

Trust Modifications Options

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Trusts have become much more complicated over the centuries. They may own a wide variety of assets, including residences, real estate, interests in family business, and interests in increasing complex financial instruments. Beneficiaries are mobile and often have complicated blended families. Many families have one or more members who cannot manage money well, who have substance abuse issues, or special needs. The job of acting as trustee is now frequently shared by multiple persons, potentially including investment advisors and distribution advisors. The gift and estate tax rules have experienced a roller coaster of change, and all indications are that the wild ride will continue for some time. Further, many states have modified their rules for how long a trust can last; now trusts may last multiple generations or even indefinitely.

The settlor of a trust generally cannot retain the right to amend or revoke a trust if the settlor wishes to remove the trust assets from her or his estate. Even revocable trusts, which serve as a substitute for a Will, eventually become irrevocable when the settlor dies. Thus, there has been a growing need over the past few decades to develop ways to modify irrevocable trusts.

Trusts can be drafted to build in a certain amount of flexibility through trustee discretion, powers of appointment, and trust protector provisions. It can be difficult, however, to identify a person to act as trust protector, to create effective provisions for naming trust protectors, and to define the scope of a trust protector's power to amend a trust.

Under certain circumstances a trust can be modified by a court. Courts have traditionally been reluctant to override the settlor's wishes as stated in the trust document. Further, judicial modification can be costly and may make the trust modification a public matter.

Non-Judicial Settlement Agreements

Over the past few decades, trust law has rapidly developed several ways to modify irrevocable trusts when circumstances change. First, many states now permit the trustee and the beneficiaries to make certain modifications without going to court by entering into non-judicial settlement agreements. Because most trusts have or potentially will have minor, incapacitated, or unborn beneficiaries, state law must also have rules for allowing certain persons to represent such beneficiaries in order to make non-judicial settlement agreements a practical way to modify trusts.

State Decanting Statutes

More than a majority of the states have decanting statutes, which permit a trustee to make modifications to irrevocable trusts under some circumstances and subject to some restrictions.

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