NJSAs: Death to Irrevocable Trusts

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- Wis. Stat. § 701.0111(3)

  - "an interested person may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust. A binding nonjudicial settlement agreement is considered part of the trust instrument."

- Wis. Stat. § 701.0111(5) lists matters that may be addressed by NJSAs

  - 1. The interpretation or construction of the terms of the trust.

  - 2. The approval of a trustee's report or accounting or waiver of the preparation of a trustee's report or accounting.

  - 3. Direction to a trustee to perform or refrain from performing a particular act or the grant to a trustee of any necessary power.

  - 4. The resignation or appointment of a trustee.

  - 5. The determination of a trustee's compensation.

  - 6. The transfer of a trust's principal place of administration.

  - 7. The liability or release from liability of a trustee for an action relating to the trust.

  - 8. The criteria for distribution to a beneficiary where the trustee is given discretion.

  - 9. The resolution of disputes arising out of the administration or distribution of the trust.

  - 10. An investment action.

  - 11. The appointment of and powers granted to a directing party or a trust protector.

  - 12. Direction to a directing party or to a trust protector to perform or refrain from performing a particular act or the grant of a power to a directing party or trust protector."

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Who is an Interested Person?

- Wis. Stat. § 701.0111(1)
  - "a person whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court."
  - Most times, qualified beneficiaries of the trust

- All interested persons must consent to the NJSA

- An interested person may be represented under subch. III of ch. 701

- Is the Settlor(s) an interested party?
  - Iowa – *Little v. Davis*

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Validity & Reliance

- Wis. Stat. § 701.0111(4)
  - "A nonjudicial settlement agreement is valid only to the extent it includes terms and conditions that could be properly approved by a court under this chapter or other applicable law"
  - Basis of actions that could be "properly approved by a court":
    - Inconsistent with material purpose
    - Inability to administer trust effectively
    - Trust is uneconomic
    - Correct of mistakes
    - Achieve tax objectives
    - Combine and divide trusts

- Notice
  - No notice requirement.
  - *Note*, may be changed by the Trust Code Trailer Bill

- Wis. Stat. § 701.0111(6)
  - "A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance"
  - NJSA is part of the trust instrument.

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Structure

- Identification of Interested Persons

- Recitals
  - Who? What? When? Why? How?

- Agreement
  - Description and effective date
  - Consider adding boilerplate language re: governing law, venue for future litigation, voluntary nature of agreement, binding effect, etc.

- Signatures

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Using an NJSA to Terminate a Trust

- Wis. Stat. § 701.0111 doesn't specifically state that you can use an NJSA to terminate a trust; however, most practitioners believe that the enumerated matters under subsection (5) is not exhaustive and does allow for the termination of trusts under Wis. Stat. § 701.0111.

- Wis. Stat. § 701.0411(1) – specifically allows for the termination of an irrevocable noncharitable trust without court approval upon the consent of the grantor and all of the beneficiaries.

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Considerations

- Interested Persons
  - Who are the "interested persons" in the NJSA?
  - Is there a statute or other law on the matter being addressed that outlines whose consent must be obtained?
  - Are all interested persons willing and able to sign? If not, does the law authorize representation by someone else, and if so, does adequate representation exist?
  - Be sure to consider any minor and unborn children of the beneficiaries.

- Tax Consequences
  - Consider all types of tax (income, gift, estate and GST)
  - If there are negative tax consequences, are there other options?

- Court Approval
  - Wis. Stat. § 701.0111(6) – "Any interested person may request a court to approve a nonjudicial settlement agreement, to determine whether the representation . . . was adequate, or to determine whether the agreement contains terms and conditions the court could have properly approved."
  - May be advisable to prevent any later argument

- Fiduciary Duty of Trustee to Trust Beneficiaries
  - *Vouk v. Chapman* (Idaho)

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Trust Code Trailer Bill Desired Changes

- Expansion of enumerated matters that NJSAs can address under subsection (5)
  - Potentially helpful to expand the list to make clear that matters listed under subsection (5) are not exclusive
  - Clarify that NJSAs may be used to provide for the removal and replacement of trustee and modify or terminate a trust.
  - Note, these actions are still subject to the requirement under subsection (4) that the proposed action can only include terms that could be properly ordered by a court.
    - Example: When removing a trustee or modifying a trust, the proposed action cannot be inconsistent with the material purpose of the trust.

- Requirement to provide notice of an NJSA to the Settlor, if living, the Trustee, and any directing party or a trust protector.

- Expansion of the representation statutes which would affect the definition of interested persons under Wis. Stat. § 701.0111.

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Thank you

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