# MEDIATION ARBITRATION AND SETTLEMENT

Disputes Are Best Solved In The Livingroom, Not The Courtroom: practical ideas for avoiding the long, expensive slog through the judicial process.

By

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# Mediation

Mediation is addressed in a series of court rules contained in the Florida Rules of Civil Procedure beginning with Rule 1.700 and ending with Rule 1.730 and in chapter 44, Florida Statutes. These rules and law cover a variety of topics including the authority to refer a case for mediation, the appointment and disqualification of mediators, and the procedure for conducting the mediation, and the mediator's immunity.

Mediation and mediated settlements are darlings of the judiciary and are required in most trust and estate proceedings throughout Florida. Mediation agreements are typically upheld against any attack. And, the rules of confidentiality that are the hallmark of mediations are enforced to the extreme by courts throughout Florida. *See Paranzino v. Barnett Bank of South Florida*, 690 So. 2d 725 (Fla. 4th DCA 1997); *Mocombe v. Russell Life Skills and Reading Foundation*, 2014 WL 11531569 (S.D. Fla. October 7, 2014); §§44.405, 44.406, Fla. Stat.

As counsel you play a crucial role in mediation, starting with fully understanding the process, fully preparing clients and other participants for the process, carefully choosing a mediator, addressing practical problems that occur in mediation, and avoiding a badly drafted settlement agreement. Also, you must consider the team of professionals you need to reach an appropriate resolution of the case. I am not a tax maven, so I bring one.

It is critical that the parties actually attend the mediation in person or have someone present with truly full authority to settle. Curiously, this fundamental point and the confidential nature of mediation seem to be ignored from time to time, resulting in sanctions. *See* Fla. R. Civ. Pr. 1.720 (b), (c) (f) (appearance and sanctions for failing to appear); *Carden & Associates v. C.O.D. Trees Partnership*, 83 So. 3d 862 (Fla. 5th DCA 2012); *Mash v. Lugo*, 49 So. 3d 829 (Fla. 5th DCA 2010); §§44.405, 44.406, Fla. Stat. (confidentiality and sanctions for breaching confidentiality).

More and more, lawyers are agreeing to mediate cases in anticipation of court-ordered mediation. There is a procedural mechanism for stipulating to a court ordered-mediation, but no real procedural guidance to mediation purely by agreement. Section 44.402, Florida Statutes, now embraces mediations by agreement, but I have not seen a rule doing the same thing, which may matter. *See Massey v. David*, 979 So. 2d 931 (Fla. 2008) (mediation is procedural and subject to the Supreme Court's rulemaking authority). As a mediator, my biggest concern with these mediations involves confidentiality, immunity, and mediator fees and expenses. I prefer that the parties get a court order, placing them squarely within the ambit of Florida law on mediations, but, absent that, I have used the form of agreement below:

## MEDIATION AGREEMENT

The undersigned agree to the following process for mediating issues between them related to _____.

1. The mediation shall be confidential and sections 44.405 and 44.406, Florida Statutes, shall govern the confidentiality of this mediation as though the mediation was court ordered. Rules 1.700, et. Seq. shall govern the mediation process.
2. Robert W. Goldman, Esquire, shall be the mediator and shall be paid by the parties to the mediation at the rate of $600/hour, plus reasonable costs. The mediator shall have the same immunity as any mediator would have under Florida law in a court-ordered mediation.
3. The parties agree to conduct these proceedings in good faith.

_____
Dated:

_____
Dated:

A mediated settlement is enforceable only if it's in writing and signed by the parties and their counsel, if any. Fla. R. Civ. Pr. 1.730(b). Although most good settlement agreements address enforcement of the agreement and possible sanctions for not performing, rule 1.730(c), Florida Rules of Civil Procedure, also addresses the issue: "In the event of any breach or failure to perform under the agreement, the court upon motion may impose sanctions, including costs, attorneys' fees, or other appropriate remedies including entry of judgment on the agreement."

## Mediated Settlement Agreements

Simple Agreement or War and Peace

In my experience mediations can last for hours, days, and months. Typically, the important, substantive points were "settled" within several hours. Then, despite my best efforts to have the lawyers reduce these points to writing and have the parties and counsel sign the agreement, the lawyers get sucked into the siren song of their professional training, which navigates them on to the jagged rocks of detail-skirmish, often times snatching impasse from the jaws of settlement.

I am not pretending here to know what is the correct method, but I have settled cases using a 1 and 1/2-page agreement, to be followed by copious lawyering to address the finer details of releases and transferring property. And, these agreements have been upheld in court, after ugly litigation. One looked something like this:

MEDIATED SETTLEMENT AGREEMENT

Tax-Free Split-Off. A tax-free split-off for the _____beneficiaries, their spouses, and the _____beneficiaries ("Protectorate"), as approved by the Internal Revenue Service through a Private Letter Ruling, shall be accomplished through one or more newly formed subsidiary corporations. The split-off will include an exchange of all of the voting shares and non-voting shares of _____, Inc. (the "Company") held by the _____beneficiaries, the _____ Family Limited Partnership, and the _____Trust ("Trust"), as well as the shares owned by the _____beneficiaries held within the Trust.

I. Tax-free split-off.

On May ____, 2001, there shall be a tax-free split-off of assets representing the relative fair value of the Protectorate interests in the trust and outside the trust. The shares of the Protectorate shall be redeemed.

The preferred stock (_____ shares) shall be redeemed for cash:$_____. This is not included as part of the percentage calculation of the total company assets.

The assets for this tax free split-off are:

A. _____Stock All _____ shares.

B. Ranch Property - All of _____ Ranch.

C. Cattle - The Company shall transfer to the New Subsidiaries all of the brood cows and bulls existing on _____ Ranch, consistent with the past stocking rate. The total cattle to be transferred are _____ head.

D. Liabilities – Assume $_____ of liabilities.

II. Attorneys' fees and costs.

Each party in the pending lawsuit shall bear his or its own attorneys' fees and costs. Neither the Trust nor the Company shall pay any of the attorneys' fees or costs, unless the parties unanimously agree otherwise

III. Enforcement of settlement.

Venue for enforcement of this agreement shall be in _____ County, Florida. In any action brought to enforce this agreement the prevailing party shall be entitled to recover reasonable attorneys' fees and costs for trial, appeal, mediation and arbitration, in an amount to be determined by_____.

IV. Releases.

Upon court approval of this settlement (after an *in camera* inspection of this confidential agreement), voluntary dismissal of the suit, and court approval of the termination of the Trust, mutual general releases (excluding enforcement of the agreement) shall be exchanged by _____ and each member of the Protectorate.

V. Miscellaneous.

_____ shall draft the petition to approve the settlement or address the court *ore tenus*, but with all parties represented. All parties shall act reasonably and in good faith to execute any documents necessary to this settlement process and to effectuate the settlement. Among the findings of the court requested by the parties shall be:

1. All trust beneficiaries are represented actually or virtually (by persons with the same or greater interests);

2. Because it is in the best interest of the beneficiaries and based on material information [settlor] could not have known at the time he created the trust, the trust shall be terminated, effective May 1, 2001; and

3. The settlement is in the best interests of the parties to the action.

Executed this _____day of _____, 2001.

_____

_____

_____
Counsel to _____

_____
Counsel to _____

Standard Clauses

I know that no matter how hard I try, you will hunker down with your fellow lawyers in mediation and work through the night(s), eschewing the cries from the spouse and kiddies, greeting the night and morning office-cleaning staffs and security, munching on stale pizza and slurping mud-like coffee. Below are a few standard clauses you may wish to have on a checklist so your sleep-deprived, malnourished self does not make a mistake.

- Upon Court approval of this settlement and within 10 days of the _____, case no. _____, including the defendants' counterclaim, shall be voluntarily dismissed with prejudice.

- If provisions of this Agreement require interpretation or construction, there shall not be any presumption in favor or against any particular one of the parties based upon that person's participation (including by counsel) in the drafting of this agreement. Each party acknowledges having carefully read the provisions of this agreement and confirms understanding its provisions and having an adequate opportunity to consult with counsel.

- If it is necessary for any of the parties to take action to enforce the terms of the agreements set forth in this instrument, the parties agree that the prevailing party shall be entitled to recovery of attorneys' fees and costs (including the attorneys' fees and costs of any appeal). This provision is in addition to any other enforcement provisions and remedies under Florida law.

- Florida law shall govern all aspects of this agreement [regardless of the jurisdiction in which the agreement is construed or enforced] [and all proceedings for the enforcement of this agreement shall be commenced and resolved in _____County, Florida.

- The parties acknowledge that this is a settlement of hard-fought litigation, each arty had counsel appear in the litigation and each party was represented by counsel in connection with this settlement. This settlement is not based on any representation of another party [or this settlement is based on the following representations by the following persons].

- This Agreement shall be binding upon, and shall inure to the benefit of the parties and their respective successors, assigns, heirs and representatives. This agreement sets forth the entire agreement and understanding of the parties. Further, the parties acknowledge that by their execution of this agreement they virtually represent and bind all descendants, minor and unborn issue of the parties or under the _____estate plan.

Releases

Releases are extremely important and tedious, and are never standard at least as to who or what is releasing and being released, and exclusions to the releases, if any. Typically, enforcement of the terms of the settlement agreement will be excluded from the release. DO NOT FORGET THAT EXCLUSION! Below is a sample:

GENERAL RELEASE

For and in consideration of the sum of in excess of TEN MILLION DOLLARS ($10,000,000) and other valuable considerations, received from or on behalf of _____, individually, as a general and limited partner of the _____ Family Limited Partnership dated _____2015, and as cotrustee of the _____ Trust, dated _____, ("releasee"), the receipt whereof is hereby acknowledged, _____, individually, as a general and limited partner of the _____ Family Limited Partnership dated_____2015, and as cotrustee of the _____Trust, dated _____-("releasor"), *except for the agreement dated*_____*and enforcement of it*, voluntarily and knowingly releases and forever discharges releasee, for, and from all manner of known or unknown, matured or unmatured, obligation or liability, including without limitation, actions, causes of action, theories of recovery, liability, fault, suits, indemnity, contribution, subrogation or other third-party claims by any person, debts, controversies, agreements, promises, damages, judgments, executions, claims and demands whatsoever, in law or in equity, which releasor ever had, now has or could have or allege, or hereafter can, shall or may have against releasee, the _____ Family Limited Partnership _____2015,and the _____Trust, dated _____, upon or by reason of any matter, arising from_____, and all claims made therein, or which could have been made therein. In

addition, releasor voluntarily and knowingly hereby releases and forever discharges releasee , for, and from all manner of known or unknown, matured or unmatured, obligation or liability including without limitation actions, causes of action, theories of recovery, liability, fault, suits, indemnity, contribution, subrogation or other third-party claims by any person, debts, controversies, agreements, promises, damages, judgments, executions, claims and demands whatsoever, in law or in equity, which releasor ever had, now has or could have or allege, or hereafter can, shall or may have in the future, against releasee, the _____ Family Limited Partnership dated _____2015, and the_____Trust, dated_____, for, upon or by reason of any matter or thing whatsoever, from the beginning of the world to the day of these presents.

This release is given with full knowledge that the releasor is receiving adequate and good consideration and that the releasor has the benefit of advice of legal counsel, and with the knowledge that the releasee intends to rely on this release. Further, after advice of counsel, the releasor understands and agrees that this release is intended to be the broadest possible release permitted by law and should be liberally construed in favor of the releasee. In addition to releasing _____ from all possible individual liability, this release is intended to extinguish all interests that the releasor had or may have had in the _____ Family Limited Partnership dated _____2015, and the _____Trust, dated _____.

Releasor represents and warrants that no claims which she has or might have had against releasee arising out of or concerning the subject matter of this release have been assigned or transferred to any other person or entity, and releasor agrees to indemnify and hold harmless releasee from any and all liability, attorneys' fees, costs, or expense resulting from the assignment or transfer of any such claims.

Releasor warrants that no promise or inducement has been offered except as herein set forth; that this release is executed without reliance on any statement or representation by the releasee or other representatives concerning the nature and extent of the claims and the damages or the legal liability therefore; that she is competent to execute this release and accept full responsibility therefore; and she hereby acknowledges that this release evidences the settlement of claims disputed both as to liability and as to amount and that the consideration set forth above shall not be construed as an admission of liability, as the same is now and always has been expressly denied by releasee.

This release was negotiated and delivered within the State of Florida and shall be governed by Florida law.

Wherever used herein the terms ``releasor'' and ``releasee'' shall include all agents, heirs, representatives, employees, executors, officers, directors, subsidiaries, successors, assigns, insurers, sureties, indemnitors and guarantors, and the singular includes the plural and the plural includes the singular.

IN WITNESS WHEREOF, I have set my hand and seal this _____ day of _____, 2016.

_____ Releasor
Witness

_____
_____, individually, as a general and limited partner of the _____ Family Limited Partnership dated _____2015, an as co-trustee of the _____Trust, dated _____.

_____
Witness

STATE OF FLORIDA
COUNTY OF

The foregoing instrument was acknowledged before me this _____ day of January, 2018, by _____, who ☐ is personally known to me or ☐ has produced a driver's license as identification, and who did take an oath.

NOTARY PUBLIC:

Sign _____

Print _____
State of FLORIDA at Large
My commission expires:

## DANGER CASES

*Moriber v. Dreiling*, 194 So. 3d 369 (Fla. 3d DCA 2016).

This fraudulent reliance case involves an underlying extremely complicated family estate plan and business and fiduciary relationships between the decedent and her daughter. These disputes were ongoing from 1996 through 2000 and, in part involved information being withheld from the daughter, which allegedly impacted her ability to satisfy fiduciary and business obligations and impacted her personal interests in the estate plan.

In 2000, the parties began negotiating and working through several (12) iterations of a written settlement agreement. At all times the parties were represented by counsel.

The resulting settlement included releases and neither the releases nor the body of the settlement required any warranties or representations as conditions of the settlement or as matters on which the parties were relying.

Upon the decedent's subsequent death, the daughter sought her share of the estate, but it did not exist (premiums of certain insurance policies had not been made by her mother and so the daughter's interest lapsed). The complexities involved in how the daughter was duped are no matter; daughter was in litigation, had counsel, and could have continued with her litigation (in part to get the very information that would have exposed her mother's deviousness).

In the hostile environment of litigation among parties, one must not trust the opposing parties and either get satisfied with the information needed to settle, require assurances and build them into the settlement, or carry on the litigation.

It's a cruel world out there. I should note that rehearing was only recently denied and this case may or may not be heading to the Supreme Court. In the Supreme Court some cases are already pending that involve the current state of the law pertaining to issues of reliance and the potential bar to fraudulent reliance claims resulting from lease agreements and other agreements. The pending cases may or may not impact the holdings in this case.

*Gogoleva v. Soffer*, 187 So. 3d 268 (Fla. 3d DCA 2016).

This case teaches and reminds us that releases matter and warrant our very careful attention in the settlement process.

The court recognizes that releases are contracts and are subject to the same rules of construction, including, among others, when parol evidence may be employed to interpret a contract and construing ambiguities against the drafter of the contract.

Without getting into the gory details, the court noted that the release could be read to limit the release of claims to those related to the accident forming the basis of the settlement, not to alleged misrepresentations intended to induce the signing of the releases and could be read to not even apply to bar claims against three of the

defendants. Hence the court reversed dismissal of the fraudulent misrepresentation claims.

This case reached the appellate court on an order dismissing the case below with prejudice. The court correctly warned us that it reviewed the alleged facts (which it had to take as true at this stage) in order to determine whether dismissal below should have been with prejudice or with leave to amend.

*Sugar v. Estate of Stern*, 201 So. 3d 103 (Fla. 3d DCA 2015).

In yet another lesson and warning about releases, this estate settlement between beneficiaries was construed by the appellate court in accordance with contract principles. The court held:

> Second, a written settlement agreement which states that it is "based upon the representations of the parties as of the date of the settlement," but does not (a) incorporate those specific representations into the written agreement, or (b) attach them or refer to separate writings detailing those representations, has no apparent evidentiary foundation in a later attempt to avoid the settlement terms because of alleged misrepresentation. Statements during settlement negotiations concerning liability, the absence of liability, or value, are privileged and inadmissible in subsequent proceedings in the same case.
> …
>
> This is also so because, after the assertion of claims involving dishonesty, the claimant in negotiations culminating in a settlement and release cannot rely on oral representations made by the party already asserted to have been dishonest. *Finn v. Prudential–Bache Sec., Inc.*, 821 F.2d 581, 586 (11th Cir.1987); *Sutton v. Crane*, 101 So.2d 823 (Fla. 2d DCA 1958); *Columbus Hotel Corp. v. Hotel Mgmt. Co.*, 116 Fla. 464, 156 So. 893 (1934). This is as simple as the adage, "fool me once, shame on you; fool me twice, shame on me,"… .

Absent a statute of frauds issue, non-mediated settlements need not be in writing and need not be signed. *See Boyko v. Ilardi*, 613 So. 2d 103 (Fla. 3d DCA

1993). The other procedures required in mediation also do not trump the non-mediated settlement of disputes. *See Hendrick v. Redfearn*, 88 So. 2d 620 (Fla. 1956).

Non-mediated settlements, however, lack the level of confidentiality enjoyed in the mediation process. *See* §90.408, Fla. Stat.; *Agan v. Katzman &* Korr, 328 F. Supp.2d 1363, 1372-73 (S.D. Fla. 2004); *Ritter v. Ritter*, 690 So. 2d 1372 (Fla. 2d DCA 1997); *Rease v. Anheuser-Busch*, 644 So. 2d 1383 (Fla. 1st DCA 1994). Further, non-mediated settlements are more vulnerable to rescission. *Sponga v. Warro*, 698 So. 2d 621 (Fla. 5th DCA 1997); *Leff v. Ecker*, 972 So.2d 965 (Fla. 3d DCA 2007) (holding that where the plaintiff entered into a mediated settlement agreement with a limited knowledge of the relevant facts, the plaintiff bore the risk of mistake).

# Arbitration of T&E Disputes

## INTRODUCTION

No testator or settlor has as his or her goal making his or her attorney the primary beneficiary of his or her estate or trust. 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.

Arbitration, done correctly, may be a way of resolving estate and trust disputes in a more efficient and more predictable way.

"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* (9th Edition).

We have always used arbitration clauses in a limited way in wills and trusts, but now they are in vogue for almost all forms of dispute resolution.

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 19th century disfavored private 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.").

## 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. 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.

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). Some commentators have "thrown the baby out with the bathwater" citing to cases relying on "contract theory" to say arbitration clauses in will and trusts simply will not work. *See Rachal v. Reitz*, 347 S.W.3d 305 (Tx. Ct. App. 2011) (contract analysis under

Texas Arbitration Act), reversed based on conditional gift theory expressed below, *Rachal v. Reitz*, 403 S.W.3d 840 (Tx. 2013); *In re Calomiris*, 894 A.2d 408 (D.C. 2006) (a will is not a contract under Uniform Arbitration Act).

Less controversial is the conditional transfer and acceptance of benefits, which subsumes the intent of the testator/settlor and acceptance of the benefits and appears more firmly entrenched throughout our jurisdictions. *See Pray v. Belt*, 26 U.S. 670, 679-80 (1828); *Howe v. Sands*, 194 So. 798 (Fla. 1940); *Tennant v. Satterfield*, 216 S.E.2d 229, 232 (W. Va. 1975) ("The general rule with regard to acceptance of benefits under a will is that a beneficiary who accepts such benefits is bound to adopt the whole contents of that will and is estopped to challenge its validity. ... Acceptance of a beneficial legacy or transfer is presumed, but the presumption is rebuttable by express rejection of the benefits 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); *Rachal v. Reitz*, 403 S.W.3d 840 (Tx. 2013).

Some commentators appear concerned that this type of conditional gift may create a "terminable interest" that runs afoul of the marital deduction. But, that worry does not appear to be well-founded if the applicable state law clearly permits the arbitration. *See* PLR 129008-10 (2011). To that end, having statutory authority that makes arbitration clauses in wills and trusts enforceable creates a preferred level of certainty. To the extent this type of statute defaults to your jurisdictions general arbitration statutes, note that most of those statutes are drafted as though the parties have or will enter into contractual provisions involving arbitration. Therefore, whether in your specific statute on enforcing arbitration clauses in wills and trusts or in your actual clause, you may wish to treat the parties to arbitration as though they have a contract. For example, section 731.401, Florida Statutes (2014) provides:

> (1) A provision in a will or trust requiring the arbitration of disputes, other than disputes of the validity of all or a part of a will or trust, between or among the beneficiaries and a fiduciary under the will or trust, or any combination of such persons or entities, is enforceable.
> (2) Unless otherwise specified in the will or trust, a will or trust provision requiring arbitration shall be presumed to require binding arbitration under chapter 682, the Revised Florida Arbitration Code. *If an arbitration enforceable under this section is governed under chapter 682, the arbitration provision in the will or trust shall be treated as an agreement for the purposes of applying chapter 682.*

(Emphasis added.).

CONSTITUTIONALITY OF ARBITRATING WILL AND TRUST DISPUTES

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). 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). 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).

Of course a constitutional issue does not arise if there is no "state action." With very limited exceptions, our state and federal constitutions exist to protect the individual from his or her government. If the government has no involvement in a transaction, 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 jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be." For these reasons, if the arbitration is purely a matter of agreement between parties or a condition of a gift, the lack of any "state action" should preclude the implication of a state or federal constitutional question. *See Davis v. Prudential Securities***,** 59 F. 3d 1186, 1190-91 (11th Cir. 1995)

(Constitutional due process protections do not extend to private conduct abridging individual rights.).

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. On the other hand, an arbitration agreement imposing undue procedural impediments or prohibitive cost requirements may be invalid because it denies access to an effective remedy. *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 92 (2000) ("Similarly, we believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively

expensive, that party bears the burden of showing the likelihood of incurring such costs... How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss; for in this case neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point."); *Bradford v. Rockwell Semiconductor Systems, Inc*., 238 F.3d 549 (4th Cir. 2001) (fee-splitting provision in employment agreement requiring employee to share costs of arbitration can render a mandatory arbitration agreement unenforceable where the arbitration fees and costs are so prohibitive as to effectively deny the employee access to the arbitral forum); *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. S*ee 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 (6th Cir. 2002)."); *See Mandl v. Bailey*, 858 A.2d 508, 522 (Ct. Spec. App. 2004) (assuming fair notice and a genuine opportunity to be heard, virtually any procedural rules developed for an arbitration will satisfy due process requirements); *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. Notice and a fair opportunity to be heard should be given to minors and unborn and unascertained persons through their proper representatives.

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.

## LITIGATING OVER THE ARBITRATION CLAUSE

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. Indeed, These were subjects, along with valuation methodology, raised by petition for instructions, decided by the trial court and decided on appeal in *Cleveland Trust Co. v. Manchester*, 128 N.E. 2d 216 (Ct. App. 1955), rehearing was sought and decided in 1956, 139 N.E. 2d 673.

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 for dispute strictly factual issues. 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 investments, 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. And, obviously arbitration clauses in wills and trusts are not binding on third parties such as creditors.

Other issues to consider may involve time bars. For example, should my clause dictate when the arbitration should commence? When it should end? *See Gren v. Gren*, 133 So. 3d 1066 (Fla. 4th DCA 2014). Note, that over two years passed before the preliminary issues involving when an arbitration had to commence and whether waiver of arbitration occurred were resolved in *Gren*. Only now may the parties proceed with a trust construction issue. Also consider whether an arbitration is barred by the same statute of limitation that would bar a proceeding before a judicial tribunal in the same jurisdiction? Should your clause address that issue? *See Raymond James Financial Services v. Phillips*, 126 So. 3d 186 (Fla. 2013)

("proceeding" in statute of limitation was broad enough to cover arbitration). Some states' limitations statutes expressly include the term arbitration. *See* Weintraub, *When Do Statutes of Limitations Apply in Arbitration?,* 81 Fla. Bar J. 25, 25 (2007) (citing New York's and Georgia's statutes of limitation as examples).

As with all aspects of estate planning, arbitration clauses need to be carefully worded. For example, a settlor's "request" that beneficiaries and trustees arbitrate their disputes is precatory and, therefore, arbitration cannot be compelled. *See Archer v. Archer,* 2014 WL 2802735 (Tx. Ct. App., June 17, 2014).

FORM TO PLAY WITH

Below is a draft of arbitration provisions for a trust. The language is designed to stir your creativity; not as something on which you can rely:

19.29 If there is a dispute or controversy of any nature between or among the Trustee and beneficiaries involving any aspect of any trust under this trust agreement or its administration (other than a determination of a person's disability or the validity of the document containing this clause), I direct the parties in dispute to submit the matter to mediation or some other method of alternative dispute resolution selected by them, and if that procedure fails to resolve the dispute, to binding arbitration. Except as otherwise provided in this trust agreement, the parties shall conduct binding arbitration in accordance with Section 731.401 and chapter 682, Florida Statutes, as amended, or successor laws, and the Florida Rules of Court applicable to binding arbitrations, that are not in conflict with this arbitration clause. For the purpose of applying these laws to arbitration under this clause, the parties to arbitration will be treated as though they have an agreement to arbitrate under Florida law.

19.29(a) A beneficiary shall commence an arbitration proceeding by submitting a written notice to the Trustee by ____-delivery, which indicates the nature of the dispute and a list of all persons believed to be interested in the dispute. The Trustee shall serve all interested persons with the notice within 5 days of receipt of it.

19.29(b) A Trustee shall commence an arbitration proceeding by submitting a written notice to all persons interested in the dispute by _____delivery, which indicates the nature of the dispute and a list of those persons believed to be interested in the dispute.

19.29(c) If the parties are unable to agree on the selection of a mediator or arbitrator, the court having jurisdiction over the trust shall, upon application by an interested person and after notice to all other interested persons, select the mediator or arbitrator, who shall be a lawyer with at least 10 years of practice in trust and estate law, unless none is available. There shall be only one mediator and only one arbitrator for each dispute, and the same person may not serve in both roles (although a mediator or arbitrator may mediate or arbitrate more than one dispute). The mediator or arbitrator cannot have any interest or involvement in the dispute.

19.29(d) In any arbitration, hearing venue, discovery, and other procedures shall be in accordance with agreement of the parties, or if they cannot agree, by rules established by the arbitrator, recognizing the goals of privacy, efficiency, obtaining cost savings, and proceeding with less formality than in a judicial tribunal, while reaching a fair result. The Florida Evidence Code shall apply to the proceeding, but affidavits and other means of reducing the cost of authenticating and explaining evidence may be used in the discretion of the arbitrator.

19.29(e) Within 15 days of selection of the arbitrator or appointment of the arbitrator by the court, the arbitrator shall meet with the interested persons to identify the dispute and to establish a discovery schedule, hearing venue, the fee of the arbitrator, and applicable procedural rules. The issues to be resolved, discovery procedures and schedule, hearing venue, arbitrator's fee, and hearing procedures shall be included in a written order served on the interested persons within 5 days of the arbitrator's meeting with interested persons.

19.29(f) The arbitrator's fee and costs (including cost of the hearing venue, if any) shall be paid from the trust estate initially. After the final hearing, the arbitrator may determine whether all or any portion of the arbitrator's fee and costs should be borne by one or more of the persons interested in the arbitration in accordance with Florida law and equitable principles of fairness, except as follows. I direct that no such fees or costs be assessed or charged to any Trustee personally, unless the arbitrator determines in a final order that the Trustee acted or failed to act in bad faith or with reckless indifference to the purposes of the trust or the beneficial interests of the beneficiaries.

19.29(g) Unless good cause is shown, the final hearing shall commence within 120 days of appointment of the arbitrator. The final decision shall be in writing and shall include findings of fact and conclusions of law. The arbitrator shall serve the parties with a copy of the decision within 10 days of the final adjournment of the arbitration proceeding. Within 10 days of service of the decision, the parties may serve on the other parties and the arbitrator 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, the arbitrator shall serve a corrected written decision or advise the interested persons in writing that no corrections were made.

19.29(h) If the arbitrator determines that a guardian ad litem is necessary to represent the interests of unborn, unascertained, or disabled interested persons, one shall be appointed by the arbitrator and confirmed by the court having jurisdiction over the trust either before or upon conclusion of the arbitration. In all other respects, decisions of the arbitrator 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.

19.29(i) Each beneficial interest in each trust under this trust agreement is conditioned on the beneficiary participating in alternative dispute resolution processes in good faith. If a beneficiary refuses to participate in alternative dispute resolution, I authorize the court having jurisdiction over the matter to award costs and attorney's fees from that beneficiary's share. If an arbitration proceeding was commenced in which all the interested persons participated, the arbitrator may determine whether a beneficiary participated in good faith. If the arbitrator determines that the beneficiary did not participate in good faith, it may award attorneys' fees and costs from beneficiary's share.

19.29(j) Each Trustee's acceptance of the Trustee's position constitutes that Trustee's agreement to participate in alternative dispute resolution processes in good faith. If a Trustee refuses to participate in alternative dispute resolution, it shall cease to serve as a Trustee. The court having jurisdiction over the Trustee is authorized to remove that Trustee and surcharge it for costs and attorneys' fees. If an arbitration proceeding was commenced in which all the interested persons participated, the arbitrator may determine whether a Trustee participated in good faith. If the arbitrator determines that the Trustee did not participate in good faith, it may surcharge it for attorneys' fees and costs.

19.29(k) All applicable statutes of limitation, statutes of repose, and other time bars with respect to any dispute or controversy of any nature between or among the Trustee and beneficiaries involving any aspect or the administration of any trust under this trust instrument shall continue to apply and will bar the commencement of an arbitration proceeding if a judicial action or proceeding with respect to that dispute or controversy would be barred.

## WAIVER

However brilliant the arbitration clause is, it is only helpful if enforced. In the context of a conditional transfer, is it waivable? *See FPE Foundation v. Solomon*, 2013 WL 5302502 (D. Mass. 2013).

## CHOICE OF LAW

Prior to *Hancock v. Northport Health Services*, 150 So.3d 1262 (Fla. 5th DCA 2014), I would have guessed that your arbitration clauses could express the substantive law applicable to the arbitrable issue, but the procedural law of the jurisdiction where the case would other be litigated would control. In this case, the Fifth District Court of Appeal held that in accordance with the arbitration clause, the Alabama rules of civil procedure applied to this Florida arbitration proceeding.