

Article 7.Part 6. Revocable Trusts	Article 7.Part 6.
<p>GENERAL COMMENT</p> <p>This article deals with issues of significance not totally settled under prior law. Because of the widespread use in recent years of the revocable trust as an alternative to a will, this short article is one of the more important articles of the Code. This article and the other articles of the Code treat the revocable trust as the functional equivalent of a will. Section 601 provides that the capacity standard for wills applies in determining whether the settlor had capacity to create a revocable trust. Section 602, after providing that a trust is presumed revocable unless stated otherwise, prescribes the procedure for revocation or amendment, whether the trust contains one or several settlors. Section 603 provides that while a trust is revocable and the settlor has capacity, the rights of the beneficiaries are subject to the settlor’s control. Section 604 prescribes a statute of limitations on contest of revocable trusts.</p> <p>Sections 601 and 604, because they address requirements relating to creation and contest of trusts, are not subject to alteration or restriction in the terms of the trust. See Section 105. Sections 602 and 603, by contrast, are not so limited and are fully subject to the settlor’s control.</p> <p>SECTION 62-7-601. Capacity of settlor of revocable trust.</p> <p>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</p>	<p>GENERAL COMMENT</p> <p>This article deals with issues of significance not totally settled under prior law. Because of the widespread use in recent years of the revocable trust as an alternative to a will, this short article is one of the more important articles of the Code. This article and the other articles of the Code treat the revocable trust as the functional equivalent of a will. Section 62-7-601 provides that the capacity standard for wills applies in determining whether the settlor had capacity to create a revocable trust. Section 62-7-602, after providing that a trust is presumed revocable unless stated otherwise, prescribes the procedure for revocation or amendment, whether the trust contains one or several settlors. Section 62-7-603 provides that while a trust is revocable and the settlor has capacity, the rights of the beneficiaries are subject to the settlor’s control. Section 62-7-604 prescribes a statute of limitations on contest of revocable trusts.</p> <p>Sections 62-7-601 and 62-7-604, because they address requirements relating to creation and contest of trusts, are not subject to alteration or restriction in the terms of the trust. See Section 62-7-105. Sections 62-7-602 and 62-7-603, by contrast, are not so limited and are fully subject to the settlor’s control.</p> <p>SECTION 62-7-601.</p> <p>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</p>

the same as that required to make a will.

COMMENT

This section is patterned after Restatement (Third) of Trusts Section 11(1) (Tentative Draft No. 1, approved 1996). 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 upon the settlor's death. 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 the settlor did manage to convey. Given this primary use of the revocable trust as a device for disposing of property at death, the capacity standard for wills rather than that for lifetime gifts should apply. The application of 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 this Code 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.

The Uniform Trust Code does not explicitly spell out the standard of capacity necessary to create other types of trusts, although Section 402 does require that the settlor have capacity. This section includes 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

the same as that required to make a will.

REPORTER'S COMMENT

This section is patterned after Restatement (Third) of Trusts Section 11(1) (Tentative Draft No. 1, approved 1996). 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 upon the settlor's death. 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 the settlor did manage to convey. Given this primary use of the revocable trust as a device for disposing of property at death, the capacity standard for wills rather than that for lifetime gifts should apply. The application of 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 this Code for a trust not created by will, and a trust not containing real property may be created by an oral statement. See SCTC Section 62-7-407 and comment. See SCTC Section 62-7-401, which requires a writing for a self-trusted declaration of trust.

The SCTC does not explicitly spell out the standard of capacity necessary to create other types of trusts, although Section 62-7-402 does require that the settlor have capacity. This section includes 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

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 Section 11 (Tentative Draft No. 1, approved 1996); Restatement (Third) of Property: Wills and Other Donative Transfers Section 8.1 (Tentative Draft No. 3, approved 2001).

SOUTH CAROLINA COMMENT

South Carolina Probate Code Section 62-2-501 provides that a person who is “of sound mind and who is not a minor as defined in Section 62-2-201(24) may make a will.” Section 62-2-201(24) defines a minor as a person under eighteen excluding persons under eighteen who are married or emancipated by court decree. The test for mental capacity is whether the person knows (1) his estate, (2) the objects of his affections, and (3) to whom he wishes to give his property. The capacity to understand as opposed to actual knowledge or understanding is sufficient. It is a lower standard than that required to sign a deed or contract. *Weeks v. Drawdy*, 329 S.C. 251, 495 S.E.2d 454 (S.C. Ct.App. 1997); *McCollum v. Banks, et al.*, 213 S.C. 476, 50 S.E.2d 199 (S.C. 1948).

A higher degree of capacity is required to execute an irrevocable trust. The settlor must have the mental capacity to understand the nature of the trust and its probable consequences. *Macauley, et al. v. Wachovia Bank, et al.*, 351 S.C. 287, 569 S.E.2d 371 (S.C. Ct.App. 2002).

There was no prior statutory counterpart to this Section.

As a practical matter, the relatively common

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 Section 11 (Tentative Draft No. 1, approved 1996); Restatement (Third) of Property: Wills and Other Donative Transfers Section 8.1 (Tentative Draft No. 3, approved 2001).

South Carolina Probate Code Section 62-2-501 provides that a person who is “of sound mind and who is not a minor as defined in Section 62-2-201(27) may make a will.” Section 62-2-201(27) defines a minor as a person under eighteen excluding persons under eighteen who are married or emancipated by court decree. The test for mental capacity is whether the person has the capability to know (1) his estate, (2) the objects of his affections, and (3) to whom he wishes to give his property. The capacity to understand as opposed to actual knowledge or understanding is sufficient. It is a lower standard than that required to sign a deed or contract. *Weeks v. Drawdy*, 329 S.C. 251, 495 S.E.2d 454 (S.C. Ct.App. 1997); *McCollum v. Banks, et al.*, 213 S.C. 476, 50 S.E.2d 199 (S.C. 1948).

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use of pour over wills in conjunction with minimally funded revocable trusts indicates that the measure of capacity for execution of the trust is the same as that for a will. See *Bowles v. Bradley*, 219 S.C. 377, 461 S.E.2d 811 (S.C. 1995).

See SCTC Section 62-7-401, which requires a writing for a self-trusted declaration of trust.

SECTION 62-7-602. Revocation or amendment of revocable trust.

(a) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection does not apply to a trust created under an instrument executed before the effective date of this article.

(b) If a revocable trust is created or funded by more than one settlor:

(1) to the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses; and

(2) to the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution; and

(3) upon the revocation or amendment of the trust by fewer than all of the settlors, the trustee shall promptly notify the other settlors of the revocation or amendment.

(c) The settlor may revoke or amend a revocable trust:

(1) by substantial compliance with a method provided in the terms of the trust; or

(2) if the terms of the trust do not provide a

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(2) to the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution; and

(3) upon the revocation or amendment of the trust by fewer than all of the settlors, the trustee shall promptly notify the other settlors of the revocation or amendment.

(c) The settlor may revoke or amend a revocable trust:

(1) by substantial compliance with a method provided in the terms of the trust; or

(2) if the terms of the trust do not provide a method or the method provided in the terms

<p>method or the method provided in the terms is not expressly made exclusive, by:</p> <p>(A) a later will or codicil that expressly refers to the trust, manifesting clear and convincing evidence of the settlor's intent; or</p> <p>(B) by oral statement to the trustee if the trust was created orally; or</p> <p>(C) any other written method, other than a later will or codicil, delivered to the trustee and manifesting clear and convincing evidence of the settlor's intent.</p> <p>(d) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.</p> <p>(e) A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the power of attorney provided the exercise of the power does not alter the designation of beneficiaries to receive the property on the settlor's death under the settlor's existing estate plan.</p> <p>(f) A conservator of the settlor or, if no conservator has been appointed, a guardian of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the conservatorship or guardianship and with regard to the requirements of Section 62-5-408 (3)(c).</p> <p>(g) A trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.</p>	<p>is not expressly made exclusive, by:</p> <p>(A) a later will or codicil that expressly refers to the trust, manifesting clear and convincing evidence of the settlor's intent; or</p> <p>(B) by oral statement to the trustee if the trust was created orally; or</p> <p>(C) any other written method, other than a later will or codicil, delivered to the trustee and manifesting clear and convincing evidence of the settlor's intent.</p> <p>(d) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.</p> <p>(e) A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the power of attorney provided the exercise of the power does not alter the designation of beneficiaries to receive the property on the settlor's death under the settlor's existing estate plan. <u>RESERVED</u></p> <p>(f) A conservator of the settlor or, if no conservator has been appointed, a guardian of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the conservatorship or guardianship and with regard to the requirements of Section 62-5-408 (3)(c).</p> <p>(g) A trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.</p>
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<p>COMMENT</p> <p>Subsection (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 evidence of contrary intent. See Restatement (Second) of Trusts Section 330 (1959). California, Iowa, Montana, Oklahoma, and Texas presume that a trust is revocable. The Uniform Trust Code endorses this minority approach, but only for trusts created after its effective date. This Code 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 Section 63 cmt. c (Tentative Draft No. 3, approved 2001). Because professional drafters habitually spell out whether or not a trust is revocable, subsection (a) will have limited application.</p> <p>A power of revocation includes the power to amend. An unrestricted power to amend may also include the power to revoke a trust. See Restatement (Third) of Trusts Section 63 cmt. g (Tentative Draft No. 3, approved 2001); Restatement (Second) of Trusts Section 331 cmt. g & h (1959).</p> <p>Subsection (b), which is similar to Restatement (Third) of Trusts Section 63 cmt. k (Tentative Draft No. 3, approved 2001), provides default rules for revocation or amendment of a trust having several settlors. The settlor's authority</p>	<p>REPORTER'S COMMENT</p> <p>South Carolina Trust Code Section 62-7-602(a) is a departure from former South Carolina law, which presumed that a trust was irrevocable unless a power of revocation was validly reserved and that, if a particular method of revocation was specified, it must be strictly followed. Where the right to revoke was reserved and no particular mode was specified, any mode sufficiently showing an intention to revoke was effective. See <i>Peoples National Bank of Greenville v. Peden et al.</i>, 229 S.E. 2d 163 (S.C. 1956), citing to 4 <i>Bogert on Trusts and Trustees</i> Section 996 and 54 <i>Am. Jur. Section 77 on Trusts</i>. Likewise, a settlor had to expressly reserve the right to modify a trust. <i>First Carolinas Joint Stock Land Bank v. Deschamps, et al.</i>, 171 S. C. 466 172 S.E. 622 (S.C. 1934).</p> <p>The South Carolina Supreme Court has noted that there are some exceptions to the general rule that a trust cannot be revoked or modified unless such a power is expressly reserved in the trust instrument, such as mistake. <i>Chiles v. Chiles, et al.</i>, 20 S. C. 379, 242 S.E. 2d 426 (S.C. 1978), citing to the Restatement 2d of Trusts Section 330(2).</p> <p>Most states follow the rule that a trust is presumed irrevocable absent evidence of contrary intent. See Restatement (Second) of Trusts Section 330 (1959). California, Iowa, Montana, Oklahoma, and Texas presume that a trust is revocable. The South Carolina Trust Code endorses this minority approach, but only for trusts created after its effective date. This Code 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</p>
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to revoke or modify the trust depends on whether the trust contains community property. To the extent 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. While 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 move from a community to a noncommunity state. For this reason, subsection (b), and its provision on contributions of community property, should be enacted in all states, whether community or noncommunity. With respect to separate property contributed to the trust, or all property of the trust if none of the trust property consists of community property, subsection (b) provides that each settlor may revoke or amend the trust as to the portion of the trust contributed by that settlor. The inclusion of a rule for contributions of separate property does not mean that the drafters of this Code concluded that the use of joint trusts should be encouraged. The rule is included because of the widespread use of joint trusts in noncommunity property states in recent years. Due to the desire to preserve the community character of trust property, joint trusts are a necessity in community property states. Unless community property will be contributed to the trust, no similarly important reason exists for the creation of a joint trust in

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 Section 63 cmt. c (Tentative Draft No. 3, approved 2001). Because professional drafters habitually spell out whether or not a trust is revocable, subsection (a) will have limited application.

A power of revocation includes the power to amend. An unrestricted power to amend may also include the power to revoke a trust. *See* Restatement (Third) of Trusts Section 63 cmt. g (Tentative Draft No. 3, approved 2001); Restatement (Second) of Trusts Section 331 cmt. g & h (1959).

Subsection (b), which is similar to Restatement (Third) of Trusts Section 63 cmt. k (Tentative Draft No. 3, approved 2001), provides default rules for revocation or amendment of 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 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. While 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.

<p>a noncommunity property state. Joint trusts are often poorly drafted, confusing the dispositive provisions of the respective settlors. Their use can also lead to unintended tax consequences. See Melinda S. Merk, <i>Joint Revocable Trusts for Married Couples Domiciled in Common-Law Property States</i>, 32 Real Prop. Prob. & Tr. J. 345 (1997).</p> <p>Subsection (b) does not address the many technical issues that can arise in determining the settlors' proportionate contribution to a joint trust. Most problematic are contributions of jointly-owned property. In the case of joint tenancies in real estate, each spouse would presumably be treated as having made an equal contribution because of the right to sever the interest and convert it into a tenancy in common. This is in contrast to joint accounts in financial institutions, ownership of which in most states is based not on fractional interest but on actual dollar contribution. See, e.g., Unif. Probate Code Section 6-211. Most difficult may be determining a contribution rule for entireties property. In <i>Holdener v. Fieser</i>, 971 S.W. 2d 946 (Mo. Ct. App. 1998), the court held that a surviving spouse could revoke the trust with respect to the entire interest but did not express a view as to revocation rights while both spouses were living.</p> <p>Subsection (b)(3) requires that the other settlor or settlors be notified if a joint trust is revoked by less than all of the settlors. Notifying the other settlor or settlors of the revocation or amendment will place them in a better position to protect their interests. If the revocation or amendment by less than all of the settlors breaches an implied agreement not to revoke or amend the trust, those harmed by the action</p>	<p>For this reason, subsection (b), and its provision on contributions of community property, should be enacted in all states, whether community or noncommunity.</p> <p>With respect to separate property contributed to the trust, or all property of the trust if none of the trust property consists of community property, subsection (b) provides that each settlor may revoke or amend the trust as to the portion of the trust contributed by that settlor. The inclusion of a rule for contributions of separate property does not mean that the use of joint trusts should be encouraged. The rule is included because of the widespread use of joint trusts in noncommunity property states in recent years. Due to the desire to preserve the community character of trust property, joint trusts are a necessity in community property states. Unless community property will be contributed to the trust, no similarly important reason exists for the creation of a joint trust in a noncommunity property state. Joint trusts are often poorly drafted, confusing the dispositive provisions of the respective settlors. Their use can also lead to unintended tax consequences. See Melinda S. Merk, <i>Joint Revocable Trusts for Married Couples Domiciled in Common-Law Property States</i>, 32 Real Prop. Prob. & Tr. J. 345 (1997).</p> <p>Subsection (b) does not address the many technical issues that can arise in determining the settlors' proportionate contribution to a joint trust. Most problematic are contributions of jointly-owned property. In the case of joint tenancies in real estate, each spouse would presumably be treated as having made an equal contribution because of the right to sever the interest and convert it into a tenancy in common. This is in contrast to joint accounts</p>
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can sue for breach of contract. If the trustee fails to notify the other settlor or settlors of the revocation or amendment, the parties aggrieved by the trustee's failure can sue the trustee for breach of trust.

Subsection (c), which is similar to Restatement (Third) of Trusts Section 63 cmt. h & i (Tentative Draft No. 3, approved 2001), specifies the method of revocation and amendment. Revocation of a trust differs fundamentally from revocation of a will. Revocation of a will, because a will is not effective until death, cannot affect an existing fiduciary relationship. With a trust, however, because a revocation will terminate an already existing fiduciary relationship, there is a need to protect a trustee who might act without knowledge that the trust has been revoked. There is also a need to protect trustees against the risk that they will misperceive the settlor's intent and mistakenly assume that an informal document or communication constitutes a revocation when that was not in fact the settlor's intent. To protect trustees against these risks, drafters habitually insert provisions providing that a revocable trust may be revoked only by delivery to the trustee of a formal revoking document. Some courts require strict compliance with the stated formalities. Other courts, recognizing that the formalities were inserted primarily for the trustee's and not the settlor's benefit, will accept other methods of revocation as long as the settlor's intent is clear. See Restatement (Third) of Trusts Section 63 Reporter's Notes to cmt. h-j (Tentative Draft No. 3, approved 2001).

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Subsection (b)(3) requires that the other settlor or settlors be notified if a joint trust is revoked by less than all of the settlors. Notifying the other settlor or settlors of the revocation or amendment will place them in a better position to protect their interests. If the revocation or amendment by less than all of the settlors breaches an implied agreement not to revoke or amend the trust, those harmed by the action can sue for breach of contract. If the trustee fails to notify the other settlor or settlors of the revocation or amendment, the parties aggrieved by the trustee's failure can sue the trustee for breach of trust.

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<p>same time protecting a trustee against inadvertent liability. While notice to the trustee of a revocation is good practice, this section does not make the giving of such notice a prerequisite to a trust's revocation. To protect a trustee who has not been notified of a revocation or amendment, subsection (g) provides that a trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust, as unamended, was still in effect. However, to honor the settlor's intent, subsection (c) generally honors a settlor's clear expression of intent even if inconsistent with stated formalities in the terms of the trust.</p> <p>Under subsection (c), the settlor may revoke or amend a revocable trust by substantial compliance with the method specified in the terms of the trust or by a later will or codicil or any other method manifesting clear and convincing evidence of the settlor's intent. Only if the method specified in the terms of the trust is made exclusive is use of the other methods prohibited. Even then, a failure to comply with a technical requirement, such as required notarization, may be excused as long as compliance with the method specified in the terms of the trust is otherwise substantial.</p> <p>While revocation of a trust will ordinarily continue to be accomplished by signing and delivering a written document to the trustee, other methods, such as a physical act or an oral statement coupled with a withdrawal of the property, might also demonstrate the necessary intent. These less formal methods, because they provide less reliable indicia of intent, will often be insufficient, however. The method</p>	<p>There is also a need to protect trustees against the risk that they will misperceive the settlor's intent and mistakenly assume that an informal document or communication constitutes a revocation when that was not in fact the settlor's intent. To protect trustees against these risks, drafters habitually insert provisions providing that a revocable trust may be revoked only by delivery to the trustee of a formal revoking document. Some courts require strict compliance with the stated formalities. Other courts, recognizing that the formalities were inserted primarily for the trustee's and not the settlor's benefit, will accept other methods of revocation as long as the settlor's intent is clear. <i>See</i> Restatement (Third) of Trusts Section 63 Reporter's Notes to cmt. h-j (Tentative Draft No. 3, approved 2001).</p> <p>This Code tries to effectuate the settlor's intent to the maximum extent possible while at the same time protecting a trustee against inadvertent liability. While notice to the trustee of a revocation is good practice, this section does not make the giving of such notice a prerequisite to a trust's revocation. To protect a trustee who has not been notified of a revocation or amendment, subsection (f) provides that a trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust, as unamended, was still in effect. However, to honor the settlor's intent, subsection (c) generally honors a settlor's clear expression of intent even if inconsistent with stated formalities in the terms of the trust.</p> <p>Under subsection (c), the settlor may revoke</p>
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<p>specified in the terms of the trust is a reliable safe harbor and should be followed whenever possible.</p> <p>Revocation or amendment by will is mentioned in subsection (c) not to encourage the practice but to make clear that it is not precluded by omission. See Restatement (Third) of Property: Will and Other Donative Transfers Section 7.2 cmt. e (Tentative Draft No. 3, approved 2001), which validates revocation or amendment of will substitutes by later will. Situations do arise, particularly in death-bed cases, where revocation by will may be the only practicable method. In such cases, a will, a solemn document executed with a high level of formality, may be the most reliable method for expressing intent. A revocation in a will ordinarily becomes effective only upon probate of the will following the testator's death. For the cases, see Restatement (Third) of Trusts Section 63 Reporter's Notes to cmt. h-i (Tentative Draft No. 3, approved 2001).</p> <p>A residuary clause in a will disposing of the estate differently than the trust is alone insufficient to revoke or amend a trust. The provision in the will must either be express or the will must dispose of specific assets contrary to the terms of the trust. The substantial body of law on revocation of Totten trusts by will offers helpful guidance. The authority is collected in William H. Danne, Jr., Revocation of Tentative ("Totten") Trust of Savings Bank Account by Inter Vivos Declaration or Will, 46 A.L.R. 3d 487 (1972). Subsection (c) does not require that a trustee concur in the revocation or amendment of a trust. Such a concurrence would be necessary only if required by the terms of the trust. If the trustee concludes that an amendment</p>	<p>or amend a revocable trust by substantial compliance with the method specified in the terms of the trust or by a later will or codicil or any other method manifesting clear and convincing evidence of the settlor's intent. Only if the method specified in the terms of the trust is made exclusive is use of the other methods prohibited. Even then, a failure to comply with a technical requirement, such as required notarization, may be excused as long as compliance with the method specified in the terms of the trust is otherwise substantial.</p> <p>While revocation of a trust will ordinarily continue to be accomplished by signing and delivering a written document to the trustee, other methods, such as a physical act or an oral statement coupled with a withdrawal of the property, might also demonstrate the necessary intent. These less formal methods, because they provide less reliable indicia of intent, will often be insufficient, however. The method specified in the terms of the trust is a reliable safe harbor and should be followed whenever possible.</p> <p>Revocation or amendment by will is mentioned in subsection (c) not to encourage the practice but to make clear that it is not precluded by omission. See Restatement (Third) of Property: Will and Other Donative Transfers Section 7.2 cmt. e (Tentative Draft No. 3, approved 2001), which validates revocation or amendment of will substitutes by later will. Situations do arise, particularly in death-bed cases, where revocation by will may be the only practicable method. In such cases, a will, a solemn document executed with a high level of formality, may be the most reliable method for expressing intent. A revocation in a will ordinarily becomes</p>
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<p>unacceptably changes the trustee’s duties, the trustee may resign as provided in Section 705. Subsection (d), providing that upon revocation the trust property is to be distributed as the settlor directs, codifies a provision commonly included in revocable trust instruments. A settlor’s power to revoke is not terminated by the settlor’s incapacity. The power to revoke may instead be exercised by an agent under a power of attorney as authorized in subsection (e), by a conservator or guardian as authorized in subsection (f), or by the settlor personally if the settlor regains capacity. Subsection (e), which is similar to Restatement (Third) of Trusts Section 63 cmt. 1 (Tentative Draft No. 3, approved 2001), authorizes an agent under a power of attorney to revoke or modify a revocable trust only to the extent the terms of the trust or power of attorney expressly so permit. An express provision is required because most settlors usually intend that the revocable trust, and not the power of attorney, to function as the settlor’s principal property management device. The power of attorney is usually intended as a backup for assets not transferred to the revocable trust or to address specific topics, such as the power to sign tax returns or apply for government benefits, which may be beyond the authority of a trustee or are not customarily granted to a trustee. Subsection (f) addresses the authority of a conservator or guardian to revoke or amend a revocable trust. Under the Uniform Trust Code, a “ conservator” is appointed by the court to manage the ward’s party, a “ guardian” to make decisions with respect to the ward’s personal affairs. See Section 103. Consequently, subsection (f) authorizes a</p>	<p>effective only upon probate of the will following the testator’s death. For the cases, see Restatement (Third) of Trusts Section 63 Reporter’s Notes to cmt. h-i (Tentative Draft No. 3, approved 2001). A residuary clause in a will disposing of the estate differently than the trust is alone insufficient to revoke or amend a trust. The provision in the will must either be express or the will must dispose of specific assets contrary to the terms of the trust. The substantial body of law on revocation of Totten trusts by will offers helpful guidance. The authority is collected in William H. Danne, Jr., <i>Revocation of Tentative (“Totten”) Trust of Savings Bank Account by Inter Vivos Declaration or Will</i>, 46 A.L.R. 3d 487 (1972). Subsection (c) does not require that a trustee concur in the revocation or amendment of a trust. Such a concurrence would be necessary only if required by the terms of the trust. If the trustee concludes that an amendment unacceptably changes the trustee’s duties, the trustee may resign as provided in Section 62-7-705. As to SCTC Section 62-7-602(c), although prior South Carolina case law required strict compliance with method of revocation provided by the terms of the trust, the courts would recognize a valid revocation as long as it was clear that the settlor had exercised every right within his power to revoke the trust and if notice requirements which were strictly for the benefit of the trustee were waived by the trustee. Peoples National Bank of Greenville v. Peden et al., 229 S.C. 167, 92 S.E. 2d 163 (S.C. 1956). SCTC subsection (c)(2) differs from the UTC version by requiring a writing to revoke or amend a trust unless the trust was</p>
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<p>guardian to exercise a settlor's power to revoke or amend a trust only if a conservator has not been appointed.</p> <p>Many state conservatorship statutes authorize a conservator to exercise the settlor's power of revocation with the prior approval of the court supervising the conservatorship. See, e.g., Unif. Probate Code Section 411(a) (4). Subsection (f) ratifies this practice. Under the Code, a conservator may exercise a settlor's power of revocation, amendment, or right to withdraw trust property upon approval of the court supervising the conservatorship. Because a settlor often creates a revocable trust for the very purpose of avoiding conservatorship, this power should be exercised by the court reluctantly. Settlers concerned about revocation by a conservator may wish to deny a conservator a power to revoke. However, while such a provision in the terms of the trust is entitled to considerable weight, the court may override the restriction if it concludes that the action is necessary in the interests of justice. See Section 105(b)(13).</p> <p>Steps a conservator can take to stem possible abuse is not limited to petitioning to revoke the trust. The conservator could petition for removal of the trustee under Section 706. The conservator, acting on the settlor- beneficiary's behalf, could also bring an action to enforce the trust according to its terms. Pursuant to Section 303, a conservator may act on behalf of the beneficiary whose estate the conservator controls whenever a consent or other action by the beneficiary is required or may be given under the Code.</p> <p>If a conservator has not been appointed, subsection (f) authorizes a guardian to exercise a settlor's power to revoke or amend the trust</p>	<p>created orally.</p> <p>Under prior South Carolina case law, if the power to revoke was not expressly reserved in a trust, the terms of a later will could not control the disposition of property under a previously executed trust document. <i>Bonney v. Granger, et al.</i>, 292 S.C. 308, 356 S.E. 2d 138 (S.C. Ct. App. 1987). If the right to revoke was reserved and no particular method of revocation was specified, a revocable trust could be revoked by a testamentary devise of the corpus of the trust. Whether a will impliedly revoked a revocable trust was a question of intention. <i>Peoples National Bank of Greenville v. Peden et al.</i>, 229 S.C. 167, 92 S.E. 2d 163 (S.C. 1956), citing to 54 Am Jur. Section 77. A residuary clause was insufficient to revoke or amend a trust. <i>First Carolinas Joint Stock Land Bank v. Deschamps, et al.</i>, 171 S.C. 466, 172 S.E. 622 (S.C.1934).</p> <p>See SCTC Section 62-7-401, which requires a writing for the creation of self-trusteed declarations of trust.</p> <p>Subsection (d), providing that upon revocation the trust property is to be distributed as the settlor directs, codifies a provision commonly included in revocable trust instruments. Prior South Carolina case law required a trustee upon termination of a trust to distribute the assets to the beneficiaries or to their nominee. <i>Beaty Trust Co. v. S. C. Tax Com.</i>, 278 S.C. 113, 292 S.E. 2d 788 (S.C. 1982). There was no prior South Carolina law that addressed the responsibility of the trustee in regard to a revocable trust.</p> <p>A settlor's power to revoke is not terminated by the settlor's incapacity. The power to revoke may instead be exercised by an agent in</p>
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upon approval of the court supervising the guardianship. The court supervising the guardianship will need to determine whether it can grant a guardian authority to revoke a revocable trust under local law or whether it will be necessary to appoint a conservator for that purpose.

2001 Amendment. By amendment in 2001, revocation by “executing a later will or codicil” in subsection (c)(2)(A) was changed to revocation by a “later will or codicil” to avoid an implication that the trust is revoked immediately upon execution of the will or codicil and not at the testator’s death.

2003 Amendment. The amendment, which adds a new subsection (b)(3), requires that if a joint trust that is revoked or amended by fewer than all of its settlors, that the trustee must give prompt notice of the change to the other settlors. This new subsection is a substitute for Section 603(b), which was deleted by a 2003 amendment. For a discussion, see Section 603 comment.

SOUTH CAROLINA COMMENT

South Carolina Trust Code Section 62-7-602(a) is a departure from former South Carolina law, which presumed that a trust was irrevocable unless a power of revocation was validly reserved and that, if a particular method of revocation was specified, it must be strictly followed. Where the right to revoke was reserved and no particular mode was specified, any mode sufficiently showing an intention to revoke was effective. See *Peoples National Bank of Greenville v. Peden et al.*, 229 S.C. 167, 92 S.E.2d 163 (S.C. 1956), citing to 4 *Bogert on Trusts and Trustees* Section 996 and 54 *Am. Jur.* Section 77 on Trusts. Likewise, a

accordance with Section 62-7-602.1.

Subsection (e) addresses the authority of a conservator or guardian to revoke or amend a revocable trust. Under the South Carolina Trust Code, a “conservator” is appointed by the court to manage the ward’s party, a “guardian” to make decisions with respect to the ward’s personal affairs. *See* Section 62-7-103.

Consequently, subsection (e) authorizes a guardian to exercise a settlor’s power to revoke or amend a trust only if a conservator has not been appointed.

In South Carolina, the probate court, acting through a conservator, exercises control over the estate and affairs of an incapacitated person in regard to trusts. Acting through the conservator, the court may create, amend or fund, but not revoke (unless amendment could be construed so broadly as to constitute a right to revoke), a revocable trust. In exercising these powers, the court must consider the estate plan and the terms of any revocable trust of which the incapacitated person is settlor. The court has no power to make a will for the incapacitated person. S. C. Code Section 62-5-404(G)(2).

If a conservator has not been appointed, subsection (e) authorizes a guardian to exercise a settlor’s power to revoke or amend the trust upon approval of the court supervising the guardianship. The court supervising the guardianship will need to determine whether it can grant a guardian authority to revoke a revocable trust under local law or whether it will be necessary to appoint a conservator for that purpose.

settlor had to expressly reserve the right to modify a trust. *First Carolinas Joint Stock Land Bank v. Deschamps, et al.*, 171 S.C. 466, 172 S.E. 622 (S.C. 1934).

The South Carolina Supreme Court has noted that there are some exceptions to the general rule that a trust cannot be revoked or modified unless such a power is expressly reserved in the trust instrument, such as mistake. *Chiles v. Chiles, et al.*, 20 S.C. 379, 242 S.E.2d 426 (S.C. 1978), citing to the Restatement 2d of Trusts Section 330(2).

There was no South Carolina case law or statutory counterpart to SCTC Subsection 62-7-602(b).

As to SCTC Section 62-7-602(c), although South Carolina law required strict compliance with the method of revocation provided by the terms of the trust, the courts would recognize a valid revocation as long as it was clear that the settlor had exercised every right within his power to revoke the trust and if notice requirements which were strictly for the benefit of the trustee were waived by the trustee. *Peoples National Bank of Greenville v. Peden et al.*, 229 S.C. 167, 92 S.E.2d 163 (S.C. 1956). SCTC subsection (c)(2) differs from the UTC version by requiring a writing to revoke or amend a trust unless the trust was created orally, and the UTC Comment should be adjusted accordingly.

Under prior South Carolina case law, if the power to revoke was not expressly reserved in a trust, the terms of a later will could not control the disposition of property under a previously executed trust document. *Bonney v. Granger, et al.*, 292 S.C. 308, 356 S.E.2d 138 (S.C. Ct.App. 1987). If the right to revoke was reserved and no particular method of

revocation was specified, a revocable trust could be revoked by a testamentary devise of the corpus of the trust. Whether a will impliedly revoked a revocable trust was a question of intention. Peoples National Bank of Greenville v. Peden et al., 229 S.C. 167, 92 S.E.2d 163 (S.C. 1956), citing to 54 Am.Jur. Section 77. A residuary clause was insufficient to revoke or amend a trust. First Carolinas Joint Stock Land Bank v. Deschamps, et al., 171 S.C. 466, 172 S.E. 622 (S.C. 1934).

See SCTC Section 62-7-401, which requires a writing for the creation of self-trusteed declarations of trust.

As to Section 62-7-602(d), prior South Carolina case law required a trustee upon termination of a trust to distribute the assets to the beneficiaries or to their nominee. Beaty Trust Co. v. S. C. Tax Com., 278 S.C. 113, 292 S.E.2d 788 (S.C. 1982). There was no prior South Carolina law that addressed the responsibility of the trustee in regard to a revocable trust.

Prior South Carolina law had no provision for the revocation, amendment or distribution of trust property by an agent acting under a power of attorney, such as in Section 62-7-602(e). SCTC subsection (e) adds to the UTC version the prohibition against an agent altering the settlor's existing estate plan, and the UTC Comment should be adjusted accordingly.

As to Section 62-7-602(f), in South Carolina, the probate court, acting through a conservator, exercises control over the estate and affairs of an incapacitated person in regard to trusts. Acting through the conservator, the court may create, amend or fund, but not revoke (unless amendment could be construed so broadly as to

constitute a right to revoke), a revocable trust. In exercising these powers, the court must consider the estate plan and the terms of any revocable trust of which the incapacitated person is settlor. The court has no power to make a will for the incapacitated person. S.C. Code Section 62-5-408.

There was no prior statutory counterpart to Section 62-7-602(g).

SECTION 62-7-602A.

(a) An agent acting pursuant to a power of attorney may exercise the following powers of the settlor with respect to a revocable trust only to the extent expressly authorized by the terms of the trust or the power of attorney:

- (1) revocation of the trust;
- (2) amendment of the trust;
- (3) additions to the trust;
- (4) direction to dispose of property of the trust;

(5) creation of the trust, notwithstanding the provisions of Section 62-7-402(a)(1) and (2).

(b) An agent acting pursuant to a power of attorney may exercise the following powers of the settlor with respect to an irrevocable trust only to the extent expressly authorized by the terms of the trust or the power of attorney:

- (1) additions to the trust;
- (2) creation of the trust, notwithstanding

<p>SECTION 62-7-603. Settlor’s powers.</p> <p>While a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.</p>	<p><u>the provisions of Section 62-7-402(a)(1) and (2).</u></p> <p><u>(c) The exercise of the powers described in subsection (a) and (b) shall not alter the amount of property beneficiaries are to receive on the settlor’s death under the settlor’s existing will or other estate planning documents or in the absence thereof in accordance with the law of intestate succession.</u></p> <p>REPORTER’S COMMENT</p> <p>This section replaces former SCTC Section 62-7-602(e) and expands agent powers with respect to a revocable trust.</p> <p>Subsection (a) expands the powers found in the Uniform Trust Code and former Section 62-7-602(e) which authorized an agent under a power of attorney to revoke, amend, or distribute property from a revocable trust of the principal. Subsection (a) adds to these powers the authorization of an agent of the settlor to create or add to a revocable trust. Subsection (b) revises the limitations of the former Section 62-7-602(e) that prohibited an agent from deviating from the settlor’s estate plan by stating that there shall be no deviation in regard to the amount of property beneficiaries are to receive from the settlor’s will or in the absence thereof from the law of intestate succession.</p> <p>SECTION 62-7-603.</p> <p>While a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.</p>
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COMMENT

This section has the effect of postponing enforcement of the rights of the beneficiaries of a revocable trust until the death or incapacity of the settlor or other person holding the power to revoke the trust. This section thus recognizes that the settlor of a revocable trust is in control of the trust and should have the right to enforce the trust.

Pursuant to this section, the duty under Section 813 to inform and report to beneficiaries is owed to the settlor of a revocable trust as long as the settlor has capacity.

If the settlor loses capacity, subsection (a) no longer applies, with the consequence that the rights of the beneficiaries are no longer subject to the settlor's control. The beneficiaries are entitled to request information concerning the trust and the trustee must provide the beneficiaries with annual trustee reports and whatever other information may be required under Section 813. However, because this section may be freely overridden in the terms of the trust, a settlor is free to deny the beneficiaries these rights, even to the point of directing the trustee not to inform them of the existence of the trust. Also, should an incapacitated settlor later regain capacity, the beneficiaries' rights will again be subject to the settlor's control. The cessation of the settlor's control upon the settlor's incapacity or death does not mean that the beneficiaries may reopen transactions the settlor approved while having capacity.

Typically, the settlor of a revocable trust will also be the sole or primary beneficiary of the trust. Upon the settlor's incapacity, any right of action the settlor-trustee may have against the trustee for breach of fiduciary duty will

REPORTER'S COMMENT

This section has the effect of postponing enforcement of the rights of the beneficiaries of a revocable trust until the death of the settlor or other person holding the power to revoke the trust. This section thus recognizes that the settlor of a revocable trust is in control of the trust and should have the right to enforce the trust.

Pursuant to this section, the duty under Section 62-7-813 to inform and report to beneficiaries is owed to the settlor of a revocable trust as long as the settlor has capacity.

The beneficiaries are entitled to request information concerning the trust and the trustee must provide the beneficiaries with annual trustee reports and whatever other information may be required under Section 62-7-813. However, because this section may be freely overridden in the terms of the trust, a settlor is free to deny the beneficiaries these rights, even to the point of directing the trustee not to inform them of the existence of the trust. Also, should an incapacitated settlor later regain capacity, the beneficiaries' rights will again be subject to the settlor's control. The cessation of the settlor's control upon the settlor's incapacity or death does not mean that the beneficiaries may reopen transactions the settlor approved while having capacity.

Typically, the settlor of a revocable trust will also be the sole or primary beneficiary of the trust. Upon the settlor's incapacity, any right of action the settlor-trustee may have against the trustee for breach of fiduciary duty will pass to the settlor's agent or conservator.

Prior South Carolina law addressed the trustee's duty of loyalty to the beneficiaries of

pass to the settlor's agent or conservator. Subsection (c) makes clear that a holder of a power of withdrawal has the same powers over the trust as the settlor of a revocable trust. Equal treatment is warranted due to the holder's equivalent power to control the trust. For the definition of power of withdrawal, see Section 103(10).

2001 Amendment. By a 2001 amendment, former subsection (b) was deleted. Former subsection (b) provided: "While a trust is revocable and the settlor does not have capacity to revoke the trust, rights of the beneficiaries are held by the beneficiaries." No substantive change was intended by this amendment. Former subsection (b) was superfluous. Rights of the beneficiaries are always held by the beneficiaries unless taken away by some other provision. Subsection (a) grants these rights to the settlor of a revocable trust while the settlor has capacity. Upon a settlor's loss of capacity, these rights are held by the beneficiaries with or without former subsection (b).

2003 Amendment. The purpose of former subsection (b), which was deleted in 2003, was to make certain that upon revocation of amendment of a joint trust by fewer than all of its settlors, that the trustee would notify the nonparticipating settlor or settlors. The subsection, which provided that "If a revocable trust has more than one settlor, the duties of the trustee are owed to all of the settlors having capacity to revoke the trust," imposed additional duties upon a trustee and unnecessarily raised interpretative questions as to its scope. The drafter's original intent is restored, and in a much clearer form, by repealing former subsection (b), and by

the trust. See e.g., *Ramage v. Ramage*, 283 S.C. 239, 322 S.E. 2d 22 (S.C. Ct. App. 1984). SCTC Section 62-7-603 omits the language found in the UTC 2004 Amendments expressly providing that a trust is revocable only while the settlor has the capacity to revoke.

amending Section 602 to add a subsection (b)(3) that states explicitly what former subsection (b) was trying to achieve.

SOUTH CAROLINA COMMENT

Prior South Carolina law primarily addressed the trustee’s duty of loyalty to the beneficiaries of the trust. See, e.g., *Ramage v. Ramage*, 283 S.C. 239, 322 S.E.2d 22 (S.C. Ct.App. 1984). SCTC Section 62-7-603 omits the language found in the UTC 2004 Amendments expressly providing that a trust is revocable only while the settlor has the capacity to revoke.

SCTC Section 62-7-603 does not include UTC subsection 603 (b), and the UTC Comment should be adjusted accordingly.

SECTION 62-7-604. Limitation on action contesting validity of revocable trust; distribution of trust property.

(a) A person must commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor’s death within the earlier of:

- (1) one year after the settlor’s death; or
- (2) one hundred twenty days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust’s existence, of the trustee’s name and address, and of the time allowed for commencing a proceeding.

(b) Upon the death of the settlor of a trust that was revocable at the settlor’s death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for doing so unless:

- (1) the trustee knows of a pending judicial

SECTION 62-7-604.

(a) A person must commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor’s death within the earlier of:

- (1) one year after the settlor’s death; or
- (2) one hundred twenty days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust’s existence, of the trustee’s name and address, and of the time allowed for commencing a proceeding.

(b) Upon the death of the settlor of a trust that was revocable at the settlor’s death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for doing so unless:

- (1) the trustee knows of a pending

<p>proceeding contesting the validity of the trust; or</p> <p>(2) a potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within one hundred twenty days after the contestant sent the notification.</p> <p>(c) A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.</p> <p>COMMENT</p> <p>This section provides finality to the question of when a contest of a revocable trust may be brought. The section is designed to allow an adequate time in which to bring a contest while at the same time permitting the expeditious distribution of the trust property following the settlor's death.</p> <p>A trust can be contested on a variety of grounds. For example, the contestant may allege that no trust was created due to lack of intent to create a trust or lack of capacity (see Section 402), that undue influence, duress, or fraud was involved in the trust's creation (see Section 406), or that the trust had been revoked or modified (see Section 602). A "contest" is an action to invalidate all or part of the terms of the trust or of property transfers to the trustee. An action against a beneficiary or other person for intentional interference with an inheritance or gift, not being a contest, is not subject to this section. For the law on intentional interference, see Restatement (Second) of Torts Section 774B (1979). Nor does this section preclude an action to determine the validity of a trust that is brought during the settlor's lifetime, such as a petition for a declaratory judgment, if such action is</p>	<p>judicial proceeding contesting the validity of the trust; or</p> <p>(2) a potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within one hundred twenty days after the contestant sent the notification.</p> <p>(c) A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.</p> <p>REPORTER'S COMMENT</p> <p>This section provides finality to the question of when a contest of a revocable trust may be brought. The section is designed to allow an adequate time in which to bring a contest while at the same time permitting the expeditious distribution of the trust property following the settlor's death.</p> <p>A trust can be contested on a variety of grounds. For example, the contestant may allege that no trust was created due to lack of intent to create a trust or lack of capacity (<i>see</i> Section 62-7-402), that undue influence, duress, or fraud was involved in the trust's creation (<i>see</i> Section 62-7-406), or that the trust had been revoked or modified (<i>see</i> Section 62-7-602). A "contest" is an action to invalidate all or part of the terms of the trust or of property transfers to the trustee. An action against a beneficiary or other person for intentional interference with an inheritance or gift, not being a contest, is not subject to this section. For the law on intentional interference, see Restatement (Second) of Torts Section 774B (1979). Nor does this section preclude an action to determine the validity of a trust that is brought during the settlor's lifetime, such as a petition for a declaratory</p>
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authorized by other law. See Section 106 (Uniform Trust Code supplemented by common law of trusts and principles of equity). This section applies only to a revocable trust that becomes irrevocable by reason of the settlor's death. A trust that became irrevocable by reason of the settlor's lifetime release of the power to revoke is outside its scope. A revocable trust does not become irrevocable upon a settlor's loss of capacity. Pursuant to Section 602, the power to revoke may be exercised by the settlor's agent, conservator, or guardian, or personally by the settlor if the settlor regains capacity.

Subsection (a) specifies a time limit on when a contest can be brought. A contest is barred upon the first to occur of two possible events. The maximum possible time for bringing a contest is three years from the settlor's death. This should provide potential contestants with ample time in which to determine whether they have an interest that will be affected by the trust, even if formal notice of the trust is lacking. The three-year period is derived from Section 3-108 of the Uniform Probate Code. Three years is the maximum limit under the UPC for contesting a nonprobated will. Enacting jurisdictions prescribing shorter or longer time limits for contest of a nonprobated will should substitute their own time limit. To facilitate this process, the "three-year" period has been placed in brackets.

A trustee who wishes to shorten the contest period may do so by giving notice. Drawing from California Probate Code Section 16061.7, subsection (a)(2) bars a contest by a potential contestant 120 days after the date the trustee sent that person a copy of the trust instrument and informed the person of the trust's

judgment, if such action is authorized by other law. See Section 62-7-106 (SCTC supplemented by common law of trusts and principles of equity).

This section applies only to a revocable trust that becomes irrevocable by reason of the settlor's death. A trust that became irrevocable by reason of the settlor's lifetime release of the power to revoke is outside its scope. A revocable trust does not become irrevocable upon a settlor's loss of capacity. Pursuant to Section 62-7-602 and 62-7-602.1, the power to revoke may be exercised by the settlor's agent, conservator, or guardian, or personally by the settlor if the settlor regains capacity.

Subsection (a) specifies a time limit on when a contest can be brought. A contest is barred upon the first to occur of two possible events. The maximum possible time for bringing a contest is one year from the settlor's death. This should provide potential contestants with ample time in which to determine whether they have an interest that will be affected by the trust, even if formal notice of the trust is lacking. The one-year period is derived from Section 62-3-108, under which the contest of an informally probate will must occur by the later of one year from death or eight months after informal probate

A trustee who wishes to shorten the contest period may do so by giving notice. Subsection (a)(2) bars a contest by a potential contestant 120 days after the date the trustee sent that person a copy of the trust instrument and informed the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a contest. The 120 day period in subsection (a)(2) is subordinate to the one-year bar in subsection (a)(1). A

existence, of the trustee's name and address, and of the time allowed for commencing a contest. The reference to "120" days is placed in brackets to suggest to the enacting jurisdiction that it substitute its statutory time period for contesting a will following notice of probate. The 120 day period in subsection (a)(2) is subordinate to the three-year bar in subsection (a)(1). A contest is automatically barred three years after the settlor's death even if notice is sent by the trustee less than 120 days prior to the end of that period.

Because only a small minority of trusts are actually contested, trustees should not be restrained from making distributions because of concern about possible liability should a contest later be filed. Absent a protective statute, a trustee is ordinarily absolutely liable for misdelivery of the trust assets, even if the trustee reasonably believed that the distribution was proper. See Restatement (Second) of Trusts Section 226 (1959). Subsection (b) addresses liability concerns by allowing the trustee, upon the settlor's death, to proceed expeditiously to distribute the trust property. The trustee may distribute the trust property in accordance with the terms of the trust until and unless the trustee receives notice of a pending judicial proceeding contesting the validity of the trust, or until notified by a potential contestant of a possible contest, followed by its filing within 60 days.

Even though a distribution in compliance with subsection (b) discharges the trustee from potential liability, subsection (c) makes the beneficiaries of what later turns out to have been an invalid trust liable to return any distribution received. Issues as to whether the distribution must be returned with interest, or

contest is automatically barred one year after the settlor's death even if notice is sent by the trustee less than 120 days prior to the end of that period.

Because only a small minority of trusts are actually contested, trustees should not be restrained from making distributions because of concern about possible liability should a contest later be filed. Absent a protective statute, a trustee is ordinarily absolutely liable for misdelivery of the trust assets, even if the trustee reasonably believed that the distribution was proper. See Restatement (Second) of Trusts Section 226 (1959). Subsection (b) addresses liability concerns by allowing the trustee, upon the settlor's death, to proceed expeditiously to distribute the trust property. The trustee may distribute the trust property in accordance with the terms of the trust until and unless the trustee receives notice of a pending judicial proceeding contesting the validity of the trust, or until notified by a potential contestant of a possible contest, followed by its filing within 120 days.

Even though a distribution in compliance with subsection (b) discharges the trustee from potential liability, subsection (c) makes the beneficiaries of what later turns out to have been an invalid trust liable to return any distribution received. Issues as to whether the distribution must be returned with interest, or with income earned or profit made are not addressed in this section but are left to the law of restitution.

For purposes of notices under this section, the substitute representation principles of Part 3 are applicable. The notice by the trustee under subsection (a)(2) or by a potential contestant under subsection (b)(2) must be

with income earned or profit made are not addressed in this section but are left to the law of restitution.

For purposes of notices under this section, the substitute representation principles of Article 3 are applicable. The notice by the trustee under subsection (a)(2) or by a potential contestant under subsection (b)(2) must be given in a manner reasonably suitable under the circumstances and likely to result in its receipt. See Section 109(a).

This section does not address possible liability for the debts of the deceased settlor or a trustee's possible liability to creditors for distributing trust assets. For possible liability of the trust, see Section 505(a)(3) and Comment. Whether a trustee can be held personally liable for creditor claims following distribution of trust assets is addressed in Uniform Probate Code Section 6-102, which was added to that Code in 1998.

SOUTH CAROLINA COMMENT

There was no statutory limitations period to contest the validity of a trust under prior South Carolina law. For statutory limitations periods applicable to wills, see South Carolina Probate Code Section 62-3-108. For statutory limitations periods applicable to claims of beneficiaries against the trustee, see SCTC Section 62-7-1005.

SECTION 62-7-605. Effect of penalty clause for contest.

A provision in a revocable trust purporting to penalize any interested person for contesting the validity of the trust or instituting other proceedings relating to the trust is

given in a manner reasonably suitable under the circumstances and likely to result in its receipt. See Section 62-7-109(a).

This section does not address possible liability for the debts of the deceased settlor or a trustee's possible liability to creditors for distributing trust assets. For possible liability of the trust, see Section 62-7-505(a)(3) and Comment

For statutory limitations periods applicable to wills, see South Carolina Probate Code Section 62-3-108.

For statutory limitations periods applicable to claims of beneficiaries against the trustee, see SCTC Section 62-7-1005.

SECTION 62-7-605.

A provision in a revocable trust purporting to penalize any interested person for contesting the validity of the trust or instituting other proceedings relating to the trust is unenforceable if probable cause exists for

<p>unenforceable if probable cause exists for instituting proceedings.</p> <p>SOUTH CAROLINA COMMENT</p> <p>The Uniform Trust Code does not contain a similar provision. This Section is analogous to South Code Probate Code Section 62-3-905, which is applicable to wills.</p> <p>SECTION 62-7-606. Anti-lapse provision in trust.</p> <p>(A) Unless the trust expressly provides otherwise, if the beneficiary under a revocable trust, who is a great-grandparent or a lineal descendant of a great-grandparent of the settlor, is dead at the time of execution of the trust, fails to survive the settlor, or is treated as if he predeceased the settlor, the issue of the deceased beneficiary who survived the settlor take in place of the deceased beneficiary and if they are all of the same degree of kinship to the beneficiary they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been a beneficiary under a class gift if he had survived the settlor is treated as a beneficiary for purposes of this section whether his death occurred before or after the execution of the trust.</p> <p>(B) Except as provided in subsection (A), if the disposition of any real or personal property under a revocable trust fails for any reason, this property becomes a part of the residue of the trust.</p> <p>(C) Except as provided in subsection (A), if the residue under a revocable trust is distributed to two or more persons and the share of one of the residuary beneficiaries fails for any reason, his</p>	<p>instituting proceedings.</p> <p>REPORTER’S COMMENT</p> <p>This Section is analogous to South Code Probate Code Section 62-3-905, which is applicable to wills.</p> <p>SECTION 62-7-606.</p> <p>(A) Unless the trust expressly provides otherwise, if the beneficiary under a revocable trust, who is a great-grandparent or a lineal descendant of a great-grandparent of the settlor, is dead at the time of execution of the trust, fails to survive the settlor, or is treated as if he predeceased the settlor, the issue of the deceased beneficiary who survived the settlor take in place of the deceased beneficiary and if they are all of the same degree of kinship to the beneficiary they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been a beneficiary under a class gift if he had survived the settlor is treated as a beneficiary for purposes of this section whether his death occurred before or after the execution of the trust.</p> <p>(B) Except as provided in subsection (A), if the disposition of any real or personal property under a revocable trust fails for any reason, this property becomes a part of the residue of the trust.</p> <p>(C) Except as provided in subsection (A), if the residue under a revocable trust is distributed to two or more persons and the share of one of the residuary beneficiaries fails</p>
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share passes to the other residuary beneficiary or to other residuary beneficiaries in proportion to their interests in the residue.

SOUTH CAROLINA COMMENT

This Section retains and incorporates South Carolina Probate Code Section 62-7-113 (2002) (except for the deletion of the words “inter vivos” when used to describe the trust and the addition of the introductory “Unless the trust expressly provides otherwise”).

SECTION 62-7-607. Divorce or annulment as revoking revocable trust.

If after executing a revocable trust the settlor is divorced or his marriage annulled or his spouse is a party to a valid proceeding concluded by an order purporting to terminate all marital property rights or confirming equitable distribution between the spouses, the divorce or annulment or order revokes any disposition or appointment of property including beneficial interests made by such trust to the spouse, any provision conferring a general or special power of appointment on the spouse, and any nomination of the spouse as trustee, unless the trust expressly provides otherwise. Property prevented from passing to a spouse because of revocation by divorce or annulment or order passes as if the spouse failed to survive the settlor, and other provisions conferring some power or office on this spouse are interpreted as if the spouse failed to survive the settlor. If provisions are revoked solely by this section,

for any reason, his share passes to the other residuary beneficiary or to other residuary beneficiaries in proportion to their interests in the residue.

REPORTER’S COMMENT

This Section retains and incorporates former South Carolina Probate Code Section 62-7-113 (except for the deletion of the words “inter vivos” when used to describe the trust and the addition of the introductory “Unless the trust expressly provides otherwise”) and is analogous to SCPC Section 62-2-603 applicable to wills.

SECTION 62-7-607.

If after executing a revocable trust the settlor is divorced or ~~his~~ the marriage annulled or ~~his~~ the spouse is a party to a valid proceeding concluded by an order purporting to terminate all marital property rights or confirming equitable distribution between ~~the~~ spouses, the divorce or annulment or order revokes any disposition or appointment of property including beneficial interests made by such trust to the spouse, any provision conferring a general or special power of appointment on the spouse, and any nomination of the spouse as trustee, unless the trust expressly provides otherwise. Property prevented from passing to a spouse because of revocation by divorce or annulment or order passes as if the spouse failed to survive the settlor, and other provisions conferring some power or office on this spouse are interpreted as if the spouse failed to survive the settlor. If these provisions

<p>they are revived by the settlor's remarriage to the former spouse. For purposes of this section, divorce or annulment or order means any divorce or annulment or order which would exclude the spouse as a surviving spouse within the meaning of subsections (a) and (b) of Section 62-2-802. A decree of separate maintenance which does not terminate the status of husband and wife is not a divorce for purposes of this section. No change of marital or parental circumstances other than as described in this section revokes a revocable trust.</p> <p>SOUTH CAROLINA COMMENT This Section retains and incorporates South Carolina Probate Code Section 62-7-114 (2002) (except for the deletion of the words "inter vivos" when used to describe the trust).</p>	<p><u>for the spouse</u> are revoked solely by this section, they are revived by the settlor's remarriage to the former spouse. For purposes of this section, divorce or annulment or order means any divorce or annulment or order which would exclude the spouse as a surviving spouse within the meaning of subsections (a) and (b) of Section 62-2-802. A decree of separate maintenance which does not terminate the status of husband and wife is not a divorce for purposes of this section. No change of marital or parental circumstances other than as described in this section revokes <u>a disposition to a spouse in</u> a revocable trust.</p> <p>REPORTER'S COMMENT This Section retains and incorporates South Carolina Probate Code Section 62-7-114 (except for the deletion of the words "inter vivos" when used to describe the trust) and is consistent with SCPC Section 62-2-507.</p>
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