

# 2021

Some Things that Changed  
(and Some that Didn't)

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# CERTAIN ITEMS ON THE CHOPPING BLOCK DIDN'T GET CHOPPED (FOR NOW).

Enhanced  
Exemption

40% Estate  
Tax Rate

Unification  
of Estate and  
Gift Taxes

Valuation  
Discounts

Backdoor  
Roths

GRATs

Dynasty  
Trusts

Grantor  
Trusts

# SOME THINGS NEEDED ADJUSTING.

- Unified Credit Against Estate Tax: \$12,060,000
- Annual Exclusion for Gifts of Present Interests: \$16,000
- Thresholds for Reaching Top Income Tax Bracket (37%)
  - Married Filing Jointly/Surviving Spouse: \$647,850
  - Head of Household/Unmarried: \$539,900
  - Trusts and Estates: \$13,450
- Thresholds for Reaching Top Capital Gains Bracket (20%)
  - Married Filing Jointly/Surviving Spouse: \$517,200
  - Head of Household: \$488,500
  - Unmarried: \$459,750
  - Trusts and Estates: \$13,700

*Rev. Proc. 2021-45*



## Contribution Limits

	2022	2021	2020	2019	2018
401(k) Limit	\$20,500	\$19,500	\$19,500	\$19,000	\$18,500
Catch-up Limit	\$6,500	\$6,500	\$6,500	\$6,000	\$6,000
Defined Contribution Limit	\$61,000	\$58,000	\$57,000	\$56,000	\$55,000
Annual Compensation Limit	\$305,000	\$290,000	\$285,000	\$280,000	\$275,000
Highly Compensated Employee	\$135,000	\$130,000	\$130,000	\$125,000	\$120,000
Key Employee	\$200,000	\$185,000	\$185,000	\$180,000	\$175,000
Income Subject to Social Security Tax	\$147,000	\$142,800	\$137,700	\$132,900	\$128,400

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**CONTRIBUTION  
LIMITS TO  
RETIREMENT  
PLANS ALSO  
GOT ADJUSTED.**



Smaller RMDs



A divisor is essentially the anticipated LIFE EXPECTANCY for that IRA owner.

Life Expectancy	↑	Divisor	↑	RMD	↓
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RMDs are approximately 6-8% lower until age 91...at which point they are only slightly smaller.

**AS DID THE  
LIFE  
EXPECTANCY  
TABLES FOR  
REQUIRED  
MINIMUM  
DISTRIBUTIONS.**

# THE TENNESSEE “UNIFORM” TRUST CODE SAW SIGNIFICANT CHANGES IN 2021.

- Governing Law and Situs
- Record Keeping and Reports
- Decanting
- Nonjudicial Settlement Agreements
- Modification of Trusts
- Electronic Signatures
- Creditors
- Tennessee Investment Services Trusts (TISTs)
- Purpose Trusts
- Passive Trusts
- Registration of Trusts
- Uniform Principal and Income Act (UPIA)
- Definitions

# GOVERNING LAW AND SITUS



- Don't conflate governing law and situs.
- Governing law refers to
  - The law of the state referred to in the trust instrument itself (“state jurisdiction provision”), or
  - The law of the state where the trust was executed.
- Situs
  - Refers to the principal place where the trust is administered.
  - Normally determined by
    - Location of the trustee
    - Location of the trust assets
- What happens when the governing law of a trust is different from the law of its situs?

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# GOVERNING LAW AND SITUS

- Questions regarding the validity and interpretation of a trust, but NOT its administration, are determined by reference to the trust's GOVERNING LAW.
  - The comments to T.C.A. § 35-15-108 refer to these as questions regarding the "meaning and effect of the trust's terms."
- Questions regarding the administration of a trust are determined by reference to the trust's SITUS.
  - Tennessee law governs administration of a trust while it is being administered in Tennessee, unless the trust's state jurisdiction provision or a court order say otherwise.
  - The designation of a state's trust administration rules will be valid if:
    - The trustee's principal place of business or residence is in the designated state,
    - All or part of the trust administration occurs in the designated state, or
    - Some or all of the trust assets are deposited in the designated state.
- Some questions remain...
  - What types of issues are interpretative in nature?
  - What types of issues relate to a trust's administration?



*T.C.A. § 35-15-107 (a)*  
*T.C.A. § 35-15-108(a), (b)*



# RECORD KEEPING AND REPORTS

- **Separate Shares**
  - Treated as separate trusts for all purposes of the Tennessee Uniform Trust Code.
- **Virtual Representatives**
  - If a beneficiary is represented by a “virtual representative,” the trustee owes a duty to inform and report to that virtual representative.
  - Potential virtual representatives include: guardian/conservator, agent, trustee, personal representative, parent/ancestor, person designated by the settlor in writing, person designated by the beneficiaries
  - How does one become a virtual representative?
- **Information Directives**
  - The settlor, trust advisor, or trust protector can give the trustee instructions regarding how much information to provide to a beneficiary.
  - If the settlor has designated a virtual representative for a beneficiary, the trustee shall send required information to the virtual representative, rather than the beneficiary.



- Decanting refers to a trustee's ability to appoint assets from one trust to another.
  
- There are five (5) requirements:
  1. Trustee must have the power to invade the principal of the trust
  2. Appointment must not improperly affect a current beneficiary's income interest
  3. Appointment must be in favor of the "proper objects" of the exercise of the power
  4. Appointment must not extend the permissible period of the applicable rule against perpetuities
  5. Must be in writing, signed and acknowledged by the trustee and filed with the trust records



- The new statute makes four (4) changes:
  1. Loosens the rule regarding income interests
    - Old Rule: Can't decant if doing so would reduce a fixed income interest of a beneficiary
    - New Rule: Can decant, even if doing so would reduce a fixed income interest, unless the trust is a marital trust, charitable remainder trust or GRAT/GRUT
  2. Allows the trustee to convert a remainder beneficiary into a current beneficiary, but only after the Grantor's death
  3. Puts certain limits on a trustee's ability to decant if the trustee is also a beneficiary
  4. Eliminates the acknowledgment requirement

*T.C.A. § 35-15-816(c)*

# NONJUDICIAL SETTLEMENT AGREEMENTS (NJSA)

- The trustee and qualified beneficiaries of a trust may enter into a binding nonjudicial settlement agreement with respect to “any matter involving a trust.”
  - Can’t violate a material purpose of the trust
  - Must include terms and conditions that could properly be approved by a court
- Some items that can be addressed in an NJSA, per the statute:
  - Interpretation/Construction
  - Directions to Trustees
  - Situs and Governing Law
  - Trustee Liability
- The new law adds 2 categories of items than can be addressed by an NJSA:
  - Resignation, appointment, and establishment of the powers and duties of trust protectors or trust advisors
  - Approval of an investment decision, delegation, policy, plan or program

*T.C.A. § 35-15-111*

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Modification

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of an

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Irrevocable

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Non-charitable

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Trust

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After the settlor's death

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By the trustee and qualified beneficiaries

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Does NOT require

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A non-judicial settlement agreement

*T.C.A. § 35-15-411(c)*

# MODIFICATION OF TRUSTS

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# ELECTRONIC SIGNATURES

- Revised T.C.A. § 35-15-1102 explicitly authorizes electronic signatures for:
  - Non-Judicial Settlement Agreements
  - Trust Modifications, and
  - Trust Terminations
- What about items that are not on the list?
- “The Tennessee Uniform Trust Code does not require that any document be in paper form, allowing all documents under such code to be transmitted in electronic form.”  
*2013 Restated Comments.*



## Claims Against Settlers

- **General Rule** [T.C.A. § 35-15-505(a)(2)]:
  - A creditor of the settlor of an irrevocable trust may reach the maximum amount that can be distributed to or for the settlor's benefit.
- **New Rule** [T.C.A. § 35-15-505(h)]:
  - The settlor's spouse is not considered a settlor or deemed settlor of an inter vivos irrevocable trust merely because he or she is the beneficiary of a trust funded with assets from his or her spouse.
  - Think SLATs, inter-vivos QTIPs

## Judicial Foreclosure of Beneficial Interests [T.C.A. § 35-15-509]

- Creditor can't reach property transferred pursuant to a testamentary power of appointment
- Exception: appointment to decedent's estate

## Tenancy by the Entireties Trusts (TBETs) [new T.C.A. § 35-15-510(i)]

- Previous version stated: "After a conveyance to a [TBET], the property transferred shall no longer be held by the husband and wife as TBE."
- This had negative connotations in bankruptcy.
- The new version of the statute clarifies the status of property post transfer.
- "[T]he property transferred is tenancy by the entirety property held by husband and wife subject to this section."

# CREDITORS

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# TISTS

The window for challenging a “qualified disposition” to a TIST has been reduced from 2 years to 1.5 years.

- 6-month discovery rule for pre-disposition creditors still applies, though

*T.C.A. § 35-16-104(b)(1)*

You can now have a “qualified disposition” without a qualified affidavit.

- But should you?

*T.C.A. § 35-16-102(11)*

A qualified affidavit creates a rebuttable presumption that the assets disclosed were transferred to the trust on the date of execution of the affidavit.

- Otherwise, transferor has burden of proof by preponderance of the evidence

*T.C.A. § 35-16-104(c)*

# PURPOSE TRUSTS

“Purpose Trusts” are trusts without ascertainable beneficiaries.

There are two (2) types:

- Trusts for general, but noncharitable, purposes; and
- Trusts for a specific noncharitable purpose (other than the care of pets, which is handled in a separate statute)

Examples:

- Bequest of money to be distributed to such objects of benevolence as the Trustee might select.
- Trust for the care of a cemetery plot.
- Trust for the care of someone who has been “cryopreserved.”

The purpose cannot be “capricious.” See T.C.A. § 35-15-404.

Previously, purpose trusts could not be enforced for more than 90 years (same as pet trusts).

Now, they can last for up to 360 years.

# PASSIVE TRUSTS

- “A passive trust is not terminable because it is passive.”
- There are five (5) requirements for a valid trust:
  - Settlor has capacity
  - Settlor indicates an intention to create a trust
  - The trust has a definite beneficiary (subject to exceptions)
  - The same person is not sole trustee and sole beneficiary
  - **The trustee has duties to perform**
- Trustee duties are usually active, such as investing assets and making distributions pursuant to explicit standards.
- However, trustee duties can also be passive, meaning that the trustee has a duty not interfere with the beneficiary’s enjoyment of the trust property.
- There was some concern that passive trusts could violate the common law Statute of Uses and would thus be terminable.
- The intent seems to be that the common law Statute of Uses cannot be invoked to terminate a passive [mere title-holding] trust.

*T.C.A. § 35-15-402(e)*



# REGISTRATION OF TRUSTS

- A trustee can now register a trust with the Tennessee Secretary of State by filing a statement and paying \$250.
- Contents
  - Contact information for trustees and any trust protectors or trust advisors
  - Prior registration(s)
  - Name and date of trust and any amendments
  - Name of the testator/settlor
  - Statement that the trustee submits to the jurisdiction of Tennessee courts
- Confidential and not subject to public inspection
- Settlor, trustee, trust advisor, or trust protector may obtain a certified copy of the registration
- Effective January 1, 2022
- Forms not available yet?

*T.C.A. § 35-15-113*

# UPIA

- **Partial liquidation**
  - **General Rule**: Under T.C.A. § 35-6-401, money received from an entity is allocated to income
  - **Exception**: certain entity receipts are allocated to principal, including “money received in partial liquidation” of an entity.
  - What constitutes “money received in partial liquidation?”
  - **New Rule**: If the total amount of money and property received in a distribution or series of related distributions is equal to or less than twenty percent (20%) of an entity's gross assets, then it is not a partial liquidation, unless the entity declares it to be.

*T.C.A. § 35-6-401(d)(2)*



# UPIA

- **Trustee compensation**
  - **General Rule**: Under T.C.A. § 35-6-502, a trustee *shall* make certain disbursements from principal, including 50% of the trustee’s regular compensation.
  - **New Rule**:
    - Trustee now has discretion to charge all of its regular compensation to income if:
      - Impracticable to charge to principal due to lack of cash or readily marketable assets, or
      - Inadvisable because of the nature of the assets
    - Trustee’s decision is “conclusive”
    - Adjustment is not available if it would violate T.C.A. § 35-6-104(c)
- **How important is the income/principal distinction in modern trust administration?**

*T.C.A. § 35-6-502(a)(1)*

### Qualified Beneficiary [T.C.A. § 35-15-103(24)]

- Now includes a distributee or permissible distributee if the previous interest terminates without the trust terminating.

### Expanded Definition of "Person" [T.C.A. § 35-15-103(20)]

- Individual
- Corporation
- Business Trust
- Estate
- Trust or Civil Law Equivalent of a Trust, including a Fideicomiso or Equivalent, or a Foundation of the Equivalent;
  - Fideicomiso = 50-year, perpetually renewable, irrevocable trust established in Mexico with a corporate bank to allow foreigners to hold real estate
- Partnership
- Limited Liability Company
- Association
- Joint Venture
- Government
- Governmental Subdivision, Agency, or Instrumentality
- Public Corporation; or
- Any Other Legal or Commercial Entity

# DEFINITIONAL CHANGES

- When the trustee changes, the current or successor trustee shall execute and record an instrument that:
    - Recites the resignation or removal of the trustee;
    - Gives the name and address of the successor trustee; and
    - Identifies each parcel of real estate held by the trust.
  - Moved from T.C.A. § 35-1-111 to T.C.A. § 35-1-101
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# TRUST OWNING REAL ESTATE

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