

BOSTON BAR ASSOCIATION

Non-Judicial Settlement Agreements

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“How do we change that irrevocable trust you helped me create for my kids?”

- Prior to the enactment of the Massachusetts Uniform Trust Code (the “MUTC”) in 2012, the answer to this question would often be a time consuming and expensive court proceeding, even for the simplest of changes.

Overview

- Under the MUTC interested persons may enter into a binding non-judicial settlement agreement (“NJSA”) with respect to any matter involving a trust.
 - Parties: All interested parties must consent.
 - Terms: the NJSA must include terms and conditions that could be properly approved by the court under the MUTC or other applicable law.
 - A NJSA may not be used for an action otherwise illegal, or to terminate a trust in a manner not authorized by the MUTC.
 - If something could not be done with the court’s approval, then it cannot be done without the court’s approval either.
 - The NJSA may not modify a material purpose of the trust. G.L. c. 203E, § 111(c)
 - If the settlor is alive, he or she can verify that the issue resolved by the NJSA does not violate a material purpose of the trust.
 - If you are seeking to modify a material purpose of the trust it cannot be done by an NJSA. Instead, the modification must be done by a petition to the court under G.L. c. 203E, § 411(a) with the settlor’s consent.
- The NJSA option can simplify trust administration and encourages out-of-court resolution of disputes.

When Can You Use A Non-Judicial Settlement Agreement?

- Matters that may be resolved by a NJSA include:
 - (1) the interpretation or construction of the terms of a trust;
 - (2) the approval of a trustee’s report or accounting;
 - (3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;

(4) the resignation or appointment of a trustee and the determination of a trustee's compensation;

(5) transfer of a trust's principal place of administration; and

(6) liability of a trustee for an action relating to the trust.

G.L. c. 203E, § 111(d)

- Other matters that could be resolved by a NJSA, provided they do not violate a material purpose of a trust, might include:
 - to engage in an originally unanticipated transaction;
 - to deal with new rules imposed by financial institutions;
 - to update trustee succession language; and
 - to change the dispositive language of a trust to take into account a disease/addiction/mental illness developed by a beneficiary.
 - To terminate a trust
 - To divide a “spray” trust into separate shares

Material Purposes

- What would be considered a material purpose of a trust?
 - Spendthrift clause;
 - The exclusion of certain beneficiaries, adopted children or non-marital children;
 - Provisions requiring the trustees to continue to operate a business;
 - Certain trustee appointments or the requirement that there always be a professional trustee, especially if there is additional language in the trust to support this; or
 - Guidance found in the drafting attorneys working papers and notes concerning the purposes and reasons behind the trust structure.
- We now often include a general provision in our revocable trust that the terms all reflect the settlor's material purposes in creating the trust. In instances where there are specific concerns or issues driving the client's approach, it is advisable to explicitly spell that out and identify them as material purposes.

Definitions Under Section 103

- An “interested person” is a person whose consent would be required to achieve a binding settlement were the settlement to be approved by the court. G.L. c. 203E, §111(a).

- A “beneficiary” is a person who has a present or future beneficial interest in a trust, which is either vested or contingent. G.L. c. 203E, §103.
- A “qualified beneficiary”, is a beneficiary who, on the date the beneficiary’s qualification is determined:
 - Is a distributee or permissible distributee of trust income or principal; or
 - Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

G.L. c. 203E, §103.
- The identity of the “interested persons” will differ depending on the subject matter of the NJSA. For example:
 - The combination and division of trusts under Section 417 requires the qualified beneficiaries;
 - The removal of a trustee under Section 706 is based on the agreement of the qualified beneficiaries;
 - The modification or termination of a trust under Section 411(b) requires agreement of all beneficiaries;
 - When there is no specific guidance in the MUTC, it should be presumed that the interested persons include all beneficiaries;
 - If a charity is an interested person, the Attorney General’s office would also be an interested party to the NJSA;
 - Except in the case of a trustee removal, it should be presumed that the trustee is a required interested party in any NJSA;
 - If the settlor is still living, it is also a good idea to obtain the settlor’s consent, even if not explicitly required by the MUTC, but to protect the integrity of the agreement and to confirm that the subject of the NJSA does not impact a material purpose of the trust.

Virtual and Parental Representation

- If there are minors and other interested parties who cannot participate in the NJSA, it may be possible to use the virtual representation or parental representation procedures Sections 303 or 304 to achieve the Agreement if those persons are adequately represented.
- Virtual representation and parental representation are new concepts to Massachusetts and serve to greatly reduce the need for guardian *ad litem*. Absent a conflict of interest:

- In some matters personal representatives and trustees can represent persons interested in an estate or trust.
- Conservators and guardians can represent a ward/protected person.
- Parents can represent their minor and unborn children (but not grandchildren and their issue).
- A beneficiary with a substantially identical interest in the trust can represent unborn and/or unascertained beneficiaries, or incapacitated beneficiaries.

Court Approval

- Any “interested person” may request that the court approve an NJSA under G.L. c. 203E, § 111(e). This is useful to:
 - Determine whether the representation as provided in Sections 301 through 304 was adequate;
 - Determine whether the agreement contains terms and conditions that the court could have properly approved; and
 - Protect a trustee who is concerned about potential liability.
- As a practical matter, obtaining court approval of the NJSA *should be* quicker and simpler than going to court in the first instance to resolve the issue.

Non-Judicial Settlement Agreement Versus Decanting

- When would you do one versus the other?

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