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# FLORIDA STATUTE PROVIDES CONFIDENTIALITY IN DISPUTES INVOLVING WILLS AND TRUSTS

**by Carol Soret Cope**

Which American president was the first to incorporate arbitration as a dispute resolution method in his will?

Every lawyer swears an oath to maintain the secrets of clients. This is the client's guarantee that when he or she consults a lawyer about professional, legal and personal matters, including wealth management, business transactions, and family relationships, this information shall remain strictly confidential. This guarantee is absolute and fundamental to the integrity of the legal profession and the relationship between lawyers and their clients. Nowhere is this promise of confidentiality more crucial than when a client is deceased and thus no longer available to revise or interpret his/her final instructions as incorporated in a will or trust document.

Accordingly, lawyers who practice in this area must carefully ascertain their client's intentions and scrupulously craft documents, which will accomplish these intentions with the utmost clarity, promptness, and finality, at the least possible cost, and, importantly, with the least danger of disputes which become public and destroy the very confidentiality which the client sought. Practitioners in the wills, trusts, and estates area — and their clients — fervently hope that the plans and documents they have structured so carefully will, upon the inevitable demise of the client, operate exactly as intended with no disputes among beneficiaries and/or fiduciaries or unanticipated adverse financial consequences. In reality, however, disputes among beneficiaries and fiduciaries do occur, sometimes erupting into unsavory news headlines. Practitioners have a sworn duty to their clients and a professional obligation to themselves to minimize the likelihood of such unpleasant outcomes. In other words, the practitioner's goals include keeping such disputes and their ultimate resolutions private and confidential as much as possible. Most importantly, this means avoiding traditional dispute litigation in court, with its open public record and full disclosure of the client's private matters, as well as time-consuming and expensive discovery procedures, uncertainty of outcome, and possible lack of finality, even after a verdict at trial, if there is an appeal.

When such disputes arise, voluntary or court-ordered mediation resolves many controversies amicably and records them in settlement agreements, which may maintain confidentiality. But not all these disputes are successfully mediated, leaving the issue of how to deal with unresolved disputes without instituting litigation and the consequent breach of confidentiality. In court, there are no secrets. Every relevant document is available to the disputants, the judge and/or jury, and, most importantly, to the news media. Simply put, there is no confidentiality.

After a failed mediation, the parties to the dispute could voluntarily agree to submit to a binding arbitration, which may provide for confidentiality of the resolution. But what

if the disputants refuse to make such an agreement? Could wills, trusts and estate documents include legally enforceable provisions for binding arbitration to resolve these disputes in private, by-passing what one seasoned practitioner called "the shoals of the litigation process?" Until recently, Florida law provided no guidance on this subject.

This issue is so crucial that in 2004 the premier professional association of practitioners, the American College of Trust and Estate Counsel established a task force for the sole purpose of reviewing current practice throughout the nation and recommending a solution. The membership included three preeminent Florida practitioners: chairman Robert W. Goldman, Steven L. Hearn and Bruce Stone. They met regularly throughout 2004 and 2006, presented seminars, examined the legal underpinnings of the issue, published a paper in ACTEC notes and finally submitted a draft report to the ACTEC fiduciary litigation committee for comment. When the 46-page report was released, it appended a Model Enforceability Act establishing the enforceability of a will or trust provision containing a legally enforceable arbitration requirement, provided that such an act was passed by a state legislature.

--In 2007, the Florida Legislature enacted Section 731.401, which appears to be derived in part from ACTEC's Model Enforceability Act appended to the report. Since some practitioners are still unaware of the potential and practical utility of this important statute, it is repeated here:

(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 Sect. 44.104.

This statute settles any lingering doubts about the enforceability of arbitration provisions in will and trust documents and creates a presumption favoring binding arbitration under Florida Statute Section 44.104. Thus Florida law enables practitioners to maintain their client's confidentiality in the resolution of disputes between or among beneficiaries and fiduciaries by including appropriate mediation and arbitration provisions in wills and trust documents.

It is important to note that there may be some disputes which cannot be kept confidential even if drafted in accordance with this statute. For example, if there are tax sensitive provisions in the will or trust document, practitioners must consider the effect of including binding arbitration provisions on the intended tax consequences of the will or trust provisions. See, e.g., Private Letter Ruling 201117005, in which the IRS ruled that binding arbitration provisions that were sanctioned under a state's governing law would not disqualify a trust from the federal estate tax marital and charitable deductions. However, persons other than the taxpayer who obtained the private letter ruling from the IRS cannot rely on the positions taken by the IRS in that ruling.

And now, the answer to the initial question: Our founding father, President George Washington, was the first president to incorporate an arbitration provision in his last will and testament. Not only was President Washington prudent in his own affairs, he was prescient in devising a practical and non-public method of resolving any disputes which might arise under his will. His eloquent language follows:

"[H]aving endeavored to be plain, and explicit in all the Devises, even at the expense of prolixity, perhaps of tautology, I hope, and trust, that no disputes will arise concerning them; but if, contrary to expectation, the case should be otherwise, from the want of legal expression, or the usual technical terms, or because too much or too little has been said on any of the Devises to be consonant with law, My Will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants, each having the choice of one, and the third by those two. Which three men thus chosen shall, unfettered by the Law, or legal constructions, declare their Sense of the Testator's intention; and such decision is, to all intents and purposes to be as binding on the parties as if it had been given in the Supreme Court of the United States."

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