

YOUNG LAWYERS



BY KENDAL WEISENMILLER, ESQ.

NONJUDICIAL SETTLEMENT AGREEMENTS IN FIDUCIARY MATTERS

The saying goes that there is nothing like death and a dollar. This is apparent from the abundance of trust and state litigation encompassing all sizes of trusts and estates in Nevada. When faced with disputes in fiduciary matters, estate planning and probate practitioners should consider the utility of nonjudicial settlement agreements (NJSAs), which encourage nonjudicial resolution of disputes. NJSAs can be utilized in trust and estate administrations and litigation, even while a settlor or testator is living; taking this path helps the parties involved avoid, or at least minimize, the time and often exorbitant costs required by the litigation process—which can deplete the very assets in dispute.

In 2015, the Nevada Legislature enacted NRS 164.940 and 164.942, Settlement of Disputes, which authorize NJSAs relating to trusts. This statute is similar to Section 111 of the Uniform Trust Code, which has been adopted by 32 states.¹

The statute provides a non-exhaustive list of 15 matters that may be resolved by NJSAs. Matters relating to a trustee that may be resolved by the NJSAs include approval of a trustee's accounting, directing the trustee "to perform or refrain from

performing a particular act," "[t]he resignation or appointment of a trustee and the determination of a trustee's compensation," and "[n]egating the liability of a trustee for an action relating to the trust and providing indemnification therefor...." Matters relating to the trust itself that may be resolved by an NJSAs include adding, deleting, modifying, interpreting or construing the terms of the trust. This non-exclusive list is only a guideline for matters that may be resolved by an NJSAs, and lawyers may find other matters appropriate for resolution through these means.

The NJSAs are valid if it is:

- "Entered into by all indispensable parties;"
- Does not violate "a material purpose of the trust;" and
- Does not include "terms and conditions that could not be properly approved by the court, as defined in NRS 132.116, under the law governing the trust instrument."

Given how recently the NJSAs statute was enacted, there is no applicable Nevada case law; in fact, only one Nevada Supreme Court case even mentions NRS 164.940-42, *Matter of Frei Irrevocable Tr.* Dated Oct. 29, 1996, 133 Nev. 8, (2017), in which the Nevada Supreme Court declined to consider the statute because it was enacted after the settlement at issue.

NRS 164.942(5) defines "indispensable parties" as "all interested persons, as defined in NRS 132.185, whose consent would be required in

order to achieve a binding settlement were the settlement to be approved by the court." An "interested person," under NRS 132.185, is one "whose right or interest under an estate or trust may be materially affected by a decision of a fiduciary or a decision of the court." Who constitutes an interested person may be determined by the trustee or the court, "according to the particular purposes of, and matter involved in, a proceeding." In determining who to include as a party to the NJSAs, attorneys should consider persons against whom they might seek to enforce the agreement.

Although the Nevada Supreme Court has not yet addressed what constitutes a "material purpose" of a trust, the Third Restatement of Trusts explains: "[m]aterial purposes are not readily to be inferred. 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 a beneficiary's management skills, judgment or level of maturity."²

NRS 164.940-942 encourage the resolution of trust disputes, giving the NJSAs the same effect as court approval. Trust settlors who anticipate disputes relating to the trust may benefit from an antemortem NJSAs, which may serve to prevent challenges to the trust itself or to the settlor's capacity to execute the trust.³ Given the potential for litigation regarding what constitutes a material purpose of a trust, an antemortem NJSAs could include an affidavit from the settlor "stating that the subject of the nonjudicial settlement agreement and



any attendant changes to the trust do not violate a material purpose of the trust and are consistent with the settlor's intentions in creating the trust."⁴

When disputes arise in probate administration, practitioners should also consider NRS 151.005, which allows "distributees [to] agree among themselves to alter the interests, shares or amounts to which they are entitled under the terms of the will of the decedent, or under the laws of intestacy, in any way that they provide in a written agreement executed by all who are affected by its provisions."

NJSAs are valuable tools for resolving fiduciary disputes, minimizing attorneys' fees and preserving trust or estate assets for distribution, increasing client satisfaction. Estate planning and probate practitioners should consider the many uses of NJSAs as they come across these issues in their practices. **NL**

1. See References & Annotations, Uniform Trust Code (2000). Section 111 of the Uniform Trust Code authorizes "interested persons [to] ... enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust", as long as "it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court." Unif. Trust Code § 111 (2018).
2. Restatement (Third) of Trusts § 65 (2003).
3. See, e.g., Kelly M. Preteroti and Lindsay R. DeMoss D'Andrea, Nonjudicial Settlement Agreements: The Many Uses and Potential Pitfalls, available at <https://www.bakerdonelson.com/webfiles/Bios/Nonjudicial%20Settlement%20Agreements%20-%20The%20Many%20Uses%20and%20Potential%20Pitfalls.pdf> (last visited October 25, 2018).
4. Daniel F. Hayward, Miguel D. Pena, Methods for Modifying Trusts Under Delaware Law, 15 Del. L. Rev. 95, 104 (2015).

KENDAL WEISENMILLER practices probate and trust litigation and administration at the Law Firm of Jeffrey Burr. She was named Legal Elite by Nevada Business Magazine in 2014, 2016, 2017 and 2018, and a Mountain States Super Lawyer Rising Star in 2017 and 2018.

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