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Resolving Contested Trusts and Estates-Related Fiduciary Matters Without Litigation: Overview

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A Practice Note providing an overview of strategies and methods that can be used to resolve contested trusts and estates matters before litigation, including by using informal discovery, mediation, arbitration, nonjudicial or family settlement agreements, and court-approved settlement agreements. This Note explains how the process of pre-litigation settlement begins, how to settle before litigation, what information is needed and useful for a settlement, and types of settlements.

The estate and trust administration processes often proceed without controversy. However, disputes may arise when the decedent's estate plan does not match a beneficiary's expectations or a beneficiary is dissatisfied with a fiduciary's actions. Whether counsel are representing a fiduciary (typically the executor of an estate or the successor trustee of an *inter vivos* trust created by an individual that has recently died) or a beneficiary in a trust or estate administration matter, counsel should be aware of and attempt to help the client resolve any potential or actual disputes before they progress to formal litigation. Doing so will help preserve the decedent's estate or trust assets for the intended beneficiaries and relieve the fiduciary of potential liability. This Practice Note explains key issues counsel should consider when representing a fiduciary or a beneficiary in a trust or estate administration matter that may be subject to disputes to help resolve the matter without litigation.

Importance of Consulting State Law

The laws of estate and trust administration are jurisdiction specific and can vary widely from state to state. This Note is designed to provide an overview of the most common methods of resolving contested trusts- and estates-related disputes before engaging in litigation but does not focus on state-specific rules, instead focusing on common strategies and rules.

This Note therefore includes information regarding the applicable trusts- and estates-related rules using the Uniform Probate Code (UPC) and the Uniform Trust Code (UTC) with some notable state examples. Counsel can use this Note as a guide but should consult all relevant state law before engaging in settlement negotiations related to contested trusts and estates matters governed by state law or preparing or advising clients regarding executing a settlement agreement.

For state-specific information regarding:

- Wills, see Wills: State Q&A Tool.
- Probate, see Probate: State Q&A Tool.
- Revocable trusts, see Revocable Trusts: State Q&A Tool.
- Irrevocable trusts, see Irrevocable Trusts: State Q&A Tool.
- Contracts, including settlement agreements, see Contract Basics for Litigators: State Q&A Tool.

When Trusts and Estates-Related Contests Typically Arise

For most individuals, the transfer of all or the bulk of their wealth happens at their death by their estate plan and does not involve any disputes or contested matters. However, in some cases, disputes do arise.

Challenges to an individual's estate plan may arise because of events that occur during the individual's life, such as a new marriage, the appointment of a new trustee, or a controversial lifetime gift. However, most controversies in the trusts and estates context arise after the individual dies, because:

- An individual's estate plan typically remains subject to change throughout the individual's life (except for irrevocable transfers and, in some cases, if the individual becomes incapacitated). An actual or expectant beneficiary typically cannot challenge a transfer or an estate planning instrument during the time that it remains revocable by the person who created it (for example, § 732.518, Fla. Stat. and see *Steinhart v. County of Los Angeles*, 47 Cal. 4th 1298, 1319-20 (2010), *Moon v. Lesikar*, 230 S.W.3d 800, 804 (Tex. App.—Houston [14th Dist.] 2007, pet. denied), and *Hoelscher v. Sandage*, 462 N.W.2d 289, 294 (Iowa 1990)).
- An actual or expectant beneficiary may not know the details of the estate plan until after the individual's death.
- An expectant beneficiary may want to avoid litigation regarding irrevocable parts of an individual's estate plan while the individual is still alive due to the risk of angering or upsetting the individual (which, for example, may soil the relationship or may lead the individual to omit the expectant beneficiary from other revocable aspects of the estate plan).

This Note focuses on post-death disputes relating to an individual's estate plan or estate or trust administration, including disputes regarding:

- Any will or trust that becomes irrevocable on the individual's death (typically an *inter vivos* revocable trust or a testamentary trust under the individual's will).
- The administration of the individual's estate and related trusts.

Except where specifically indicated otherwise, this Note refers to:

- These controversies as contested trusts and estates matters, contested matters, or disputes.
- The administration process, whether the fiduciary is administering a trust or administering the individual's estate under a will, as an administration.
- The individual or entity responsible for administering the individual's estate (frequently referred to as an executor or personal representative under state law) and the individual responsible for administering the trusts created by the individual (the trustee) collectively as the fiduciary. Contested trusts and estates matters generally involve the same duties and methods of resolution whether they specifically involve the executor of an estate or the trustee of a trust.

Although this Note focuses on strategies a fiduciary or beneficiary can use to help resolve post-death disputes relating to an individual's estate plan or an administration without litigation:

- Many of the topics discussed in this Note can be applied more broadly to other types of trusts and estates-related disputes, including disputes relating to lifetime irrevocable trusts.
- There are also ways to help avoid these types of disputes by proper planning during life. When preparing an estate plan for a client whose estate plan may be subject to later dispute, see:
  - Practice Note, Trusts & Estates Litigation: Overview: Preventing or Assessing Potential Disputes for information regarding incorporating no contest provisions into estate planning documents, minimizing the risk of a dispute when modifying an estate plan, communicating with beneficiaries during the planning stage when a later dispute may be likely, and documenting the facts and circumstances surrounding document execution to help guard against claims of incapacity or improper execution;
  - Standard Clause, No Contest Clause for Will or Trust and State No Contest Clause Laws Chart for additional information regarding incorporating a no contest clause into estate planning documents and sample language; and
  - Practice Note, Trustee Duties and Liability: Exculpation Clauses and Revocable Trusts: State Q&A Tool: Question 23 for information regarding the enforceability of clauses relieving a trustee from liability for certain acts (referred to as exculpation clauses) that can be included in trust instruments in some circumstances.

For more information on the types of contested matters that typically arise out of an individual's estate plan, see Practice Note, Trusts & Estates Litigation: Overview.

Identifying and Attempting to Avoid Disputes

To help avoid or minimize the risk of a contested trusts and estates matter after an individual's (sometimes referred to as the decedent) death, the decedent's fiduciary and the attorney representing the fiduciary should understand:

- Under what circumstances trusts and estates disputes typically arise (see Assessing the Likelihood of a Trusts and Estates Contest).
- The best way to avoid a dispute in circumstances where disputes typically arise (see Keeping the Beneficiaries Informed).

The fiduciary should also continue to comply with all existing fiduciary duties despite any tension between the fiduciary and any beneficiaries (see Complying with Ongoing Fiduciary Duties).

Assessing the Likelihood of a Trusts and Estates Contest

When an individual engages in estate planning, if the individual anticipates that the estate plan may be contested, their estate planning counsel can implement various planning structures to reduce that risk (see Practice Note, Trusts & Estates Litigation: Overview: Preventing or Assessing Potential Disputes).

Certain aspects of an individual's estate plan and family dynamics may increase the likelihood that an actual or expectant beneficiary will challenge the estate plan after the individual's death. Circumstances where the likelihood of a contest may increase include:

- Blended families.
- Strained family relationships.
- Numerous changes to an estate plan before death.

Although there are methods to help decrease the likelihood of these types of disputes during the planning phase, once an individual dies, there are additional ways to attempt to avoid disputes. It is important for the attorney representing the fiduciary involved in an administration to be aware of potentially troublesome family issues or beneficiaries so the fiduciary can carefully navigate the administration process to avoid or minimize the risk of what may otherwise eventually result in litigation.

For information on additional scenarios that may increase the likelihood of a trusts and estates-related dispute, see Practice Note, Trusts & Estates Litigation: Overview: Likelihood of a Trusts and Estates Contest.

Keeping the Beneficiaries Informed

Once an individual dies and the administration of their estate or the transition of their revocable trust to an irrevocable trust begins, the primary way the fiduciary can avoid disputes with the beneficiaries is to keep the beneficiaries informed regarding administration matters. Keeping beneficiaries informed can help avoid trusts and estates disputes because, by doing so, the fiduciary:

- Is complying with their fiduciary duty, which avoids potential claims of breach.
- Keeps the beneficiaries involved in the process, which may keep relations between the fiduciary and beneficiaries positive and help avoid surprises.
- May be able to shorten the time frame in which an interested person can raise certain objections. For example, in some states:
  - providing notice of the creation of an irrevocable trust or a previously revocable trust becoming irrevocable begins the time frame for objecting to the trust's creation (for example, Cal. Prob. Code § 16061.8). However, in some states, such as New York, this statute of limitations (as to a revocable trust) begins to run on the date of the settlor's death, regardless of whether and when notice is provided (see *In re Kosmo Family Trust, dated July 18, 1994*, 72 Misc.3d 1214(A) (N.Y. Sur. Ct. Albany Co. 2021)); and
  - circulating an accounting to interested persons (in some cases, along with making specific disclosures required by statute) may start the statute of limitations running for objections to items disclosed in the accounting. For state-specific information on a trustee's duty to inform, see Revocable Trusts: State Q&A Tool: Question 28 and Irrevocable Trusts: State Q&A Tool: Question 19.

Complying with Ongoing Fiduciary Duties

When representing a fiduciary in an administration that is subject to dispute, counsel must remind the fiduciary that even when a dispute seems likely or

even during a dispute, the fiduciary continues to have obligations to the beneficiaries. The fiduciary must continue to comply with all fiduciary duties during the dispute to avoid creating additional issues.

Although a beneficiary can generally release a fiduciary for a breach as part of a settlement agreement (or otherwise) (see Mutual Releases), a release is invalid if the release was procured by improper conduct (Unif. Trust Code § 1009; see also Unif. Probate Code § 3-1101 and Unif. Probate Code § 3-1102 (allowing compromises subject to court approval)). In California, a trustee cannot withhold a required distribution in an attempt to force a beneficiary into settlement negotiations (Cal. Prob. Code § 16004.5).

Fiduciaries should continue to comply with all fiduciary duties and conduct settlement negotiations at arm's length and, if possible, in front of a mediator to avoid any later allegations of impropriety (see Mediation).

Initial Considerations When Trying to Resolve Disputes Without Litigation

Even when a fiduciary takes every precaution and engages in open communication with the beneficiaries throughout the administration process, a dispute sometimes cannot be avoided. In these cases, even though a dispute has arisen, the parties usually understand that litigation can be costly, time consuming, and emotionally taxing, and the parties frequently want their concerns addressed without resorting to litigation when possible.

When the beneficiaries or other interested persons are unhappy or are considering litigation, there are various options available to them and attendant concerns that should be considered by both the beneficiaries and the fiduciary before initiating a formal litigation, including:

- The availability of making an initial settlement offer or demand before instituting formal litigation (see Initial Settlement Offer or Demand).
- The necessity of having all necessary parties included in any pre-litigation process to ensure that any resolution is binding (see Including All Necessary Parties).
- Whether and how the beneficiaries can obtain and how the fiduciary can provide the information the parties need to resolve the dispute without engaging in formal discovery as part of litigation (see Informal Discovery).

Initial Settlement Offer or Demand

Before litigation begins, aggrieved parties may make demands on the fiduciary or potentially other parties. These demands may either be orally or in writing by a demand letter. For example:

- A beneficiary who believes they were wrongfully excluded from an estate may demand specific assets of the estate in exchange for waiving their right to contest the estate.
- A creditor who believes that the individual's estate still owes it for the decedent's pre-death debts may try and informally demand a payment instead of filing a creditor's claim and filing suit.
- A beneficiary who believes that a trustee has committed a breach may demand that the trustee immediately resign, provide an accounting, renounce the trustee's right to fees, and make a payment to the beneficiary in exchange for waiving the right to seek a surcharge and other relief against the trustee.

Demands and responses to them are more efficient than going through litigation and may incentivize a fiduciary to engage in discussions with unhappy beneficiaries to avoid litigation because the fiduciary understands how expensive, unpleasant, and time-consuming litigation may become.

However, if the initial demand is outrageous or excessive, it may provide little incentive for the recipient to settle and may harden feelings, making later settlement more difficult. For example, consider a situation where the client is the only child and sole heir of the client's mother's estate. The mother's on-again-off-again caregiver sends the client a demand letter claiming that the mother told the caregiver many years ago that the caregiver would inherit the mother's entire estate, but the caregiver is willing to settle now for 90% of the mother's estate. An aggressive and unexpected demand may anger the client so that the client does not want to settle for any amount.

Once a demand is made, the parties may choose to engage in settlement negotiations through counsel, personally, or through a combination of both.

Admissibility of Demands and Responses in Subsequent Litigation

Beneficiaries may be hesitant to submit a reasonable demand out of concern that they will be limited to the amount of their demand in a subsequent litigation. However, this should not be a concern because demands are generally considered settlement offers, and settlement offers are typically not admissible in court to prove or disprove the validity or amount of a disputed claim, with some limited exceptions, including to:

- Show bias of a witness.
- Negate a claim of undue delay.
- Prove interference with a criminal prosecution.

(Fed. R. Evid. 408, Cal. Evid. Code §§ 1152 and 1154, and CPLR 4547.)

When demands and settlement negotiations are inadmissible, the parties are free to offer a more candid and frank analysis of potential liability.

Negotiation Strategy Concerns

When representing a fiduciary or beneficiary attempting to resolve a dispute without formal litigation, counsel should help the client understand that though the goal is for settlement negotiations to be open and honest, initial offers often involve one or both parties trying to posture their position in an attempt to appear strong at the outset. Parties should understand that an initial offer is a starting point in the negotiations rather than an indication of how the dispute will be resolved.

Counsel must be aware and attempt to warn their client against a psychological phenomenon known as the anchor effect where a person's viewpoint is tied to an anchor, with the initial offer being the anchor. For example, if a beneficiary opens with a demand of $1 million, the fiduciary may be subconsciously anchored to the belief that $1 million is:

- Within the ballpark of settlement.
- The absolute cap on any liability.

This type of anchoring may persist even if there are material changes that otherwise would affect a settlement. Because of this, there is always an incentive for parties to posture by making unreasonably high or low initial offers.

Including All Necessary Parties

After an initial settlement demand or offer has been made and generally before engaging in settlement negotiations, all necessary parties should be included. Both the beneficiaries and the fiduciary will want to ensure all necessary parties are part of the settlement talks to ensure any potential agreement reached is binding and final.

A necessary party is generally anyone whose interests are directly affected by the pending matter and whose participation in the matter is required to ensure a complete and fair resolution (for example, Tex. R. Civ. P. 39). This may or may not include all persons interested in the matter. An interested person in a trusts and estates matter is generally one who:

- Has a property right in or claim against a trust or an estate (for example, an individual's heirs, devisees, children, spouses, creditors, and beneficiaries). This may include a person who expected to be included as a beneficiary of an individual's will or trust but was not.
- Has priority for appointment as:
  - the executor of an individual's estate; or
  - the trustee of a trust created by the individual.
- Serves as a fiduciary for another interested person.

(Unif. Probate Code § 1-201(23) and, for example, Cal. Prob. Code § 48 and see *Cruz v. Cmty. Bank & Trust of Fla.*, 277 So. 3d 1095, 1097 (Fla. 5th DCA 2019) and *In re Estate of Davidson*, 677 N.Y.S.2d 729, 730 (Sur. Ct. N.Y. Co. 1998).)

As a practical matter, all necessary parties have an interest in how the proceeds are divided. If some parties are excluded and later voice their objection (informally or before the court), the settlement may come undone.

Recognizing this, some states allow procedural steps to ensure all necessary parties are included in settlement discussions. In California, the court has the power to make any orders or take any action necessary to dispose of the matters before the court, which may include ordering the parties to engage in mediation to settle disputes (Cal. Prob. Code § 17206). If the court orders mediation, necessary parties must receive notice of the required mediation. If notice is not given, any settlement reached at mediation may

not be approved by the court. However, if notice is given and a party chooses not to participate, the court may approve a settlement over the non-participant's objection based on their nonattendance. (See *Breslin v. Breslin*, 62 Cal. App. 5th 801, 808-09 (2021).)

For more information on standing and interested persons in trusts and estates-related matters, see Practice Note, Trusts & Estates Litigation: Overview: Standing to Challenge Trusts and Estates Related Matters.

Informal Discovery

Depending on the nature of the dispute, the beneficiaries or other interested persons may need certain information to make an informed decision on how to proceed, and the fiduciary may want to provide the information so that all parties can understand the full nature and the disputed issues and ultimately make a knowing agreement if the parties settle. The parties may agree to informal document exchanges to avoid the cost of initiating a litigation proceeding to engage in formal discovery. Alternatively or additionally, the parties may agree that the fiduciary will provide an informal accounting to provide all the parties with information regarding the estate or trust transactions and investments.

However, counsel for a fiduciary should understand, particularly before advising a fiduciary to provide any information that is not otherwise required by law, that if any information obtained informally validates a concerned family member's or beneficiary's concerns or suspicions, their dispute will likely escalate to a formal proceeding.

Relevant Information to Uncover

Before resolving any dispute, all parties should have sufficient information to make as informed a decision as possible. Depending on the dispute, to the extent possible and agreeable, before entering into a settlement, the parties should explore through informal discovery:

- The estate planning documents (including all applicable amendments and codicils). The applicable estate planning documents are relevant to almost any type of trusts- and estates-related dispute. For example, if the dispute relates to:
  - the validity of an estate planning document, understanding the terms of the documents, including whether the document includes a no-contest clause, as well as whether the required execution formalities were complied with and the identity of the witnesses is paramount; or
  - the estate or trust administration, the terms of the applicable trust or the fiduciary powers and authorities are crucial to determining whether a duty has been violated.
- In a dispute regarding the validity of existing estate planning documents, previous estate planning documents. These will help determine:
  - whether the contestant has standing to bring the action (for example, are they a beneficiary under a previous estate planning document that will come back into force if the existing estate planning document is overturned);
  - if further documents need to be contested (for example, if a beneficiary contemplating a contest to an existing will determines that they receive the same bequests under a prior will, the beneficiary may need to have a strong case for overturning both will versions for it to make sense to proceed with a contest);
  - the scope of issues at stake;
  - the change in the gift to the disputing beneficiary between documents;
  - other potential witnesses like a prior estate planning attorney who drafted older documents;
  - witnesses to the document signing; and
  - interested parties who also may want to join the contest.
- In a dispute regarding the propriety of a trustee's discretionary distributions, particularly if the trustee is being challenged for denying a discretionary distribution request when the trustee must take a beneficiary's other assets into consideration, information from the requesting beneficiary regarding the requesting beneficiary's available financial resources.
- Medical records, particularly neurological, if testamentary capacity is at issue or if the trustee's capacity is at issue.
- Property records, including deeds or titles, to the extent relevant to the dispute at issue.
- Any financial documents relating to the trust or estate, including bank records and investments statements. This includes all trust and estate

records regarding trust or estate distributions and other evidence of the trustee's actions.

Meeting with Drafting Attorney or Other Advisors

In cases of contests, interpretation issues, and breach of duty claims, understanding the individual's intent when creating their estate plan is crucial.

If family members and disappointed beneficiaries understand the deceased individual's intent and if the family members are confident the estate planning documents accurately reflect the deceased individual's intent, their concerns and issues often may resolve without further issue for the fiduciary.

It may be valuable to speak with the drafting attorney or any other of the individual's pre-death advisors to resolve outstanding questions regarding the individual's intent. While the attorney client privilege typically prevents attorneys from sharing their client's confidential information, many jurisdictions have laws that invalidate the privilege regarding issues concerning testamentary intent. For example:

- In California, there is no privilege regarding an attorney-client communication relevant to an issue between parties all of whom claim through the attorney's deceased client (Cal. Evid. Code § 957).
- New York law states that in any action involving the probate, validity, or construction of a will or, after the grantor's death, a revocable trust, an attorney or the attorney's employee must disclose information about the "preparation, execution, or revocation of" any testamentary document. However, no privileged information may be disclosed "which would tend to disgrace the memory of the decedent." (CPLR 4503(b).)

It is paramount to speak with the planning attorney whenever possible to obtain the information necessary to resolve disputes before litigation.

Interviews with Other Potential Witnesses

The drafting attorney is often the best witness to understand the intent of the deceased individual. If the drafting attorney is unavailable or if the family members or other beneficiaries are not satisfied that they understand the deceased individual's intent, additional persons to talk to include:

- Family members.
- Friends and associates.
- Neighbors or housemates.
- Clergy.
- Doctors or nurses.
- Professional assistants (for example, attorneys and accountants).
- Personal assistants (for example, cleaning persons, gardeners, mechanics, or hairdressers).

Informal Accountings

As part of an attempt to reach an agreement among all interested parties without formal litigation, the parties may agree that the fiduciary provide an informal accounting. The trustee owes beneficiaries the duty to inform and account. (Unif. Trust Code § 813; for example, Cal. Prob. Code § 16060; § 736.0813, Fla. Stat.; 20 Pa. C.S.A. § 7780.3.) The parties are free to agree on the degree of formality and structure of the information provided in an informal account. For state-specific information regarding a trustee's duty to keep a beneficiary reasonably informed, see Irrevocable Trusts: State Q&A Tool: Question 19.

In some instances, no work may be required by the fiduciary apart from providing relevant financial statements like monthly brokerage statements and tax returns. The format in which the information is provided is generally less important than the content of the information provided. The information provided should be sufficient to allow the beneficiaries to protect their interests and make a knowing agreement if they decide to settle. (Unif. Trust Code § 813 cmts.)

These informal accountings may be sufficient to ease beneficiary concerns regarding administration and thereby help resolve potential disputes early. While there is also a risk that an informal accounting may give rise to additional concerns by already skeptical beneficiaries, the fiduciary will generally have to provide the same information to the beneficiaries at some point during the trust or estate administration anyway.

Reaching an Agreement

After a demand is made and after the parties feel they have enough information to understand how the estate or trust is being administered, interested parties can attempt to come to an agreement without court involvement through informal discussions. There are numerous methods that can be used to

help facilitate an agreement, including an informal family meeting, mediation, or arbitration.

The right method or combination of methods depends largely on the dispute, specific circumstances, and family dynamics.

Informal Family Meeting

A parent or beloved family member's death is a traumatic experience and often one of the hardest things a person deals with during their life. Determining what to do with the decedent's assets can add serious additional stress. In the case of parents and children, beneficiaries often equate their parents' decision of who gets what and who is in charge as a proxy for their relationship with their parents. Disappointing results, such as not being named trustee or not receiving what one believes to be their fair share, can often be devastating. Litigation is often used as a way of working out emotional issues with a deceased parent, and when this is the case, a resolution can be difficult because the litigants' primary issue may be more emotional than financial.

Depending on the nature of the dispute, differences can at times be resolved with a family meeting. A family meeting can be held in person, on video, or even by phone. These meetings should include the fiduciary and can include or exclude counsel or other professional advisors (for example, accountants or wealth managers).

When arranging family meetings, a fiduciary should consider:

- Erring on the side of oversharing any information that is not confidential. Beneficiaries are generally entitled to information under the trust or regarding the estate and frequently appreciate a fiduciary's candor or respond poorly to feeling like information is being withheld. A party should not disclose any confidential information that they received, particularly from any attorney. As an example, it is unwise to inform beneficiaries that the fiduciary's attorney informed the fiduciary that the fiduciary may be liable to the beneficiaries for substantial damages, surcharge, and removal.
- Documenting what was provided to everyone. Memories are imperfect, and documents will help prove what was disclosed. Because beneficiaries are entitled to know what is going on with the trust and estate, the more that is disclosed, the better.

When attending a family meeting, a beneficiary should consider that:

- This is an understandably emotional time. It may be helpful to include an advisor, attorney, spouse, or friend who is not as emotionally invested. This person can hopefully add a layer of objectivity in discussing sensitive topics.
- They should not be afraid to ask for information. The fiduciary's role is to provide information to beneficiaries.
- No decisions need to be made instantly, and beneficiaries should not feel pressured into a take it or leave it situation. It is important to take time to make a wise and informed decision after making whatever investigation the beneficiary deems appropriate.

Counsel should consider family dynamics and personalities when deciding who should attend the meeting. For example, counsel should assess whether adding a professional is more likely to help address concerns or be off-putting to a hot-headed beneficiary.

If the family prefers an informal meeting and if the necessary parties generally believe an agreement can be reached, it may be beneficial to bring in a trusted third party on an informal basis to help the family moderate discussions. This may be a trusted neighbor, longtime friend, or possibly a professional therapist.

Professional Therapist Can Moderate the Meeting

Professional therapists can at times be helpful in comforting beneficiaries, which may lead to a clearer mind more willing to compromise and move forward with their life. The family may request that a trusted therapist moderate the meeting. The therapist should ensure that they can ethically moderate a meeting if they also work with any of the attendees individually.

Group Therapist May Host the Meeting

Group therapy (which is confidential) may also be an option. It may be beneficial for all interested parties to meet and have a candid discussion of their feelings. People are often not seeking more property but instead trying to be heard and understood, and this can be facilitated with professional involvement of a therapist in a group setting.

Mediation

Mediation is a voluntary process where parties work with a third party, known as a mediator, who assists them in negotiating their differences. The mediator works to help facilitate compromise and negotiation, by trying to find common ground and encourage concessions from both sides in an effort to find a consensus. To achieve this, a mediator may help reframe the issues to one or more parties, provide candid feedback to parties on their positions and likelihood of success at trial, or raise issues that parties may not have considered. A mediator frequently:

- Relays information and offers between the parties.
- Helps address and interpret concerns.
- Prepares responses or counteroffers.

The goal of the mediator is to help the parties find a solution that all parties can accept.

Mediation is a confidential process. Nothing discussed or disclosed in mediation may be used in court. This includes:

- Information disclosed in mediation that was not disclosed in discovery.
- Settlement offers or counterproposals.
- Evaluations of one or another's case by an attorney, mediator, or opposing party or counsel.
- Examples of reasonable or unreasonable behavior. For example, it is inappropriate for counsel to explain to a judge in a hearing that opposing counsel refused to even consider a settlement offer at mediation.

Mediation Process

Before a mediation, the parties typically each submit briefs and exhibits outlining their positions to the mediator. The parties may elect for these briefs and exhibits to be shared (in full or in part) or confidential. The mediator may ask or encourage parties to swap briefs either in the beginning of mediation or at any later point to spur discussion and help find consensus.

During the mediation, one side may release new information that may create new issues or roadblocks to settlement. Parties sometimes hold this information until mediation strategically to procure the most favorable settlement, hoping that the surprise of this new information may scare the other party into settling. In practice, these tactics are rarely successful and often lead to quick, unsuccessful mediations.

During the mediation session:

- The mediator may engage in shuttle diplomacy, where the mediator goes back and forth between each party and relays information and settlement offers.
- The parties may all be gathered in a single room negotiating.
- The parties or mediator may prefer a combination of both.

Given the personal emotional toll of trusts and estates disputes, it is frequently advisable to keep the parties separated, at least initially. Most mediations include a portion of shuttle diplomacy, which allows the mediator to help encourage each side to settle by confidentially explaining the weaknesses in each party's position. If these weaknesses were shared with the other side in an open session, they would have less incentive to compromise. It is a proven method of mediation to explain and emphasize the weaknesses in each party's case and the certain expensive costs of continued litigation to help encourage settlement by both parties.

An important aspect of mediation is that it is a non-binding process where:

- All participating parties need to agree to a resolution to be bound by it.
- Any party can leave at any time.
- The mediator cannot force the parties to come to an agreement or rule on the dispute like in arbitration.

Advantages of Mediation

Mediation has many advantages, including that it:

- Allows beneficiaries to hear from an experienced mediator acting as a neutral party to help them understand the risks and downsides of their litigation position. A mediator is frequently a retired judge with experience in the field (though this is not always the case). This allows the mediator to opine on the strengths and weaknesses of the case with some weight.
- Is typically binding on all the parties that participate. Mediation may also be useful when some interested parties want to resolve a dispute without litigation

but others do not want to participate. Only the parties involved in the mediation are typically bound by the terms of any agreements reached in the mediation. However, there may be instances where a party not involved in the mediation is bound by the terms of the mediated settlement agreement. For example, in California, parties that are not involved in mediation can be bound by the terms of mediation if they receive notice of the mediation and choose not to participate in it (see *Breslin*, 62 Cal. App. 5th at 808, 809).

Disadvantages of Mediation

Mediation also has several disadvantages, including that:

- Mediation may be an expensive process, and there is no guarantee that it will be successful. Reputable mediators, such as retired judges, usually charge high rates on top of attorneys' fees for any represented parties.
- Mediation can be a long process, particularly if it is successful. Successful mediations often end late in the night when an agreement is finally reached and can be a taxing experience for all parties involved.
- While mediation is confidential, parties may nevertheless convey information during the mediation that may weaken their position. While not admissible, an opposing party may see a settlement offer as an admission of weakness in the other party's case and that may embolden them to be less accommodating in future negotiations.

Despite these disadvantages, mediation is an invaluable tool for settlement. When successful, mediation is much more financially responsible and less taxing personally than proceeding with trial and formal litigation.

Arbitration

Arbitration is a process where the parties agree to be bound by the ruling of a private party instead of a government court. It is the most common form of private dispute resolution, but it is rarely used to resolve estate and trust-related disputes.

For an arbitration to proceed, the parties must agree in advance to be bound by an arbitration. While litigants can agree to arbitration before filing a lawsuit, they rarely choose to do so. Most arbitrations are instead initiated because of a previous contractual agreement, such as the terms and conditions that consumers often agree to with a company.

Testamentary documents like wills and trust documents rarely have these sorts of provisions. Even if a will or trust document included an arbitration provision, arbitration provisions are rarely enforceable against beneficiaries because beneficiaries are not required to sign the will or trust documents. (See, for example, *McArthur v. McArthur*, 224 Cal. App. 4th 651, 659 (2014) (arbitration provision unenforceable against beneficiary who did not agree to trust instrument or benefit from it); *Schmitz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 405 Ill. App. 3d 240, 245 (2010) (trust beneficiaries not bound by arbitration clause); *Morgan Stanley DW Inc. v. Halliday*, 873 So. 2d 400, 403 (Fla. 4th DCA 2004) (beneficiary not bound by arbitration agreement between trust and third party).)

Nevertheless, while rare in trust and estate disputes, the parties may choose to arbitrate their claims as opposed to litigating or mediating them.

Arbitration Process

The rules and procedures of arbitration are decided by the parties. Standard rules, procedures, and forms can be found at the American Arbitration Association website or JAMS website.

Advantages of Arbitration

The arbitration process has many advantages to litigation, including that it:

- Is likely quicker from onset to resolution than a typical court proceeding. Arbitrators are paid privately by the parties, and they are likely to have a smaller docket and more incentive to streamline the process. The parties may also stipulate for shorter deadlines than their state law provides, quickening the process.
- Brings finality. Arbitration rulings are final and not typically appealable unless agreed to by the parties in limited circumstances.
- Will likely be streamlined and require less work than litigation because the parties are generally not bound by the state rules of civil procedure. For example, even in states that do not authorize service by email, the arbitrator may order that email service is sufficient at the outset.

Disadvantages of Arbitration

Arbitration also has several disadvantages, including that:

- Arbitration is costly. In addition to paying attorneys' fees, the parties must pay the arbitrator (usually a retired judge or seasoned attorney who will have expensive rates). It is possible that parties will spend more money in arbitration than they would in traditional litigation, particularly if the arbitrator is heavily involved.
- While the time frame to a resolution will likely be quicker than a court trial, arbitration is similar to litigation. The costs and tolls on the parties will be essentially the same as traditional litigation.
- Parties that submit to arbitration may not have the same rights to discovery that they would in litigation. For example, it may be more difficult to subpoena witnesses or documents in arbitration.
- In rare trusts and estates instances where a party or defendant has a right to a jury trial (for example, an elder abuse case), submitting to arbitration will waive that right.

Memorializing the Agreement

Once the parties have come to an agreement, it is important to memorialize all material terms of the agreement both to ensure all parties comply with the agreement and, at times, for other purposes, such as tax purposes. This is known as a settlement agreement.

The two most common types of settlement agreements are nonjudicial settlement agreements, also known as family settlement agreements, and court-approved settlement agreements.

Threshold Requirements

Under general principles of contract law, all parties must have capacity to be able to consent to and enter into a settlement agreement. Even when capacity is not at issue, there may be instances where a settlement agreement is not valid, including when:

- The beneficiary did not know of their rights and material facts that the trustee knew and the trustee knew or should have known that the beneficiary did not know those facts (Cal. Prob. Code § 16464(b)(2); see also *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 446 n.24 (3d Cir. 1996); *Beyer v. First Nat'l Bank of Colorado Springs*, 843 P.2d 53, 59 (Colo. App. 1992)).
- The settlement agreement is induced by improper conduct of the trustee (Cal. Prob. Code § 16464(b)(3); *Beyer*, 843 P.2d at 59).
- The terms of the settlement agreement are not fair and reasonable to the beneficiary (Cal. Prob. Code § 16464(b)(4); *Beyer*, 843 P.2d at 59).

Assuming a beneficiary or other interested parties otherwise meet the requirements for consenting to a contractual agreement, many states also allow parties to waive unknown claims in an agreement provided that the parties intend to waive unknown claims and that any unknown claims arise from the same circumstances and subject matter that initially gave rise to the agreement (*Myers v. Fecker Co.*, 252 N.W.2d 595, 599 (Minn. 1977); *Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.*, 929 N.Y.S.2d 3, 8 (2011); *Katy Int'l, Inc. v. Jiang*, 451 S.W.3d 74, 88 (Tex. App.—Houston [14th Dist.] 2014, pet. denied)). However, if the waiver and release is general and without express reference to future or unknown claims, the waiver and release typically does not extend to future or unknown claims (for example, N.D.C.C. § 9-13-02; SDCL 20-7-11).

Types of Settlement Agreements

Settlement agreements are typically either:

- Non-judicial settlement agreements not required to be approved by a court, sometimes referred to as family settlement agreements.
- Court-approved settlement agreements.

Nonjudicial Settlement Agreements

The simplest type of settlement agreement in a trusts and estates-related dispute is a nonjudicial settlement agreement, also referred to as a family settlement agreement.

A nonjudicial or family settlement agreement is a contract that is not required to be approved by any court, though it may be required to be filed with the court, particularly when relating to an estate dispute. Despite the nomenclature, a nonjudicial or family settlement agreement:

- Is not limited to family members and should include all necessary parties.
- Can generally be judicially approved if the parties request it.

Necessary parties for any given dispute depend on the facts and circumstances (see Including All Necessary Parties).

The UTC encourages nonjudicial settlement agreements in the context of trust-related disputes and allows parties to enter into a family settlement agreement if:

- All persons whose consent would be required to achieve a binding settlement agreement if the settlement agreement were to be approved by the court consent to the agreement (these persons are referred to collectively in the UTC as interested persons, though they are commonly referred to as the necessary parties (see Including All Necessary Parties)).
- The agreement does not violate a material purpose of the trust.
- The agreement does not violate the law.

(Unif. Trust Code § 111(b), (c).)

Although a nonjudicial settlement agreement generally does not require court approval, interested parties typically have the right to request court approval for certain reasons, including to confirm that any parties represented by others (generally by direct or virtual representation) were represented sufficiently or if they want confirmation that the settlement agreement is within the scope of what the court would have approved judicially (Unif. Trust Code § 111(e)).

Matters that are appropriate for family settlement agreements under the UTC include:

- The interpretation or construction of the terms of a trust.
- The approval of a fiduciary's report or accounting.
- A direction to a fiduciary to refrain from performing a particular act or the grant to a fiduciary of any necessary or desirable power.
- The 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.

(Unif. Trust Code § 111(d).) State laws regarding family settlement agreements vary but generally follow principles of contract law, which are in line with the UTC provisions. For states that have adopted the UTC, see the Uniform Law Commission legislative tracking website.

The UPC also has provisions regarding nonjudicial family settlement agreements in the estate administration context. In an estate administration proceeding, the beneficiaries may agree among themselves to alter their interests, shares, or amounts that they are entitled to in any way they agree, provided that their agreement is:

- In writing and signed by all parties affected by the agreement.
- Subject to the executor's duty to:
  - administer the estate for the decedent's creditors;
  - pay all taxes and costs of the estate administration; and
  - fulfill their fiduciary duties for any beneficiaries not party to the agreement.

(Unif. Probate Code § 3-912; § 733.815, Fla. Stat.; MCL 700.3914.)

States may have different or additional requirements. For example, states may indicate that a nonjudicial settlement agreement regarding an estate administration matter is valid only to the extent it does not violate a material purpose or intention of the testator (O.C.G.A. § 53-5-27; T.C.A. § 30-2-615).

Court-Approved Settlement Agreements

In some instances, even when settlement negotiations are successful without formal litigation or judicial intervention, court approval may be advisable or necessary to procure a valid settlement agreement. This is often the case when the resulting agreement requires that the underlying instrument be modified in a way not authorized by statute or when not all parties can adequately be represented in the agreement (for example, Unif. Trust Code § 410 to Unif. Trust Code § 417). Judicial settlement agreements are explicitly addressed under the UPC (Unif. Probate Code § 3-1101 and Unif. Probate Code § 3-1102).

For example:

- If the parties are entering into a settlement agreement that modifies the terms of a trust in a way that is not authorized by statute, the fiduciary and the parties likely want to obtain court approval

of their settlement agreement to ensure the trust terms are valid going forward.

- If there are necessary parties that were not participants in the settlement agreement, the parties will likely want court approval of their settlement agreement to ensure the agreement is binding on the absent parties.
- In a dispute related to a trust or an estate where the resolution of the dispute changes the tax treatment of any aspect of the estate or trust, the parties will generally seek judicial approval of the settlement agreement to help bolster the likelihood that the IRS will not challenge the change in tax treatment.

Terms to Include in All Settlement Agreements

All settlement agreements, both judicial and nonjudicial, should be clear in their terms to protect all parties and must comply with all state law requirements.

Although this section includes common provisions, counsel should consult their own state law to determine whether these terms are legal and enforceable in their jurisdiction and what precise language should be used to comply with any state law requirements. Contract law varies by state and is an evolving doctrine (see Importance of Consulting State Law).

Factual Recitations

The settlement agreement should include a factual recital of the parties and their contentions. While typically this is background information that is not part of the settlement terms, it helps frame the dispute. Clients often want to make sure their voice is heard, and these recitals may help achieve that as well. However, the tone of the factual recitals should be neutral and high level. Counsel should consider including, as applicable:

- The parties and their relations to one another, including whether there are unknown or unascertained beneficiaries being represented in the agreement.
- The facts regarding the creation of the documents at issue, including any amendments or important events, such as a death of a testator.
- High-level contentions of the parties regarding the dispute at issue.
- Defined terms, including defining the documents at issue, the parties, and the disputes.
- A recitation that the parties intend to settle the dispute and a definition of the parameters of the dispute. It is important to frame the dispute appropriately, as it is common for post-settlement litigation around either the settlement document itself or ancillary issues. For example, a party may want to settle a will contest but still seek elder abuse claims against a party for wrongful death. Understanding what is and is not part of the settlement is crucial.
- An incorporation by reference to the recitals.

Stating Whether the Agreement Will Be Court Approved

Every settlement agreement should have an explicit statement about whether court approval is or is not required and, if so, a clear explanation of the rights of the parties and their obligations. A sample recitation that the agreement is pending court approval may provide:

> "All terms and conditions of this Agreement are subject to the express approval of the [COURT] (the "**Court**"). Upon execution of this Agreement by all Parties, [PARTY NAME] will file a Petition seeking such approval, and the Parties agree to join in promptly seeking that Court's approval of this Agreement (which will be provided to the Court) and to take all reasonable steps necessary to obtain such approval. Pending judicial review of this Agreement, this Agreement shall remain binding upon each of the Parties, and no Party may withdraw from this Agreement unless approval of this Agreement is denied by the Court on its merits. The creation of any mutual rights and obligations under this Agreement is expressly conditioned upon its approval in its entirety by the Court, and the Court's approval shall validate each and every term and condition of this Agreement and shall be binding on the Parties and all individuals and entities (whether or not now known or presently ascertainable) interested in the Trust, or any property [PARTY NAME] ever owned to the fullest extent permitted by law. The Parties agree to and hereby do waive any rights to appeal from any order

approving this Agreement in its entirety, assuming it is granted in full as prayed or as otherwise agreed by the Parties and ordered by the Court. If the Court denies approval of this Agreement on the merits, then this Agreement shall be null and void from inception as though it were never entered into."

Explanation of Payments

Every settlement agreement should have a section explaining any payments, transfers of property, or characterization of the property or rights of parties that the parties negotiated. This statement should clearly address whose property is whose, when any transfers should be made, and any conditions required for the transfers. An example of an explanation of payments provision is:

> "Within 10 days of the full execution of the Agreement, [PARTY NAME] will pay [OTHER PARTY NAME] $[DOLLAR AMOUNT]. Within 90 days of the sale of [PROPERTY], or by [DATE], whichever is earlier, [PARTY NAME] will pay [OTHER PARTY NAME] an additional $[DOLLAR AMOUNT]. [OTHER PARTY NAME] agrees that the remainder of the proceeds of [PROPERTY] is [PARTY NAME]'s property, alone."

Mutual Releases

Settlement agreements generally include mutual releases of all claims. To the extent the parties agree, the mutual releases should be as expansive as possible to avoid any potential later litigation on related issues. The settlement agreement should include an explicit reference to unknown claims as allowable under each state's law (see Threshold Requirements).

The precise language of a release must be jurisdiction specific given the variety of jurisprudence on this issue, which is beyond the scope of this guide.

Choice of Jurisdiction

The parties should agree which law governs the interpretation of the settlement agreement and, in case later issues arise, where cases related to the settlement agreement should be heard. For example, the settlement agreement may address whether related cases should it be heard in state court, through an arbitrator, or through a mediator. An example of a choice of law provision is:

> "This Agreement shall be governed and construed in accordance with the laws of [STATE]. The Parties agree that any disputes will be arbitrated before [ARBITRATOR NAME]."

Severance Clauses

Severance clauses allow the remainder of a contract to be enforceable even if a provision is found to be invalid for any reason. The parties should consult their local state law to determine whether severance clauses are valid. An example of a severance clause is:

> "If any provision of this Agreement shall be found to be invalid in any respect, the validity of the remaining provisions shall not be impaired in any way."

Attorneys' Fees Provisions

If state law allows, the parties may want to include a provision that allows for the payment of attorneys' fees to the prevailing party on any future dispute. This helps discourage future litigation. An example of an attorneys' fees provision is:

> "If any action or other proceeding is brought for the enforcement of this Agreement or any of its terms, the prevailing Party shall be entitled to recover reasonable attorneys' fees and other expenses, including expert witness fees, incurred in connection with such action or proceeding."

Disclaimer of Additional Terms or Promises

To maintain clarity of the agreement, counsel should include language indicating that the agreement is entirely and solely what is written in the agreement and that there are no oral promises or other documents that affect or add to the terms or obligations of the agreement. An example of a disclaimer of additional terms or promises provision is:

> "The Parties declare and represent that no oral or written promises or agreements not here expressed have been made by or to them with regard to the subject matter of this Agreement; that this Agreement contains the entire Agreement, oral and written, between and among the Parties with regard to the subject matter of this Agreement; and that this

> Agreement supersedes and replaces all prior negotiations, proposed agreements and agreements, whether oral or written, between and among the Parties with regard to the subject matter of this Agreement."

Amendment Requirements

All settlement agreements should provide how the agreement may be modified, if at all. This helps avoid any confusion about further modification (for example, if a party thinks that the terms were changed because of an oral conversation over dinner). An example of a provision regarding modifying the agreement is:

> "This Agreement may not be amended in any respect except by a written document executed by the Parties or their authorized representatives."

Representations of Counsel

Depending on the jurisdiction and especially in cases involving fiduciaries, courts may void an agreement where a vulnerable party was not represented by counsel or was underrepresented. All settlement agreements should include a statement that all parties were represented or had the ability to be represented by an attorney. Additionally, the parties should warrant that they have had the opportunity to conduct whatever investigation they deem proper when they enter into the settlement. An example of a representations of counsel clause is:

> "Each of the Parties acknowledges that they have been represented by independent legal counsel throughout the negotiations which culminated in the execution of this Agreement, and that they have executed this Agreement with the consent and on the advice of such independent legal counsel or, knowing of their right to have such independent legal counsel, freely and voluntarily chose not to have such counsel and made their own decision to execute this Agreement. Each Party further acknowledges that, before the execution of this Agreement, they or their respective counsel, or both, have had an adequate opportunity to make whatever investigation or inquiry they deem necessary or desirable with respect to the subject matter of this Agreement."

Interpretation of Language

In some states, the language of a contract may be construed against the drafter to protect the other parties. If allowable, it is wise to include a provision that states that both parties approved of the language of the agreement. A sample provision regarding parties' approval of language is:

> "The Parties have negotiated, read, and approved the language of this Agreement, which language shall be construed in its entirety according to its fair meaning and not strictly for or against any of the Parties, who have worked together in preparing the final version of this Agreement."

Disclaimer of Liability

No party to a dispute wants to formally admit liability, even if they are making a payment by the terms of the agreement. An admittance of liability could raise concerns regarding troublesome legal ramifications for any settling party. All parties should generally disclaim any liability even if payment is made. A sample provision disclaiming liability is:

> "This Agreement is entered into to avoid difficult and protracted litigation and to resolve pending disputes among the Parties, and nothing contained herein is intended to nor does constitute an admission of liability by any Party to any other Party."

Representations and Warranties

To ensure that all parties are on the same page about their rights and counterparts, it is often helpful to include a warranty that the parties have not transferred their rights to someone else. A sample representations and warranties provision is:

> "Each of the Parties warrants and represents to the others that, before the execution and approval of this Agreement, they have not transferred, pledged, assigned, or hypothecated their respective rights and claims in the Dispute."

Counterparts and Photocopies

Many agreements are not signed in person but through counterparts exchanged through email or fax. It is also difficult to require that the original contract be kept (and difficult to determine who should keep it). It is wise to include a provision stating that the

settlement may be entered into by counterparts and that a photocopy will suffice. A sample counterparts and photocopies provision is:

> "This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument. A photocopy of this Agreement may be used in lieu of an original in any action or proceeding brought to enforce or interpret this Agreement. Also, a signature page of this Agreement executed by any Party and sent via facsimile or electronically shall be binding as though it were an executed original."