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# No Child Left Behind: Extending Ohio's Pretermitted Heir Statute to Revocable Trusts

Danielle J. Halachoff

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**NO CHILD LEFT BEHIND: EXTENDING OHIO’S  
PRETERMITTED HEIR STATUTE TO REVOCABLE TRUSTS**

*Danielle J. Halachoff\**

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## I. INTRODUCTION

Consider the circumstances and estate plans of two decedents, Testator and Settlor. Testator executes a will that devises her entire estate. The will does not provide for, or state an intention to disinherit, a child born after the execution of the will. Testator then has a child, *A*. Similarly, Settlor establishes and funds an inter-vivos revocable trust to dispose of her assets at her death. The trust instrument does not provide for, or express an intention to disinherit, an afterborn child. Settlor subsequently has a child, *B*. Suppose Testator and Settlor both die shortly thereafter as single Ohio domiciliaries. Testator dies without revoking her will or executing a new will, and Settlor dies without having revoked or revised the trust instrument. Will the afterborn children receive a share of the estate or the trust?

To answer this question, it is necessary to look to what are commonly referred to as omitted child or pretermitted heir statutes.<sup>1</sup> Such statutes, however, have traditionally applied only to wills,<sup>2</sup> and neither the General Assembly nor the courts in Ohio have made its pretermitted heir statute applicable to revocable trusts.<sup>3</sup> Thus, under Ohio's pretermitted heir statute, because *A* was omitted from Testator's will, *A* is entitled to an intestate share of the estate.<sup>4</sup> Conversely, because

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1. See generally RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.6 cmt. a (AM. LAW INST. 2003).

2. See Alan Newman, *Revocable Trusts and the Law of Wills: An Imperfect Fit*, 43 REAL PROP. TR. & EST. L.J. 523, 550 (2008).

3. See *infra* Part II.

4. OHIO REV. CODE ANN. § 2107.34 (West, Westlaw through File 2 of the 132nd GA (2017-

*B* was unintentionally disinherited from a revocable trust instrument, and although the situations of *A* and *B* are very much alike, it is unlikely *B* will receive a share of Settlor's trust assets. That outcome, however, is not entirely clear, as there is some authority for applying rules under the law of wills to will substitutes such as revocable trusts even in the absence of explicit statutory authority for doing so.<sup>5</sup>

Generally, pretermitted heir statutes protect a child, and under some statutes a more remote descendant of the testator from unintentional disinheritance.<sup>6</sup> Their purpose is to carry out the presumed intent of the decedent to provide for a child inadvertently omitted from the will.<sup>7</sup> Because revocable trusts are regularly used as substitutes for wills, primarily to avoid probate administration,<sup>8</sup> presumptions regarding the intent of a decedent that are applicable to wills should also be applicable

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2018)). This is the result because Testator died single. In Ohio, if the testator has a surviving spouse, the pretermitted heir receives an intestate share of only that portion of the estate which is not left to the surviving spouse. *Id.*; see also UNIF. PROB. CODE § 2-302 (amended 2010), 8 U.L.A. 194-95 (2013).

5. See generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 (AM. LAW INST. 2003); RESTATEMENT (THIRD) OF TRUSTS § 25(2) (AM. LAW INST. 2003); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 34.2(2) (AM. LAW INST. 1992).

6. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.6 cmt. d. The disinheritance of a child must be unintentional for the statute to apply. See, e.g., UNIF. PROB. CODE § 2-302. Under the Uniform Probate Code, the statute does not apply if it appears that the omission was intentional by the language of the will or if the testator provided for the afterborn child by nonprobate transfer in lieu of providing for the child in the will. *Id.* § 2-302(b). Most omitted child or heir statutes protect only persons born after a testator's execution of her will, although some also apply to children or other heirs who were living when the testator executed the will. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.6(a).

7. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.6 cmt. i (Because omitted child statutes only protect persons from unintentional disinheritance, they yield to a contrary intent.).

8. Today, the widely accepted public conception of probate administration is that it is costly, time consuming, too complex, and lacks privacy. David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 639-41 (2015); see also Karen M. Moore, *Current Issues Under the Ohio Trust Code: The Revocable Trust, Chapter 5806*, 25 OHIO PROB. L.J. 8 (2015). By the use of will substitutes, individuals are able to avoid these disadvantages of the probate system. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 7.1-7.2; see also Langbein, *supra* note 5, at 1108-09. Other common uses of revocable trusts are to prepare for the settlor's incapacity, see Nathaniel W. Schwickerath, Note, *Public Policy and the Probate Pariah: Confusion in the Law of Will Substitutes*, 48 DRAKE L. REV. 769, 777 (2000) (citing Louis A. Mezzullo et al., *Planning for Incapacity*, C712 A.L.I.-A.B.A. 319, 333-34 (1991)), and to provide privacy with respect to the disposition of the settlor's assets, Moore, *supra* note 8 (discussing the increase in accessibility to individuals' information with the use of the Internet). Revocable trusts can also be easily created and amended. *Id.*; see also Langbein, *supra* note 5, at 1113 (explaining the widely offered "standard-form revocable trusts with fill-in-the blank beneficiary designations").

to revocable trusts.<sup>9</sup> Additionally, many other problems that arise when disposing of a testator's property at death may also arise with a settlor's use of a revocable trust,<sup>10</sup> and there is a recent trend toward resolving these problems by looking to the law of wills.<sup>11</sup> Consequently, in Ohio, several statutory rules that apply to wills have been extended to apply to revocable trusts.<sup>12</sup>

This Comment argues that the Ohio legislature should similarly extend the wills pretermitted heir statute to revocable trusts. Part II of this Comment provides the statutory background of the Ohio pretermitted heir statute and a review of Ohio cases involving the application of the law of wills to revocable trusts, as well as the few non-Ohio cases that have addressed the issue of whether pretermitted heir statutes are applicable to revocable trusts. Part III addresses whether Ohio's pretermitted heir statute, although not explicitly applicable to revocable trusts, nevertheless could be so applied and concludes that it is unlikely that an Ohio court would apply the current pretermitted heir statute to a revocable trust. Part IV addresses whether Ohio's pretermitted heir statute should be amended to apply to revocable trusts, the most commonly used will-substitute,<sup>13</sup> and considers the rationale for such an amendment. Part V of this Comment then proposes two alternatives for the Ohio legislature to resolve this issue. First, Part V recommends that the legislature enact a statute that will provide guidance in the application of wills statutes to revocable trusts more broadly, as these interpretation and constructional issues will continue to arise in many other contexts.<sup>14</sup> Second, Part V recommends and concludes that the legislature should amend the pretermitted heir statute

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9. See, e.g., Newman, *supra* note 2, at 550 (explaining that it is difficult to defend the UPC's treatment of a decedent's failure to modify his will after the birth of a child as unintentional, but not to similarly treat a decedent's failure to modify his revocable trust).

10. *Id.* at 523-24; see also Langbein, *supra* note 5, at 1136-37 (emphasizing the necessity of acknowledging the will-like character of will substitutes in order to achieve uniform resolutions to "functionally identical problems").

11. Newman, *supra* note 2, at 524-25; Langbein, *supra* note 5, at 1141 ("The law of wills has reached sound solutions to these interpretive questions, and I have urged that these solutions should extend presumptively to the will-like transfers of the nonprobate system."); William M. McGovern Jr., *Nonprobate Transfers Under the Revised Uniform Probate Code*, 55 ALB. L. REV. 1329, 1352 (1992) ("The sensible rules developed as guides to the construction of wills ought to be applied to will substitutes.").

12. See, e.g., OHIO REV. CODE ANN. § 2107.33(D) (West, Westlaw through File 2 of the 132nd GA (2017-2018)) (Revocation of will by divorce); OHIO REV. CODE ANN. § 5815.31 (Revocation of trust by divorce).

13. Moore, *supra* note 8.

14. See *id.*; see also Brian Layman, *The Traditional Wills Doctrine of Ademption and Its Exceptions Should be Extended to Revocable Trusts*, 13 OHIO PROB. L.J. 119 (2003).

to apply to inter-vivos revocable trusts.

## II. BACKGROUND

In every state except Louisiana, a testator may disinherit a child.<sup>15</sup> Although most states provide some protection against unintentional disinheritance of a child or heir, the protection differs by state.<sup>16</sup> The extent of protection may be dependent upon whether a state has enacted an omitted child or pretermitted heir statute. For example, some statutes apply only to children born after the execution of the will,<sup>17</sup> while others also protect more remote descendants.<sup>18</sup> Generally, such statutes do not offer protection to a child born before the execution of the will;<sup>19</sup> however, a few statutes protect any omitted child or heir, whether alive or not when the will was executed, from inadvertent disinheritance.<sup>20</sup> Although these statutes differ, their fundamental purpose of carrying out the decedent's presumed intent remains the same.<sup>21</sup>

### A. *Ohio's Pretermitted Heir Statute—Section 2107.34 of the Ohio Revised Code*

Ohio enacted a pretermitted heir statute in 1932,<sup>22</sup> which was amended in 1961.<sup>23</sup> Prior to the enactment of the statute, the birth of a child revoked the testator's will.<sup>24</sup> Under the 1932 statute, if a testator

15. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.6 note 19 (AM. LAW INST. 2003); see also LA. CONST. ANN. art. 12, § 5 (Westlaw through Jan. 1, 2017) (Forced heirship and trusts).

16. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.6 note 18.

17. See *id.* § 9.6 cmt. c. Generally, omitted child statutes apply only to afterborn children and also apply to children adopted after the execution of the will. See *id.* § 9.6(a).

18. *Id.* § 9.6 cmt. a. Some pretermitted heir statutes apply only to children and some apply also to more remote descendants. See *id.* § 9.6 cmt. d; see also OHIO REV. CODE ANN. § 2107.34 (West, Westlaw through File 2 of the 132nd GA (2017-2018)) (If the afterborn child dies before the testator, the deceased child's issue or heir receives the share the parent would have received if living.).

19. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.6(a).

20. See *id.* § 9.6 cmt. d. See OKL. STAT. ANN. tit. 84, § 132 (West, Westlaw through First Session of the 56th Legislature (2017)) for an example of a statute that protects children born before or after the execution of the will.

21. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.6 cmt. i.

22. OHIO GEN. CODE. § 10504.49 (1932) (Afterborn or pretermitted heirs; effect on will).

23. OHIO REV. CODE ANN. § 2107.34 (West, Westlaw through File 2 of the 132nd GA (2017-2018)).

24. The General Code of the State of Ohio Section 10504.49 (1932) (Afterborn or pretermitted heirs; effect on will) superseded Section 10561 (Birth of a child) (1910) which

had a living child and executed a will, which left nothing to the child nor mentioned an afterborn child, and then later had an afterborn child without revising or revoking the will, the afterborn child would take an intestate share and the living child would be disinherited.<sup>25</sup>

Under Ohio's current pretermitted heir statute, if a testator makes a will and, following the execution of the will, has or adopts a child, and there is no provision in the will for the pretermitted child or that child's heir or issue, the will is not revoked.<sup>26</sup> Instead, the pretermitted heir will receive a share equal to what the person would have received out of the estate that is not devised to a surviving spouse (had the testator died intestate without a surviving spouse)<sup>27</sup> unless it appears by the will that the testator intended to disinherit the pretermitted heir.<sup>28</sup> Similarly, if the pretermitted heir dies before the testator, the issue of the deceased pretermitted heir will receive the share that the parent would have received if still alive.<sup>29</sup>

Following the policy of the 1961 amendment, Ohio's current pretermitted heir statute protects children that, at the time of will execution, were not born, not considered, or were overlooked.<sup>30</sup> Such considerations should also apply to children who were not born, not considered, or were overlooked at the creation of a trust instrument. However, no court in Ohio has yet addressed this issue, and courts from other jurisdictions that have done so have been unwilling to apply a wills

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provided:

If a testator had no children at the time of executing his will, but afterward has a child living, or born alive after his death, such will shall be revoked, unless provision has been made for such child by some settlement, or he is provided for in the will, or in such a way mentioned therein as to show an intention not to make such provision. No other evidence to rebut the presumption of revocation shall be received.

OHIO GEN. CODE. § 10561 (1910). *See also* *Ash v. Ash*, 9 Ohio St. 383, 384 (1959) (holding that the will remained revoked following the birth of testatrix's child even though the testatrix survived the child).

25. OHIO GEN. CODE. § 10504.49 (1932).

26. OHIO REV. CODE ANN. § 2107.34. Even today in some states, a previous will is revoked after the birth of a child. *See, e.g.*, MISS. CODE ANN. § 91-5-3 (West, Westlaw through 2017 Reg. Sess.).

27. OHIO REV. CODE ANN. § 2107.3(A) (The heir receives only a share of the property that was not devised to the surviving spouse.). For the statute to apply, the afterborn child must be born within 300 days following the testator's date of death. *See id.* § 2107.34(C). However, if the testator's will provides for a posthumously conceived child, the child may take under the statute if born within at least one year and 300 days following the testator's death. *See id.*

28. *Id.* § 2107.3(A). Ohio's pretermitted heir statute protects not only children born to, or adopted by, the testator after the execution of the will, but also persons designated by the testator as heirs under Section 2105.15 of the Ohio Revised Code. *Id.*

29. *Id.*

30. *See id.*

pretermitted heir statute to a revocable trust.<sup>31</sup>

*B. Ohio Supreme Court's Application of Wills Rules to Revocable Trusts*

Although the issue of whether Ohio's wills pretermitted heir statute should be applicable to revocable trusts has never been addressed by an Ohio court, Ohio courts have addressed other issues involving the application of the law of wills to revocable trusts.<sup>32</sup>

For example, in Ohio, a surviving spouse who is not provided for in a decedent's will is given the right to elect against the will and receive a share of the decedent's estate.<sup>33</sup> In *Dumas v. Estate of Dumas*, the Ohio Supreme Court considered whether to allow a surviving spouse to elect a forced share from a decedent's revocable trust.<sup>34</sup> Reversing the judgment of the court of appeals and reaffirming the decision in *Smyth*,<sup>35</sup> the *Dumas* Court held that a revocable trust existing at the time of the settlor's death "bars the settlor's spouse from claiming a distributive share in the trust assets under the statutes of descent and distribution."<sup>36</sup>

In her dissent in *Dumas*, Justice Resnick noted that by providing for a surviving spouse's right of election against a decedent's will, the intent of the General Assembly to protect the surviving spouse's interests was clear.<sup>37</sup> Justice Resnick criticized the majority for ignoring the interests of those surviving spouses who are "overlooked" in the provisions of the decedent's trust instrument.<sup>38</sup> Justice Resnick placed great emphasis on the significance of the surviving spouse's rights and interests that the General Assembly aimed to protect in such cases where a decedent's trust instrument passes all of the decedent's property to a person other than the surviving spouse, because from the surviving spouse's

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31. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.6 note 17 (AM. LAW INST. 2003) ("No cases have been found in which the protections by statute or case law afforded to a child omitted from a will have been extended to apply to a child omitted from a will substitute used as a comprehensive dispositive plan. Courts that have addressed the issue have decided against expanding the policy.").

32. See *Dumas v. Estate of Dumas*, 627 N.E.2d 978 (Ohio 1994); see also *Dollar Sav. Tr. Co. of Youngstown v. Turner*, 529 N.E.2d 1261 (Ohio 1988).

33. OHIO REV. CODE ANN. § 2106.01.

34. *Dumas*, 627 N.E.2d at 982-83.

35. *Smyth v. Cleveland Tr. Co.*, 179 N.E.2d 60 (Ohio 1961).

36. *Dumas*, 627 N.E.2d at 983. According to the Court, this is the case in the absence of fraud. *Id.* However, Ohio is in the minority, because in most states, a surviving spouse can elect a forced share of assets in a decedent's revocable trust. See *Moore*, *supra* note 8, at 8.

37. *Dumas*, 627 N.E.2d at 983 (Resnick, J., dissenting).

38. *Id.*

viewpoint, there is no difference between a will and a trust.<sup>39</sup>

Justice Resnick then noted that application of the broad rule in *Smyth* could result in “grave injustices” and could ultimately result in married persons successfully disinheriting their spouses.<sup>40</sup> In Justice Resnick’s view, to determine when a surviving spouse can elect against a decedent’s inter-vivos trust, the interests of the surviving spouse and the right of the decedent to dispose of his or her property must be weighed.<sup>41</sup> According to Justice Resnick, by drafting a bill that balances these interests, the General Assembly could correct the inequities that result from the majority’s broad reading of the *Smyth* holding that a revocable trust “is never reachable by a surviving spouse who exercises the right of election.”<sup>42</sup>

In *Dollar Savings Trust Co. v. Turner*, the Supreme Court of Ohio addressed the issue of whether Ohio’s anti-lapse statute<sup>43</sup> applied to trust agreements.<sup>44</sup> The court reasoned that although on its face the statute was applicable only to wills, its application to trust agreements furthered the intent of the legislature.<sup>45</sup> Because the inter-vivos trust essentially became a testamentary instrument at the settlor’s death, the court explained that applying the anti-lapse statute to a revocable trust was “wholly consistent” with the legislature’s intent in enacting the statute.<sup>46</sup> Reversing the decision of the court below, the court held that the anti-lapse statute was applicable to trusts and therefore the death of the settlor would prevent the failure of a gift contained within the trust.<sup>47</sup>

Following this decision, however, the Ohio General Assembly amended Sections 2107.01 and 2107.52 of the Ohio Revised Code in response to the court’s decision in *Dollar Savings*.<sup>48</sup> Section 2107.01(A) expressly states that a “‘will’ does not include inter-vivos trusts.”<sup>49</sup> This reversal of the holding in *Dollar Savings* by the General Assembly suggests that in order to make additional wills rules of construction

39. *Id.* at 984.

40. *Id.* at 985.

41. *Id.* at 984.

42. *Id.* at 986.

43. OHIO REV. CODE ANN. § 2107.52 (West, Westlaw through File 2 of the 132nd GA (2017-2018)).

44. *Dollar Sav. Tr. Co. of Youngstown v. Turner*, 529 N.E.2d 1261, 1263 (Ohio 1988).

45. *Id.* at 1264.

46. *Id.*

47. *Id.*

48. Act of July 8, 1992, § 3, 1992 Ohio Laws File 212.

49. OHIO REV. CODE ANN. § 2107.01(A) (West, Westlaw through File 2 of the 132nd GA (2017-2018)).

applicable to trusts, specific statutes must be enacted.<sup>50</sup> Recently, in fact, the General Assembly did just that by enacting Section 5808.19 of the Revised Code, which extended the anti-lapse wills rule of construction to trusts.<sup>51</sup>

*C. Other State Courts Have Declined to Apply the Wills Pretermitted Heir Statute to Trusts*

Although the issue of whether Ohio's pretermitted heir statute is applicable to revocable trusts has never been addressed in an Ohio case, several other state courts have addressed the issue with respect to their states' pretermitted heir statutes.<sup>52</sup> Consistently, these courts have held that wills pretermitted heir statutes are not applicable to revocable trusts.<sup>53</sup>

For example, in the case of *In re Estate of Jackson*, the Supreme Court of Oklahoma addressed whether Oklahoma's pretermitted heir statute applied to a revocable inter-vivos trust.<sup>54</sup> The plaintiff unsuccessfully argued that children and surviving spouses, as forced heirs under pretermitted heir statutes, should be treated the same.<sup>55</sup> The court considered an earlier Oklahoma case in which the court had applied the wills elective share statute that protects surviving spouses to a revocable trust.<sup>56</sup> Despite having done so, the court in *Jackson* contrasted such forced heir statutes, which limit a married person's power to dispose of his or her property, with Oklahoma's pretermitted heir statute, which was not intended to be a limitation on a testator's power, but rather to assure that a child was not unintentionally omitted from a will.<sup>57</sup> Consequently, the court found that the pretermitted heir statute "unambiguously pertain[ed] to only wills," and refused to extend it to a situation where a child is omitted from a revocable inter-vivos trust instrument.<sup>58</sup>

The Supreme Court of Arkansas followed similar reasoning in

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50. David M. English, *The Uniform Trust Code (2000) and Its Application to Ohio*, 30 CAP. U. L. REV. 1, 11 (2002).

51. See *infra* Part III.C.

52. See *In re Estate of Jackson*, 2008 OK 83, 194 P.3d 1269; *Kidwell v. Rhew*, 268 S.W.3d 309 (Ark. 2007); *Robbins v. Johnson*, 780 A.2d 1282 (N.H. 2001); *In re Estate of Cayo*, 342 N.W.2d 785 (Wis. Ct. App. 1983).

53. See *infra* Part II.C.

54. *Jackson*, 2008 OK 83, ¶ 1.

55. *Id.* ¶ 18-22.

56. *Thomas v. Bank of Okla., N.A.*, 1984 OK 41, 684 P.2d 553.

57. *Jackson*, 2008 OK 83, ¶ 17-23.

58. *Id.* ¶ 17.

*Kidwell v. Rhew*.<sup>59</sup> In *Kidwell*, the court considered the “clear language and express terms” of the Arkansas pretermitted heir statute and held that it was only applicable to wills.<sup>60</sup> The plaintiff argued that had the decedent disposed of her estate by a Last Will and Testament with the same terms as provided in the decedent’s revocable trust instrument, the child would have had rights as a pretermitted heir under the statute.<sup>61</sup> However, the court rejected this argument by reasoning that “will” and “trust” are not interchangeable terms, and that the pretermitted heir statute does not apply unless there is a will.<sup>62</sup>

The plaintiff in *Kidwell* also unsuccessfully argued that the court should follow the Restatement (Second) of Property, which provides that in the absence of a controlling statute, when a descendant of a donor is omitted as a beneficiary under a will substitute or revocable transfer, the policy of the controlling statute applicable to wills should be “applied by analogy” to the omitted beneficiary.<sup>63</sup> Declining to adopt that approach of the Second Restatement, the Supreme Court of Arkansas held that the statutory language of the pretermitted heir statute was clear and unambiguous and that it was not necessary to look to rules of construction.<sup>64</sup>

In *Robbins v. Johnson*, the Supreme Court of New Hampshire addressed whether a pretermitted heir statute was applicable to a trust.<sup>65</sup> The plaintiffs unsuccessfully argued that because the trust functioned like a will, by providing for the distribution of property after the settlor’s death, the pretermitted heir statute should apply.<sup>66</sup> The Court examined the language of the statute and found that the statute was specifically applicable only to wills.<sup>67</sup> The court reasoned that it was the role of the legislature to decide, as a matter of policy, whether the pretermitted heir

59. *Kidwell v. Rhew*, 268 S.W.3d 309 (Ark. 2007).

60. *Id.* at 312.

61. *Id.* at 311. Arkansas’ pretermitted heir statute applies to living descendants who have been omitted from the testator’s will, and in this case, the omitted child was living when the revocable trust was established. *See id.*

62. *Id.* at 312.

63. *Id.* (quoting RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 34.2 (AM. LAW INST. 1992)).

64. *Id.* The court pointed to the preface to the Statutory Note and Reporter’s Note of the Restatement, explaining that no cases have been found that have extended an omitted child statute to apply to will substitutes. *Id.* (quoting RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 34.2). As such, the plaintiff offered no convincing authority to compel the court to extend the statute. *Id.*

65. *Robbins v. Johnson*, 780 A.2d 1282, 1283 (N.H. 2001).

66. *Id.* at 1283-84.

67. *Id.*

statute should be extended to will substitutes, and “absent clear indication from the legislature” of this intention, the court declined to extend the statute to trusts.<sup>68</sup>

Finally, the Court of Appeals of Wisconsin in *In re Estate of Cayo*, considered whether Wisconsin’s pretermitted heir statute applied to a parent’s failure to provide for an afterborn child in a revocable trust instrument.<sup>69</sup> In *Cayo*, the decedent executed a will and a trust naming her only then-living child as the sole beneficiary.<sup>70</sup> The afterborn child’s guardian ad litem argued that the afterborn child, under Wisconsin’s pretermitted heir statute, was entitled to one-half of the decedent’s assets under the will and the trust.<sup>71</sup> The *Cayo* court explained that the unambiguous words of the statute “must be given their obvious and ordinary meaning.”<sup>72</sup> Because the statute applied only to wills and did not contemplate a settlor’s failure to provide for an afterborn child in a trust, the court held that the afterborn child was a beneficiary under the will but not the revocable trust.<sup>73</sup>

### III. THE APPLICABILITY OF OHIO’S CURRENT PRETERMITTED HEIR STATUTE TO REVOCABLE TRUSTS

Although some state courts have held that their pretermitted heir statutes do not extend to revocable trusts, public policy suggests that Ohio’s pretermitted heir statute should be applied in such a way, because the presumed intent of a testator not to disinherit an afterborn (or adopted) child is equally applicable to the settlor of a revocable trust.<sup>74</sup> However, under the plain language of the statute, Ohio’s pretermitted heir statute is limited to wills. Thus, if an Ohio court were to be presented with this issue, it would be necessary for the court to determine whether Ohio’s pretermitted heir statute, even in the absence of explicit statutory authority, could nevertheless be applied to a revocable trust.

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68. *Id.* at 1284.

69. *In re Estate of Cayo*, 342 N.W.2d 785, 786 (Wis. Ct. App. 1983).

70. *Id.*

71. *Id.*

72. *Id.* at 787.

73. *Id.*

74. See RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. e(1) (AM. LAW INST. 2003); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 34.2(2) (AM. LAW INST. 1992).

A. *Applying Ohio's Pretermitted Heir Statute to Trusts is Consistent with Persuasive Authority*

Although the Ohio pretermitted heir statute does not explicitly apply to trusts, there is some authority that suggests that pretermitted heir protection and other wills rules should nevertheless apply to revocable trusts and other will substitutes, even when the statutory authority for doing so is lacking.<sup>75</sup> For example, Section 25 comment e(1) of the Restatement (Third) of Trusts provides:

[A]n array of statutes are found throughout the various American jurisdictions that are designed as protections or aids against oversight or inadequacies in the planning and drafting of wills. These statutes often fail specifically to address revocable inter vivos trusts . . . .

Illustrative are pretermitted-heir statutes . . . .

Sound policy suggests that a property owner's choice of form in using a revocable trust rather than a will as the central instrument of an estate plan should not deprive that property owner and the objects of his or her bounty of appropriate aids and safeguards intended to achieve likely intentions. Thus, although a particular statute of this general type fails to address trusts that are revocable but nontestamentary, the legislation should ordinarily be applied as if trust dispositive provisions that are to be carried out after the settlor's death had been made by will.<sup>76</sup>

The Ohio Supreme Court in *Dollar Savings* adopted an approach similar to that of the Third Restatement, explaining that a remedial statute, such as the wills anti-lapse statute at issue, "should be extended 'beyond its actual language to cases within its reason and general intent,'"<sup>77</sup> allowing for the statute to be "liberally construed in favor of the persons

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75. See *supra* note 5.

76. RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. e(1) (discussing statutory protections against oversight including pretermitted heir and anti-lapse statutes); see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2; Langbein, *supra* note 5, at 1137 (explaining that the subsidiary rules for probate and nonprobate transfers should be consistently applied as a matter of legislative policy).

77. *Dollar Sav. & Tr. Co. of Youngstown v. Turner*, 529 N.E.2d 1261, 1264 (Ohio 1988) (quoting *Rice v. Wheeling Dollar Sav. & Tr. Co.*, 99 N.E.2d 301, 304 (Ohio 1951)); see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 reporter's note to cmt. a (AM. LAW INST. 2003) ("The operative canon of statutory construction that allows a court to apply a statute to a will substitute although the statute's terms speak only of a will is that '[t]o effect its purpose a statute may be implemented beyond its text.'") (quoting Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401 (1950)).

to be benefited.”<sup>78</sup> Based on the court’s reasoning in *Dollar Savings*, child *B*, from the hypothetical presented in the Introduction to this Comment, as a person to be benefited from the language of the statute, would receive a share of Settlor’s revocable trust. Moreover, because the Ohio General Assembly has extended several statutory rules that apply to wills to revocable trusts, this may suggest some receptiveness from the legislature.<sup>79</sup> However, even though there is support for applying the wills pretermitted heir statute to revocable trusts, it is unlikely this alone would be enough to persuade an Ohio court to do so.<sup>80</sup>

*B. It is Unlikely an Ohio Court Would Extend the Pretermitted Heir Statute to Revocable Trusts*

First, it is important to consider the clear and unambiguous language of the Ohio pretermitted heir statute, which reads, in relevant part:

If, after making a *will*, a testator has a child born alive, [or] adopts a child, . . . [u]nless it appears by the will that it was the intention of the testator to disinherit the pretermitted child or heir, the devises and legacies granted by the *will*, except those to a surviving spouse, shall be abated proportionately, or in any other manner that is necessary to give effect to the intention of the testator as shown by the *will* . . .<sup>81</sup>

Based on the plain language of the statute and the Ohio General Assembly’s response to *Dollar Savings*, which was the enactment of a new Ohio statute defining “will” to expressly exclude inter-vivos trusts,<sup>82</sup> it is unlikely an Ohio court would extend the statute to a revocable trust. This reading of the plain language is consistent with the Ohio Supreme Court’s refusal to apply the wills elective share statute to revocable trusts in *Dumas*.<sup>83</sup>

Additionally, the Ohio legislature has been selective in its enactment of various statutes making wills rules applicable to revocable

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78. *Dollar Sav.*, 529 N.E.2d at 1264 (quoting State *ex rel. Maher v. Baker*, 102 N.E. 732, 734 (Ohio 1913)).

79. Although the General Assembly reversed the holding of *Dollar Savings*, it has more recently extended the anti-lapse statute at issue in *Dollar Savings*, as well as several other statutes, to revocable trusts. See OHIO REV. CODE ANN. § 5808.19 (West, Westlaw through File 2 of the 132nd GA (2017-2018)) (Anti-lapse); OHIO REV. CODE ANN. § 5815.31 (Revocation by divorce).

80. See *infra* Part III.B.

81. OHIO REV. CODE ANN. § 2107.34 (emphasis added).

82. OHIO REV. CODE ANN. § 2107.01(A).

83. *Dumas v. Estate of Dumas*, 627 N.E.2d 978 (Ohio 1994).

trusts in specific contexts.<sup>84</sup> Notably, however, the legislature has not extended the wills law in the pretermitted heir context.<sup>85</sup> Furthermore, even the Uniform Probate Code, which in many contexts makes wills rules applicable to revocable trusts, does not do so in its pretermitted heir statute.<sup>86</sup>

### C. *The Uniform Probate Code*

The 1990 revision of the Uniform Probate Code (UPC) set out to unify the law of probate and nonprobate transfers by first recognizing that will substitutes and inter-vivos transfers have become a major form of wealth transmission today.<sup>87</sup> Based in part on the idea that the presumptions about a decedent's intent supplied by wills rules may be equally applicable to comparable provisions found in other governing instruments, the 1990 revisions reformed wills rules of construction such that several rules<sup>88</sup> were restructured to apply to wills and all other governing instruments.<sup>89</sup> However, the 1990 revisions also included a section of rules that are applicable only to wills,<sup>90</sup> thus extending only selected wills construction rules to nonprobate transfers.

The UPC omitted children statute appears in a section entitled "Spouse and Children Unprovided for in Wills" and reads, "[I]f a testator fails to provide in his *will* for any of his [or her] children born or adopted after the execution of the will . . . [the] child receives a share in the estate."<sup>91</sup> So, unlike other wills construction rules, the UPC's omitted

84. See *infra* Part IV.C.

85. See Lauren Ashley Gribble, Comment, *Justice Before Generosity: Creditors' Claim to Assets of a Revocable Trust After the Death of the Settlor*, 48 AKRON L. REV. 383, 413 (2015) ("[L]egislative intent may be inferred from what the . . . legislature did not do.")

86. UNIF. PROB. CODE § 2-302 (amended 2010), 8 U.L.A. 194-95 (2013); Newman, *supra* note 2, at 550.

87. UNIF. PROB. CODE prefatory note (1990).

88. See Article II, Part 7 of the Uniform Probate Code for rules of construction, such as the 120-hour survivorship rule, that apply to wills and other governing instruments. Article II, Part 8 also provides general provisions that apply to both probate and nonprobate transfers, including revocation upon divorce and the elective share statute. Finally, some provisions extend concepts from the law of wills to apply to certain nonprobate assets. For example, the wills anti-lapse statute, UNIF. PROB. CODE § 2-603, is extended by Section 2-207 to future interest in trusts.

89. UNIF. PROB. CODE prefatory note (1990).

90. *Id.* See Article II, Part 6 of the Code for rules of construction that are applicable only to wills, for example ademption by satisfaction.

91. UNIF. PROB. CODE § 2-302 (emphasis added). If, however, the testator has one or more living children when the will is executed and the will does not make a devise for the then-living children, any afterborn or after-adopted children will not receive a share of the estate under the UPC omitted child statute. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.6 cmt. c (AM. LAW INST. 2003).

child statute is not extended to revocable trusts, and an omitted child's share is thus limited to probate property.<sup>92</sup> In the Prefatory Note, the drafters make clear that some of the wills construction rules appropriately apply only to wills, such as ademption by satisfaction.<sup>93</sup> However, neither the Prefatory Note, nor the comment to the UPC's omitted child statute, offers an explanation as to why the omitted child statute is applicable only to wills.<sup>94</sup>

#### D. *The Restatement (Third) of Property*

Similar to the UPC, a policy of the Restatement (Third) of Property is that wills rules of construction and other rules that aid in giving effect to a decedent's presumed intent should be generally applicable to donative documents.<sup>95</sup> Notably, a comment to Section 7.2 of the Third Restatement addresses making wills rules applicable to will substitutes on a selective basis in the context of protection against disinheritance.<sup>96</sup> However, Section 9.6, which provides for the protection of a child or descendant against unintentional disinheritance, applies only to wills.<sup>97</sup>

Because Ohio courts have been largely unwilling to apply wills rules to revocable trusts,<sup>98</sup> it is unlikely that an Ohio court would choose to do so with the clear and unambiguous language of the current Ohio pretermitted heir statute and the specific statute enacted after *Dollar Savings* defining a will not to include a trust.<sup>99</sup> Similarly, other state courts that have addressed the issue have been unwilling to extend wills pretermitted heir statutes to revocable trusts.<sup>100</sup> Moreover, because state supreme courts decided such cases, they may be broadly interpreted by

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92. Melanie B. Leslie & Stewart E. Sterk, *Revisiting the Revolution: Reintegrating the Wealth Transmission System*, 56 B.C. L. REV. 61, 69, 114-15 (2015) (explaining that although this is the approach taken in most states, by failing to apply the omitted children provision to nonprobate assets such as revocable trusts, the UPC does not go far enough in extending the rules of construction to nonprobate transfers); *see also* Newman, *supra* note 2, at 570 (noting the UPC's failure to extend the pretermitted heir statute to trusts, though contrary to the goal of the UPC to unify the laws applicable to probate and nonprobate transfer).

93. UNIF. PROB. CODE prefatory note (1990).

94. *See id.*

95. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. a.

96. *Id.* cmt. g.

97. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.6.

98. *E.g.*, *Dumas v. Estate of Dumas*, 627 N.E.2d 978 (Ohio 1994).

99. *See* Schwickerath, *supra* note 8, at 810 n.279 (noting the consistency in the Ohio Supreme Court's application of plain language of the statutes, as well as the Court's indifference to legislative policy).

100. *See supra* Part II.C.

the lower courts and may continue to yield “intent-defeating results.”<sup>101</sup> Thus, for the Ohio pretermitted heir statute to be applicable to revocable trusts, an amendment of the statute by the General Assembly is necessary.<sup>102</sup> Although a vast majority of states’ pretermitted heir statutes apply only to wills,<sup>103</sup> Ohio would not be the first state to provide protection to a child inadvertently omitted from a revocable trust.<sup>104</sup>

#### IV. RATIONALE FOR AMENDING THE PRETERMITTED HEIR STATUTE TO REVOCABLE TRUSTS

Because wills were historically the basic method for transferring property upon death, it follows that some rules of construction were drafted to apply only to wills.<sup>105</sup> A majority of state courts and legislatures have been slow to respond to the vast increase in the use of revocable trusts as will substitutes.<sup>106</sup> By failing to extend wills pretermitted heir statutes to revocable trusts, the policy of such statutes to protect unintentionally disinherited children or heirs is undermined.<sup>107</sup> By extending certain wills rules to revocable trusts and other nonprobate transfers, a few state legislatures have successfully demonstrated the movement toward unifying the law of wills and will substitutes, a policy recognized by the Restatements, the Uniform Probate Code, and the Uniform Trust Code alike.<sup>108</sup>

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101. Leslie & Sterk, *supra* note 92, at 69 n.45.

102. See English, *supra* note 50, at 11; see also Schwickerath, *supra* note 8, at 813-14 (“Judicial intervention can make only piecemeal efforts to solve this problem of inconsistency.”).

103. Newman, *supra* note 2, at 550.

104. See *infra* Part IV.A.

105. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. a (AM. LAW INST. 2003).

106. *Id.*; see also Schwickerath, *supra* note 8, at 814 (“Unless and until broad based legislative reform takes place, many states will remain in the quagmire of uncertainty concerning the applicability of policy-driven substantive restrictions on testation to a decedent’s nonprobate, but essentially testamentary transfers. . . . [I]t seems unlikely that legislatures will be willing to review the importance of those policies expressed in their probate codes to determine whether their reach should be extended.”).

107. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 34.2 cmt. g (AM. LAW INST. 1992); *id.* § 34.2(2). (“[T]he policy of the statute in the controlling state applicable to an omitted issue in a will should be applied by analogy to the omitted issue in the substitute for a will, or in the transfer revocable by the donor at the time of the donor’s death.”).

108. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. a (“[R]ules of construction and other interpretative devices aid in determining and giving effect to the donor’s intention or probable intention and hence should apply generally to donative documents.”); UNIF. PROB. CODE prefatory note (1990) (UNIF. LAW COMM’N 2010) (explaining the policy of unifying the law of probate and nonprobate transfers); UNIF. TRUST CODE prefatory note (UNIF. LAW COMM’N 2010) (noting a basic policy of the UTC is to treat revocable trusts as equivalent to

A. *Several States Have Properly Extended the Pretermitted Heir Statute to Revocable Trusts*

A few states have enacted statutes that extend the pretermitted heir statute to revocable trusts. This has been accomplished by state legislatures in different ways. For example, the Iowa legislature enacted a separate provision that effectively extends Iowa's wills pretermitted heir statute<sup>109</sup> to revocable trusts.<sup>110</sup> The enactment of this statute by the Iowa legislature was an attempt to unify the law of wills and the law of revocable trusts.<sup>111</sup> However, it has been argued that there is no coordination between Iowa's pretermitted heir statute applicable to wills and the statute applicable to revocable trusts.<sup>112</sup> Because the statutes treat wills and trusts separately and fail to address several problems that could potentially arise when a decedent implements a will and revocable trust into his or her estate plan, such problems may require resolution by the Iowa courts.<sup>113</sup>

Conversely, other states have enacted pretermitted heir statutes that apply to both probate and nonprobate property.<sup>114</sup> For example, in 1994 the California legislature extended all of its wills rules of construction to revocable trusts.<sup>115</sup> The pretermitted heir provisions of the California Probate Code apply to "testamentary instrument[s]," which include a

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wills).

109. IOWA CODE ANN. § 633.267 (West, Westlaw through 2017 Reg. Sess.).

110. *Id.* § 633A.3106.

111. Martin D. Begleiter, *In the Code We Trust – Some Trust Law for Iowa at Last*, 49 DRAKE L. REV. 165, 219 (2001). The revocation-by-divorce provision of the Iowa statutes, Section 633.3107, was another wills law that was extended by the Iowa legislature to revocable trusts. *Id.* at 219-20.

112. See Martin D. Begleiter, *Son of the Trust Code – The Iowa Trust Code After Ten Years*, 59 DRAKE L. REV. 265, 331 (2011).

113. *Id.* For example, the statutes do not address what would happen if afterborn children were not mentioned in the revocable trust but were mentioned in the will. *Id.*

114. See CAL. PROB. CODE § 21601 (West, Westlaw through Ch. 4 of 2017 Reg. Sess.); 20 PA. STAT. AND CONS. STAT. ANN. § 7710.2 (West, Westlaw through 2016 Reg. Sess.); see also MO. ANN. STAT. § 461.059 (West, Westlaw through 2016 Veto Sess. of the 98th GA). Missouri's statute applies more generally to nonprobate transfers and distinguishes the wills pretermitted heir statute from the statute that is applicable to nonprobate transfers by providing that "[n]o law intended to protect a spouse or child from unintentional disinheritance by the will of a testator shall apply to a nonprobate transfer." MO. ANN. STAT. § 461.059. However, because "nonprobate transfer," as defined in Section 461.005 of the Missouri Revised Statutes, "does not include . . . a transfer under a trust established by an individual, either inter vivos or testamentary," the statute does not apply to revocable trusts. *Id.* § 461.005. Like the California statute, Section 461.059 has been analyzed as an "awkward attempt" by the Missouri legislature to extend the protection of the omitted-child statute to nonprobate transfers. Grayson M.P. McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 BROOK. L. REV. 1123, 1180 n.250 (1993).

115. English, *supra* note 50, at 12.

“decendent’s will or revocable trust.”<sup>116</sup> Under Section 21620, an omitted child receives a share of the estate,<sup>117</sup> including the decedent’s probate estate and property held in a revocable trust, which the child would have received had the decedent died without executing a testamentary instrument.<sup>118</sup> However, the “simplistic approach” of the California statutes has been described as only a partial success because it ignores the differences between trusts and wills.<sup>119</sup>

Pennsylvania took a similar approach by enacting Section 7710.2 of the Pennsylvania Consolidated Statutes in 2006.<sup>120</sup> Section 7710.2 provides that “[t]he rules of construction that apply in this Commonwealth to the provisions of testamentary trusts also apply as appropriate to the provisions of *inter vivos* trusts.”<sup>121</sup> Pennsylvania’s pretermitted heir statute can be found in Section 2507(4), which states that if a testator fails to provide in his will for an afterborn or after-adopted child, the child receives a share of the property not passing to a surviving spouse.<sup>122</sup> Although Section 2507(4) expressly refers to a child unintentionally disinherited from a will, a comment to Section 7710.2 explains that “section [7710.2] imports section 2507 . . . and other statutory and judicial rules of interpretation that apply to trusts under wills.”<sup>123</sup> Thus, Section 7710.2 operates to include revocable trust assets into the property distributable as an intestate share under Pennsylvania’s pretermitted heir statute in Section 2507(4).<sup>124</sup>

*B. Because Revocable Trusts Are Functionally Equivalent to Wills, the Pretermitted Heir Statute Should Similarly Apply*

It has been argued that the UPC appropriately did not extend the omitted child provisions to will substitutes.<sup>125</sup> For example, in order to

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116. CAL. PROB. CODE § 21601.

117. *Id.* § 21620. Estate is defined as “a decedent’s probate estate and all property held in any revocable trust that becomes irrevocable on the death of the decedent” *Id.* § 21601.

118. *Id.* § 21620.

119. English, *supra* note 50, at 12.

120. 20 PA. STAT. AND CONS. STAT. ANN. § 7710.2 (West, Westlaw through 2016 Reg. Sess.). This provision is a codification of Section 112 of the UTC. *See infra* Part V.A.

121. 20 PA. STAT. AND CONS. STAT. ANN. § 7710.2 (emphasis added).

122. 20 PA. STAT. AND CONS. STAT. ANN. § 2507(4).

123. 20 PA. STAT. AND CONS. STAT. ANN. § 7710.2 cmt.

124. *Id.* § 7710.2; *see also In re Tr. Under Deed of Kulig*, 131 A.3d 494, 500 (Pa. Super. Ct. 2015), *appeal granted*, No. 217 MAL 2016, 2016 WL 5820602 (Pa. Oct. 4, 2016) (discussing the applicability of Section 7710.2 to a revocable trust in determining a decedent’s intent in the pretermitted spouse context, noting that the “comment [to Section 7710.2] references Section 2507 in its entirety”).

125. *See McCouch*, *supra* note 114, at 1179.

determine whether the testator intended to disinherit an omitted child, it may be impractical to inquire into a testator's comprehensive dispositive plan for each individual will substitute.<sup>126</sup> This argument, however, applies to single-asset will substitutes rather than revocable trusts,<sup>127</sup> which, like wills, usually provide a comprehensive dispositive plan.<sup>128</sup> While it may be unreasonable and difficult to extend the pretermitted heir statute to include all standard single-asset will substitutes,<sup>129</sup> this same rationale does not necessarily apply to revocable trusts.<sup>130</sup> Because revocable trusts are functionally equivalent to wills<sup>131</sup> and are generally used as will substitutes in order to avoid probate administration, the basis for inconsistent treatment of wills and revocable trusts is lacking.<sup>132</sup>

*C. The Ohio General Assembly Has, on a Case-by-Case Basis, Extended Wills Rules to Trusts*

The General Assembly has made many wills rules also apply to revocable trusts. This has been accomplished in different ways. For example, some of the wills rules have been extended to trusts by the enactment of separate statutes and provisions that apply specifically to revocable trusts.<sup>133</sup> Conversely, some Ohio statutes are broad enough to apply to both probate and nonprobate transfers, including revocable trusts.<sup>134</sup>

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126. *Id.* Because a will disposes of residual property, it is reasonable to take into account the testator's dispositive plan when interpreting a will. *Id.*

127. *See id.* at 1180 n.250.

128. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 34.2 cmt. g (AM. LAW INST. 1992) (Because a revocable trust usually involves "multiple benefits being shared among described beneficiaries," a situation in which a revocable trust instrument is used is analogous to a situation in which a will is used.); *see also* Langbein, *supra* note 5, at 1115 n.32 (explaining that unlike single-asset will substitutes, such as pay-on-death accounts and life insurance, revocable trusts can apply to all types of property).

129. Leslie & Sterk, *supra* note 92, at 69 (explaining the complexity of drafting an omitted child statute to cover nonprobate transfers).

130. Newman, *supra* note 2, at 550.

131. Under the UTC, a revocable trust is functionally equivalent to a will while the settlor is living. David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 187 (2002). Moreover, the capacity requirement for the creation, revocation, or amendment of a trust is also the capacity standard that applies to wills. *Id.*; *see also* UNIF. TRUST CODE § 601 (UNIF. LAW COMM'N 2010).

132. Langbein, *supra* note 5, at 1136-37.

133. *See, e.g.*, OHIO REV. CODE ANN. § 5808.19 (West, Westlaw through File 2 of the 132nd GA (2017-2018)) (Anti-lapse); OHIO REV. CODE ANN. § 5815.31 (Revocation by divorce).

134. *See, e.g.*, OHIO REV. CODE ANN. § 2105.19 (Slayer rule); OHIO REV. CODE ANN. § 2113.86 (Apportionment of taxes).

As mentioned in Part II of this Comment,<sup>135</sup> by enacting Section 5808.19 of the Ohio Revised Code, the Ohio General Assembly extended the wills anti-lapse statute to revocable trusts.<sup>136</sup> The statute addresses problems, like the issue in *Dollar Savings*,<sup>137</sup> that occur when a trust beneficiary—whether an individual or member of a class—predeceases the decedent and determines whether the surviving descendants of the beneficiary take the property that the beneficiary would have been entitled to had the beneficiary survived.<sup>138</sup> Similar to the Ohio statute that controls issues that arise when dealing with a devisee under a will who predeceases the testator,<sup>139</sup> the provisions of Section 5808.19 apply unless the trust instrument shows a contrary intent by the settlor.<sup>140</sup>

The General Assembly also enacted Section 5815.31, which provides that upon a settlor's divorce, dissolution, annulment, or actual separation from settlor's spouse, any provision in a revocable trust that confers upon the settlor's spouse any beneficial interest, power of appointment, or nomination as a trustee or trust advisor is automatically revoked.<sup>141</sup> This is equivalent to Section 2107.33(D) of the Revised Code, which automatically revokes any provision in a will upon a testator's divorce, dissolution, annulment, or actual separation that confers upon the former spouse a disposition of property, power of appointment, or nomination in the will as executor, trustee, or guardian.<sup>142</sup> In fact, the most recent amendment to Section 5815.31, which added language clarifying that divorce terminates "any beneficial interest," reaffirms the intent of the General Assembly that divorce revokes the same interest in revocable trusts as it does beneficial interests under wills.<sup>143</sup>

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135. *Supra* Part II.

136. OHIO REV. CODE ANN. § 5808.19.

137. *Dollar Sav. & Tr. Co. of Youngstown v. Turner*, 529 N.E.2d 1261 (Ohio 1988).

138. OHIO REV. CODE ANN. § 5808.19 (B)(2)(b)(i)-(ii).

139. *Id.* § 2107.52. This was the statute that the Ohio Supreme Court in *Dollar Savings* held was applicable to revocable trusts. *See supra* Part II.B.

140. OHIO REV. CODE ANN. § 5808.19(B)(2); *see also* John D. Clark, *Antilapse Statutes for Wills and Trusts: Rules of Construction & Expanded Statutory Distribution Authority for Trustee*, 22 OHIO PROB. L.J. NL 6 (2012) (explaining that because the statute addresses only trusts that are not clear on the settlor's intent, the statute will not apply to well drafted trusts); *see also* Langbein, *supra* note 5, at 1137 (explaining that because financial intermediaries are cognizant of the lapse problem, the anti-lapse statute would be applied to will substitutes only on occasion, but noting that a variety of situations are not corrected by the business practices of financial intermediaries).

141. OHIO REV. CODE ANN. § 5815.31.

142. OHIO REV. CODE ANN. § 2107.33(D).

143. *See* William B. McNeil, *Amended Sub. S.B. 106 Saved from the Savings Statute and Other Changes*, 20 OHIO PROB. L.J. 167 (2010) (citing Robert M. Brucken, *Divorce and Revocable*

Similarly, the Uniform Simultaneous Death Act, enacted by the General Assembly in 2002,<sup>144</sup> aims to resolve issues that arise when a governing instrument does not require a beneficiary to survive the decedent by a stated period of time, and the beneficiary dies simultaneously (or nearly simultaneously) with the decedent.<sup>145</sup> The Ohio statute provides that for certain probate purposes<sup>146</sup> and for purposes of a provision of a revocable trust agreement or other governing instrument<sup>147</sup> relating to the person surviving an event,<sup>148</sup> a person who does not survive another person by 120 hours, established by clear and convincing evidence, is deemed to have predeceased the other person.<sup>149</sup>

Another example is Section 2105.19 of the Revised Code,<sup>150</sup> which is commonly referred to as a “slayer statute.”<sup>151</sup> These statutes prevent a slayer from benefitting from the decedent’s death.<sup>152</sup> The statute applies to “[a]ll property of the decedent, and all money, insurance proceeds, or other property or benefits payable or distributable in respect of the decedent’s death.”<sup>153</sup> Under the statute, a person who causes the death of the decedent is treated as having predeceased the decedent and becomes a constructive trustee for the benefit of the individuals entitled to the property.<sup>154</sup> Ohio courts have construed Section 2105.19 to be applicable

*Trusts*, 18 OHIO PROB. L.J. 196 (2008)).

144. OHIO REV. CODE ANN. § 2105.31.

145. *See, e.g.*, UNIF. PROB. CODE § 2-702 cmt. (UNIF. LAW COMM’N 2010); *see also* Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC’s New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091, 1095-96 (1992) (explaining that the survival requirement better serves the decedent’s intent because the person who dies within 120 hours of the decedent will not likely receive any personal benefit from the property and thus, the property should go to the decedent’s heirs or devisees instead of the deceased beneficiary’s heirs or devisees).

146. OHIO REV. CODE ANN. § 2105.32 (Determination of survivorship with respect to specified person).

147. OHIO REV. CODE ANN. § 2105.33 (Determination of survivorship with respect to specified event). For purposes of this section, “governing instrument” includes a deed, will, trust, insurance or annuity policy, account with a transfer-on-death designation or the abbreviation TOD, account with a payable-on-death designation or the abbreviation POD, pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type. OHIO REV. CODE ANN. § 2105.31(B).

148. “Event” includes the death of another person. OHIO REV. CODE ANN. § 2105.31(D).

149. OHIO REV. CODE ANN. §§ 2105.32-33.

150. OHIO REV. CODE ANN. § 2105.19.

151. Karen J. Sneddon, *Should Cain’s Children Inherit Abel’s Property?: Wading into the Extended Slayer Rule Quagmire*, 76 UMKC L. REV. 101, 109 (2007).

152. *See, e.g.*, UNIF. PROB. CODE § 2-803 (UNIF. LAW COMM’N 2010).

153. OHIO REV. CODE ANN. § 2105.19(A).

154. *Id.* § 2105.19(A)-(B).

to funds in joint and survivorship accounts<sup>155</sup> as well as to trusts.<sup>156</sup>

Section 2113.86 of the Revised Code is another example of recognition by the Ohio legislature that in some contexts the same rules that apply to wills also should apply to revocable trusts.<sup>157</sup> This statute controls the apportionment of estate taxes unless the will or other governing instrument provides otherwise.<sup>158</sup> Under the statute, the tax is apportioned equitably against both gifts made in the clause of a will and gifts made in a provision of a revocable trust, and is then reapportioned to the residue of the estate or trust.<sup>159</sup>

#### V. RECOMMENDATIONS FOR THE OHIO GENERAL ASSEMBLY

Ohio courts are unlikely to address an issue unless it is presented,<sup>160</sup> and even if an Ohio court resolved the pretermitted heir, revocable trust issue, it is unlikely that an afterborn, pretermitted heir would be protected by the current Ohio statute.<sup>161</sup> Thus, in order to address the problem of inconsistent treatment between a child omitted under a will and a child omitted from a revocable trust instrument,<sup>162</sup> action by the Ohio General Assembly is necessary, as this problem is unlikely to be resolved jurisprudentially. Corrective action by the General Assembly would be consistent with the states that have legislatively extended their pretermitted heir statutes to revocable trusts. This section of the Comment proposes two recommendations for the General Assembly, specifically, adopting Section 112 of the UTC and alternatively, extending Ohio's current pretermitted heir statute to revocable trusts. With guidance from other state statutes and careful drafting, a statute can be enacted that effectively prevents the inconsistent treatment of wills and revocable trusts in the pretermitted heir context and fixes the current problems inherent in the statutes of other states.

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155. *In re Estate of Fiore*, 476 N.E.2d 1093, 1069 (Ohio Ct. App. 1984). The Fiore court noted that “[t]he language of the statute covers all property and all benefits payable in respect of decedent’s death and is not limited to property that descends according to intestate succession laws or passes by will.” *Id.* (emphasis added).

156. *Evans v. Evans*, 2014-Ohio-4450, 20 N.E.3d 1139, ¶ 45-46 (Ohio Ct. App. 2014).

157. OHIO REV. CODE ANN. § 2113.86.

158. *Id.* § 2113.86(A).

159. *Id.* § 2113.86(B).

160. See Schwickerath, *supra* note 8, at 810 n.278.

161. See *supra* Part III.

162. For example, consider the hypothetical presented in Part I *supra*.

A. *Ohio Could, but is Unlikely to, Adopt Section 112 of the UTC*

1. The Uniform Trust Code

The Uniform Trust Code (UTC), “the first national codification of the law of trusts,”<sup>163</sup> was approved by the National Conference of Commissioners on Uniform State Laws in August of 2000.<sup>164</sup> In response to the increased use of trusts and “day-to-day questions” arising related to trusts,<sup>165</sup> the UTC drafters set out to develop a uniform law to provide “precise, comprehensive, and easily accessible guidance on trust law questions.”<sup>166</sup> Modeled after existing state comprehensive trust statutes,<sup>167</sup> the UTC incorporated existing Uniform Acts<sup>168</sup> and was drafted in close coordination with the Restatement (Third) of Trusts.<sup>169</sup> The UTC also superseded some other Uniform Acts.<sup>170</sup> For example, because Article VII of the UPC addressed only a limited number of topics regarding trust administration, the UTC superseded this Article, with the exception of the trust registration provisions.<sup>171</sup>

Similarly, there is some overlap between the UTC and the UPC concerning rules of construction.<sup>172</sup> As mentioned in Part III of this Comment, the UPC extends to trusts certain rules of construction applicable to wills.<sup>173</sup> Although a “basic policy” of the UTC is the treatment of a revocable trust as the equivalent of a will,<sup>174</sup> the UTC does not provide the “exact”<sup>175</sup> rules of construction applicable to trusts.<sup>176</sup> As the UTC’s Reporter has explained, this is in part due to the

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163. UNIF. TRUST CODE prefatory note (UNIF. LAW COMM’N 2010).

164. Alan Newman, *The Uniform Trust Code: An Analysis of Ohio’s Version*, 34 OHIO N.U. L. REV. 135, 135 (2008).

165. See UNIF. TRUST CODE prefatory note (This has also “led to a recognition that the trust law in many States is thin. . . [and] that the existing Uniform Acts relating to trusts, while numerous, are fragmentary.”).

166. *Id.*

167. For example, the Drafting Committee referred to the statutes already in effect in California, Georgia, Indiana, Texas, and Washington throughout the drafting process. See UNIF. TRUST CODE prefatory note.

168. *Id.*

169. UNIF. TRUST CODE prefatory note; see also English, *supra* note 50, at 2-3.

170. UNIF. TRUST CODE prefatory note.

171. *Id.*

172. *Id.*

173. See *supra* Part III.C.

174. UNIF. TRUST CODE prefatory note; see also Newman, *supra* note 2, at 568.

175. UNIF. TRUST CODE § 112 cmt.

176. UNIF. TRUST CODE prefatory note; see also English, *supra* note 131, at 162 (explaining that although the UTC includes numerous provisions that address revocable trusts and “the Code’s drafters concluded that the rules of construction for revocable trusts . . . ought to be the same as the

recognition by the drafters that any attempt to draft detailed rules of construction for trusts would be unsuccessful and would be consistent with the laws of only a few states.<sup>177</sup>

So instead, the rules of construction issue is addressed in a more general, optional provision in Section 112 of the UTC.<sup>178</sup> Modeled after Section 25(2) and comment e of the Restatement (Third) of Trusts,<sup>179</sup> Section 112 of the UTC provides: “The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.”<sup>180</sup> A comment to Section 112 explains that because different jurisdictions take different approaches regarding wills rules of construction, Section 112 provides that the enacting State’s specific wills construction rules, “whatever they may be,” will apply to the construction of trusts.<sup>181</sup>

## 2. Application of Section 112

Thirty-one states and the District of Columbia have enacted versions of the Uniform Trust Code,<sup>182</sup> and several of those states have

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rules for wills,” the UTC does not provide a rules of construction section).

177. English, *supra* note 131, at 162. This is because the rules of construction by state vary greatly. *Id.*; see also John D. Clark, *Anti-Lapse Statute for Trusts: Finding Grantor’s Intent in Absence of Clear Trust Language*, 18 OHIO PROB. L.J. 196A (2008) (“The Uniform Trust Code, as a series of laws for trust administration, did not need to address the many rules of trust construction/interpretation because of the existence of the Uniform Probate Code (UPC) that applies to trusts and not simply probate matters.”).

178. A comment to Section 112 offers an alternative:

Instead of enacting this section, a jurisdiction enacting this Code may wish to enact detailed rules on the construction of trusts, either in addition to its rules on the construction of wills or as part of one comprehensive statute applicable to both wills and trusts. For this reason and to encourage this alternative, the section has been made optional.

UNIF. TRUST CODE § 112 cmt. It appears Ohio has followed this method by, on a case-by-case basis, enacting detailed rules on the construction of trusts in addition to the will construction rules. See *supra* Part IV.C.

179. The comment to Section 112 explains that unlike the Restatement, Section 112 applies to both revocable and irrevocable trusts. UNIF. TRUST CODE § 112 cmt.

180. UNIF. TRUST CODE § 112.

181. UNIF. TRUST CODE Article 1 General Comment.

182. The states that have enacted a version of the UTC include: Alabama, Arizona, Arkansas, Florida, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. *Legislative Fact Sheet – Trust Code*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Code> (last visited Apr. 14, 2017).

adopted a provision based on Section 112 of the UTC.<sup>183</sup> A recent case decided by the Superior Court of Pennsylvania illustrates the applicability of Pennsylvania's version of Section 112 to a pretermitted spouse statute.<sup>184</sup> In *In re Trust under Deed of Kulig*, a decedent executed a revocable deed of trust for the benefit of the decedent and his then-spouse.<sup>185</sup> Following the execution of the trust, the spouse died and the decedent remarried.<sup>186</sup> The surviving spouse argued that pursuant to Sections 2507(3)<sup>187</sup> and 7710.2<sup>188</sup> of the Pennsylvania Consolidated Statutes, she was entitled to an intestate share of the decedent's estate including the principal of the trust.<sup>189</sup> As a question of first impression, the court in *Kulig* considered the Joint State Government Commission Comments to, and the plain and unambiguous language of, Section 7710.2.<sup>190</sup> The court found that the text of Section 7710.2 unambiguously applied existing wills rules of construction to the interpretation of revocable trusts, and that the legislature intended the pretermitted spouse rule to be applied to revocable trusts.<sup>191</sup>

### 3. Ohio's Adoption of the UTC—The Ohio Trust Code

Ohio enacted a modified version of the UTC, the Ohio Trust Code

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183. ALA. CODE § 19-3B-112 (through Act 2017-130 of the 2017 Reg. Sess.); ARIZ. REV. STAT. ANN. § 14-10112 (West, Westlaw through First Reg. Sess. of the 53rd Leg. (2017)); ARK. CODE ANN. § 28-73-112 (West, Westlaw through 2016 Third Extraordinary Sess.); ME. STAT. tit. 18-B, § 112 (Westlaw through Ch. 3 of the 2017 First Reg. Sess. of the 128th Leg.); N.H. REV. STAT. ANN. § 564-B:1-112 (Westlaw through Ch. 7 of the 2017 Reg. Sess.); N.C. GEN. STAT. § 36C-1-112 (Westlaw through 2016 Reg. Sess.); 20 PA. STAT. AND CONS. STAT. ANN. § 7710.2 (West, Westlaw through 2016 Reg. Sess.); S.C. CODE ANN. § 62-7-112 (West, Westlaw through 2016 Sess.); TENN. CODE ANN. § 35-15-112 (West, Westlaw through 2017 First Reg. Sess.); VT. STAT. ANN. tit. 14A, § 112 (West, Westlaw through First Sess. (2017)); W. VA. CODE ANN. § 44D-1-112 (West, Westlaw through 2017 Reg. Sess.).

184. *In re Tr. Under Deed of Kulig*, 131 A.3d 494, 495 (Pa. Super. Ct. 2015), *appeal granted*, No. 217 MAL 2016, 2016 WL 5820602 (Pa. Oct. 4, 2016).

185. *Id.*

186. *Id.*

187. 20 PA. STAT. AND CONS. STAT. ANN. § 2507(3) (Modification by circumstances – Marriage).

188. 20 PA. STAT. AND CONS. STAT. ANN. § 7710.2 (Rules of construction – UTC 112).

189. *Kulig*, 131 A.3d at 495.

190. *Id.* at 497, 499-501.

191. *Id.* at 499, 501 (“In sum, we conclude that the plain language of Section 7710.2, consistent with the legislative comments appended thereto, reveals the intention of the Legislature to make rules of construction consistent whether interpreting testamentary dispositions or inter vivos trusts.”); *but see* Bell v. Estate of Bell, 2008-NMCA-045, ¶ 32-33, 143 N.M. 716, 181 P.3d 708 (holding, without referencing New Mexico's version of Section 112 of the UTC, that a pretermitted spouse was not entitled to a share of the decedent's revocable trust assets).

(OTC), which became effective January 1, 2007.<sup>192</sup> Generally, the OTC codified existing trust law in Ohio, providing easily accessible answers to many questions.<sup>193</sup> However, consistent with Section 112 of the UTC being an optional provision, a comparable provision was omitted from the OTC.<sup>194</sup> Because Section 112 directly conflicts with Ohio Revised Code Section 2107.01, which defines “will” to exclude inter vivos trusts, it would present uncertainties in Ohio law.<sup>195</sup> In that regard, in his article addressing the implications of enacting the UTC in Ohio, Professor English notes the importance of the “as appropriate” language of Section 112:

This phrase masks some very difficult questions. Not all will construction rules should necessarily be applied to trusts. Also, even those that should apply may require modification due to the legal distinctions between wills and trusts. There is a need for a consensus on which rules should apply, and once that issue has been determined, what they should say.<sup>196</sup>

Thus, even after the enactment of the Ohio Trust Code, Ohio is left without “any comprehensive trust interpretation statute.”<sup>197</sup> On trust interpretation issues for which there is not a specific statute, Ohio courts are left relying on common law to interpret trust documents with ambiguous or unclear language to determine how, considering the probable intent of the settlor, to distribute the trust assets.<sup>198</sup>

Policy considerations suggest that the General Assembly should adopt Section 112 of the UTC as it applies to trusts.<sup>199</sup> Additionally, similar issues involving the application of wills rules to trusts will continue to arise,<sup>200</sup> and enactment of Section 112 would allow for

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192. For an overview of the impact of the enactment of the Ohio Trust Code, see Newman, *supra* note 164.

193. *Id.* at 136.

194. Moore, *supra* note 8.

195. *Id.* (citing Alan Newman, *Report on HB 416: The Ohio Trust Code as Enacted*, in OHIO TRUST CODE 2.16 (Robert M. Brucken ed., 2006)).

196. English, *supra* note 50, at 12; *see also* English *supra* note 131, at 163 n.114 (explaining why some rules of construction, such as abatement and the anti-lapse statute, would require modification and special definitions).

197. Clark, *supra* note 177. However, Ohio is not in the minority. *See* English, *supra* note 131, at 162 (“While most states have enacted numerous statutes on the construction of wills, most have not enacted rules of construction applicable to revocable trusts and other nonprobate devices.”).

198. Clark, *supra* note 177 (noting that difficult problems often arise due to a misunderstanding of the law or inattentiveness of the drafting attorney).

199. *See supra* Part IV.

200. The numerous problems that may arise in relation to revocable trusts include: (1) the meaning to be given to particular words such as “heirs,” “descendants,” and “by representation”; (2)

predictability and could help to resolve such problems before they occur. The approach that Ohio has taken by addressing these issues on an “ad hoc basis” may be less efficient than others, because it may require amendment of statutes by the General Assembly each time an issue is presented.<sup>201</sup> However, due to the “as appropriate” language of Section 112, it is not clear whether this Section would apply to the pretermitted heir section even if Ohio were to adopt it.<sup>202</sup>

Moreover, it is unlikely that Ohio would adopt Section 112. Following the approval of the UTC in 2000, “members of the Estate Planning, Trust, and Probate Law Section of the Ohio State Bar Association, and members of the Legal, Legislative, and Regulatory Committee of the Ohio Bankers League” carefully studied the UTC and its provisions until enacting Ohio’s version in 2006.<sup>203</sup> Thus, because UTC Section 112 was specifically considered and omitted from the OTC,<sup>204</sup> it is unlikely the General Assembly would backtrack. A more appropriate resolution may be for the General Assembly to, continuing its pattern of extending wills rules of construction to trusts on a case-by-case basis, extend the pretermitted heir rule to revocable trusts.<sup>205</sup>

*B. The Ohio General Assembly Should Extend the Wills Pretermitted Heir Statute to Trusts*

Although it is not likely that an Ohio court would extend the current Ohio pretermitted heir statute to revocable trusts, there are sound policy reasons for the Ohio legislature to do so, as it has done with the anti-lapse and several other statutes.<sup>206</sup> The same policy reasons for

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abatement; and (3) ademption. See English, *supra* note 50, at 11-12.

201. Layman, *supra* note 14. Alternatively, the General Assembly could enact one comprehensive statute applicable to both wills and trusts. See *supra* note 178. However, this approach would likely introduce problems by ignoring the differences between wills and trusts, see English, *supra* note 131, at 162, and like Section 112, would present uncertainties in Ohio law, see Alan Newman, *Report on HB 416: The Ohio Trust Code as Enacted*, in OHIO TRUST CODE HANDBOOK (2006), at 17, [http://ideaexchange.uakron.edu/cgi/viewcontent.cgi?article=1167&context=ua\\_law\\_publications](http://ideaexchange.uakron.edu/cgi/viewcontent.cgi?article=1167&context=ua_law_publications).

202. See Layman, *supra* note 14.

203. Newman, *supra* note 164, at 135-36.

204. Newman, *supra* note 201, at 17.

205. See Moore, *supra* note 8 (“The Ohio General Assembly has been attentive to the task of adopting construction rules applicable to wills to trusts on a case by case basis and, hopefully, this effort will continue in the coming years.”).

206. See Angela G. Carlin, *Anti-lapse statute pertaining to trusts*, 1 BALDWIN’S OH. PRAC. MERRICK-RIPPNER PROB. L. § 34:20 (2014) (explaining that because trusts are increasingly used as will substitutes, the legislature found it appropriate to apply wills anti-lapse rules of construction to trusts); see also Clark, *supra* note 140 (noting that because the trust is a common will substitute, the anti-lapse rule of construction for wills appropriately applies to trusts).

extending the anti-lapse statute are present when considering the pretermitted heir statute.<sup>207</sup> As rules of construction, the anti-lapse and pretermitted heir statutes aim to give effect to the intention or probable intention of the donor.<sup>208</sup> Similarly, when certain events occur after the execution of a will or donative document, some rules of construction assume how, following such an event, a donor would have revised the will or donative document.<sup>209</sup> For example, the pretermitted heir statute assumes how a testator would have revised his or her will after the birth or adoption of a child.<sup>210</sup> Moreover, the purpose of the pretermitted heir statute is to prevent the unintentional disinheritance of a child born after the execution of the will, and the rationale for applying this statute to wills is equally applicable when a revocable trust is used as a will substitute.<sup>211</sup>

### 1. Issues with Current State Statutes Extending Pretermitted Heir Statutes to Revocable Trusts

As explained in Part IV,<sup>212</sup> Iowa enacted a separate pretermitted heir statute applicable to revocable trusts. Because the Iowa statutes treat wills and trusts differently, many questions are left unanswered.<sup>213</sup> For example, the statutes do not address what would happen if an afterborn child was mentioned in a will but not mentioned in a trust instrument.<sup>214</sup> Similarly, the statutes do not address the ramifications of a decedent including an intentional omission provision in the trust instrument but not in the will.<sup>215</sup> Specifically, Section 633.267 provides that a child

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Notably, the Estate Planning, Trust and Probate Law Section of the Ohio State Bar Association recently proposed modifications that would allow for the procedure under Ohio's pre-mortem statute to apply similarly to trusts. Ralph Lehman, *Wills and Trusts: Updating Ohio's Pre-Mortem Validation Law*, 26 OHIO PROB. L.J. 191, 191-92 (2016) (arguing that this modification is necessary due to the evolution of estate planning and the conventional use of trusts in estate plans).

207. See *supra* Parts III.A., IV.

208. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. a (AM. LAW INST. 2003).

209. UNIF. TRUST CODE § 112 cmt. (UNIF. LAW COMM'N 2010).

210. See McCouch, *supra* note 114, at 1180 (explaining that pretermitted heir statutes operate essentially as constructional rules to determine whether a decedent's failure to provide for a child was intentional).

211. See *supra* note 74 and accompanying text.

212. *Supra* Part IV.A.

213. Begleiter, *supra* note 112, at 331.

214. *Id.* Presumably, if the afterborn child is mentioned in a will but not in a trust instrument, the child would also receive a share of the trust assets. See IOWA CODE ANN. § 633A.3106 (West, Westlaw through 2017 Reg. Sess.). However, if it appears from the terms of the will that the omission was intentional, the child would not receive a share. *Id.*

215. IOWA CODE ANN. § 633A.3106.

omitted from a will receives an intestate share “unless it appears from the will that such omission was intentional.”<sup>216</sup> By contrast, Section 633A.3106 provides that a child omitted from a revocable trust instrument receives an intestate share, “unless it appears from the terms of the trust or decedent’s *will* that such omission was intentional.”<sup>217</sup> Thus, if a decedent’s will indicates intent to omit the child, the pretermitted child is prevented from taking from the revocable trust.<sup>218</sup>

The approach taken by California of extending all wills rules of constructions to trusts may also present problems. Unlike the Iowa provisions that treat wills and trusts differently, California’s approach ignores the difference between trusts and wills altogether.<sup>219</sup> However, the California statutes seem to address some of the issues that may arise when applying the Iowa statutes. The California statute reads:

[I]f a decedent fails to provide in a testamentary instrument for a child of decedent born or adopted after the execution of all of the decedent’s testamentary instruments, the omitted child shall receive a share in the decedent’s estate equal in value to that which the child would have received if the decedent had died without having executed any testamentary instrument.<sup>220</sup>

Under the California statutes, if a child is born after the execution of all of the decedent’s testamentary instruments (including both the will and revocable trust instrument) and the afterborn child is provided for in a decedent’s will but not the trust instrument, whether the child receives a share of the trust assets will depend on the circumstances of that case.<sup>221</sup> Under California law, in order for a decedent to effectively disinherit an afterborn child, the decedent’s intention to disinherit the child must appear on the face of the instrument that “at the time of its execution, the decedent had the child in mind and knowledgeably and intentionally omitted to provide for the child.”<sup>222</sup> Thus, if the decedent made clear in

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216. IOWA CODE ANN. § 633.267 (Children born or adopted after execution of will).

217. IOWA CODE ANN. § 633A.3106 (Children born or adopted after execution of a revocable trust) (emphasis added).

218. Begleiter, *supra* note 112, at 331.

219. English, *supra* note 50, at 12.

220. CAL. PROB. CODE § 21620 (West, Westlaw through Ch. 4 of the 2017 Reg. Sess.).

221. For example, the omitted child would not receive a share of the decedent’s estate if: (1) the decedent’s intention to disinherit the child appears in the testamentary instruments; or (2) the decedent had one or more children and devised substantially all the estate to the omitted child’s other parent; or (3) the decedent provided for the child by transfer outside of the testamentary instruments. CAL. PROB. CODE § 21621.

222. Edith C. Schaffer, 1 CAL. TRANSACTIONS FORMS—EST. PLANNING *Omitted Child Statutes* § 6:31, Westlaw (database updated June 2015) (citing *In re Torregano’s Estate*, 352 P.2d

the trust instrument that the omission of the child was intentional, the omitted child would not be entitled to a portion of the trust assets.<sup>223</sup> Additionally, when a decedent includes an intentional omission provision in the trust but not in the will, the child would receive a share of the decedent's estate equal in value to what the child would have received had the decedent died without having executed any testamentary instrument.<sup>224</sup>

## 2. Consideration of these Issues Will Provide for a More Careful and Effective Drafting of Ohio's Statute

For several reasons, if the General Assembly were to extend Ohio's pretermitted heir statute to revocable trusts, amending the current wills pretermitted heir statute to include revocable trusts would be preferable to enacting a separate statute that applies only to revocable trusts. First, revocable trusts are functionally equivalent to wills and both are often used by decedents in comprehensive estate plans.<sup>225</sup> Thus, treating wills and revocable trusts separately in this context would likely present more issues than providing one statute that applies to both wills and trusts. Similarly, it will be simpler to give effect to the presumed intent of the decedent to provide for an inadvertently-omitted child by including rules applicable to both wills and trusts within one statute.

Next, in order to draft a statute that effectively provides for an afterborn child omitted from a revocable trust instrument, it must be determined under what circumstances a pretermitted child should take. Ohio's wills pretermitted heir statute applies in instances where: (1)

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505 (Cal. 1960); *Smith v. Crook*, 206 Cal. Rptr. 524 (Cal. Dist. Ct. App. 1984)) ("To effectively omit a child, the disinheritance provision in a testamentary instrument must either specifically mention the child . . . to be omitted, or must contain language clearly evidencing the decedent's intention, at the time of executing the instrument, to omit the child . . . from sharing in the estate."); see also Derek P. Cole, *Chapter 724: The California Bar Association's 1997 Omnibus Probate Law Amendments*, 29 MCGEORGE L. REV. 397, 401 (1998) ("To the extent a person chooses not to provide for a child or spouse they will have to make this explicit in their trust instrument. There will be no uncertainties as to whom the trustor intended to provide for and whether the omission of a certain child or spouse was accidental.") (footnotes omitted).

223. CAL. PROB. CODE § 21621.

224. CAL. PROB. CODE § 21620 Section 21621(a) provides: "The decedent's failure to provide for the child in the decedent's testamentary instruments was intentional and that intention appears from the testamentary instruments." CAL. PROB. CODE § 21621(a). It seems this provision could be construed to mean that if there were an intentional omission provision in either the decedent's trust instrument or the will (but not both), the afterborn child would not receive a share of the estate.

225. See Newman, *supra* note 2, at 524; English *supra* note 131, at 187 n.189 ("[T]he revocable trust is normally used in conjunction with a pourover will. The use of a pourover will assures that property not transferred to the trust during life will, at death, be combined and distributed with the property the settlor managed to convey.").

“after making a will, a testator has a child born alive, adopts a child, or designates an heir . . . , or if a child or designated heir who is absent and reported to be dead proves to be alive;” (2) the child has not been provided for in the will or by settlement; (3) it does not appear by the will that the testator intended to disinherit the pretermitted child or heir; and (4) the entire estate is not devised to the surviving spouse.<sup>226</sup> Presumably, the same circumstances that invoke the wills pretermitted heir statute would be applicable to omissions of an afterborn child from a trust instrument.

The General Assembly should also consider instances when a decedent may implement both a will and a revocable trust in his or her comprehensive dispositive plan and address the potential problems that are made apparent by the other states’ pretermitted heir statutes.<sup>227</sup> Thus, the statute should specify what happens when a decedent provides for a pretermitted child in a will but not a trust instrument, or conversely, when the decedent provides for the child in a trust instrument but not a will.<sup>228</sup> One approach the General Assembly could take is providing that an afterborn child receives an intestate share of the estate, including the revocable trust assets, “unless it appears by either the will or revocable trust instrument that it was the intention of the testator to disinherit the pretermitted child or heir.”<sup>229</sup> Thus, any intention in either the will or trust to disinherit the child will apply to both instruments. Alternatively, the General Assembly could, like California, require the decedent to indicate the intent to disinherit in each testamentary instrument or otherwise the child will take an intestate share.<sup>230</sup>

Similarly, it should be determined whether the child must be born after the execution of both the will and the revocable trust instrument in order to be considered pretermitted, and what effect it has, if any, if the will and the trust instrument were executed at the same time.<sup>231</sup> Because under Section 2107.34 the child must be born or adopted after the execution of the will in order to receive a share, a comparable provision that requires a child to be born after the execution of both the will and

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226. OHIO REV. CODE ANN. § 2107.34 (West, Westlaw through File 2 of the 132nd GA (2017-2018)).

227. See CAL. PROB. CODE §§ 21620-21621 (West, Westlaw through Ch. 4 of the 2017 Reg. Sess.); IOWA CODE ANN. §§ 633.267, 633A.3106 (West, Westlaw through 2017 Reg. Sess.).

228. See CAL. PROB. CODE §§ 21620-21621; IOWA CODE ANN. §§ 633.267, 633A.3106.

229. See OHIO REV. CODE ANN. § 2107.34.

230. *Id.*

231. For example, if the will and the trust instrument were executed at the same time and the decedent provides for an afterborn child in the will but not the trust instrument, presumably that would demonstrate the decedent’s intent not to provide for the child in the trust instrument.

the trust instrument would allow for easier administration of the rule.<sup>232</sup>

## VI. CONCLUSION

The Ohio General Assembly should amend the pretermitted heir statute to allow an afterborn child to receive a share of their deceased parent's property, regardless of whether the child was inadvertently omitted from a will or revocable trust instrument. Although, in general, state legislatures have been slow to respond to the increase in the use of revocable trusts as will substitutes, persuasive authority supports the extension of this rule to revocable trusts. Moreover, the Ohio legislature has responded to similar issues that arise in relation to revocable trusts on a case-by-case basis and should do so here. By amending the statute, a decedent's presumed intent will be given effect regardless of whether the decedent chooses to use a will, a revocable trust, or both, to dispose of his property at his death. Similarly, in the context of the hypothetical in the Introduction to this Comment, amendment of the statute will allow for equal treatment under Ohio law of child *B*, who was unintentionally omitted from Settlor's revocable trust instrument, and child *A*, who was inadvertently omitted from Testator's will.

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232. Instead, having to establish a timeline including the date of the execution of the will and the trust instrument, if the will and the trust instrument were executed at different times, and the birth date of a child would be more burdensome than enforcing a rule like that enacted by the California legislature. *See* CAL. PROB. CODE § 21620.