

**IS THIS IRREVOCABLE TRUST REALLY IRREVOCABLE?
HOW TO FIX POORLY DRAFTED OR INEFFECTIVE TRUSTS**

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I. INTRODUCTION

- A. The Challenge. Many old irrevocable trusts (i.e., testamentary trusts, inter vivos irrevocable trusts and revocable trusts which become irrevocable upon the grantor's death) become problematical in light of conditions that arise after the trusts have been executed. Unless the governing instrument contains provisions that allow for changes, altering the trust to meet new circumstances can be difficult.
- B. Particular Areas of Concern
1. Change in Circumstances. Over time, the grantor's family situation may change due to economic circumstances, family relationships, or changes in tax laws.
 2. Trusteeship. Over time the initially designated trustee may have become unacceptable to the beneficiaries or may no longer be suitable. Many old documents do not contain trustee removal powers, so changing the trusteeship provisions is a challenge.
 3. Investment provisions. The trust governing instrument may contain prohibitions against certain types of investments or may mandate certain types of investments, which are no longer advisable in light of current market conditions and investment philosophies. Such prohibitions or mandates may not produce a reasonable level of income, a reasonable rate of overall appreciation in the portfolio, or may conflict with modern investment standards for risk, diversification, and asset allocation.
 4. Dispositive provisions. The trust governing instrument may contain provisions regarding discretionary income and principal distributions that result in a failure to provide beneficiaries with a reasonable cash flow under current economic conditions. This problem arises particularly in a situation in which the trust mandates distribution of trust accounting income only, and does not contain the more standard provisions we see today allowing for discretionary principal distributions in addition to mandatory or discretionary income distributions.
 5. Scrivener's Errors. A draftsman's errors, including inappropriate tax provisions, may defeat the intended tax treatment or other intended results of the trust.

Dealing with these types of issues can be a challenge to the practitioner faced with an outdated governing instrument.

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