

THE IRREVOCABLE TRUST IN TENNESSEE

NOT AS FINAL AS
YOU THINK

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THANKS TO MAJOR
CHANGES IN THE TENNESSEE
UNIFORM TRUST CODE,
IRREVOCABLE TRUSTS CAN
BE MODIFIED THROUGH A
NUMBER OF METHODS

MODIFICATIONS

1. Nonjudicial Settlement Agreements

T.C.A. § 35-15-111

2. Modification By Consent

T.C.A. § 35-15-411

3. Modification of Uneconomic Trust

T.C.A. § 35-15-414



MODIFICATIONS

4. Reformation to Correct Mistakes*

T.C.A. § 35-15-415

5. Modification to Achieve Settlor's Tax Objectives*

T.C.A. § 35-15-416

* By Court Approval



MODIFICATIONS

6. Merger of Trust with Another Existing Trust

T.C.A. § 35-15-417

7. Modification of Trust by Trust Protector

T.C.A. § 35-15-416

8. Decanting

T.C.A. § 35-15-816(b)(27)

NON JUDICIAL SETTLEMENT AGREEMENT

1. Trustee and Qualified Beneficiaries
May Enter into Binding Agreement
“with respect to any matter involving a
trust”
2. May Not Violate a Material Purpose of
the Trust

NON JUDICIAL SETTLEMENT AGREEMENT

3. Matters That May Be Resolved by Nonjudicial Settlement Agreement (not limited to list)
 - a. Except as otherwise provided in subsection (b), the trustee and the qualified beneficiaries may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.
 - b. A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and included terms and conditions that could be properly approved by the court under this chapter or other applicable law.

NON JUDICIAL SETTLEMENT AGREEMENT

c. Matters that may be resolved by a nonjudicial settlement agreement include, but are not limited to:

- i. The interpretation or construction of the terms of the trust;
- ii. The approval of a trustee's report or accounting;
- iii. Direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
- iv. The resignation or appointment of a trustee and the determination of a trustee's compensation;
- v. Transfer of a trust's principal place of administration;
- vi. Liability of a trustee for an action relating to the trust;
- vii. The extent or waiver of bond of a trustee;
- viii. The governing law of the trust; and
- ix. The criteria for distribution to a beneficiary where the trustee is given discretion.

NON JUDICIAL SETTLEMENT AGREEMENT

4. Any Qualified Beneficiary or Trustee
May Request Court Review



AMENDING WITH CONSENT

1. During Grantor's Lifetime, Modification by Trustee if (a) All Qualified Beneficiaries Consent, and (b) Grantor Does Not Object. 60 Days Notice to Beneficiaries is Required.

AMENDING WITH CONSENT

2. Following Death of Grantor, By Consent of Qualified Beneficiaries with Court Approval (Court Must Conclude that Modification is not Inconsistent with a Material Purpose of the Trust.)



AMENDING WITH CONSENT

3. Even if All Beneficiaries Do Not Consent and Regardless of Whether or not Grantor is Living, Court May Approve if (a) The Trust Could Have Been Modified With Consent of All Qualified Beneficiaries, and (b) The Interest of All Nonconsenting Qualified Beneficiaries Will be “Adequately Protected”

MODIFICATION OF UNECONOMIC TRUST

Court May Modify Trust or Remove and Replace Trustee if it Determines Value of Trust Property is Insufficient to Justify Cost of Administration

REFORMATION TO CORRECT MISTAKES

1. Court May Reform Terms of Trust, Even if Unambiguous, to Conform to the Grantor's Intention
2. Must be Proved That BOTH the Grantor's Intent and the Terms of the Trust Were Affected by a Mistake of Law or Fact

REFORMATION TO ACHIEVE GRANTOR'S TAX OBJECTIVES

1. Court May Modify Terms in Manner Not Contrary to Grantor's Probable Intention
2. Modification Can Have Retroactive Intent

MERGER OF TRUST

1. Trustee May Combine 2 or More Trusts Into a Single Trust if the Result Does Not Either Impair the Rights of Any Beneficiary or Adversely Affect the Achievement of the Purposes of the Trust
2. Must Give Advance Notice to Qualified Beneficiaries

TRUST PROTECTOR

1. The Terms of a Trust May Confer on a Person Other Than the Trustee, a Power to Direct the Modification of a Trust
2. Such Person Typically Referred to as a Trust Advisor or Trust Protector or Both
3. Watch for Clayton QTIP



DECANTING

1. If You Can't Reform or Merge, Think Decant Where the Trustee Created a Totally New Trust
2. Requirements



CHANGING IRREVOCABLE TRUSTS

Decanting. T.C.A. § 35-15-816(b)(27): If you can't amend or merge, and you don't have a Trust Protector, you may be able to “decant” into a new trust with very different terms. The requirements are as follows:

- (i) Trust agreement must not expressly prohibit decanting.
- (ii) Trust must allow for distribution of principal.
- (iii) Decanting cannot reduce the fixed income interest of any beneficiary.
- (iv) Cannot add or remove beneficiaries, or move a remainder beneficiary up to a current beneficiary.
- (v) Decanting must be documented in writing, signed and acknowledged by Trustee, and kept with trust records.
- (vi) Cannot extend permissible rule against perpetuities.
- (vii) Some states require notice to beneficiaries, but non require beneficiary consent. Tennessee does not require notice to beneficiary.

DECANTING

1. Generation Skipping Tax
 - (a) Protection of Exempt Trusts
 - (b) Changes May Be Administrative

2. Powers of Appointment
 - (a) Avoidance of GST
 - (b) Step-up In Basis



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