

## Revocable Trusts: South Carolina

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A State Q&A that provides guidance on the laws and customs governing revocable trusts in South Carolina. This State Q&A addresses key issues under the South Carolina Trust Code (S.C. Code Ann. §§ 62-7-101 to 62-7-1106), including the requirements for creating a valid revocable trust, including capacity and execution formalities. It explores common provisions found in trust instruments, like no-contest clauses and the rule against perpetuities. Furthermore, this resource details the rules for trustee appointment, compensation, liability, and removal. It examines the relationship between a revocable trust and a pour-over will, the impact of funding a trust on a surviving spouse's elective share, and creditor protection for both the settlor and beneficiaries. This State Q&A also covers privacy considerations, beneficiary notification rights, and the legal implications of special circumstances such as divorce or the simultaneous death of a settlor and beneficiary.

Answers to questions can be compared across a number of jurisdictions (see Revocable Trusts: State Q&A Tool). For similar information relating to irrevocable trusts in South Carolina, see [State Q&A, Irrevocable Trusts: South Carolina](#).

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

### Key Statutes and Rules

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

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

- The South Carolina Trust Code (S.C. Code Ann. §§ 62-7-101 to 62-7-1106).
- South Carolina Court rules, including those of:

- the South Carolina Probate Court, which has exclusive original jurisdiction over trusts (S.C. Code Ann. § 62-1-302(a)(3); Rules 1 to 5, SCRPC); and
- the South Carolina Circuit Court, given that certain matters relating to trusts can be removed on motion of a party or the court (S.C. Code Ann. § 62-1-302(d); Rules 1 to 86, SCRCP).
- South Carolina case law.

In addition, once the revocable trust becomes irrevocable, federal and state transfer and income tax rules may apply (see [State Q&A, Irrevocable Trusts: South Carolina: Question 1](#)).

### Who Can Create a Revocable Trust

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

The South Carolina Trust Code does not specify a minimum age for creating a trust. However, the Trust Code provides that the capacity to create a trust is the same that is required to make a will (S.C. Code Ann. § 62-7-601). To create a will, a person must be either:

- At least 18 years old.
- Emancipated by a family court order.
- Legally married.

(S.C. Code Ann. §§ 62-1-201(27) and 62-2-501.)

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

In South Carolina, the mental capacity required for the settlor to make a trust is the same as for a testator to make a will (S.C. Code Ann. § 62-7-601). A testator of sound mind may make a will (S.C. Code Ann. § 62-2-501). To be of sound mind, the testator must understand:

- The nature and extent of the testator's assets.
- The natural objects of the testator's bounty.
- How the testator wants assets to pass at death.

(*In re Washington's Estate*, 46 S.E.2d 287, 289 (S.C. 1948).)

### 4. Can any of the following create a revocable trust on behalf of an individual:

- Agent under a power of attorney?
- Guardian or conservator?

### Agent Under a Power of Attorney

In South Carolina, an agent acting under a power of attorney may create a revocable trust for the principal if the power of attorney expressly authorizes the agent to create the principal's trust (S.C. Code Ann. § 62-7-602A(a); see [Standard Document, Power of Attorney \(SC\)](#)).

### Guardian or Conservator

A conservator is a fiduciary appointed by the probate court to preserve and protect the assets of a minor or an incapacitated adult (S.C. Code Ann. §§ 62-5-101(3), 62-5-402, and 62-5-403). A conservator can petition the probate court for authority to create or amend

a trust for the conservatee (S.C. Code Ann. § 62-5-405(A)(2)).

A guardian is a fiduciary appointed by the probate court to protect the person of a minor or incapacitated adult, and not their assets (S.C. Code Ann. § 62-5-101(9)).

## Trust Requirements

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

### Trustee Requirements

In South Carolina, a trust generally must have a trustee (S.C. Code Ann. § 62-7-401(a)). For a trust to be valid in South Carolina:

- The trustee must have duties to perform.
- The same person cannot be the sole trustee and the sole beneficiary.

(S.C. Code Ann. § 62-7-402(a)(4), (5).)

However, a trust does not fail for a lack of a trustee (*Leaphart v. Harmon*, 195 S.E. 628, 629 (S.C. 1938)). Instead, trustees are appointed to fill any vacancy (see Question 13: Filling Vacancies in a Trusteeship).

### Beneficiary Requirements

A trust must have a definite beneficiary unless it is a:

- Charitable trust.
- Trust for the care of an animal (S.C. Code Ann. § 62-7-408).
- Trust for a noncharitable purpose (S.C. Code Ann. § 62-7-409).

(S.C. Code Ann. § 62-7-402(a)(3).)

A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities (S.C. Code Ann. § 62-7-402(c); see Question 12: Rule Against Perpetuities).

### Trust Property Requirements

A trust must be funded with assets. The initial funding amount can be a *de minimus* amount (for example \$5), with the majority of funding occurring later. A trust can be funded either:

- During the settlor's lifetime by a transfer of assets.
- At the settlor's death by will, beneficiary designation, or exercise of a power of appointment.

(S.C. Code Ann. § 62-7-401(a).) For more information on funding trusts, generally, see [Practice Note, Funding Revocable Trusts](#).

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

In South Carolina, trusts created on or after January 1, 2014, are revocable and the settlor may revoke or amend the trust unless the terms of the trust expressly provide that the trust is irrevocable (S.C. Code Ann. § 62-7-602(a)). Trusts created before January 1, 2014, are irrevocable unless the trust provides that it was revocable (S.C. Code Ann. § 62-7-602, Rptr. Cmts.).

## Trust Formalities and Execution Requirements

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

South Carolina permits oral trusts for personal property, which may be established only by clear and convincing evidence (S.C. Code Ann. § 62-7-407). A trust must be in writing if it either:

- Disposes of real estate, in which case the settlor must also sign the trust (S.C. Code Ann. § 62-7-401(a)(2)).
- Is to receive property through a pour-over will (S.C. Code Ann. § 62-2-510(A)(1)(a)).

Attorneys generally create written trust agreements rather than oral ones for clarity and if the trust might hold real property interests in the future.

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

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

## Settlor's Signature

If the trust agreement is in writing, the trust should be signed in South Carolina either:

- By the settlor.
- In the settlor's name by:
  - some other person at the settlor's direction; and
  - in the settlor's presence.

(S.C. Code Ann. § 62-7-402(b); see Question 7.)

## Trustee's Signature

Although it is standard practice in South Carolina for the trustee to sign the trust instrument, South Carolina does not require the trustee's signature to create a valid revocable trust. Since the settlor is often the initial trustee, the settlor typically signs in the capacity of both settlor and trustee. When the initial trustee or an initial co-trustee is not the settlor, counsel typically have that trustee sign the revocable trust instrument to indicate the trustee's acceptance of the trust (see Question 14).

## Witness Requirements

Although it is standard practice in South Carolina for the trust agreement to be witnessed by two witnesses, South Carolina does not require witness signatures to create a valid revocable trust.

## Notary Requirements

Although it is standard practice in South Carolina for a trust agreement to be notarized, South Carolina does not require acknowledgment before a notary to create a valid revocable trust. Third parties with which the trustee may transact on behalf of the trust generally prefer the trust to be notarized as notarization protects against fraud.

## Relationship to Pour-Over Will

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

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

### Existence of Revocable Trust Before Execution of Will

In South Carolina, it is standard for the trust to exist before the existence of the settlor's will. However, a will can leave assets to the trustee of a trust (a pour-over will) if the trust is identified in the testator's will and the trust terms are set out in either:

- A written instrument, other than a will, executed before, concurrently with, or after the execution of the testator's will, but not later than the testator's death.
- The valid will of another person predeceasing the testator.

(S.C. Code Ann. § 62-2-510(A).)

### Incorporation by Reference

A pour-over will can refer to a revocable trust's terms and provisions and direct that those terms and provisions apply if the trust is not in existence when the testator dies. To incorporate an existing trust agreement by reference, the pour-over will must both:

- Manifest this intent to incorporate the existing trust agreement.
- Describe the trust sufficiently to permit its identification.

(S.C. Code Ann. § 62-2-509.)

### Rights of Surviving Spouse

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

In South Carolina, a revocable trust may be found to be illusory for the purpose of calculating a surviving spouse's elective share rights. This finding does not render the trust invalid, but instead allows for inclusion of the trust assets as part of the probate estate of the settlor only for the purpose of calculating the spouse's elective share. (S.C. Code Ann. § 62-7-401(c).)

The court generally find a trust illusory where a spouse retained the extensive powers over the trust assets that the spouse had, until the spouse's death, the same rights in the assets after the creation of the trust that the spouse had before its creation (*Dreher v. Dreher*, 634 S.E.2d 646, 648 (S.C. 2006)). Therefore, because settlors typically retain complete

control over assets in their revocable trusts until their death or incapacity, South Carolina finds revocable trusts, generally, to be illusory for purposes of calculating the spouse's elective share, though they may remain valid for all other purposes.

For more information about the elective share in South Carolina, see [State Q&A, Wills: South Carolina: Disinheriting a Testator's Spouse](#).

#### 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

South Carolina is not a community property state. However, a South Carolina trust may include community property acquired by the spouses when living in another state. Unless provided otherwise in the trust, to the extent a joint trust consists of community property, the trust instrument may only be amended by both spouses acting jointly but can be revoked by either spouse acting alone (S.C. Code Ann. § 62-7-602(b)).

### Tenants by the Entirety

South Carolina does not have tenants by the entirety form of ownership (*Davis v. Davis*, 75 S.E.2d 46, 47 (S.C. 1953).)

### Common Revocable Trust Provisions

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

- No-contest clause.
- Incorporation by reference of trustee powers.
- Virtual representation.

- Rule against perpetuities.
- Sample rule against perpetuities clause.
- Governing law.
- Transfer of assets to trust by schedule.

### No-Contest Clause

In South Carolina, a provision in a revocable trust purporting to penalize any interested party for contesting the validity of a trust (also known as an *in terrorem* clause) or instituting other proceedings related to the trust is unenforceable if probable cause exists for instituting the proceedings (S.C. Code Ann. § 62-7-605). The court must find probable cause if, based on the facts, a finding of probable cause is supported by evidence the contestant acted reasonably in pursuing the action and was likely to prevail (*Deborah Dereede Living Trust dated December 18, 2013 v. Karp*, 831 S.E.2d 435, 440 (S.C. App. Ct. 2019), cert. denied (S.C. Mar. 12, 2020)).

### Incorporation by Reference of Trustee Powers

The trustee powers include:

- Those found in the trust agreement.
- Except as limited by the trust agreement, all powers over the trust property that an unmarried, competent owner has over individually owned property.
- Any other powers appropriate to achieve the proper investment, management, and distribution of the trust property.

(S.C. Code Ann. § 62-7-815(a).) The trustee's exercise of these powers is subject to the trustee's fiduciary duties conferred by Part 8 (S.C. Code Ann. §§ 62-7-801 to 62-7-819) of the South Carolina Trust Code (S.C. Code Ann. § 62-7-815(b)).

South Carolina statutes grant specific powers are granted to a trustee, which powers do not need to be listed in the trust agreement, unless the settlor wants to specifically incorporate them (S.C. Code Ann. § 62-7-816). However, most trust agreements list in detail the powers of the trustee regarding the administration of real property, personal property, investment assets, bank accounts, and businesses so that third parties can more easily see whether the

trustee is authorized to take a certain action related to trust property.

### Virtual Representation

A beneficiary representative is a person who may represent and bind another person concerning the affairs of a trust. Notice to the beneficiary representative is the same as giving notice to the represented person. Consent of a beneficiary representative is binding on the person represented unless the person represented objects to the representation before the consent becomes effective. In judicial proceedings, a beneficiary representative may bind those people represented by the beneficiary representative. (S.C. Code Ann. § 62-7-301.)

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

- A conservator can represent and bind the ward to the extent of the power conferred on the conservator generally or by court order.
- A guardian can represent and bind the ward if a conservator was not appointed and to the extent of the power conferred on the guardian generally or by court order.
- An agent may represent and bind a principal to the extent that the agent has the authority to act.
- A trustee may represent and bind trust beneficiaries regarding issues involving the trust.
- A personal representative of a decedent's estate can represent and bind persons interested in the estate regarding estate issues.
- A parent may represent and bind the person's minor or unborn children if a conservator or guardian has not been appointed.

(S.C. Code Ann. § 62-7-303.)

A person may represent a settlor lacking capacity and receive notice and give binding consent for the settlor. However, court approval is required in certain cases involving a trust revocation, amendment, or termination. (S.C. Code Ann. § 62-7-301(d).)

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

### Rule Against Perpetuities

A nonvested property interest is invalid unless either:

- When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive.
- The interest vests or terminates within 360 years after its creation.

(S.C. Code Ann. § 27-6-20(A).)

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

”Notwithstanding anything herein to the contrary, the trusts created hereunder shall terminate not later than the latest of Twenty-One (21) years after the death of the last survivor of my Spouse and issue living on the date of my death or Three Hundred Sixty (360) years after the creation of the trusts, and at that time, the trustee shall distribute each remaining trust hereunder to the beneficiary or beneficiaries entitled to receive the current income thereof, and if there is more than one beneficiary, in the proportion to which the beneficiaries are entitled to receive the income, or, if no proportion is designated, in equal shares to such beneficiaries.”

### Governing Law

The meaning and effect of the terms of a trust are determined by either:

- The law of the jurisdiction designated in the terms of the trust .
- If the terms of the trust do not designate the law of a jurisdiction, the law of the jurisdiction having the most significant relationship with the matter at issue.

(S.C. Code Ann. § 62-7-107.)

### Transfer of Assets to Trust by Schedule

Including assets on a trust by schedule shows the settlor’s intent that the trust hold those assets. However, titled assets must actually be transferred into the trust. Attaching a schedule of trust assets to the trust instrument is generally not effective to complete a transfer to the trust of any asset that is

titled in the settlor’s name to the trust. (S.C. Code Ann. § 62-7-401.)

All titled assets that are designated as trust assets must either:

- Be re-titled in the trust’s name.
- Have a beneficiary designation completed naming the trust as beneficiary if the asset has a beneficiary designation (such as an insurance policy or annuity).

If the decedent executes a pour-over will, any assets that are part of the decedent’s probate estate are transferred to the trust through a probate of the will or any applicable expedited probate procedures (see Question 9). For more information on probate in South Carolina, see [State Q&A, Probate: South Carolina](#).

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

## Trustee Appointment

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

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

### Eligibility to Act as Trustee

There are no statutory requirements for an individual to qualify as a trustee in South Carolina, though corporate trustees are subject to certain requirements under S.C. Code Ann. § 34-21-10. To act as trustee, a prospective trustee must accept the trusteeship (see Question 14).

The settlor, the co-trustee, or a beneficiary may petition the court to remove a trustee, or the court may remove a trustee on its own initiative for certain reasons (S.C. Code Ann. § 62-7-706; see Question 18).

### Filling Vacancies in a Trusteeship

A vacancy in trusteeship occurs if:

- A person designated as trustee rejects the trusteeship.

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- A person designated as trustee does not exist or cannot be identified.
- A trustee resigns.
- A trustee is disqualified or removed.
- A trustee dies.
- A guardian or conservator is appointed for an individual trustee.

(S.C. Code Ann. § 62-7-704(a).)

The trust agreement may set out how to fill a trustee vacancy. A trustee vacancy in a noncharitable trust that is required to be filled must be filled in the following order of priority:

- By a person designated in the trust instrument to act as successor trustee.
- By a person appointed by unanimous agreement of the qualified beneficiaries.
- By a person appointed by the court.

(S.C. Code Ann. § 62-7-704(c).) A qualified beneficiary is a living beneficiary who, on the date the beneficiary's qualification is determined:

- Is a distributee or permissible distributee of trust income or principal.
- Would be a distributee or permissible distributee of trust income or principal if:
  - the interests of the above distributees terminated on that date but the termination of those interests did not terminate the trust; or
  - the trust terminated on that date.

(S.C. Code § 62-7-103(12).)

Unless the terms of the trust provides otherwise, if one or more co-trustees remain in office, a vacancy in a trusteeship need not be filled (the remaining co-trustees can continue to act for the trust) (S.C. Code Ann. §§ 62-7-105(b) and 62-7-704(b)).

A vacancy in a trusteeship must be filled if the trust has no remaining trustee (S.C. Code Ann. § 62-7-704(b)). Because a trust must have a trustee to be valid, the probate court can fill a trustee vacancy and appoint a successor trustee (S.C. Code Ann. § 62-7-704(e)).

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

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

### Drafting Attorney as Trustee

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

- The client must be properly informed.
- The appointment must not violate SCACR, Rules of Prof. Conduct, Rule 1.7 regarding material limitation conflicts.
- The appointment must not be the product of undue influence or improper solicitation by the attorney.
- The client must give informed consent, preferably confirmed in writing. When obtaining informed consent, the attorney should advise the client regarding which other parties are eligible to serve as a fiduciary, that a person serving as a fiduciary is entitled to compensation, and that the attorney may be eligible to receive compensation for serving as fiduciary in addition to the attorneys' fees that the attorney or the attorney's firm may earn for serving as attorney for the fiduciary.

(SCACR, Rules of Prof. Conduct, Rule 1.8(c), cmt. Gifts to Lawyers.)

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

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

In South Carolina, a person designated as trustee accepts the trusteeship either:

- By substantially complying with a method of acceptance provided in the terms of the trust.

- If the terms of the trust do not provide a method for acceptance or if the method provided in the trust is not expressly made exclusive, by:
  - accepting delivery of trust property;
  - exercising powers or performing duties as trustee; or
  - otherwise indicating acceptance of the trusteeship.

(S.C. Code Ann. § 62-7-701(a).)

If a designated trustee does not accept the trusteeship within a reasonable time after knowing of the designation, the person is deemed to have rejected the trusteeship (S.C. Code Ann. § 62-7-701(b)).

A person designated as trustee may, without accepting the trusteeship:

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

(S.C. Code Ann. § 62-7-701(c).) For a definition of qualified beneficiary, see Question 13: Filling Vacancies in a Trusteeship.

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

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

In South Carolina, a designated trustee not yet accepting the trusteeship may reject the trusteeship. A designated trustee not accepting the trusteeship within a reasonable time after learning about the designation is deemed to have rejected the trusteeship. (S.C. Code Ann. § 62-7-701(b).) There is no statutory method of declining to serve as trustee.

A person designated as trustee may, without accepting the trusteeship, act to preserve the trust property

if, within a reasonable time after acting, that person must send a rejection of the trusteeship to the settlor or, if the settlor is dead or lacks capacity, to a qualified beneficiary (S.C. Code Ann. § 62-7-701(c); see Question 13: Filling Vacancies in a Trusteeship).

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

## Trustee Compensation

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

In South Carolina, if the terms of the trust do not specify trustee compensation, the trustee is entitled to compensation that is reasonable under the circumstances (S.C. Code Ann. § 62-7-708(a)). If the trust terms specify the trustee's compensation, the trustee is entitled to the compensation specified. However, the court may allow more or less compensation if:

- The duties of the trustee are substantially different from those contemplated when the trust was created.
- The specified compensation is unreasonably high or low.

(S.C. Code Ann. § 62-7-708(b).)

Corporate trustees typically take compensation according to their fee schedule and sometimes require specific language to be included in the trust. If the settlor wants a corporate trustee, counsel should contact the corporate trustee to discuss trustee fees and any language that should be included in the trust.

### Compensation of Attorney as Trustee

There is no prohibition of any attorney serving as a trustee of a client's trust under South Carolina law. The terms of the trust may specify the trustee's compensation. If not, the compensation must be reasonable under the circumstances. (S.C. Code Ann. § 62-7-708(a).) Similarly, while there is no prohibition for a drafting attorney to serve as a personal representative under a client's will, a drafting attorney appointed as a trustee should:

- Disclose the potential amount of the compensation for serving as personal representative in writing to the client.

- Give the client a reasonable opportunity to seek the advice of independent counsel.

(SCACR, Rules of Prof. Conduct, Rule 1.8(a), (c).) Additionally, best practice is that counsel and the client agree in writing to the form of compensation, which should be memorialized in the executed trust instrument.

## Multiple Trustees

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

In South Carolina, unless the trust agreement provides otherwise:

- Co-trustees unable to reach a unanimous decision may act by majority decision (two co-trustees must act unanimously on the proposed action) (S.C. Code Ann. § 62-7-703(a)).
- If a vacancy occurs, the remaining co-trustees may act for the trust (S.C. Code Ann. § 62-7-703(b)).

A co-trustee must participate in the performance of a trustee's functions unless the co-trustee is not available to perform the function due to:

- Absence.
- Illness.
- Disqualification under other law.
- Temporary incapacity.
- The co-trustee proper delegating the performance of the function to another trustee.

(S.C. Code Ann. § 62-7-703(c).) However, if a co-trustee is unavailable and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining co-trustee or a majority of the remaining co-trustees may act for the trust (S.C. Code Ann. § 62-7-703(d)).

## Removal and Resignation of Trustees

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

A settlor may always remove the trustee of a revocable trust during the settlor's life, unless the

settlor is incapacitated, because a revocable trust is by its terms fully revocable and amendable by the settlor. Even if the settlor does not include a removal provision in the trust instrument, the settlor can amend the instrument to include a removal provision or revoke the instrument in its entirety if it becomes necessary or desirable to remove a trustee.

However, the trust instrument should generally include a trustee removal provision specifying who has authority to remove trustees and the method for doing so. This becomes particularly important following the settlor's incapacity or death, when the trust instrument can generally no longer be revoked or amended.

In addition to any removal provisions in the trust instrument in South Carolina, the settlor, a co-trustee, or a beneficiary may request that the South Carolina Probate Court remove a trustee or the court, on its own initiative, may remove a trustee if:

- The trustee committed a serious breach of trust.
- Lack of cooperation among co-trustees substantially impairs the trust's administration.
- Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines removal is in the beneficiaries' best interests.
- There was a substantial change in circumstances or removal was requested by all the qualified beneficiaries and the following apply:
  - the court finds that trustee's removal best serves the interests of all the beneficiaries;
  - the removal is not inconsistent with a material purpose of the trust; and
  - a suitable co-trustee or successor trustee is available.

(S.C. Code Ann. § 62-7-706; see Question 13: Filling Vacancies in a Trusteeship.)

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

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

In South Carolina, except as otherwise provided in the trust instrument a trustee may resign either:

- After providing at least 30 days written notice to:
  - the qualified beneficiaries;
  - the settlor, if living; and
  - all co-trustees.
- With court approval.

(S.C. Code Ann. §§ 62-7-105 and 62-7-705(a); see Question 13: Filling Vacancies in a Trusteeship.)

If the court approves the resignation, it may issue orders reasonably necessary to protect the trust property (S.C. Code Ann. § 62-7-705(b)). Even if the trust provides a mechanism for resignation, the probate court can hear an action to remove, replace, or appoint a successor trustee. (S.C. Code Ann. § 62-7-706; Question 18).

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

### Trustee Liability

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

In South Carolina, a trustee must administer a trust as a prudent person would, by considering the trust's purposes, terms, distributional requirements, and other circumstances, and with the exercise of reasonable care, skill, and caution. (S.C. Code Ann. § 62-7-804.) A trustee with special skills or expertise must use those special skills or expertise in administration of the trust (S.C. Code Ann. § 62-7-806).

A trustee must:

- Administer the trust in good faith, according to the trust's terms and purposes and the beneficiaries' interests.
- Comply with the South Carolina Trust Code.

(S.C. Code Ann. § 62-7-801.)

A trustee owes the trust beneficiaries a duty of loyalty and a duty of impartiality (S.C. Code Ann. §§ 62-7-802 and 62-7-803). South Carolina provides statutory guidelines for different trust administration situations that may represent a conflict between the trustee's fiduciary duties and the trustee's personal interests (S.C. Code Ann. § 62-7-802). When a trust is revocable, the duties of the trustee are owed exclusively to the settlor (S.C. Code Ann. § 62-7-603).

A trustee's breach of trust creates a personal liability. The trustee must pay any damages awarded from the trustee's own funds. (*Deborah Dereede Living Trust dated December 18, 2013 v. Karp*, 427 S.C. 336, 345 (S.C. App. Ct. 2019), cert. denied (S.C. Mar. 12, 2020).)

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

In South Carolina, a successor trustee is generally not liable for the acts of a previous trustee. The successor trustee:

- Is entitled to a statement of account of a prior trustee's acts, on reasonable request. The successor trustee may accept the account rendered and is under no duty to examine the prior trustee's actions.
- Not liable for failing to seek redress regarding the prior trustee's actions.

(S.C. Code Ann. § 62-7-812.)

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

In South Carolina, a co-trustee not joining in the action of another trustee is not liable for the action unless the non-joining co-trustee did not exercise reasonable care to:

- Prevent a co-trustee from committing a serious breach of trust (see, for example, *Floyd v. Floyd*, 365 S.C. 56, 95-96 (Ct. App. 2005), overturned on other grounds due to legislative action).
- Compel a co-trustee to redress a serious breach of trust.

(S.C. Code Ann. § 62-7-703(f), (g).)

Unless the action is a serious breach of trust, a dissenting trustee joining in an action at the direction of the majority of the trustees is not liable for the action if the dissenting trustee notifies any co-trustee of the dissent at or before the time the action is taken (S.C. Code Ann. § 62-7-703(h)).

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

A South Carolina trust term relieving a trustee of liability for breach of trust is unenforceable to the extent it either:

- Relieves the trustee of liability for breach of trust committed:
  - in bad faith; or
  - with reckless indifference to the trust purposes or beneficiaries' interests.
- Was inserted because of the trustee's abuse of a fiduciary or confidential relationship with the settlor.

(S.C. Code Ann. § 62-7-1008.)

Otherwise, the trust may generally waive trustee liability, provided that the trust's terms cannot waive the duty of a trustee to act in good faith and according to the trust purposes (S.C. Code Ann. § 62-7-105(b)(2)).

### Special Circumstances Regarding Gifts or Recipients

#### 24. Please describe what happens if:

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

South Carolina statute provides for certain rules of construction for wills (S.C. Code Ann. §§ 62-2-601 to 62-2-612). These rules of construction that apply to wills also apply as appropriate to trusts (S.C. Code Ann. § 62-7-112).

#### Beneficiary Does Not Survive (Lapse)

In South Carolina, the trust may provide for a contingent beneficiary a gift if the original beneficiary is not living at the time the gift is to be made. If the trust agreement does not provide for a contingent beneficiary and the deceased beneficiary of a revocable trust is settlor's great-grandparent or lineal descendant of settlor's great-grandparent, and either

is dead when the settlor executed the trust, fails to survive the settlor, or is otherwise treated as having predeceased the settlor, the issue of the deceased beneficiary surviving the settlor take in deceased beneficiary's place:

- Equally, if they are all of the same degree of kinship.
- By representation (the share is divided equally at the first level where there are surviving issue, and a share for any deceased issue at that level is further divided for issue of that deceased issue), if they are of an unequal degree of kinship.

(S.C. Code Ann. § 62-7-606(A).)

Except as provided above, if the disposition of property under a revocable trust fails for any reason, the property becomes part of the trust residue. If the residue of a revocable trust is to be distributed to two or more persons and the share of a residuary beneficiary fails, that share passes to the other residuary beneficiary or beneficiaries in proportion to their interests. (S.C. Code Ann. § 62-7-606(B), (C).)

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

If the settlor no longer owns the specific asset devised at the settlor's death, the bequest generally adeems. In limited situations, the beneficiary may receive a bequest related to that asset, including:

- Specifically devised securities (for example, if the securities adeemed as the result of a merger, reorganization, or as the result of a reinvestment plan).
- The balance of the purchase price on the specific asset owed by a purchaser at the settlor's death from the sale of the property.
- Any portion of a condemnation or insurance award (or other recovery for injury to the specific asset) unpaid at the settlor's death.
- Any property owned by the settlor at death acquired from foreclosure (or instead of foreclosure) of the security for a specifically devised obligation.

(S.C. Code Ann. §§ 62-2-605, 62-2-606, and 62-7-112.)

#### Not Enough Assets (Abatement)

Unless the trust instrument expresses an order of abatement, if there are not enough assets, shares of beneficiaries abate as follows, without any priority between real and personal property:

- Property not disposed of by the trust.
- Residuary gifts.
- General gifts.
- Specific gifts.

(S.C. Code Ann. §§ 62-3-902 and 62-7-112.)

### Gifted Property Encumbered

A specific gift passes subject to any mortgage, pledge, security interest, or other lien existing on that asset at the settlor's death without right of exoneration regardless of a general directive in the trust to pay all debts (S.C. Code Ann. §§ 62-2-607 and 62-7-112). If the settlor wants the debt paid from other trust assets before distribution of the gift, it must be specifically stated in the trust instrument.

### Effect of Divorce

Unless the trust instrument expressly provides otherwise, if the settlor is divorced or the marriage is annulled after the creation of a revocable trust, generally all trust provisions that affect the former spouse are revoked, including:

- The fiduciary nominations.
- Bequests.
- Grants of powers of appointment.

(S.C. Code Ann. § 62-7-607.)

Property not passing to a spouse because of revocation by divorce or annulment, or court order, passes as if the spouse did not survive the settlor. A decree of separate maintenance that does not terminate the status of spouses is not considered a divorce for these purposes. (S.C. Code Ann. § 62-7-607.)

### Simultaneous Death

Unless an exception applies, clear and convincing evidence of survivorship by 120 hours is required for a beneficiary to be deemed to have survived the settlor (S.C. Code Ann. §§ 62-1-502 and 62-1-503). The most common exception is when the governing instrument contains language specifically dealing with simultaneous deaths and creates rules for when the order of death of the settlor and beneficiaries is unknown (S.C. Code Ann. § 62-1-506(1)).

Counsel may include a provision in the trust instrument dealing with simultaneous deaths and

specify the rules that apply to determine which person died first.

## 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

During the settlor's life, the revocable trust property is subject to the claims of settlor's creditors (S.C. Code Ann. § 62-7-505(a)(1)).

### Settlor's Debts After Death

After the settlor's death, to the extent the settlor's probate estate cannot satisfy the following liabilities, subject to the settlor's right to direct the source from which liabilities are paid, and except otherwise provided by law, the property held in a revocable trust at the settlor's death is subject to:

- Valid claims of the settlor's creditors. These claims cannot be barred by the applicable statutes of limitations or otherwise, under the South Carolina creditor claim statutes (S.C. Code Ann. §§ 62-3-801 to 62-3-816).
- Costs of administering the settlor's estate.
- Expenses for the settlor's funeral and disposal of remains.
- Statutory allowances to a surviving spouse and children.

(S.C. Code Ann. § 62-7-505(a)(3).)

Because the assets in the revocable trust are subject to the creditor claims period of the probate estate, it is advisable for the trustee to hold onto the assets until

the probate claims period expires. If the trustee is also named as personal representative of the testator's estate, it may be advisable to file the will with the probate court to prompt the publication of notice to creditors and shorten the creditor claims period.

For more information regarding creditor claims in South Carolina probates, including applicable statutes of limitation, see [State Q&A, Probate: South Carolina: Time Limits for Presentation of Creditor Claims](#) and [Question 14](#).

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

In South Carolina, a trust instrument that provides that the interest of a beneficiary is held subject to a spendthrift provision prevents both voluntary and involuntary transfer of the beneficiary's interest. If the trust agreement includes a spendthrift provision:

- A beneficiary's creditors or assignees cannot reach the assets of the trust before the assets are distributed to the beneficiary.
- A beneficiary cannot assign or transfer the beneficiary's future interest.

(S. C. Code Ann. § 62-7-502.)

### Medicaid Eligibility

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

## Court Supervision and Privacy

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

Trusts and trustees are normally not subject to court supervision in South Carolina. However, on the petition of an interested person, a court may:

- Determine a trust's validity (S.C. Code Ann. § 62-7-604(a)).
- Appoint or remove a trustee.
- Ascertain beneficiaries.
- Review and settle accounts.

- Determine questions arising in the administration or distribution of a trust.

(S.C. Code Ann. § 62-7-201(a).)

Proceedings brought by an interested party do not result in continuing court supervision after the matter that was the subject of the proceeding is resolved (S.C. Code Ann. § 62-7-201(b)).

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

A revocable trust estate plan generally provides the settlor with more privacy than a will-based estate plan. If a probate proceeding is required to transfer assets on the settlor's death, the settlor's personal representative will need to file any will for a testator's estate and an inventory of probate assets with the probate court (S.C. Code Ann. §§ 62-3-102 and 62-3-706). However, a revocable trust instrument is generally not filed with the probate court and the assets in the trustee's hands are not reported to the probate court (see Question 26). Assets the settlor did not transfer to the trust during the settlor's lifetime may be subject to probate.

### 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?

Unless the terms of the trust instrument state otherwise:

- There is no duty to provide trust beneficiaries with any information regarding the trust during the settlor's lifetime.
- On the death of the settlor or when the trust becomes irrevocable, the trustee must, within 90 days of accepting the trusteeship, notify the qualified beneficiaries of the trust of:
  - the trust's existence;
  - the settlor's identity;
  - the trustee's name, address, and telephone number;
  - the right to request a copy of the trust instrument; and

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- the right to request in writing a copy of the trustee’s report.

(S.C. Code Ann. § 62-7-813(a), (b); see Question 13: Filling Vacancies in a Trusteeship.) Though a qualified beneficiary is entitled to a copy of the complete trust instrument, a beneficiary other than a qualified beneficiary, on their reasonable request and unless unreasonable under the circumstances, is entitled to a copy of the trust instrument redacted to include the provisions relevant to that beneficiary’s interest in the trust (S.C. Code Ann. § 62-7-813(b)(3)).

When the settlor dies and the trust becomes irrevocable, a person may contest the trust’s validity within the earlier of:

- One year after the settlor’s death.
- 120 days after the trustee sends a copy of the trust instrument and a notice informing the person of:
  - the trust’s existence;
  - the trustee’s name and address; and
  - the time allowed to commence a proceeding.

(S. C. Code Ann. § 62-7-604(a).)

Unless the trust provides otherwise, the trustee of a revocable trust that becomes irrevocable has a continuing duty to:

- Keep the distributees and permissible distributees, or other qualified beneficiaries requesting information in writing reasonably informed as to the trust administration.
- Send annually and on termination of the trust, a written report of trust property that may be in any format providing those individuals or other qualified beneficiaries with enough information necessary to protect their interests. It may include:
  - a copy of the fiduciary income tax return;
  - copies of financial statements;
  - an informal list of trust assets and their market value; and
  - the liabilities, receipts, and disbursements, including the source and amount of the trustee’s compensation.

(S.C. Code Ann. § 62-7-813(c)(1)(B).) For a definition of qualified beneficiary, see Question 13: Filling Vacancies in a Trusteeship.

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