

The Rise of Non-Judicial Settlement Agreements

By: Shannon A. Laymon-Pecoraro, CELA

I. Adoption of the Uniform Trust Code

In 2000, the Uniform Law Commission codified the common law of trusts with the Uniform Trust Code (“UTC”).¹ The UTC has subsequently been amended multiple times, most recently in 2010, and has been enacted by thirty-five jurisdictions.²

The development of the UTC has helped breathe new life, opportunity and interest into what many considered a rigid and immovable entity - the irrevocable trust. Although irrevocable trusts were once viewed as inflexible, irrevocable trusts can now be modified and molded, within reason, for the benefit of the trust and its beneficiaries. More specifically, Section 111 of the UTC provides that interested persons may enter into a binding non-judicial settlement agreement (“NJSAs”) with respect to any matter involving a trust, as long as the modification does not violate a material purpose of the trust and includes provisions that could be approved by a court.³ The UTC enumerates certain matters that may be resolved by a NJSAs including:

- Interpretation or construction of the terms of the trust;
- Approval of a trustee’s report or accounting;
- Direction to a trustee to refrain from performing a particular act;

A special thank you to my Associate, Rachel Snead, Esq., for her assistance in preparing these materials.

¹<https://my.uniformlaws.org/committees/community-home?communitykey=193ff839-7955-4846-8f3c-ce74ac23938d&tab=groupdetails>.

² Alabama, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming have enacted the Uniform Trust Code.

³ The use of NJSAs is consistent with Section 65 of the Restatement (Third) of Trusts and continues a trend in the law to reduce the need for judicial supervision. For example, powers of attorney have reduced the need for guardianships and trusts have reduced the need for probate.

- The grant to a trustee of a necessary or desirable power;
- The resignation or appointment of a trustee;
- Determination of a trustee’s compensation;
- Transfer of a trust’s principal place of administration; and
- Liability of a trustee for an action relating to the trust.⁴

While the UTC sets forth specific matters that may be resolved by NJSA, the Commentary specifically states that the list is nonexclusive. Four states have adopted a NJSA statute with a limited list of matters that can be resolved⁵, and two, specifically North Carolina and South Carolina, specify requirements for a NJSA. Additionally, several non-UTC states have enacted NJSA statutes that permit a NJSA.⁶ If a trust is located in a jurisdiction that does not allow a NJSA, or more desirable laws are available in another jurisdiction, it may be advantageous to change the trust’s situs. Assuming the new jurisdiction will permit the NJSA, you will need to assess whether the new state’s laws will apply.⁷ For example, Delaware law will govern the administration of any trust once a Delaware trustee is appointed and the trust is administered in Delaware, unless the trust expressly states that another jurisdiction’s laws shall govern even when the place of administration or situs changes.⁸

In the past, solving issues that arose in the administration of irrevocable trusts involved expensive court proceedings; however, the UTC encourages resolution of disputes by non-judicial means.⁹ The Commentary of Section 111 specifically states that the UTC facilitates the use of

⁴ Unif. Trust Code § 111(d) (2010).

⁵ See Mich. Comp. Laws § 700.7111; NCGS § 36C-1-111; SC Code § 62-7-111; KS Stat § 58a-111.

⁶ Such states include Delaware, Idaho, Iowa, Nevada and Washington. It is important to note that Idaho and Washington each have a “binding agreement” statute that appear to operate similarly to a NJSA. Incidentally, Alaska and South Dakota, which are highly regarded trust jurisdictions, do not have a NJSA mechanism under their laws.

⁷ Todd A. Flubacher & Kenneth F. Hunt, *The Non-Judicial Settlement Agreement Wrapper: An Alternative to Directed Trusts*, TRUST & ESTATES, Dec. 2013.

⁸ *Id.* at 4.

⁹ Unif. Trust Code § 111 Comment (2010).

NJSAs by giving them the same effect as if the agreement had been approved by the court; provided the agreement does not produce a result that was not authorized by law. This has become an extremely useful tool for practitioners, because it promotes flexibility and decreases expense.

The UTC identifies that not all beneficiaries of an irrevocable trust may have the capacity to consent to a NJSA. Specifically, a beneficiary may be a minor, an incapacitated adult, unborn, or unascertained.¹⁰ In the past, a court would need to appoint a guardian ad litem to represent the interests of such beneficiaries, adding to the complexity and expense of a court proceeding. Various fiduciaries and parents may represent these beneficiaries, provided there is no conflict of interest.¹¹ Specifically, the UTC identifies that:

- a conservator may represent and bind the estate that the conservator controls,
- a guardian may represent and bind the ward if a conservator has not been appointed,
- an agent having authority to act with respect to the particular question or dispute may represent and bind the principal,
- a trustee may represent and bind the beneficiaries,
- a personal representative of a decedent's estate may represent and bind persons interested in the estate, and
- a parent may represent and bind the parent's minor or unborn child if no guardian or conservator has been appointed.¹²

Additionally, the holder of a general testamentary power of appointment may also represent the interests subject to the power, which may include permissible appointees and takers in default.¹³

¹⁰ The history and necessity of virtual representation in such cases is thoroughly discussed in the Reporter's Notes on Section 65 of the Restatement (Third) of Trusts.

¹¹ Unif. Trust Code § 303 (2010).

¹² *Id.*

¹³ Unif. Trust Code § 302 (2010).

The UTC also provides that trust beneficiaries with substantially similar interests may represent the interests of those beneficiaries who are unable to represent themselves, as long as no conflict of interest exists.¹⁴

While the use of NJSAs encourages resolution of disputes outside of a court, a court of competent jurisdiction remains available to the extent its jurisdiction is invoked by interested persons. As a result, an interested person may request a court approve a NJSA, determine whether the representation of beneficiaries was adequate, or determine whether the agreement contains proper terms and conditions.¹⁵

II. Who is an Interested Person?

The term “interested persons” means “persons whose consent would be required in order to achieve a binding settlement to be approved by the court.”¹⁶ Since a NJSA may be utilized in a variety of circumstances, the interested persons to a NJSA will vary depending on the substantive issues being addressed. The interested persons will often include the trustee and some, if not all, current and future beneficiaries, and in some cases, the settlor.¹⁷ It is interesting to note, however, that termination or modification under the Restatement (Third) of Trusts does not require the consent of a Trustee, but that the Trustee has a duty to assure necessary requirements are met.¹⁸

Identification of the appropriate beneficiaries to the NJSA is often problematic. The UTC defines a beneficiary as “a person that has a vested or contingent present or future beneficial interest in a trust, vested or contingent; or... in a capacity other than that of trustee, holds a power

¹⁴ Unif. Trust Code § 304 (2010).

¹⁵ Unif. Trust Code § 111(e) (2010).

¹⁶ Unif. Trust Code § 111(a) (2010).

¹⁷ The Restatement (Third) of Trusts indicates that termination or modification requires the unanimous consent of all potential beneficiaries, and identified that would include (1) those who are unlikely to ever receive a distribution, those whose interest arise by operation of law and those who hold powers of appointment, as well as those who would take in default of such exercise, (2) successors in interest of prior beneficiaries, and (3) potential unborn or unascertainable beneficiaries. *See* § 65 cmt b.

¹⁸ *See id.* at cmt. a.

of appointment over trust property¹⁹.”²⁰ The commentary points out that a beneficiary may be unborn or unascertained, and will also include circumstances in which an individual may be a beneficiary as a result of the creation of an interest outside the terms of the trust; however, the fact that an individual received an incidental benefit does not mean they are a beneficiary of the trust.²¹ The UTC also defines a qualified beneficiary as “a beneficiary, on the date the beneficiary’s qualification is determined: (A) is a distributee or permissible distributee of trust income or principal; (B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated on that date without causing the trust to terminate; or (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.”²²

It is critical that the appropriate interested parties are bound by the NJSA so that no party can later challenge it. As the definition of an “interested party” varies from jurisdiction to jurisdiction, it may not be entirely clear which consents are required. A few states define the necessary parties to a NJSA more concretely; for example, Delaware defines “interested persons” by reference to the Court of Chancery consent petition rules.²³ Those rules provide a specific, discrete list of necessary parties. At least seven other jurisdictions clearly define who must sign a NJSA.²⁴ Even among these jurisdictions, individuals with minimal connection to the trust may be

¹⁹ The inclusion of a holder of a power of appointment as a beneficiary is a deviation from the common law of trusts. The Uniform Law Commission determined that the holders of such powers have a significant interest in the trust and therefore should be included in the definition of beneficiary. *See* Comments for Unif. Trust Code § 103 regarding the inclusion of such interest and a further discussion regarding powers of appointment.

²⁰ Unif. Trust Code § 103(3) (2010).

²¹ *See e.g.* Comments for Unif. Trust Code § 103.

²² Unif. Trust Code § 103(13) (2010).

²³ Flubacher, *supra* note 7, at 5 (citing 12 Del. Code § 3338).

²⁴ *See* 20 Pa. Cons. Stat. §7710.1(b), Tenn. Code Ann. §35-15-111(a), RCW 11.96A.030(6), WV Code § 44D-1-103(k), ORS 130.045, ORC 5801.10, Ariz. Rev. Stat § 14-1201(28), 12 DE Code § 3338.

required to consent, such as in Arizona, where a spouse of a beneficiary or a creditor may be required to consent to a NJSA.²⁵

While non-judicial settlement agreements seem like an excellent cost-efficient resolution for an irrevocable trust's problems, as a practical matter, the NJSA is only binding against the parties to an agreement, whether acting in an individual or representative capacity. As a result, the NJSA may not be effective unless signed by all interested persons. This could be particularly problematic in situations where all interested parties are not in agreement, resulting in the need for a judicial resolution.

III. What Constitutes a Material Purpose?

A NJSA must not violate a material purpose of the trust.²⁶ The phrase “material purpose” appears three times in the UTC, and is clearly of central importance, but ironically remains undefined. Additionally, the commentary fails to provide any guidance as to how a trust's material purposes are to be derived.

In *Clafin v. Clafin*, the Supreme Judicial Court of Massachusetts deviated from the English Common law that the wishes of the beneficiaries were paramount, and resolved the American majority rule that a settlor's intent is paramount.²⁷ Generally, a trust's material purposes relate directly to the settlor's underlying motivations. While case law has helped to provide guidance regarding what a court looks for when reviewing whether the material purpose of the

²⁵ Flubacher, *supra* note 7, at 5. Arizona specifically defines “interested person” as “any trustee, heir, devisee, child, spouse, creditor, beneficiary, person holding a power of appointment and other person who has a property right in or claim against a trust estate or the estate of a decedent, ward or protected person. Interested person also includes a person who has priority for appointment as personal representative and other fiduciaries representing interested persons. Interested person, as the term relates to particular persons, may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.” Ariz. Rev. Stat. §14-1201(28).

²⁶ Unif. Trust Code § 111 (2010).

²⁷ 149 Mass. 19 (1889). *See also* Restatement (Third) of Trusts § 65 cmt. a.

trust has been violated,²⁸ the facts and intentions surrounding the creation of the trust and the purposed change or termination tend to govern materiality.²⁹

A settlor who wants to ensure that trust administration remains consistent with their intent should expressly declare their material purposes from the outset in the trust agreement. The expression of the settlor's intent should help preclude a future misunderstanding of the intent by a trustee, the beneficiaries or the court. If the trust does not expressly state its material purposes, the parties entering into the NJSA may need to consider circumstantial evidence regarding the settlor's intent in order to avoid violating a material purpose of the trust.³⁰ The structure of the trust itself may, however, demonstrate the trust was intended to serve as a protective mechanism or other material purpose.³¹ That said, not all inferences may establish a material purpose for a trust. For example, the mere fact a trust provides for successor beneficiaries may not be a sufficient to infer a material purpose of successive enjoyment.³² Instead, it would be necessary to have other circumstances that would demonstrate deprivation of management or protection of the beneficiaries.³³ Similarly, while the terms of the trust may contain spendthrift protections, thus demonstrating a protective intent, these clauses may be routine or incidental and, therefore, may not be sufficient for establishing a material purpose.³⁴

The identification and weighing of material purpose frequently involves a relatively subjective process of interpretation and application of judgement to a particular situation, in as

²⁸ See e.g. *Rust v. Rust*, 176 F.2d 66 (D.C. Cir. 1949); *Trabits v. First Nat'l Bank*, 323 So. 2d 353 (Ala. 1975); *Lafferty v. Sheets*, 267 P.2d 962 (Kan. 1954); *Franklin Foundation v. Attorney Gen.*, 163 N.E.2d 662 (Mass. 1960); *Fidelity Union Trust Co. v. Margetts*, 82 A.2d 191, 195 (N.J. 1951).

²⁹ Restatement (Third) of Trusts § 65 cmt. d.

³⁰ Valerie J. Vollmar, *The Oregon Uniform Trust Code and Comment*, 42 WILLAMETTE L. REV. 187, 267-68 (2006) (quoting Restatement (Third) of Trusts § 67 cmt. d.).

³¹ *Id.*

³² Restatement (Third) of Trusts § 65 cmt. d, illus. 6.

³³ *Id.*

³⁴ *Id.* at cmt. e.

much as purposes or underlying objectives of settlors are often left to be inferred from specific terms of a trust, the nature of various interests created, and the circumstances surrounding the creation of the trust.³⁵ The issue may be more tailored in modification as opposed to termination.³⁶

IV. Use of Non-judicial Settlement Agreements

A NJSA can be used to settle bona fide disputes or resolve construction issues with respect to a trust, but may also be used to accomplish more strategic objectives.³⁷ Additionally, NJSAs are usually a faster, less expensive and more predictable alternative to judicial resolution.³⁸ For all of these reasons, NJSAs are a powerful tool in resolving fiduciary litigation matters.

NJSAs have also found increasing utility in trust administration, even in the absence of a bona fide dispute and are commonly used to improve administrative provisions or otherwise modernize a trust. For example, NJSAs may be executed to appoint a trust protector, clarify trustee succession, adjust trustee powers, change situs, clarify a scrivener's error, change outdated language, merge trusts, add tax planning provisions, address incapacity or special needs of a beneficiary, change grantor trust status, or otherwise explain trust terms.³⁹

Additionally, a NJSA offers a complete set of tools to effectively bifurcate specific areas of trust administration from traditional trustee functions. Parties to a NJSA can control certain aspects of trust administration by removing obstacles, while minimizing a trustee's concern over liability when exercising discretion, without modifying the trust agreement.⁴⁰ This has led to the so-called NJSA "wrapper" to control trust administration by granting the trustee additional powers

³⁵ *Id.* at cmt. d.

³⁶ *Id.*

³⁷ Flubacher, *supra* note 7, at 2.

³⁸ *Id.* at 4.

³⁹ See Lauren Evans DeJong, Alissa B. Gorman, & Miguel D. Pena, *Modifying Irrevocable Trusts Using Nonjudicial Settlement Agreements: Structuring NJSA Wrappers, Relocating Trust Situs, Resolving Disputes, Remediating Trust Construction Issues*, STRAFFORD PUB., September 19, 2017.

⁴⁰ Flubacher, *supra* note 7, at 2.

and providing express conditions on the exercise of such powers while limiting trustee liability.⁴¹ This has become a powerful tool to incorporate modern trust concepts, such as directed trusts, by providing for the appointment of specialized trustees. For example, an “investment trustee” may be appointed to oversee and manage investments while a “distribution trustee” may be appointed to oversee distributions.⁴² This would vest such trustee with specific power while limiting the liability of the general trustee with regard to such power.⁴³ Additionally, you may limit Trustee liability for holding assets that may otherwise violate various duties pertaining to the management and investment of trust assets under the Uniform Prudent Investor Act or other state law.⁴⁴

In many cases, a NJSA will be administratively preferable to decanting or trust merger, because no new trust is created; therefore, the trustee does not create a new trust account or require a new tax identification number. A NJSA may also eliminate some tax concerns associated with trust modification or the creation of a new trust.

V. When Is a Non-Judicial Settlement Agreement Not Advantageous

The use of NJSAs is not always desirable or feasible. For example, in Virginia, a testamentary trust created by a Last Will and Testament is subject to the continual oversight of the court, by and through a Commissioner of Accounts.⁴⁵ As a result, a petition for termination or modification is often the most efficient way to effect the desired change in the trust. When the Trustee provides notice and the written consent of all qualified beneficiaries, such proceedings are usually swift.

⁴¹ Flubacher, *supra* note 7, at 2.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 3 & 4 (detailing the use of NJSA wrappers to hold a concentration in a single asset, to hold an LLC, or to fund a discretionary investment account).

⁴⁵ Va. Code § 64.2-1306.

Additionally, although NJSAs under the UTC, there are times when court approval is warranted. For example, if the parties wants to bind the federal government, then court approval may be required. In *Commissioner v. Estate of Bosch*, the Supreme Court determined that a state court's decision regarding a tax issue, particularly when the federal government was not made a party, would only bind the federal government if the state's highest court had heard and decided on the case.⁴⁶ Many practitioners keep the *Bosch* case in mind in situations where the IRS may object to the modification, termination, or decanting of an irrevocable trust, and therefore, seek a court order.

A NJSA may not be advantageous if the law is unclear as to the liability of a trustee when entering into a NJSA. The UTC expressly provides that beneficiaries to NJSA may, without consideration, release the trustee from liability for a breach of trust⁴⁷ and many non-UTC jurisdictions have provisions relating to the release of liability as well.⁴⁸ It is also important to consider whether consideration is required for the release of trustee liability. Unlike other situations, such as those in which a trustee resigns or is terminated, in which waiver of a judicial accounting for trustee services can serve as consideration, a NJSA is not, theoretically, entered into by the trustee in exchange for consideration. Courts have held that a beneficiary's release of liability for a trustee is invalid on the basis that the release lacked consideration, and one state has a statute that implies consideration is required for a valid trustee release.⁴⁹ The Delaware Court of

⁴⁶ 387 U.S. 456 (1967).

⁴⁷ Unif. Trust Code § 111(d)(6) (2010). The UTC does not require consideration but does require that (i) the release was not induced by improper Trustee conduct and (ii) at the time of the release, the beneficiary knew his or her rights and the material facts relating to the breach. The comment to this UTC provision provides that a release requires an affirmative act by the beneficiary, a failure to object is not sufficient. *See also* Restatement (Third) Trusts § 97 cmt b(3).

⁴⁸ Delaware has specifically addressed this issue and provides that a release is enforceable with or without consideration. *See* 12 Del. Code §3588.

⁴⁹ Flubacher, *supra* note 7, at 5. Note that a Trustee may pursue court involvement, and as a result, there is an argument that foregoing litigation and court involvement may be sufficient to satisfy the consideration requirement.

Chancery, in dicta, once suggested that an enforceable release of trustee liability probably requires consideration, but Delaware has since adopted a release statute that expressly provides that a release is enforceable with or without consideration.⁵⁰

When choosing jurisdiction for a NJSA, it is important to consider the limitations on the discharge of trustee liability. In jurisdictions that have adopted the UTC, the terms of a trust instrument cannot exculpate a trustee for bad faith or for reckless indifference with respect to the purposes of the trust or the interests of its beneficiaries.⁵¹

⁵⁰ *Id.*

⁵¹ Unif. Trust Code § 105 and § 1008.

**NON-JUDICIAL SETTLEMENT AGREEMENT REGARDING
THE [NAME OF TRUST]**

This Non-Judicial Settlement Agreement (“Agreement”) is made this _____ day of _____, 2020, by and between [NAME OF PRIMARY BENEFICIARY 1], as Trustee of The [NAME OF TRUST] A and The [NAME OF TRUST] B created under The [NAME OF TRUST] under Agreement dated [DATE TRUST ESTABLISHED], [NAME OF CPA], as Delegated Trustee of The [NAME OF TRUST] A and The [NAME OF TRUST] B created under The [NAME OF TRUST] under Agreement dated [DATE TRUST ESTABLISHED], and [NAME OF SPECIFIC BENEFICIARY], [NAME OF PRIMARY BENEFICIARY 1], [NAME OF PRIMARY BENEFICIARY 2], [NAME OF PRIMARY BENEFICIARY 3], or [NAME OF PRIMARY BENEFICIARY 4], individually and as beneficiaries of The [NAME OF TRUST] A and The [NAME OF TRUST] B, created under The [NAME OF TRUST] under Agreement dated [DATE TRUST ESTABLISHED], (hereinafter individually referred to as “Party” and collectively referred to as the “Parties”).

RECITALS

1. On [DATE TRUST ESTABLISHED], [SETTLOR 1] and [SETTLOR 2] (the “Trustors”), established The [NAME OF TRUST] (the “Trust”), with [SETTLOR 1] and [SETTLOR 2], as the original Co-Trustees. A copy of the Trust is attached hereto as Exhibit “A”.
2. The Trustor Powers set forth on [Page #] of the Trust provided that the Trustors may during their joint lives, sign instruments delivered to Trustee, to change the beneficiaries, their respective shares and the plan of distribution, amend the Trust in any other respect, or revoke the Trust in its entirety or any provision therein, except as to any share or Trust created herein which has become irrevocable by the terms hereof or by operation of law.
3. [SETTLOR 2] died on [DOD SETTLOR 2], making [SETTLOR 1] the sole surviving Trustor and Trustee of the Trust. A copy of her certificate of death is attached hereto as Exhibit “B”.
4. Upon the death of [SETTLOR 2] the Trust was to be divided into The [NAME OF TRUST] A (hereinafter the “Survivor’s Trust”) and The [NAME OF TRUST] B (hereinafter the “Decedent’s Trust”). The Survivor’s Trust remained revocable while the Decedent’s Trust became Irrevocable.
5. The Trust was amended seven times. The First, Second and Third Amendments were made in a single document, a copy of which is attached hereto as Exhibit “C”, while [SETTLOR 2] was still alive, however, such amendments were only executed by [SETTLOR 1]. The Fourth, Fifth, Sixth and Seventh Amendments, copies of which are attached hereto as Exhibits “D”, “E”, “F”, and “G”, were executed by [SETTLOR 1], the surviving Trustor, after the death of [SETTLOR 2], and therefore apply only to Survivor’s Trust. The Fourth, Fifth, Sixth, and Seventh Amendments made amendments to the special bequests made in the Trust.

6. Upon the death of [SETTLOR 2], Survivor's Trust and Decedent's Trust were to fund as follows:

- a. Commonly held property transferred to the Trust was to retain its commonly held nature and divided as follows: [SETTLOR 1]'s 1/2 interest in property, in addition to any property not otherwise allocated to the Marital Share, to Survivor's Trust, and [SETTLOR 2]'s 1/2 interest in property to Decedent's Trust.
- b. The Marital Share was to be divided as follows: an amount equal to the exemption equivalent by reason of the unified tax credit was to be allocated to Decedent's Trust with the balance allocated to Survivor's Trust.
- c. Decedent's Trust shall also include: (1) amounts held by [SETTLOR 2] in an IRA or other retirement plan that have been disclaimed in favor of Decedent's Trust, as amended to comply with tax issues, and (2) property having a value equal to the largest amount, after allowing for the unified credit against the federal estate tax and the state death tax credit, that would not result in federal estate tax being imposed on the estate of the [SETTLOR 2].
- d. Separate property was to retain its separate nature.

7. [SETTLOR 1] died [DOD SETTLOR 1]. A copy of his death certificate is attached hereto as Exhibit "H". Upon his death, Survivor's Trust became irrevocable, and [NAME OF PRIMARY BENEFICIARY 1] was named as, and assumed the role of, Trustee.

8. The Trust was not properly administered during the life of [SETTLOR 1], and as a result, the property in the Trust was never properly retitled to reflect the allocation of assets between Survivor's Trust and Decedent's Trust, however, an Estate Tax Return ("IRS Form 706") was filed upon the death of [SETTLOR 2] and reports the intended division of Trust property. The IRS Form 706 reported that the real property held by the Trust and [NAME OF CORPORATION] passed to Survivor's Trust, and that cash assets of \$_____ went to Decedent's Trust. A copy of the IRS Form 706 is attached hereto as Exhibit "I".

9. The assets of the Trust at time of [SETTLOR 1]'s death, with estimated values, are set forth below:

- a. Liquid Cash Assets of \$_____, all of which was titled in the name of the Trust.
- b. [NAME OF CORPORATION], which was jointly owned prior to assignment on [DATE TRUST ESTABLISHED].
- c. Real Property, all of which was jointly owned prior to the gift into the Trust, which consisted of:

- i. [ADDRESS OF PRIMARY RESIDENCE], which had a tax assessed value of \$ _____,
 - ii. [ADDRESS 1], which had a tax assessed value of \$ _____, and
 - iii. [ADDRESS 2], which had a tax assessed value of \$ _____.
- d. Tangible Personal Property of unknown value
- e. \$ _____ in interest-only loans, with a 3% annual interest thereon, to [NAME OF PRIMARY BENEFICIARY 4] by [SETTLOR 1], plus all outstanding quarterly interest payments that have not been paid by [NAME OF PRIMARY BENEFICIARY 4] since the death of [SETTLOR 1]. The interest payments on such loans were reported on Decedent's Trust fiduciary returns and deposited into the bank account(s) held by the Trust. Payments on such loans are due the last day of the month for each March, June, September, and December. These loans consisted of:
 - i. \$ _____ loan on [DATE OF LOAN 1], and
 - ii. \$ _____ loan on [DATE OF LOAN 2].

10. Due to the dispute of the Parties regarding the administration of the Trust, [NAME OF CPA] was appointed by Trustee as a Delegated Trustee and was provided specific authority to ensure neutral administration until resolution of the dispute.

11. The Parties to this Agreement are all of the persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by a court.

12. This Agreement does not violate a material purpose of the Trust Agreement and includes terms and provisions that could be properly approved by a court under the Virginia Uniform Trust Code or other applicable law.

13. The Parties to this agreement agree that due to the failure to properly title assets of the Trust and its subtrusts, and the provisions of the Trust and the Amendments thereto, there are ambiguities and the Parties to this Agreement desire to enter into an agreement that will direct Trustee in the administration of and distributions from Survivor's Trust and Decedent's Trust. The Parties do not wish to petition a court to approve the terms of this Agreement or otherwise determine if all interested Parties are represented to determine whether this Agreement contains terms and conditions the court could have properly approved.

TERMS OF AGREEMENT

In consideration of the mutual promises and conditions contained herein, and other good and valuable consideration, and pursuant to Virginia Code § 64.2-709, [NAME OF PRIMARY BENEFICIARY 1], as Trustee of Survivor's Trust and Decedent's Trust created under The [NAME OF TRUST] under Agreement dated [DATE TRUST ESTABLISHED], and [NAME OF CPA], as Delegated Trustee of Survivor's Trust and Decedent's Trust created under The

NON-JUDICIAL SETTLEMENT AGREEMENT REGARDING THE [NAME OF TRUST]

[NAME OF TRUST] under Agreement dated [DATE TRUST ESTABLISHED], and [NAME OF SPECIFIC BENEFICIARY], [NAME OF PRIMARY BENEFICIARY 1], [NAME OF PRIMARY BENEFICIARY 2], [NAME OF PRIMARY BENEFICIARY 3], or [NAME OF PRIMARY BENEFICIARY 4], individually and as beneficiaries of Survivor's Trust and Decedent's Trust, created under The [NAME OF TRUST] under Agreement dated [DATE TRUST ESTABLISHED], agree as follows:

1. The statements in the Recitals are true and accurate and are binding on the Parties.
2. At the time of [SETTLOR 1]'s death, the Trust consisted of the assets identified in paragraph 9 above.
3. [NAME OF PRIMARY BENEFICIARY 2]'s inheritance was to be kept in trust because it was believed that he was receiving means-tested public benefits as a result of his disability. [NAME OF PRIMARY BENEFICIARY 2] has reported to Trustee that he is receiving Social Security Disability Income and Medicare, without Medicaid benefits, and as a result is not receiving means-tested public benefits. Therefore, all distributions to be made to or for the benefit of [NAME OF PRIMARY BENEFICIARY 2] in accordance with the terms of the Trust and the Amendments thereto shall be made outright, and free of Trust, to [NAME OF PRIMARY BENEFICIARY 2].
4. The \$_____ in loans to [NAME OF PRIMARY BENEFICIARY 4] shall be distributed to him as part of his equal share of the liquid cash assets. All unpaid interest payments from the date of [SETTLOR 1]'s death until the date the first partial distribution shall also be treated as distributions to [NAME OF PRIMARY BENEFICIARY 4] from his equal share of the liquid cash assets. The calculations of such unpaid interest shall be calculated by [NAME OF CPA].
5. The following assets shall be distributed to [NAME OF SPECIFIC BENEFICIARY], the necessary initial draft of such documentation for which shall be prepared by [NAME OF SPECIFIC BENEFICIARY]'s attorney, within 30 days of this Agreement:
 - a. The stock of [NAME OF CORPORATION]
 - b. The real property located at [ADDRESS 1] and [ADDRESS 2].
6. One million dollars (\$1,000,000) worth of trust assets be distributed no later than the later of 30 days of this Agreement or 10 days of receipt of quarterly interest payment calculation from [NAME OF CPA] as follows:
 - a. To [NAME OF RESIDUARY BENEFICIARY 1], an amount totaling \$250,000,
 - b. To [NAME OF PRIMARY BENEFICIARY 2], an amount totaling \$250,000,
 - c. To [NAME OF RESIDUARY BENEFICIARY 3], an amount totaling \$250,000, and
 - d. To [NAME OF PRIMARY BENEFICIARY 4], an amount totaling \$250,000, less distribution of his loans and unpaid quarterly interest as outlined in paragraph 3 of this Agreement.

NON-JUDICIAL SETTLEMENT AGREEMENT REGARDING THE [NAME OF TRUST]

7. The items of silver shall be divided by weight, in approximately equal shares, between the Primary Beneficiaries. This division shall take into consideration equal distribution that there are items that consider of 90% and 95% silver. Trustee shall work with **[NAME OF CPA]** to divide the silver into shares and put each such share into separate bags. Because Trustee will assist with the division of the silver, she shall not be entitled to select her share, but shall receive the remaining bag(s) of silver after all other Primary Beneficiaries receive their share. Primary Beneficiaries shall select and receive their share of silver when they received their distribution of tangible personal property.

8. Items of tangible personal property were selected by the Primary Beneficiaries for distribution as follows:

- a. **[NAME OF PRIMARY BENEFICIARY 1]**
 - i.
- b. **[NAME OF PRIMARY BENEFICIARY 2]**
 - i.
- c. **[NAME OF PRIMARY BENEFICIARY 3]**
 - i.
- d. **[NAME OF PRIMARY BENEFICIARY 4]**
 - i.

[NAME OF CPA] shall schedule a distribution date and time, to be held on a Friday that is mutually available for **[NAME OF CPA]** and the Primary Beneficiaries. The house located at **[ADDRESS OF PRIMARY RESIDENCE]** will be open for a period not to exceed four (4) hours and all identified above shall be removed from the house at that time. Prior to such removal, the Primary Beneficiaries shall each execute a copy of the Receipt attached hereto as Exhibit A and return it to **[NAME OF CPA]**. A Primary Beneficiary who does not execute such a Receipt shall forfeit his or her share of the tangible personal property. Any items not removed from the house within the allocated four (4) hour window shall be forfeited by such Primary Beneficiary.

9. The real property located at **[ADDRESS OF PRIMARY RESIDENCE]** (the "House") shall be listed and sold as follows:

- a. After removal of all the tangible personal property in the House, the House will be cleaned by a third-party housekeeper.
- b. Trustee shall obtain an appraisal on the House from **[NAME OF APPRAISER]**.
- c. Trustee will retain **[NAME OF REALTOR]**, a licensed realtor and list the house for sale at the appraised value. Any change in realtor shall be agreed upon by Trustee.
- d. Trustee shall not accept an offer on the House that is below 90% of the appraised value unless the Primary Beneficiaries are consulted.
- e. The net proceeds from the sale of the House shall be deposited into an account for Survivor's Trust.
- f. The Settlement Agent shall be **[NAME OF SETTLEMENT AGENT]**.

10. After the net proceeds from the sale of the house have been deposited in an account for Survivor's Trust, Trustee shall obtain a fixed fee quote from [NAME OF CPA] to prepare final returns, and a trust report, which shall include all final costs of administration, shall be prepared by [NAME OF CPA] to be sent to the Primary Beneficiaries with a proposal for final distribution, to be prepared by Trustee's attorney, in accordance with Virginia Code § 64.2-779. Final distributions shall be made within 30 days of the date in which all receipts have been returned or the expiration of the term provided by Virginia Code § 64.2-779, whichever occurs first.

11. The Parties have all benefited from the legal advice provided by Trustee's attorney, and the services provided by [NAME OF CPA]. Trust shall bear the cost of any and fees incurred by the Trust for administration, which shall include those fees charged by [NAME OF CPA], and reimbursement of the legal fees, costs, and expenses incurred by Trustee. A Party who has retained an attorney to represent their beneficial interest shall be reimbursed their legal fees, costs, and expenses in an amount not to exceed five thousand dollars (\$5,000).

12. This Agreement was created in the Commonwealth of Virginia pursuant to its laws and with the decisions of its courts in mind. Therefore, this Agreement shall be construed and governed in accordance with the laws of the Commonwealth of Virginia and the decisions of its courts.

13. This Agreement contains the entire understanding of the Parties, and there are no oral or written promises, inducements, representations, warranties, covenants, or undertakings other than those expressly set forth in this Agreement. None of the Parties is relying upon, and each specifically repudiates, any representations other than those set forth herein. All prior written or oral agreements between the Parties are hereby revoked and declared null and void.

14. Each Party has fully read this Agreement and fully understands all of the facts, terms, covenants, provisions, and conditions of this Agreement. Hook Law Center, P.C. represents [NAME OF PRIMARY BENEFICIARY 1], as Trustee. Hook Law Center, P.C. has not provided legal advice to [NAME OF CPA], as Delegated Trustee, or [NAME OF SPECIFIC BENEFICIARY], [NAME OF PRIMARY BENEFICIARY 1], [NAME OF PRIMARY BENEFICIARY 2], [NAME OF PRIMARY BENEFICIARY 3], or [NAME OF PRIMARY BENEFICIARY 4], as beneficiaries of Survivor's Trust and Decedent's Trust created under The [NAME OF TRUST] under Agreement dated [DATE TRUST ESTABLISHED]. [NAME OF FIRM 1] was retained by [NAME OF PRIMARY BENEFICIARY 4] to represent his beneficial interest and [NAME OF FIRM 2] was retained by [NAME OF SPECIFIC BENEFICIARY]. Each Party has been advised of his or her right to consult an attorney of his or her own choice and has had an adequate opportunity to do so. Each Party has been fully and adequately advised of their legal rights and obligations as they relate to this Agreement, or, in lieu thereof, each Party hereby expressly waives their right to have an attorney of his or her own choice explain their legal rights and obligations as they relate to this Agreement, and this waiver of counsel is made freely, knowingly and voluntarily.

15. In a manner consistent with Virginia Code §§ 64.2-716 and 64.2-717, the Parties agree to act as a representative to receive notice, consent on behalf of, and to bind to this Agreement (a) his or her minor, incapacitated, unborn, or unknown children, (b) his or her heirs,

personal representatives, successors, and assigns, (c) the beneficiaries of any estate or trust of which he is serving as a fiduciary, (d) the potential appointees of any power of appointment he or she holds, and (e) any other person who may be bound to this Agreement by him or her under Virginia law.

16. This Agreement will be binding on and inure to the benefit of the Parties and their respective successors, heirs, assigns, transferees, representatives, agents, guardians, and personal representatives.

17. This Agreement constitutes the sole and entire agreement between the Parties with respect to the subject matter of this Agreement. The Parties are not relying upon any representation, undertaking, or agreement relating to the subject matter of this Agreement that is not set forth in this Agreement.

18. This Agreement may not be modified except by a writing signed by all Parties.

19. Each Party agrees to take such further action as may be reasonably necessary to effectuate the consummation of this Agreement, including the execution and filing of any documents as may be necessary to effectuate such consummation.

20. Each Party acknowledges and agrees that no provision of this Agreement will be construed in favor of any Party or against any Party by reason of such provision having been drafted by or on behalf of one Party rather than the other.

21. If any provision of this Agreement is held for any reason to be invalid or unenforceable, such invalidity or unenforceability will not affect any of the other terms of this Agreement, and this Agreement will be construed as if such unenforceable term had never been contained herein.

22. Whenever the context of this Agreement requires, the gender of all words includes the masculine, feminine, and neuter, and the plural of all words includes the singular and plural.

23. This agreement may be signed in any number of counterparts, each of which is an original and all of which taken together form one single document.

Witness the following signatures and seals:

[NAME OF PRIMARY BENEFICIARY 1], Individually
and as Trustee and beneficiary of Survivor's Trust and
Decedent's Trust

STATE OF _____
CITY/COUNTY OF _____, to-wit:

NON-JUDICIAL SETTLEMENT AGREEMENT REGARDING THE [NAME OF TRUST]

BEFORE ME, the undersigned authority, on this _____ day of _____, 2020, personally appeared [**NAME OF PRIMARY BENEFICIARY 1**], personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged that such person executed the same.

WITNESS my hand and official seal.

Notary Public

[**NAME OF CPA**], as Delegated Trustee of Survivor's Trust and Decedent's Trust

STATE OF _____
CITY/COUNTY OF _____, to-wit:

BEFORE ME, the undersigned authority, on this _____ day of _____, 2020, personally appeared [**NAME OF CPA**], personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged that such person executed the same.

WITNESS my hand and official seal.

Notary Public

[**NAME OF SPECIFIC BENEFICIARY**], Individually and as a beneficiary of Survivor's Trust and Decedent's Trust

STATE/Commonwealth of _____
CITY/COUNTY OF _____, to-wit:

BEFORE ME, the undersigned authority, on this _____ day of _____, 2020, personally appeared [**NAME OF SPECIFIC BENEFICIARY**], personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged that such person executed the same.

NON-JUDICIAL SETTLEMENT AGREEMENT REGARDING THE [**NAME OF TRUST**]

WITNESS my hand and official seal.

Notary Public

[NAME OF PRIMARY BENEFICIARY 2], Individually
and as a beneficiary of Survivor's Trust and Decedent's
Trust

STATE OF _____
CITY/COUNTY OF _____, to-wit:

BEFORE ME, the undersigned authority, on this _____ day of _____,
2020, personally appeared [NAME OF PRIMARY BENEFICIARY 2], personally known to me
or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed
to the within instrument and acknowledged that such person executed the same.

WITNESS my hand and official seal.

Notary Public

[NAME OF PRIMARY BENEFICIARY 3], Individually
and as a beneficiary of Survivor's Trust and Decedent's
Trust

STATE OF _____
CITY/COUNTY OF _____, to-wit:

NON-JUDICIAL SETTLEMENT AGREEMENT REGARDING THE [NAME OF TRUST]

BEFORE ME, the undersigned authority, on this _____ day of _____, 2020, personally appeared **[NAME OF PRIMARY BENEFICIARY 3]**, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged that such person executed the same.

WITNESS my hand and official seal.

Notary Public

[NAME OF PRIMARY BENEFICIARY 4], Individually and as a beneficiary of Survivor's Trust and Decedent's Trust

STATE OF _____
CITY/COUNTY OF _____, to-wit:

BEFORE ME, the undersigned authority, on this _____ day of _____, 2020, personally appeared **[NAME OF PRIMARY BENEFICIARY 4]**, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged that such person executed the same.

WITNESS my hand and official seal.

Notary Public