I am very much looking forward to the upcoming conference in Philadelphia, with its outstanding series of seminars and special events. Hope to see you there.

It has been an honor to represent you as President of the National College of Probate Judges this year. As President, I had the opportunity to explain and promote the work of NCPJ at the summer meeting of the American College of Trust and Estate Counsel and the joint meeting of the Conference of Chief Judges and the Conference of State Court Administrators. It is my hope that NCPJ will continue to seek out opportunities to share ideas and best practices with these and other organizations interested in improving the administration of justice.

On a personal note, I have recently retired as Register of Wills, a statutory position in the District of Columbia. Like many courts, probate and guardianship issues raised in the District of Columbia courts present a myriad of challenges and require compassion and an alarmingly broad range of skills. As a probate court manager for many years—and not a judge—I would like to share my perspective with the members of NCPJ. In the District of Columbia court, as in many others, there is a close and ongoing relationship between the administrative and judicial personnel. My office benefited greatly from the support provided by District of Columbia judges as we worked together to deal with an ever-increasing caseload, an expansion of adult guardianships to address both aging persons and persons facing problems associated with mental illness, and public demand for more and technologically adept resources to assist in bringing and monitoring probate cases. Such teamwork enabled the District of Columbia court to not only address the legal implications of issues but also to smooth, as possible, administrative implementation, and seek redirection of resources or prompt requests for additional resources. As a result of this collaboration and an ongoing collaboration with the bar, the District of Columbia recently launched the Probate Self-Help Center. This Probate Self Help Center includes web-based portals for public access to general information, answers to frequently asked questions, and fillable forms for members of the public seeking to open a new case or serve as a fiduciary in a small estate, large estate, or adult guardianship. An electronic lobby keeps statistical information of the number of persons served and other useful information. Such collaboration is key, I believe, to further advance NCPJ’s mission of improving probate law and probate courts.

During the past few years, the NCPJ membership committee, under the leadership of Dianne Yarmin and Tim Grendell, has made significant progress in its efforts to add new members to NCPJ and to reach out to jurisdictions not previously represented. Based upon my experience, I would like for you to consider the long term benefits of inviting and encouraging court managers from your court to accompany you when arranging to attend NCPJ conferences. In conclusion, I would like to thank Shelley Rockwell of the National Conference of State Courts for her expertise and good humor and the members of the NCPJ executive committee for their many contributions and unfailing assistances when asked for even more help. I would also ask you to join me in welcoming Hon. Christine Butts (ret), who has worked so hard on the NCPJ journal, as she begins her year as President of NCPJ in Philadelphia.
Maine’s New Uniform Probate Code

By The Honorable James P. Dunleavy, Esq.
Judge of Probate, Aroostook County, Maine

On September 1, 2019, the “Maine Uniform Probate Code” (MUPC) became law in the “Pine Tree State.” It is the first major recodification of Maine Probate law since 1969. Many of its extensive changes are responsive to several Maine Supreme Court decisions interpreting our old law over the last 50 years, and by societal changes which have served as the impetus for a perceived need in Maine for a comprehensive new look at our substantive Probate law. The MUPC is to be “liberally construed and applied to promote its underlying purposes and policies.” See 18-C MRSA § 1-102.

These purposes and policies “simplify and clarify the law concerning the affairs of [Maine] decedents, missing persons, protected persons, minors and incapacitated persons; discover and make effective the intent of the decedent in the distribution of the decedent’s property; promote a speedy and efficient system for liquidating the estate of the decedent and making distributions to the decedent’s successors; facilitate use and enforcement of certain trusts; and make uniform the law among the various jurisdictions.” Id.

Unless repealed and replaced by the new MUPC, all previous Maine probate “principles of law and equity supplement [the MUPC’s] provisions (§ 1-103) … and no part of it may be considered impliedly repealed by subsequent legislation if it can reasonably be avoided.” (§1-104). Maine’s rules of evidence, “including any relating to simultaneous deaths, are applicable unless specifically displaced by the [MUPC]”. (§1-106). Additionally, the new MUPC covers the rights of persons injured by fraud committed in connection with Probate proceedings (§1-105) and codifies specifically when a person is considered dead (§1-106).

These comprehensive changes in Maine law deal with definitional changes, jurisdictional matters, intestacy, wills and donative transfers, probate of wills and administration of decedents estates, foreign personal representatives, uniform guardianships and protective proceedings, nonprobate transfers on death, protection of financial institutions, transfer on death security regulations, uniform real property transfers on death, trust administration, missing or absent persons, adoptions, and many ramifications of these broad areas of Maine probate law.

The MUPC makes changes in spousal elective share law (which share is now greater and indexed for inflation); and the new MUPC is very regardful of “testator intent” as it allows going significantly beyond the four corners of the will to look for other evidence of what the decedent wanted done with his or her property so his or her last wishes are honored.

Significantly, the new MUPC also addresses deeds, insurance and annuity policies, accounts with “pass on death” designations, securities registered in beneficiary form, qualified testamentary deeds, pensions, retirement plans, powers of attorney and other “dispositive instruments” of similar type. The MUPC recognizes that “will substitutes” (i.e. the giving of nonprobate assets) are now the primary means of transferring wealth to the next generation.

The MUPC also recognizes that blended families are now commonplace and stepchildren are now included in Maine’s antilapse statute, so if a person who makes a will includes a gift in that will to a beneficiary who predeceases the testator, the MUPC will dictate in certain circumstances that the gift will pass to the beneficiary’s decedents. This could result in stepchildren, or other individuals not related by blood, receiving a predeceased relative’s inheritance. Therefore, a Maine person in a blended family would be well-advised to review his or her existing will. This change reflects the changing times we are in and the fact that blended families are now a very significant part of Maine and American society. Stepchildren, however, are not included under the MUPC’s intestacy provisions.

Many specific areas of the MUPC are of significant interest and represent major changes from current Maine law, such as Maine’s intestacy law, Maine’s elective share law, increases in probate exemptions and allowances under Maine law, “small estate” legal provisions which are now larger than prior law, uniform real property transfers at death (this is a new act which 14 states in the country have adopted) which provides for a new type of deed called a “transfer on death deed” (TOD) deed. TOD deeds provide for nonprobate transfers of real estate by designating one or more beneficiaries of the real property interest to take upon the death of the owner. The owner retains complete ownership, title and control over the property interest during his or her lifetime. A TOD

(“Therefore, a Maine person in a blended family would be well-advised to review his or her existing will. This change reflects the changing times we are in and the fact that blended families are now a very significant part of Maine and American society.”)

(to be continued page 3)
Maine’s New Uniform Probate Code (continued from page 2)

deed can be revoked by the owner during his or her lifetime by recording an instrument of revocation in the Registry of Deeds.

There are provisions in the new MUPC to help prevent financial elder abuse such as specifically requiring some financial institutions to require anyone opening a single party or multiple party account to complete and sign a form which explicitly designates survivorship rights. There are significant changes in Maine’s guardianship and conservatorship laws; Maine is now the first state in the country to adopt the “Uniform Guardianship, Conservatorship and Other Protective Arrangements Act” with only minor revisions which the Commissioners on Uniform State Laws have proposed to allow for less restrictive alternatives to guardianship and conservatorship and which were endorsed by the NCPJ by Formal Resolution in 2007 and which makes it more difficult for family members to be appointed and provides for court supervision of actions of family members if appointed.

The new MUPC inhibits any effort on the part of a testator to disinherit a surviving spouse by giving the widow or widower the right to opt for the statutory “elective” share instead of what that survivor would receive by the will or nonprobate will substitutes; and the MUPC provides that the elective share is linked to the length of the marriage as well as indexed for inflation.

My colleagues and I on the Maine Probate Judges Assembly have already scheduled future meetings to address what many of us perceive as potential pitfalls, errors and inconsistencies in the new MUPC and I hope to be able to report back to readers of this Journal on future developments regarding Maine’s comprehensive new Probate law.

Judge of Probate James P. Dunleavy has served on the Executive Committee of the National College of Probate Judges (NCPJ) since 2014. Before his election as Aroostook County Judge of Probate, he was elected to represent the people of Presque Isle, Maine in the House of Representatives of the Maine State Legislature. He is a graduate of the University of Maine School of Law and was Comments Editor of the Maine Law Review while in law school.

NCPJ Member Steven L. Reed Makes History

By Hon. Christine Butts

On Tuesday, October 8, 2019, the citizens of Montgomery, Alabama decisively elected its first African American Mayor, forty-five year old Steven L. Reed. Reed defeated his opponent, David Woods, garnering a robust sixty-seven percent of the vote. This is not the first time Mayor Elect Reed has made history. Reed served as the first black probate judge of Montgomery County, Alabama; and we know him well, as he frequently attends NCPJ Conferences and is a distinguished member of the NCPJ.

Born and raised in Montgomery, Alabama, Reed served as an aide to the lieutenant governor and was the first probate judge in the state to issue same-sex marriage licenses.

Redirecting the spotlight during his victory speech, Reed explained, “This election has never been about just my ideas. It’s been about all of the hopes and dreams that we have as individuals and collectively in this city . . . and the way we found the opportunity to improve outcomes regardless of neighborhood, regardless of zip code, regardless of anything that may divide us or make us different from one another.”

To understand what makes Mayor Elect’s victory so consequential, consider the history of Montgomery, Alabama, a vibrant and now the largest city in Alabama. Montgomery served as the first capital of the Confederate States of America and racial tensions simmered long after the Civil War ended, giving rise to the civil rights movement. Montgomery, Alabama represented the epicenter of civil rights protests. In 1955, Rosa Parks tipped off the famous bus boycott when she refused the bus driver’s instruction to sit at the back of the bus. Then, in 1965, Martin Luther King, Jr. famously led a march from Selma to Montgomery, Alabama and mightily observed, “The arc of the moral universe is long, but it bends toward justice.”

The executive editor of the Montgomery Advertiser advised, “Do not underestimate what this means to generations of people who fought hard for the man who looks like Reed to hold the city’s highest office. Do not depreciate what it means to the parents of the youth of this city who look like Reed and who now have a man they can hold up an example.”

Mayor Elect Steven L. Reed
NCPJ Member and former Probate Judge
Presentation of the Isabella Award

By Mary Joy Quinn

At the 2019 Spring Conference in New Orleans, Louisiana, The National College of Probate Judges awarded Judge Christopher Bieter of Idaho with the 2019 Judge Isabella Horton Grant Guardianship Award. This NCPJ honor recognizes demonstrated leaders in the field of guardianship for adults and/or minors. For more information about the award or to nominate someone for the award, refer to the information provided below this article.

Judge Bieter was assigned to the probate bench of Ada County, Idaho in 2004. In 2006, Judge Bieter was appointed to the newly created Idaho Supreme Court Guardianship and Conservatorship Committee (GC Committee). In 2012, he became chair of the GC Committee.

The mission of the GC Committee is to protect and empower vulnerable individuals under guardianship or conservatorship through education, monitoring, enforcement and community support. Under Judge Bieter’s leadership, and with the strong support of the Supreme Court, the Idaho Legislature, and community groups, guardianship/conservatorship practice has dramatically improved throughout Idaho according to Chief Justice Roger S. Burdick. Advances include:

- establishing new administrative rules requiring online training for potential guardians and conservators prior to appointment;
- clarifying reporting requirements for guardians and conservators; and
- enhancing the quantity and quality of the information provided to the court in visitor reports and evaluation committee reports in developmental disability guardianships.

Other activities include providing judges and lawyers with tools in order to apply appropriate legal standards in establishing guardianship and conservatorship and assessing capacity, including bench cards. With funding from the legislature, a Monitoring Coordinator in each of Idaho’s seven judicial districts was appointed to assist in monitoring, helping guardians comply with reporting requirements, and looking into potential problem guardianships including home visits when indicated.

The National College of Probate Judges was honored to make Judge Bieter the 2019 Judge Isabella Horton Grant Award Recipient.

Hon. Christopher Bieter
2019 Recipient of the Isabella Award

Nominations for the Isabella Award

Judge Isabella Horton Grant was a pioneering lawyer and judge who practiced law for 25 years before being appointed in 1979 to the San Francisco Municipal Court by Governor Jerry Brown and then in 1982 to the Superior Court. Judge Grant served as presiding judge of the Family Court, where she initiated a separate domestic violence calendar and helped pass California’s no fault divorce legislation. Judge Grant later served for 11 years as presiding judge of the Probate Court, where she streamlined court procedures, created the Guardianship Monitoring Program, and assured that up-to-date court rules were available to attorneys.

Judge Grant was an active member of the National College of Probate Judges and the recipient of its coveted Treat Award in 2000. In 2011, she was awarded, posthumously, the Rose Bird Award from the California Association of Women Lawyers. The Isabella Award is presented to the recipient at the NCPJ Spring Conference each year. Nominations for the award should include the name, address and position of the nominee and the nominators, together with a brief description of the accomplishments of the nominee. Supporting letters may be included. Nominations may be submitted by probate judges, probate practitioners, guardianship practitioners, academicians, or others having personal knowledge about the nominee.

Qualifying achievements may include a variety of activities, such as: innovative programs leading to improvements in guardianship laws; articles, treatises, books or other publications of unusual quality and impact on guardianship issues; leadership roles or other activities in organizations that have led to significant improvements in the laws, administration, or practices in the guardianship field.

Nominations should be sent by February 1, 2020 to:

The Isabella Award
c/o National College of Probate Judges
300 Newport Avenue
Williamsburg, VA 23185
ncpj@ncsc.org
NCPJ Fall Conference in Philadelphia, Pennsylvania

In the Spring of this year many of you joined us for our conference in the diverse and eclectic city of New Orleans. It is now our great pleasure to extend a warm invitation to you to join us in Philadelphia, the historic city of "Brotherly Love," for a fantastic conference scheduled for November 13 to 16, 2019, Wednesday through Saturday. A high caliber educational program has been planned for you in the city that boasts the Liberty Bell, the Philadelphia Museum of Art, the Franklin Institute and Independence Hall.

Program. The Curriculum Chairs, Judges Dianne E. Yamin and Jim Purnell, have developed an enlightening and timely program that includes presentations on Blockchain in the Courts by Di Graski, Consultant, National Center for State Courts, Technology Division; Online Guardianship Tracking System by Cherstin Hamel, Director, Office of Elder Justice in the Courts, Admin. Office of PA Courts; Judicial Ethics by Col. Linda Strite Murnane; and the Administration of the Han Solo Estate: Administration Problems of Galactic Proportions, by Attorneys Adam Gusdorff and Jennifer Kosteva. There will also be a presentation regarding the National Judicial Opioid Task Force.

Accommodations. The Conference hotel, The Loews Philadelphia, is centrally located in the heart of the city and offers easy access to great restaurants and to the legendary Reading Terminal Market. The Conference rate of $199.00 per night plus tax is available three days before and after the conference dates, subject to availability. The cut-off date for reservations is October 14, but you are encouraged to make your reservation before then to be assured of getting the dates that you want. You may call Loews Reservations at 888-575-6397 and mention NCPJ or click here to obtain reservations.

Registration. The conference registration fee is $400 for members, if received by September 13, and $450 after that date. The fee for retired judges who do not need CLE credit is $200. The registration fee includes all conference materials, the welcome reception and final reception and banquet. The fee for spouses/guests is $80.00, which includes the reception and banquet. The dress code for the conference is casual; dress code for the banquet is business casual.

Transportation. Access to Philadelphia is available by virtually every mode of transportation including flights into Philadelphia International Airport, trains into 30th Street Station and by vehicle from Interstates 95 and 76.

Explore and Enjoy. Philadelphia is the fifth largest city in the U.S. and has a blend of historic and modern places to explore, eat, shop and enjoy. You can easily enjoy historic Valley Forge and Gettysburg, wineries, cooking schools, sports, and many other activities. Two optional events have been planned, both of which involve an additional cost. On Wednesday evening, November 13 after the welcome reception you can join NCPJ colleagues at a Philadelphia Flyers vs. Washington Capitals game. Then, on Thursday afternoon, head to Lincoln Field for a behind-the-scenes tour of Eagles Stadium! Use the forms below to register for either outing. The history lovers will not want to miss a trip to Independence Hall, which is the adoption site of the U.S. Constitution and the Declaration of Independence.

Please arrange now to join us in Philadelphia at our Fall Conference and plan to enjoy the opportunity to network with judges and probate professionals from across the U.S. from November 13-16 at the Loews Philadelphia.
I. Introduction

Estate and trust litigation can pose a greater risk to family wealth than the current tax regime under which most estates are not subject to transfer taxes. Specifically, there is always the possibility that an estate plan will be subject to attack, whether on a legitimate basis or out of frustration or confusion with the plan. The description in Charles Dickens’s Bleak House (first published in 1852-1853) of legal proceedings involving conflicting wills dragging on for generations remains appropriate:

Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties … without knowing how or why; whole families have inherited legendary hatreds with the suit (Dickens 6).

Dickens’s story, although an extreme example of heirs receiving none of their intended inheritance, encapsulates the worst of trust and estate litigation. The authors find that trust and estate disputes are less common in families who start discussions about wealth early and often, have chosen to be transparent about the source and preservation of their wealth, and who do not have fissured familial relationships. In those instances where disputes do arise; however, the question becomes how to effectively address such disputes.

Over the last century, arbitration has established itself as one of the most popular means for resolving commercial disputes (Born 93-97). It is no wonder that commentators and estate planners (planners) have been talking about arbitration as a method of resolving trust and estate disputes for some time. Notably, George Washington, a forefather in more ways than one, included in his 1799 Will a clause providing that any disputes should be decided by three impartial individuals who, “unfettered by Law, or legal constructions” would decide the matter (Last Will and Testament of George Washington, 1799). The practice of including arbitration provisions in estate planning documents, however, failed to gain much traction until recently. Part of the issue was that few courts around the country enforced arbitration provisions in trust agreements and wills. In 2007, Florida became the first state to enact a statute expressly authorizing mandatory arbitration clauses in wills and trusts for disputes between or among the beneficiaries and a fiduciary. Disputes about the validity of the instrument, however, are not subject to arbitration (Fla. Stat. § 731.401). Thus, a shift began to occur as some states began enacting statutes authorizing arbitration in trust or will disputes. According to Sherman, approximately twelve states have enacted statutes which allow for mandatory arbitration clauses in wills and trusts with varying conditions. (To date, Texas has not joined their ranks). In 2009, the International Chamber of Commerce released its first arbitration clauses. Then, in 2012, the American Arbitration Association® (the “AAA”) followed suit and released arbitration rules for wills and trusts (American Arbitration Association [AAA], 2012). Finally, in 2013, the Texas Supreme Court jumped into the fray by ruling that an arbitration clause in an inter vivos trust instrument was valid and enforceable. The decision opened the door to the widespread use of arbitration in trust and estate disputes.

Now, Texas fiduciary litigation attorneys (including one of the authors) see a casual approach to the inclusion of arbitration provisions in wills and trusts when the planner – and more importantly, the settlor – has given no real thought to the consequences of including the provision. Many well-intentioned estate planning attorneys now include arbitration provisions in their estate planning documents regardless of whether it actually saves time or money or discourages litigation. In a recent CLE discussion of this topic, one lawyer sug-
gested that the arbitration provision should be included in the basic form so that “the planner would be reminded to discuss it with the client.” In many cases, if not most, rather than reminding the planner to discuss the option with the client, the provision receives little attention – or explanation other than a stock mention of the supposed benefits. Genuine consideration needs to be given by the estate planning lawyer as to why an arbitration provision is being included in a document and what benefit, if any, the arbitration provision will provide.

In this paper, the authors examine whether, how, and when it makes sense to include arbitration clauses in estate planning documents.

II. Arbitrating Trust and Estate Disputes in Texas

Texas courts historically held that a valid arbitration provision required an agreement between the parties. The Texas General Arbitration Act (the “TAA”), enacted in 1965, provides that “[a] written agreement to arbitrate is valid and enforceable if … the controversy … exists at the time of the agreement; or … arises between the parties after the date of the agreement.” (TEX. CIV. PRAC. & REM. CODE §§171.001 et seq). The expectation was that arbitration required two signatories and could not be forced upon a beneficiary who did not specifically agree to it. Thus, arbitration in the trust and estate context occurred in Texas, but only on a very small scale and usually when a fiduciary acceptance document required arbitration. In such cases, the settlor, beneficiary, or another trustee may have bound themselves to arbitrating any disputes with that accepting fiduciary.

III. Arbitration Clauses in Trust Agreements

In 2013, the Texas Supreme Court changed the landscape of how an agreement to arbitrate could be created. The Court held in Rachal v. Reitz that an arbitration provision in an inter vivos trust agreement was binding against the trust beneficiaries. The trust instrument at issue contained the following provision:

Despite anything herein to the contrary, I intend that as to any dispute of any kind involving this Trust, or any of the parties or persons concerned herewith (e.g. beneficiaries, Trustees), arbitration as provided herein shall be the sole and exclusive remedy, and no legal proceedings shall be allowed or given effect except as they may relate to enforcing or implementing such arbitration in accordance herewith. Judgment on any arbitration award pursuant hereto shall be binding and enforceable on all said parties.

The trust instrument further provided that “[t]his agreement shall extend to and be binding upon the Grantor, Trustees, and beneficiaries hereto and on their respective heirs, executors, administrators, legal representatives, and successors.” Rachal was an attorney who drafted the trust instrument and was named the successor trustee of the trust. Reitz, a beneficiary, sued Rachal claiming misappropriation of trust assets and failure to account. Rachal moved to compel arbitration under the trust agreement. The probate court denied Rachal’s motion on the basis that a binding arbitration provision must be the product of an enforceable contract between the parties and that no such contract existed in the context of a trust because there was no consideration and the beneficiary had not assented to the arbitration provision. The Court of Appeals, in an en banc split decision, affirmed the trial court’s ruling and holding that it was for the legislature, rather than the courts, to decide “whether and to what extent the settlor of this type of trust should have the power to bind the beneficiaries of the trust to arbitrate.” The Texas Supreme Court reversed and held that the arbitration provision was enforceable for two reasons.

First, the Court focused upon the intent of the settlor, which was to arbitrate. Next, the Court

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“The authors find that trust and estate disputes are less common in families who start discussions about wealth early and often, have chosen to be transparent about the source and preservation of their wealth, and who do not have fissured familial relationships.”

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Arbitration Clauses (continued from page 7)

found that there was consideration because the beneficiary received a distribution from the trust subject to conditions (the settlor’s intent to arbitrate trust disputes). Some commentators contend that the Court’s decision turned on both an “intent” theory and an “acceptance of benefits” theory and suggest that, even if there had been no “acceptance of benefits”, the Court would have held that arbitration was required simply because the settlor intended that arbitration apply.

The Court’s opinion is not entirely clear on this point. The opinion states:

We conclude that the arbitration provision contained in the trust at issue is enforceable against the beneficiary for two reasons. First...we enforce trust restrictions on the basis of the settlor’s intent. The settlor’s intent here was to arbitrate any disputes over the trust. Second...an agreement [to arbitrate] requires mutual assent, which we had previously concluded may be manifested through the doctrine of direct benefits estoppel.

The statement suggests that the two theories (intent and acceptance of benefits) are independent and that the settlor’s intent alone is enough to bind the beneficiary. However, the Court later states, “We must enforce the settlor’s intent and compel arbitration if the arbitration provision is valid and the underlying dispute was within the scope of the provision.” In that regard, a settlor’s intent that arbitration apply will always be clear from the mere fact that the arbitration requirement is included in the trust agreement. The key, at least in the Rachal set of facts, is that some action by the beneficiary must indicate an acceptance of the arbitration agreement. This acceptance of the agreement can be actual written consent by the beneficiary, or, in the case of Rachal, an acceptance of benefits under the agreement.

Under this “acceptance of benefits” or “direct benefits estoppel” doctrine, a “beneficiary who attempts to enforce rights that would not exist without the trust manifests his or her assent to the trust’s arbitration clause...in such circumstances it would be incongruent to allow a beneficiary to hold a trustee to the terms of the trust but not hold the beneficiary to those same terms” (Rachal v. Reitz, 2013). In summary, after the Rachal ruling, a beneficiary need not be a signatory to an arbitration agreement; he or she is subject to an arbitration provision in a trust agreement by merely accepting the benefits or rights under the trust agreement and is estopped from arguing otherwise.

Another aspect of the Rachal ruling is that, at least in the near term, there is likely to be considerable litigation disputing the application or scope of arbitration clauses. While most lawyers, and even clients (if they know anything about it) assume that arbitration will save money, the reality is that disputes concerning the applicability or scope of arbitration clauses can, in fact, create more expensive and prolonged litigation, at least until courts flesh out the law. In the interim, many planners will continue to use the clause simply because they have heard it is the thing to do, or assume it discourages contests or litigation, without really knowing or thinking about the concrete ramifications. Litigation in Texas regarding the enforceability of arbitration clauses in wills and trusts typically arises from a claim that an unwilling participant did not accept a benefit (and therefore is not bound), and/or manifests itself in objections to the actual meaning and/or scope of the arbitration clause. For example, arguments tend to arise if the arbitration clause is silent and/or vague regarding the number of arbitrators, the arbitrator selection process, the arbitration rules which are to be utilized, etc. A motivated lawyer can argue about anything, and an arbitration clause which is susceptible to more than one meaning provides good fodder for argument.

IV. Arbitration Clauses in Wills

The Rachal case did not address whether an arbitration clause in a will is enforceable, but it seems the same rule and analysis would apply: (1) is there intent for an arbitration provision; and (2) is the beneficiary estopped from challenging its applicability under the direct benefit theory?

The purpose of probate courts is to achieve the testator’s intent (Zack 179). It would follow, then, that the probate court would honor a testator’s stated intent in a will for disputes to be arbitrated unless it violated a law or public policy. With regards to the second prong of the analysis, where one has accepted benefits under a will that contains an arbitration clause, such individual seems to have bound himself to arbitrate any covered claims. If so, it follows that such arbitration clause applies to a testamentary trust in a will, the administration of the estate, or the construction of the terms of the will itself.

The question becomes who has received a benefit under the will. The entire estate administration proceeding is in rem, and as such, binds all persons having notice, whether or not they actually participate in the proceeding (Tex. Est. Code § 32.001(d)). Is it fair to require arbitration by all persons having notice (i.e., those having an interest in the probate proceeding)? If this theory is applied, all persons interested in the estate, including beneficiaries and creditors, would be bound by an arbitration provision in a will.

Next, it seems that allowing arbitration of estate administration disputes without a written agreement signed by the parties to be bound presents the question of whether a testator may deprive the court of its ability to supervise probate proceedings that are non-statutory in nature.”

“It seems that allowing arbitration of estate administration disputes without a written agreement signed by the parties to be bound presents the question of whether a testator may deprive the court of its ability to supervise probate proceedings that are non-statutory in nature.”

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is a regular occurrence, such as when parties to an independent estate administration enter into a settlement agreement that adjusts the disposition of a testator’s assets.

Finally, does it make sense that an independent executor or administrator can be forced into or participate in mutually agreed arbitration to settle a claim, but the same claim against a dependent administrator would remain in court? This type of bifurcated system has the earmarks of unfairness.

Thankfully, the Houston Court of Appeals (in the only Texas case addressing arbitration in the context of a will) has answered some of those questions. In that case, the court-appointed estate administrator sued the executor who had been removed by the court for breach of fiduciary duty (arising from wasted and misappropriated trust assets). The will contained an arbitration clause, but the court-appointed administrator argued that the claims against the executor were not subject to the arbitration clause because the claims arose not from the administrator’s powers given under the will, but rather under statutory and common law. Specifically, the administrator argued that an administrator is not named in the will and the source of the administrator’s power to act is created under the statutes and by the court; the administrator’s fees also were statutorily authorized. Additionally, nothing in the administrator’s petition alleged that the executor’s liability needed to be determined under the will.

The court agreed that the administrator had not received a direct benefit under the will that would estop the claim. In doing so, the court held that the Rachal theory of direct-benefits estoppel was inapplicable. Therefore, the arbitration clause in the will did not apply to the administrator’s claim against the removed executor (Ali v. Smith, 2018).

Ultimately and unequivocally, an arbitration provision in a will that has not been probated is meaningless until the will is admitted to probate; there can be no agreement of mutual assent by way of direct-benefit estoppel or any in rem jurisdiction over interested parties. Thus, a challenge to the will before it is submitted for probate should not invoke an arbitration clause in the will.

V. Should I Include an Arbitration Clause in my Client’s Estate Planning Documents?

A. Reasons Why You Should

Proponents of arbitration argue that it has greater privacy, is expertly adjudicated, is less inflammatory, is less costly, is less time consuming, has greater enforceability, and provides greater procedural flexibility than litigation.

1. Privacy

The trend for most clients tends to be toward keeping information and proceedings private. Included in the top reasons why families engage in estate planning are avoiding probate (e.g., privatization of the wealth-transfer process) and to minimize discord among beneficiaries.

Therefore, one of the most attractive aspects of arbitration is the prospect of avoiding publicity. In today’s world of immediately available information, clients and planners alike recognize the need for privacy and security, especially with regard to wealth transfers and intra-family disputes. Few clients wish to advertise their familial issues, who manages or will manage their wealth, or the identity of who will receive the wealth and in what manner. Similarly, professional trustees may not want adverse publicity regarding their trust management and administration services. Although court proceedings offer some privacy measures, such as applications for in camera review or sealing court records, the parties must prove such need to the court before such protective measures will be granted. Alternative dispute resolution, such as arbitration, can be a viable option for providing for the resolution of trust and estate disputes in a private manner.

Specifically, the arbitration record is not public, other than maybe someone’s initial filing and/or motion to compel arbitration. It should be noted; however, that “non-public” does not mean “confidential”. If the client desires or needs confidentiality, the arbitration provisions should specify it as reiter-ated in subsequent Section VI, I.

2. Expertise

Trust and estate litigation can arise in several forums. In a bench trial in a statutory probate court, the parties are assured that an expert in the subject matter will hear and rule upon the issues. In contrast, a jury trial does not offer that same guarantee, nor does a sitting district court judge or county court at law judge. This is not to say that a district court judge or county court at law judge may not have a great understanding of trusts and estates law; the subject matter simply is not one that most such judges study on a daily basis and the subject can involve different rules.

Arbitration provisions can require a subject matter expert with whatever qualifications the drafting attorney desires. The prospect of having an arbitrator who is well-versed in probate and trust matters can be advantageous to both sides.

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Arbitration Clauses (continued from page 9)

3. Access to Information

Discovery in arbitration is typically limited, so less emphasis is placed on digging up all of the familial issues that often find their way into trust and estate litigation and can distract from the actual issue. Additionally, many estate and trust disputes are submitted to juries to decide, and in that forum, there is some evidence that juries tend to side with a disinherited or disgruntled heir over a settlor or testator (Langbien 607, 613-614). In those cases, arbitration may be somewhat less inflammatory than litigation.

4. Shifting the Burden of Expense

A plaintiff in an estate or trust dispute risks little in bringing a lawsuit. Plaintiffs’ attorneys often offer contingency fee structures to their clients; and, a losing plaintiff may not be ordered to pay the defense costs of a successful defendant. Specifically, many estate planning documents permit a fiduciary to use estate or trust assets to defend a suit, which diminishes the assets to be distributed and spreads the burden of defense among all estate or trust beneficiaries.

An arbitration provision can provide that the parties pay their own fees, thereby shifting the economic burden more squarely upon the disputing party. The expense may also encourage the disputing party to be more open to settlement and at an earlier date.

5. Less Time Consuming and/or Expensive

Arbitration proponents often cite overburdened and understaffed courts, but the situation will differ from jurisdiction to jurisdiction. In some cases, arbitration can be faster and less contentious (which usually means less expensive). The arbitrator can impact these factors greatly. The arbitrator has the ability to “drive” the proceeding by creating shorter deadlines and limit the number of issues at hand, which can reduce costs and make the proceeding more efficient. Additionally, the lack of an appeals process can expedite matters, make the process less costly, and lead to finality more quickly.

In cases in which there may be various options for jurisdiction or venue (e.g., multi-national clients), arbitration also can limit the proceedings to the desired jurisdiction or venue.

6. Enforceability of Award

In cases involving multiple jurisdictions, arbitration awards may be more easily enforceable. For example, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards offers recognition of awards across jurisdictions. Under Texas common law, a person seeking to enforce an award must obtain a judgment on it in a new lawsuit (Payton v. Hurst, 1958). The TAA provides a statutory method for enforcing an arbitration award that is very straightforward. On application of a party, a Texas court is required to confirm an arbitration award unless grounds are urged for vacating, modifying, or correcting the award within the appropriate time limits (TEX. CIV. PRAC. & REM. CODE § 171). Review of an arbitration award is extremely limited, and an award may not be vacated even if there is a mistake of law or fact (Humitech v. Perlman, 2014). On granting an order that confirms an award, the court must render a judgment or decree in conformity with the award. The judgment from the court which confirms the arbitration award may also include an order assessing the costs of the application and judicial proceedings. The judgment may be enforced like any other judgment or decree (TEX. CIV. PRAC. & REM. CODE § 171.092). The State of Texas has many laws which benefit judgment debtors; however, the collectability of judgments in Texas is a topic which is beyond the scope of this outline.

7. Different Rules

Arbitrations are typically less stressful for the lawyer because many of the rules (in particular, the rules of evidence) tend to be relaxed (Bayer and Vanburen 649, 653-54). Whether or not formal rules of evidence will be employed during an arbitration proceeding depends upon the arbitrator. More specifically, there is case law which suggests that the Texas Rules of Evidence apply only in court proceedings (Castleman v. AFC Enters, 1997). In 1993, the U.S. District Court in the Southern District of Texas opined that the arbitrator is the “judge of the relevance and admissibility of evidence introduced in an arbitration proceeding” (Castleman at 653). With regard to discovery, the administrative rules from various sources which apply to arbitration proceedings, as a general rule, allow for the potential for discovery at the arbitrator’s discretion. For those who participate in an arbitration proceeding as a lawyer, the authors strongly suggest that the attorney gain an understanding from the arbitrator, at the initial pre-hearing conference (or shortly thereafter), regarding the arbitrator’s attitude toward the applicability of the rules of evidence and the types and scope of pre-hearing discovery that will be permitted for the case. In the authors’ experience, the rules of evidence are observed (but not always followed) in an arbitration, and discovery is typically allowed but streamlined (as well as controlled) by the arbitrator.

B. Reasons Why You Should Not

Detractors of arbitration argue that arbitration proceedings are less expertly adjudicated, are more costly, unduly restrict information, disallow summary judgments, fail to bind parties, are potentially biased, and limit appeals.

Based upon one of the author’s own personal (and very recent) experiences arbitrating trust disputes in Texas, arbitration has not

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Arbitration Clauses (continued from page 10)

In court, a party can seek summary judgment on legal grounds, such as statute of limitations or lack of duty or causation. Generally, arbitration does not permit a preliminary bite at the apple on legal grounds; instead, often, written submissions or a hearing must occur. Therefore, it can be difficult to address a discreet issue without tackling the entire case, which may not be as time or cost efficient.

5. Inability of Arbitration Award to Bind Desired Parties

As discussed above, arbitration works best in cases of direct benefit estoppel or in personam jurisdiction. One issue in arbitration may be binding all of the beneficiaries. Will the arbitration award bind unborn, unascertained, minor, or otherwise incapable beneficiaries? In court cases, a guardian ad litem may be appointed or such parties may be bound by virtual representation (TEX. PROP. CODE §§ 114.032(B) & 115.013(C)). Will those same concepts apply under the arbitration rules?

Probably, under Texas law, (at least one of the authors believes) minors, unborns, and unascertained beneficiaries probably can be bound by virtual representation; but, if there is a conflict, a guardian ad litem is essential. AAA rules contemplate the appointment of a guardian ad litem, if necessary. Care must be taken to join those beneficiaries that are required to have finality, but that may lead to more fights about the arbitration process.

If an arbitration award will not bind all of the desired parties, a lawsuit should be the chosen course of action. For example, consider a trustee administering a trust in accordance with an arbitration decision that does not bind all beneficiaries. The trustee lacks certainty as to whether the position or actions it is taking are binding and final, which potentially subjects the trustee to further disputes and litigation and may hinder the trustee’s decision making.

6. Potential Bias

In the context of commercial arbitration, several critics have voiced concerns about perceived or inherent bias in favor of those parties who routinely appear before arbitrators. In the trusts and estates context, if such bias were to exist, it likely would be in favor of institutional executors or trustees who service many clients, rather than in favor of a particular individual who is not likely to be involved in multiple disputes.

7. Appeals Process

There are two times at which an appeal potentially can be filed. The first time arises when a motion to compel arbitration is granted. In Texas, there is an inequity involved in appealing orders on motions to compel arbitration. Specifically, a party may appeal an order denying a motion to compel arbitration and an order granting an application to stay arbitration, but not an order that compels arbitration unless that order also dismisses the underlying litigation (TEX CIV. PRAC. & REM. CODE § 171.098(a)(1)-(2)). Therefore, if
Arbitration Clauses (continued from page 11)

the court compels arbitration but does not dismiss the underlying suit, the losing party may not appeal the order granting arbitration. Thus, depending on your position in the suit, you will either want to ensure that the order granting arbitration does not dismiss the underlying suit (if you do not want the order immediately appealable) or that it does dismiss the underlying suit (if you want to immediately appeal the order).

The inability to appeal an arbitration award (the award itself can only be modified to correct clerical or computational errors) can make for unfortunate results when arbitrators make mistakes or do not have sufficient expertise in the subject matter. The trusts and estates area is one that is particularly rife for mistakes of law given the special rules involved. While a probate judge has specific expertise in the area; if the matter is determined by someone without such specific expertise, mistakes of law can occur. Arbitration rulings also can be wildly different from, and inconsistent with, cases decided by courts. And, because there is no review, there is no way to correct erroneous decisions. Texas law and the Federal Arbitration Act (“FAA”) rules (9 U.S.C. § 1 et seq) specifically provide that no appellate review will be allowed for mistakes of law or fact by arbitrators, even clear or gross errors (Universal Comp. Sys., Inc. v. Dealer Solutions, 2005). In limited situations, however, there is the ability to file a court action seeking to vacate the award, but the grounds for doing so are very narrow as discussed in Section VI, L. 2. below.

VI. 14 Questions to Ask and Answer When Drafting an Arbitration Clause

The AAA publishes a resource entitled, “The Top 10 Ways to Make Arbitration Faster and More Cost Effective” in which the first item discussed is “Pay Attention to Your Arbitration Clause” (Murphy and Johnson, 2013). The following arbitration provision was included in a trust agreement that was at issue in a lawsuit which one of the authors handled:

The trustee may originate a proceeding (including mediation and binding arbitration) to construe this trust instrument, and to resolve all matters pertaining to disputed issues or controverted claims. Settlor does not want to burden this trust with the cost of a litigated proceeding to resolve questions of law or fact.

We include this provision in this paper for the finite purpose of illustrating the authors’ belief that the content of an arbitration provision needs to be more than boilerplate. Moreover, the authors believe that the aforementioned arbitration provision illustrates the need for an estate planning attorney to answer the first five questions set forth below when he or she is deciding to incorporate an arbitration provision into an estate planning document for a client.

A. Is the Subject Matter Arbitrable?

There are two types of estate and trust disputes: (1) contests over the validity of the instrument itself on the basis of lack of capacity, undue influence, fraud, or duress; and (2) the interpretation or application of the instrument’s terms and provisions.

Therefore, the question under Texas law becomes whether there is a written agreement to arbitrate, or whether there is mutual assent. In the case where a beneficiary has not accepted benefits from an estate or trust nor attempted to enforce such beneficiary’s rights under the instrument (direct benefit theory), but instead seeks to have the instrument set aside on the basis of lack of capacity, undue influence, duress, or fraud, it is unlikely that the Texas courts will enforce an arbitration clause because there is not mutual assent. In other words, the beneficiary is not estopped from making the claim on the basis that the beneficiary has received some benefit under the instrument (e.g., receipt of assets or enforcement of the beneficiary’s rights). A 2014 California case (citing Rachal) succinctly analyzes whether a contest attempts to enforce any aspect of the instrument as follows:

And a beneficiary is also free to challenge the validity of a trust: conduct that is incompatible with the idea that she has consented to the instrument. Thus, beneficiaries have the opportunity to opt out of the arrangement proposed by the settlor and consequently to not be bound by the arbitration provision” (McArthur v. McArthur, 2014).

The Texas Supreme Court has held that whether there is a valid or existing contract for arbitration is an issue that must be decided first. The issue of settlor or testator capacity must be decided by a court to determine whether there is a valid contract requiring arbitration that can be enforced.

At the outset, the attorney must decide if the potential dispute for which he or she would likely require arbitration is in personam or in rem. As discussed above, an estate administration proceeding is in rem, and as such, binds all persons having notice, whether or not they actually participate in the proceeding, though this interpretation may not hold in the arbitration context (TEX. EST. CODE § 32.001(d)).

B. Which Arbitration Rules Apply?

The AAA has its Wills and Trusts Arbitration Rules and Mediation Procedures, a 45-page document available on the internet. It can give you guidance as to how to proceed. The first issue is to determine whether the arbitration is governed by the TAA or another act. If it is an arbitration provision in a Texas trust or will which does not incorporate some other arbitration procedure, one can assume it is arbitrated in conjunction with the TAA.

If not mandated by the agreement, the parties can agree to arbi-
rate according to the rules of a particular administrative organization such as the AAA or JAMS (formerly Judicial Arbitration and Mediation Services). While a bit more expensive, it veritably can make the process more streamlined and provide clearer rules.

C. How Many Arbitrators Will Be Used?

One of the first issues to resolve is whether you pick one arbitrator or some other number, assuming it is not in the arbitration provision itself. Logically, odd is the correct source of number so that you have a tie-breaker. Many practitioners believe that three is the optimum number; however, requiring three arbitrators can add to the cost and extend the length of the process. One arbitrator’s schedule is easier to manage than trying to schedule three arbitrators, the parties, and the parties’ attorneys. If you choose to require a single arbitrator, and the arbitrator takes the wrong approach, misunderstands the facts, or gets sidetracked, you may be stuck with an unfortunate ruling. Three minds working together does not guarantee that they get it right, but it makes it more likely.

Absent a requirement or agreement on the number of arbitrators, the rules of the AAA require a three-person panel for claims of $1,000,000 or more and a single arbitrator for claims of less than that amount; subject, however, to a financial hardship exception. In contrast, under JAMS’s Comprehensive Arbitration Rules & Procedures, there will be a single arbitrator unless the parties agree otherwise.

D. What Qualifications Should the Arbitrator(s) Have?

As discussed above, the authors recommend including specific requirements for the arbitrator(s). The AAA arbitration clause provides that the arbitrator will be a practicing lawyer in the state at issue who has primarily practiced in the area of wills and trusts for at least ten years. Some commentators have suggested that the arbitrator might be someone who is a member of the American College of Trust and Estate Counsel or Board Certified in Estate Planning & Probate Law by the Texas Board of Legal Specialization. Both descriptions probably lead to estate planners.

Consider whether you want the arbitrator to be involved in a daily trusts and estates practice. An estate planner might be ideal in some situations, especially highly complicated trusts constructions, or even accounting issues. In contrast, a seasoned lawyer with experience in fiduciary or other estates and trusts litigation might be better in certain cases. Someone with actual trial experience could be an even better choice.

Sometimes, describing the qualifications of the arbitrator leads to the naming of the estate planner as the arbitrator. While that sounds good because the planner might be knowledgeable about the settlor’s intent, it raises a number of problems, such as being defensive about the language or the construction; being biased towards the fiduciary or certain beneficiaries; or worse, being another victim of someone’s undue influence. Certain provisions—arbitration, exculpation, forfeiture clauses—are often tools used by the undue influencer to insulate themselves or solidify their power in connection with the trust or estate. What happens if the estate planner does not pick up on these motives in the estate planning process? In such a case, arbitrating with a planner who has worked with one of the beneficiaries and/or the trustee(s) in the creation of the plan (such as a son helping his father in the estate planning process) could easily bias the planner in his or her role as the arbitrator (thereby leading to potentially more litigation and increased cost - as one of the litigants tries to disqualify the arbitrator).

E. How Should the Arbitrator Be Selected?

The arbitration provision should provide a method for arbitrator selection. Absent agreement on this issue, the selected rules will govern. Under a typical method, the administering organization provides the parties with a slate of candidates from a roster or panel of arbitrators maintained by the organization, the parties strike candidates they deem objectionable and number the remaining candidates based on preference. The organization then selects the arbitrator most preferred by both parties from among the candidates not stricken.

After arbitrator selection, under the rules of most administering organizations, the arbitrator must disclose information that might give rise to a justifiable doubt about the arbitrator’s impartiality or independence, including information about relationships to the parties and counsel. The parties then have an opportunity to object to the selected arbitrator based on the disclosed information.

An arbitration provision in an estate planning document, if appropriate, could specifically permit the parties to question arbitrator

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candidates as a part of the arbitrator selection process. Thus, the parties have the ability to hand-select the temperament or other qualities of the arbitrator that would be beneficial to their type of case.

**F. Where Should the Arbitration Occur and What Law Should Govern?**

When drafting an arbitration clause, the general rule is to make the arbitration convenient for your client. Determining convenience for the potential parties in an estate planning dispute can be difficult. You may know where the initial trustee is located, but that location may change over time or a different trustee may be in place when a dispute arises. Similarly, if you are seeking to assist the beneficiaries, you may know their current location, but again, the location may change over time. Therefore, it may be prudent to include language requiring arbitration in the location in which the preferred party is a resident.

The governing law of the instrument generally should govern the arbitration proceeding. If you desire to change that law for some reason, be sure that you specify what other law should govern.

**G. What Will the Scope of the Arbitration Be?**

What issues will be addressed in arbitration? Will it be a documents-only hearing or will testimony be permitted? Will there be a timeframe imposed on the proceedings?

**H. What Remedies Will Be Permitted?**

The remedy sought may differ depending on the context. Consider whether you want the arbitrator to be able to offer legal or equitable remedies or both. The desired remedies will vary depending on the document in which the arbitration clause is included. For example, your client may want to be able to offer specific performance (for example, the instruction that a trustee should or should not do something), damages (if the complaining party has been financially harmed), and the recovery of attorneys’ fees. The arbitration clause you include should address what remedies will be available.

**I. Will the Arbitration Be Confidential?**

As discussed above, clients often seek arbitration to preserve privacy and offer confidentiality. Arbitration proceedings are not necessarily “confidential” just because arbitration proceedings are not public. If confidentiality is what your client seeks, make sure you state it clearly in the provision you draft.

**J. Will Emergency Relief Be Available?**

If the transaction at issue involves any measure of timeliness, you should include reference to what, if any, emergency interim relief (as with court hearings, arbitration proceedings take time to arrange) will be made available such as the AAA’s Option Rules for Emergency Measures of Protection.

**K. Will the Arbitrator Prepare an Opinion to Accompany the Award?**

In some cases, you may want the arbitrator to prepare a written opinion to accompany the award. If the arbitration will be appealable (discussed below), it would be wise to require such an opinion. If the arbitration will not be appealable, then it generally will not be as important to have a written opinion. However, if the arbitration is to produce a course of action to be followed or some other set of rules for moving forward, you may want some or all of the award in written form.

**L. Will Arbitration Be Binding, or Can the Award Be Appealed?**

**1. Binding Versus Non-binding Arbitration**

In non-binding arbitration, the arbitrator still makes a decision on the outcome of the dispute, but this decision is not binding, and no enforceable award is issued. Each disputing party is at liberty to reject the arbitrator’s decision and instead head to the courthouse to settle the matter (TEX. CIV. PRAC. & REM. CODE § 154.027).

Non-binding arbitration is best for less complex disputes or cases where parties simply require an independent decision maker. Likewise, non-binding arbitration may be useful in very limited cases to solve a discreet issue or provide guidelines for a non-contentious relationship that might otherwise not be possible if the parties are involved in a lawsuit. Although non-binding arbitration is often used in the high-dollar commercial context to help parties assess their strengths and weaknesses in a potential court proceeding or achieve the goal of reaching a mutually acceptable settlement, non-binding arbitration is not advisable in most trust and estate contexts. Many drafters include provisions for independent decision makers or tie-breakers in their documents. Moreover, if arbitration is not binding, the parties incur the cost of arbitration without the certainty most parties desire.

In binding arbitration, disputing parties waive their right to a trial and agree that they will be bound by the arbitrator’s final decision. Binding arbitration is more commonly used in the trusts and estates context where the parties need to determinatively resolve a conflict in order to achieve or expedite an outcome.

“In binding arbitration, disputing parties waive their right to a trial and agree that they will be bound by the arbitrator’s final decision. Binding arbitration is more commonly used in the trusts and estates context where the parties need to determinatively resolve a conflict in order to achieve or expedite an outcome.”

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ment as a manner of validating and upholding arbitration as a trusted alternative to litigation.

Because of the lack of appeals process, some parties who lose at arbitration may be tempted to find another way around the award and want to file a court action seeking to annul or vacate the award. Doing so, however, can bear additional financial risk. The Seventh Circuit recently cautioned: “[C]hallenges to commercial arbitration awards bear a high risk of sanction” (Johnson Controls, Inc. v. Edman Controls, Inc., 2013).

Whereas the grounds for setting aside arbitration awards are exceedingly narrow under the FAA and the TAA, most court actions seeking vacature fail. A recent opinion from the United States Court of Appeals for the Fifth Circuit illustrates how difficult it is for a non-prevailing party to overturn an unfavorable arbitration award at the courthouse. In its opinion, the Fifth Circuit found that a federal district court committed error when it substituted its judgment for that of the arbitrators merely because it would have reached a different decision (Campbell v. Hill, 2015). The Fifth Circuit reiterated that a court's decision to confirm or vacate an arbitration award is reviewed de novo, but, such review “is extraordinarily narrow” and “[e]very reasonable presumption must be indulged to uphold the arbitrator’s decision” (Forest Oil Corp. v. El Rucio, 2014). Additionally, as mentioned above, under Texas law, review of an arbitration award is so limited that an award may not be vacated even if there is a mistake of fact or law (Universal Comp. Sys. v. Dealer Solutions, 2005).

The TAA provides a list of enumerated grounds to vacate an arbitration award. In pertinent part, the TAA states that an arbitration award can only be vacated by a court if there is evidence of one or more of the following:

- the award was obtained by corruption, fraud, or other undue means;
- the rights of a party were prejudiced by evident partiality by an arbitrator appointed as a neutral arbitrator;
- the arbitrator committed misconduct or willful misbehavior;
- the arbitrators exceeded their powers;
- the arbitrators refused to postpone the hearing after a showing of sufficient cause for postponement;
- the arbitrators refused to hear evidence material to the controversy;
- the arbitrators conducted the hearing, contrary to various statutory provisions, in a manner that substantially prejudiced the rights of a party; or
- there was no agreement to arbitrate, the issue was not adversely determined in a proceeding, and the party did not participate in the arbitration hearing without raising the objection (TEX. CIV. PRAC. & REM CODE § 171).

In 2016, the Texas Supreme Court addressed whether or not a party can vacate an arbitration award under the TAA not based on any of the grounds enumerated in the statute, rather by invoking extra-statutory, common-law vacatur grounds. The case involved a trust dispute between a mother and her two sons. The parties entered into a settlement agreement requiring mediation for disputes about performance, and if mediation was unsuccessful, by binding arbitration. Several years after the settlement agreement was executed, a performance dispute arose and the parties went to arbitration. The arbitrator dismissed, without hearing, claims brought by one of the sons.

The losing son sought to vacate the arbitrator’s award because the arbitrator manifestly disregarded the law (even though this is not a ground for vacatur under the TAA). The Trial Court confirmed the arbitration award, and the losing son appealed the trial court’s ruling. The Fourth District Court of Appeals in San Antonio affirmed the Trial Court’s confirmation of the arbitration award. Specifically, the Court of Appeals held that the TAA’s enumerated vacature grounds are exclusive (it did not consider the merits of the manifest disregard arguments) and rejected appellant’s argument that he was deprived of his statutory hearing rights. Appellant then petitioned the Texas Supreme Court for review, which was granted for the stated purpose of resolving “a split in the courts of appeals on whether the TAA permits vacatur of an arbitration award on common law grounds not enumerated in the statute [the TAA].” In a majority opinion, the Texas Supreme Court affirmed the Court of Appeals’s ruling by holding that the TAA’s enumerated vacature grounds are exclusive (Hoskins v. Hoskins, 2016).

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It is important to mention that the arbitration provision you draft can determine whether or not the award can be appealed. The AAA offers such clauses online via ClauseBuilder® which may be found at www.clausebuilder.org/cb/faces/index.

M. How do I Enforce an Award?

If an arbitration claimant obtains an award that grants monetary damages and the other side does not properly pay (the award will likely require payment by a certain date), the claimant’s remedy is to file an action in court seeking confirmation of the award. A court order or judgment confirming an arbitration award is enforceable in the same manner that any other judgment is enforceable.

N. What Should I Do to Keep a Disgruntled Beneficiary from Defeating the Arbitration Clause?

Under Rachal, one answer seems obvious. If your client is likely to make a claim, plan to make it before accepting any benefits or acknowledging the validity of the estate planning document; note that this likely is easier with a trust than a will. That said, be assured that there will be fights about what constitutes acceptance of benefits. For example, what if your client was to receive mandated distributions, had not received them, and sued to enforce them?

If your client has not accepted the actual benefits your client was supposed to receive, your client has to accept the right to receive those benefits in order to enforce them. That is really the deciding factor in Rachal. In this context, for the acceptance of benefits to apply, it does not seem that a beneficiary would have to receive the assets, one merely has to have accepted the trust. In other words, it is one’s entitled benefit that one is seeking to enforce that manifests acceptance of the trust.

Finally, there is an exception to the acceptance of benefits doctrine where one is not estopped if he or she returns that which was accepted.

VI. We Have a Valid Arbitration Provision, Now What?

Once the rules are set (hopefully by a well-drafted arbitration provision), arbitrator selection is of utmost importance. Ideally, you want: an arbitrator with subject matter expertise; an arbitrator whose professional background and experience suggest that the arbitrator will be fairly receptive to your client’s claim or defense; and, an arbitrator unburdened by relationships to the opposing party or opposing counsel that might fairly call the arbitrator’s neutrality into question. Investigate the candidates. Check their websites. Use a search engine. Check social media sites such as Facebook. Ask the other lawyers in your office and any colleagues who regularly arbitrate if they know or know of the candidates. Some administering organizations, including the AAA, may allow the parties to submit written questions to the candidates or to conduct telephone interviews of the candidates (with counsel for both parties being on the call).

VII. Arbitration Clauses in Settlement Agreements

Settlement agreements are highly favored by Texas courts. The main object of any settlement is a termination of all, or at least a part, of litigation—both pending and contemplated. If you must sue to enforce a settlement agreement, the objective of the settlement (i.e., the termination of litigation) has not been achieved.

A settlement agreement will not be set aside because of ordinary mistake of law or fact if all parties had the same knowledge provided there is no fraud, misrepresentation, concealment or other inequitable conduct (Crosley v. Staley, 1999). Thus, a party’s unilateral mistake of law is not grounds to avoid the settlement agreement (id. at 796).

A settlement agreement is subject to the laws of contracts. So, the lack of an essential contractual element (which is a question of law for the court to decide) (Montanaro v. Montanaro, 1997) will prevent its enforceability (Stewart v. Mathes, 1975) In doing so, the court may consider evidence of the facts and circumstances surrounding the execution of the settlement agreement (id. at 428, 430). When the evidence shows that the parties intended to enter into a settlement agreement, courts must enforce the agreement (id.). In reaching its determination, the court will decide whether all the essential terms were included in the settlement agreement and all conditions precedent to the enforcement of the agreement have occurred.

Additionally, if the settlement agreement is ambiguous to the extent that it creates an unresolved issue of fact, the party challenging the agreement may be entitled to a jury trial on any unresolved fact issue. Consider the case in which a term sheet created at mediation and signed by all parties was an enforceable settlement agreement (Martin v. Black, 1995). The term sheet provided that “the parties’ understandings are subject to securing documentation satisfactory to the parties” (id. at 194). The court held that a question of fact existed regarding whether the parties intended the execution of formal documentation to be a condition precedent to the formation of a contract or a memorialization of an existing contract (id.). When no fact issue exists, however, the court may find as a matter of law that the agreement is enforceable notwithstanding the fact that the agreement contemplated circulation of final settlement documentation (Hardman v. Dault, 1999).

When “the settlement dispute arises while the trial court has jurisdiction over the underlying action, a claim to enforce the settlement agreement should, if possible, be asserted in that court under the original cause number” (Mantas v. Fifth Court of Appeals, 1996). However, when the dispute arises while the underlying action is on appeal, the party seeking enforcement must file a separate breach of contract action (id. at 659). The inclusion of a carefully drafted arbitration clause/provision in a settlement agreement can go a long way towards terminating the litigation that the agree-
Arbitration Clauses (continued from page 16)

m ent intends to settle; however, the agreement should also include a series of binding representations for the parties to the agreement.

For purposes of minimizing, and hopefully completely eliminating, the success rate of any attempts by the opposing party(ies) to repudiate the agreement after it is signed, the authors recommend the inclusion of the following representations within the agreement:

- That each party to the settlement agreement has knowledge of all relevant and material information and facts about the case and the underlying evidence;
- That each party has been fully informed, including by advice of counsel, concerning the existence of potential claims of any other party including additional affirmative or defensive claims arising from all matters known to the party and arising during the period of negotiations leading to and culminating in the execution by the parties of the agreement in order for each party to make an informed and considered decision to enter into the agreement;
- That each party, after receiving advice of counsel, is waiving any right to demand or obtain further information and/or documents;
- That each party, after receiving advice of counsel, is waiving any obligation of any other party that is not specifically stated in the agreement;
- That each party acknowledges that he or she is not in a significantly disparate bargaining position with regard to any other party to the agreement;
- That each party intends to enter into a settlement agreement, and that all intended, agreed upon and essential terms of settlement are recited in the agreement;
- That each party represents that the terms of the settlement agreement are not in any way ambiguous;
- That each party intends for the agreement to be a binding settlement agreement under Texas law for the purpose terminating the litigation which is presently pending between them that the agreement concerns;
- That in executing the agreement, each party represents that he or she has relied upon his or her own judgment and the advice of his or her own attorneys, and further, that he or she has not been induced to sign or execute the agreement by promises, agreements or representations not expressly stated herein, and he or she has freely and willingly executed this agreement and expressly disclaims reliance upon any facts, promises, undertakings or representations made by any other party to the agreement; and
- That each party represents that his or her consent to the agreement was not procured, obtained or induced by improper conduct, undue influence or duress.

VIII. Arbitration Provisions in Other Documents

Arbitration provisions may arise under other documents not previously discussed. The question then becomes whom does the document containing the arbitration provision bind? Consider the case of beneficiaries suing a trustee and trust advisor for breach of fiduciary duty. In one such case, the trustee and trust advisor attempted to force the trust beneficiaries to arbitration based on an arbitration clause in the wealth-management agreement between the trustee and trust advisor. The court, applying the direct benefits estoppel theory, found that the agreement did not bind the trust beneficiaries because the beneficiaries were asserting their rights under the trust agreement and not under the wealth-management agreement (Pinnacle Trust Co. v. McTaggart, 2014). The case underscores the need for an analysis of where an arbitration clause appears and under what theory beneficiaries are asserting their rights. ■

(Works Cited on page 17)
Arbitration Clauses (continued from page 17)

DRAFTING & ENFORCING ARBITRATION CLAUSES
IN WILLS, TRUSTS & SETTLEMENT AGREEMENTS

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