

ADR FOR THE T&E ATTORNEY

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ADR for the T&E Attorney

I. Introduction

It has often been said that there are only two certainties in life – death and taxes. Based on the increasing number of trusts and estates disputes and the potential repeal of the federal estate tax, it might be more appropriate to say that the new certainty in the life of an estate planner is that sooner or later there will be disputes involving his or her estate planning clients.

It has been projected that from 1998 to 2052, \$41 trillion will be transferred between generations. *See Millionaires and the Millennium: New Estimates of the Forthcoming Wealth Transfer and the Prospects for a Golden Age of Philanthropy*, John J. Havens and Paul G. Schervish, Boston College Social Welfare Research Institute (October 19, 1999). Much of this wealth will be transferred through wills and trusts, and even the most carefully crafted estate plan may become the subject of litigation. Like any other litigation, disputes involving wills and trusts (collectively referred to in this outline as “trust disputes”) often result in significant legal fees but, unlike most litigation, trust disputes are frequently between or among family members whose relationships with one another will never be the same after the dispute is litigated. Moreover, many trust disputes involve high profile individuals or families that make for sensational media headlines. In many cases this publicity will not only disclose private family matters but also open the door for additional scrutiny from the IRS and make the potential settlement of the dispute more difficult.

For the above reasons, the resolution of trust disputes through mediation or arbitration is often preferable to traditional litigation in the courts. The opportunity to resort to one or both of these alternative dispute resolution (“ADR”) procedures will generally be available with the consent of the parties or pursuant to a court order after a dispute arises. However, in at least some states, including Missouri, the settlor of a trust may require that most trust disputes be resolved through ADR.

This outline discusses ADR that may be available after a trust dispute arises and the extent to which the settlor of a trust may require the use of ADR to resolve future trust disputes.

II. History of the Use of ADR for Trust Disputes

A. Statutory Approach for Post-Dispute ADR

1. Trust and Estate Dispute Resolution Act (“TEDRA”)
2. Washington
 - a. Enacted in 1999
 - b. Judicial and non-judicial resolutions - procedural - does not create new causes of action
 - c. Applies to:

- i. Will contests
 - ii. Declaratory judgment regarding status as beneficiary
 - iii. Determination if property is separate or community
 - iv. Petition to determine if formerly revocable trust is now irrevocable per its terms
 - v. Appointment or change of Trustee
 - vi. Surcharges or damages against fiduciaries
 - vii. Settlement agreements
 - viii. Not guardianships
 - ix. Not wrongful death
- d. Goal - prompt resolution of trust disputes
- e. When not inconsistent with TEDRA, still have trial by jury (if otherwise available)
- f. Arbitration and Mediation Allowed
- i. Mediation first-voluntary or court compelled
 - ii. Serve Notice of Mediation- must show “Good Cause” to avoid - rarely successful
 - iii. Court Order for/relieving from Mediation not appealable
 - iv. Parties must stay in Mediation for three hours
 - v. Non-contentious (at least not yet) issues also can utilize TEDRA provisions - modify a trust, change fiduciaries, clarify terms
 - vi. Written agreement - binding
- g. Arbitration More Limited than Mediation
- i. Mediation concluded unsuccessfully
 - ii. All parties agree to arbitration
 - iii. Court orders it
 - iv. “Good Cause” to avoid; order compelling not appealable

3. Other states - Idaho and Oregon
 - a. Considered highly successful
 - b. Has not become common across the country

B. Judicial Programs and Legislation Authorizing Post-Dispute ADR

1. Arizona court program
 - a. Started by the Bar
 - b. Intense training of mediators
 - c. Private mediators - suggested list vs. private counsel
 - d. Judge assigned *full time*
 - e. Private mediators paid but sometimes asked to volunteer; then payment issues - attorneys getting hourly fees
2. Georgia - process varies by county
3. Statutes in Regional States Relating to ADR for Trust Disputes
 - a. Missouri - UTC State
 - i. Section 456.1-111 of Missouri Uniform Trust Code (“MUTC”) allows interested persons to enter into non-judicial settlement agreements
 - ii. Section 456.8-816(23) authorizes a Trustee to “resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution”
 - iii. Section 456.2-204 specifically provides that a provision in a trust instrument requiring the mediation or arbitration of trust disputes (other than those relating to the validity of a trust) are enforceable - this is discussed in detail below
 - b. Kansas - UTC State
 - i. Section 58a-111 of Kansas Uniform Trust Code allows interested persons to enter into non-judicial settlement agreements - note that the Kansas version of this statute is significantly more restrictive than the UTC provision

- ii. Section 58a-816(23) authorizes a Trustee to “resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution”
- c. Oklahoma - only non-UTC state in region
- d. Arkansas - UTC State
 - i. Section 28-73-111 of Arkansas Uniform Trust Code allows interested persons to enter into non-judicial settlement agreements
 - ii. Section 28-73-816(23) authorizes a Trustee to “resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution”
- e. Nebraska - UTC State
 - i. Section 30-3811 of Nebraska Uniform Trust Code allows interested persons to enter into non-judicial settlement agreements
 - ii. Section 30-3881(23) authorizes a Trustee to “resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution”

C. Other Post-Dispute ADR Options

- 1. Court recommended mediation
 - a. Not “required” but suggested by court - timing
 - b. For presenting issues or for ancillary - after judgment, but mediate fees
- 2. Attorney suggested and agreed mediation - court always approves unless seen as delay or has been unsuccessful

III. Trust Provisions Requiring the Use of ADR to Resolve Disputes

A. Enforceability of ADR Provisions in Trusts

- 1. ACTEC Arbitration Task Force
 - a. In 2004, ACTEC formed an Arbitration Task Force to study mandatory ADR provisions in trusts
 - b. In a report dated September 18, 2006, the Task Force issued a report (the “ACTEC Task Force Report”) that concluded that “[l]egislation

should be promulgated at the state level to make arbitration clauses in wills and trusts enforceable”

- c. The ACTEC Task Force Report proposes two Model Acts to make ADR clauses enforceable - a short form and a long form - the short form, which has been the template for state statutes that have been enacted, is discussed in more detail below
- d. The ACTEC Task Force Report also includes sample ADR clauses for wills and trusts
- e. The ACTEC Task Force Report can be found online at the following link:

<https://www.mnbar.org/docs/default-source/sections/actec-arbitration-task-force-report.pdf?sfvrsn=2>

2. Cases Ruling on Enforceability of ADR Clauses in Trusts

- a. *Schoneberger v. Oelze*, 208 Ariz. 591, 96 P.3d 1078 (Ariz. Ct. App. 2004) - Arizona Court of Appeals ruled that mandatory arbitration clause was not enforceable because arbitration is a creature of contract law and relationships that arise out of a trust are not contractual - Arizona general arbitration statute only applied to “contracts” - as discussed below, this case was superseded by an Arizona statute that was adopted in response to the court’s ruling
- b. *Diaz v. Bukey*, 125 Cal. Rptr. 3d 610 (Ct. App. 2011) - Although California general arbitration statute referred to “written agreements” as opposed to “contracts,” California Court of Appeals relied on the court’s analysis in *Schoneberger* and ruled that an arbitration clause in a trust was not enforceable under California law
- c. *In re Calomiris*, 894 A.2d 408 (D.C. 2006) - Also relying on the analysis in *Schoneberger*, the District of Columbia Court of Appeals ruled that an arbitration provision in a will was not enforceable because a will is not a contract – the Washington D.C. arbitration statute at issue was similar to Arizona statute in that it referred to a “contract” rather than an agreement
- d. *Rachal v. Reitz*, 403 S.W.3d 840 (Tex. 2013) - Texas Supreme Court ruled that mandatory arbitration clause in a trust was enforceable because:
 - i. The settlor of the trust unambiguously manifested an intent for arbitration to be the “sole and exclusive remedy” for any disputes involving the trust

- ii. The Texas arbitration act provided that a “written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that: (1) exists at the time of the agreement; or (2) arises between the parties after the date of the agreement”
 - iii. Under the theory of “direct benefits estoppel,” a person who benefits from an agreement is estopped from attempting to enforce the benefits due to such person while at the same time attempting to avoid provisions of the agreement
 - iv. For a great analysis of the appellate court ruling in this case (and why the appellate court was wrong), see *You Can’t Have Your Trust and Defeat it Too: Why Mandatory Arbitration Provisions in Trusts are Enforceable, and Why State Courts are Getting it Wrong*, Rachel M. Hirshberg, 2013 J. Disp. Resol. 213 (2013)
3. State Statutes Specifically Providing ADR Provision is Enforceable
- a. The ACTEC Task Force Report
 - i. As stated above, the ACTEC Task Force Report proposed two Model Acts - a short form and a long form
 - ii. Section (1) of the short form provides that “[a] provision in a will or trust requiring the arbitration of disputes between or among the beneficiaries, a fiduciary under the will or trust, or any combination of them, is enforceable”
 - iii. Section (3) of the short form sets forth an exception to the general rule in Section (1) for disputes regarding the validity of the will or trust
 - b. Proposed Statute in Hawaii
 - i. In 2005, Hawaii became the first state to propose a statute that specifically addressed the enforceability of ADR clauses in trusts
 - ii. The Hawaii statute provided that both arbitration and mediation clauses in a will or trust were enforceable and it did not contain an exception for disputes regarding the validity of the documents
 - iii. The Hawaii statute apparently failed because it was proposed by a sole attorney, rather than a Bar association, and it did not have a “champion” in the legislature - see *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, Stephen Wills Murphy, 26 Ohio St. J. on Disp. Resol. 627, 663-664 (2011)

c. Florida Statute

- i. In 2007, Florida became the first state to enact a statute that specifically addressed the enforceability of ADR clauses in trusts
- ii. The Florida statute provides that “[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” - FLA.STAT.ANN. § 731.401 (2010)
- iii. Note that, like the proposed Model Act in the ACTEC Task Force Report, the Florida statute is limited to arbitration provisions and it does not apply to disputes regarding the validity of a will or trust

d. Arizona Statute

- i. In direct response to the *Schoneberger* case, Arizona enacted a statute in 2008 that made ADR clauses in trust instruments enforceable
- ii. The Arizona statute provides that “[a] trust instrument may provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons or among interested persons with regard to the administration or distribution of the trust” - ARIZ.REV.STAT.ANN. § 14-10205
- iii. This statute seems to apply any reasonable procedures to resolve disputes and thus presumably authorizes both mandatory mediation and arbitration provisions
- iv. Like the proposed Model Act in the ACTEC Task Force Report and the Florida statute, the Arizona statute does not apply to disputes regarding the validity of a trust instrument

e. Missouri Statute

- i. In 2014, Missouri enacted a statute similar to the ACTEC Task Force Report and the Florida statute - MO.REV.STAT. § 456.2-205
- ii. The full text of the Missouri statute is as follows:

“(1) Subject to the exception in subsection 2 of this section, a provision in a trust instrument requiring the mediation or arbitration of disputes between or among the beneficiaries, a fiduciary, a person granted nonfiduciary powers under the trust instrument, or any combination of such persons is enforceable.

(2) A provision in a trust instrument requiring the mediation or arbitration of disputes relating to the validity of a trust is not enforceable unless all interested persons with regard to the dispute consent to the mediation or arbitration of the dispute.”

iii. The Missouri statute is part of the MUTC and therefore the term “trust instrument” includes trust provisions set forth in a will or a trust agreement

f. New Hampshire Statute

i. In 2014, New Hampshire enacted a statute which provides that if the terms of a trust require trust disputes to be resolved exclusively by reasonable nonjudicial procedures, such as arbitration or mediation, then the interested parties must resolve a dispute in accordance with the terms of the trust - New Hampshire RSA § 564-B:1-111A

ii. Like the other state statutes, the New Hampshire statute provides that ADR procedures cannot be used to determine whether a trust is valid

iii. The New Hampshire statute also provides that ADR cannot be used to determine a trust’s material purpose or any matter involving a charitable trust

g. Proposed Kansas Statute

i. House Bill No. 2126 proposed the enactment of an ADR statute that is patterned after the Missouri statute

ii. Although there is apparently no opposition to the substance of the bill, it was stalled in the committee due to concerns regarding the Kansas budget shortfall

iii. ACTEC Member Tim O’Sullivan is optimistic that the bill will eventually be enacted in Kansas

B. Sample ADR Provisions

The ACTEC Task Force Report includes three sample ADR clauses

1. Sample 1 is attached to this outline as Exhibit A
2. Sample 2 is attached to this outline as Exhibit B
3. Sample 3 is attached to this outline as Exhibit C

C. Potential Tax Issues

1. *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967)
 - a. As stated on page 24 of the ACTEC Task Force Report, “Bosch specifically dealt with the effect of lower state court determinations involving the particular taxpayers (and events) which were the subject of the tax case before the Court. But Bosch probably also stands for the proposition that, absent a determination of the law by the highest court of the state in any other case as to a particular issue of law, the IRS will not be bound by any lower state court rulings in other cases on the issue.” -Citing Culler, Lile and Tescher, *Uncle Sam: The Silent Party at Estate and Trust Dispute Settlements*, 2005 ACTEC Annual Meeting, p. B-5
 - b. The ACTEC Task Force Report further states on page 24 that “[t]he same factors that determine whether the Internal Revenue Service gives deference to a trial court decision under state law or to a settlement of those disputes should apply equally to a simplified trial resolution under the Model Act.”
 - c. The ACTEC Task Force Report concludes its discussion of Bosch by stating on page 26 that “the theory underlying the analysis of *Bosch* and its progeny is so fundamentally sound and well established that it should be without question that the same analysis should apply to resolution of disputes under the Model Act.”
 - d. It may be advisable to include a “savings” clause in the trust in case a court decision, as opposed to an arbitration ruling, would prevent unwanted tax consequences - the following is an example of a possible savings clause:

“() The Arbitrator shall have no power to make any decision that would cause the trust estate or any beneficiary to be subject to gift, estate or generation-skipping transfer (“GST”) taxes. Any decision by the Arbitrator may, in the discretion of the Arbitrator, be conditioned upon one or more interested parties obtaining a ruling from the Internal Revenue Service that the decision will not cause the trust estate or any beneficiary to be subject to gift, estate or GST taxes, and the Arbitrator may require one or more interested parties to request such a ruling from the Internal Revenue Service. Notwithstanding the foregoing, if the Arbitrator determines that a Dispute that would otherwise be subject to arbitration under this Article IV would have adverse tax consequences to the trust estate or any beneficiary and there would be no such adverse tax consequences if the Dispute were to be resolved solely by a court having jurisdiction thereof, then the Arbitrator shall enter an award stating that it has reached the limit of its jurisdiction, and the Trustee or

any interested party may then submit the Dispute to such a court to be resolved by such court.”

2. Marital and Charitable Deductions

- a. Samples 1 and 2 of the ACTEC Task Force Report include language that addresses the potential loss of the marital or charitable deduction in an ADR clause that includes a forfeiture provision
- b. The following are additional clauses that are designed to address the risk that an ADR clause will preclude a trust from qualifying for the marital or charitable deduction:
 - i. Savings Clause in Forfeiture Provision

“() In the event any beneficiary (other than Settlor) under this Trust Agreement shall directly or indirectly, under any pretense or for any cause or reason whatsoever, institute, abet, take or share, directly or indirectly, in any action or proceeding against the trust to impeach, impair, set aside or invalidate any of the provisions of this Article IV, or make any agreement, direct or indirect, in connection with any of the foregoing with any person instituting, abetting, taking or sharing, directly or indirectly in such action, then for all purposes of this Trust Agreement, including without limitation the terms and limitations of all trust estates created under this Trust Agreement, such beneficiary shall cease to be a beneficiary of each trust estate created under this Trust Agreement and such beneficiary shall cease to have any rights, powers or interests in any trust estate created under this Trust Agreement. Notwithstanding the foregoing, the provisions of this subparagraph () shall not apply to: (a) any beneficial interest of a person married to Settlor at the time of Settlor’s death in a trust that qualifies for the marital deduction from the federal estate tax; or (b) any beneficial interest of a charitable organization that is eligible to receive distributions from a trust if any portion of the trust, or any portion of the assets passing to the trust, qualifies for the charitable deduction from the federal estate tax.”

ii. Stand Alone Savings Clause

“() Notwithstanding the foregoing, the provisions of this Article IV shall be unenforceable to the extent that such provisions would preclude an interest in, or any portion of, a trust from qualifying for either the marital deduction or the charitable deduction from the federal estate tax. However, the provisions of this Article IV shall apply to the trust after such marital or charitable interests or rights have expired.”

3. Annual Exclusion Gifts

a. Chief Counsel Memorandum 201208026

- i. Issued by the Chief Counsel's Office in 2012
- ii. IRS opined that Crummey withdrawal rights were "unenforceable and illusory" because the trust agreement required trust disputes to be submitted to a forum other than a court (i.e., arbitration) and the trust agreement included a no contest provision
- iii. IRS position was subsequently rejected by the Tax Court in *Mikel v. Commissioner*, T.C. Memo 2015-64 (2015) (discussed below)

b. *Mikel*

- i. Same facts as Chief Counsel Memorandum 201208026
- ii. The arbitration clause required trust disputes to be "submitted to arbitration panel consisting of three persons of the Orthodox Jewish faith"
- iii. The Tax Court ruled that the arbitration provision did not preclude the beneficiaries' withdrawal rights from qualifying for the annual exclusion
- iv. The Tax Court also found that the no contest clause did not apply to the beneficiaries' withdrawal rights because it applied only to actions relating to discretionary distributions
- v. The Tax Court denied the taxpayers' request for attorneys' fees because the IRS position was "substantially justified"

c. See Capital Letter No. 39 by Ronald D. Aucutt, Washington D.C. (and now Kansas), January 8, 2016 for a more complete discussion of Chief Counsel Memorandum 201208026 and *Mikel*

D. Other Considerations

1. Virtual Representation

- a. Consideration should be given to whether any state "virtual representation" statutes should be included in the ADR clause
- b. The following is an example of such a clause:

"(d) The parties shall have the right to rely on virtual representation in the proceedings to the same extent that the parties would have the right to rely on virtual representation if the Dispute were litigated in a

Missouri state court. The Arbitrator shall determine with respect to each Dispute if the adult and otherwise legally competent individual qualified beneficiaries adequately represent the interests of the minor, legally incompetent, unborn and unascertained beneficiaries who are qualified beneficiaries (the “unavailable beneficiaries”). If the Arbitrator determines that there is adequate representation of the interests of the unavailable beneficiaries, the Arbitrator shall not appoint a person to serve as if he or she were a guardian ad litem to represent those interests. If the Arbitrator determines that there is not adequate representation of the interests of the unavailable beneficiaries, the Arbitrator shall appoint a person to serve as if he or she were a guardian ad litem appointed by a Missouri court to represent those interests, whose expenses shall be paid from the trust estate. The person appointed to serve as if he or she were a guardian ad litem shall be a practicing lawyer licensed to practice law in the State of Missouri whose practice has been devoted substantially to wills or trusts for at least ten years prior to his or her appointment.”

2. Retaining Flexibility to Modify Trusts under UTC

- a. It may be desirable to retain the flexibility offered by the UTC or other state law to modify or revoke an irrevocable trust
- b. The following is an example of such a clause:

“(b) The terms of this Article IV shall not preclude the Trustee or any beneficiary or beneficiaries from filing an action to modify, amend or vary the terms of this Trust Agreement in a court having jurisdiction thereof.”

3. Other Clauses

- a. Location of mediation or arbitration
- b. Applicable rules - American Arbitration Association or other recognized organization
- c. Qualifications of mediator or arbitrator
- d. Confidentiality requirement

EXHIBIT A

Sample 1 from ACTEC Task Force Report

Generic provision - long version with forfeiture clause

[Comment: As with other language in these sample clauses, the forfeiture provision in paragraph (c) below has not been tested in the courts. Assuming that a mandatory arbitration provision in a will or trust is otherwise enforceable in a given jurisdiction, it is believed that a forfeiture provision is also likely to be enforceable, including in jurisdictions that do not recognize the validity of no-contest provisions. Among other arguments for enforceability is that the requirement to submit to arbitration is simply another condition of receiving the gift or bequest. (See the discussion of conditional transfers in the introductory materials.)]

(a) It is my hope and expectation that there will be no dispute in relation to this Trust [my estate]. Nevertheless, if there is any dispute or controversy among any of the Trustee [personal representative] and the beneficiaries involving any aspect of this Trust [my estate] or its administration, the parties to the dispute may agree on the manner of resolution. If there is no such agreement, the disputing parties shall submit the matter to mediation, and, if unresolved by mediation, to binding arbitration. If the parties are unable to agree on the selection of a mediator or arbitrator, the court having jurisdiction over this Trust [my estate] shall select the mediator or arbitrator, who shall be a Fellow of the American College of Trust and Estate Counsel with no interest in or involvement in the matter. *[Comment: Depending on future developments, this language may be further tailored to take into account statutes, training, certifications of trust and estate arbitrators, and experience requirements.]* The Trustee [my Executor] shall not have any liability to any beneficiary or other interested person for participating in or agreeing to any such procedure.

(b) In any arbitration, the arbitrator shall establish the procedure for arbitrating all matters, recognizing the goals of privacy, efficiency, and less expense and formality than in a judicial Arbitrator, while reaching a fair result. The decision of the arbitrator shall be final and binding on the Trustee [Executor], all beneficiaries, and their heirs, successors, and assigns. If the arbitrator determines that a guardian ad litem is necessary to represent the interests of unborn, unascertained, or incapacitated interested persons, a guardian ad litem shall be appointed by the court having jurisdiction over this Trust [my estate].

(c) If a disputing beneficiary fails to participate in good faith in the agreed-on procedure for resolution, or in the mediation or arbitration if there is no such agreement, the disputing beneficiary's interest in this Trust [my estate] shall be forfeited and the beneficiary, if an individual, shall be treated as having predeceased the Settlor [me] [with no surviving issue]. If for any reason the court having jurisdiction over this Trust [my estate] determines that the foregoing provision for forfeiture is not effective, then instead of forfeiture the arbitrator or the court having jurisdiction over this Trust [my estate] is authorized to award costs and attorney's fees from the beneficiary's share.

(d) *[Comment: As will be readily apparent, this paragraph addresses the possibility of tax consequences of a forfeiture provision.]* The provisions of subparagraph (c) above shall not apply to the beneficial interests of:

(1) the Settlor's [my] spouse, to the extent that his [her] interest would otherwise qualify for an estate or gift tax marital deduction;

(2) any beneficiary, to the extent that the beneficial interest would otherwise qualify for an income, gift, or estate tax deduction for charitable purposes unless and until all such charitable beneficial interests have expired.

If, however, the Settlor's [my] spouse or any such beneficiary who is a disputing beneficiary to whom the above forfeiture provisions do not apply nevertheless fails to participate in good faith in the agreed-on procedure for resolution or in the mediation or arbitration, the arbitrator or the court having jurisdiction over this Trust [my estate] is authorized to award costs and attorney's fees from that party's beneficial share.

(e) The Trustee's acceptance of the Trust constitutes the Trustee's agreement to comply with the above provisions. If a Trustee is a party to a dispute and fails to participate in good faith in the agreed-on procedure for resolution or in the mediation or arbitration, it shall be deemed that the Trustee has breached its fiduciary duties and has resigned, and the court having jurisdiction over this Trust is authorized to surcharge the Trustee for costs, attorney's fees, and any other sums the court deems appropriate. *[For wills: The personal representative's consent to act constitutes it's the personal representative's agreement to comply with the above provisions. If a personal representative is a party to a dispute and fails to participate in good faith in the agreed-on procedure for resolution or in the mediation or arbitration, it shall be deemed that the personal representative has breached his, her, or its fiduciary duties and has resigned, and the court having jurisdiction over my estate is authorized to surcharge the personal representative for costs, attorney's fees, and any other sums the court deems appropriate.]*

(f) If any party disputes the validity of these provisions, the court having jurisdiction over this Trust [my estate] shall resolve the issue of validity prior to resolution of the balance of the dispute. If the arbitration provisions are determined to be valid, all remaining issues shall be resolved as provided in this Article ___.

EXHIBIT B

Sample 2 from ACTEC Task Force Report

Arbitration - reference to statute

[Comment: This sample assumes that the jurisdiction has enacted the Model Act in full or an appropriate variant of it.] It is my hope and expectation that there will be no dispute in relation to this Trust [my estate]. Nevertheless, if there is any dispute among any of the Trustee [personal representative] and the beneficiaries involving this Trust [my estate] or its administration, the disputing parties may agree on the manner of resolution. If there is no such agreement, the disputing parties shall submit the matter to mediation, and, if the matter is not resolved by mediation, shall submit to binding arbitration pursuant to [Model Act]. In any arbitration, the disputing parties shall follow the procedures set forth in [Model Act], including the provision allowing for variance from the procedures in [Model Act] by agreement of all parties to the dispute. The Trustee [my Executor] shall have no liability to any beneficiary or other interested person for participating in or agreeing to any such procedure.

EXHIBIT C

Sample 3 from ACTEC Task Force Report

Arbitration - reference to Model Act with forfeiture provision

(a) It is my hope and expectation that there will be no dispute in relation to this Trust [my estate]. Nevertheless, if there is any dispute among any of the Trustee [personal representative] and the beneficiaries involving this Trust [my estate] or its administration, the disputing parties may agree on the manner of resolution. If there is no such agreement, the disputing parties shall submit the matter to mediation, and, if the matter is not resolved by mediation, shall submit to simplified dispute resolution subject to the provisions of the ACTEC Model Simplified Trial Resolution Act (the "Model Act"). The parties shall follow the procedures set forth in the Model Act, including the provision allowing for variance from the procedures in the Model Act by agreement of all parties to the dispute. The Trustee [my Executor] shall have no liability to any beneficiary or other interested person for participating in or agreeing to any such procedure.

(b) If a disputing beneficiary fails to participate in good faith in the agreed-on procedure for resolution, or in the mediation or arbitration if there is no such agreement, the disputing beneficiary's interest in this Trust [my estate] shall be forfeited and the beneficiary, if an individual, shall be treated as having predeceased the Settlor [me] [with no surviving issue]. If for any reason the court having jurisdiction over this Trust [my estate] determines that the foregoing provision for forfeiture is not effective, then instead of forfeiture the arbitrator or the court having jurisdiction over this Trust [my estate] is authorized to award costs and attorney's fees from the beneficiary's share.

(c) *[Comment: As in Sample 1, this paragraph addresses the possibility of tax consequences of a forfeiture provision.]* The provisions of subparagraph (b) above shall not apply to the beneficial interests of:

- (1) the Settlor's [my] spouse, to the extent that his [her] interest would otherwise qualify for an estate or gift tax marital deduction;
- (2) any beneficiary, to the extent that the beneficial interest would otherwise qualify for an income, gift, or estate tax deduction for charitable purposes unless and until all such charitable beneficial interests have expired.

If, however, the Settlor's [my] spouse or any such beneficiary who is a disputing beneficiary to whom the above forfeiture provisions do not apply nevertheless fails to participate in good faith in the agreed-on procedure for resolution or in the mediation or arbitration, the arbitrator or the court having jurisdiction over this Trust [my estate] is authorized to award costs and attorney's fees from his, her, or its beneficial share.

(d) The Trustee's acceptance of the Trust constitutes the Trustee's agreement to comply with the above provisions. If a Trustee is a party to a dispute and fails to participate in good faith in the agreed-on procedure for resolution or in the mediation or arbitration, it shall be deemed that

the Trustee has breached its fiduciary duties and has resigned, and the court having jurisdiction over this Trust is authorized to surcharge the Trustee for costs, attorney's fees, and any other sums the court deems appropriate. [*For wills:* The personal representative's consent to act constitutes the personal representative's agreement to comply with the above provisions. If a personal representative is a party to a dispute and fails to participate in good faith in the agreed-on procedure for resolution or in the mediation or arbitration, it shall be deemed that the personal representative has breached his, her, or its fiduciary duties and has resigned, and the court having jurisdiction over my estate is authorized to surcharge the personal representative for costs, attorney's fees, and any other sums the court deems appropriate.]

(e) If at any time in the future governing law provides for arbitration of disputes relating to trusts and estates in a manner substantially similar to the Model Act, then that governing law shall apply to this Trust [Will].