

Non-Judicial Settlement Agreements under Massachusetts Uniform Trust Code
A New Tool for Trustees

I. Key Statutory Provisions of M.G.L. c. 203E (referred to as the Massachusetts Uniform Trust Code)

A. “Section 111. Non-judicial settlement agreements

- (a) For purposes of this section, “interested persons” means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.
- (b) Except as otherwise provided in subsection (c), interested persons may enter into a binding non-judicial settlement agreement with respect to any matter involving a trust.
- (c) A non-judicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this chapter or other applicable law.
- (d) Matters that may be resolved by a non-judicial settlement agreement include:
 - (1) the interpretation or construction of the terms of the 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.
- (e) Any interested person may request the court to approve a non-judicial settlement agreement, to determine whether the representation as provided in article 3 was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.”

- A. Virtual Representation: Barring a conflict of interest, the interests of a minor, incapacitated, unborn, or unascertained beneficiary may be represented by another beneficiary having a “substantially identical interest” with respect to that particular question or dispute, and a parent may represent the interests of a minor or unborn child. § 303 and § 304.
- B. Trust modification/termination: If the settlor and all of the beneficiaries consent, the court may approve a termination or any modification even if inconsistent with a material purpose of the trust. If all beneficiaries consent, the court may approve a modification if not inconsistent with a material purpose of the Trust and may approve a termination if the court determines that continuance is not serving a material purpose of the trust. If fewer than all beneficiaries consent, the court may approve a modification or termination if the above requirements are satisfied and the interests of a non-consenting beneficiary are protected. In addition, the court may modify the administrative or dispositive provisions in order to address unanticipated circumstances. § 411-412.
- C. Trustee removal: The court may remove a trustee if (i) the trustee has committed a breach of trust, (ii) there is lack of cooperation among co-trustees, (iii) the trustee is unfit or unwilling to administer the trust, (iv) there has been a substantial change in circumstances, or (v) removal is requested by all qualified beneficiaries, is in the best interests of all beneficiaries, is not inconsistent with a material purpose of the trust, *and* a suitable successor trustee is available. § 706.

D. Key Concepts

- 1. “Interested persons”
 - (a) Definition - “persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court”
- 2. “Does not violate a material purpose of the trust”
- 3. “Terms and conditions that could be properly approved by the court”

II. NJSA Examples

- A. Statutory examples - M.G.L. c. 203E §111(d)
- B. Correct a drafting error in irrevocable trust.
- C. Approve trust accountings and provide releases to the trustee.

- D. Appoint successor trustee not qualifying as “professional” trustee under the provisions of trust instrument.
- E. Obtain agreement of beneficiaries to treat certain gifts made by donor and/or distributions made by the independent trustee as advancements against those descendants’ eventual shares of the trust property.
- F. Approve the termination of the trust and the distribution of the funds among the beneficiaries.
- G. Sample Fact Pattern
 - (a) Mr. and Mrs. Jones executed estate plans in the 1990s when the Massachusetts and federal exemptions were unified. Mr. Jones died in 1997 when the Massachusetts and federal estate tax exemptions were each at \$600,000.
 - (b) Mr. Jones was survived by Mrs. Jones and their four adult children. Today, there are 10 grandchildren (3 of whom are minors).
 - (c) The Credit Shelter Trust was funded with \$600,000 and the Marital Trust for Mrs. Jones was funded with \$4M.
 - (d) In both Mr. and Mrs. Jones’ trusts, their respective trust assets pass outright in equal shares to the adult children on the death of the surviving spouse, as the Joneses were uninterested in multi-generational planning.
 - (e) At the time the trusts were drafted, the family had had a long-standing relationship with the law firm of Draper and Sterling, LLP. As a result of that relationship, Mr. and Mrs. Jones named one of the firm’s partners, Shirley Walker, to serve as the independent trustee upon his death.
 - (f) While Mrs. Jones has the ability to remove and replace trustees of Mr. Jones’ trust during her lifetime, there is a requirement in the trust that any successor to Shirley Walker be a partner of the firm at which Shirley Walker works.
 - (g) Since Mr. Jones’ death, the Credit Shelter Trust has grown to \$800,000 while the value of the Marital Trust has remained stagnant at \$4M due to principal distributions for the support of Mrs. Jones.
 - (h) Mrs. Jones currently owns 100% of the marital home, valued at approximately \$800,000, and a small checking account that receives her Social Security income with an average balance of \$100,000. All of her expenses are being met by her Social Security income and income and principal distributions from the Marital Trust. Mrs. Jones is currently 82, but in good health.

- (i) Several years ago, Walker opened her own firm, Walker & Walker, LLC, while the Joneses continued their legal relationship with Draper and Sterling, LLP.
- (j) At present, Mrs. Jones and her four adult children would like to:
 - i. appoint Mr. and Mrs. Jones' current estate planning attorney, Roger Draper, of the firm with which they have a long-standing relationship, Draper and Sterling, LLP as the independent trustee in the place of Walker; and
 - ii. terminate and distribute the Credit Shelter Trust outright in four (4) equal shares to the children to help the children cover their respective household expenses, including current and looming college expenses for their children.

III. Sample Agreement – see attached

**JOHN JONES TRUST AGREEMENT
NON-JUDICIAL SETTLEMENT AGREEMENT
DATED FEBRUARY 1, 2017**

INTRODUCTION

Reference is hereby made to a Trust Agreement dated September 20, 1996 (the “Trust Agreement”), created by John Jones (“John”), as Grantor, and Shirley Walker (“Walker”), as Trustee, and known as the John Jones Trust (the “Trust”). This instrument reflects the agreements of the beneficiaries of the Trust with respect to (i) removing the trustee, (ii) modifying the administrative provisions of the Trust Agreement, (iii) appointing a successor trustee, and the agreements of the beneficiaries and successor trustee of the trust with respect to (iv) making terminating distributions from one of the trusts created under the Trust Agreement.

PRELIMINARY STATEMENTS

1. Trust Provisions and Administration

Article Fourth of the Trust Agreement provides for division of the Trust into two separate shares (the Marital Trust and the Credit Shelter Trust) upon John’s death. John died on September 20, 1997. The Marital Trust is held in trust for the benefit of John’s surviving spouse, Jane Jones (“Jane”), in accordance with Article Fifth of the Trust Agreement. The Credit Shelter Trust is held as a separate trust for the benefit of Jane, in accordance with the provisions of Article Sixth of the Trust Agreement.

The Trustee must distribute income and may distribute principal from the Marital Trust to Jane. Upon Jane’s death, she may exercise a power of appointment directing the remaining assets of the Marital Trust to any one or more of John’s issue. If Jane does not exercise the power of appointment, the remaining assets will be distributed outright to John’s then living children (and the then living issue of any deceased children).

The Trustee may make distributions of income and principal from the Credit Shelter Trust to Jane. Upon Jane’s death, she may exercise a power of appointment directing the remaining assets of the Credit Shelter Trust to any one or more of John’s issue. If Jane does not exercise the power of appointment, the remaining assets will be distributed outright to John’s then living children (and the then living issue of any deceased children).

At the time John signed the Trust Agreement, John and Jane had a long-standing relationship with the law firm of Draper and Sterling, LLP, at which Shirley Walker worked. Article Tenth of the Trust Agreement provides that Walker shall serve as sole Trustee of each trust created under the Trust Agreement. Article Tenth further provides that Jane may remove a trustee and requires that any successor trustee be appointed by the managing partner at the firm at which Shirley Walker works.

Walker has served as the sole Trustee of the Marital Trust and the Credit Shelter Trust since their creation upon the death of John. On January 1, 2012, Walker left Draper and Sterling LLP and opened her own firm, Walker & Walker, LLC.

The Marital Trust is currently valued at approximately \$4,000,000. The income produced by the Marital Trust is sufficient to meet Jane's living expenses. Jane has never taken a distribution from the Credit Shelter Trust, and does not anticipate doing so in the future. The Credit Shelter Trust is currently valued at approximately \$800,000.

2. Beneficiary Information

Jane is the current beneficiary of the Trust. John's children, Peter Jones ("Peter"), Kurt Jones ("Kurt"), George Jones ("George"), and Sara Jones ("Sara"), George's children, Dolores Jones ("Dolores") and Barbara Jones ("Barbara"), and Sara's children, Donna Jones ("Donna"), Susan Jones ("Susan"), Reena Jones ("Reena") and Allison Jones ("Allison"), are the remainder beneficiaries of the Trust. Jane, Peter, Kurt, George, Sara, Dolores, Barbara and Donna are all legally competent adults. Susan, Reena and Allison are currently minors. All of John's grandchildren are either currently in college, or will be attending college in the near future.

3. Relevant Law

Section 412 of the Massachusetts Uniform Trust Code permits modification of a trust because of unanticipated circumstances if the modification would further the purposes of the trust. Under Paragraph (a) of Section 412, a modification should be made in accordance with the settlor's probable intent.

Pursuant to Section 111 of the Massachusetts Uniform Trust Code, interested persons (those persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court) may enter into a binding non-judicial settlement agreement with respect to any matter involving a trust so long as it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court.

Pursuant to Section 303 of the Massachusetts Uniform Trust Code, to the extent there is no conflict of interest a parent may represent and bind the parent's minor or unborn child if a conservator or guardian for the child has not been appointed.

Pursuant to Section 304 of the Massachusetts Uniform Trust Code, to the extent there is no conflict of interest, the interests of a minor may be represented and bound by another having a substantially identical interest.

4. Modification of Trust

The beneficiaries wish to modify the provisions of Article Tenth of the Agreement of Trust regarding the qualifications of a successor Trustee.

The beneficiaries believe that by naming Walker as trustee and requiring that any successor trustee be a partner at the firm at which Shirley Walker works, John intended that a professional with close ties to his family serve as trustee of his trust, but that John did not

anticipate that Walker would leave the firm with which John and Jane had a relationship. Accordingly, the beneficiaries believe that modifying the administrative provisions of the Trust Agreement to expand the class of permissible trustees, while still requiring a professional trustee (defined as a partner or member at any law firm having greater than ten attorneys or a bank or financial institution) would further John's intent.

5. Removal of Trustee and Appointment of Successor Trustee

Jane wishes to remove Walker and appoint Roger Draper ("Draper") as successor Trustee to fill the vacancy caused by such removal. Draper is a partner at the law firm of Draper and Sterling, LLP, a law firm with greater than ten attorneys.

6. Distribution from and Termination of the Credit Shelter Trust.

Jane and the remainder beneficiaries wish to terminate the Credit Shelter Trust by distributing the remaining assets in equal shares to John's children.

Jane acknowledges that the termination will be treated as a taxable gift of \$800,000 from Jane to Peter, Kurt, George and Sara. Jane has \$5,340,000 of gift tax exemption remaining, approximately \$800,000 of which will be utilized by this gift.

The beneficiaries believe that by naming Jane as the sole beneficiary of the Credit Shelter Trust, John intended to make sure that his wife was adequately provided for during her lifetime. John did not anticipate that the Marital Trust would be sufficient to meet his wife's expenses and that the costs of college tuition would increase so dramatically that it would place a financial hardship on his children. Accordingly, the beneficiaries believe that terminating the Credit Shelter Trust by distributing the remaining trust property to his children would further John's intent to provide for his family members.

NOW, THEREFORE:

1. *Incorporation of Preliminary Statements.* The Preliminary Statements are hereby incorporated into this Agreement by this reference, and the undersigned parties hereby represent that the Preliminary Statements are true and correct.

2. *Parties to the Agreement.* The undersigned parties are all of the living beneficiaries of the Trust, with Susan, Reena and Allison represented by Donna in accordance with Section 304 of the Massachusetts Uniform Trust Code.

Donna's interests under the Trust Agreement are substantially identical to those of her siblings, Susan, Reena and Allison. Donna does not have a conflict of interest representing Susan, Reena and Allison and agrees to represent them for all purposes of this Agreement.

3. *Modification of Trust Agreement.* Article Tenth of the Trust Agreement is hereby revoked in its entirety and the provisions contained in Exhibit A attached hereto are substituted in lieu thereof.

4. *Removal of Trustee.* Jane hereby removes Walker as Trustee of the Marital Trust and the Credit Shelter Trust, pursuant to the Removal forms attached hereto as Exhibit B.

5. *Appointment of Successor Trustee.* Jane hereby appoints Draper as the successor Trustee of the Trust, pursuant to the Appointment of Trustee form attached hereto as Exhibit C.

6. *Acceptance of Successor Trustee.* Draper hereby accepts his appointment as the successor Trustee of the Trust, pursuant to the Acceptance of Appointment form attached hereto as Exhibit D.

7. *Distribution of Credit Shelter Trust Property.* Draper hereby distributes the sum of \$200,000 to each of Peter, Kurt, George and Sara.

8. *Termination of Credit Shelter Trust.* Draper hereby terminates the Credit Shelter Trust and agrees to take all actions necessary to accomplish the termination.

9. *Drafted by all Parties.* Each of the undersigned parties hereby agrees that he or she has reviewed and understands this Agreement and has had the opportunity to discuss this Agreement with his or her own counsel and is entering into this Agreement of such party's own volition being aware of the legal consequence of this Agreement. No rule of construction construing ambiguities against the drafter shall apply to this Agreement, and all parties agree that they have had the opportunity to modify the terms of this Agreement in negotiation with the other parties hereto.

10. *Non-judicial settlement agreement.* The parties intend that this Agreement comply with the non-judicial settlement requirements of Section 111 of the Massachusetts Uniform Trust Code. To the greatest possible extent, all provisions of this Agreement shall be construed in a manner consistent with that intention. Nevertheless, in the event that said statute is deemed not to be applicable to this Agreement for any reason whatsoever, each of the parties hereto shall continue to be bound by all of the provisions of this Agreement.

11. *Other provisions.*

(a) All of the terms of this Agreement and the rights and obligations conferred under this Agreement shall be binding upon, shall inure to the benefit of and shall be enforceable by, each interested person and his or her respective estates, heirs, legal representatives, successors and assigns.

(b) This Agreement embodies the entire agreement and understanding among the interested persons and supersedes all prior agreements and undertakings, if any, among and between such interested persons relating to the subject matter hereof.

(c) Should any one or more of the provisions hereof be determined to be invalid, illegal or unenforceable, all other provisions hereto shall be given effect separately therefrom and shall not be affected thereby.

(d) This Agreement shall be governed by and interpreted in accordance with the laws of the Commonwealth of Massachusetts, without regard to conflict of laws principles.

(e) No modification, amendment or waiver of any provision of this Agreement will be effective against any interested person unless such modification, amendment or waiver is approved in writing by each interested person.

(f) Descriptive headings are inserted for convenience only and shall not control or affect the meaning or construction of any provision.

12. *Counterparts.* This Agreement may be executed in counterparts.

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Each of the undersigned enters into this Agreement under Section 111 of the Massachusetts Uniform Trust Code as of this 1st day of February, 2017.

Jane Jones

Peter Jones

Kurt Jones

George Jones

Sara Jones

Dolores Jones

Barbara Jones

Donna Jones, individually and as representative of her minor siblings, **Susan Jones**, **Reena Jones** and **Allison Jones**

Roger Draper, Trustee

4th Annual Trust Decanting State Rankings Chart

Rank	State	Has Decanting Statute? (60% weight)	Can Decant Trust with Ascertainable Standard? (7.5% weight)	Notice to Beneficiaries Required? (7.5% weight)	Can Decant Trust with Ascertainable Standard into Discretionary Trust? (7.5% weight)	Can Remove Mandatory Income Interest? (2.5% weight)	Allow Power of Appointment in Second Trust to Bene for Non-Bene? (2.5% weight)	Can Accelerate Remainder Bene's Interest? (2.5% weight)	Dynasty Trust State Ranking (7.5% weight)	Domestic Asset Protection Trust State Ranking (2.5% weight)	Total Score
1	SD	§§ 2-15-21	Yes	No	Yes	Yes	Yes	Yes	Ranked #1	Ranked #2	99.5
2	NV	§163.556, SB 484, Sec. 57	Yes	No	Yes	Yes	Yes	Yes	Ranked #2	Ranked #1	99
3	TN	§35-15-816(b)(27)	Yes	No	Yes	No	Yes	Silent	Ranked #3	Ranked #3	93
4	NH	§564-B:4-4:18	Yes	No, except charitable trusts	Yes	No	Yes	Silent	Ranked #7 (tie)	Ranked #10	91
5	DE	12, §3528	Yes	No	No	Yes	Yes	No	Ranked #7 (tie)	Ranked #5 (tie)	87
6	OH	§5808.18	Yes	Yes	No	Yes	Yes	No	Ranked #6	Ranked #4	80
7 (tie)	AK	§13.36.157-159, §13.36.215	Yes	Yes	No, except after first trust would have ended	No	Yes	No	Ranked #4	Ranked #7	77.5
7 (tie)	IL	760 ILCS 5/16.4	Yes	Yes	No	No	Yes	Silent	Ranked #9	Not allowed	77.5
9	IN	§30-4-3-36	Yes	Yes	Yes	No	Silent	Silent	Unranked	Not allowed	75
10 (tie)	MO	§456.4-419	Yes	Yes, only to beneficiaries of second trust	No	Yes	Silent	Yes	Unranked	Ranked #5 (tie)	74.5
10 (tie)	WY	§4-10-816(a)(xxviii)	Yes	No	Yes	Silent	Silent	Silent	Ranked #5	Ranked #8	74.5
12 (tie)	SC	§62-7-816A	Yes	Yes	No	Yes	Yes	No	Unranked	Not allowed	72.5
12 (tie)	TX	§§112.071 to 112.087	Yes	Yes	No	No	Yes	Yes	Unranked	Not allowed	72.5
14	VA	§64.2-778.1	Yes	Yes	No, except if court approval	No	Yes	No	Unranked	Ranked #13	70.5
15 (tie)	CO	§15-16-901	Yes	Yes	No	No	Yes	No	Unranked	Not allowed	70
15 (tie)	KY	§386.175	Yes	Yes	No	No	Yes	No	Unranked	Not allowed	70
15 (tie)	NM	HB 280	Yes	Yes	No	No	Yes	No	Unranked	Not allowed	70
15 (tie)	NC	§36C-8-816.1	Yes	Yes	No	No	Yes	No	Unranked	Not allowed	70
19	RI	§18-4-31	Yes	Yes	Silent	No	Silent	No	Unranked	Ranked #9	68.5
20 (tie)	AZ	§14-10819	Yes	No	Yes	No	Silent	Silent	Unranked	Not allowed	67.5
20 (tie)	MI	§700.7820a / §556.115a	No	Yes	No	No	Yes	Silent	Unranked	Not allowed	67.5
20 (tie)	MN	§502.851	Yes	Yes	No, except after first trust would have ended	No	No	No	Unranked	Not allowed	67.5
20 (tie)	NY	§10-6.6	Yes	Yes	No	No	Yes	No	Unranked	Not allowed	67.5
20 (tie)	WI	§701.0418	Yes	Yes	No	No	Silent	No	Unranked	Not allowed	67.5
25	FL	§736.04117	No	Yes	No	No	Silent	Silent	Ranked #10	Not allowed	63.5

*The Dynasty Trust State Ranking column is based on the 5th Annual Dynasty Trust State Rankings Chart created in October 2016 and the Domestic Asset Protection State Rankings Chart is based on the 7th Annual Domestic Asset Protection State Rankings Chart, both at <http://www.oshins.com/state-rankings-charts>.

*This Trust Decanting State Rankings Chart created in January 2017. Original Trust Decanting State Rankings Chart created in January 2014.

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Steve Oshins is a member of the Law Offices of Oshins & Associates, LLC in Las Vegas, Nevada. He is rated AV by the *Martindale-Hubbell Law Directory* and is listed in *The Best Lawyers in America*®. He was inducted into the NAEP Estate Planning Hall of Fame® in 2011 and has been named one of the 24 "Elite Estate Planning Attorneys" by *The Trust Advisor* and one of the Top 100 Attorneys in *Worth*. He can be reached at 702-341-6000, ext. 2 or soshins@oshins.com. His law firm's website is www.oshins.com.