



ARBITRATION TASK FORCE

REPORT

SEPTEMBER 18, 2006

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## INTRODUCTION

There is no substitute for the certainty and self-determination resulting from the settlement of a dispute among 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, not every case is resolved through mediation. Further, many disputes that settle are resolved after the parties have gone to great expense in navigating the shoals of judicial process. Our task was to study trust and estate litigation and attempt to develop a more efficient process for deciding the cases that are not settled through mediation.<sup>1</sup>

The Task Force first met at the 2004 annual ACTEC meeting in San Antonio. We met at every ACTEC meeting thereafter and had two additional meetings in Manhattan, in 2004 and 2006. The membership of the committee was diverse as to practice areas and jurisdictions. The committee included Robert W. Goldman, Chair (Florida), Sharon Gardner (Texas), Erin Donovan (Oklahoma), Steven L. Hearn (Florida), John T. Rogers, Jr (California), Bridget A. Logstrom (Minnesota), Margaret E.W. Sager (Pennsylvania), and

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<sup>1</sup> 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.

Bruce Stone (Florida). Robert J. Rosepink was our liaison to the Executive Committee of ACTEC and was the father of this project.

In addition to its meetings, the Task Force presented seminars at the ACTEC annual meeting in 2005 and at an informal litigation symposium of ACTEC attorneys in Carmel Valley, also in 2005, published a paper in ACTEC Notes, and presented seminars at certain ACTEC regional meetings and state bar meetings. We also submitted a draft report to the Fiduciary Litigation Committee for comments from its members.

In studying and developing a method for deciding (rather than settling) disputes outside the traditional judicial process, we had no choice but to speak of “arbitration.” “Arbitration” is simply the act of resolving a dispute by a person appointed by the parties or given authority by a statute or otherwise. An “arbitrator” is simply a person with the power to decide a dispute. *Webster’s New Collegiate Dictionary* (9<sup>th</sup> Edition). These seemingly simple, innocent words, we have learned, conjure 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 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 the word “arbitration” often 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 assets passing to their 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 the administration of a will or trust would run more efficiently and at less cost if we could resolve disputes in those proceedings through a non-traditional form of trial resolution involving a private trial resolution judge with extensive experience in, and knowledge of, our field of practice. Justice often is 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.<sup>2</sup>

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 swung far to the other side. Now, these clauses are upheld by our courts whenever possible. *See Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 132 (2001) (dissenting opinion) ("Times have changed. Judges in the 19<sup>th</sup> century disfavored private

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<sup>2</sup> 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), query whether the matter will be resolved by the court, rather than 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). If federal law governs or if the federal case authority is applied by a state, then, absent contrary language in an arbitration clause, it is possible the case would be arbitrated even when the entire instrument, which includes the arbitration clause, is attacked as being void. *See Buckeye Check Cashing v. Cardegna*, 126 S.Ct. 1204 (2006). It appears the arbitration clause has to be directly and expressly contested in order to avoid having the litigation resolved by the arbitrator, in accordance with the arbitration clause. *Id.*; *Ostroff v. Alterra Healthcare Corporation*, 433 F.Supp.2d 538, 542 (E.D.Pa. 2006).

arbitration. The 1925 [Federal Arbitration] 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.”<sup>3</sup> 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, we see constant outsourcing of trials to retired judges and magistrates with more

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<sup>3</sup> The practitioner should keep this policy change in mind when reading the turn of the century cases on arbitration clauses in wills.

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 developed to meet the needs of our trust and estate clients and work in tandem with the mediation process.

## LEGAL UNDERPINNINGS OF ARBITRATION

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.<sup>4</sup>

Less obvious is whether arbitration can be mandated by a person in his or her will or trust in a way that is enforceable. The answer may 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. At a minimum, arbitrating trust and estate disputes is not prohibited in most states.<sup>5</sup>

Planners often prepare documents that include 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

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<sup>4</sup> 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. Compare *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) with *Clark v. Clark*, 57 P.3d 95, 99 (Okla. 2002) (beneficiary not bound).

<sup>5</sup> As we mention later in this report, 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).

decide what is income or principal, to decide whether a trust no longer is revocable by the settlor,<sup>6</sup> and the like. The fiduciary's decision can be attacked only on limited grounds such as arbitrariness, conflict of interest, and bad faith<sup>7</sup>—which happen to be the same limited grounds, in most jurisdictions, to appeal the decision of an arbitrator.<sup>8</sup>

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 (Mass. App. Ct. 2003) (table) (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

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

<sup>7</sup> *See* 3 Scott on Trusts §§187, 187.2; *Steele v. Kelley*, 710 N.E.2d 973 (Mass. App. Ct.1999).

<sup>8</sup> *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.

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 or by acts inconsistent with acceptance. Without acceptance by the intended transferee, the transfer does not occur...”); *Wait v. Huntington*, 40 Conn. 9, 1873 WL 1382 (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.

These underpinnings, in our opinion, lack the 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 disputes involving the estate or trust administration be decided by an arbitrator, 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 would merely codify the common law, theoretically it could apply to documents already in existence.

## **CONSTITUTIONALITY OF ARBITRATING WILL AND TRUST DISPUTES**

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 few 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 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 WL 1382 (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)).

Because 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 Jacobovitz*, 295 N.Y.S.2d 527, 529 (1968).<sup>9</sup> 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. The Pennsylvania Superior Court ruled that, “as a matter of public policy, issues of incompetency cannot be submitted to arbitration.” *In re Fellman*, 412 Pa. Super. 577, 604 A. 2d 263 (1992).<sup>10</sup> 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, 266 N.W. 351 (1936).<sup>11</sup>

Of course a constitutional issue does not arise if there is no “state action.” With very limited exceptions, our state and federal constitutions

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<sup>9</sup> 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.

<sup>10</sup> 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).

<sup>11</sup> 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?

exist to protect the individual from his or her government. If the government has no involvement in a transaction, 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<sup>12</sup> 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 (11<sup>th</sup> Cir. 1995) (Constitutional due process protections do not extend to private conduct abridging individual rights.).<sup>13</sup>

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<sup>12</sup> “No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .” U.S. Constitution, Amdt. 14, §1.

<sup>13</sup> 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, n. 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).

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 denies access to court died with *Circuit City Stores v. Adams*, 532 U.S. 105 (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.<sup>14</sup> On the other hand, an arbitration agreement imposing undue procedural

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<sup>14</sup> This point may impact an analysis of arbitration clauses and their impact on or as no contest clauses. The Task Force considered the impact of a request for alternate dispute resolution when a governing instrument contained a no contest clause. While there are no reported decisions in which both a request for arbitration or mediation of a probate or trust dispute and the application of a no contest clause were considered, the Task Force believes that the same analysis as to whether to initiate litigation in the first place is necessary when a claim for alternate dispute resolution is made by a person interested in the estate or trust. Applying for arbitration in accordance with a clause in a will may trigger the no contest clause. Regarding whether an arbitration clause constitutes a no contest, we think not. The arbitration clause merely determines how a contest will be resolved. That answer might change if the arbitration clause was drafted in a manner that made it unconscionable, in which case it may be void, as indicated in this section of the report.

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); *Ostroff v. Alterra Healthcare Corporation*, 433 F.Supp.2d 538 (E.D.Pa. 2006) (general discussion of unconscionability of arbitration clauses).

Traditional rules of civil procedure might lull us into thinking that there is a due process right to discovery, but that is not correct. *See Savage v. Commercial Union Insurance Company*, 473 A.2d 1052, 1058 (Pa. Super.

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), *superseded by statute as to another point of law*, *Battle v. F.A.A.*, 393 F.3d 1330, 1335, 87 4 (D.C.Cir. Jan 11, 2005). The Supreme Court explicitly held that limitations on discovery do not necessarily render an arbitration provision invalid. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991)

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 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 (6<sup>th</sup> 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); *Curry v. MidAmerica Care Foundation*, 2002 WL 1821808 (S.D. Ind. June 4, 2002) (arbitration agreement upheld that gave each party

the right to take the depositions of the other party, the other party's expert and two other persons, and to serve one set of five interrogatories and three requests for production). In most cases, simply leaving the nature and amount of discovery to the discretion of the arbitrator will be sufficient to satisfy due process. *See Booker v. Robert Half International, Inc.*, 315 F.Supp.2d 94 (2004), *affirmed*, 413 F.3d 77 (D.C. Cir. 2005) (court upheld arbitration agreement which, with respect to discovery, empowered arbitrator to direct production of documents and other information and to identify any witnesses to be called); *Ndanyi v. Rent-A-Center*, 2004 WL 3254516 (E.D. La. Dec. 11, 2004) (arbitration agreement valid and enforceable as to limitations on discovery, which applied to both parties, and allowed either party to request from the arbitrator expansion of discovery); *Cole v. Berns Intern. Sec. Services*, 105 F.3d at 1480 (provision upheld that granted arbitrator "the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise," as the arbitrator believed was needed to fully explore the issues in dispute). Thus, the arbitrator, rather than specific procedures, directed the exchange of information. "Because no particular discovery is precluded, and the determination of appropriate discovery is left to the parties and the

arbitrator, this is similar to a situation where the arbitration agreement is silent with respect to discovery.” *Booker*, 315 F.Supp.2d at 104.

In certain cases, however, an arbitration clause’s restrictions on discovery may be so severe and lopsided as to be unconscionable. For example, if one party to the arbitration has peculiar knowledge of the facts of the case and all others are not permitted to depose the knowledgeable party, then the arbitration would be unfair. *See Ostroff*, 433 F.Supp.2d at 546. *See Geiger v. Ryan’s Family Steak Houses, Inc.*, 134 F.Supp.2d 985, 996 (S.D. Ind. 2001) (where each party could take only one deposition as of right and was allowed to request additional depositions only in extraordinary circumstances and for good cause shown, the limited nature of discovery and the potential bias of arbitration panel that controlled discovery made the arbitral forum inadequate).

Therefore, effective trust or estate arbitration must include a mechanism for providing notice and a fair opportunity to be heard. As we stress elsewhere in this report, notice and a fair opportunity to be heard should be given to minors and unborn and unascertained persons through their proper representatives.<sup>15</sup>

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<sup>15</sup> Both the sample will and trust clauses and the Model Act included in this report provide for simplified trial resolution that is binding on minors and unborn and unascertained persons.

Finally, the right to a jury trial may be waived through a clearly established agreement to arbitrate. From the agreement, courts may 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 (Tex. 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); but see *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.<sup>16</sup>

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 long form of 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

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<sup>16</sup> 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).

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 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 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 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 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. The second Model Act is longer and includes a complete default process for resolving disputes.

Whether a jurisdiction chooses the shorter form 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 intended. 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 ENFORCEABILITY ACT**

(1) A provision in a will or trust requiring the arbitration of disputes between or among the beneficiaries, a fiduciary under the will or trust, or any combination of them, is enforceable.

(2) Unless otherwise specified in the will or trust, a will or trust provision requiring arbitration shall be presumed to require binding arbitration

under section [add state law on binding arbitration or ACTEC Model Simplified Trial Resolution Act].

(3) If the validity of the provision requiring arbitration is contested, either expressly or as part of a challenge to the validity of all or a portion of the will or trust containing the arbitration clause, the court shall determine the validity of the arbitration provision and any additional challenge to the validity of the will or trust. If the arbitration provision is determined to be valid, all disputed issues other than those described above shall 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.<sup>17</sup>

## 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, either expressly or as part of a challenge to the validity of all or a portion of the will or trust containing the arbitration clause, the court shall determine the validity of the arbitration provision and any additional challenge to the validity of the will or trust. If the arbitration provision is determined to be valid, all disputed issues other than those described above shall 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.

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<sup>17</sup> This subsection was added to address will and trust contests in which the validity of the arbitration clause is at issue. Footnote 2 of this report addresses the applicable law on this point absent legislation to the contrary. The task force considered providing for a separate trial on the validity of the arbitration clause. Then, if the arbitration clause is valid, it would control the balance of the will or trust contest. We were concerned, however, that this process would involve two trials involving virtually the same proof. If so, we would be contravening our goal of developing a simpler method of trial resolution.

(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 maintain the records of simplified trial resolution proceedings separate 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 simplified trial resolution 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 proposed 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.<sup>18</sup> 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

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<sup>18</sup> 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.

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. The recusal or disqualification of a simplified trial resolution judge shall not alone affect his or her compensation for services rendered in the simplified trial resolution proceeding.

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 otherwise permitted by law, 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.<sup>19</sup>

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<sup>19</sup> 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.

## **SAMPLE ARBITRATION-RELATED CLAUSES FOR TRUSTS AND WILLS**

Litigation relating to an estate or trust can occur regardless of how well the estate plan has been prepared. The client or his or her attorney may want to consider providing in the trust or will for alternatives to the formal judicial process under current rules of civil procedure. The goals may be any combination of privacy, efficiency, less formality than in a judicial tribunal, and less expense than might be incurred in a judicial forum, while reaching a fair result.

But is it enough simply to add to the trust or will a clause such as "all disputes regarding the administration of this trust (my estate) shall be resolved through arbitration"? What does that mean? What about a clause such as "all questions that arise in the course of the administration shall be resolved by my trustees (executors) and their decisions shall be final and binding upon my beneficiaries"? These clauses might be enforceable, but they are laden with ambiguity. Consider a somewhat more elaborate provision:

"It is my hope and expectation that there will be no dispute in relation to this Trust [my estate]. Nevertheless, if there is any dispute or controversy among any of the Trustee [personal representative] and the beneficiaries involving any aspect of this Trust [my estate] or its administration, the parties to the dispute may agree on the manner of resolution. If there is no such agreement, the disputing parties shall submit the matter to

mediation, and, if unresolved by mediation, to binding arbitration. If a party to the dispute fails to participate in good faith in the mediation or arbitration, the arbitrator or the court having jurisdiction over this Trust [my estate] is authorized to award costs and attorney's fees from that party's beneficial share or from other amounts payable to that party (including amounts payable to that party as compensation for services as a fiduciary)."

The above example begins to show a bit of promise, but still it lacks definitions or guidelines. What procedures should be followed if there is to be an arbitration? How formal should the arbitration be? How is the arbitrator chosen? Is there local law on the subject? Open-ended provisions like the ones above could lead to disastrous results.

The nature of the dispute is likely to determine how it must be resolved. For example, consider fiduciary compensation disputes. Depending on the law governing compensation in the local jurisdiction, any issues of law may be minimal, leaving the dispute a strictly factual one. Because the affected parties are fiduciaries and beneficiaries, discovery may be informal, or at least not require processes such as subpoenas. The threat to a beneficiary of incurring a forfeiture by not complying with the arbitration clause (assuming such a provision appears in the instrument) should be enough to cause the beneficiary to participate in the proceeding, including any informal discovery process. The arbitrator can make a non-arbitrary decision with minimal, informal input. This may also be true with respect to disputes over investment, discretionary

distribution issues, fiduciary instructions, document interpretation (absent the need for extrinsic evidence), decisions on principal and income, and the like. On the other hand, decisions regarding partial invalidity of documents, document interpretation involving parol evidence, breaches of fiduciary duty involving third persons, and other similar cases may require some element of state involvement, such as issuance and enforcement of subpoenas. A clause that incorporates a state law giving such authority to the arbitrator may eliminate concern over whether arbitration will be appropriate.

The samples below attempt to provide particular guidelines, referring to the ACTEC Model Simplified Trial Resolution Act (the "Model Act"), or referring to the arbitration statute (assuming one has been enacted in the applicable jurisdiction). The drafter may wish to consider attaching a copy of the Model Act as an appendix to the trust instrument. (This would perhaps be less likely with a will.) Access to the Model Act should be available on the ACTEC website.

The samples are meant to be somewhat interchangeable. Depending on the particular circumstances, the drafter may choose to combine language from more than one sample or delete particular provisions. Notably, each sample provides for mediation as a prerequisite to arbitration if the disputing parties do not otherwise agree on the manner of resolution.

## Sample 1

### Generic provision - long version with forfeiture clause

*[Comment: As with other language in these sample clauses, the forfeiture provision in paragraph (c) below has not been tested in the courts. Assuming that a mandatory arbitration provision in a will or trust is otherwise enforceable in a given jurisdiction, it is believed that a forfeiture provision is also likely to be enforceable, including in jurisdictions that do not recognize the validity of no-contest provisions. Among other arguments for enforceability is that the requirement to submit to arbitration is simply another condition of receiving the gift or bequest. (See the discussion of conditional transfers in the introductory materials.)]*

- (a) It is my hope and expectation that there will be no dispute in relation to this Trust [my estate]. Nevertheless, if there is any dispute or controversy among any of the Trustee [personal representative] and the beneficiaries involving any aspect of this Trust [my estate] or its administration, the parties to the dispute may agree on the manner of resolution. If there is no such agreement, the disputing parties shall submit the matter to mediation, and, if unresolved by mediation, to binding arbitration. If the parties are unable to agree on the selection of a mediator or arbitrator, the court having jurisdiction over this Trust [my estate] shall select the mediator or arbitrator, who shall be a Fellow of the American College of Trust and Estate Counsel with no interest in or involvement in the matter. *[Comment: Depending on future developments, this language may be further tailored to take into account statutes, training, certifications of trust and estate arbitrators, and experience requirements.]* The Trustee [my Executor] shall not have any liability to any beneficiary or other interested person for participating in or agreeing to any such procedure.
- (b) In any arbitration, the arbitrator shall establish the procedure for arbitrating all matters, recognizing the goals of privacy, efficiency, and less expense and formality than in a judicial tribunal, while reaching a fair result. The decision of the arbitrator shall be final and binding on the Trustee [Executor], all

beneficiaries, and their heirs, successors, and assigns. If the arbitrator determines that a guardian ad litem is necessary to represent the interests of unborn, unascertained, or incapacitated interested persons, a guardian ad litem shall be appointed by the court having jurisdiction over this Trust [my estate].

- (c) If a disputing beneficiary fails to participate in good faith in the agreed-on procedure for resolution, or in the mediation or arbitration if there is no such agreement, the disputing beneficiary's interest in this Trust [my estate] shall be forfeited and the beneficiary, if an individual, shall be treated as having predeceased the Settlor [me] [with no surviving issue]. If for any reason the court having jurisdiction over this Trust [my estate] determines that the foregoing provision for forfeiture is not effective, then instead of forfeiture the arbitrator or the court having jurisdiction over this Trust [my estate] is authorized to award costs and attorney's fees from the beneficiary's share.
- (d) *[Comment: As will be readily apparent, this paragraph addresses the possibility of tax consequences of a forfeiture provision.]* The provisions of subparagraph (c) above shall not apply to the beneficial interests of:
- (1) the Settlor's [my] spouse, to the extent that his [her] interest would otherwise qualify for an estate or gift tax marital deduction;
  - (2) any beneficiary, to the extent that the beneficial interest would otherwise qualify for an income, gift, or estate tax deduction for charitable purposes unless and until all such charitable beneficial interests have expired.

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

- (e) The Trustee's acceptance of the Trust constitutes the Trustee's agreement to comply with the above provisions. If a Trustee is a party to a dispute and fails to participate in good faith in the agreed-on procedure for resolution or in the mediation or arbitration, it shall be deemed that the Trustee has breached its fiduciary duties and has resigned, and the court having jurisdiction over this Trust is authorized to surcharge the Trustee for costs, attorney's fees, and any other sums the court deems appropriate. [*For wills:* The personal representative's consent to act constitutes it's the personal representative's agreement to comply with the above provisions. If a personal representative is a party to a dispute and fails to participate in good faith in the agreed-on procedure for resolution or in the mediation or arbitration, it shall be deemed that the personal representative has breached his, her, or its fiduciary duties and has resigned, and the court having jurisdiction over my estate is authorized to surcharge the personal representative for costs, attorney's fees, and any other sums the court deems appropriate.]
- (f) If any party disputes the validity of these provisions, the court having jurisdiction over this Trust [my estate] shall resolve the issue of validity prior to resolution of the balance of the dispute. If the arbitration provisions are determined to be valid, all remaining issues shall be resolved as provided in this Article \_\_\_.

## Sample 2

Arbitration - reference to statute

*[Comment: This sample assumes that the jurisdiction has enacted the Model Act in full or an appropriate variant of it.]* It is my hope and expectation that there will be no dispute in relation to this Trust [my estate]. Nevertheless, if there is any dispute among any of the Trustee [personal representative] and the beneficiaries involving this Trust [my estate] or its administration, the disputing parties may agree on the manner of resolution. If there is no such agreement, the disputing parties shall submit the matter to mediation, and, if the matter is not resolved by mediation, shall submit to binding arbitration pursuant to [Model Act]. In any arbitration, the disputing parties shall follow

the procedures set forth in [Model Act], including the provision allowing for variance from the procedures in [Model Act] by agreement of all parties to the dispute. The Trustee [my Executor] shall have no liability to any beneficiary or other interested person for participating in or agreeing to any such procedure.

### Sample 3

Arbitration - reference to Model Act with forfeiture provision

- (a) It is my hope and expectation that there will be no dispute in relation to this Trust [my estate]. Nevertheless, if there is any dispute among any of the Trustee [personal representative] and the beneficiaries involving this Trust [my estate] or its administration, the disputing parties may agree on the manner of resolution. If there is no such agreement, the disputing parties shall submit the matter to mediation, and, if the matter is not resolved by mediation, shall submit to simplified dispute resolution subject to the provisions of the ACTEC Model Simplified Trial Resolution Act (the "Model Act"). The parties shall follow the procedures set forth in the Model Act, including the provision allowing for variance from the procedures in the Model Act by agreement of all parties to the dispute. The Trustee [my Executor] shall have no liability to any beneficiary or other interested person for participating in or agreeing to any such procedure.
- (b) If a disputing beneficiary fails to participate in good faith in the agreed-on procedure for resolution, or in the mediation or arbitration if there is no such agreement, the disputing beneficiary's interest in this Trust [my estate] shall be forfeited and the beneficiary, if an individual, shall be treated as having predeceased the Settlor [me] [with no surviving issue]. If for any reason the court having jurisdiction over this Trust [my estate] determines that the foregoing provision for forfeiture is not effective, then instead of forfeiture the arbitrator or the court having jurisdiction over this Trust [my estate] is authorized to award costs and attorney's fees from the beneficiary's share.

- (c) *[Comment: As in Sample 1, this paragraph addresses the possibility of tax consequences of a forfeiture provision.]* The provisions of subparagraph (b) above shall not apply to the beneficial interests of:
- (3) the Settlor's [my] spouse, to the extent that his [her] interest would otherwise qualify for an estate or gift tax marital deduction;
  - (4) any beneficiary, to the extent that the beneficial interest would otherwise qualify for an income, gift, or estate tax deduction for charitable purposes unless and until all such charitable beneficial interests have expired.

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

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

- (e) If at any time in the future governing law provides for arbitration of disputes relating to trusts and estates in a manner substantially similar to the Model Act, then that governing law shall apply to this Trust [Will].

## **TRAINING FELLOWS IN THE SIMPLIFIED TRIAL RESOLUTION OF TRUST AND ESTATE DISPUTES**

To develop a meaningful system of arbitration, the College must create programs to train Fellows both in planning for, and in the conduct of, simplified trial resolution proceedings under the Model Statute. Training in planning for simplified trial resolution proceedings will largely be addressed to Fellows engaged in estate planning, through the development of arbitration provisions in wills and trusts. Training for the conduct of simplified trial resolution proceedings must be tailored to apply to potentially different audiences, with one approach for Fellows engaged in a litigation practice and another for Fellows with little or no prior litigation experience.

Naturally there will be some overlap between the intended audiences for both the planning and conduct aspects of training. For example, Fellows drafting estate planning documents must have a good understanding of how simplified trial resolution under the Model Statute actually works before drafting arbitration clauses that will create binding and enforceable procedures for dispute resolution. Fellows conducting arbitration must know both how

simplified trial resolution proceedings will work under the Model Statute and how these proceedings can be customized through provisions in a client's estate planning documents.

The Task Force recommends that modules be developed for each aspect of training. A minimum of six to eight hours of training time would be required to review the basic essential elements for simplified trial resolution. Considerably more time could be involved for higher levels of training in the conduct of simplified trial resolution proceedings. For example, Fellows with nominal litigation experience may require training in evidentiary and procedural issues that may arise during the course of simplified trial resolution proceedings.<sup>20</sup>

As an initial effort to develop training content, a three-hour presentation will be made at the Heckerling Institute on Estate Planning to be held in Orlando in January 2007, during the afternoon workshop sessions. (A separate podium presentation will be made to introduce the general topic to the larger audience at the Institute.) The presentation will be made by four members of the Task Force, but it will not be formally identified or advertised as a College-sponsored presentation. Because of the nature of the forum, the presentation will focus mostly on the drafting and estate planning aspects of

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<sup>20</sup> Of course persons advocating for clients in a simplified trial resolution proceeding would benefit from this training.

simplified trial resolution. Appropriate arrangements have been made to protect the College's interests in any written materials submitted in connection with the podium and workshop presentations.

To develop a proper curriculum to train Fellows in the conduct of simplified trial resolution proceedings, the Task Force believes that it would be useful to examine the procedures used by the National Judicial College to train new judges, and if appropriate, to design a similar curriculum to train Fellows to serve as trial resolution judges under the Model Statute. The Task Force also has been reviewing procedures used by the Dispute Resolution Center of the Florida Supreme Court for its "Certified Arbitration Training Program" required by Rule 11.020 of the Florida Rules for Court-appointed Arbitrators.

In addition to developing a curriculum, decisions need to be made on a forum to conduct the training. To maintain a longer term, well-established training program, the Task Force recommends the program be established under the auspices of a law school. The Task Force has had preliminary discussions with the University of Miami School of Law, which has voiced interest in helping the College conduct training programs. A faculty member who has been involved both in the teaching and conduct of alternative dispute resolution methods would have primary responsibility for administering the program. The program would be offered first to Fellows in connection with

periodic meetings (preferably in the same manner in which the mediation training sessions were conducted). Thereafter the training programs would be extended to lawyers outside the College.

## **CHECKLISTS AND FORMS FOR OPTIMAL ARBITRATION**

In the context of arbitration in general as well as the possible inclusion of arbitration provisions in a trust or will, it may be useful to consider the following checklist of issues or discussion points, all of which were addressed above in this Report.

### Checklist

- Entry into process

- agreement of parties
- agreement of parties allowed through state law
- will
- trust

- Nature of claims arbitrated

- concerns over validity of clause in will or trust (will contest)
- sufficient process to fairly litigate

- Who arbitrates?
- Who pays arbitrator?
- Sufficient procedures

- will the arbitrator have subpoena power?
- sanction authority?
- discovery provisions for fair hearing

- Binding effect on unborns, minors, etc.
- Review of decisions, if any
- Need for a judgment incorporating arbitration decree
- Document storage

Further, attached as appendix A to this Report is a sample stipulation and order that litigants may want to use as a form if they arbitrate in accordance with the proposed Model Act. This same stipulation may serve as an additional checklist for estate planners in drafting and advising their clients regarding simplified trial resolution.

## CONCLUSION

We hope this Report will provide a useful, alternative method of serving our clients, other practitioners, the judiciary, and the public in general, which is the hallmark of our College. The resolution of disputes by means other than through traditional litigation is cemented into the jurisprudence applicable to virtually every area of practice other than trusts and estates. ACTEC would certainly be remiss if it blindly submitted to this wave of change. ACTEC would also be remiss if it did not serve as the forerunner in offering suitable alternative means of resolving trust and estate disputes.

To meet that challenge, this Report may serve as a launching pad, but it certainly does not conclude the work on this endeavor. As the Report indicates, training methods and training must be developed and then implemented. Legislation should be promulgated at the state level to make arbitration clauses in wills and trusts enforceable. Perhaps most importantly, the College must work to replace the general unfamiliarity with arbitration and traditional prejudices against it with an awareness that it is another available tool – not one that is preferred over mediation, but one that may be preferred over litigation – for the resolution of trust and estate disputes.



**APPENDIX TO  
REPORT OF ARBITRATION TASK FORCE**

With the permission of Cary R. Singletary, Esq., Tampa, Florida, we have reprinted below a form of arbitration stipulation and order that may be useful in a simplified trial resolution proceeding:

In Re The Arbitration	Between	}	
		}	
		}	
	Claimant(s)	}	Case #
		}	
and		}	
		}	
		}	
	Respondent(s)	}	
		}	

Pre-Arbitration Conference Stipulation and Order

This matter came on for a Pre-Arbitration Conference on this day of \_\_\_\_\_, 200\_\_\_\_ pursuant to notice by the arbitrator. The following persons were present:

Advocate for Claimant: \_\_\_\_\_ ( ) In person ( ) By Phone  
 Claimant: \_\_\_\_\_ ( ) In person ( ) By Phone  
 Advocate for Respondent: \_\_\_\_\_ ( ) In person ( ) By Phone  
 Respondent: \_\_\_\_\_ ( ) In person ( ) By Phone  
 Others: \_\_\_\_\_ ( ) In person ( ) By Phone

At said conference the following matters were taken up and either stipulated to or ordered by the arbitrator, as indicated:

- Date(s) of the arbitration hearing:  
 \_\_\_\_\_  
 ( ) stipulated ( ) ordered
- Place of the arbitration hearing:  
 \_\_\_\_\_

3. If accommodations for disabled persons are needed, what are they?

\_\_\_\_\_  stipulated  ordered

4. Hours of the arbitration hearing:

\_\_\_\_\_  stipulated  ordered

5. Issues submitted for arbitration: (Include all issues the arbitrator(s) are to decide, including but not limited to issues of law, issues of fact, damages, injunctive relief, punitive damages, entitlement to attorney's fees and costs, amounts of attorney's fees and costs, etc.)

(1) \_\_\_\_\_  stipulated  ordered

(2) \_\_\_\_\_  stipulated  ordered

(3) \_\_\_\_\_  stipulated  ordered

(4) \_\_\_\_\_  stipulated  ordered

(5) \_\_\_\_\_  stipulated  ordered

(6) \_\_\_\_\_  stipulated  ordered

6. Cut off date for amendment to list of issues:

\_\_\_\_\_  stipulated  ordered  
(date)

7. Relevant Statutory Provisions:

\_\_\_\_\_  stipulated  ordered \_\_\_\_\_  stipulated  ordered

\_\_\_\_\_  stipulated  ordered \_\_\_\_\_  stipulated  ordered

\_\_\_\_\_ ( ) stipulated ( ) ordered \_\_\_\_\_ ( ) stipulated ( ) ordered

8. Cut off date for amendment to relevant statutory provisions:

\_\_\_\_\_ ( ) stipulated ( ) ordered  
(date)

9. Rules of Evidence to be followed:

\_\_\_\_\_ Yes \_\_\_\_\_ No  
( ) stipulated ( ) ordered

10. If Yes, \_\_\_\_\_ State \_\_\_\_\_ Federal

( ) stipulated ( ) ordered

11. Is discovery to be conducted?

\_\_\_\_\_ Yes \_\_\_\_\_ No  
( ) stipulated ( ) ordered

12. If yes, what discovery shall be permitted?

\_\_\_\_\_ depositions ( ) stipulated ( ) ordered  
\_\_\_\_\_ request to produce ( ) stipulated ( ) ordered  
\_\_\_\_\_ subpoena duces tecum ( ) stipulated ( ) ordered  
\_\_\_\_\_ request for admission ( ) stipulated ( ) ordered  
\_\_\_\_\_ interrogatories ( ) stipulated ( ) ordered

( ) stipulated ( ) ordered

13. If discovery is being conducted, what discovery procedures are to be followed for matters not otherwise specified in this order?

\_\_\_\_\_ Federal Rules of Civil Procedure \_\_\_\_\_ State Rules of Civil Procedure.  
( ) stipulated ( ) ordered

14. If yes, when will discovery close?

\_\_\_\_\_ ( ) stipulated ( ) ordered  
(date)

15. Cut off date for any motions concerning discovery issues:

\_\_\_\_\_ ( ) stipulated ( ) ordered  
(date)

16. Date for exchange of initial witness lists including experts and rebuttal witnesses.  
 \_\_\_\_\_ ( ) stipulated ( ) ordered  
 (date)
17. Date for exchange of final witness lists including experts and rebuttal witnesses.  
 \_\_\_\_\_ ( ) stipulated ( ) ordered  
 (date)
18. Will witnesses (other than attorney fee experts) not on list be permitted to testify?  
 \_\_\_\_\_Yes \_\_\_\_\_No ( ) stipulated ( ) ordered
19. Will witnesses for authentication and/or identification of documents be waived?  
 \_\_\_\_\_Yes \_\_\_\_\_No ( ) stipulated ( ) ordered
20. Will an interpreter be needed?  
 \_\_\_\_\_Yes \_\_\_\_\_No ( ) stipulated ( ) ordered
21. If, yes, who will arrange and pay for the interpreter?  
 \_\_\_\_\_  
 ( ) stipulated ( ) ordered
22. May witnesses testify by telephone?  
 \_\_\_\_\_Yes \_\_\_\_\_No ( ) stipulated ( ) ordered
23. May witness's testimony be presented by deposition?  
 \_\_\_\_\_Yes \_\_\_\_\_No ( ) stipulated ( ) ordered
24. May witnesses testify out of order (i.e. during other party's case in chief)?  
 \_\_\_\_\_Yes \_\_\_\_\_No ( ) stipulated ( ) ordered
25. Date for exchange of initial exhibits/documents, including expert's reports (other than attorney fee experts) and rebuttal exhibits/documents.  
 \_\_\_\_\_ ( ) stipulated ( ) ordered  
 (date)

26. Date for exchange of final exhibits/documents, including expert's reports (other than attorney fee experts) and rebuttal exhibits/documents.

\_\_\_\_\_ ( ) stipulated ( ) ordered  
(date)

27. Will exhibits/documents not exchanged be permitted in evidence?

\_\_\_\_\_ Yes \_\_\_\_\_ No ( ) stipulated ( ) ordered

28. Number of pre-marked copies to be produced at arbitration:

\_\_\_\_\_ (Place in Ring Binders) ( ) stipulated ( ) ordered  
(number)

29. Will the Rule on Exclusion of witnesses (sequestration) be invoked?

\_\_\_\_\_ Yes \_\_\_\_\_ No ( ) stipulated ( ) ordered

30. Will arbitrator be requested to conduct any in camera inspections?

\_\_\_\_\_ Yes \_\_\_\_\_ No ( ) stipulated ( ) ordered

31. If yes, what and when:

\_\_\_\_\_  
( ) stipulated ( ) ordered

32. Will a court reporter be ordered?

\_\_\_\_\_ Yes \_\_\_\_\_ No ( ) stipulated ( ) ordered

33. If yes, who will order and pay the expenses?

\_\_\_\_\_  
( ) stipulated ( ) ordered

34. Will dispositive motions be made?

\_\_\_\_\_ Yes \_\_\_\_\_ No ( ) stipulated ( ) ordered

35. If yes, cut off date for making the motion:

\_\_\_\_\_ ( ) stipulated ( ) ordered  
(date)



45. Will advance deposits for arbitrator's fees and expenses be made?  
 \_\_\_\_\_Yes \_\_\_\_\_No ( ) stipulated ( ) ordered
46. If yes, how much, by whom, when and where deposited?  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 ( ) stipulated ( ) ordered
47. Will arbitration hearing be divided into a liability and damage phase?  
 \_\_\_\_\_Yes \_\_\_\_\_No ( ) stipulated ( ) ordered
48. Will subpoenas be necessary for discovery or for production and attendance at the arbitration?  
 \_\_\_\_\_Yes \_\_\_\_\_No ( ) stipulated ( ) ordered
49. If yes, will copies of subpoenas be provided to opposite side five days before submission to arbitrator?  
 \_\_\_\_\_Yes \_\_\_\_\_No ( ) stipulated ( ) ordered
50. Any other preliminary matters not otherwise provided for herein shall be raised by:  
 \_\_\_\_\_ ( ) stipulated ( ) ordered  
 (date)
51. All deadlines stated herein shall be strictly enforced.
52. Other matters:  
 (Schedule additional pre-hearing telephone conferences if a complex case or if significant discovery is to take place).  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
53. This order shall continue in effect unless and until subsequent order of the arbitrator(s).

This order is made and entered this day of \_\_\_\_\_, 200\_\_ in  
\_\_\_\_\_, Florida.

\_\_\_\_\_  
Arbitrator

\_\_\_\_\_  
Arbitrator

\_\_\_\_\_  
Arbitrator

Copies to:

