

Irrevocable Trusts: Virginia

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A Q&A guide to the laws governing irrevocable trusts in Virginia. This Q&A addresses state laws and customs that impact irrevocable trusts, including the key statutes and rules related to irrevocable trusts, the requirements for creating a valid irrevocable trust, common irrevocable trust provisions, information concerning trustees, and information on making changes to irrevocable trust instruments after execution. Answers to questions can be compared across a number of jurisdictions (see Irrevocable Trusts: State Q&A Tool). For similar information relating to revocable trusts in Virginia, see [State Q&A, Revocable Trusts: Virginia](#).

For a Toolkit providing jurisdiction-neutral irrevocable trust forms that can be used with this Q&A, and other resources to help counsel draft irrevocable trust instruments under Virginia law, see [State-Specific Irrevocable Trust Drafting Toolkit](#).

Key Statutes and Rules

1. What are the key statutes and rules that govern irrevocable trusts in your state?

State Law

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

- 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.

Other state laws, such as state income tax laws, may apply to an irrevocable trust, depending on the circumstances and the trust purposes (Va. Code Ann. §§ 58.1-360 to 58.1-363, 58.1-370 to 58.1-371, and 58.1-380 to 58.1-383).

Federal Law

Federal law, including federal estate, gift, generation-skipping transfer (GST), and income tax rules frequently apply to irrevocable trusts, depending on the purpose and characteristics of the trust (26 U.S.C. §§ 1 to 2801; 26 C.F.R. §§ 1.0-1 to 26.7701-2). For specific information related to federal estate, gift, and GST taxes, see Practice Notes:

- [Federal Estate Tax](#).
- [Federal Gift Tax](#).
- [Federal Generation-Skipping Transfer Tax](#).

For examples of specific rules and provisions applicable to specific types of irrevocable trusts, see [Irrevocable Trust Creation, Funding, and Administration Toolkit](#).

Applicability of Rules to Revocable Trusts

Many individuals (settlers) create revocable trusts as will substitutes to dispose of their assets at death.

These revocable trusts generally become irrevocable on the settlor's incapacity or death. Once a revocable trust becomes irrevocable, it is generally subject to the same rules as a trust that was irrevocable when created. For more information on revocable trusts, see [State Q&A, Revocable Trusts: Virginia](#).

Applicability of Rules to Testamentary Trusts

A testamentary trust is a trust created under a testator's will that generally comes into existence and becomes irrevocable when the testator dies. Testamentary trusts are generally subject to the same rules as all irrevocable trusts once they are created at the settlor's death. However, unlike other irrevocable trusts, testamentary trusts are subject to ongoing jurisdiction of the circuit court where the will was admitted to probate (see [Trustee Appointment, Removal and Resignation of Trustees, and Court Supervision](#)) (Va. Code Ann. §§ 64.2-1400 to 64.2-1432).

For information on wills that may include testamentary trusts, see [State Q&A, Wills: Virginia](#).

Trust Requirements

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

Methods of Creation

A trust creator (settlor) may create a trust in Virginia by:

- Transferring property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect on the settlor's death.
- Declaring that the settlor holds identifiable property as trustee.
- Exercising a power of appointment in favor of a trustee.

In addition, a conservator or a circuit court may create a trust in certain circumstances. (Va. Code Ann. § 64.2-719.)

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.

(Va. Code Ann. § 64.2-722.)

Threshold Requirements

The threshold requirements to create a valid trust require that:

- The settlor has capacity to create a trust (see [State Q&A, Revocable Trusts: Virginia: Question 2](#) and [3](#)).
- The settlor indicates an intent to create the trust.
- There is a definite beneficiary, unless the trust is:
 - a charitable trust;
 - for the care of an animal as provided under Va. Code Ann. § 64.2-726.
 - for a noncharitable purpose as specified under Va. Code Ann. § 64.2-727.

A beneficiary is definite if the beneficiary can be determined currently or in the future subject to any applicable rule against perpetuities. 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 who would have taken the property if the power had not been conferred.

- The trustee has duties to perform.
- The same person is not the sole trustee and sole beneficiary.

(Va. Code Ann. § 64.2-720.)

A trust does not fail because it has no trustee. However, a vacancy in the trusteeship that leaves a trust without a trustee must be filled (see *Fitzgerald v. Doggett's Ex'r*, 155 S.E. 129, 134 (Va. 1930) and see [Question 7: Filling Vacancies in a Trusteeship](#)).

Effect of Fraud, Duress, or Undue Influence

If the creation of a trust is procured by fraud, duress, or undue influence, the trust (or any part so procured) is void (Va. Code Ann. § 64.2-724).

3. What provisions, if any, must be included for a trust to be irrevocable?

In Virginia, unless the terms of a trust expressly provide that the trust is irrevocable, the trust is revocable (Va. Code Ann. § 64.2-751(A)).

Terms of a Trust

The terms of a trust are defined under the Virginia Trust Code to mean:

- The manifestation of the settlor's intent regarding a trust's provisions as:
 - expressed in the trust instrument; or
 - established by other evidence that would be admissible in a judicial proceeding.
- The trust's provisions as established, determined, or amended by:
 - a trustee or trust director in accordance with applicable law;
 - a court order; or
 - a nonjudicial settlement agreement (Va. Code Ann. § 64.2-709).

(Va. Code Ann. § 64.2-701.)

Counsel should always expressly indicate that a trust is irrevocable in the trust terms if that is the settlor's intention. The best way to do this is through a written trust instrument that provides that the trust is an irrevocable trust.

Trust Formalities and Execution Requirements

4. Must an irrevocable trust instrument be in writing to be valid?

Under Virginia law, a trust does not need to be in writing unless:

- 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)).
- The trust disposes of real property (Va. Code Ann. § 55.1-101).

Though oral trusts are generally valid, a proponent of an oral trust must prove its creation and terms by clear and convincing evidence (Va. Code Ann. § 64.2-725 and see Question 3: Terms of a Trust).

Despite this general rule, irrevocable trusts should always be in writing:

- To expressly provide that the trust is irrevocable (Va. Code Ann. § 64.2-751(A) and see Question 3).
- Because, though a settlor may not initially intend to transfer real property to a trust depending on the type of trust and other considerations, the settlor may want to do so later.
- Because most irrevocable trusts are created for one or more specific intended purposes and the purposes and required provisions to achieve those purposes should be documented in writing (see, for example, [Practice Notes](#), [Understanding Irrevocable Life Insurance Trusts](#) and [Understanding Grantor Retained Annuity Trusts](#)).

5. What are the execution requirements for a valid written irrevocable trust instrument? In particular, please specify requirements for:

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

Signature Requirements

In Virginia, an irrevocable trust should always be in writing to expressly provide that the trust is irrevocable (Va. Code Ann. § 64.2-751(A) and see Question 4). Settlers generally should sign written trust instruments.

There is no statutory requirement in Virginia that a trustee sign an irrevocable trust instrument for it to be valid. If the settlor is the initial trustee, the settlor typically signs in the capacity of both settlor and trustee. If the initial trustee or an initial co-trustee is not the settlor, counsel typically have that trustee sign the trust instrument to indicate the trustee's acceptance of the trust.

Witness Requirements

Virginia law does not require a trust instrument to be witnessed to be valid. In Virginia, it is uncommon for witnesses to sign an irrevocable trust instrument.

Notary Requirements

Virginia law does not require an irrevocable trust instrument to be notarized. In Virginia, the settlor's signature on an irrevocable trust instrument is often notarized, even though it is not required, especially if the trust may contain real property. 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.

Common Irrevocable Trust Provisions

6. Discuss specific provisions commonly found in an irrevocable 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.

Provisions included in irrevocable trust instruments in Virginia are generally substantially the same as and subject to the same rules as those included in revocable trust instruments regarding:

- Incorporation by reference of trustee powers.
- Virtual representation.
- Governing law (though a provision regarding changing the governing law of a trust created under a revocable trust instrument may only be operative on the death of the settlor whereas a similar provision in an irrevocable trust instrument is generally immediately operative when the trust is created).

In addition, the rules are the same for an irrevocable trust as those that apply to a revocable trust regarding both:

- The rule against perpetuities.
- Opting out of the rule against perpetuities (for personal property interests created between July 1, 2000 and June 30, 2024).

No contest clauses are more commonly included in revocable trust instruments in Virginia.

For more information on:

- Each of these types of provisions and the applicable rules, see [State Q&A, Revocable Trusts: Virginia: Question 12](#).
- No contest clauses, see [State No Contest Clause Laws Chart](#) and [Standard Clause, No Contest Clause for Will or Trust](#).

Rule Against Perpetuities Sample Clause for Irrevocable Trust Instrument

“Subject to the paragraph below, any trust created under this agreement, or by the exercise of a power of appointment granted under this agreement, for which equitable title to the property is not indefeasibly vested in any beneficiary shall terminate no later than the date that is 1,000 years following the date this agreement became irrevocable. Upon termination, the trustee shall distribute the then remaining principal and undistributed income of that trust to its then current income beneficiaries, *per stirpes*.

I encourage the trustee to hold or receive interests in real property on behalf of any trust, if at all, only through entities constituting personal property. If the rule against perpetuities is nevertheless deemed to apply to any real property held or received by the trustee, all interests in such property shall vest in the then current income beneficiaries *per stirpes* of the subject trust on the date that is 21 years after the date of death of the last to die of myself and those of my descendants who are living on the date this agreement became irrevocable.”

Trustee Appointment

7. What are the rules regarding appointment of trustees and acceptance and declination of trusteeship 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.
- How a nominated trustee accepts or declines the nomination.

Eligibility to Act as Trustee

Except for testamentary trustees, the rules regarding eligibility to act as trustee in Virginia (including the rules regarding the drafting attorney acting as trustee) for an *inter vivos* irrevocable trust are identical to the rules regarding eligibility to act as trustee for a revocable trust. For more information, see [State Q&A, Revocable Trusts: Virginia: Question 13: Eligibility to Act as Trustee](#).

Eligibility to Act as a Testamentary Trustee

A prospective testamentary trustee must meet additional requirements before the testamentary trustee can act. A trustee of a testamentary trust must qualify either:

- In the circuit court where the will was admitted to probate.
- In the case of a will of a nonresident that was not admitted to probate in Virginia, in any jurisdiction where the will could be probated or if there is no jurisdiction where the will could be probated:
 - in any jurisdiction where the trustee resides; or
 - if one trustee is a corporate trustee, the jurisdiction where the corporate trustee has its registered office.

(Va. Code Ann. §§ 64.2-1401 and 64.2-1402.)

Qualification of a testamentary trustee may be done *ex parte*, and no prior notice is required to be given to the beneficiaries. However, when an interested party makes a motion for the appointment of a testamentary trustee, reasonable notice must be

provided to all persons interested in the execution of the trust (other than the moving party). (Va. Code Ann. § 64.2-1406.)

The trustees named to act in the will generally apply to qualify as testamentary trustee. If fewer than all the trustees named in the will desire to qualify, the remaining trustee or trustees must give reasonable notice to the other named trustee or trustees before they can qualify (Va. Code Ann. § 64.2-1400).

Before acting as trustee, the trustee named in a will probated after July 1, 1968 must also give bond before the circuit court or clerk with surety as is required by the court or the clerk unless either:

- The will waives surety on the bond.
- Surety is not required under Virginia Code Ann. § 6.2-1003.
- The will was executed before July 1, 1968, the trustee offering to qualify was also named in the will as executor and qualifies as such, and the will waives surety on the bond of the executor.

(Va. Code Ann. § 64.2-1401.)

The circuit court or clerk under whose order the trustee derives the trustee's authority:

- Must order a new or additional bond on application of any surety or the surety's personal representative.
- May order a new or additional bond on motion of the fiduciary or when it appears proper on report of the clerk or a commissioner of accounts or on evidence adduced before it by any interested party.

The court prescribes a reasonable time for the bond and in the amount and with or without sureties as the court deems proper. (Va. Code Ann. § 64.2-1410(A).) The new or additional bond has the effect provided under Va. Code Ann. § 49-14.

If the trustee does not comply with the order, or whenever from any cause it appears proper, the court may revoke and annul the testamentary trustee's powers on reasonable notice given to the trustee by:

- The commissioner of accounts making the report.
- The surety or the surety's representative making the application.
- The service of a rule or otherwise.

No order or revocation invalidates any previous act of the trustee. (Va. Code Ann. § 64.2-1410(A).)

Filling Vacancies in a Trusteeship

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).)

If a vacancy occurs in the trusteeship of a testamentary trust, the circuit court where the will was admitted to probate, where the trustee resides, or where its principal office in Virginia is located (if the trustee is a corporation), may appoint:

- A trustee in place of the named trustee on the motion of an interested party.
- A substitute corporate trustee whenever a corporate trustee removes the management function over an existing testamentary trust which was previously managed in Virginia to a jurisdiction outside of Virginia if the court finds that the management of the trust after the removal results in good cause for the substitution of the trustee.

(Va. Code Ann. § 64.2-1405.)

If the trustee of a testamentary trust dies, the personal representative of the trustee or the remaining trustee (if there is more than one trustee) continues administering the trust unless the instrument creating the trust directs otherwise or another trustee is appointed by the circuit court having jurisdiction over the testamentary trust. (Va. Code Ann. § 64.2-1407.)

For more information regarding appointing successor trustees and a jurisdiction-neutral form for appointing a successor trustee for an irrevocable trust, see [Standard Document, Appointment of Successor Trustee for Irrevocable Trust](#).

Qualified Beneficiaries

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

- Is a distributee or a permissible distributee of trust income or principal.

- Would be a distributee or permissible distributee of trust income or principal if the interests of other distributees 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.)

Accepting a Nomination as Trustee

The rules for accepting a trusteeship for an irrevocable *inter vivos* trust in Virginia generally are identical to the rules regarding accepting a trusteeship for a revocable trust (see [State Q&A, Revocable Trusts: Virginia: Question 14](#)). However, for a testamentary trust, no formal acceptance of trusteeship is needed because the trustee must qualify before the circuit court or clerk prior to acting as trustee (see [Eligibility to Act as Trustee](#)).

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

Declining a Nomination as Trustee

The rules for declining a trusteeship for an irrevocable trust in Virginia generally are identical to the rules regarding declining a trusteeship for a revocable trust (see [State Q&A, Revocable Trusts: Virginia: Question 15](#)).

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

Trustee Compensation

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

The rules regarding trustee compensation in an irrevocable trust in Virginia are identical to the rules regarding trustee compensation for a revocable trust (see [State Q&A, Revocable Trusts: Virginia: Question 16](#)).

Multiple Trustees

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

The rules regarding authority to act when there are multiple trustees of an irrevocable trust in Virginia generally are identical to the rules regarding authority to act when there are multiple trustees of a revocable trust (Va. Code Ann. §§ 64.2-700(A) and 64.2-1416 and see [State Q&A, Revocable Trusts: Virginia: Question 17](#)).

Removal and Resignation of Trustees

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

In Virginia, the settlor, a co-trustee, or beneficiary of an irrevocable *inter vivos* trust may petition the court to remove a trustee, or the court may remove a trustee on its own initiative, based on the same criteria for removal that applies to removal of a trustee of a revocable trust that became irrevocable (see [State Q&A, Revocable Trusts: Virginia: Question 18](#)). The court may also revoke or annul a testamentary trustee's powers if the trustee fails to provide bond or additional bond (Va. Code Ann. § 64.2-1410(A) and see Question 7: Eligibility to Act as a Testamentary Trustee).

A trust instrument should generally include a trustee removal provision specifying who has authority to remove trustees and the method for doing so.

For jurisdictional-neutral information regarding removal of trustees, see [Standard Clause, Removal of Trustee Clause for Will or Trust: Incapacity of Trustee](#).

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

The rules regarding trustee resignation for an irrevocable *inter vivos* trust, including a testamentary trust, in Virginia are generally identical to the rules regarding trustee resignation for a revocable trust (see [State Q&A, Revocable Trusts: Virginia: Question 19](#)).

With a testamentary trust or court-created trust, the circuit court or clerk qualifying the trustee may condition the trustee's resignation on the trustee's settling and stating of accounts under Virginia law. This resignation does not invalidate any act done or affect any liability incurred by the trustee while serving as trustee. (Va. Code Ann. § 64.2-1424.)

For a jurisdiction-neutral trustee resignation form, see [Standard Document, Resignation of Trustee](#).

Trustee Liability

12. 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 according to:
 - 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 with certain relatives or parties related to the trustee (except under certain statutory circumstances) (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 and 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.) For more information on the duties and liabilities for trust directors and directed trustees, see Question 16.
- The trustee of a testamentary trust is required to file annual accountings with the commissioner of accounts, except where there were waivers of those accountings in certain circumstances or when the sole beneficiary is also the trustee (Va. Code Ann. §§ 64.2-1306 and 64.2-1307).

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

The rules regarding successor trustee liability for an irrevocable trust, including a testamentary trust, in Virginia are generally identical to the rules regarding successor trustee liability for a revocable trust (see [State Q&A, Revocable Trusts: Virginia: Question 21](#)).

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

The rules regarding co-trustee liability for an irrevocable *inter vivos* trust in Virginia are identical to the rules regarding co-trustee liability for a revocable trust. For more information, see [State Q&A, Revocable Trusts: Virginia: Question 22](#).

Testamentary and court-created trusts have slightly different co-trustee rules (Va. Code Ann. §§ 64.2-700(A) and 64.2-1416). With a testamentary trust or court-created trust:

- A trustee who has not joined in exercising a power is not liable to beneficiaries or to others for the consequences of the exercise.
- A dissenting trustee is not liable for the consequences of an act in which the trustee joins at the direction of a majority of the trustees if the trustee expressed the trustee's dissent in writing to the co-trustees, if the act is not itself a patent breach of trust.
- The trustee is answerable and accountable only for the trustee's own acts, receipts, neglects, or defaults, and not for those of any co-trustee, or for those of any banker, broker, or other person with whom the trust money or securities may be lawfully deposited, or for any loss that does not result from the trustee's own default or negligence.
- A trustee is not excused from liability for failing to:
 - participate in the administration of the trust;
 - attempt to prevent a breach of trust; or
 - seek advice or guidance from the circuit court in an apparently recurring situation unless otherwise expressly provided by the instrument under which the trustee is acting.

(Va. Code Ann. § 64.2-1416.)

Additional Liability Issues Related to Testamentary Directed Trusts

For a testamentary and court-created trust, when the trust instrument reserves the authority to direct the making or retention of any investment for the settlor or vests this authority in an advisory or investment committee or any other person (including a co-trustee) to the exclusion of other trustees, the excluded trustees may be liable only as ministerial agents. They are not liable as trustee or co-trustee for any loss resulting from any investment under the authorized direction. (Va. Code Ann. § 64.2-1416(D).)

Otherwise, the directed trust liability provisions under the Uniform Directed Trust Act apply (see Question 16).

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

The rules regarding waiver of trustee liability in an irrevocable trust instrument in Virginia generally are identical to the rules regarding waiver of trustee liability in a revocable trust instrument (see [State Q&A, Revocable Trusts: Virginia: Question 23](#)). For more information regarding waiver of trustee liability for directed trusts, see Question 16.

16. Does your state have a statute authorizing 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:

- 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) if the trust existed before July 1, 2020.

(Va. Code Ann. § 64.2-779.27(A).)

Terminology

In a directed trust, the trust instrument 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 the power to amend or terminate the trust.

- 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.)

Office of Trust Director

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 instrument.
- 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).

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

- Acceptance (see Question 7: Accepting a Nomination as Trustee).
- Performance bonds (see Question 7: Accepting a Nomination as Trustee).
- Reasonable compensation (see Question 8).
- Resignation (see Question 11).
- Removal (see Question 10).
- Vacancy and appointment of successor (see Question 7: Filling Vacancies in a Trusteeship).

(Va. Code Ann. § 64.2-779.38.)

Actions by Joint Trust Directors

Unless the trust terms provide otherwise, trust directors with joint powers must act by majority decision (Va. Code Ann. § 64.2-779.29(B)(2)).

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 instrument'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)).

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

For a testamentary and court-created trust, when the trust instrument reserves the authority to direct the making or retention of any investment for the settlor, or vests this authority in an advisory or investment committee or any other person (including a co-trustee) to the exclusion of other trustees, the excluded trustees may be liable only as ministerial agents and not as trustees or co-trustees for any loss resulting from any investment under the authorized direction (Va. Code Ann. § 64.2-1416(D)). Otherwise, the directed trust liability provisions under the Uniform Trust Act apply (Va. Code Ann. § 64.2-700(A)).

Duty to Provide Information

Trustee's 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).)

Trust Director's Duty to Provide Information

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 trustee.
- Another trust director.

(Va. Code Ann. § 64.2-779.33(B).)

No Liability for Breach of Trust Based on Reliance on Information

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 doing so 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 instrument 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 director 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 any of these actions to monitor, inform, or advise, a trustee or trust advisor does not assume the above-excluded duties (Va. Code Ann. § 64.2-779.34(A)(2), (B)(2)).

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 under 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).
- For more information regarding these time limits, see Question 17: Statutes of Limitations.
- 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 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).

For additional information regarding directed trusts, see [Practice Note, Directed Trusts](#) and [State Directed Trust Laws Chart](#).

Court Supervision

17. Is an irrevocable trust court supervised?

Trusts and trustees are normally not subject to continuing court supervision in Virginia unless ordered by the court (Va. Code Ann. § 64.2-710(B)). However, testamentary trusts and trusts established by the circuit court are subject to the provisions of Va. Code Ann. §§ 64.2-1200 to 64.2-1506 unless, in the case of a testamentary trust, either:

- The statutory rules are clearly inapplicable to testamentary trusts.
- The Uniform Trust Code or other Virginia statute applies to the testamentary trust

(Va. Code Ann. § 64.2-700(A).)

When a trust is not subject to continuing court supervision, interested persons may petition for court involvement. This petition may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights. (Va. Code Ann. § 64.2-710 and 64.2-1200 to 64.2-1222.)

Statutes of Limitations

A person may file a claim to contest the validity of a trust that was revocable at the settlor's death within the earlier of either:

- Two years after the settlor's death.
- Six months after the trustee sent the person a copy of:
 - the trust instrument; 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).)

A beneficiary may not begin a proceeding against a trustee for breach of trust more than one year after the date the trustee sent the beneficiary or a representative of the beneficiary a report both:

- Adequately disclosing the existence of a potential claim for breach of trust.
- Informing the beneficiary of the time allowed for commencing a proceeding.

(Va. Code Ann. § 64.2-796(A).)

A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence (Va. Code Ann. § 64.2-796(B)).

Otherwise, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within five years after the first of either:

- The removal, resignation, or death of the trustee.
- The termination of the beneficiary's interest in the trust.
- The termination of the trust.

(Va. Code Ann. § 64.2-796(C).)

For fraud related to proceedings or statements filed regarding a trust, or fraud used to circumvent the provisions and purposes of trust laws:

- A person injured may obtain appropriate relief against the perpetrator of the fraud or restitution from any person benefiting from the fraud, whether innocent or not, except for a *bona fide* purchaser.
- A related proceeding must be commenced within two years after the fraud is discovered, but no proceeding may be brought against one not a perpetrator of the fraud later than five years after the time the fraud is committed.

(Va. Code Ann. § 64.2-796(D).) This does not apply to remedies for fraud practiced on a decedent during the decedent's lifetime that affects the succession of the decedent's estate (Va. Code Ann. § 64.2-796(D)).

In addition, in certain circumstances a court may modify an irrevocable trust or authorize its early termination (see Question 18).

Trust Modification and Early Termination

18. What are the options for modifying or early termination of an irrevocable trust?

Trust Modification and Termination

In Virginia, a court may:

- Modify the administrative or dispositive terms of a trust (or terminate the trust) if, because of circumstances not anticipated by the settlor, doing so furthers the purpose of the trust (Va. Code Ann. § 64.2-730(A)).
- Modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable, wasteful, or impair the trust's administration (Va. Code Ann. § 64.2-730(B)).
- Conform the terms to the settlor's intent if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law (Va. Code Ann. § 64.2-733).
- Modify the terms of a trust to achieve the settlor's tax objectives if the modification is not contrary to the settlor's probable intent (Va. Code Ann. § 64.2-734).

In addition:

- A trust terminates to the extent:
 - the trust is revoked or expires by its terms;
 - no purpose of the trust remains to be achieved; or
 - the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.

(Va. Code Ann. § 64.2-728.)

- A court must enter an order modifying or terminating a noncharitable irrevocable trust if the court finds that the settlor and all beneficiaries consented. This is the case even if modification or termination is inconsistent with a material purpose of the trust. A noncharitable irrevocable trust may be modified or terminated on consent of all beneficiaries if the court concludes that modification is not inconsistent with, or continuance of the trust is not necessary to

achieve, a material purpose of the trust (Va. Code Ann. § 64.2-729(A), (B)). If not all beneficiaries consent, the court may approve a modification or termination if the court is satisfied that:

- had all beneficiaries consented, the trust could have been modified or terminated under these rules; and
- the interests of a beneficiary who does not consent will be adequately protected.

(Va. Code Ann. § 64.2-729(D).)

- If the applicable requirements are met, the trustee can decant the property of an irrevocable trust into a new trust (Va. Code Ann. §§ 64.2-779.1 to 64.2-779.25). For additional information on decanting, see [State Decanting Laws Chart](#) and [Practice Note, Trust Decanting](#).
- A charitable trust may be modified or terminated under different rules (Va. Code Ann. §§ 64.2-731 and 64.2-736).

Early Termination of Uneconomic Trusts

A trustee may terminate a trust if there is less than \$100,000 of property in the trust and the trustee:

- Notifies the qualified beneficiaries under Va. Code Ann. § 64.2-707 (see Question 7: Qualified Beneficiaries).
- Determines that the value of the trust property is insufficient to justify the cost of administration.

(Va. Code Ann. § 64.2-732(A).)

In addition, the court can modify or terminate a trust or remove the trustee and appoint a different trustee if the court determines that the value of the trust property is insufficient to justify the cost of administration (Va. Code Ann. § 64.2-732(B)).

On termination of a trust under Va. Code Ann. § 64.2-732, the trustee must distribute the trust property consistent with the trust's purposes and may simultaneously use the distribution on termination provisions of Va. Code Ann. § 64.2-779 (Va. Code Ann. § 64.2-732(C)).

The trust estate pays expenses incurred by the trustee related to the trust's termination (Va. Code Ann. § 64.2-732(E)).

Trust instruments frequently include a provision indicating the settlor's intent regarding early termination.

Information Provided to Trust Beneficiaries

19. What information are the beneficiaries of an irrevocable trust entitled to when the trust is created and throughout its administration?

In Virginia, the trustee has several duties to provide information to irrevocable trust beneficiaries.

Generally, the trustee must:

- Keep the qualified beneficiaries of the trust reasonably informed about the trust administration and the material facts necessary for them to protect their interests.
- Unless unreasonable under the circumstances, promptly respond to a beneficiary's request for information related to the trust administration.

(Va. Code Ann. § 64.2-775(A).)

Specifically, the trustee's duty to inform and account includes (but is not limited to) the requirement that the trustee provide the relevant beneficiaries with:

- **Notice of acceptance of trusteeship.** Within 60 days after the trustee's acceptance of the trust, the trustee must give notice to the qualified beneficiaries of:

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

(Va. Code Ann. § 64.2-775(B)(2).)

- **Notice of creation of irrevocable trust or trust becoming irrevocable.** Within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust or that a formerly revocable trust has become irrevocable, the trustee must give notice to the qualified beneficiaries of:

- the trust's existence;
- the settlor's identity;
- their right to request a copy of the trust instrument; and
- their right to a trustee's report.

(Va. Code Ann. § 64.2-775(B)(3).)

- **Notice of changes in compensation.** The trustee must notify the qualified beneficiaries in advance of

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any changes to the method or rate of the trustee's compensation (Va. Code Ann. § 64.2-775(B)(4)).

- **A copy of the trust instrument.** On request of a beneficiary, the trustee must provide the beneficiary with a copy of the trust instrument (Va. Code Ann. § 64.2-775(B)(1)).
- **A trustee's report.** The trustee must report the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values:
 - at least annually and at termination of the trust to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it; and
 - on a vacancy in a trusteeship, unless a co-trustee remains in office, to the qualified beneficiaries (this report is sent by the former trustee).

(Va. Code Ann. § 64.2-775(C).)

A beneficiary may waive the right to a trustee's report or other information to which the beneficiary is entitled and may withdraw a waiver previously given with respect to future reports and other information (Va. Code Ann. § 64.2-775(D)).

A trustee who fails to furnish information to a beneficiary or respond to a request for information regarding the administration of the trust in a good faith belief that to do so would be unreasonable under the circumstances or contrary to the settlor's purposes is not subject to removal or other sanctions for doing so (Va. Code Ann. § 64.2-775(A)).

For the definition of qualified beneficiary, see Question 7: Qualified Beneficiaries.

Trust directors and directed trustees also have certain duties to provide information when dealing with directed trusts (see Question 16: Duty to Provide Information).

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