

Revocable Trusts: Connecticut

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

KEY STATUTES AND RULES

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

KEY STATUTES AND RULES GOVERNING REVOCABLE TRUSTS

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

- Connecticut General Statutes Title 45a, Probate Courts and Procedure (in particular Chapter 802c, Conn. Gen. Stat. Ann. §§ 45a-471 to 45a-545).
- State of Connecticut - Probate Court Rules of Procedure (CT R PROB Rule 1 to CT R PROB Rule 72).
- Case law.

REVOCABLE TRUSTS AS WILL SUBSTITUTES

There are few statutes applicable to trusts in Connecticut, and they relate generally to all forms of trusts. Most applicable statutes

appear in Title 45a of the Connecticut General Statutes (Conn. Gen. Stat. Ann. §§ 45a-199 to 45a-249 and 45a-471 to 45a-545).

Use of revocable trusts as a will substitute is common and generally preferred in Connecticut. Use of testamentary trusts is relatively uncommon in modern estate planning in Connecticut. Wills without revocable trusts are typically recommended only when the testator does not create trusts to continue after death (when the testator wants outright distributions of assets). Most estate plans using a revocable trust should include a pour-over will to ensure all probate assets are transferred to the trust at death, if not transferred during lifetime of the grantor (see Question 9). When deciding whether to use a revocable trust as a will substitute, practitioners should consider many factors, including desire for probate avoidance:

- During life. A funded revocable trust can avoid the need for a court-appointed conservator (or guardian) if an individual becomes incapacitated during lifetime. When the probate court appoints a conservator, the conservator must post a bond based on the value of the conserved person's assets. The requirement of bond cannot be waived. The conservator must also report to the probate court, usually on an annual basis. This financial accounting carries a filing fee of \$500 per year and often also involves the cost of professional assistance to prepare.
- At death. Connecticut requires full and formal probate proceedings for every resident who holds assets in excess of \$40,000 in his or her sole name without beneficiary designations. The full probate proceeding requires notice to all beneficiaries and all legal heirs. It also requires the fiduciary to file an accounting in every probate estate. The cost of administering a probate estate often is more expensive than administering a revocable trust. A revocable trust that is fully funded before death allows the estate to avoid a probate proceeding, or take advantage of the small estate process if the probate assets remaining outside the trust at death are less than \$40,000.
- For the duration of trusts. If a testator creates a testamentary trust for a beneficiary under his or her will, that trust remains subject to permanent probate court oversight and jurisdiction. The trustee of a testamentary trust generally must report to the probate court at least every three years. The cost for this accounting is \$500 per year. The testator can waive interim accountings over a testamentary trust but cannot waive the final accounting. If no

interim accounts are filed, the final accounting covers the entire period from inception to termination, and the fee is based on the number of years covered at \$500 per year. There is also the added cost of professional assistance to prepare the accountings.

WHO CAN CREATE A REVOCABLE TRUST

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

In Connecticut, a natural person must be 18 years old to create a revocable trust (Conn. Gen. Stat. Ann. §§ 45a-604(4) and 45a-250 (regarding wills)).

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

It is unclear what level of mental capacity is necessary in Connecticut to create a revocable trust that contains testamentary dispositions. While Connecticut law provides a standard of mental capacity required to create a will, it does not have a similar standard for creating a trust (Conn. Gen. Stat. Ann. § 45a-250).

The law presumes a person's competence or sanity in the performance of legal acts (see *Stanton v. Grigley*, 418 A.2d 923 (Conn. 1979)). The mental capacity required to make a will may be different from the mental capacity to make an *inter vivos* trust agreement since some *inter vivos* trusts are far more complicated documents than simple wills, and these documents would require that the settlor have a higher degree of mental capacity and understanding (see *Whittemore v. Neff*, 2001 WL 753802 (Conn. Super. Ct. 2001)).

Courts have distinguished between the mental capacity required to execute a will and the higher standard required to execute a contract, namely, the ability to understand the nature, extent, and consequence of the action (see *Kunz v. Sylvain*, 2014 WL 1568613 (Conn. Super. Ct. 2014)). In *Kunz*, both standards were met and the court did not decide what precise standard of mental capacity to apply to the creation of a contract (a trust) that was testamentary in nature (see *Kunz*, 2014 WL 1568613 at *6). The court also found that an amendment to a revocable trust is valid if the settlor understood the consequences of the amendment at the time of execution (see *Kunz*, 2014 WL 1568613 at *6).

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

An agent under a power of attorney may create, amend, revoke, or terminate an *inter vivos* trust only if:

- The power of attorney expressly grants the agent the authority to perform these activities.
- The exercise of the authority to perform these activities is not otherwise prohibited by another agreement or instrument to which the authority or property is subject, including the trust agreement. (Conn. Gen. Stat. Ann. § 1-351(a)(1)).

GUARDIAN OR CONSERVATOR

The Court may authorize a conservator to make gifts or other transfers from the estate of a conserved person to a court-approved trust created by the conservator (Conn. Gen. Stat. Ann. § 45a-655(e)).

TRUST REQUIREMENTS

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

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

For a trust to be valid in Connecticut it must have:

- A trustee (see Trustee Requirements).
- One or more beneficiaries (see Beneficiary Requirements).
- Trust property (see Trust Property Requirements).

TRUSTEE REQUIREMENTS

A required element of a valid and enforceable trust in Connecticut is a trustee that holds the trust property and is subject to duties to administer the trust property for the benefit of one or more others (see *Palozie v. Palozie*, 927 A.2d 903, 910 (Conn. 2007)).

A trust does not fail for lack of a trustee. In that case, a trustee is appointed by a court or under the terms of the trust (see *Palozie*, 927 A.2d at 910 (citing Restatement (Third) of Trusts § 2, Comments f and g)).

A settlor can be the sole trustee of a trust by declaring that he is holding property for the benefit of another person (Conn. Gen. Stat. Ann. § 45a-489 and see *Hansen v. Norton*, 374 A.2d 230 (Conn. 1977)).

BENEFICIARY REQUIREMENTS

For a trust to be valid and enforceable Connecticut trust it must have one or more beneficiaries, to whom and for whose benefit the trustee owes the duties regarding the trust property (see *Palozie*, 927 A.2d at 910). However, a trust can continue without a designated beneficiary in being if a beneficiary becomes ascertainable within the requirements of the applicable rule against perpetuities (see Restatement (Third) of Trusts § 2, Comment h).

TRUST PROPERTY REQUIREMENTS

For a trust to be valid and enforceable in Connecticut, it must have trust property, or trust res, which is held by the trustee for the beneficiaries (see *Palozie*, 927 A.2d at 910 and *Goytizolo v. Moore*, 604 A.2d 362 (Conn. App. Ct. 1992)). However, a revocable trust may be valid even if it is unfunded during the settlor's lifetime (see Question 9).

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

In Connecticut, a trust is presumed to be irrevocable unless the power to revoke is specifically reserved (see Drafting Trusts in Connecticut § 2:3 (Thomson Reuters, 2d ed. 2017)). A revocable trust should specifically state that the settlor intends the trust to be a

revocable trust during the settlor's lifetime and reserve for the settlor the unlimited right to revoke the trust.

TRUST FORMALITIES AND EXECUTION REQUIREMENTS

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

In Connecticut, there is no affirmative statutory requirement that a trust be in writing to be valid.

Connecticut courts have considered whether a trust can be oral. In determining the validity of an oral trust, the court focused on whether the settlor intended to create a trust and impose the duties of trustee on himself or another (see *Hebrew Univ. Ass'n v. Nye*, 169 A.2d 641 (Conn. 1961)).

Although an oral trust may be valid in Connecticut, the burden of proving the existence of the trust may be difficult or impossible (see *In re Estate of Gladys Prella*, 22 Quinnipiac Prob. L.J. 98 (Ellington Dist. Prob. Ct. 2008)). The existence of an oral trust must be proven by oral testimony.

The trust provisions should always be in writing and signed by the settlor and the trustee.

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

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

SETTLOR'S SIGNATURE

In Connecticut, there is no affirmative requirement that a trust agreement be signed by a settlor to create a valid and enforceable trust. However, the settlor should execute a trust agreement in writing to set out his intent and the dispositive provisions of the trust.

TRUSTEE'S SIGNATURE

In Connecticut, there is no affirmative requirement that a trust agreement be signed by a trustee to create a valid and enforceable trust. However, because a trustee must intend to take on the enforceable duties of a trustee, the trustee should execute a written trust agreement accepting his duties (see *Palozie*, 927 A.2d at 903).

WITNESS REQUIREMENTS

In Connecticut, there is no requirement that the settlor's or the trustee's signatures be witnessed unless the trust agreement conveys real property (Conn. Gen. Stat. Ann. § 47-5). However, it is good practice to have a trust agreement signed by at least two disinterested witnesses who can later be asked to testify regarding the settlor's capacity or undue influence or fraud.

NOTARY REQUIREMENTS

In Connecticut, there is no requirement that the settlor's or the trustee's signatures be notarized unless the trust agreement conveys real

property (Conn. Gen. Stat. Ann. § 47-5). However, it is good practice to have a trust agreement executed in the presence of a notary public who can later attest to the settlor's capacity or undue influence or fraud.

RELATIONSHIP TO POUR-OVER WILL

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

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

EXISTENCE OF REVOCABLE TRUST BEFORE EXECUTION OF WILL

For any gift made by a will executed on or after October 1, 1994, and any gift made by a will executed before October 1, 1994 if the testator was living on that date, a will may validly give property to the trustee or trustees of a revocable trust created (or to be created) either:

- During the testator's lifetime by the testator, by the testator and some other person or persons, or by some other person or persons including a funded or unfunded life insurance trust, although the settlor has reserved any or all rights of ownership of the insurance contracts.
- At the testator's death by the testator's devise to the trustee or trustees if the trust is identified in the testator's will or codicil and its terms are set out in a written instrument, other than a will or codicil, executed before, concurrently with, or after the execution of the testator's will or in another individual's will if that other individual has predeceased the testator, regardless of the existence, size, or character of the corpus of the trust.

(Conn. Gen. Stat. Ann. § 45a-260(a).)

The gift in the testator's will to a revocable trust does not fail if the trust is amended after the execution of the will or after the testator's death (Conn. Gen. Stat. Ann. § 45a-260(a)).

INCORPORATION BY REFERENCE

Connecticut courts have not adopted the doctrine of incorporation by reference. In Connecticut, a will cannot incorporate a revocable trust by simply referring to it. If the trust mentioned in the will is revoked or terminated before the testator's death or otherwise fails, the disposition to the trust fails.

RIGHTS OF SURVIVING SPOUSE

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

In Connecticut, when a decedent dies with a will, if the decedent's surviving spouse receives less than a statutory elective share amount under the will, the surviving spouse has a right to make an election against the will of a deceased spouse and to take a statutory share of the estate of the deceased spouse. The statute defines the statutory share as a life estate of one-third in value of the real and personal property passing under the will of the deceased spouse. (Conn. Gen. Stat. Ann. § 45a-436.)

This right of election does not extend to assets held in a revocable trust created and funded by the deceased spouse before death (see *Cherniack v. Home Nat'l Bank Tr. Co.*, 198 A.2d 58 (Conn. 1964)). A funded revocable trust is an effective tool in Connecticut to defeat a spouse's claim for a statutory elective share.

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

Connecticut is not a community property state. If an individual acquires an interest in property while married and domiciled in a community property state, the laws of that jurisdiction may govern the community property character of that property and whether and how that character may be altered by transfers to trust or otherwise.

Connecticut has adopted the Uniform Disposition of Community Property Rights at Death Act, which provides that property acquired as community property from a Connecticut decedent retains its character as community property (Conn. Gen. Stat. Ann. § 45a-458 to 45a-466). However, the statute does not prevent the parties from severing the community character of the property. A transfer to a trust may be evidence of an intent to alter the character of the property as community property.

TENANTS BY THE ENTIRETY

Connecticut does not recognize tenants by the entirety. If real property is acquired by spouses as tenants by the entirety, the law of the jurisdiction where the real property is located controls whether and how the tenancy can be terminated.

Connecticut does recognize joint ownership with rights of survivorship. The transfer by one spouse of his interest in jointly owned property into a revocable trust severs the survivorship component and converts the property ownership to tenants-in-common.

COMMON REVOCABLE TRUST PROVISIONS

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

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

NO-CONTEST CLAUSE

Connecticut does recognize the validity and enforceability of no-contest clauses, but they are not favored and are to be construed

strictly (see *In re Estate of Andrews*, 1991 WL 157657 (Conn. Super. Ct. 1991)). There is an exception to enforceability of a no contest clause where a contest was begun in good faith and with probable cause and reasonable justification (see *South Norwalk Tr. Co. v. St. John*, 101 A. 961 (Conn. 1917) and *In re Estate of Andrews*, 1991 WL 157657).

The courts also recognize an exception to the general rule where the contest is brought to secure an interpretation of a will or trust or where the beneficiary is advocating for a construction which he believes to be the correct one. These actions are deemed not to constitute a contest for purposes of the no-contest clause because the beneficiary is merely seeking to give effect to the real intent of the testator. (See *Griffin v. Sturges*, 40 A.2d 758 (Conn. 1944).)

INCORPORATION BY REFERENCE OF TRUSTEE POWERS

Connecticut law has specific requirements to incorporate trustee powers into a trust instrument by reference to the statute setting out those powers. Under the Fiduciary Powers Act, which contains the general and common powers granted to fiduciaries, the settlor of a trust may incorporate all of the powers by a general reference to that specific statute (Conn. Gen. Stat. Ann. § 45a-234).

A general reference to powers provided by law is insufficient to incorporate the Fiduciary Powers Act into the document. Under Conn. Gen. Stat. Ann. Section 45a-235, which contains more substantial and special fiduciary powers, the settlor may only incorporate the various powers by a specific reference to each separate subsection of the statute that the settlor wishes to grant to the trustee. A general reference to incorporate all of Section 45a-235 is insufficient. (Conn. Gen. Stat. Ann. § 45a-235.)

The following is the common language used to incorporate statutory trustee powers by reference (Subsections are randomly selected as demonstrative and are not indicative that inclusion of these powers is normal or desirable):

“In addition to all powers granted herein, or otherwise by law, I hereby grant to the trustees all of the powers set forth in Conn. Gen. Stat. Ann § 45a-234, as well the powers set forth in Conn. Gen. Stat. Ann. § 45a-235 (1), (3), (7) and (12).”

VIRTUAL REPRESENTATION

Connecticut recognizes virtual representation. A minor, unborn, or incapacitated beneficiary can be represented and bound by another beneficiary if their interests are substantially identical and if there is no conflict of interest between the known beneficiary and the represented beneficiary (Conn. Gen. Stat. Ann. § 45a-487d). If there is no conflict of interest, the holder of a power of appointment can represent the interests of the potential appointees and, if the power of appointment is a general power or a power to revoke, the powerholder may represent the takers in default of exercise (Conn. Gen. Stat. Ann. § 45a-487b).

RULE AGAINST PERPETUITIES

Connecticut retains the common law rule against perpetuities, which provides that a property interest is invalid if it is not certain to vest before:

- Twenty-one years after the death of the last measuring life alive at the time the interest is created.
 - Ninety years after the date of creation.
- (Conn. Gen. Stat. Ann. § 45a-491.)

RULE AGAINST PERPETUITIES SAMPLE CLAUSE

“Limitation on Duration of Trusts. Notwithstanding any provision of this Trust Agreement to the contrary, no trust created hereunder shall continue beyond the rule against perpetuities period then allowed under the laws of the state of Connecticut, and upon the expiration of said period, such trust shall terminate and the assets thereof shall be distributed outright to the Beneficiary of such trust, to his or her legal or natural guardian, or to a custodian acting for such person under statutory authority.”

“Rule against perpetuities. I realize that the law imposes certain limits upon the duration of trusts, and, accordingly, regardless of any other provision of this document, each trust established under this document or created pursuant to the exercise of a power of appointment granted under this document shall terminate not later than twenty (20) years after the death of the last to die of all of my descendants [or the descendants of my parents and my spouse’s parents] living on the date of my death, and my Trustees shall distribute any remaining trust property to any one or more of the Eligible Beneficiaries in such proportions as my Independent Trustees in their absolute discretion consider advisable.”

GOVERNING LAW

A trust created by a Connecticut resident is governed by Connecticut law unless the trust expressly provides that it should be governed by the law of some other jurisdiction. A settlor who is a resident of another state may provide that Connecticut law should govern the administration of the trust (see *Priest v. Lynn*, CV02 018 9311 (Conn. Super. Ct. Oct. 29, 2002)).

A trustee may generally change the governing law and the place of administration of the trust. However, a mere change in the place of administration does not automatically change the governing law. Even if the place of administration and governing law of the trust are both changed, the construction of the terms of the trust are still governed by Connecticut law if the settlor was a resident of Connecticut when the trust was created.

TRANSFER OF ASSETS TO TRUST BY SCHEDULE

A settlor may transfer assets that do not have legal title, such as household furnishings and personal effects, to a revocable trust by the use of a schedule or other written memorandum stating an intention to do so. However, any property with a title, such as real estate, automobiles, and bank or investment accounts, cannot be transferred to a trust by schedule or memorandum.

At the death of the settlor, those assets must be probated to complete the transfer into the trust. Real property requires a deed to transfer title to the Trustee of the revocable trust and items such as automobiles and financial accounts require that the title be affirmatively transferred to the name of the trust for the transfer to be complete before death.

TRUSTEE APPOINTMENT

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

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

QUALIFICATION AS TRUSTEE

There are no statutory provisions restricting the qualifications of an individual to serve as trustee. If an individual is legally competent to manage his or her own affairs, there is no legal constraint on his or her ability to serve as a trustee.

A Connecticut corporation chartered to serve as a fiduciary or a nationally chartered bank may qualify as trustee. A foreign corporation may qualify as a trustee in Connecticut if the state where the foreign entity received its charter to serve as fiduciary provides reciprocal rights for a Connecticut corporation so chartered to act as a fiduciary in that state (Conn. Gen. Stat. Ann. § 45a-206).

APPOINTMENT OF SUCCESSOR TRUSTEE

Connecticut does not have any priority rules for the appointment of a successor trustee.

The trust instrument should name the successor trustees. If none of the nominated successor trustees can act, the instrument should include a comprehensive mechanism for the appointment of successor trustees. If the trust instrument does not include this provision, a court may appoint a trustee. (Conn. Gen. Stat. Ann. § 45a-242.)

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

The trust instrument should include express provisions stating how a nominated trustee accepts the trustee appointment.

The trust instrument often requires that the trustee sign a written acceptance of appointment and deliver the acceptance to one or more appropriate parties. The instrument may require witnesses or acknowledgement before a notary public. Delivery may be to the settlor, if living, otherwise to the other trustees or to the beneficiaries. If there is no mechanism in the document for accepting appointment, then a trustee may accept appointment in writing or by performing acts that are consistent with the intent to accept the responsibility of serving as trustee. (See *Baskin v. Dam*, 239 A.2d 549, 552 (Conn. Cir. Ct. 1967) and *Rizzuto v. Baltrush*, 2012 WL 5992701 (Conn. Super. Ct. Nov. 13, 2012).)

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

The governing trust instrument should include express provisions for how a nominated trustee declines to accept a trustee appointment. Declination should generally be in writing and delivered to either the other trustees, the settlor of the revocable trust, if living, or the current beneficiaries. If the nominated trustee fails to take affirmative steps to demonstrate the trustee’s declination to act, there may be a presumption that the trustee

accepted appointment and the trustee may incur liability based on that presumption.

TRUSTEE COMPENSATION

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

Trustees are entitled to reasonable compensation for their service as trustees. There is no statutory fee schedule that creates a presumption of reasonableness. The landmark case on trustee compensation set out nine factors that the court should consider when determining if the fees are reasonable, including what level of compensation is fair in view of:

- The size of the estate.
- The responsibilities involved in the administration of the estate.
- The character of the work required.
- The special problems and difficulties met in doing the work.
- The results achieved.
- The knowledge, skill, and judgment required of and used by the fiduciary.
- The manner and promptitude in which the matter is settled.
- The time and service required.
- Any other circumstances which may appear relevant and material to this determination.

(See *Hayward v. Plant*, 119 A. 341, 346-47 (Conn. 1923).)

MULTIPLE TRUSTEES

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

Where there are multiple trustees named, they must act unanimously to bind the trust unless the trust instrument expressly provides that less than unanimous consent is required. Where unanimity is not required by the trust instrument, a trustee who does not join in the decision of a majority trustee typically is exempt from liability for the act of the other trustees. (Conn. Gen. Stat. Ann. § 45a-235(13).)

REMOVAL AND RESIGNATION OF TRUSTEES

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

A trust instrument may contain express provisions for the removal of a trustee. It may provide that one trustee has the power to remove another trustee or it may provide that one or more beneficiaries have the power to remove the trustee. A trust instrument that grants removal powers should state in express terms whether it is necessary to appoint a successor trustee and what qualifications, if any, the successor trustee must meet. It also may provide how often the removal power may be exercised.

If the trust instrument does not contain express provisions regarding removal, the court of probate may remove a trustee if certain conditions are met, including:

- Good cause (for example, the fiduciary is incapable of handling the trust administration, neglects trust duties, or wastes trust property).

- Conflict among co-fiduciaries that impairs proper administration.
- It is found to be in the best interest of the beneficiaries because the fiduciary is unfit or unwilling to perform trust duties.
- If there is a change in circumstances or all beneficiaries request a change.

(Conn. Gen. Stat. Ann. § 45a-242.)

The court will generally allow removal of a trustee if:

- The removal is found to be in the best interest of the beneficiaries.
- Removal is not inconsistent with a material purpose of the trust.
- A suitable successor fiduciary is available.

(See *Ramsdell v. Union Tr. Co.*, 519 A.2d 1185 (Conn. 1987).)

In addition to the statutory grounds for removal, an interested party may seek removal of a trustee if the trustee has a conflict of interest (see *Ramsdell*, 519 A.2d at 1190-91).

Because of the broad power vested in the court to remove a trustee, many trust instruments contain an express statement that the court may only remove a trustee for cause if the settlor does not want to allow beneficiaries wide latitude to remove the trustee through a court action. Another option is to provide that certain trustees were selected because of their special knowledge or skill or because of their relationship to the settlor or the beneficiaries, and that the service by that particular trustee shall be deemed to be a material purpose of the trust.

Removal under either the common law or by statute is an extraordinary remedy. Courts are required to give great deference to the selection of a fiduciary by the settlor and should use the power to remove only to prevent on-going risk of harm to the estate. Court removal is not intended to be used to punish a fiduciary for the fiduciary's past misconduct. (See *Cadle Co. v. D'Addario*, 844 A.2d 836 (Conn. 2004) and *In re Saccu's Appeal from Probate*, 905 A.2d 1285 (Conn. App. Ct. 2006).)

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

A trustee may resign under the resignation provision in the trust agreement, which should provide a method for the trustee to resign and a method for a successor to be appointed. Court approval need not be obtained and there is no requirement that a written resignation document be acknowledged, unless the trust agreement requires it.

In addition to the resignation provisions contained in the trust agreement, a trustee may petition the court for permission to resign in Connecticut. The court of probate, after notice and hearing, may accept or reject the written resignation of any fiduciary, but that resignation cannot be accepted until the fiduciary has fully and finally accounted for the administration of the trust to the acceptance of the court. (Conn. Gen. Stat. Ann. § 45a-242(b).)

TRUSTEE LIABILITY

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

If the trust does not expand or restrict the standard of care for investment and management of trust assets, for trusts created after October 1, 1997, Connecticut requires the trustee to follow the Uniform Prudent Investor Act (UPIA). The UPIA requires the trustee to act as a prudent investor would, exercising reasonable care, skill, and caution. It measures that standard based on the trust portfolio as a whole and as part of an overall investment strategy, not based on the individual assets.

The prudent investor rule is a default rule that may be expanded, restricted, eliminated, or otherwise altered by provisions of the trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on provisions of the trust. (Conn. Gen. Stat. Ann. § 45a-541b.)

A trustee must invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee must exercise reasonable care, skill, and caution. (Conn. Gen. Stat. Ann. § 45a-541b.)

A trustee must invest and manage the trust assets solely in the interest of the beneficiaries (Conn. Gen. Stat. Ann. § 45a-541e and see *Appeal of Clement*, 49 Conn. 519 (1882)).

In Connecticut, trustees are personally liable for breaches of fiduciary duties, including loyalty, diligence, impartiality, and integrity. As fiduciaries, they are held to the highest legal standards in all of their actions. Trustees are also subject to the general rules of civil liability applicable to fiduciaries. Therefore, trustees may be personally liable on contracts they enter into as trustees and for torts committed in the course of their trusteeship. (See *Andrews v. Platt*, 58 A. 458 (Conn. 1904).)

For information on exculpatory clauses for trustee liability, see Question 23.

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

As a general principle of fiduciary law, successor trustees are not liable to beneficiaries for breaches committed by predecessor trustees unless the successor trustee either:

- Knows or should know of a breach of trust committed by a previous trustee and allows it to continue.
- Fails to take proper steps to:
 - compel the previous trustee to deliver the trust property to him; or
 - address a breach of trust committed by a predecessor trustee.

(Restatement (Second) of Trusts § 223.)

Each fiduciary is responsible only for those assets which are actually delivered to the fiduciary. Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee should review the trust assets and make and implement decisions about the retention and disposition of assets to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust (Conn. Gen. Stat. Ann. § 45a-541d).

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

Under Connecticut law, co-trustees must act unanimously. A trust agreement generally can dispense with the common law requirement that co-trustees act unanimously.

A settlor may incorporate particular fiduciary powers by specific reference in the document to Conn. Gen. Stat. Ann. Section 45a-235. One permitted power is to allow for majority control. The statute provides that where there are three or more fiduciaries, the decision of a majority of the fiduciaries binds all of the fiduciaries, but an absent or dissenting fiduciary who joins in carrying out the decision of the majority is not liable for the consequences of any majority decision if the absent or dissenting fiduciary promptly files a written notice, by certified mail, of his dissent with both:

- All co-fiduciaries.
- Either:
 - the probate court having jurisdiction over any estate or trust; or
 - the income beneficiaries of any *inter vivos* trust.

(Conn. Gen. Stat. Ann. § 45a-235(13).)

Liability for failure to join in administering the estate or trust or for failing to prevent a breach of trust cannot be avoided (Conn. Gen. Stat. Ann. § 45a-235(13)).

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

A provision in the trust agreement may excuse a trustee for any:

- Mistake or error of judgment.
- Action taken or omitted by:
 - the trustee; or
 - any agent or attorney employed by the trustee.
- Loss or depreciation in the value of any trust, except in the case of willful misconduct.

A trust provision that relieves a trustee of liability for breach of trust is unenforceable to the extent that it relieves the trustee of liability for a breach of trust committed in bad faith (Restatement (Third) of Trusts § 96).

Connecticut recognizes the validity of exculpatory provisions in trusts (Conn. Gen. Stat. Ann. § 45a-234(38)). A statutory exculpatory clause may be incorporated by general reference to the Fiduciary Powers Act (Conn. Gen. Stat. Ann. § 45a-234(38)). This clause exonerates the trustee except for acts undertaken either:

- In bad faith.
- With willful misconduct.
- With gross negligence.

(Conn. Gen. Stat. Ann. § 45a-234(38).)

An exculpation clause excluding only willful misconduct by the trustee is enforceable (see *Jackson v. Conlandi*, 420 A.2d 898 (Conn. 1979)).

SPECIAL CIRCUMSTANCES REGARDING GIFTS OR RECIPIENTS

24. Please describe what happens if:

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

In Connecticut, the rules regarding gifts of encumbered property are unclear in the revocable trust setting. However, when revocable trusts are functioning as will substitutes, it is likely that Connecticut courts will apply the laws relating to wills to revocable trusts in this context.

BENEFICIARY DOES NOT SURVIVE (LAPSE)

Under the Connecticut anti-lapse statute, when a child, stepchild, grandchild, brother, or sister of the testator who is a beneficiary of the testator's estate dies before him, and the will does not state otherwise, the issue of that beneficiary takes in the beneficiary's place. The anti-lapse statute applies to wills and probate estates, but not to trusts.

A trust draftsperson should always incorporate specific provisions for what happens if a named beneficiary is deceased because the anti-lapse statute will not control.

GIFT NOT OWNED BY SETTLOR AT DEATH (ADEMPTION)

If a settlor makes a disposition of a specific item of property but does not own that property at his death, the bequest generally adeems and the intended beneficiary receives nothing (see *Burnham v. Hayford*, 104 A.2d 217 (Conn. 1954)). The trust should have a provision directing what happens if a specific asset is not owned by the trust at the settlor's death, but in the absence of any provision, the distribution language in the trust is simply ineffectual.

INSUFFICIENT ASSETS (ABATEMENT)

If the trust is silent, the taxes will be apportioned and prorated according to the state apportionment statutes (Conn. Gen. Stat. Ann. § 12-401). The statutory order of abatement is the default rule, and the settlor can change the order under the terms of the trust.

Under the law pertaining to estates and wills, if the estate lacks sufficient assets to pay its obligations and all dispositions under the will, bequests abate (that is, are reduced or eliminated) in the following order:

- Distributees.
- Residuary beneficiaries.
- Beneficiaries of general dispositions.

- Beneficiaries of specific dispositions of personal property.
- Beneficiaries of specific dispositions of real property.
- Transfer on death beneficiaries.

(Conn. Gen. Stat. Ann. § 45a-369(a).)

GIFTED PROPERTY ENCUMBERED

In Connecticut, the rules regarding gifts of encumbered property are unclear in the revocable trust setting. However, when revocable trusts are functioning as will substitutes, it is likely that Connecticut courts will apply the laws relating to wills to revocable trusts in this context.

Unless the instrument provides otherwise, a beneficiary receiving a gift of real property takes the property subject to any mortgage or lien on the property. The fiduciary is not responsible for the satisfaction of encumbrances out of the assets of the decedent's estate for:

- Any property subject to any lien, security interest, or other charge at the time of the decedent's death that is specifically disposed of by will and that passes to:
 - a distributee; or
 - a joint tenant under a right of survivorship.
- The trustee is responsible for the satisfaction of encumbrances on will-disposed property that the testator expressly (or by necessary implication) indicated that the trustee should satisfy. A general provision in the will for the payment of debts is not a sufficient indication.
- The proceeds of any policy of insurance on the life of the decedent that are payable to a named beneficiary if that policy is subject to any lien, security interest, or other charge.

(Conn. Gen. Stat. Ann. § 45a-266(a).)

A beneficiary receiving an outright gift of real property from a revocable trust on the death of the settlor would also likely take subject to the mortgage or any lien on the property.

EFFECT OF DIVORCE

In Connecticut, a divorce revokes dispositions of property to a former spouse that are found in a will (Conn. Gen. Stat. Ann. § 45a-257c). If a testator does not provide for a surviving spouse who married the testator after the execution of the will, state statutes provide for the disposition of property from the decedent's estate to the surviving spouse, typically providing that the spouse receives the share he or she would have received if the testator died intestate (Conn. Gen. Stat. Ann. § 45a-257a).

Unlike wills, trust documents must contain a provision for what happens if there is a divorce because the law does not expressly provide for the termination of a spouse's interest in a revocable trust because of a divorce. Failure to include an express provision may result in an ambiguity in the trust if there are provisions that refer to the ex-spouse by name but the settlor and his spouse are no longer married.

Under Connecticut's equitable distributions laws, the divorcing spouse's ability to attach or be assigned trust assets or share in

trust distributions depends on whether and to what extent the trust beneficiary's rights are vested (see *Dryfoos v. Dryfoos*, 2000 WL 1196339 (Conn. Super. Ct. 2000)).

SIMULTANEOUS DEATH

When the title to property depends on the order of death and there is insufficient evidence that the persons have died otherwise than simultaneously, the property of each person is disposed of as if that person had survived (Conn. Gen. Stat. Ann. § 45a-440(a)).

CREDITOR PROTECTION

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

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

SETTLOR'S DEBTS DURING LIFE

In 1942, the Connecticut Supreme Court declared that the transfer of property to a trust where the settlor retains the beneficial use of the property is ineffective to insulate the trust property from the settlor's creditors during the settlor's lifetime (see *Greenwich Tr. Co. v. Tyson*, 27 A.2d 166 (Conn. 1942)). As a result, Connecticut does not allow an individual to obtain protection from creditors during his lifetime through a self-settled trust.

SETTLOR'S DEBTS AFTER DEATH

A living trust affords no protection against a settlor's creditors. After the settlor's death, creditors of the estate can reach assets of a revocable trust, either directly or by pursuing an action against the estate's representatives. While there is no express law on the rights of creditors after the settlor's death in Connecticut, it is generally accepted that absent a specific state enabling statute, after the settlor's death, the settlor's creditors cannot reach property in a formerly revocable trust. Connecticut does not have this kind of a statute, nor does it have any case law on point (*Lefevre v. Lefevre*, 2012 WL 3264051 (Conn. Super. Ct. 2012)).

A decedent's debts must be paid, whether or not all of the decedent's assets were in a living trust at death. Where a revocable trust functions as a testamentary substitute, the trustee generally pays all of the settlor's final debts. If properly funded, the trust typically consists of the bulk of the settlor's property, and it is normally appropriate for the trustee to make all final payments when this is the case. The trustee of a living trust cannot use the simple and protective probate court procedure for settling claims against the decedent's estate. The trustee must resolve any unsettled claims in the Connecticut Superior Court (Ralph H. Folsom and others, *Revocable Trusts and Trust Administration in Connecticut* (Thomson Reuters 2017)).

DEBTS OF TRUST BENEFICIARIES AFTER SETTLOR'S DEATH

Spendthrift trusts refer to those living trusts where the trustees are empowered to accumulate or withhold income from the beneficiaries. In Connecticut, spendthrift provisions protect trust income from the claims of creditors or transferees of income rights of the beneficiaries only if the income can be accumulated in the trust or when the income is expressly given for the support of the beneficiary or the beneficiary's family (Conn. Gen. Stat. Ann. § 52-321). Unless the statutory requirements are met, no attempt at achieving spendthrift protection for income beneficiaries of a trust is likely to succeed (Conn. Gen. Stat. Ann. § 52-321). A person cannot create a trust for his or her own benefit and include spendthrift provisions (*Greenwich Tr. Co.*, 27 A.2d at 171).

Creditors may reach at least the vested income interest of a trust beneficiary (see *Greenwich Tr. Co.*, 27 A.2d at 171). However, it is clear under Connecticut law that a creditor may not reach a trust beneficiary's contingent interest by attachment (see *Smith v. Gilbert*, 41 A. 284, 286 (Conn. 1898)).

MEDICAID ELIGIBILITY

The assets in a funded revocable trust are available resources for determining a settlor's Medicaid eligibility (42 U.S.C. § 1396p(d)(3)(A)).

Connecticut law provides that on the application of the Department of Social Services, the Superior Court must terminate an *inter vivos* trust created by a person (or the person's spouse) when the person (or the person's spouse) becomes an applicant for (or recipient of) public assistance or Medicaid. The Superior Court must order that the principal and any undistributed income be distributed to the settlor of the trust. This does not apply, however, if it can be proven by clear and convincing evidence that not one of the principal purposes of the trust is the current or future qualification of the settlor or the settlor's spouse for benefits under Title XIX of the Social Security Act. (42 U.S.C. §§ 1396 to 1396w-5 and Conn. Gen. Stat. Ann. § 45a-486.)

Spendthrift trust assets intended for supplemental support are not actually available to pay for beneficiaries' needs in assessing Medicaid eligibility. Sole discretion is not absolute and does not necessarily permit the trustee to withhold payments unless the discretion to make distributions is subject to a properly drafted, ascertainable standard (see *Kolodney v. Kolodney*, 503 A.2d 625 (Conn. App. Ct. 1986)).

COURT SUPERVISION AND PRIVACY

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

A funded revocable trust is not subject to court supervision on the death of the settlor and is an effective tool for avoiding probate in Connecticut. However, if the settlor owns assets in his own name at his death, a revocable trust is ineffective at avoiding probate. In this case, a probate proceeding is required to probate the client's pour-over will and to transfer any individually-owned assets to the decedent's revocable trust.

Although a court does not generally supervise a revocable trust during the settlor's life or at death, on a motion by an interested party to remove or replace a trustee, the court of probate having jurisdiction may intervene in the trust administration (Conn. Gen Stat. Ann. § 45a-175(a) and see Removal and Resignation of Trustees).

Any beneficiary of an *inter vivos* trust may petition a court of probate having jurisdiction for an accounting by the trustee or trustees (Conn. Gen Stat. Ann. § 45a-175(c)(1)). The court may, after a hearing with notice to all interested parties, grant the petition and require an accounting for those periods of time as it determines are reasonable and necessary on finding that:

- The beneficiary has an interest in the trust sufficient to entitle him to an accounting.
- Cause has been shown that an accounting is necessary.
- The petition is not for the purpose of harassment.

(Conn. Gen Stat. Ann. § 45a-175(c)(1).)

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

In Connecticut, a decedent's will and other personal information are provided to the court during the probate process. This information, including assets and liabilities, is held in the estate file and is available to the public.

A revocable trust is not typically filed with the probate court and is generally unavailable to the public. This allows for the details of the trust, notably the dispositive provisions and the value of the trust's assets and liabilities, to remain private. If the trust is filed with the estate tax return, it is held in a non-public portion of the file.

The Connecticut probate application inquires as to the existence of a revocable trust and its trustees. However, the trust is not made part of the estate file.

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?

It is unnecessary for the settlor of a revocable trust to notify the trust beneficiaries (present or future, contingent or vested) of the trust's existence (*Ambrosius v. Ambrosius*, 239 F. 473 (2d Cir. 1917)). Unlike a will, after the settlor's death, the secrecy of the trust can be continued by the trustee until a court orders an accounting. At that time, beneficiaries are entitled to request a copy of the trust agreement. (Conn. Gen Stat. Ann. § 45a-177.)

A trustee also has a duty to provide complete and accurate information about the trust to a beneficiary who makes a reasonable request for that information, including information about the nature and amount of the trust property. In an unpublished opinion, the West Hartford Probate Court dismissed a trustee's argument that Title 45 applies only to irrevocable trusts and that it is an unconstitutional infringement on the grantor's right to privacy to require an accounting for a revocable trust. Having determined the right of the court to request an accounting under 45a-177, the court then rejected the trustee's argument that it need not present to the court a copy of the trust agreement, reaching the conclusion that the court could not properly audit the accounting without viewing the trust document.

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