

Revocable Trusts: Tennessee

by Michael S. Goode, Lewis Thomason, P.C., with Practical Law Trusts & Estates

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A Question and Answer (Q&A) guide that explores revocable trusts in Tennessee. This guide provides insights into the state's laws and practices affecting revocable trusts, including key statutes such as the Tennessee Uniform Trust Code (T.C.A. §§ 35-15-101 to 35-15-1206). It addresses the requirements for creating a valid revocable trust, trustee appointment and duties, and the implications of using revocable trusts as will substitutes. The document highlights the importance of trustee powers, virtual representation, and the rule against perpetuities, as well as common provisions like no-contest clauses and those affecting the governing law of the trust. It also discusses the impact of divorce on trust provisions, creditor protection, and the privacy advantages of revocable trusts over wills. Additionally, it covers the rights of surviving spouses, the execution requirements of trust instruments, and the interplay between revocable trusts and pour-over wills. This guide serves as a valuable resource for understanding revocable trust creation and administration.

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 Tennessee, see [State Q&A, Irrevocable Trusts: Tennessee](#).

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 Tennessee 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 and are revocable trusts commonly used as will substitutes in your state?

Key Statutes and Rules Governing Revocable Trusts

The rules and laws pertaining to trusts in Tennessee are found in Title 35 of Tennessee Code Annotated and relevant case law. The Tennessee Uniform Trust Code addresses revocable trusts (T.C.A. §§ 35-15-101 to 35-15-1206).

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

Revocable Trusts as Will Substitutes

Use of revocable trusts as a will substitute is common in Tennessee but wills without the use of a revocable trust are common as well (T.C.A. § 35-15-601, cmts.). Several factors should be considered when deciding whether to recommend a will or a revocable trust-based estate plan, including whether the client:

- Has minor children and prefers a shorter and more certain process than probate.
- Has property outside of Tennessee and can use a trust to avoid multiple probates.

- Owns their own business, which might be adversely affected from the length of time and the uncertainty of probate.

Clients also might prefer wills because they are less expensive than trusts and require less initial work, although there may be more work later when the will is probated.

Who Can Create a Revocable Trust

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

In Tennessee, the capacity required to create a revocable trust is the same as that required to make a will (T.C.A. § 35-15-601). To create a will a person must be 18 years of age or older (T.C.A. § 32-1-102).

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

In Tennessee, the capacity required to create a revocable trust is the same as that required to make a will (T.C.A. § 35-15-601). Any person of sound mind may make a will (T.C.A. § 32-1-102). To be of sound mind to execute a will, the person must have sufficient knowledge and memory to know and understand the business they are conducting at that time (executing a will), including:

- What property they own.
- How and to whom it is being transferred.

(See *Hammond v. Union Planters Nat. Bank*, 222 S.W.2d 377, 383 (Tenn. 1949); *In re Estate of Phillips*, 2004 WL 2086331, at *3 (Tenn. Ct. App. 2004).)

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 Tennessee, an agent under a power of attorney cannot create a trust for an individual (T.C.A. § 35-15-401). However, an agent under a power of attorney may revoke or modify a revocable trust if the trust

or power of attorney terms expressly authorize the action (T.C.A. § 35-15-602(e)).

Settlors usually intend the trust to be settlors' principal property management device and the power of attorney to either:

- Be a backup to cover assets not transferred to the trust.
- Address specific topics not covered by the trust document.

(T.C.A. § 35-15-602, cmts.) For example, a power of attorney may be needed for the power to sign tax returns or the power to apply for government benefits, which may be beyond the trustee's authority or are powers not generally granted to a trustee (T.C.A. § 35-15-602, cmts.).

Guardian or Conservator

There is no Tennessee statute that authorizes a guardian or conservator to create a revocable trust for a ward or protected person. However, a guardian or conservator can petition a court to exercise its statutory or equitable powers to create a trust for the ward or protected person (T.C.A. § 35-15-401(4)).

If expressly authorized by the trust, a conservator or guardian may act for the settlor regarding either:

- Revoking or amending a trust.
- Distributing trust property.

(T.C.A. § 35-15-602(f).)

Trust Requirements

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

Settlor Requirements

In Tennessee, a trust is not valid unless the settlor:

- Has capacity to create the trust (T.C.A. § 35-15-402(a)(1); see Question 3).
- Indicates an intention to create a trust (T.C.A. § 35-15-402(a)(2)).

In considering a settlor's intent, a court considers only those manifestations of intent that are admissible as proof in a judicial proceeding (T.C.A. § 35-15-402, cmts.; see *Tenn. Div. of the United Daughters of the*

Confederacy v. Vanderbilt Univ., 174 S.W.3d 98, 113 (Tenn. Ct. App. 2005)).

Trustee Requirements

A valid trust is created only if:

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

(T.C.A. § 35-15-402(a)(4), (5).)

Tennessee also applies the doctrine of merger. Under this doctrine, a trust is not created if all beneficial interests in trust property, both life interests and remainders, are vested in the same person. Tennessee considers all those interests merged and ownership vested in that person. For example, merger occurs when the settlor is the sole trustee, sole lifetime beneficiary, and the remainder is payable to the settlor's probate estate. (T.C.A. § 35-15-402(a)(5), cmts.; see *Atkins v. Marks*, 288 S.W.3d 356, 365-66 (Tenn. Ct. App. 2008).)

However, a trust is not invalid solely because the settlor is both the sole trustee and the sole current beneficiary, if the trust designates at least one other beneficiary entitled to receive a beneficial interest in the trust property on the settlor's death. A remainder beneficiary, even one whose interest is contingent or postponed until the settlor's death, prevents merger and preserves the trust's validity. (T.C.A. § 35-15-402(a)(5), cmts.; see *Atkins*, 288 S.W.3d at 366.)

Beneficiary Requirements

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

- A charitable trust.
- A trust for the care of an animal.
- A trust for another valid, noncharitable purpose.

(T.C.A. § 35-15-402(a)(3).) To be a definite beneficiary, the beneficiary must be definite either:

- When the settlor creates the trust.
- In the future, if they are determined within the applicable perpetuities period (see Question 12: Rule Against Perpetuities).
- As part of a class of persons if the class membership is determined or closed within the applicable perpetuities period.

(T.C.A. § 35-15-402(b) and cmts.)

A settlor may generally create a trust for a noncharitable, but otherwise valid, purpose (other than the for the care of an animal) that the trustee selects, without a definite or ascertainable beneficiary. These trusts are called purpose trusts. Purpose trusts, like all Tennessee trusts, cannot exist for more than 360 years after creation, under the Tennessee rule against perpetuities (see Question 12: Rule Against Perpetuities). (T.C.A. 35-15-409(1).)

Purpose trusts may be enforced by a trustee, trust protector, or other person named in the trust agreement or, if none, by the person the court appoints (T.C.A. 35-15-409(2)). The trustee can apply purpose trust property only for its intended use (except to the extent the court determines the value of trust property exceeds the amount required for its intended use). The trustee must distribute any purpose trust property that is not needed for its intended use to the settlor, if then living, or the settlor's successors in interest. (T.C.A. 35-15-409(3).)

Trust Property Requirements

A trust is only valid as to assets held by the trust that have been transferred to the trust. A settlor transfers to the trust assets:

- Capable of registration, including real estate, stocks, bonds, and bank accounts, by recording a deed or registering the asset in the name of the trust or trustee.
- That are not registrable by including a recital of assignment describing the assets with particularity within the trust document. However, merely reciting the assignment, holding, or receipt of an asset in the trust document is not sufficient to transfer assets to the trust that are capable of registration.

(T.C.A. § 35-15-402(d).)

Trust Registration

Effective January 1, 2022, a trustee of a trust principally administered in Tennessee may register that trust with the Tennessee Secretary of State and obtain a certified copy of the registration. The registration is voluntary and not required to create a valid trust in Tennessee. (T.C.A. 35-15-113.)

The main benefit of this registration is to prove Tennessee domicile, which may be useful for certain

taxation issues where domicile is an issue. A settlor establishes a state as the settlor's domicile by the settlor's physical presence in the with the settlor's intention to remain residing in that state (see *Parrott v. Abraham*, 146 S.W.3d 623 (Tenn. Ct. App. 2003)).

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

In Tennessee, trusts created on or after July 1, 2004, are presumed to be revocable unless the trust terms expressly provide otherwise (T.C.A. § 35-15-602(a)). Despite this presumption, practitioners commonly include provisions in the trust instrument that expressly reserve the settlor's right to amend or revoke the trust during the settlor's lifetime (T.C.A. § 35-15-602, cmts.).

Trust Formalities and Execution Requirements

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

There is no requirement that a trust needs to be in writing to be valid in Tennessee (see Question 8). However, practitioners do not commonly recommend the use of oral trusts and prefer written, executed trusts for clarity and easier enforceability. Oral trusts must:

- Be shown by clear and convincing evidence.
- Comply with certain statutes, such as the statute of frauds, meaning an individual cannot create an oral trust for real property.

(T.C.A. § 35-15-407.)

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.

Signature and Witness Requirements

In Tennessee, there are no statutory trust requirements for:

- A settlor's signature.
- A trustee's signature.
- Witnesses' signatures.

(T.C.A. §§ 35-15-402, 35-15-407, and 35-15-601.)

However, the settlor must comply with other statutory and common law not in the Uniform Trust Code (T.C.A. § 35-15-407). For example, if a trust is to hold real property, the settlor must comply with the statute of frauds. Therefore, it is advisable when creating a trust in Tennessee to create a written trust instrument with the settlor's and trustee's signatures acknowledging the creation of the trust and agreeing to its terms. (T.C.A. § 35-15-407, cmts.)

Notary Requirements

There are no notary requirements to create a valid trust in Tennessee (T.C.A. §§ 35-15-402, 35-15-407, and 35-15-601). However, even though notarization is not required, trusts are commonly notarized to:

- Minimize fraud.
- Ensure that the trust is recognized in other jurisdictions, if necessary.

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 Tennessee, a will can dispose of property to a revocable trust (a will can be a pour-over will) if either:

- The will identifies a trust already in existence.
- The trust is executed before or concurrently with the testator's will.

(T.C.A. § 32-3-106(a)(1).) The disposition to the trust is not invalid because the trust either:

- Is amendable or revocable, or both.
- Was amended after the will's execution or after the testator's death.

(T.C.A. § 32-3-106(a)(2).) A revocation or termination of the trust before the testator's death causes the disposition to the trust to lapse (T.C.A. § 32-3-106(a)(4)).

Incorporation by Reference

Pour-over wills often include a clause to incorporate the related trust's provisions by reference. This can be helpful if the trust is found invalid. If the will incorporates the trust provisions, the pour-over will can be probated to distribute property as provided in the trust as it existed when the will incorporated its provisions.

To incorporate an existing trust instrument by reference:

- The trust must be in existence when the will is executed.
- The will must describe the trust instrument as existing at that time.
- The will must show the testator's intent to incorporate the terms of the revocable trust instrument.

(See *Howell v. Moore*, 1930 WL 1772, at *28 (Tenn. Ct. App. 1930).)

Rights of Surviving Spouse

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

In Tennessee, the decedent's surviving spouse can claim a portion of the estate, known as an elective share, and other statutory entitlements (see [State Q&A, Wills: Tennessee: Disinheriting a Testator's Spouse](#)). A settlor cannot eliminate these entitlements by transferring the settlor's assets to a revocable trust. Any conveyances made fraudulently to children or others with an intent to defeat the

surviving spouse's distributive or elective share rights is voidable at the surviving spouse's election. (T.C.A. § 31-1-105; *Warren v. Compton*, 626 S.W.2d 12, 15-17 (Tenn. Ct. App. 1981); *Horne v. Estate of Horne*, 1992 WL 187641, at *4 (Tenn. Ct. App. Aug. 7, 1992).)

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

Tennessee is not a community property state. However, property considered community property under the laws of another jurisdiction may be transferred into Tennessee and retain its character as community property within a community property trust. When a revocable trust is created by more than one spouse as settlors and contains community property assets, the community property trust may be:

- Revoked by either spouse acting alone.
- Amended only by joint action of both spouses.

(T.C.A. § 35-15-602(b)(1).)

Spouses may classify any or all their property as community property by transferring property to a community property trust (T.C.A. § 35-17-105(a)). All property owned by a community property trust is treated as community property during marriage. However, if property is distributed from a community property trust, the property is no longer community property. (T.C.A. § 35-17-105(c), (e).)

Tenancy by the Entirety

Spouses may jointly own property as tenants by the entirety. This provides certain immunity from the spouses' separate creditors. A transfer of tenancy by the entirety property into the spouses' revocable trust allows the property, and the proceeds from the property, to have immunity from the claims of spouses' separate creditors, if:

- The spouses remain married.
- The property or its proceeds continues to be held in trust by the trustee or trustees.

- While both spouses are living, the trust is revocable by either or both of them, acting together.
- Both spouses are permissible current beneficiaries of the trust while living.
- The trust instrument, deed, or other instrument of conveyance provides that this statutory provision applies to the property or its proceeds.

(T.C.A. § 35-15-510(b).) Property is no longer technically held as tenants by the entirety after being transferred to a joint revocable trust. However, the property and any proceeds from it continue to have the same immunity from the claims of the spouses' separate creditors as if the spouses held the property or its proceeds as tenants by the entirety (T.C.A. § 35-15-510(i)).

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

Tennessee law provides for the enforceability of no-contest provisions (also called *in terrorem* or forfeiture provisions) in trust instruments (T.C.A. § 35-15-1014). However, Tennessee does not enforce these provisions if the contesting beneficiary had probable cause to contest the trust on certain statutory grounds, including:

- Fraud.
- Duress.
- Revocation.
- Lack of testamentary capacity.

- Undue influence.
- Mistake.
- Forgery.
- Irregularity in the execution of the trust.

(T.C.A. § 35-15-1014(b).)

Tennessee does not enforce no-contest provisions also for actions brought for certain other reasons, including:

- To challenge a fiduciary's actions to the extent that the fiduciary has breached the fiduciary's duties or for breach of trust.
- Construction or interpretation of trust terms.
- An agreement among persons in resolution of a matter relating to the trust.

(T.C.A. § 35-15-1014(c) and cmts.)

Incorporation by Reference of Trustee Powers

A trustee of a trust agreement can exercise:

- Powers as stated in the trust terms.
- Certain statutory default powers, except as limited by the trust's terms.

(T.C.A. § 35-15-815.) While Tennessee permits the trustee to exercise those statutory powers without explicit statutory language, trust instruments also typically expressly list some or all of those statutory powers. Restating the trustee's powers in the trust instrument can:

- Help provide the trustee with guidance in particular circumstances.
- Convince individuals and financial institutions with whom the trustee is dealing that the trustee has the powers necessary to act.

Virtual Representation

Tennessee's virtual representation statute generally allows a person with a substantially identical interest as another person, regarding a specific issue, to give binding consent for that other person regarding that issue if the representative and the person represented do not have a material conflict of interest (T.C.A. § 35-15-304).

Absent this material conflict of interest, Tennessee also allows representation regarding a specific issue by certain individuals, which include:

- A holder of a power of appointment for those whose interests are subject to the power, in certain circumstances.
- Certain fiduciaries of individuals.
- Certain designated persons.
- If a disinterested party is serving as trustee, parents or certain other relatives of incapacitated individuals, in certain circumstances.

(T.C.A. §§ 35-15-302 and 35-15-303.)

Virtual or direct representation generally applies when there is a minor, incapacitated, or unborn individual or a person whose identity or location is unknown and not reasonably ascertainable, and that individual is not otherwise represented directly.

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

Tennessee adopted a modified version of the Uniform Statutory Rule Against Perpetuities (T.C.A. §§ 66-1-201 to 66-1-208). The rule provides that any nonvested interest in property is invalid except for trusts that:

- Are created or that become irrevocable after June 30, 2007, the beneficial interests vest or terminate within 360 years.
- Were created or became irrevocable before June 30, 2007, where:
 - the nonvested interest is certain to vest or terminate no later than 21 years after the death of an individual then living; or
 - the nonvested interest vests or terminates within 90 years after creation.

(T.C.A. § 66-1-202.) Effective July 1, 2024, Tennessee has different rule against perpetuities for relocated trusts, which is when the principal place of administration of a trust created in a foreign jurisdiction is transferred to Tennessee (T.C.A. § 66-1-202(g)).

Rule Against Perpetuities Sample Clause for Revocable Trust Instrument

”Notwithstanding any other provision herein, all non-charitable trusts created herein shall terminate as required by the Tennessee Uniform Statutory Rule Against Perpetuities,

Tenn. Code Ann. § 66-1-201 et seq., and as amended, if applicable, and at such time shall proportionately distribute all assets free and clear of trust, per stirpes, to those persons entitled to receive income.”

Governing Law

A governing law provision establishes each trust under the trust agreement as a Tennessee trust and generally provides the trustee with the power to change the law governing the administration of any of the trusts (or change the situs of the trust) after the settlor’s death. Changing the governing law or situs of a trust can have a significant effect since each state has its own specific laws regarding trusts and taxes.

Non-domiciliary settlors may choose to have Tennessee law apply to their trusts. If they do, the governing law provision is effective to determine the validity, effect, and interpretation of the disposition in the trust of:

- Any real or immovable property located in Tennessee when the trust was created.
- All personal or movable property wherever located if owned by a trust designating Tennessee law as the trust’s governing law.

(T.C.A. § 35-15-107(b)(3).)

Tennessee permits the law of the state designated in the trust instrument (called the state jurisdiction provision) to govern the validity, construction, and administration of the trust if either:

- The trustee’s principal place of business is located in the designated state.
- The trustee is a resident of the designated state.
- All or a part of the trust administration occurs in the designated state.

(T.C.A. §§ 35-15-107(a) and 35-15-108(a) and cmts.)

These are not exclusive methods for determining whether the state jurisdiction provision applies. However, other jurisdictions and federal courts might not recognize this broad of an application of Tennessee state jurisdiction provision law.

Transfer of Assets to Trust by Schedule

A revocable trust can be funded both during the settlor’s life and when the settlor dies by transfers on the settlor’s death (T.C.A. § 35-15-401).

A typical trust instrument includes a Schedule A, which lists the property initially transferred to the trust at its execution. However, many revocable trust instruments recite only a nominal amount on Schedule A (for example, ten dollars (\$10)). The rest of the funding occurs after the trust is created as the settlor transfers assets to the trust.

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, disputes may arise later about what assets are actually held by the trust. In addition, simply listing assets intended to be owned by the trust on Schedule A is usually not sufficient to transfer all of a settlor's assets to a trust. A settlor:

- Must transfer to the trust registered or titled assets, such as real estate, stocks, bonds, and bank and brokerage accounts, by recording a deed or changing registration of the asset to the name of the trust or trustee.
- Can transfer non-registerable assets, such as furniture or clothes, to the trust through a recital of assignment specifically describing the asset in the trust instrument.

(T.C.A. § 35-15-402(d).)

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

In Tennessee, anyone generally can be appointed as trustee if they can legally fulfill Tennessee's statutory trustee duties (T.C.A. §§ 35-15-801 to 35-15-817). These duties include the duty:

- Of loyalty (T.C.A. § 35-15-802).
- Of impartiality (T.C.A. § 35-15-803).
- To prudently administer the trust (T.C.A. § 35-15-804).
- To control and protect trust property (T.C.A. § 35-15-809).
- To inform and report to beneficiaries, where required (T.C.A. § 35-15-813(a)(1)).

Therefore, minors and incompetent individuals generally cannot serve as trustee.

Nonresident trustees must file an Agent Appointment by Nonresident Fiduciary ([Form SS-4512](#)) with the Tennessee Secretary of State, which appoints the Secretary of State as agent for service of process (T.C.A. § 35-50-107(b)(2)).

To act as a corporate trustee in Tennessee, an entity generally must be:

- A Tennessee trust company.
- A Tennessee bank with trust powers.
- A national bank with trust powers and with a physical presence in Tennessee.
- Certain other institutions to the extent authorized by Tennessee or federal law.

(T.C.A. §§ 35-15-1301(a) and 45-2-1001.) However, certain private entities may serve as a trust advisor or protector if they qualify as special purpose entities (T.C.A. §§ 35-15-1201 and 35-15-1301(a)); see [State Q&A, Irrevocable Trusts: Tennessee: Question 16.](#)

Filling Vacancies in a Trusteeship

Where there are no remaining trustees, the successors named in the trust instrument die, resign, or refuse to act, and the procedure in the trust for appointing additional successor trustees (if any) fails, a successor trustee may be appointed, in the following order of priority, by:

- Appointed by unanimous agreement of the qualified beneficiaries of the trust. A qualified beneficiary is generally:
 - a distributee or permissible distributee of trust income or principal; or
 - A person who would be a distributee of income or principal if the trust terminated on the date the beneficiary's qualification is determined.

(T.C.A. § 35-15-103(25) and cmts.; *Brown v. Brown*, 2013 WL 1619687, at *10 (Tenn. Ct. App. Apr. 16, 2013).)

- Appointed by the court.

(T.C.A. § 35-15-704(c).)

Trust agreements should include a procedure for appointing additional successor trustees if all the named successor trustees cannot serve for any reason. This power is typically given to the resigning trustee, the designated successor trustee, or the qualified beneficiaries.

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

Tennessee does not prohibit a settlor from naming the attorney preparing a revocable trust instrument as trustee of one or more trusts created under the trust instrument. However, if an attorney prepares a document appointing the attorney or a person related to the attorney to a fiduciary office:

- The appointment must not violate TN R S CT Rule 8, RPC 1.7 regarding material limitation conflicts.
- The appointment and its terms are fair to the client.
- The client must be properly informed in writing.
- The client is advised in writing of the desirability of seeking, and is given reasonable opportunity to seek, independent counsel.
- The client must give informed consent, confirmed in writing. When obtaining informed consent, the attorney should advise the client regarding which 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.

- The appointment must not be the product of undue influence or improper solicitation by the attorney.

(TN R S CT Rule 8, RPC 1.8 and cmts.)

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

In Tennessee, a trustee accepts the trusteeship by either:

- Substantially complying with the acceptance method provided in the trust's terms.
- If the trust terms do not provide a method of acceptance or the terms do not make the acceptance method exclusive, then by:
 - accepting delivery of the trust property;
 - exercising powers or performing duties as trustee; or
 - otherwise indicating acceptance of the trusteeship.

(T.C.A. § 35-15-701(a).)

Tennessee deems a designated trustee not accepting the trusteeship within a reasonable time after knowing of the designation and trust assets to have rejected the trusteeship (T.C.A. § 35-15-701(b)).

Without accepting the trusteeship, a person designated as trustee may:

- Act to preserve the trust property if, within a reasonable time after acting, the person sends a rejection of the trusteeship to the settlor or, if the settlor is deceased or lacks capacity, to a qualified beneficiary.
- Inspect or investigate the trust property to determine potential liability under environmental or other law or for any other purpose.

(T.C.A. § 35-15-701(c); 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 Tennessee, a person not yet accepting a trusteeship may reject the trusteeship. Tennessee deems a designated trustee not accepting the

trusteeship within a reasonable time after knowing of the designation and of the trust assets to have rejected the trusteeship. (T.C.A. § 35-15-701(b).) What constitutes a reasonable time depends on the facts and circumstances of the specific case (T.C.A. § 35-15-701, cmts.).

After accepting a trusteeship, a trustee no longer wanting to serve must resign the trusteeship (see Question 19).

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 Tennessee, a trustee, trust advisor, or trust protector is entitled to reasonable compensation for the trustee's services unless either:

- The trust instrument provides otherwise.
- A living settlor, or if no living settlor, then a majority of the qualified beneficiaries have otherwise agreed.

(T.C.A. § 35-15-708(a).)

Factors that determine reasonable compensation include:

- The custom of the community.
- The trustee's skill, experience, and facilities.
- The time devoted to trust duties.
- The amount and character of the trust property.
- The degree of difficulty, responsibility, and risk assumed in administering the trust.
- The nature and costs of services rendered by others.
- The quality of the trustee's performance.

(T.C.A. § 35-15-708, cmts.).

If the terms of a trust specify compensation, the court may allow a higher or lower compensation if:

- The trustee, trust advisor, or trust protector duties substantially changed from when the trust was created.

- The specified compensation is unreasonably low or high.

(T.C.A. § 35-15-708(b).)

Financial institution trustees, trust advisors, and trust protectors normally base their fees on published fee schedules. Subject to the court's authority, the fees in a published fee schedule of a trustee, trust advisor, or trust protector that is regulated, compared to the fees of those that are unregulated, are presumed to be reasonable unless otherwise provided by the trust terms (T.C.A. § 35-15-708(d)).

Despite the presumption of reasonableness, these schedules are still subject to the same reasonableness standard as are other methods for computing fees. For example, termination fees, which are fees charged on trust termination or transfer to a successor trustee, are highly litigated. (T.C.A. § 35-15-708, cmts.).

Multiple Trustees

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

In Tennessee, co-trustees who cannot reach a unanimous decision may act by majority, unless the trust agreement states otherwise (T.C.A. §§ 35-15-105 and 35-15-703(a)). Trustees who dissent and do not join in an action are generally protected from liability from the consequences of that action (T.C.A. § 35-15-703(f)).

If there is a deadlock or a trustee fears potential liability from the conduct of co-trustees, a co-trustee may seek declaratory relief under T.C.A. § 29-14-105 (T.C.A. § 35-15-703, cmts.).

Removal and Resignation of Trustees

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

In Tennessee, the settlor of a revocable trust may remove a trustee and appoint a successor trustee by giving written notice to the trustee being removed and to the successor trustee being appointed. However, if there are two or more settlors of the same revocable

trust, then the removal and appointment of trustees must be made by unanimous decision of all settlors. (T.C.A. § 35-15-606.)

The settlor, a co-trustee, or a qualified beneficiary may request that the court remove a trustee, or a court may remove the trustee on its own, in certain circumstances. A qualified beneficiary cannot petition for removal of a trustee if the settlor has capacity. (T.C.A. § 35-15-706(a) and cmts.) For a definition of a qualified beneficiary, see Question 13: Filling Vacancies in a Trusteeship.

A court may remove a trustee on request or on its own initiative if:

- The trustee committed a serious breach of trust.
- The co-trustees' failure to cooperate substantially impairs the trust administration.
- The court determines that removal of the trustee best serves the interest of the beneficiaries, due to unfitness, unwillingness, or persistent failure of the trustee to effectively administer the trust.
- There was a substantial change of circumstances or all the qualified beneficiaries request removal and:
 - removal best serves the interests of all the beneficiaries;
 - removal is not inconsistent with a material purpose of the trust; and
 - a suitable replacement is available.

(T.C.A. § 35-15-706(a), (b) and cmts.)

The trust instrument generally should include a trustee removal process outlining how the trustee can be removed and replaced, and by whom, especially if the settlor named a corporate trustee.

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 Tennessee, a trustee may resign:

- As provided in the trust instrument.
- By giving at least 30 days' notice to the qualified beneficiaries, a living settlor, and all co-trustees. Tennessee law is unclear on whether, if a trust instrument provides for a different resignation

process, a trustee may resign using this statutory method, and not exclusively the method provided in the trust instrument.

- With court approval.

(T.C.A. §§ 35-15-105 and 35-15-705(a).)

Unless the trust instrument provides otherwise, where a settlor has capacity, a trustee needs to give notice of the resignation only to the settlor and all co-trustees. If the settlor is incapacitated, the trustee gives the notice to all co-trustees and either:

- The person appointed as successor trustee under the trust instrument, if any.
- Any person holding a power under the trust instrument to appoint a successor trustee.
- Any agent under a durable power of attorney that has the power to accept a resignation or appoint successor trustees.
- To the conservator or guardian of the property of the incapacitated settlor, if applicable.

(T.C.A. §§ 35-15-105 and 35-15-705, cmts.)

If none of the options for notice are available, the resigning trustee, a qualified beneficiary, or a co-trustee can petition the court to approve the resignation (T.C.A. § 35-15-705, cmts.). For a definition of a qualified beneficiary, see Question 13: Filling Vacancies in a Trusteeship.

Resignation does not release a trustee from potential liability for the trustee's actions in administering the trust (T.C.A. § 35-15-705(c); see [Trustee Liability](#)).

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 Tennessee, the trustee must administer the trust until the trust terminates or a successor trustee is appointed, and all assets are delivered in good faith, according to:

- The trust's terms and purposes.
- The beneficiaries' interests.
- Tennessee trust law.

(T.C.A. § 35-15-801.) When a trust is revocable, the duties of the trustee are owed exclusively to the settlor (T.C.A. § 35-15-603(a)).

A trustee must administer the trust as a prudent person would by exercising reasonable care, skill, and caution. In administering the trust, the trustee must consider the trust's purposes, terms, distribution requirements, and other circumstances. (T.C.A. § 35-15-804.) A trustee with special skills or expertise, or who was named trustee in reliance on the trustee's representation that the trustee has special skills or expertise, must use those special skills or expertise in administering the trust (T.C.A. § 35-15-806).

A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. A trustee must exercise reasonable care, skill, and caution in delegating a duty or power to another person. (T.C.A. § 35-15-807(a).)

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

In Tennessee, successor trustees are generally not liable for the acts of prior trustees. A trustee is:

- Personally liable for a breach of trust that the trustee committed (T.C.A. § 35-15-1002). A trustee acting in reasonable reliance on the trust's terms is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance (T.C.A. § 35-15-1006).
- Not personally liable on a contract properly entered into in the trustee's fiduciary capacity if the trustee disclosed the fiduciary capacity, except as otherwise provided in the contract (T.C.A. § 35-15-1010(a)).
- Personally liable for torts committed in administering a trust only if the trustee is personally at fault due to the trustee's own willful misconduct. This misconduct must be proven by clear and convincing evidence. (T.C.A. § 35-15-1010(c).)

Therefore, a successor trustee is only liable for the acts of a prior trustee if there is sufficient evidence that the successor trustee had personal fault in those wrongful acts.

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

In Tennessee, a trustee not joining an action of a co-trustee is generally not liable for the co-trustee's action. To avoid liability each trustee, including a trustee not joining in the action of a co-trustee, must exercise reasonable care to:

- Prevent a co-trustee from committing a serious breach of trust.
- Compel a co-trustee to redress a serious breach of trust.

(T.C.A. § 35-15-703.) A serious breach of trust is one which causes significant harm or involves flagrant misconduct either as a single breach or as an accumulation of non-serious breaches considered as a whole (T.C.A. § 35-15-706, 2013 Rest. Cmts.).

When more than one trustee is liable for a breach of trust, a trustee can seek contribution from the other trustees to the extent that the trustee paid more than the trustee's proportionate share of the liability. A trustee is not entitled to contribution if the trustee either:

- Was substantially more at fault.
- Committed the breach of trust in bad faith or with reckless indifference to the trust purposes or beneficiaries' interests.

(T.C.A. §§ 35-15-105(a) and 35-15-1002(b) and cmts.) For more information regarding trustee liability in the context of directed trusts, see [State Q&A, Irrevocable Trusts: Tennessee: Question 16](#).

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

In Tennessee, a trust provision that relieves a trustee of liability for breach of trust is not enforceable if the provision either:

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

(T.C.A. § 35-15-1008(a).)

An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of fiduciary or confidential relationship unless:

- The trustee can prove that the exculpatory term is fair under the circumstances.

- The term's existence and contents were adequately communicated directly to either:
 - the settlor; or
 - the settlor's independent attorney.

(T.C.A. § 35-15-1008(b) and cmts.) The trustee's burden is satisfied if the settlor was represented by independent legal counsel (T.C.A. § 35-15-1008 cmts.).

To determine whether an exculpatory clause is fair, the court may consider:

- The extent of the prior relationship between the settlor and the trustee.
- Whether the settlor received independent advice.
- The level of sophistication the settlor has regarding business and fiduciary matters.
- The trustee's reasons for drafting the exculpatory provision.
- The scope of the specific provision inserted.

(T.C.A. § 35-15-1008(b) cmts.)

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.

In Tennessee, a revocable trust is used primarily as a will substitute, with its key provisions determining the persons to receive the trust property on the settlor's death. Given this functional equivalence between a revocable trust and a will, unless there are specific

statutory rules provided for trusts, the rules for interpreting the disposition of property at death are generally similar for wills and trusts (T.C.A. §§ 35-15-112 and 35-15-601 cmts.).

Beneficiary Does Not Survive (Lapse)

If a named beneficiary dies before the settlor, the bequest to that beneficiary does not lapse if the beneficiary is survived by issue. Under the Tennessee anti-lapse statute, unless the trust instrument directs a different disposition, the named beneficiary's surviving issue take the bequest to the named beneficiary. (T.C.A. § 32-3-105.)

Gift Not Owned by Settlor at Death (Ademption)

A specific bequest in the trust of property not part of the trust estate at the settlor's death lapses under the common law doctrine of ademption by extinction (the bequest is adeemed). The specific bequest cannot be made because that property is not held by the trust. In that case, the beneficiary does not receive that bequest under the trust provisions.

However, there are certain ademption exceptions where the beneficiary of an adeemed gift receives certain sums instead of the adeemed gift, including:

- The balance of the purchase price and any security interest owed settlor at death from the sale of the property.
- Any unpaid condemnation award for the taking of the property.
- Any unpaid insurance proceeds.
- If an agent acting for the principal conveys specifically devised property to a third party, the beneficiary of the specific bequest conveyed out of the deceased principal's estate is entitled to the proceeds of any sale of the property or its value in cash from the estate (see *Stewart v. Sewell*, 215 S.W.3d 815, 825-26 (Tenn. 2007)).

(T.C.A. § 32-3-111.)

Insufficient Assets (Abatement)

In Tennessee, unless the trust provides otherwise, the trust assets abate (or are used) to pay the settlor's

debts in the following order, proportionally within each category of gifts:

- Remainder (residuary) bequests.
- General bequests (gifts of cash).
- Specific bequests.

(See *Maupin v. Maupin*, 62 S.W. 1110, 1113 (Tenn. Ct. App. 1901).)

Gifted Property Encumbered

Under common law, a beneficiary of probate estate assets (property passing by will or in intestacy) generally takes property free of encumbrances unless the decedent's will specifically directs otherwise. However, this common law does not apply to assets passing outside of a probate, such as in a trust. For the beneficiary to be entitled to exoneration of the encumbrance, the trust must specifically provide for exoneration. A general directive to pay debts in the trust is not sufficient to exonerate an encumbrance. (See *In re Estate of Vincent*, 98 S.W.3d 146, 148-49 (Tenn. 2003).)

Effect of Divorce

Unless the trust instrument expressly provides otherwise, a settlor's divorce or annulment of the settlor's marriage revokes any provision in a revocable trust agreement for the benefit of the settlor's former spouse (including bequests to or appointment as fiduciary, of the settlor's spouse). The trust is read as if the former spouse died before the settlor. (T.C.A. §§ 32-1-202 and 35-15-112, cmts.)

Simultaneous Death

Unless the trust instrument provides otherwise, Tennessee deems a beneficiary to predecease the settlor if both:

- Title to property depends on the order of death.
- It cannot be established by clear and convincing evidence that a beneficiary survived the settlor by 120 hours or more.

(T.C.A. §§ 31-3-106 and 31-3-108.)

Creditor Protection

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

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

Settlor's Debts During Life

In Tennessee, assets in a revocable trust are subject to the claims of the settlor's creditors while the settlor is living (T.C.A. § 35-15-505(a)(1)).

Settlor's Debts After Death

After the settlor's death, trust assets are subject to:

- Claims of the settlor's creditors,
- Costs of administration of the settlor's estate.
- Other charges, such as funeral and disposition of remains.

(T.C.A. § 35-15-505(a)(6).)

The assets of the settlor's probate estate generally must be exhausted to pay these charges before the creditors can reach the revocable trust assets. However, the settlor can include language in the trust providing otherwise as the settlor can direct which liabilities are to be paid. (T.C.A. § 35-15-505(a)(6).)

Claims against revocable trusts are subject to the same time limitations and order of priority among creditors as imposed on claims against probate estates. Creditor claims that would be barred against the fiduciary of a settlor's estate, the settlor's estate, or any creditor or beneficiary of the settlor's estate are also barred against:

- Property of a trust that was revocable at the settlor's death.
- The trustee of the trust.
- The creditors and beneficiaries of the trust.

(T.C.A. § 35-15-505(a)(6) and cmts.; see [State Q&A, Probate: Tennessee: Time to File Creditor Claims](#) and [Priority of Claims](#).)

If, on the death of the settlor a revocable trust receives life insurance proceeds, these assets are protected from creditors (T.C.A. § 35-50-103(c)).

Debts of Trust Beneficiaries After Settlor's Death

If a trust contains a spendthrift provision, the spendthrift provision blocks any creditor or assignee of a beneficiary from reaching any interest of the beneficiary while the trust holds that interest. This includes any present, future, or prospective trust distribution. No creditor can:

- Force a distribution from the trust.
- Attach a protected interest.

(T.C.A. § 35-15-502 and cmts.)

A spendthrift provision generally also prevents a beneficiary from transferring or assigning the beneficiary's future interest in the trust (T.C.A. § 35-15-502(d)).

Once the trustee makes a distribution to a beneficiary, the creditor can attempt to collect directly from the beneficiary.

Medicaid (TennCare) Eligibility

To determine eligibility for all categories of Tennessee's Medicaid program, TennCare, for assets in revocable trusts created on or after August 11, 1993:

- The principal of the trust is considered an available resource to the settlor.
- Any payments from the trust to, or for the benefit of, the individual are considered income to the individual.
- Any other payments from the trust for any other purpose must be considered under the Transfer of Assets and Penalty Periods policy.

([Tennessee Health Care Finance and Administration Policy Manual Number 110.055, Section: Financial Eligibility Requirements, Chapter: ABD Trusts](#).)

Transferring assets to a revocable trust does not shelter the settlor's assets from TennCare reimbursement or for eligibility purposes (see *Bell ex rel. Bell v. Tenn. Dep't Human Servs.*, 2006 WL 74143, at *5-6 (Tenn. Ct. App. Jan. 12, 2006)). Assets held in a revocable trust are generally treated as countable resources for TennCare eligibility purposes because the settlor retains access to and control of these trust assets (42 U.S.C. § 1396p(d)(3)(B); Tenn. Comp. R. & Regs. 1200-13-20-.06).

TennCare can use property, including real property, in a decedent's revocable trust for the reimbursement of claims against an estate for medical benefits paid for by TennCare. Any property that can be reached by the personal representative for the payment of the debts of an insolvent estate can be reached to reimburse TennCare. (T.C.A. §§ 35-15-505 and 71-5-116(c)(1); *In re Estate of Stidham*, 438 S.W.3d 535, 543 (Tenn. Ct. App. 2012).)

Court Supervision and Privacy

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

In Tennessee, trust agreements, including revocable trust agreements, are generally not subject to court supervision. However, the court may intervene in a trust administration on request by an interested person (generally, a person with an interest affected by the administration) or as the law provides for some matters, including:

- A request for instruction.
- To declare rights under the trust.

(T.C.A. § 35-15-201.)

If, at the settlor's death, the settlor owned assets in the settlor's own name, a court-supervised probate proceeding may be necessary to fully fund the revocable trust. If the settlor had a pour-over will, the probate transfers the individually owned assets to the revocable trust recited in the will (see Question 9). If the settlor funded some, but not all, probate assets to the trust, the probate process (if any) is likely be simpler, more expedited, and less expensive than if the settlor did not fund those assets to the trust since the probate involves fewer assets. Any delays generally have less effect since they affect only the few assets in the probate.

Once the court transfers the probate asset to the trust under the settlor's pour-over will, there is no ongoing court oversight of the revocable trust

administration, absent a petition by an interested party for court intervention (T.C.A. § 35-15-201).

If a settlor transfers all the settlor's probate assets to the settlor's revocable trust before the settlor dies, there may be no need for a probate and no court involvement in the transfer of assets on death.

For more information on probate in Tennessee generally, see [State Q&A, Probate: Tennessee](#).

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

Trusts in Tennessee generally are not subject to court process and therefore may remain private. However, a revocable trust does not guarantee privacy or protection of the individual's assets from disclosure. If an individual dies with any assets in that person's name that do not pass by operation of law or beneficiary designation, the individual's pour-over will may need to be probated to transfer those assets to the revocable trust. Probates, including the inventory and distribution of assets included in the probate, are a matter of public record (see *Kan. City Land Co. v. Hill*, 11 S.W. 797, 802 (Tenn. 1889); *Nichols v. Schubert*, 2005 WL 3555574, at *11 (Tenn. Ct. App. Dec. 28, 2005)).

If a court intervenes in a trust administration on request by an interested person (generally, a person with an interest affected by the administration) or as the law provides, the trust or any part of the trust may become a matter of public record (T.C.A. § 35-15-201; see Question 26). Any court proceedings are public unless otherwise ordered (*Knoxville News-Sentinel v. Huskey*, 982 S.W.2d 359, 362 (Tenn. Crim. App. 1998)).

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?

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In Tennessee, a trustee of a revocable generally does not have a duty to provide information to the trust beneficiaries until the trust becomes irrevocable (usually at the settlor's incapacity or death). A trustee only has a duty to keep beneficiaries of a trust informed about the administration of the trust and material facts to protect their interests if the beneficiaries are current mandatory or permissible distributees of trust income or principal. (T.C.A. § 35-15-813(a).) Beneficiaries named in a revocable trust, other than the settlor, usually are not mandatory or permissible distributees because the settlor may revoke the trust at any time.

The trustee generally must notify these beneficiaries and provide certain information within 60 days after a revocable trust becomes irrevocable. The notice must include either:

- A complete copy of the trust instrument.
- An abstract containing specified information.

(T.C.A. § 35-15-813(b).) Beneficiaries may waive this right to information or revoke a previous waiver of this right (T.C.A. § 35-15-813(d)).

The settlor may waive this duty to inform if the settlor expressly provides for the waiver in either:

- The trust instrument.
- Another separate writing from the settlor (or a trust protector or trust advisor) to the trustee.

(T.C.A. § 35-15-813(e).)

Silent Trusts

The settlor may:

- Designate a person to receive notices rather than a beneficiary.
- Direct that notices not be sent, in which case the notices would go to the settlor, the trust protector, or the trust advisor, as applicable.

(T.C.A. § 35-15-813(e).) Tennessee refers to revocable trusts containing these provisions as silent trusts. If the required person receives the notices, the applicable statutes of limitations related to those notices can run (T.C.A. § 35-15-813(h)).

The main reason for silent trusts is due to settlor concerns that trust beneficiaries will not be productive if the beneficiaries are aware of the trust. The settlor may use silent trust provisions to keep those beneficiaries unaware of the gifts in trust for a certain time.