

Revocable Trusts: Virginia

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A Q&A guide to the laws governing revocable trusts in Virginia. This Q&A addresses state laws and customs that impact revocable trusts, including the key statutes and rules related to revocable trusts, the requirements for creating a valid revocable trust agreement, common revocable trust provisions, information concerning trustees, information on making changes to revocable trust agreements after execution, and Virginia's treatment of certain special circumstances for gifts made under a revocable trust agreement and gift recipients.

KEY STATUTES AND RULES

1. What are the key statutes and rules that govern revocable trusts in your state and are revocable trusts commonly used as will substitutes in your state?

The Virginia Uniform Trust Code governs revocable trusts in Virginia (Va. Code Ann. §§ 64.2-700 to 64.2-808).

Revocable trusts (with pour-over wills) are commonly used as will substitutes in Virginia.

WHO CAN CREATE A REVOCABLE TRUST

2. Is there a minimum age requirement to create a revocable trust?

In Virginia, an individual must be at least 18 years old to create a revocable trust, unless the individual is an emancipated minor (Va. Code Ann. §§ 64.2-401(B) and 64.2-750).

3. What is the standard of mental capacity required to create a revocable trust?

In Virginia, the standard of mental capacity required to create a revocable trust is the same capacity required to make a will. A person must be of sound mind to create a revocable trust. (Va. Code Ann. §§ 64.2-401(B) and 64.2-750.)

An individual creating a revocable trust only needs to have the mental capacity to:

- Understand the nature of the business the individual is doing.
- Recollect the property of which the individual disposes.
- Know the objects of the individual's bounty.
- Hold these things in the individual's mind for enough time to observe their relations to each other and form a rational judgment in relation to them.

(Va. Code Ann. §§ 64.2-401(B) and 64.2-750; *Lester v. Simpkins*, 83 S.E. 1062, 1066 (Va. 1915); *Spencer v. Moore*, 8 Va. 423 (1798).)

An individual may be deemed competent even if the individual is under a guardianship, elderly, or eccentric (see *Gilmer v. Brown*, 44 S.E.2d 16, 19 (Va. 1947); *Tate v. Chumbley*, 57 S.E.2d 151, 158 (Va. 1950)).

4. Can any of the following create a revocable trust on behalf of an individual:

- Agent under a power of attorney?
- Guardian or conservator?

AGENT UNDER A POWER OF ATTORNEY

In Virginia, an agent under a power of attorney may create a revocable trust for the benefit of the principal if the power of attorney document expressly authorizes the agent to create a trust on the principal's behalf (Va. Code Ann. §§ 64.2-719 and 64.2-720).

GUARDIAN OR CONSERVATOR

Under Virginia law, a conservator may create a revocable trust for the benefit of an incapacitated person only if a court approves the

trust as specified in Va. Code Ann. Section 64.2-2023 (Va. Code Ann. §§ 64.2-719 and 64.2-2023). A court considers the following factors when determining whether to approve the trust terms:

- The estate's size and composition.
- The nature and probable duration of the person's incapacity.
- The effect of the gifts, disclaimers, trusts, or transfers on the estate's financial ability to meet the incapacitated person's foreseeable health, medical care, and maintenance needs.
- The incapacitated person's estate plan and the effect of the gifts, disclaimers, trusts, or transfers on the estate plan.
- The incapacitated person's prior patterns of assistance or gifts to the proposed donees.
- The tax effect of the proposed gifts, disclaimers, trusts, or transfers on the estate.
- The effect of any transfer of assets or disclaimer on establishing or retaining the incapacitated person's eligibility for medical assistance services.
- Whether to require, during the incapacitated person's lifetime, that the trustee post bond, with or without surety, or provide an accounting as required in Va. Code Ann. Section 64.2-1305.
- Other factors that the court may deem relevant.

(Va. Code Ann. § 64.2-2023(C).)

TRUST REQUIREMENTS

5. What conditions must be met in your state to create a valid trust? In particular, please specify:

- Trustee requirements.
- Beneficiary requirements.
- Trust property requirements.

TRUSTEE REQUIREMENTS

In Virginia, a trust will not fail for lack of a trustee. If the settlor does not name a trustee, a court will appoint one. A trustee:

- Must have active duties to perform.
- Cannot be the sole trustee and the sole beneficiary.

(Va. Code Ann. §§ 64.2-720 and 64.2-1400; *Fitzgerald v. Doggett's Ex'r*, 155 S.E. 129 (Va. 1930).)

BENEFICIARY REQUIREMENTS

Under Virginia law, a trust must have a definite beneficiary, unless it is a:

- Charitable trust.
- Trust for the care of an animal, as provided in Va. Code Ann. Section 64.2-726.
- Trust for a noncharitable purpose, as specified in Va. Code Ann. Section 64.2-727.

(Va. Code § 64.2-720(A)(3).)

A beneficiary is definite if the beneficiary can be determined now or in the future, subject to any applicable rule against perpetuities (Va. Code § 64.2-720(B)).

A trust may specify that a trustee has the power to select a beneficiary from an indefinite class. However, if the trustee does not choose

a beneficiary within a reasonable time, the property passes to the party who would have taken the property had the power not been conferred. (Va. Code § 64.2-720(C).)

TRUST PROPERTY REQUIREMENTS

In Virginia, a trust can be created without transferring property into the trust (Va. Code Ann. §§ 64.2-719 and 64.2-720). Many practitioners declare in the trust agreement that the settlor funds the trust with a nominal amount of cash when the settlor executes the trust agreement and more fully funds the trust later.

6. What provisions, if any, must be included for a trust to be deemed revocable?

A settlor may revoke an *inter vivos* trust created on or after July 1, 2006 unless the terms of the trust expressly provide that the trust is irrevocable and cannot be amended (Va. Code Ann. § 64.2-751(A)).

TRUST FORMALITIES AND EXECUTION REQUIREMENTS

7. Must a revocable trust agreement be in writing to be valid?

Under Virginia law, a trust does not need to be in writing. However, a proponent of an oral trust must prove its creation and terms by clear and convincing evidence. (Va. Code Ann. § 64.2-725.)

8. What are the execution requirements for a valid written revocable trust agreement? In particular, please specify requirements for:

- The settlor's signature.
- The trustee's signature.
- Witnesses to the agreement.
- Notarization.

SETTLOR'S SIGNATURE

Virginia law does not explicitly state whether the settlor's signature is required to execute a revocable trust. The Virginia Uniform Trust Code only specifies that a settlor must indicate an intention to create a trust (Va. Code Ann. § 64.2-720(A)(2)). A settlor typically indicates the settlor's intention to create a trust by signing the trust agreement.

TRUSTEE'S SIGNATURE

Virginia law does not require that a trustee sign a trust agreement for the agreement to be valid. It is common for the trustee to sign the trust agreement to formally accept the trusteeship.

WITNESS REQUIREMENTS

Virginia law does not require witnesses to sign a revocable trust agreement for the trust to be validly executed. It is uncommon for them to do so.

NOTARY REQUIREMENTS

Virginia law does not require that a revocable trust agreement be notarized to be valid. The settlor's signature on a revocable trust agreement is often notarized even though it is not mandatory.

RELATIONSHIP TO POUR-OVER WILL

9. How is a revocable trust agreement used in conjunction with a pour-over will in your state? In particular please specify:

- Whether the revocable trust must exist before the pour-over will can be signed.
- Whether the terms of the revocable trust agreement can be incorporated by reference into the pour-over will.

EXISTENCE OF REVOCABLE TRUST BEFORE EXECUTION OF WILL

In Virginia, a will can dispose of property to a revocable trust if the trust is:

- Executed before, with, or after the will.
- Identified in the will.
- In existence at the time of the testator's death.

(Va. Code Ann. § 64.2-427(A).)

Counsel should:

- Have the testator execute the revocable trust before executing the will to show the testator intended to distribute the testator's probate assets to the revocable trust in existence when the will is executed.
- Specify the date of the revocable trust agreement when drafting a pour-over will to indicate the revocable trust the testator intended for the testator's assets.

INCORPORATION BY REFERENCE

In Virginia, a document may generally be incorporated by reference in a will if:

- The document exists when the will is executed.
- The will refers to the document as being in existence.
- The will identifies and describes the document with reasonable certainty.

However, a revocable trust agreement may be incorporated by reference into a will even though the testator executes the trust agreement after the testator executes the will. (Va. Code Ann. §§ 64.2-104 and 64.2-427; *Lawless v. Lawless*, 47 S.E.2d 431 (Va. 1948).)

RIGHTS OF SURVIVING SPOUSE

10. How are the elective share rights affected by funding a revocable trust?

If the decedent's surviving spouse receives less than the statutory elective amount, the surviving spouse may elect to receive the spouse's elective share determined, in part, on the length of the marriage (Va. Code Ann. § 64.2-308.4). However, a spouse may waive the right to an elective share by executing a written agreement or waiver (for example, a prenuptial agreement) (Va. Code Ann. § 64.2-308.14).

Assets in a revocable trust generally are included in the augmented estate that is potentially subject to the surviving spouse's elective share (Va. Code Ann. §§ 64.2-308.1 to 64.2-308.17).

11. Does the transfer of property to a revocable trust change the characterization of ownership between spouses? Specifically, please discuss:

- Community property.
- Property owned as tenants by the entirety.

COMMUNITY PROPERTY

Virginia is not a community property state. However, community property brought to Virginia and proceeds of the property may remain community property (*Virginia v. Terjen*, 90 S.E.2d 801, 802 (Va. 1956)). Virginia has adopted the Uniform Disposition of Community Property Rights at Death Act (Va. Code Ann. §§ 64.2-315 to 64.2-324), which applies at death to:

- All personal property, wherever situated, that:
 - was acquired as or became community property under another jurisdiction's laws;
 - was acquired with the rents, issues, income of, or proceeds from, or in exchange for, the community property; or
 - is traceable to the community property.
- The proportionate part of any real property in Virginia acquired with the rents, income of, proceeds from, or in exchange for property acquired as community property under another jurisdiction's laws or property traceable to that community property.

(Va. Code Ann. § 64.2-315.)

After a married person dies:

- Half of the community property is the surviving spouse's property and is not subject to testamentary disposition.
- The other half of the community property is the decedent's property and is subject to testamentary disposition.

(Va. Code Ann. § 64.2-317.)

Under the Virginia Uniform Trust Code, if a revocable trust is created or funded with community property, the trust may be revoked by either spouse acting alone but may only be amended by joint action of both spouses. To the extent the trust consists of property other than community property, each settlor may revoke or amend the trust to the extent it relates to the trust property contributed by that settlor. (Va. Code Ann. § 64.2-751.)

TENANTS BY THE ENTIRETY

Under Virginia law, property held by a married couple as tenants by the entirety is entitled to immunity from claims of the spouses' separate creditors (*Vasillion v. Vasillion*, 66 S.E.2d 599, 602 (Va. 1951)). Property held by a married couple as tenants by the entirety and conveyed to their joint revocable trust or to their separate revocable trusts (and any proceeds from the sale or disposition of the property) has the same immunity from the claims of the spouses' separate creditors as it would if it had remained a tenancy by the entirety if all of the following apply:

- The couple is married.
- The property continues to be held in trust.

- The property continues to be the couple's property. This applies where:
 - both spouses are current beneficiaries of one trust that holds the entire property, even if other people are current or future beneficiaries of the trust; or
 - each spouse is a current beneficiary of a separate trust and the two separate trusts together hold the entire property, whether or not other people are also current or future beneficiaries of the trusts.

(Va. Code Ann. § 55-20.2(C).)

COMMON REVOCABLE TRUST PROVISIONS

12. Discuss specific provisions commonly found in a revocable trust agreement and the rules that apply to these provisions in your state. In particular, please discuss the following provisions and their effect:

- No-contest clause.
- Incorporation by reference of trustee powers.
- Virtual representation.
- Rule against perpetuities.
- Sample rule against perpetuities clause.
- Governing law.
- Transfer of assets to trust by schedule.

NO-CONTEST CLAUSE

In Virginia, no-contest clauses (*in terrorem* clauses) are valid and enforceable, though they are disfavored and strictly construed (*Keener v. Keener*, 682 S.E.2d 545 (Va. 2009); *Rafalko v. Georgiadis*, 777 S.E.2d 870 (Va. 2015)). Virginia courts are more likely to invalidate a broad no-contest clause than one that is more limited in its application.

INCORPORATION BY REFERENCE OF TRUSTEE POWERS

A settlor may incorporate by reference, in whole or in part, the fiduciary powers specified in:

- Va. Code Ann. Section 64.2-105, which specifies certain powers of fiduciaries.
- Va. Code Ann. Section 64.2-769, which specifies duties and powers delegated by the trustee.
- Va. Code Ann. Section 64.2-770, which specifies that a trustee may follow a direction of the settlor that is contrary to the trust's terms.
- Va. Code Ann. Section 64.2-777, which specifies the trustee's general powers.
- Va. Code Ann. Section 64.2-778, which specifies the trustee's specific powers.

VIRTUAL REPRESENTATION

Unless otherwise represented, the following categories of individuals may be represented by and bound by another person who or entity that has a substantially identical interest regarding a question or dispute:

- A minor.
- An individual who is incapacitated.

- An unborn individual.
- An individual whose identity or location is unknown and not reasonably ascertainable.

However, the individual may be represented and bound only to the extent that there is no conflict of interest regarding the question or dispute between the representative and the person represented. (Va. Code Ann. § 64.2-717.)

RULE AGAINST PERPETUITIES

Under the rule against perpetuities, a nonvested property interest is invalid unless either:

- When the interest is created, the interest vests or terminates within 21 years after the individual's death.
- The interest either vests or terminates within 90 years after creation.

(Va. Code Ann. § 55-12.1(A).)

Under Virginia's Uniform Statutory Rule Against Perpetuities (Va. Code Ann. §§ 55-12.1 to 55-12.6), a settlor may include a provision in the settlor's trust instrument allowing the following to be excluded from the rule against perpetuities:

- A nonvested interest in or power of appointment over personal property held in trust.
- A power of appointment over personal property granted under a trust.

(Va. Code Ann. § 55-12.4(A)(8).)

RULE AGAINST PERPETUITIES SAMPLE CLAUSE

"Pursuant to Virginia Code § 55-12.4(A)(8), the rule against perpetuities shall not apply to any trust created hereunder, including any trust created by the exercise of a power of appointment; provided, however, if contrary to the forgoing provision, any property in any trust is required to vest within the rule against perpetuities, then at the expiration of that period, such property shall be distributed, absolutely and in fee simple, equally to the income beneficiaries of such trust."

GOVERNING LAW

In Virginia, the meaning and effect of the trust's terms are determined by either the law of the jurisdiction:

- Designated in the trust agreement, unless that jurisdiction's law is against the public policy of the jurisdiction having the most significant relationship to the matter.
- Having the most significant relationship to the matter at issue, if the trust does not specify a jurisdiction.

(Va. Code Ann. § 64.2-705.)

Parties typically include a provision specifying that the agreement is made or delivered in Virginia and is governed by Virginia law.

TRANSFER OF ASSETS TO TRUST BY SCHEDULE

There is no law in Virginia requiring the transfer of assets to a trust by a schedule attached to a trust agreement. Many practitioners attach a schedule to the trust agreement that contains a list of assets the settlor conveys to the trust via a separate document or action.

TRUSTEE APPOINTMENT

13. What are the rules regarding appointment of trustees in your state? In particular, please discuss:

- Criteria for qualifying as a trustee.
- Priority rules for appointment of a successor trustee if the named trustees fail to qualify or stop to act.

QUALIFICATION AS TRUSTEE

Any natural person may serve as a trustee unless the person is:

- Incompetent.
- Imprisoned.
- No longer a Virginia resident if residency is statutorily required.

(Va. Code Ann. § 64.2-1405.)

A nonresident individual may serve as a testamentary trustee if the individual either:

- Consents to service on the clerk of the court making the appointment.
- Appoints a resident agent for service of process.

(Va. Code Ann. § 64.2-1426.)

The following entities may also serve as a trustee:

- A bank incorporated in Virginia with a separate trust department.
- A corporation authorized to engage in trust business in Virginia under federal banking laws.
- A trust company, trust subsidiary, and savings institution authorized to operate trust offices or engage in trust business in Virginia.
- A Virginia corporation engaged in the practice of law, or an officer, employee, or agent of the corporation (Va. Code Ann. § 13.1-546.1).

(Va. Code Ann. § 6.2-1001.)

A nonresident bank or trust company not authorized to do business in Virginia cannot serve as a testamentary trustee. However, if the bank or trust company is serving as a trustee of an *inter vivos* trust, the institution may be the recipient of a pour-over gift from the settlor's will and can act as the trustee regarding those assets.

APPOINTMENT OF SUCCESSOR TRUSTEE

Under Virginia law, a vacancy in trusteeship occurs if:

- The person designated as trustee rejects the trusteeship.
- The person designated as trustee cannot be identified or does not exist.
- The trustee resigns.
- The trustee is disqualified or removed.
- The trustee dies.
- The trustee is incapacitated.

(Va. Code Ann. § 64.2-757(A).)

However, the vacancy need not be filled if a co-trustee remains in office (Va. Code Ann. § 64.2-757(B)).

A vacancy in a trusteeship of a non-charitable trust that must be filled is filled (in order of priority) by:

- The person designated in the trust to act as successor trustee.
- A person appointed by unanimous agreement of the qualified beneficiaries.
- A person appointed by the court under Va. Code Ann. Sections 64.2-1405, 64.2-1406, or 64.2-712.

(Va. Code Ann. § 64.2-757(C).)

A qualified beneficiary is a beneficiary who, on the date the beneficiary's qualification is determined:

- Is a person entitled to share in the distribution of an estate (distributee) or a permissible distributee of trust income or principal.
- Would be a distributee or permissible distributee of trust income or principal if the distributee's entitlement to share in the distribution terminated on the date the beneficiary's qualification is determined without causing the trust to terminate.
- Would be a distributee or permissible distributee of trust income or principal if the trust terminated on the date the beneficiary's qualification is determined.

(Va. Code Ann. § 64.2-701.)

14. Please describe how a nominated trustee accepts the trusteeship.

A trustee of a revocable trust agreement often signs the agreement to formally accept the trusteeship. However, Virginia law only requires that a trustee accept the designation by either:

- Substantially complying with a method of acceptance provided in the terms of the trust.
- Accepting delivery of the trust property, exercising powers, performing duties as trustee, or otherwise indicating acceptance of the trusteeship if the terms of the trust do not provide a method of acceptance.

(Va. Code Ann. § 64.2-754(A).)

15. Please describe how a nominated trustee declines the trusteeship.

Virginia law does not specify any formality for a nominated trustee to reject the trusteeship. The nominated trustee who wishes to reject the trusteeship typically either:

- Sends a written document to the settlor, current trustee, or beneficiaries.
- Refuses delivery of the trust property.

A designated trustee who does not accept the trusteeship within a reasonable time after learning of the designation is deemed to have rejected the trusteeship (Va. Code Ann. § 64.2-754(B)).

TRUSTEE COMPENSATION

16. What are the rules, if any, regarding trustee compensation in your state?

If the terms of the trust agreement do not specify the trustee's compensation, Virginia law only specifies that a trustee is entitled to

compensation that is reasonable under the circumstances (Va. Code Ann. § 64.2-761(A)).

If the terms of the trust agreement specify the trustee's compensation, a court may allow more or less compensation if:

- The trustee's duties are substantially different from those contemplated when the trust was created.
- The compensation specified by the terms of the trust would be unreasonably low or high.

(Va. Code Ann. § 64.2-761(B).)

MULTIPLE TRUSTEES

17. Who has authority to act when there are multiple trustees?

Under Virginia law, co-trustees who are unable to reach a unanimous decision may act by majority decision. A co-trustee must participate in performing the function unless the co-trustee either:

- Cannot do so because the co-trustee is absent, ill, disqualified, or has another temporary incapacity.
- Delegated the task to another trustee.

(Va. Code Ann. § 64.2-756(A), (C).)

A trustee may delegate to a co-trustee the performance of any function other than a function that the terms of the trust agreement expressly require to be performed by the trustees jointly (Va. Code Ann. § 64.2-756(E)).

The remaining co-trustee or a majority of the remaining co-trustees may act for the trust if:

- A co-trustee cannot perform duties because of absence, illness, disqualification, or temporary incapacity.
- Prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property.

(Va. Code Ann. § 64.2-756(D).)

If a vacancy occurs, the remaining trustees may act for the trust (Va. Code § 64.2-756(B)).

REMOVAL AND RESIGNATION OF TRUSTEES

18. Can a trustee be removed from office, and if so, how?

In Virginia, a trustee may be removed from office under the terms of the trust agreement. The settlor, a co-trustee, or a beneficiary may also petition the court to remove a trustee. The court may also remove a trustee on its own initiative. (Va. Code Ann. § 64.2-759(A).)

A court may remove a trustee if:

- The trustee has committed a serious breach of trust.
- A lack of cooperation among co-trustees substantially impairs the administration of the trust.
- The trustee is unfit, unwilling, or has persistently failed to administer the trust effectively and the court determines that removing the trustee best serves the beneficiaries' interests.
- There has been a substantial change in circumstances or removal is requested by all the qualified beneficiaries (see Question 13), and the court finds that:

- removing the trustee best serves the interests of all the beneficiaries and is not inconsistent with a material purpose of the trust; and
- there is a suitable co-trustee or successor trustee available.

(Va. Code Ann. § 64.2-759(B).)

19. What rights does a trustee have to resign from office?

In Virginia, a trustee may resign:

- Under the terms of the trust.
- With the court's approval.
- After providing at least 30 days' notice to:
 - the settlor, if living;
 - all co-trustees; and
 - the qualified beneficiaries (see Question 13), except those qualified beneficiaries under a revocable trust that the settlor has the capacity to revoke.

(Va. Code Ann. § 64.2-758(A).)

TRUSTEE LIABILITY

20. What is the standard of care applicable to the trustee?

In Virginia, the trustee owes a duty of care, good faith, and loyalty to the trust beneficiaries. Under these duties, the trustee must, among other things:

- Administer the trust and invest the trust assets in good faith and in a prudent manner, in accordance with the terms and purposes of the trust and the beneficiaries' interests (Va. Code Ann. § 64.2-763).
- Follow:
 - the prudent investor rule (Va. Code Ann. §§ 64.2-780 to 64.2-791).
 - the fiduciary duties of care under the Uniform Principal and Income Act (Va. Code Ann. §§ 64.2-1000 to 64.2-1003).
- (Va. Code Ann. § 64.2-763.)
- Administer the trust solely in the beneficiaries' interests, meaning that the trustee cannot engage in self-dealing (Va. Code Ann. § 64.2-764).
- If a trust has two or more beneficiaries, act impartially in investing, managing, and distributing the trust property (Va. Code Ann. § 64.2-765).
- Administer the trust as a prudent person would, and exercise reasonable care, skill, and caution (Va. Code Ann. § 64.2-766).
- Incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the trustee's skills (Va. Code Ann. §§ 64.2-767).
- Use any special skills or expertise, if the trustee has special skills or expertise, or is named trustee because the trustee had claimed to have a special skill or expertise (Va. Code Ann. § 64.2-768).
- Keep the beneficiaries reasonably informed of the trust and its administration (Va. Code Ann. § 64.2-775(A)).

- Not commingle trust property with the trustee's own property or that of another trust (Va. Code Ann. § 64.2-772(B)).
- Control and protect the trust, which includes a duty to make the trust property productive (Va. Code Ann. § 64.2-771).

21. Under what circumstances is a successor trustee liable for the acts of a prior trustee?

In Virginia, a successor trustee may be liable for the trustee's own breach in failing to redress the previous trustee's breach of duty or trust. Under the Virginia Uniform Trust Code, a trustee must take reasonable steps to enforce claims of the trust (Va. Code Ann. § 64.2-773). A trustee must take reasonable steps to redress a breach of trust or duty that the trustee knows a former trustee or another fiduciary committed (Va. Code Ann. § 64.2-774).

22. Under what circumstances is a trustee liable for the acts of a co-trustee?

In Virginia, a co-trustee is liable for the actions of another trustee if the co-trustee joins in the trustee's action (Va. Code Ann. § 64.2-756(F)). Each trustee must exercise reasonable care to prevent a co-trustee from committing a serious breach of trust and compel a co-trustee to redress a serious breach of trust (Va. Code Ann. § 64.2-756(G)). A dissenting trustee is not liable for the action if all the following apply:

- The dissenting trustee joined in an action at the direction of a majority of the trustees.
- The dissenting trustee notified any co-trustee of the dissent at or before the action.
- The action was not a serious breach of trust.

(Va. Code Ann. § 64.2-756(H).)

23. To what extent can the trust agreement waive trustee liability?

A trust may include an exculpatory clause that waives trustee liability under certain conditions. A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust agreement is not liable for a breach of trust to the extent the breach resulted from the reliance (Va. Code Ann. § 64.2-797).

However, an exculpatory clause in a trust is void if it:

- Relieves the trustee of liability for a breach of trust committed in bad faith or with reckless indifference.
- Appears in the trust instrument because of the trustee's abuse of a confidential relationship with the settlor.

(Va. Code Ann. § 64.2-799(A).)

Under the Virginia Uniform Prudent Investor Act, the provisions in a trust agreement may also alter the trustee's obligations under the prudent investor rule, which a trustee must follow. A trustee is not liable to a beneficiary if the trustee in good faith relied on a waiver of the prudent investor rule. (Va. Code Ann. § 64.2-781(B).)

SPECIAL CIRCUMSTANCES REGARDING GIFTS OR RECIPIENTS

24. Please describe what happens if:

- A beneficiary does not survive the settlor.
- A gift is not owned by the settlor or the revocable trust at the settlor's death.
- There are not enough assets passing through the revocable trust agreement, or after payment of taxes and debts, to satisfy all the gifts.
- The gifted property is encumbered.
- The settlor and a beneficiary or fiduciary to whom the settlor was married when the revocable trust was created are no longer married when the settlor dies.
- The settlor and a beneficiary die at the same time.

BENEFICIARY DOES NOT SURVIVE (LAPSE)

In Virginia, distributions for deceased beneficiaries under a revocable trust agreement pass in a similar manner as bequests to deceased beneficiaries under a will.

Unless a contrary statement appears in the revocable trust agreement, if a beneficiary, including a beneficiary under a class gift, is settlor's grandparent or a descendant of settlor's grandparent and deceased at the execution of the trust agreement or at the settlor's death, the descendants of the deceased beneficiary who survive the settlor take in place of the deceased beneficiary. The trustee divides the deceased beneficiary's trust share into as many equal shares as there are both:

- Surviving descendants in the closest degree of kinship to the deceased beneficiary.
- Deceased descendants, if any, in the same degree of kinship to the deceased beneficiary who left descendants surviving at the time of the settlor's death.

(Va. Code Ann. § 64.2-418(B).) One share passes to each surviving descendant and one share passes, *per stirpes*, to the descendants of deceased descendants (Va. Code Ann. § 64.2-418(B)). This statute is applicable only to the extent the trust agreement or provision is revocable immediately before the settlor's death on or after July 1, 2018, and the beneficiary would have taken because of the settlor's death if the beneficiary survived the settlor (Va. Code Ann. § 64.2-418(C)).

Unless a contrary statement appears in the revocable trust agreement, if a trust distribution (other than a residuary distribution) fails, it becomes part of the residue. If the trust agreement requires the trustee to distribute the residue to two or more beneficiaries and the share of one beneficiary fails, that share passes to the other residuary beneficiaries in proportion to their interests in the residue. (Va. Code Ann. § 64.2-416(B).) This statute is applicable only to the extent the trust agreement or provision is revocable immediately before the settlor's death on or after July 1, 2018, and the distribution occurs because of the settlor's death (Va. Code Ann. § 64.2-416(D)).

GIFT NOT OWNED BY SETTLOR AT DEATH (ADEMPTION)

In Virginia, unless the settlor makes a contrary statement in the settlor's revocable trust agreement, ademption generally applies to distributions from a revocable trust in a similar manner as bequests under a will (that is, the beneficiary does not take the specific gift if the gift is not owned by the trust at the settlor's death). Ademption does not apply (the testator receives the following property notwithstanding ademption of the original gift) as follows:

- Specific securities, whether or not expressed in a number of shares, adeem except the beneficiary receives:
 - as much of the securities as are a part of the trust because of the settlor's death;
 - any additional or other securities of the same entity owned by the trustee because of an action initiated by the entity (except for securities acquired by the exercise of purchase options); and
 - any securities of another entity acquired with respect to the specific gifted securities from a merger, consolidation, reorganization, or similar action initiated by the entity.

(Va. Code Ann. § 64.2-415(B)(1).)

- The beneficiary receives any:
 - amount of any condemnation award for a taking of the gifted property that remains unpaid at death; and
 - proceeds unpaid at death on fire and casualty insurance on the gifted property.

(Va. Code Ann. § 64.2-415(B)(2).)

A trust provision requiring distribution of specific property because of the settlor's death (including property that is or becomes part of the trust because of the settlor's death) is deemed to be a distribution of a pecuniary amount if, while the settlor was incapacitated, the trustee sold this specific property or proceeds of fire or casualty insurance as to this property were paid to the trustee. The pecuniary amount is the net sales price or insurance proceeds, reduced by the sums received under Virginia Code Ann. Section 64.2-415(B)(2). No adjudication of the settlor's incapacity before death is necessary. This does not apply, however, if the settlor ratifies the trustee's sale of the specific property or receipt of insurance proceeds. (Va. Code Ann. § 64.2-415(E).)

This statute applies to trusts only to the extent the trust agreement or provision is revocable immediately before the settlor's death on or after July 1, 2018, and the distribution occurs because of the settlor's death and is of property that is or becomes part of the trust because of the settlor's death (Va. Code Ann. § 64.2-415(F)).

INSUFFICIENT ASSETS (ABATEMENT)

The Virginia Uniform Trust Code does not contain provisions regarding insufficient assets in the satisfaction of gifts. The Virginia Uniform Trust Code has not incorporated Uniform Trust Code Section 112, which incorporates will doctrines and rules, for example, abatement provisions. The Virginia Uniform Trust Code instead provides that the common law of trusts and principles of equity supplement the Uniform Trust Code, except as modified by statute (Va. Code Ann. § 64.2-704).

GIFTED PROPERTY ENCUMBERED

The Virginia Uniform Trust Code does not contain a provision regarding gifts of encumbered property.

EFFECT OF DIVORCE

In Virginia, unless the trust agreement expressly provides otherwise, if a settlor creates a revocable trust and if, subsequently:

- The settlor is divorced or the marriage is annulled (and the trust was revocable immediately before the divorce or annulment), then any provision of this revocable trust agreement transferring property to or conferring any beneficial interest on the settlor's former spouse is revoked on the divorce or annulment and the property or beneficial interest is administered as if the former spouse failed to survive the divorce or annulment.
- An action is filed either for the divorce or annulment of the settlor's marriage or for legal separation or by either the settlor or the settlor's spouse for separate maintenance, and the trust was revocable at the time of the filing, then any provision in the revocable trust agreement conferring a power, including a power of appointment, on the spouse or nominating or appointing the spouse as a fiduciary (including trustee, trust director, conservator, or guardian) is revoked on the filing, and the provision is interpreted as if the former spouse failed to survive the filing.

(Va. Code Ann. § 64.2-412(D).)

If the provisions of a revocable trust agreement are revoked solely under this statute and there is no subsequent trust revocation (other than under this statute) or no inconsistent trust amendment, those provisions are revived on the settlor's remarriage to the former spouse. This statute does not prevent a settlor from transferring property to, conferring a beneficial interest on, conferring a power on, or nominating or appointing as a fiduciary a spouse or former spouse after the event causing the revocation under this statute. (Va. Code Ann. § 64.2-412(E).)

Virginia Code Ann. Section 64.2-412 applies to trusts and trust provisions only to the extent the event causing the revocation under this statute occurs on or after July 1, 2018 (Va. Code Ann. § 64.2-412(G)).

SIMULTANEOUS DEATH

Unless the trust agreement includes a survivorship provision, a beneficiary must survive:

- A settlor by 120 hours or else the beneficiary is deemed to have predeceased the settlor.
- An event by 120 hours for purposes of a donative provision of a trust agreement.

(Va. Code Ann. §§ 64.2-2202, 64.2-2204, and 64.2-2205.) The beneficiary's death must be proven by at least clear and convincing evidence (Va. Code Ann. §§ 64.2-2202, 64.2-2204, and 64.2-2205).

CREDITOR PROTECTION

25. What, if any, creditor protection does a revocable trust provide in your state. In particular, please specify:

- Any protection provided regarding the settlor's debts during life.
- Any protection provided regarding the settlor's debts after the settlor's death.
- Any protection provided regarding the debts of the trust beneficiaries after the settlor's death.
- Whether revocable trust assets are considered available resources in determining Medicaid eligibility.

SETTLOR'S DEBTS DURING LIFE

The property of a revocable trust is subject to the claims of the settlor's creditors during the settlor's lifetime (Va. Code Ann. § 64.2-747(A)(1)).

SETTLOR'S DEBTS AFTER DEATH

If there is insufficient property in the settlor's probate estate after the settlor dies, subject to the settlor's right to direct the source from where liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to:

- The claims of the settlor's creditors.
- The costs of administering the settlor's estate.
- The costs relating to settlor's funeral and disposal of remains.
- Statutory allowances to a surviving spouse and children.

(Va. Code Ann. § 64.2-747(A)(3).)

DEBTS OF TRUST BENEFICIARIES AFTER SETTLOR'S DEATH

In Virginia, spendthrift provisions are enforceable for non-grantor beneficiaries of a trust who do not hold an *inter vivos* general power of appointment (Va. Code Ann. §§ 64.2-742, 64.2-743, and 64.2-744; *In re Salahi*, 2012 WL 1438213, at *3 (Bankr. E.D. Va. Apr. 25, 2012)).

A spendthrift provision is valid only if it limits both voluntary and involuntary transfers of a beneficiary's interest (Va. Code Ann. § 64.2-743(A)). A term of a trust providing that the beneficiary's interest is held subject to a "spendthrift trust" (or words of similar effect) is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest (Va. Code Ann. § 64.2-743(B)).

To the extent a beneficiary's interest is not subject to a spendthrift provision, a court may authorize a creditor to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. Courts can limit the awards as appropriate under the circumstances. (Va. Code Ann. § 64.2-742.)

However, even if a trust contains a spendthrift provision, the following parties may obtain a court order attaching present or future distributions to or for the beneficiary's benefit:

- A beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance.
- A judgment creditor who has provided services for the protection of a beneficiary's interest in the trust.

(Va. Code Ann. § 64.2-744(B).)

MEDICAID ELIGIBILITY

The Virginia Uniform Trust Code does not explicitly state that a beneficiary's interest in a trust negatively affects the beneficiary's eligibility for Medicaid. However, if Virginia or federal law requires a beneficiary to reimburse the state or any agency for public assistance, the Attorney General of Virginia may file a petition in a circuit court requesting reimbursement. The court may order the trustee to either satisfy all or part of the liability out of all or part of the amounts:

- The beneficiary is entitled to, presently or in the future, to the extent the beneficiary has the right under the trust to compel the trustee to pay income or principal to or for the beneficiary's benefit.
- That the trustee chooses to make to or for the beneficiary's benefit in the exercise of discretion under the trust, regardless of whether

the beneficiary can compel the trustee to pay income or principal to or for the beneficiary's benefit.

(Va. Code Ann. § 64.2-745.)

COURT SUPERVISION AND PRIVACY

26. Is a revocable trust court supervised on the death of the settlor?

Virginia courts generally do not supervise revocable trusts after the settlor's death. However, a person may file a claim to contest the validity of a trust that was revocable at the settlor's death within the earlier of either:

- Two years after the settlor's death.
- Six months after the trustee sent the person a copy of:
 - the trust agreement; and
 - a notice informing the person of the trust's existence, the trustee's name and address, and the time allowed to file a claim.

(Va. Code Ann. § 64.2-753(A).)

27. Does an estate plan that includes a revocable trust afford a settlor more privacy than a will-based estate plan?

In Virginia, an estate plan that includes a revocable trust agreement separate from a will provides a settlor more privacy than a will-based estate plan. A will and the information provided to the court is available to the public (Va. Code Ann. §§ 64.2-500 to 64.2-510). However, a revocable trust is generally administered without a public proceeding.

28. Are the beneficiaries of a revocable trust entitled to notice of its existence, or any other information, during the settlor's life or when the settlor dies?

In Virginia, the qualified beneficiaries of a revocable trust are entitled to notice of the trust's existence within 60 days after:

- The trustee accepts the trusteeship.
- The trust becomes irrevocable.

(Va. Code Ann. § 64.2-775.)

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