

NEWSLETTER

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Message from the Chair

Brooke Tansill

On behalf of the Board of Governors of the Trusts and Estates Section of the Virginia State Bar, we are pleased to present the Fall 2024 issue of the

Trusts and Estates Section Newsletter. In this edition we explore a number of timely topics which we hope you will find both interesting and educational.

First, in his article “Virginia Reforms Its Statutory Rule Against Perpetuities,” Charles T. Brooks of the firm Armstrong Bristow Farley & Schwarzschild PLC discusses recent reforms to Virginia’s Uniform Statutory Rule Against Perpetuities Act. His article summarizes the old rules and explains how application of the old rules created some ambiguities. He then describes the statutory reforms and how the new rules resolve those ambiguities, and he concludes by highlighting some important implications for drafting, even providing sample language for inclusion in trusts. I am grateful to Charles for summarizing this highly technical and nuanced topic into such a succinct and accessible article.

Next, Douglas Murphy of the firm Baker Hostetler presents his article “529 Plans...More Exciting Than You Think.” Douglas outlines the unique advantages of 529 plans, including tax benefits, financial and economic benefits, asset protection benefits, and control benefits, and he describes numerous scenarios where 529 plans can be particularly beneficial. He makes a very compelling case that 529 plans, especially those created in Virginia, are a powerful and unique estate planning tool.

Finally, in her article “Beneficiary Consent, Release and Ratification, Virginia’s Revisions to Va. Code § 64.2-800,” Meghan Gehr Hubbard of the firm McGuireWoods LLP summarizes new legislation in Virginia which aims

to streamline both trust termination and the trustee resignation process. She describes the steps necessary to obtain the protections of the statute, and she also discusses some of the important relevant issues that are not addressed directly by the statute. This article is particularly helpful for lawyers who advise trustees regarding how to wind down trusts and how to protect themselves from liability in the process.

We want to thank Peter Davies, the Newsletter Editor, and James Gillis, the Assistant Newsletter Editor, for their efforts in preparing this edition. We also want to thank all of the authors for contributing their time, knowledge, and expertise to this edition. And finally, we want to thank our partners at the Virginia State Bar for their hard work. If you are interested in writing for future editions of the Trusts and Estates Section Newsletter, we encourage you to reach out to Peter Davies (peter@daviesanddavies.com), James Gillis (james@gillislaw.com), or any of the Board Members.

TABLE OF CONTENTS

Virginia Reforms Its Statutory Rule Against Perpetuities Charles T. Brooks	2
529 Plans...More Exciting Than You Think Douglas Murphy	6
Beneficiary Consent, Release and Ratification, Virginia’s Revisions to Va. Code § 64.2-800 Meghan Gehr Hubbard	10

Virginia Reforms Its Statutory Rule Against Perpetuities

By Charles T. Brooks

As of July 1, 2024, trust settlors can no longer create truly perpetual trusts under Virginia law. Instead, interests of personal property held in trust created after June 30, 2024, must vest or terminate within the common law rule against perpetuities period or 1,000 years.

This is a result of reforms to Virginia's Uniform Statutory Rule Against Perpetuities Act (Sections 55.1-124 through 55.1-133 of the Code of Virginia) in the 2024 legislative session. These reforms eliminate potential uncertainty regarding the federal tax consequences under Internal Revenue Code Section 2041(a)(3) ("IRC Section 2041(a)(3)") of exercising certain nongeneral powers of appointment. This Article explains how the legislative reforms clarify these tax consequences, and what these reforms mean for drafting attorneys.

This article first summarizes Sections 55.1-124 through 55.1-133 of the Code of Virginia in effect on June 30, 2024 ("Old USRAP"). It then explains how application of IRC Section 2041(a)(3) upon the exercise of a nongeneral power of appointment was potentially ambiguous under the Old USRAP. Next, this article explains the statutory reform to the Old USRAP ("New USRAP") and how the New USRAP clarifies application of IRC Section 2041(a)(3) upon the exercise of a nongeneral power of appointment. The article concludes by discussing implications for trust drafting.

For ease of reading, this article will refer to a nonvested interest in personal property held in trust as a "trust interest." That term will not include nonvested interests in real property held in trust. In addition, the remainder of this article will refer to powers of appointment as "powers."

Old USRAP

On July 1, 2000, Virginia adopted the Old USRAP, which largely tracked the Uniform Law Commission's Uniform Statutory Rule Against Perpetuities Act. In general, the Old USRAP provided that a nonvested

interest in property was valid only if (i) such interest was certain to vest or terminate within twenty-one years after the death of an individual who was alive at the creation of such interest ("common law rule"), or (ii) if such nonvested property interest violated the common law rule, it actually did vest or terminate within ninety years of the interest's creation ("90-year wait and see rule").¹

However, Virginia adopted an additional statutory provision not included in the Uniform Law Commission's Uniform Act. Section 55.1-127(A)(8) of the Old USRAP allowed trust settlors to "opt out" of the common law rule and 90-year wait and see rule with respect to trust interests and powers over such interests.² In effect, the statutory opt-out provision allowed the creation of perpetual trust interests and powers over those interests. This ability to create perpetual trust interests and powers potentially caused estate tax uncertainty for power holders under IRC Section 2041(a)(3).

How was the Effect of IRC Section 2041(a)(3) Unclear under Old USRAP?

In certain circumstances, IRC Section 2041(a)(3) causes assets that are subject to a nongeneral power of appointment to be included in the power holder's estate for federal estate tax purposes. Specifically, IRC Section 2041(a)(3) causes estate inclusion when a power holder "exercises a power of appointment created after October 21, 1942, by creating another power of appointment which under the applicable local law can be validly exercised so as to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such property, for a period ascertainable without regard to the date of the creation of the first power."³

Example 1 illustrates the potentially uncertain application of IRC Section 2041(a)(3) to Virginia power holders under the Old USRAP.

Example 1: Father creates a trust for Son's benefit during Son's lifetime. Son is given a testamentary nongeneral power. If Son does not exercise the power, the trust is to divide at Son's death into separate lifetime trusts for Son's descendants, with each descendant having a testamentary nongeneral power. The trust continues for successive generations until Father has no living descendant. The terms of the trust opt out of the common law rule and the 90-year wait and see rule. Therefore, the trust interests and powers created under the trust have potentially perpetual duration.

Son exercises his nongeneral power to create a new trust for Granddaughter that lasts for her lifetime. Son gives Granddaughter a testamentary nongeneral power, and if she does not exercise the power, the trust is to continue after her death for successive generations. The trust for Granddaughter opts out of the common law rule and the 90-year wait and see rule.

Although Son's exercise of his power is valid under the Old USRAP, it is unclear whether it may trigger IRC Section 2041(a)(3).

One interpretation is that Son's exercise did not trigger IRC Section 2041(a)(3). Although Son exercised a power and created a new power in Granddaughter, Granddaughter cannot exercise her power to "postpone" termination or vesting. This is because the trust interests created by Father could continue in perpetuity, and perpetuity cannot be "postponed."

This interpretation is not certain, however. Granddaughter can validly exercise her power to create trust interests that last in perpetuity. Could it be argued that perpetuity is a period "ascertainable without regard to the date of the creation of the first power" (i.e., Son's Power), therefore triggering IRC Section 2041(a)(3)?⁴

New USRAP

The New USRAP eliminates the ability to create truly perpetual trust interests and powers.⁵ Existing perpetual trust interests created before July 1, 2024, will remain effective so long as no power holder exercises a power over such interests.⁶

The New USRAP replaces the 90-year wait and see rule with a 1,000-year wait and see rule ("1000-year

wait and see rule") for trust interests and powers over such interests created after June 30, 2024.⁷ This means that under the New USRAP, a trust interest or power over such interest that violates the common law rule is nonetheless valid if it actually vests or terminates within 1,000 years of creation. Importantly, the 1,000-year wait and see rule only applies to nonvested interests in or powers over *personal property held in trust*. It does not apply to other nonvested property interests, including nonvested interests of real property held in trust.⁸

Finally, the New USRAP codifies, with one important exception, a portion of the common law "relation back doctrine."⁹ The relation back doctrine provides that any nonvested interest or power created by the exercise of a power is deemed created on the date that the original power was created.¹⁰

How the New USRAP Clarifies IRC Section 2041(a)(3) Ambiguity

The New USRAP provides certainty to power holders regarding the applicability of IRC Section 2041(a)(3) to the exercise of a power creating a new power. The New USRAP does so by (1) eliminating the ability to create truly perpetual trusts, and (2) providing a maximum duration for trust interests and powers of 1,000 years after the initial creation date. As Example 2 shows, the New USRAP prevents a power holder from postponing vesting or termination "for a period ascertainable without regard to the date of creation of the first power."¹¹

Example 2: Father creates a trust for Son's benefit during Son's lifetime. The trust is governed by the New USRAP. At Son's death, Son has a testamentary nongeneral power. If Son does not exercise his power, at his death the trust terminates and distributes to his descendants.

Son exercises his power to create a trust for Granddaughter that lasts for her lifetime. Son gives Granddaughter a testamentary nongeneral power, and if Granddaughter does not exercise her power, at her death the trust distributes to her descendants.

Son's exercise of his power is valid under Virginia law if the trust interests and powers created by Son's exercise vest, terminate, or are exercised within 1,000 years of the creation of Son's power.

Accordingly, Son's exercise should not trigger IRC Section 2041(a)(3). Although Son exercised a power to create a new power in Granddaughter, Granddaughter cannot exercise her power to "postpone" vesting for a "period ascertainable without regard to the date of the creation of the first power."¹² Under the New USRAP, any trust interests or powers created by the exercise of Granddaughter's power are invalid unless they vest, terminate, or are exercised within 1,000 years of creation of the first power (i.e., Son's power).

Prospective Application for New USRAP

The New USRAP applies to trust interests and powers created after June 30, 2024.¹³ Clearly, if a settlor creates a trust in 2025 and grants a nongeneral power under the trust, the validity of the trust interests and power are determined under the New USRAP.

However, the New USRAP also has applicability to trusts created before July 1, 2024. Section 55.1-128(B) of the Code of Virginia creates a special rule when a power is exercised over such a trust to create a new trust interest or power.¹⁴ Under the special rule, the new trust interest or power is *deemed created* when the original power is *exercised* (i.e., the relation back doctrine does not apply).¹⁵ *Crucially, this special rule applies for the sole purpose of ensuring the New USRAP applies to the new trust interest or power.*¹⁶ This concept is best illustrated by an example.

Example 3: Assume the same facts in Example 1, except that Father created the trust in 2020 and son exercises his testamentary nongeneral power in 2025.

Step 1: Determine what law applies. Although the original trust and Son's power were created before the effective date of the New USRAP, the validity of the trust interests and power Son creates by exercise of his power are determined under the New USRAP. This is because under the special rule of Section 55.1-128(B) of the Code of Virginia the new trust interests and power are deemed created in 2025 when Son exercises his power.¹⁷ Because the new trust interests and power are deemed created after June 30, 2024, the New USRAP governs the validity of such interests. We are now done with the special rule – it applies only for Step 1. The relation back doctrine applies going forward.

Step 2: What is the effect of applying the New USRAP? Even though the validity of Son's trust interests and power were determined under the Old USRAP,

the new trust interests and power under Granddaughter's trust are not. Instead, such new interests and power must vest, terminate, or be exercised either within the common law rule period or 1,000 years, in either case *measured from the date of creation of Son's power*.¹⁸ This is because the relation back doctrine applies to the trust interests and power, and the special rule does not apply to the testing of the validity of the interests and power under Step 2.¹⁹

Note how this clarifies the impact of IRC Section 2041(a)(3) for trusts created before July 1, 2024. Son's exercise should not cause estate inclusion under IRC Section 2041(a)(3). For the reasons set forth in Step 2, Granddaughter's power cannot be exercised to postpone vesting for a "period ascertainable without regard to the date of the creation of the first power" (i.e., Son's power).²⁰ Therefore, a power holder exercising a power under a trust created prior to July 1, 2024, has certainty regarding the application of IRC Section 2041(a)(3).

Implications for Drafting

Attorneys should review the New USRAP to determine how it affects their drafting practices. Trust interests and powers that are initially valid under the common law rule are valid under the New USRAP. However, if a trust interest or power created after June 30, 2024, fails the common law rule, then such interest or power will be subject to the 1,000-year wait and see rule. As a reminder, the 1,000-year wait and see rule applies only to nonvested interests of personal property held in trust and powers over those interests. The 90-year wait and see rule still applies to nonvested interests of real property held in trust.

Attorneys should remove language from their forms that purports to opt out of Virginia's rule against perpetuities. If the terms of a trust become irrevocable after June 30, 2024, and include a provision that purports to opt out of Virginia's rule against perpetuities, such provision will have no effect.

Finally, attorneys should review rule against perpetuities savings language in forms. For trusts intended to comply with the common law rule, attorneys can continue to use common law rule against perpetuities savings provisions. If trusts do not comply with the common law rule, it is advisable to include a clause directing the disposition of trust property at the end of the applicable 1,000-year wait and see period or

the 90-year wait and see period. The following is a sample clause for revocable trusts created on or after July 1, 2024:

“Notwithstanding any provision in this Agreement to the contrary, upon termination of a period of 1,000 years from the date of my death, any property held in trust under this Agreement shall be distributed free of trust to the person then authorized to receive income of such trust, or if more than one person is then authorized to receive such trust income, among such persons and in such shares as my Trustee (other than any income beneficiary of the trust) deems appropriate. Pursuant to Section 55.1-124 of the Code of Virginia as of the date of execution of this Agreement, certain nonvested interests in real property held in trust may become invalid before the end of the period provided in the preceding sentence. To avoid such invalidity, my Trustee may consider owning real property through a corporation, limited liability company, partnership, business trust, or other entity.”

Conclusion

By reforming the Old USRAP, the Virginia legislature provided certainty as to the tax consequences under IRC Section 2041(a)(3) when power holders exercise nongeneral powers and create new powers in a manner that continues to allow settlors to create effectively perpetual trusts. Attorneys should review the New USRAP to ensure their forms work as intended. As always, the terms of a trust could alter the general analysis provided in this article, and practitioners should carefully analyze the generation-skipping transfer tax consequences of exercising powers. ♣

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(Endnotes)

1. VA CODE ANN. §§ 55.1-124 – 55.1-133 (Repl. Vol. 2022); see J. Rodney Johnson, *Wills, Trusts and Estates*, 34 U. RICH. L. REV. 1069, 1070 (2000).
2. VA CODE ANN. §55.1-127(A)(8) (Repl. Vol. 2022); see Johnson, *supra* note 1 at 1071-72.
3. I.R.C. § 2041(a)(3).
4. *Id.*
5. VA CODE ANN. § 55.1-127(A)(8) (Cum. Supp. 2024).
6. *Id.* See VA CODE ANN. § 55.1-127(A)(8).
7. § 55.1-124(F).
8. *Id.*
9. § 55.1-125(D).
10. *Id.*; see also Jessica A. Cohan and Blake N. Melton, *Using Powers of Appointment to Increase the Period Assets Are Held in Trust*, 54 REAL PROP. TR. & EST. L.J. 1, 9 (2019).
11. I.R.C. § 2041(a)(3).
12. *Id.*
13. VA CODE ANN. §§ 55.1-124(F), 55.1-125, 55.1-127(A)(8) (Cum. Supp. 2024).
14. § 55.1-128(B).
15. *Id.*
16. See *Id.*
17. *Id.*
18. Pursuant to § 55.1-127(A)(8) of the Code of Virginia, opt-out provisions cannot apply to the trust interests and power. Pursuant to §55.1-124(F) of the Code of Virginia, the 1,000-year wait and see rule may apply to the trust interests and power.
19. § 55.1-125(D).
20. I.R.C. § 2041(a)(3).

529 Plans...

More Exciting Than You Think

By: Douglas Murphy

Clients frequently ask how they can best set aside funds to educate their children and grandchildren. As estate planners, we quickly answer by turning to different forms of trusts. However, a properly utilized 529 plan not only accomplishes the client's educational goal but may provide greater flexibility and simplicity.

Since the addition of Internal Revenue Code § 529 in 1996, 529 plans have become the hallmark of the middle to upper-middle class striving to save for increasingly unaffordable college expenses. 529 plans are thought to be boring, conventional savings programs. But, what if these plans were not just vanilla savings vehicles for fiscally responsible parents and grandparents, but a multifaceted estate planning vehicle for the successful family? As it turns out, 529 plans aren't boring at all; they are one of the most underutilized and dynamic estate planning tools available.

529 Plan Basics

There are two basic types of 529 plans: (1) college savings plans; and (2) prepaid tuition plans. This article will focus on college savings plans, and any reference to "529 plan" is a reference to such a subset of 529 plan.

529 plans provide tax-advantaged investment accounts designed to encourage saving for future education costs. A 529 plan account is an investment account that allows for tax-free growth and tax-free withdrawals when used to pay for qualified education expenses. A 529 plan can be used to pay for college expenses, or even K-12 tuition (to a limited extent).¹ The typical 529 plan account owner is a parent or grandparent saving for their children or grandchildren's higher education expenses.

The Status Quo – Disfavored for Wealthy Families

Many estate planning attorneys disfavor 529 plans for high-net worth families. The argument boils down to two points: (1) the fact that direct payments to educational institutions do not use any transfer tax exemption; and (2) trusts allow for greater flexibility, including the ability to provide for support beyond education expenses.

These are valid points. Direct payments to educational institutions are "qualified transfers" and do not use the federal gift tax annual exclusion or lifetime exemption. Therefore, a grandparent would be better off by paying tuition directly to the educational institution on behalf of his or her grandchild and utilizing their annual exclusions to fund a grandchildren's trust. This would: (1) remove assets from the grandparent's taxable estate; (2) provide for the education of the grandchild; and (3) provide funds free of transfer tax for other uses, such as purchasing a first home. Sounds like a home run — and it is. However, it may be shortsighted to end the analysis of using a 529 plan right there, for several reasons.

The first reason is that grandparents die, often before they have paid all of their descendants' tuition directly to the educational institution. The funds remaining in their taxable estate that would have eventually been paid as tuition become subject to the estate tax. In contrast, a 529 plan allows for the prefunding of education expenses, removing such funds and the growth on those funds from their taxable estate. The second reason is that the income tax savings, flexibility in ownership and changing of beneficiaries, and retention of control make 529 plans beneficial regardless of the points listed above.

The Secret Sauce – Unique Benefits of 529 Plans

529 plans in Virginia offer several unique and powerful features, which are as follows: (1) state income tax savings; (2) tax-advantaged growth; (3) estate tax savings with retention of control; (4) preferred annual exclusion treatment; (5) flexibility in naming beneficiary; (6) flexibility in ownership; and (7) asset protection.

(1) State Income Tax Savings

Virginia taxpayers who are Virginia529 account owners can deduct their contributions up to \$4,000 per account, per year, with unlimited carry forward to future years. Those age 70 and above may deduct the entire amount contributed to a Virginia529 account in one year.

The top income tax rate in Virginia is 5.75%. Assuming accounts are funded with \$4,000 or more each year, this results in a state income tax savings of \$230 per account, per year, prior to age 70.

Imagine a 74-year-old taxpayer with a \$2,000,000 401(k) retirement account; this year the required minimum distribution would be approximately \$78,000 which, if deposited into 529 accounts, would result in current year state income tax savings of \$4,485, while providing a tax-advantaged account for her descendants' education.

(2) Tax-Advantaged Growth

Earnings in a 529 plan account grow free from federal and Virginia income taxes, if the money is used to pay for qualified higher education expenses.

Any withdrawals from a 529 account for nonqualifying expenses will be subject to income tax on any gains, and there will generally be a 10% early withdrawal penalty on the earnings. Given a long enough time horizon, the benefits of tax deferral may still outweigh the income taxes and early withdrawal penalties.²

(3) Estate Tax Savings with Retention of Control

529 plan account owners retain complete control of the funds. The account owner can change the beneficiary designation and can even distribute the asset to himself or herself (subject to taxation on any gains and a 10-percent penalty for nonqualified distributions).

529 plan accounts are the only asset where, despite maintaining control, the asset is removed from the tax-

able estate of the account owner for federal estate tax purposes.³ If the account owner has a taxable estate, transferring funds to a 529 account results in savings of 40% of the amount contributed, while retaining access the funds if needed.

There is no limit on account growth, but only the contribution amount. Virginia529 accounts can be funded with up to \$550,000 per account. If a taxpayer set up and fully funded (over a series of years with front-loaded annual exclusion gifts, as discussed below) accounts for her four grandchildren, \$2,200,000 would be removed from her estate, resulting in estate tax savings of \$880,000, all while the account is growing tax-free for the grandchildren's benefit.

(4) Preferential Annual Exclusion Treatment

529 plans are unique in that a taxpayer may "superfund" an account with up to five years' of contributions in a single year (\$90,000 in 2024). Taxpayers are permitted to treat this superfunding as made ratably over five years, thus qualifying as annual exclusion gifts for five years. Because there is a time value of money, this allows for greater growth within the account than if the contributions were made over five years.

(5) Flexibility in Naming Beneficiary

The account owner can change the beneficiary at any time. If the change is to a family member of the prior beneficiary, there is no penalty.⁴ And, if the change is to a family member in the same generation or above as the prior beneficiary, there are no gift or GST tax consequences either.⁵ A family member includes a spouse, descendant, sibling or stepsibling, ancestor, stepparent, niece or nephew, aunt or uncle, first cousin, son-, daughter-, father-, mother-, brother-, or sister-in-law, or the spouse of any of these people.

This flexibility is a strong counter-point to a common concern. What happens if I overfund the account for the needs of my grandchild, either because they don't have higher education expenses or their expenses are lower than what is in the account? Given this broad flexibility, if one grandchild does not use their entire account, another grandchild could be named as beneficiary, or even a niece or nephew, without penalty. Further, even if the 529 account beneficiary was changed to name a family member a generation below the current beneficiary (i.e., a great-grandchild), there

would be no penalty, and there would be a deemed gift from the current beneficiary (and not the account owner).⁶

(6) Flexibility in Ownership

When a Virginia529 account owner passes away, ownership automatically transfers to the designated survivor named on the account. One beneficial strategy often overlooked by planners is that a trust can be the owner of a Virginia529 account.

By naming existing (or testamentary) trusts as the designed survivor of a Virginia 529 account, the future decisions regarding education expenses and any changes in the named beneficiary can be integrated in a client's estate plan and placed with a trusted fiduciary.

(7) Asset Protection

By statute, funds in a Virginia529 account are not subject to the creditors of the contributor, account owner, or beneficiary.⁷ If deposited over two years prior to a bankruptcy filing, Virginia529 accounts are fully protected from a Chapter 7 Trustee.⁸

Different Scenarios Where 529 Plans Can Be Beneficial

Potentially Taxable Estate, Not Ready to Give Up Control

Clients that are potentially subject to the estate tax are often reluctant to irrevocably give up assets just in case they were to need them later due to some unforeseen event. If the current lifetime exemption is cut in half at the end of 2025 as scheduled, more people are likely to find their estates subject to tax upon their passing. 529 plans are the only estate planning device that allow a person to transfer money outside of their estate for the benefit of their descendants' education, while retaining the ability to return any necessary funds tax deferred (less a 10% withdrawal penalty on earnings).

529 plans are an inexpensive way to deliver a win-win scenario to such a client. If the client does not need the funds, they are removed from the client's taxable estate upon death (40% estate tax savings), and the funds are available for a grandchild's (or other relative's) education expense. If financial disaster strikes, the taxpayer could distribute the funds to himself or herself, pay taxes and a 10% penalty on the earnings – if the funds are held long enough prior to the need for

distribution, the benefit of tax deferral may overcome the income taxes and penalties. The financial downside to the use of the 529 plan is very limited.

Asset Protection

Imagine a client motivated by a need for asset protection, but also looking to provide for the educational needs of future generations. The client may consider a domestic asset protection trust to provide protection from creditors while potentially remaining a beneficiary with some access to the funds, and direct that the trust to be used to primarily provide for the education of the settlor's descendants following his or her death. This approach would require attorney fees, continuing trustee fees, and unsettled estate and gift tax consequences.

Alternatively, the client could set up 529 plan accounts for each desired beneficiary and receive asset protection while maintaining access to the assets. A Virginia529 plan account can be set up in 10 minutes and funded with up to \$550,000 for each beneficiary. If the client sets up and fully funds Virginia529 accounts for four different grandchildren (either up front or over the course of years using annual exclusion gifts), the taxpayer has statutorily protected \$2,200,000 from creditors over which he or she still has complete control. Additionally, the funds are growing tax-free for the educational needs of the beneficiaries.

No More Remaining GST Exemption

Contributions to 529 plans at or below the annual exclusion amount (\$18,000 in 2024; \$36,000 per couple) are exempt from GST tax, and do not require any additional allocation of GST exemption. Compare this to a dynastic trust, where even if the contributions qualify for the gift tax annual exclusion, GST tax exemption generally must be allocated in order to ensure the trust is GST-exempt. If the client has fully utilized their GST exemption, care must be taken to avoid unintended inclusion ratios in trusts meant to be GST exempt.

Conclusion

As an estate planning attorney, I find that many of life's problems can be solved by hiring an attorney to draft a trust agreement; however, sometimes there are non-trust strategies that can reduce cost and complexity, creating a better result for the client. 529 plans do just this.

529 plans offer clients a cost-effective, flexible solution to provide for the future educational needs of their descendants that can be fully integrated into an estate plan by naming a trust as the designated survivor of an account. The income and transfer tax savings coupled with the retention of control make 529 plans unparalleled as a planning vehicle. ♣

Douglas Murphy, with Baker Hostetler, focuses his growing practice on helping high-net-worth families develop plans for the orderly transition of their estates and businesses to the next generation. Using both traditional and non-traditional estate planning tools, he collaborates with his clients to determine their goals and effective solutions for achieving them. Leveraging his background as a CPA, Doug also provides valuable insight on the tax ramifications involved in any proposed strategy before it is implemented.

(Endnotes)

1. IRC § 529(e)(3) and 529(c)(7).
2. Assuming a 529 account earning a 6% return, and a taxable account earning a net-of-tax return of 4.8%, with an assumed tax rate of 23%, the return of a 529 account will exceed that of the taxable account after 27 years due to the benefit of tax deferral.
3. IRC § 529(c)(4).
4. IRC § 529(c)(3)(C)(ii)
5. IRC § 529(c)(5).
6. Proposed Treas. Reg. § 1.529-5(b)(3)(ii).
7. V.A. Code § 23.1-707.G.1.
8. 11 U.S. Code § 541(b).

Beneficiary Consent, Release and Ratification, Virginia's Revisions to Va. Code § 64.2-800

By Meghan Gehr Hubbard

As of July 1, 2024, a Virginia trustee will have a new tool in its toolbox to effectively wind-up administration of a trust and be discharged as trustee. Virginia Code Section 64.2-800, a provision of Virginia's Uniform Trust Code, previously was limited to addressing the effect of a beneficiary's consent, release, or ratification of a trustee for a breach of trust during the trustee's administration of the trust. The prior version of Virginia Code Section 64.2-800 was modeled after Section 1009 of the Uniform Trust Code promulgated by the Uniform Law Commission.¹ The revised Virginia Code Section 64.2-800 departs from the language of the uniform act and adds new sub-sections B through E.

In enacting this new legislation, Virginia joins several other states (its neighbor Maryland among them) that have enacted similar legislation with the objective of streamlining trust termination or the trustee resignation process.²

The newly enacted statute provides that the beneficiary of a trust shall be deemed to have released the trustee and ratified all actions of the trustee for the administration of the trust, if, when the trust terminates or the trustee ceases to serve, the trustee sends the beneficiary notice, and the beneficiary does not object within 45 days after the trustee sent such notice. In order to obtain the protections of the statute and the deemed release, the trustee must provide the beneficiary (1) a report that meets the requirements of subsection C of Virginia Code 64.2-775, for the immediately preceding two years; (2) the amount of taxes, expenses, or fees, including trustee fees and any reserves remaining to be paid; (3) notice regarding the application of subsection B of Virginia Code 64.2-800; and (4) if the trust is terminating, a description of any trust property or interests reasonably anticipated but not yet received and a proposal for distribution. The report described in

subsection C of Virginia Code 64.2-775 is a listing of trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values.

The notice must state that (1) the trust is terminating or the trustee is ceasing to serve; (2) if the beneficiary does not object in writing to the trustee within 45 days after the trustee sent the notice and information, the beneficiary shall be deemed to have released the trustee and ratified all actions of the trustee; and (3) the trustee is unaware of any undisclosed information that could give rise to a claim by the beneficiary.

Subsection E of the statute describes the effect of proper notice and non-objection under Virginia Code 64.2-800 as follows:

When a trustee complies with the provisions of subsection B, has received no objection or has resolved any objection, and distributes the assets of a terminating trust to a beneficiary or to a successor trustee, such action shall have the same legal and preclusive effect as if a court had entered a final order approving the trustee's final account or approving the trustee's interim accounts. A beneficiary or other party who received the notice and statements and either consented or did not object shall be prohibited from bringing a claim against the trustee.

The new version of Virginia Code Section 64.2-800 does not address what is required to "resolve an objection" for purposes of application of the statute. In the case of an objection by a beneficiary, and given this uncertainty, a distinct agreement memorializing resolution of the objection by separate consent, release, ratification, or nonjudicial settlement agreement may still

be appropriate. In addition, the statute does not explain what “other parties” the deemed release procedure may apply to other than trust beneficiaries. It remains to be seen whether the statute could apply to a successor trustee or trust protector.

In addition, it is unclear how or if the new deemed release procedure will apply to testamentary trusts and, if so, the procedure’s interplay with the accounting process before the Commissioner of Accounts required of testamentary trustees. For example, the statute provides that when applicable, a beneficiary shall be prohibited from bringing a claim against the trustee, but does not address the commissioner’s distinct obligation to review and approve trustee accounts or the ten year statute of limitations applicable to a suit to surcharge or falsify a fiduciary’s accounts.³

The new deemed release procedure does not apply to trust decantings (Virginia Code Section 64.2-779.1 et seq.) with such application expressly carved out to avoid unintended adverse tax consequences. The statute also makes clear that the new statutory procedure is not the exclusive means by which a trustee may seek or obtain a discharge as trustee at the end of its tenure. For example, a trustee may still seek court approval of its accountings, employ the provisions of subsection A of Virginia Code Section 64.2-796 to shorten the statute of limitations period applicable to a breach of trust, or enter into a nonjudicial settlement agreement to address the trustee’s liability with respect to trust administration. Kentucky, the first state in the country to adopt a similar statute, similar to Virginia Code Section 64.2-800, provides that it is the exclusive means for a trustee to obtain a discharge and fiduciaries have faced liability for non-compliance with the statute. Kentucky’s statute provides more detailed provisions for resolving beneficiary objections should they arise.

The new deemed release procedure promotes efficiency in the wind down and termination of a trust or transition to a new trustee. To avoid potential ongoing

liability and the longer 5-year statute of limitations period found in Virginia Code Section 64.2-796, trustees often seek court approval of their accountings (formal settlement of administration) or a private agreement with the beneficiaries to avoid the time and expenses associated with court proceedings (informal settlement). In some instances, formal settlement may be necessary because of unresponsive beneficiaries or beneficiaries who are unwilling to affirmatively act. The new deemed release procedure obviates this problem in such scenarios by protecting the trustee while avoiding the need for formal settlement proceedings. ♣

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(Endnotes)

1. See <https://www.uniformlaws.org/>.
2. See e.g. MD Code Ann. § Section 14.5-907.
3. VA. Code Ann. § 8.01-245.

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