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**Non-Judicial  
 Settlement  
 Agreements under  
 the Uniform Trust  
 Code**

**HOOK**  
 LAW CENTER



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**Adoption of the UTC**

- 2000 – codified common law of trust
- Most recently amended in 2010
- Adopted by 35 jurisdictions
- Created flexibility in administration of irrevocable trust

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**Section 111**

- Interested persons may enter into a binding non-judicial settlement agreement (“NJSA”) with respect to any matter involving a trust
- Modification does not violate a material purpose of the trust
- Includes provisions that could be approved by a court
- Examples:
  - 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;
  - 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.

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**+ Benefits**

- Minimize tax concerns for modification of trust
- Minimize cost
- Maximize predictability
- Faster



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**+ Deviations from UTC**

- Michigan, North Carolina, South Carolina and Kansas set forth limited list of matters that can be resolved by NJSAs
- North Carolina and South Carolina set forth specific requirements
- Delaware, Idaho, Iowa, Nevada and Washington are non-UTC states with similar statutes
- Alaska and South Dakota do not have NJSAs mechanisms
- Some UTC states have deviances



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**+ Interested Persons**

- Persons whose consent would be required in order to achieve a binding settlement to be approved by the court
- Varies depending upon the substantive issues being addressed
- Consent of Trustee is NOT required, however, Trustee has a duty to assure necessary requirements are met
- Some jurisdictions define who must sign a NJSAs



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## + Beneficiary

- Beneficiary - 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 of appointment over trust property
- Qualified Beneficiary - 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.

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## + Inability to Consent

- Minor, incapacitated, unborn or unascertained
- Historically, a GAL would need to represent interest of such persons
- Fiduciary and parent may represent if no conflict
  - 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.
- Holder of general power of appointment may represent interested subject to the power
- Beneficiaries with substantially similar interests may represent the interests of those beneficiaries unable to represent themselves

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## + Material Purpose

- Not defined in the UTC
- English common law v. *Clafin v. Clafin*
  - Intent of the settlor is paramount
- Some case law defining material purpose, but boils down to the facts surrounding the creation of the trust and proposed change or termination
- To avoid change and define intent, settlors should express intent in the trust
  - Default: Circumstantial evidence
- Note: UTC 411(a) - modification if inconsistent with material purpose if settlor and all beneficiaries agree

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## + Structure and Provisions Alone Insufficient

- Successor beneficiary does not mean intent for successive enjoyment
  - Other circumstances to demonstrate intent to deprive beneficiary of management or to protect beneficiaries
- Spendthrift clauses are routine and incidental
  - UTC Comment: "A finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to the beneficiary's management skills, judgment, or level of maturity."
  - PA: presumed to constitute a material purpose

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## + Use of NJSAs

- Settlement bona fide disputes or resolve construction issues
- Improve administrative provisions or modernize trust

Administrative	Modernize
Trust Protector	Scrivener's Error
Trustee Succession	Outdated Provisions
Adjust Powers	Merge Trusts
Situs/Governing Law	Tax Planning
	Address Special Needs
	Grantor to Non-Grantor

- NJSA Wrapper – Directed Trusts

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## + When Not to Use NJSA

- Court supervision required
- Interested persons do not agree
- Government involved
  - *Commissioner v. Estate of Bosch*
- Liability of Trustee unclear
  - Consideration required?

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