

Unexpected Implications of Trust Modifications and Decanting: What You Need to Know

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Modifying and Revoking the Irrevocable: Nothing is Set in Stone... Except for Stone

ARTICLE XIV Irrevocability

This Trust Agreement shall be irrevocable. The Settlor shall have no right to alter it or amend it in any way and, notwithstanding any other provision hereof, none of the principal and none of the income therefrom shall ever be payable to the Settlor, to the Settlor's estate, or to the creditors of the Settlor's estate, or to discharge any obligation of the Settlor to the Settlor's creditors, to the Settlor's estate or to the creditors of the Settlor's estate. The authorization to distribute income or principal for a beneficiary's support does not include authority to make distributions that would discharge or substitute for any obligation of the Settlor to support the beneficiary. The Settlor intends that no distribution from a trust hereunder shall be deemed to discharge or substitute for the Settlor's obligation to support a beneficiary of a trust hereunder, and the Settlor directs that no distribution shall be made that would have that effect.

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A Brief Note on Different States and the Uniform Trust Code

- The Uniform Law Commission produces a number of proposed Statutes in an effort to standardize laws between states, including the Uniform Trust Code and the Uniform Trust Decanting Act
- As of 2024, 36 states have adopted some portion of these uniform trust laws, including Florida

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Florida's Statutory Toolbelt for Trust Modification

- Judicial Modification



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Florida's Statutory Toolbelt for Trust Modification

- Judicial Modification
- Non-Judicial Modification*



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Florida's Statutory Toolbelt for Trust Modification

- Judicial Modification
- Non-Judicial Modification*
- Non-Judicial Settlement Agreements



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Florida's Statutory Toolbelt for Trust Modification

- Judicial Modification
- Non-Judicial Modification*
- Non-Judicial Settlement Agreements
- Judicial Reformation



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Florida's Statutory Toolbelt for Trust Modification

- Judicial Modification
- Non-Judicial Modification*
- Non-Judicial Settlement Agreements
- Judicial Reformation
- Trust Decanting



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Florida Law: Purposes for Judicial Modification

- Judicial Modification can be Pursued in 2 baseline situations:
 - Modification not inconsistent with Settlor's purpose (Fla. Stat. § 736.04113)



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Florida Law: Purposes for Judicial Modification

- Judicial Modification can be Pursued in 2 baseline situations:
 - Modification not inconsistent with Settlor's purpose (Fla. Stat. § 736.04113)
 - Modification in the best interests of the Beneficiaries (Fla. Stat. § 736.04115)



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736.04113: When It Can be Used

- The purposes of the trust have been fulfilled or have become illegal, impossible, wasteful, or impracticable to fulfill;



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736.04113: When It Can be Used

- 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 settlor, compliance with the terms of the trust would defeat or substantially impair a material purpose of the trust



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736.04113(1): When It Can be Used

- 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 settlor, compliance with the terms of the trust would defeat or substantially impair a material purpose of the trust; or
- A material Purpose of the trust no longer exists



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736.04113(2): What can a Judge Do?

- Amend or change the terms of the trust, including terms governing distribution of the trust income or principal or terms governing administration of the trust;



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736.04113(2): What can a Judge Do?

- Amend or change the terms of the trust, including terms governing distribution of the trust income or principal or terms governing administration of the trust;
- Terminate the trust in whole or in part;



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736.04113(2): What can a Judge Do?

- Amend or change the terms of the trust, including terms governing distribution of the trust income or principal or terms governing administration of the trust;
- Terminate the trust in whole or in part;
- Direct or permit the trustee to perform actions (even if those actions are not covered in the agreement or are explicitly prohibited);



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736.04113(2): What can a Judge Do?

- Amend or change the terms of the trust, including terms governing distribution of the trust income or principal or terms governing administration of the trust;
- Terminate the trust in whole or in part;
- Direct or permit the trustee to perform actions (even if those actions are not covered in the agreement or are explicitly prohibited);
- Prohibit the trustee from performing actions that are authorized under the trust agreement



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Interstate Law Interlude

Fla. Stat. § 736.04113(2)

(2) In modifying a trust under this section, a court may:

- (a) Amend or change the terms of the trust, including terms governing distribution of the trust income or principal or terms governing administration of the trust;
- (b) Terminate the trust in whole or in part;
- (c) Direct or permit the trustee to do acts that are not authorized or that are prohibited by the terms of the trust; or
- (d) Prohibit the trustee from performing acts that are permitted or required by the terms of the trust.



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Interstate Law Interlude

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- (a) Amend or change the terms of the trust, including terms governing distribution of the trust income or principal or terms governing administration of the trust;
- (b) Terminate the trust in whole or in part;
- (c) Direct or permit the trustee to do acts that are not authorized or that are prohibited by the terms of the trust; or
- (d) Prohibit the trustee from performing acts that are permitted or required by the terms of the trust.

S.C. Code § 62-7-412

- (a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.



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Fla. Stat. § 736.04115: Beneficiaries' Best Interests

- Less limited ability to modify trusts in situations where circumstances have changed and trust terms are no longer ideal to provide for trust beneficiaries



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Fla. Stat. § 736.04115: Beneficiaries' Best Interests

(2) In exercising discretion to modify a trust under this section:

- (a) The court shall exercise discretion in a manner that conforms to the extent possible with the intent of the settlor, taking into account the current circumstances and best interests of the beneficiaries.
- (b) The court shall consider the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust, and extrinsic evidence relevant to the proposed modification.
- (c) The court shall consider spendthrift provisions as a factor in making a decision, but the court is not precluded from modifying a trust because the trust contains spendthrift provisions.



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Interstate Law Interlude 2: The Revenge

Fla. Stat. § 736.04115

(1) Without regard to the reasons for modification provided in §. 736.04113, if compliance with the terms of a trust is not in the best interests of the beneficiaries, upon the application of a trustee or any qualified beneficiary, a court may at any time modify a trust that is not then revocable as provided in §. 736.04113(2).



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(1) Without regard to the reasons for modification provided in §. 736.04113, if compliance with the terms of a trust is not in the best interests of the beneficiaries, upon the application of a trustee or any qualified beneficiary, a court may at any time modify a trust that is not then revocable as provided in §. 736.04113(2).

S.C. Code § 62-7-411

(a) A noncharitable irrevocable trust may be modified or terminated with court approval upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's power to consent to a trust's modification or termination may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; by the settlor's conservator with the approval of the court supervising the conservator if an agent is not so authorized; or by the settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed.



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Fla. Stat. § 736.0412: Non-Judicial Modification

- Broad authorization to modify trust terms with the consent of the Trustee and all "Qualified Beneficiaries"



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What is a Qualified Beneficiary

Fla. Stat. § 736.0103(19): "Qualified beneficiary" means a living beneficiary who, on the date the beneficiary's qualification is determined:

- (a) Is a distributee or permissible distributee of trust income or principal;
- (b) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (a) terminated on that date without causing the trust to terminate; or
- (c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated in accordance with its terms on that date.



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Fla. Stat. § 736.0412: Non-Judicial Modification

- Requirements:
 - The Settlor must be dead



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Fla. Stat. § 736.0412: Non-Judicial Modification

- Requirements:
 - The Settlor must be dead
 - Cannot extend the administration period under the Rule Against Perpetuities



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Fla. Stat. § 736.0412: Non-Judicial Modification

- Requirements:
 - The Settlor must be dead
 - Cannot extend the administration period under the Rule Against Perpetuities
 - Cannot be used for Trust established prior to January 1, 2001
 - Any Trust with provisions requiring the Trust to vest or terminate prior to the end of the perpetuities period



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Non-Judicial Settlement Agreements

- What are they?



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Non-Judicial Settlement Agreements

- What are they?
 - An agreement between the “Interested Persons” to take certain actions with regard to a trust



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Non-Judicial Settlement Agreements

- What are they?
 - An agreement between the “Interested Persons” to take certain actions with regard to a trust
- “Interested Persons”
 - Can include the Qualified Beneficiaries, the Trustee, and the Settlor/Grantor (in some cases)



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Non-Judicial Settlement Agreements

- What can an NJSA do (typically)?



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Non-Judicial Settlement Agreements

- What can an NJSA do (typically)?
 - Approve Trustee reports and accountings



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Non-Judicial Settlement Agreements

- What can an NJSA do (typically)?
 - Approve Trustee reports and accountings
 - Direct the Trustee to perform or refrain from performing particular administrative acts or grant the Trustee authority to perform administrative acts

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Non-Judicial Settlement Agreements

- What can an NJSA do (typically)?
 - Approve Trustee reports and accountings
 - Direct the Trustee to perform or refrain from performing particular administrative acts or grant the Trustee authority to perform administrative acts
 - Handle resignation or appointment of trustees and determination of trustee compensation

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Non-Judicial Settlement Agreements

- What can an NJSA do (typically)?
 - Approve Trustee reports and accountings
 - Direct the Trustee to perform or refrain from performing particular administrative acts or grant the Trustee authority to perform administrative acts
 - Handle resignation or appointment of trustees and determination of trustee compensation
 - Transfer a trust's principal place of administration

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Non-Judicial Settlement Agreements

- What can an NJSA do (typically)?
 - Approve Trustee reports and accountings
 - Direct the Trustee to perform or refrain from performing particular administrative acts or grant the Trustee authority to perform administrative acts
 - Handle resignation or appointment of trustees and determination of trustee compensation
 - Transfer a trust's principal place of administration
 - Determine trustee liability



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Non-Judicial Settlement Agreements

- What can NJSA's not do
 - Generally, cannot make any modification or take any action that could not be approved by a court



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Judicial Reformation

- Method of petitioning a court to cure errors in the trust document



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Judicial Reformation

- Requirement: Petitioner must present clear and convincing evidence that both the settlor's intent and the trust's written terms were negatively affected by a mistake



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Judicial Reformation

- Requirement: Petitioner must present clear and convincing evidence that both the settlor's intent and the trust's written terms were negatively affected by a mistake
- Mistakes can include misunderstandings, incorrect assumptions, or clerical/scrivener's errors



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Judicial Reformation

- In general a mistake has to relate to a condition that was present when the trust was created



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Judicial Reformation

- In general a mistake has to relate to a condition that was present when the trust was created
 - Courts will not grant reformation in cases where circumstances such a financial situations change subsequent to the execution of the trust



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Trust Decanting

- What Is it?



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Trust Decanting

- What Is it?
 - The act of the Trustee to invade the principal of the trust (the trust's assets) and to appoint the assets to a new trust



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Trust Decanting

- Requirements for the Replacement Trust



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Trust Decanting

- Requirements for the Replacement Trust
 - The beneficiaries must only include beneficiaries of the original trust



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Trust Decanting

- Requirements for the Replacement Trust
 - The beneficiaries must only include beneficiaries of the original trust
 - The replacement trust cannot reduce the vested interest of any beneficiary



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Trust Decanting

- What can the Replacement Trust change?

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Trust Decanting

- What can the Replacement Trust change? Fla. Stat. § 736.04117(2)(b):
 1. Retain a power of appointment granted in the first trust;
 2. Omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;
 3. Create or modify a power of appointment if the power holder is a current beneficiary of the first trust;
 4. Create or modify a power of appointment if the power holder is a beneficiary of the first trust who is not a current beneficiary, but the exercise of the power of appointment may take effect only after the power holder becomes, or would have become if then living, a current beneficiary of the first trust; and
 5. Extend the term of the second trust beyond the term of the first trust.

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Trust Decanting

- Notice Requirements

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Trust Decanting

- Notice Requirements
 - Must be provided to all beneficiaries, other Trustees, and any individual with the power to remove Trustees at least 60 days prior to exercise of power to decant

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Trust Decanting

- Notice Requirements
 - Must be provided to all beneficiaries, other Trustees, and any individual with the power to remove Trustees at least 60 days prior to exercise of power to decant
 - Notice must include an explanation of the decanting, and provide copies of both the original trust and the proposed replacement trust

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Trust Decanting

- Notice Requirements
 - Must be provided to all beneficiaries, other Trustees, and any individual with the power to remove Trustees at least 60 days prior to exercise of power to decant
 - Notice must include an explanation of the decanting, and provide copies of both the original trust and the proposed replacement trust
 - A beneficiary can waive his/her right to receive notice

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Illustration: Harell v. Badger, 171 So. 3d 764



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Tax Consequences: When Trust's Shouldn't be Modified

- Est. of Anenberg v. Commissioner, 162 T.C. 199 (2024)
- McDougall v. Commissioner, 163 T.C. No.5 (2024)



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Important Considerations for Trust Modification

- What was the testamentary intent of the settlor?



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Important Considerations for Trust Modification

- What was the testamentary intent of the settlor?
- Once a Tool is chosen from the Toolbelt, what are the statutory requirements for its proper use?



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Important Considerations for Trust Modification

- What was the testamentary intent of the settlor?
- Once a Tool is chosen from the Toolbelt, what are the statutory requirements for its proper use?
 - Procedural Requirements?



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Important Considerations for Trust Modification

- What was the testamentary intent of the settlor?
- Once a Tool is chosen from the Toolbelt, what are the statutory requirements for its proper use?
 - Procedural Requirements?
 - Limitations?



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Important Considerations for Trust Modification

- What was the testamentary intent of the settlor?
- Once a Tool is chosen from the Toolbelt, what are the statutory requirements for its proper use?
 - Procedural Requirements?
 - Limitations?
- If everything is done properly, what consequences will result post-modification



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- Questions?



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