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Arbitrating Probate Matters, Not as Unconventional as It Sounds

By Catherine A. Gallagher

Probate litigation is often very difficult for parties and participants, involving battles over financial and property issues as well as emotional baggage related to family disagreements. While most probate litigation is resolved through settlement or trial, there is another option: arbitration. Arbitration is well-suited to probate litigation as it can be tailored to fit the personalities and needs of all parties involved. Arbitration also offers a level of confidentiality that going to court will not.

Many probate litigants choose mediation or a traditional settlement conference to resolve their dispute. In most cases, this is effective because it provides parties with a chance to discuss their case with a neutral who can help guide them to a solution that is acceptable to all involved. It also preserves confidentiality and avoids having to air the family's dirty laundry in court.

For some probate disputes, however, parties either want or need an independent third party to resolve their differences in a way that is binding. In these cases, going to trial might appear to be the only solution. Yet a trial in Superior Court might not fit a litigant's needs. In public courts, unless parties are elderly, there can be a significant wait for a trial date. Unlike juvenile and family matters, probate cases are not given priority on the master trial calendars. Once the case can be heard, it sometimes cannot be tried in one sitting; so the case must be continued over several weeks. As anyone who has ever been involved in such a trial will attest, it is not an ideal situation, but often preferable to having a judge who is unfamiliar with this specialized area of practice. Additionally, as the trials are public, if a litigant has notoriety in the community or is averse to discussing delicate financial matters in a public setting, these trials can be embarrassing and even more painful.

Some attorneys hire a "private judge" to hear the entire matter or to manage cases and issues such as discovery. However, while the temporary judge will not hear the case in a public courtroom (California Rule of Court 2.833(b)), the case is not entirely private. All pleadings must still be filed with the court and the court clerk must post a notice about the case, including a telephone number so that members of the public or press can attend all open proceedings (California Rule of Court 2.833). A private neutral is powerless to even decide whether personal financial records can be sealed; that motion must be returned to the Superior Court for hearing. Granted, it is rare to have these privately held trials actually become public, but certain high profile clients will not want to take the risk.

In the right case, especially if confidentiality is paramount to the parties, arbitration can be the right solution. Arbitration proceedings are private and neither the hearing nor related documents are open to the public, except as necessary in connection with a judicial challenge or the enforcement of an award. Even when the award is filed in Superior Court, only the award and judgment become public and not any private financial exhibits or sensitive testimony received in the proceedings. This evidence retains its private nature and the arbitrator can issue orders to protect the confidentiality of sensitive information. Furthermore, if litigants agree, they can fashion arbitration proceedings as they wish. For example, testimony can be provided principally through affidavits or time-limited in order to save costs; or hearings can be set on an expedited basis with limited discovery.

As one experienced litigator, Ellen McKissock, head of Hopkins & Carley's Trusts and Estates Litigation Practice Group explains "In probate litigation our clients usually have deep-seeded family conflicts that make it very difficult for even cooperative opposing counsels to settle a case. Having an independent, objective third party weigh in on these bitter battles is a real help in settling cases, and mediation or non-binding arbitration can serve that purpose. But many of our clients shy away from mediation because it is expensive, they have little money and there is no guarantee of a final result. Binding arbitration fills that niche, giving a client the chance to be "heard" and get some resolution in a very cost-effective way."

The ability to select an experienced neutral is another advantage noted by probate and business litigator Jack Coward, who explains that, "Binding private arbitration should be considered in many estate and trust cases. This is especially true when the case involves complex tax and accounting issues. Selection of a knowledgeable neutral will allow the parties to have an individual

who begins with an understanding of the law and will focus on the issues presented."

There has been a reluctance to use arbitration primarily because trial or appellate review was extremely limited so that errors of law could not be reviewed or reversed by the courts. The grounds for vacating an award are enumerated in Code of Civil Procedure Section 1286.2 and discussed in *Moncharsh v. Heily & Blaise* (1992) 3 Cal. 4th 1. In that case, the state Supreme Court confirmed that judicial review of an arbitrator's decision regarding questions of fact or law is extremely limited. Thus, even though an error of law appears on the face of an arbitration award and causes substantial injustice, it is not subject to judicial review in the absence of a limiting clause or as provided by statute. Needless to say any attorney, especially one who practices in a highly specialized area such as trusts and estates, would want to carefully select a neutral with a proven track record in the area, and might blanch at the idea of trusting a client's case to a neutral whose work can not be reviewed. However, recent case law offers some relief from this concern.

In *Cable Connection, Inc. V. DirectTV Inc.* (2008) 44 Cal 4th 1334, state Supreme Court held that under the California Arbitration Act, judicial review of the merits of an arbitration award is permissible where the contracting parties have expressly agreed to permit appellate review. The award can then be vacated or corrected on appeal for legal error. It should be noted, however, that this type of agreement is only enforceable under the California Arbitration Act and not the Federal Arbitration Act.

The 2nd District Court of Appeal further clarified judicial review in *Burlage v. Superior Court* (2009) 177 Cal. App. 4th 166. Here, the court overturned the arbitrator's decision even though the parties had not included a right to appeal clause in their arbitration agreement. In a very clear and concise opinion, the court focused on Section 1286.2 (a)(5), which provides: a court "shall" vacate an award when a party's rights "were substantially prejudiced...by the refusal of the arbitrator to hear evidence material to the controversy...." Following Burlage, the state Supreme Court issued *Pearson Dental Supplies Inc. v. Superior Court* (Turcios),(2010) 48 Cal. 4th 665. In a 4-3 decision, the Court found that in the case of a mandatory employment arbitration agreement, Moncharsh does not restrict the scope of judicial review of a clearly erroneously arbitrator's decision. Before *Burlage* and *Pearson Dental*, courts rarely vacated arbitration awards; it appears the door to judicial review is opening where the facts support it and the unbridled discretion of the arbitrator is finally subject to restriction.

Jim Cilley, a partner with Temmerman, Cilley & Kohlmann, said "Arbitration of disputed probate cases can be very effective under the appropriate circumstances. Because of the emotionally charged nature of these cases, it is important that the parties feel as if they have had their 'day in court.' Arbitration has many of the advantages of a traditional court trial. At the same time, it has many of the advantages of mediation because it allows for prompt scheduling and established time frames for each step of the process. As a consequence, many of the costs typically associated with a formal court trial can be eliminated or reduced."

Now that the state Supreme Court has clearly indicated an appeal is available if the litigants agree, arbitration might be the perfect solution to resolve a probate dispute, especially in cases where client confidentiality is paramount.

Catherine A. Gallagher joined JAMS as a neutral in 2009. Prior to that, she served as the Presiding Judge of the Santa Clara County Superior Court. She has experience in all aspects of dispute resolution, which she developed while serving in every division of the court.