

**The
Delaware
Economy:
A Check Up**

Another View

Utilizing Nonjudicial Settlement Agreements to Modify Trusts

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Since the enactment of Delaware’s nonjudicial settlement agreement statute, 12 Del. C. § 3338 (the “NJSA Statute”) in 2013, trust practitioners and trust industry professionals have debated whether the NJSA statute may be used to modify trust provisions. For several reasons, we believe that it can.

The plain wording of the NJSA statute, modeled after Section 111 of the Uniform Trust Code (the “UTC”), is purposely broad and allows the interested persons to enter into a NJSA with respect to “any matter” involving a trust. The phrase “any matter” is inclusive rather than restrictive, suggesting that the presumption should be that any matter does fall within the proper subject matter of a NJSA rather than not. In fact, jurisdictions that have adopted similar statutes but did not want NJSAs to be used to modify trusts, such as Iowa and Michigan, have found it necessary to explicitly state this restriction in the statute to counteract the otherwise expansive language contained in Section 111 of the UTC.

Further, the non-exclusive list of matters under paragraph (d) of the NJSA Statute that can be resolved by a NJSA

includes the ability to grant a trustee “any necessary or desirable power.” Use of a nonjudicial settlement agreement in this manner would logically include necessary or desirable powers not already granted in the trust (otherwise the use of a NJSA to grant such powers would be unnecessary), and, as such, would effectuate a de facto trust modification.

Paragraph (c) of the NJSA Statute provides that a NJSA 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 of Chancery.” The vast majority of trust modifications are purely administrative in nature and would not violate a material purpose of a trust. Furthermore, if the settlor of the trust is living at the time a NJSA is contemplated, then the issue of whether a material purpose of the trust is being violated is largely moot. The settlor can be asked to represent that any attendant changes to the trust effectuated by the NJSA do not violate a material purpose of the trust and are consistent with the settlor’s intentions in creating the trust. Finally, the requirement imposed by paragraph (c) of the NJSA Statute that the NJSA is valid only to the extent it includes terms and conditions

that could properly be approved by the Court of Chancery does not impose any impediment to using the NJSA Statute to modify trusts, as the Court of Chancery routinely enters orders modifying trusts.

Although it is true that, due to the short period of time since the NJSA Statute was enacted, no Delaware case has approved the use of a NJSA to modify a trust, the same may be said of other nonjudicial methods to modify a trust under Delaware law, such as decanting. In fact, one could easily surmise that the Court might look more favorably upon the use of a NJSA for such purposes due to the language of paragraph (a) of the NJSA Statute, which requires all "interested persons" to sign the NJSA effectively builds in the considerable protections set forth in Court's own Rule 101(a)(7) relating to consent petitions. In contrast, decanting and merger do not even require notice to beneficiaries who would otherwise need to sign off in connection with a consent petition. In short, when contemplating how the Court would look upon this issue, Trustees may want to consider that a NJSA is far more akin to a consent petition than decanting or merger.

A Trustee might find a NJSA preferable to decanting or merger due to the ability to incorporate consent and release language in a single, cohesive document. Further, although the Trustee must exercise some level of discretion to sign a NJSA, the Trustee's signature has no effect on the trust until all other parties have signed, in contrast to decanting or merger, where the Trustee's discretion is the sole determinative act under the applicable statute.

Trustees should consider NJSAs as a valuable tool that may be used to modify trusts, especially when the trust's grantor is living. Indeed, the protections that the NJSA Statute affords to trust beneficiaries may make this a more attractive approach than other nonjudicial options for modifying trusts.



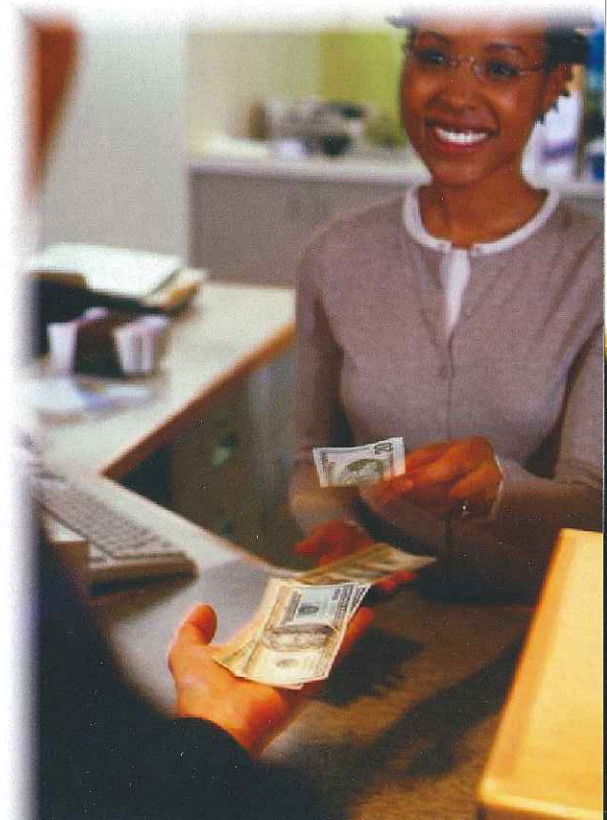
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