35th Annual

Tax Symposium

IRREVOCABLE(ISH): CHANGING AN "UNCHANGEABLE" TRUST

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OVERVIEW

- What is "irrevocable"?
- Why would someone create an irrevocable trust?



OVERVIEW

- High gift and estate tax exemptions ($15M) have made many irrevocable trusts unnecessary
- Even if the trust is still needed, its irrevocable nature can render it unsuitable for current circumstances
- But we cannot get rid of it or even revise it because it is irrevocable, right?

OVERVIEW

- The trust agreement may contain built-in tools for changing or terminating the trust
- Michigan law may provide options when the trust agreement does not cooperate



READ THE TRUST AGREEMENT!

- You must read the trust agreement
- Then, you should read it again



READ THE TRUST AGREEMENT!

- Does the trustee have the power to amend?



Administrative powers



Tax provisions or changes in tax law



Correcting errors



Resolving ambiguity

READ THE TRUST AGREEMENT!

- Is there a trustee appointer?
  - Can a trustee be removed? By whom?
  - Can a successor trustee be appointed? By whom?
  - Are there limitations?



READ THE TRUST AGREEMENT!

- Is there a trust protector?
- A trust protector often has "superpowers"
  - Add or remove beneficiaries
  - Change distribution provisions
  - Grant or modify powers of appointment
  - Change trust situs



MICHIGAN LAW MAY HELP

- What if the trust agreement provides no solution?
- Michigan law is helpful, but it can be somewhat limited



MICHIGAN LAW MAY HELP

- MCL 700.7111
  - Can be used for interpretation, approval of accountings, and trustee appointment, compensation, and liability
  - No court involvement required
  - CANNOT be used to terminate or “modify” a trust

MICHIGAN LAW MAY HELP

- MCL 700.7411
  - Can be used to terminate or modify a trust
  - Requires probate court approval



MICHIGAN LAW MAY HELP

- Decanting – MCL 700.7820a
  - If the trust has a “discretionary trust provision,” the trustee may distribute trust assets to a second trust
  - Beneficial interests CANNOT be materially changed

MICHIGAN LAW MAY HELP

- Decanting – MCL 556.115a
  - A trustee with a discretionary power may appoint trust assets to a second trust
  - The power cannot be limited by an ascertainable standard (best interests, welfare, comfort, happiness are OK)
  - Beneficial interests CAN be changed

MICHIGAN LAW MAY HELP

- Decanting generally:
  - Decanting must be consistent with the trustee's fiduciary duties to all beneficiaries
  - Tax consequences are unclear



CONCLUSION

- If you see an irrevocable trust, ask:
  - Is it still needed?
  - Does it still do what the client wants?



CONCLUSION

- Read the trust agreement for provisions relating to trustee amendment powers, trustee appointers, trust protectors, and powers of appointment
- Analyze Michigan law
- Do not be afraid to petition the probate court

CONCLUSION

- It is always a good idea to consult a Michigan lawyer experienced in trust drafting and administration
- Maddin Hauser has extensive experience in this area



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QUESTIONS

Submit questions for presenters

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THANK YOU



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