

**SUMMARY OF
ACTEC SURVEY ON REVOCABLE TRUSTS**

**Ira Mark Bloom¹
Chair, Revocable Trusts Subcommittee, ACTEC State Laws Committee**

Background

The Revocable Trusts Subcommittee of the States Laws Committee of the American College of Trust and Estate Counsel (ACTEC) prepared a comprehensive survey on revocable trusts (Survey). The Survey was sent to an ACTEC fellow from each state,² with a view towards determining revocable trust usage on a comparative basis. The Survey included the following Instructions:

The survey includes questions on substantive state law and questions that are practice-related. For substantive law questions please cite relevant statutory or case law authority.

For practice-related questions, please answer based on the common practice within your state. Depending on your state, there may not be a common practice on a particular practice-related matter, e.g., local practice considerations may dictate different approaches. If there is not a common practice on a particular matter, please explain the different practices and the reasons for the differences. In some instances, you may find it helpful to confer with an ACTEC fellow in a different part of your state.

Responses, which were received for each state, are compiled in a massive Excel file. If you would like the file, please email me at [@albanylaw.edu](mailto:albanylaw.edu).

Caveat: The file is not intended to be printed in its entirety as it will print out to over 1,500 pages.

The following summarizes the Survey results. Many questions will not have 51 responses because a fellow or fellows chose not to respond to a particular question. For other questions, a fellow was unsure of the answer; indeed there may not be any authority in the particular state.

Hopefully the Survey will facilitate planning and drafting and encourage appropriate legislation.

¹ Justice David Josiah Brewer Distinguished Professor of Law, Albany Law School.

² For purposes of the Survey, the District of Columbia was treated as a state.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel ("ACTEC") does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

Uniform Statutory Adoptions

Has your state enacted the UTC? Yes-20; No-31.

Has your state enacted Article II of the UPC?³ Yes-24; No-27.

1. USE OF REVOCABLE TRUST AS PRIMARY DEVICE TO TRANSMIT PROPERTY AT DEATH

Is there a consensus in your state that a revocable trust (and not a will) should be used as the primary device to transmit property at death?

YES-16 states, including CA, DE, FL, MA and OH; also AZ, HI and MI which have enacted UPC informal administration.

If yes, please explain the general reasons for its primacy, i.e., the specific benefits of probate avoidance, including relative cost savings over wills, court supervision concerns, probate complexity, privacy. (Note that other reasons for using revocable trusts are surveyed below and that additional questions about privacy are also surveyed below.)

Problems with probate process

- * Lack of immediate access to and control over assets.
- * Time delays (WY: 1 year if uncomplicated)
- * Notice and filing requirements, filing fees
- * Statutory fees for executors and lawyers
- * Other cost savings
- * Court supervision concerns-opening and closing, inventory; avoid dealing with court personnel-can be arbitrary and tyrannical.
- * Privacy issues. *See* Part 4.
 - OH, OK and WA: online access to wills possible in some counties.
- * If testamentary trust, ongoing administration, frequent accountings, fees. *See* Part 2.

3 Article II (Intestacy, Wills and Donative Transfers) is quite comprehensive. A “YES” response does not necessarily mean that all of Article II has been enacted.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel (“ACTEC”) does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

AZ: Probate avoidance is probably the number 1 reason, but the relative cost savings if an individual fiduciary is appointed are not large. Currently, clients generally expect that the trust will be used except in smaller estates (under \$100,000).

CA: Avoidance of probate and attendant filing fee based on size of estate, attendant statutory executor's commission and attorney's fee, mandatory court supervision (minimum of formal opening and closing of estate, court-filed inventory), public record.

DE: The primary reason is probate avoidance. There is a 1.25% to 1.75% fee imposed on the net probate estate.

FL: Although I am not certain that there is a true consensus in Florida, there is a significant preference for the use of revocable trusts for most estate planning. The reason for this is that there are a number of practitioners (as well as others who are not lawyers!) who have made a cottage industry of putting on estate planning seminars at which they are selling trust packages. Thus, the "folklore around the shuffleboard court" has become that you must have a revocable trust in order to have an effective estate plan.

MA: Court supervision concerns, cost savings, privacy.

MO: Most estate planners use a revocable trust as the primary document in creating an estate plan. There would have to be a good reason not to do so. Locally, the probate court for many years has had a reputation for being slow and erratic. However the trust practice is wide spread across the state. An alternative to solemn form, or supervised, probate was enacted in 1981, known as independent administration, sections 473.780 et.seq. We would estimate of the probate estates opened 90% are opened as Independent estates. While the courts are involved, supervision is limited. Mo still does have a statutory fee schedule for compensation of Personal Representatives and Attorneys, and Attorneys must be utilized. Trust mills, both run by lawyers, and non-lawyers, were very prevalent in the recent past and led to a general opinion among the public that an attorney was not doing a proper job without use of revocable trusts. With that background, the main reasons for use of revocable trusts as main estate planning vehicles are:

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel ("ACTEC") does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

Probate Avoidance,
Privacy,
Reduction of fees,
Planning for new spouse (avoidance of elective share, see below), and
Incapacity planning (see below).

Caveat: Avoiding probate completely is a “fool’s errand”-will inevitably be assets owned at death.

Other reasons for RT preference

- * Agent can have authority to amend RT but not will.
- * Elective share avoidance. *See* Part 3.
- * Disability, including guardianship avoidance. *See* Part 4.

Management if incapacity and RT much preferred over durable powers as banks and brokerages question authority/concern about reliability of agent (and disability or death of agent). Some use of standby RTs.

CA: A common purpose of the revocable trust.

HI: Prior to enactment of the Uniform Probate Code in 1997, one of the primary reasons for using revocable trusts was to avoid the time delays of probate. Now that informal probate is available in Hawaii, this reason no longer applies. These days, the two main reasons for using trusts instead of wills are privacy and disability planning concerns. Avoiding the necessity to file a conservatorship is an important consideration. Using durable powers of attorney does not necessarily handle the problem because many banks or brokers want their own form or do not want to take a power that is a few years old, even though the statutes provide that they are protected if they accept them. It is also slightly more expensive to go through the probate process. The filing fee to open a probate is \$175. If the Trustee wishes to file a final account in court, that would be \$85.

NM: Providing for a current or relatively-expectable disability is one of the reasons a trust might be used in preference to a will. I cannot recall seeing a revocable trust recently that does not contain provisions for management in the event of the disability of the settler.

NY: This may be the primary reason for their use.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel (“ACTEC”) does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

WY: This is a common use, with a self-defined method of determining “disability,” which typically involves less time and effort than the establishment of a conservatorship

* Asset management, for example, for travel, elderly. *See* Part 4.

VA: It is common for this to be a primary purpose of a revocable trust.

If there is no consensus in your state that a revocable trust should be used as the primary device to transmit property at death, is there a consensus in your state that a will should be used as the primary device to transmit property at death?

YES in only 3 states: LA, NJ and SC.

Even if no consensus probate may be very simple as in GA, TX and WA along with UPC states with informal administration.

PA ACTEC fellow reports that that probate takes 5-10 minutes although do have to file inventory.

If yes, please explain the general reasons why the will is the primary device.

SOL for will challenges is shorter; less expensive.

If there is no consensus in your state that either a revocable trust or a will should be used as the primary device to transmit property at death, please explain why there is no consensus and under what circumstances a revocable trust is preferred over a will.

*Virtual consensus that RT should be used for out-of-state real property.

* Problems with RTs.

Deed tax for rev trusts but not wills.

Title insurance and homeowners’ insurance issues.

Problem with funding-cost and inconvenience of retitling.

Incomplete funding and still need probate.

Two transfers with RT: on creation and then on death but only one under wills.

MS: Whether a revocable trust or a will is preferred depends on the facts and circumstances relating to the matter upon which the estate planner is working. There may be certain facts and circumstances that produce a preference for a will as compared to a revocable trust or vice versa.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel (“ACTEC”) does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

2. REVOCABLE TRUSTS COMPARED TO TESTAMENTARY TRUSTS

Do revocable trusts have advantages in your state over testamentary trusts apart from avoiding the need to probate a will? Privacy for RTS.

TX: There are no differences in Texas between the administration of a revocable trust and those of a testamentary trust.

Wide differences re court supervision over testamentary trusts and RTs.

*In some states, no mandatory supervision over RTs but required for wills, including NV and OH. Comprehensive Nevada response follows:

There is one particular advantage in Nevada for a revocable trust over a testamentary trust other than the need to probate the will for the testamentary trust. The advantage of the revocable trust is that the court does not have automatic and continuing jurisdiction over the revocable trust as is the case with a testamentary trust. In regard to a revocable trust, the court is only gets jurisdiction over the trust if some interested party seeks to have court obtain jurisdiction. NRS 153.020 memorializes the concept of automatic and continuing jurisdiction over a testamentary trust.

NY: Court approval for Test. Trustee to resign or appoint new trustee; court approval to change trust situs.

*In some states, no mandatory supervision for either, including CA, CO and IA.

Differences in accountings

CA: Mandatory accountings for both.

CT: TTs are worse for income tax.

MA and OH: probate acct for TTs.

Does your state prohibit a lawyer who drafts a revocable trust from serving as trustee of a revocable trust? No-51.

Does your state prohibit a lawyer who drafts a will from serving as testamentary trustee? No-51.

From serving as executor? No-51.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel ("ACTEC") does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

3. **USE OF REVOCABLE TRUSTS TO AVOID CREDITORS= AND FAMILY RIGHTS AT DEATH OF SETTLOR**

Creditors= Rights

Can creditors of the settlor reach property held in a revocable trust after the settlor dies?

Yes-37, including UPC 6-102 and UTC 505 (20 states) but only after probate exhausted.

No-2. ND and RI ...CREATE TRUSTS THERE???

Not clear/never been decided-10.

When must creditors= claims against revocable trusts be filed?

Wide variation:

IL: Not entirely clear. As to claims that are payable from the revocable trust because the trust provides for payment of taxes and expenses, it makes sense that the claims period would be the same as set forth below for estates. I am not aware, however, of any case on point, and there is no statutory authority one way or the other.

MD: There is no law on point, but it may be that claims can be filed only within 6 months after date of death (same as for estates).

ME: Not clear. The assumption is that the claim must first be perfected against the estate since the trust can only be reached if the probate estate is insufficient.

MA and NE: 1 year from date of death.

VA, WA and WY: 2 years generally.

MN, MI, MT, NJ, OK: There is no statute of limitations as to when creditors' claims against revocable trusts must be filed – except the “regular” statute or limitations.

When must creditors' claims against estate be filed? Definite statutory rules.

Family Rights

Does your state provide a surviving spouse with elective share rights?

Yes-40; No-11.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel (“ACTEC”) does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

If your state provides a surviving spouse with elective share rights, can a revocable trust limit or avoid these rights?

Yes-over 10, including CT, DE, MI, OH, OR.

No-about 20.

Unclear/Maybe-10.

Can a revocable trust avoid other spousal and family rights such as exempt property rights, homestead rights, and family allowance provisions?

Not under UTC 505 and UPC 6-102.

FL: Although I had not focused on it before, it does appear that the revocable trust could avoid the rights to exempt property or family allowance, but that is not clear. Perhaps the limitation would be found judicially, which is where the determination has been made that a revocable trust may not avoid the homestead rights. See Estate of Johnson, 397 So. 2d 970 (Fla. 4th DCA 1981).

NY: Probably based on avoidance of exempt property by GCM.

Any other uses of revocable trusts regarding family rights after the settlor dies, e.g., to avoid rights to quasi-community property?

CA: Revocable trust will not avoid rights to quasi-community property.

NY: They can be used to segregate property as community or as separate.

VA: A revocable trust can be used to hold property acquired by gift or bequest and maintained as separate property from being included in the augmented estate. It can also be used to exclude property acquired before the marriage and placed in a revocable trust before the marriage from the augmented estate.

4. ADDITIONAL REASONS, APART FROM AVOIDANCE OF CREDITORS= AND FAMILY RIGHTS, TO USE REVOCABLE TRUST TO TRANSMIT PROPERTY AT DEATH

Whether or not the revocable trust is the primary device used in your state to transmit property at death, there may be specific reasons to use a revocable trust. Please address the following for your state whether or not the revocable trust is the primary device used in your state to transmit property at death. (Joint trust issues are surveyed later in this survey.)

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel ("ACTEC") does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

Privacy Aspects

Are revocable trusts useful to prevent public disclosure of trust terms?

Overwhelming Yes!!!!

OH-Some courts now place their files (always public) on the internet, accessible worldwide from any computer; revocable trusts avoid that publicity. Same in OK and WA.

Under what circumstances will a revocable trust become public record after the settlor dies?

Litigation.

NV: The Trust would become public record if there is a dispute and one of the parties uses the Trust as an exhibit for their pleading. Furthermore, anytime there is a petition brought to confirm the trustee, a trust dispute, or a request for accounting there is good chance that the trust will become public record. However, the trustee may ask that the trust in question be filed under seal to prevent it from becoming public record.

Specifically, will it become public if a pour-over will is probated?

No-Virtually all

NH: New Hampshire has adopted the Uniform Testamentary Additions to Trusts Act as RSA Chapter 563-A. RSA 563A:1, II provides that unless the testator's will provides otherwise, property devised or bequeathed to a revocable, pour-over trust is not held under a testamentary trust, and there is no requirement that the revocable trust be filed with the probate court or otherwise be made a part of the probate record if the pour-over will is probated.

NY is EXCEPTION; LA if real property involved.

Other privacy issues?

HI: Although not unique to Hawaii, there is always concern about (1) disclosure of information that might lead to identity theft, particularly social security numbers and addresses, (2) disclosure of medical information when showing that a trustee is unable to serve, (3) disclosure of proprietary information (value of company or sales figures) or property value, particularly if sale pending, and (4) disclosure about any information on beneficiaries who are minors. In the past, it was easy to have information sealed. Recently, it has become much more difficult to seal the entire file or any portion of files.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel ("ACTEC") does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

Other Considerations

Are there any state tax or property law advantages in having a revocable trust (instead of a testamentary trust) as the receptacle for life insurance and pensions, TOD accounts and other devices?

No-41.

NE: Yes, life insurance payable to a revocable trust will not be included in the inheritance tax determination. Life insurance payable to the estate is subject to inheritance tax.

OH: Yes, An inter vivos trust maybe able to avoid Ohio trust income tax, for example, if none of its current beneficiaries lives in Ohio, but a testamentary trust does not have that opportunity.

RI: Yes. If a testamentary trust is established through the probate process, there is uncertainty whether benefits payable to the trust will have to be probated.

Is a revocable trust useful if determining and locating intestate takers will be difficult?

Yes-about half of states; but if pour over will may still have problem.

NV: Yes, as there is nothing in Nevada law requiring the trustee to contact heirs who are not trust beneficiaries. In contrast, the probate of a will does not occur until after heirs have been given notice of the petition for probate.

Can a revocable trust avoid ancillary probate of out-of-state real property?

Yes in virtually all states.

NV: Yes, if the out-of-state property is properly conveyed to the trust.

If your state is a community property state, is a revocable trust used to hold separate property to preserve its character? Yes.

Any other reasons for using revocable trusts?

Disability planning.

Asset management by a non-Settlor Trustee.

Trusts are honored more consistently than powers of attorney.

Preserving community property in non-comm prop states.

Preserving or establishing separate and community property in community property.

Challenge to undue influence.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel ("ACTEC") does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

GA: Revocable trusts are often used for planning for incapacity, sometimes in conjunction with a springing power of attorney.

Revocable trusts may assure continuity of asset management.

Revocable trusts may be used as ‘testing ground’ for the trustee.

Revocable trusts may be used when a challenge for undue influence is expected under the assumption that it will be more difficult for challengers to convince a court that undue influence has occurred if the arrangement has been a long-term one of which the settlor has had continuing knowledge throughout his or her life.

HI: Although Hawaii has eliminated statutory probate fees, it is still less expensive to administer a trust than it is to go through probate. Trusts seem to be administered with greater speed than probates. The administration of assets held in the trust of a disabled settlor is much easier than trying to use a durable power of attorney. If a Settlor desires to disinherit a child, a trust can be administered without notice to the disinherited child (in contrast to a probate where notice to disinherited child is required). Of course, if the disinherited child finds out and challenges the validity of the trust, this benefit is lost.

ID: Some clients choose to use trusts for purely emotional reasons or for the psychological reason that they believe that they are making it easier for their family to administer their estate after their deaths.

IA: (1) The substitute decision making procedures in a trust are more safe than use of a power of attorney. (2) It is often a cost effective way to manage assets during the clients’ lifetime. (3) In some situations, clients with revocable trusts (and their lawyers) take the fact that they have a trust very seriously and are more amenable to regular review of their documents and plan.

5. REASONS FOR NOT USING A REVOCABLE TRUST TO TRANSMIT PROPERTY AT DEATH

Whether or not the revocable trust is the primary device used in your state to transmit property at death, there may be specific reasons NOT to use a revocable trust. Please address the following for your state whether or not the revocable trust is the primary device used in your state to transmit property at death.

Can the interest of an individual in a professional practice be held in a revocable trust? Yes-15; No-25; Maybe-7.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel (“ACTEC”) does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

Is there any other property that cannot be held in a revocable trust?

Generally no but see below:

MS: No, but holding a homestead or other property that is subject to a tax exemption in a revocable trust may affect the exemption. Not that I know of other than qualified plan benefits and IRAs.

VA: An automobile should not be titled in a revocable trust as some counties (local jurisdictions) consider it a business vehicle and tax it accordingly. Local Virginia jurisdictions impose a personal property tax on automobiles. Personal automobiles are entitled to a reduced rate of tax or are exempt up to a certain dollar amount. Business vehicles do not qualify for the reduced rate of tax or any exemption.

Is there any other property that should not be held in a revocable trust (e.g., S Corp stock, property with potential environmental problems)?

NV: No, as our forms typically provide “bootstrap” S corporation provisions (QSST and ESBT provisions), and authorize segregation of environmentally sensitive or other problem properties into a “pocket” trust to create a firewall between the problematic asset and other trust assets. Sometimes we counsel clients to divert potentially contaminated real estate away from the revocable trust in the first instance, specifically excluding it from the pour-over will’s residuary clause and directing it elsewhere so that none of the revocable trust assets are tainted.

In some counties if real estate is placed in a revocable trust and the beneficiary is not the trustee, the beneficiary (equitable owner of the real estate) could lose the ability to claim reduced real estate tax assessment for persons of limited means.

If yes, please identify the specific type of property and the reason or reasons why it should not be placed in trust.

Are there other reasons why a revocable trust should not be used? Please explain.

Creation and operation Costs.
Medicaid exposure/SNT trigger trusts.
Potential contests and creditors-longer than wills.

CO: Might lose homestead exemption.
MA: Loss of real estate exemption.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel (“ACTEC”) does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

WI: Careful consideration of S corporation status required. May be as expensive to draft trust as to incur probate expenses in small estates. Client wishes to “keep it simple,” i.e., “all I want is a simple will, don’t make it so complicated.” Complicates certain government tax breaks for forest preservation and conservation tax credits. Trust as beneficiary of a non-qualified (non-IRA) annuity will not qualify for extended payment options, i.e., only the “five-year rule.” May complicate stretch out payments of retirement benefits, i.e., trust must qualify as a “look through trust” or a “conduit trust.” There are difficult issues in the “look through” trust area, but “conduit trusts” are simple to draft. Conduit trust use is not widespread and not well understood.

6. REVOCABLE TRUST CREATION/VALIDITY ISSUES

Formalities

What formalities are statutorily required to create a revocable trust that does not include real property?

Generally no execution formalities but exceptions including FL, LA and NY.

RI: N/A. (Practice is to have one witness and a notary).

May a trust of personal property be oral?

Yes over 30, including UTC states.

No about 10.

If so, under what circumstances? Clear and convincing evidence.

What formalities are statutorily required to create a revocable trust that includes real property?

Lots of variations-from nothing to writing, notarized.

Under what circumstances, if any, must a revocable trust be recorded?

Generally no recording of trust necessary.

Funding Issues regarding Personal Property

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel (“ACTEC”) does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

What rules are required to fund a revocable trust with personal property?

Varies-general rules of transfers.

Specifically, will the mere listing of an item of personal property on a trust schedule satisfy your state=s funding rules?

Yes-12; No-9; Maybe-28.

GA: Lawyers in the state disagree as to whether that would work. There is no statutory or case law on the subject.

Is it common practice in your state for the lawyer to help the client to actually fund revocable trusts with personal property or is the funding left to the client? VARIES

What is the impact on insurance on personal property that was formerly held by the settlor?

NV: Unfortunately, this has not been determined under Nevada law. Unclear may not have coverage/get policy endorsement/have trustee named as insured/settler as additional insured/may need a rider.

What other issues or concerns are encountered on funding revocable trusts with personal property?

AR: A lack of understanding of the client's responsibility to transfer and retitle assets to the trust.

ME: Trusts for tangible personal property such as vehicles or household possessions are usually cumbersome and professional trustees will normally not want to be accountable for such items. The most frequent problem with investment property involves confusion over tax identification numbers and inconsistencies in the documentation that brokers and transfer agents require to transfer registration to the trustee.

MD: When transferring a cooperative apartment interest to a trust, the board of the cooperative generally will require specific language in the trust instrument and the payment of a fee to effect the transfer.

MS: The typical difficulty is that the client fails to transfer all of the property that was contemplated to the trustee to be held as part of the trust property. This often leads to the requirement of probating a will or an intestate estate in order to pass title to the property to the beneficiaries or heirs.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel ("ACTEC") does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

OR: Questions of whether an assignment conveys after-acquired personal property.

TN: Proving which property is actually titled to the trust. Many trustors use a very generic description of which properties are in the trust making it very difficult to know exactly which items are in the trust and which are not.

UT: From practical standpoint, major issue is recognition by applicable institution (bank, stock company, etc.) that asset is considered held in name of trust. Determining if contents of a safe deposit box are deemed to be assets of revocable trust may be an issue when contents are not specifically identified but only generally identified, such as “safe deposit box contents”.

NY: The Department of Motor Vehicles will not allow cars to be titled in the name of the trust.

Funding Issues Regarding Real Property

What rules are required to fund revocable trust with real property?

Deed to trustee but some variations.

CO: The preferred method is to convey legal title to the trust (not to the trustee), as authorized by C.R.S. § 38-30-108.5, which for this purpose treats the trust as an entity. The trustee records a statement of authority to evidence the existence of the trust and the authority of one or more trustees to act on behalf of the trust with respect to the real property. C.R.S. §§ 38-30-108.5 and 38-30-172(2). Conveyances may be, and sometimes are, made to the trustee, in which case the conveyance is presumed to be to the trustee individually, unless the representative capacity of the trustee is shown as provided in C.R.S. § 38-30-108. As noted above, *In re Estate of Granberry*, 498 P.2d 960 (Colo. App. 1972), held that listing the legal description of real property on an exhibit to a declaration of trust was sufficient to create a trust.

What is the impact on TITLE INSURANCE on real property that was formerly held by the settlor?

Confused area.

AZ: Not clear. Common to recommend that client obtain endorsement to the title insurance policy.

CO: There is a dispute whether coverage is lost. Some practitioners believe that conveyance by way of warranty deed will preserve title insurance protection through the grantor’s warranties. More cautious practitioners advise the client either to obtain a new title insurance policy for the trust or an endorsement to the client’s existing policy.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel (“ACTEC”) does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

HI: Title insurance does not cover transferee. So, typically settlor transfers to revocable trust using a warranty deed (or limited warranty deed), thereby allowing the trustee to seek relief from settlor, who in turn seeks coverage from title policy. In theory, warranty deeds would carry out the same protection when trustee conveys to heirs of settlor. If, however, a quitclaim deed is used, title company likely will deny coverage.

IA: Iowa does not have title insurance.

KY: An endorsement should be secured from the title insurance company acknowledging that the trustee is the insured.

MD: Unless the grantor arranges for reissuance of the title insurance to the trust, the title insurance will not be in effect after the title to the property has been transferred to the trust.

MI: Title insurance does not pass with the real property into the trust. Once the settlor conveys title and interest to the trust, the settlor no longer has an interest in the real property. If the policy of title insurance names only the settlor as insured, there is no coverage (unless the contract of title insurance were to provide otherwise). *Bengeyfield v. First American Title Insurance Company*, 2005 Mich. App. LEXIS 2116.

MN: Any applicable title insurance policy should be reviewed prior to deeding real estate to a revocable trust, to determine whether transfer would cause loss of title insurance. In some policies, for example, there may be some coverage if the transfer is by warranty deed, but not if by quitclaim deed. This is especially true for ALTA policies issued before 2006. (Pre-2006 policies defined the "Insured" in a manner which included persons who "succeed to the interest of the named insured by operation of law," but excluded purchasers; the policy did not explicitly include as an insured a recipient of real estate in a gratuitous transfer). ALTA amended its standard form in 2006 to include "a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title . . . (4) if the grantee is a trustee or beneficiary of a trust created by a written instrument established by the Insured . . . for estate planning purposes. Many attorneys recommend that clients contact the title insurance company before recording the deed and purchase additional coverage naming the Trustee as an Insured under the policy; this is usually available at relatively nominal cost, and is the best means to avoid any question later if a title defect arises.

NE: Effective June 17, 2007, the Nebraska Department of Insurance has authorized the use of the 2006 ALTA title insurance policy. If the property being deeded into the trust was acquired and insured under the 2006 ALTA title insurance policy, the title coverage is not affected by the transfer into the trust. If the property transferred is not insured under the 2006 ALTA title insurance policy, the transfer into the trust should be by warranty deed.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel ("ACTEC") does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

NY: The trustee might not be insured unless the policy were reissued.

NV: This is an unresolved issue in Nevada.

PA: Case by case depending on the title insurance company. My general understanding is that there is a risk of revocation that must be considered in doing this sought of transfer.

TX: Don't know.

WI: Need to update title policy to protect trust. Most title companies charge a nominal fee to extend, e.g., \$200 to insure the interest of the trustee.

What is the impact on HOMEOWNERS INSURANCE on real property that was formerly held by the settlor?

Less problems than title insurance but best practices to get rider or endorsement.

CA: Should not impact coverage, but best to obtain policy endorsement if trustee is other than trustor.

CO: The effect is unclear. Cautious lawyers advise their clients to add the trust as an insured if the residence is conveyed to the revocable trust.

CT: This is a difficult issue as most insurance companies have difficulty with issuing policies in the name of a trust. At the very least the revocable trust should be added to the grantor's policy as an additional insured. Once the trust becomes irrevocable the trustee will clearly need to obtain its own separate policy for casualty, liability and possibly umbrella coverage. Persons residing in the house would need separate coverage (similar to a tenants policy) to protect their personal property and to provide liability coverage.

IL: The trustee should be added as an additional insured.

NV: This is an unresolved issue in Nevada.

Other insurance issues if real property is transferred to a revocable trust?

HI: Umbrella coverage and Hurricane insurance coverage should be amended if property transferred to trust.

NY: A transfer to a revocable trust of real estate might violate a mortgage representation and be an event of default.

SC: Will trigger liability for roll-back of property tax reduction for agricultural-use property. Trustee can reapply and rollback is usually not due.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel ("ACTEC") does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

Does your state have homestead protection?

Yes over 40.

If yes, will a settlor=s homestead protection be lost if a revocable trust is funded with the settlor=s homestead?

Yes-3; No-16; Maybe-20.

FL: homestead has been called "a legal chameleon," although the issue of whether its protection can be lost in a revocable trust is very much in question. Thus, there is some uncertainty as to whether homestead property transferred to a revocable trust can be subject to forced sale by a judgment creditor, notwithstanding Article X, §4(a) of the Florida Constitution, and as a result, the case law is in a state of flux.

In *Crews v. Bosonetto* (In re *Bosonetto*), 271 B.R. 403 (Bankr. M.D. Fla. 2001), the bankruptcy court held that a debtor could not claim the Florida homestead exemption from forced sale for residential real property that she owned, not in her individual capacity, but as trustee of a revocable trust to which that she had conveyed all of her property, including her homestead property. The court reasoned that the trust could not be considered a "natural person" for the purposes of the homestead exemption set forth in the Florida Constitution. Accordingly, the court held that Florida law did not afford homestead protection to the debtor's property held in trust. Three years later, the Third District Court of Appeal rendered an apparently conflicting decision in *Callava v. Feinberg*, 864 So. 2d 429 (Fla. 3d DCA 2004). In *Callava*, the court, without citing *Bosonetto*, held that a judgment debtor who sold her homestead and purchased a replacement residence, albeit titled in the name of another individual as trustee without any further description as to the relationship between the judgment debtor and the individual, was entitled to homestead protection from forced sale. In ruling that the replacement residence was protected from forced sale by the judgment creditor by virtue of Article X, §4(a) of the Florida Constitution, the court determined that the judgment debtor's beneficial interest in the replacement residence was sufficient to enable her to claim a homestead exemption from forced sale and that a judgment debtor is not required to hold a fee simple interest in the real property. Furthermore, a recent decision of the Fourth DCA, in *Engelke v. Estate of Engelke*, 31 Fla. L. Weekly D408 (4th DCA February 8, 2006), in dicta, was supportive of the holding of the Third DCA in *Callava*.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel ("ACTEC") does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

Note that two other bankruptcy courts have also addressed the issue in *Bosonetto*, i.e., will the exemption from creditors provided to individuals with respect to their homestead real property be extended to the beneficial interest in such homestead real property in which the legal title is owned by a revocable trust established by such individual. In a recent decision with respect to a bankruptcy proceeding involving a resident of Connecticut, the bankruptcy judge held that the exemption is lost due to the transfer of the legal title from the individual to the individual's revocable trust. *In re Dorothy Estarella*, 2006 Bankr. Lexis 318 (Feb. 23, 2006). Note, however, that in another recent case with respect to a bankruptcy proceeding involving a resident of Kansas, the bankruptcy judge held that the exemption is available to the debtor, notwithstanding the transfer of the legal title from the individual to the individual's revocable trust. *In re Donald Kenton Keifer*, 2006 Bankr. Lexis 319 (March 13, 2006).

Although one can certainly criticize the holding of *Bosonetto* and argue that the reasoning of the Third District Court of Appeal DCA in *Callava* is correct under Florida constitutional law, the uncertainty surrounding the treatment of homestead property funded into revocable trusts still remains.

MN: No; however, the trustee must file an Application for Homestead Classification for Real Property Held by Trustee by December 15 of the assessment year if qualifying homestead property (as defined in Minn. Stat. § 273.124, subd. 21) is transferred to a revocable trust.

MS: Maybe; the homestead exemption from real property tax may be lost, depending upon the interpretation of the tax assessor in the county in which the property is located.

Does your state provide an individual property owner other exemptions for real property, e.g., school tax exemptions?

Yes-33; No-10.

If yes, what are these exemptions?

Property tax rebate for low-income senior citizens. Veterans and senior citizens (partial)/tax exemption for homestead.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel ("ACTEC") does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

If yes, will the settlor=s exemptions be lost if a revocable trust is funded with the settlor=s real property?

Generally no but:

DE: There are exemptions for elderly/low income property owners that would be lost. A special assessment for agricultural land use would not necessarily be lost by the transfer. 9 Del. C. §§ 8131 et seq., 8329.

GA: Rules vary by county.

ID: No, but an affidavit setting forth certain information must be provided to the county assessor to establish that the owner-occupier of the "homestead" property is a beneficiary of the trust.

ME: Some local property tax assessors reportedly will not "look through" the revocable trust, but take the position that the title must be held by the individual. However, the Homestead Exemption, Blind Person's Exemption and Veteran's Exemption statutes expressly include real estate held in revocable trusts.

MA: Difficulties with local tax authorities – loss in some communities.

MI: No. Michigan law statutorily provides that an owner of a personal residence includes “a grantor who has placed the property in a revocable trust. . . .” MICH. COMP. LAWS § 211.7dd(a)(vi) (2006). Therefore, the exemption is not lost when a settlor places the personal residence in a revocable trust. §211.7cc-211.7dd.

MS: As a practical matter, this must be addressed on a case by case basis with the county tax assessor.

NH: Probably not, although state law is unclear and the position of some tax assessors varies from town to town.

Will any taxes be triggered on transferring real property to a revocable trust? For example, transfer taxes, stamp taxes, recording fees?

Yes-33, but pretty much just recording not deed tax, transfer Standard recording fees apply but a transfer to a trust without consideration is exempt from our real property transfer tax so long as a certificate of trust is presented to the recorder at the same time the deed is presented for recording. [NRS 375.090(7)].

No-14.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel (“ACTEC”) does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

Are there other concerns or issues on funding a revocable trust with real property? If yes, please explain.

Yes.

HI: Taking property out of tenants-by-entirety and transferring to revocable trusts for husband and wife results in loss of some creditor protection. Also, a transfer of a residence makes the residence a resource for Medicaid purposes.

IL: Yes, if the property is mortgaged, the lawyer should confirm that the transfer doesn't trigger the due on sale clause.

MI: Yes, there are concerns with "uncapping" of the value of property for assessment of real estate taxes.

NH: If the property is subject to a mortgage, the lender's written consent to the transfer should be obtained. Most lenders require the borrower/transferor to pay a service charge for this.

VT: Transfer of mortgaged real property may trigger due-on-sale clause.

Other Issues

Absent an expression of intent, under what circumstances will a lifetime trust be revocable or irrevocable?

Varies. Default rule under UTC is revocable.

Can a revocable trust be incorporated by reference into a will or other document?

Yes in virtually all; CT and NY clear exceptions.

Other concerns or issues about creation or validity?

Note: During settlor's lifetime no ability to contest validity but if incapacitated may be able to do so in at least guardianship-can't do with will. *But see In re Rita R.*, 811 NYS2d 89 (N.Y. App. Div.2006) (Surrogate validly revoked incapacitated living person's will). Amendment of NY Ment. Hygiene Law § 81.29(d) to bar revocation of will not yet enacted.

CT: Placing title in a revocable trust may make it difficult or impossible to obtain mortgage financing on the property.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel ("ACTEC") does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

ID: Some fiduciaries are concerned with environmental liability issues with certain types of property. Also, some cabins in Idaho are on leased property from the federal government, and in order to have such property transferred to a trust, the federal government must consent to the transfer of the lease and the trust must comply with their rules and regulations.

IL: Yes, if the property is mortgaged, the lawyer should confirm that the transfer doesn't trigger the due on sale clause.

MA: Possible acceleration of mortgage principal payment.

MO: If property had been owned by settlor and spouse, transfer to trust likely loses special husband-wife ownership protection from creditors of one spouse (MO refers to this ownership form as "tenants by entirety").

NH: If the property is subject to a mortgage, the lender's written consent to the transfer should be obtained. Most lenders require the borrower/transferor to pay a service charge for this.

OR: A law allows a property owner to claim payment if law use regulations decrease its value in certain circumstances. The law is uncertain regarding whether a transfer to a revocable living trust would defeat that right.

VT: Transfer of mortgaged real property may trigger due-on-sale clause.

WI: Buyers may not accept a trustee's deed with limited warranties; may insist property be deeded to grantor and require grantor to give a warranty deed. Having trust own property often complicates receiving a mortgage loan. Trust mortgage loans may be less freely transferable by the bank in secondary market and, therefore, some banks will not lend to trusts.

7. FURTHER ASPECTS OF LIFETIME REVOCABLE TRUSTS

Whether or not the revocable trust is the primary device used in your state to transmit property at death, there will be lifetime aspects to revocable trusts including **SPECIFIC LIFETIME REASONS** to use a revocable trust. Please address following for your state whether or not the revocable trust is the primary device used in your state to transmit property at death.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel ("ACTEC") does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

Privacy Aspects

Under what circumstances will a revocable trust become public record during the settlor's lifetime?

Litigation/recording.

Conservator/incapacity proceedings.

WA: If the settlor becomes incapacitated, and a dispute arises with regard to the trust, resolution will probably result in filing of the trust or a copy of it with the Clerk of the Court, at which point it becomes a public record. In our larger counties, the Clerk's files are available online.

Specifically, if real property is part of the revocable trust under what circumstances, if any, will the revocable trust need to be recorded?

Majority-none.

KY: Recording would not generally be necessary to convey real property into or out of the trust.

Certification can also substitute:

MI: Recording of the trust should be able to be avoided in all circumstances because Michigan allows a certificate of trust existence and authority to be recorded in lieu of the trust document when the transfer of real property of a trust is involved. See MICH. COMP. LAWS § 565.431- 436 (2006).

But in minority yes:

DE: Although there is no recording requirement, recording will be necessary as a practical matter in order to create a marketable title.

May not need all of RT to be recorded.

HI: A party or entity involved in the real property transaction may require that the revocable trust or a short form of the trust be recorded to formally provide notice of the trustee's powers to enter into or carry out the transaction.

Does your state permit a trustee to certify a revocable trust without requiring that the dispositive provisions of the trust be disclosed?

Yes-Over 30 states have certification, UTC 1013 or memo of trust.

About 15 have no statute but in a few states it's common practice, e.g.

IL: No authority one way or another, but we do this all the time for financial institutions and the like.

MD: There is no state law to that effect, but, as a practical matter, some third parties accept certifications.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel ("ACTEC") does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

Other privacy issues?

Only a few identified other issues.

CO: Banks, investment firms, and other financial institutions where the trustee of a revocable trust wants to open an account frequently ask for copies of either the entire trust document or of the first page and signature page of the trust. Sometimes these requests can be satisfied by providing a Statement of Authority for the trust. A Statement of Authority is a document signed by a trustee under C.R.S. § 38-30-172 that identifies the trust and the trustee(s). Increasingly, however, it is necessary as a practical matter to comply with a financial institution's demand for a copy of the trust or of the first and signature pages if the trustee is going to do business with that financial institution.

ID: Trustees are supposed to register to signify their acceptance of the trust. If a beneficiary or settlor requests that the Trustee register a Trust, failure to do so can result in sanctions against the Trustee. Registration requires basic information about the trust to be disclosed but not the details or contents of the trust. For a written trust, it requires disclosure of the names of each settler, and the original trustee and the date of the trust instrument. Registration of an oral trust requires additional information including beneficiaries, subject matter, and time of performance. I.C. § 15-7-102.

NY: Often, the institutions holding the accounts where assets are to be transferred to the trust, require a copy of the trust for their files.

Inheritance tax states:

MD: Because Maryland still has an inheritance tax on collateral relatives and non-family members, the Register of Wills in most counties requires that the revocable trust be presented for review to determine whether there are any transfers subject to inheritance tax, but they do not require that the trust become part of the public record.

NE: Privacy is not a major factor. Nebraska has a unique method of death taxation. At death, an inheritance tax is assessed on the amount received by beneficiaries. The Inheritance Tax is determined by the County Court where the will is being probated or would be probated if a probate would occur. The County Court proceeding is open to the public as is the documentation filed in connection with the proceeding. It is required to file an inventory setting forth the assets of the decedent. In addition, it is necessary to file an Inheritance Tax Worksheet which identifies the recipient, the amount received by the recipient and the relationship of the recipient to the decedent. Because of the public disclosure required in connection with the determination of inheritance tax, Nebraska in general does not offer a degree of privacy that may be available in other states where the death taxes are paid to the Department of Revenue.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel ("ACTEC") does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

Other Considerations

Is it common practice for revocable trusts to name the settlor as sole trustee?

Yes-48.

But note NY: Since a primary use in New York is to guard against a protracted period of incapacity, it is less common than it might be.

To what extent are revocable trusts used to provide property management for the settlor?

OH: Frequently. But see TX: Occasionally.

VA: It is common for this to be a primary purpose of a revocable trust.

KS: Quite common with clients approaching or experiencing disability.

MO: Revocable trusts are generally viewed as the primary document for disability planning. While financial Durable Powers of Attorneys are also a part of any comprehensive estate plan, they are viewed more as an emergency document, to be used to transfer assets to the incapacitated person's revocable trust and to perform acts outside of the authority of the Trustee, such as filing tax returns, accessing safe deposit boxes, etc.

PA: Very common particularly for older settlors or those who travel frequently or otherwise unavailable.

NY: That is one distinct benefit of revocable trusts. Although powers of attorney may accomplish this goal, the trust is usually much more specific in terms of asset management, and institutions are more receptive to asset management by a trustee than an attorney in fact. They are frequently used in order to avoid guardianship proceedings.

OK: Fullest extent possible. Goal is to replace the need for an attorney-in-fact under a DPOA (but still have as a backup) and eliminate the need for a guardian of property in the event of incapacity. A revocable trust is more efficient and predictable than the use of a DPOA.

But power of attorney may be used more:

LA: Occasionally revocable trusts are used for this purpose but powers of attorney are more commonly used.

TN: Although Powers of Attorney are widely used and accepted, if the settlor wants a corporate manager, the settlor will be required to use a revocable trust.

WA: It is very common if a client does not have a suitable candidate to serve under a durable power of attorney. Otherwise, very seldom.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel ("ACTEC") does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

This is done when powers of attorney are deemed inadequate to meet the settlor's needs. The revocable trust will contain whatever provisions the Settlor wants in this regard.

Is it common practice for revocable trusts to name the settlor as principal trust beneficiary?

Yes-ALL Jurisdictions.

To what extent are revocable trusts used to provide for the settlor in case of disability?

NB: If RT created, there always will/should be a disability provision!!!

CA: A common purpose of the revocable trust.

CT: This is one of the most important uses of a revocable trust in planning for incapacity and avoiding probate court Conservatorships. Revocable trusts are also used as a vehicle for managing property for elderly parents or other relatives.

IA: These trusts are usually used for this possible purpose. They contain provisions dealing with disability, including change of trustee and the use of assets for the care of settlor and dependants. While a conservator is required to file the ward's will with the court, there is no similar requirement for filing a revocable trust.

NM: Providing for a current or relatively-expectable disability is one of the reasons a trust might be used in preference to a will. I cannot recall seeing a revocable trust recently that does not contain provisions for management in the event of the disability of the settlor.

NV: Most revocable trusts established by the settlor while competent allow the trustee to provide for the settlor in case of disability. In addition, revocable trusts can be created by a court-appointed guardian when approved by the Family Court.

OK: Fullest extent possible. The goal is to alleviate the need for the attorney-in-fact under a DPOA to act on behalf of the settlor since all the settlor's assets should be in the trust. The successor trustee then manages and pays the settlor's bills and takes care of the settlor's property.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel ("ACTEC") does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

Can creditors of the settlor reach property held in a revocable trust during the settlor=s lifetime?

Yes in all.

OK: Yes, unless the property is in an asset preservation trust created in accordance with specific Oklahoma statutes pertaining to self-settled, revocable asset preservation trusts. See 31 O.S. §§ 10 through 18.

Can an agent under a durable power of attorney revoke a revocable trust if authorized by the power but not specifically authorized by the trust?

Yes-about 20—Uniform Act §201(a) and UTC §602(e)(terms of trust or power).

No-10, including CA.

OH: No, authority is required in both instruments, new RC 5806.02 (eff. Jan. 1, 2007).

Maybe/no-20; MA: Not clear; NJ: Probably yes; PA: Probably not.

NV: This is an unresolved issue under Nevada statutory and case law, but it has been done.

Drafting issue-amend trust

If a guardian for the settlor has been appointed, what court-approved actions may be taken by the guardian with respect to a revocable trust that was created by the settlor?

With court approval, can create, amend, revoke etc Accord UTC 602(f).

But see VA: The guardian may revoke the trust or withdraw or demand distribution of trust assets with the permission of the Court for good cause shown, unless the trust instrument provides to the contrary. Va. Code §37.2-1024 and In Re Regina E. Rudwick, 2002 WL 31730757 (Va. Cir. Ct. 2002).

NV: This depends on the terms of the trust. Without court authorization or authorization under a specific provision of the trust, the guardian has no power to act.

What are the rights, if any, of trust beneficiaries of a revocable trust during the lifetime of the settlor?

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel ("ACTEC") does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

Generally none, consistent with UTC 603.

If trust beneficiaries= rights are limited during the settlor=s lifetime, will the incapacity of the settlor enhance beneficiary rights during the settlor=s incapacity?

Various answers-UTC §603 is now bracketed.

DC: YES. While a trust is revocable and a settlor does not have the capacity to revoke the trust, a beneficiary shall have the right to enforce the settlor's intent to benefit the beneficiary during the settlor's incapacity. D. C. Code § 19-1306.03(c).

MD: There is no authority on point, but reasonable position that the trust beneficiaries have no rights during the settlor's lifetime, including a period of incapacity.

8. APPLICATION OF WILLS RULES TO REVOCABLE TRUSTS

Do the following wills doctrines/rules also apply to revocable trusts?

Note on UTC § 112: UTC § 112 provides as follows: "The rules of construction of the jurisdiction applicable to the interpretation of and disposition of property by wills is to apply to the interpretation of the terms of the trust in the disposition of the trust property."

In effect, UTC §112 purports to extend all applicable wills rules to RTs (and IRR Trusts) so if enacted, specific rules, e.g., ademption and pretermitted heirs rules, should apply to RTS w/o the need for specific legislation.

As it turns out, UTC §112 is a bracketed; a LexisNexis search reveals that 10 of the 20 UTC states have enacted UTC §112: AR, KS, ME, NH, NM, NC, ND, SC, TN, UT.

NE: Section 112 was not adopted by the Nebraska Legislature at the time it enacted the Nebraska Uniform Trust Code. The study group reviewing the Uniform Trust Code that made recommendations to the Nebraska Legislature regarding the adoption of the Uniform Trust Code recommended omitting Section 112 and, instead, strongly recommended that the Nebraska Legislature appoint a committee to study the adoption of detailed rules of construction for trusts. At this point in time, statutory rules of construction for trusts have not been adopted.

Caveat: Because UTC §112 is so new many fellows may not have taken its broad reach into account. In effect, instead of answering yes, answer may have been no/maybe or no authority. As a result, the yes responses are likely understated and others overstated.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel ("ACTEC") does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

Basic point: There is a severe lack of uniformity in this country on default constructional rules.

Abatement Yes-13; No-12; Maybe/no authority-20.

Advancement 10/14/21.

Ademption by extinction 10/13/20.

Ademption by satisfaction 11/13/20.

Anti-lapse 23/11/14; Cf. UPC 2-603 with UPC 2-707.

Correction of Mistakes

Does your state allow wills to be corrected for mistakes if the will is unambiguous? 15/23/8.

If yes, does your state allow revocable trusts to be corrected for mistakes if the trust is unambiguous? 26/6/15.

Disclaimer Yes-47; No-1(MS).

Effect of homicide Yes-33; Maybe/No authority-16.

Pretermitted heirs 8/ 22/12.

Revocation on divorce 23/19/6.

Right to a jury trial

Is there a right to a jury trial in will contests? 27/16/5.

Is there a right to a jury trial in revocable trust contests? 15/13/20.

Simultaneous death 37/4/4.

Statute of limitations for contesting validity

What are the rules for will contests? Well-established.

What are the rules for revocable trust contests?

Generally can't during lifetime except for guardianship but can if declaratory judgment as in VT.

After death:

In many states, no rules perhaps laches or slim:

TN: Probably the contract statute of limitations.

VT: No specific rules for revocable trusts. Contest likely made under declaratory judgment procedure. See 12 V.S.A. ch. 167. Likely statute of limitations is 6 years. 12 V.S.A. §511.

IL: Generally, the concept of laches applies. However, if there is a will that pours over to the trust at the settlor's death, and the will is admitted to probate, the IL Code of Civil Procedure provides for the same period as the will contest period to be applicable to the trust contest. 735 ILCS 5/13-223.

UTC § 604: earlier 3 years after death-most enacting states shorter time or 120 days after receives trust and notice of time to commence.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel ("ACTEC") does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

9. JOINT TRUSTS

In non-community property states, is it common practice to create joint spousal revocable trusts to preserve community property character? 6/27/6.

In non-community property states, when and how often are joint trust spousal revocable trusts used apart from preserving community property in non-taxable estates?

Apart from OR (Yes, frequently used for convenience or to equalize property for tax purposes; I sense from talking to colleagues in the state that the predominant device of choice is a revocable living trust, frequently a joint revocable living trust. In our practice, the comparable ratio is about 80% for joint revocable living trusts and 20% for wills.) rarely used

KY: Joint trusts are most commonly seen in documents prepared by “trust mills.”

MO: Estate tax planning with joint revocable trusts does not work well in common law jurisdictions and are generally not used in MO trust context. However, with the federal applicable exclusion now at \$2,000,000 and likely to climb, more plans are being prepared for clients who are substantially below the applicable exclusion amount and likely to stay there. In those cases joint revocable trusts between spouses are becoming more common.

VA: Very rarely. However, with the PLR’s (e.g., 200101021, 200403094 and 200604028) allowing the creation of a credit shelter trust in joint or separate trusts with the predeceasing spouse having a general power of appointment, joint trusts can be useful and are being used to create a credit shelter trust for the less wealthy spouse.

In community property states, when and how often are joint trust spousal revocable trusts used for community property?

CA: In California, it is the most common format.

NV: Very common.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel (“ACTEC”) does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.

Under what circumstances are joint revocable trusts, other than joint trust spousal revocable trusts, used in your state?

TX: response is common: Rarely if ever.

CA: With recent domestic partner legislation, joint trusts are probably being used by many registered domestic partners.

NV: Ownership of real property in which each settlor has an interest. This frequently includes trusts established by gay couples, parents and children, and siblings.

DISCLAIMER ON USE:

The reader is cautioned to confirm the information provided in this Survey by independent research and analysis to ensure that it is accurate, complete, and current. The publication and dissemination of this Survey by any means by the American College of Trust and Estate Counsel ("ACTEC") does not constitute the rendering of legal, accounting, or other professional advice. ACTEC disclaims any liability with respect to use of this Survey.