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January 31, 2017

Senator John A. Alario, Jr.
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

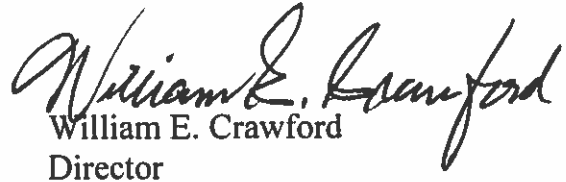
Representative Taylor Barras
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804

RE: SCR 62 OF 2016

Dear Mr. President and Mr. Speaker:

The Louisiana State Law Institute respectfully submits herewith its report to the legislature relative to the feasibility of an enforceable mediation or arbitration provision in a testament or trust.

Sincerely,


William E. Crawford
Director

WEC/puc

Enclosure

cc: Senator Barrow Peacock

email cc: David R. Poynter Legislative Research Library
drplibrary@legis.la.us
Secretary of State, Mr. Tom Schedler
admin@sos.louisiana.gov

**LOUISIANA STATE LAW INSTITUTE
ALTERNATIVE DISPUTE RESOLUTION COMMITTEE**

**REPORT TO THE LEGISLATURE
IN RESPONSE TO SCR NO. 62 OF THE 2016 REGULAR SESSSION**

**Relative to the feasibility of an enforceable mediation or arbitration provision in a
testament or trust**

Prepared for the
Louisiana Legislature on

January 31, 2017

Baton Rouge, Louisiana

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Ronald J. Scalise, Jr., Reporter
Mallory C. Waller, Staff Attorney

SENATE CONCURRENT RESOLUTION NO. 62

BY SENATOR PEACOCK

A CONCURRENT RESOLUTION

To urge and request the Louisiana State Law Institute to study and make recommendations regarding the feasibility of revisions to the law of wills and testaments and trusts.

WHEREAS, other states permit an enforceable mediation or arbitration provision to be included in a testament or trust.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby urge and request the Louisiana State Law Institute to study and make recommendations regarding the feasibility of whether revisions to present laws of the state are necessary in light of other states' laws that expressly permit an enforceable mediation or arbitration provision to be included in a testament or trust.

BE IT FURTHER RESOLVED that the Louisiana State Law Institute shall submit a written report of its findings, together with any recommendations in the form of proposed legislation, to the Legislature of Louisiana no later than February 1, 2017.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the Director of the Louisiana State Law Institute.

PRESIDENT OF THE SENATE

SPEAKER OF THE HOUSE OF REPRESENTATIVES

January 31, 2017

To: Senator John A. Alario, Jr.
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

Representative Taylor F. Barras
Speaker of the House
P.O. Box 94062
Baton Rouge, Louisiana 70804

**REPORT TO THE LEGISLATURE
IN RESPONSE TO SCR 62 OF THE 2016 REGULAR SESSION**

Senate Concurrent Resolution No. 62 of the 2016 Regular Session requested the Louisiana State Law Institute (LSLI) “to study and make recommendations regarding the feasibility of whether revisions of present laws of the state are necessary in light of other states’ laws that expressly permit an enforceable mediation or arbitration provision to be included in a testament or trust.” The Louisiana State Law Institute referred the Resolution to its ADR Committee, whose Chair is Emmett Sole and whose Reporter is Professor Edward Sherman. In turn, the ADR Committee consulted with the Law Institute’s Trust Code Committee, whose Reporter is Professor Ronald Scalise, and with the Successions and Donations Committee, whose Chair/ Reporter is Max Nathan. This response to the Senate Concurrent Resolution was adopted by the Law Institute’s Council based on discussion and agreement among the three committees.

Arbitration in Wills and Trusts

The Federal Arbitration Act, as well as most state arbitration statutes and rules (including Louisiana) do not provide for enforcement of a mandatory arbitration clause in a will or trust document. They contemplate that the parties must agree to arbitrate in order for there to be an enforceable arbitration clause. Typically, the heirs or trust beneficiaries have not been parties to the execution of the document by the testator/settlor (nor has the executor/trustee), and therefore have not agreed to the requirement of arbitration put in the document by the testator/settlor. Some ten states have, either by legislation or judicial decision, expanded their state arbitration law to give effect to clauses requiring arbitration in wills and trusts (with some variation as to requirements and conditions). However, the large majority of states have not moved in this direction.

Positions Regarding Mandatory Arbitration Clauses in Wills and Trusts

Advocates of enforcing arbitration clauses in wills and trust agreements emphasize that they can lessen discord amongst heirs and beneficiaries (who are often family members) by having a prompt and final process to resolve disputes. That can avoid the dissipation of the estate

in prolonged, expensive litigation. A related motive is to avoid these protracted disputes that can severely damage family relationships for decades afterwards.

Opponents emphasize that arbitration is a process requiring consent of the parties and that heirs and beneficiaries have not given their consent to mandatory arbitration in wills and trusts. There is also a concern that decisions of the executor/trustee could constantly be taken to arbitration, impeding proper administration and inflating its cost. They also question whether mandatory arbitration would conflict with Louisiana law provisions such as forced heirship.

Careful drafting of state arbitration statutes or rules concerning mandatory arbitration in wills and estates might overcome some objections. For example, judicial decisions in some states have held a mandatory arbitration clause to be enforceable against heirs and beneficiaries even though they did not consent to it, if they do not renounce any claim they have to take under the will/trust. Opponents find this implied consent to be inadequate to bind heirs and beneficiaries and doubt that such a decision is possible under Louisiana law. The upshot is that approval of mandatory arbitration in Louisiana would, at the very least, be a contentious, demanding, and time-consuming process.

The three Law Institute committees (ADR, Successions and Donations, and Trust Code) are not in agreement as to whether drafting could adequately resolve concerns with mandatory arbitration in wills and trusts, but they do agree that, in view of the complexity of the issue, more study and discussion would be required before legislation is adopted.

Current State of Louisiana Arbitration Law

Two bodies of law govern Louisiana state law arbitrations today – Louisiana Civil Code provisions (Louisiana Civil Code Articles 3099-3132) and the Louisiana Binding Arbitration Law (La. R.S. 9:4201-4217). These two sources exist separately and must both be consulted for the standards applicable to arbitration. They are not entirely consistent with one another, and a number of the provisions (particularly in the Civil Code articles) are antiquated and in conflict with contemporary arbitration practice. The failure of these two sources to provide a uniform body of law for the guidance of lawyers and courts in Louisiana causes uncertainty.

In light of the shortcomings of current Louisiana arbitration law, the Louisiana State Law Institute established an ADR Committee to study the status of Louisiana arbitration law. The Committee decided that arbitration law in Louisiana should be contained in a single arbitration act and that the Revised Uniform Arbitration Act (RUAA) issued by the National Conference on Uniform State Laws should be used as a model for the Louisiana act.

The ADR Committee has undertaken a line-by-line review of the uniform law to determine whether any changes were needed to insure consistency with other provisions of Louisiana law. That process is now close to completion, and the Committee will submit a new Louisiana Arbitration Act for consideration by the Law Institute's Council and for ultimate submission to the Louisiana legislature.

Recommendations

In light of these developments, the request in the Senate Concurrent Resolution to study and make recommendations regarding “the feasibility of revisions to present laws of the state” relating to mandatory arbitration in wills and trusts should focus on the proposed new Louisiana Arbitration Act.

The current draft of this Act neither addresses nor provides for arbitration in wills and trusts, which is consistent with the uniform law on which it is based. The ADR Committee voted to add a new provision in the proposed Louisiana Arbitration Act that mandatory arbitration clauses in wills and trusts would be valid and enforceable. However, concerns were expressed by the both the Successions and Donations and the Trust Code Committees. In light of these concerns, as well as the need to undertake more study as to whether careful drafting might ameliorate the concerns discussed above, the ADR Committee agreed not to address arbitration in wills and trusts in the new Act that it is preparing. The ADR Committee also expressed the desire not to delay consideration and enactment of the new Louisiana Arbitration Act due to this controversial provision, and agreed that consideration of the issue of arbitration in wills and trusts should be deferred until after the new Act is enacted.

Having considered the feasibility of revisions in Louisiana law to allow arbitration in wills and trusts, the three Committees as well as the Council of the Law Institute recommend that such a provision should not be included in the new Louisiana Arbitration Act at this time. Instead, consideration of a mandatory arbitration provision in wills and trusts should be deferred until after the enactment of the proposed new Act.