—is increasing across the country, including in Iowa,[176] it is going to become a question of "when" not "if" the Iowa Supreme Court will need to address the application of the alter ego doctrine to an irrevocable trust in the name of equity.

A major reason why asset-protection trusts, in particular, are more susceptible to abuse than other types of trusts is the lack of case law on the subject.[177] As a result, there is little guidance as to how these trusts can be constructed to fully comport with notions of justice or fairness. This lack of

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Id. § 684.4(2). Other state courts have shown this standard can be applied to transfers to an irrevocable trust so as to justify imposing the alter ego theory. *See* Rigby v. Mastro (*In re* Mastro), 465 B.R. 576, 601 (Bankr. W.D. Wash. 2011).

171. Other courts have found attempting to hide or insulate assets in a trust for creditor protection, while still using those assets, is sufficient for application of the alter ego theory. *See, e.g.*, *In re* Richards, No. 97-14798DWS, 1998 WL 205915, at *12 (Bankr. E.D. Pa. Apr. 3, 1998). It is likely Iowa courts would follow a similar rationale as they have found corporations hiding assets from creditors a primary reason to justify applying the alter ego theory. *See, e.g.*, Briggs Transp. Co. v. Starr Sales Co., 262 N.W.2d 805, 810–11 (Iowa 1978); HOK Sport, Inc. v. FC Des Moines, L.C., 495 F.3d 927, 941 (8th Cir. 2007) (applying Iowa law); Benson v. Richardson, 537 N.W.2d 748, 762 (Iowa 1995).

172. Stowell et al., *supra* note 59, at 526, 529 ("Asset protection trusts are a 'booming business for banks, trust companies, and estate planners, both [in the U.S.] and abroad. They [are] a multi-billion-dollar-a-year business.'" (quoting Jeffrey A. Morse, *Nevada Self-Settled Spendthrift Trusts or Offshore Trusts?*, NEV. LAW., Mar. 2008, at 16, 16)).

173. GEORGE TAYLOR BOGERT, GEORGE GLEASON BOGERT & HELENE S. SHAPO, BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 223 (2020).

174. *See* Stowell et al., *supra* note 59, at 546–47 (explaining that asset-protection trusts are commonly used to commit crimes like: hiding assets from creditors, hiding assets to avoid taxes, money laundering, funding some sort of terrorism, etc.).

175. *Id.* Any asset-protection trust used in the State of Iowa is unjust, or illegal, as that is the determination of the state legislature. *See* IOWA CODE § 633A.2302 (showing the illegality of self-settled spendthrift trusts).

176. *See supra* Section III.A.

177. *See* Stowell et al., *supra* note 59, at 545 (explaining how "[asset-protection trust] law in the U.S. is very unsettled (due to a paucity of case law)"); Matthew Russo, Comment, *Asset Protection: An Analysis of Domestic and Offshore Trust Accounts*, 23 MICH. ST. INT'L L. REV. 265, 289 (2014).

case law is understandable; asset-protection trusts are a relatively new phenomenon, and most courts have simply not yet been able to consider the issue. But the resultant uncertainty is a serious problem in a variety of ways. For instance, consider an application of the Full Faith and Credit Clause[178] in the case of a creditor obtaining a judgment against a debtor's assets held in an asset-protection trust in a state that does not recognize such trusts. Would the establishment state of the asset-protection trust recognize the judgment?

It is currently unclear how the Full Faith and Credit Clause would apply to the recognition and enforcement of such a judgment on a trust in a state that does not allow for an asset-protection trust.[179] This uncertainty could lead to a couple of different outcomes. First, it could lead to a potential chilling effect on using irrevocable trusts in general, but this result seems unlikely considering such trusts seem to be increasing in popularity.[180] Second, since individuals do not necessarily know where the line is in how the alter ego doctrine will be applied, there is a higher likelihood that individual settlors could end up using irrevocable trusts in ways that end up constituting abuse.[181]

Without more well-defined application, the use of the alter ego theory to prevent fraud and injustice can thus have the effect of potentially *contributing* to the problem, rather than resolving it. If the Iowa legislature and Iowa courts wish to ensure that the use of irrevocable trusts does not erode fundamental notions of justice and fairness, it is thus necessary not only to adopt the alter ego theory, but to also ensure it will be applied in a manner that is predictable.[182]

Additionally, the issue of what choice of law a state will choose when interpreting the validity of an asset-protection trust lends more uncertainty to how the alter ego theory will be applied.[183] This question is quite significant

178. U.S. CONST. art. IV, § 1 (requiring states to respect "the public Acts, Records, and judicial Proceedings of every other State").

179. *See* Stowell et al., *supra* note 59, at 544 (recognizing, nonetheless, that since the trend in the number of states who allow asset-protection trusts is increasing, it is likely that states who do not allow such trusts will honor the validity of them if a claim is brought against it in their state court); *see also* Wesley D. Cain, Note, *Judgment Proof: Can Connecticut Residents Insulate Assets from Creditors Using a Delaware Domestic Asset Protection Trust?*, 47 CONN. L. REV. 1463, 1487–88 (2015) (suggesting that while the Full Faith and Credit Clause may require recognition of the validity of the judgment, it does not necessarily follow the state allowing for asset-protection trusts will need to enforce the judgment).

180. *See supra* Section III.A.

181. *See supra* text accompanying notes 170–71. Some even consider violating the proposition "[y]ou should keep your promises and pay your debts because it is the right thing to do" as enough to constitute an abuse or injustice. Karen E. Boxx, *Gray's Ghost—A Conversation About the Onshore Trust*, 85 IOWA L. REV. 1195, 1259 (2000).

182. See *infra* Part IV for an example of a statute designed to ensure more predictability.

183. Brendan Duffy, Note, *In States We "Trust": Self-Settled Trusts, Public Policy, and Interstate Federalism*, 111 NW. U. L. REV. 205, 218 (2016) (explaining how the conflict is between enforcing the law where the trust was created or the law where the suit is actually brought).

because, for example, an Iowa resident who has an asset-protection trust set up in a state with more settlor-favorable laws will naturally prefer to use the settlor-favorable state's law in interpreting the validity of the trust. As a result, the settlor will likely have a choice of law provision in the trust dictating the settlor-favorable state as the applicable law. Meanwhile, the creditor bringing the claim will prefer to use Iowa law, where the trust might not be upheld as valid,[184] and have the court not recognize the choice of law provision as valid. It was not until *In re Huber* in 2013 that a federal court resolved this problem.[185] In that case, Huber established an asset-protection trust in Alaska to protect his assets from the liability he thought was likely coming.[186] When the creditors eventually came for the assets in the trust, they brought suit in the State of Washington, where Huber resided, and the district court found that Washington law applied since Washington had a substantial interest in the trust but Alaska did not.[187] Because Washington did not recognize asset-protection trusts as valid under their laws, the trust in question was reverse pierced through the alter ego theory to promote justice, thus allowing the relevant creditors to reach the assets in the trust.[188] This decision has since been met with criticism by many who think that the analysis used in *Huber* was flawed.[189] It is also likely that states with a strong economic interest in asset-protection trusts will not be in favor of the result reached in *Huber*.[190] But, for the time being, *Huber* potentially incentivizes settlors to construct their irrevocable trust in a way consistent with the policy of the state that might have the most "substantial relationship"[191] to the trust, rather than in the more advantageous way allowed for in states recognizing asset-protection trusts.

184. *See, e.g.*, IOWA CODE § 633A.2302 (2020) (making clear that since the asset-protection clause is a self-settled spendthrift, it is not allowed under Iowa law).

185. *See generally* Waldron v. Huber (*In re* Huber), 493 B.R. 798 (Bankr. W.D. Wash. 2013) (finding that a trust's choice of law provision designating Alaska as the applicable law would not be upheld because the trust did not have a substantial relation to Alaska).

186. *Id.* at 804–05.

187. *Id.* at 808–09 (explaining that the test for having a substantial relation to the trust is to look at if: "(1) the trustee or settlor is domiciled in the state; (2) the assets are located in the state; and (3) the beneficiaries are domiciled in the state," and finding Alaska failed all three prongs of the test according to the district court, while Washington satisfied all three). This analysis is similar to that used in Iowa to determine if a substantial relationship exists when deciding governing law. IOWA CODE § 633A.1108(2)(a) (explaining the factors considered are: whether the jurisdiction is a "residence or domicile of the settlor or of any qualified beneficiary, the location of a substantial portion of the assets of the trust, or a place where the trustee was domiciled or had a place of business" at the time of the trust's creation).

188. *In re Huber*, 493 B.R. at 810 (applying Washington alter ego law).

189. Duffy, *supra* note 183, at 230–31 (claiming that the bankruptcy court in *Huber* used the wrong restatement provision in their choice of law decision, and that the court should have given more weight to Alaska's interest and less to the public policy interest of the State of Washington).

190. *See* Nienhuser, *supra* note 41, at 564.

191. *See supra* note 187 and accompanying text.

Even though *Huber* ends up applying the alter ego theory, it is unclear if Iowa will follow that court's reasoning in deciding the choice of law, or if an Iowa court would choose to go another route as the *Huber* decision is not binding on it. In the context of corporations, under Iowa law it is the law of the state of incorporation that is controlling when applying the alter ego theory.[192] This uncertainty creates a situation wherein a settlor does not know if an Iowa court applying the alter ego doctrine to irrevocable trusts will either (1) treat the situation similar to that of corporations and use the state of establishment as the applicable law[193] or (2) if it will follow an analysis similar to that of *Huber*.[194] Regardless, when paired with the uncertainty surrounding the Full Faith and Credit Clause, the overall uncertainty over the what the applicable law might be could potentially lead to individuals using their asset-protection trusts in a way that could constitute an injustice,[195] and thus create situations where justice requires application of the alter ego doctrine. But, as noted above, any application of the alter ego doctrine should be tailored through statute to allow for more predictability in comporting with notions of fairness and justice.

C. *JUDICIAL DISCRETION IN THE ALTER EGO DOCTRINE BRINGS UNCERTAINTY TO THE LAW*

It is desirable that, as a matter of public policy, Iowa should reduce the broad range of judicial discretion available to judges in applying the alter ego theory in an effort to reduce the uncertainty surrounding what the law actually is on the matter. While the Iowa Supreme Court has yet to address the question of whether the alter ego doctrine should apply to irrevocable trusts, it seems likely that with the increase in these types of trusts being used for unjust purposes,[196] fundamental notions of fairness and justice demand that the court apply the alter ego doctrine to these trusts.[197] However, the way

192. *E.g.*, Tyson Fresh Meats, Inc. v. Lauer Ltd., L.L.C., 918 F. Supp. 2d 835, 850 (N.D. Iowa 2013) (applying Nebraska law to a corporation incorporated in Nebraska).

193. It is worth noting that in this situation the establishment state will likely also be the state chosen in the choice of law provision as it will be more favorable to the settlor.

194. Such an analysis will likely evaluate if the chosen jurisdiction or state of establishment had a substantial relationship to the trust at the time of creation. IOWA CODE § 633A.1108(2)(a) (2020). For a list of the factors looked for in such an analysis, see *supra* note 187 and accompanying text. If there is no substantial relationship, the court will decide which jurisdiction has the most significant relationship to the matter in determining applicable law. IOWA CODE § 633A.1108(2)(b).

195. This proposition is based on a potential assumption that individuals could rely on the possibility or probability that it is the law of the state where the trust is formed that will control, which will help to protect the viability of the asset-protection trust.

196. *See supra* Sections III.A–.B.

197. *See The Court and Constitutional Interpretation*, SUP. CT. OF U.S., https://www.supremecourt.gov/about/constitutional.aspx [https://perma.cc/VK2B-5ZRF] (explaining that the role of the court is to promote "the promise of equal *justice* under law" (emphasis added)).

in which the alter ego doctrine is applied can often vary quite a bit both across different states and between courts in the same state, including Iowa, because of the huge amount of judicial discretion that is involved in applying the doctrine.[198] The broad range of discretion is usually due to application of the doctrine being very fact specific.[199]

Of course, judicial discretion is impossible to eliminate entirely,[200] but as a public-policy matter it is more appropriate to limit broad ranges of judicial discretion when possible because it allows for a more fair and predictable legal system.[201] Judicial discretion should not be so broad as to potentially be arbitrary in nature, but rather it should "giv[e] effect to the will of the Legislature; or, in other words, to the will of the law."[202] As Iowa has yet to speak on the issue, it is unclear what standard the Iowa Supreme Court will use when applying the alter ego theory to irrevocable trusts,[203] which in turn means that the law is currently unclear on how it will treat irrevocable trusts used for asset protection in a potentially unjust way. This Iowa-specific uncertainty is only compounded when paired with an alter ego doctrine already inherently known for its "ambiguity, unpredictability, and even a

198. Pamela R. Shisler, Note, *Altering the Alter Ego Doctrine: Misapplication and Gender Issues in* Spotts v. United States, 59 TAX LAW. 309, 315 (2005) (noting that application of "the alter ego doctrine involves considerable judicial discretion"); *see* DORE, *supra* note 77, § 15:4 (explaining that in Iowa it is hard to actually make sense of the alter ego doctrine due to the large amount of judicial discretion granted to courts).

199. *See, e.g.*, United States v. Jon-T Chems., Inc., 768 F.2d 686, 694 (5th Cir. 1985); United States v. Fidelity Cap. Corp., 920 F.2d 827, 836 (11th Cir. 1991). Additionally, while Iowa has never explicitly said that the alter ego doctrine is extremely fact specific, it is an appropriate inference to make due to the totality of the circumstances type tests Iowa courts use to consider whether or not to pierce the corporate veil or apply the alter ego theory. *See* Briggs Transp. Co. v. Starr Sales Co., 262 N.W.2d 805, 810 (Iowa 1978); HOK Sport, Inc. v. FC Des Moines, L.C., 495 F.3d 927, 935 (8th Cir. 2007).

200. Steven J. Cleveland, *Judicial Discretion and Statutory Interpretation*, 57 OKLA. L. REV. 31, 31 (2004) ("The legislature cannot craft statutes to govern every (in)action.").

201. Jon Roland, *Abuse of Judicial Discretion*, JUSTICE4YOU, http://www.justice4you.org/judicial_discretion.php [https://perma.cc/2ST5-4LPY] (explaining how "[i]deally, officials should be mutually consistent and interchangeable, making similar decisions in similar cases, so that no one can gain an undue advantage by choosing the official or exercising undue influence on the official or on the process he operates"); *see also* Marcantel, *supra* note 134, at 206 (noting predictability in the law brings many benefits such as "promot[ing] public confidence in the law; foster[ing] certainty; enhanc[ing] stability in the law; creat[ing] efficiency; promot[ing] unbiased, meritorious decisions; and encourag[ing] judicial restraint" (citations omitted)).

202. Nathan Isaacs, *The Limits of Judicial Discretion*, 32 YALE L.J. 339, 343 (1923) (quoting Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 866 (1824)).

203. There seems to be two main possibilities for how the Iowa Supreme Court could interpret such an application: (1) it could simply extend the application of the established alter ego theory as it applies to corporations to trusts in general (which would include the irrevocable trusts at issue), *see* discussion *supra* Section II.B, or (2) it could potentially deem the Iowa Trust Code to be the controlling authority on the matter, and thus could potentially create a new standard, *see* DORE, *supra* note 77, § 15:5 (noting that there is Iowa precedent for not using the traditional veil piercing techniques when there is another source of statutory material which is deemed to be controlling).

seeming degree of randomness."[204] There will thus be an inherent lack of predictability in this area of the law, which will not necessarily go away when Iowa courts do eventually look at this issue as such a fact-specific area of the law with broad judicial discretion will lead to a multitude of close cases, creating inconsistent decisions.[205] As a result, citizens in Iowa will not know where the line is between what is an acceptable action to take regarding their irrevocable trust and what is an action that could leave them open to potential liability under the alter ego doctrine.[206] A statutory limitation on such judicial discretion is thus necessary to solve this issue.[207]

IV. PROPOSED AMENDMENT TO THE IOWA TRUST CODE

Given this fundamental problem, the Iowa legislature should take matters into its own hands. As the representative of the people of the state, it should enact legislation that will both (1) encourage the use of the alter ego theory to prevent injustice and (2) ensure that citizens know exactly what the law is on the matter by reducing the broad range of judicial discretion in applying the doctrine. This approach will help to reduce the possibility that individuals could use their irrevocable trust in a way that constitutes abuse due to the uncertainty in the law. This Note thus suggests a draft of what a statute regulating the application of the alter ego theory to irrevocable trusts could look like. Fortunately for Iowa, there are some states around the country that have already drafted statutes dealing with such an application (specifically Indiana, Mississippi, Nevada, New York, South Dakota, and Tennessee), all of which have much more extensive experience dealing with both the alter ego theory, in general, and application of the theory to irrevocable trusts, in particular.[208] These statutes make clear that the settlor of an irrevocable trust can be held to be the alter ego of the trust if the evidence is sufficient under the state's applicable alter ego doctrine, but there are certain features common to the administration of a trust that are excluded

204. Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 507 (2001).

205. Maureen Armour, *Rethinking Judicial Discretion: Sanctions and the Conundrum of the Close Case*, 50 SMU L. REV. 493, 570 (1997).

206. Just as lack of predictability brought about by the judicial discretion inherent in applying the alter ego theory to corporations leads to challenges in making sound business decisions, it will also lead to challenges in making prudent estate-planning decisions. *See* Sandra K. Miller, *Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the U.S.: A Comparative Analysis of U.S., German, and U.K. Veil-Piercing Approaches*, 36 AM. BUS. L.J. 73, 112 (1998); Marcantel, *supra* note 134, at 206.

207. Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 8–9 (2004) (explaining statutory enactment is the best method for reigning in unfettered judicial discretion); *see infra* Part IV.

208. *See* IND. CODE § 30-4-2.1-16 (2020); MISS. CODE ANN. § 91-8-1107 (2020); NEV. REV. STAT. § 163.418 (2020); N.Y. EST. POWERS & TRUSTS § 7-3.1 (McKinney 2020); S.D. CODIFIED LAWS § 55-1-33 (2020); TENN. CODE ANN. § 35-15-1104 (2020).

from consideration.[209] These statutes help to refocus the alter ego analysis on whether the irrevocable trust is being used to perpetuate a fraud or injustice.[210] The statutes do not allow courts to declare an individual to be the alter ego of an irrevocable trust based on factors that are otherwise common to the administration of the trust and do not in themselves show dominion or control over the trust.

Any statute adopted by Iowa should reflect the Iowa public policy of not allowing for self-settled spendthrift trusts.[211] Notably, this policy concern differs from most of the states that have enacted statutes governing asset-protection trusts. Although these statutes do serve the goal of ensuring predictability in application, it is likely that the states of Mississippi, Nevada, South Dakota, Tennessee, and, potentially, Indiana all originally enacted their asset-protection-trust statutes to help make the law more *favorable* for the asset-protection trusts established in their states.[212] All of these laws are laid out in an extremely similar fashion.[213]

Indeed, it is likely that they were inspired by South Dakota's enactment, as it was the first such law to come about in 2007.[214] By contrast, New York's statute was enacted to reinforce their public policy of not allowing for self-settled spendthrift trusts.[215] Any statute adopted by Iowa should thus reflect the spirit behind New York's statute, even as it should also borrow from the predictability-ensuring structure used by the other states.

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209. *See, e.g.*, S.D. CODIFIED LAWS § 55-1-33 (establishing that the settlor can be considered the alter ego of the irrevocable trust if there is "clear and convincing evidence" outside of those features common to the trusts administration); N.Y. EST. POWERS & TRUSTS § 7-3.1(a), (d) (making clear "a disposition in trust *for the use of the creditor* is void[,]" but certain factors may not be considered when determining if a trust is self-settled or not (emphasis added)); *see also* Sidney Kess & Edward Mendlowitz, *Understanding the Duties of a Trustee in Administering a Trust*, CPA J. (June 2019), https://www.cpajournal.com/2019/06/03/understanding-the-duties-of-a-trustee-in-administering-a-trust [https://perma.cc/XJ3Q-7C5D] (listing common administrative features of a trust).

210. *See* TransFirst Grp. Inc. v. Magliarditi, No. 2:17-CV-00487-APG-VCF, 2017 WL 3723652, at *2 (D. Nev. Aug. 29, 2017) (noting that NEV. REV. STAT. section 163.418 is a clear alter ego standard set forth by the legislature, and something like a fraudulent conveyance to the irrevocable trust is enough to show "clear and convincing evidence" that the settlor is the alter ego of the trust).

211. *See* IOWA CODE § 633A.2302 (2020).

212. *See supra* text accompanying note 59 (stating that those states of Mississippi, Nevada, South Dakota, and Tennessee are all among the states that allow for self-settled asset-protection trusts in some way); Nienhuser, *supra* note 41, at 564–65 (discussing the economic incentives for those states to protect the validity of asset-protection trusts); *see also* IND. CODE §§ 30-4-8-1 to 30-4-8-16 (establishing legacy trusts in Indiana, which are similar in many ways to an asset-protection trust, but such trusts have only been allowed since 2019).

213. *See* IND. CODE § 30-4-2.1-16; MISS. CODE ANN. § 91-8-1107; NEV. REV. STAT. § 163.418; S.D. CODIFIED LAWS § 55-1-33; TENN. CODE ANN. § 35-15-1104.

214. *See* S.D. CODIFIED LAWS § 55-1-33.

215. *See* N.Y. EST. POWERS & TRUSTS § 7-3.1 (McKinney 2020); Pangea Cap. Mgmt., LLC v. Lakian, No. 16-CV0840 (LAK), 2017 WL 4081911, at *4 (S.D.N.Y. Sept. 13, 2017).

Based on twin goals of ensuring justice and creating predictability, Iowa should adopt the basic structure of the statute adopted by Indiana, Mississippi, Nevada, South Dakota, and Tennessee, but with some slight alterations to better reflect Iowa public policy and alter ego law. While based on different policy aims, these states' statutes deal explicitly with irrevocable trusts and are thorough in limiting what judges are allowed to consider in an alter ego analysis. In terms of alterations to better reflect the purpose behind this statute, the Iowa legislature should include language indicating that the overall purpose behind the statute is to prevent a fraud or injustice, which is at the foundation of Iowa alter ego law.[216] This language will also help reflect that the statute is more about not allowing for factors common in a trust's administration to be analyzed arbitrarily in deciding if the alter ego theory is applicable. This also shows that goal of the statute is not to protect self-settled spendthrift trusts. Additionally, a second statute should be created that lists different factors to emphasize the factors related to dominion and control over the irrevocable trust.[217] At the moment, Iowa courts do not have a set list of factors they consider when looking for the requisite degree of control over a corporation, and the same is true with regard to control over an irrevocable trust.[218] Iowa should follow the lead of states that have considered it prudent to limit what can be considered to show the requisite control, protecting against arbitrary application.

The format of the statute to be adopted is essentially as follows: (1) a statement that the settlor cannot be considered the alter ego of an irrevocable trust or of a trustee of such trust "[a]bsent clear and convincing evidence,"[219] followed by (2) a list of factors courts are not allowed to consider to conclude that the settlor is the alter ego of the irrevocable trust. These factors include:

> ([i]) Any combination of the factors listed [to show dominion and control]; ([ii]) [*i*]*solated occurrences* where the settlor has signed checks, made disbursements, or executed other documents related to the trust as a trustee, when in fact the settlor was not a trustee; ([iii]) [m]aking any requests for distributions on behalf of

216. The proposed language is based off of the third prong of the Iowa alter ego test for corporations. *See* HOK Sport, Inc. v. FC Des Moines, L.C., 495 F.3d 927, 935 (8th Cir. 2007); *see also* Benson v. Richardson, 537 N.W.2d 748, 762 (Iowa 1995) (indicating that a fraudulent scheme to hide assets justifies the imposition of the alter ego theory).

217. "Dominion and control" is referring to the first factor of the second prong of the proposed alter ego statute. *See infra* text accompanying note 220. This factor is intended to be a sort of catch-all factor in order to find that an individual is the alter ego of an irrevocable trust. However, every state to have enacted this kind of statute has also eliminated a number of factors for a court to consider when deciding if the requisite dominion and control is there. *See infra* text accompanying note 222.

218. This situation is due to the fact that Iowa courts have not yet considered the application of the alter ego theory to irrevocable trusts.

219. *See* IND. CODE § 30-4-2.1-16 (2020); MISS. CODE ANN. § 91-8-1107 (2020); NEV. REV. STAT. § 163.418 (2020); S.D. CODIFIED LAWS § 55-1-33; TENN. CODE ANN. § 35-15-1104 (2020).

> beneficiaries; ([iv]) [m]aking any requests to the trustee to hold, purchase, or sell any trust property.[220]

As noted above, the first prong, which borrows from South Dakota's statute, should be worded as follows to better make clear the overall purpose of the statute:

> "Absent clear and convincing evidence" that the irrevocable trust has been abused such that the trust sanctions a fraud or promotes injustice, "no settlor of an irrevocable trust may be deemed to be the alter ego of a trustee" or of the irrevocable trust.[221]

Additionally, the first factor (i) of the second prong of the test is usually accompanied by a separate list of factors that are not allowed to be considered by courts to find dominion and control over the irrevocable trust. Those factors include:

> (1) [t]he settlor or a beneficiary serving as a trustee or a co-trustee as described in [the main statute]; (2) [t]he settlor or a beneficiary holds an unrestricted power to remove or replace a trustee; (3) [t]he settlor or a beneficiary is a trust administrator, a general partner of a partnership, a manager of a limited liability company, an officer of a corporation, or any other managerial function of any other type of entity, and part or all of the trust property consists of an interest in the entity; (4) [a] person related by blood or adoption to the settlor or a beneficiary is appointed as trustee; (5) [t]he settlor's or a beneficiary's agent, accountant, attorney, financial advisor, or friend is appointed as trustee; (6) [a] business associate is appointed as a trustee; (7) [a] beneficiary holds any power of appointment over any or all of the trust property; (8) [t]he settlor holds a power to substitute property of equivalent value; (9) [t]he trustee may loan trust property to the settlor for less than a full and adequate rate of interest or without adequate security; (10) [t]he distribution language provides any discretion; (11) [t]he trust has only one beneficiary eligible for current distributions; or (12) [t]he beneficiary serving as a trust advisor for investments . . . .[222]

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220. S.D. CODIFIED LAWS § 55-1-33 (emphasis added). While there are slight differences on how these four factors are worded across the state statutes, the general idea is still the same. However, since it is likely that South Dakota's statute inspired the others, it was the one used here as the "model" statute template. *See* IND. CODE § 30-4-2.1-16; MISS. CODE ANN. § 91-8-1107; NEV. REV. STAT. § 163.418; TENN. CODE ANN. § 35-15-1104.

221. S.D. CODIFIED LAWS § 55-1-33. This change reflects Iowa alter ego law as applied to corporations. *See supra* Section II.B.

222. S.D. CODIFIED LAWS § 55-1-32; *see* IND. CODE § 30-4-2.1-15; MISS. CODE ANN. § 91-8-1108; NEV. REV. STAT. § 163.4177; TENN. CODE ANN. § 35-15-1105. Once again, South Dakota was chosen as the example for some potential factors the court can be limited to in considering if there is the requisite dominion and control, and the lists for other states is roughly equivalent

This list of factors not allowed to be considered in finding dominion and control over an irrevocable trust should be incorporated into a separate statute so as to mirror what other states have done.

As a whole, the adoption of this proposed statutory language will decrease the broad level of judicial discretion that is used in applying the alter ego doctrine to corporations but will still allow some amount of discretion to judges in eliminating certain factors from consideration. Consistent with Iowa public policy, it focuses the analysis on whether some fraud or injustice is present in order for a court to apply the theory. This reform is necessary, as many of the current common-law factors used in an alter ego analysis for corporations are specific to corporations[223] and cannot be cleanly extended to irrevocable trusts. This new statute is thus desirable from a public-policy perspective for two reasons: (1) it prevents the injustices to which asset-protection trusts are prone by allowing the application of the alter ego theory, and (2) it gives citizens a better idea of how the law will treat their irrevocable trusts and how they might be able to protect their assets within the constraints of general notions of justice and fairness.

V. CONCLUSION

There has been an increase in the number of irrevocable trusts used for asset-protection purposes, both around the country and in Iowa specifically. This change, in turn, has brought about a corresponding increase in the number of these trusts being used for unjust or abusive purposes. This rise in irrevocable trusts being used unjustly makes it more likely that the State of Iowa will eventually be faced with the question of whether they should apply their current alter ego doctrine to irrevocable trusts. Notions of fairness and justice inherent in the role of courts dictate that it should be applied to prevent the settlors from committing fraud or hiding their assets from creditors while still maintaining control over them. However, the way in which this doctrine is currently applied to corporations in Iowa includes too broad a range of judicial discretion. As a result, if extended to irrevocable trusts, it is unclear how exactly the doctrine would actually be applied, harming efforts at ensuring predictability in trust law for settlors and creditors alike. Individuals must actually know what the law says so that they might plan accordingly. Thus, Iowa should adopt a new statute modeled after other state statutes on the same topic, with some slight alterations to better fit with Iowa's public-policy goals.

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but for some slight variations. *See* IND. CODE § 30-4-2.1-15; MISS. CODE ANN. § 91-8-1108; NEV. REV. STAT. § 163.4177; TENN. CODE ANN. § 35-15-1105.

223. *See* Briggs Transp. Co. v. Starr Sales Co., 262 N.W.2d 805, 810 (Iowa 1978) (listing the factors considered in any veil piercing analysis, including an alter ego analysis).