



MODIFYING AN IRREVOCABLE TRUST

Yes, It Can Be Done

Modifying an irrevocable trust may sound like an oxymoron, but it is possible under Florida law. In most cases, after the death of a trust creator, the terms and provisions of a formerly revocable trust become irrevocable. Outdated or restrictive provisions in an irrevocable trust can hold trustees and beneficiaries hostage. However, there are specific circumstances where changing the terms of an irrevocable trust may be allowed. The most common methods to amend an irrevocable trust include (i) petitioning a court for modification, (ii) entering into a nonjudicial modification or nonjudicial settlement agreement, and (iii) utilizing a process known as “decanting.”

Judicial Modification

Florida Statutes allow any trustee or qualified trust beneficiary to petition a court to modify an irrevocable trust for any of the following reasons:

- The purposes of the trust have been fulfilled or have become illegal, impossible, wasteful, or impracticable to fulfill.
- Because of circumstances not anticipated by the trust creator, compliance with the terms of the trust would defeat or substantially impair the accomplishment of a material purpose of the trust.
- A material purpose of the trust no longer exists.
- For trusts created on or after January 1, 2001, judicial modification is allowed if compliance with the terms of a trust is not in the best interests of the beneficiaries.

Nonjudicial Modification/Settlement Agreement

Judicial modification of an irrevocable trust can prove to be costly and time consuming. As an alternative, Florida law also allows for a nonjudicial modification or nonjudicial settlement agreement to change the terms of an irrevocable trust.

- **Nonjudicial Modification** of an irrevocable trust can be made (i) at any time after the death of the trust creator, (ii) upon the unanimous agreement of the trustee and all qualified beneficiaries, (iii) with no justification necessary, and (iv) only with respect to irrevocable trusts created after January 1, 2001
- **Nonjudicial Settlement Agreements** to amend an irrevocable trust are valid if entered into by all “interested persons” (including the trustee, all qualified beneficiaries and any person whose interests would be affected) *as long as the terms of the agreement could be approved by a court*. In general, all of the justifications named above in the Judicial Modification section would be permissible under this kind of agreement.

Decanting

In basic terms, decanting is taking assets in an old trust and transferring them to a new trust. In general, Florida law allows decanting from an irrevocable trust to a new trust under the following scenarios:

1. If a trustee has “absolute power” to invade the assets of a trust, there are a wide array of options available to a trustee to transfer assets to a new trust with more favorable terms.
2. If an irrevocable trust restricts a trustee’s distribution options – for example, only for health, education, maintenance, and support (or HEMS) – decanting remains an option, but with fewer options. The new trust cannot substantially change a beneficiary’s rights under the old trust. This type of decanting is usually limited to administrative issues.
3. A trustee may decant from an irrevocable trust that does not qualify as a “supplemental (or special) needs trust” into a qualifying trust for the benefit of a disabled beneficiary.