

# **But I Thought It Was Irrevocable?**

## **How To Use Trust Modification Techniques To Modernize Trusts**

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**Michael M. Gordon** is a Director at the Wilmington law firm of Gordon, Fournaris & Mammarella, P.A. He is a graduate of Fairfield University and the Catholic University of America, Columbus School of Law. He received his Masters of Law in Taxation from Villanova University School of Law in 2008 and is a member of the Delaware and Maryland Bar Associations.

Michael works with clients throughout the country in connection with their trust and estate planning.

Michael's practice focuses on how clients can achieve estate planning and tax benefits through the use of Delaware trusts. Michael routinely works with clients across the country to transfer the situs of trusts to Delaware and to modify those trusts to take advantage of Delaware's favorable trust law.

Michael's practice is unique in that although he does work with clients locally to assist them in the construction of their estate plans he spends the majority of his time working with high net worth clients throughout the country, their advisors, and attorneys to assist them with Delaware-centric trust and estate planning. Michael advises his clients on complex federal wealth transfer techniques that can be accomplished through the use of Delaware trusts. Michael also assists clients throughout the country in connection with income tax planning through the use of Delaware trusts including Qualified Small Business Stock planning and state income tax planning.

Michael is recognized as one of the preeminent estate planning attorneys in the country. He is ranked by Chambers and Partners among the top attorneys in Delaware for Private Wealth Law. He is a fellow of the American College of Trust and Estate Counsel, a national organization of peer-selected lawyers and law professors who are at the top of their profession and committed to maintaining excellence in the field of trust and estate law. Michael routinely speaks at the top estate planning conferences and events throughout the country on trust and estate planning topics.



**MICHAELLE DiGRAZIA RAFFERTY** is a shareholder attorney in the law firm of Maupin, Cox & LeGoy, exclusively practicing in the areas of high net worth estate planning, taxation, administration of trusts and estates, and family trust company planning operations. Michaelle also practices in fiduciary related litigation, audit related matters, and provides expert witness services.

Michaelle has been admitted as a Fellow of the American College of Trust & Estate Counsel (ACTEC) where she serves as a Regent and the Nevada State Chair. Michaelle is a past Chair of the Nevada State Bar Probate & Trust Section where she served as an executive officer for the previous 8 years. She is a current Co-Chair of the Section's Legislative Committee for Nevada, including drafting and testifying on pending legislation before the Nevada legislature, and appearing before the Nevada Supreme Court on matters of trust and estate litigation.

She serves as the Court-appointed member of the Nevada Supreme Court's Bench-Bar Committee representing interests of trust and estate counsel. Michaelle is a founding and current Executive Officer for the Probate Bar Association of Washoe County, and has previously served as Executive Officer of the Washoe County Bar Association. She is also a long-standing member of the Northern Nevada Estate Planning Council, and is a frequent speaker and presenter for both national and state continuing education courses related to her areas of practice. Michaelle holds seven "Lawyer of the Year" designations from Best Lawyers, including for 2025 in planning and litigation. She is a Chambers Tier 1 designee for high net worth planning, the past Chair of Cambridge Forum's Fiduciary Litigation Forum and a planning committee member for Cambridge Forum's Private Wealth Forum. Michaelle represents diverse clientele including individuals, families, entities, private and commercial trust companies, university foundations, financial institutions, private and public foundations, family offices and private family trust companies. In her free time, Michaelle can be found skiing, hiking, running, biking, or kayaking in the Sierra Nevada mountains and lakes.

# INTRODUCTION

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# **Why Do Clients Want to Modernize Trusts and Typical Changes Made to Trusts**

## **A. Beneficial Provisions no Longer Work**

- **Family Changes**
- **Changes in Beneficiary's Life**

## **B. Outdated Administrative Provisions**

- **Fiduciaries**
- **Other Administrative Updates**

## **C. Outdated Tax Planning**

- **Income Tax**
- **GST & Estate Tax**

## **D. Other Reasons Why Trusts Become Stale**

- **Changes in the Law**
- **Drafting Errors**

# Strategies to Modernize and Modify Trusts

## A. Nonjudicial Settlement Agreements and Nonjudicial Modifications

- Overview of Modification
- Modification Under the Uniform Trust Code
- Judicial Modifications

## B. Decanting

- Overview of Decanting
- Requirements for Use of Decanting Statute

## C. Merger

- Overview of Merger
- Requirements for Use of Merger Statute

## D. Division

## E. Reformation

- Overview of Reformation
- Requirements for Reformation

# Protecting the Fiduciary in Trust Modifications

## A. Statute of Limitations

- Time Period
- Information Required to Trigger Statute
- Virtual Representation

## B. Release Agreements

- Consent, Release and Indemnity Agreements
- Tax Concerns

## C. Judicial Actions

- Petition for Instruction
- Judicial Accounting

# Potential Tax Consequences of Modernizing and Modifying Trusts

## A. Overview of IRS Action

## B. Income Tax Considerations

- Grantor Trust Issues
- Identity of the Settlor of the Second Trust
- DNI and Transfer Tax Attributed
- Recognition of Gain

## C. Gift and Estate Tax Considerations

- Beneficiary's Consent to Decanting
- Trustee/Beneficiary
- Marital Deduction Trusts
- Estate Tax
- The Delaware Tax Trap



# Potential Tax Consequences of Modernizing and Modifying Trusts

## D. GST Tax Considerations

- **GST Exempt Status of a Trust**
- **Decanting as the Exercise of a Limited Power of Appointment**
- **The “Discretionary Distribution” Safe Harbor for Grandfathered Trusts**
- **The “Trust Modification” Safe Harbor for Grandfathered Trusts**
- **Non-Grandfathered Trusts**
- **Effect of Loss of GST Exempt Status**

# CONCLUSION AND QUESTIONS

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