

# Revocable Trusts: West Virginia

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A Q&A guide to the laws governing revocable trusts in West Virginia. This Q&A addresses state laws and customs that impact revocable trusts (both during the time they are revocable and after they become irrevocable), including the key statutes and rules related to revocable trusts, the requirements for creating a valid revocable trust instrument, common revocable trust provisions, information concerning trustees, information on making changes to revocable trust instruments after execution, and West Virginia's treatment of certain special circumstances for gifts made under a revocable trust instrument and gift recipients. Answers to questions can be compared across a number of jurisdictions (see Revocable Trusts: State Q&A Tool). For similar information relating to irrevocable trusts in West Virginia, see State Q&A, Irrevocable Trusts: West Virginia.

For a Toolkit providing jurisdiction-neutral revocable trust forms that can be used with this Q&A, and other resources to help counsel draft revocable trust instruments under West Virginia law, see [State-Specific Revocable Trust Drafting 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?**

- W. Va. Code §§ 44-6-1 to 44-6-11 (investments by fiduciaries).
- The Uniform Product Management of Institutional Funds Act (institutional funds are generally those used by certain persons exclusively for charitable purposes) (W. Va. Code §§ 44-6C-1 to 44-6C-15).
- West Virginia case law.

## Key Statutes and Rules Governing Revocable Trusts

The rules and laws pertaining to revocable trusts in West Virginia are found in:

- The West Virginia Uniform Trust Code (W. Va. Code §§ 44D-1-101 to 44D-11-1105).
- W. Va. Code §§ 44-5A-1 to 44-5A-7 (powers of fiduciaries).
- The West Virginia Uniform Fiduciary Access to Digital Assets Act (W. Va. Code §§ 44-5B-1 to 44-5B-19).

## Revocable Trusts as Will Substitutes

Revocable trusts are frequently used to allow a settlor (referred to under statute as a grantor) to both:

- Manage their assets during life, including during any time when the settlor is incapacitated at which point the revocable trust may become irrevocable by its terms or may be functionally irrevocable by the settlor if the settlor does not have capacity to revoke it.
- Dispose of their assets at death, because a revocable trust is generally also used as a will substitute.

Many provisions included in revocable trust instruments are primarily useful only once the revocable trust becomes irrevocable, because while the trust is revocable the settlor generally has complete control over the trust and its provisions (W. Va. Code §§ 44D-6-602 to 44D-6-603).

Using revocable trusts as a will substitute is common in West Virginia, but wills alone (without using a revocable trust) are common as well. Counsel typically consider a number of factors when deciding whether to recommend a will or a revocable trust-based estate plan in West Virginia, including the client's:

- **Age.** A simple will may be sufficient for younger clients with straightforward family relationships who only have a few basic assets, most of which the individual can dispose of by beneficiary designation, survivorship right, or deed.
- **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 guardianship is likely to be necessary.
- **Desire for privacy.** Revocable trusts generally afford clients more privacy than wills (see Court Supervision and Privacy).
- **Fee tolerance.** Revocable trust-based plans typically cost more during the planning phase than will-based plans.
- **Creditor concerns.** If the client has creditor concerns it may make sense to use the West Virginia probate creditor claims process to potentially make use of a shortened statute of limitations for creditor claims (see Question 25: Settlor's Debts After Death).

For additional information on the differences between will and revocable trust-based estate plans, see [Practice Note, Choosing Between a Will and Revocable Trust](#).

## Who Can Create a Revocable Trust

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

In West Virginia, the capacity required to make a revocable trust is the same as the capacity required to make a will (W. Va. Code § 44D-6-601). An individual must be at least 18 years old to create a will or revocable trust (W. Va. Code §§ 41-1-1, 41-1-2, and 44D-6-601).

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

In West Virginia, the standard of mental capacity required to create a revocable trust is the same as the capacity required to make a will (W. Va. Code § 44D-6-601). A settlor must be of sound mind to create a revocable trust (W. Va. Code § 41-1-2). To be of sound mind to create a revocable trust, it is sufficient that a settlor have the mental capacity to:

- Understand the nature of the settlor's business in which the settlor is engaged (namely, creating a revocable trust).
- Recollect the property of which the settlor wishes to dispose.
- Understand the objects of the settlor's bounty.
- Understand the way the settlor wants to distribute the settlor's bounty.

(Syl. Pt. 6, in part, *James v. Knotts*, 705 S.E.2d 572 (W. Va. 2010).) Being elderly or eccentric are insufficient evidence by themselves to demonstrate lack of mental capacity to make a will or, therefore, a revocable trust (Syl. Pt. 6, *Prichard v. Prichard*, 65 S.E.2d 65 (W. Va. 1951)).

A settlor does not need to have capacity to create a trust if the trust is created in writing, during the settlor's lifetime, and by the settlor's agent acting under authority granted under a durable power of attorney, which expressly authorizes the agent to create a trust for the settlor (W. Va. Code § 44D-4-402(d)(2); see Question 4: Agent Under a Power of Attorney).

### 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 West Virginia, during the settlor's life, a settlor's agent may create a revocable trust for a settlor, if the agent acts according to authority granted under the settlor's durable power of attorney expressly authorizing the agent either:

- To create a trust for the settlor.
- To fund an existing trust of the settlor.

(W. Va. Code §§ 39B-2-101(a)(1) and 44D-4-401(b); see [Standard Document, Power of Attorney \(WV\): Drafting Note: Create, Amend, Revoke, or Terminate an Inter Vivos Trust.](#))

### Guardian or Conservator

In West Virginia, a conservator, with court authorization, may create a revocable trust for the settlor, when the settlor is the protected person, even if the trust extends beyond the settlor's life (W. Va. Code § 44A-3-7(a)(3)).

## Trust Requirements

### 5. What are the requirements for a valid trust in your state?

In West Virginia, except for court order, to create a valid trust, either:

- The settlor must indicate the settlor's intention to create the trust in writing.
- An agent creating the trust must create the trust in writing under a power of attorney containing express authorization.

(W. Va. Code § 44D-4-402(a)(2); see Question 4.)

### Methods of Creation

A trust may be created in West Virginia by:

- Transfer of property to another person as trustee during the settlor's lifetime by the settlor or by will

or by other disposition taking effect on the settlor's death.

- Written declaration by the property owner that the owner holds identifiable property as trustee.
- Exercise of a power of appointment in favor of a trustee.
- Court order.

(W. Va. Code §§ 44D-4-401(a) and 44D-4-402(a)(2).)

### Trust Purposes

A trust may be created only to the extent the purposes of the trust are:

- Lawful.
- Not contrary to public policy.
- Possible to achieve.

A trust and its terms must be for the benefit of the beneficiaries. (W. Va. Code § 44D-4-403.)

### Threshold Requirements

The threshold requirements to create a valid trust require that:

- The settlor has capacity to create a trust (see Question 3).
- The settlor indicates an intent, in writing, to create the trust.
- There is a definite beneficiary, unless the trust is:
  - a charitable trust;
  - for the benefit of an animal (W. Va. Code § 44D-4-408); or
  - a non-charitable trust with a specific intended use, in which case the trust may not be enforced for longer than the period allowable under the statutory rule against perpetuities period (W. Va. Code § 44D-4-409; see Question 12: Rule Against Perpetuities).
- A beneficiary is definite if the beneficiary can be ascertained currently or in the future subject to the applicable rule against perpetuities under W. Va. Code § 36-1a-1. A trustee's power to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons taking the property if the power was not conferred.

- The trustee has duties to perform.
- The same person is not the sole trustee and sole beneficiary. However, a trust is not invalid or terminated, and title to trust assets is not merged, because the trustee or trustees are also beneficiaries of the trust (W. Va. Code § 44D-4-402(e)). 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 not considered the sole beneficiary of the trust, and this requirement generally is not violated.

(W. Va. Code § 44D-4-402.)

A trust does not fail because it has no trustee (see Syl. Pt. 3, *Bond v. Bond*, 592 S.E.2d 801 (W. Va. 2003)). However, a vacancy in the trusteeship that leaves a trust without a trustee must be filled (see Question 13: Filling Vacancies in a Trusteeship).

### Effect of Fraud, Duress, Mistake, or Undue Influence

A trust is void to the extent its creation was induced by fraud, duress, or undue influence (W. Va. Code § 44D-4-406).

### Trust Property Requirements

West Virginia does not require property to be transferred into a trust when the trust is created for the trust to be valid. There are no West Virginia requirements regarding the existence, value, or character of the corpus to create a valid trust. (W. Va. Code § 44D-4-402(d)(1).) Trust funding can be accomplished primarily on a settlor's death by the settlor's will or by beneficiary designations (W. Va. Code § 41-3-8). However, funding primarily or exclusively at death likely defeats the primary purposes of a revocable trust-based plan if the settlor's intention is to avoid or minimize probate or to avoid the need for a guardianship on the settlor's incapacity.

For jurisdiction-neutral information on funding a revocable trust, see [Practice Note, Funding Revocable Trusts](#).

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

For West Virginia trusts executed on or after June 10, 2011, unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend a trust (W. Va. Code § 44D-6-602(a)). Typically, West Virginia revocable trusts include express language making the trust revocable and amendable to clarify the settlor's intent.

### Terms of a Trust

The West Virginia Uniform Trust Code defines the terms of a trust to mean either:

- The manifestation of the settlor's intent regarding a trust's provisions as:
  - expressed in the trust instrument; or
  - established by other evidence admissible in a judicial proceeding.
- The trust's provisions as established, determined, or amended by:
  - a trustee or trust director under applicable law;
  - a court order; or
  - a nonjudicial settlement agreement (W. Va. Code § 44D-1-111).

(W. Va. Code § 44D-1-103(v).)

### Trust Formalities and Execution Requirements

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

To create a trust in West Virginia, the settlor must indicate the settlor's intention to create the trust in writing (W. Va. Code § 44D-4-402(a)(2)). Oral trusts are unenforceable in West Virginia (W. Va. Code § 44D-4-407).

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

- The settlor's signature.
- The trustee's signature.
- Witnesses.
- Notarization.

### Signature and Witness Requirements

West Virginia law does not explicitly state that:

- The settlor's signature is required to create a valid trust. However, to create a trust, the settlor must indicate the settlor's intention to create a trust in writing (W. Va. Code § 44D-4-402(a)(2)). The settlor generally indicates this intention by signing the written trust instrument.
- The trustee's signature is required to create a valid trust. However, a common method of indicating that the trustee accepted the trusteeship is to sign the trust instrument. (W. Va. Code § 44D-7-701; see Question 14.) Since the settlor of a revocable trust is often the initial trustee, the settlor typically signs in the capacity of both settlor and trustee. When the initial trustee or an initial co-trustee is not the settlor, that trustee typically signs the revocable trust instrument to indicate the trustee's acceptance of the trust.

West Virginia law does not require witnesses to sign a revocable trust instrument for the valid execution of a trust. Witnesses generally do not sign West Virginia trust instruments.

If certain criteria are met, revocable trust instruments can be created and signed electronically and witnessed remotely and electronically (W. Va. Code § 44D-1-103(21)).

### Notary Requirements

West Virginia law does not require that a revocable trust instrument be notarized for the valid execution of a trust. However, although not mandatory, it is common to notarize the settlor's and trustee's signatures to minimize fraud.

## Relationship to Pour-Over Will

### 9. How is a revocable trust instrument used 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 instrument can be incorporated by reference into the pour-over will.

### Existence of Revocable Trust Before Execution of Will

In West Virginia, a testator may devise or give property to the trustee of a trust by will at the testator's death if both:

- The will identifies the trust.
- The trust's terms are stated in:
  - a written instrument, other than a will, executed before or with the execution of the testator's will; or
  - another individual's will if that other individual predeceased the testator.
- The devise or bequest remains valid even if the trust is amendable or revocable or if the trust was amended after the execution of the will or the testator's death.

(W. Va. Code § 41-3-8(a)(ii).)

For jurisdiction-neutral information on using a pour-over will with a revocable trust, including a pour-over will form, see [Standard Document, Pour-Over Will](#).

### Incorporation by Reference

In West Virginia, a testator may incorporate a document by reference into a will, including incorporating the terms of a revocable trust instrument into a pour-over will, if:

- The extrinsic document to be incorporated exists when the will is executed.
- The testator clearly intends to incorporate the extrinsic document into the will.

- The reference in the will identifies the extrinsic document with sufficient certainty that the written document referenced in the will is the written document proffered.

(See Syl. Pt. 4, *Cyfers v. Cyfers*, 759 S.E.2d 475, 482 (W. Va. 2014).) In West Virginia, it is common to incorporate the terms of a trust into a will, in case the revocable trust is or becomes not valid or otherwise ineffective.

### Rights of Surviving Spouse

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

In West Virginia, the surviving spouse of a decedent can elect, against either the decedent's will (if any) or the surviving spouse's intestate share (if the decedent died intestate), to take an elective share percentage of the decedent's augmented estate, with this percentage determined based on the length of the marriage (W. Va. Code § 42-3-1(a)). The surviving spouse may waive this right to the elective share (W. Va. Code § 42-3-3a).

The augmented estate used to calculate the elective share includes assets in a decedent's revocable trust (W. Va. Code §§ 42-3-2(b)(2)(iii) and 42-3-6). Therefore, a settlor cannot shield assets from a surviving spouse by transferring assets to a revocable trust.

For more information on the elective share in West Virginia, [State Q&A, Wills: West Virginia: Question 8](#).

#### 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

West Virginia is not a community property state and therefore preserving the character of property as community property is not a common issue in West Virginia. However, a married settlor with property that

was considered community property under the laws of another jurisdiction when the settlor acquired it can generally dispose of no more than half of that property at death (W. Va. Code §§ 44D-6-602(b) and 48-7-108).

### Tenants by the Entirety

West Virginia does not recognize tenancy by the entireties (Syl. Pt. 1, *Wartenburg v. Wartenburg*, 100 S.E.2d 562 (W. Va. 1957)).

### Common Revocable Trust Provisions

#### 12. Discuss specific provisions commonly found in a revocable trust instrument 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 West Virginia, no-contest clauses are enforceable, unless there is probable cause for the contest (*Dutterer v. Logan*, 137 S.E. 1, 3 (1927)). No contest clauses, if used, in West Virginia, are used more commonly in wills than in revocable trusts.

For additional information about no contest clauses, see [State No Contest Clause Laws Chart](#) and [Standard Clause, No Contest Clause for Will or Trust](#).

### Incorporation by Reference of Trustee Powers

In West Virginia, unless the terms of the trust instrument provide otherwise, a trustee of a trust governed by the West Virginia Uniform Trust Code

(WVUTC) has all powers under W. Va. Code § 44-5A-3 without the need for incorporation by reference of those powers in the trust instrument (W. Va. Code §§ 44D-8-815 and 44D-8-816). However, many trust instruments also typically expressly list some or all the powers afforded by law. Restating the trustee's powers in the trust instrument can:

- Help provide the trustee with guidance in particular circumstances.
- Convince individuals and financial institutions with whom the trustee is dealing that the trustee has the powers necessary to act.

### Direct Representation

West Virginia generally provides that, to the extent that there is no conflict of interest between the representative and the person represented regarding the particular question or dispute:

- The holder of a general testamentary power of appointment may represent and bind persons with interests subject to the power.
- A conservator or guardian of a protected person may represent and bind the estate that the fiduciary controls.
- An agent with authority to act regarding a particular question or dispute may bind the principal.
- A trustee may represent and bind the trust beneficiaries.
- 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 conservator or guardian for that minor or unborn child or descendant was not appointed.
- A grandparent or more remote ancestor may represent and bind a minor or unborn person, if that minor or unborn person is not otherwise represented.

(W. Va. Code §§ 44D-3-302 and 44D-3-303.)

These types of representation provisions allow for an interest holder to be directly represented in a proceeding by a fiduciary, parent, or other representative.

### Virtual Representation

Unless otherwise represented directly, an interest holder may be deemed to be represented in a dispute or question in certain circumstances. For example, if a class of beneficiaries (for example all trust remainder beneficiaries) consists of some adults and some minors, the minors can be virtually represented by the adults if the applicable criteria are met.

A minor, incapacitated, unborn, or unascertained individual (a person with an unknown location or identity that is not reasonably ascertainable) can be represented by another person:

- If the individual is not otherwise represented directly (see Direct Representation).
- If the representative has a substantially identical interest regarding the particular question or dispute.
- To the extent there is no conflict of interest between the representative and the person represented.

(W. Va. Code § 44D-3-304.)

If the court finds that a minor, incapacitated, unborn, or unascertained individual is not represented, or the direct or virtual representation would be inadequate, the court may appoint a representative to represent the individual or multiple individuals (W. Va. Code § 44D-3-305).

The West Virginia statutory representation rules apply whether a trust instrument specifically incorporates them or not, but it is best practice to include a virtual representation clause in West Virginia trust instruments.

For additional jurisdiction-neutral information regarding direct and virtual representation and a sample virtual representation clause, see [Standard Clause, Virtual Representation Clause for Wills and Trusts](#).

### Rule Against Perpetuities

In West Virginia, a trust must have a definite beneficiary, which is a beneficiary able to be ascertained now or in the future, subject to any applicable rule against perpetuities (W. Va. Code § 44D-4-402(a)(3), (b)).

West Virginia is a Uniform Statutory Rule Against Perpetuities (USRAP) state (W. Va. Code §§ 36-1A-1 to 36-1A-8). Under the West Virginia rule, a non-vested property interest must vest or terminate generally no later than either:

- 21 years after the death of an individual who is alive when the interest is created.
- 90 years after its creation.

(W. Va. Code § 36-1A-1.) West Virginia did not adopt the USRAP provision relating to certain perpetuities savings clauses, under Unif. Statutory Rule Against Perpetuities § 1(e).

### Rule Against Perpetuities Sample Clause for Revocable Trust Instrument

"In no event may the Trustee withhold delivery of income and principal to any beneficiary in such a manner as would violate the rule against perpetuities or any duration of trust rules."

### Governing Law

A governing law provision establishes each trust under the trust instrument as a West Virginia trust, but generally provides the trustee with the power to change the law governing the administration of any of the trusts after the settlor's death (if, for example, another jurisdiction has more favorable tax laws or the trustee relocates to that jurisdiction). In West Virginia, the meaning and effect of the terms of a revocable trust are governed by:

- The law of the jurisdiction designated in the terms of the trust instrument, unless the law designated is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue.
- If a jurisdiction is not designated in the terms of the trust instrument, the law of the jurisdiction in which the settlor is domiciled when the trust becomes irrevocable. An individual's domicile is the place where the individual resided with the intention to remain there, either permanently or for an indefinite period (*Sutton v. Sutton*, 36 S.E.2d 608, 611 (W. Va. 1945)).

(W. Va. Code § 44D-1-107.) West Virginia revocable trust instruments commonly include a governing law provision.

### Transfer of Assets to Trust by Schedule

West Virginia does not have a statute permitting or prohibiting the transfer of assets by schedule. However, in West Virginia it is common for revocable trusts to include a schedule to indicate the settlor's intention to transfer assets to a trust.

An initial schedule to a trust instrument does not typically include an exhaustive list of the settlor's assets. Rather, assets are more often transferred to the trust after the trust's creation. Most attorneys recite only a nominal amount on the schedule (for example, ten dollars (\$10)). The rest of the funding occurs after the trust is created as the settlor transfers assets to the trust, such as by assignment or by transfer of title.

Listing specific assets on a schedule to the trust rather than listing 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 a schedule to the agreement is also insufficient to actually transfer title of the property to the trust. For example, the settlor must complete the transfer of real property to a revocable trust by using a deed transferring the property to the trust. It is preferable for any schedule to the trust to recite only a nominal amount rather than a comprehensive list of assets.

For an example of:

- An assignment to trust, see [Standard Document, Assignment of Property to Revocable Trust](#).
- A letter transferring accounts to a revocable trust, see [Standard Document, Letter to Financial Institution: Transfer of Accounts to Revocable Trust](#).

For more information on funding a revocable trust, see [Practice Note, Funding Revocable Trusts](#).

### Homestead Interests in Trust

In West Virginia, a homestead interest held in a revocable trust is eligible for the property tax benefits otherwise afforded to homestead property if the trust instrument grants the person claiming these benefits a beneficial interest for life in the property (W. Va. Code §§ 11-6B-2 and 11-6B-3). To ensure that the property continues to receive these property tax



benefits, counsel should include language in both the revocable trust instrument and the deed that conveys the property to the trust making clear that the settlor has retained the interest.

### Trustee Appointment

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

- Who is eligible to act as trustee.
- Priority rules for filling vacancies in a trusteeship if the named trustees fail to qualify or stop acting.

#### Eligibility to Act as Trustee

In West Virginia, there are no specific statutory requirements for an individual to be eligible to act as a trustee. However, many trust instruments contain limitations regarding what persons may be appointed as trustee. For example, the settlor may:

- Require that a corporate trustee serve, rather than an individual.
- Require that a corporate trustee have a certain amount of assets under management to be eligible to serve.
- Prohibit a beneficiary from serving as the trustee of the beneficiary's own trust.

In addition, a trustee may be removed in certain circumstances (W. Va. Code § 44D-7-706; see Question 18).

#### Drafting Attorney as Trustee

West Virginia generally permits naming an attorney preparing a revocable trust instrument, who is not related to the settlor, as trustee of one or more trusts created under the trust instrument if certain conditions are met (W. Va. Rules of Professional Conduct, Rule 1.8, cmt. Gifts to Lawyers). If the attorney prepares a document appointing the attorney (or, out of an abundance of caution, a person related to the attorney) to a fiduciary office:

- The client must be properly informed.
- The appointment must not violate W. Va. Rules of Professional Conduct, Rule 1.7 regarding material limitation conflicts.

- The appointment must not be the product of undue influence or improper solicitation by the attorney.
- The client must give informed consent, preferably confirmed in writing. When obtaining informed consent, the attorney should advise the client regarding which parties are eligible to serve as a fiduciary, that a person serving as a fiduciary is entitled to compensation, and that the attorney may be eligible to receive compensation for serving as fiduciary in addition to the attorneys' fees that the attorney or the attorney's firm may earn for serving as attorney for the fiduciary.

(W. Va. Rules of Professional Conduct, Rule 1.8, cmt. Gifts to Lawyers.)

For additional jurisdiction-neutral information regarding the ethics rules that apply to estate planning attorneys, see [Ethics in Estate Planning: Key Issues Checklist](#).

#### Filling Vacancies in a Trusteeship

Under West Virginia law, a vacancy in a trusteeship occurs if:

- A person designated as trustee rejects the trusteeship (see Question 15).
- A person designated as trustee cannot be identified or does not exist.
- A trustee resigns (see Question 19).
- A trustee is disqualified or removed (see Question 18).
- A trustee dies.
- The court appoints a guardian or conservator for an individual serving as a trustee.

(W. Va. Code § 44D-7-704(a).)

Unless the terms of the trust instrument provides otherwise:

- If a trust has one or more co-trustees, a vacancy is not required to be filled. However, a vacancy must be filled if a trust has no remaining trustee. (W. Va. Code § 44D-7-704(b).)
- A vacancy of a noncharitable trusteeship that must be filled must be filled in the following order, by a person:
  - designated in the terms of the trust instrument to act as successor trustee;
  - appointed by unanimous written agreement of the qualified beneficiaries (see [Qualified Beneficiaries and Current Beneficiaries](#)); or

- appointed by the court with jurisdiction over the trust.
- (W. Va. Code § 44D-7-704(c).)
  - A vacancy of a charitable trusteeship that must be filled must be filled in the following order, by a person:
    - designated in the terms of the trust instrument to act as successor trustee;
    - selected by the charitable organizations expressly designated to receive distributions under the terms of the trust instrument if the West Virginia Attorney General either concurs in writing or fails to make a written objection to the selection within 90 days after receiving by certified or registered mail a notice of the selection by the charitable organizations; or
    - appointed by the court with jurisdiction over the trust.
- (W. Va. Code § 44D-7-704(d).)

For more jurisdiction-neutral information regarding appointing successor trustees and a form for appointing a successor trustee for a revocable trust when the settlor:

- Is the outgoing trustee, see [Standard Document, Appointment of Successor Trustee for Revocable Trust: Settlor is Outgoing Trustee](#).
- Is not the outgoing trustee, see [Standard Document, Appointment of Successor Trustee for Revocable Trust: Settlor is Not Outgoing Trustee](#).

### Qualified Beneficiaries and Current Beneficiaries

The qualified beneficiaries of a trust at any given time are:

- The current or permissible recipients of trust income or principal.
- Those who would be current or permissible recipients of trust income or principal if the interests of the current permissible recipients terminated at that time without causing the trust to terminate.
- Those who would be current or permissible recipients of trust income or principal if the trust terminated at that time.

(W. Va. Code § 44D-1-103(18).)

A current beneficiary is beneficiary that at the time of determination has a present permissible right to

receive trust income or principal (W. Va. Code § 44D-1-103(7)). A current beneficiary is always a qualified beneficiary, but a qualified beneficiary is not always a current beneficiary.

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

In West Virginia, a nominated trustee can accept the appointment by substantially complying with the method of acceptance in the terms of the trust instrument. If the terms of the trust instrument do not provide a method for accepting the trusteeship or do not provide that its method is the exclusive method for doing so, the trustee can accept the trusteeship by:

- Accepting delivery of the trust property.
- Exercising powers or performing duties as trustee.
- Otherwise indicating acceptance of the trusteeship, including signing a written instrument stating the trustee's acceptance.

(W. Va. Code § 44D-7-701(a).)

Without accepting the trusteeship, a nominated trustee may:

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

(W. Va. Code § 44D-7-701; see Question 13: Qualified Beneficiaries and Current Beneficiaries.)

A nominated trustee should always accept a trusteeship in writing to make their intention to accept clear.

For a jurisdiction-neutral form for accepting an appointment as trustee, see [Standard Document, Acceptance of Trusteeship](#).

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

West Virginia deems a person designated as trustee, who has not accepted the trusteeship within a reasonable period of time after knowing

of the designation, to reject the trusteeship (W. Va. Code § 44D-7-701(b)). West Virginia law does not provide for specific acts to decline a trusteeship. It is common practice for a designated trustee to decline a trusteeship in writing, and deliver the declination to the settlor, if living and with capacity, and the current beneficiaries (see Question 13: Qualified Beneficiaries and Current Beneficiaries).

For a jurisdiction-neutral form for declining an appointment as trustee, see [Standard Document, Declination of Trusteeship](#).

### Trustee Compensation

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

If the terms of a trust instrument do not specify the trustee's compensation, the trustee is entitled to compensation that is reasonable under the circumstances (W. Va. Code § 44D-7-708(a)). If the terms of a trust instrument specify the trustee's compensation, the trustee is entitled to be compensated as specified (W. Va. Code § 44D-7-708(b)).

However, on petition of the settlor, a qualified beneficiary, the trustee or co-trustee, the court may allow for more or less compensation than that specified in the terms of the trust instrument if either:

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

(W. Va. Code § 44D-7-708(b)(1), (2); see Question 13: Qualified Beneficiaries and Current Beneficiaries.)

If it is likely that an individual trustee is to be appointed and receive compensation, counsel should consider with the client whether including a specific trustee compensation formula or amount is preferable to applying the non-specific reasonable compensation standard.

Corporate trustees typically take compensation according to their fee schedule. In addition to the typical corporate trustee fee for ongoing trust

administration, corporate trustees of revocable trusts also often charge an estate settlement fee. Because the revocable trust is used as a will substitute, the estate settlement fee is intended to compensate the trustee for the role it takes in the trust administration immediately following the settlor's death. These early actions of the trustee are typically similar to the actions of a personal representative when assets are passed by will and are distinct from the typical duties of a trustee.

The terms of a trust instrument may also provide that some or all of the named trustees are not entitled to commissions. However, this is not recommended as it may discourage trustees from serving. Trustees generally may waive compensation, as commonly is the case for trustees who are beneficiaries.

A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, 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.

(W. Va. Code § 44D-7-709.)

#### Compensation of Attorney as Trustee

There is no prohibition of any attorney serving as a trustee of a client's trust under West Virginia law. The terms of the trust may specify the trustee's compensation. If not, the compensation must be reasonable under the circumstances. (W. Va. Code § 44D-7-708(a).) Similarly, while there is no prohibition for a drafting attorney to serve as a personal representative under a client's will, a drafting attorney appointed as a trustee should:

- Disclose the potential amount of the compensation for serving as personal representative in writing to the client.
- Give the client a reasonable opportunity to seek the advice of independent counsel.

(WV R RPC Rule 1.8(a), (c).) Additionally, best practice is that counsel and the client agree in writing to the form of compensation, which is memorialized in the executed trust instrument.

### Multiple Trustees

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

In West Virginia, unless otherwise specified in the terms of the trust instrument:

- Co-trustees unable to reach a unanimous decision may act by majority decision.
- If a majority of the co-trustees are unable to reach a decision, on petition of any of the trustees, the settlor (if living), a qualified beneficiary, or any interested person, the court, in its discretion, may direct the exercise or nonexercise of a power as it considers necessary for the trust's best interest.

(W. Va. Code § 44D-7-703(a); see Question 13: Qualified Beneficiaries and Current Beneficiaries.)

Co-trustees generally must participate in the performance of the trustee's function unless they:

- Cannot perform because of absence, illness, disqualification, or other temporary incapacity. If a co-trustee is unavailable to perform duties for these reasons and prompt action is necessary to achieve the trust purposes or to avoid injury to the trust property, the remaining co-trustee or a majority of the remaining co-trustees may act for the trust.
- Properly delegated the performance of a function to a co-trustee other than a function that the terms of the trust require the co-trustees to perform jointly. A trustee may revoke a delegation previously made unless the delegation was made irrevocable.

(W. Va. Code § 44D-7-703(c) to (e).)

West Virginia also has the Uniform Directed Trust Act, which permits a trust to:

- Segregate the duties related to a trust's administration and delegate some management duties to a third party, who may or may not also be a trustee.
- Protect the trustee from liability for directions provided by that third party.

(W. Va. Code §§ 44D-8A-801 to 44D-8A-817.) A trust including these provisions is sometimes referred to as a directed trust. Each client's goals, expectations, and assets must be examined to determine whether a directed trust is appropriate in any particular circumstance.

For more information on directed trusts, see State Q&A, Irrevocable Trusts: West Virginia: Question 16 and [State Directed Trust Laws Chart](#).

### Removal and Resignation of Trustees

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

In West Virginia, a settlor with capacity (see Question 3) may always remove the trustee of a revocable trust during the settlor's life because a revocable trust is by its terms fully revocable and amendable by the settlor. Even if the settlor does not include a removal provision in the trust instrument, the instrument can be amended to include a removal provision or revoked in its entirety if it becomes necessary or desirable to remove a trustee.

However, the trust instrument should generally include a trustee removal provision specifying persons with authority to remove trustees and the method for doing so. This is important following the settlor's incapacity or death when the trust instrument can generally no longer be revoked or amended without court intervention.

In addition to any removal provisions in the trust instrument, in West Virginia, once the trust becomes irrevocable, a co-trustee, or a beneficiary may petition the court to request that the court remove a trustee, or a court may remove a trustee on its own initiative. The West Virginia Attorney General also has standing to petition the court for the removal of a trustee of a charitable trust. (W. Va. Code § 44D-7-706(a).)

A court may remove a trustee if the court finds, by a preponderance of the evidence that either:

- The trustee committed a serious breach of trust. West Virginia does not offer any guidance on what constitutes a serious breach of trust.
- Lack of cooperation among co-trustees substantially impairs the trust administration.
- Because of unfitness, unwillingness or persistent failure of the trustee to administer the trust effectively, removal of the trustee best serves the beneficiaries' interests.

- There was a substantial change of circumstances or removal is requested by all the qualified beneficiaries, and:
  - removal of the trustee best serves the interests of all the beneficiaries;
  - removal is not inconsistent with a material purpose of the trust; and
  - a suitable co-trustee or successor trustee is available.

(W. Va. Code § 44D-7-706(b).)

For the definition of qualified beneficiary, see Question 13: Qualified Beneficiaries and Current Beneficiaries.

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

In West Virginia, a trustee may resign either:

- According to the terms of the revocable trust instrument.
- Unless the terms of the trust expressly state that the resignation terms are the exclusive method for resignation, without court approval by giving at least 30 days written notice to the settlor, if living, all of the qualified beneficiaries, and all co-trustees, if any. (W. Va. Code § 44D-7-705(a).)
- With approval of the court having jurisdiction of the trust by filing a petition to resign joining as respondents the settlor, if living, all the qualified beneficiaries, and all co-trustees, if any. In approving a resignation, the court may issue an order and impose conditions reasonably necessary for the protection of the trust property. (W. Va. Code § 44D-7-705(b); see Question 13: Qualified Beneficiaries and Current Beneficiaries.)

Unless otherwise provided by court order, any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation (W. Va. Code § 44D-7-705(c)).

## Trustee Liability

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

The trustee has extensive duties set out under the West Virginia Uniform Trust Code (W. Va. Code

§§ 44D-8-801 to 44D-8-813). Among these duties, the trustee must:

- Administer the trust and invest the trust assets in good faith, following its terms and purposes and the interest of the beneficiaries (W. Va. Code § 44D-8-801).
- Comply with the Uniform Prudent Investor Act under W. Va. Code §§ 44-6c-1 to 44-6c-15 (W. Va. Code § 44D-8-801).
- Comply with the Uniform Principal and Income Act under W. Va. Code §§ 44B-1-101 to 44b-6-606 (W. Va. Code § 44D-8-801).
- Administer the trust solely in the beneficiaries' interests (W. Va. Code § 44D-8-802(a)).
- If a trust has more than one beneficiary, act impartially in vesting, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests (W. Va. Code § 44D-8-803).
- Administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements and other circumstances of the trust and exercising reasonable care, skill, and caution (W. Va. Code § 44D-8-804).
- Incur only costs that are reasonable in relation to the trust property, the trust purposes, and the trustee's skill (W. Va. Code § 44D-8-805).
- Use any special skills or expertise, if the trustee has these skills or expertise, or is named trustee because of the trustee's representation that the trustee has special skills or expertise (W. Va. Code § 44D-8-806).
- Delegate only duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances and use reasonable care, skill, and caution in doing so (W. Va. Code § 44D-8-807(a)).

During the time a trust is revocable, the trustee's duties are owed exclusively to the settlor (W. Va. Code § 44D-6-603(a)).

During the trust administration, the trustee must ensure the trust holds enough assets in reserve to pay all estate taxes, income taxes, and trust expenses for all years that the trust remains in existence. Since the estate tax exclusion remains high, in most cases no estate tax will be due (see [Federal Estate, Gift, and GST Tax Chart](#)).

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

Although a successor trustee is not automatically liable for a breach of trust committed by a prior trustee in West Virginia, a successor trustee must take reasonable steps to redress a breach of trust known to have been committed by a former trustee (W. Va. Code § 44D-8-812). Consequently, liability may be imposed where the successor trustee knows or should know of the prior breach of trust and nevertheless permits it to continue or remain unaddressed.

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

In West Virginia, a trustee not joining in an action of a co-trustee is generally not liable for the co-trustee's action (W. Va. Code § 44D-7-703(f)). A dissenting trustee joining in an action at the direction of the majority of the co-trustees is not liable for the action if the dissenting trustee notifies any co-trustee of the dissent at or before the time the action is taken (W. Va. Code § 44D-7-703(h)).

To avoid liability, each trustee, including a trustee not joining in an action of a co-trustee, must generally exercise reasonable care to:

- Prevent a co-trustee from committing a serious breach of trust.
- Compel a co-trustee to redress a breach of trust.

(W. Va. Code § 44D-7-703(g).)

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

In West Virginia, a term of a trust relieving a trustee from liability (an exculpatory term) is generally unenforceable to the extent it either:

- Relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the trust purposes or the beneficiaries' interests.
- Was included in the trust instrument because of an abuse by the trustee of a fiduciary or confidential relationship with the settlor.

(W. Va. Code § 44D-10-1008(a).)

An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless either:

- The trustee proves that the exculpatory term is fair under the circumstances and its existence and contents were adequately communicated to the settlor.
- The settlor was represented by an attorney not employed by the trustee regarding the trust and the attorney provided independent legal advice.

(W. Va. Code § 44D-10-1008(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, 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.

The West Virginia Uniform Trust Code generally does not contain express rules of construction relating to the interpretation of and disposition of property by trust. However, the West Virginia Uniform Trust Code provides that the rules of construction applicable to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and its disposition of trust property (W. Va. Code § 44D-1-112).

### Beneficiary Does Not Survive (Lapse)

The West Virginia Uniform Trust Code does not contain an express provision related to lapse or anti-lapse of a beneficiary's interest should they fail to survive the settlor (settlor). West Virginia has an anti-lapse statute for wills with respect to the death of a

devisee or legatee before the testator. In this case, unless the testator provided for a different disposition in the will, if a predeceased devisee or legatee leaves issue (descendants) surviving the testator, the issue takes the deceased devisee's or legatee's gift or share (W. Va. Code § 41-3-3). This may apply to trusts as well under W. Va. Code § 44D-1-112. However, there are no reported cases in West Virginia regarding this matter. Therefore, attorneys should draft contingent dispositive provisions in trust instruments that provide for the disposition of property if a beneficiary dies before the settlor.

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

Sometimes a gift of specific property adeems if the property is disposed of before the settlor's death or is not properly funded to the trust. This means that, in certain circumstances, if the settlor gives property away or otherwise disposes of the property during life, the beneficiary receives neither the gift nor its equivalent value.

The West Virginia Uniform Trust Code does not contain an express provision related to the ademption of property. For wills, a specific legacy (gift) is subject to ademption if not in existence (see *Claymore v. Wallace*, 120 S.E.2d 241, 247 (W. Va. 1961)). Therefore, if the settlor disposed of property during life or does not validly transfer property to the trust (during life or at death by pour-over will, beneficiary designation, or otherwise), a trust beneficiary should receive neither the gift nor its equivalent value (W. Va. Code § 44D-1-112).

To avoid confusion and potential disputes after death, counsel should advise clients to update trust instruments when the clients no longer own property that is specifically gifted under the terms of their trust.

### Insufficient Assets (Abatement)

The West Virginia Uniform Trust Code does not contain an express provision related to the abatement of property (the use of gifted property to satisfy valid claims against the settlor).

For wills, unless the will provides contrary abatement provisions, if there are not enough assets to pay all of the taxes, expenses, and creditor's claims and still make distributions, then residuary gifts abate (are used) first, followed by general gifts (gifts of money),

and then specific dispositions (see *Claymore*, 120 S.E.2d at 247). Therefore, these abatement rules should apply for dispositions under trust instruments (W. Va. Code § 44D-1-112).

However, counsel should add abatement provisions in a trust instrument if the settlor prefers that certain dispositions be cancelled or reduced if the trust assets are insufficient to satisfy all distributions under the trust instrument. If the trust instrument does not contain abatement provisions, the default rules are likely to apply.

### Gifted Property Encumbered

The West Virginia Uniform Trust Code does not contain an express provision regarding whether gifts of encumbered property are made free of or subject to the encumbrance. For wills, unless the will provides otherwise, a devisee is generally entitled to have encumbrances on real property paid by the estate's personal property (Syl. pt. 4, *Estate of Fussell v. Fortney*, 730 S.E.2d 405 (W. Va. 2012)). Therefore, unless the trust instrument provides otherwise, the beneficiary of encumbered property should be entitled to have the encumbrance paid by the trustee's satisfaction of debts (W. Va. Code § 44D-1-112).

To minimize confusion and disputes, the trust instrument should specify whether a beneficiary takes a gift of encumbered property subject to the encumbrance.

### Effect of Divorce

The West Virginia Uniform Trust Code does not provide for what happens to provisions in a trust instrument relating to a former spouse on the divorce of the settlor to that spouse or the annulment of that marriage. For wills, unless the will provides otherwise, divorce or annulment revokes:

- Any disposition made to the former spouse.
- Any provision conferring a general or special power of appointment on the former spouse.
- Any provision nominating the former spouse as executor, trustee, conservator, or guardian.

(W. Va. Code § 41-1-6.)

If provisions are revoked solely by this section, they are revived by the testator's remarriage to the former spouse. A decree of separation which does not

terminate the status of spouses is not a divorce for this section. (W. Va. Code § 41-1-6.) Unless the trust instrument provides otherwise, divorce or annulment should effect similar revocations in a trust instrument (W. Va. Code § 44D-1-112).

Counsel should advise clients to revoke or amend their trust instruments that provide for spouses, if the clients are going through a divorce or annulment proceeding, if permissible under family court orders, or immediately on finalization of the divorce or annulment.

### Simultaneous Death

In West Virginia, unless otherwise provided in the terms of the trust instrument, if title to property depends on whether a person survived the settlor but there is insufficient evidence to determine survivorship, the property is disposed of as if the settlor survived the beneficiary (W. Va. Code §§ 42-5-1, 42-5-6, and 44D-1-112).

### 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 (Settlor's) Debts During Life

In West Virginia, revocable trusts generally do not prevent the settlor's creditors from reaching trust assets. Revocable trust property is generally subject to the claims of the settlor's creditors during the settlor's lifetime to the same extent as property owned directly by the settlor (W. Va. Code § 44D-5-505(a)(1)).

### Settlor's Debts After Death

After the settlor's death, trust assets held by the settlor's revocable trust are subject to the valid claims of the deceased settlor's creditors. To the extent the settlor's probate estate is inadequate to satisfy the claims, and unless the terms of the trust instrument provide otherwise (in which case, claims are paid as provided in the trust instrument), these claims are paid in the following priority:

- The costs and expenses of administration of the settlor's estate.
- Reasonable funeral expenses.
- Debts and taxes with preference under federal law.
- Unpaid child support which is due and owing at the time of the decedent's death.
- Debts and taxes with preference under other West Virginia law.
- Reasonable and necessary medical and hospital expenses of the decedent's last illness, including compensation for persons attending the decedent during the decedent's last illness.
- All other claims.

(W. Va. Code § 44D-5-505(a)(3).) Unless the trust instrument provides otherwise, these claims are paid in the statutory order, and no payment is made to a lower class until the higher class is fully paid. If the trust assets are insufficient to pay all of the creditors in one class, those class members are paid ratably. (W. Va. Code §§ 44-2-22 and 44-3A-27.)

However, a revocable trust is not responsible for paying any claim barred in the settlor's probate proceeding (W. Va. Code § 44-2-26).

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

In West Virginia, a term of a trust instrument that provides that the interest of a beneficiary is held subject to a spendthrift provision prevents both voluntary and involuntary transfer of the beneficiary's interest (W. Va. Code § 44D-5-502(a), (b)). If the trust instrument includes a spendthrift provision:

- A beneficiary cannot transfer the beneficiary's future interest.



- A beneficiary's creditors cannot attach the assets of the trust before the assets are distributed to the beneficiary.

(W. Va. Code § 44D-5-502(c).)

Spendthrift protection has some limitations including:

- A beneficiary facing judgments for unpaid child support.
- A judgment creditor providing services for the protection of a beneficiary's interest in the trust.
- A claim of West Virginia or the United States to the extent a relevant statute provides.

(W. Va. Code § 44D-5-503(b).)

A creditor of a trust beneficiary may, with court approval attach present or future distributions to or for the beneficiary's benefit if either:

- The trust instrument contains a spendthrift provision, but the creditor is of the type that is not subject to the spendthrift provision.
- The trust instrument does not include a spendthrift provision.

In either of these cases, the court may limit this as appropriate under the circumstances. (W. Va. Code §§ 44D-5-501 and 44D-5-503(c).)

### Medicaid Eligibility

The assets titled in a revocable trust where the settlor is also the sole beneficiary (a self-settled trust) are available for determining the settlor's Medicaid eligibility (42 U.S.C. § 1396p(d)(3)(A)).

### Court Supervision and Privacy

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

Revocable trusts and trustees are normally not subject to court supervision in West Virginia either during the settlor's life or on the settlor's death, unless ordered by the court (W. Va. Code § 44D-2-201(b)). The court may intervene in the administration of a trust to the extent an interested person invokes the court's jurisdiction or as provided by law (W. Va. Code § 44D-2-201(a)). A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a

request for instructions and an action to declare rights (W. Va. Code § 44D-2-201(c)).

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

In West Virginia, An estate plan that includes a revocable trust likely affords the settlor more privacy than a will-based estate plan. When a will is admitted to probate, the records in the respective county clerk's office are publicly accessible. Most of these records are also accessible online. Therefore, anyone can access and review:

- The decedent's will.
- The identity and mailing address of the decedent's personal representative and beneficiaries.
- The decedent's assets and date of death valuations.

Unlike a will admitted to probate, an *inter vivos* revocable trust is generally not a matter of public record, unless a judicial proceeding is commenced (see Question 26). However, if the trust contains real estate, the current serving trustee, before transacting in real property, must prepare and record a Memorandum of Trust in the office of the clerk of the county commission of any county in which real property that is subject to the trust is located, which includes:

- The existence and date of the trust.
- The names and mailing addresses of the settlor, the current trustee, any successor trustees, and the circumstances under which any successor trustees assume trust powers.
- The revocability or irrevocability of the trust.
- A verbatim recitation of the trust powers concerning the acquisition, sale, disposition, or encumbering of real property by the trustee.

(W. Va. Code § 36-1-4a.) Aside from this information that must be recorded in this circumstance, information regarding a revocable trust (where there has been no judicial proceeding commenced) is generally not available to the public.

The trust beneficiaries are also entitled to information when the settlor dies or the trust otherwise becomes irrevocable (see Question 28).

### 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 West Virginia, the trustee has several duties to provide information to beneficiaries at various times after the settlor's death. For example:

- **Notice of acceptance of trusteeship.** Within a reasonable time after the trustee's acceptance of the trust, the trustee must give notice to the current beneficiaries of:

- the trustee's acceptance of the trust; and
- the trustee's name, address, and telephone number.

(W. Va. Code § 44D-8-813(b)(2).)

- **Notice of trust becoming irrevocable.** Within a reasonable time after the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, the trustee must give notice to the current beneficiaries of:

- the trust's existence;
- the settlor's identity;
- their right to request a copy of the trust instrument; and
- their right to trustee reports, with the information as required under statute.

(W. Va. Code § 44D-8-813(b)(3).)

- **A copy of the trust instrument.** On a beneficiary's request, the trustee must within a reasonable time provide a beneficiary with a copy of the trust instrument (W. Va. Code § 44D-8-813(b)(1)).

- **Trustee's report.** The trustee must provide a report to each current beneficiary of trust income or principal, at least annually, and on the trust's termination or a change of trustee. The report must include:

- the trust's liabilities, receipts, and disbursements;
- the source and amount of trustee compensation; and
- the trust assets and their respective market values, if feasible.

(W. Va. Code § 44D-8-813(c).) A beneficiary can waive their right to receive a trustee's report and withdraw a waiver previously given (the withdrawal is effective only for future reports or other information) (W. Va. Code § 44D-8-813(d)).

The trustee's duties to account and provide information do not extend to the trust beneficiaries of a revocable trust while the settlor is living (W. Va. Code § 44D-6-603(a)).

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