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A Powerful Tool: Modification or Termination of a Noncharitable Irrevocable Trust by Consent under Section 411(a) of the Uniform Trust Code

*Maureen L. O'Leary**

Section 411(a) of the Uniform Trust Code (“UTC”) is a powerful tool in an estate planner’s tool chest in jurisdictions where it has been adopted. Subsection (a) of section 411 can be used to resolve deficiencies found in irrevocable trusts, provided the settlor is alive and the settlor and all beneficiaries are in agreement regarding the resolution.

I. OVERVIEW OF SECTION 411(A)

Section 411(a) of the UTC is one of several sections of the UTC that allow irrevocable noncharitable trusts to be modified or terminated for various reasons.¹ A key feature that differentiates section 411(a) from most of the other UTC sections that allow modification or termination is that section 411(a) requires no or limited court approval of the modification or termination.²

II. SUBSECTION (A) COMPARED TO SUBSECTION (B)

Subsection (a) of section 411 describes the circumstances in which a noncharitable irrevocable trust may be modified or terminated by the

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¹ See UNIF. TRUST CODE § 411(a) (UNIF. LAW COMM’N 2010). Other UTC sections allowing for modification or termination of certain irrevocable trusts include section 410 (Modification or Termination of Trust; Proceedings for Approval or Disapproval), section 411(b) (modification or termination permitted if the court concludes that “the continuance of the trust is not necessary to achieve any material purpose of the trust” or “modification is not inconsistent with a material purpose of the trust.”), section 412 (Modification or Termination because of Unanticipated Circumstances or Inability to Administer Trust Effectively), section 414 (Modification or Termination of Uneconomic Trust), section 415 (Reformation to Correct Mistakes), and section 416 (Modification to Achieve Settlor’s Tax Objectives).

² See *id.* Other ways an irrevocable noncharitable trust might also be modified or terminated without court approval include (1) by Trust Protector (if the Trust has a Trust Protector and such action is within the scope of the Trust Protector’s powers), or (2) pursuant to UTC section 414(b) (Modification or Termination of Uneconomic Trust). See also RESTATEMENT (THIRD) OF TRUSTS § 65 (AM. LAW INST. 2003).

consent of all beneficiaries *with* the concurrence of the settlor. Modification or termination under subsection (a) does not require a finding by a court that the action is consistent with a material purpose of the trust, provided the settlor and all beneficiaries consent to the action (the consent of the Trustee is not required).³

In contrast, subsection (b) of section 411 describes the circumstances in which a noncharitable irrevocable trust may be modified or terminated by the consent of all beneficiaries *without* the concurrence of the settlor. Unlike subsection (a), modification or termination under subsection (b) requires a court to conclude that the action is not inconsistent with a material purpose of the trust.

In other words, if a settlor is deceased, does not consent, or is unable to act and does not have an authorized agent to consent on his or her behalf, then subsection (b) of section 411 controls and court approval is required. However, if the settlor is alive and able to act or has an authorized agent to consent on his or her behalf, then subsection (a) of section 411 controls if the settlor (or the settlor's agent) is in agreement with all of the trust beneficiaries.

III. 2004 AMENDMENT CREATED OPTIONS

In 2004, subsection (a) of section 411 was amended. The 2004 amendment created options so every jurisdiction can choose how they want to address the modification or termination of noncharitable irrevocable trusts with the consent of all beneficiaries and the settlor. Accordingly, subsection (a) now provides the following options (or jurisdictions can adopt their own language):

Option 1: Omit subsection (a) of section 411. (As a result, the state's existing law controls the issue.)

Option 2: Enact the original version of the first sentence to subsection (a). This original version allows modification or termination with the consent of the settlor and all beneficiaries for any reason and without court approval. The exact language of this sentence is as follows: “[A *noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust.*]”

Option 3: Enact the alternate version of the first sentence to subsection (a), which requires court involvement to modify or

³ UNIF. TRUST CODE § 411(a); *see also id.* § 411 cmt. para. 4 (“Under this section, a trust may be modified or terminated over a trustee’s objection. However, pursuant to Section 410, the trustee has standing to object to a proposed termination or modification.”).

terminate a trust with the consent of the settlor and all beneficiaries. The exact language of this sentence is as follows: “[If, upon petition, the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, the court shall approve the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust.]”

Option 3 requires court involvement in the trust modification or termination even though the settlor and all beneficiaries consent, but it limits the court’s inquiry to finding that the settlor and all beneficiaries properly consented to the modification or termination. It does not require the court to make any determination regarding the substance of the action, such as whether the modification or termination is consistent with a material purpose of a trust.

The author, being a Wisconsin lawyer, is partial to the approach adopted by the Wisconsin Trust Code, which comes closest to Option 2 but has a slight twist. The Wisconsin Trust Code allows modification or termination of a noncharitable irrevocable trust “with or without court approval,” upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust.⁴ Thus, the Wisconsin Statutes allow the option of court approval if a party desires to seek it, but does not require court approval if the settlor and all beneficiaries consent.

IV. ARTICLE 3 OF THE UTC

Article 3 of the UTC (Representation) can apply to actions under section 411(a). For example, Article 3 may allow a representative to act on behalf of a settlor or a beneficiary when amending or terminating an irrevocable trust under section 411(a).

However, the Drafting Committee for the UTC recommends that all jurisdictions enact section 301(d).⁵ Subparagraph (d) of section 301 provides,

[(d) A settlor may not represent and bind a beneficiary under this [article] with respect to the termination or modification of a trust under Section 411(a).]

Section 301(d) is intended to eliminate the possibility of a trust being included in a settlor’s gross estate due to any ability the settlor might

⁴ WIS. STAT. § 701.0411(1) (2019).

⁵ UNIF. TRUST CODE § 411 cmt. para. 20.

have otherwise had to represent and bind a beneficiary with respect to a termination or modification of the trust.⁶

V. LIMITATIONS ON A SETTLOR'S AGENT

Section 411(a) limits an agent's ability to consent on behalf of a settlor for the purposes of subsection (a) in an effort to ensure that the subsection is only used in circumstances when the settlor personally consents or an agent is specifically authorized to consent on their behalf.⁷

More specifically, an agent may only exercise a settlor's power to consent to a trust's modification or termination as follows:

- Under a power of attorney, but only to the extent expressly authorized by the instrument; or
- By the settlor's conservator with the approval of the court supervising the conservatorship if an agent is not so authorized; or
- By the settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed.

VI. EFFECTIVE DATE

Section 411(a) includes an optional provision for an effective date. This provision reads as follows:

[This subsection does not apply to irrevocable trusts created before or to revocable trusts that become irrevocable before [the effective date of this [Code] [amendment].]]

This optional provision can be adopted by jurisdictions that prefer section 411(a) to only apply prospectively to "new trusts" (i.e. trusts that are created after or become irrevocable after the effective date).

⁶ *Id.* § 411 cmt. para. 19.

⁷ "Subsection (a) also addresses the authority of an agent, conservator, or guardian to act on a settlor's behalf. Consistent with Section 602 on revocation or modification of a revocable trust, the section assumes that a settlor, in granting an agent general authority, did not intend for the agent to have authority to consent to the termination or modification of a trust, authority that could be exercised to radically alter the settlor's estate plan. In order for an agent to validly consent to a termination or modification of the settlor's revocable trust, such authority must be expressly conveyed either in the power or in the terms of the trust." *Id.* § 411 cmt. para. 7.

VII. RELATIONSHIP WITH SUBSECTION (D) OF SECTION 411

Subsection (d) of section 411 addresses the disposition of the assets of a Trust that is terminated pursuant to subsection (a).⁸ Subsection (d) provides that upon such termination of a trust, “the trustee shall distribute the trust property as agreed by the beneficiaries.”

Even though the settlor has to consent to the termination of a trust pursuant to subsection (a), the settlor does not have to consent to how the trust property is distributed after trust termination. Only the beneficiaries must agree on how the trust property is to be distributed.

VIII. RELATIONSHIP WITH SUBSECTION (E) OF SECTION 411

If consent to a trust modification or termination cannot be obtained from all beneficiaries, subsection (e) of section 411 provides that a modification or termination may be approved by a court if the court is satisfied that “(1) if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and (2) the interests of a beneficiary who does not consent will be adequately protected.”

Failure to obtain consent from all beneficiaries will certainly make an action under subsection (a) more challenging. However, subsection (e) nevertheless preserves the possibility of proceeding with a trust modification or termination under section 411 even if, for example, a lone beneficiary refuses to consent to a reasonable proposal.

IX. CONCLUSION

Statutory authority to modify or terminate irrevocable trusts has become increasingly prevalent across the country as states adopt the UTC. If a settlor is alive and all beneficiaries agree with the settlor, subsection (a) of section 411 can be a powerful tool when modification or termination of an irrevocable noncharitable trust is desired, regardless of the nature of, or reason for, the change.

⁸ *Id.* § 411(d). Subsection (d) also applies to the disposition of the assets of a trust that is terminated pursuant to subsection (b) of section 411.

