



## Are Irrevocable Trusts Truly Irrevocable? – It Depends

The word “irrevocable” sounds so formal and final because all of us want freedom and the ability to change our minds. Something that is irrevocable takes away that freedom. According to various dictionaries, the word “irrevocable” means the inability to change; unalterable; final; unable to revoke.

Fortunately, in the world of estate planning, particularly in today’s modern times, irrevocable does not truly mean irrevocable. And, as a result, wealthy individuals and families who may potentially have estate tax issues, should not fear the creation of estate plans that include the use of irrevocable trusts. Individuals and families who had irrevocable trusts created many years ago may wish to have those trusts reviewed to determine if they still meet current goals and objectives. If not, they can discuss with their estate planning attorney the possibility of changing those irrevocable trusts.

The person creating the trust is the “grantor” or “trustor.” The people for whom the trust was intended to benefit are the “beneficiaries.” The person or organization designated to administer the terms of the trust is the “trustee.” There may be one or more beneficiaries and trustees. In addition to these fundamental roles which every trust has, some trusts may also have other individuals or organizations empowered to perform other duties with respect to the trust (e.g., investment committee, distribution committee, trust protector, etc.).

Some common irrevocable trusts that you may have heard of, or had implemented in your own plan, include Irrevocable Life Insurance Trusts (ILITs), Spousal Lifetime Access Trusts (SLATs) and Dynasty Trusts. ILITs are designed to own life insurance so that the death proceeds are not included in the grantor’s taxable estate at death. SLATs are used by one spouse to reduce the taxable estate for both spouses, but still provide benefits to the other spouse. Dynasty Trusts are designed to take advantage of the Generation Skipping Transfer (GST) Tax exemption and benefit multiple generations of family members. These trusts are commonly funded by the grantor using gifts. These gifts may take advantage of the annual gift tax exclusion and/or the GST and lifetime gift tax exemption amounts.

After the creation of the trust however, over time, circumstances may change, such as family dynamics, federal or state tax laws, spendthrift issues, creditor protection issues, distribution objectives, and more. The trust as originally drafted, may no longer meet the needs and objectives of the grantor or the family. Changes to the trust may be desired and beneficial.

There are several ways to build flexibility into new trusts. Here are a few of the more common methods.

- A trust may have provisions allowing the trustee broad authority to make or withhold distributions. That allows the trustee to react to changing financial circumstances of the trust beneficiaries (e.g., spendthrift or creditor issues) or to react to negative behavior (e.g., issues with substance abuse or gambling problems). The trust can also encourage positive behavior or react to financial windfalls.
- The trust document may allow the trustee to change the situs of the trust and/or governing law. For example, a certain state may have more favorable tax laws or creditor protection laws than the state in which the trust was created. Allowing the trustee to change the situs of the trust to this other state or having this other state's laws govern the trust may be beneficial.
- A trust provision may be included to grant a beneficiary with a limited testamentary power of appointment. This allows the beneficiary to potentially alter the terms of trust distributions to a specified class of beneficiaries.
- The trust may include a Trust Protector. This is an independent party with the power to do several things such as reacting to changes in the law by amending the trust, alter administrative powers of the trustee, and creating committees to help the trustee in matters of investment of trust assets or distributions to beneficiaries. The Trust Protector may even have the power to remove and replace the trustee. Of course, the powers of the Trust Protector are limited to the state laws governing that trust.

Finally, in the case of existing trusts that were not created with flexibility in mind, the trust can be "decanted" into a new trust. The term was borrowed from the world of fine wines. Often, when opening a bottle of fine wine, it is desirable to decant the wine by pouring it into another vessel to aerate the wine and filter out sediment. Trust decanting is the act of pouring over trust assets into a new trust with modified provisions and perhaps, filtering out unwanted provisions or consequences.

For example, an ILIT is a common estate planning strategy to own life insurance to provide liquidity to help pay estate taxes and to provide a legacy to heirs. In past years, ILITs and other trusts often contained provisions to distribute its assets to beneficiaries at certain ages (e.g., 33% of trust assets at age 30, 50% of balance at age 35, and the remaining balance at age 40). Today, given concerns about spendthrifts, creditors, substance abuse, potential divorces and other reasons, the grantor may wish to decant the existing ILIT into a new ILIT. Instead of mandatory distributions, the new ILIT may provide the trustee with broad powers to make or withhold distributions. Decanting the ILIT may also allow the new trust to maintain the original life insurance without the need for a new policy and underwriting.

Trust decanting has existed in common law for quite some time. Increasingly, states are adopting new statutes to authorize decanting. While most states allow for trust decanting, each state's laws vary in terms of when a trust can or cannot decant, whether the provisions of the new trust would be allowed, and the possible tax consequences of doing so. Therefore, tax and legal advice must be sought before a trust is decanted.

## Conclusion

If you've been worrying about the implementation of irrevocable trusts in your estate plan, note that trusts can be created with provisions to provide flexibility to react to future changes in various situations. If you already had irrevocable trusts created years ago, it's time to have them reviewed against your goals and objectives. You may not have to resign yourself to these trusts because they are supposed to be irrevocable, particularly if the original reasons for having them created have changed.

### For More Information Contact:

**Contact your Security Mutual Life insurance advisor today to get the process started. Your advisor will assemble your team and coordinate with your attorney and tax professional to review your situation and to determine the plan and strategies that are appropriate for you and your family.**



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