Examining the Use of Arbitration and Dealing with Decedent's Wishes in Wills, Trusts and Estates

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Abstract

This article examines the use of arbitration in wills and trusts as a method to honor decedents wishes. It explores the use of contracts drafted prior to the creation of a will or trust – referred to as a pre-drafting contract – as a method to allow for the inclusion of arbitration. The article also briefly discusses the use of in terrorem clauses – also known as disinheritance clauses – in wills and trusts. It suggests that in terrorem clauses can be detrimental and that the issues that can arise as a result of such provisions can be avoided by using pre-drafting contracts. Finally, the article suggests the benefits of using arbitration and pre-drafting contracts can include confidentiality, the ability to save time and money, and the ability to protect family relationships.

Keywords: arbitration, wills, trusts, pre-drafting contract, family.

A. Introduction

Alternative Dispute Resolution (ADR) has been a beneficial tool for parties instead of litigation. It is widely accepted that arbitration is more cost effective and more efficient. There are, however, areas of the law where arbitration is not as widely used. Wills and trusts in estate planning is a field where arbitration has not yet been generally accepted nor commonly established. One of the biggest obstacles regarding the use of arbitration in areas associated with estate planning is that wills and trusts are not considered contracts. However, the benefits that arbitration can provide for this area go beyond the general benefits of commonly understood arbitration. "Several legal scholars have acknowledged that litigation is an inadequate – or at least an inferior – method for resolving trust disputes."[1] The use of arbitration in estate disputes can protect family relations and allow for the wishes of the decedents to be met with fewer disputes.

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1 M.P. Bruyere & M.D. Marino, 'Mandatory Arbitration Provisions: A Powerful Tool to Prevent Contentions and Costly Trust Litigation, But Are They Enforceable?', 42 *Real Prop. Prob. & Tr. J.* 2007, p. 351 at p. 352.

This article will discuss the importance of utilizing arbitration to protect the intentions and wishes of decedents in the implementing of wills and trusts. There have been a variety of issues that have been cited as reasons to utilize arbitration in estate and trust disputes. "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."[2] By examining the advantages and disadvantages that are specific to wills and trusts in arbitration, it can be seen that, unless arbitration can be utilized in a binding manner, it will be ineffective in practice in wills and trusts. Therefore, unless families are on amicable terms to voluntarily agree to arbitration – which is generally contrary to the current literature on the topic – then it will have difficulty gaining momentum to be utilized in this field. One possible way, however, for arbitration to survive in wills and trusts would be to utilize a pre-drafting contract for those who would be named in a will or trust prior to their inclusion in the document.

B. Arbitration in Wills and Trusts in Theory

I. Family Relationships

One of the prevalent dynamics that comes into consideration when examining disputes that arise from wills and trusts is that of family relationships. "Estate planning disputes can turn vicious, partly because they sometimes involve vast amounts of money, but also because they are often charged with intra-family emotions and conflict."[3] It is these intra-family emotions that present special challenge for ADR practitioners. Generally, because of these emotions, the normal frequently made arguments about the benefits of arbitration being more efficient in terms of time and money may not be as persuasive. This is most likely because a family's first concern can be "maintaining its familial bonds and keeping disputes out of the public eye".[4]

Litigation is an aggressive and lengthy means of resolving wills and trusts disputes, in addition it can also be devoid of any consideration for feelings.[5] It is clear that the emotional elements present in wills and trusts disputes are not presented, or at least not as prevalent, as in other litigated matters.[6] This is why arbitration is attractive for wills and trusts disputes, because the "primary goal is to facilitate the resolution of family disputes in a more amicable and private manner than the court system would allow".[7] In these types of litigated matters, it is difficult to balance the generally large amounts of money with the feelings associ-

2 J.G. Blattmachr, 'Reducing Estate and Trust Litigation Through Disclosure, In Terrorem Clauses, Mediation and Arbitration', 9 *Cardozo J. of Conflict Resol.* 2008, p. 237 at p. 247.

3 J.R. Phillips, S.K. Martinsen & M.L. Damerion. 'Analyzing the Potential for ADR in Estate Planning Instruments', 24 *Alternatives to the High Cost Litig.* 2006, p. 1.

4 *Id.*, at p. 15.

5 Blattmachr, *supra* note 2, at p. 237 ("Pure hurt feelings [...] generally go uncompensated.").

6 *Id.*

7 Phillips, Martinsen & Damerion, *supra* note 3.

ated with family dynamics and even the death of a loved one. "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."[8] This feeling of being wrongly favoured over another child can and, more often than not, does lead to the bruised feelings that lead to litigation.[9] But these 'bruised feelings' disputes have a variety of facets and may occur for other reasons as well. Some examples of these facets can range from an older child's misperception of the size of the share of the inheritance that he or she may believe that he or she was entitled to.[10] Further, "children may feel that the descendents 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."[11]

As mentioned above, the reason these disputes are so different and complicated is because they do not deal with commercial relationships and elements commonly seen in disputes regarding finances. These disputes are generally so emotionally charged that they can easily escalate.

> 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.[12]

Minimizing personal animosity towards other parties involved in a dispute is especially important in these situations because of the importance of preserving familial relationships.[13] Not only because preserving familial relationships makes things easier when dealing with the property being bequeathed, but also because of the moral importance of families. Presumably regardless of who the decedent was it can be a safe assumption that he or she did not want their family fighting.

One consideration advocated by some experts is to inform any children or people who are having property left to them how the estate planning is being handled and what shares each person will be receiving. By including children or others involved in the planning process and informing them what shares will be coming their way, the likelihood of a dispute arising can be reduced.[14] This becomes especially prudent when a child is going to receive a non-equal share compared to other children. In this situation, one way to offset any risk of dispute or litigation is to utilize a disinheritance clause.[15] As will be discussed later

8 Blattmachr, *supra* note 2, at p. 238.
9 *Id.*
10 Blattmachr, *supra* note 2, at p. 241.
11 *Id.*
12 Blattmachr, *supra* note 2, at p. 239.
13 Blattmachr, *supra* note 2.
14 Blattmachr, *supra* note 2, at p. 248.
15 *See infra* Part C, III.

in this article,[16] these ideas can become important elements in the utilization of a pre-drafting contract for those who would be named in a will or trust prior to their inclusion in the document.

When utilizing arbitration in these types of disputes, it will always be an important goal to avoid "bitter and protracted litigation among family members".[17] It is in the best interest of the family, the testator (future decedent) and any involved lawyer or arbitrator to incorporate some form of an ADR clause into a will or trust. In doing this, any family member who has a dispute will need to utilize ADR, possibly through mediation, and if that is unsuccessful they can then move to arbitration.[18] The utilization of methods such as ADR and pre-drafting contracts will encourage civility among those in a dispute and allow for an easier resolution.

II. Confidentiality

Another attractive element of utilizing arbitration in wills and trusts is the element of confidentiality. Frequently, this element of confidentiality is one of the most important considerations for the client.[19] As discussed previously, the family matters and emotions that are commonly associated with dealing and sorting out the affairs of a loved one after their death are generally matters that most family members do not want to be public. Taking this element of confidentiality even further, it often becomes even more important to family members or clients than any concern about the costs of litigation be dealt with privately.[20] Generally, family matters are private and most family members prefer to keep things that way. Of course, if there is a third party involved who is not a family member, his or her concerns for maintaining confidentiality may not be as strong as those of a family member.

Additionally, concern can arise when dealing with a dispute that has the potential to be highly publicized. The publicity that would arise from the death of a celebrity and his or her decision to leave everything to one child and not the other has the potential to be emotionally damaging and even possibly defamatory. One example of this was the publicity that ensued after the passing of producer Aaron Spelling.[21] It was widely publicized that Aaron Spelling, whose estate was worth $500 million,[22] had only left a comparatively meager sum to his daughter Tori Spelling. Tori Spelling reportedly received $800,000[23] – 0.0016% – of her father's fortune. It was widely speculated in the press that Tori had been expect-

16 *See infra* Part B, IV.

17 Blattmachr, *supra* note 2, at p. 265.

18 Phillips, Martinsen & Damerion, *supra* note 3, at p. 10.

19 *Id.*, at p. 11.

20 Phillips, Martinsen & Damerion, *supra* note 3.

21 B. Carter, 'Aaron Spelling, 83, Prolific Producer of Television Hits', *The New York Times*, 25 June 2006, available at: <http://query.nytimes.com/gst/fullpage.html?res=9E06E4D81630F936A15755C0A9609C8B63&scp=5&sq=&st=nyt&pagewanted=all>.

22 G. Serpe, 'Spelling Out Tori's Inheritance', *E! Online*, 29 March 2007, 8:48 pm, available at: <www.eonline.com/uberblog/b54768_Spelling_Out_Tori_s_Inheritance.html>.

23 *Id.*

ing more money and that the reason she got such a 'small' amount was because she was estranged from her mother – who was the estate executor.[24] Tori Spelling's brother in response contacted the press about the amount he received and stated that it was an amount that she should have expected to receive.[25] There was even discussion on the internet that Tori Spelling was planning to contest on the grounds that Aaron was "not of sound mind"[26] because she "thought it was weird that an interior designer would get almost as much as her".[27] The dispute and arguments were in the press and news for well over a year before the remaining Spelling family members "showed signs of a cease fire".[28]

This is a very clear example of how things can get complicated and ugly in estate disputes. Additionally, due to the highly publicized nature[29] of this dispute and the way that the press ran stories about the dispute, the likelihood of possible defamatory statements[30] being made about the Spelling children or Spelling's wife was reasonably foreseeable. In the end, the wishes of Aaron Spelling were generally unknown, or at least unreported, yet it is a fair assumption that Aaron Spelling, "a self-effacing and extremely shy man in private",[31] would not have wanted his family fighting in the press about the money he left them. If the Spelling family had utilized arbitration, all of these details would have been confidential – provided the family members did not speak to the press about them. Further, if they had utilized a pre-drafting contract that would have illustrated the plans of the estate and how it was going to be managed, there presumably would have been less shock over the amount received and more civility among the family members, which would have allowed for an easier resolution.

III. Time and Money

At the risk of stating the obvious, litigation frequently happens regarding wills and trusts because there are large sums of money involved. Disputes notoriously turn vicious quickly because of the money involved in addition to any tension already present because of family relationships.[32] The slow progress of arbitration into the realm of wills and trusts relates to the general growth of wealth of families in recent years. Because peoples' wealth has been growing considerably this has created are rise in estate planning. As a result people are able to utilize their

24 *Id.*

25 *Id.*

26 S. Ferguson, 'Tori Spelling Won't Inherit Daddy's Fortune – Maybe', *The Deadbolt.com*, 27 July 2006, available at: <www.thedeadbolt.com/news/111475/torispellingnomoney.php>.

27 *Id.*

28 Serpe, *supra* note 22.

29 "The lack of legal protections for interests of the dead encourages the spreading of highly sensational material since this tends to be most profitable for publishers." *See* R.D. Madoff, *Immortality and the Law: The Rising Power of the American Dead*, 2010, p. 123.

30 "After death the picture is quite different. Here the law does a radical about face and provides essentially no protection against defamation. The reason most commonly given fort his rule is that a dead person is beyond harm or benefit." *See* Ray D. Madoff, *Immortality and the Law: The Rising Power of the American Dead*, 2010, p. 122.

31 Carter, *supra* note 21.

32 Phillips, Martinsen & Damerion, *supra* note 3.

ever-increasing financial benefits to provide for their children, grandchildren, spouses or any other chosen beneficiary.[33] This is both a good and bad thing. It is good that people are able to leave or provide financial benefits to their children, and Congress has even enacted tax breaks to encourage this.[34] However, it is bad because with the growth of wealth comes a growth of greed and entitlement. "Under such circumstances, it seems natural for the descendants to expect to continue to be supported by their ancestor's wealth after the ancestors die."[35] This sense of entitlement could arguably be the root of some of the familial problems that raise their head when wills and trusts issues are disputed.

One way of preventing these kinds of disputes and this sense of entitlement is to incorporate family into estate planning so that they understand the decisions of those bequeathing their property to others.[36] Expanding on this incorporation, the frequently perceived element of entitlement that is based on emotional feelings associated with familial disputes often adds to the disputes about claims to wealth.[37] By including and incorporating family members into the estate or trust planning process, the entitlement and emotional elements can be handled more effectively. "As long as grantors continue to utilize trusts as instruments to preserve and distribute wealth, disagreements and litigation surrounding the operation of those trusts are inevitable."[38] Arbitration will not eliminate these disputes and disagreements altogether. It will, however, ensure that less time and money is wasted in litigation in settling such disputes and disagreements.

IV. Ensuring that the Wishes of the Decedent Are Honoured

Arbitration is one method in which the wishes of the decedent can be maintained and honoured. Placing families in a situation in which disputes are handled in a non-litigious manner allows them to take the time to acknowledge the wishes of the decedent and to comply with them. Additionally, the added security of confidential proceedings provides for an environment conductive to settling disputes. One way to ensure that decedent's wishes will be honoured would be to utilize a decedent-controlled approach. Similar to the use of the decedent-controlled approach used in the concept of redefining family,[39] this approach would allow for a decedent to specify exactly how the matters concerning an estate or trust would be carried out. Further, the use of a pre-drafting contract would be able to

33 Blattmachr, *supra* note 2.

34 Internal Revenue Service, United States Department of the Treasury, 2010 Federal Income Tax Rate Schedule for Estates and Trusts, available at: <www.irs.gov/formspubs/article/0,,id=188575,00.html>. (The IRS provides a different Federal Income Tax Rate Schedule for Estates and Trusts.)

35 Blattmachr, *supra* note 2.

36 *See infra* Part C, I generally.

37 Blattmachr, *supra* note 2.

38 Bruyere & Marino, *supra* note 1.

39 F.H. Foster, 'Individualized Justice in Disputes Over Dead Bodies', 61 *Vand. L. Rev.* 2008, p. 1351 at p. 1364 (The decedent-controlled approach as discussed in this article suggests that decedents decide which persons involved in their life constitute 'family' and would allow "articulated preferences to trump traditional status-based rules of inheritance".).

provide insurance that beneficiaries would agree to and honour the terms set by the testator/future decedent. One proposed idea to institute this would be to utilize a requirement that beneficiaries execute a written consent as a condition to receiving any benefits under the testamentary instrument.[40] A pre-drafting contract would take this a step further by making a 'condition to receiving benefits' a binding contract. A pre-drafting contract would be utilized prior to the drafting of a will or a trust and any person that the testator/future decedent would want to include as a beneficiary would need to sign said contract in order to be included. That contract would contain provisions stating that the person signing will honour the wishes of the testator/future decedent to the best of their abilities and that, should any dispute happen to arise, they will submit that dispute to binding arbitration. Additionally, including persons to be named in a will or trust in the creation and planning period so early also allows them to be able to understand the process better and to be aware of how the testator plans to distribute an estate or trust.[41] This would then ensure that any risk of litigation would be offset by the family participation.

C. Arbitration in Wills and Trusts in Practice

Due to the considerable amount of property and money that is directly connected to wills and trusts, motives like greed frequently become an issue.[42] Motives like greed and attempting to sway a person in a fraudulent manner is not unheard of in the preparation of wills and trusts.[43] These motives are probably one reason that arbitration and the use of binding arbitration clauses in wills and trusts has grown in popularity.[44] Considering the discussion above about the need for the consideration of privacy, family relationships and emotions, it is no wonder that an attempt has been made for parties to utilize ADR as opposed to litigation.[45]

> 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.[46]

40 T.P. O'Sullivan, 'Family Harmony: An All Too Frequent Casualty of the Estate Planning Process', 8 *Marq. Elder's Advisor* 2007, p. 253 at p. 315.

41 *See supra* Section B, I.

42 Blattmachr, *supra* note 2, at p. 244.

43 *Id.*

44 A.M. Vallario *et al.*, 'Basic Estate Tax Planning: Chapter Four', The Maryland Institute for Continuing Professional Education of Lawyers, Inc., BETP MD-CLE 977, 2008.

45 *Id.*

46 Blattmachr, *supra* note 2, at p. 266.

It is unclear how this preferable way of dealing with disputes can require a participant to give up their right to litigate.[47] One way to add some clarity would be to utilize provisions that would establish which matters could be subject to arbitration. "The provisions of the governing instrument can specify that certain matters are not arbitrable, such as questions regarding the settlor's competence or removal of a fiduciary."[48] This would be beneficial in attempting to utilize arbitration in an already drafted will or trust. However, it does not address the possible arbitration of disputes that arise out of disagreement between family members about the money or property being bequeathed. In order to arbitrate disputes like those there needs to be an element of a binding nature.

I. Can It Be Binding?

1. Agreements of the Parties

One issue that is commonly cited regarding the use of arbitration in wills and trusts is whether or not any resolution by an arbitrator can be binding. "The scarcity of arbitration clauses in wills and trusts [...] is at least in part due to the legal hurdle that mediation and arbitration must normally be by agreement of the parties."[49] The necessity of an agreement of the parties and consideration is one reason that practitioners in the area of trusts and estates have perhaps been slow in including arbitration clauses in dispositive documents.[50] Hence, the difficulty with attempting to utilize binding arbitration is that it can only become mandatory from a statute or from a contract that is voluntarily entered into.

> Generally, it is 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.[51]

The contracts view of wills and trusts suggests that wills and trusts are generally not contracts between two parties. Therefore, unless there is a statute expressly allowing binding arbitration, it will be very difficult to utilize mandatory or binding arbitration. Critics of the contracts view of wills and trusts, however, state that this idea is "an outdated distinction between contract and trust agreement and therefore reach[es] inequitable results".[52] While the idea may be outdated, it still remains valid that there is difficulty in making binding arbitration manda-

47 M.S. Poker & A.S. Kiiskila, 'Prevention and Resolution of Trust and Estate Controversies', 33 *ACTEC J.* 2008, p. 262 at p. 266.

48 *Id.*

49 O'Sullivan, *supra* note 40.

50 M.W. O'Toole, '2006-2007 Survey of New York Law: Trusts & Estates', 58 *Syracuse L. Rev.* 2008, p. 1191 at p. 1199.

51 Blattmachr, *supra* note 2, at p. 244.

52 M.P. Bruyere & M.D. Marino, 'Making Arbitration Truly Mandatory', *Trusts & Estates*, Vol. 147, No. 7, 2008, at p. 22 (on file with author).

tory when parties never agreed to give up their right to litigate. Again, one simple way to overcome this obstacle would be to utilize a pre-drafting contract.[53]

2. *State-Specific Cases and Legislation*

States tend to deal with arbitration in wills and trusts in a similar manner. Most litigated cases tend to hold that any binding arbitration clause in a will or trust is not binding. For example, an unreported Maryland case held that a binding arbitration clause is not binding on beneficiaries.[54] This holding took into consideration money already received and stated that the holding was decided regardless of whether the beneficiary received distributions from the trust or not.[55] Additionally, Arizona agreed with Maryland in *Schoneberger v. Oelze*. In this case, a father and his wife had created three trusts, each of which contained an arbitration provision.[56] The Arizona Court of Appeals held that "the trial court properly recognized the inter vivos trusts created by Bert and Linda were not contracts".[57] Therefore the trust beneficiaries were not required to arbitrate and the arbitration clause was not enforceable against beneficiaries who sued the trustees.[58]

On the other hand, some states have taken the statutory approach in addressing the use of binding arbitration in wills and trusts disputes. In Hawaii, there was proposed legislation entitled 'The Probate Mediation and Arbitration Choice Act',[59] which provided a way for enforcement of mediation and arbitration clauses in wills and trusts.[60] Essentially, it would amend Hawaii Probate Code, HRS 560, to "expressly provide that a decision such as arbitration is as enforceable as if there was an agreement to arbitration by the parties to the dispute".[61] This type of legislation would be ineffective because it essentially skirts the contract issue. If, instead of trying to get around the contract issue, the issue is met head on with a pre-drafting contract – where those to be included in a will or trust must agree to be bound by a contract to be included in the will or trust – legislation like this will be wholly unnecessary.

Expanding on this idea, Florida took on the issue of mandatory binding arbitration in wills and trusts. Florida recently became the first state to implement a law that will allow for the inclusion and use of mandatory binding arbitration clauses in trusts.[62] The Florida statute states:

53 *See supra* Part B, IV generally.

54 *Butler v. Revels*, No. 718 *Md. Ct. Spec. App. Sept. 2006 (unreported).

55 *Id.*

56 *Schoneberger v. Oelze*, 96 P.3d 1078, 1079 (Ariz. App. 2004).

57 *Id.*, at p. 1084.

58 *Id.*, at p. 1078.

59 The Probate Mediation and Arbitration Choice Act failed to pass. "[T]he bill died in the Judiciary Committee during the 2006 Regular Session of the Hawaii State Senate without so much as a hearing." *See* Bruyere & Marino, *supra* note 52, at p. 25.

60 D. Bent, 'My Bequest To My Heirs: Years of Contentious, Family Splitting Litigation...', 8 *Haw. B.J.* 2004, p. 28 at p. 30.

61 *Id.*

62 Bruyere & Marino, *supra* note 52.

(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 § 44.104.[63]

This legislation essentially resolves the contract issue by making binding arbitration law. As of June 2008, the issue of the validity or enforceability of the statute had yet to be addressed by the Florida courts.[64] How these disputes will be interpreted will no doubt affect the way arbitration is used in wills and trusts significantly.

II. Minors and Unborn Persons

Another issue that must be addressed is whether arbitration can be binding on any trust beneficiaries who are minor, legally incompetent, unborn or yet unascertained beneficiaries.[65] Because these types of beneficiaries are unable to comprehend or to legally be a party to a contract it makes holding them to mandatory binding arbitration especially difficult if not impossible. One way to do this would be to appoint a guardian *ad litem* to represent the interests of these types of beneficiaries. One question regarding the appointment of a guardian *ad litem* would be who appoints them and at what point in the proceeding are they appointed. Some suggest that "a mechanism should be included in the arbitration clause that allows the arbitration panel to appoint someone to act in a role that is comparable to a guardian ad litem."[66] However, it is unclear whether arbitration can legally be binding on such a guardian.[67] If a pre-drafting contract was utilized, the legal guardian, parent etc. of the minor, legally incompetent or unborn person could utilize the contract to determine how the elements of the contract would be interpreted to deal with this. For example, the pre-drafting contract could stipulate that any minor or unborn person would have the opportunity to opt out of the contract after reaching the age of majority. By doing this, any not already added beneficiaries could decide, upon reaching the age of majority, what is in their best interest and whether they want to be a party to the contract or whether they want to have a separate contract drafted.

III. In Terrorem *Clauses*

As discussed previously, one of the caveats of mandatory binding arbitration is that it cannot be imposed unless state law will enforce it or it is voluntarily agreed to by the parties.[68] How then can it be utilized in current will and trust disputes

63 Fla. Stat. Ann. § 731.401 (2007).
64 Bruyere & Marino, *supra* note 52, at p. 24.
65 Phillips, Martinsen & Damerion, *supra* note 3.
66 *Id.*
67 Poker & Kiiskila, *supra* note 47.
68 Blattmachr, *supra* note 2, at p. 259.

without using a pre-drafting contract? One way this could be accomplished is with an *in terrorem* or 'disinheritance' clause. An *in terrorem* clause is a clause that may be considered in order to provide forfeiture of benefits under the document if any challenge is made regarding the will or trust.[69]

> A typical in terrorem provision results in a difficult choice: totally abandon the complaint or risk loss of everything. The incentive to participate in arbitration allows the party with the complaint to be heard and does not risk losing everything by doing so.[70]

Proponents of the use of *in terrorem* clauses suggest that the utilization of such a clause would weed out such frivolous claims where the intention is to harass others and to allow disputes to go on for decades.[71] However, it could be suggested that the utilization of a provision that essentially says 'you must arbitrate or lose everything' leaves beneficiaries without a choice and strong-arms beneficiaries into decisions they may not agree with. The pre-drafting contract example *would* provide beneficiaries with a choice because: (1) they do not have to sign the contract if they do not want to; and (2) they can propose changes to the contract by making a counter-offer. While an *in terrorem* provision would be an effective way to get binding arbitration into a will or trust, it would presumably not be attractive to beneficiaries, because these kinds of provisions essentially bully people into giving up their rights to litigate.

D. Conclusion

The most important issue that will aid in the advancement of arbitration in wills and trusts is to encourage its use through educating lawyers.[72] Educating lawyers about the uses of arbitration will not only benefit their clients and their client's families but will also influence the field of wills and trusts as a whole. The benefits of the use of arbitration in wills and trust are numerous and extremely valuable.

> Mandatory arbitration clauses included in trust documents offer benefits to grantors, trustees, and beneficiaries: grantors can rest assured that their private lives remain private, trustees can protect trust assets while limiting personal liability, and beneficiaries can avoid both the emotional damage and the cost of protracted litigation.[73]

69 *Id.*, at p. 255.
70 *Id.*, at pp. 260-261.
71 *Id.*, at p. 261.
72 B.L. Josias, 'Burying The Hatchet In Burial Disputes: Applying Alternative Dispute Resolution to Disputes Concerning the Interment of Bodies', 79 *Notre Dame L. Rev.* 2004, p. 1141 at p. 1180.
73 Bruyere & Marino, *supra* note 1, at p. 366.

In addition to this, utilizing arbitration in disputes concerning wills and trusts protects family relations, ensures privacy and allows for the graceful honouring of the wishes of the decedents. Further, arbitration saves families and beneficiaries from wasting their time and money through the eventual depletion by litigation.[74]

Arbitration is one way to ensure that decedents' wishes will be met to the best of the attorneys and beneficiaries abilities. The limitation of this seemingly story-book idea of resolving family disputes and preventing litigation stemming from a will or a trust is that, in order to ensure the benefits of arbitration will occur, the arbitration needs to be mandatory and binding. The best, and least offensive, way to do this is through the utilization of pre-drafting contracts. By encouraging beneficiary awareness in the drafting of wills and trusts, it will be less stressful and demanding for a testator/future decedent to utilize a contract that will ensure that this or her wishes will be met and that if there are any disputes that they will be dealt with in arbitration. Arbitration is a step in the direction that protects the value of family relationships while ensuring that everyone's rights and wishes are upheld.

74 *Id.*, at p. 352.