

Nonjudicial Settlement Agreements: Creatively Solving Trust Administration Issues



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The use of Nonjudicial Settlement Agreements (NJSAs) has become commonplace in the administration of trusts in Wisconsin. Because NJSAs can modify the terms of an irrevocable trust without the approval of a court, they offer a flexible, cost-effective solution to many trust administration issues. These agreements are particularly helpful for trusts that contain provisions that are no longer relevant or that no longer meet the needs of the family. To ensure the enforceability of NJSAs, it is important to understand the law authorizing their use and to recognize its limitations.

Wisconsin Trust Code

The new Wisconsin Trust Code became effective on July 1, 2014, and ratified the use of NJSAs. Wis. Stat. § 701.0111 provides that the interested persons of a trust may enter into a binding NJSA with respect to any matter involving a trust, provided that its validity extends only to the terms and conditions that could be properly approved by a court. Wis. Stat. § 701.0411(2)(b) specifies that the beneficiaries of a noncharitable irrevocable trust may consent to modify any provision of the trust so long as the modification is not inconsistent with a material purpose of the trust.

The term “interested person” is defined as a person whose consent would be required to achieve a binding settlement were the settlement to be approved by a court. An interested person may be represented as provided in Wis. Stat. §§ 701.0301 through 701.0305 which govern when the consent of one party may bind another. Generally, the parties to a NJSA are the qualified beneficiaries of the trust (i.e., the current beneficiaries and the first-tier remainder beneficiaries), but the actual signatures required for a proposed NJSA will be fact-specific.

Wis. Stat. § 701.0111(5) provides a nonexclusive list of the matters that may be addressed by a NJSA. For example, NJSAs can be used to address interpretation or construction of trust terms, give direction to a trustee, replace a trustee or appoint successor trustees, adjust trustee compensation, appoint a trust protector, transfer the principal place of administration of the trust, amend criteria for discretionary distributions to a beneficiary, and release the trustee from liability for an action relating to the trust administration. Although any interested party may request a court to approve a NJSA, courts are not typically involved.

Reliance on NJSAs

Wis. Stat. § 701.1006 provides that a trustee who acts in reasonable reliance on the terms of the trust is not liable for a breach of trust to the extent the breach resulted from the reliance. Because a binding NJSA is part of the trust instrument under Wis. Stat. § 701.0111(3), a trustee who has received notice of a properly executed NJSA can therefore rely on that document with respect to the ongoing trust administration. Additionally, under Wis. Stat. § 701.1009, if a beneficiary consents to conduct constituting a breach of trust, the trustee is not liable to the beneficiary unless such consent was induced by improper conduct of the trustee or the beneficiary did not have knowledge of his or her rights or of the material facts relating to the breach.

The information contained herein is based on a summary of legal principles. It is not to be construed as legal advice and does not create an attorney-client relationship. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.

Enforceability of NJSAs

Disputes regarding the enforceability of NJSAs may occur if a beneficiary argues that the terms violated state law and/or that one or more interested persons were not party to the NJSA or were inadequately represented. Because NJSAs are relatively new, there is limited case law regarding their enforceability. To further complicate matters, states have adopted modified versions of the Uniform Trust Code so the analysis contained in case law from other states may not be as useful in analyzing Wisconsin law even if some of the statutory provisions are identical. That said, the Nebraska Supreme Court recently ruled a NJSA was unenforceable because it violated a material purpose of the trust. We feel this ruling is worthy of a brief review.

In the case *In re McGregor*, 308 Neb. 405, 954 N.W.2d 612 (2021), there was a dispute as to the applicability of a NJSA that was signed by three beneficiaries of a Family Trust – namely, the Grantor's wife, Evelyn, and the Grantor's two adult children, Allen and Debra. The terms of the original trust agreement provided that after Evelyn's death, the balance of the Family Trust would be divided into equal trusts for Allen and Debra, which would be held for the benefit of a child and his or her issue for the child's lifetime and would be subject to a limited testamentary power of appointment at the child's death. In 2011, Evelyn, Allen and Debra signed a NJSA that provided for an outright distribution to Allen and Debra upon Evelyn's death. In 2017, Evelyn emailed Allen purporting to revoke the NJSA. Allen subsequently petitioned the court seeking an order requiring compliance with the terms of the NJSA. The Nebraska Supreme Court ultimately held that the NJSA was nonbinding and unenforceable because the spendthrift provisions contained in the original trust agreement constituted a material purpose of the trust and, therefore, the NJSA violated this material purpose by distributing assets outright.

It is important to note that Wis. Stat. § 701.0411(3) states that “a spendthrift provision in terms of the trust is not presumed to constitute a material purpose of the trust” whereas the corresponding provision in the Nebraska Trust Code states the opposite (see Neb. Rev. Stat. § 30-3837).

Creative Solutions

A NJSA provides versatility and flexibility regarding the matters it addresses. In many instances, a NJSA provides a simple solution to modify an irrevocable trust as opposed to a more expensive and time intensive court proceeding.

For more information on this topic, or to learn how Godfrey & Kahn can help, contact a member of our Trust Company Industry Group.