

UNDERSTANDING THE PEF CODE'S NEW RULES FOR NONJUDICIAL SETTLEMENT AGREEMENTS

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BASICS

“UTC” -- Uniform Trust Code

“UTA” -- Uniform Trust Act

in PA since November 2006

“UDTA”/“DTA” -- Uniform Directed Trust Act

in PA Since October 2024

WHAT IS A NONJUDICIAL SETTLEMENT AGREEMENT

- ❖ A nonjudicial settlement agreement (NJSA) is a contract between parties to a trust that allows them to modify the terms of a trust or resolve disputes without going to court.
- ❖ NJSAs afford parties speed, privacy, and cost savings as opposed to judicial resolution.

- -NJSAs are great litigation avoidance tools
 - Can be used to stave off or resolve trust-based disputes
- -NJSAs are also useful even where no bona fide dispute exists
 - Allow for more economical resolution of routine administration tasks

NJSA USES

Examples of NJSA Uses

- Agreements can be used to resolve matters unless disallowed by statute or the trust
- Use is becoming more widespread as UTC, UTA, DTA are passed and refined by caselaw
- Common uses include:
 - Interpreting or construing the terms of the trust
 - Approving a trustee's report or accounting
 - Directing a trustee to act or refrain from acting
 - Removing or appointing a trustee
 - Determining a trustee's compensation
 - Transferring the trust's principal place of administration
 - Determining a trustee's liability for actions related to the trust
 - Modifying or terminating the trust

UTC AS BASIS FOR NJSA

- Uniform Trust Code encourages efficient resolution of trust matters
 - Uniform Law Commission: “UTC’s comprehensive defaults rules [that] apply when a trust does not address a particular subject, which will fill many gaps in trust instruments and help to prevent unnecessary litigation.”
- UTC has been adopted in most states
 - As of 2024, 26 states have adopted in some form
- Pennsylvania adopted UTC in 2006 by way of UTA
 - Some sections modified from “model” UTC
- Look to UTC Commentary because caselaw is limited

UTC AS BASIS FOR NJSA

- UTC § 111 specifically authorizes NJSAs
 - UTC § 111(b) provides that “interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.”
- UTC is not the only source that may authorize or define nonjudicial resolution
 - UTC is supplemental to trust and other laws, and fills in gaps not specified in trust
 - Caselaw has allowed resolution by agreement

REQUIREMENT OF UTC 111

- Interested persons may enter into NJSAs:
 - Provided that the agreement and matter resolved does not violate the material purpose of the trust
 - Provided that the agreement includes terms and conditions that could be properly approved by the court

REQUIREMENT OF UTC 111 . . .

- UTC provides nonexclusive list of issues to be resolved:
 - “the interpretation or construction of the terms of the trust”
 - “the approval of a trustee’s report or accounting”
 - “direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power”
 - “the resignation or appointment of a trustee and the determination of a trustee’s compensation”
 - “transfer of a trust’s principal place of administration”
 - “liability of a trustee for an action relating to the trust”
- UTC 111(b) says NJSA can be used for “any matter” whereas 111(c) provides limitation on procedure and parties

PENNSYLVANIA'S UTC

- Authorized under 20 Pa. C.S. § 7710.1
- Pennsylvania's § 7710.1(d) expanded scope of matters covered under UTC to include:
 - Questions relating to trust property/property interests
 - Action or proposed action with respect to trust or trustee
 - Modification or termination of the trust
 - An investment decision, policy, plan or program of a trustee
 - ***Any other*** trust administration matter
- Directed Trust Act in 2024 (Act 64 of 2024) provided some notable revisions, like § 7785.1

PENNSYLVANIA'S TWIST ON UTC

- Old § 7710.1(b) was different than UTC 111
 - PA required consent of all beneficiaries **and** trustees
 - UTC only required consent of interested persons
 - “Interested persons” is much more uncertain than defined roles of “all beneficiaries and trustees”
- Act 64 of 2024 modified § 7710.1(b) to be more in line with UTC. NJSA requires agreement by:
 - All beneficiaries
 - All trustees
 - All other persons (**if any**) who have an interest
 - interested parties = indispensable parties

STATUTORY LIMITATIONS ON NJSAS

- UTC 111, 411 and 7710.1 and 7740.1 provide defined limits
 - Cannot violate material purpose of the trust
 - Cannot authorize something a court could not approve
 - In most cases, dispositive provisions cannot be changed without judicial involvement unless permitted elsewhere (e.g., §§ 7740.2–7740.5)
- NJSAs simply act as an alternative to court

UTC AS BASIS FOR NJSA

- Pre-UTC nothing prevented use of resolution by agreement prior to UTC
 - More of a practical issue that there was no explicit mechanism
 - Often hard to get all persons affected by a settlement agreement (eg. the trust beneficiaries) to agree to any modification or termination unless there were not minors, unborn, or unascertainable beneficiaries of the trust
 - Many trusts had remaindermen, “descendants” or “issue” who were unascertainable, and who could not consent
- UTC Provided defined notice or inclusion requirements

PARTICIPANTS TO NJSA

PARTICIPANTS TO NJSA: BENEFICIARIES

- Who/what is a beneficiary?
 - If trust terminated today who would receive the trust property?
- § 7703 and UTC 103(2) define beneficiary as: Individual who “has a present or future beneficial interest in a trust, vested or contingent” or
- Holder of a power of appointment over the trust (defined in 7703)
 - Cannot be a trustee or trust protector
 - Must be exercised in nonfiduciary manner
 - Aligns with “grantor trust” rules like IRC 674
 - Under common law, a power holder was not considered a beneficiary
 - UTC afford power holders the same classification as beneficiaries because their interests are so significant
 - Does this apply to limited/special powers of appointment?

PARTICIPANTS TO NJSA: BENEFICIARIES . . .

- § 7703 defines “qualified beneficiary”
 - Have an immediate income or principal interest
 - “beneficiary” includes future interest holders, too
- Charities may be beneficiaries
- While UTC provides framework, common law fills in the gaps. 7706 and UTC 106.
 - Settlor’s intent within trust controls who/what is a beneficiary. *In re Atwater Kent Museum*, 329 A.3d 128 (Pa. Comm. Ct. 2024) and UTC 103.

PARTICIPANTS TO NJSA: BENEFICIARIES . . .

- Definition of beneficiary is more nuanced in other contexts
 - Does not always have named or explicit interest
- Beneficiaries may be those that receive interests by:
 - Assignment
 - Resulting trust upon the failure of an interest
 - Lapse in disposition, operation of antilapse statute upon predecease of a named beneficiary
 - Lapse by predecease of beneficiary upon termination of the trust
- Persons who receive an incidental benefit by performance of the trust are not beneficiaries. Restatement (Third) of Trusts § 48 cmt. (Am. L. Inst. 2003)
 - Trustee or advisor who is paid by trust is not a beneficiary.

PARTICIPANTS TO NJSA: BENEFICIARIES . . .

- If trust has multiple classes of beneficiaries, all must be included
 - Must ascertain who benefits and how
- Split interests trusts become tricky:
 - Charitable beneficiaries
 - 7710(d) gives the AG the same rights as a charitable beneficiary
 - Non-charitable beneficiaries

PARTICIPANTS TO NJSA: BENEFICIARIES . . .

- Be mindful of remainder beneficiaries, especially in SNT context
 - DHS of Pennsylvania
 - Was/is beneficiary participant in any other jurisdiction?
- Practice Tip: DHS is highly unlikely to consent to and participate in NJSA
 - DHS may issue a “No Objection” statement, which can be obtained prior to filing an action to confirm the contents of the NJSA
 - If court action is required anyway, is it just easier to file and skip the NJSA?

PARTICIPANTS TO NJSA: TRUSTEES

- Code requires “all trustees” to join
 - Be mindful of multiple trustees or directed trustees under Directed Trust Act
 - Under DTA, is a trust director in a fiduciary role a “trustee”?
- Must include all presently serving trustees, regardless of role
- Do you need to include named successors?
 - Do they have a present interest?
- If replacing trustee, make sure nominated successor is party
 - they will be on notice and bound by NJSA

PARTICIPANTS TO NJSA: INTERESTED PARTIES

- UTA classifies “interested parties” as those indispensable if matter were before a court
- Court lacks all jurisdiction to act where all indispensable parties are not joined
 - Must determine whether a party’s rights are so connected with the issues at hand that no decree could be issued without impairing those rights. *See Sprague v Casey 520 Pa. 38, 49-50 (1988)*
- **Even if impact of NJSA would have virtually no impact on individual interests, *all* interested parties must be joined**
 - Example: trustee has little beneficial interest in distribution

PARTICIPANTS TO NJSA: OTHER INTERESTED PARTIES . . .

- Settlers, if living
- Trust Protector
- Trust Director
 - Under UTA, may be a beneficiary or settlor
- What if there is a charitable beneficiary?
 - Under 7710(d) the Attorney General has the same rights as a qualified beneficiary of a charitable trust
 - Practice Tip: Like DHS, Attorney General is highly unlikely to consent to and participate in NJSA
 - AG may issue a “No Objection” statement, which can be obtained prior to filing an action to confirm the contents of the NJSA

PARTICIPANTS TO NJSA: BY REPRESENTATION

- Not all beneficiaries or interested parties can be readily identified
- Virtual representation allows a present interest holder to represent and bind subordinate or future interest holders
- UTC § 301 through 305 and 7723 of the Code define who can be represented
- An individual representing another is a “representative”
- Virtual representation allows almost all parties to be represented under NJSA

PARTICIPANTS TO NJSA: BY REPRESENTATION . . .

- Common examples of representation
 - Guardian represents incapacitated ward
 - common in SNT context
 - Adult class members can represent minor or unborn class members
 - A contingent beneficiary can represent all future/remote contingent beneficiaries
 - For example, a tertiary beneficiary who would take if contingent beneficiary predeceased
 - 7723(5) allows such representation, even if future beneficiary is ascertained or an adult

PARTICIPANTS TO NJSA: BY REPRESENTATION . . .

- 7723(6) mirrors UTC 304 catchall provision.
 - A person represents all minors, unborn, unascertainable, and unknown individuals if interests of representative and potential beneficiary are “substantially identical with respect to the particular question or dispute involved”
 - A person represents their minor or unborn descendants
 - Appears to include all descendants
 - “Descendant” is broader than just children or issue. *Estate of Carlson*, 479 Pa. 421 (1978)

PARTICIPANTS TO NJSA: LIMITATIONS OF REPRESENTATION

- A representative can represent multiple interest holders provided they can do so without conflict and can represent multiple interests impartially
 - Conflicts may arise in trust termination cases between multiple pot-trust beneficiaries with purely discretionary or HEMS interests
 - Who is entitled to more?

PARTICIPANTS TO NJSA: LIMITATIONS OF REPRESENTATION

- Who is entitled to more?

Example: Trust provides income, is payable to testator's spouse and upon the spouse's death the principal is payable to the testator's children (or descendants of deceased children) and in default of descendants to the testator's heirs. If one or more children are living and adult, they represent all the testator's descendants per 7723 (4), and they represent all heirs by virtue of 7723(5). The adult children represent other children, descendants and heirs. However, if the trust instead continued for the children's lives with remainders to grandchildren, the sui juris children may represent all children but would not represent the class of grandchildren because conflict between lifetime income and principal interests.

PARTICIPANTS TO NJSA: LIMITATIONS OF REPRESENTATION . . .

- Always make sure to do an analysis of conflicts and potential conflicts between interests prior to engaging in NJSA
- If the virtual representation is flawed due to conflict, whole NJSA may be invalid
- 7726 dictates that a representative cannot represent another adult where the adult objects to the representation
 - 7725 requires notice to represented party prior to representation

PARTICIPANTS TO NJSA: LIMITATIONS OF REPRESENTATION

- 7723(2) allows agent under Power of Attorney to represent and bind the principal provided the Power of Attorney authorizes the same
 - Drafting Tip: Practitioners should make sure General and Durable Powers of Attorney afford the agent the power to modify a trust or consent to the modification of a trust on the principal's behalf
- Settlor cannot virtually represent beneficiary. Is this still the case where settlor established trust for himself or herself, such as first-party SNT?
 - Probably can but statute does not confirm. Otherwise, absurd result
 - Can always rely on court to approve

COMMON USE CASES

7710.1(d) lists 12 enumerated uses
for NJSAs which are nonexclusive

COMMON USE CASE – WAIVER OR APPROVAL OF ACCOUNT

- 7710.1(d)(2) allows trustee to seek the approval or waiver of an accounting
 - Typically to release trustee of liability over accounting period
 - Waiver is to avoid accounting whereas approval is in lieu of court audit/adjudication
- Usually part of larger plan involving:
 - Replacement of trustee
 - Modification or termination of trust
 - Settlement of fiduciary litigation
- Useful where trust is old as an accounting has never been produced
- Accounting, Schedule of Distribution, relevant documents should be attached and incorporated as an exhibit to agreement

COMMON USE CASE – WAIVER OR APPROVAL OF ACCOUNT

- UDTA and 7785.1 allow **fiduciary** to elect nonjudicial account resolution be binding
 - May be used at termination, trustee change, or interim account
 - Notice under 7785.1 is broader than 7710.1
 - Mandatory and permissive notice
 - Must detail anticipated final expenses and distributions
 - Must provide prior 30 months of statements of trust statements
 - Objections to account, if made within 60 days, can either be resolved by the NJSA or submitted to court for resolution
 - Must give notice that objections barred if not timely made
 - Notice provides financial disclosure and starts 60-day clock
 - Objections only need to be in writing, no filing necessary

COMMON USE CASE – WAIVER OR APPROVAL OF ACCOUNT

- Once objection made, trustee cannot be discharged by NJSA until resolution to objections is agreed
 - NJSA to memorialize this and provide liability release
 - Agreement has same preclusive effect of a final, unappealable court order approving a final or interim account
- Note: 7785.1 only available to trustees. See OC Rule 5.8 and comments

COMMON USE CASE – DIRECTION TO TRUSTEE

- 7710.1(d)(3) protects trustee in taking a desired action which trust may not authorize, or which may deviate from best practice
 - Permission to hold certain assets without diversification
 - Purchasing real property when other assets are limited
 - Directing trustee to sell/not sell certain assets
- Advisable to include “release and hold harmless” language for trustee for action or inaction taken by agreement
 - Purpose of the NJSA is, in part, to provide protection to trustee

COMMON USE CASE – CHANGE SITUS

- 7710.1(d)(5) allows NJSA to be used to change trust situs
- Situs is generally where trust is administered and where trustee's principal place of business is
 - What jurisdiction does trust have sufficient connection with?
- 7708(c)-(e) direct requirements for and options for of transfer by trustee
- 7708(e) only requires consent by **qualified** beneficiaries whereas 7710.1(b) requires agreement by all interested parties
 - Should consider whether transfer under 7708 or 7710.1(b) is preferable
 - Best practice may be to ensure all interested parties have notice and memorialized agreement

COMMON USE CASE – CHANGE SITUS . . .

- Why change situs?
 - Trust or parties may be advantaged by other state's laws or courts
 - Legitimate reasons may include: laws concerning modification, decanting, power to adjust, and power to convert to unitrust
 - "Forum shopping" appears acceptable under the UTC and PA's adoption
- Situs change relates to administration whereas jurisdiction of creation relates to validity, interpretation of dispositive language, and intent...unless otherwise directed in the trust
 - Drafting Tip: Practitioners can draft prospectively and indicate another state's laws apply to interpretation or distribution if future move is envisioned. See *Kerr Trust*, 40 D. & C. 2d 415, 16 Fiduc. Rep. 485 (O.C. Chester 1966)
 - PA SNT drafted with Trust Protector authorized to amend to NY SNT language and situs, memorialized by NJSA, upon beneficiary move

COMMON USE CASE – CHANGE SITUS . . .

➤ Examples:

- Some states have much more favorable non-grantor trust taxation laws
- No PA tax for in-state trust with no PA-sourced income
- PA vs. NJ requirement that grantor/settlor be involved in nonjudicial trust modification
- Want administration closer to assets or interested parties

COMMON USE CASE – MODIFICATION

- Under common law a settlor and beneficiaries could all consent to modify or terminate a trust. See *In re Bowers' Trust Estate*, 346 Pa. 85, 29 A.2d 519, 520 (1943) (adopting the Restatement (Second) of Trusts § 338 (1959))
 - Trust was just a “contract” between interested parties. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 627 (1995)
- Modification by NJSA is often limited to administrative terms
 - Settlor often is dead
 - Administrative terms do not implicate trust’s material purpose
 - 7740.1(a) permits modification of an irrevocable noncharitable trust by agreement of **all settlors** and all beneficiaries
 - “even if the modification or termination is inconsistent with a material purpose of the trust”
 - Remember 7710.1(b)/UTC 111 does not allow NJSA where material purpose is violated

COMMON USE CASE – MODIFICATION . . .

- NJSA requires consent of all interested parties whereas 7740.1(a) *only* requires beneficiaries and settlor
- *In re Trust of Garrison*, 288 A.3d 866 (Pa. 2023). Settlor and beneficiaries agree to amend trust to allow beneficiaries to remove trustee. Orphans' and Superior Court say no. Supreme Court distinguishes from *Trust under Agreement of Edward Winslow Taylor*, 640 Pa. 629, 164 A.3d 1147 (2017)
 - Settlor establishes trust for beneficiaries
 - Trustee's only interest is derivative of beneficiaries
 - Removal of trustee not solely dictated by 7766
 - Agreement in *Garrison* was not a valid NJSA because trustee did not sign off, nevertheless, it was still a valid modification
 - Would NJSA have been valid if settlor and trustee were the same?

COMMON USE CASE – MODIFICATION . . .

➤ Examples:

- Convert SNT to support trust
 - Beneficiary is no longer disabled
 - Trust was created with beneficiary/settlor's own funds, for their exclusive benefit
 - Often without direct consent or knowledge if they were minor
 - Modification and restatement allows trust to continue to meet beneficiary's needs, but with the Medicaid monkey off its back

COMMON USE CASE – MODIFICATION . . .

➤ Examples:

- Convert first party support trust to a SNT
 - Beneficiary's funds will be used for their care, now to supplement public benefits
 - If beneficiary has power of appointment, they should be able to bind future beneficiaries under 7723(7), otherwise, there may be a conflict between beneficiary and remainder beneficiaries due to payback
 - Practice Tip: If trust is explicitly drafted to allow this conversion, there may be no conflict or issue with NJSA

COMMON USE CASE – MODIFICATION . . .

➤ Examples:

- Tax planning, such as adding/removing marital A/B trust provisions
 - Trust will still benefit spouse and beneficiaries, just allowing more flexibility in tax planning
- Give beneficiary option to extend power of appointment to further trust
 - To employ Delaware Tax Trap

CAN YOU MODIFY TO INCLUDE TRUST PROTECTOR OR DIRECTOR?

- Basis found in 7710.1(d)(7) (d)(8) and (d)(11)
 - (d)(7)-(8) relate to trustee's power
 - (d)(11) relates to modifying trust
- Whether you can add a Trust Protector or Trust Director by NJSA depends on whether their inclusion affects trust's material purpose
- Trust Protector with non-fiduciary power should be allowed by NJSA
 - Does not expand or limit fiduciary, and does not affect beneficiary's interests
 - May even further trusts purpose to have the non-fiduciary middleman between parties

CAN YOU MODIFY TO INCLUDE TRUST PROTECTOR OR DIRECTOR? . . .

- Trust Advisor/Director for investments under 7780.16 may be allowed
 - Investment decisions carry fiduciary responsibility, and will reduce named trustee's authority
 - Is the original named trustee unique/material to the trust?
 - Are specific trustee's powers material to trust?
 - Are unique inception assets best served by Trust Advisor/Director as opposed to trustee alone?

CAN YOU MODIFY TO INCLUDE TRUST PROTECTOR OR DIRECTOR? . . .

- Distribution Director to direct trustee to make distributions for beneficiary might be permitted
 - Will the release of trustee's sole discretion violate the trust's material purpose?
 - Trustee may not consent where they feel power shift hinders their ability to carry out duties
- If Trust Protector is given power to adjust beneficial shares, terminate trust, or modify power of appointment under 7780.17(b)(1)-(3), then likely violates material purpose of trust

CAN YOU MODIFY TO INCLUDE TRUST PROTECTOR OR DIRECTOR? . . .

- Examples:
 - Add administrative language like Trust Protector
 - Should be allowed under *Garrison* case
- Can you modify to add directed trust language? Perhaps.
 - Is the control by a trustee with certain powers a material purpose?
 - Will material purpose be violated by bifurcating responsibilities?
 - Would specific or inception assets be better managed by trustee or trust director?

COMMON USE CASE – TERMINATION

- 7740.1(a) permits termination of an irrevocable noncharitable trust by agreement of all settlors and all beneficiaries
 - “even if the modification or termination is inconsistent with a material purpose of the trust”
 - Remember 7710.1(b)/UTC 111 does not allow NJSA where material purpose is violated
 - Is ongoing trust for successive beneficiaries’ material?
 - *Estate of Weeks*, 485 Pa. 329, 333 (1979), found keeping assets in trust for beneficiaries, and contingent beneficiaries is not a material purpose
 - 7740.1(b.1) *presumes* spendthrift is material purpose

COMMON USE CASE – TERMINATION . . .

- NJSA requires consent of all interested parties whereas 7740.1(a) *only* requires beneficiaries and settlor
 - Termination may be in whole, or partial
 - Withdrawal is not a loophole to terminate. Withdrawal of all trust property does not terminate the trust
 - Contrasts with Treas. Reg. § 1.641(b)-3(b)

COMMON USE CASE – TERMINATION . . .

- Termination by beneficiaries with inclusion of settlor should not have lifetime gift tax consequences
 - Treas. Reg. § 20.2038-1(a)(2) defines a “taxable power”
 - Termination is not a “taxable power” and no gift tax consequences result from a termination provided the beneficiaries agree to distribute the trust property in accordance with the value of their proportionate interests.
 - 7740.1(c) dictates what happens to assets upon termination
 - If all beneficiaries and settlor enter into agreement, assets can be distributed however **beneficiaries** agree
 - Agreement is critical to memorialize distribution, especially if it deviates from settlor’s original plan

COMMON USE CASE – TERMINATION . . .

- Examples:
 - ILIT or Crummey created under old tax laws no longer necessary as part of settlor's estate plan
 - SNT beneficiary no longer disabled

COMMON USE CASE – CHANGE TRUSTEE

- NJSA is useful to memorialize a change of trustee
- Outgoing trustee typically will want a release by beneficiaries
- Incoming trustee wants to be indemnified and held harmless from actions of outgoing trustee
- Should include an accounting or waiver of accounting
- Will replacing the trustee violate the material purpose? It depends
 - In re McKinney, 67 A.3d 824, 838 (Pa. Super. 2013) found that settlor's naming specific trustee may be material, but if named trustee no longer exists, specific trustee may not be material where equally capable alternative exists
 - Comment to UTC 706 says deference should be given to original named trustee

COMMON USE CASE – SETTLE DISPUTES

- UTC 1009 and 7789 allow beneficiaries to release trustee of liability
- Significant cost and time savings resolving issues outside of court
- Parties, not judge, gets to define controversy and dictate results
- Examples of controversies to be resolves:
 - Improper expenditure/distribution of funds
 - SNT distributions jeopardized benefits
 - Miscalculation of unitrust amount
 - Failure to invest prudently and diversity
 - Accounting discrepancies
 - See references to UTA and 7785.1 above about settling account objections

COMMON USE CASE – UNITRUST CONVERSION

- Trustee has power to convert unitrust under 8104 without court action needed, but should it be done by NJSA?
 - Will trust be modified? If revising documents, should use NJSA
- NJSA is advisable to put all parties on notice and memorialize changes

BORROWING FROM OTHER JURISDICTIONS

- Colorado UTC (CUTC 15-5-113), among some others, allows settlor, in drafting trust, to designate methods of alternative dispute resolution. This may include nonjudicial dispute resolution, arbitration, ADR
 - Methods are in addition to court
- Nonjudicial methods of resolution are binding on all parties, unless dispute is over validity of the trust
- Practitioners may be able to draft trusts which direct what disputes are resolved nonjudicially, what disputes *must* be resolved by agreement, and even parties to the agreements
- Caselaw in other states is limited, and split on the enforceability and limits of these clauses...so proceed at your own risk

COURT GUIDANCE

COURT GUIDANCE

- Limited guidance from Pennsylvania courts specifically about NJSAs
- *Testamentary Trust of Conti, 41 Pa. D. & C.5th 134 (Phila. 2014)*
 - Beneficiaries sought to amend trust to include trustee removal language
 - Thought basis under 7766 “no fault” removal may apply
 - **HOLDING:** Court cannot approve trust amendment to allow removal by NJSA because court could not grant such relief even if petitioned.
- *In re Atwater Kent Museum*
 - Trust instrument controls who is a beneficiary, therefore dictates who is an interested party for NJSA

LIMITATIONS ON NJSAS

- Must be something court could approve (*See Conti Phila OC case*)
- Cannot violate trust's material purpose
- Need all interested parties involved

PREDRAFTING ANALYSIS

- What is the material purpose or purposes of trust?
- Does original trust explicitly prevent or direct modification in a specific way?
 - By what method?
- Who are settlor, trustee, and beneficiaries (and qualified beneficiaries)?
 - Who is an adult with capacity?
 - Who can represent successor interests?
- Is this relief a court could grant?
- Are there other trust-related controversies to be resolved concurrently?
 - Can they also be resolved by agreement?

DRAFTING NJSAS

- NJSA is typically drafted like a contract
- Identify all interested parties in recitals
- Provide a detailed recitals or background section
 - **What is/was the material purpose of the trust**
 - Explain the relevant history of the trust and the financials
 - Summary of present account (unless accounting is provided in detail)
 - Detail and cite to relevant language in trust and any prior amendments or court actions
 - Draft to affirmatively indicate consent by all
 - “The parties recognize…”, “The parties hereto agree that…”
- Identify which law or laws control and why
 - Especially important if trust is not presently subject to a court’s jurisdiction

DRAFTING NJSAS . . .

- Detail everyone's interests and whether there is any virtual representation
 - No mechanism in an NJSA to "test" who is an interested person, so explain why X can represent Y
 - Whether statutory or in trust, what is the basis for the representation?
 - Employ general and inclusive language like: "each beneficiary is deemed to represent other beneficiaries as allowed by applicable law, and each beneficiary consents to the same."
- Different sections for each aspect of substantive relief
 - For example, approval of accounting, release of trustee liability, and trust modification
 - Only include parties relevant to that section
 - Within each section, explain factual and legal basis for why action is permitted
 - **Explain explicitly why each action does not violate material purpose of the trust**
 - Draft as if court were reviewing the NJSA for validity

DRAFTING NJSAS . . .

➤ Legal Recitals

- All representatives agree to represent and bind represented parties
- Each party has had the opportunity to have agreement reviewed by independent counsel
- Each party is fully informed of the material facts
- Each party “agrees that the terms of the NJSA do not violate the material purpose of the trust”
- Each party has had the opportunity to request and review documents and financials
 - Either did review the documents
 - Is satisfied with choice not to review
- Each party “agrees that the terms of the NJSA are such that could be approved by a court of competent jurisdiction, and that each party agrees to waive court approval of the NJSA”

SHOULD YOU SEEK COURT APPROVAL?

- Can always seek court approval to confirm a NJSA
- If NJSA is controversial or changes dispositive language, may want approval
 - If all parties are in agreement near NJSA execution, may be little risk
- May be concerns on whether material purpose is violated under 7710.1(c)
 - Court decision is conclusive and binding

SHOULD YOU SEEK COURT APPROVAL? . . .

- Some Sections of Code give the **court** power to modify a trust, but are silent as to NJSA, so court approval is presumably needed
 - -7740.3-Charitable trusts
 - -7740.5-Reformation to correct mistakes
 - -7740.6-To achieve settlor's tax objectives
- If not all necessary parties joined or if there is a conflict of interest

CASE STUDIES

NON-PRO RATA DISTRIBUTIONS SOUGHT

- Upon settlor death, support trusts to be established for 2 kids and their issue. One beneficiary refuses ongoing trust. One beneficiary demands trust-owned real property in support trust
- Trustee concerns over potentially unequal “non-pro rata” result between differing asset classes
- Trustee and beneficiaries enter into NJSA
 - Approving informal account and actions of trustee
 - Terminating trust, transferring assets to resulting trusts
 - Making non-pro rata distributions
- Beneficiaries bind minor, potential future class members

TRUST NO LONGER FITS INTO ESTATE PLAN

- Husband and wife are in for estate planning. Crummey trust from 2005 with large life insurance policy is becoming too much to manage, Crummey letters too costly. Want to transfer trust to name outright as there is no immediate death tax consequence based on current and projected estate size.
- (SEE SAMPLE) NJSA between parties to terminate trust, distribute policy back to settlor. Settlor receives assets because **beneficiaries** agree, per 7740.1(c)

RESOLVING LITIGATION OVER FIDUCIARY MISMANAGEMENT

- SNT receiving structured settlement annuity for term. Annuity continued to run for nearly 9 years after term. Trustee failed to monitor annuity. Discrepancy discovered during process to change trustees. Annuity company sued trust and beneficiary for restitution
 - Beneficiary and trustee agree on reduced restitution amount, approved by DHS

RESOLVING LITIGATION OVER FIDUCIARY MISMANAGEMENT . . .

- NJSA between trustee, beneficiary, and successor trustee
 - Approving accounting in light of restitution
 - Releasing, discharging, and indemnifying outgoing trustee
 - Replacing trustee and holding harmless new trustee from actions of old trustee
- Note: because DHS had an interest and they could not be represented, NJSA only provided partial resolution. NJSA and overall plan was submitted and approved by Orphans' Court

APPROVING CONTESTED DISTRIBUTION

- Trust to terminate on death of beneficiary, with distributions to intestate heirs. Mother is known. Mother asserts presumed father may not be actual father, and suggests another man is biological dad. Presumed father agrees to reduced distribution to prevent litigation.
 - NJSA between corporate trustee, mother, and father is binding
 - Corporate trustee files for approval of NJSA, with notice to potential biological father, to prevent liability in the event he presents himself as a beneficiary in the future

AMENDMENT FOR ESTATE INCLUSION

- Surviving spouse wants to find a way to get Credit Shelter Trust for step-up as there is now no concern over Estate Tax. Spouse will amend CST by agreement to include a new power of appointment, exercisable under limited circumstances, for estate inclusion
 - NJSA to give wife an “intentionally defective” power to be able to appoint trust assets only to her creditors
 - Who would actually exercise this?
 - Trustee should agree because virtually no impact on their rights
 - Spouse and remainder beneficiaries should agree to achieve tax savings
 - Note: may want court approval because 7740.6 says **court** can modify trust to achieve tax objectives

MORE FAVORABLE JURISDICTIONS

- Interested parties may seek to move situs to different jurisdiction with ties to the trusts to take advantage of more favorable laws
 - Delaware, Nevada, Tennessee, South Dakota, Alaska
 - Typically higher wealth or more complex trusts
- NJ UTC allows for more liberal termination or modification by consent
 - Unlike PA where settlor is required, New Jersey only requires beneficiaries and trustees to consent
 - Solves common PA problem where settlor is dead and trust needs amendment or termination

**Please feel free to utilize the
sample agreements distributed as
part of the materials.**



THANK YOU

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