

Revocable Trusts: Maryland  
State Q&A  
**Key Statutes and Rules**

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

The statutes and rules governing revocable trusts in Maryland are found in:

- The Maryland Trust Act, which became effective on January 1, 2015, and is adapted from the Uniform Trust Code and Maryland trust law. It sets out the specific rules governing trusts, trust administration, and fiduciaries. (Md. Code Ann., Est. & Trusts §§ 14.5-101 to 14.5-1006.)
- Subtitle 6 of the Maryland Trust Act which governs the rules specific to revocable trusts (Md. Code Ann., Est. & Trusts §§ 14.5-601 to 14.5-604).
- Title 15 of the Estates and Trusts law which governs the rules specific to fiduciaries (Md. Code Ann., Est. & Trusts §§ 15-101 to 15-620).
- Title 10 of the Maryland Rules, which governs the rules specific to guardians of person and property (Md. R. 10-101 to 10-712).

**Revocable Trusts as Will Substitutes**

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

- Age: A simple will may be sufficient for younger clients who are not likely to die or become incapacitated in the near term.
- Wealth: A revocable trust based plan often makes more sense for a wealthy client than for a client of limited means who is likely to have a simple probate.
- Tolerance for complexity: Funding a revocable trust and continuing to fund it with newly acquired assets on an ongoing basis can be daunting for some clients.
- Likelihood of becoming incapacitated in the near-term: If funded, a revocable trust allows a trustee to manage the client's trust assets if the client becomes incapacitated. If there is no revocable trust, a guardianship is likely to be needed.
- Desire for privacy: Revocable trusts generally afford clients more privacy than wills (see [Court Supervision and Privacy](#)).
- Fee tolerance: Revocable trust-based plans typically cost more during the planning phase than will-based plans.
- Probate avoidance: Assets held by a revocable trust may avoid probate not only in Maryland, but in the other states in which a client may own property.

## Who Can Create a Revocable Trust

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

In Maryland, a person must be eighteen years of age or older to create a revocable trust (Md. Code Ann., Est. & Trusts §§ 4-101 and 14.5-601).

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

In Maryland, a person must have the capacity to create a will in order to create a revocable trust. To create a will or revocable trust, a person must be legally competent. (Md. Code Ann., Est. & Trusts §§ 4-101 and 14.5-601(a).)

The standard for mental capacity is established through case law and is not clearly defined by statute. The testator of a will and the settlor of a trust have the mental capacity to create a will or trust if the testator or settlor:

- Understands the nature of the business in which the testator or settlor is engaging.
- Can recite the property of which the testator or settlor intends to dispose and who is to receive it.
- Knows the relative claims of the persons who were or should be the objects of the testator's or settlor's bounty (that is, knows the claims of those who would receive the property if the testator or settlor did not make the will or trust).

(See *Dougherty v. Rubenstein*, 172 Md. App. 269, 283-84, 914 A.2d 184, 192-93 (2007).)

A revocable trust does not automatically convert to an irrevocable trust if the settlor no longer has capacity. However, an incapacitated settlor may not create, revoke, or amend a trust instrument. (Md. Code Ann., Est. & Trusts § 14.5-601(c).)

### 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

A principal may grant the power to create, amend, or revoke an *inter vivos* trust to an agent. However, this power must be explicitly stated in both the trust instrument and the power of attorney. (Md. Code Ann., Est. & Trusts §§ 17-108(d)(1) and 17-203.)

## Guardian or Conservator

A guardian of the property of a settlor (or, if none has been appointed, a guardian of the settlor's person) may exercise the same powers that a settlor has to amend or revoke a trust if both:

- The court supervising the guardianship approves.
- The trust instrument does not provide otherwise (Md. Code Ann., Est. & Trusts § 14.5-602(f)).

However, statute does not authorize a guardian to create a trust for the settlor.

## Trust Requirements

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

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

### Trustee Requirements

For a trust to be valid in Maryland, a trustee must have duties to perform (Md. Code Ann., Est. & Trusts § 14.5-402(a)(4)).

### Beneficiary Requirements

For a trust to be valid in Maryland, there must be a definite beneficiary, unless the trust is:

- A charitable trust.
- For the benefit of an animal.
- A non-charitable trust with a specific intended use, in which case it can exist for no longer than 21 years.

(Md. Code Ann., Est. & Trusts §§ 14.5-402(b) and 14.5-408.)

### Trust Property Requirements

A revocable trust does not need to be funded when it is created to be valid in Maryland. The trust can be funded by transfers by will or other disposition that takes effect on the settlor's death (for example, a beneficiary designation). (Md. Code Ann., Est. & Trusts § 14.5-401.)

It is routine to fund the trust with a small amount of cash (usually \$10) at the time of the execution, and fund it more significantly once the trust has been properly established.

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

In Maryland, there is a presumption that the trust instrument is revocable unless it expressly states that it is irrevocable (Md. Code Ann., Est. & Trusts §14.5-602(a)(1)).

For a trust to be considered revocable, a settlor must be able to revoke the trust without the consent of the trustee or a person holding an adverse interest in the trust or trust property (Md. Code Ann., Est. & Trusts § 14.5-103(u)).

## Trust Formalities and Execution Requirements

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

A trust agreement created by an individual does not have to be in writing to be valid in Maryland if the creation and terms of the trust are established by clear and convincing evidence (Md. Code Ann., Est. & Trusts § 14.5-406).

However, in practice, counsel should always create a trust agreement in writing because:

- The clear and convincing evidence standard is almost impossible to meet.
- An oral trust may not hold real property or the proceeds from the sale of real property (see *Juliano v. Juliano*, 36 Md. App. 1, 5-12, 372 A.2d 1084, 1086-91 (1977)).
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### 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.

In Maryland, there are no execution requirements for a valid written revocable trust instrument. However, it is standard practice to execute a trust instrument in compliance with the execution requirements of a will (Md. Code Ann., Est. & Trusts § 4-102). A will in Maryland is valid if the will is:

- In writing.
- Signed by the testator, or some other person for him, in his presence and by his express direction.
- Attested and signed by two or more credible witnesses in the presence of the testator.

(Md. Code Ann., Est. & Trusts § 4-102.)

If a trust holds real property, the trust (and any amendments to that trust), must be in writing and signed by the party who by law can create the trust or else the trust is void (Md. Code Ann., Real Prop. § 5-105).

### Settlor's Signature

The settlor's signature is required on a written revocable trust agreement if the settlor wants to comply with the execution requirements of a will. If the settlor does not sign the trust instrument, another person must sign it on his behalf, in his presence, and by his express direction to be in compliance with the rules regarding will execution. (Md. Code Ann., Est. & Trusts § 4-102(2) and see *Vito v. Grueff*, 453 Md. 88, 106, 160 A.3d 592, 602-03 (2017).)

In practice, a Maryland trust should be executed in compliance with the requirements of a will to strengthen the argument of capacity. Two witnesses, and even a notary, as well, may

provide some support against those who may challenge or contest the validity of a trust document.

### **Trustee's Signature**

The trustee is not required to sign a valid written revocable trust instrument. However, a trust is not created until property is transferred to another as trustee during the settlor's lifetime or by some disposition taking effect on the settlor's death. For a successful transfer, the trustee must accept the trust property and agree to administer it as written in the trust instrument. (Md. Code Ann., Est. & Trusts § 14.5-401 and see *Owings v. Owings*, 233 Md. 357, 364, 196 A.2d 908, 912 (1964).) Therefore, it is common practice to have the trustee sign the trust instrument to indicate this acceptance.

### **Witness Requirements**

If the settlor intends to follow the common practice of complying with the rules for will execution when creating a revocable trust, the revocable trust instrument must be signed in the presence of the settlor and attested by two or more credible witnesses (Md. Code Ann., Est. & Trusts § 4-102(3)). A credible witness is a person who is competent to testify under the penalties of perjury, and should be notified of the settlor's competency at the time of execution (see *Estep v. Morris*, 38 Md. 417, 423-4 (Md. 1873)).

### **Notary Requirements**

A trust instrument is not required to be notarized in Maryland. However, it is common practice to notarize the settlor's signature and the witnesses' signatures of the trust agreement to express that the settlor:

- Intentionally created the trust.
- Had the mental capacity to create the trust.

It is also common practice to notarize the trustee's signature of the trust agreement to express that the trustee:

- Accepts the trust property.
- Agrees to administer the trust property as written in the trust agreement.

The settlor will sign the agreement as settlor and initial trustee, and usually have his signature notarized.

### **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.

In Maryland, a pour-over will is used to transfer a settlor's property to a revocable trust that may not have been transferred during the settlor's lifetime. This ensures that, even if the property must be probated, the property becomes trust property to be administered and

distributed under the terms of the revocable trust instrument. (Md. Code Ann., Est. & Trusts §§ 4-402 and 4-411.)

### **Existence of Revocable Trust Before Execution of Will**

In Maryland, for a settlor's property to be transferred to the settlor's revocable trust at the settlor's death, the trust instrument must be created before or contemporaneously with the will and must be identified in the will (Md. Code Ann., Est. & Trusts § 4-411).

### **Incorporation by Reference**

A Maryland will may incorporate by reference the terms of any writing which is in existence when the will is executed by reference to the writing if the intention to incorporate the terms is clearly written into the will (Md. Code Ann., Est. & Trusts § 4-107).

Often, when a pour-over will distributes the settlor's assets to the settlor's revocable trust, the will also includes contingency provisions to distribute the settlor's assets as stated in the trust, in case the trust or any of its provisions fail or are not operative at the settlor's death. If the trust (and any amendments) is executed before the will, and the will expressly identifies the trust (and any existing amendments), the will can dispose of the settlor's property under the trust and amendment terms.

Incorporation by reference is a separate doctrine from the one in Section 4-411 of the Maryland Code, which addresses a similar concept but is limited to allowing wills to distribute the settlor's assets to the settlor's revocable trust. Section 4-411 of the Maryland Code is only applicable if the settlor's trust is in existence and valid when the settlor dies, whereas the incorporation by reference doctrine indicated above applies if the revocable trust is not in existence or is not valid when the settlor dies.

### **Rights of Surviving Spouse**

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

In Maryland, a spouse is entitled to either the spouse's bequests under the decedent's will or a share of the deceased spouse's net probate estate under statute, known as the elective share. The net estate is the deceased spouse's property that passes by testate succession reduced by:

- Funeral and administration expenses.
- Family allowances.
- Enforceable claims and debts against the estate.

The amount the spouse may claim is also dependent on whether the deceased spouse had surviving children at the time of his death. To claim the elective share, the surviving spouse must make the proper election and file it in the probate estate proceeding. (Md. Code Ann., Est. & Trusts § 3-203.)

Because revocable trust property passes outside of probate, it is not subject to the spousal election. Maryland does not include in the elective share any non-probate assets over which the deceased spouse had control during the deceased spouse's lifetime, such as:

- Jointly owned properties or accounts (with survivorship rights).
- Property with payable on death or transferable on death designations.
- Property held in a revocable trust.

(Md. Code Ann., Est. & Trusts §3-203.)

However, Maryland will invalidate a trust that unlawfully frustrates a spouse's elective share right and the trust assets would become part of the deceased spouse's estate and the elective share in this circumstance. To create a valid revocable trust, the settlor must have reasons for creating the revocable trust other than to eliminate a spouse's right to an elective a share of the settlor's estate. (*Karsenty v. Schoukroun*, 959 A.2d 1147 (Md. 2008).)

Especially in these circumstances, counsel should consider including a clear statement of the settlor's intent for creating the trust in the trust instrument to provide clarity to any potential beneficiaries. That statement should explain the reasons that the settlor created the trust. Potential reasons for creating a revocable trust include probate avoidance, additional privacy, and ease of transition and administration of the settlor's assets when the settlor becomes incapacitated or dies.

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**

Maryland is not a community property state. However, trusts created in Maryland may include property from community property states. If a revocable trust contains community property, the trust may be revoked by either spouse acting alone, but may be amended only by both spouses acting jointly (to the extent of the community property). (Md. Code Ann., Est. & Trusts § 14.5-602(b)(1).) This preserves the community character of the property that is transferred to the trust.

Unless the trust provides otherwise, the portions of a revocable trust holding the balance of the property which is not community property may be revoked or amended by each settlor acting alone with regard to the portion of the trust property attributable to that settlor's contribution (Md. Code Ann., Est. & Trusts § 14.5-602(b)(2)).

### **Tenants by the Entirety**

In Maryland, when property held by married couples as tenants by the entirety is transferred to a revocable trust, the property loses its characterization as a tenancy by the entirety. However, the property (or proceeds from the sale of the property) retains immunity against the claims of separate creditors of each spouse if:

- The husband and wife remain married.
- The property or proceeds continue to be held in trust.
- The husband and wife are both beneficiaries of the trust.
- The trust instrument, deed, or conveyance specifically provides that this Section 511(b) of the Maryland Trust Act applies to the property or proceeds.

(Md. Code Ann., Est. & Trusts § 14.5-511(b), (g).)

## 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

There are no statutes or cases that address the enforceability of no-contest clauses in revocable trusts in Maryland. However, a no-contest clause in a will is void if probable cause exists for instituting proceedings (Md. Code Ann., Est. & Trusts § 4-413). These rules likely apply to gifts made by Maryland trusts, as well, since trusts are generally considered will substitutes (*Vito v. Grueff*, 453 Md. 88, 106, 160 A.3d 592, 602-03 (2017)).

A no-contest clause that is included in a revocable trust may deter a beneficiary from challenging the trust instrument if the beneficiary receives a substantial bequest under the trust. The bequest would be lost if the beneficiary challenges the trust without probable cause. This may minimize meritless litigation.

### Incorporation by Reference of Trustee Powers

Trust documents in Maryland generally grant trustees all the powers and authorities listed in the Maryland Trust Act, subject to the provisions of the trust instrument that conflict with those powers (Md. Code Ann., Est. & Trusts § 14.5-105). Trust instruments generally also explicitly state the specific powers conferred to fiduciaries under Maryland law (Md. Code Ann., Est. & Trusts § 15-102(b)(1)).

### Virtual Representation

Maryland recognizes the concept of virtual representation by which a holder of an interest in a trust can be represented and bound by another (called a "representative") regarding a particular question or dispute. The holder is bound by the action of the representative in the

following circumstances, if there is no conflict of interest between the holder and representative:

- A guardian of the property may represent and bind a minor or disabled person.
- If no guardian of the property has been appointed, a guardian of the person may represent and bind a minor or disabled person.
- An agent with specific authority to act for trust matters may represent and bind the principal.
- A trustee of a trust that is the beneficiary of another trust may represent and bind the beneficiaries of the beneficiary trust.
- A personal representative of the estate of a decedent who is also a beneficiary of a trust may represent and bind interested persons in the estate.
- If no guardian of the property or person of a minor, incapacitated, unborn, or unknown child has been appointed, the child's parent or guardian may represent and bind the child.
- If a minor, incapacitated, unborn, or unknown individual whose location is unknown and not reasonably ascertainable cannot otherwise be represented, that individual's grandparent or more remote ancestor may represent and bind the individual.
- A representative with a substantially identical interest with respect to the particular question or dispute may represent a minor, an incapacitated or unborn individual, or an individual whose identity or location is unknown and not reasonably ascertainable, regarding that particular question or dispute.
- The holder of a qualified power of appointment may represent and bind a person whose interests are subject to this power.

(Md. Code Ann., Est. & Trusts §§ 14.5-302 to 14.5-304.)

### **Rule Against Perpetuities**

Generally, Maryland follows the common law rule against perpetuities, which states that no interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest (Md. Code Ann., Est. & Trusts § 11-103 and *Dorado Ltd. P'ship v. Broadneck Dev. Corp.*, 562 A.2d 757, 759 (Md.1989)).

However, a revocable trust instrument may state that the rule against perpetuities does not apply. If the trust instrument states that the rule against perpetuities does not apply and the trust provisions allow for the trustee to sell, lease, or mortgage property any period of time beyond the rule against perpetuities vesting period, a trust interest is not required to meet the standard of the common-law rule against perpetuities. (Md. Code Ann., Est. & Trusts § 11-102(b)(5).)

### **Rule Against Perpetuities Sample Clause**

Pursuant to Section 11-102(b)(5) of the Estates and Trusts Article of the Annotated Code of Maryland, the Rule Against Perpetuities does not apply to this instrument or to any trust created under this instrument. The Trustee is hereby granted, and shall at all times have, the power to sell, lease, or

mortgage property for any period of time beyond the period that is required for an interest created under this instrument to vest, so as to be good under the Rule Against Perpetuities. If, notwithstanding the Settlor's intent as expressly stated above, the Rule Against Perpetuities is nonetheless applicable to this instrument or to a trust created under this instrument, the following provisions shall apply to the extent and with regard to any such trust to which the Rule Against Perpetuities is so applicable:

Unless sooner terminated by the express provisions of this instrument, each trust created in this instrument shall terminate twenty-one (21) years after the death of the last survivor of the Settlor's descendants who are living at the time of the Settlor's death. At that time, the property held in trust shall be discharged of any further trust, and shall immediately vest in and be distributed to those persons, equally, (if more than one) entitled to receive or have the benefit of the income from the respective trust.

For purposes of distributions under this Section only, it shall be presumed that any person then entitled to receive any discretionary payments of the income of a separate trust is entitled to receive all of the income, and it shall be presumed that any class of persons entitled to receive discretionary payments of income is entitled to receive all of such income.

### **Governing Law**

A governing law provision establishes each trust under the trust agreement as a Maryland trust. But, a governing law provision may also provide the trustee with the power to change the law governing the administration of any of the trusts after the settlor's death, to change the situs of administration of the trust, or to allow removal of trust property from one jurisdiction to another. These actions may require additional trustee action, such as appointing an independent trustee or filing an instrument with the trust records that the governing law is changing.

Generally, unless otherwise provided in the trust, Maryland law applies to a trust if:

- The trust instrument was executed in Maryland.
- The settlor was domiciled in Maryland.
- The trustee was domiciled in Maryland.
- Any trust property was located in Maryland at the time of creation.

(Md. Code Ann., Est. & Trusts §§ 14.5-403 and 14.5-404(a).) For clarity, Maryland trusts usually specify that Maryland law is the governing law of the trust.

### **Transfer of Assets to Trust by Schedule**

A revocable trust does not need to be funded when it is created to be valid in Maryland. The trust can be funded by transfers by will or other disposition that takes effect on the settlor's death (for example, a beneficiary designation). (Md. Code Ann., Est. & Trusts §14.5-401.)

Generally, a trust instrument states that the settlor transfers, conveys, and assigns to the trustee the trust property described in an attached "Schedule A." It is routine to fund the trust with a small amount of cash (usually \$10), and list this asset on the Schedule A, at the time of the execution. Trust funding is an ongoing process, and as the trust acquires more property,

the settlor may add each asset to Schedule A after the trust has been properly established, but this is not required.

It may be beneficial to keep Schedule A updated to inform the successor trustees of the assets that have been funded to the trust to make administration an easier process. Depending on how the initial trust has been drafted, Schedule A may need to be signed by the trustee to show acceptance of the trust assets, however, the trust itself may not need to be amended. To make this process less cumbersome, counsel should consider not requiring Schedule A to be signed, witnessed, or notarized each time it is changed. Typically, the settlor will not update the Schedule A, but counsel should make sure that he or she has knowledge of the assets being transferred to or out of the trust when the settlor seeks a review of his or her estate plan.

Listing specific assets on Schedule A rather than a nominal amount can be problematic if the schedule is not constantly updated as assets are sold or acquired because disputes may arise later about what assets are actually held by the trust. If titled or registered property is involved, creating a list of this property as being titled in the trust is not sufficient to actually transfer title to the trust.

## 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 requirements for an individual to qualify as a trustee in Maryland. Under Maryland law, a trustee may be any of the following:

- An individual.
- A trust company.
- A tax-exempt organization.
- A bank, trust company, or savings bank that is either:
  - organized under the laws of another state and authorized to act as trustee in the state where the principal place of business is located; or
  - organized under the laws of the United States and authorized to act as trustee under federal laws.

(Md. Code Ann., Est. & Trusts §14.5-710.) However, a court can remove a trustee if certain conditions are met (see [Question 18](#)).

## Appointment of Successor Trustee

In Maryland, if there is a vacancy in the office of trustee and there is no co-trustee remaining in office, the vacancy is filled in the order indicated:

- By a person designated under the trust to act as successor trustee.

- By a person appointed by unanimous agreement of the qualified beneficiaries.
- By a person appointed by the court.

(Md. Code Ann., Est. & Trusts §14.5-704.)

"Qualified beneficiaries" of a trust at any given time are:

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

(Md. Code Ann., Est. & Trusts § 14.5-103(t).)

The court also may appoint a successor trustee or special fiduciary (who may be a third party or uninterested temporary trustee) whether or not there is a vacancy, as is necessary for the administration of the trust (Md. Code Ann., Est. & Trusts §14.5-704(d)).

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

In Maryland, a nominated trustee can accept the trusteeship by complying with the method of acceptance as written in the terms of the trust. If the trust instrument does not provide a method for accepting the trusteeship, or if it does not provide that the acceptance method indicated in the trust instrument is exclusive, the trustee can accept the trusteeship by:

- Accepting delivery of the trust property.
- Exercising the duties of a trustee.
- Otherwise indicating acceptance of the trusteeship.

(Md. Code Ann., Est. & Trusts § 14.5-701(a).)

Without accepting the trusteeship, a nominated trustee may:

- Act to protect and preserve trust property, as long as the person notifies the settlor, or if he cannot be notified, the qualified beneficiary, of his rejection of the trusteeship within a reasonable time after acting.
- Inspect or investigate trust property to determine potential liability under environmental law or other law or for any other purpose.

(Md. Code Ann., Est. & Trusts § 14.5-701(c).)

Generally, a nominated trustee should accept a trusteeship in writing to make the trustee's intention to accept clear.

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

In Maryland, a trustee may decline a trusteeship by:

- Before accepting any trust property, notifying in writing the person who designated the trustee or that person's legal representative of his declination (Md. Code Ann., Est. & Trusts §14-403(f)(2)).
- Not accepting any trust property within a reasonable time (Md. Code Ann., Est. & Trusts §14.5-701).

Generally, if the nominated trustee does not want to accept the trusteeship, he should decline a trusteeship in writing to make that intention clear.

## Trustee Compensation

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

Trustees in Maryland whose duties include the collection and distribution of income from trust property are entitled to commissions. A trust agreement or any other valid agreement may provide for the amount and source of payment of commissions. (Md. Code Ann., Est. & Trusts § 14.5-708(a)(1).) If a valid agreement exists, a court that has jurisdiction over the trust may:

- Increase or decrease commissions for cause
- Provide for compensation for special or unusual services.

(Md. Code Ann., Est. & Trusts § 14.5-708(a)(1).) The settlor of the trust cannot prohibit the court from revising a trustee's commission (Md. Code Ann., Est. & Trusts § 14.5-105(8)).

Absent a provision in the trust agreement or another agreement regarding compensation, Maryland law provides a statutory fee schedule:

- Income commissions (paid from and chargeable against income) are:
  - 6% on all income from real estate, ground rents, and mortgages collected in each year;
  - 6.5% on the first \$10,000 of all other income collected in each year;
  - 5% on the next \$10,000;
  - 4% on the next \$10,000; and
  - 3% on any remainder.

(Md. Code Ann., Est. & Trusts § 14.5-708(b)(1).)

- Principal commissions, payable at the end of each year on the fair value of the principal held in the trust at the end of each year (paid from and chargeable out of principal) are:
  - 0.4% on the first \$250,000;
  - 0.25% on the next \$250,000;
  - 0.15% on the next \$500,000; and
  - 0.1% on any excess of value.

(Md. Code Ann., Est. & Trusts § 14.5-708(c)(1).)

A trustee who is a financial institution or a member of the Maryland Bar may charge a commission higher than these statutory income and principal commission rates. To do so, the trustee must file a schedule of fees with the appropriate agency and give notice to qualified beneficiaries. (Md. Code Ann., Est. & Trusts § 14.5-708(a)(2).) For more information on qualified beneficiaries, see [Appointment of Successor Trustee](#).

A Maryland trustee may also be reimbursed out of the trust property:

- For proper expenses incurred within the scope of trust administration.
- When necessary to prevent unjust enrichment of the trust, such as for other expenses incurred by the trustee that are not within the scope of trust administration.

(Md. Code Ann., Est. & Trusts § 14.5-709(a).)

## Multiple Trustees

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

Maryland law requires co-trustees of a trust to act unanimously unless the trust agreement provides otherwise (*Donovan v. Miller*, 137 Md. 555, 555, 112 A. 926, 927 (1921)).

The trust agreement can eliminate the requirement of unanimity of trustee action (Md. Code Ann., Est. & Trusts §§ 14.5-105 and 14.5-106).

If a co-trustee cannot perform his duties due to illness, absence, disqualification, or other temporary incapacity, the remaining trustee or trustees may act for the trust (Md. Code Ann., Est. & Trusts § 14.5-703(c)). A trustee may delegate functions to a co-trustee when prudent under the circumstances (Md. Code Ann., Est. & Trusts § 14.5-703(d)). However, a settlor can prohibit delegation of functions by specific provisions in the trust agreement (Md. Code Ann., Est. & Trusts § 14.5-105).

## Removal and Resignation of Trustees

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

The settlor of a revocable trust may remove a trustee at any time if the settlor has capacity to do so. The trust agreement should also provide for the removal of a trustee and include provisions for who may do so, the method of removal, and who may replace the removed trustee.

In addition to the trust's provisions for removal of a trustee, in Maryland a court must remove a trustee if the trustee has:

- Willfully misrepresented material facts leading to his appointment or to other action by the court in reference to the fiduciary estate.
- Willfully disregarded an order of court.
- Shown himself incapable, with or without fault to properly perform the duties of his office.
- Breached his duty of good faith or loyalty in the management of property of the fiduciary estate.

(Md. Code Ann., Est. & Trusts § 15-112(a)(1).)

A court may remove a trustee on its own initiative, or on the petition of the settlor, a co-trustee, or a beneficiary of the trust if:

- The trustee has negligently failed to file a bond within the time required by rule or order of court (Md. Code Ann., Est. & Trusts § 15-112(a)(2)(i)).
- The trustee has negligently failed to obey an order of court (Md. Code Ann., Est. & Trusts § 15-112(a)(2)(ii)).

- The trustee has failed to perform any of the trustee's duties as fiduciary, or to competently administer the estate (Md. Code Ann., Est. & Trusts § 15-112(a)(2)(iii)).
- The trustee has engaged in a serious breach of trust (Md. Code Ann., Est. & Trusts § 14.5-706(2)(i)).
- There is a lack of cooperation among co-trustees that substantially impairs the trust administration (Md. Code Ann., Est. & Trusts § 14.5-706(2)(ii)).
- The trustee is unfit, unwilling, or persistently failing to administer the trust effectively and the court determines that removal is in the best interests of the beneficiaries (Md. Code Ann., Est. & Trusts § 14.5-706(2)(iii)).
- A substantial change of circumstances has occurred and all of the qualified beneficiaries request removal, and the court finds that:
  - removal is in the beneficiaries' best interests;
  - removal is not inconsistent with a material purpose of the trust; and
  - another suitable trustee is available to serve.

(Md. Code Ann., Est. & Trusts § 14.5-706(2)(iv).) For a definition of qualified beneficiaries, see [Appointment of Successor Trustee](#).

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

The trust agreement should include provisions for a trustee to resign and for a successor trustee to be appointed. If the trust agreement does not include resignation provisions, Maryland requires court approval for a trustee to resign (Md. Code Ann., Est. & Trusts § 14.5-705(a)). Unless a co-trustee continues to serve or a court orders otherwise, the resigning trustee is required to act until either:

- A successor trustee takes control of the trust property.
- The trust property is delivered to the person entitled to it.

(Md. Code Ann., Est. & Trusts § 14.5-707(a).)

### **Trustee Liability**

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

A person or company that is acting as a trustee is considered a fiduciary and is bound by the rules and regulations of that role (Md. Code Ann., Est. & Trusts § 15-101(g)).

The trustee has extensive duties under the Maryland Trust Act (Md. Code Ann., Est. & Trusts §§ 14.5-801 to 14.5-817). Among these duties, the trustee must administer the trust:

- Reasonably under the circumstances, under the terms and purposes of the trust and in the interest of the beneficiaries (Md. Code Ann., Est. & Trusts § 14.5-801).
- Solely in advancement of the interests of the beneficiaries, not the trustee's own interests (Md. Code Ann., Est. & Trusts § 14.5-802).
- Impartially, as between beneficiaries' respective interests (Md. Code Ann., Est. & Trusts § 14.5-803).

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- Prudently, exercising reasonable care, skill, and caution considering the purpose, terms, requirements and other circumstances of the trust (Md. Code Ann., Est. & Trusts § 14.5-804).

The settlor cannot draft around the trustee's duty to act reasonably, under the terms and purpose of the trust, and in the interest of the beneficiaries (Md. Code Ann., Est. & Trusts § 14.5-105).

Maryland has also enacted the Prudent Investor Rule, which allows a fiduciary to take advantage of the Modern Portfolio Theory when investing trust assets. This rule only applies to:

- Trust companies.
- Investment advisors.
- Individual fiduciaries that have made the election to be governed by this statutory standard.

(Md. Code Ann., Est. & Trusts § 15-114(g).)

Any other fiduciary is governed by the common law Prudent Man Rule, which requires a fiduciary to invest trust assets as a prudent man would invest his own property. Under the Prudent Man Rule, a fiduciary may be held liable for a loss resulting from a single bad investment, regardless of how the whole portfolio performed. (*Bd. of Trs. of Employees' Ret. Sys. of Balt. City v. Mayor and City Council*, 317 Md. 72, 102-03, 562 A.2d 720, 734-35 (1989).)

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

Under Maryland law, a successor trustee is generally not liable for the acts or omissions of the prior trustee (Md. Code Ann., Est. & Trusts §14.5-812). However, a trustee is liable to a beneficiary if the trustee:

- Knows or should know of a situation constituting a breach of trust committed by a former trustee and the trustee improperly permits it to continue.
- Neglects to take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee.
- Neglects to take reasonable steps to redress a breach of trust committed by a former trustee.

(Md. Code Ann., Est. & Trusts §14.5-812(b).)

The acts or omissions of a resigning trustee are not discharged by his resignation (Md. Code Ann., Est. & Trusts §14.5-705(c)).

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

A trustee in Maryland may be found liable for the acts of a co-trustee in certain circumstances:

- A trustee may be liable for the acts of a co-trustee when one trustee delegated important duties to another who then wastes the trust funds. The delegating trustee is liable to the injured parties along with the trustee to whom the duty was delegated. (*Caldwell v. Graham*, 115 Md. 122, 128, 80 A. 839, 841 (Md. 1911).)

- Because all co-trustees must participate in the performance of trustee duties under Section 14.5-703(b) of the Maryland Trust Act, a trustee who remains inactive is guilty of a breach of trust committed by the acting trustees (*Jacob v. Davis*, 128 Md. App. 433, 460-61 738 A.2d 904, 918 (Md. App. 1999)).

If two or more trustees committed a breach of trust and are liable to the beneficiaries, all liable trustees must contribute to restore the value of the trust property or return the profit made by the breach, whichever greater (Md. Code Ann., Est. & Trusts §14.5-902). However, a trustee who received a benefit from the breach is not entitled to contribution from another trustee who did not so benefit, to the extent of the benefit received (Md. Code Ann., Est. & Trusts § 14.5-902(b)(2)).

The terms of the trust may allow for a trustee to dissent or abstain from a decision of the majority and then be absolved of personal liability by documenting the dissent or abstention in trust records (Md. Code Ann., Est. & Trusts § 14.5-105). Because the terms of the trust prevail except in certain circumstances, the trust can be drafted to afford a trustee greater protection from liability. However, the trust cannot change the duty of the trustee to act reasonably under the circumstances and in accordance with the trust's terms and purpose (Md. Code Ann., Est. & Trusts § 14.5-105(2)). Additionally, there are limitations as to any exculpatory provisions included in the trust. See Question 22.

A trustee is not liable for the loss, depreciation, or lack of profitability of trust property absent a breach of trust or breach of the standard of care applicable (Md. Code Ann., Est. & Trusts § 14.5-903). A trustee will not be held personally liable for a contract entered into by the trustee acting in as a fiduciary so long as the contract states that the trustee is acting in such fiduciary capacity (Md. Code Ann., Est. & Trusts § 14.5-908(a)).

While a trustee must act in accordance with the document, a settlor may direct a trustee to act contrary to the terms of the trust if the settlor's direction is expressed in writing (Md. Code Ann., Est. & Trusts § 14.5-808(a)). This protects the trustee acting contrary to the terms of the trust at the settlor's direction from liability for a breach.

The trust can be drafted to provide more protection from liability for the trustees if the settlor chooses to do so (Md. Code Ann., Est. & Trusts § 14.5-105).

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

Under the Maryland Trust Act, an exculpatory provision relieving the trustee of liability for acts performed while administering the trust is unenforceable if it:

- Relieves a trustee of liability for a breach of trust that was committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries
- Was included as the result of an act of abuse by the trustee who has a fiduciary or confidential relationship to the settlor.
- Is unreasonable under the circumstances.

(Md. Code Ann., Est. & Trusts § 14.5-906(a).)

If a trustee drafted an exculpatory provision or caused an exculpatory provision to be drafted, that provision is invalid unless the trustee proves that the provision is fair under the circumstances and that its existence and contents were adequately communicated to the settlor. Generally, if the settlor retained independent counsel, then the exculpatory provision

is not considered to have been drafted or caused to be drafted by the trustee. (Md. Code Ann., Est. & Trusts § 14.5-906(b).) A settlor may not draft around the limitations on exculpatory provisions, those limitations apply regardless of what is included in the trust instrument (Md. Code Ann., Est. & Trusts § 14.5-105(12)).

The beneficiaries of a trust can consent, release, or ratify the conduct of a trustee and therefore relieve a trustee of liability. The trustee is not liable then unless the trustee acted improperly to induce the consent, release, or ratification or if the beneficiary was unaware of the beneficiary's rights or the material facts relating to the trustee's breach. (Md. Code Ann., Est. & Trusts § 14.5-907.) It is common practice for trustees in Maryland to obtain beneficiary consent, release, or ratification for their actions.

Also, in Maryland, a trustee will not be liable if the beneficiary consented to, released, or ratified the conduct that resulted in a breach of trust. However, a trustee will be held liable for the breach of trust, despite the beneficiary's consent, release, or ratification if either:

- The beneficiary's action was induced by a trustee's improper conduct.
- The beneficiary did not know of his rights at that time.
- The beneficiary was unaware of the material facts relating to the breach at that time.

(Md. Code Ann., Est. & Trusts § 14.5-907.)

### 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.

The rules regarding priority of dispositions, abatement, ademption, and lapse are not clear in the revocable trust setting. However, because revocable trusts are generally considered will substitutes, the rules of construction for wills are generally the same for trusts; the court will try to ascertain the testator's or settlor's intent (Md. Code Ann., Est. & Trusts § 14.5-103(z)). It is therefore likely that Maryland courts will apply the law of wills to revocable trusts in this context, as has been done by Maryland courts in other contexts (*Vito v. Grueff*, 453 Md. 88, 106, 160 A.3d 592, 602-03 (2017) and see, for example, *Upman v. Clarke*, 359 Md. 32, 46, 753 A.2d 4, 11 (2000)).

#### Beneficiary Does Not Survive (Lapse)

Maryland has an anti-lapse statute under the law of wills that states that a legacy may not lapse or fail due to the death of the legatee unless a contrary intent is expressly stated in the will (Md. Code Ann., Est. & Trusts § 4-403). This rule likely applies to distributions under a

trust if the trust does not provide for what happens if the beneficiary predeceases the settlor. This rule does not apply in the context of wills if the legatee was dead when the will was made (and similarly likely does not apply in the trust context) (see *Billingsley v. Tongue*, 9 Md. 575 (1856)).

A non-spouse legatee who does not survive the testator (or likely the settlor, if a trust is involved) by 30 days is considered to have predeceased unless the document specifically states otherwise (Md. Code Ann., Est. & Trusts § 4-401).

### **Gift Not Owned By Settlor at Death (Ademption)**

Under the law of wills, when specific property bequeathed in a will is not owned by the testator at his death, the property is considered to have adeemed and the gift fails (*Von Steinner v. Sorrell*, 259 Md. 228, 230, 269 A.2d 604, 605 (1970)). This rule likely applies to gifts made by Maryland trusts, as well, since trusts are generally considered will substitutes (*Vito v. Grueff*, 453 Md. 88, 106, 160 A.3d 592, 602-03 (2017)).

To avoid confusion and potential disputes after death, counsel should generally advise the client to update the trust agreement when the client no longer owns property that is specifically gifted in the trust agreement.

### **Insufficient Assets (Abatement)**

Under the law of wills, specific legacies almost always have priority over other bequests. Assets are available first to pay debts and costs. If the remaining assets are insufficient to pay all legacies, specific legacies have priority over other legacies. (*Hall v. Elliott*, 236 Md. 196, 204–05, 202 A.2d 726, 730–31 (1964).) These rules likely apply to Maryland trusts, as well, since trusts are generally considered will substitutes (*Vito v. Grueff*, 453 Md. 88, 106, 160 A.3d 592, 602-03 (2017)).

Unless a contrary intent is stated in the document, legacies in a will or trust abate in proportional amounts in order as follows:

- Residuary legacies.
- General legacy (other than general legacy's to the testator's or settlor's dependents, the testator's or settlor's creditor in satisfaction of a just debt, or to the testator's or settlor's surviving spouse).
- General legacy to dependents of testator or settlor.
- General legacy to creditor of testator or settlor in satisfaction of a just debt.
- General legacy to surviving spouse of testator or settlor.
- Specific and demonstrative legacies.

(Md. Code Ann., Est. & Trusts § 9-103(b).)

Counsel should add custom priority provisions in a trust agreement if the settlor prefers that certain dispositions be cancelled or reduced if the assets are insufficient to satisfy all distributions under the trust agreement.

### **Gifted Property Encumbered**

Under the law of wills, unless a contrary intent is stated in the document, a legacy of specific property passes subject to a security interest or lien existing at the time of execution of the

will or which is a renewal, extension, or refinancing of a security interest or lien that existed at the time the will was executed. The legatee is entitled to exoneration if the security interest or lien is created or attaches after the execution of the will. (Md. Code Ann., Est. & Trusts §4-406.) These rules likely apply to Maryland trusts, as well, since trusts are generally considered will substitutes (*Vito v. Grueff*, 453 Md. 88, 106, 160 A.3d 592, 602-03 (2017)).

### **Effect of Divorce**

After the creation of the settlor's revocable trust, if the settlor and the settlor's spouse divorce or if the marriage is annulled:

- All terms relating to trust distributions to or for the benefit of the spouse are revoked and the spouse is considered to have predeceased the settlor for the purposes of the trust.
- The spouse is removed as a trustee or an advisor without further court action.
- The former spouse may not serve as trustee or an advisor or exercise any trust or fiduciary powers after the divorce or annulment.

(Md. Code Ann., Est. & Trusts § 14.5-604(b).)

These rules do not apply if otherwise expressly provided:

- In the trust instrument.
- By court order.
- By agreement between the settlor and the settlor's spouse or former spouse.

(Md. Code Ann., Est. & Trusts § 14.5-604(a)(2).)

### **Simultaneous Death**

Where a disposition of property depends on the priority of death, and there are simultaneous deaths with no sufficient evidence that the persons died in a particular order, each person's property is generally disposed of as if he was the survivor (Md. Code Ann., Cts. & Jud. Proc. § 10-801). However, both a testator and settlor may provide for a different disposition of property in his trust or will by stating who should be deemed the survivor under those circumstances. (Md. Code Ann., Cts. & Jud. Proc. § 10-805).

### **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**

A revocable trust does not provide asset protection during the life of the settlor. A revocable trust can preserve the protection under Maryland law for married couples when property that is transferred to the trust was initially titled tenants by the entirety (see [Tenants by the Entirety](#)).

### **Settlor's Debts After Death**

In Maryland, the property of a trust that was revocable at the settlor's death is subject to the claims of the settlor's creditors, subject to the settlor's right to direct the source from which liabilities are to be paid (Md. Code Ann., Est. & Trusts § 14.5-508(a)(5)).

If there are insufficient assets to pay final expenses and debts, payments are made in the order prescribed by statute (Md. Code Ann., Est. & Trusts § 8-105(a)).

If the settlor has no probate estate, the trustee may publish a general notice to creditors substantially in the form provided by statute. The trustee must publish the notice for three successive weeks in a newspaper of general circulation in the venue where probate would have been filed for the decedent (Md. Code Ann., Est. & Trusts § 14.5-508(b)). Claims by the deceased settlor's creditors are barred unless the creditor files an action against the trustee or presents sufficient notice to the trustee within the 6-month term following the first publication of a notice (Md. Code Ann., Est. & Trusts § 14.5-508(b)(4)).

The trustee can pay a properly presented claim or can disallow it in whole or in part. If a properly presented claim is disallowed in whole or in part, the claim is barred unless the claimant files an action against the trustee or the beneficiary to whom the property is distributed within 60 days of the mailing of the notice of disallowance (if the notice informed the claimant about this time limitation) (Md. Code Ann., Est. & Trusts § 14.5-508(b)(6)).

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

A revocable trust can provide some asset protection to the beneficiaries after the death of the settlor.

If the trust agreement includes a discretionary distribution provision, a support provision, or a spendthrift provision, the beneficiary's interest cannot be judicially foreclosed, attached by a creditor, or transferred by the beneficiary. The creditors can only reach the beneficiary's interest when it is actually distributed to the beneficiary. (Md. Code Ann., Est. & Trusts §§ 14.5-502 to 14.5-504.) However, both a spendthrift provision and a support provision may still be reached in satisfaction of an enforceable claim by:

- A child, spouse, or former spouse of the beneficiary that has a judgment or court order against the beneficiary for support or maintenance.
- A judgment creditor that has provided services for the protection of the interest of a beneficiary in the trust.
- Maryland or the United States, in certain limited cases.

(Md. Code Ann., Est. & Trusts § 14.5-505.)

## Medicaid Eligibility

Assets titled in a settlor's revocable trust, which the settlor contributed to the trust, are considered available resources for determining the settlor's Medicaid eligibility (42 U.S.C. § 1396p(d)(3)(A) and COMAR 10.09.24.01).

## Court Supervision and Privacy

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

A revocable trust is normally not subject to ongoing supervision by a court after the death of the settlor unless the court orders supervision. However, an interested person may petition a court or a court on its own may intervene in the administration of a trust and provide remedies as required considering the public interest and the interests of the beneficiaries. (Md. Code Ann., Est. & Trusts § 14.5-201.) An interested person is:

- A person named as the executor in a will.
- A person serving as personal representative after judicial or administrative probate.
- A distributee with a vested or contingent interest that has not been fully paid.
- An heir (a person entitled to receive property in intestacy).

(Md. Code Ann., Est. & Trusts § 1-101(h), (i).)

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

In Maryland, a revocable trust is not published in the public record like a will (Md. Code Ann., Est. & Trusts §§ 2-211 and 4-201). Since a revocable trust is generally administered without any public proceeding, the details of the trust agreement are kept private, unless the trust assets become subject to court supervision (Md. Code Ann., Est. & Trusts § 14.5-201 and see [Question 26](#)).

However, having a revocable trust does not guarantee there will be no probate estate. Any assets that are not titled to the trust or do not have an associated survivorship right or beneficiary designation may pass through probate and be made public record.

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

In Maryland, while a settlor is alive and has capacity, the beneficiaries of a revocable trust are not entitled to notice of its existence or any other information. If the settlor becomes incapacitated, the beneficiaries are entitled to notice only if they were entitled to distributions during the settlor's lifetime. (Md. Code Ann., Est. & Trusts § 14.5-603.)

Qualified beneficiaries (usually, there are no qualified beneficiaries of a revocable trust, other than the settlor or settlors, until after the settlor's death) are entitled to certain notice and information anytime a change of trustee occurs.

Within 60 days of accepting a trusteeship, the trustee must notify the qualified beneficiaries of:

- The acceptance.
- The trustee's name.

- The trustee's address.
- The trustee's phone number.

(Md. Code Ann., Est. & Trusts § 14.5-813(b)(1)(i).)

Within 90 days of a revocable trust becoming irrevocable, the trustee must notify the qualified beneficiaries of:

- The trust's existence.
- The settlor's identity.
- The qualified beneficiaries' right to request a copy of the trust agreement.
- The qualified beneficiaries' right to a trustee's report, which is an accounting of the trust property, liabilities, receipts, disbursements, and other transactions involving the trust.

(Md. Code Ann., Est. & Trusts § 14.5-813(b)(1)(ii).) For a definition of qualified beneficiaries, see [Appointment of Successor Trustee](#).