

## Revocable Trusts: Virginia

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Status: Law stated as of 15 Jun 2022 | Jurisdiction: United States, 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. Answers to questions can be compared across a number of jurisdictions (see Revocable Trusts: State Q&A Tool).

Estate planning, estate and trust administration, and estate and trust taxation filing deadlines may be impacted by emergency measures enacted in response to the 2019 novel coronavirus disease (COVID-19). For current updates on certain state and local laws and procedures impacted by COVID-19, including electronic signature, notarization, and witnessing laws and emergency orders, court closures, deadline extensions, and updated procedures, tax extensions, and general emergency estate planning guidance, see [Private Client Global Coronavirus Toolkit](#).

### 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?

Virginia revocable trusts are governed by:

- The Virginia Uniform Trust Code (Va. Code Ann. §§ 64.2-700 to 64.2-808).
- Certain additional statutes governing wills, trusts, and fiduciaries (Va. Code Ann. §§ 64.2-100 to 64.2-132 and 64.2-2200 to 64.2-2741).
- Virginia case law.

Revocable trusts with pour-over wills are commonly used as will substitutes in Virginia. Counsel should consider many factors when deciding whether to recommend a will or a revocable trust-based estate plan. Factors include the client's:

- Wealth. A revocable trust-based plan often makes more sense for a wealthy client than for a client of limited means who is likely to have a simple probate.
- Tolerance for complexity. Funding a revocable trust and continuing to fund it with newly acquired assets on an ongoing basis can be daunting for some clients.
- Likelihood of becoming incapacitated in the near-term. If funded, a revocable trust allows a trustee to manage the client's trust assets if the client becomes incapacitated. If there is no revocable trust, a conservatorship is likely to be needed, unless assets can be managed during the client's incapacity by an agent acting under a durable power of attorney.
- Desire for privacy. Revocable trusts generally afford clients more privacy than wills (see Question 27).

### Who Can Create a Revocable Trust

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



In Virginia, the standard for a settlor's capacity to create a revocable trust is the same as a testator's capacity to create a will. To create a will, an individual must be either:

- At least 18 years old.
- An emancipated minor.

(Va. Code Ann. §§ 1-207, 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 for a settlor's mental capacity to create a revocable trust is the same as a testator's capacity to create 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 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).)

An individual may be competent even if the individual is:

- Under a guardianship.
- Adjudicated as lacking sanity.
- Elderly.
- Eccentric.

(See *Gilmer v. Brown*, 44 S.E.2d 16, 19 (Va. 1947); *Tate v. Chumbley*, 57 S.E.2d 151, 158 (Va. 1950).) Mental weakness is not inconsistent with testamentary capacity. A lower degree of mental capacity is required to execute a will than to execute a contract and transact ordinary business (*Gilmer*, 44 S.E.2d at 19).

### 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 principal's benefit if the power of attorney document expressly authorizes the agent to create a trust for the principal (Va. Code Ann. §§ 64.2-719 and 64.2-720(A)(1); [Standard Document: Power of Attorney \(VA\)](#)).

## Guardian or Conservator

A conservator may create a revocable trust for an incapacitated person's benefit if a court approves the trust. 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; and
  - the incapacitated person's 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.
- Other factors the court deems relevant.

(Va. Code Ann. §§ 64.2-719(A)(4) and 64.2-2023.)

## 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 does not fail for lack of a trustee. A court can appoint a trustee if the settlor does not name one (see *Fitzgerald v. Doggett's Ex'r*, 155 S.E. 129, 134 (Va. 1930); Question 13: Appointment of Successor Trustee). A trustee:

- Must have active duties to perform.
- Cannot be the sole trustee and beneficiary. The settlor of a revocable trust is also frequently the sole trustee and the sole current beneficiary during the settlor's life. However, because the settlor names remainder beneficiaries to receive trust assets on the settlor's death, the settlor is generally not considered the sole beneficiary of the trust, and this requirement is not violated

(Va. Code Ann. §§ 64.2-720(4), (5), and 64.2-1400.)

### Beneficiary Requirements

A trust must have a definite beneficiary unless it is:

- A charitable trust.
- A trust for the care of an animal, as provided in Va. Code Ann. § 64.2-726.
- A trust for a noncharitable purpose as specified in Va. Code Ann. § 64.2-727.

(Va. Code Ann. § 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 Ann. § 64.2-720(B); see Question 12: Rule Against Perpetuities).

A trust may specify that a trustee has the power to select a beneficiary from an indefinite class. If the trustee does not select a beneficiary within a reasonable time, the property passes to the party taking the property if the trust did not confer that power. (Va. Code Ann. § 64.2-720(C).)

### Trust Property Requirements

A settlor can create a Virginia trust without transferring property into the trust at that time. A settlor can fund the trust primarily on a settlor's death, for example, by the settlor's will or beneficiary designations. (Va. Code Ann. §§ 64.2-719(A)(1) and 64.2-720.) However, funding primarily or exclusively at death is not recommended as administration of the settlor's property may require a probate and a conservatorship, if the settlor becomes

incapacitated and does not have a general, durable power of attorney. For more information on:

- Probate in Virginia, see [State Q&A, Probate: Virginia](#).
- Powers of attorney in Virginia, see [Standard Document, Power of Attorney \(VA\)](#).

In Virginia, 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 (but well before incapacity or death).

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

In Virginia, an *inter vivos* trust created on or after July 1, 2006 is revocable and amendable unless the trust terms expressly provide that the trust is irrevocable (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. A proponent of an oral trust must prove its creation and terms by clear and convincing evidence. (Va. Code Ann. § 64.2-725.) Despite this general rule, a trust generally must be in writing and comply with certain statutory formalities if:

- The settlor creates a pour-over will to transfer any of the settlor's property to the trust (Va. Code Ann. § 64.2-427(A); see Question 9).
- The trust disposes of real property (Va. Code Ann. § 55.1-101).

In practice, counsel should always put a revocable trust in writing because:

- For general estate planning purposes, the settlor almost always creates a pour-over will with a trust.
- Even if a settlor does not initially intend to transfer real property to the settlor's revocable trust, the settlor may want to do so later.
- To make clear the settlor's intentions regarding the trust terms.

### 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 signing the trust agreement typically indicates the settlor's intention to create a trust. Settlers should sign their revocable trusts.

#### Trustee's Signature

Virginia law does not require that a trustee sign a trust agreement. However, it is common in Virginia for the trustee to sign the trust agreement to formally accept the trusteeship (see Question 14). For most revocable trusts created for estate planning purposes, the settlor is also the trustee and signs in both capacities. When the initial trustee is not the settlor, that trustee typically signs the revocable trust agreement separately to indicate the trustee's acceptance of the trust..

#### Witness Requirements

Virginia law does not require witnesses to sign a revocable trust agreement for the trust to be valid. In Virginia, it is uncommon for witnesses to sign a revocable trust agreement.

#### Notary Requirements

Virginia law does not require that a revocable trust agreement be notarized. In Virginia, the settlor's signature on a revocable trust agreement is often notarized, even though it is not required, especially if the trust may contain real property (see Question 7). Financial institutions often prefer the trust to be notarized to avoid fraud and portions of the trust (or a trust certificate) may need to be recorded if the trust disposes of real property.

## 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:

- In a writing executed before, with, or after the will.
- Identified in the will.
- In existence or established at the testator's death.

(Va. Code Ann. § 64.2-427(A).) Virginia does not invalidate the disposition of property to the revocable trust because the trust is amendable or revocable, or was amended after the execution of the will or testator's death (Va. Code Ann. § 64.2-427(A)).

Counsel should:

- Have a 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 executing the will.
- 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

Any 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.

(Va. Code Ann. § 64.2-104; *Lawless v. Lawless*, 47 S.E.2d 431, 434-35 (Va. 1948).)

### Rights of Surviving Spouse

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

In Virginia, if the decedent's surviving spouse receives less from the decedent 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. §§ 64.2-308.1 to 64.2-308.17). 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). For more information on elective share and certain other marital rights to a decedent's estate in Virginia, see [State Q&A, Wills: Virginia: Question 8](#).

Assets in a deceased spouse's revocable trust generally are included in the augmented estate that is potentially subject to the surviving spouse's elective share (Va. Code Ann. § 64.2-308.4).

#### 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 (*Commonwealth v. Terjen*, 90 S.E.2d 801, 802 (Va. 1956)). Virginia adopted the Uniform Disposition of Community Property Rights at Death Act (Va. Code Ann. §§ 64.2-315 to 64.2-324). The act applies at death to:

- All personal property, wherever situated, that:
  - was acquired as or became, and remained, 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 or disposition under Virginia's intestacy statutes.
- The other half of the community property is the decedent's property and is subject to testamentary disposition or distribution under Virginia's intestacy statutes.

(Va. Code Ann. § 64.2-317.)

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(B).)

### Tenants by the Entirety

Property a married couple holds as tenants by the entirety is immune to claims of the spouse's separate creditors, but subject to the spouse's joint creditors (*Vasillion v. Vasillion*, 66 S.E.2d 599, 602 (Va. 1951)). If the property is conveyed to the married couple's joint revocable trust or to their separate revocable trusts, the property, 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 remains married.
- The property continues to be held in trust.
- The property continues to be the couple's property, including 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, even if other people are also current or future beneficiaries of the trusts.

(Va. Code Ann. § 55.1-136(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

Virginia disfavors forfeiture of property. Therefore, though Virginia enforces no-contest clauses, also known as *in terrorem* clauses, in revocable trusts that are a part of a settlor's testamentary estate plan, Virginia strictly construes them according to their terms (*Keener v. Keener*, 682 S.E.2d 545, 548 (Va. 2009); *Rafalko v. Georgiadis*, 777 S.E.2d 870, 875 (Va. 2015)). A broad no-contest clause is more likely to be invalidated 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, into the trust instrument trustee fiduciary powers, including those stated in:

- Va. Code Ann. § 64.2-105 (specifying certain powers of fiduciaries).
- Va. Code Ann. § 64.2-769 (specifying duties and powers delegated by the trustee).
- Va. Code Ann. § 64.2-777 (specifying the trustee's general powers).
- Va. Code Ann. § 64.2-778 (specifying the trustee's specific powers).

Trust documents in Virginia generally grant the trustee all the powers and authorities in the Virginia Uniform Trust Code, subject to any provisions of the trust instrument

that conflict with those powers. While this is effective to give the trustee the statutory powers, trust instruments also typically expressly list some or all of the powers that are afforded by law.

#### Virtual Representation

To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

- The holder of a power of attorney may represent and bind persons with interests subject to the power.
- A conservator or guardian of the estate may represent and bind the estate that such fiduciary controls.
- A guardian may represent and bind the ward if a conservator or guardian of the ward's estate has not been appointed.
- An agent having authority to act with respect to the particular question or dispute may represent and bind the principal.
- A trustee may represent and bind the beneficiaries of the trust.
- A personal representative of a decedent's estate may represent and bind persons interested in the estate.
- A parent may represent and bind the parent's minor or unborn child if a guardian of the estate or guardian for the child was not appointed.
- If a minor or unborn person is not otherwise represented under this section, a grandparent or more remote ancestor may represent and bind that minor or unborn person.

(Va. Code Ann. § 64.2-716.)

Unless otherwise represented, the following categories of individuals may be represented and bound by another person or entity with 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.

(Va. Code Ann. § 64.2-717.) These individuals 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).



The court may appoint a representative if the court determines an interest is not represented (Va. Code Ann. § 64.2-718).

### Rule Against Perpetuities

A nonvested property interest is invalid unless either:

- When the interest is created, the interest must vest or terminate within 21 years after the death of an individual then alive.
- The interest either vests or terminates within 90 years after creation.

(Va. Code Ann. § 55.1-124(A).)

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. § 55.1-127(A)(8).)

### Rule Against Perpetuities Sample Clause

"Pursuant to Virginia Code § 55.1-127(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

Virginia determines the meaning and effect of a trust's terms under the law of the jurisdiction either:

- 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.
- With 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 a Virginia trust agreement is both:

- Made or delivered in Virginia.
- Governed by Virginia law.

### Principal Place of Administration

Without precluding other means for establishing a sufficient connection with the designated jurisdiction, the terms of an *inter vivos* trust designating the principal place of administration are valid and controlling if either:

- A trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction.
- A trust director's principal place of business is located in or a trust director is a resident of the designated jurisdiction.
- All or part of the administration occurs in the designated jurisdiction.

(Va. Code Ann. § 64.2-706(A).)

Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee of an *inter vivos* trust may transfer the trust's principal place of administration to another state or to a jurisdiction outside the US that is appropriate to:

- The trust's purposes and administration.
- The interests of the beneficiaries.

(Va. Code Ann. § 64.2-706(B).)

The trustee must timely notify the qualified beneficiaries of the proposed transfer of the trust's principal place of administration of:

- The name of the jurisdiction to which the principal place of administration is to be transferred.
- The address and telephone number at the new location at which the trustee can be contacted.
- An explanation of the reasons for the proposed transfer.
- The date on which the proposed transfer is anticipated to occur.
- The date, not less than 60 days after the giving of the notice, by which the qualified beneficiaries must notify the trustee of an objection to the proposed transfer.

(Va. Code Ann. § 64.2-706(C); see Question 13: Qualified Beneficiary.)

The trustee's authority to transfer a trust's principal place of administration is terminated if a qualified beneficiary

notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice (Va. Code Ann. § 64.2-706(D)).

A corporate trustee in which all or significant portions of the trust's administration are performed outside Virginia is not deemed to have transferred its principal place of administration if the company maintains a place of business in Virginia where one or more trust officers are available on a regular basis for personal contact with trust customers and beneficiaries (Va. Code Ann. § 64.2-706(C)).

In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed under Va. Code Ann. § 64.2-757 (Va. Code Ann. § 64.2-706(E)).

### Transfer of Assets to Trust by Schedule

A settlor can fund a Virginia revocable trust primarily at any time after its creation during the settlor's lifetime or on a settlor's death, for example, by the settlor's will or beneficiary designations. (Va. Code Ann. §§ 64.2-719(A)(1) and 64.2-720; see Question 5: Trust Property Requirements.) Virginia does not have a law 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.

A typical trust instrument includes a Schedule A, which lists the property initially transferred to the trust at its execution. However, many revocable trust instruments recite only a nominal amount on Schedule A (for example, "ten dollars (\$10)"). The rest of the funding occurs after the trust is created as the settlor transfers assets to the trust.

Listing specific assets on Schedule A rather than a nominal amount can be problematic. If the schedule is not constantly updated as assets are sold or acquired, disputes may arise later about what assets are actually held by the trust. Simply listing assets intended to be owned by the trust on Schedule A is also insufficient to actually transfer title of the property to the trust. It may be best for Schedule A to show only a nominal amount rather than a comprehensive list of assets.

For more information on funding revocable trusts and for examples of relevant jurisdiction-neutral forms, see the resources in the [Revocable Trust Funding and Administration Toolkit](#).

## 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 acting.

### Qualification as Trustee

In Virginia, any natural person may serve as a trustee unless the person is:

- Incapable of administering the trust because of physical or mental disability or imprisonment.
- No longer a Virginia resident if residency is statutorily required.
- For a corporate trustee, adjudicated bankrupt or losing its charter.
- For any other good cause shown.

(Va. Code Ann. § 64.2-1405(A).)

The following entities may serve as a trustee:

- A corporation authorized to engage in trust business in Virginia under federal banking laws.
- A bank incorporated in Virginia with a separate trust department.
- A trust company, trust subsidiary, or 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 (Va. Code Ann. § 64.2-1426(B)). However, if that 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.

### Drafting Attorney as Trustee

A settlor may want to name the attorney preparing a revocable trust agreement as trustee of one or more



trusts created under the trust instrument. However, in these circumstances, counsel must make certain:

- The terms of the appointment are fair and reasonable to the client..
- The terms of the appointment are fully disclosed and transmitted in writing to the client in a manner the client can reasonably understand.

The client is given reasonable opportunity to seek the advice of independent counsel to the transaction.

The client consents in writing to the appointment.

(Virginia Rules of Professional Conduct, Rule 1.8.)

The Virginia Supreme Court approved a legal ethics opinion discussing the circumstances under which an attorney may draft an instrument in which the client names the attorney as trustee (or executor). These circumstances include that:

- An attorney-client relationship preexisting the attorney-client relationship deriving from preparing the client's trust instrument, though not required, is a significant factor concerning the appropriateness of an attorney being named as trustee in a document drafted by the attorney. The lack of any preexisting attorney-client relationship enhances the potential for a finding of undue influence. Whether or not a pre-existing attorney-client relationship is involved, an attorney must carefully consider the settlor's state of mind and health before recommending the attorney or a member of the attorney's firm for future employment as trustee.
- The attorney must:
  - fully disclose to the settlor the attorney's potential fees as trustee or attorney to the trust before the settlor executes the trust instrument. The attorney has a duty to suggest that the settlor investigate potential fees of others who could provide trustee services.
  - disclose and obtain consent of the settlor before the settlor executes the trust instrument when the attorney intends to or considers retaining the attorney's law firm as attorney for the trust. The disclosure must include the general compensation to be paid to the law firm.
- The attorney should only act as trustee when the attorney can act with competence and demonstrate the specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by attorneys undertaking similar matters.

- The attorney should not consciously influence the settlor to name the attorney as trustee in a trust instrument.

(Virginia State Bar: Legal Ethics Opinion #1515.)

### Appointment of Successor Trustee

A vacancy in trusteeship occurs if:

- The person designated as trustee rejects the trusteeship (see Question 15).
- The person designated as trustee cannot be identified or does not exist.
- The trustee resigns (Question 19).
- The trustee is disqualified or removed (Question 18).
- The trustee dies.
- The trustee is incapacitated.

(Va. Code Ann. § 64.2-757(A).) Unless otherwise provided in the trust agreement, 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 the court appointed under Va. Code Ann. §§ 64.2-1405, 64.2-1406, or 64.2-712.

(Va. Code Ann. § 64.2-757(C).)

### Qualified Beneficiary

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 that date without causing the trust to terminate.
- Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(Va. Code Ann. § 64.2-701.)

### Directed Trusts

Virginia enacted the Uniform Directed Trust Act effective July 1, 2020 (Va. Code Ann. §§ 64.2-779.26 to 64.2-779.38). The act applies to a trust either:

- Created on or after July 1, 2020.
- Amended by a settlor on or after July 1, 2020.
- Amended or modified on or after July 1, 2020 by:
  - a nonjudicial settlement agreement; or
  - a second-trust instrument under the Uniform Trust Decanting Act.
- Containing a specific reference that the trust was made subject to Va. Code Ann. § 64.2-770(E) prior to if the trust existed before July 1, 2020.

(Va. Code Ann. § 64.2-779.27(A).)

### Definitions

In a directed trust, the trust agreement terms grant a person other than a trustee the power over some aspect of the trust's administration (Va. Code Ann. § 64.2-779.26). There is no consistent vocabulary in Virginia to describe the person, though the person is often called a trust director, trust advisor, or trust protector.

The trust director holds a power of direction. A trustee that is subject to the power of direction is called a directed trustee. The power of direction may include:

- A power over the investment, management, or distribution of trust assets or other trust administration powers, such as the power to amend or terminate the trust agreement.
- The grant or revocation of a general power of appointment.

(Va. Code Ann. § 64.2-779.29, 64.2-779.30, and 64.2-779.32.)

Unless the trust terms provide otherwise, trust directors with joint powers must act by majority decision (Va. Code Ann. § 64.2-779.29(B)(1)).

In Virginia, the trust director is often an attorney specializing in estate and trust planning and administration as well as tax planning. Because of the potential tax implications involved in holding a power of direction, many practitioners limit the pool of potential trust directors to American College of Trust and Estate Counsel (ACTEC) Fellows. Most of the time, practitioners also limit the role of trust director to someone not:

- A beneficiary under the trust agreement.
- The settlor.

- Related or subordinate parties under 26 U.S.C. § 672(c), including:
  - the settlor;
  - the settlor's spouse; or
  - any of the settlor's descendants (issue).

### Actions Against a Trust Director

For an action against a trust director for breach of trust:

- The action must be commenced within the same time limits outlined in Va. Code Ann. § 64.2-796 for breach of trust by a trustee in a like position and under similar circumstances (Va. Code Ann. § 64.2-779.35).
- A report or accounting has the same effect on the time limits that the report or accounting has under Va. Code Ann. § 64.2-796 in an action for breach of trust against a trustee in a like position and under similar circumstances (Va. Code Ann. § 64.2-779.35).
- The trust director may assert the same defenses a trustee in a like position and under similar circumstances could assert in an action for breach of trust against the trustee (Va. Code Ann. §§ 64.2-779.36 and 64.2-792 to 64.2-804).

A person accepting appointment as a trust director appointment submits to personal jurisdiction of the courts of Virginia regarding any matter related to a power or duty of the trust director (Va. Code Ann. § 64.2-779.37).

### Office of Trust Director

Unless the trust agreement provides otherwise, the rules applicable to a trustee apply to a trust director regarding:

- Acceptance (see Question 14).
- Giving of bond to secure performance.
- Reasonable compensation (see Question 16).
- Resignation (see Question 19).
- Removal (see Question 18).
- Vacancy and appointment of successor (see Appointment of Successor Trustee).

(Va. Code Ann. § 64.2-779.38.)

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

In Virginia, a trustee of a revocable trust agreement often signs the agreement to formally accept the trusteeship

(most frequently for revocable trusts created for estate planning purposes, the trustee is the settlor). However, Virginia law only requires that a trustee accept the designation by either:

- Substantially complying with a method of acceptance provided in the trust's terms.
- If the trust terms do not provide a method for acceptance or the trust terms do not expressly make its method exclusive, accepting delivery of the trust property, exercising powers, performing duties as trustee, or otherwise indicating acceptance of the trusteeship.

(Va. Code Ann. § 64.2-754(A).)

Without accepting the trusteeship, a nominated trustee may:

- Act to preserve the trust property if, within a reasonable time after acting, the nominated trustee sends a rejection of the trusteeship to:
  - the settlor; or
  - a qualified beneficiary, if the settlor is dead or lacks capacity.
- Inspect or investigate trust property:
  - to determine potential liability under environmental or other law; or
  - for any other purpose.

(Va. Code Ann. § 64.2-754(C); see Question 13: Qualified Beneficiary.)

### 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 did not accept the trusteeship, may reject the trusteeship, typically by either:

- Sending a written rejection to the settlor, current trustee, or beneficiaries.
- Refusing delivery of the trust property.

Virginia deems a designated trustee not accepting the trusteeship within a reasonable time after learning of the designation to reject the trusteeship (Va. Code Ann. § 64.2-754(B)).

## Trustee Compensation

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

In Virginia, if the trust agreement does not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances (Va. Code Ann. § 64.2-761(A)). Virginia does not provide statutory guidance as to what is reasonable compensation. However, trustees commonly take compensation on an annual basis, based on the fair market value of the trust assets at the beginning of the accounting period (see [Commissioner of Accounts, Henrico County: Guidelines for Fiduciary Compensation](#)).

If the trust agreement specifies the trustee's compensation, a court may allow more or less compensation if either:

- The trustee's duties are substantially different from those contemplated when the settlor created the trust.
- The compensation specified by the trust is unreasonably low or high.

(Va. Code Ann. § 64.2-761(B).) The trustee is entitled to be reimbursed out of trust assets, with appropriate interest, for:

- Expenses properly incurred in the trust administration.
- To the extent necessary to prevent unjust enrichment of the trust, expenses not properly incurred in the trust administration.

(Va. Code Ann. § 64.2-762.)

## Multiple Trustees

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

Under Virginia law, unless otherwise provided under the trust terms:

- Co-trustees not reaching a unanimous decision as to trust administration matters may act by majority decision. A co-trustee must participate in performing the matter unless the co-trustee:
  - cannot do so because the co-trustee is absent, ill, disqualified, or has another temporary incapacity; or
  - properly delegated the task to another trustee.(Va. Code Ann. §§ 64.2-703 and 64.2-756(A), (C).)
- 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; and

- 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 Ann. § 64.2-756(B)).

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 the trustees to perform jointly (Va. Code Ann. § 64.2-756(E)).

## 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 petition the court to remove a trustee. The court may remove a trustee on its own initiative. (Va. Code Ann. §§ 64.2-703 and 64.2-759(A).)

A court may remove a trustee if:

- The trustee committed a serious breach of trust. Virginia defines a breach of trust as a violation by a trustee of a duty the trustee owes to a beneficiary (Va. Code Ann. § 64.2-792; see Question 20). However, Virginia does not provide guidance as to what is 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 removing the trustee best serves the beneficiaries' interests.
- There was a substantial change in circumstances or all the qualified beneficiaries request removal and the court finds that:
  - removing the trustee best serves the interests of all 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); see Question 13: Qualified Beneficiary.)

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

In Virginia, a trustee may resign:

- Under the trust's terms.
- With the court's approval. The court may issue orders and impose conditions reasonably necessary for the protection of trust property.
- After providing at least 30 days' notice to:
  - the settlor, if living;
  - all co-trustees; and
  - the qualified beneficiaries, except those qualified beneficiaries under a revocable trust the settlor has the capacity to revoke.

(Va. Code Ann. §§ 64.2-703 and 64.2-758(A), (B); see Question 13: Qualified Beneficiary.)

## 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.)
- In administering, managing, and investing assets, comply with:
  - the prudent investor rule (Va. Code Ann. §§ 64.2-780 to 64.2-791); and
  - the Uniform Principal and Income Act (Va. Code Ann. §§ 64.2-1000 to 64.2-1032).(Va. Code Ann. § 64.2-763.)
- Administer the trust solely in the beneficiaries' interests, meaning that the trustee cannot engage in self-dealing, including transactions entered into with certain relatives or parties related to the trustee (except

under certain circumstances as provided in statute) (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 trust's purposes, 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 claimed to have a special skill or expertise (Va. Code Ann. § 64.2-768).
- Exercise reasonable care, skill, and caution in delegating duties and powers, as provided by statute and delegate only those duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances (Va. Code Ann. § 64.2-769).
- Keep the beneficiaries reasonably informed of the trust and its administration, including taking specific actions to provide information to certain trust beneficiaries as provided under statute (Va. Code Ann. § 64.2-775).
- Keep adequate records of the trust administration (Va. Code Ann. § 64.2-772(A)).
- Not commingle trust property with the trustee's own property or that of another trust (Va. Code Ann. § 64.2-772(B)).
- Take reasonable steps to control and protect the trust property, (Va. Code Ann. §§ 64.2-771 and 774).
- Take reasonable steps to enforce trust claims and defend claims against the trust (Va. Code Ann. § 64.2-773).
- Exercise discretionary power in good faith under the trust's terms and purposes and the beneficiaries' interests (Va. Code Ann. § 64.2-776).
- Provide requested information to a trust director if the information is reasonably related to the powers and duties of both the trustee and trust director. This duty does not apply if there is no acting trust director. (Va. Code Ann. § 64.2-779.33.)

### Directed Trusts

#### Duties and Liabilities of a Directed Trustee

A directed trustee must take reasonable action to comply with a trust director's exercise or non-exercise of a power

of direction or further power under Va. Code Ann. § 64.2-779.29. The trustee is not liable for taking the action. However, a directed trustee cannot comply with a trust director's exercise or non-exercise of a power of direction or other power to the extent complying causes the trustee to engage in willful misconduct. (Va. Code Ann. § 64.2-779.32(A), (B).)

An exercise of a power of direction under which a trust director releases a trustee or another trust director from liability for breach of trust is not effective if either:

- The breach involved the trustee's or other trust director's willful misconduct.
- The release was induced by improper conduct of the trustee or other trust director in procuring the release.
- At the time of the release, the trust director did not know the material facts relating to the breach.

(Va. Code Ann. § 64.2-779.32(C).)

If a directed trustee has reasonable doubt about the duty to act, the trustee may petition the court for instructions (Va. Code Ann. § 64.2-779.32(D)).

The trust agreement's terms may impose additional duties or liabilities on a directed trustee (Va. Code Ann. § 64.2-779.32(E)).

#### Duties and Liabilities of Trust Director

A trust director has the same fiduciary duty and liability in the exercise or non-exercise of a power as:

- A sole trustee in a like position and under similar circumstances if the power is held individually.
- A co-trustee in a like position and under similar circumstances if the power is held jointly with a trustee or another trust director.

(Va. Code Ann. § 64.2-779.31(A)(1).)

The trust agreement's terms may:

- Vary the trust director's duty or liability to the same extent the trust's terms could vary the duty or liability of a trustee in a like position and under similar circumstances (Va. Code Ann. § 64.2-779.31(A)(2)).
- Impose a duty or liability on a trust director in addition to the duties and liabilities imposed by the directed trust act (Va. Code Ann. § 64.2-779.31(C)).

Unless the trust's terms provide otherwise, a trust director has no duty or liability under the directed trust act if the trust director is licensed, certified, authorized, or permitted by law to provide healthcare in the ordinary

course of the trust director's business or professional practice to the extent the trust director acts in that capacity (Va. Code Ann. § 64.2-779.31(B)).

### Duty to Provide Information

Subject to Va. Code Ann. § 64.2-779.34, a trustee must provide information to a trust director to the extent the information is reasonably related to the powers or duties of both:

- The trustee.
- The trust director.

(Va. Code Ann. § 64.2-779.33(A).)

Subject to Va. Code Ann. § 64.2-779.34, a trust director must provide information to a trustee or another trust director to the extent the information is reasonably related to the powers or duties of both:

- The trust director.

The trustee or another trust director (Va. Code Ann. § 64.2-779.33(B).)

There is no liability for a breach of trust for:

- A trustee acting in reliance on information a trust director provided (to the extent the breach resulted from the reliance), unless by so acting the trustee engages in willful misconduct.
- A trust director acting in reliance on information a trustee or another trust director provided (to the extent the breach resulted from the reliance), unless by so acting the trust director engages in willful misconduct.

(Va. Code Ann. § 64.2-779.33(C), (D).)

### No Duty to Monitor, Inform, or Advise

Unless the trust agreement provides otherwise:

- A trustee does not have a duty to:
  - monitor a trust director; or
  - inform or give advice to a settlor, beneficiary, trustee, or trust director concerning where the trustee might have acted differently than the trust director.
- A trust advisor does not have a duty to:
  - monitor a trustee or another trust director; or
  - inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning where the trust director might have acted differently than a trustee or another trust director.

(Va. Code Ann. § 64.2-779.34.) By taking such described actions, a trustee or trust advisor does not assume the above-excluded duties (Va. Code Ann. § 64.2-779.34(A)(2), (B)(2)).

### 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. A trustee must take reasonable steps to:

- Enforce claims of the trust and defend claims against the trust (Va. Code Ann. § 64.2-773).
- 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 not joining in an action of another trustee is generally not liable for the actions of another trustee if the co-trustee joins in the trustee's action. However, 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(F), (G).)

A dissenting trustee is not liable for trustee 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. Virginia does not provide guidance on what is a serious breach of trust.

(Va. Code Ann. § 64.2-756(H).)

Virginia defines a breach of trust as a violation by a trustee of a duty the trustee owes to a beneficiary (Va. Code Ann. § 64.2-792; see Question 20). However, Virginia does not provide guidance as to what is a serious breach of trust.

The trust terms may relieve a co-trustee from a duty and liability regarding another co-trustee's exercise or nonexercise of a power of the other co-trustee to the same extent that, in a directed trust, a directed trustee is relieved from duty and liability regarding a trust director's power of direction under statute (Va. Code Ann. § 64.2-756(I)).



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

In Virginia, a trustee acting in reasonable reliance on the trust's terms 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).

A trust may include an exculpatory clause that waives trustee liability. 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 to the trust's purposes or beneficiaries' interests.
- Appears in the trust instrument because of the trustee's abuse of a fiduciary or confidential relationship with the settlor.

(Va. Code Ann. § 64.2-799(A).)

An exculpatory term drafted or caused to be drafted by the trustee is invalid unless the trustee proves the existence on contents of the exculpatory term were adequately communicated to the settlor (Va. Code Ann. § 64.2-799(B)).

The terms in a trust agreement may 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 the settlor's grandparent and deceased at the execution of the trust agreement or at the settlor's death, the deceased beneficiary's descendants surviving 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 leaving descendants surviving at 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. This statute is applicable only when both:

- The trust agreement or provision is revocable immediately before the settlor's death on or after July 1, 2018.
- The beneficiary would have taken because of the settlor's death if the beneficiary survived the settlor.

(Va. Code Ann. § 64.2-418(B), (C).)

Unless a contrary statement appears in the revocable trust agreement (and unless otherwise provided by statute), if a trust distribution other than a residuary (remainder) distribution fails, it becomes part of the residue (remainder). 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. This statute is applicable only when both:

- The trust agreement or provision is revocable immediately before the settlor's death on or after July 1, 2018.
- The distribution occurs because of the settlor's death.

(Va. Code Ann. § 64.2-416(B), (D).)

### Gift Not Owned by Settlor at Death (Ademption)

Ademption generally applies to distributions from a revocable trust in a similar manner as bequests under a

will. The beneficiary generally does not take the specific gift if the gift is not owned by the trust at the settlor's death. However, unless a contrary intention appears in the settlor's revocable trust agreement, ademption of specific gifts in the trust does not apply 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 the trustee owned 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 the entity initiated.
- The beneficiary receives any:
  - amount of any condemnation award for a taking of the gifted property remaining unpaid at death; and
  - proceeds unpaid at death on fire and casualty insurance on the gifted property.

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 a distribution of a pecuniary amount if, while the settlor was incapacitated, the trustee, agent under a durable power of attorney, conservator, or guardian sold this specific property or proceeds of fire or casualty insurance as to this property were paid to the trustee, agent under a power of attorney, conservator, or guardian. The pecuniary amount is the net sales price or insurance proceeds, reduced by the sums received under Virginia Code Ann. § 64.2-415(B)(2). No adjudication of the settlor's incapacity before death is necessary. This does not apply if the settlor ratifies the trustee's sale of the specific property or receipt of insurance proceeds or to a transaction entered into under a power of attorney limited to one or more specific purposes.

(Va. Code Ann. § 64.2-415(B), (C), (E).)

This statute applies to trusts only to the extent both:

- The trust agreement or provision is revocable immediately before the settlor's death on or after July 1, 2018.
- 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 how gifts abate (are used to satisfy the settlor's debts and obligations) where there are insufficient assets in the satisfaction of gifts. The Virginia Uniform Trust Code did not incorporate Uniform Trust Code Section 112, which incorporates will doctrines and rules including, 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).

Under Virginia case law, except as otherwise provided in the governing document, gifts abate in the following order (with gifts in each category abating ratably):

- Remainder (or residuary) gifts.
- General bequests (such as gifts of furniture or household gifts or bequests of money).
- Specific gifts of tangible personal property.
- Specific gifts of real property.

(*In re Estate of Carter*, 2002 WL 31432468, \*2 (Va. Cir. Ct. 2002).)

### Gifted Property Encumbered

The Virginia Uniform Trust Code does not contain a provision regarding gifts of encumbered property, but rather 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). Courts attempt to determine the settlor's intention on whether encumbered property is distributed to the beneficiary subject to or free of the encumbrance (whether the trust estate pays the encumbrance) (see *Kellam's Ex'rs v. Jacob*, 152 Va. 725, 148 S.E. 835, 837 (Va. 1929)).

The settlor should generally include language clarifying the settlor's intention as to whether encumbered property is distributed subject to or free of the encumbrance.

### Effect of Divorce

Unless the trust agreement expressly provides otherwise, if a settlor creates a revocable trust and subsequently:

- The settlor is divorced or the marriage is annulled (and the trust was revocable immediately before the divorce or annulment), 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 (Va. Code Ann. § 64.2-412(E)).

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. § 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 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 in Virginia (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 are to 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 (see [State Q&A, Wills: Virginia: Question 8](#)).

(Va. Code Ann. § 64.2-747(A)(3).)

### Debts of Trust Beneficiaries After Settlor's Death

Spendthrift provisions are generally enforceable to prevent creditors of trust beneficiaries, for non-settlor beneficiaries of a trust who do not hold an *inter vivos* general power of appointment, from reaching those beneficiaries interests while still held by the trust (Va. Code Ann. §§ 64.2-742, 64.2-743, and 64.2-744).

A spendthrift provision is valid only if it limits both voluntary and involuntary transfers of a beneficiary's interest. 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(A), (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.)

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 with a judgment or court order against the beneficiary for support or maintenance.
- A judgment creditor providing services for the protection of a beneficiary's interest in the trust.
- The US or Virginia (or any agency or instrumentality thereof) in reimbursement for public assistance benefits to the beneficiary.

(Va. Code Ann. §§ 64.2-744(B), (C) and 64.2-745.)

### Medicaid Eligibility

A provision in any *inter vivos* trust that provides directly or indirectly for the suspension, termination, or diversion of the principal, income, or other beneficial interest of the settlor if the settlor applies for medical assistance or requires medical, hospital, or nursing care or long-term custodial, nursing or medical care is generally ineffective against the Commonwealth of Virginia. The trust assets, both principal and interest, must be distributed as though the settlor's application was not made. This applies without regard to the trust's irrevocability or the settlor's purpose for creating the trust. (Va. Code Ann. § 64.2-108.2(B).)

These rules do not apply to any trust created before August 11, 1993, having a corpus of \$25,000 or less. If a trust created before August 11, 1993, has a corpus exceeding \$25,000, then \$25,000 of that corpus is exempt from the provisions of this statute. If the settlor created more than one trust as described in Virginia Code Ann. § 64.2-108.2(B), the \$25,000 exemption is prorated among the trusts. Further, if the settlor made

uncompensated transfers within 30 months of applying for Medicaid benefits and no payments were ordered under Virginia Code Ann. § 20-88.02(D), this \$25,000 exemption does not apply. (Va. Code Ann. §§ 20-88.02 and 64.2-108.2(C).)

However, this exemption under Virginia Code Ann. § 64.2-108.2(C) does not apply to any trust created on or after August 11, 1993 (Va. Code Ann. § 64.2-108.2(D)). However, to the extent any trust created between August 11, 1993 and July 1, 1994 would, but for Virginia Code Ann. § 64.2-108.2(D), be entitled to the exemption provided by Virginia Code Ann. § 64.2-108.2(C), the settlor may revoke that trust despite any irrevocability in the trust terms. Under this provision, the settlor cannot effect the vested rights of any beneficiary of this trust without that beneficiary's express written consent. (Va. Code Ann. § 64.2-108.2(E).)

The Virginia Uniform Trust Code does not explicitly state that a non-settlor 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:

- To which the beneficiary is entitled, 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:

- 2 years after the settlor's death.
- 6 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 provides a settlor more privacy than a will-based estate plan. A will and the information recorded with the circuit court clerk is available to the public (Va. Code Ann. § 17.1-208). However, a revocable trust is generally administered without a public proceeding (see Question 26).

### **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; see Question 13: Qualified Beneficiary.)

### **Settlor’s Powers: Powers of Withdrawal**

While a trust is revocable:

- The rights of beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor,
- The trustee may follow a direction of the settlor that is contrary to the terms of the trust.

(Va. Code Ann. § 64.2-752(A), (B).)

The holder of a power of withdrawal over revocable trust assets has, during the time when the holder may exercise the power, the rights of the settlor under Va. Code Ann. § 64.2-752, to the extent of the property subject to the power (Va. Code Ann. § 64.2-752(C)).

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