

# Nonjudicial Settlement Agreements

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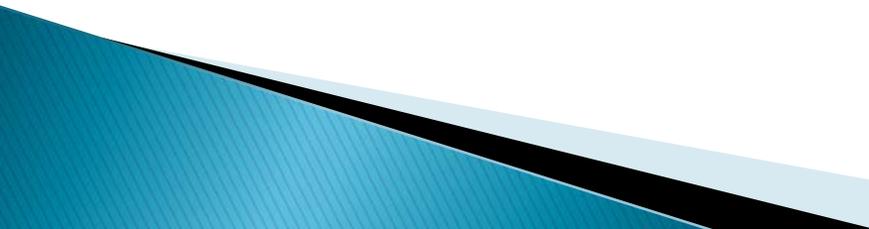
# Judicial Policy Generally

- ▶ Delaware jurisprudence encourages parties to find ways to resolve differences nonjudicially.

# The Emerging View

- ▶ If all parties with an interest in an irrevocable trust consent, they can compel its modification.
- ▶ Exception: if modification would be inconsistent with a material purpose of the trust, (unless the grantor consents or a court authorizes).

Restatement (Third) of Trusts §65



# Topics for Agreement

Matters identified in statute as subjects of a nonjudicial settlement agreement:

- ▶ 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 or the grant to a trustee of any necessary or desirable power;
- ▶ Resignation or appointment of a trustee and the determination of a trustee's compensation;
- ▶ Transfer of a trust's principal place of administration;
- ▶ Liability of a trustee for an action relating to the trust.

Cannot violate a material purpose. 12 *Del. C.* § 3338(d).

# Who Must Participate

- ▶ Every beneficiary must participate.
    - Everyone with a present interest;
    - Any person whose interest would vest, without regard to any exercise of a power of appointment, if a present interest in the trust terminated on the date of the agreement.
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# Others who must participate

- ▶ All other persons with an interest in the trust:
  - ▶ Each fiduciary
  - ▶ Advisers
  - ▶ Protector
  - ▶ The grantor, if living
  - ▶ All others with an interest in the trust
- ▶ 12 *Del. C.* § 3338(a)

# Charitable Beneficiaries

- ▶ If charity is identifiable and in existence, it can consent.
- ▶ Otherwise, the Attorney General of Delaware must consent.

# Minor Beneficiaries

- ▶ An adult with identical interests and no material conflict of interest may consent for a minor.
- ▶ A material conflict of interest is presumed :
- ▶ The adult would obtain greater authority or liability protection; or
- ▶ The adult has an actual or potential conflict of interest due to a differing investment horizon or an interest in current income over capital growth.
- ▶ 12 *Del. C.* § 3547(e).

# Trustee's Duties

- ▶ No trustee liability to a beneficiary who consents, releases the trustee or ratifies the transaction, unless:
- ▶ Improper conduct of the trustee induced the beneficiary's consent, release or ratification; or
- ▶ The beneficiary did not know of (a) her rights; or (b) material facts knowable by the trustee.

12 *Del. C.* § 3588

The duties of impartiality, care and loyalty apply.

# Inadvisable Topics:

- ▶ Dispensing with a fiduciary obligation.
  - ▶ Concealing the trust from a beneficiary.
  - ▶ Reducing the standard for fiduciary liability, unless all beneficiaries are competent adults.
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# 2016 Legislation

- ▶ 2016 legislation removed requirement that the terms of a nonjudicial settlement agreement must be ones “that could be properly approved by the Court of Chancery.”

12 *Del. C.* § 3338

# Modification with Living Grantor's Consent

- ▶ Added in 2016 legislation, 12 *Del. C.* § 3342 permits an irrevocable trust to be modified, even to change a material purpose of the trust, if the grantor, and all fiduciaries and beneficiaries consent or agree in writing not to object.
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# Transfer Tax Issues

- ▶ Acquiescing in an agreement that reduces a party's interest can be a transfer for less than adequate consideration, a gift.
  - *Cerf v. Commissioner*, 141 F.2d 564 (3rd Cir. 1944)
- ▶ A GST-exempt trust may be modified without loss of exemption if no beneficial interest is shifted to a beneficiary in a lower generation than those having a beneficial interest before the modification, and the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust.

Treas. Reg. § 26.2601-1(b)(4)(i)(D).