

Department of Legislative Services  
Maryland General Assembly  
2015 Session

FISCAL AND POLICY NOTE

Senate Bill 419

(Senator Lee)

Judicial Proceedings

Rules and Executive Nominations

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**Estates and Trusts - Maryland Trust Act - Incapacity**

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This bill defines the terms “incapacitated” and “incapacity” as they relate to the Maryland Trust Act. Under the bill, “incapacitated” means the state of having an incapacity. “Incapacity” means the inability of an individual to manage the individual’s property or financial affairs effectively due to (1) physical or mental disability; (2) disease or illness; (3) habitual drunkenness; (4) drug addiction; (5) imprisonment; (6) compulsory hospitalization; (7) confinement; (8) detention by a foreign power; or (9) disappearance.

The bill clarifies that loss of capacity by a settlor to create a will does not convert a revocable trust into an irrevocable trust.

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**Fiscal Summary**

**State Effect:** The bill does not affect State operations or finances.

**Local Effect:** The bill does not affect local government operations or finances.

**Small Business Effect:** None.

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**Analysis**

**Current Law:** The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will. The incapacity of a settlor does not convert a revocable trust into an irrevocable trust.

A person may make a will if the person is 18 years of age or older and legally competent to make a will. Maryland law presumes that a person is legally competent to make a will and the burden rests on the person alleging incompetency to prove otherwise.

Maryland courts follow the common law rule to determine a lack of legal competency. The common law rule states that, in order to make a will, a person must have sufficient strength and clearness of mind and memory to know, in general, without prompting (1) the nature and extent of the property subject to disposition by the person; (2) the nature of the act he or she is about to perform; (3) the names and identity of the persons who are the beneficiaries; and (4) the relationships. Physical and mental infirmities associated with old age that result in confusion and behavioral oddities do not necessarily render a person incompetent.

In addition to the provision dealing with an individual's capacity to create, amend, revoke, or add property to a revocable trust, the terms "incapacitated" and "incapacity" appear in five separate provisions of the Maryland Trust Act. Under these provisions, the use of the terms "incapacity" or "incapacitated" in these sections seemingly refer to the ability of an individual to manage property and financial affairs rather than the individual's competency to make a will. These provisions are as follows:

- A parent is authorized to represent and bind an incapacitated child in the same manner as for a minor, unborn, or unknown child of the parent or a child of the parent whose location is unknown and not reasonably ascertainable, under specified circumstances.
- A court is authorized to appoint a representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of an incapacitated individual in the same manner as for a minor or unborn individual or an individual whose identity or location is unknown, under specified circumstances.
- A cotrustee is required to participate in the function of a trustee unless the cotrustee is unavailable because of absence, illness, disqualification under other law, or "other temporary incapacity."
- The remaining cotrustee or cotrustees are authorized to act for the trust if a cotrustee is unavailable because of absence, illness, disqualification under other law, or "other temporary incapacity."
- Specified income beneficiaries who have not attained majority or who are "otherwise incapacitated" are excluded as parties for specified purposes.

**Background:** *Black's Law Dictionary* defines a "revocable trust" as a trust in which the settlor reserves the right to terminate the trust and recover the trust property and any undistributed income. An "irrevocable trust" is defined as a trust that cannot be terminated by the settlor once it is created.

Chapter 585 of 2014 established the Maryland Trust Act. The Act applies to express charitable or noncharitable trusts and trusts created by State law (including the Maryland Discretionary Trust Act, unless otherwise specified by statute), judgment, or decree that required the trust to be administered in the manner of an express trust.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None designated; however, HB 703 (Delegate Miele, *et al.* – Health and Government Operations) is identical.

**Information Source(s):** Department of Health and Mental Hygiene, Judiciary (Administrative Office of the Courts), Register of Wills, *Black's Law Dictionary*, Maryland State Bar Association, Department of Legislative Services

**Fiscal Note History:** First Reader - March 5, 2015  
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