

**ADR PROVISIONS IN
ESTATE PLANNING DOCUMENTS**

Use of ADR Procedures in Estate Planning,
Probate, and Trust Administrations,
Including the Pre-Dispute Use to Avoid Litigation

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CHAPTER 14

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ADR PROVISIONS IN ESTATE PLANNING DOCUMENTS

I. BRIEF OVERVIEW AND HISTORICAL PERSPECTIVE

Dispute resolution processes that are currently being used in Texas have existed for centuries in other countries and cultures. However, the widespread use of ADR procedures, both court-ordered and private contractually-agreed upon, did not become commonplace in Texas until after the enactment by the Texas Legislature of the Texas Alternative Dispute Resolution (ADR) Procedures Act in 1987 (the “Texas ADR Act”). Tx. Civ. Prac. & Rem. Code Ch. 154.

The Texas ADR Act essentially embodied a new public policy in Texas to encourage the peaceful resolution of disputes and officially favors the utilization by Texas courts of voluntary settlement procedures and the early settlement of pending litigation. The Texas ADR Act permits participants and the courts to choose a wide variety of voluntary ADR procedures, and it also adopts basic qualifications, standards and duties for impartial third parties to facilitate a particular ADR process.

II. ADR PROCEDURES CONSIDERED

A. Texas ADR Procedures Act

The Texas ADR Procedures Act provides for a number of different ADR processes, including (1) mediation, (2) mini-trial, (3) moderated settlement conference, (4) summary jury trial, and (5) non-binding arbitration. All of the ADR processes subject to the Texas ADR Act are nonbinding, confidential, and flexible. These ADR procedures generally involve the use of a third party neutral to facilitate an attempted settlement of dispute outside of the courtroom. However, because the Texas ADR system is nonbinding, even in court-ordered ADR, the parties cannot be compelled to settle. A general discussion of ADR procedures and of court-ordered ADR in particular is beyond the scope of this article, and the article will address those private contractually-agreed upon ADR processes that this writer thinks might be most useful in an estate planning and probate practice. For a comprehensive discussion of Texas ADR procedures generally, please refer to *The Handbook of Alternative Dispute Resolution (Third Edition 2003)* published by the Alternative Dispute Resolution Section of the State Bar of Texas.

B. Direct Negotiation

The most obvious and widely used ADR process is direct negotiation-talking to the other side. The

majority of disputes between parties are inherently negotiable, and such disputes can be resolved without resort to litigation if the parties can rationally communicate with one another. Consequently, direct negotiation between the parties (and their respective legal counsel) is frequently the first requested form of ADR for the parties to engage in. However, in those circumstances where there is no reasonable common ground for resolution of the dispute or one or both parties (or their advisors) are irrational or angry and combative, then direct negotiation, without incorporation of additional ADR processes, is unlikely to be successful.

C. Mediation

Section 154.023 of the Texas ADR Procedures Act defines mediation as “...a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.” It is not the function of the mediator to render any final decision or evaluation of the dispute, but rather to facilitate the exchange of information and settlement proposals between the disputing parties. Consequently, mediation involves resolution of a dispute, the terms of which are negotiated between the parties themselves. Mediation is the next step above direct negotiation between the parties, and employs a process of compromise.

Mediation is perhaps the most commonly used form of ADR in Texas. It is often used before the parties initiate legal proceedings against one another, and it is now common place that courts will require and refer litigating parties to mediation before the case is set for trial.

There are two broadly recognized types of mediation – (1) the conference model, and (2) the caucus model. The conference model encourages the parties to meet jointly to discuss their disagreements in the same room and to work largely together to develop an agreed upon solution. The mediator is present to help facilitate the parties discussions. The dominant model used in Texas is the caucus (or shuttle) mediation. Under this model, the parties may meet initially in a joint session, but the parties are then primarily separated from one another during most of the negotiations with the mediator going back and forth between the parties.

Some factors that may favor the use of mediation in a given case are:

- (1) The parties will have an ongoing business or personal relationship.
- (2) Economic or non-economic factors favor an early resolution of the dispute.

- (3) Critical or material facts are not in dispute between the parties.
- (4) One or more of the attorneys for the parties requests or believes ADR procedures might work.
- (5) The parties have had some prior settlement discussions.
- (6) Cost of litigation is disproportionate to the amount at issue.
- (7) Trial of the dispute will be lengthy or complex and result in loss of privacy to the parties.
- (8) All parties have reasonable counsel.

Conversely, some factors that may make a successful mediation either difficult or impossible are:

- (1) A gross disparity in bargaining power between the parties.
- (2) Cases involving physical injury or abuse among the parties.
- (3) One or both parties have unrealistic expectations concerning the ultimate outcome of the dispute, if litigated.
- (4) Parties disagreed on the critical or material facts.
- (5) One or both parties have counsel who are against any form of settlement of the case.
- (6) One or both parties (or their counsel) are unduly combative.

D. Arbitration

The Texas ADR Act provides for non-binding arbitration wherein a third party arbitrator or panel of arbitrators meet with the parties, listen to the presentation of facts and law and render a specific award. See Tx. Civ. Prac. & Rem. Act, Section 154.027. Non-binding arbitration under this statute is intended to produce an “advisory opinion” to the parties, which they can accept or reject.

Binding arbitration is available under either the Texas General Arbitration Act (Tx. Civ. Prac. & Rem. Code, Chapter 171) or the Federal Arbitration Act (9 U.S.C.A., Sec. 1-15 West 1970 and Supp. 1990). In binding arbitration, the opinion of the arbitrator(s) is not advisory, but is binding upon the parties.

Mediation and non-binding arbitration are not the same ADR process.

E. Hybrid/Combined Procedures

Variations, combinations or “hybrid” ADR procedures have evolved and are commonly used with agreement of the parties and/or of the courts. A combination of both mediation and binding arbitration has grown in popularity in recent years. There are two

forms of this type of “hybrid” ADR process-(1) mediation-arbitration, or (2) arbitration-mediation.

Mediation-arbitration (Med.-Arb.) is a process wherein the parties agree to convene a traditional mediation with a fixed duration, after which the mediator will leave if settlement is at an impasse and a separate arbitrator will arrive to resolve the dispute like a traditional binding arbitration. Although there is some disagreement on this point, it is generally agreed and recommended that the same person should not serve as both the mediator and the arbitrator in the dispute.

Arbitration-mediation (Arb.-Med.) commences with a traditional binding arbitration. While the arbitrator is preparing his opinion, a separate mediator will attempt to facilitate a settlement agreement between the parties. If the arbitrator completes his opinion while the mediation is still in progress, the opinion is sealed and given to the mediator. If the attempted mediation ultimately concludes in an impasse between the parties, then the arbitrator’s opinion is opened and is binding. If the mediation is successful, the arbitrator is dismissed, and the arbitrator’s opinion is not disclosed.

F. Collaborative Dispute Resolution

A rapidly growing dispute resolution technique is referred to as “collaborative law” or “collaborative dispute resolution.” This technique has proven to be very successful in divorce and other family law disputes, and has been enacted into Texas law in 2001 in the adoption of Section 6.603 of the Texas Family Code. (Tex. Fam. Code. §6.603).

Collaborative law is a procedure in which the parties and their counsel agree in writing to use their best efforts and to make a good faith attempt to resolve their dispute on an agreed basis without resorting to the courts, except perhaps to have a court approve the settlement agreement and to sign such orders as the parties and the court deems appropriate and necessary.

The collaborative process commences with each party’s appointment of separate “settlement counsel” who are not the parties regular or “litigation counsel.” The parties and their settlement counsel enter into a “Collaborative Participation Agreement” to work together in good faith to collaboratively attempt to settle their dispute. The parties agree that if the process is unproductive and no settlement of the dispute is reached, the settlement counsel are discharged and cannot serve as litigation counsel for the parties.

After the Collaborative Participation Agreement is signed, the settlement counsel will work in good faith on cost-effective discovery or exchange of information. Generally, if experts are required, only one will be

employed. Settlement counsel will do whatever is required to forge an objectively fair proposal for settlement.

G. Religious Dispute Resolution Systems

Judaism, the Islamic faith and the Christian faith each have religious dispute resolution systems that seek to resolve disputes outside the judicial system. Such procedures are generally conciliatory rather than adversarial in nature. For an example of a religious dispute resolution system, refer to the Guidelines for Christian Conciliation set forth on the website for the Association of Christian Conciliation Services found at www.hispeace.org.

III. ADR IN ESTATE PLANNING, PROBATE AND TRUST ADMINISTRATIONS

A. Pre-Dispute Use of ADR Procedures in Estate Planning and Business Succession Planning.

A common problem faced by estate planners is a client's well-founded concern that members of his or her family will most likely be in disagreement, or even litigation, following the client's death over the disposition of his or her estate, particularly the disposition of family businesses, ranches, farms or other family icons.

In appropriate situations, it may well be advisable for the client and other affected family members to engage in an appropriate "pre-death" or "pre-dispute" ADR process to attempt to reach some agreement, understanding or settlement among the parties as to the final disposition of those assets.

The use of an impartial third party mediator in this type of situation might be far more effective to facilitate genuine communication between the parties than mere negotiations between the parties and their respective legal counsel.

It also appears to this writer that the use of a collaborative dispute resolution procedure in such cases might be appropriate.

B. Probate and Trust Administrations.

Court-ordered ADR in fiduciary litigation involving trusts and estates is commonplace in Texas at this time. As a general rule, mediation is required before the case can proceed in court. Recently, specialized programs for probate and trust-specific mediation training have been developed by the American College of Trust and Estate Counsel (ACTEC) and other organizations regularly offering advanced ADR training courses. Mediation in this area is one where specialized training and professional experience of the selected mediator in the area of probate, trust and tax law is highly beneficial.

Disputes in probate and trust administrations are frequently highly emotionally charged. Such disputes often involve issues or matters that are only incidental to the administration of the estate or trust. Mediation is an appropriate forum for family members to "vent" their emotions over such issues. Mediators can help fiduciaries, distributees, heirs and beneficiaries look rationally at all possible options.

A challenge for estate planners today is determining how effective ADR procedures might be incorporated into the provisions of Wills and trust documents for clients who prefer that any future dispute arising in regard to the administration of their estate or trust be first attempted to be resolved by an appropriate ADR procedure, rather than through litigation.

C. Guardianships and Elder Law Cases.

Like probate or trust administrations, mediation in the administration of a guardianship seem appropriate and beneficial. Issues involving abuse are probably not appropriate for mediation. Mediation between the children regarding disputes over an elderly parent's living arrangements or medical treatments seem appropriate in certain situations.

V. DRAFTING ADR PROVISIONS IN WILLS AND TRUST DOCUMENTS

A. Issues to Consider

Assuming that your client wants to incorporate ADR procedures into his Will or trust document, the initial question to consider is whether the provisions are intended to be precatory and advisory or mandatory and controlling on the affected parties? Are they to affect all future disputes or are certain matters (i.e. fraud, gross negligence or willful misconduct of the fiduciary) to be excluded? Are certain administrative actions by the fiduciary such as declaratory judgments or actions for the construction, reformation or modification of certain provisions of the Will or trust document to be excluded? Will inclusion of ADR provisions have any adverse tax effects on certain provisions of a Will or trust, such as the marital or charitable deduction?

B. Conditional Bequests.

If a client intends for the ADR provisions included in his Will or trust document to be binding and mandatory on his distributees and beneficiaries, the issue arises of how those parties are going to be made subject to those ADR provisions if they are not a signatory to the Will or trust document itself. The answer appears to be that the receipt of their interest in the estate or trust must be made a "condition" on their

execution of an agreement to be bound by the ADR provisions included in the Will or trust instrument.

A provision in a Will that prevents the estate from vesting in a designated beneficiary creates a condition. A devisee or legatee will be required to take the property subject to the imposed condition unless the condition is illegal or violates public policy. Stewart v. Republic Bank, Dallas, 698 S.W.2d 786 (Tex. App-Fort Worth 1985, writ ref'd.n.r.e.). Any condition that contemplates forfeiture of the estate if not met will be strictly construed.

C. Effect on Marital or Charitable Bequests.

If a bequest to a spouse or a charity is involved, a question arises as to whether or not subjecting those bequests to a "condition" might cause the loss of a valuable federal estate tax marital or charitable deduction. With regard to the marital deduction, the specific issue is whether or not requiring the spouse to execute a contractual agreement to be bound by the ADR provisions in the document might cause the bequest to become a non-qualified terminable interest.

This writer did not find any authority dealing specifically with this situation, but there is existing authority regarding similar items that appear to suggest that a condition requiring the spouse to execute an agreement to be bound by such ADR provisions within not more than 6-months after the decedent's date of death would not disqualify an otherwise qualified marital deduction bequest. See PLR9244020 (dealing with requirements that the spouse and charities execute a written release of any right to contest the decedent's Will within 6 months of decedent's death); PLR8735003 (also dealing with a no-contest provision); PLR8727002 (also dealing with a no-contest clause); Estate of Tompkins v. Commissioner, 68 TC 912 (1977) (dealing with the surviving spouse's right of election); Estate of George C. Mackie v. Commissioner, 64 TC 308 (dealing with the spouse's right of election); Estate of Tompkins v. Commissioner, 68 TC 912 (1977) (dealing with the spouse's right of election).

APPENDIX A

Arbitration Rules for Wills and Trusts

Effective July 1, 2003

Introduction

Every year billions of dollars are administered by executors and trustees. Occasionally disputes arise about whether those funds are being properly administered and whether the governing will or trust is being interpreted correctly by the fiduciary. Many of these disputes can be resolved by the use of arbitration, the voluntary submission of a dispute to a disinterested lawyer or lawyers with substantial experience in the area of trusts and estates for final and binding determination. Arbitration is an effective way to resolve these disputes privately, promptly, and economically.

The American Arbitration Association (AAA) is a public-service, not-for-profit organization offering a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York City and through offices located in major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on all forms of out-of-court dispute settlement.

Executors and trustees, and beneficiaries of estates and trusts, can voluntarily agree to arbitrate an existing dispute under these rules. However, they should review state law to determine whether a guardian *ad litem* is necessary to represent any minor, incapacitated, or unborn beneficiary. Testators or settlors can require that future disputes be arbitrated by inserting the following clause into their wills and trusts.

Standard Arbitration Clause

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 Wills 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) and whose practice has been devoted primarily to wills and trusts for at least ten years. The arbitrator(s) shall apply the substantive law (and the law of remedies, if applicable) of 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.

Administrative Fees

The AAA's administrative fees are based on service charges. The fees cover AAA administrative services; they do not cover arbitrator compensation or expenses, if any, reporting services, or any postaward charges incurred by the parties in enforcing the award.

There is no additional administrative fee where parties to a pending arbitration attempt to mediate their dispute under the AAA's auspices.

Mediation

The parties might wish to submit their dispute to mediation prior to arbitration. In mediation, the neutral mediator assists the parties in reaching a settlement but does not have the authority to make a binding decision or award. Mediation is administered by the AAA in accordance with its Commercial Mediation Rules.

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission.

The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Rules. (The clause may also provide for the qualifications of the mediator(s), the method of payment, locale of meetings, and any other item of concern to the parties.)

The services of the AAA are generally concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.

Arbitration Rules for Wills and Trusts

1. Incorporation of These Rules into a Will or Trust *

A testator or settlor shall be deemed to have made these rules a part of the will or trust whenever the will or trust has provided for arbitration by the American Arbitration Association (hereinafter AAA) or under its Arbitration Rules for Wills and Trusts. These rules and any amendment of them shall apply in the form obtaining when the demand for arbitration or submission agreement is received by the AAA. The parties, by written agreement, may vary the procedures set forth in these Rules.

*A dispute arising out of a contract, agreement or plan between a consumer and a business will be administered in accordance with the AAA's *Supplementary Procedures for Consumer-Related Disputes*, unless the parties agree otherwise after the commencement of the arbitration. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

2. Administrator and Delegation of Duties

When a will or trust provides for arbitration under these rules, the AAA is authorized to administer the arbitration. The authority and duties of the AAA are established in the will or trust and in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its regional offices.

3. National Panel of Arbitrators

The AAA shall establish and maintain a state-by-state panel of will and trust arbitrators, who shall be attorneys whose practice has been primarily devoted to estate and trust matters for at least ten years, and shall appoint arbitrators from this panel as provided in these rules.

4. Initiation under a Submission

Parties to any existing dispute may start an arbitration under these rules by filing at any regional office of the AAA three copies of a written submission to arbitrate under these rules, signed by the parties. It shall contain a statement of the matter in dispute, the amount involved, if any, the remedy sought, and the hearing locale requested, together with the appropriate filing fee.

5. Initiation under an Arbitration Provision in a Will or Trust

Arbitration under an arbitration provision in a will or trust shall be initiated by the claimant in the following manner.

The initiating party shall give written notice to all other parties (hereinafter respondent) of its intention to arbitrate (demand), which notice shall contain a statement setting forth the nature of the dispute, the amount involved, if any, the remedy sought, and the hearing locale requested, and shall file at any regional office of the AAA three copies of the notice and three copies of the arbitration provisions of the will or trust, together with the appropriate filing fee. The AAA shall give notice of such filing to the respondents named by the claimant.

6. Answer

A respondent may file an answering statement in duplicate with the AAA within ten days after notice from the AAA, in which event the respondent shall at the same time send a copy of the answering statement to the claimant. If a counterclaim is asserted, it shall contain a statement setting forth the nature of the counterclaim, the amount involved, if any, and the remedy sought. If a counterclaim is made, the appropriate fee shall be forwarded to the AAA with the answering statement. If no answering statement is filed within the stated time, it will be treated as a denial of the claim. Failure to file an answering statement shall not operate to delay the arbitration.

7. Changes of Claims

After filing of a claim, if either party desires to make any new or different claim or counterclaim, it shall be made in writing and filed with the AAA. Simultaneously, a copy must be sent to the other party, who shall have a period of ten days from the date of such transmittal within which to file an answer with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

8. Procedures for Large, Complex Disputes

The AAA's Supplementary Procedures for Large, Complex Disputes shall apply where (1) the parties agree to have those procedures apply or (2) where the disclosed claim or counterclaim exceeds \$1 million, one party has requested that those procedures apply, and the AAA in its discretion determines that those procedures will apply.

9. Administrative Conferences and Mediation

At the request of any party or at the discretion of the AAA, an administrative conference with the AAA and the parties and/or their representatives will be scheduled in appropriate cases to expedite the arbitration proceedings. There is no administrative fee for this service.

Unless the parties agree otherwise, the AAA at any stage of the proceeding may arrange a mediation conference under the Commercial Mediation Rules, in order to facilitate settlement. The mediator shall not be an arbitrator appointed to the case. Where the parties to a pending arbitration agree to mediate under the AAA's rules, no additional administrative fee is required to initiate the mediation.

10. Fixing of Locale

The parties may agree on the locale where the arbitration is to be held. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within ten days after notice of the request has been sent to it by the AAA, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale in the state whose law governs the will or trust, and its decision shall be final and binding.

11. Appointment from the Panel

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner: immediately after the filing of the demand or submission, the AAA shall send simultaneously to each party to the dispute an identical list of names of persons chosen by the AAA from its will and trust panel.

Each party to the dispute shall have ten days from the transmittal date in which to strike any names objected to, number the remaining names in order of preference, and return the list to the AAA. In a single-arbitrator case, each party may strike three names on a peremptory basis. In a multi-arbitrator case, each party may strike five names on a peremptory basis. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the panel without the submission of additional lists.

12. The Number of Arbitrators

If the will or trust has not specified the number of arbitrators or if the parties have not agreed to the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that a greater number of arbitrators be appointed.

13. Notice to Arbitrator of Appointment

Notice of the appointment of the arbitrator, whether appointed mutually by the parties or by the AAA, shall be sent to the arbitrator by the AAA, together with a copy of these rules. The signed acceptance of the arbitrator shall be filed with the AAA prior to the opening of the first hearing.

14. Disclosure and Challenge Procedure

Any person appointed as arbitrator shall disclose to the AAA any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others. Upon objection of a party to the continued service of an arbitrator, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.

15. Vacancies

If for any reason an arbitrator is unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled by the AAA.

In the event of a vacancy in a panel of arbitrators after the hearings have commenced, unless the parties agree otherwise, the vacancy shall be filled as provided above, and the newly constituted panel shall determine whether all or part of any prior hearing shall be repeated.

16. Preliminary Hearing

At the request of any party or at the discretion of the arbitrator or the AAA, a preliminary hearing with the parties and/or their representatives and the arbitrator may be scheduled by the arbitrator to specify issues to be resolved, to stipulate uncontested facts, to schedule hearings to resolve the dispute, and to consider other matters that will expedite the arbitration proceedings. There is no administrative fee for the first preliminary hearing.

Consistent with the expedited nature of arbitration, the arbitrator may establish (i) the extent of and schedule for production of documents and other information, (ii) identification of any witnesses to be called, and (iii) a schedule for further hearings to resolve the dispute. The arbitrator is authorized to resolve any dispute over this information exchange.

17. Date, Time, and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing. The AAA shall send a notice of hearing to the parties at least ten days in advance of the hearing date, unless otherwise agreed by the parties.

18. Representation

Any party may be represented by counsel or other authorized representative. A party intending to be represented shall notify the other party and the AAA of the name, address and telephone number of the representative at least three days prior to the date set for the hearing at which that person is first to appear. When a representative initiates an arbitration or responds for a party, notice of representation is deemed to have been given.

19. Stenographic Records

Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements in advance of the hearing. The requesting party or parties shall pay the cost of the record.

If the transcript is agreed by the parties to be, or determined by the arbitrator to be, the official record of the proceeding, it must be made available to the arbitrator and to the other parties for inspection, at a date, time and place determined by the arbitrator.

20. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

21. Attendance at Hearings; Experts

The arbitrator shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. Although expert witnesses are generally permitted to attend the hearing, the arbitrator shall have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

22. Postponements

The arbitrator for good cause shown may postpone any hearing upon the request of a party or upon the arbitrator's own initiative, and shall grant a postponement when all of the parties agree.

23. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

24. Majority Decision

All decisions of the arbitrators, including the award, shall be by a majority.

25. Order of Proceedings and Communication with the Arbitrator

A hearing shall be opened by the filing of the oath of the arbitrator, where required; by the recording of the date, time and place of the hearing, and the presence of the arbitrator, the parties and their representatives, if any; and by the receipt by the arbitrator of the statement of the claim and the answering statement, if any.

The arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved. In some cases, part or all of the above will have been accomplished at the preliminary hearing conducted by the arbitrator pursuant to [Section 16](#).

The complaining party shall then present evidence to support its claim. The defending party shall then present evidence supporting its defense. Witnesses for each party shall submit to questions or other examination. The arbitrator has the discretion to vary this procedure but shall afford a full and equal opportunity to all parties for the presentation of any material and relevant evidence.

Exhibits, when offered by either party, may be received in evidence by the arbitrator.

The names and addresses of all witnesses and a description of the exhibits in the order received shall be made a part of the record.

There shall be no direct communication between the parties and the arbitrator other than at oral hearing, unless the parties and the arbitrator agree otherwise. Any other oral or written communication from the parties to the arbitrator shall be directed to the AAA for transmittal to the arbitrator.

26. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

27. Evidence

The parties may offer evidence that is relevant and material to the dispute, and shall produce such evidence as the arbitrator deems necessary to an understanding and determination of the dispute. An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all the arbitrators and all the parties, except where any of the parties is absent in default or has waived the right to be present.

28. Evidence by Affidavit and Posthearing Filing of Documents or Other Evidence

The arbitrator may receive and consider the evidence of witnesses by affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.

If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine such documents or other evidence.

29. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any

party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make a verbal or written report to the parties and afford them an opportunity to comment.

30. Interim Measures

The arbitrator may direct whatever interim measures are deemed necessary with respect to the dispute, including measures for the conservation of property, without prejudice to the rights of the parties or to the final determination of the dispute. Such interim measures may be taken in the form of an interim award and the arbitrator may require security for the costs of such measures.

31. Closing of Hearing

The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.

If briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided in Section 28 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the date of closing the hearing. The time limit within which the arbitrator shall endeavor to make the award shall start to run, in the absence of other agreements by the parties, upon the closing of the hearing.

32. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or upon application of a party, at any time before the award is made.

33. Waiver of Oral Hearing

The parties may provide, by written agreement, for the waiver of oral hearings in any case. If the parties are unable to agree as to the procedure, the AAA shall specify a fair and equitable procedure.

34. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

35. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

36. Serving of Notice

Each party shall be deemed to have consented that any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action in connection therewith; or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.

The AAA and the parties may also use facsimile transmission, telex, telegram or other written forms of electronic communication to give the notices required by these rules.

37. The Award

(a) The arbitrator shall endeavor to issue the award within thirty days from the date of closing of the hearing or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

(b) The award shall be in writing, shall be signed by a majority of the arbitrators, and shall be executed in the manner required by law. The award shall contain the names of the parties and representatives, if any, a summary of the issues, the damages and/or other relief requested and awarded, a statement of any other issues resolved, a statement regarding the disposition of any statutory claim, the names of arbitrators, the date when the case was filed, the date of the award, the number and dates of hearings, the location of the hearings, and the signatures of the arbitrators concurring in or dissenting from the award.

(c) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable within the scope of the claims or counterclaims being arbitrated including, but not limited to, specific performance. The arbitrator shall, in the award, assess arbitration fees, expenses, and compensation as provided in [Sections 41, 42, and 43](#) in favor of any party and, in the event that any administrative fees or expenses are due the AAA, in favor of the AAA.

(d) If the parties settle their dispute during the course of the arbitration, the arbitrator may, upon the written agreement of those parties, set forth the terms of the agreed settlement in an award. Such an award is called a consent award.

(e) Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail addressed to a party or its representative at the last known address, personal service of the award, or the filing of the award in any other manner that is permitted by law.

38. Correction of the Award

Within twenty days after the transmittal of an award, any party, upon notice to the other parties, may request that the arbitrator correct any clerical, typographical, technical, or computational error in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided.

The other parties shall be given 10 days to respond to the request. The arbitrator shall dispose of the request within twenty days after transmittal by the AAA to the arbitrator of the request and any response thereto.

39. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to the party, at its expense, certified copies of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

40. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary party in judicial proceedings relating to the arbitration.

(c) Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules.

41. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe filing and other administrative fees to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable.

The filing fee shall be advanced by the initiating party or parties, subject to final apportionment by the arbitrator in the award.

The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

42. Expenses

The fees and expenses of witnesses shall be paid by the party producing the witnesses. Unless the parties agree otherwise, all other expenses of the arbitration not specifically provided for in these Rules, including required travel and other expenses of the arbitrator, and AAA representatives and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, subject to final allocation by the arbitrator as provided in [Section 37\(c\)](#).

43. Arbitrator's Compensation

Unless the parties agree otherwise, an arbitrator will receive compensation at his or her customary hourly rate, advanced equally by the parties.

44. Deposits

The AAA may require the parties to deposit at any time or times such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

45. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA. Large, Complex Disputes

46. Applicability

(a) The Supplementary Procedures for Large, Complex Disputes shall apply to the Arbitration Rules for Wills and Trusts as provided in [Section 8](#) thereof. The procedures are designed to complement the Wills and Trusts rules selected by the parties to govern their dispute. To the extent that there is any variance between such rules and the procedures, the procedures shall control. Any such cases are herein referred to as "Large, Complex Cases."

(b) The parties to any arbitration proceeding that is to be subject to the procedures may, by consent of all parties, agree to eliminate, modify or alter any of the procedures, and, in such case, the procedures as so modified or altered shall apply to that particular case.

47. Administrative Conferences

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless it determines the same to be unnecessary, conduct an administrative conference with the parties or their attorneys or other representatives, either in person or by conference call, at the discretion of the AAA. The administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

- (a) to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;
- (b) to discuss the views of the parties about the technical and other qualifications of the arbitrators;
- (c) to consider, with the parties, whether mediation or other nonadjudicative methods of dispute resolution might be appropriate.

48. Arbitrators

(a) Large, Complex Disputes shall be heard and determined by three arbitrators, or as may be otherwise agreed upon by the parties. If the parties are unable to agree upon the number of arbitrators, then three arbitrators shall hear and determine the case unless the AAA shall determine otherwise.

49. Management of Proceedings

(a) Arbitrators shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of Large, Complex Disputes.

(b) Parties shall cooperate in the exchange of documents, exhibits, and information within their control if the arbitrators consider such production to be consistent with the goal of achieving a just, speedy, and cost-effective resolution of a Large, Complex Dispute.

(c) At the request of a party, the arbitrators may order the conduct of the deposition of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrators to be necessary to a determination of a Large, Complex Dispute and who will not be available to testify at the hearings.

50. Form of Award

If requested by all parties, the award of the arbitrators shall be accompanied by a statement of the reasons upon which such award is based. If requested by one party the arbitrators may, in their discretion, issue such a statement.

51. Interest, Fees and Costs

The award of the arbitrators may include: (a) interest at such rate and from such date as the arbitrators may deem appropriate; (b) an apportionment between the parties of all or part of the fees and expenses of the AAA and the compensation and expenses of the arbitrators; and (c) an award of attorneys' fees if all parties have requested or authorized such an award.

Administrative Fees

The administrative fees of the AAA are based on the amount of the claim or counterclaim. Arbitrator compensation is not included in this schedule. Unless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award.

In an effort to make arbitration costs reasonable for consumers, the AAA has a separate fee schedule for consumer related-disputes. Please refer to Section C-8 of the *Supplementary Procedures for Consumer-Related Disputes* when filing a consumer-related claim.

Fees

A nonrefundable initial filing fee is payable in full by a filing party when a claim, counterclaim or additional claim is filed.

A case service fee will be incurred for all cases that proceed to their first hearing. This fee will be payable in advance at the time that the first hearing is scheduled. This fee will be refunded at the conclusion of the case if no hearings have occurred.

However, if the Association is not notified at least 24 hours before the time of the scheduled hearing, the case service fee will remain due and will not be refunded.

These fees will be billed in accordance with the following schedule:

Amount of Claim	Initial Filing Fee	Case Service Fee
Above \$0 to \$10,000	\$500	N/A
Above \$10,000 to \$75,000	\$750	N/A
Above \$75,000 to \$150,000	\$1,250	\$750
Above \$150,000 to \$300,000	\$2,750	\$1,000
Above \$300,000 to \$500,000	\$4,250	\$1,250
Above \$500,000 to \$1,000,000	\$6,000	\$2,000
Above \$1,000,000 to \$7,000,000	\$8,500	\$2,500
Above \$7,000,000 to \$10,000,000	\$13,000	\$3,000
Above \$10,000,000	*	*
No Amount Stated **	\$3,250	\$750

*Contact your local AAA office for fees for claims in excess of \$10 million.

** This fee is applicable when no amount can be stated at the time of filing, or when a claim or counterclaim is not for a monetary amount. The fees are subject to increase or decrease when the claim or counterclaim is disclosed.

The minimum having three or more arbitrators are \$2,750 for the filing fee, plus a \$1,000 case service fee.

Expedited Procedures are applied in any case where no disclosed claim or counterclaim exceeds \$75,000, exclusive of interest and arbitration costs.

Hearing Room Rental

The fees described above do not cover the rental of hearing rooms, which are available on a rental basis. Check with the AAA for availability and rates.

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APPENDIX B

I. Negotiation/Mediation Provisions

A. Will Provision.

Resolution of Disputes. I request (direct) that my Executor, my Trustee, and all other parties interested in my estate or in any trust created or arising under my Will shall attempt in good faith to promptly resolve any dispute arising out of, incident to, or otherwise appertaining to the administration, distribution and/or settlement of my estate or of such trust by negotiation between such affected parties. All negotiations pursuant to this provision of my Will shall be and remain confidential and shall be deemed to be compromise and settlement negotiations for purposes of applicable rules of evidence. If such dispute has not been resolved by negotiations between the affected parties within (30) days after such negotiations are initiated, the I request (direct) that the parties, as a condition precedent to filing or pursuing any legal remedy, including suit in any court or arbitration, first agree to participate in good faith in a non-binding mediation, assisted by a trained and neutral mediator mutually agreed to by the parties. Such mediation shall be governed by the applicable laws of the State of Texas, including, but not limited to, the Texas Alternative Dispute Resolution Procedures Act, as well as the applicable provisions of the Texas Rules of Civil Procedure. The costs of such mediation shall be born equally by the affected parties.

B. Trust Provision.

Resolution of Disputes. I request (direct) that my Trustee and all beneficiaries interested in any trust created or arising under this instrument shall attempt in good faith to promptly resolve any dispute arising out of, incident to or otherwise appertaining to the administration, distribution and/or settlement of such trust by negotiation between such affected parties. All negotiations pursuant to this provision shall be and remain confidential and shall be deemed to be compromise and settlement negotiations for purposes of applicable rules of evidence. If such dispute has not been resolved by negotiations between the affected parties within (30) days after such negotiations are initiated, then I request (direct) that the parties, as a condition precedent to filing or pursuing any legal remedy, including suit in any court or arbitration, first agree to participate in good faith in a non-binding mediation, assisted by a trained and neutral mediator mutually agreed to by the parties. Such mediation shall be governed by the applicable laws of the State of Texas, including, but not limited to, the Texas Alternative Dispute Resolution Procedures Act, as well as the applicable provisions of the Texas Rules of Civil Procedures. The costs of such mediation shall be born equally by the affected parties.

II. Negotiation/Arbitration Provisions

A. Will Provision.

Resolution of Disputes. I request (direct) that my Executor, my Trustee, and all other parties interested in my estate or in any trust created or arising under my Will shall attempt in good faith to promptly resolve any dispute arising out of, incident to, or otherwise appertaining to the administration, distribution and/or settlement of my estate or of such trust by negotiation between such affected parties. All negotiations pursuant to this provision of my Will shall be and remain confidential and shall be deemed to be compromise and settlement negotiations for purposes of applicable rules of evidence. If such dispute has not been resolved by negotiations between the affected parties within (30) days after such negotiations are initiated, then I request (direct) that such dispute shall be settled by binding arbitration administered under the Texas General Arbitration Act, Chapter 171 of the Texas Civil Practices and Remedies Code, as amended.

B. Trust Provision.

Resolution of Disputes. I request (direct) that my Trustee and all beneficiaries interested in any trust created or arising under this instrument shall attempt in good faith to promptly resolve any dispute arising out of, incident to or otherwise appertaining to the administration, distribution and/or settlement of such trust by negotiation between such affected parties. All negotiations pursuant to this provision shall be and remain confidential and shall be

deemed to be compromise and settlement negotiations for purposes of applicable rules of evidence. If such dispute has not been resolved by negotiations between the affected parties within (30) days after such negotiations are initiated, then I request (direct) that such dispute shall be settled by binding arbitration administered under the Texas General Arbitration Act, Chapter 171 of the Texas Civil Practices and Remedies Code, as amended.

III. Mediation Only

A. Will Provision.

Resolution of Disputes. In the event that my Executor, my Trustee, my distributees or the beneficiaries of any trust created or arising under my Will shall have any dispute regarding, incident to or otherwise appertaining to the administration, distribution, or settlement of my estate or of any such trust, such affected parties, as a condition precedent to filing or pursuing any legal remedy, including suit in any court or arbitration, agree to first participate in good faith in a non-binding mediation, assisted by a trained neutral mediator. Such mediation shall be governed by the applicable laws of the State of Texas, including, but not limited to, the Texas Alternative Dispute Resolution Procedures Act, as well as the applicable provisions of the Texas Rules of Civil Procedure. The costs of such mediation shall be born equally by the affected parties.

B. Trust Provision.

Resolution of Disputes. In the event that my Trustee or any beneficiary of any trust created or arising under this trust instrument shall have any dispute regarding, incident to or otherwise appertaining to the administration, distribution, or settlement of such trust, such affected parties, as a condition precedent to filing or pursuing any legal remedy, including suit in any court or arbitration, agree to first participate in good faith in a non-binding mediation, assisted by a trained neutral mediator. Such mediation shall be governed by the applicable laws of the State of Texas, including, but not limited to, the Texas Alternative Dispute Resolution Procedures Act, as well as the applicable provisions of the Texas Rules of Civil Procedure. The costs of such mediation shall be born equally by the affected parties.

IV. Arbitration Only (Texas General Arbitration Act)

A. Will Provision.

Resolution of Disputes. I request (direct) that my Executor, my Trustee, and all other parties interested in my estate or in any trust created or arising under my Will shall settle any dispute arising between them by binding arbitration administered under the Texas General Arbitration Act, Chapter 171 of the Texas Civil Practices and Remedies Code, as amended.

B. Trust Provision.

I request (direct) that my Trustee and all beneficiaries interested in any trust created or arising under this trust instrument shall settle any dispute arising between them by binding arbitration administered under the Texas General Arbitration Act, Chapter 171 of the Texas Civil Practices and Remedies Code, as amended.

V. Arbitration Only (American Arbitration Association)

A. Will Provision.

Resolution of Disputes. I request (direct) that my Executor, my Trustee, and all other parties interested in my estate or in any trust created or arising under my Will shall settle any dispute arising between them by binding arbitration administered by the American Arbitration Association under its Arbitration Rules for Wills and Trusts then in effect. The Arbitrator shall be a practicing lawyer, Board Certified in Estate Planning and Probate Law, and licensed to practice law in the State of Texas. The Arbitrator shall apply the substantive law (and the law of remedies, if applicable) of the state whose laws govern my Will or such trust. The Arbitrator's decision shall be final and binding on any and all persons who have or may thereafter have any interest in my estate or such trust, including

unborn or Incapacitated persons. Judgment on the Arbitrator's award may be entered in any court having jurisdiction thereof.

VI. Conditional Bequest

Resolution of Disputes. I direct that each and every bequest or devise provided for under my Will is expressly subject to the condition precedent that the devisee, legatee or distributee otherwise entitled thereto shall execute and deliver to my Executor within four months of my date of death, a written consent or agreement to be bound by the terms of this provision of my Will and the alternative dispute resolution ("ADR") procedures set forth below. The failure of any devisee, legatee or distributee to timely provide such written consent or agreement to my Executor will result in a lapse of each and every bequest otherwise passing to such person under my Will, and such lapsed property or bequests shall be distributed as though such non-consenting person had predeceased me.

(ADD SELECTED ADR PROCEDURES)

VII. Form Supplied by Hal Moorman

Mediation and Arbitration of Incapacity of a Trustee or Executor. The issue of the incapacity of a Trustee and Executor shall be resolved first by non-binding mediation and then by arbitration as provided herein, and the resolution of the dispute by arbitration as provided herein shall be final as between the parties to the dispute and may be enforced or preserved upon application to any court of competent jurisdiction. The purpose of this section is to provide an impartial, fair, and private means to determine the incapacity (as defined herein) of a Trustee and Executor (As used hereinafter, the word "Trustee" shall also refer to an Executor). A Trustee is "incapacitated" when the Trustee lacks the physical or mental capacity, personal stability or maturity of judgment needed to effectively give prompt, intelligent, and rational consideration to business matters or financial affairs (whether because of a medical condition, substance abuse or dependency, or another reason). A person under age 25 is deemed to be incapacitated without the need for arbitration.

A. General Rules. Except as provided herein to the contrary, all proceedings required herein shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA") as then in effect; provided that such rules shall be applied in accordance with Texas law and that any questions which are not resolved by such rules shall be determined by Texas law. All parties to a mediation and an arbitration proceeding herein shall make all reasonable efforts to perform their obligations herein promptly, recognizing that time is of the essence,

B. English Rule - Loser Pays. The parties prevailing in an arbitration proceeding herein or in a legal proceeding brought in a court of competent jurisdiction to enforce or preserve the rights awarded pursuant to an arbitration proceeding herein, including all appeals, shall be entitled to recover from the other parties all costs and expenses incurred by the prevailing parties with respect to all of the proceedings, including reasonable attorney's fees. If a Trustee is determined to be incapacitated, the Trust shall pay the cost of the proceedings. If a Trustee is determined not to be incapacitated, the person bringing the action to have the Trustee declared to be incapacitated shall pay.

C. Arbitration Procedures.

1. Written Notice of Arbitration. Any party wishing to submit the issue of a Trustee's incapacity to arbitration ("Petitioner") shall provide written notice of the arbitration containing the information required below to all Trustees serving hereunder and all income beneficiaries of the Trust (or their parents if such beneficiaries are under the age of 25) ("Respondents") and simultaneously shall file copies of the written notice or arbitration with the regional office of the AAA for Houston, Texas, together with the appropriate fee as provided in the AAA's administrative fee schedule. All communications with the AAA regarding the arbitration proceedings shall be directed to the regional office for Houston, Texas, unless the AAA directs

otherwise. The written notice of arbitration shall provide a brief description of the nature of the dispute and the resolution sought by Petitioner.

2. **Written Response.** Within twenty days after receiving the notice of arbitration, each of the Respondents shall provide the Petitioner and the AAA with a written response describing the Respondent's opinion of the nature of the dispute and the resolution desired by the Respondent.

3. **List of Arbitrators.** As soon as reasonably possible after receiving each response notice, the AAA shall compile a list of arbitrators which are available and are qualified to arbitrate the dispute by having knowledge of the subject matter of incapacity, which list shall contain the names of a number of arbitrators equal to one plus the number of parties to the dispute (Petitioner plus each Respondent) in rank order, and shall provide that list to Petitioner and each of the Respondents, together with a return date which is seven days after the date on which the AAA sends the list to the Petitioner and each of the Respondents, excluding Saturday, Sunday, and holidays.

4. **Deletions from the List of Arbitrators.** Unless otherwise agreed, Petitioner and each of the Respondents shall meet on the return date specified by the AAA at the Principal Office at 10:00 A M, Houston, Texas time, at which time each of them shall strike one name from the list of arbitrators provided by the AAA, and if any party fails to attend the meeting, the AAA shall strike one name from the list on behalf of each missing one of them. The highest ranking arbitrator whose name remains on the list after an arbitrator has been stricken by or on behalf of Petitioner and each of the Respondents shall be the arbitrator of the dispute. If the arbitrator selected in this manner for any reason fails to perform as required by this Exhibit, the procedures provided in this paragraph shall be repeated until an arbitrator is selected which performs as required.

5. **Arbitration of the Dispute.** The arbitration shall be held in Houston, Texas, at a location determined by the AAA. The decision of the arbitrator shall be final as between Petitioner and Respondents and may be enforced or preserved upon application to any court of competent jurisdiction.

6. **Standing.** The issue of incapacity may be brought to arbitration by the remainder beneficiaries of the Trust, the spouse of the Trustee, the siblings of the Trustee, or such siblings¹ child if such child is over the age of 25, the children of the Trustee age 25 or older, or the parent of the children of the Trustee, if such children are all under the age of 25.

D. Mediation Procedures.

1. **Notice of Mediation and Responses.** The notice of arbitration serves as the notice of mediation.

2. **Selection of Mediator.** The arbitrator selected as provided in (3) above shall select a mediator who is a fellow of the American College of Trust and Estate Counsel and who is an experienced mediator.

3. **Mediator of the Dispute.** The mediation shall be held in Houston, Texas, at a location selected by the mediator. The Texas Civil Practice Remedies Code shall govern the mediation process.

4. **Costs of Mediation.** The cost of mediation shall be paid in advance and borne equally by the party asserting incapacity and the party opposing a finding of incapacity. The mediator shall apportion costs in the event of a dispute as to the division of costs. If the dispute is arbitrated, then the losing party shall pay the winning party the costs of the mediation paid by the winning party, included, but not limited to, the attorneys fees involved.