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ARBITRATION IN WILLS AND TRUSTS: FROM GEORGE WASHINGTON TO AN UNCERTAIN
PRESENT

By
Edward F. Sherman*

I. INTRODUCTION

Shortly before his death in 1799, George Washington made a will that bequeathed his property to various relatives.¹ Historians have been most interested in his disposition of his slaves who were intermixed with slaves of other family members and some of whom he had only a life estate. He decreed freedom for various slaves to take place after his and Martha's deaths.² Legal scholars have been particularly intrigued by a provision for arbitration.³ It said that "all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men known for their probity and good understanding"⁴ who "shall, unfettered by Law, or legal constructions, declare their sense of the Testators intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States."⁵

There were no uniform fixed procedures for arbitration at the time Washington's will was made, and the nature of arbitration differed considerably among the states. Arbitration dates back to the medieval guilds that established tribunals for disputes between merchants. It was largely used in commercial disputes; its primary function was "to

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¹ See generally THE LAST WILL AND TESTAMENT OF GEORGE WASHINGTON AND SCHEDULE OF HIS PROPERTY, TO WHICH IS APPENDED THE LAST WILL AND TESTAMENT OF MARTHA WASHINGTON (John C. Fitzpatrick ed., The Mount Vernon Ladies' Association of the Union 1939).

² *Id.* at 4 (an exception was his long-time manservant who was to be emancipated immediately upon Washington's death).

³ See Juan C. Antunez, *George Washington on Arbitration of Probate Disputes*, PROBATE & TRUST LITIG. BLOG (Aug. 16, 2008), <http://www.flprobatelitigation.com/2008/08/articles/mediating-arbitrating-inheritance-disputes/george-washington-on-arbitration-of-probate-disputes/>.

⁴ THE LAST WILL AND TESTAMENT OF GEORGE WASHINGTON AND SCHEDULE OF HIS PROPERTY, TO WHICH IS APPENDED THE LAST WILL AND TESTAMENT OF MARTHA WASHINGTON, *supra* note 1, at 28 (he set out the following method for their selection: "two to be chosen by the disputants—each having the choice of one—and the third by those two." There is no record of the arbitration clause being revoked).

⁵ *Id.* (this language was preceded by a statement that Washington had "endeavoured to be plain" and hoped and trusted that "no disputes would arise" concerning the devises," "but if, contrary to expectation, the case should be otherwise from the want of legal expression, or the usual technical terms, or because too much or too little has been said on any of the Devises to be consonant with law," then all disputes "shall be decided by the three men. One uncertainty is whether Washington intended to limit arbitration to disputes only concerning legal technicalities. However, it appears that Washington, who was not a lawyer and wrote the will himself, was simply concerned that it not founder for lack of legal niceties and intended to give the arbitrators broad powers as to disputes between the devisees "unfettered by law or legal constructions."

provide the merchants fora where mercantile disputes will be settled by merchants.”⁶ Its utility in inheritance disputes, as in Washington’s will, was not unknown, as it could be particularly useful because it provided a confidential, informal process that avoided the need to invoke the courts. By the twentieth century, arbitration was routinely provided in contracts relating to labor and building construction, but its main use was still in commercial contracts.⁷ Many states, either by statute or court decision, refused to enforce arbitration clauses because they deprived parties of the right to go to the courts. This was finally resolved by the Federal Arbitration Act (FAA) in 1925 that preempted state law that did not enforce arbitration clauses and awards.⁸

II. ARBITRATION IN WILLS AND TRUSTS

The Federal Arbitration Act did not provide for enforcement of a mandatory arbitration clause in a will or trust document, applying only to a written provision to arbitrate in a “contract.” The act contemplated that the parties to a dispute must agree to arbitrate for there to be an enforceable arbitration clause. Typically, a person makes a will or trust on his or her own, and the heirs in a will or beneficiaries in a trust have not been parties to the execution of the document (nor has the executor/trustee). Therefore, they have not agreed to the requirement of arbitration put in the document by the testator/settlor.

In recent decades, interest has grown as to the utility of arbitration in will and trust disputes. Although the arbitration issue has not been addressed in many cases, some courts have taken the traditional position that a will or trust is not a contract and thus cannot bind non-signatories such as beneficiaries.⁹ A different approach, still not adopted by many courts, is that an arbitration clause in a will or trust is enforceable against beneficiaries if they choose to accept benefits under the document. In *Rachal v. Reitz*,¹⁰ a trust beneficiary sued the trustee, alleging failure to provide a statutory accounting and breach of fiduciary duty, and seeking the trustee's removal. The trustee filed a motion to compel arbitration and to stay litigation. The Texas Supreme Court reversed the Texas Court of Appeals’ affirmance of the probate court’s denial of arbitration.¹¹ The court held that the doctrine of “direct benefits estoppel” applied to bar the beneficiary's claim that an arbitration clause

⁶ William C. Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U.L.Q. 193, 218 (1956).

⁷ Soia Mentschikoff, *Commercial Arbitration*, 61 COL. L. REV. 846, 853-54 (1961).

⁸ Federal Arbitration Act, 9 U.S.C. § 2 (1925).

⁹ See *Schoneberger v. Oelze*, 96 P.3d 1078, 1084 (Ariz. Ct. App. 2004); see also *In re Calomiris*, 894 A.2d 408, 410 (D.C. 2006).

¹⁰ *Rachal v. Reitz*, 403 S.W.3d 840, 842 (Tex. 2013).

¹¹ *Rachal v. Reitz*, 347 S.W.3d 305, 315 (Tex. App. Dallas 2011).

in the trust agreement¹² was invalid. The doctrine provides that in the absence of a contract the acceptance of the benefits of an arrangement constitutes tacit consent to its terms.¹³

The Texas Supreme Court's decision cited the Texas Arbitration Act that makes enforceable a written *agreement* to arbitrate a controversy, rather than using the term *contract* as did the Federal Arbitration Act.¹⁴ The court found that a generally accepted definition of "agreement" would include any arrangement between two or more persons intended to affect their relations¹⁵ and need not meet all the formal requirements for a contract. By accepting the benefits of the trust, the beneficiaries gave "mutual assent" to the settlor's clear intent to require arbitration of disputes.¹⁶

There are a number of questions regarding the application of the *Rachal* decision to a broad range of trust disputes. First, many state arbitration acts, which contain language directly taken from the Federal Arbitration Act, use the term "contract."¹⁷ One might ask how critical the "agreement" language in the Texas Act was for the court to apply the doctrine of direct benefits estoppel. Could a trust arbitration clause be upheld on estoppel grounds even if the state arbitration act used the term "contract" (or indeed, could it be upheld if under the FAA and not under a state arbitration act)? Second, could estoppel be applied not only to disputes between beneficiaries and trustees as in *Rachal*, but also to disputes *between* beneficiaries? Third, the language used in the trust clause in *Rachal* left no doubt as to the settlor's strong intent to require arbitration of *all* disputes involving the beneficiaries and trustees. In other cases, the settlor might only be concerned, for example, about disputes as to division of property or administrative expenses. The settlor might not want to mandate arbitration for *every* act in the administration of the trust, with its attendant expense and delay. This would require careful drafting to accomplish the settlor's objectives.

Finally, the *Rachal* opinion did not address the fact that the Federal Arbitration Act is understood to require a contractual agreement that would conflict with a state arbitration act that did not require formal compliance with contract requirements. The *Rachal* opinion

¹² *Rachal*, 403 S.W.3d at 846-48. That provision stated: "*Arbitration*. 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." *Rachal*, 347 S.W.3d at 308-09. The trust 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." *Id.* at 313.

¹³ *Id.*

¹⁴ Texas Arbitration Act, TEX. CIV. PRAC. & REM. CODE § 171.001(a) (1997).

¹⁵ *Agreement*, BLACK'S LAW DICTIONARY (9th ed. 2009); 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 1:3, at 13-14 (4th ed. 1990).

¹⁶ *Rachal*, 403 S.W.3d at 848.

¹⁷ As some states have moved to include arbitration in wills and trusts in their arbitration acts, they might change the language, although the term "contract" has a long precedential history from the FAA that can be useful in administering arbitrations.

seems to assume that the trust agreement is intended to proceed under the Texas Arbitration Act (although this is not specified).¹⁸ The opinion says that the direct benefits estoppel doctrine is taken from federal law¹⁹ but does not clarify to what extent federal procedural law in the Federal Arbitration Act would preempt a contrary position in the Texas arbitration act. This is a question with great uncertainty in arbitration law.²⁰

III. ROLE OF STATE ARBITRATION ACTS IN ALLOWING ARBITRATION IN WILLS AND TRUSTS

Each state has its own law governing arbitration procedure, and eighteen states and the District of Columbia have adopted the Revised Uniform Arbitration Act (RUAA), issued by the Uniform Law Commission in 2000.²¹ The Federal Arbitration Act (FAA) does not preclude the application of state arbitration law. However, the breadth of the FAA (encompassing all arbitration agreements in "a contract evidencing a transaction involving commerce")²² and the Supreme Court's broad application of FAA abstention²³ have left a narrow area for state arbitration law. State arbitration laws govern arbitrations when the FAA does not apply to the limited range of cases where the transaction does not involve interstate commerce or that concern matters that are exclusively within the province of state law. Parties are free to provide in their arbitration agreement that state law will govern arbitration, but FAA preemption²⁴ would apply when such rules discriminate

¹⁸ Some courts have required that in order to conduct an arbitration under state arbitration law, this be specified in the agreement. *BNSF Ry. Co. v. Alstom Transp., Inc.*, 777 F.3d 785, 790 (5th Cir. 2015) (quoting *Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 341 (5th Cir. 2004) ("FAA rules apply absent clear and unambiguous contractual language to the contrary . . . [T]his Court permits arbitration under non-FAA rules if a contract *expressly references* state arbitration law.") (emphasis added); *Cooper v. WestEnd Capital Management, L.L.C.*, 832 F.3d 534, 544 (5th Cir. 2016) (FAA governed an action to vacate an arbitration award, rather than California law despite its designation in a choice of law provision; "a choice-of-law provision is insufficient, by itself, to demonstrate the parties' clear intent to depart from the FAA's default rules," and the agreement did not expressly reference California arbitration law).

¹⁹ *Rachal*, 403 S.W.3d at 842.

²⁰ For differing views consider Rachel M. Hirshberg, *You Can't Have Your Trust and Defeat It Too: Why Mandatory Arbitration Provisions in Trusts Are Enforceable, and Why State Courts Are Getting It Wrong*, 2013 J. DISP. RESOL. (2013); Alan Rau, *Federal Common Law and Arbitral Power*, 8 NEV. L.J. 169 (2007); Alan Rau, *Does State Arbitration Law Matter at All?*, in AMERICAN ARBITRATION ASSOCIATION, *ADR & THE LAW* 199 (15th ed. 1999).

²¹ Unif. Arbitration Act (2000).

²² Federal Arbitration Act, 9 U.S.C. § 1 (1925).

²³ See *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 270 (1995) (commerce should be viewed broadly, extending the FAA to the limits of Congress's Commerce Clause power); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 53, 58 (2003) (holding parties' debt restructuring agreement was a contract evidencing a transaction involving commerce within the meaning of the FAA, stating that "the broad impact of commercial lending on the national economy was certainly subject to Congress's power to regulate that activity pursuant to the Commerce Clause").

²⁴ See *Southland Corporation v. Keating*, 465 U.S. 1, 16 (1984).

against arbitration or impose unnecessary burdens on enforcing arbitration agreements or awards.

The FAA is a bare bones statute whose principal aim when it was passed in 1927 was to make arbitration clauses and awards legally enforceable. State arbitration laws, including the uniform act (RUAA), have tended to replicate many of the FAA provisions concerning enforceability of arbitration clauses and awards, but also to specify more detailed procedures for the whole arbitration process. Courts often look to their state's arbitration law to fill in interstices in the FAA (which can also be served by rules of an arbitral institution, like the American Arbitration Association, if appointed or by more detailed provisions in the arbitration agreement itself). When there is a conflict between state and federal practice on a point, it has been resolved in different, and sometimes inconsistent, ways by courts. Thus, the interplay between the FAA and state arbitration acts can be difficult to predict.

The opinion in *Rachal* did not address whether the provision in the Texas Arbitration Act to enforce the arbitration clause in the trust agreement would apply despite a different practice under the FAA. This would result in more, rather than less arbitration, and therefore would not seem to interfere with or limit the ability of parties to enter into arbitration agreements or to single out arbitration provisions for suspect status.²⁵ Thus more liberal provisions in a state act for enforcing arbitration in trusts would not seem to run afoul of FAA preemption.

IV. DIFFERING POSITIONS REGARDING MANDATORY ARBITRATION CLAUSES IN WILLS AND TRUSTS

Advocates of enforcing arbitration clauses in wills and trusts emphasize that enforcement can prevent arguments among family members by having a prompt and final process to resolve disputes. Enforcement of arbitration clauses may avoid the dissipation of the estate in prolonged expensive litigation. A related motive is to avoid these protracted disputes that can severely damage family and friend relationships for decades afterwards.

Opponents emphasize that arbitration is a process requiring consent and that heirs/beneficiaries have not provided their consent. There is also a concern that decisions of the executor/trustee could constantly be taken to arbitration, stymieing proper administration. On the other hand, concerns are expressed over the inability of probate judges, with limited time and resources, to deal with delicate personal issues.

Careful drafting of state arbitration acts or rules concerning mandatory arbitration in wills and trusts might overcome some objections. A state arbitration act could simply state that a provision in a will or trust requiring arbitration of disputes is enforceable. It will then be up to the courts or legislative amendments to determine whether certain limitations and restrictions should apply. But there are a number of considerations that could go into an arbitration act with much more detailed provisions:

²⁵ See *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). In *Doctor's Assoc.*, the Supreme Court considered a Montana statute requiring that for an arbitration provision to be enforceable, notice of arbitration must be typed on the first page of the contract in underlined capital letters. *Id.* at 684. The Court found these requirements were not applicable to contracts generally and singled out arbitration for imposition of the restrictions. *Id.* at 688. The Court therefore found the Montana provisions were preempted by the FAA. *Id.*

1. Having all matters in the administration of a will or estate subject to arbitration on the motion of a heir/beneficiary or executor/trustee could bring the orderly and efficient administration to a halt, causing expense and delay that testators/settlers hope to avoid by providing for arbitration. The myriad details of day-to-day administration should not be up for challenge in arbitration, but it is not easy to craft language to accomplish this. Arbitration might only be permitted, for example, as to dispositive and irreparable actions by the executor/trustee. One can see how hard it is to encapsulate that objective in language in an arbitration act. Leaving it to language in the will or trust agreement might be better, but ultimately one has to trust, as did George Washington, in the wisdom of the executor/trustee.
2. Challenges to the capacity of the executor/trustee, which are often raised in will contests, and to the validity of the will/trust document, should not be arbitrable and are better suited to the courts.
3. Certain actions by executors/trustees should be exempted from arbitration (such as a paternity determination), and the list might vary with the persons and situations involved.
4. If there is uncertainty in the jurisdiction regarding applicability of estoppel, as in *Rachal*, the arbitration clause might require formal agreement *ex post* by any heir/beneficiary who desires to benefit from the process.
5. Disputes among heirs/beneficiaries over entitlements, distributions, or payments could be required to be taken to the arbitrator for informal determination or mediation, at the arbitrator's discretion. Again, such determinations must be as to matters whose disposition would be dispositive and irreparable.

V. ARBITRATION ACT DEVELOPMENTS TO ALLOW ARBITRATION IN WILLS AND TRUSTS

In response to court decisions finding arbitration clauses in wills and trusts to be unenforceable, some dozen states have enacted statutes to allow for mandatory arbitration clauses in wills and trusts with varying conditions. The Florida law allows for binding arbitration to be imposed in a will or trust document on disputes that do not involve challenges to the validity of the will or trust “between or among the beneficiaries and a fiduciary under the will or trust, or any combination of such.”²⁶ Arizona law allows for enforcement of arbitration in wills and trusts with regard to “administration or distribution of the will or trust.”²⁷ A trust instrument may provide mandatory, exclusive, and reasonable procedures to resolve issues between the trustee and interested persons or among interested

²⁶ FLA. STAT. § 731.401 (2013).

²⁷ ARIZ. REV. STAT. ANN. § 14-10205 (2008).

persons with regard to the administration or distribution of the trust. The Washington state has a lengthy statute allowing for arbitration of wills and trusts disputes.²⁸

The American College of Trust and Estate Counsel (ACTEC) created a task force to study the issue, which produced both a short and long form model statute:

ACTEC Taskforce Shortform Model Act

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

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

(3) If the validity of the provision requiring arbitration is contested, either expressly or as part of a challenge to the validity of all or a portion of the will or trust containing the arbitration clause, the court shall determine the validity of the arbitration provision and any additional challenge to the validity of the will or trust. If the arbitration provision is determined to be valid, all disputed issues other than those described above shall be resolved in accordance with the arbitration 1 provision, and the time for resolving those disputes shall toll pending final resolution of the validity of the arbitration provision.²⁹

VI. CONCLUSION

There has been a growing interest in making arbitration available in will and trust disputes. Arbitration could offer a confidential, informal process without a need to invoke the courts in what often involves delicate family relationships in the administration of wills and trusts. The Federal Arbitration Act of 1925 does not address wills and trusts. It makes enforceable written provisions to arbitrate in a contract and has been understood as inapplicable to will and trust disputes because the heirs/beneficiaries and executors/trustees are not parties to a contract. Recently, there have been a few cases that bind trust beneficiaries to arbitration provisions in a trust agreement on an estoppel theory, if they choose to receive benefits under it. However, this has not attracted support in most jurisdictions and poses a number of questions as to its workability. Some dozen states have provided for arbitration of wills and trusts in their arbitration acts, but those acts also pose a number of drafting issues. Crafting the conditions for allowing arbitration in wills and trusts in state acts and in arbitration clauses in wills or trust agreements is a challenging

²⁸ WASH. REV. CODE ANN. §§ 11.96A.260-11.96A.320 (2009).

²⁹ *Arbitration Task Force Report*, ACTEC, 27-28 (2006), <https://www.mnbar.org/docs/default-source/sections/actec-arbitration-task-force-report.pdf?sfvrsn=2>; see also *Wills and Trusts Arbitration Rules and Mediation Procedures*, AMERICAN ARBITRATION ASSOCIATION (2012), <https://www.adr.org/sites/default/files/Commercial%20Wills%20and%20Trusts%20Rules%2012813%20-%20Archieve%202015%20Oct%2021%2C%202011.pdf>

matter. There is also considerable uncertainty in arbitration law as to the role that state law may play as to arbitration in wills and trusts given the breadth of preemption by the Federal Arbitration Act. There is still much disagreement about the benefits and disadvantages of arbitration in wills and trusts, but the movement continues to grow.