ARBITRATION ISSUES IN TRUST AND ESTATE LITIGATION

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State Bar of Texas
EIGHTH ANNUAL FIDUCIARY LITIGATION COURSE
December 5-6, 2013
San Antonio, Texas

CHAPTER 9

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"Top Mistakes of Estate Planners in Potential Will/Trust Contest Scenarios"

Author/Speaker for Fiduciary Litigation: Beyond the Basics 2011 Course, San Antonio, Texas, December 2, 2011
"How To Defend A Fiduciary Who Screwed Up"

Author/Speaker for Probate, Trusts and Estate Section, Dallas Bar Association, October 25, 2011
"Top Mistakes of Estate Planners in Potential Will/Trust Contest Scenarios"

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I. INTRODUCTION

Commentators and estate planners have talked about the use of arbitration to resolve trust and estate disputes for many years, but the practice has never gained much traction, and few courts around the country have enforced arbitration provisions in trust agreements and wills. A valid arbitration provision usually requires an agreement between the parties, so the expectation was that arbitration could not be forced upon a beneficiary who did not specifically agree to it. So far, only a few states have specifically enacted statutes authorizing arbitration in trust or will disputes. Texas is not one of them. Still, some estate planners have included arbitration provisions in their documents, even in Texas, and some corporate fiduciaries include arbitration provisions in documents relating to their acceptance of the role as fiduciary. In the latter case, depending upon who signed the document (trustee, settlor, beneficiary, etc.), certain parties may have bound themselves to arbitration of any disputes with that fiduciary. Thus, some agreements for arbitrations of estate and trust disputes have occurred in Texas, but only on a very small scale. That is about to change dramatically.

II. GET READY TO ARBITRATE TRUST AND ESTATE DISPUTES.

In *Rachal v. Reitz*, 403 S.W.3d 840 (2013), the Texas Supreme Court held that an arbitration provision in an inter vivos trust is binding, and compelled arbitration. The trust contained the following arbitration provision:

> 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.

In *Rachal*, the attorney who drafted the trust (Rachal) was also the successor trustee. Reitz, a beneficiary, sued Rachal claiming he had misappropriated trust assets and failed to account. Rachal moved to compel arbitration, and the probate court denied his motion. The Dallas Court of Appeals, in an *en banc* split decision, affirmed, concluding that there was no contract between the parties and that it was for the legislature, rather than the courts, to decide "whether and to what extent the settlor of this type of trust should have the power to bind the beneficiaries of the trust to arbitrate." *Rachal v. Reitz*, 347 S.W.3d 305, 311-12 (Tex.App.-Dallas 2011).

The Supreme Court reversed, and held that arbitration was binding under the "direct benefits estoppel" doctrine, more commonly known as the "acceptance of benefits" rule. The Court reasoned that a "beneficiary who attempts to enforce rights that would not exist without the trust manifests her assent to the trust's arbitration clause . . . in such circumstances it would be incongruent to allow a beneficiary to hold a trustee to the terms of the trust but not hold the beneficiary to those same terms." 403 S.W.3d at 847. The Court held that, because of the beneficiary's acceptance of the trust, "the doctrine of direct benefits estoppel applies to bar Reitz's claim that the arbitration provision in the trust is invalid." 403 S.W.3d at 847.

This important decision by the Court opened the door to widespread use of arbitration in trust and estate disputes. However, it will likely be an unfortunate decision, for several reasons. Most importantly, too many lawyers, from novices to sophisticated estate planners, will add an arbitration provision to all of their trust agreements and wills as a matter of boilerplate. A client's desire will not be the driving force in the decision to include an arbitration provision -- it will simply become part of the lawyer's form. Also, little genuine consideration will be given to why the arbitration provision is being included. Many draftsmen will include one regardless of whether it actually saves time or money, or discourages litigation. This writer has already seen a casual approach to the inclusion of exculpatory clauses and forfeiture clauses in wills and trusts. Both clauses often are standard boilerplate while the planner - and more importantly, the settlor - has given no real thought to the consequences of including the provisions.

In a recent CLE discussion of this topic, one lawyer suggested that the arbitration provision should be included in the basic form so that "the planner would be reminded to discuss it with the client." The unfortunate reality is that, in many cases, if not most,

rather than reminding the planner to discuss the option with the client, the provision will receive little attention or explanation other than a stock mention of the supposed benefits. In truth, how many settlors would want an arbitration provision if told that their beloved friend/trustee could be the victim of a wildly unfair result handed down by a mistaken arbitrator, with no way for the friend to correct that injustice? The answer is probably "not many."

Another unfortunate aspect of the Court's ruling is that, at least in the near term, there is likely to be considerable litigation disputing the application or scope of arbitration clauses. While most lawyers, and even clients (if they know anything about it) assume that arbitration will save money, the reality is that it will create more expensive and prolonged litigation, at least until the law is fleshed out. In the interim, many planners will continue to use the clause simply because they have heard it is the thing to do, or assume it discourages contests or litigation, without really knowing or thinking about the concrete ramifications.

III. WAS THE RACHAL CASE DETERMINED ON AN INTENT THEORY OR AN ACCEPTANCE OF BENEFITS THEORY?

Some commentators contend that the Supreme Court's decision turned on both an "intent" theory and an "acceptance of benefits" theory, and suggest that, even if there had been no "acceptance of benefits," the Court would have held that arbitration was required simply because the settlor intended that arbitration apply. The Court's opinion is not crystal clear on this point. For example, the Court says,

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

Id., 842. This quote suggests that the two theories are independent and that the settlor's intent alone is enough to establish mandatory arbitration. However, later, the Court states, "We must enforce the settlor's intent and compel arbitration if the arbitration provision is valid and the underlying dispute is within the provision's scope." *Id*., 844. That quote suggests that the Court was not enforcing arbitration simply because it was the settlor's intent. The second requirement is a valid "arbitration provision," and that is where "acceptance of benefits" came into the equation: by accepting the benefits under the agreement, the beneficiary has effectively "agreed" to arbitrate. The Court compelled arbitration because it was the settlor's intent; the arbitration provision was valid; and the underlying dispute was within the scope of the provision.

A settlor's intent that arbitration apply will always be clear from the mere fact that the arbitration requirement is included in the trust agreement. The key, at least in the *Rachal* set of facts, is some action by the beneficiaries that indicates an acceptance of the arbitration agreement, either an actual agreement by the beneficiary, or, in the case of *Rachal*, an acceptance of benefits.

IV. DID THE SUPREME COURT GET IT WRONG?

One reason the *Rachal* decision was surprising is that it involved a trust agreement drafted by a lawyer who later became the trustee. In this writer's mind, any arbitration provision designed to protect a draftsman who also serves as trustee is highly suspect. However, it does not appear that the Court addressed this issue at all. The Court even specifically noted that the beneficiary had not raised the trustee's potentially unclean hands as a defense. *Id.,* 848, fn. 7.

It is also difficult to reconcile the *Rachal* decision with the Texas Trust Code. Among the causes of action in the *Rachal* case was an action to remove the trustee. Texas Property Code §111.0035(b) provides that:

> The terms of a trust prevail over any provisions of this subtitle, except that **the terms of a trust may not limit: ... (5) the power of a court, in the interest of justice, to take action or exercise jurisdiction,** including the power to:
>
> (A) modify or terminate a trust or take other action under Section 112.054;
> (B) remove a trustee under Section 113.082;
> (C) exercise jurisdiction under Section 115.001;
> (D) require, dispense with, modify, or terminate a trustee's bond; or
> (E) adjust or deny a trustee's compensation if the trustee commits a breach of trust.

Texas Property Code §115.001 lists the court's jurisdiction to hear a variety of trust-related matters

including constructions, actions to appoint trustees, actions to determine beneficiaries, etc. How, then, could the Supreme Court allow arbitration of those matters when the statute provides that the trust **"may not limit . . . the power of a court"**? It does not appear that the Supreme Court considered whether the Property Code might prohibit arbitration in those instances.

Interestingly, the American Arbitration Association offers a standard arbitration clause for use in estate planning documents which is consistent with the view that some matters must be left to the courts (though not as many as the Texas Trust Code appears to suggest):

> In order to save the cost of court proceedings and promote the prompt and final resolution of any dispute regarding the interpretation of my will (or my trust) or the administration of my estate or any trust under my will (or my trust), I direct that any such dispute shall be settled by arbitration administered by the American Arbitration Association under its AAA Wills and Trusts Arbitration Rules and Mediation Procedures then in effect. **Nevertheless, the following matters shall not be arbitrable: questions regarding my competency, attempts to remove a fiduciary, or questions concerning the amount of bond of a fiduciary.** The arbitrator(s) shall be a practicing lawyer, licensed to practice law in the state whose laws govern my will (or my trust) and whose practice has been devoted primarily to wills and trusts for at least 10 years. The arbitrator(s) shall apply the substantive law (and the law of remedies, if applicable) of the state whose laws govern my will (or my trust). The 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 my estate or any trust under my will (or my trust) including unborn or incapacitated persons, such as minors or incompetents. Judgment on the arbitrator's award may be entered in any court having jurisdiction thereof.

Although the AAA provision specifically excludes questions of incompetency, note that undue influence is not mentioned. The exclusion of "competency" indicates that the question of validity of the arbitration provision is not arbitrable but provision does not go that far. The removal of a fiduciary, which is also excluded above from arbitration, must necessarily include breach of fiduciary claims, while claims for damages from breach of fiduciary duty do not appear to be excluded.

In this writer's view, the decision to allow arbitration in estate and trust litigation is better left to the legislature which can set the scope, methods, limits, etc. All that the Supreme Court could do in *Rachal* was determine whether arbitration should be compelled according to the provision in question and under the facts of that case. The Supreme Court opinion does little to guide us, beyond telling us that an arbitration provision in a trust can be enforced, depending on the circumstances.

V. LITIGATION EXPENSE AND DELAY WILL PROBABLY INCREASE, AT LEAST INITIALLY.

While one of the supposed benefits of arbitration is a cheaper process, costs are likely to go up in the near term as parties continue to litigate the validity of arbitration provisions; their scope; whether parties have accepted benefits; whether other non-signing parties can be forced into the arbitration; and whether matters that are not within the scope can be joined in the arbitration. The *Rachal* opinion leaves many questions unresolved that will have to be addressed by other courts over the coming years, such as:

i. Is the arbitration clause subject to any of the exceptions to the acceptance of benefit doctrine?
ii. Are there matters in a trust administration that cannot be forced into arbitration?
iii. What if some beneficiaries have accepted benefits and other have not?
iv. Does it apply to challenges brought by minors?
v. Who represents the minors and remainder beneficiaries in these fights, and who appoints them?
vi. Will arbitration provisions apply only to administrations or also to the construction of the document?
vii. Will arbitration clauses apply to contests of the documents?
viii. Can an arbitrator pick and appoint a disinterested successor trustee?
ix. Are arbitration decisions binding on beneficiaries who did not participate in the arbitration?
x. Is an arbitration provision in a will also enforceable?

xi. Does it matter whether the dispute is pre-probate or post-probate?

xii. Will an arbitration provision in a will be limited only to a testamentary trust, or will it apply to the will itself, or to the administration of the estate?

xiii. Can a court be divested of its power to supervise a dependent administrator by virtue of an arbitration provision?

Adding significantly to the cost and the potential delay is the prospect of an early appeal. Section 171.098 of the Texas Civil Practices & Remedies Code provides that an order denying a motion to compel arbitration (and certain other matters related to arbitration) is subject to interlocutory appeal. In other words, the litigation on the merits will be halted while the parties fight over the applicability of the arbitration provision, which may also include a lengthy appeal.

All of these areas, and many more, will be prime topics for fighting -- adding to the expense and length of the proceeding. Since this is new law in Texas, there will not be much relevant precedent to guide us. Nationally, there is not much help either. At least two states, Florida and Arizona, have statutes that allow for arbitration provisions in trusts and/or wills. Ariz.Rev.Stat. §14-10205 (for trusts); Fla.Stat. §731.401(1) (wills or trusts). The Florida statute expressly excludes disputes as to the validity of all or part of the will, and the Arizona statute is limited to matters relating "to the administration or distribution of the trust." Nonetheless, these statutes can probably provide some guidance in certain situations.

Additionally, there are a number of articles by commentators which might be helpful. Most of the authors and commentators have favored arbitration of trust and estate disputes. See, for example,

- Charles Lloyd and Jonathan Pratt, *"Trust and Arbitration"*, 12 Trusts & Trustees 18 (2006);
- Strong, "Mandatory Arbitration of Internal Trust Disputes: *Improving Arbitrability and Enforceability Through Proper Procedural Choices*", 28 Arbitration International Issue;
- American College of Trust and Estate Counsel, Arbitration Task Force Report, September 18, 2006;
- Blattmacher, "*Reducing Estate and Trust Litigation Through Disclosure, In Terrorem Clauses, Mediation and Arbitration*;
- Phillips, Martinsen, Dameron, "*Analyzing the Potential for ADR in Estate Planning Instruments*", 24 Alternatives 1, 1 (January 2006;
- Strong, *"Empowering Settlor's: How Proper Language Can Increase the Enforceability of a Mandatory Arbitration Provision in a Trust"*, 47 Real Prop. Tr. & Est. L. J.275, 280 (2012;
- Strong, *"Arbitration of Trust Disputes: Two Bodies of Law Collide"*, 45 V and. J. Transnational. L. 1157 (2012;
- Murphy, *"Enforceable Arbitration Clauses in Wills and Trusts: A Critique"*, 26 Ohio St. J. on Disp. Resolution 627, 635-36 (2011;
- Mignogna, *"Mediation on the Rise: As Estate Disputes Increase the Use of Mediation and Arbitration will Become More Frequent"*, 187 N.J.L.J. Initial 416 (2007).

VI. WHAT ABOUT AN ARBITRATION CLAUSE IN A WILL?

The *Rachal* court did not address whether an arbitration clause in a will is enforceable, but it seems obvious that the same factors would apply. In other words, where one has accepted benefits under a will that contains an arbitration clause, the beneficiary may have bound himself to arbitrate any covered claims. This might be true whether the arbitration clause applies to a testamentary trust in a will, the administration of the estate, or the construction of the terms of the will itself. Allowing arbitration of estate administration disputes would present the question of whether a testator could ever deprive the court of its ability to supervise a dependent administrator. For example, what if the will contains an arbitration provision but, for whatever reason, results in a dependent administration? Surely a claim against a court supervised administrator must be brought in court, especially, if it involves statutory actions. Could it make sense that a claim against an independent executor or administrator can be forced into arbitration but the same claim against a dependent administrator would remain in court? That type of bifurcated system would make no sense.

It should be rather obvious that an arbitration provision in a will that has not been probated is meaningless until the will is admitted to probate; thus a pre-probate challenge should not invoke an arbitration clause in the challenged will.

VII. SHOULD ARBITRATION CLAUSES APPLY IN CHALLENGES TO THE VALIDITY OF THE DOCUMENT?

Another open question is whether an arbitration provision will apply to a challenge of the validity of the trust, containing an arbitration provision. In dicta, the Supreme Court seems to suggest that an arbitration clause does not apply when the validity of the document is challenged. The *Rachal* Court noted that "a beneficiary is also free to challenge the validity of a

trust; conduct that is incompatible with the idea that she has consented to the instrument". 403 S.W. 3d at 847 (citing *Rapid Settlements, Ltd. v. SSC Settlements, LLC*, 251 S.W.3d 129, 148 (Tex.App.-Tyler 2008, no pet.) which held that direct benefits estoppel was inapplicable when a non-signatory filed suit for a declaration that an arbitration agreement was not binding on it). This language seems to say, without making it crystal clear, that a contest of the validity of the trust itself would not be subject to arbitration.

But what happens when the contest occurs after an acceptance of benefits. Contests of trusts and wills are often barred by a party's acceptance of benefits. Further complicating the question, many acceptance of benefits cases seems to allow a contest to continue if the accepter offers to return that which was accepted. See *Matter of Estate of McDaniel*, 935 S.W.2d 827 (Tex.App.-Texarkana 1996, writ denied); *Sheffield v. Scott*, 620 S.W.2d 691 (Tex.Civ.App.-Houston [14th Dist.], writ ref'd n.r.e.). And, according to the Dallas Court of Appeals in *Holcomb v. Holcomb*, 1992 WL352917 (Tex.App.-Dallas 1992, no pet.) (not for publication), a contestant can continue with a contest, provided that the acceptance of benefits is not inconsistent with the contest (for example, where the contestant accepted less than they would receive if the document were successfully contested). What then? In those situations, would arbitration be required?

Another difficult question arises if the trust contest is tied to a suit against the trustee. For example, what if a party brings a trust contest, but in the same proceeding sues, alternatively, to remove the trustee, for disgorgement of fees, for an accounting, or for other relief? What would the result be? Again, the Supreme Court's decision leaves this area open to interpretation, but other contractual arbitration provisions have been construed broadly to include any actions related to the matter which must be arbitrated. See *Pennzoil Company v. Arnold Company, Inc*., 30 S.W.3d 494, 498 (Tex.App.-San Antonio 2000, no pet.). If that is the case, then *Rachal* will create even more litigation. For example, in the scenario above where alternative claims are made with respect to validity and mismanagement, won't lawyers be compelled to separate the cases into two suits in order to avoid arbitration of all of the claims? No doubt the planners who actually discuss arbitration with clients will likely say that arbitration is cheaper. But is that the reality given the scenarios described above? Probably not.

VIII. DOES ONE HAVE TO ARBITRATE THE VALIDITY – CHIEF JUSTICE HECHT'S VIEW

Looking beyond arbitration clauses in trusts, the law as to who decides the validity of an arbitration clause is not as clear as one would hope either. The Supreme Court appears to have conclusively decided that a challenge to an arbitration provision on the basis of mental incapacity is a matter for a court, not the arbitrator. In *In re Morgan Stanley & Co., Inc.*, 293 S.W.3d 182 (Tex. 2009), the court considered whether a guardian's suit against the ward's brokerage firm for breach of fiduciary duty was subject to arbitration. The brokerage firm moved to compel arbitration. Probate Court No. 2 in Dallas County (the same judge who denied arbitration in the *Rachal* case) denied the motion. The Dallas Court of Appeals denied a petition for mandamus and the Supreme Court denied the petition with a written opinion, concluding that,

> Given the overwhelming weight of authority, it is apparent to us that the formation defenses identified in *Buckeye* are matters that go to the very existence of an agreement to arbitrate and, as such, are matters for the court, not the arbitrator. *Id*. at 189.
>
> . . . we agree that *Prima Paint* reserves to the court issues like the one here, that the signor lacked the mental capacity to assent. Accordingly, the trial court did not abuse its discretion in declining to yield the question to the arbitrator. *Id.* at 190.

So the matter is clear … or is it? The lone dissent in *Morgan Stanley* was Justice Hecht, now our Chief Justice. Justice Hecht reasoned that incapacity merely makes a document voidable as opposed to void, and that incapacity does not prevent the formation of a contract. He concluded that Texas should follow the Fifth Circuit's pronouncement in *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469 (5th Cir. 2002) where it specifically held that the arbitrator should decide a defense of mental incapacity, because it is not a specific challenge to the arbitration clause, but rather goes to the entire agreement.

Justice Hecht also noted that fraudulent inducement (think undue influence) is a matter for the arbitrator, as held by the U. S. Supreme Court in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 403-404, 87 S.Ct. 1801, 18 L.Ed. 2d 1270 (1967).

And how do you read the *Morgan Stanley* case in the context of these decisions:

> *In re Weekley Homes, L.P.,* 180 S.W.3d 127, 130 (Tex.2005):

> Under the Federal Arbitration Act (FAA), absent unmistakable evidence that the parties intended the contrary, it is the courts rather than arbitrators that must decide 'gateway matters' such as whether a valid arbitration agreement exist. Whether an arbitration agreement is binding on a nonparty is one of those gateway matters.
>
> *In re Labatt Food Service, L.P.*, 279 S.W.3d 640, 647-8 (Tex.2009):
>
> There are two types of challenges to an arbitration provision: (1) a specific challenge to the validity of the arbitration agreement or clause, and (2) a broader challenge to the entire contract, either on a ground that directly affects the entire agreement, or on the ground that one of the contract's provisions is illegal and renders the whole contract invalid. [citation omitted] A court may determine the first type of challenge, but a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.

Adding another layer of complexity to the issue of arbitration of wills is that, until a will is probated, there is no valid will, and thus there can be no valid arbitration agreement before probate. It seems unlikely that a pre-probate contest could ever be forced into arbitration. But should we really have a separate rule for post-probate will contests? Once probated, the will has been determined to be valid, although still subject to contest. Could that challenge be forced into arbitration when a pre-probate contest cannot?

This creates yet another conflict. What if the contest is of a will and a trust executed contemporaneously? Can the Contestant be forced to arbitrate the trust contest but not the will contest? Obviously, in that circumstance, the contests should be conducted jointly, both for efficiency and to avoid the possibility of conflicting outcomes. Perhaps these are reasons never to open the door to arbitration of validity of wills.

IX. WHAT ARE THE LIMITS OF ARBITRATION, IF ANY?

There will be plenty of new litigation about whether an arbitration provision applies at all, but the fights will also be about the scope of the claims that are subjected to arbitration. As the *Rachal* Court noted, once the arbitration clause is determined to be valid, a "strong presumption favoring arbitration arises" and any doubt as to the agreement's scope is resolved in favor of arbitration. Arbitration provisions in trusts and wills don't have a lot of precedent to guide us regarding what is or isn't within the scope, contractual arbitration provisions have been construed broadly to include any actions related to the matter which must be arbitrated. See *Pennzoil Company v. Arnold Company, Inc*., 30 S.W.3d 494, 498 (Tex.App.-San Antonio 2000, no pet.).

X. THE GOOD AND BAD OF ARBITRATION IN THE TRUST AND ESTATE ARENA.

Some of the good: Arbitration can be faster and less contentious, which usually means less expensive. The lack of an appeal process can also expedite matters, make the process less costly, and lead to finality more quickly. The prospect of having arbitrators, who are well-versed in probate and trust matters, can be advantageous to both sides. One of the most attractive aspects of arbitration is the prospect of avoiding publicity. As a lawyer, arbitrations are typically less stressful, in part, because many of the rules (in particular, the rules of evidence) tend to be relaxed.

Some of the bad: It may prove just as expensive, just as long, and just as contentious as a traditional case in the courts. The lack of appeal can make for unfortunate results when the arbitrators make mistakes or do not understand this area of law specifically. Discovery might be more limited, which could be especially problematic in a fiduciary case involving many transactions over a period several years.

To this writer, arbitration is not a good thing for trust and estate litigation. Arbitration rulings can be wildly different from, and inconsistent with, cases decided by courts and, because there is no review, there is no way to correct the erroneous decisions. In this writer's experience, arbitration is not any cheaper, is not always faster, and is not more reliable. In fact, when it comes to defending a breaching fiduciary, especially one who is also a relative of a beneficiary, this writer's experience is that a jury is likely to be more reliable than an arbitrator might be. The reason is simple: jurors are more likely to consider, and be swayed by, the equities and/or the family relationship and more apt to give a family member a break.

The law related to fiduciaries can be harsh and counter-intuitive. In that circumstance it is more likely that an arbitrator versed in the law, or more able to dissect it, will also be more inclined to implement a harsh result.

But there are a few aspects that make arbitration valuable in the trust and estate world. Number one is privacy. Many wealthy families are especially loathe to having their laundry aired in public. If arbitration is good for anything, it is to shield the case from public view. Another benefit is that discovery in arbitration is typically limited, so less emphasis is placed on digging up all the mud that often finds its way into trust and estate litigation. In those cases an arbitration may be somewhat less inflammatory than litigation.

XI. HOW CAN YOU AVOID ARBITRATION?

A. Bring your challenge before accepting any of the benefits.

Under *Rachal*, one answer seems obvious. If your client is likely to make a claim, plan to make it before accepting any benefits or acknowledging the validity of the trust. One can be assured that there will be fights about what constitutes acceptance of benefits. For example, what if you were to receive mandated distributions, but had not received them, and sued to enforce them?

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

B. If your client has accepted benefits, offer to return them.

And what about the exceptions to the acceptance of benefits doctrine which suggest that one is not estopped if they returned that which they accepted?

C. Tie the fiduciary duty claims to a contest.

Since the Supreme Court appears to suggest that a contest to the trust is for the court, even if the claims relating to the trust are for the arbitrator, why not tie them together, challenge the trust, and, at the same time, leave the fiduciary duty claims in the alternative? While this might lead to a motion for severance or a motion for a separate trial, judicial economy would seem to warrant combining the discovery.

D. Do the parties want it?

The fact that a document has an arbitration agreement and the issue falls within the scope of the arbitration clause does not mean that the parties have to arbitrate. The first step is to decide whether you want arbitration. If not, head for the courthouse and see what the other side does. Some of the factors that should be considered in making the decision are the types of claims; the size of the controversy; whether a jury would be good or bad for your side; and who the judge might be if you went to the courthouse. For example, if the matter would be heard by a statutory probate judge with a lot of experience and a reputation for making the tough decisions and getting things done, why go to arbitration? But it is also important for the lawyer to realistically examine the facts, the type of case, and the equities, remembering that trained lawyers will often be much harsher on a fiduciary who has breached fiduciary duties, than any jury ever would. Of course, a corporate representative, in particular a bank, would almost always tip the scale towards arbitration.

If you make it to court and the other side does not compel arbitration quickly, you may be able to claim they have waived arbitration. This is a very heavy burden on the party seeking to avoid arbitration, but if the other party "substantially invokes the judicial process to the other party's detriment," there may be waiver. *EZ Paw Corp. v. Mancias*, 934 S.W.2d 87, 89 (Tex. 1996); *Perry Homes v. Cull*, 258 S.W.3d 580, 589-90 (Tex. 2008). Waiver is a decision made by a court, not an arbitrator. *See Perry Homes*, 258 S.W.3d at 587-88.

XII. SO I HAVE TO ARBITRATE, NOW WHAT?

The American Arbitration Association has its Wills and Trusts Arbitration Rules and Mediation Procedures, a 45-page document available on the Internet. It can give you guidance as to how to proceed. The first issue is to determine whether the arbitration is governed by the Texas Arbitration Act (Texas Civil Practices & Remedies Code §171.001). If it is an arbitration provision in a Texas trust or will which does not incorporate some other arbitration procedure, one can assume it is arbitrated in conjunction with the Texas Arbitration Act. Texas Civil Practices & Remedies Code §§154.021-027 also provide some procedures for arbitration.

A. Determining whether to use an administrative organization's rules.

If not mandated by the agreement, the parties can agree to arbitrate according to the rules of a particular administrative organization, like the American Arbitration Association or JAMS. While a bit more expensive, it can actually make the process more streamlined and provide clearer rules.

B. How many arbitrators?

One of the first issues is, do you pick one arbitrator or some other number, assuming it is not in the arbitration provision itself? Obviously, odd is the right number. This writer's view is that 3 is the optimum number; however, 3 add to the cost and add to the scheduling delay. (One schedule is obviously easier to manage than three.) If you choose a single arbitrator, and he/she takes the wrong approach, misunderstands the law, misunderstands the facts, or gets sidetracked, you may be stuck with an unfortunate ruling. Three minds working together does not guarantee that they get it right, but makes it more likely.

C. What type of arbitrator?

The AAA arbitration clause above provides that the arbitrator will be a practicing lawyer in the state at issue who has primarily practiced in the area of wills and trusts for at least ten years. Some commentators have suggested that the arbitrator might be someone who is a member of the American College of Trust and Estate Counsel. Both descriptions probably lead to estate planners. Estate planners might be ideal in some situations, especially highly complicated trust constructions, or even accounting issues. But a seasoned lawyer with experience in fiduciary or other estate and trust litigation is probably better in most cases. Someone with actual trial experience is even better. Some planners will be specific in describing the qualifications of the arbitrators in the clause. Unfortunately, that sometimes leads to the naming of the estate planner as the arbitrator. While that might sound good because he or she might be knowledgeable about the settlor's intent, it raises a number of problems, such as being defensive about the language or the construction; being biased towards the fiduciary or certain beneficiaries; or worse, being another victim of someone's undue influence. These types of provisions – arbitration, exculpation, forfeiture clauses – are often tools used by the undue influencer to insulate themselves or solidify their power in connection with the trust or estate. Many times the estate planner does not pick up on these motives in the estate planning process. Arbitrating with a planner who has worked with one of the beneficiaries and/or the trustee in the creation of the plan (such as a son helping his father in the estate planning process) could easily bias the planner in his role as arbitrator (thereby leading to potentially more litigation as you try to disqualify the arbitrator).

D. Manage the schedule.

Work with the other side to set a manageable schedule to get what you need, get the other side what they need, and get the matter resolved. This requires some real focus, not the freewheeling discovery often seen in litigation. In this writer's experience, the more squabbles there are, the more difficult it is to keep the arbitration on track because of the scheduling difficulties created by adding three busy lawyers' schedules to the mix. It is important to keep the fight to a minimum.

E. Binding the People that Need to be Bound

Care needs to be taken to bind those that need to be bound. For example, minors, unborns, and unascertained beneficiaries can still probably be bound by virtual representation, but if there is a conflict, a guardian ad litem is still essential. AAA rules contemplate the appointment of guardians ad litem, if necessary. Care must be taken to join those beneficiaries that are required to have finality but, that may lead to more fights about the arbitration process.

F. Private, Unfortunately, Does Not Mean Confidential

One clear potential advantage of arbitration is that the record is not public, other than maybe someone's initial filing and/or a motion to compel arbitration. However, "non-public" does not mean "confidential". So, if the parties want confidentiality, or need it, a confidentiality agreement is probably still a necessity.

XIII. CONCLUDING THOUGHTS

It is relatively rare for the Texas Supreme Court to consider significant trust and estate issues, and even rarer for the Court to make dramatic changes in trust and estate law. This is for good reason, because the members of the Court have relatively little experience in trust and estate law, and major changes in this specialized area of the law have been historically made by the Legislature. For the Court without any legislative input to suddenly shift Texas out of the mainstream with regard to arbitration clauses in wills and trusts is akin to tossing a basketball into a china store.

Unfortunately, what may work well in commercial law does not necessarily work well in non-commercial areas of law. By imputing an agreement to arbitrate in a non-commercial setting, the Supreme Court has stepped onto a slippery slope. Will we next see efforts to arbitrate child custody? Guardianships? Or other imputed "agreements" to arbitrate, like a sign at the front of a store "By shopping here, you agree to arbitrate any dispute with the store"? In this writer's opinion, the Legislature needs to put the genie back in

the bottle and restrict arbitration to signed agreements or, at a minimum, limit it to trust administration issues.