Irrevocable Trust? A Discussion on Modification and its Implications

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1

Methods of Modification

- Consent
  - Nonjudicial Settlement Agreement
  - Judicial Modification or Termination
- Nonconsent
  - Merger – Trustee Directed
  - Judicial Intervention (Ineffective, Uneconomic, Mistake, Tax Objectives) – Interested Parties
  - Decanting – Trustee
  - Trust Protector

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2

Comparison of the States – Nonjudicial Settlement

	North Dakota N.D.C.C. § 59-09-11	Minnesota Minn. Stat. § 501C.0111	South Dakota S.D.C.L. ▪ 55-3-24
Scope of Agreement	Any matter involving a trust	Any matter involving a trust	Any matter involving a trust
Who Must Enter Agreement	Interested persons: Trustee, all beneficiaries (present or future, vested or contingent or holds a power of appointment)	Interested persons: Trustee, all beneficiaries (present or future, vested or contingent or holds a power of appointment)	All beneficiaries and including the trustor if the modification/termination is necessary to carry out a material purpose of the trust
Material Purpose Limitation	Agreement must not violate material purpose	Agreement must not violate material purpose	Not important if beneficiaries and trustor all consent. Without trustor, modification/termination must carry out a material purpose
Spendthrift Provision	Presumed material purpose	Not specifically addressed	Not specifically addressed
Court Approval Required	No (optional review available at the request of interested person)	No (optional review available at the request of interested person)	No (optional review available at the request of trustor, trustee or beneficiary § 55-3-25)
Notice Requirement	None specified by statute	None specified by statute	30 days written notice to fiduciaries, unless waived

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3

Comparison of the States – Merger

	North Dakota N.D.C.C. ▪ 59-12-17	Minnesota Minn. Stat. ▪ 501C.0417	South Dakota S.D.C.L. ▪ 55-3-29
Statutory Authority	Trustee may combine or divide trusts after notice to qualified beneficiaries	Trustee may combine or divide trusts after notice to qualified beneficiaries	Trustee may combine or divide trusts without court approval (unless trust terms say otherwise)
Notice to Beneficiaries Required	Yes — notice to qualified beneficiaries is expressly required.	Yes — notice to qualified beneficiaries is expressly required	Not expressly required in statute (but court petition possible by beneficiaries)
Standard for Combination / Merger	Combination cannot impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust AND Beneficiaries' interests in resulting trust must be substantially the same as before combination	Combination cannot impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust	Combination cannot impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust
Division of Trusts Permitted	Yes, same standard for Merger	Yes; same standard as Merger	Yes, same standard as Merger
Authority to Set Surviving Terms After Merger	Trustee determines controlling terms of combined trust	Statute silent; governed by trust code and trust instruments	Statute silent, but Court may resolve inconsistencies if trust instruments conflict

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4

Comparison of the States – Consent and Court

	North Dakota N.D.C.C. ▪▪ -12-10-16 (410-411)	Minnesota Minn. Stat. ▪▪ 01C.0410-0411	South Dakota S.D.C.L. ▪▪ -3-24-25
Types of Trusts	Describes all types of trusts but this table will focus only on noncharitable irrevocable trusts	Noncharitable irrevocable trusts	Noncharitable irrevocable trusts
Nonjudicial Consent Required	All beneficiaries to terminate if the trust does not achieve any material purpose. All beneficiaries to modify if modification is not inconsistent with a material purpose	All beneficiaries to terminate if the trust does not achieve any material purpose. All beneficiaries to modify if modification is not inconsistent with a material purpose. Add Settlor if modification is inconsistent with material purpose.	All beneficiaries to terminate or modify if the trust is not necessary to carry out a material purpose and including the trustor if the trust is necessary to carry out a material purpose.
Less than Unanimous Beneficiary Consent	Court may approve modification or termination if it could have been approved with unanimity and non-consenting interests are adequately protected	Court may approve if it would have been allowed with unanimity and non-consenting beneficiaries are adequately protected	Court may approve if the rights or interests of the beneficiaries who do not consent are not significantly impaired or adversely affected.
Court Involvement Required	Yes – petition brought by trustee or beneficiary	Yes – petition brought by trustee or beneficiary or settlor	No - Not required if statutory consent and notice requirements are met; judicial action optional

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5

Comparison of the States – Judicial Intervention

	North Dakota N.D.C.C. ▪▪ -12-12–16	Minnesota Minn. Stat. ▪▪ 01C.0412–0416	South Dakota S.D.C.L. ▪▪ -3-26–28
Unanticipated Circumstances / Ineffective Administration	Court may modify or terminate if unanticipated circumstances make modification necessary to further the purposes of the trust, consistent with settlor's probable intent	Court may modify or terminate if unanticipated circumstances make modification necessary to further the purposes of the trust, consistent with settlor's probable intent	Court may modify or terminate if, because of circumstances not anticipated, modification or termination would substantially further the trust purposes
Uneconomic Trust	Trustee alone if Trust Property < $100k. Court may modify or terminate if trust value is insufficient to justify administration costs	Trustee alone if Trust Property < $150k. Court may modify or terminate if trust value is insufficient to justify administration costs	Trustee alone if Trust Property < $150k. Court may modify or terminate if trust value is insufficient to justify administration costs
Reformation to Correct Mistake	Court may reform trust to conform to settlor's intent proven by clear and convincing evidence if trust terms are affected by mistake of fact or law	Court may reform trust to conform to settlor's intent proven by clear and convincing evidence if trust terms are affected by mistake of fact or law	Court may reform trust to correct mistake of law or fact or scrivener's error, consistent with settlor's intent.
Modification to Achieve Tax Objectives	Court may modify trust to achieve settlor's tax objectives in a manner not contrary to the settlor's probable intention	Court may modify trust to achieve settlor's tax objectives in a manner not contrary to the settlor's probable intention	Court may modify trust to achieve settlor's tax objectives in a manner not contrary to the settlor's probable intention

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6

Comparison of the States – Decanting

	North Dakota N.D.C.C. § 59-16.1	Minnesota Minn. Stat. § 502.851	South Dakota S.D.C.L. §§ 55-3-15–21
Who May Decant?	"Authorized trustee" = trustee with authority to pay trust principal for a beneficiary other than a trustee/settlor or trustee/beneficiary (simplified)	"Authorized trustee" = trustee with authority to pay trust principal for a beneficiary other than a trustee/settlor or trustee/beneficiary (simplified)	Trustee with discretion to distribute income or principal
Role of Trustee Discretion	Central; scope depends on whether discretion is "unlimited"	Central; scope depends on whether discretion is "unlimited"	Central; broad discretion strongly favored
Can Trustee Be Settlor or Mandatory Beneficiary?	Generally, no	Generally, no	Restricted trustee rules apply (Restricted trustee = trustee/beneficiary or trustee who can be replaced by beneficiary
Court Approval Required?	No (trustee may seek court involvement if desired)	No (trustee may seek court involvement if desired)	No (trustee may seek court involvement if desired)
Notice to Beneficiaries Required?	Yes – minimum 60 days unless agreed to earlier or waived	Yes – minimum 60 days unless agreed to earlier or waived	Discretionary; no minimum days specified
Ability to Add New Beneficiaries	I don't think so.	I don't think so.	No
Ability to Change Distribution Terms	Unlimited Discretion = yes Without Unlimited Discretion = no	Unlimited Discretion = yes Without Unlimited Discretion = no	Yes, subject to restrictions and whether Trustee is a Restricted trustee

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7

Comparison of the States – Trust Protector

	North Dakota N.D.C.C. § 59-16.2-05	Minnesota Minn. Stat. § 501C.0808	South Dakota S.D.C.L. § 55-1B-6
Statutory Recognition of "Trust Protector"	Expressly recognized as a "directing party" within directed trust framework	Expressly recognized as a "directing party" within directed trust framework	Expressly recognized as part of directed trust statute
Standard of Discretion	Powers may be exercised or not exercised in the sole and absolute discretion of the trust protector and are binding on all persons	Powers may be exercised or not exercised in the sole and absolute discretion of the trust protector and are binding on all persons	Powers may be exercised or not exercised in the sole and absolute discretion of the trust protector, in the best interests of the trust, and are binding on all persons
Fiduciary Status	Unclear, sole discretion vs directing party – instrument should provide	By default, not a fiduciary unless governing instrument provides otherwise	By default, not a fiduciary unless governing instrument provides otherwise
Controls	• amend trust instrument; • increase, decrease, or modify beneficiary interests; • powers of appointment; • remove and appoint trustees, advisors, committee members, and successors; • veto or direct trust distributions; • terminate trust and direct distribution consistent with trust purposes; • change situs and governing law; • interpret trust terms and advise trustee regarding beneficiaries; • appoint successor trust protectors	• amend trust instrument;* • change beneficial interests;* • amend powers of appointment;* • appoint or remove trustees or fiduciaries;* • direct, consent to, or veto actions;* • terminate trust;* • change situs / governing law;* • interpret trust terms and advise trustee;* • appoint successor trust protectors*	• amend or modify trust instrument; • increase or decrease interests of beneficiaries; • add beneficiaries from classes; • powers of appointment permitted but no expansion beyond defined classes; • remove and appoint trustees, fiduciaries, advisors, committee members, and representatives; • veto or direct distributions; • terminate trust;* • change situs and governing law; • interpret trust terms and advise trustee;* • appoint successor trust protectors
Selection of Trust Protector	Independent Party, not Settlor, Trustee, Beneficiary, or related to or subordinate to the Settlor.	Independent Party, not Settlor, Trustee, Beneficiary, or related to or subordinate to the Settlor.	Independent Party, not Settlor, Trustee, Beneficiary, or related to or subordinate to the Settlor.

*if authority is granted in the doucment

8

What to do?

- Consent
  - Does a consent method go far enough?
  - Will the parties actually consent?
  - Limiting exposure/liability?
  - Is a court filing detrimental?
  - Gift Tax Consequences?
- Nonconsent
  - Will the document allow it?
  - Will Judicial Intervention go far enough?
  - Will Merger go far enough?

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9

Thank you for your time and attention today!

Contact

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10

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10