



TRUSTS AND ESTATES

Enforcing Arbitration Decisions and Provisions in Estate-Related Litigation

By Robert M. Harper

In *In re Kalikow*, the Appellate Division, Second Department, recently held that the decedent's agreement to arbitrate was enforceable against the representative of her estate. The *Kalikow* decision is noteworthy because arbitration decisions and provisions are not universally enforced in estate-related proceedings, especially in cases concerning the admission of a will to probate and the distribution of an estate. This article discusses the public policy-based considerations, which militate against the arbitration of estate-related disputes, and the circumstances in which arbitration provisions will be enforced.

In *In re Berger*, the decedent wrote a letter, directing that any company in which he had an interest "come under the sole direction of his 'four children' and [that] all benefits due him . . . be divided equally among the four children." The decedent also directed that his son "do all that is necessary to fulfill [his] wishes expressed in this Will[.]" apparently intending that the letter be treated as his last will and testament.

Upon the decedent's death, a dispute concerning the decedent's interests in companies arose between the decedent's son and son-in-law, the petitioners and the proponents of the letter as the decedent's will, and the respondent, another one of the decedent's sons. The parties then sought to have the decedent's letter interpreted by a Rabbinical Tribunal, which rendered a "Decision and Verdict" with respect to the decedent's "interests and properties . . ."

Shortly thereafter, the petitioners commenced a proceeding in the Supreme Court, Kings County, to confirm the Rabbinical Tribunal's decision, presumably for the purpose of compelling the respondent's compliance with the arbitration-like decision. The



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Supreme Court declined to confirm the Tribunal's decision for public policy reasons. On appeal, the Second Department affirmed.

As the Appellate Division explained, "[i]t [was] clear that . . . the [decedent's letter did] indeed purport to be the last will and testament of the deceased and to provide for the distribution of his estate." That conclusion, when taken in conjunction with the Appellate Division's finding that the Tribunal's interpretation of the letter was "an attempt to determine the distribution of a decedent's estate[.]" precluded the court from enforcing the Tribunal's decision. The Appellate Division reasoned that "[t]he probate of an instrument purporting to be the last will and testament of a deceased and the distribution of an estate cannot be the subject of arbitration . . . and any attempt to arbitrate such issue is against public policy[.]" Accordingly, the Second Department affirmed the Supreme Court's decision not to confirm the Rabbinical Tribunal's decision.

More recently, in *In re Kalikow*, the decedent owned a 1 percent general partnership interest and a 50 percent limited partnership interest in a partnership.¹ The respondents, the decedent's two children, owned the other interests in the partnership.

The decedent died, leaving a last will and testament, in which she bequeathed her ownership interests in the partnership to a charity. Following the decedent's death, the respondents served a demand for arbitration against the petitioner. They sought to arbitrate whether the decedent violated the partnership agreement by bequeathing her interests in the partnership to the charity. The respondents based their demand on two partnership agreement provisions, which prohibited partners from pledging, encumbering, selling, mortgaging, hypothecating or assigning their interests in the partnership without the express written consent of all other partners and di-

rected that any dispute arising from the partnership agreement be resolved through arbitration.

The petitioner responded by commencing a proceeding in the Surrogate's Court, Nassau County, to stay the arbitration. In support of his petition, the petitioner argued that the arbitration concerned the distribution of the decedent's estate and, therefore, violated public policy. Notwithstanding the petitioner's contentions, however, the Surrogate's Court denied the petition and the petitioner appealed.

On appeal, the Second Department held that the arbitration provision was enforceable and affirmed the Surrogate's decision. As the court opined, "[a] decedent's agreement to arbitrate a controversy is binding on the representative of the decedent's estate." In contrast to *Berger*, the court was not concerned that the arbitration clause violated public policy because the arbitration concerned a subject other than "the construction of the decedent's will or the administration of her estate."

In sum, arbitration decisions and provisions are not universally enforceable in estate-related proceedings. On the one hand, arbitration decisions and provisions will be deemed unenforceable, as against public policy, where they implicate the construction of wills or affect the administration of estates. On the other hand, where neither one of those policy-based concerns is called into question, courts likely will conclude that arbitration provisions are enforceable against the representatives of decedents' estates. *Berger* and *Kalikow* make these points clear.

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¹ *In re Berger*, 81 A.D.2d 584 (2d Dep't 1981).

² *In re Kalikow*, 2009 WL 202461 (2d Dep't Jan. 27, 2009).