CURRENT DEVELOPMENTS IN ALTERNATIVE DISPUTE RESOLUTION FOR PROBATE AND TRUST MATTERS

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Arizona both encourages and compels alternative dispute resolution ("ADR") through statute and case law. Parties to every nature of probate proceeding (guardianship and conservatorships; will contests, will and trust administration disputes, etc.) may be required to participate in some form of ADR, be it mediation, settlement conference or arbitration. Attorneys should understand the different types of ADR and be prepared to counsel their clients regarding how to use the ADR process most effectively.

ADR provisions in trust instruments are now statutorily binding on beneficiaries, so it is important that drafting attorneys take great care in the ADR language used in their documents, so the provision accomplishes what was intended. A poorly drafted ADR provision can create more havoc than the ADR process was designed to prevent.

This presentation will identify current Arizona statutes and case law that apply to ADR, different ADR provisions for different types of probate cases and various issues to be considered in drafting ADR provisions.

I. LEGAL AUTHORITY FOR ADR IN PROBATE AND TRUST MATTERS

A. Statutory Authority

Recently enacted Arizona statutes and recent case law encourage and/or compel ADR in probate and trust matters. In the last few years, Title 14 was expanded to include several statutes and a Probate Rule to empower the Court to compel ADR and to allow an award of fees related to an arbitration.

1. A.R.S. §14-1108.

This statute became effective in January, 2012 and provides that, in a probate proceeding, after initial appointment of the fiduciary, the court may require arbitration of a dispute pursuant to §12-133 (B-K) or order alternative dispute resolution.

2. Rule 29, Arizona Rules of Probate Procedure.

This Rule became effective in January, 2009 and was amended effective February, 2012. It provides that, pursuant to A.R.S. §14-1108, the court may order the parties to participate in ADR. The Rule includes procedures for an ADR proceeding.

3. A.R.S. §14-10205.

This statute also became effective in January, 2009, and had the effect of superseding preexisting case law. In *Schoneberger v. Oelze*, 208 Ariz. 591, 96 P.3d 1078 (Ariz. Ct. App. 2004), the Court of Appeals had held that arbitration clauses in trust instruments could not be enforced against the beneficiaries. Under §14-10205, a trust instrument may provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons or among interested persons with regard to the administration or distribution of the trust.

4. A.R.S. § 14-11004.

This statute also became effective in January, 2009 and empowers the court or arbitrator to award reasonable attorneys' fees and costs to be paid by any other party or the trust.

B. Case Law

Appellate decisions regarding ADR in probate and trust matters reflect the Court's favorable inclination toward ADR. The Court has, however, recognized some limitations on compelling ADR in certain circumstances.

1. Arbitration compelled. In *In re Amended Watson Trust*, 1 CA-CV 10-0432, 2011 WL 1631941 (Ariz. Ct. App. Apr. 28, 2011), the trial court order denying a motion to compel ADR was reversed. The probate proceeding was dismissed and the parties were required to follow an out of court ADR procedure set forth in a separate contract between some of the parties. The contract which contained the ADR provision referenced the subject trust but was not itself mentioned in the trust. The appellate court concluded that the ADR language in the separate contract was clear evidence of the parties' intent to subject all claims arising from both the contract and trust to the ADR procedure. The court also held that the contract and ADR provision were binding on the parties to the contract and on future trustees, successors, and assigns.

2. Arbitration not compelled. *Jones v. Fink* – 1 CA-SA 10-0262, 2011 WL 601598 (Ariz. Ct. App. Feb. 22, 2011), review denied (Mar. 20, 2011). The trial court's order compelling arbitration was reversed and the parties were sent back to court to litigate issues involving an irrevocable life insurance trust ("ILIT"). The original ILIT contained no ADR provisions, but an "integrity agreement" with ADR requirements was executed in conjunction with a second ILIT. The Court found that issues related to the first ILIT were not bound by possible ADR requirements attached to the second ILIT.

The court also recognized that, prior to the enactment of A.R.S. §14-10205, a trustor of an inter vivos trust could not force arbitration on beneficiaries because they were not parties to the will or trust when it was created and did not agree to the provision. See *Schoneberger v. Oelze*, 208 Ariz. 591, 96 P.3d 1078 (Ct. App. 2004). The court held that, to the extent *Schoneberger* required consent as a pre-condition to arbitration, *Schoneberger* had been superseded by statute. However, in the particular circumstances of the case before it, the court recognized that there are limits on the reach of arbitration clauses in certain trusts.

3. ADR May be Waived. Mandatory arbitration may be waived by an express and intentional relinquishment or by conduct that warrants an inference of such an intentional relinquishment. See *In re Estate of Cortez*, 226 Ariz. 207, 245 P.3d 892 (Ct. App. 2010). Look for conduct inconsistent with utilization of the arbitration remedy – proceeding in contradiction of arbitration, unreasonably delaying assertion of arbitration.

C. Different Considerations for Different Types of Cases

There is no "one size fits all" for ADR in probate proceedings. The general term "probate cases" encompasses many types of proceedings each with their own issues and

considerations. Effective ADR planning will take these differences into account. Good planning can mean the difference between a successful and unsuccessful ADR proceeding. There are many issues to consider. Below are some of the different types of cases that are governed by Title 14 and the issues which should be considered in selecting and engaging in the appropriate ADR process.

- Guardianship/Conservatorship issues
  - Is the proposed ward incapacitated?
  - Who should be guardian? Who should be conservator?
  - Should the guardianship and/or conservatorship be limited or plenary?
  - Who should participate in an ADR proceeding? Any professionals? The proposed protected person?
  - Who can speak for the proposed protected person at ADR before a guardian or conservator is appointed?
  - Who should be the mediator, settlement judge or arbitrator? Qualifications?
  - When should the ADR proceeding take place?
  - Who pays for the ADR?

- Will/Trust Contests
  - When should the ADR proceeding take place? Any discovery first?
  - Who should attend? Only "parties" or all interested persons?
  - Who should be the mediator, settlement judge or arbitrator?
  - Who pays for the ADR?

- Estate and Trust Administration (breach of fiduciary duty, exploitation, accountings, etc.)
  - When should the ADR proceeding take place? Any discovery first?
  - Who should attend? Only "parties" or all interested persons?
  - Who should be the mediator, settlement judge or arbitrator?
  - Who pays for the ADR?

- Qualifications of Settlement Judge or Mediator or Arbitrator
  - Different individuals for different types of cases or for different parties
  - Does the person need to have mediation or arbitration training?
  - Does the person need a probate or trust background?
  - Does the person need any other particular skills?

- Mechanics of the ADR
  - How much time is set aside?
  - When should it take place?
  - Policies for attendance by parties (telephonic for non-local parties)

II. GOAL OF INSERTING AN ADR PROVISION

In drafting ADR provisions for wills and trusts, attorneys should begin by asking why an ADR provision is a good idea for that particular situation. There is no one size fits

all and the ADR provision should not be so inflexible as to cause the parties more harm than good. Some of the primary goals of requiring ADR are:

- Avoiding litigation
- Minimizing expense
- Timing/process
- Location
- Selection of decision makers

Make sure that the ADR language creates a process that will accomplish these goals.

A. Checklist. Checklists are helpful here. Determine the intent for including the provision and draft the provision so the trustor/testator's intent can be effectuated.

- Faster than court? – What provisions will accomplish this goal?
- Cheaper than court? – How is it cheaper if the parties are paying the mediator and/or arbitrator?
- What selection mechanisms will facilitate selection of an appropriate mediator or arbitrator?
- What are "reasonable procedures?"
- Venue – where is the most convenient place?
- Qualifications - different requirements for mediator or arbitrator?
- How to select the mediator and arbitrator (how many?)
- Time to complete each step of the ADR process
- How to define the issues to be mediated and arbitrated
- When there are multiple trustees – who attends, who decides?
- Who pays? What if a beneficiary cannot afford to pay?
- Can a fiduciary use estate assets to fund the fiduciary's prosecution or defense during the process?
- Are other remedies waived? Are they waived for all or just some issues?
- What happens if emergency relief is needed – what recourse?
- How can trustees be removed?
- What about no fault removal under A.R.S. §14-10706?
- Are there other issues that should not be decided outside of a court?
- Who gets notice? Who gets to participate?
- Who can be affected by a mediation or arbitration?
- What is the available recourse against someone who refuses to abide by the ADR clause?

III. ADR PROCEDURES AND DRAFTING CONSIDERATIONS:

Typically, the ADR process includes two or three steps – a) notice of the problem and a right to cure; b) mediation and c) arbitration. Do you need all three?

A. Notice of Claim/Objections and Right to Cure

- Is there a particular form for the claim?
- Who must be served?
- How must service be accomplished? Certified mail, service of process, email, fax
- Is there a right to cure?
- How long is the right to cure? Is the goal of the ADR procedure to expedite resolution of disputes?
- Who decides whether the claim has been cured?
- Does a non-participating party waive their right to bring a claim if it is brought by another party?

B. Mediation

- How do you get from Notice of Claim/Right to Cure to mediation? Complaining party notifies other side that claim has not been cured and makes demand for mediation. Notice and timing should be spelled out.
- How do you select the mediator?
- Timing of mediator selection
- What happens if one side will not cooperate in the selection of the mediator?
- Qualifications of mediator. Does the case require special tax knowledge or knowledge of trust issues or probate law? Is this a case that requires a tough mediator or a strong but gentle guide? Should the ADR clause be flexible enough to allow for different types of mediators for different types of disputes?
- When must the mediation conference be held?
- Who must attend? Who may attend?
- Where is the mediation to take place?
- Is telephonic appearance acceptable? The parties could be scattered all over the world.

C. Arbitration

- How do you get from mediation to arbitration? Mediation fails and complaining party makes demand for arbitration. Notice and timing should be spelled out.
- How do you select the arbitrator?
- Timing of arbitrator selection
- What happens if one side will not cooperate in the selection of the arbitrator?
- Qualifications of arbitrator. Is this a case that requires special tax knowledge or knowledge of trust issues or probate law? Should the ADR clause be flexible enough to allow for different types of arbitrators for different types of disputes?
- What rules of procedure apply to the arbitration? Discovery? What types? Timing?

- When must the arbitration hearing be held?
- Who must attend? Who may attend?
- Where is the arbitration to take place?
- Is telephonic appearance acceptable?
- Is the arbitrator's decision final?
- Is there any recourse to the losing party?
- Fee awards
- Procedures for securing an enforceable judgment
- Procedures for enforcing the arbitration decision – who handles post arbitration enforcement procedures?

IV. MORE DRAFTING CONSIDERATIONS:

A. What about emergency relief? What happens in situations requiring emergency relief (removal of trustees or PR, injunctive relief, etc.)? Does an ADR provision completely block you from ever going to court?

V. EXAMPLE LANGUAGE AND ISSUES

There are many resources available to find guidance for drafting ADR provisions. The American Arbitration Association (AAA) and the International Chamber of Commerce have model arbitration provisions for use in trusts. See www.adr.org and www.iccdrl.com. Look at ADR provisions in existing documents drafted by colleagues and think about what works and what does not work. Actual ADR provisions can help to illustrate the good, the bad and the ugly. Think about the provisions from all perspectives – trustor, trustee, beneficiary, third party. When drafting an ADR provision, work through a dry run to see if the procedure has any holes that need to be plugged.

Here are some examples of ADR provisions culled from different estate planning documents which show how important it is to draft carefully.

A. The 3 Step Process: Notice of Objections, Mediation and Arbitration

In this type of ADR, the complaining party is required to send notice of their objections and complaints to allow the responding party an opportunity to cure the problem. If the issues are not cured, the parties go to mediation and then, if still not resolved, to arbitration. Below is language that, for purposes of these seminar materials, combines what were actually separate mediation and arbitration paragraphs. Editorial comments and questions are italicized.

Mediation/Arbitration. If defendant fails to cure the objections within the Cure Period as determined by claimant in the exercise of claimant's reasonable discretion (or if the mediation is unsuccessful), claimant shall so notify defendant, and claimant and defendant shall submit the objections to a mediator/arbitrator to be selected jointly by claimant and defendant no later than 90 days following the end of the Cure Period.

- *Is this 90 days to pick the mediator/arbitrator or 90 days to hold the mediation/arbitration? If the 90 days applies to selection of the mediator/arbitrator, when must the actual mediation/arbitration take place?*

If claimant and defendant fail to jointly select a mediator/arbitrator, then each party shall select a mediator/arbitrator, and the mediators/arbitrators so selected shall appoint a third person to serve as sole mediator/arbitrator, as soon as reasonably practicable. Any mediator/arbitrator selected shall be a person with at least _____years of experience in _____ (administration, the laws relating to fiduciary relationships, fiduciary income tax issues and estate tax and gift tax issues). Following the selection of a mediator, claimant and defendant shall attempt to mediate their dispute in good faith according to the terms set forth by the mediator.

- *When must the ultimate mediator/arbitrator be selected?*
- *What happens if the defendant fails to timely pick the mediator/arbitrator?*
- *When does the mediation/arbitration have to be completed?*
- *Who pays the mediator/arbitrator?*

Arbitration Procedure. All objections shall be arbitrated according to the provisions of the Federal Arbitration Act and applicable "state" law. The arbitration proceedings shall be held in _____ County, _____ State. The fees of the arbitrator and all other costs that are unique to the arbitration shall be paid by the parties in equal shares. Each party shall be solely responsible for paying its own fees and costs for the arbitration, including but not limited to its own attorney and expert witness fees. If either party prevails on an objection, however, the arbitrator shall award reasonable attorneys' fees, costs and expenses to the prevailing party. The arbitrator shall have authority to award any damages authorized by law. The award of the arbitrator shall be in writing and shall contain the arbitrator's factual findings, legal conclusions and reasons for the award and shall be final and binding and may be entered as a judgment in any court with jurisdiction over the parties.

- *Federal Arbitration Act or Rules of American Arbitration Association or some other rules or statutes?*
- *May the trustees use trust assets to pay their costs during the process?*
- *How to enforce the arbitration award? Is there any avenue for appeal?*

B. The 2 Step Process

Some ADR provisions only require two steps – the first step effectively combines the "notice of objection" and mediation steps.

1. Objection/Mediation. In the event of a dispute between co-trustees as to administration of the trust, they shall first seek guidance of the attorney representing the trustees. Each party shall present their positions and the attorney shall

give a written recommendation. If the attorney is unable or unwilling to provide this mediation service, then the trustees shall proceed to arbitration.

- *Would this also apply to disputes between trustee and beneficiary?*
- *What if the trustees have different counsel?*

2. Arbitration. In order to save costs of court proceedings and promote prompt and final resolution of disputes regarding interpretation of the trust or administration and/or distribution of the trust, the dispute shall be settled by arbitration administered by the American Arbitration Association under its Arbitration Rules for Wills and Trusts. Arbitrator shall be a practicing lawyer in the state whose laws govern the Trust whose practice has been devoted primarily to wills and trusts for more than 10 years. Arbitrator's decision shall not be appealable to any court, but shall be final and binding on any and all persons who have or may have an interest in the trust. Judgment on the arbitrator's award may be entered in any court having jurisdiction thereof.

VI. LANUGUAGE TO PERMIT EXCEPTIONS TO ADR:

Certain situations may not be appropriate for ADR, and a process for emergency relief must be available. It is important to include language in the governing document that creates some flexibility and leaves room for a party to go to court for appropriate relief.

Example language: Exception to arbitration: the following matters shall not be arbitrable: questions regarding competency of the trustor (or trustees), attempts to remove a fiduciary; questions concerning the amount of bond for the fiduciary. Arbitration may be waived by all parties in interest.

- *What if one party wants to waive and the other does not?*

CONCLUSION

Litigation in probate and trust matters is time-consuming, expensive and emotionally draining. Alternative dispute resolution is a wonderful process that has the potential to help parties resolve issues economically and efficiently. However, if ADR provisions are not well thought out and/or are ambiguous or incomplete, ADR can be a nightmare process with a result that is neither prompt nor inexpensive. If, however, ADR is used wisely and if ADR provisions are drafted carefully, then ADR can be a productive process with a prompt, final and relatively inexpensive result.