

## **Did Circumstances Change? Perhaps Your Irrevocable Trust Can Too.**

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Just by virtue of the name, “irrevocable” living trust, one would assume this is something that cannot be revoked, changed, or terminated. In fact, if you are the person who created the trust, you should consider the terms of an irrevocable living trust to be set in stone; a benefit which has provided much needed security for many beneficiaries.

But wait. Not so fast...

We know one thing in life to be certain and that is change. People change, tax laws change, and the world changes. We are currently living in 2020 which is more than enough proof that “change happens”.

After a certain amount of time, an irrevocable trust may fail to meet the exact needs of the beneficiaries. At some point, a trustee, a beneficiary, or the creator of the trust may feel that some aspect of an irrevocable trust should be changed and when that happens, what are families to do if a change in circumstances necessitates modifying the terms of an irrevocable trust?

Generally speaking, once a trust becomes irrevocable, its terms are set. However, there are ways in which even an irrevocable living trust can be changed.



### **Unanimous Thumbs Up**

You can't ‘agree to disagree’ on this one. All parties involved must have unanimous consent before changing an irrevocable trust, including:

- If the person who created the irrevocable trust is still living and agrees to a

change, and ALL beneficiaries of the irrevocable trust consent, they may petition the court for modifications.

- If the person who created the irrevocable trust is deceased, and ALL beneficiaries of the irrevocable trust consent, they may petition the court for modification.

There is a theme here - Agreement. Consent. Or, said in layman's terms - Yes please! Right on! Let's do this! If these aren't phrases you are hearing, then this will be a very difficult fight to win. Modification of an irrevocable living trust is much easier when everyone is on the same page and in total alignment about the changes. But, if you have a beneficiary who does not agree, or who has yet to be born, this route will not work.

Changes may also be hindered under a specific section of the Probate Code which states, "If the continuance of the trust is necessary to carry out a material purpose of the trust, the trust cannot be modified or terminated unless the court determines that the reason for doing so under the circumstances outweighs accomplishing a material purpose of the trust."

But wait. There's more...

## The Times, They Are A-Changin

When beneficiaries are unable to reach a unanimous consent over changes to their irrevocable living trust, they may be able to modify the trust using the "changed circumstances" doctrine defined within a section of the Probate Code which reads:

"On petition by a trustee or beneficiary, the court may modify the administrative or dispositive provisions of the trust or terminate the trust if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust. In this case, if necessary, to carry out the purposes of the trust, the court may order the trustee to do acts that are not authorized or are forbidden by the trust instrument."

The key words here are "circumstances not known and not anticipated" which can be defined in numerous different ways. Below are just a couple of examples:

- Charitable Trust: A charitable trust typically includes provisions to allow changes to the trust agreement to comply with changes in federal tax or other applicable laws.
- Serve the (original) Purpose of the Trust: If the court deems there is an opportunity that would best serve the support of the beneficiary, and this opportunity was not known or anticipated by the person who created the trust, then modifying the irrevocable trust could be allowed to serve that purpose.

## Challenges to Consider



While these points may seem like a straightforward way for the beneficiaries to accomplish a modification, there are a few things to consider:

**Court Order:** While it is not required that the beneficiaries get court approval, it is likely in the best interest of the beneficiaries to get a court to sign-off on whatever terms the beneficiaries seek to change. In fact, if the terms that are being changed are key to the trust, some financial institutions or other government entities may require a court to approve the change in the terms.

**Timing:** If a Court Order is required, it is important that the beneficiaries understand how long it may take to obtain a Court Order. If modification has to happen in a short time frame, it will be vital to let your attorney know your goals so they can realistically advise you on timing, and perhaps explore alternatives if the timing isn't right as the court process can be lengthy.

**Reason for the modification:** In the mind of the court, the terms of a trust were written as they were intended by the creator of the trust. For the court to modify these terms and thus modify the wishes of the trust's creator, it is not to be taken lightly. Therefore, it will be important to evaluate the terms of the irrevocable trust very closely to ensure that the proposed modification does not interfere with a material purpose of the trust (such as providing lifetime income to a beneficiary) and if it does, demonstrate proof of good reason for the revision.

It is not impossible to change an irrevocable trust, but it is challenging. Irrevocable trusts are, by their very nature, meant to be irrevocable. They can also be very difficult to interpret and understand, requiring an experienced estate planning attorney, litigation attorney or inheritance dispute attorney to determine if anything can be done to modify the provisions of the trust, as laws vary considerably from state to state.

The key is to gain alignment with all involved and if that is proving futile, then consider consulting an attorney as we are up to date on the most current estate laws and we practice empathy when listening to our clients to help reach the end goal.



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