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## Revocable Trusts

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### §19.1 OVERVIEW

The revocable trust is the most common trust created today in the United States. This heavy use of the revocable trust is a recent phenomenon, beginning decades if not centuries after most traditional trust law was formulated. The provisions of UTC Article 6 on revocable trusts are among the Code's most important and most innovative, dealing largely with issues that are not addressed by common law. The biggest change is a reversal of the common law presumption that trusts are irrevocable. Reflecting the increasing if not predominant use of the revocable trust in the United States, section 602(a) provides that a trust is revocable unless provided otherwise in the terms of the trust.

The revocable trust is used today largely as a substitute for a will. In general, the UTC reflects this usage, treating the revocable trust in most respects as the functional equivalent of a will, at least while the settlor is alive. Section 601 provides that the capacity required to create a trust is the same as that required to execute a will. Also, while the settlor has capacity, section 603 provides that all of the rights of the beneficiaries are controlled exclusively by the settlor. Notices that would otherwise be given to the beneficiaries must instead be given to the settlor, and the settlor is authorized to give binding consents on a beneficiary's behalf. Access to the trust document is also within the settlor's control.

Unless the terms of the trust make a specified method of revocation exclusive, section 602 provides that a trust may be revoked by substantially complying with the method specified in the trust's terms or by any other method manifesting clear and convincing evidence of the settlor's intent. Section 604 prescribes a statute of limitations on contests of revocable trusts. Contests are barred three years after the settlor's date of death, although the states are free to insert a shorter period. A trustee can shorten the contest period to 120 days by sending a notice to potential contestants. Whether or not the statute of limitations has run, a trustee without actual knowledge that a contest has been or will be filed is protected in making distributions.

Sections 601 and 604, because they address requirements relating to creating and contesting trusts, are not subject to alteration or restriction in the terms of the trust. *See* section 105, discussed at section 13.2. Sections 602 and 603, in contrast, are not so limited and are fully subject to the settlor's control.

### §19.2 CAPACITY TO CREATE REVOCABLE TRUST

Section 601 provides that the capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will. Section 601 is patterned after the *Restatement (Third) of Trusts* §11(1) (2003) and is consistent with recent case law. *See Upman v. Clarke*, 753 A.2d 4 (Md. 2000); *Martone v. Martone*, 509 S.E.2d 302 (Va. 1999); *Argo v. Moncus*, 721 So.2d 218, 219 (Ala. Civ. App. 1998).

The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property when the settlor dies. To solidify the use of the revocable trust as a device for transferring property at death, the settlor usually also executes a pourover will. The use of a pourover will assures that property not transferred to the trust during life will be combined with the property that the settlor managed to convey. Given this primary use of the revocable trust as a device for disposing of property

at death, the drafters of the UTC concluded that the capacity standard for wills rather than for lifetime gifts should apply. Applying the capacity standard for wills does not mean that the revocable trust must be executed with the formalities of a will. There are no execution requirements under the UTC for a trust not created by will, and a trust not containing real property may be created by an oral statement. *See* section 407 and comment, discussed at section 16.8.

The UTC does not specify the standard of capacity necessary to create other types of trusts, although section 402 requires that the settlor have capacity. Section 601 specifies a capacity standard for creation of a revocable trust because of the uncertainty in the case law and the importance of the issue in modern estate planning. No such uncertainty exists with respect to the capacity standard for other types of trusts. To create a testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have the capacity that would be needed to transfer the property free of trust. *See generally Restatement (Third) of Trusts* §11 (2003); *Restatement (Third) of Property: Wills and Other Donative Transfers* §8.1 (2003).

The UTC does not specify the capacity test for amending or revoking a revocable trust, although in the case of a will, a testamentary capacity standard is applied not only to the creation of a will but also to its amendment or revocation. Presumably, because the UTC requires testamentary capacity to create a revocable trust, testamentary capacity is also the standard for amendment or revocation. However, North Carolina provides that a settlor may revoke or amend a revocable trust without regard to the settlor's actual capacity. N.C. Gen Stat. §36C-6-602.

### §19.3 PRESUMPTION OF REVOCABILITY

Section 602(a), which provides that a settlor may revoke or modify a trust unless the terms of the trust expressly state that the trust is irrevocable, changes the common law. Most states follow the rule that a trust is presumed irrevocable absent evi-

dence of contrary intent. See *Restatement (Second) of Trusts* §330 (1959). California, Iowa, Montana, Oklahoma, and Texas presume that a trust is revocable. The UTC endorses the minority approach, but only for trusts created under instruments executed after its effective date. The UTC presumes revocability when the instrument is silent because the instrument was likely drafted by a nonprofessional, who intended the trust as a will substitute. The most recent revision of the *Restatement of Trusts* similarly reverses the former approach. A trust is presumed revocable if the settlor has retained a beneficial interest. See *Restatement (Third) of Trusts* §63 comment c (2003). Because professional drafters habitually specify whether a trust is revocable or irrevocable, section 602(a) will have limited application. If a provision making the trust irrevocable is omitted by mistake, the trust may be reformed to correct the mistake. See §17.8.

## §19.4 JOINT TRUSTS

### §19.4.1 Description of UTC Provision

Section 602(b), which is similar to the *Restatement (Third) of Trusts* §63 comment k (2003), provides default rules for revoking or amending a trust having several settlors. The settlor's authority to revoke or modify the trust depends on whether the trust contains community property. To the extent that the trust contains community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses. The purpose of this provision, and the reason for the use of joint trusts in community property states, is to preserve the community character of property transferred to the trust. Although community property does not prevail in a majority of states, contributions of community property to trusts created in noncommunity property states does occur. This is due to the mobility of settlors, and the fact that community property retains its community character when a couple moves from a community to a noncommunity state. For this reason, section 602(b) and its