

REDUCING ESTATE AND TRUST LITIGATION THROUGH DISCLOSURE, IN TERROREM CLAUSES, MEDIATION AND ARBITRATION

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INTRODUCTION

This Article discusses how litigation relating to the administration of estates and trusts might be reduced through by careful planning prior to the property owner's transfer of wealth during lifetime or at death. As the article details, litigation involving trust and estate matters often involves an emotional element not present in most other legally disputed matters. That also suggests that methods to reduce the risk of such litigation occurring may be unique to such matters. In Part 1, certain background matters relating to the climate for such litigation are presented. In Part 2, the historic "tool" of a disinheritance clause in an instrument is discussed. In Part 3, six specific ways in which litigation or the scope and cost of litigation relating to the administration of estates and trusts might be reduced, including the use of mandatory mediation and arbitration, are presented.

PART 1: BACKGROUND

Law is the tool that our society uses as a method of resolving disputes. It is not an exclusive or perfect solution. Wars still occur, outcomes produced by the law are sometimes wrong in many ways, from an incorrect finding of fact to legal decisions that, in turn, spawn more disputes. Also, the law does not provide a remedy for all perceived wrongs. Pure hurt feelings, for example, generally go uncompensated.¹ In the context of estate and trust administration, these feelings, regardless of whether not consciously realized or openly acknowledged, often are involved because of the familial

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¹ In severe cases, a cause for action for intentional or negligent infliction of emotional distress might arise but such cases are rare. *See, e.g.,* *Howell v. N.Y. Post*, 81 N.Y.2d 115, 596 N.Y.S.2d 350 (1993).

relationships among the parties who have an interest in the estate or trust. And these “bruised” feelings often are a catalyst in triggering litigation with respect to trust and estate matters. Moreover, the cost of society’s resources in providing a legal forum for dispute resolution sometimes is greater than what the cost to society would be if no such forum were offered.² Despite that fact that millions of lawsuits are filed each year in the United States,³ most disputes are resolved by negotiation or concession.

The common element in most legal disputes is money. Even the most fundamental source of crime, even violent crime, usually is money. No one goes to court for truth and justice. Rather, each litigant goes to court to win—and, almost always, to win money. However, disputes relating to estates and trusts often involve another element: vindication for a perceived moral wrong such as one child being “wrongly” favored over another. Money sometimes can be restored by other means (such as a lucky investment) but many do not accept that a moral impingement can be righted in an alternative matter. In some cases, the hurt feelings arise not on account of another inheritor being financially favored over another but because the individual was not selected as a fiduciary (e.g., executor of the Will) or because his or her share of the inheritance is placed in trust rather than passing outright and free of trust.⁴

The saying goes, “you never really know another person until you share an inheritance with him (or her).” That expression has been spawned by experience. Emotions run high with respect to actual or expected inheritances or the management of the property gratuitously transferred. Part of the reason is that the perception of whether an inheritance is “fair” often is related to the inheritor’s

² The law of New York, and other states, at one time required mandatory counseling for married couples planning divorce. The legislative and judicial resources expended were so great compared to the results society envisioned it would gain that the required counseling was abandoned. *See, e.g.,* N.Y. Domestic Relations Law.

³ *See generally* *America’s Capital Markets: Maintaining Our Lead in the 21st Century: Hearing Before Subcom. on Capital Markets, Insurance, and Government Sponsored Enterprises of the H. Comm on Financial Services* (statement of James R. Copland, Director of the Center for Legal Policy at the Manhattan Institute for Policy Research) (estimating that “the American ‘tort tax’ – the percentage of the gross domestic product consumer by tort law cost – is 2.22 [%].”). And, of course, there many legal claims other than those founded in tort made each year in America.

⁴ Although it is at least arguable that virtually all gratuitous transfers should be in trust, many beneficiaries perceive that trusts are used by lawyers to separate them from their “rightful” entitlements to others’ property. *See generally* Jonathan G. Blattmachr, *The Right Answer: Put It All In Trust*, TR. & INVESTMENTS, Sept.-Oct. 1998, *reprinted in* 10 N.Y.S.B.A. ELDER LAW ATTORNEY 1 (2000).

view of his or her position in the family. Unlike commercial relationships where perceived productivity is, perhaps, the key element of position in and economic rewards bestowed (that is, how much has the person “earned” by effort and productivity), position and financial reward within a family are often based upon other factors, such as acceptance and support by a family member without regard to how deserving he or she is in a financial and, often, moral sense.⁵

Failure to be treated as one believes he or she should have been with respect to sharing in an inheritance or gift often triggers litigation. And, it seems that the climate for such disputes likely may never have been greater in modern time on account of three factors. One is expectation. The growing wealth of people has allowed them to provide their offspring and spouses with ever increasing financial benefits. Fewer teenagers today acquire summer jobs, more children receive automobiles immediately upon obtaining a driver’s license, more adult children live at home (often with their own spouses and children) supported by their parents. Under such circumstances, it seems natural for the descendants to expect to continue to be supported by their ancestors’ wealth after the ancestors die. There is a sense of entitlement that does not have to be earned. Frustrating that sense may lead to litigation.

Second, there are more marriages than ever before where either or both spouses have a descendant from a different union.⁶ Although almost everyone knows that a person is most influenced by the one with whom he or she sleeps (such as his or her parent’s spouse who is not his or her parent), descendants from an earlier union continue to have expectations of financial reward especially when the parent dies, even though the parent may be married to someone other than their other parent. The last spouse also may expect to be rewarded financially even if the deceased spouse has descendants only from another union (or unions). In fact, most states provide a minimum inheritance for a surviving spouse no matter how short the duration of the marriage (unless the right to it has been effectually waived).⁷ But there are virtually no rights to inheritance for descendants.⁸ Not infrequently, the surviving spouse will be approximately the same age as the children from a

⁵ GERALD LE VAN, *HEALTHY WEALTH IN FAMILIES* 37–38 (2007).

⁶ It has been reported that fewer than half of American marriages last to the twenty-fifth anniversary. See Sam Roberts, *25th Anniversary Mark Elusive for Many Couples*, N.Y. TIMES, Sept. 20, 2007, at A1.

⁷ See, e.g., N.Y. EST. POWERS & TRUSTS § 5-1.1A.

⁸ One exception is in Louisiana. LA. CIV. CODE ANN, art. 1493 *et. seq.*

prior union of the spouse dying first, and sometimes considerable younger.⁹ In such a case, diversion of wealth, even if only temporarily for the surviving spouse (such as for the balance of his or her lifetime), may result in a perception of denial of the property by descendants.¹⁰

Third, more families today, than in the recent past, have three generations living together.¹¹ Grandchildren expect continued support from grandparents and some grow to believe that they should share any inheritance equally with their parents who are the children of the grandparent. Usually, however, neither the law nor the instruments that control the disposition of wealth at death provide directly for a grandchild whose parent who is the child of the property owner and which child survives. For example, the intestacy laws, which specify the distribution of the wealth of a decedent who does not dispose of his or her directly owned property by Will, universally provide for a distribution to children who survive and not to any grandchild unless his or her parent who is the child of the property owner has predeceased the latter.¹²

In general, the law provides for all children (or descendants of a predeceased child collectively) to receive an equal share of

⁹ In one celebrated “Will contest,” the exercise of a power of appointment, conferred on the decedent by his late wife, by him by his Will, in favor of a trust providing an income interest for life for his subsequent wife, was challenged by his children, two of whom it is understood were younger than his subsequent wife. An attorney whose firm represented the decedent’s children in the contest advised that his firm presented evidence on how much more in value the exercise of the power favored the decedent’s widow as opposed to his children who were the remainder beneficiaries of the trust he created by that exercise. The contest by the children was unsuccessful. *See generally* William H. Honan, *How Prices Are a Threat to Art Collections*, N.Y. TIMES, July 29, 1991, at C11 (noting that the children “sued, contending that their stepmother had exercised undue influence on their father when he changed his will [sixteen] times during their [seven] years of marriage. They lost.”).

¹⁰ Probably, it is most common for the first spouse to die to devote all, or almost all, of his or her wealth to the surviving spouse if there are descendants only of that union. Federal tax law encourages such action because estate tax on the wealth of the first spouse to die may be postponed through the use of the estate tax marital deduction. *See* I.R.C. § 2056(a) (2000). In some cases, overall taxation of the wealth of the first spouse to die may increase because, in general, property that has qualified for the marital deduction in the estate of the spouse first to die is included in the gross estate for Federal estate tax purposes of the surviving spouse, potentially subjecting it to higher tax rates. In any case, from a “time use of money” perspective, the descendants of the marriage are better off financially receiving the wealth when the first spouse dies rather than waiting to receive it when the surviving spouse dies. *See generally* Jonathan G. Blattmachr, *Economic Ramifications of the Use of the Marital Deduction and Related Matters*, CHASE REVIEW, Oct. 1985.

¹¹ *See, e.g.*, Sara B. Miller, *Three Generations, One Home*, CHRISTIAN SCI. MONITOR, Aug. 22, 2005.

¹² These are commonly called “intestacy” laws. *See, e.g.*, N.Y. EST. POWERS & TRUSTS § 4.1.1.

wealth belonging to the property owner when the latter dies, unless an alternative disposition is specified in a Will¹³ or other testamentary instrument.¹⁴ Usually, disputes arise among descendants as to the disposition of property directed by the decedent when that disposition among children is not equal. But disputes may occur for other reasons as well. For example, an older child may perceive that he or she is entitled to a larger share of the inheritance.¹⁵ Also, children may feel that the descendants of a predeceased child should not share equally with the surviving children even though such descendants usually take collectively only the part that the predeceased child would have received had he or she survived.¹⁶

On the other hand, some grandchildren believe that they should share equally with other grandchildren even though the number of children each predeceased child leaves behind is different. For example, two of a parent three children predecease her. The first oldest child to die has three children and the next child to die has only one child. The three children of the older predeceased child share equally in the part the oldest child would have received if he or she had not predeceased the parent (that is, each receives one-third of one-third or one-ninth of the parent's estate); the one child of the other predeceased child takes the entire share his or her parent would have received if he or she had survived (that is, a full one-third). Hence, the grandchildren do not share equally: the only child of one of the two predeceased children receiving three times more than that which his or her cousins receive.¹⁷

¹³ See, e.g., *id.*

¹⁴ For example, as a general matter, proceeds of insurance on the property owner's life are disposed of pursuant to a written form (not part of the insured's Will and not executed with the formalities of a Will). However, if no effectual designation has been made, the proceeds typically are paid to the insured's probate estate and will be disposed of in accordance with the insured's Will or, to the extent not so thereby disposed of, under the intestacy law of the insured's domicile.

¹⁵ At one time, under English law, the oldest son inherited the entire estate under a concept known as "primogeniture." See BLACK'S LAW DICTIONARY 1210 (7th ed. 1999). Even the Bible directs inequality of inheritances. See *Numbers* 27:1-11.

¹⁶ *In re Matter of Martin B.*, N.Y.L.J., Aug. 6, 2007 at pg 1, col. 1 [Sur. Ct., New York County, Roth, R.] Surrogate's Court ruled that posthumously conceived children of a son of the grantor of a trust, which son predeceased his father, would be entitled to share on a *per stirpital* basis along with the other descendants in the trust their biological paternal grandfather had created for his wife (who survived him) and which would pass to his "then living issue *per stirpes*" upon her death. *Id.* Initially, the other child who survived his father took the position that his brother's posthumously conceived children should not share (or should not share as completely) in the trust as he should. *Id.*

¹⁷ See generally Spencer Pinkham, *Frustrari Per Stirpes*, 53 REC. ASS'N BAR CITY N.Y. 138 (1963).

It is appropriate to point out that today significant property passing upon death does not pass under the intestacy laws or Wills.¹⁸ Rather, it passes pursuant to “operation of law,” such as a survivorship feature embedded in the legal relationship such as property jointly owned with right of survivorship, a contract or similar designations (such as with respect to life insurance and annuity policies, retirement plans and trusts) or by other means. Disputes also arise with respect to wealth that is disposed of by such alternate means. Yet the development of mechanisms to discourage litigation with respect to such wealth has been limited.¹⁹

In addition to disputes as to the proper disposition of wealth among inheritors, disputes between fiduciaries and inheritors often arise and lead to litigation. The person raising the dispute is sometimes called the “contestant” or “objectant.”²⁰ Usually, the complaint is made by the contestant about the conduct of the fiduciary although it has arisen in the context of the fiduciary making a complaint.²¹ Inheritors may seek damages from a fiduciary for alleged violation of the duties of care and loyalty, or they may seek the removal of a fiduciary for a variety of other reasons.²²

In some ways, the law in some states itself spurs litigation. For example, in certain jurisdictions, such as New York, proving an instrument is the property owner’s Will may be accomplished only by a commencement of a lawsuit against those who would inherit if there were no Will, those whose interests have been reduced or eliminated by a codicil (which is also offered to probate) and those whose interests have been reduced or eliminated under the instrument offered for probate that is later in date than one filed in the

¹⁸ See, e.g., N.Y. EST. POWERS & TRUSTS § 13-3.2

¹⁹ Legislation permitting designation of successor does not specify whether “disinheritance” provisions may be embedded. For example, under the Uniform Transfer On Death Security Registration Act providing for testamentary dispositions of property other than by Will or trust appears silent on whether a disinheritance provision may or may not be used to cause a forfeiture if a designated recipient challenges the dispositions made pursuant to such Act. This Act has been adopted in a number of states. See, e.g., N.Y. EST. POWERS & TRUSTS §§ 13-4.1–4.12.

²⁰ The term “objectant” is used because the person “objects” to the accounting presented by the fiduciary of the fiduciary’s acts, transactions and proceedings. That is, the objectant contends the accounting does not accurately reflect those acts or that certain acts should be found to be improper.

²¹ See, e.g., *In re Othmer*, 796 N.Y.S.2d 109 (2d App. Div. 2005), where an executor unsuccessfully “contested” a limitation on commissions for services as executor where his appointment as that fiduciary was conditioned on his accepting the compensation limitation set forth in the Will even though he did not accept it prior to his appointment by the court.

²² One may be that the fiduciary is incompetent to serve or has become ineligible to serve (e.g., on account of a conviction of a crime). Cf., e.g., N.Y. Surr. Ct. Proc. Act §§ 709–711.

court where the probate proceeding is commenced.²³ Hence, a lawsuit must be commenced, causing those against whom the suit is brought often to seek legal advice as to their rights and options. Not all states follow such procedures.²⁴ It is understood that the reason many jurisdictions do not require the commencement of a lawsuit to get the instrument admitted to probate as the decedent's Will is that those who would inherit were there no Will likely would be aware that the property owner had died and aware of the probability that an instrument will be offered for probate (Usually, notice of the offering of the instrument to probate must be published). It is understood that a far lower percentage of Will contests occur in such jurisdictions.

Another area where the law tends to spur litigation is with respect to the actions of a fiduciary. In New York, for example, it is common for the executor(s) or trustee(s) to prepare a written accounting of the acts, transactions and proceedings undertaken while acting as such fiduciary and to commence a proceeding in court against those who have an interest in the trust or estate with respect to which the accounting relates. Again, being made a party to a lawsuit may well trigger that party into seeking legal advice. Also, the form of the accounting "required" by New York law²⁵ is essentially not comprehensible except by those who have had considerable experience with it. Hence, an interested party who receives such an accounting (sometimes at least as thick as the Manhattan telephone directory) may turn to a lawyer for advice about it and that increases the chances of litigation with respect to matter disclosed in it (or matters which the beneficiary is advised should have been disclosed).

PART II: IN TERROREM CLAUSES

Until well into the twentieth century, almost all property passing at death was transferred by Will. However, as indicated above, now significant wealth (often the majority of wealth of an individual) is transferred at death by other means. This wealth includes

²³ See, e.g., N.Y. Surr. Ct. Proc. Act §§ 1402–1403.

²⁴ See, e.g., PA. Cons. Stat. § 9 (2007).

²⁵ The "statutory" form of accounting "approved" under New York law is prescribed in the Official Forms to the Surrogate's Court Procedure Act. See, e.g., Official Form JA-4 prescribed by the New York Surrogate Procedure Act. 17 WEST MCKINNEY'S FORMS EST. & Surr. Prac. § 13.17. It is uncertain if any other type of accounting will provide a fiduciary with a discharge of liability.

life insurance proceeds, pension and similar benefits and payable-on-death accounts which in some ways operate as a revocable trust does. In fact, in many jurisdictions, the “preferred” method to transfer assets to others at death is through a revocable (also known as a “living” or “inter vivos”) trust.²⁶ However, considerable property continues to be disposed of by Americans by their Wills. Greed and other motives often resulted in attempts to influence the person who executes the Will (commonly called the “testator”) to transfer all or a significant portion of that wealth to certain individuals or institutions. Outright fraud was (and still is) not uncommon with respect to the preparation of an individual’s Will. The law has attempted to create barriers to prevent fraud with respect to such documents and to attempt to ensure the document reflects the conscious and actual wishes of the property owner. One is the Statute of Wills.²⁷ Generally, it is a state statute requiring that the Will be executed in accordance with strict formalities, including, as a general matter, that it be in writing, be declared by the testator to be his or her Last Will and Testament and be witnessed by disinterested persons (that is, those who would take no financial interest under it).²⁸

Many people do not execute Wills.²⁹ As a result, all states have a default disposition scheme, called “intestate succession” (often referred to as “intestacy laws” or simply “intestacy”). Intestacy laws provide for the property to be inherited by those whom the state legislature believes are the ones the property owner would wish to receive his or her property in the event of death. Typically, these are the surviving spouse and descendants, descendants alone if there is no spouse, parents if there is neither a spouse

²⁶ See James Casner, *Estate Planning-Avoidance of Probate*, 60 COLUM. L. REV. 108 (1960).

²⁷ See, e.g., Statute of Wills, 1540, 32 Hen. 8, c.1 (Eng.); N.Y. EST. POWERS & TRUSTS § 3-2.1. Although significant wealth today, as indicated, is transferred by means other than by Will, virtually none of the safeguards with respect to dispositions by Will has been enacted. *But see* FLA. STAT. § 737.111 (2007) (requiring trusts will “testamentary aspects” to be executed with the formalities of a Will). However, this provision has been repealed effective July 1, 2007, except with respect to revocable trusts. FLA. STAT. § 736.0403 (2007).

²⁸ Other statutes have been passed to attempt to insure that the decedent’s property passes as he or she wishes. For example, many jurisdictions have passed what are called “mortmain” statutes, which limit bequests to charity. See, e.g., *Runyan v. Coster’s Lessee*, 39 U.S. 122, 131 (1840) (“the English statutes of mortmain are in force in Pennsylvania”).

²⁹ Apparently, a majority of decedents die without Wills. See, e.g., Ralph Calhoun Brashien, *Half-Bloods, Inheritance and Family*, 37 U. MEM. L. REV. 215, 216 n. 1 (2007). Infants and incompetents cannot lawfully execute Wills.

nor descendants and so on.³⁰ These individuals are commonly called heirs-at-law, next-of-kin, intestate takers or distributees.

Generally, if an heir-at-law does not receive under the instrument offered to be proved (or probated) as the property owner's Will at least as much as he or she would have received in intestate succession, he or she has legal standing to challenge the instrument offered for probate (that is, to contend it is not a valid Will, in whole or in part). Even if he or she does receive at least as much property under the instrument offered for probate as he would receive if there were no Will, the intestate taker may have standing to challenge the Will for other reasons, such as the form of disposition (e.g., that the inheritance is in trust and not outright as it would be under the intestacy laws), or the nomination of someone as the executor of or trustee under the Will.³¹

Probably, the failure to receive at least as much under the proffered Will as the distributee would receive in intestacy is the principal reason to challenge the document (that is, to contend that it is not the decedent's Will). Obviously, such a challenge may well reflect a financial interest in the decedent's property, but it often also reflects an emotional one as well. A child who, under the instrument offered for probate, would receive less than his or her sibling may feel emotionally "disinherited." That is, the child perceives that the document reflects lack of equal love and respect that has been bestowed on his or her brother or sister or someone else.

To attempt to prevent an heir-at-law from challenging the instrument offered as the property owner's Will (such distributee called an "objectant" or "contestant" because he or she is objecting to or contesting the admission of the document to probate), that instrument may provide that an objectant will forfeit any disposition it makes in his or her favor. Such a provision is intended to frighten or terrorize any distributee from objecting and is commonly called an "in terrorem," "disinheritance" or "forfeiture" clause, and those terms are used interchangeably in this article. Usually, such a provision states that any objectant will be treated as though he or she predeceased the testator (often without descendants if even the objectant has one or more descendants³²), if

³⁰ See, e.g., N.Y. EST. POWERS & TRUSTS § 4-1.1.

³¹ See, e.g., RESTATEMENT (THIRD) OF PROPERTY (WILLS & OTHER DONATIVE TRANSFERS) § 8.1 (2003). Cf. *In re Weinstock*, 40 N.Y.2d 1, 386 N.Y.S.2d 1 (1976).

³² The reason the objectant is treated as predeceasing without descendants is because Wills often provide that if a child predeceases the testator the disposition in his or her favor passes to

he or she challenges the instrument. An in terrorem clause, quite obviously, is ineffectual to cause the disinheritance if the instrument is denied probate. In other words, if the instrument is not proved to be the Last Will and Testament of the property owner, the disinheritance provision it contains will have no force or effect. Also, the extent to which an in terrorem clause is enforceable depends upon state law. Some states, such as California and New York, enforce them without limitation.³³ In general, states that have adopted the Uniform Probate Code, enforce disinheritance provisions only if the objectant did not have a reasonable basis to object to the admission of the Will to probate.³⁴ Other states, such as Florida, do not enforce them.³⁵

If the individual is domiciled in a state that limits or prohibits the enforcement of such disinheritance clauses, such a provision might be made enforceable against his or her heirs-at-law by directing the instrument offered to original probate in a state that will enforce them.³⁶ Alternatively, the individual may place his or her assets (or almost all assets) into a revocable trust to be governed by the law of a state that will enforce such forfeiture provisions in such a trust.³⁷

his or her surviving descendants. Hence, if only the objectant is treated as predeceasing, his or her descendants would take the share. *Cf.* N.Y. EST. POWERS & TRUSTS § 3-3.3 (“[w]henever a testamentary disposition is made to the issue . . . of the testator, and such beneficiary dies during the lifetime of the testator leaving issue surviving such testator, such disposition does not lapse but vest in such surviving issue.”). Because that would keep the share in the objectant’s family, the disinheritance clause may not be as onerous as one where both the objectant and his or her descendants are all treated as predeceasing.

³³ See, e.g., N.Y. EST. POWERS & TRUSTS § 3-3.5(b).

³⁴ See, e.g., ALASKA STAT. § 13.36.555 (2007) (“[a] provision in a Will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.”)

³⁵ FLA STAT. §§ 737.207, 732.517, 736.1108 (2007).

³⁶ See, e.g., N.Y. SURR. CT. PROC. ACT § 1605 (allowing non-residents of New York to direct admission of the instrument to probate in New York). Note that N.Y. EST. POWERS & TRUSTS § 3-5.1(h) provides, in part,

When a testator, not domiciled in this state at the time of death, provides in his will that he elects to have the disposition of his property situated in this state governed by the laws of this state, the intrinsic validity, including the testator’s general capacity, effect, interpretation, revocation or alternation of any such disposition is determined by the local law of this state.

Id.

³⁷ See, e.g., ALASKA STAT. § 13.36.330 (2008):

A provision in an inter vivos or testamentary trust purporting to penalize a beneficiary by charging the beneficiary’s interest in the trust, or to penalize the beneficiary in another manner, for instituting a proceeding to challenge the acts of the trustee or other fiduciary of a trust, or for instituting other proceeding relating to the trust, is enforceable even if probable cause exists for instituting the proceedings.

Many reasons have been cited to use arbitration or mediation, especially with respect to estates and trusts.³⁸ These include reducing costs and time to resolve a dispute, privacy, and to avoid the nearly inevitable results of hostility (or enhanced hostility) that individuals develop in litigation toward the other party or parties.³⁹ It has been suggested that the latter point (that is, minimizing personal animosity toward the other party or parties to the dispute) is especially important in trust and estate matters on account of the probability that the parties are family members.⁴⁰ And it is likely a reasonable observation that few, if any, individuals want their wealth to be the source of generating disputes among surviving family members or between beneficiaries whom the property owner has selected to enjoy the benefits of his or her wealth, and the fiduciaries selected by the property owner to manage and care for it.

Nevertheless, as indicated, preventing the beneficiaries from exercising their full rights and remedies under the law deprives them of the opportunity to use the full panoply of these rights and remedies that law would otherwise bestow of them to remedy a perceived wrong. And, as indicated, at least some states, such as Florida, limit the extent to which an individual may, through a disinheritance clause, limit these rights.

As explained below, a disinheritance or forfeiture provision might be used as a key element in causing individuals to use mediation or arbitration to resolve disputes. In fact, although it is beyond the scope of this article to discuss the matter in detail, such a provision in a Will might also be used to prevent other disputes relating to the transfer of property transferred at death other than by Will, such as by a designation of a beneficiary to receive retirement plan interests belonging to the decedent.

Id.

³⁸ See, e.g., Ray D. Madoff, *Mediating Probate Disputes: A Study of Court Sponsored Programs*, 39 REAL PROP. PROB. & TR. J. 697 (2004); Susan N. Gary, *Mediating Probate Disputes*, 13 PROB. & PROP. 11 (1999); Roselyn L. Friedman & Erica E. Lord, *Using Facilitative Mediation in a Changing Estate Planning Practice*, 32 EST. PLANNING 15 (2005); Robert N. Sacks, *Mediation: An Effective Method to Resolve Estate and Trust Disputes*, 27 EST. PLAN. 210 (2000).

³⁹ See *supra* note 38.

⁴⁰ *Id.*

PART III: METHODS OF REDUCE DISPUTES

Depending upon the jurisdiction involved and the goals the property owner seeks to achieve, it seems there are at least six methods that may be available to reduce the risk of litigation with respect to trust and estate matters.

1. *Advise Inheritors of Inheritance Plans.*⁴¹

Although Will and related “contests” are often about claims to wealth, the litigation often includes an element of perceived entitlement. And that feeling of entitlement is based upon emotional feelings. More than one a child who has been partially or totally disinherited – that is, does not receive at least what would be his or her intestate share (or at least a share as large as others) – has said something like: “Mother loved me as much as she loved you. So she would not have voluntarily given you more. You tricked her. And you cheated me and my children.” Occasionally, a child will perceive that he or she had an extra need that the parent wanted to fulfill. That happens, for example, where one child lives with the parent and another (or the others) do not. The stay-at-home child views the parent’s residence as his or her own home and has an expectation that he or she will receive that asset as well as an equal share of the balance of the estate. Unless the parent provides for the child to receive the home, that child may perceive that the parent was duped. Typically, the complaint is against another sibling even if the other sibling received no more of the estate than the stay-at-home child. Sometimes, the complaint is lodged against the attorney who prepared the Will or against another advisor (such as the individual’s accountant or financial counselor).

Regardless of whether the complaint is spurred by a failure to receive an equal share or failure to receive more than an equal share, telling the children (or others) ahead of time what their shares in the estate will be may reduce the risk of a post-mortem dispute. A child or other inheritor, who is displeased with the advice, especially if it is given long before death, has many opportuni-

⁴¹ Some contend that a parent’s involving his or her adult children in his or her estate planning, as part of “holistic” estate planning, including mediation during the estate planning process, reduces the risk of litigation. *See, e.g.*, David Gage, John Gromala & Edward Kopf, *Holistic Estate Planning and Integrating Mediation in the Planning Process*, 39 *REAL PROP. PROB. & TR. J.* 509 (2004).

ties to try to change the outcome. In some cases, the advice is initially given verbally. A parent, for example, may tell the child who will receive less than an equal share that the parent is discriminating in favor of another child on account of a perceived additional need of such other child. This may be less likely to cause anger if the parent states that the other child who will receive more does not know about it.

However, advising a child that he or she will not receive an equal share may have adverse effects even if it prevents litigation after death. For example, the child may refuse to communicate with the parent and may turn against the other child who will receive an enhanced share even if that other child is unaware of the plans for provide an unequal disposition of wealth.

When the reason for the reduced or total disinheritance is because the parent perceives the child with disfavor, such as where the parent and child do not communicate (or when they do it is contentious), advising the child may be appropriate. There seems to be little downside to doing so. Whether the reason should be communicated to the child is debatable. The child may contest the disposition on the ground that the parent was acting under a delusion or claim while the parent is alive that he or she is incompetent and the child should be appointed as his or her guardian.⁴²

In some cases, the “spill back” may be lowered if the lawyer for the parent makes written communication advising the child (perhaps, through the child’s own attorney) of the inheritance plan. In any case, the lawyer may invite the child to have his or her own legal counsel contact the testator’s lawyer to discuss the matter. The fact that the parent’s lawyer is involved tends to show it is not a whim or the result of a delusion and may reduce the risk that there will be a perception of unfair play by the family members who receive enhanced shares.

Another option may be not just to advise the potential contestant of the property owner’s plans for disposition but to enter a contract with that person that he or she will not object to the validity of the document or otherwise challenge it. Such a pre-death contract seems enforceable but the states vary widely as to how much consideration must be provided to make it enforceable. In at least some jurisdictions, it seems that the person releasing the claim must receive “fair consideration.”⁴³ It seems extremely difficult to

⁴² *Cf.*, e.g., *Getty v. Getty*, 187 Cal. App. 3d 1159, 232 Cal. Rptr. 603 (Cal. 2d. Dist. 1986).

⁴³ *See*, e.g., RESTATEMENT (THIRD) OF PROPERTY (WILLS & OTHER DONATIVE TRANSFERS) § 2.6, cmt. j. (1992):

determine what fair consideration would be. Hence, it seems “risky” at best to rely on such a pre-death contract to avoid Will contests and similar challenges. However, use of a pre-death contract might be used to obtain consent to mediation or arbitration, as discussed below.

2. *Use a Revocable Trust in Lieu of a Will.*

A Will becomes operative only when the testator dies. It typically has no practical effect during the testator’s lifetime. It seems to be more credible to contend that the decedent did not know the contents of the Will or that it does not reflect his or her true wishes than a document that has impact during his or her lifetime. A revocable trust, especially if funded with substantial assets during lifetime, seems more difficult to challenge on the ground that the individual was unaware of its terms.⁴⁴ Usually, after creating such a trust, the property owner will have assets retitled into the name of the trust, a tax identification number for the trust may be acquired, tax returns and other tax forms may have been filed by the trust, insurance in the name of the trust may be obtained (to insure assets the trust owns) and other action may be taken that demonstrates that the property owner is aware of the trust’s existence if not its post-death effects. In some cases, such as where life insurance is acquired by or transferred to the trust, the insurance company will ask for a copy of the trust or a description of it. Again, such action may reinforce that the property owner is fully aware of

A presumptive heir (or devisee) can *release* an expectancy interest to the decedent or *assign* an expectancy interest to a third person. A contract to release or assign an expectancy interest is only enforceable in equity and only if the heir (or devisee) receives fair consideration. If a releasor or assignor predeceases the decedent, the right of the descendants of a releasor but not of an assignor are cut off by the ancestor’s action.

Id. See generally Kathleen R. Guzman, *Releasing the Expectancy*, 34 *ARIZ. ST. L.J.* 775 (2002).

⁴⁴ However, in at least one respect, a Will may be more difficult to challenge. That is with respect to capacity. The capacity to make a Will is regarded as the lowest of all legal documents. Nonetheless, as a general rule, the legal capacity that is required to make a Will is lower than that for making a trust. See, e.g., *Matter of ACN*, 133 Misc. 2d 1043, 509 N.Y.S.2d 966 (Surr. Ct. New York County 1956). Also, in some states, the burden of proof may shift on certain issues if a revocable trust is used rather than a Will. For example, the burden of proof of whether a disposition is the product of undue influence where the recipient of the gift stood in a fiduciary relationship to the decedent may shift if the disposition is made under a revocable trust rather than by Will.

the trust and its terms.⁴⁵ Also, as a general rule, a trust is valid even if not executed in accordance with the formalities of a Will.⁴⁶ Furthermore, when the grantor of the trust dies and the trust becomes irrevocable, no lawsuit need be commenced to “prove” the document in order to make it effective in transmitting property. Finally, it seems that a property owner, in general, has significantly greater flexibility in choosing the law that will govern the validity, construction and effect of the trust than of his or her Will.⁴⁷

As a consequence, it seems that the validity of a trust created during a lifetime is less likely to generate challenge than may the validity of a Will.

⁴⁵ The insurance company generally will require that any trust that acquires a life insurance policy have beneficiaries who have an “insurable” interest in the life of the insured. *See, generally* Jonathan G. Blattmachr & Michael L. Graham, *No Fear, Chawla and the ILIT: Past, Present and Future*, WEALTH TRANSFER PLAN NEWS, May 2005, available at http://www.mylegalnews.com/ilsdocs/Archives/05_2005_A1_.htm.

⁴⁶ *But cf.* FLA. STAT. § 737.111 (2007) requiring trusts with “testamentary aspects” to be executed with the formalities of a Will. However, this provision has been repealed effective July 1, 2007, except with respect to revocable trusts. FLA. STAT. § 736.0403 (2007).

⁴⁷ *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270 (1971); ALASKA STAT. § 13.36.035 (2000) provides, in part:

(c) A provision that the laws of this state govern the validity, construction, and administration of the trust and that the trust is subject to the jurisdiction of this state is valid, effective, and conclusive for the trust if

(1) some or all of the trust assets are deposited in this state and are being administered by a qualified person; in this paragraph, “deposited in this state” includes being held in a checking account, time deposit, certificate of deposit, brokerage account, trust company fiduciary account, or other similar account or deposit that is located in this state;

(2) a trustee is a qualified person who is designated as a trustee under the governing instrument or by a court having jurisdiction over the trust;

(3) the powers of the trustee identified under (2) of this subsection include or are limited to

(A) maintaining records for the trust on an exclusive basis or a nonexclusive basis; and

(B) preparing or arranging for the preparation of, on an exclusive basis or a nonexclusive basis, an income tax return that must be filed by the trust; and

(4) part or all of the administration occurs in this state, including physically maintaining trust records in this state.

(d) The validity, construction, and administration of a trust with a state jurisdiction provision are determined by the laws of this state, including the

(1) capacity of the settlor;

(2) powers, obligations, liabilities, and rights of the trustees and the appointment and removal of the trustees; and

(3) existence and extent of powers, conferred or retained, including a trustee’s discretionary powers, the powers retained by a beneficiary of the trust, and the validity of the exercise of a power.

Id.

Another possible step to take is to make the trust amendable or revocable only with the consent of an independent person. A recital in the instrument that the individual has thoroughly considered the terms of the trust and feels so strongly that they are what he or she wishes that he or she has decided to permit change only if an independent person approves may reinforce that the instrument does express his or her true wishes.⁴⁸

3. *Use an Irrevocable Trust In Lieu of a Will or Revocable Trust.*

An even further step would be to make the trust irrevocable. As described above, a lifetime revocable trust both from a practical perspective (e.g., no lawsuit needed to be commenced to prove its validity) and theoretical one (e.g., no or fewer formalities as a general rule needed to make the trust valid as there are for a Will) is less likely to be challenged as invalid than is a Will. An even more assured manner to reduce the risk of a challenge to the validity of the document and reduce the risk of an effective challenge may be to make the trust irrevocable. Even though irrevocable, the transfers of property to the trust need not be subject to gift tax. Many irrevocable transfers in trust, such as those where the grantor may “change the interests of the beneficiaries as between themselves” or “revest the beneficial title to the property in himself” or herself, are not subject to gift tax because the transfer is regarded as incomplete for such purposes.⁴⁹ The transfer also is incomplete and, therefore, not subject to gift tax, even if the transfer is irrevocable, and the grantor retains no power to change the interests of the beneficiary but is eligible, in the discretion of another person as trustee, and not entitled to any distribution from the trust if, under local law, the grantor’s creditors may attach the assets in the trust.⁵⁰ Indeed, under the law of most states, a creditor of the grantor may attach the trust assets to the extent the trustee may distribute property to the grantor, even if the grantor has no intent to

⁴⁸ For tax purposes, a transfer is regarded as incomplete (and, hence, not regarded as a taxable gift) if it may be changed by the transferor alone or with the consent of a non-adverse party (which is a person who has no substantial economic interest in the property that would be adversely affected if the transferor made the change). *See* Treas. Reg. § 25.2511-2(c) (1999).

⁴⁹ *Id.*

⁵⁰ *See, e.g.,* Rev. Rul. 76-103, 1976-1 C.B. 293. Under the law of most American states, creditors may attach property in a trust from which the trustee may distribute property to the grantor. *See generally* RESTATEMENT (THIRD) OF TRUSTS, §§ 58–60 (2003).

delay, hinder or defraud creditors when transferring property to the trust.⁵¹

However, a grantor may (or, if any part of a transfer to the trust is a completed gift, must)⁵² file a United States Gift (and Generation-Skipping) Transfer Tax Return (I.R.S. Form 709) reporting the transfer and attaching a copy of the trust agreement even if the transfer is incomplete.⁵³ Even if the taxpayer is relatively confident the transfer is not complete, filing a Form 709 may permanently establish for Federal gift tax purposes that the transfer is complete. If no return is filed or if the transfer is not reported on it (even if the taxpayer has a reasonable basis to believe that no reporting of the transfer is required), the statute of limitations to impose gift tax with respect to the transfer never commences.⁵⁴ In fact, significant detail about a transfer that the taxpayer believes is not subject to gift tax (because it is incomplete or otherwise) must be disclosed in detail to cause that statute to run.⁵⁵ That kind of detailed disclosure likely is evidence of knowledge of the disposition and that it was intended to be a gift.⁵⁶

In fact, making a transfer to a trust a completed gift, upon which gift tax is paid, likely constitutes further evidence of an intent to make precisely the transfer involved and which is described on the gift tax return.⁵⁷ And, a transfer to a trust may be complete even if the grantor is a beneficiary to whom another as trustee may, as a matter of discretion, make distributions, if the trust is created under the law of the state under which the creditors of the grantor may not attach the trust assets.⁵⁸ Alternatively, during his or her lifetime the property owner could transfer property outright to per-

⁵¹ See generally Jonathan G. Blattmachr, *Does the New Alaska Trusts Act Provide an Alternative to the Foreign Trust?*, J. ASSET PROTECTION, Vol. 2, No. 6 (July-Aug. 1997).

⁵² No gift tax return need be filed if all transfers for the year fell under the gift tax annual exclusion under section 2503(a) of the Internal Revenue Code of 1986, as amended, qualified without election for the gift tax marital deduction or qualified for the gift tax charitable deduction. See, I.R.C. § 6019 (1986) (as amended).

⁵³ See Treas. Reg. § 301.6501(c)-1(f)(5) (2000).

⁵⁴ See I.R.C. § 6510 (c) (11) (1986) (as amended).

⁵⁵ Treas. Reg. § 301.6501(c)-1(f) (2000).

⁵⁶ A United States tax return must be sworn to be made under penalties of perjury, which may be further indication that the taxpayer believes the description of the gift (whether complete or not) accurately reflect his or her understanding of what is disclosed such as the nature of the transfer.

⁵⁷ Normally, gift tax is lower than estate tax on account of the manner in which the gift tax and estate tax are imposed. See generally Jeffrey N. Pennell & R. Mark Williamson, *The Economics of Prepaying Wealth Transfer Tax*, 136 TR. & EST. 40, 49, 52 (1997).

⁵⁸ See, e.g., *German v. United States*, 7 Cl. Ct. 641 (1985); cf. Rev. Rul. 2004-64, 2004-27 I.R.B. 7.

sons (or in irrevocable trusts for their benefit) disclosing the transfer on a gift tax return. That likely reduces the risk of any challenge to such dispositions and the likely success of any made. However, most individuals do not wish to transfer all or a significant part of their wealth prior to death. Hence, such completed gift strategies, especially if they will generate the payment of gift tax, are unlikely to be employed to avoid post-death disputes among beneficiaries.

Nevertheless, as discussed above, it seems that a successful challenge to the validity of a document is less likely if it is a lifetime trust, which has been significantly funded, rather than if a Will is used. It also seems that the possibility of successful challenges to specific provisions also may be lower if the instrument is such a trust agreement rather than a Will. For example, if the grantor of the trust has his or her chosen successor trustee act as trustee during the grantor's lifetime either alone or with the grantor, it should be much more difficult to contend that the grantor did not intend that person to be the successor fiduciary to act upon the grantor's death than if the appointment is made in a Will. Even dispositions in a lifetime trust may be harder to challenge. For example, if the property owner dies in a jurisdiction that has the traditional rule against perpetuities, violation of that rule may void the disposition.⁵⁹ Applying the law of another jurisdiction to the validity, construction and effect of the instrument, a jurisdiction which has "softer" rules (such as the absence of a rule against perpetuities), may limit the grounds for challenge. Similarly, alternative rules of evidence, etc. also likely can be controlled by using a lifetime trust rather than a Will.⁶⁰

4. *Use an In Terrorem Clause.*

When the child (or other intestate taker) is to receive what is likely to be perceived as a significant although not equal share, a disinheritance clause usually will help to reduce the risk of litiga-

⁵⁹ Traditionally, any violation of the rule against perpetuities vitiates all or part of the "unlawful" disposition. Historically, a theoretical possibility of violation (such as an eighty-year-old woman naturally bearing a child) is sufficient to render the disposition unlawful and, therefore, in whole or in part, void. *See generally* W. Barton Leach, *Perpetuities in a Nutshell*, 51 *HARV. L. REV.* 638 (1938).

⁶⁰ Courts seem to defer to the choice of law chosen by the grantor of a trust for resolving disputes with respect to it. *See generally* *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 270 (1971).

tion. If the property owner lives in state that will not enforce a such a clause, that person may consider directing the admission of his or her Will to original probate in a state that permits that and will enforce such clauses.⁶¹

Much of the litigation involving estates and trusts is not a “Will contest,” that is, a challenge to the validity of the document. Litigation may arise from a construction of the instrument, the choice of fiduciaries, or how the fiduciaries administer the estate or trust. In order to reduce the risk of such litigation, an in terrorem clause may be considered in order to provide a forfeiture of benefits under the document if any such a challenge is made. However, even in those states which uphold disinheritance provisions for the successful challenge of a Will, it may not be certain that such disinheritance or forfeiture clause may be used to deter other litigation, such as a challenge over certain fiduciary actions.

Just as a challenge to the validity of a trust created during lifetime may be less likely to occur and be less likely to be successful than the challenge to the validity of a Will, it seems that it may be possible to use a disinheritance provision in a trust, which is made subject to the laws of a state that will enforce a forfeiture provision, with respect to more than just an attack on the instrument’s validity. For example, as noted above,⁶² under Alaska law, a provision in a trust purporting to penalize a beneficiary by charging the beneficiary’s interest in the trust, or to penalize the beneficiary in another manner, for instituting a proceeding to challenge the acts of the trustee or other fiduciary of a trust, or for instituting other proceeding relating to the trust, is enforceable even if probable cause exists for instituting the proceedings. This broad authority given to an individual who creates the trust under Alaska law seems powerful and has been used by some attorneys to prevent almost certain litigation against the validity of other documents (including a threatened challenge by a spouse to a prenuptial agreement enter with the decedent), against fiduciaries or against other family members.

A sample provision occasionally used in Alaska trusts is as follows:

⁶¹ See *supra* note 32.

⁶² See *supra* note 37.

PROVISION AGAINST CONTEST

A. Actions Contesting the Agreement of Trust. To the extent not prohibited by applicable law, if any individual who is a beneficiary under this Agreement of Trust in any manner, directly or indirectly, (including but not limited to through a trustee, executor, guardian, conservator, committee, attorney-in-fact or any other fiduciary and even if the individual is not legally competent or is then deceased) (a) contests this Agreement of Trust, (b) contests or attacks any of its provisions, or tries to impair or invalidate any of its provisions, (c) conspires with or voluntarily assists anyone trying to do any act described in (a) and (b), or (d) brings an action claiming misconduct on behalf of any fiduciary under this Agreement of Trust and fails to establish in such action by clear and convincing evidence (whether or not such person substantially prevails in court because of a lower standard of evidence, such as a preponderance of the evidence) that such fiduciary's conduct was grossly negligent or constituted willful misconduct, then such person or persons shall forfeit and cease to have any right or interest whatsoever under this Agreement of Trust and such person or persons shall be deemed to have died without leaving issue surviving him or her for all purposes of determining any beneficial or other interest or office as a fiduciary under this Agreement of Trust.⁶³ After the commencement of any legal action referred to in this paragraph A, any distribution that would or could otherwise have been made under any provision of this Agreement of Trust to such individual or individuals or to his, her or their descendants shall not be made until the final outcome of the legal action has occurred, and then shall be made to him, her or them only if the grounds and standard of proof set forth above are met.

B. Actions against Beneficiaries. If any beneficiary hereunder shall, in any manner, directly or indirectly sue, commence or prosecute any legal proceeding of any kind in any court against another beneficiary for a violation of fiduciary duty (including, but not limited to, conversion or fraud) under this Agreement of Trust, and if such charge or contention is not proven by clear and convincing evidence (whether or not such person substantially prevails in court because of a lower standard of proof, such as preponderance of the evidence), then and in that event such

⁶³ The list of actions that will trigger the forfeiture may be expanded to cover other actions such as a contest against the decedent's Will or his or her designation of a beneficiary of a retirement plan (e.g., an individual retirement account or IRA).

beneficiary shall forfeit and cease to have any right or interest whatsoever under this Agreement of Trust.

C. Enforceability. If the foregoing provisions against challenge or contest are held by a court of competent jurisdiction to be invalid, ineffective or otherwise unenforceable, in whole or in part, such provisions shall be enforced to the extent not held to be invalid, ineffective or otherwise unenforceable, and it is the intention hereof that the Trustees with the sole and absolute discretion to make distributions to beneficiaries hereunder not exercise such discretion in favor of any individual who is a beneficiary under this Agreement of Trust, or in favor of any of his or her descendants, to the extent permitted by law, who in any manner, directly or indirectly (including but not limited to through a trustee, executor, guardian, attorney-in-fact or any other fiduciary and even if the individual is not legally competent or is then deceased), performs or takes any of the actions referred to in paragraph A or paragraph B of this Article and does not prevail to the extent and in the manner therein set forth. It is the intention hereof that no such individual or individuals, or any of his, her or their descendants receive any assets or any income or other benefit therefrom.

D. Determination of Conclusion of Action. Any action referred to in this Article shall not be deemed to be concluded, and any holding described shall not be deemed final, until either the expiration of any period of appeal from any decision or judgment concluding such action or containing such holding without appeal having been taken, or, if appeal is taken, until the last such appeal is resolved and the time to appeal from such resolution, if any, has expired.

E. Dismissal of Action. If any beneficiary files any action described in paragraph A or paragraph B of this Article, but dismisses such action with prejudice within ten (10) days of receiving written notification from the Trustees of the effect of the provisions of this Article on such beneficiary's right and interest under this Agreement of Trust, then such beneficiary shall not forfeit his or her right and interest under this Agreement of Trust, notwithstanding the provisions of this Article.

Experience has indicated that such a provision likely will reduce challenges and lawsuits. Although the law is not well developed, it seems that such a forfeiture provision would not cause any disposition intended to qualify for the estate tax, marital deduction or charitable deduction to be lost as long as the surviving spouse or

charity, as the case may be, does not take action that results in the forfeiture.⁶⁴ Even if the property owner is not willing to risk losing the marital deduction, an effective forfeiture of sorts probably may be used without significant risk of adverse tax effect in the context of a disposition intended for such deduction. For example, a gift tax or estate tax marital deduction is permitted for the entire value of property transferred in trust even though the spouse receives only an income interest for life.⁶⁵ However, the spouse may be given, among other rights, a special power to appoint the property at death, a power to withdraw corpus upon certain events or for certain purposes or to receive corpus in the exercise of discretion of a trustee. The instrument could provide that these “extra” interests (that is, those in addition to the right to receive income annually for life) will be eliminated if the spouse make a challenge that fails to meet the strictures of success set forth in the foregoing sample provision.

5. *Use Mediation or Arbitration Provisions.*

It seems that some individuals will choose to use some type of disinheritance clause (or other incentive) to prevent a Will contest or the equivalent with respect to other dispositions taking effect at the property owner’s death. As indicated by the foregoing sample language, many disputes arise even after the validity of the document has been established. And although a total forfeiture provision, similar to the foregoing sample, may prevent such challenges, it may be that the property owner instead would like to provide an alternate forum of dispute resolution (such as arbitration or mediation) rather than forfeiture.

Although it is not certain, it seems likely that the disinheritance provision will be enforceable at least to the extent a trust, which contains such a disinheritance clause, is funded prior to death and is created in a state which will enforce such disinheritance provisions.⁶⁶

⁶⁴ See, e.g., I.R.S. Priv. Ltr. Rul. 9244020 (Jul. 31, 1992) and the authority it cites. Note, however, that a private letter ruling may not be cited or used as precedent. I.R.C. § 6110(k)(3) (1986).

⁶⁵ See, e.g., I.R.C. §§ 2057(b)(7) and 2523(f) (1986) (*as amended*).

⁶⁶ A trust, in some jurisdictions, may also eliminate the rights of some persons (such as a surviving spouse) to a “statutory” share of the decedent’s estate. See generally RESTATEMENT (SECOND) OF TRUSTS § 330 cmt. o (1959); *Shawmut Bank of Boston v. Cumming*, 91 N.E.2d 337

As a practical matter, arbitration cannot be used with respect to a challenge of the validity of a document, such as a Will contest, unless the parties voluntarily consent to it.⁶⁷ It might be possible for a testator to request those in a position to contest the Will to agree to arbitration. Mediation might also be voluntarily entered into by the parties in a dispute as to the validity of the document. But unless state law will enforce it, the document itself may not impose mandatory mediation or arbitration.⁶⁸

One option, as indicated above, is to direct that the property owner's Will be direct original probate in a state, such as Florida, that will enforce mandatory arbitration provisions.⁶⁹ However, Florida does not appear to have a statute, as some states do, to permit original probate in Florida of the Will of someone who is not a Floridian.⁷⁰ Also, Florida's statute does not apply to a direction for mediation. So alternate steps, perhaps, should be taken to make an arbitration or mediation provision enforceable. So how can an arbitration or mandatory mediation provision in a Will or other instrument be enforced in a jurisdiction which does not have legislation with respect to the document's validity or in a state that generally enforces such provisions but not with respect to the document's validity? It seems it might be accomplished with an "in terrorem" or "disinheritance" clause as described above to enforce them.

For example, a Will, whose in terrorem provision will be enforced under applicable local law, provides that if a party wishing to challenge the validity of the instrument agrees to resolve the challenge by arbitration he or she will still receive all or a portion of the disposition in his or her favor under it even if the challenge in arbitration is unsuccessful. Similarly, the instrument might pro-

(Mass. 1950). *But cf.* Carnahan v. Stollman, 29 Ohio App. 3d 293, 504 N.E.2d 1218 (Ohio Ct. App. 1968), *overruled by* OHIO REV. CODE ANN. § 2107.39 (2008).

⁶⁷ Note, for example, that even the Florida statute that enforces arbitration provisions in Wills does not apply to challenges to the Will's validity. *See* FLA. STAT. § 731.401 (2007): Arbitration of disputes.—(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 s. 44.104.

Id.

⁶⁸ Michael Bruyere & Meghan D. Marino, *Mandatory Arbitration Provisions: A Powerful Tool to Prevent Contentious and Costly Trust Litigation, But Are They Enforceable?* 42 REAL PROP. PROB. & TR. J. 351, 366 (2007).

⁶⁹ *See* FLA. STAT. § 731.401 (2007).

⁷⁰ *See supra* note 36.

vide that a party wishing to challenge the validity of the instrument must participate in good faith in mediation before making any challenge to validity in court and, if he or she does so participate, he or she will receive all or a portion of the disposition in his or her favor even if the challenge in court is unsuccessful.

Little, if any law, however, has developed as to the application of such a disinheritance provision. Nevertheless, it would appear to be fully enforceable under Alaska law with respect to interests in a trust governed by the law of that state.⁷¹

In any case, it seems that provisions mandating arbitration or good faith mediation⁷² are more likely to be accepted by beneficiaries if the property owner advises those who have standing under the document to bring suit. For example, the lawyer for the testator might write to her testator's children (or their lawyers) advising them that their mother does not want disputes arising after her death with respect to her property or its administration and has provided in her Will for a disinheritance if an action is commenced against the admission of the document to probate, but that if a contest otherwise would be commenced, the contesting party may agree to arbitration (or mediation) and a portion of the inheritance will not be lost. The advise would also state that if a party does participate in the arbitration or mediation the disposition in their favor will be preserved in whole or in part but completely forfeited if he or she does not so participate.

The arbitration as to the admission of the document to probate would not be binding upon the court that ultimately may be asked to admit the Will to probate. However, if the "contestant" enters arbitration he or she would lose standing to contest and would lose his or her "remaining" inheritance if he or she attempts to contest in court.⁷³ Even if there is serious question as to enforceability of such a disinheritance provision, a requirement to participate in arbitration or mediation may be respected because it reduces risk of forfeiture. The party holding the "complaint" still has a day in "court" (although it may be an arbitration forum). A typical in terrorem provision results in a difficult choice: totally abandon the complaint or risk loss of everything. The incentive to

⁷¹ See *supra* nn. 37 & 47.

⁷² Significant law has developed as to the meaning of good faith bargaining under the National Labor Relations Law Section 8. It may be used as the standard by appropriate cross reference in a Will or trust.

⁷³ See, e.g., *Matter of Ismailoff*, N.Y.L.J., Feb. 20, 2007 (Surr. Ct. Nassau County), in which the court enforced an arbitration provision against the grantor of a lifetime trust who had provided in the instrument that any challenge be decided by arbitration.

participate in arbitration (or good faith mediation) allows the party with the complaint to be heard and does not risk losing everything by doing so.

In fact, such a provision may weed out frivolous claims. Often, a claim will be made which is only to harass others, such as by preventing any distribution for any beneficiary. Not infrequently, Will contests, claims against a fiduciary and other estate and trust disputes literally go on for decades. And, as indicated above, financial matters may not be the real or principal purpose for the lawsuit. Rather, it is to cause adverse publicity or emotional injury another party,⁷⁴ to embarrass that other party or to cause that party to incur substantial costs. In fact, it may be appropriate to direct that the parties (and their counsel) must agree to keep the arbitration proceedings confidential, waive rights of appeal, etc.

As indicated many times above, disputes in the estate and trust arena often arise not just with respect to the validity of the document, but also against one or more fiduciaries for alleged breach of the duty of care (e.g., negligence in investment of the trust assets or the failure to collect assets that should be made part of the decedent's estate for distribution to beneficiaries) or the duty of loyalty (e.g., improperly benefiting one beneficiary over another). Provisions for arbitration (or good faith mediation) for such disputes also could be included in the document, essentially enforced by partial or total forfeiture for an interested party who refuses to participate in the alternative dispute resolution process.

Here is a sample provision:

PROVISION FOR ALTERNATIVE DISPUTE RESOLUTION

A. Actions Contesting the Agreement of Trust or Against Any Fiduciary Acting Hereunder. To the extent not prohibited by applicable law, if any individual (or anyone acting on behalf of such individual, such as a guardian, attorney-in-fact or other fiduciary) who is a beneficiary under this Agreement of Trust wishes to challenge the validity, construction or effect of all or any portion of this document (including but not limited to this Article), or wishes to commence an action against any fiduciary

⁷⁴ In the celebrated "Johnson v. Johnson" Will contest held in the New York Court Surrogates' Court in the early 1980s, many negative things about the participants and the decedent were made public. See BARBARA GOLDSMITH, *JOHNSON V. JOHNSON* (Alfred Knopf, 1987).

acting hereunder, such individual shall proceed as set forth in this paragraph A or shall forfeit his or her interest hereunder as specified in paragraph B hereof. Such individual is hereinafter referred to as the “challenging individual.” The challenging individual (or fiduciary acting on behalf of the challenging individual) shall agree in writing with the fiduciary acting under this instrument or named to act under it to participate in good faith mediation. Any fiduciary who refuses to so agree in writing shall cease to act as a fiduciary hereunder. Such good faith mediation shall be conducted in accordance with [specify].⁷⁵ All other persons whose interests hereunder reasonably could be affected by such action shall also agree to participate in such good faith mediation and/or to be bound by any agreement arising from such mediation. If no binding resolution of the dispute is reached within the later of six months after the commencement of the mediation or such later period for which the parties to the mediation continue mediation, then the challenging individual (or fiduciary acting on behalf of his or her behalf) shall agree in writing with the fiduciary acting under this instrument to submit the matter to binding arbitration before the American Arbitration Association in the location of the court which has primary jurisdiction over this instrument and shall participate in such arbitration. Any fiduciary who refuses to so agree in writing shall cease to act as a fiduciary hereunder. All other persons whose interests reasonably could be affected by such action shall also agree to participate in such arbitration and to be bound by such arbitration.

B. Forfeiture for Failure to Participate in Mediation or Arbitration or for Making a Frivolous or Bad Faith Claim. If the challenging individual (or fiduciary acting on behalf of the challenging individual) refuses to participate in the mediation or arbitration processes set forth in paragraph A above and commences an action in any court (whether or not it is determined that such court had jurisdiction over the matter in dispute) with respect to any matter relating to the validity, construction or effect of this instrument (including but not limited to this Article) or complaint against any fiduciary acting hereunder, or if the mediator determines based upon clear and convincing evidence that the challenging individual (or fiduciary acting on behalf of the challenging individual) did not participate in the mediation in good faith, or if the mediator or arbitrator determines by clear and convincing evidence that the challenging individual (or fiduciary acting on behalf of the chal-

⁷⁵ See *supra* note 72.

lenging individual) made the challenge that was frivolous or in bad faith, the challenging individual (and all of his or her descendants) shall forfeit and cease to have any right or interest whatsoever under this Agreement of Trust. Any person whose interests reasonably could be affected by such action shall also agree to participate in such arbitration and to be bound by such arbitration or he or she shall forfeit all benefits hereunder.

C. Enforceability. If the foregoing provisions contained in this article are held by a court of competent jurisdiction to be invalid, ineffective or otherwise unenforceable, in whole or in part, such provisions shall be enforced to the extent not held to be invalid, ineffective or otherwise unenforceable, and it is intended that the Trustees with discretion to make distributions to beneficiaries hereunder not exercise such discretion in favor of any challenging individual or in favor of any of his or her descendants.

As indicated above, another alternative to attempt to have parties agree to arbitration and/or good faith mediation is to enter a contract to agree to do so before the transfer and, therefore, before the contest or challenge would occur. It seems unlikely many individuals, even if anticipating a challenge or contest, would choose this route although it might be considered in some cases. In any event, this appears to fall outside of the “fair consideration” rule, as discussed above, that may be required to agree to forfeit an expectancy. The agreement to mediate and/or arbitrate does not result in forfeiture of property, only procedure.

6. Use a Condition Precedent to a Bequest as an Alternative Method of Causing Participation in Mediation or Arbitration.

As stated above, it seems that a “challenging individual” likely would agree to the mediation and arbitration resolution procedures unless he or she were nearly certain the forfeiture provision for failing to do so would not be enforced. At least some commentators⁷⁶ suggest that such a forfeiture provision would not be enforced because, among other reasons, a person cannot be forced to

⁷⁶ See generally Bruyere & Marino, *supra* note 68; see also, Robert W. Goldman, *Simplified Trial Resolution: High Quality Justice in a Kinder, Faster Environment*, 41 U. MIAMI INST. ON EST. PLAN. 16 (2007).

participate in arbitration unless the person agrees to it, or unless state law provides for its enforcement if contained in the document to be challenged, as Florida now does.⁷⁷ The foregoing provision “mandating” good faith mediation and arbitration does not impose mediation or arbitration; rather, it requires that the challenging individual agree to it or forfeit his or her benefits under the instrument.

A restructuring of “mandatory” mediation and arbitration provisions might be considered. Rather than provide that benefits stipulated under the instrument will be forfeited for failure to agree to participate, the instrument might condition the bestowal of benefit on each individual agreeing to mediation or arbitration. In other words, just as a Will might provide that an individual receive a bequest only if he or she had reached a certain age, graduated from college or some other condition precedent were present, so too an instrument might have an agreement to mediate and arbitrate as a condition precedent to the receipt of a benefit under the instrument. This seems to “fit” into a normal bargained for consideration arrangement which should be enforceable regardless of the “fairness” of the consideration.⁷⁸

Here is a sample provision:

CONDITION PRECEDENT TO RECEIPT OF BEQUEST

Conditional Bequest to Son. If but only if (1) my son, Herman, both survives me and (2) he (or his guardian or other personal representative) executes, within two months of being advised by the person named hereunder as my Executor (who shall so advise him as soon after as my death as is reasonably possible) of the opportunity to do so, an acknowledged instrument in writing agreeing, in consideration of the bequest hereby offered to him, that any challenge he wishes to make or issue he wishes to raise relating to the validity, construction or effect of all or any portion of this document (including but not limited to this provision) or any complaint he may have at any time against any fiduciary acting hereunder shall be resolved, as hereafter provided, by mediation and arbitration as provided in paragraph B of this Article, and foregoes any opportunity to make such a challenge, raise such issue or make such complaint before any court or other governmental entity, I give and bequeath to him

⁷⁷ FLA. STAT. § 731.401 (2007).

⁷⁸ See *supra* note 43 and accompanying text.

the sum of One Hundred Thousand Dollars (\$100,000). If my son does not survive me or if he (or his guardian or other personal representative) shall fail to execute such an acknowledged instrument, this bequest shall lapse and no anti-lapse rule⁷⁹ shall apply.

Terms of Mediation and Arbitration. The mediation that my son Herman must agree to in order to receive the conditional bequest for him provided in the foregoing paragraph of this instrument must be by the acknowledged instrument referred to in paragraph A of this Article in which he agrees to participate in good faith mediation conducted in according with [specify]⁸⁰. If no binding resolution of the matter that is the subject of the mediation reached within the later of six months after the commencement of the mediation or such later period for which the parties to the mediation continue mediation, then the arbitration that my son will be agreeing to by the execution of the acknowledged instrument referred to in paragraph A of this Article shall be binding arbitration before the American Arbitration Association in the location of the court which has primary jurisdiction over this instrument. Any fiduciary who refuses to participate in such mediation or arbitration shall cease to act as a fiduciary hereunder.

SUMMARY AND CONCLUSIONS

The level of legal disputes involving trust and estate matters is significant. In some cases, the legal system itself aggravates the conditions for such disputes to arise (such as requiring the commencement of a lawsuit in order to have an instrument admitted to probate as a decedent's Will). Although most of the actions involve claims for money or other property, claims arising with respect to trust or estate matters usually are among family members and, therefore, they typically involve emotional matters. Emotions often make compromise more difficult to achieve. Also, the American legal system generates animosity among those litigants involved, often resulting in the ceasing of any further communication among the family members involved. Avoiding bitter and protracted litigation among family members almost always will be a desired goal of a property owner. It seems that using certain mech-

⁷⁹ See *supra* note 72.

⁸⁰ Several different types of forums and procedures for mediation are available. See generally Madoff, *supra* note 38.

anisms, such as using a trust governed by the laws of a jurisdiction, such as Alaska, to transmit wealth, may reduce the risk of such litigation on account of the enforcement of forfeiture clauses if a beneficiary undertakes certain action.

However, some property owners will not wish to use such a harsh “stick” to avoid protracted litigation. Rather, they will wish the parties to settle disputes through good faith mediation and/or arbitration. The consensus among commentators appears to be that mediation and arbitration usually are far preferable to court litigation but that there is no practical way to cause potential litigants to participate in such alternative dispute resolution absent their agreement or absent a statute that will enforce a mandate under the instrument that the will be subject to litigation. Also, such a statute apparently cannot be used to enforce mediation or arbitration with respect to the validity of the document itself. However, it seems that inducing the use of mediation and/or arbitration can be effected either by using a forfeiture provision or conditioning the grant of a beneficial interest by requiring a binding agreement by the party to mediation or arbitration.