
IRREVOCABLE NO MORE: MODIFYING IRREVOCABLE TRUSTS UNDER THE MARYLAND TRUST ACT

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As estate planning attorneys well know, the days of preparing estate plans that are intended to be set in stone are long gone. Indeed, the term “irrevocable trust” is really a misnomer under current Maryland law; while the settlor cannot change it unilaterally, if the required parties agree and the terms are legally compliant, an irrevocable trust can be modified. Although Maryland Courts permitted modification under common law,¹ the Maryland Trust Act (the “MTA”)² has codified the circumstances in which an irrevocable trust can be modified not only by the Court,³ but also by private agreement amongst interested persons.⁴

Judicial Modification

The statutory bases for modification of an irrevocable trust are fairly straightforward in concept. Under § 14.5-410, a noncharitable trust can be modified with the consent of all beneficiaries and the trustee, so long as the court concludes that modification is not inconsistent with a material purpose of the trust. Pretty simple, right? Maybe not when it comes to determining the material purpose of the trust, as Maryland case law provides limited guidance.⁵

The Comment to Restatement (3d) of Trusts § 65 (2003), relating to a court’s termination or modification of a trust with consent of the beneficiaries, provides some helpful guidance:

Material purposes are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to a beneficiary’s management skills, judgment, or level of maturity. Thus, a

court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple intended beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose.

Thankfully, when seeking modification pursuant to § 14.5-410, the court is charged with assessing whether the proposed modification violates a material purpose of the trust.

What if you do not have uniform agreement amongst the beneficiaries and trustee for the proposed modification? In that case, the court can approve the modification if it concludes that the trust could have been modified in the fashion proposed (had all of the beneficiaries agreed) and that the non-consenting beneficiary’s interests will be adequately protected.⁶ Notably, by its terms, § 14.5-410(d) provides an avenue for modification when there is not full agreement amongst the *beneficiaries*, but it is silent on whether it can also provide a remedy if all of the beneficiaries agree to the proposed modification and the trustee is the outlier.

The MTA also provides opportunities for court-ordered modification of administrative and dispositive terms of irrevocable trusts if it is needed to further the purpose of the trust, but the circumstances were not accounted for by the settlor.⁷ The court may also modify administrative terms of a trust if modification will avoid waste or impracticality in the trust’s continued administration.⁸ Finally, the court may modify the terms of a trust to achieve the tax objectives of the settlor.⁹

Nonjudicial Modification

Where things become more interesting is when “interested persons” (no pun intended) enter into binding contracts known as nonjudicial settlement agreements (“NJSAs”) to modify the terms of an irrevocable trust.¹⁰

¹ See *From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church*, 370 Md. 152, 184 (2002) (holding that a trust may be modified with the beneficiaries’ consent); *In re Trust of Lane*, 323 Md. 188, 193 (1991) (holding that a trust could be modified rather than terminated with beneficiaries’ consent); *Probasco v. Clark*, 58 Md. App. 683, 687-88 (1984) (holding that the court may reform a trust to best effectuate the settlor’s intent); *Shriners Hosps. for Crippled Children v. Md. Nat’l Bank*, 270 Md. 564, 582 (1973) (holding that trustees cannot alter beneficiaries’ interest without their consent).

² Md. Code Ann., Estates and Trusts § 14.5-101 *et seq.* All statutory citations in this article are to the Estates & Trusts Article of the Maryland Annotated Code.

³ See §§ 14.5-410, 14.5-411, 14.5-413 & 14.5-414.

⁴ See § 14.5-111.

⁵ See *Grueff v. Vito*, 229 Md. App. 353, 367-68 (2016) (explaining that the court will look for the settlor’s intent and provisions of a trust instrument in constructing the purpose of a trust); *Convention of Protestant Episcopal Church of the Diocese of Washington v. PNC Bank, N.A.*, 802 F. Supp. 2d 664, 669-70 (D. Md. 2011) (opining that a spendthrift provision, alone, did not establish a material purpose to prevent trust termination); *Probasco v. Clark*, 58 Md. App. 683, 687-88 (1984) (citing that consistency with settlor’s intention is key in modifying or terminating trusts). But see *In re Trust of Lane*, 323 Md. 188, 193 (1991) (holding that spendthrift trusts may not be terminated as contrary to intention of the grantor); *Mahan v. Mahan*, 320 Md. 262, 266-67 (1990) (holding that spendthrift provision prevented trust’s termination); *Kirkland v. Mercantile-Safe Deposit & Trust Co. of Baltimore*, 218 Md. 17, 23 (1958) (holding that spendthrift provisions constitutes material purpose). Thankfully, § 14.5-410(b) resolves the conflict over the materiality of spendthrift provisions.

⁶ See § 14.5-410(d).

⁷ See § 14.5-411(a).

⁸ See § 14.5-411(b).

⁹ See § 14.5-414.

¹⁰ The drafters of the Uniform Trust Code, upon which the MTA is based, did not attempt to precisely define the “interested persons” whose consent is required to obtain a binding settlement because of the great variety of matters to which a nonjudicial settlement may be applied. See Unif. Trust Code § 111, comment (2010).

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Section 14.5-111 of the MTA defines “interested person” as a person whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court. Unfortunately, due to the complexity of many trust instruments as well as the court’s authority to modify a trust with fewer than all of the beneficiaries, this definition does not always describe a clearly defined group.

The Maryland Rules provide additional guidance with respect to a trust over which the court has assumed jurisdiction. In Maryland Rule 10-103(f), “interested person” is defined to mean a current income beneficiary of the trust, a trustee and co-trustee of the trust, the settlor of the trust, and in the case of an interested person who is a minor or disabled person, a fiduciary, parent, or other person acting on his or her behalf. Returning to the MTA, § 14.5-103 defines “beneficiary” as a person that: (1) has a present or future beneficial interest in a trust, vested or contingent; or (2) in a capacity other than that of a trustee, holds a power of appointment over trust property.” Further, the term “qualified beneficiary” refers to a beneficiary that on the date the qualification is determined: (i) is a distributee or permissible distributee of trust income or principal; (ii) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in item (i) of this paragraph terminated on that date without causing the trust to terminate; or (iii) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date and no power of appointment was exercised.

Whether the interested persons, beneficiaries, qualified beneficiaries, or others are necessary parties to the NJSA depends on the issues addressed by the agreement and the particular facts and circumstances of the matter. Accordingly, there is no “one size fits all” answer for determining who must participate to create a legally binding NJSA.

Like court ordered modifications under § 14.5-410, modifications through a NJSA are “valid only to the extent the settlement does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under [the MTA] or other applicable law.”¹¹ The rationale for this language is to ensure that parties are not trying to do by agreement what a court could not do through a formal order.¹²

Similar to seeking modification under § 14.5-410, when entering into NJSAs practitioners must inquire as to the material purpose(s) of the irrevocable trust. Given that the agreement is informal and typically prepared without court

¹¹ See § 14.5-111(c).

¹² See Unif. Trust Code § 111, comment (2010).

involvement, these efforts should include scrutinizing the trust instrument and reviewing case law on what constitutes a “material purpose.” Taking it one step further, this may even include speaking with the scrivener of the instrument.

Helpfully, the MTA gives some guidance as to the matters that can be resolved by NJSA. These matters include:

1. The interpretation or construction of the terms of the trust;
2. The approval of a report or accounting of a trustee;
3. Direction to a trustee to refrain from performing a particular act or the grant to a trustee of a necessary or desirable power;
4. The resignation or appointment of a trustee and the determination of the compensation of a trustee;
5. Transfer of the principal place of administration of a trust; and
6. Liability of a trustee for an action relating to the trust.

These categories are non-exhaustive and fairly broad, presenting opportunities for creative practitioners. For example, can a NJSA be used to modify distributive provisions in a trust in order to resolve a dispute over the interpretation or construction of the trust’s terms? The answer to that question really depends on whether the distributive provisions are clearly a material purpose of the trust and who is willing to sign the agreement.

When in doubt, the parties to the NJSA can rely upon the court and seek a formal determination of whether the agreement contains terms that could have been properly approved.¹³ This inquiry necessarily entails a determination of whether the modification violates a material purpose of the trust.¹⁴ Although there is practical appeal to using a NJSA to modify a trust, judicial oversight of the agreed upon terms may provide a comforting stamp of approval for the fiduciaries and practitioners.

Modification of “Charitable” Trusts

Under the MTA, charitable trusts present a unique problem as modification under § 14.5-410 is limited to “noncharitable irrevocable trust[s]” and interested persons can agree only to modifications through a NJSA that could be approved by the court. The MTA broadly defines a “charitable trust” as one in which a trust, or portion of a trust, was created for a charitable purpose.¹⁵ The definition of “charitable purpose” is tied to the Statute of Charitable Uses, which lists purposes and activities commonly accepted as beneficial to society.¹⁶

To be a charitable trust, the trust, or a portion of the trust,

¹³ Parties can also seek a determination that representation under § 14.5-301 *et seq.* was adequate.

¹⁴ See § 14.5-410(a).

¹⁵ See § 14.5-103(e).

¹⁶ The Restatement summarizes the Statute as charitable purposes which advance or promote education, health, religion, poverty relief, government and/or municipalities. See Restatement (Third) of Trusts § 28.

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must have been *created* for a charitable purpose. While the definition of “charitable trust” fails to qualify or quantify the extent of a charitable purpose, in practice the purpose of a trust as charitable is usually clear. Such is the case with charitable remainder or charitable lead trusts, or even charitable foundations created as trusts. On the other hand, when a trust contains a charitable beneficiary, or a general power that allows a trustee to make charitable contributions, it is less likely that the trust itself was created for a charitable purpose.

The use of NJSAs can be especially complicated when charitable beneficiaries are involved, as there is no clearly defined point at which an interest is too remote for the trust’s purpose to be considered charitable. Moreover, identification of the necessary parties to a NJSA may be difficult if the trust includes a charitable intention without naming specific beneficiaries.

If it is determined that the trust is charitable, practitioners should look to Subtitle 3 of the Estates and Trusts Article in addition to the MTA. Specifically, § 14-302 codifies the doctrine of *cy pres* and allows the court to order administration of a charitable trust “as nearly as possible to fulfill the general charitable intention of the settlor” when the charitable purpose cannot be carried out because it is

illegal, impossible or impracticable.¹⁷ Additionally, § 14-304 permits modification of a charitable trust to comply with certain provisions of the Internal Revenue Code. The common element of these provisions is that modification must be in line with the intention of the settlor. Since identification of a charitable purpose often entails a judgment call, cautious practitioners may want the added layer of judicial oversight when modifying these types of trusts or refrain from changing the charitable portion of the trust.

Conclusion

Modification of irrevocable trusts – even those with charitable beneficiaries – is provided for under the MTA. When seeking to modify, it is important to identify who must agree and think carefully about the material purpose of the trust, including whether all or part of the trust was created for a charitable purpose. If, after a thorough assessment, you determine that you have the requisite parties and the trust was not created for a charitable purpose, then the MTA provides many options for modification, including the permitted use of NJSAs. If all or part of the trust was created for a charitable purpose, your statutory bases for modification are more limited under the MTA, but include the use of NJSAs provided there is statutory support for the modification.

¹⁷ See § 14-302(a).



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