Resolving Disputes with Ease and Grace

by Bridget A. Logstrom, Minneapolis, Minnesota,
Bruce M. Stone, Coral Gables, Florida, and
*Robert W. Goldman, Naples, Florida**

INTRODUCTION

There is no substitute for the certainty and self-determination that comes from a settlement of a dispute between parties. Much has been written about mediation as a tool for helping litigants settle their differences. There are many success stories that bolster the credibility of that process. But, some cases just cannot get resolved in that manner. And, many disputes that do get settled are resolved after the parties have gone to great expense in navigating the shoals of judicial process. Our task is to study the litigation that does not settle or settles late in the litigation and see if we can develop a more efficient process for deciding those cases.

As estate planners and lawyers for fiduciaries administering estates and trusts, we are ever cognizant that one of our clients' goals and one of our biggest challenges is to save taxes and other expenses where feasible, resulting in the maximum amount of assets passing to the intended beneficiaries. One of the largest expenses incurred by estates, trusts and beneficiaries involves the costs and fees associated with litigation, not to mention the beneficiaries' loss of time to enjoy the assets.

Our collective gut tells us that the administration of a will or trust would run more efficiently and at less cost if we could resolve disputes arising in those proceedings through the use of an arbitral, rather than judicial, forum. Justice is often mired in procedure, hyper technical evidentiary rules, ignorant finders of fact and law, and unmanageable judicial calendars. If we could only bring common sense and legal expertise to our specialized disputes, we might get to justice more efficiently. Further, we might be able to keep these proceedings private.

Beyond our common gestalt, there may be other compelling reasons to consider arbitration. For example, in a fascinating article, Professor Gary Spitko makes the case for using arbitration clauses in wills and trusts to combat the prejudices of majoritarian cultural norms on the wishes of a non-conforming testator or settlor. *See* "Gone But Not Conforming: Protecting The Abhorrent Testator From Majoritarian Cultural Norms Through Minority-Culture Arbitration," 49 *Case W. Res. L. Rev.* 275 (1999). While the professor's thesis involves somewhat exotic examples, it need not. If you are developing an estate plan for a person who, for whatever reason, is considered controversial within your community, you fit within the professor's theory.[1] Further, many "small disputes" can be quickly and cheaply litigated through arbitration.

Although private arbitration clauses were at one time eschewed by the courts as denying access to the only true arbiters of legal dispute and due process, the pendulum has moved far to the other pole. Now, these clauses are most holy and are upheld by our courts whenever possible. *See Circuit City Stores Inc. v. Adams,* 121 S. Ct. 1302, 1318 (U.S. 2001) ("Times have changed. Judges in the 19th century disfavored private arbitration. The 1925 Act was intended to overcome that attitude, but a number of this Court's cases decided in the last several decades have pushed the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration.").[2] Further, each state in these United States and the District of Columbia has codified a form of binding arbitration into its statutes. Most states have patterned their law after the Uniform Arbitration Act.[3]

What is now a choice to agree to arbitrate or to require arbitration may become a practical necessity.

[1] Note, however, that the prejudice, if it appears, is likely to come out in a will or trust contest. If that contest takes the form of an attack on the validity of the whole will or trust, including the arbitration clause (*e.g.,* testamentary capacity), then the matter will be heard by the court, not the arbitrator, whose very power is at issue. *See Prima Paint Corp. v. Flood & Conklin Manufacturing Co.,* 388 U.S. 395, 403-04, 87 S.Ct. 1801 (1967); *See "Cardegna v. Buckeye Check Cashing, Inc.,* 894 So.2d860 (Fla. 2005). On the other hand, if the arbitration clause is attacked as being the product of fraud or undue influence, then arbitration under an otherwise appropriate clause remains extant. *Id.* This point may offer a strategy issue for the contestant: do I bring a partial contest based on undue influence, if my capacity case is weak (as most are), in order to preserve arbitration?

[2] The practitioner should keep this change in policy in mind when reading the turn of the century cases on arbitration clauses in wills.

[3] While each state has a version of the UAA, be aware that New York seems to prohibit arbitration in probate disputes. *See In re Will of Jacobovitz,* 295 N.Y.S.2d 527 (Surr. Ct. 1968)

To have this vision, one need only look to one's own jurisdiction and the yearly budget disputes between governors and their legislatures as they make difficult spending choices. The "third branch of government" is not an uncommon target. Within that debate, social and political considerations mandate that our leaders use their limited resources to fund criminal, juvenile, and family justice long before they reach estates and trusts. As judicial resources dwindle or shift to a more pressing use, it is apodictic that already slothful judicial resolutions of trust and estate litigation will slow even further.

Arbitration, *per se,* does not solve these concerns. Indeed, it can be as cumbersome a process as a judicial proceeding, if not more so. We endeavor here to offer our colleagues a more efficient form of arbitration that specifically meets the needs of our trust and estate clients.

ARBITRATION PRIMER

I. What Is Arbitration?

A. Definition: "A process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard. Where arbitration is voluntary, the disputing parties select the arbitrator who has the power to render a binding decision."[4]

B. Adversarial Process: Arbitration, like litigation, is an inherently adversarial process. Arbitration procedures (*i.e.,* discovery, evidence, motions, etc.) may be agreed to by the parties and, therefore, may be much more relaxed than—or very similar to—the trial process. Further, arbitration may be before a single arbitrator or a panel of arbitrators.

C. Binding vs. Non-binding: The arbitrator's decision may be binding upon the parties or non-binding. While binding arbitration is more common, non-binding arbitration may be used if the parties want to test their positions before a neutral prior to going to court. This approach may promote settlement of claims after the arbitration concludes, but adds significant costs if the parties go forward to trial.

II. Advantages and Disadvantages of Arbitration over Litigation

A. Selection of Arbitrators:

1. *Advantage:* Parties may select an arbitrator with a specialty in the area of the specific dispute to ensure a high quality of review. Typically, the parties must mutually agree on the arbitrator, but another process for selecting the arbitrator may be set out in the will or trust agreement. Further, a testator may desire to pre-select an arbitrator in her will if she believes her testamentary scheme may be "unpopular" with a judge or jury.[5]

2. *Disadvantage:* While arbitrators may fully intend to act neutrally, certain arbitrators may have inherent biases. For instance, if your client is a beneficiary that has a claim against a corporate trustee, an arbitrator that had a previous career as a corporate trustee may bring to the table a subconscious bias in favor of corporate trustees. This concern may be remedied through careful selection of an arbitrator, but must be considered by counsel when selecting the arbitrator.

B. Limited Review by Courts:

Each state's arbitration statutes may set forth the specific instances when an arbitration award may be vacated. However, courts typically read the exceptions strictly to further the federal policy of encouraging arbitration and enforcing agreements to arbitrate. In practice, arbitration decisions are generally enforced by courts unless the decision is (1) in manifest disregard of the law, (2) arbitrary and capricious, or (3) against public policy.[6]

1. *Advantage:* The limited review of arbitration decisions adds finality to the arbitrator's decision. This greatly reduces the cost and delay associated with the appeal process. Further, an arbitrator may "ignore" precedent that may not lead to an equitable result. For instance, most states will not allow reformation of an unambiguous will, even if it is clearly shown that the wording used does not express the testator's intent (*i.e.,* if the drafting lawyer improperly stated the testator's intent). An arbitrator may have a greater ability to "get around" such precedent to carry out the testator's intent than a court would.

2. *Disadvantage:* Many attorneys advise against arbitration for this very factor. Courts have been very reluctant to overturn arbitration decisions. For instance, to show a manifest disregard for the law, many courts require not simply that the decision went against precedent but a further showing that the arbitrator was well aware of and intentionally ignored set-

[4] Black's Law Dictionary 105 (6th ed. 1990).

[5] E. Gary Spitko, "Gone But Not Conforming: Protecting the Abhorrent Testator From Majoritarian Cultural Norms Through Minority-Culture Arbitration," 49 *Case W. Res. L. Rev.* 275 (Winter 1999).

[6] Mary F. Radford, "An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters," 34 *Real Prop. Prob. & Tr. J.* 601, 611 (2000).

tled precedent.[7] Further, unless the parties require that the arbitrator write a written decision explaining his or her decision, a court will have little to review. In sum, a party may have no redress for a bad decision. When suggesting arbitration to a client, counsel should fully explain this aspect and establish arbitration procedures to protect against this result.

C. Expedited Process:

1. *Advantage:* In many jurisdictions, the court system is overburdened and understaffed. This results in significant delays in the resolution of disputes. The arbitration process usually involves an expedited process so the dispute does not drag on as long as those before a court.

2. *Disadvantage:* Arbitrations involving many complex issues may not be more efficient than litigation. For one, dispositive motions which may reduce the number of issues are typically not allowed in arbitration unless agreed to beforehand by the parties. Further, arbitration may not be quicker if the parties have agreed to follow the traditional rules of discovery. Finally, if the arbitrator is a practicing attorney, the arbitrator's schedule may delay multi-day proceedings.

D. Cost:

1. *Advantage:* Assuming arbitration is completed in an expedited process, the cost of arbitration is often significantly less than litigation. Further, an arbitration participant's limited appeal rights help to keep costs down.

2. *Disadvantage:* While a faster process will generally keep costs down, there are additional costs involved that are absent from litigation. For one, many arbitration organizations such as the AAA have significant filing fees. Second, arbitrators charge an hourly or daily fee, which may be very significant in a complex arbitration (especially if there is a panel of arbitrators). In addition, if the parties adopt fairly complex discovery and procedural rules, the proceedings may last as long as a trial. Indeed, in some cases, arbitration may ultimately be more expensive than litigation.

E. Flexible Procedures:

1. *Advantage:* Parties may write their own rules of procedure for arbitration, or the parties may adopt standard rules (*e.g.,* AAA's Arbitration Rules for Wills and Trusts; the state's rules of procedure). Such rules may address discovery rights, whether the parties may file dispositive motions, what evidence the arbitrator may consider, or any other aspect the parties desire. This allows parties to appropriately tailor the proceedings to their specific dispute.

2. *Disadvantage:* If the parties do not specify rules, arbitrators are typically given great discretion regarding discovery (often little discovery is allowed), whether to accept preliminary motions from parties, and the evidence that will be considered.[8] This discretion is in part what makes arbitration a more efficient forum, but it also removes the protections that the rules of procedure and evidence have developed over time.

F. Confidentiality:

Advantage: Arbitration hearings are not public record and, therefore, may help to keep private details of family disputes private.

G. "Ideal" Situations:

With the above advantages and disadvantages in mind, the following are a few examples of when arbitration will typically be advantageous:

1. Fee disputes, including fiduciary and legal fees
2. Prudent investing disputes
3. Document construction
4. Principal and income disputes, including adjustment powers
5. Trust terminations or severances
6. Accounting disputes
7. Declaratory relief in general

III. Potential Concerns When Using Arbitration in Will or Trust Disputes

A. Enforceability against Beneficiaries:

Arbitrating trust and estate disputes is not prohibited in any state, except, perhaps, New York. Nothing prohibits two or more persons with a trust or estate dispute from agreeing to resolve their dispute through arbitration. See, for example, U.A.A. (2000) §6; A.R.S. §12-1501; Cal. C.C.P. §1281; §44.104, Fla. Stat.[9] Some states may authorize a fiduciary to arbitrate in one form or another. *See,* for example M.G.L.A. 204 §13 (giving courts power to authorize a trustee or executor to arbitrate in certain circumstances); *see Clarke v. Cordis,* 86 Mass. 466, 1862 WL 3779 (Mass. 1862) (finding law empowering court to send trustee to arbitration to be constitutional).

The question with a less obvious answer is whether arbitration can be mandated by a testator or

[7] John W. Hinchey and Thomas V. Burch, "Georgia General Assembly Adopts 'Manifest Disregard' as Ground For Vacating Arbitration Awards: How Will Georgia Courts Treat The New Standard?" Vol. 9 No. 4 *Ga. Bar J.* 10 (Feb. 2004).

[8] For instance, an arbitrator may consider hearsay and give it the weight the arbitrator feels appropriate. *See* Bette J. Roth et al., *Alternative Dispute Resolution Practice Guide* § 3:9 (West Supp. 2004).

[9] Can a trustee enter into a contract with a third party for services to the trust and thereby bind the trust beneficiaries to the arbitration clause included in the contract? That may depend on your jurisdiction. *See Merrill Lynch Pierce Fenner & Smith v. Eddings,* 838 S.W.2d 874, 878-79 (Ct. App. 1992) (beneficiaries bound by trustee's agreement to arbitrate); *Clark v. Clark,* 57 P.3d 95, 99 (Okla. 2002) (beneficiary not bound).

settlor in a will or trust in a way that is enforceable. The answer appears to be "yes." *See* "ADR in the Trusts and Estates Context," 21 *ACTEC Notes* (Fall 1995) 170; "The Use of Arbitration in Wills and Trusts," 17 *ACTEC Notes* 177 (1991). This thinking of our brethren seems anchored in contract theory, testamentary intent, and conditional transfers of property.

Testamentary and settlor intent are typically used by planners to create a form of arbitration they may not even recognize as such. We commonly give a fiduciary "sole discretion" to make certain principal invasions, to decide what is income or principal, to employ agents, to decide whether a trust is no longer revocable by the settlor,[10] and the like. The decision of the fiduciary can be attacked only on limited grounds such as arbitrariness, conflict of interest, and bad faith[11]—which happen to be the same limited grounds, in most jurisdictions, for appealing the decision of an arbitrator.[12]

Contract theory seems to lack viability with respect to wills. Whether a trust is a "contract" is, **at best,** debatable. *See Schoneberger v. Oelze,* 96 P.3d 1078 (Az. Ct. App. 2004); *Estate of Washburn,* 581 S.E.2d 148, 152 (N.C. Ct. App. 2003) (referring to "trust agreement or other contract"); *Robsham v. Lattuca,* 797 N.E.2d 502 (table), 2003 WL 22399541 (Mass. App. Ct. 2003) (unpublished) (trust is not a contract).

Less controversial is the conditional transfer, which subsumes the intent of the testator/settlor and appears more firmly entrenched throughout our jurisdictions. *See Tennant v. Satterfield,* 216 S.E.2d 229, 232 (W. Va. 1975) ("The general rule with regard to acceptance of benefits under a will is that a beneficiary who accepts such benefits is bound to adopt the whole contents of that will and is estopped to challenge its validity. *Moore v. Harper,* 27 W.Va. 362 (1886). Acceptance of a beneficial legacy or transfer is presumed, but the presumption is rebuttable by express rejection of the benefits of by acts inconsistent with acceptance. Without acceptance by the intended transferee, the transfer does not occur. *Hardesty v. Corrothers,* 31 F. Supp. 365 (N.D.W.Va.1940)."); *Wait v. Huntington,* 1873 WL 1382 (Conn. 1873). A beneficiary takes only by benevolence of the testator, who may attach lawful conditions to the receipt of the gift. *American Cancer Soc., St. Louis Division v. Hammerstein,* 631 S.W.2d 858, 864 (Mo. App. 1981).

But, contract theory or testamentary intent may be preferred in certain cases, such as when we anticipate transfers to a surviving spouse and we want those transfers to qualify for the marital deduction. In that case, using the "conditional gift" mechanism may create a "terminable interest" that runs afoul of the marital deduction.

All of these underpinnings, in our opinion, lack a level of certainty that most planners and clients would consider desirable. We could bring certainty to the issue by a simple statute allowing a testator or settlor to require by will or trust that all or some issues involving the estate or trust administration be decided by an arbitral, rather than a court. This may be problematic with respect to third parties such as creditors, if they are indispensable parties. But, we see no bar to legislative action that would assist in binding trustees and beneficiaries. And, because the statute is merely codifying the common law, theoretically it could apply to documents already in existence. By way of example consider the following statute:

> §731.012. Arbitration Clauses in wills and trusts.
> 1) A provision in a will or trust requiring the arbitration of disputes between or among the personal representatives, trustees, beneficiaries, or any combination of them, is enforceable.
> 2) Unless otherwise specified in the will or trust, a will or trust provision requiring arbitration shall be presumed to require binding arbitration under section [add state law on binding arbitration].

B. Inclusion of All Necessary Parties must also be considered in deciding whether to arbitrate and the scope of the arbitration:

1. *Third Party Rights:* Though a will or trust may be enforceable against beneficiaries, parties whose claims derive apart from the will or trust may not be bound by a mandatory arbitration clause contained in such document. This group may include creditor's, disinherited spouses (statutory right to elective share), or spouses with rights under a prenuptial agreement.

2. *Minor, Unborn, or Incapacitated Beneficiaries:* In traditional court proceedings, statutes in every state allow the interests of such parties to be represented, whether through virtual representation, by the court itself, or a court-appointed special representative or

[10] If you employ this type of provision you may want to take a hard look at *In re Revocation of Revocable Trust of Fellman,* 604 A.2d 263 (Pa. Super. Ct. 1992) (arbitration of settlor's competency violated public policy).

[11] *See* 3 *Scott on Trusts* §§187, 187.2; *Steele v. Kelley,* 46 Mass. App. Ct. 712, 734 (1999).

[12] *See In re Hirshorn's Estate,* 209 P.2d 543 (Co. 1949) (en banc); *Old Nat'l Bank & Trust Co. of Spokane v. Hughes,* 134 P.2d 63 (Wa. 1943); *Howe v. Sands,* 194 So. 798 (Fla. 1940) (en banc); U.A.A. (2000) §23.

guardian ad litem. However, such is not likely the case in an arbitration proceeding. If the interests of all necessary parties are not properly represented, it is extremely unlikely an arbitration decision will be enforceable against such parties. This solution may be remedied by statutes allowing courts to appoint a special representative or guardian ad litem in arbitration proceeding (See Section IV.A below); however, absent such statutes, the potential of unenforceable decisions exists.

C. Adverse Tax Implications:

Though the adversarial nature of arbitration proceedings will likely protect most arbitration awards from adverse tax implications, it is important to consider the following aspects on a case-by-case basis and inform clients of any potential concerns:

1. *Marital Deduction (IRC § 2056)*

a) The estate tax regulations state that the marital deduction is available in conjunction with settlement of a will contest for property that is surrendered as a "bona fide recognition of enforceable rights of the surviving spouse in the decedent's estate. Such bona fide recognition will be presumed where the assignment or surrender was pursuant to a decision of a local court upon the merits in an adversary proceeding following a genuine and active contest. However, such a decree rendered by consent…will not necessarily be accepted as a bona fide evaluation of the rights of the spouse."[13]

b) To determine whether there is a "genuine and active contest" in an alternative dispute resolution setting, courts will look to whether (1) the parties' interests are truly adverse, (2) the parties' are represented by counsel, and (3) there were multiple offers/counteroffers.[14]

c) Further, some courts limit the amount of the deduction to the amount provided to the surviving spouse under the will, while others may allow the full value of the property passed according to the terms of the settlement.[15]

2. *Administrative Expenses (IRC § 2053)*

a) Generally, expenses relating to a dispute incurred by an estate are deductible if they were incurred on behalf of the estate and not of the claimants to the estate.[16] For instance, attorney's fees approved by a probate court (or arbitrator) as an expense payable or reimbursable by the estate will not necessarily be deductible as an administrative expense if the dispute was "not essential to the proper settlement of the estate, but incurred for the individual benefit of the heirs."[17]

b) Therefore, parties that insert a requirement in the will or trust that "The arbitrator's fee shall be paid by my estate or from the principal of the trust in question" should be aware that the costs may not be deductible for estate tax purposes in all cases.

IV. Sample Statute Regarding Arbitration of Estate Administration Disputes.

1. Enforceability of Arbitration Clauses. A provision in a will or trust requiring the arbitration of disputes among beneficiaries, fiduciaries, or any combination of them, is enforceable, provided the validity of the provision requiring arbitration is not being contested as part of the dispute.

(a) Unless otherwise specified in the will or trust, a will or trust provision requiring arbitration shall be presumed to require simplified trial resolution under this statute.

(b) If the validity of the provision requiring arbitration is contested, the court shall resolve that issue prior to resolution of the balance of the dispute and, if the arbitration provision is determined to be valid, the balance of the disputed issues will be resolved in accordance with the arbitration provision.

(c) Notwithstanding a valid arbitration provision, all persons interested in a dispute may agree to have their dispute resolved by the court rather than in accordance with the arbitration provision.

2. *Arbitration by Agreement.* Absent an applicable arbitration provision in a will or trust, persons interested in a dispute may agree in writing to submit a controversy to arbitration before or after an action has commenced. Unless otherwise specified in the agreement, the agreement shall be presumed to require simplified trial resolution under this statute.

3. *Fiduciary Liability.* A personal representative or trustee[18] is not individually liable for agreeing to arbitrate, agreeing to have the court resolve an issue that would otherwise be resolved by arbitration, or any other agreement made in accordance with this statute.

4. *Commencement of Simplified Trial Resolution.* A Notice of Commencement of Simplified Trial Resolution shall be filed by one or more interested persons. When a Notice of Commencement of Simplified Trial Resolution is filed, fees paid to the clerk of court shall be paid in the same amount and manner as for complaints initiating civil actions. The clerk of the court shall handle and account for these matters in all

[13] 26 C.F.R. § 20.2056(c)-2(d) (as amended in 1994).

[14] *See* Radford, *supra* note 4, at 656.

[15] *Id.*

[16] 26 C.F.R. § 20.2053-3(a) (as amended in 1979); *see also* Radford, *supra* note 4, at 658-659.

[17] 26 C.F.R. § 20.2053-3(a); *see also* 26 C.F.R. § 20.2053-3(c)(3).

[18] Definitions of personal representative and trustee may vary from jurisdiction to jurisdiction.

respects as if they were civil actions, except that the clerk of court shall keep separate the records of the applications for simplified trial resolution from all other civil actions.

5. *Jurisdiction and Venue.* The filing of the Notice of Commencement of Simplified Trial Resolution and all other clerk and court involvement in the arbitration process shall occur in the court and clerk's office that would be assigned to resolve the controversy through the judicial process. By agreement of all interested persons and the trial resolution judge, the simplified trial resolution hearings and dispute management conference may occur at a location outside the jurisdiction and venue of the court that would otherwise resolve the dispute; provided such an agreement will not change the jurisdiction and venue of any court proceedings related to the simplified trial resolution.

6. *Tolling of Statutes of Limitation.* The filing with the clerk of court of the Notice of Commencement of Simplified Trial Resolution will toll the running of the applicable statutes of limitation.

7. *Content of Notice of Commencement and Objections.* The notice of commencement shall concisely list the issue or issues in dispute and shall certify that all persons interested in the dispute were served by facsimile, email, or U.S. Mail (certified Return Receipt Requested) with the application. Proof of service of the notice of commencement shall be filed with the clerk of court. The responsive pleading, motion or objection may include appropriate objections, if any, to the dispute being resolved by simplified trial resolution.

8. *Appointment of Trial Resolution Judge and Qualifications.* If a will or trust provides for a method for appointing the trial resolution judge, or if the interested persons have entered into an agreement which provides for a method for appointing the trial resolution judge, the court shall proceed with the appointment as prescribed. In the absence of an agreement among the parties or provision in a will or trust, or if the agreement, will or trust provision regarding appointment fails or for any reason cannot be followed, the court, on application of a party, shall appoint a trial resolution judge who is a neutral lawyer with at least 10 years of practice in trust and estate law. Within 10 days after the submission of the Notice of Commencement of Simplified Trial Resolution, the court shall appoint the trial resolution judge. Within five days of rendition of the order appointing the trial resolution judge, the person who filed the notice of commencement shall serve a conformed copy of the signed order on all interested persons.

9. *Setting Final Simplified Trial Resolution Hearing.* Within 10 days of the rendition of the order appointing the trial resolution judge, the trial resolution judge shall notify the interested persons of the time and place of the final hearing. The final hearing shall commence within 120 days of the date on which the order appointing the trial resolution judge was rendered.

10. *Discovery and Procedures for Final Arbitration Hearing.*

(a) Discovery and hearing procedures shall be in accordance with an agreement of the parties or, if none, by rules established by the trial resolution judge. The [your state Evidence Code or laws of evidence] shall apply generally to all proceedings under this section, except that affidavits and other means of reducing the cost of authenticating and explaining evidence may be used at the discretion of the trial resolution judge. A record and transcript may be made of the arbitration hearing if requested by any party or at the direction of the trial resolution judge. The record and transcript may be used in subsequent legal proceedings subject to the [Your state Rules of Evidence and Rules of Appellate Procedure].

(b) Within 15 days of service of the order appointing the trial resolution judge, the trial resolution judge shall, after notice to all interested persons, conduct a dispute management conference. At the conference, the trial resolution judge and the interested persons shall execute a written agreement setting forth the terms of the arbitration, discovery parameters and the process to be followed, including the trial resolution judge's compensation. To the extent the parties cannot agree to the terms of the simplified trial resolution, discovery parameters and the process to be followed, these matters shall be decided by the trial resolution judge and included in a written order served on the interested persons attending the dispute management conference. If the parties cannot agree on the trial resolution judge's compensation, it shall be set by the court after notice to all interested persons and an opportunity to be heard.

(c) The trial resolution judge may administer oaths or affirmations and conduct the proceedings in accordance with the [rules of court or other promulgating authority]. The trial resolution judge may issue subpoenas for the attendance of witnesses and for the production of books, records, documents, and other evidence. The trial resolution judge may apply, or authorize an interested person to apply, to the court for orders compelling attendance and production. Subpoenas shall be served and shall be enforceable in the manner provided by law.

11. *Final Decision and Appeal.* The trial resolution judge shall serve the parties with a copy of the decision and file the decision with the court within 10 days of the final adjournment of the simplified trial resolution hearing. Any party may enforce a final

decision rendered in simplified trial resolution by filing a petition for final judgment in the [circuit court or other trial court] in the jurisdiction of the simplified trial resolution as established pursuant to this statute. Upon entry of final judgment by the [circuit court or other trial court], any party may appeal to the appropriate appellate court within 30 days after the final judgment is rendered. Factual findings determined in the simplified trial resolution are not subject to appeal. The harmless error doctrine shall apply in all appeals. An appeal of a simplified trial resolution decision shall be limited to review on the record and not de novo, of:

(a) Any material failure of the trial resolution judge to comply with the rules of procedure or evidence that apply to the arbitration by agreement, rule, or statute.

(b) Any partiality or misconduct by a trial resolution judge prejudicing the rights of any party.

(c) Whether the decision reaches a result contrary to the Constitution of the United States or of the State of [your state].

12. *Indispensable Parties.* This section shall not apply to any dispute which involves the rights of a person who is not a party to the simplified trial resolution when that person would be an indispensable party if the dispute were resolved in court.

13. *Virtual Representation.* Decisions in simplified trial resolution proceedings shall be binding upon minors and unborn and unascertained persons to the same extent as orders and judgments entered in judicial proceedings concerning the administration of estates and trusts.

14. *Disqualification of Trial Resolution Judge.* Any party may petition the court to disqualify a trial resolution judge for good cause. If the court disqualifies the trial resolution judge, the court shall appoint a successor, qualified trial resolution judge. Nothing in this provision shall preclude a trial resolution judge from disqualifying himself or herself or refusing any appointment. The time for simplified trial resolution shall be tolled during any periods in which a motion to disqualify is pending.

15. *Immunity.* A trial resolution judge appointed under this statute shall have judicial immunity in the same manner and to the same extent as a judge. All parties, attorneys, witnesses and other persons participating in the simplified trial resolution shall have the same immunity from libel and slander and other tortious conduct that would be afforded them if this were a proceeding in court.

16. *Costs.* Except as otherwise agreed, costs of the simplified trial resolution, including compensation of the trial resolution judge and cost of the hearing room, if any, shall be initially borne equally by the parties participating in the simplified trial resolution, with the details of these costs and fees set forth in the written agreement between the trial resolution judge and parties, or, if none, the trial resolution judge's order, executed at the dispute management conference. A party shall initially bear its own costs and expenses in connection with the simplified trial resolution, including, but not limited to, legal fees, witness expenses, and deposition and hearing transcripts. The trial resolution judge may order costs, including, but not limited to, reasonable attorneys' fees, expert witness fees, and deposition and hearing transcripts to be paid by any party to the proceedings, individually or from a beneficial interest in the estate or trust before the trial resolution judge, as justice may require.

17. *Jury Trial.* Nothing in this law shall be construed as abrogating any person's right to a jury trial.

V. Arbitration Clauses.

Assuming we want to achieve the goals enunciated above, is it enough to simply say that "all disputes regarding the administration of my estate (trust) shall be resolved through arbitration"? What does that mean? Or, might we just provide that "all questions that arise in the course of the administration shall be resolved by my trustees (executors) and their decisions shall be final and binding upon my beneficiaries"? These clauses might be enforceable. But, these clauses reek of ambiguity. Their seeming simplicity belies a web of expensive litigation just to glean the settlor's or testator's intent. To exhaust the point, let's consider a more exact clause:

> Three arbitrators shall be chosen, who shall name such price, one arbitrator to be selected by the trustee, one by my son, Wilbert J. Austin, and the third by the remainder of my children. The amount thus determined shall be considered the price and value of the said premises which my son shall pay to the trustee therefor.

Shall these arbitrators decide the matter by a majority? And, who will pay the freight for these three arbitrators? These were subjects, along with valuation methodology, raised by petition for instructions, decided by the trial court and decided on appeal in *Cleveland Trust Co. v. Manchester,* 128 N.E.2d 216 (Ct. App. 1955), rehearing was sought and decided in 1956, 139 N.E.2d 673. Only thereafter could the parties get to the business of arbitrating.

In addition, we must pay special attention to the proceedings we contemplate falling within the ambit of the arbitral. For example, consider executor and trustee commissions. In those disputes, we typically

have enabling legislation, so the issues of law, if any are minimal. These are generally disputes over the facts. Further, most if not all of the persons with relevant information to assist the arbitrator are fiduciaries, beneficiaries or controlled by one of them.[19] Thus, "discovery" will not require subpoenas. The threat of not complying with the arbitration clause and a resulting gift over should be enough (provided you've included that remedy). The arbitrator can make a non-arbitrary decision with minimal, informal input. This is probably true of investment issues, discretionary distribution issues, matters of fiduciary instruction, document interpretation (absent the need for extrinsic evidence), decisions on principal and income, and the like. On the other hand, decisions regarding the partial invalidity of documents, document interpretation involving parol evidence, breaches of fiduciary duty involving third-persons, and other cases may require some element of state involvement in order to subpoena witnesses and enforce subpoenas.

If we do not consider these issues how can we advise our clients regarding the utility of the arbitration clause?

We also need to pay close attention to what we mean when we use the word "arbitration." In many jurisdictions, we may have statutorily recognized options such as non-binding arbitration that puts the threat of attorneys' fees, costs, or both into the case, but allows the dissatisfied litigant a trial de novo. Then, there is binding arbitration, subject to limited court review. And, my favorite, "voluntary trial resolution." Are we going to create our own form of arbitration or use a state statute or rule?

Here are some sample clauses that MIGHT be useful in crystallizing your own ideas:

Generic provision—Short version:

It is my hope and expectation that there will be no dispute in relation to this Trust [my estate]. Nevertheless, if there is any dispute or controversy among any of the Trustee [personal representative] and the beneficiaries involving any aspect of this Trust [my estate] or its administration, the parties to the dispute may agree on the manner of resolution. If there is no such agreement, the disputing parties shall submit the matter to mediation, and, if unresolved by mediation, to binding arbitration. If a party to the dispute fails to participate in good faith in the mediation or arbitration, the arbitrator or the court having jurisdiction over this trust [my estate] is authorized to award costs and attorney's fees from that party's beneficial share or from other amounts payable to that party (including amounts payable to that party as compensation for services as a fiduciary).

Generic provision—Long version with forfeiture clause:

[Comment: As with other language in these sample clauses, the forfeiture provision in paragraph (c) below has not been tested in the courts. Assuming that a mandatory arbitration provision in a will or trust is otherwise enforceable in a given jurisdiction, it is believed that a forfeiture provision is likely to be enforceable also, including in jurisdictions that do not recognize the validity of no-contest provisions.]

(a) It is my hope and expectation that there will be no dispute in relation to this Trust [my estate]. Nevertheless, if there is any dispute or controversy among any of the Trustee [personal representative] and the beneficiaries involving any aspect of this Trust [my estate] or its administration, the parties to the dispute may agree on the manner of resolution. If there is no such agreement, the disputing parties shall submit the matter to mediation, and, if unresolved by mediation, to binding arbitration. If the parties are unable to agree on the selection of a mediator or arbitrator, the court having jurisdiction over this Trust [my estate] shall select the mediator or arbitrator. [The mediator or arbitrator shall have the following qualifications: ACTEC fellow; attorney with at least 10 years' experience in trusts and estates; etc.]

(b) In the case of arbitration, the arbitrator shall establish the procedure for arbitrating the matter or matters and recognizing the goals of privacy, efficiency, less formality than in a judicial tribunal, and less expense than might be incurred in a judicial forum, while reaching a fair result. The decision of the arbitrator shall be final and binding on the Trustee [Executor], all beneficiaries, and their heirs, successors, and assigns. If the arbitrator determines that a guardian ad litem is needed to represent the interests of unborn, unascertained, or incapacitated interested persons, a guardian ad litem shall be appointed by the court having jurisdiction over this Trust [my estate].

(c) If a disputing beneficiary fails to participate in good faith in the agreed-on procedure for resolution, or in the mediation or arbitration if there is no such agreement, the disputing beneficiary's interest in this Trust [my estate] shall be forfeited and the beneficiary, if an individual, shall be treated as having predeceased the Settlor [me] [with no surviving issue]. If for any reason it is determined by the court having jurisdiction

[19] An interested person who is neither the executor\settlor nor beneficiary will not be bound by the arbitration clause, but may still stipulate to the arbitration.

over this Trust [my estate] that the foregoing provision for forfeiture is not effective, the arbitrator or the court having jurisdiction over this trust [my estate] is authorized to award costs and attorney's fees from the beneficiary's share or from other amounts payable to the beneficiary.

(d) The provisions of subparagraph (c) above shall not apply to the beneficial interests of:

(1) the Settlor's [my] spouse, to the extent that his [her] interest would otherwise qualify for an estate or gift tax marital deduction;

(2) any beneficiary, to the extent that the beneficial interest would otherwise qualify for an income, gift, or estate tax deduction for charitable purposes unless and until all such charitable beneficial interests have expired.

If, however, the Settlor's [my] spouse or any such beneficiary who is a disputing beneficiary to whom the above forfeiture provisions do not apply nevertheless fails to participate in good faith in the agreed-on procedure for resolution or in the mediation or arbitration, the arbitrator or the court having jurisdiction over this trust [my estate] is authorized to award costs and attorney's fees from his, her, or its beneficial share.

(e) The acceptance of the Trust by any trustee or co-trustee constitutes the trustee's or co-trustee's agreement to comply with the above provisions. If a trustee or co-trustee is a party to a dispute and fails to participate in good faith in the agreed-on procedure for resolution or in the mediation or arbitration, it shall be deemed that the trustee or co-trustee has breached its fiduciary duties and has resigned, and the court having jurisdiction over this Trust is authorized to surcharge the trustee or co-trustee for costs, attorney's fees, and any other sums deemed appropriate. [The personal representative's consent to act constitutes his, her, or its agreement to comply with the above provisions. If a personal representative is a party to a dispute and fails to participate in good faith in the agreed-on procedure for resolution or in the mediation or arbitration, it shall be deemed that the personal representative has breached his, her, or its fiduciary duties and has resigned, and the court having jurisdiction over my estate is authorized to surcharge the personal representative for costs, attorney's fees, and any other sums deemed appropriate.]

(f) If the validity of these provisions requiring arbitration is contested, the court having jurisdiction over this Trust [my estate] shall resolve that issue prior to resolution of the balance of the dispute. If the arbitration provisions are determined to be valid, the balance of the disputed issues shall be resolved as provided in this Article __.

Arbitration—Reference to statute:

It is my hope and expectation that there will be no dispute in relation to this Trust [my estate]. Nevertheless, if there is any dispute or controversy among any of the Trustee [personal representative] and the beneficiaries involving this Trust [my estate] or its administration, the disputing parties shall submit the matter to mediation, and, if the matter is not resolved by mediation, shall submit to binding arbitration pursuant to [ACTEC statute]. In the case of arbitration, the disputing parties shall follow the procedures set forth in [statute], including the provision allowing for variance from the procedures in [statute] by agreement of all of the parties to the dispute. Pursuant to [paragraph 3 of statute], the Trustee [my Executor] shall not have any liability to any beneficiary or other interested person for participating in such arbitration or agreeing to any such variance.

Arbitration—Reference to ACTEC "Model Rules" with forfeiture provision:

(a) It is my hope and expectation that there will be no dispute in relation to this Trust [my estate]. Nevertheless, if there is any dispute or controversy among any of the Trustee [personal representative] and the beneficiaries involving this Trust [my estate] or its administration, the disputing parties shall submit the matter to mediation, and, if the matter is not resolved by mediation, shall submit to binding arbitration subject to the provisions of the ACTEC Model Rules for Trust and Estate Arbitration (the "Model Rules"). The parties shall follow the procedures set forth in the Model Rules, including the provision allowing for variance from the procedures in the Model Rules by agreement of all of the parties to the dispute. Pursuant to paragraph 3 of the Model Rules, the Trustee [my Executor] shall not have any liability to any beneficiary or other interested person for participating in such arbitration or agreeing to any such variance.

(b) If a disputing beneficiary fails to participate in good faith in the agreed-on procedure for resolution, or in the mediation or arbitration if there is no such agreement, the disputing beneficiary's interest in this Trust [my estate] shall be forfeited and the beneficiary, if an individual, shall be treated as having predeceased the Settlor [me] [with no surviving issue]. If for any reason it is determined by the court having jurisdiction over this Trust [my estate] that the foregoing provision for forfeiture is not effective, the arbitrator or the court having jurisdiction over this trust [my estate] is authorized to award costs and attorney's fees from the beneficiary's share or from other amounts payable to the beneficiary.

(c) If at any time in the future the State of _____ adopts a statute providing for arbitration of disputes relating to trusts and estates and the statute is substan-

tially similar to the Model Rules, then the statute shall apply to this Trust [Will].

CONCLUSION

Most of the disadvantages of traditional arbitration proceedings need not be duplicated by ACTEC Fellows. As leaders of our respective Bars and protectors of our clients' interests, we are dedicated to leaving our laws and processes better than we found them. With a little more polishing, your Arbitration Task Force believes it can offer the College a dispute resolution process that gets disputes resolved with the quality, ease and grace to which most traditional forms of dispute resolution can only aspire.