But as Ohio lawyers and notaries have observed, the requirements for the certificates under the new R.C. 147.542(D)(1) are not entirely consistent with the current statutory short forms found at R.C. 147.55 ("the foregoing instrument was acknowledged before me this (date) by (name of person acknowledging) . . .") and R.C. 147.551 ("[s]worn to or affirmed and subscribed before me by (signature of person making jurat) this date of (date).")

In addition, others have noted that the new definition of "acknowledgment" contained in the Act requires a notary to confirm not only that signer signed the document, but also that the signer understood the document and was aware of the consequences of executing the document. R.C. 147.011(A). These last two elements are new and put notaries—particularly non-attorney notaries—in a more challenging position as they carry out their duties.

Since the last issue, legislative counsel for the Ohio State Bar Association has been in contact with the co-sponsors of the Act and has formed a legislative task force to prepare a comprehensive list of proposed revisions to the Act in the next few months. He reports that the proposed legislative revision is likely to include a provision that would operate as a safe harbor for documents executed between the effective date of the Act and the effective date of coming revisions.

Until this issue is resolved by the legislature, the most conservative approach would be to add the following language (or language to similar effect) to the appropriate notarial certificates:

This is a jurat certificate. An oath or affirmation was administered to the signer.

This is an acknowledgement certificate. No oath or affirmation was administered to the signer.

With the addition of this language, Ohio notaries should be able to avoid any question as to the validity of their notarial acts and certificates while these statutes are clarified by further legislative action.

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AN INTRODUCTION TO TRUST ARBITRATION

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With the March 22, 2019 enactment of R.C. 5802.05, the Ohio Legislature authorized arbitration as a means to resolve trust disputes. While there was no formal prohibition against arbitrating trust matters previously, Ohio law now endorses these provisions within trusts instruments. Beyond that threshold permission, though, the statute provides no guidance on what makes for good or bad arbitration clauses.

As arbitration is more familiar to attorneys with commercial-litigation backgrounds, this article will examine the history of trust arbitration, introduce arguments for enforcing trust-arbitration clauses, and provide an overview of drafting considerations.

THE RISE OF TRUST ARBITRATION

Arbitration is a form of extra-judicial, alternate-dispute resolution in which a neutral party or panel hears facts and law and then issues a determination binding upon the interested parties.[1] Arbitration is a popular alternative to traditional litigation in legal areas such as employment and labor, construction, and securities regulation. A 2017 Economic Policy Institute study determined that more than half of all Ohio employment contracts contain mandatory arbitration provisions when only 2% of such provisions were included nationwide in 1992.[2] To that end, Ohio law "reflects a strong policy favoring arbitration of disputes[,]"[3] and there is a "strong presumption in favor of arbitration."[4]

Despite arbitration's popularity in other areas of law, Ohio is the seventh state—following Washington[5] (2001), Arizona[6] (2008), Florida[7] (2013, and Florida is the only state in which the statute allows both will- and trust-dispute arbitration), Missouri[8] (2013), New Hampshire[9] (2014), and South Dakota[10] (2015)—to have a statute explicitly authorizing trust arbitration. The main reasons for allowing trust arbitration are faster dispute resolution, arbitration tends to cost less than traditional litigation, professional arbitrators have specialized knowledge in the disputed subject matter, and parties receive privacy not available in a probate court.

While only seven states allow trust arbitration, history demonstrates that will/trust arbitration is as old as the United States itself. After helping draft the U.S. Constitution, President George Washington inserted the following clause into his will:

> "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 disputant, each having the choice of one, and the third by those two. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their sense of the Testators 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."[11]

Case law also supports that attorneys did not wait for their respective states to adopt trust-arbitration statutes before inserting trust-arbitration clauses into wills and trusts.[12] The passing of the trust-arbitration statutes, though, provide attorneys and their clients with more assurances that trust-arbitration clauses will be enforced.

ARE TRUST-ARBITRATION CLAUSES ENFORCEABLE?

The main reason trust arbitration is an old concept that has been only recently codified is the longstanding legal requirement that both sides to a dispute agree to arbitration in advance.

The Federal Arbitration Act ("FAA") was passed on February 12, 1925,[13] and the FAA "was designed to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate, and place such agreements upon the same footing as other contracts."[14] Ordinary principals of contract law dictate whether a party has agreed to arbitrate.[15] To fall under the FAA's purview, the contract containing the arbitration clause must constitute "a contract evidencing a transaction involving commerce."[16]

Pursuant to Ohio law, a trust is not a contract.[17] The Ohio Arbitration Act ("OAA"), however, is broader than the FAA as the OAA applies to "any agreement in writing between two or more persons to submit to arbitration any controversy . . ."[18] Ohio courts also have applied equitable estoppel to determine an arbitration provision is binding upon a non-signatory.[19] Should a beneficiary challenge the enforceability of trust-arbitration provision, the trustee could rely upon equitable estoppel and the Ohio Supreme Court's longstanding holding that a court's primary responsibility in reviewing a trust is to ascertain the settlor's intent.[20]

These issues have already been litigated in other jurisdictions. The Supreme Court of Texas applied equitable estoppel to enforce a trust-arbitration clause, holding that "a beneficiary who attempts to enforce rights that would not exist without the trust manifest[s] her assent to the trust's arbitration clause."[21] In other words, a beneficiary cannot claim the rights and benefits that are created for the beneficiary under a trust and simultaneously reject the conditions of those rights and benefits—even if that condition is to arbitrate disputes. Under both theories—intent and equitable estoppel—an arbitration provision is no different than a conditional gift.

In expecting that beneficiaries who have not agreed to arbitration in wills/trusts could challenge such clauses for lack of mutual assent, one law professor disagreed with the widespread position that a will is not a contract.[22] According to the professor, "a will is part of an implied unilateral contract between the testator and the state in which the state offers to honor the testator's donative intent, and the testator accepts and provides consideration for the offer by creating and preserving wealth."[23] Pursuant to the same legal theory used to enforce arbitration clauses as part of implied unilateral contracts contained in employee handbooks, the professor argues that will-arbitration clauses should be enforceable under state and federal arbitration acts.[24]

CONSIDERATIONS FOR DRAFTING TRUST-ARBITRATION CLAUSES

Ohio's trust-arbitration statute does not provide guidance on how to draft trust-arbitration clauses or how to advise clients about one. While estate planners often use standard language for some provisions, they should be cautious about having a one-size-fits-all arbitration clause.

One limitation contained in the statute is a settlor cannot compel arbitration regarding the instrument's validity.[25] Similarly, arbitration is limited in its ability to compel third parties to produce records and information without the courts' subpoena powers. Default arbitration provisions have binding results upon the parties, but the settlor has discretion on this issue.[26] Other important drafting considerations include the following:

— **Scope:** Should arbitration cover all disputes? Or just certain types, such as the exercise of trustee discretion, payment of fees, allocation of costs, etc.?

— **Criteria:** What qualifications should the arbitrator(s) have? ACTEC fellow? OSBA Certified? Business background? Does the settlor want a panel of three arbitrators

or a sole decision maker? Who selects the arbitrator(s)?

— **Procedure:** What rules or procedure should govern the arbitration? The American Arbitration Association ("AAA") Rules? As the arbitrator determines?

— **Who pays?:** Is the cost of arbitration borne equally among the disputing parties? What if the dispute is trustee versus beneficiaries? Should the costs be a general expense of the trust, or allocated against a losing party's interest?

— **Minors:** How will the interests of minors be protected? Virtual representation?

— **Interaction with other provisions:** How should the arbitration provision be read if there is an in terrorem provision? What about removal or nomination of a successor trustee?

The AAA provided the following trust-arbitration clause as a template:

> In order to save the cost of court proceedings and promote the prompt and final resolution of any dispute regarding the interpretation of my will (or my trust) or the administration of my estate or any trust under my will (or my trust), I direct that any such dispute shall be settled by arbitration administered by the American Arbitration Association under its Arbitration Rules for Will and Trusts then in effect. Nevertheless the following matters shall not be arbitrable—questions regarding my competency, attempts to remove a fiduciary, or questions concerning the amount of bond of a fiduciary. In addition, arbitration may be waived by all *sui juris* parties in interest.
>
> The arbitrator(s) shall be a practicing lawyer licensed to practice law in the state whose laws govern my will (or my trust). The arbitrator's decision shall not be appealable to any court, but shall be final and binding on any and all persons who have or may have an interest in my estate or any trust under my will (or my trust), including unborn or incapacitated persons, such as minors or incompetents. Judgment on the arbitrator's award may be entered in any court having jurisdiction thereof.[27]

CONCLUSION

Given the popularity of arbitration to resolve disputes, R.C. 5802.05 provides attorneys with another tool for estate-planning clients to consider should they be concerned about trust disputes. While the enforceability of a trust-arbitration clause could be the subject of litigation, case law supports these clauses being enforced under the doctrines of honoring the settlor's intent and equitable estoppel. Should clients consider inserting a trust-arbitration clause, the attorney preparing the instrument should examine various templates and weigh the pros and cons of such a provision with the client.

ENDNOTES:

[1]*Black's Law Dictionary* 105 (6th ed. 1990).

[2]Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute, (April 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.

[3]*Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St. 3d 352, 357, 2008-Ohio-938, ¶ 25 884 N.E.2d 12 (2008).

[4]*McCann v. New Century Mtge. Corp.*, 2003-Ohio-2752, ¶ 17, 2003 WL 21246040 (Ohio Ct. App. 8th Dist. Cuyahoga County 2003).

[5]RCW 11.96A.010 (2001).

[6]Ariz. Rev. Sta. Ann. 14-10205 (2008).

[7]Fla. Stat. Ann. 731.401 (2013).

[8]Mo. Rev. Stat. 456.2-205 (2013).

[9]N.H. Rev. Stat. Ann. 564-B: 1-111A (2014).

[10]S.D. Codified Laws § 55-1-54 (2015).

[11]Edward F. Sherman, *Arbitration in Wills and Trusts: From George Washington to an Uncertain Present*, 9 Arb. L. Rev. 83 (2017), *citing* THE LAST WILL AND TESTAMENT OF GEORGE WASHINGTON AND SCHEDULE OF HIS PROPERTY, TO WHICH IS APPENDED THE LAST WILL AND TESTA-

MENT OF MARTHA WASHINGTON (John C. Fitzpatrick ed., The Mount Vernon Ladies' Association of the Union 1939).

[12]*Schoneberger v. Oelze*, 208 Ariz. 591, 96 P.3d 1078 (Ct. App. Div. 1 2004); *Rachal v. Reitz*, 403 S.W.3d 840 (Tex. 2013); *McArthur v. McArthur*, 224 Cal. App. 4th 651, 168 Cal. Rptr. 3d 785 (1st Dist. 2014); *Franklin Templeton Bank & Trust v. Butler*, 2016 WL 3129141 (D. Utah 2016).

[13]Title 9, US Code, Section 1-14, was first enacted February 12, 1925 (43 Stat. 883), codified July 30, 1947 (61 Stat. 669), and amended September 3, 1954 (68 Stat. 1233). Chapter 2 was added July 31, 1970 (84 Stat. 692), two new Sections were passed by the Congress in October of 1988 and renumbered on December 1, 1990 (PLs 669 and 702); Chapter 3 was added on August 15, 1990 (PL 101-369); and Section 10 was amended on November 15.

[14]Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 474, 109 S. Ct. 1248, 103 L. Ed. 2d 488, 51 Ed. Law Rep. 725 (1989).

[15]*Lee v. Red Lobster Inns of America, Inc.*, 92 Fed. Appx. 158, 161 (6th Cir. 2004).

[16]9 U.S.C.A. § 2.

[17]*Zahn v. Nelson,* 170 Ohio App. 3d 111, 2007-Ohio-667, ¶ 19, 866 N.E.2d 58 (4th Dist. Highland County 2007); *Lah v. Rogers,* 125 Ohio App. 3d 164, 707 N.E.2d 1208 (11th Dist. Lake County 1998).

[18]R.C. 2711.01(A).

[19]*MS Dealer Service Corp. v. Franklin,* 177 F.3d 942, 947, 43 Fed. R. Serv. 3d 1204 (11th Cir. 1999).

[20]*See Pack v. Osborn,* 117 Ohio St. 3d 14, 2008-Ohio-90, 881 N.E.2d 237 (2008).

[21]*Rachal v. Reitz,* 403 S.W.3d 840, 847 (Tex. 2013).

[22]E. Gary Spitko, *The Will as an Implied Unilateral Arbitration Contract*, 68 FLA. L. REV. 49 (2016).

[23]68 FLA. L. REV 49.

[24]68 FLA. L. REV 49.

[25]R.C. 5802.05(A).

[26]R.C. 5802.05(B).

[27]American Arbitration Association, *Wills and Trusts Arbitration Rules and Mediation Procedures,* (June 1, 2012), https://www.adr.org/sites/default/files/Commercial%20Wills%20and%20Trusts%20Rules%2012813%20-%20Archieve%202015%20Oct%2021%2C%202011.pdf.

CROUCHING TIGER, HIDDEN TAXES: UNEXPECTED INCOME-TAX EFFECTS OF EARLY TRUST TERMINATIONS

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"The hardest thing in the world to understand is the income tax."—Albert Einstein[1]

Trusts-and-estates practitioners have been subjected to misdirection, and its effect is scary. In a magic show, magicians will use misdirection to make the audience focus on one thing to distract it from another. The result is the illusion of magic. When working with clients on terminating irrevocable trusts, trusts-and-estates practitioners have been focusing on estate-tax, gift-tax, and GST-tax effects of those terminations, which distracted us from the income-tax effects of those terminations. The result is a scary set of PLRs released in 2019.

Trusts are usually terminated if they have too few assets, were designed for circumstances that have significantly changed, or are too costly. Ohio practitioners have several tools available for terminating trusts through the common law and Ohio's implementation of the Uniform Trust Code. These tools have been discussed elsewhere,[2] and different tools are appropriate to different circumstances. They typically consist of (1) an agreement among the beneficiary, trustee, and (sometimes) the settlor, (2) a judicial order of termination, or (3) use of discretionary distributions. This article is concerned with the first two "early

