PROBATE & TRUST LITIGATION COMMITTEE MEETING

Thursday, May 24, 2007

4:00 p.m. to 6:00 p.m.

Hollywood, Florida

AGENDA (ITEM 1)

I. Call Meeting to Order

II. Administrative Matters and Announcements

A. Introduction of Persons Present

B. Approval of Minutes of February, 2007, meeting at Hutchison Island, Florida [ITEM 2]

C. Time and Place of Next Meeting: August 2007, Palm Beach

D. Thanks to US Trust Company of Florida: First Annual Sponsor of Committee Meetings

III. Subcommittee Reports

A. 2007 Trust & Estate Symposium *Chair, Jack A. Falk, Jr.*

B. Status of Committee legislation, *Chair*

1. **Fiduciary Lawyer-Client Privilege: Approved by EC [ITEM 3]**.
2. **Arbitration clause in a will or trust is enforceable. Passed in Legislature 2007-HB 311** [ITEM 3]

3. **Exculpatory clause in a will: Passed in Legislature 2007 –HB 311[ITEM 3].**
4. **Payment of trustee's fees from trust assets: Pending approval of EC [ITEM 4]**

C. Crafting an appellate rule on which Orders are Appealable in a Probate Proceeding? *Sean Kelley*, *Tom Karr, Peter Sachs* **[ITEM 5]**

D. Collateral Attack on the Validity of A Marriage after Death Based Upon Undue Influence *Bill Hennessey*, *Laura Sundberg, Russ Snyder* **[ITEM 6]**

E. Revisions to Rule 1.525 concerning 30 day time limit for filing a motion for attorneys' fees [ITEM 7] *Angela Adams, Eric Virgil,Laura Sundberg*

F. No jury trial in breach of trust action. *Shane Kelley, Laura Sunberg*

G. ACTEC Model Arbitration Legislation. [ITEM 8]. *Bob Goldman*

IV. New Business

A. A fee statute to impose fees against a creditor who exaggerates claim amount and prevents distribution of estate or trust assets

V. Adjourn

ITEM 2
[UNAPPROVED]

MINUTES
Probate & Trust Litigation Committee Meeting
Hutchison Island, Florida February 23, 2007

Members in attendance (43):

Angela M. Adams, St. Petersburg

David J. Akins, Orlando

Stuart H. Altman, Miami

Lynwood Arnold, Tampa

Carlos Batlle, Miami

Phillip A. Baumann, Tampa

Wm. Fletcher Belcher, Tampa

Amy Beller, Boca Raton

David R. Carlisle, Miami

Stacy Cole, Orlando

Michael Dribin, Miami

Jack A. Falk, Jr., Coral Gables (Chair)

David Garten, West Palm Beach

Robert Goldman, Naples

Steven Hearn, Tampa

William Hennessey III, West Palm Beach
(Co-Vice Chair)

Tom Karr, Miami
(Co-Vice Chair)

Rohan Kelley, Fort Lauderdale

Sean Kelley, St. Augustine

Nelson Keshen, Miami

Andrea Kessler, Ft. Lauderdale

Laird Lile, Naples

Marsha Madorsky, Miami

Glenn Mednick, Boca Raton

Mark Middlebrook, Clearwater

Lawrence J. Miller, Boca Raton

John Moran, West Palm Beach

Pamela O. Price, Orlando

Brandan Pratt, Ft. Lauderdale

Ronald Roby, Winter Park

Deborah Russell, Naples

Peter A. Sachs, West Palm Beach

Jon Scuderi, Naples

Edward Shipe, Boca Raton

David Silberstein, Sarasota

Barry F. Spivey, Sarasota

Laura P. Stephenson, Miami

Thomas Thurlow III, Stuart

Thomas Topor, Ft. Lauderdale

Matthew Triggs, Boca Raton

J. Eric Virgil, Coral Gables

Jerry Wells, Daytona Beach

Dennis White, Naples

6 Guests: Sherri Stinson, Alexandra Rieman, Tom Tierney, Diana Zeydel, George Lange and Don Scarlett

Call to Order. The meeting of the Committee was called to order at approximately Noon.

Approval of Minutes. The Minutes of the meeting of the Committee held in September, 2006, in Kissimmee were approved as presented without correction or amendment.

Preliminary Discussion. The Committee Roster was circulated and updated and the members introduced themselves. The Chair announced that the next committee meeting would be held in May 2007 in Hollywood in connection with the Executive Council meeting.

Sponsor: The Chair thanked United States Trust Company of Florida for sponsoring the Committee's meetings.

2007 Trust and Estate Symposium. The Chair noted that the Symposium will be held in May, 2007 in Tampa and in connection with the Section's annual convention in Hollywood.

Arbitration Clause in a Will or Trust and Exculpation Clauses in Wills. The Committee's recommended draft legislation is set to move through the Legislature.

Appealability of Orders in Probate. Subcommittee members: Tom Karr, Peter Sachs, Shane Kelley. There was an extensive discussion about the subcommittee's White Paper (an excellent job) discussing the cases in Florida on the topic and law from other states. Those on the Committee who must address appeals from probate orders voiced their view that a better rule is needed and the Committee should pursue drafting a new rule. No one on the Committee voiced any opposition to our continued work on developing concepts and drafting an appellate rule. The Chair and subcommittee members have been in contact with the Chair of the Appellate Rules Committee and once we have a rule

that the Committee has agreed upon, we expect to present it to the Appellate Rules Committee for consideration.

Time limit for seeking attorneys' fees and costs after final order in probate and trust proceedings. Angela Adams, Eric Virgil, Laura Sundberg. There was some discussion of this topic and the Committee is expected to have a White Paper prepared for circulation by May, 2007.

Collateral attack on validity of a marriage based upon undue influence. William Hennessey III, Laura Sundberg, Larry Miller, and Russ Snyder. There was discussion about the topic and an updated White Paper will be circulated for the May, 2007 meeting.

No jury trial in action for breach of trust. Shane Kelley and Laura Sundberg are in the process of preparing a White Paper on this issue.

Next Committee Meeting. The Chair announced that the next meeting of the Committee would be held in Hollywood in May, 2007 in connection with the next Executive Council meeting.

Adjournment. The meeting was adjourned at 2:00 p.m.

ITEM 3

HB 1341

H 1341 **Fiduciary Lawyer-client Privilege**
Last Action: 05/05/2006 Died on Calendar
View Bill Info hb134100.html (Confidence: 79.67%)

Senate Bill 2190.

Last Action: **Fiduciary Lawyer-client Privilege**
View Bill Info 05/05/2006 Died in Committee on Judiciary
sb2190.html (Confidence: 85.1%)

Senate Bill sb2190

Florida Senate - 2006
SB 2190

Section 1. Section 90.5021, Florida Statutes, is created to read:

90.5021 Fiduciary lawyer-client privilege.--

(1) For the purpose of this section, a client acts as a fiduciary when serving as a personal representative or a trustee as defined in s. 731.201, an administrator ad litem as described in s. 733.308, a curator as described in s. 733.501, a guardian or guardian ad litem as defined in s. 744.102, a conservator as defined in s. 710.102, or an attorney in fact as described in chapter 709.

(2) A communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under s. 90.502 to the same extent as if the client were not acting as a fiduciary. In applying s. 90.502 to a

communication under this section, only the person or entity

acting as a fiduciary is considered a client of the lawyer.

Section 2. This act shall take effect July 1, 2006.

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SENATE SUMMARY

Provides that a client acts as a fiduciary when serving in certain positions. Provides that a communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure.

HB 1341

A bill to be entitled

An act relating to the fiduciary lawyer-client privilege; creating s. 90.5021, F.S.; providing that a client acts as a fiduciary when serving in certain positions; providing that a communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure; providing construction in application; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 90.5021, Florida Statutes, is created

to read:

90.5021 Fiduciary lawyer-client privilege.--

(1) For the purpose of this section, a client acts as a fiduciary when serving as a personal representative or a trustee as defined in s. 731.201, an administrator ad litem as described in s. 733.308, a curator as described in s. 733.501, a guardian or guardian ad litem as defined in s. 744.102, a conservator as defined in s. 710.102, or an attorney in fact as described in chapter 709.

(2) A communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under s. 90.502 to the same extent as if the client were not acting as a fiduciary. In applying s. 90.502 to a communication under this section, the person or entity acting as a fiduciary is considered the only, real client of the lawyer.

Section 2. This act shall take effect July 1, 2006.

Proposed 2007 House Bill

Section 731.401 Arbitration of disputes—

(1) A provision in a will or trust requiring the arbitration of disputes, other than disputes of the validity of all or a part of a will or trust, between or among the beneficiaries and a fiduciary under the will or trust, or any combination of such persons or entities, 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 s. 44.104.

733.620 Exculpation of personal representative.--

(1) A term of a will relieving a personal representative of liability to a beneficiary for breach of fiduciary duty is unenforceable to the extent that the term:

(a) Relieves the personal representative of liability for breach of fiduciary duty committed in bad faith or with reckless indifference to the purposes of the will or the interests of interested persons; or

(b) Was inserted into the will as the result of an abuse by the personal representative of a fiduciary or confidential relationship with the testator.

(2) An exculpatory term drafted or caused to be drafted by the personal representative is invalid as an abuse of a fiduciary or confidential relationship unless:

(a) The personal representative proves that the exculpatory term is fair under the circumstances.

(b) The term's existence and contents were adequately communicated directly to the testator.

This subsection applies only to wills created on or after July 1, 2007.

ITEM 4

PAYMENT OF ATTORNEYS' FEES FROM TRUST WHEN TRUSTEE IS ACCUSED OF BREACH OF TRUST

PROPOSED STATUTE PASSED BY COMMITTEE AND TO BE CONSIDERED BY PROBATE DIVISION AND EC

Section 736.0802 (10)

(10) Payment of costs or attorneys' fees incurred in a trust proceeding from the assets of the trust may be made by the trustee without the approval of any person and without court authorization, except as provided in subsection (a).

(a) If a claim or defense based upon a breach of trust is made against a trustee in a trust proceeding, a party must obtain a court order to prohibit the trustee from paying costs or attorneys' fees from trust assets.

(1) To obtain an order prohibiting payment of costs or attorneys' fees from trust assets, a party must make a reasonable showing by evidence in the record or proffer that

provides a reasonable basis for a court to conclude that there has been a breach of trust. The trustee may proffer evidence to rebut the evidence submitted by a party.

(b) Nothing in this subsection is intended to restrict the remedies a court may employ to remedy a breach of trust, including but not limited to ordering appropriate refunds.

RPPTL Probate and Trust Litigation Committee
Trustee's Attorneys' Fees Subcommittee
White Paper

1. Introduction.

Trustees of express trusts who find themselves involved in litigation face the issue of whether they can use trust assets to pay their litigation attorneys' fees and costs. Trustees can become involved in litigation for many reasons.

In some instances the trustees are joined as defendants because they are interested or necessary parties but no relief is sought against them. Such cases would include construction actions. Trustees often file such actions as plaintiffs. Suits can also be filed naming trustees as defendants in which the trustees are not accused of any wrongdoing, but the requested relief will affect the defendant trustees. Such cases would include those where a beneficiary seeks to set aside a trust in which the acting trustee has been named, and the beneficiary seeks to have administered in its stead an earlier document in which the currently serving trustee is not named. Into a third category fall those in which the serving trustees are accused of wrongdoing either in the procurement of the administered document or in the administration itself.

For purposes of this paper, the first category of actions will be referred to as "trustee neutral" cases; the second category will be referred to as "trustee affected" cases; and the third category will be referred to as "trustee liability" cases. This paper will address the "trustee liability" cases.

2. Shriner v. Dyer and the Current Law.

Florida law currently provides that the trustee is empowered to retain agents, including attorneys, and to pay them for their services. See § 737.402(2)(y), Fla. Stat. (2005). Logic dictates that in trustee neutral cases it is appropriate and expected for the trustee to use trust funds to pay trustee's counsel to prosecute or defend such cases as this would appear to be part of the administration process. Even if no relief were sought against the trustee initially, however, a party could amend at some point during the litigation proceedings to seek relief against the trustee. Alternatively, a co-defendant could assert a cross-claim against a trustee, converting a trustee neutral or trustee affected case into a trustee liability case. One might justifiably object to a trustee using trust funds to defend itself in a case where it is ultimately found to have improperly assumed the position of trustee, or the trustee is ultimately found to be liable for wrongdoing in the procurement or administration of the trust. One might also be troubled, however, by a legitimate, properly performing trustee being

barred from using trust funds to defend the trust or itself in a trustee affected or trustee liability case that proves to be baseless.

Shriner v. Dyer, 462 So. 2d 1122 (Fla. 4th DCA 1984), is the one Florida case providing some guidance on the issue of a trustee's ability to use trust funds to defend itself in litigation. Unfortunately, this case raises more questions than it answers.

In Shriner, co-trustees reimbursed themselves from trust funds for their attorneys' fees incurred in a previous action in which they were sued solely in their individual capacities. The appellate court found that the co-trustees' "personal interests conflicted with their position as Trustees," citing § 737.403(2), Fla. Stat. (1983). That statutory section provides that when "the duty of the trustee and his individual interest... conflict in the exercise of a trust power, the power may be exercised only by court authorization...". The court held that the co-trustees should have obtained court approval before exercising their power as trustees to use trust funds to pay their attorneys' fees. The court stated:

> Therefore, we hold that the unilateral payment of attorney's fees without court approval constitutes an improper payment out of trust funds.

The holding in this case arguably requires a trustee to obtain court authorization before paying attorneys' fees in any case in which the trustee is named as a party. Prior to 2005, there was no guidance in Florida statutes or case law as to when a conflict of interest arises that would require prior court approval, nor was there any guidance concerning the nature of the court approval that a trustee must obtain.

In recognition of the problem facing fiduciaries, the Florida Bankers Association proposed an amendment to § 737.403(2), which was adopted by the Florida Legislature in 2005. Section 737.403(2)(e), Fla. Stat. (2005), provides that court authorization is not required for:

> (e) Payment of costs or attorney's fees incurred in any trust proceeding from the assets of the trust unless an action has been filed or defense asserted against the trustee based upon a breach of trust. Court authorization is not required if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination by the court that the trustee has committed a breach of trust.

While this amendment addresses the trustee neutral cases, it does not explicitly address the appropriate handling of a case that begins as a trustee neutral case and becomes a trustee affected or, arguably, a trustee liability case. Nonetheless, this section frees the trustee to pay its attorneys' fees from the trust in those cases in which it has, throughout the proceeding, no conflict of interest.

The Shriner court analyzed the issue of payment of litigation fees and costs in terms of conflict of interest. In a trustee neutral case, no affirmative relief is sought against the fiduciary, so the trustee should have no conflict of interest as a consequence of the initiation of the litigation. With the enactment of § 737.403(2)(e), a Shriner analysis is unnecessary in trustee neutral cases. Arguably, a conflict of interest could arise in the trustee affected lawsuit since the outcome could result in the fiduciary losing its position, as in a trust invalidation proceeding, or the trustee's compensation could be reduced, such as in a case where one seeks to have assets excluded from the trust thereby decreasing the trustee's percentage compensation. A clear conflict of interest exists, of course, in the third category of trustee liability cases as the court could enter a money judgment directly against the trustee.

The authors performed a survey of the law across the country and found no case citing Shriner for the proposition that payment of attorneys' fees from trust funds without prior court

approval is improper. They were also unable to find any case with a holding similar to Shriner. As might be expected based on the dearth of Shriner type cases, the authors found no case that proposed a solution generally to the problem facing a trustee regarding the source of funds for litigation attorneys' fees and costs. Generally, however, the case law appears to presume that the trustee will initially pay its attorneys' fees and be able to seek reimbursement upon its successful defense of alleged wrongdoing.

The Uniform Trust Code ("UTC"), which has been adopted by a number of states throughout the country, appears to presume that the trustee will advance its own funds in connection with litigation. UTC § 709 addresses "reimbursement" of the trustee from trust property. The comment to § 709 states, in pertinent part,

> Reimbursement under this section may include attorneys' fees and expenses incurred by the trustee in defending an action. However, a trustee is not ordinarily entitled to attorneys' fees and expenses if it is determined that the trustee breached the trust.

UTC § 709 (2000).

In its version of the UTC, the state of Utah added a subsection addressing litigation expenses. This subsection appears, however, only to elaborate on the basis for entitlement to reimbursement rather than the appropriateness of initially paying the fees from the trust. It reads:

> If a trustee defends or prosecutes any proceeding in good faith, whether successful or not, the trustee is entitled to receive from the trust the necessary expenses and disbursements, including reasonable attorneys' fees, incurred.

U.C.A. 75-7-1004 (2004).

The Restatement 3d Trusts, § 88 (Tentative Draft No. 4), addresses the trustee's right of indemnification and directs payment from the trust of certain trust expenses. This section, like the cases found in the authors' survey, assumes that the trustee initially will pay the expenses incurred in lawsuits or in anticipation of litigation involving allegations of breach of trust. With respect to such cases, this section of the Restatement speaks only to indemnification.

The two sections that follow set forth the competing arguments for and against requiring a trustee to first seek judicial authorization before utilizing trust assets to pay litigation defense fees and costs. For analytical purposes, the focus of the following sections is on trustee liability cases because the authors concluded that this threshold issue must first be determined in that context before attempting to apply the analysis to the more subtle and more difficult question of trustee affected cases.

Within each of the following two sections is a suggestion for the procedure to be utilized in seeking the court's decision (whether the decision be on a petition to authorize or a petition to prohibit). The procedures are intended to be parallel, but complimentary of and consistent with each section's thesis i.e., whether the trustee should be required initially to seek judicial authorization to use trust funds to pay litigation defense fees and costs.

3. The Case for Prohibiting Trustee Access to Trust Funds to Pay Defense Costs.

A trustee sued for breach of fiduciary duty is just like any other litigant defending itself. Under the American Rule, parties to litigation bear their own attorneys' fees and costs during litigation and, unless one party prevails and demonstrates a legal basis for recovering

fees from the other side (i.e., pursuant to contract or statute), neither party recovers attorneys' fees from the other. See Frymer v. Brettschneider, 710 So. 2d 10 (Fla. 4th DCA 1998). Accordingly, a trustee accused of breach of fiduciary duty in a legal proceeding should not pay its attorneys' fees and litigation costs incurred defending itself out of trust assets unless and until the trustee first obtains court authorization.

Under § 737.403(2), Fla. Stat. (2005), trustees presently enjoy a favored position among litigants in the Florida judicial system because they have the right to seek authorization to pay their attorneys' fees and costs out of the trust assets during the litigation. No other litigants enjoy this luxury. In contrast to judicial proceedings involving matters of trust administration, no compelling reason exists for favoring trustees over other litigants by allowing a trustee to use the assets in a trust to fund the trustee's personal litigation defense.

Legislation was needed in Florida due to Shriner v. Dyer, 462 So. 2d 1122, (Fla. 4th DCA 1984). Shriner is a unique case, decided on fairly specific facts, and, although it appears to attempt to articulate the historical common law rule, it applies the rule in an illogical and arguably unfair way. The current version of § 737.403(2), Fla. Stat. (2005) clarifies and/or corrects Shriner. Specifically, the statute makes it clear that upon the successful conclusion of litigation (i.e., by settlement or dismissal), the trustee is entitled to be reimbursed out of the trust. In the absence of statutory guidance, whether it is in the form of the current version of § 737.403(2) or in the form of new legislation, the Shriner case would remain the rule in Florida and perpetuate uncertainty among practitioners and courts.

It is, in fact, a conflict of interest for a fiduciary to use trust assets to defend itself against allegations of breach of fiduciary duty. The heightened responsibility a fiduciary owes to the trust and its beneficiaries does not end when litigation begins. More specifically, the fact of litigation does not alter the fiduciary's fundamental duty to avoid conflicts of interest. Indeed, other conflicts of interest that arise in the course of a trust administration are not tolerated and almost always give rise to liability if maintained without express authorization in the trust, the informed consent of the beneficiaries, or court permission. The underlying basis for many claims of breach of fiduciary duty is that the trustee has misused or misappropriated trust assets. Therefore, litigation often directly calls into question the trustee's prior use of those very resources the trustee now wishes to utilize to defend itself. The conflict of interest inherent in allowing a fiduciary to pay its legal defense costs out of the trust assets should remain impermissible unless approved by the court.

Another favored position trustees already enjoy over ordinary litigants is the availability of a ready source of funds (i.e., the trust corpus), for payment of the fiduciary's attorneys' fees in the event the fiduciary prevails in the litigation. Moreover, if the fiduciary is awarded attorneys' fees against the beneficiary, but the beneficiary is insolvent, often the fiduciary will still be entitled to reimburse itself out of the assets of the trust. In contrast, a successful litigant in traditional civil litigation faces not only the difficulty of establishing a right to prevailing party attorneys' fees, but also the inevitable challenge in enforcing an attorneys' fee judgment. In Florida, expansive protections for debtor's rights make collectibility a significant problem in many cases.

For the same reasons, if a trustee is allowed to utilize trust funds free from scrutiny by the court, there is a substantial risk that once an individual trustee is found to have breached its fiduciary duty, those trust funds utilized to fund the unsuccessful defense may never be recoverable by the prevailing beneficiary or repaid to the trust. Of course, this is more a problem for individual fiduciaries than for most corporate trustees. At the same time, however, concerns with the requirement that a fiduciary must first seek court approval seem focused more on the individual fiduciary since corporate fiduciaries can more often afford to fund their own litigation defense if required to do so.

Whether due to the fact of a corporate fiduciary's individual resources, access to information about the trust. or the availability of trust funds at the end of the case to reimburse the fiduciary for litigation expenses, the reality is that a trustee has a distinct advantage in litigation over beneficiaries. Therefore, there is no justification for allowing a fiduciary to engage in a conflict of interest without supervision from the court.

The assumption that the settlor was justified in trusting the fiduciary and, therefore, the fiduciary should be unconstrained in looking to trust funds to defend itself against allegations of breach, is often unwarranted. Many cases involve the settlor's chosen fiduciary engaging in wrongful conduct, including some cases where the fiduciary's role in the drafting of the very document in question or the fiduciary's appointment in the first instance are called into question.

Trust funds are special funds, unique in nature, if for no other reason than the fact that they have been earmarked by the settlor for a specific purpose (i.e., for the use and beneficial enjoyment of the beneficiaries). The trustee's service is at the whim of the settlor and it is intended to be focused on the proper management of the trust funds for the beneficiaries. Regardless of what the settlor of a trust may have stated in the trust instrument regarding a trustee's right to use trust funds or resources to pay expenses, it cannot be assumed that a settlor would have approved of or intended that his trustee would use the money set aside in trust for the beneficiaries to defend the trustee against the beneficiaries' allegations of breach of fiduciary duty. Settlors who have this specific intent should be required to clearly state it in the governing instrument. In turn, that evidence of intent should be both admissible and persuasive (although not conclusive) to the court in its consideration of a trustee's petition for authorization to pay litigation expenses out of the trust.

The current version of § 737.403(2) correctly places the burden on the fiduciary to seek court authorization before paying its attorneys' fees and litigation costs out of the trust. Detailed guidance on standards the court should apply and the procedures that ought to be utilized in a specific case may be unnecessary. By definition, each situation should be judged on its own facts and each petition for authorization should be assessed on its own merits. Among other things, courts would logically consider the relative resources of the beneficiary, the trustee, and the trust itself. Courts should also consider the relative merits of the parties' positions as they appear on the record at that time, and the breadth of the powers granted to the trustee under the trust, including exculpatory language.

Courts should consider relevant extrinsic evidence. Compare § 737.403(1), Fla. Stat. (2005) ("In exercising its discretion to order a modification of a trust under this section, the court shall consider the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust, and extrinsic evidence relevant to the proposed modification."). One potential enhancement to the current version of § 737.403(2) would be the addition of express authorization to the court to consider relevant extrinsic evidence in the same manner as permitted under § 737.403(1). Finally, courts should be free to impose additional conditions (such as a bond) in connection with authorization to pay the fiduciary's defense costs out of the trust.

There is no evidence, anecdotal or otherwise, that suggests competent fiduciaries are declining to serve in light of the requirements of § 737.403(2). Indeed, it is generally recognized by many practitioners and most professional fiduciaries that a trustee should not use trust funds for breach of fiduciary duty litigation defense costs. Since there is no documented shortage of willing trustees over the course of several hundred years of experience with trusts and this common practice, there is no reason to believe a shortage will suddenly appear if the essence of the rule is maintained in § 737.403(2).

The Uniform Trust Codes recently adopted in North Carolina and South Carolina do not have express provisions on this issue. Similarly, Florida's draft version of the Uniform Trust Code does not appear to have any comparable provision. The draft Restatement of the Law Third Trusts appears to assume trustees will initially pay for their own defense in litigation involving allegations of breach. See Tentative Draft No. 4 § 88. Finally, nationwide research conducted by this subcommittee suggests that courts generally assume that trustees are not permitted to pay their litigation defense costs out of the assets of the trust prior to prevailing or without judicial authorization.

Finally, the prohibition against the trustee on using trust funds to pay for attorneys' fees and costs is not intended to be inflexible and unalterable over the entire course of a litigated matter. Rather, as the current statute provides, the trustee should be permitted the opportunity to obtain court approval for using trust funds for its defense costs.

a. Procedure for Obtaining Court Approval

Notwithstanding the policy reasons for requiring a trustee to use personal funds to defend litigation in which a breach of trust is alleged, a serving trustee should not be prohibited in every case from using trust funds as he or she deems fit to defend possibly proper conduct. See e.g. Ball v. Mills, 376 So. 2d 1174, 1181-1182 (Fla. 1st DCA 1979). In most cases, mechanisms are available to the court to protect both the trustee and the beneficiaries in the event a trustee is ultimately determined not to be liable for a breach of fiduciary duty. The court could, for example, prohibit the payment of distributions to beneficiaries or commissions to trustees pending the resolution of the litigation to preserve a fund for use in reimbursing the trust. See § 737.201, Fla. Stat. (2005). Nevertheless, due to the potential validity of the trustee's defenses, a safeguard should be put in place that allows the court, in appropriate cases, to authorize a trustee's access to trust funds to defend a breach of trust claim.

As noted above, under current law court authorization must be obtained before costs and attorneys' fees can be paid out of trust assets when breach of trust is alleged in litigation. See § 737.403(2)(e). Although the burden on the trustee to seek authorization may be implied, the current statutory mechanism does not specify who must seek court authorization before these expenses can be paid, and it does not give the court guidance on what standard it should apply in determining whether to authorize payment of these expenses out of trust assets.

One possible safeguard is a procedure borrowed from that which must be employed by plaintiffs to plead and recover punitive damages. Pursuant to § 768.72, Fla. Stat. (2005), a claim for punitive damages is not permitted until there has been a reasonable showing by evidence in the record or proffer by the plaintiff that would provide a basis for recovery of punitive damages. Such evidence can include correspondence, depositions, and affidavits. See, Int'l Ship Repair & Marine Servs., Inc. v. St. Paul Fire & Marine Ins. Co., 944 F. Supp. 886, 895, 897 (M.D. Fla. 1996). Once the court is satisfied that the proffer of evidence is sufficient to establish a punitive damage claim, the plaintiff may then amend its pleadings to raise the claim. In this procedure, the defendant is not permitted to offer evidence to mitigate the claim. In fact, no formal evidentiary hearing is necessary. See Solis v. Calvo, 689 So. 2d 366, 369 n. 2 (Fla. 3d DCA 1997).

A similar procedure should be employed in breach of trust cases. If a trustee in such a case believes it is entitled to use trust funds to pay its defense costs, the trustee can file an appropriate pleading seeking to permit such access. Attached to the pleading would be the evidence that supports the trustee's defenses to the claim of breach, as well as other evidence that it was the settlor's intent or is otherwise appropriate for the court to permit the trustee to pay its defense costs with trust assets. In addition, discovery could be employed by the trustee to generate additional evidence to support the trustee's defenses. As long as the proffered evidence is sufficient to establish to the court a reasonable basis for the claim that

no breach of trust was committed by the trustee, or other equitable grounds for allowing the trustee to use trust funds, the court would then consider permitting the trustee to pay its attorneys' fees and costs from the trust.

Unlike the punitive damage claim procedure, however, the procedure employed for breach of trust cases would permit the beneficiary to present evidence countering the trustee's claims, such as evidence tending to disprove the trustee's explanation of transactions or showing a counter-explanation to the trustee's explanation of its conduct. Additionally, the court could consider such factors as the value of assets in the trust, the trustee's entitlement to commissions or distributions and any applicable trust provisions, such as exculpatory clauses or language specifically addressing a trustee's access to trust assets for payment of expenses. By permitting the court to consider all relevant factors and authorizing the court to exercise its discretion to establish appropriate safeguards, the procedure enables the court to retain the discretion in appropriate cases to prevent unfairly burdening an honest trustee with the upfront payment of defense costs in the event of a finding of no breach, as well as making all parties whole in the event of an eventual finding of breach of trust.

This procedure would also clarify that the trustee has the burden of initiating an action to obtain court authorization prior to paying its attorneys' fees out of the trust in breach of trust actions. While avoiding the situation where a trustee has unfettered access to trust funds to defend improper conduct, this procedure would also serve as a safeguard against meritless claims of breach of trust. Only where sufficient evidence is presented by the trustee will it be permitted to use trust funds to defend against a breach of trust claim.

The proposed procedure strikes the best balance between avoiding the frustration of a settlor's intent by forcing out an innocent trustee chosen by the settlor and giving a dishonest trustee free access to the trust's assets. By permitting the court to weigh the evidence presented, the court is given the opportunity to make a reasoned decision rather than being forced into a harsh result notwithstanding the unique facts of a case. Also, as additional facts come to light during discovery, a trustee who is unsuccessful in securing an order permitting it to use trust assets to pay fees can make one or more subsequent requests to the court seeking access to trust assets. Conversely, a beneficiary who is unsuccessful in defeating a trustee's application for use of trust funds to defend itself can ask the court to revisit the matter as additional facts come to light.

4. The Case for Permitting Trustee Access to Trust Funds to Pay Defense Costs.

A person's access to the courts is a right that has long been cherished in American and Florida jurisprudence. Fla. Const. Art. 1, § 21; Flood v. State, 95 Fla. 1003 (Fla. 1928). In order to gain access to the courts in Florida, a person needs to do little more than record his or her grievances and pay a filing fee. The abolishment of technical forms of pleading (see Fla. R. Civ. P. 1.110) and the general liberality in granting plaintiffs leave to amend their pleadings (see Fla. R. Civ. P. 1.190) ensure that a plaintiff's case will not be dismissed with prejudice absent the rare inability to plead sufficient ultimate facts to state a cause of action. Often, a plaintiff will not be required to produce evidence in support of a complaint's allegations for months or years. During that period, the defendant, whether guilty or innocent of wrongdoing, must invest time and money defending the lawsuit.

Prospective and active litigants in lawsuits involving allegations of a trustee's breach of fiduciary duty are faced with these same realities of civil litigation. Additionally, due to the emotion that is often woven throughout trust litigation cases, rational evaluation of the risks and rewards of the litigation can be clouded. The potential to recover attorneys' fees pursuant to statute in trust litigation cases, which is often not present in other civil litigation cases, adds another element that can lead to more protracted lawsuits involving claims of breach of trust than one might find in other cases in the civil arena where a plaintiff is complaining about the conduct of another. See §§ 737.2035 and 737.627 Fla. Stat. (2005). In other words, cases involving a trustee's breach of fiduciary duty can be expensive and lengthy because it is easy to get into court, a litigant does not have to present proof of its claim at the outset, litigants are frequently driven by emotion, and litigants are encouraged to proceed with their cases when they learn of the possibility that the prevailing party can recover its attorneys' fees from the losing party.

Pursuing and defending lawsuits is an expensive proposition for all parties. It is important that people have free access to our courts to address grievances. This ease with which a frustrated beneficiary can sue a trustee for breach of trust, however, can give a prospective trustee good reason to pause before agreeing to serve. It also gives a serving trustee reason to be concerned over the cost of defense regardless of wrongdoing.

A plaintiff in any civil litigation is faced with paying for legal representation whether it be on a flat fee, contingency fee or hourly rate fee basis. A defendant is likewise faced with paying for legal costs. There are, however, many good reasons why a trustee who is a defendant in a lawsuit should be able to pay its legal costs from the trust's assets rather than its own assets unless and until the plaintiff can establish at some level that the claim against the trustee has merit.

The most important duty of a trustee is to carry out the intentions of the settlor of the trust. One of the important expressions of a settlor's intent is his or her choice for trustee. The selection of the trustee, especially when it is an individual, can be central to the settlor's entire plan as the settlor may perceive that only a select group of individuals has the necessary judgment, knowledge of family history and relationship to the beneficiaries to serve effectively. Exposing this prospective trustee to the possibility of significant personal expense if he or she is wrongly sued for breach of fiduciary duty could discourage that trustee from serving. This, in turn, frustrates the settlor's intentions.

Often a settlor is cognizant of the difficulties the trustee will have in dealing with certain beneficiaries but feels the chosen trustee is the proper person to handle the job. Forcing the trustee to personally absorb litigation expenses could serve only to reward the very beneficiaries with whom the settlor was concerned. The settlor may have additional reasons for selecting persons or institutions as trustees. Those reasons could be a desire to confer a

benefit on the trustee, such as compensation, or to preclude the service of others, such as unrelated third parties or difficult family members. A common situation is where a settlor appoints a spouse to succeed the settlor upon his or her death. Often we see a second or third spouse appointed to administer a trust that ultimately benefits children from a settlor's prior marriage. It would frustrate the settlor's intention if the surviving spouse refrains from serving for fear of financial strain under the weight of prospective trust litigation.

It is also after a trustee accepts the position of fiduciary that the prospect of unforeseen litigation can serve to frustrate the settlor's intentions. A trustee that finds himself or herself in litigation, even for wrongs not committed, may choose to resign rather than incur the personal expense of litigation. In the event the trustee chooses to fight the litigation, the strain on the trustee's personal resources may affect his or her judgment thereby placing that trustee in a conflict of interest. For example, an aggressive defense may serve the interests of the beneficiaries, but a trustee that is paying for litigation expenses from his or her own funds may be reluctant or unable to take a more aggressive tack. Indeed, a non-institutional trustee may have very little personal resources to pay the attorneys' fees necessary to defend against even a baseless charge of breach of fiduciary duty.

A reasonable contrary position is that a trustee should be treated no differently than any other defendant regarding defense costs, and, further, the trustee may have committed wrongdoing as alleged in the plaintiff's complaint. The allegations of wrongdoing should not, however, be taken at face value in light of the settlor's clear expression of intent regarding the selection of the trustee. Situations also arise where the settlor is not deceased and is serving as the trustee. In those cases, of course, there is no less compelling reason to defer to the settlor's intent regarding his or her selection of trustee.

Procedure for Obtaining Court Order Prohibiting Trustee Access.

Notwithstanding the policy reasons for permitting a trustee to use trust funds to defend litigation in which a breach of trust is alleged, a serving trustee should not be given a blank check to use trust funds as he or she deems fit to defend possibly improper conduct. In most cases, however, mechanisms are available to the court to protect the beneficiaries in the event a trustee is ultimately determined to be liable for a breach of fiduciary duty. The court could, for example, prohibit the payment of distributions to beneficiaries or commissions to trustees pending the resolution of the litigation to preserve a fund for use in reimbursing the trust. See § 737.201, Fla. Stat. (2005). Nevertheless, because of the potential validity of the plaintiff's claims, a safeguard should be put in place that allows the court, in the appropriate case, to prohibit a trustee's access to trust funds to defend a breach of trust claim.

Under the current law, court authorization apparently must be obtained before costs and attorneys' fees can be paid out of trust assets when breach of trust is alleged in litigation. See § 737.403(2)(e). Although the burden on the trustee to seek authorization may be implied, the current statutory mechanism does not specify who must seek court authorization before these expenses can be paid, and it does not give the court guidance on what standard it should apply in determining whether to authorize payment of these expenses out of trust assets. The current statutory mechanism, however, does not clearly specify who must seek court authorization before these expenses can be paid, and it does not give the court guidance on what standard it should apply in determining whether to authorize payment of these expenses out of trust assets.

One possible safeguard for these issues is a procedure borrowed from that which must be employed by plaintiffs to recover punitive damages. Pursuant to § 768.72, Fla. Stat. (2005), a claim for punitive damages is not permitted until there has been a reasonable showing by evidence in the record or proffered by the plaintiff which would provide a basis for recovery of punitive damages. Such evidence can include correspondence, depositions, and affidavits.

Once the court is satisfied that the proffer of evidence is sufficient to establish a punitive damage claim, the plaintiff may then amend its pleadings to raise the claim. In this procedure, the defendant is not permitted to offer evidence to mitigate the claim. In fact, no formal evidentiary hearing is necessary. See Int'l Ship Repair & Marine Servs., Inc. v. St. Paul Fire & Marine Ins. Co., 944 F. Supp. 886, 895, 897 (M.D. Fla. 1996); and Solis v. Calvo, 689 So. 2d 366, 369 n. 2 (Fla. 3d DCA 1997).

A similar procedure should be employed in breach of trust cases. If a beneficiary in such a case believes there was a breach of trust, the beneficiary can file an appropriate pleading to prohibit the trustee from paying attorneys' fees and costs with trust assets. Attached to the pleading would be the evidence that led the beneficiary to believe there was a breach. In addition, discovery could be employed by the beneficiary to generate additional evidence to support the claim. As long as the proffered evidence is sufficient to establish to the court a reasonable basis for the claim that a breach of trust was committed by the trustee, the court may then consider prohibiting the trustee from paying its attorneys' fees and costs from the trust.

Unlike the punitive damage claim procedure, however, the procedure employed for breach of trust cases would permit the trustee to present mitigating evidence, such as a clarification of misunderstood transactions or a reasonable explanation for seemingly improper conduct. Additionally, the court could consider such factors as the amount of assets in the trust, the trustee's entitlement to commissions or distributions and any applicable trust provisions, such as exculpatory clauses or language specifically addressing a trustee's access to trust assets for payment of expenses. By permitting the court to consider all relevant factors and retain discretion to establish appropriate safeguards, the procedure enables the court to retain the ability to make all parties whole in the event of an eventual finding of breach of trust.

This procedure would also clarify that the beneficiary who raises the breach of trust issue has the burden of initiating an action to prohibit a trustee from paying its attorneys' fees in breach of trust actions. This procedure would also serve as a safeguard against meritless claims of breach of trust. Only where sufficient evidence is presented by the beneficiary will the trustee be prohibited from using trust funds to defend against a breach of trust claim.

The proposed procedure strikes the best balance between avoiding the frustration of a settlor's intent by forcing out an innocent trustee chosen by the settlor and giving a dishonest trustee free access to the trust's assets. By permitting the court to weigh the evidence presented, the court is given the opportunity to make a reasoned decision rather than being forced into a harsh result notwithstanding the unique facts of a case. Also, as additional facts come to light during discovery, a plaintiff who is unsuccessful in securing an order prohibiting a trustee from using trust assets to pay fees can make one or more subsequent requests to the court seeking to limit a trustee's access to trust assets. Conversely, a trustee who is initially prohibited from using trust funds can ask the court to revisit the matter as additional facts come to light.

5. Conclusion.

The subcommittee recognizes that, in a trustee liability case, policy reasons exist for both initially prohibiting and initially permitting a trustee to have access to trust assets to pay trustee attorneys' fees and costs. While the subcommittee takes no position on which of the two approaches reflects the best policy, the subcommittee unanimously recommends adoption of a procedure akin to that set forth in § 768.72, Fla. Stat. (2005) relating to punitive damages.

The subcommittee believes that legislation rather than a rules amendment would be most appropriate, given that this is a substantive issue which should be addressed by the legislature.

The subcommittee considered and rejected the proposal that nothing should be done and the issue of trustee access to trust assets for attorneys' fees and costs be left to the courts.

ITEM 5

Appellate Rule
Project - White...

ITEM 6

Probate and Trust Litigation Committee
Fort Lauderdale, Florida
May 24, 2007

SUBCOMMITTEE REPORT ON CHALLENGES TO THE VALIDITY OF MARRIAGE AFTER THE DEATH OF A SPOUSE IN PROBATE PROCEEDINGS

I. Introduction

The mere status of surviving spouse affords a myriad of significant financial benefits under Florida law, including the right to homestead property (at least a life estate in the decedent's homestead residence), an elective share (30% of the decedent's augmented elective estate), to take as a pretermitted spouse (up to 100% of the estate under the laws of intestacy), family allowance, exempt property, and priority in preference in selecting a personal representative. In addition, Florida courts have held that a presumption of undue influence in a will contest "cannot arise in the case of a husband and wife" because the requirement of active procurement would almost always be present. Jacobs v. Vaillancourt, 634 So. 2d 667, 672 (Fla. 2d DCA 1994); Tarsagian v. Watt, 402 So. 2d 471, 472 (Fla. 3d DCA 1981).

Most of these benefits are well deserved. It has often been said that Florida has a strong public policy in favor of protecting a decedent's surviving spouse. *See, e.g.*, Via v. Putnam, 656 So. 2d 460, 462 (Fla. 1995). However, what happens when a marriage is procured by undue influence, fraud or exploitation? Is Florida's public policy furthered in such an instance? This report will discuss the current state of Florida law on the ability

to challenge the validity of a marriage after the death of one of the parties to the marriage. It will also examine how other states have addressed this issue.

II. Current State of the Law in Florida

Presently, there are no Florida Statutes that authorize a challenge to the validity of a marriage after the death of one of the spouses. However, a number of Florida cases have addressed this issue. Under existing Florida case law, an invalid marriage may be **void**, or it may be merely **voidable**, depending on the cause and nature of the invalidity. The definitions of void versus voidable become critical because the ability to challenge a marriage after death turns on the distinction between the two.

Florida case law has made it clear that an action can be maintained after the death of a spouse challenging a marriage that is ***void***.

> "Under ordinary circumstances the effect of a void marriage so far as concerns the conferring of legal rights upon the parties, is as though no marriage had ever taken place, and therefore being good for no legal purpose, its invalidity can be maintained in any proceedings in which the fact of marriage may be material, either direct or collateral in any civil court between any parties at any time." Kuehmsted v. Turnwall, 103 Fla. 1180, 138 So. 775 (1932).

However, a marriage that is merely **voidable** may not be attacked by a deceased spouse's heirs.

> "Although the invalidity of a void marriage may be asserted in either a direct or collateral proceeding and at any time, either before or after the death of the husband, the wife, or both, a voidable marriage is good for every purpose and can only be attacked in a direct proceeding during the life of the parties." Arnelle, 647 So. 2d at 1048-49 (citing Kuehmsted).

Accordingly, the question of whether a suit to annul a marriage can be maintained after the death of one of the parties to the marriage depends on whether the marriage is void in the true sense, or merely voidable. *See also* 4 Am. Jur. 2d Annulment of Marriage § 59 (2006); 47 A.L.R. 2d 1393, Right to Attack Validity of Marriage After Death of Party Thereto (2007 update).

A. Void Marriage

A void marriage is an absolute nullity and its invalidity may be shown either during the lifetime of the parties to the marriage, or after their deaths. Kuehmsted, 138 So. at 778. Upon proof of facts rendering a marriage void, the marriage will be disregarded or treated as nonexistent by the court. Id.; Bennett v. Bennett, 26 So. 2d 650 (Fla. 1946).

The invalidity of a void marriage may be maintained in any proceeding in which the fact of marriage may be material, either directly or collaterally, between any parties at

any time, whether before or after the death of the husband, wife, or both. Arnelle, 647 So. 2d 1047 at 1048 (citing Kuehmsted, 138 So. at 777); *see also* Woginiak v. Kleiman, 523 So. 2d 1209 (Fla. 3d DCA 1988)(decedent's son had standing to seek relief from order declaring alleged wife to be surviving spouse).

A marriage is void ab initio, and will be treated as if no marriage had taken place, when:

(1) it is a bigamous marriage, § 826.01, et al. Fla. Stat.;

(2) it is an incestuous marriage, § 741.21, Fla. Stat., § 826.04, Fla. Stat.;

(3) it is a marriage between persons of the same sex, § 741.212, Fla. Stat.;

(4) it is a common-law marriage entered into after January 1, 1968, § 741.211, Fla. Stat.;

(5) there is a prior existing marriage that is undissolved at the time the parties enter the marriage, Smithers v. Smithers, 765 So. 2d 117 (Fla. 4th DCA 2000); or

(6) one or both parties lack the requisite mental capacity at the time the marriage is actually contracted, Kuehmsted, 138 So. at 778.; Bennett, 26 So. 2d at 651.

Because an essential element for marriage is the possession of sufficient mental capacity to consent to the marriage, the marriage of a person who is insane or otherwise mentally incompetent to consent to the marriage is void ab initio. Kuehmsted, 138 So. at 778; Arnelle, 647 So. 2d at 1048; *see also* 82 A.L.R. 2d 1040, Mental Capacity to Marry (2007 update).

Thus, mental incapacity, one of the most frequent grounds for contesting a will, is available as a ground for contesting the validity of a marriage after the death of a spouse.

B. Voidable Marriage

A voidable marriage, on the other hand, may be attacked only in a direct proceeding during the life of the parties. Arnelle, 647 So. 2d at 1048 (citing Kuehmsted, 138 So. at 777). When dealing with a voidable marriage, upon the death of either party, the marriage is deemed valid from the outset. Id. Consequently, a voidable marriage cannot be attacked after the death of either party to the marriage. Id. at 1048-49; s*ee also* 91 A.L.R. 414, Marriage to Which Consent of One of Parties Was Obtained by Duress as Void or Only Voidable (2007 update).

The right to annul a voidable marriage has been held to be a personal right, and an action to annul such a marriage can only be maintained by a party to the marriage contract, or where the spouse seeking annulment is under legal disability, by someone

acting on his or her behalf. *See* Kuehmsted at 777; 25A Fla. Jur. 2d Family Law § 497 (2006).

A marriage has been held to be voidable when:

(1) consent to the marriage was obtained by undue influence, Arnelle, 647 So. 2d at 1048-49; Hoffman v. Kohns, 385 So. 2d 1064, 1069 (Fla. 2d DCA 1980);

(2) consent to the marriage was obtained by duress, In re Ruff's Estate, 32 So. 2d 840, 842 (Fla. 1947)(where party alleged that he was forced to marry under threats of prosecution and violence, the marriage was voidable); Tyson v. State, 90 So. 622, 623 (Fla. 1922)(evidence showed that marriage was procured by fraud and effected as a result of coercion); or

(3) consent to the marriage was obtained by fraud, Cooper v. Cooper, 163 So. 35 (Fla. 1935)(marriage voidable where the marriage ceremony was procured by fraud).

The above cases suggest that the three of the most common methods for exploiting an elderly and infirm (but competent) person, to wit: undue influence, fraud, and duress, would only render a marriage voidable, possibly leaving the remaining family members and heirs without a remedy.

C. Savage v. Olsen

However, in Savage v. Olsen, 9 So. 2d 363 (Fla. 1942), the Florida Supreme Court created some uncertainty by suggesting that fraud can serve as a ground for finding a marriage void. In Savage, the decedent's surviving blood relatives and heirs at law brought an action to annul a marriage between the decedent and her husband. Id. at 363. Some time before the marriage, the decedent, Hannah Ford, was in a car accident and suffered a serious concussion. According to the Court, Hannah was mentally defective and lacked her normal faculties. Id. at 364.

At some point after the accident, the Defendant, Charles Savage, showed an unusual interest in Hannah. He subsequently proposed marriage, which was performed, but never consummated. Id. Savage lived apart from Hannah after the ceremony, held himself out as a single person, and executed mortgages on property belonging to Hannah without her knowledge. Id. The Court also noted that Savage had a long criminal record. Id. Savage lived and cohabitated with another woman before and after his wedding to Hannah. Id.

Sixty days after they were married, Hannah died in a car accident when the automobile in which she was a passenger, driven by Savage, plunged into a canal. Id. at 365. Savage escaped unharmed and when talking to officers and the funeral director after the accident, he referred to Hannah as a "friend." Id. The funeral was held before Hannah's relatives were informed, and two days after her death, Savage became the administrator of Hannah's estate and immediately emptied her safe-deposit box. Id.

The Florida Supreme Court affirmed the lower court's ruling that the marriage was void, and stated that Hanna's mental condition, as well as Savage's "artful practices" justified the decision. Id. The Court stated:

> "It is true that much of the testimony was in conflict, but it was abundantly shown that the mental condition of Hannah Ford, although she would not be said to be actually insane, made her easy prey to the machinations of Charles B. Savage. Examining together her plight and his artful practices, we think the chancellor was fully justified in the decision he rendered declaring the marriage void. The testimony which he elected to give credit fully substantiated the allegations of the bill of complaint anent fraud of one and incapacity of the other."

Id. (internal citations omitted).

The Savage decision appeared to say that fraud alone could serve as a basis to challenge a marriage after death. Other courts, under different circumstances, have held that undue influence is a species of fraud. See, e.g., In re Guardian of Rekasis, 545 So. 2d 471, 473 (Fla. 2d DCA 1989)(noting that undue influence is a species of fraud and is treated as fraud in general); O'Hey v. Van Dorn, 562 So. 2d 405, 405 (Fla. 4th DCA 1990)(agreeing that undue influence is a species of fraud in the inducement). Does that mean that the Florida Supreme court has blessed challenges to marriage on these additional grounds? That was precisely the argument made by the parties in Arnelle, 647 So. 2d at 1049, under the factual circumstances quoted earlier in these materials.

In Arnelle, the court discussed the Florida Supreme Court's decision in Savage and opined that it was the combination of fraud and diminished mental capacity that rendered the marriage void. 647 So. 2d at 1049. The Arnelle court noted that the holding in Savage "at least suggests that where the *combination* of fraud and mental incapacity are present, the marriage is void and can be annulled after the death of one of the parties." Id. The Arnelle court declined to find that fraud or undue influence alone could support a challenge to a marriage after death absent at least some showing of mental incapacity. Accordingly, despite finding that Ms. Fortson was "conniving and exhibited undue influence over Mr. Fisher", the court refused to permit the decedent's heirs to challenge the marriage. Id.

However, diminished mental capacity is frequently present in almost every case of undue influence. When is the threshold set forth in Arnelle of diminished mental capacity plus fraud (or undue influence) met? Must a person lack the requisite mental capacity to marry or merely be of some level of diminished mental capacity? These questions currently remain unanswered under Florida law.

III. Florida Case Law Summary

The following Florida cases have addressed challenges to a marriage on the grounds of lack of capacity, fraud, and undue influence:

A. Tyson v. State, 90 So. 622 (Fla. 1922)

- This case involved a criminal prosecution against Enoch Tyson for deserting his wife and withholding alimony and child support payments.

- Tyson argued that the marriage was void because that marriage was involuntary, and that he entered into it as the result of coercion upon him by his wife and her mother.

- The Court affirmed Tyson's conviction and noted that a marriage to which the consent of one of the parties is obtained by undue influence is merely voidable.

B. Kuehmsted v. Turnwall, 138 So. 775 (Fla. 1932)

- This was a suit in equity to annul a marriage on the basis of mental incapacity. The lower court took evidence and declared the marriage to be null and void.

- The evidence at trial showed that, at the time of the marriage, the decedent was of unsound mind, memory, insane, wholly incompetent, and unable to understand or realize the marriage contract, which was entered into willfully, fraudulently, and maliciously.

- The question before the Court was: "Can a marriage alleged to be void for want of mental capacity be annulled by a court of equity after the death of one of the spouses, and may the heirs at law of the dead spouse maintain a bill in equity for that purpose?"

- The answer to both questions stated above is yes. In answering these inquiries, the Florida Supreme Court affirmed the lower court's judgment.

- The Court held that (a) the deceased spouse's lack of mental capacity served as grounds to declare the marriage void, and (b) that the decedent's heirs had a right to maintain a cause of action for annulment of the marriage.

- The Court noted that the effect of a void marriage is as though no marriage had ever taken place.

C. Cooper v. Cooper, 163 So. 35 (Fla. 1935)

- "It is well settled that party who has been the victim of a marriage ceremony procured by fraud and deception of the other party, and where such marriage has not been consummated by cohabitation, may maintain suit and procure decree of annulment of such marriage; provided, of course, such action is taken by such party before condemnation of the fraud and any affirmance of the marriage has occurred on the part of such victim."

- A marriage procured by fraud or while one of the parties thereto is actually under legal duress is voidable only, and therefore valid and binding upon the parties until annulled by a court of competent jurisdiction.

- This case suggests that a case for annulment based on fraud may be had when a spouse, having no intention to consummate the marriage, marries for financial benefits.

D. Savage v. Olson, 9 So. 2d 363 (Fla. 1942)

- This case is discussed at length in Section II(C) above.

- The Court held that a deceased wife's heirs had standing to seek annulment of the marriage after the wife's death.

- The Court analyzed the effect of fraud, undue influence and mental incapacity on a marriage. The Court ultimately opined that the marriage between Hannah Ford and Charles Savage was void.

E. Bennett v. Bennett, 26 So. 2d 650 (Fla. 1946)

- This case involved a lawsuit to reform a deed and declare a marriage void based on incapacity. The Court found the evidence of incapacity to be insufficient.

- The Court's opinion recognizes the maxim that upon proof of the facts rendering such marriage void, the marriage will be disregarded or treated as nonexistent by the courts.

F. In re Ruff's Estate, 32 So. 2d 840 (Fla. 1947)

- A marriage in which the husband was forced to enter into by threats of prosecution and violence was voidable only, and not void.

- The Court held that children of a marriage, following annulment, are not illegitimate and are heirs of the decedent.

G. Rubenstein v. Rubenstein, 46 So. 2d 602 (Fla. 1950)

- In this case, the Court suggested that concealment of a party's intentions not to have children may be grounds for an annulment, at least if the marriage has not been consummated.

- Under these circumstances, the judgment for fraud against the wife was reversed based on the evidence presented.

H. Eden v. Eden, 130 So. 2d 887 (Fla. 3d DCA 1961)

- This case involved a suit for an annulment of marriage brought by an alleged "next friend."

- The Third DCA held that suit for annulment of marriage (based on incapacity) of an adult may not be maintained by an alleged next friend.

I. Sack v. Sack, 184 So. 2d 434 (Fla. 1966)

- Where a marriage is voidable and subject to annulment because of fraud or misrepresentation of one party, the right to annul belongs to the innocent party.

J. Hoffman v. Kohns, 385 So. 2d 1064 (Fla. 2d DCA 1980)

- The Second DCA held that a marriage to which the consent of one of the parties is obtained by undue influence is merely voidable. The court took the position that undue influence is not a proper ground for the heir of a decedent to bring a case to annul a marriage after death of one of the parties.

- However, a marriage may be posthumously set aside as being void because of the mental incompetence of one of the marriage partners.

- Here the evidence was sufficient to support the conclusion that the decedent was competent to marry.

- Even though the will was procured by undue influence, the surviving spouse inherited as a pretermitted spouse under Florida Statutes § 732.301.

K. Woginiak v. Kleiman, 523 So. 2d 1209, 1210 (Fla. 3d DCA 1988)

- In this case, the decedent's son had standing to seek relief where an order declaring the alleged wife to be the decedent's surviving spouse was obtained without notice to the son in a fraudulent attempt to moot the issue of survivorship in a pending probate proceeding.

- "Relief from an order or judgment is appropriate where, as here, the movant is a victim of fraud or other misconduct by an adverse party."

L. Arnelle v. Fisher, 647 So. 2d 1047 (Fla. 5th DCA 1994)

- The Fifth DCA held that an allegedly voidable marriage could not be challenged after death by the decedent's heir (in this case, a cousin).

- "Although the invalidity of a void marriage may be asserted in either a direct or collateral proceeding at any time, either before or after the death of the husband, wife, or both, a voidable marriage is good for every purpose and can only be attacked in a proceeding during the life of the parties."

- Here, where the collateral attack is based on allegations of undue influence only, a deceased's heir cannot attack the marriage after death of one of the parties.

- The court distinguished Savage v. Olson, 9 So. 2d 363 (Fla. 1942), suggesting that fraud alone is insufficient to declare a marriage void. The Fifth DCA stated that Savage "suggests that where the combination of fraud and mental incapacity are present the marriage is void and can be annulled after the death of one of the parties."

V. Survey of Other Jurisdictions

At common law, a marriage which is merely voidable, including one procured by fraud or undue influence, must be challenged during the lifetimes of the parties to the marriage. *See also* 4 Am. Jur. 2d Annulment of Marriage § 59 (2006); 47 A.L.R. 2d 1393, Right to Attack Validity of Marriage After Death of Party Thereto (2007 update). Most jurisdictions (like Florida) continue to follow the common law rule either by statute or case law. However, a number of states have enacted statutes that specifically authorize a challenge to the validity of marriage after death.

A. States with Statutes that Permit Challenges after Death for Fraud or Duress

1. New York

An action to annul a marriage on the ground that the consent of one of the parties thereto was obtained by force or duress may be maintained at any time by the party whose consent was so obtained. An action to annul a marriage on the ground that the consent of one of the parties thereto was obtained by fraud may be maintained by the party whose consent was so obtained within the limitations of time for enforcing a civil remedy of the civil practice law and rules. Any such action may also be maintained during the life-time of the *other party* by the parent, or the guardian of the person of the party whose consent was so obtained, or by any relative of that party who has an interest to avoid the marriage, provided that in an action to annul a marriage on the ground of fraud the limitation prescribed in the civil practice law and rules has not run. But a marriage shall not be annulled on the ground of force or duress if it appears that, at any time before the commencement of the action, the parties thereto voluntarily cohabited as husband and wife; or on the ground of fraud, if it appears that, at any time before the commencement thereof, the parties voluntarily cohabited as husband and wife, with a full knowledge of the facts constituting the fraud. N.Y. Domestic Relations Law § 140 (McKinney 2005).

Bennett v. Thomas, 38 A.D.2d 682, 327 N.Y.S.2d 139 (4th Dept. 1971)

- Children of deceased wife brought action to annul marriage on grounds of fraud after death to prevent husband from taking elective share.

- The court noted that New York law permits challenges to marriage after death on the grounds of fraud. However, New York's elective share laws contain specific provisions requiring the annulment to be obtained prior to death.

2. Vermont

A marriage may be annulled during the lifetime of the parties, *or one of them*, on the basis that the consent of one of the parties was obtained by force or fraud. Such action for annulment may be instituted by the innocent party, the parent or guardian of such party, or some relative interested in contesting the validity of the marriage. Vt. Stat. Ann. tit.15, § 516 (2005).

3. Louisiana

A marriage is relatively null when the consent of one of the parties to the marriage is not freely given. Such marriage may be declared null upon application by the party whose consent was not freely given. La. Civ. Code. art. 95 (2006)

Succession of Ricks, 893 So. 2d 98 (La. App. 2004).

- Children of the decedent challenged the validity of the marriage between the decedent and his wife. They alleged that the decedent was incompetent at the time of the marriage and that his wife "took advantage of [his] infirmity to regain her status as a legatee when she remarried him hours before his death."

- The court held that the above statute permitted a court appointed administrator to bring an action to challenge a marriage.

4. New Jersey

A marriage may declared a nullity where either of the parties "lacked capacity to marry due to want of understanding because of mental condition, or the influence of intoxicants, drugs, or similar, agents, or where there was a lack of mutual assent to the marital relationship; duress; or fraud as to the essentials of marriage" and the injured party has not subsequently ratified the marriage. N.J. Stat. 2A:34-1 (2007).

In re Estate of Santolino, 895 A.2d 506 (N.J. 2005)

- The court held that the sister of the decedent could bring a claim after death on the grounds that the decedent's marriage was void due to fraud.

- The court reasoned that the sister of the decedent had standing to challenge the validity of the marriage because New Jersey Statute 2A:34-1(b) did not explicitly provide that marriages may not be challenged after the death of one of the parties.

B. States with Statutes, which Prohibit Challenges to Marriage After Death for Fraud or Duress

1. Alaska

A marriage may be declared void on the ground that the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting fraud, cohabitated with the other as husband and wife. A marriage may be declared void on the ground that the consent of either party was obtained by force, unless such party afterwards freely cohabitated with the other as husband and wife. If the consent of either party is obtained by fraud or force, the marriage is voidable, but only at the suit of the party upon whom the force or fraud is imposed. Alaska Stat. §§25.24.030, 25.05.031.

Riddell v. Edwards, 76 P. 3d 847 (Alaska 2003)

- Probate court could not declare a marriage void after the wife had died even though the estate sought to invalidate the marriage because the wife was incompetent and the husband had fraudulently induced her to enter into marriage.

2. Colorado

A marriage may be declared invalid where "one party entered into the marriage in reliance upon a fraudulent act or representation of the other party, which fraudulent act goes to the essence of the marriage" or when "one or both parties entered into the marriage under duress exercised by the other party or a third party". However, "*in no event under such circumstances may a declaration of invalidity be sought after the death of either party to the marriage,"* except in the cases of marriages which are prohibited by law such as bigamous and incestuous marriages Colo. Rev. Stat. §14-10-111 (2005)).

In re the Estate of Fuller, 862 P.2d 1037 (Co. App. 1993)

- Children of the decedent challenged the validity of the decedent's marriage on the grounds that decedent lacked capacity to consent to the marriage.

- Colorado Statute §14-10-111(2) provides, "In no event may a declaration of invalidity be sought after the death of either party to the marriage."

- Because the action for annulment was not brought until after the decedent's death and no exception applied, the court held that the children lacked standing to challenge the validity of decedent's marriage.

- The court noted the exceptions under which a marriage may be attacked posthumously. Fraud and duress are not among the exceptions.

3. Illinois

A marriage may be declared invalid where a party lacked the capacity to consent or where a party was "induced to enter into a marriage by force or duress or by fraud involving the essentials of the marriage". A declaration of invalidity may be sought by either party or by the legal representative of the party who lacked the capacity to consent, no later than 90 days after the petitioner obtained knowledge of the described condition. In no event may a declaration of invalidity of marriage be sought after the death of either party to the marriage. 750 Ill. Comp. Stat. §§301-302 (2006).

In re Estate of Crockett, 728 N.E.2d 765 (Ill.App. 2000)

- Notwithstanding this statute, the Court permitted children to challenge to marriage after death where the wife obtained marriage license, husband was mute and barely conscious during ceremony and was unable to sign marriage certificate, and representative spoke for the husband during the exchange of vows.

4. Minnesota

An action to annul a marriage, where a party lacked capacity to consent to the marriage or where consent was obtained by force or fraud and there was no subsequent voluntary cohabitation of the parties, may be brought by either party to the marriage or by the legal representative of the innocent party. However, "in no event may an annulment be sought after the death of either party to the marriage." Minn. Stat. §§518.05, 518.02 (2006).

5. Montana

A marriage may be declared invalid for lack of capacity to consent or if a party was induced to enter into a marriage by force or duress or by fraud, but such relief must be sought no later than 2 years after the petitioner obtained knowledge of the described condition. A declaration of invalidity may not be sought after the death of either party to the marriage. Mt. Stat. §40-1-402.

6. Ohio

A marriage may be annulled on the basis that the consent of either party was obtained by fraud, unless such party thereafter, with full knowledge of the facts constituting fraud, cohabitated with the other as husband or wife. An action for annulment may be brought by the aggrieved party, but must be instituted within two years after the discovery of the facts constituting fraud. A marriage may be annulled on the basis that either party has been adjudicated to be mentally incompetent, unless such party after being restored to competency cohabitated with the other as husband or wife. An action for annulment may be brought by the party aggrieved or the relative or guardian of the party adjudicated to be mentally incompetent at any time prior to the death of either party. Ohio Stat. §§3105.31-3105.32.

Hall v. Nelson, 534 N.E.2d 929 (Ohio 1987)

- The son of the decedent sought to annul the marriage between the decedent and his surviving wife on the grounds that the decedent lacked mental capacity to marry, that the marriage was obtained by fraud and that the marriage was not consummated.

- Pursuant to Ohio Statute §3105.32, the court found that only an aggrieved party may sue to have a marriage annulled because of mental incapacity, fraud or failure to consummate. Furthermore Ohio Statute §3105.02(C) permitted a relative or guardian of an incompetent to sue for annulment only while the incompetent was alive. Because the son was not a party to the marriage and the action for annulment was not brought while the decedent was alive, the court held that the son lacked standing to challenge the marriage.

7. Pennsylvania

A marriage is voidable and subject to annulment where one party was induced to enter into the marriage by fraud, duress, coercion or force attributable to the other party, provided that there has been no subsequent voluntary cohabitation after knowledge of the fraud or release from the effects of fraud, duress, coercion or force. Either party may obtain an annulment to a voidable marriage. The validity of a voidable marriage, however, may not be attacked or questioned by any person if either party to the marriage has died. 23 Pa. Cons. Stat. § 3305.

8. Texas

A court may annul a marriage if the other party used fraud, duress or force to induce the petitioner to enter into the marriage, and petitioner has not voluntarily cohabited with the other party after becoming apprised of the fraud or being released from the duress of force. A marriage subject to annulment may

not be challenged in a proceeding instituted after the death of either party to the marriage. Tx. Fam. Code §§ 6.107, 6.111.

9. Wisconsin

A court may annul a marriage if a party was induced to enter into the marriage by force, duress or fraud involving the essentials of marriage. A suit for annulment may be brought by either party, or by the legal representative of the innocent party, no later than one year after the petitioner obtained knowledge of the described condition. However, a marriage may not be annulled after the death of a party to a marriage. Wis. Stat. § 767.313 (2007).

C. States where Challenges on the Grounds of Fraud, Duress, or Undue Influence are Prohibited After Death by Case Law

1. Alabama

Rickard v. Trousdale, 508 So.2d 260 (Ala. 1987)

- The court held that a marriage allegedly induced by fraud is merely voidable and cannot be attacked after the death of one of the parties to the marriage. Therefore, even if the putative husband fraudulently induced the decedent to consent to marriage, the daughter of the decedent could not attack the validity of the marriage.

2. Arizona

Davis v. Industrial Commission of Arizona, 353 P.2d 627 (Ariz. 1960)

- In this case, the employer of the decedent denied the surviving spouse death benefits on the basis that the decedent and surviving spouse fraudulently procured a marriage license.

- The court held that the denial of benefits amounted to a collateral attack upon the validity of the marriage, which was not permitted after the death of one of the spouses.

3. Arkansas

Where the consent of either party was obtained by force or fraud, the marriage shall be void from the time its nullity is declared by the court. Ark. Stat. 9-12-201.

Vance v. Hinch, 261 S.W.2d 412 (Ark. 1953).

- In construing the identical predecessor to Arkansas Statute 9-12-201, the court held that a marriage induced by fraud was voidable (despite the fact

that the statute referred to such a marriage as "void"). Because voidable marriages are only vulnerable to attack during the lifetime of the spouses, the granddaughters of the decedent could not challenge the validity of the marriage.

4. California

A marriage may be annulled when the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting fraud, freely cohabitates with the other as husband or wife. An action for annulment based upon fraud may be brought by the injured party, but must be instituted within four years after the discovery of the facts constituting the fraud. Cal. Fam. Code §§2210-2211 (2005).

Greene v. Williams, 88 Cal. Rptr. 261 (Cal. App. 197)

- Action to annul marriage does not survive the death of a party to the marriage.

5. Mississippi

Ervin v. Bass, 160 So. 568 (Miss. 1935)

- The court noted that a marriage induced by fraud or coercion was voidable. As a result, the marriage remains valid until dissolved by court decree, which can only be rendered during the lifetime of the parties.

6. New Hampshire

Patey v. Peaslee, 111 A.2d 194 (N.H. 1955)

- The heirs-at-law of the decedent sought to annul the marriage between the decedent and the surviving spouse on the basis fraud. The court held that the heirs-at-law did not state a cause for annulment because the marriage was voidable and not brought during the lives of both parties to the marriage.

7. Nebraska

Where the consent of one of the parties is obtained by force or fraud, and the parties have not subsequently voluntarily cohabitated, the marriage shall be deemed voidable. Neb. Stat. §42-118.

Christensen v. Christensen, 14 N.W.2d 613 (Neb. 1944)

- The court held that the marriage was voidable, where spouses knew of the husband's physical condition prior to the marriage, but fraudulently concealed such condition in order to obtain a marriage license.

- A voidable marriage may only be inquired into during the lives of the parties to the marriage.

8. North Dakota

A marriage may be annulled when the consent of either party was obtained by fraud, unless such party, with full knowledge of the facts constituting fraud, subsequently freely cohabitates with the other as husband or wife. An action to annul a marriage on the grounds of fraud may be brought by the injured party within 4 years after discovery of the facts constituting fraud. N.D. Stat. § § 14-04-01, 14-04-02 (2005).

Gibbons v. Blair, 376 N.W.2d 22 (N.D. 1985)

- The court held that the father of the decedent did not have standing to bring an action to annul the marriage between the decedent and his widow on the grounds of fraud.

- The court explained that under North Dakota Statute §14-01-01, the marriage was voidable and thus could only be annulled on the basis of fraud by an action brought by the defrauded spouse while both parties to the marriage were living.

9. Oregon

A marriage is voidable where the consent of either party is obtained by force or fraud. Such marriage may be annulled, provided that the marriage was not later ratified. Or. Stat. §106.030, 107.015.

In re Estate of Hunter, 588 P.2d 617 (Or.App. 1978), reversed on other grounds, Hunter v. Craft, 600 P.2d 415 (Or. 1979).

- The court held that the decedent's marriage was not subject to collateral attack by decedent's son in a will contest proceeding.

- There was insufficient evidence to support son's claim that surviving spouse exerted undue influence over the decedent.

- Pursuant to Oregon Statute §107.015, either party may seek an annulment on the ground of fraud, not just the injured party. However, a suit for annulment does not survive death. Because the marriage at issue

was not annulled prior to the decedent's death, such marriage was valid and not subject to collateral attack

10. Washington

A marriage where the consent of either party is obtained by force or fraud is voidable, but only at the suit of the innocent party. Wash. Stat. §26.04.130.

In re Hollingsworth's Estate, 261 P. 403 (Wash. 1927)

- The court dismissed a petition seeking to annul the marriage between the decedent and surviving spouse on the basis that the surviving spouse fraudulently procured the marriage license by falsely swearing she was not feeble-minded.

- "A voidable marriage is valid for all purpose until annulled, and can be attacked only in a direct proceeding during the lifetime of both spouses; hence on the death of either party the marriage cannot be impeached."

In re Romano's Estate, 246 P.2d 501 (Wash. 1952).

- In this case, the executrix and legatees alleged that the newly employed housekeeper coerced the decedent into marriage.

- Applying Washington Statute §26.04.130, the court held that the marriage at issue was voidable and thus could not be set aside in a collateral attack after the death of one of the parties.

- The court, however, citing Savage v. Olsen, 9 So.2d 363 (Fla. 1942), noted that "under exceptional circumstances indicating fraud of the grossest kind, without apparent opportunity to detect or correct the inequity during the lifetime of the deceased spouse, a collateral attack after death has been permitted."

D. North Carolina Allows Challenge If There Are No Children

North Carolina law provides that a marriage followed by cohabitation and the birth of issue may not be declared void after the death of either of the parties to the marriage.

A marriage where either party is incapable of contracting due to lack of will or understanding is void. Such marriage may be declared void upon application by either party to the marriage. No marriage followed by cohabitation and the birth of issue may be declared void after the death of either of the parties. N.C. Stat. 51-3, 50-4.

Ivery v. Ivery, 129 S.E.2d 457 (N.C. 1963)

- In this case, the brother of the decedent challenged the validity of the marriage between the decedent and surviving spouse on the grounds that the decedent was incompetent and the surviving spouse "persuaded and induced" the decedent to enter into marriage.

- The court recognized that at common law the marriage of a person incapable of contracting for want of understanding was voidable. Accordingly, such marriage could only be attacked during the lifetime of both parties to the marriage.

- The court noted, however, that under the above statute, marriages are immune from attack after the death of either party only when the marriage was followed by cohabitation and the birth of issue. Because the marriage was followed by cohabitation, but not the birth of issue, the court held that the marriage was subject to collateral attack by the decedent's brother.

VI. Conclusion

In sum, Florida follows the common law and majority rule which only allows **void** marriages to be challenged after death. In most instances, Florida courts have held that marriages procured by fraud, duress, and undue influence are merely voidable, affording potential heirs no ability to challenge a marriage after death. Given the extensive rights available to a surviving spouse, a wrongdoer can profit significantly by simply inducing or influencing an elderly person to enter into a marriage. The Subcommittee recommends that the full committee consider and discuss legislation to address this issue.

William T. Hennessey

John C. Moran
Gunster, Yoakley & Stewart, P.A.

ITEM 7

ANALYSIS OF 30 DAY TIME LIMIT TO MOVE FOR ATTORNEYS' FEES

REVISIONS TO RULE 1.525, F.R.C.P. – 30 DAY TIME LIMIT FOR SERVICE OF MOTION FOR ATTORNEY'S FEES

SUBCOMMITTEE REPORT

(Angela Adams, Laura Sundberg, Eric Virgil)

I. Background

Initially, Laura Sundberg raised the issue of the applicability of Rule 1.525 to trust proceedings in the Trust Law Committee.

The current rule is as follows:

Rule 1.525. Motions for Costs and Attorneys' Fees

Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal.

Laura and Angela Adams were asked to review the issue and report to the Trust Law Committee. They concluded that the applicability of Rule 1.525 in trust actions depends upon the specific nature of the trust action. In other words, Rule 1.525, by its specific language, only applies in proceedings where one party is seeking to tax attorney's fees against another party. Using the specific language of the Rule, they considered various types of trust actions and the applicability of the Rule to those actions.

The attached chart was created to analyze the applicability of the Rule to various types of trust proceedings. It was Sundberg and Adams' conclusion, and the consensus of the Trust Law Committee, that Rule 1.525 should be made inapplicable to all trust proceedings except those to which F.S. 727.627 (an action challenging the proper exercise of a trustee's power, i.e., surcharge) is applicable. The Trust Law Committee, in concept, approved the following proposed revision to Rule 1.525:

Proposed Rule 1.525. Motions for Costs and Attorneys' Fees

> ***Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal. This rule shall not apply to trust proceedings unless the judgment taxing costs, attorneys' fees, or both is sought pursuant to F. S. Section 737.627.***

However, the Trust Law Committee recognized the difficulty of trying to amend the Rules of Civil Procedure and was debating whether an amendment to F.S. 737.205 (which states that trust proceedings are governed by the Florida Rules of Civil Procedure) would accomplish the desired goal without the necessity of amending the Rule. *As an aside, the new Trust Code statute 736.0201 would similarly apply the Rules to trust proceedings, with some limited exceptions not applicable here.* At this point, the Chair of the Trust Law Committee concluded that this issue should be transferred to the Probate and Trust Litigation Committee for review and action since it is clearly related to litigation.

In the course of their review for the Trust Law Committee, Laura and Angela considered the following rules and statutes:

R. 1.525 Motions for Costs and Attorneys' Fees (No trust cases cited in the annotations.)
R. 1. 010 Scope of Rules
F.S. 737.2041 Trustee's Attorney's Fees
F.S. 727.2035 Costs and Attorney's Fees in Trust Proceedings
F.S. 737.205 Trust Proceedings; Commencement
F.S. 737.627 Costs and Attorney's Fees

Although not directly on point, they also reviewed The Florida Bar Journal article by Jeffrey M. James, "Moving for Attorneys' Fees and Costs - Do It Right and Do It on Time". (January 2006 issue.)

II. What the Rule Does

Prior to 2000, the rule required a party to file and serve fee and cost motions "within a reasonable time" after judgment. The discretionary language of the old rule led to uncertainty regarding what was a "reasonable time." The revised rule was enacted in order to create predictability and consistency in post-judgment requests for attorneys' fees. Unfortunately, the District Courts of Appeal have applied Rule 1.525 inconsistently since its enactment. While some courts have strictly enforced the rule, notably the 2nd District, others have found ways to extend or relax the time limit of the rule. The rule has not created certainty, but rather has spawned further litigation and confusion over the application of the rule.

III. Current Status of Subcommittee – State of Current Law

This subcommittee has since done research of all state court decisions, including Florida, to determine if any state courts have addressed the application of Rule 1.525, or similar rule, to trust proceedings. There are no Florida decisions related to trust proceedings and the subcommittee could not find any trust decisions applying a similar rule in other states.

The Family Law Rules Committee filed a petition with the Florida Supreme Court to eliminate the application of Rule 1.525 to family proceedings. That petition was granted pursuant to new Family Law Rule 12.525. A copy of the Supreme Court decision implementing the rule and explaining the decision is attached. Much of the logic applicable to the family law rule may be applicable to trust proceedings, as well.

IV. Issues for Discussion

(1) With regard to trust law, should a change be sought to exempt trust proceedings from the application of the Rule unless the judgment taxing costs, attorneys' fees, or both is sought pursuant to F. S. Section 737.627?

(2) If the answer to (1) is no, should we make a determination of any and all types of trust actions to which the 30-day requirement should apply?

(3) If the answer to (1) is yes, then should the change be through:

A. Amendment of F.S. 736.0201 of the Trust Code;

B. Amendment to Rule 1.525 as suggested by the Trust Law Committee;

C. A new rule of civil procedure in line with what was done in by the Family Law Rules Committee;

D. Or through some other method?


R. 1.525 - Taxation of fees.pdf


Family Law 12.525.pdf

ITEM 8

ACTEC ARBITRATION TASK FORCE DRAFT PAPER

INTRODUCTION

There is no substitute for the certainty and self-determination resulting 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.[1]

In developing a method for deciding (rather than settling) disputes outside the traditional judicial process, we must speak of "arbitration." The word "arbitration" simply means the act of resolving a dispute by a person appointed by the parties or given authority by a statute or otherwise. The word "arbiter" simply means a person with the power to decide a dispute. *Webster's New Collegiate Dictionary* (9th Edition). These seemingly simple, innocent words, we have learned, conjure up images of a three-headed tribunal deciding commercial disputes in an unfair and oftentimes bureaucratic fashion, more steeped in process than the traditional judicial process. The form of trial resolution we believe may prove useful in our practice requires that we refer to "arbitration," because the law concerning the authority to resolve disputes without a traditional judge comes from cases involving arbitrations. Our hope is that the reader can see past the blinding prejudice "arbitration" evokes.

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. Our clients want us to maximize the amount of assets passing to the intended beneficiaries. One of the largest expenses incurred by estates, trusts and beneficiaries is the costs and fees associated with litigation, not to mention the beneficiaries' loss of time to enjoy the assets.

Our collective wisdom tells us that administering a will or trust will run more efficiently and at less cost if we could resolve disputes arising in those proceedings through the use of a non-traditional form of trial resolution involving a trial resolution judge with extensive experience in, and knowledge of, our field of practice. 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.

There may be other compelling reasons to consider a non-traditional form of trial resolution. For example, 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. Developing an estate plan for a person who, for whatever reason, is considered controversial within a community fits within the professor's theory.[2]

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[1] Our report does not specifically address whether this process, if it exists, could or should be employed in connection with buy-sell agreements and attorney-client retainer agreements. These complex arrangements are worthy of their own studies by the American College of Trust and Estate Counsel.

[2] Note, however, that the prejudice, if it appears, may 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). 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 may remain extant. *Id.* This point may offer a strategy issue for the contestant:

Although private trial resolution or "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 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.").[3] 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.

What is now a choice to agree to arbitrate or to require arbitration may become a practical necessity. To have this vision one need only look to one's own jurisdiction and the yearly budget disputes between governors and 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. In jurisdictions with competent, up to date jurists, you will see the constant outsourcing of trials to retired judges and magistrates with more time on their hands. And, of course, the competent, up to date jurist, will eventually retire.

Arbitration or non-traditional trial resolution, *per se*, does not solve these concerns. Indeed, it can be as cumbersome a process as a traditional judicial proceeding, if not more so. We endeavor here to offer our colleagues a more efficient form of dispute resolution that specifically meets the needs of our trust and estate clients and that works in tandem with the mediation process.

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should I bring a partial contest if my capacity case is weak (as most are) and thereby preserve arbitration?

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

LEGAL UNDERPINNINGS OF ARBITRATION

Arbitrating trust and estate disputes is not prohibited in most states.[4] In most states, nothing prohibits two or more persons with a trust or estate dispute from agreeing to resolve their dispute through arbitration. See, for example, Uniform Arbitration Act (2000) §6; A.R.S. §12-1501; Cal. C.C.P. §1281; §44.104, Fla. Stat.[5]

Less obvious is whether arbitration can be mandated by a testator or 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 answer seems imbedded in testamentary intent, contract theory, conditional transfers of property, or some combination of them.

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 decide between competing requests for principal invasions, to decide what is income or principal, to decide whether a trust is no longer revocable by the settlor,[6] and the like. The decision of the fiduciary can be attacked only on limited grounds such as arbitrariness, conflict of interest, and bad faith[7]—which happen to be the same limited grounds, in most jurisdictions, for appealing the decision of an arbitrator.[8]

Contract theory seems to lack viability with respect to wills and most trusts. Whether a trust is a "contract" is debatable in some jurisdictions and clearly not the case in others. *See Schoneberger v. Oelze*, 96 P.3d 1078 (Az. Ct. App. 2004) (A trust is not a contract); *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. ... 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…"); *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) (beneficiary takes only by the benevolence of the testator, who may attach lawful conditions to the receipt of the gift). However, in addition to other tax issues, conditional gifts to a surviving spouse 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 statute allowing a testator or settlor to require by will or trust that issues involving the estate or trust administration be decided by an arbiter, 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.

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[4] While each state has a version of the Uniform Arbitration Act, 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)

[5] 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 the 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).

[6] This type of provision may be suspect. *In re Revocation of Revocable Trust of Fellman*, 604 A.2d 263 (Pa. Super. Ct. 1992) (arbitration of settlor's competency violated public policy).

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

[8] *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.

CONSTITUTIONALITY OF ARBITRATION
IN WILLS AND TRUSTS

The practical issue involving constitutional analysis is whether the matter under scrutiny has a favorable history and is engrained in our public policy.

Arbitration, with rare exceptions, has become an integral part of conflict resolution. Testators and settlors have used arbitration clauses in their wills and trusts for centuries and courts have upheld them, even if provisions imposing binding arbitration upon the disputing parties barred their access to the courts. *See Pray v. Belt*, 26 U.S. 670, 679-80 (1828) (upholding a clause that empowered a majority of the executors to decide all disputes arising under the will); *Wait v. Huntington*, 40 Conn. 9 (1873) (court upheld testator's power to condition devises with following provision: "Should any questions arise as to the meaning of this instrument, I direct that the distribution of my estate shall be made to such persons and associations as my executors shall determine to be my intended legatees and devisees, and their construction of my will shall be binding on all parties interested"). *See also The Use of Arbitration in Wills and Trusts*, 21 ACTEC NOTES 177 (1991) (*citing* F. Kellor, *American Arbitration* 6-8 (1948)). Indeed, many practitioners routinely (if not unwittingly) include what are effectively arbitration clauses in wills and trusts. Examples include provisions directing the to executor resolve disputes arising in the division of tangible personal property or conferring the power to determine a settlor's capacity. The legal basis for this form of involuntary, binding arbitration stems from the legal basis for the testamentary disposition of property in general.

Since arbitration, in the abstract, is neither illegal nor contrary to public policy, courts have had little difficulty upholding testamentary arbitration clauses. Early courts did so by drawing analogies to contract law. They generally recited that agreements to arbitrate future disputes are enforceable and reasoned that, although a will is not a contract, parties who accept property under a will impliedly agree to be bound by all of its terms. *See American Board of Commissioners of Foreign Missions v. Ferry*, 15 Fed. 696 (1883). Other courts arrived at the same conclusion on the basis of agency law, reasoning that if the testator has the power to designate the objects of her bounty, she may also designate an arbitrator as her agent to make necessary determinations for her. *See Talladega College v*. Callanan, 197 N.W. 635, 637-38 (Iowa 1924); *Howe v. Sands*, 194 So. 798, 800 (Fla. 1940)

While arbitration itself is not contrary to public policy, some states have concluded that it contravenes public policy in certain trust and estate contexts. For example, New York courts have held that the distribution of a decedent's estate may not be submitted to arbitration. *See Swislocki v. Spiewak*, 273 A.D. 768 (N.Y. App. Div. 1947); *Matter of Kabinoff*, 163 N.Y.S. 2d 798, 799 (N.Y. Sup. Ct. 1957)*; In re Will of Jacobitz*, 295 N.Y.S.2d 527, 529 (1968).[9] In Pennsylvania, an otherwise valid arbitration clause in a revocable trust was not honored where the issue to be arbitrated was the competency of the settlor of a revocable trust. *In re Fellman*, 412 Pa. Super. 577, 604 A. 2d 263 (1992). The Pennsylvania Superior Court ruled that, "as a matter of public policy, issues of incompetency cannot be submitted to arbitration."[10] Similarly, in Michigan, the sole authority to pass on the testamentary capacity of a testator is vested by statute in the probate court and cannot be conferred on an executor, even by consent of the parties to the dispute. *Meredith's Estate*, 275 Mich. 278, 291 (1936).[11]

Of course a constitutional issue does not arise if there is no "state action." With very limited exceptions, our state and federal constitutions exist to protect the individual from his or her government. If the government has no involvement in a transaction,

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[9] The New York courts appear to base their decisions on the fact that courts are required to rule on probate matters because the New York constitution gives the power to decide probate issues to the surrogate. Following this rationale, virtually all arbitrations would be unconstitutional, as most constitutions empower courts to decide litigation. To our knowledge, this rationale has not taken hold in other jurisdictions.

[10] The Pennsylvania statute specifically provides the alleged incapacitated person the right to be present at and to request a jury in his or her capacity hearing. In fact, an alleged incapacitated person must be present unless his physical condition would be harmed by his presence or it is impossible for him to be present because of his absence from the Commonwealth. 20 Pa. C.S. 5511(a).

[11] Query whether trust provisions allowing a physician or some other person to declare a person incompetent for the purpose of making the trust irrevocable or for the purpose of changing trustees, or both, are enforceable in Pennsylvania and Michigan?

no constitutional issue is implicated. For example, in *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988), the Supreme Court stated: "Embedded in our Fourteenth Amendment[12] jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be." For these reasons, if the arbitration is purely a matter of agreement between parties or a condition of a gift, the lack of any "state action" should preclude the implication of a state or federal constitutional question. *See Davis v. Prudential Securities*, 59 F. 3d 1186, 1190-91 (11th Cir. 1995) (Constitutional due process protections do not extend to private conduct abridging individual rights.).[13]

Assuming "state action" is present, constitutional attacks on arbitration have come from three concerns: a lack of "access to court," "due process" And the right to a jury trial.

If adequate safeguards are in place to allow a prospective litigant effective vindication of his or her claim in the arbitral forum, that forum will generally suffice as an effective substitute for a judicial determination. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (plaintiff raised "a host of challenges to the adequacy of arbitration procedures" which the Supreme Court rejected, noting that such suspicions of arbitration are "out of step").

Any life remaining in the argument that arbitration denied "access to court" died with *Circuit City Stores v. Adams*, 121 S.Ct. 1302, 1313 (2001). The Supreme Court rejected the notion that a litigant would lose a substantive right because an arbitrator rather than a judge heard his or her plea. On the other hand, an arbitration agreement imposing procedural impediments or prohibitive cost requirements may be invalid because it denies access to an effective remedy. *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 92 (2000) ("Similarly, we believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs… How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss; for in this case neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point."); *Bradford v. Rockwell Semiconductor Systems, Inc*., 238 F.3d 549 (4th Cir. 2001) (fee-splitting provision in employment agreement requiring employee to share costs of arbitration can render a mandatory arbitration agreement unenforceable where the arbitration fees and costs are so prohibitive as to effectively deny the employee access to the arbitral forum).

Traditional rules of civil procedure might lull us into thinking that there is a due process right to discovery, but that is not correct. S*ee Savage v. Commercial Union Insurance Company*, 473 A.2d 1052, 1058 (Pa. Super. Ct. 1984) ("The right to discovery is one of these devices which is not obligatory as an essential of due process to a valid arbitration proceeding."); *Kropat v. Federal Aviation Administration*, 162 F.3d 129, 132 (D.C. Cir. 1998) (formal, pre-trial discovery contemplated under the Federal Rules of Civil Procedure is not required in arbitration proceedings). Due process merely requires fair notice and a fair opportunity to present one's case. *Mullane v. Central Hanover Bank & Trust* Co., 339 U.S. 306, 314 (1950) ("Fundamental fairness generally 'requires only

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[12] "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . . " U.S. Constitution, Amdt. 14, §1.

[13] What is "state action"? As noted in a footnote in *Davis*, "the term 'state action' is used generically here to mean government action." *Id.* at 1191, fn. 5. "In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. This may occur if the State creates the legal framework governing the conduct . . . ; if it delegates its authority to the private actor . . . ; or sometimes if it knowingly accepts the benefit derived from unconstitutional behavior . . . . Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor . . . . The inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id*. (citations omitted).

notice, an opportunity to present relevant and material evidence and arguments to the arbitrators, and an absence of bias on the part of the arbitrators.' *Nationwide Mutual Insurance v. Home Insurance Company*, 278 F.3d 621, 625 (6th Cir. 2002)."); *See Mandl v. Bailey*, 858 A.2d 508, 522 (Ct. Spec. App. 2004) (assuming fair notice and a genuine opportunity to be heard, virtually any procedural rules developed for an arbitration will satisfy due process requirements) Therefore, effective trust or estate arbitration must include a mechanism for providing notice and an opportunity to be heard. As we stress elsewhere in this report, notice and an opportunity to be heard should be given to minors, unborn and unascertained persons through their proper representatives.[14]

Finally, the right to a jury trial may be waived through a clearly established agreement to arbitrate. From the agreement, courts will infer that the waiver occurred. *See Marsh v. First USA Bank, N.A.,* 103 F.Supp.2d 909, 921 (N.D.Tex.2000) (valid arbitration provision waiving the right to resolve a dispute through litigation in a judicial forum, implicitly waives the attendant right to a jury trial). As mentioned in the introduction to this report, whether a party to an agreement can waive a non-party's right to a jury depends on the jurisdiction addressing the issue. *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); *In re Weekly Homes, L.P.*, 180 S.W.3d 127 (Tex. 2005) (beneficiaries bound by settlor's agreement to arbitrate); *Clark v. Clark*, 57 P.3d 95, 99 (Okla. 2002) (beneficiary not bound by trustee's agreement to arbitrate). Less certain is whether a testator or settlor can mandate waiver of a fiduciary's or beneficiary's right to a jury resolution of a probate or trust dispute as a condition of accepting the fiduciary appointment or devise under the will or trust. Assuming no state action, reason would dictate that arbitration as a condition to a devise and in lieu of a jury, might be permissible. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), the Supreme Court upheld conditions to employment agreements requiring that an employee accept arbitration over the resolution of disputes by a jury.[15]

Even less certain is whether a state could impinge on a constitutional right to a jury (versus a mere statutory right to a jury). Because of this uncertainty, the Arbitration Task Force decided to protect the right to a jury trial in the Model Act.

TAX ASPECTS OF ARBITRATING WILL AND TRUST DISPUTES

The Task Force has concluded that decisions reached in a simplified trial resolution under the Model Act, with adherence to its carefully crafted procedures and process, should be extended the same deference as decisions of state trial courts in the determination of federal tax liabilities. Much analysis has already been given to the tax consequences of resolving will and trust disputes. For example, in a paper presented at the 2005 annual meeting of the College, Fellows Patricia Culler, Laird Lile and Donald Tescher observed that:

> Trust and estate disputes are a burgeoning part of a trust and estate lawyer's practice. In addition, trust instruments that were, perhaps, adequate when drawn become problematic as the decades pass, resulting in a need for construction, reformation or other modification to resolve both "friendly" and "unfriendly" disputes over the continued administration of the trust. However such problems arise, their solutions require a careful consideration of tax consequences. This is true whether the resolution will be by judicial determination or by settlement agreement.

Culler, Lile and Tescher, *Uncle Sam: The Silent Party at Estate and Trust Dispute Settlements,* 2005 ACTEC Annual Meeting, p. B-1 (hereafter referred to as "CLT"). See also Kovar, *Adversity After Bosch*, 28 ACTEC Journal 88 (2002); McCaffrey, *Fix-Ups For Estate Planning Documents*, 2002 ACTEC Annual Meeting.

The same analysis and policy concerns apply equally well to the resolution of trust and estate disputes by arbitration. While arbitration involves neither judicial determination nor voluntary settlement, in terms of systemic analysis it is closely akin to the process of judicial determination. The Model Act requires resolution by a neutral trial resolution judge, with simplified procedures for discovery, and with safeguards to ensure compliance with fundamental due process rights. The procedure is invoked by application to a state court, which appoints the trial resolution judge. The decision of the trial resolution judge is filed with the state court, which has the jurisdiction and authority to enter orders to enforce the decision. The decision of the trial resolution judge can be appealed to the appropriate state appellate court, although the scope of the appeal is limited when compared to appeal of a decision of a state trial court.

In summary, there is both sufficient state court involvement in the simplified trial resolution process, and systemic parallelism between that process and the resolution of disputes through litigation in state trial courts, to conclude that resolution of a dispute under the Model Act is entitled to the same deference – no more and no less – as resolution of that dispute by litigation in a trial court. Thus in the end, we are left on the familiar (if somewhat uncertain) ground of the holding of *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967).

> Bosch specifically dealt with the effect of lower state court determinations involving the particular taxpayers (and events) which were the subject of the tax case before the Court. But Bosch probably also stands for the proposition that, absent a determination of the law by the highest

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[14] Both the checklist for will and trust clauses and the Model Act included in this report provide for simplified trial resolution that is binding on minors, unborn and unascertained persons

[15] Assuming the right to arbitrate exists in a particular case, it may be waived by a party. *See Raymond James Fin. Servs., Inc. v. Saldukas,* 896 So. 2d 707, 711 (Fla. 2005) (party's right to arbitration may be waived by participating in a lawsuit or taking action inconsistent with that right).

> court of the state in any other case as to a particular issue of law, the IRS will not be bound by any lower state court rulings in other cases on the issue.

CLT at p. B-5.

The same factors that determine whether the Internal Revenue Service gives deference to a trial court decision under state law or to a settlement of those disputes should apply equally to a simplified trial resolution under the Model Act.

> In actual contested litigation such as a will contest, trust contest or a tort action such as intentional interference with inheritance, breach of fiduciary duty or the like, the parties are likely to be truly adversarial and any settlement likely to be the result of a "genuine and active contest." The existence of a true adversarial contest will be one helpful factor in determining whether desired tax results are achieved. . . .
>
> A settlement may also occur in a court action that may be non-adversarial, or adversarial in theory only, such as a declaratory judgment, construction or reformation action. In these cases the "settlement" may take the form of an agreed judgment entry or merely consent by all the parties to the requested relief when the action is filed. With these types of settlements there are two concerns. First, even though there may be an actual "controversy" in the sense that there is an issue which requires resolution, the lack of true adversity may none the less cause the IRS to disregard the state court determination or the settlement. Second, the nature of the proceeding will affect the tax results. In the case of a declaratory judgment or construction action, the court's determination will speak as of the date the instrument took effect and thus is more likely to achieve the desired tax results. In the case of a reformation action or a settlement agreement under state law power allowing amendment by all beneficiaries and the trustee, there may be no retroactive effect. Under the completed transaction doctrine, it may not be possible to achieve certain taxable results if the taxable event has already occurred.

CLT at pp. B-6, 7 (footnotes omitted).

Informal discussions with a senior official in the Internal Revenue Service with responsibility for federal transfer taxes support the conclusion that the same deference (or lack thereof) for state trial court decisions will apply to decisions reached through simplified trial resolution under the Model Act. The Task Force discussed seeking a revenue ruling or procedure from the Service supporting this conclusion, but decided not to ask the College for authority to pursue this for several reasons. In those informal discussions with the senior official with the Internal Revenue Service it was apparent that the Service would not be eager to issue any rulings of a general nature in an area where the determination of federal tax liability is so completely dependent upon particular facts and circumstances of each case. In addition, it would be difficult for the Service to issue a ruling or procedure that could address the whole panoply of arbitration proceedings that might arise.

Finally, the theory underlying the analysis of *Bosch* and its progeny is so fundamentally sound and well established that it should be without question that the same analysis should apply to resolution of disputes under the Model Act. If the analysis of *Bosch* applies to settlements of trust and estate disputes (see CLT at p. 5), resolution of those same disputes in a simplified trial resolution under the Model Act should receive at least the same analysis and deference.

MODEL ACTS

In the "Legal Underpinnings" section of this report, we noted that bringing certainty to the enforceability of arbitration clauses in wills and trusts is laudable and can be done by statute. Below are two Model Acts. The first, short form, simply makes arbitration clauses in wills and trusts enforceable. It also provides a default dispute resolution process by incorporating existing law or the second, long form, Model Act below, which includes a complete default process for resolving disputes.

Whether your jurisdiction chooses the short form of Model Act or the longer form, the Task Force believes that having a default resolution process is critical. This is because a settlor or testator may simply direct that disputes be arbitrated, without any further direction or other indication of what he or she meant. Further, many estate planners lack the experience or inclination to develop provisions mandating a dispute resolution process for incorporation into a will or trust clause.

MODEL SIMPLIFIED TRIAL RESOLUTION ACT

1. Enforceability of Arbitration Clauses. Subject to subparagraph (a), a provision in a will or trust requiring the arbitration of disputes among beneficiaries, a fiduciary under the will or trust, or any combination of them, is enforceable.

(a) 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. If the arbitration provision is determined to be valid, the balance of the disputed issues will be resolved in accordance with the arbitration provision and the time for resolving those disputes shall toll pending final resolution of the validity of the arbitration provision.

(b) 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 Act.

(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 arbitration provision in a will or trust, the 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 Act.

3. Fiduciary liability. A fiduciary under a will or trust 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 Act.

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 as if they were civil actions, except the clerk of court shall keep separate the records of simplified trial resolution proceedings from other civil actions.

5. Jurisdiction and Venue. The court and clerk involved in the simplified trial resolution process shall be the same court and clerk that could be involved if the entire dispute were resolved through a judicial tribunal. By agreement of all interested persons and the simplified 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 any applicable statutes of limitation.

7. Content of Notice of Commencement and Objections. The Notice of Commencement of Simplified Trial Resolution 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. A responsive pleading, motion or objection, if any, may include appropriate objections, if any, to the dispute being resolved by simplified trial resolution. This Act 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.

8. Appointment of Simplified Trial Resolution Judge and Qualifications. If a will or trust provides for a method for appointing the simplified trial resolution judge, or if the interested persons have entered into an agreement which provides for a method for appointing the simplified 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 simplified trial resolution judge who is a lawyer with at least 10 years of practice in trust and estate law and has no interest or other involvement in the matter. Within 10 days after the filing of the Notice of Commencement of Simplified Trial Resolution, the court shall appoint the simplified trial resolution judge. Within five days after rendition of the order appointing the simplified trial resolution judge, the person who filed the notice of commencement shall serve an original or conformed copy of the signed order on all interested persons.

9. Setting Final Simplified Trial Resolution Hearing. Within 10 days after rendition of the order appointing the simplified trial resolution judge, the simplified 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 after the date on which the order appointing the simplified 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 simplified 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 simplified 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 simplified 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 after service of the order appointing the simplified trial resolution judge and after notice to all interested persons, the simplified trial resolution judge shall conduct a dispute management conference. At the conference, the simplified 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, those matters shall be decided by the simplified trial resolution judge and included in a written order served on the interested persons. If the parties cannot agree on the simplified trial resolution judge's compensation, it shall be determined by the court after notice to all interested persons and an opportunity to be heard. Nothing in this subsection is intended to preclude subsequent dispute management conferences that the simplified trial resolution judge may wish to conduct, which may address any issue described in this subsection.

(c) The simplified trial resolution judge may administer oaths or affirmations and conduct the proceedings in accordance with the [rules of court or other promulgating authority]. The simplified trial resolution judge may issue subpoenas for the attendance of witnesses and for the production of books, records, documents, and other evidence. The simplified 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 final decision shall be in writing, which shall include findings of fact and conclusions of law. The simplified trial resolution judge shall serve the parties with a copy of the decision within 10 days of the final adjournment of the simplified trial resolution proceeding. Within 10 days of service of the decision, the parties may serve on the other parties and the simplified trial resolution judge a list of corrections as to the form of the order, including clerical errors and mistakes in describing parties or property. There is no right to rehearing. Within 5 days following the period for offering corrections to the form of the decision, unless otherwise agreed to by the parties, the simplified trial resolution judge shall file the decision with the court. Upon the filing of the decision, the court shall enter a final judgment adopting the decision of the simplified trial resolution judge.[16] 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 Act.

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

13. Disqualification of Trial Resolution Judge. A simplified trial resolution judge may decline appointment or recuse himself or herself. Any party may petition the court to disqualify a simplified trial resolution judge for good cause. In the event the simplified trial resolution judge declines appointment, recuses himself or herself or is disqualified, the court shall appoint a successor simplified trial resolution judge in accordance with paragraph 8 of the Act. The time for simplified trial resolution shall be tolled during any periods in which a motion to disqualify or the appointment of a successor simplified trial resolution judge is pending.

14. Immunity. A simplified trial resolution judge appointed under this Act 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 immunity from libel and slander and other tortious conduct to the same extent as would be afforded them in a judicial proceeding.

15. Costs. Except as otherwise agreed by the parties, costs of the simplified trial resolution, including compensation of the simplified trial resolution judge and other expenses of the simplified trial resolution judge, directly related to the proceeding, including, among other things, the cost of the hearing room, if any, and the cost of the court reporter for the dispute management conference, shall be initially borne by the estate or trust, 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 his or her additional 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.

17. Jury Trial. Nothing in this law shall be construed as abrogating any person's constitutional right to a jury trial that he or she has not waived.[17]

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[16] Some jurisdictions may wish to adopt a more automatic process whereby the filing of the decision automatically makes it a final judgment of the court.

[17] Paragraph 17 may have great significance in some jurisdictions and less in others where juries are rarely the trier of fact in a court proceeding. If your jurisdiction includes this provision, parties

constitutionally entitled to have an issue resolved by a jury, who have not waived that right by agreement or otherwise, can still have the issue resolved by a jury, thereby avoiding the will or trust clause otherwise requiring arbitration.