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Special Needs Trust Modifications and Reformations

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Special Needs Trust Modifications and Reforms

By Renée C. Lovelace
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I. Why Modify a Trust? There are five basic reasons to modify a trust:

**There is a
Problem.**

**There may
be a
Problem.**

**To Get
Everyone's
Attention or
Focus.**

**To Satisfy a
Trustee or
Beneficiary.**

**Because It Is
Profitable and
Relatively
Easy to Do.**

Each of these reasons will be discussed further below. Prior to those discussions, consider the broad coverage of the Texas Trust Code for those who may seek to modify a trust. Also, consider that the most satisfactory *modification* of a trust may be the termination of that trust. Alternatively, other steps may be more economical and/or more effective than modifying a trust. Where a current trust or administration is unsatisfactory or is not cost-effective, consider:

- Modifying the trust
- Terminating the trust
- Diversifying by making distributions from the trust to an ABLE account
- Reforming the Will, if a Will creates an inadequate trust or no trust
- Decanting, if permitted under the trust terms
- Distributing broadly, if permitted under the trust terms
- Changing the trustee
- Reforming the trust (where there has been a drafting mistake)
- Using merger and division provisions in a trust
- Upgrading trust administration—alone or combined with any other step
- Other creative steps to improve the value of the trust to the beneficiary

II. Texas Trust Code Authority to Modify or Terminate a Trust. Texas courts have both statutory and common law authority to modify or terminate trusts. Primary statutes are Sections 112.054 and 115.001 of the Texas Trust Code. First, consider the language of Section 112.054:

Sec. 112.054. JUDICIAL MODIFICATION OR TERMINATION OF TRUSTS.

(a) On the petition of a trustee or a beneficiary, a court may order that the trustee be changed, that the terms of the trust be modified, that the trustee be directed or permitted to do acts that are not authorized or that are forbidden by the terms of the trust, that the trustee be prohibited from performing acts required by the terms of the trust, or that the trust be terminated in whole or in part, if:

(1) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill;

(2) because of circumstances not known to or anticipated by the settlor, the order will further the purposes of the trust;

(3) modification of administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or avoid impairment of the trust's administration;

(4) the order is necessary or appropriate to achieve the settlor's tax objectives and is not contrary to the settlor's intentions; or

(5) subject to Subsection (d):

(A) continuance of the trust is not necessary to achieve any material purpose of the trust; or

(B) the order is not inconsistent with a material purpose of the trust.

(b) The court shall exercise its discretion to order a modification or termination under Subsection (a) in the manner that conforms as nearly as possible to the probable intention of the settlor. The court shall consider spendthrift provisions as a factor in making its decision whether to modify or terminate, but the court is not precluded from exercising its discretion to modify or terminate solely because the trust is a spendthrift trust.

(c) The court may direct that an order described by Subsection (a)(4) has retroactive effect.

(d) The court may not take the action permitted by Subsection (a)(5) unless all beneficiaries of the trust have consented to the order or are deemed to have consented to the order. A minor, incapacitated, unborn, or unascertained beneficiary is deemed to have consented if a person representing the beneficiary's interest under Section 115.013(c) has consented or if a guardian ad litem appointed to represent the beneficiary's interest under Section 115.014 consents on the beneficiary's behalf.

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