

Enforceable Arbitration Clauses in Wills and Trusts: A Critique

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I. INTRODUCTION

If the headlines are any indication, estate planning is frequently better at generating conflict than avoiding it. Former *Playboy* model Anna Nicole Smith fought for a decade over a purported \$300 million gift from her late husband J. Howard Marshall.¹ When Marshall died in 1995, after just one year of marriage to Smith, his will left nothing to his new bride.² Smith promptly sued, arguing that Marshall's son Pierce used fraud and undue influence to convince his father to cut Smith out of his will.³ After a series of lawsuits that bounced between bankruptcy, probate, and appellate courts, the will has been upheld.⁴ But the case lives on; the United States Supreme Court recently weighed in on the matter for the second time, and Chief Justice John

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¹ CNN.com, *Anna Nicole Smith's Estate Loses \$300 Million Court Fight*, Mar. 19, 2010, <http://www.cnn.com/2010/CRIME/03/19/anna.nicole.estate/index.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

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G. Roberts, Jr., writing for the majority, quoted Charles Dickens' *Bleak House* to comment derisively on the length and complexity of the litigation.⁵

Disputes over wills and trusts fall into two groups. In the first category, a party contests the validity of the instrument itself. Those contestants claim that the instrument was the result of fraud, duress, or a donor with diminished capacity.⁶ In the second category, a party admits the validity of the will or trust, but he disputes the proper interpretation or application of its terms.⁷ Both categories of disputes tax family finances and resources. As one scholar put it, they are "ironic and unfortunate:" A will or trust seeks seamless distribution of wealth between generations, but litigation strains family relationships and resources.⁸ Indeed, several aspects of American law remove obstacles to a dispute over a will or a trust.⁹ For example, such disputes are usually submitted to a jury to decide, and juries tend to side with a disinherited or disgruntled heir over a settlor or testator.¹⁰ Moreover, a plaintiff risks very little in bringing suit; a losing plaintiff need not pay the attorney's fees of a successful defendant, and often the plaintiff's attorney is paid through a contingency fee. And while a plaintiff may risk nothing in bringing suit, the trust or estate suffers a financial burden, win or lose: the

⁵ See *Stern v. Marshall*, 131 S. Ct. 2594, 2600 (2011). The case has even outlived the original parties; the litigation on which the Court ruled was between the estates of Smith and Pierce Marshall. See *id.* In *Stern*, Roberts quoted Dickens' *Bleak House* and said of the case, "[T]he original parties 'have died out of it,' ... [a] 'long procession of [judges] has come in and gone out' during that time, and still the suit 'drags its weary length before the Court.'" *Id.* (quoting Charles Dickens, *Bleak House*, in 1 WORKS OF CHARLES DICKENS 4-5 (1891)). Roberts noted, "Those words were not written about this case, but they could have been." *Id.*

⁶ See JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 141-91 (7th ed. 2005) (discussing will contests based on lack of mental capacity, undue influence, fraud, and duress).

⁷ See *id.* at 365-416 (discussing the construction of wills), 771-844 (discussing trust and estate administration). Much scholarship in this area has focused on will contests, yet disputes over the interpretation of a will or trust are far more common. Will contests themselves are far less common than one might believe. One study of will contests in Nashville, Tennessee, over a nine-year span found that the wills were contested less than one percent of the time. See Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 613-14 (1987) (finding that, of a total of 7,638 wills probated, only 66, or 0.86%, were contested).

⁸ Michael P. Bruyere & Meghan D. Marino, *Making Arbitration Truly Mandatory: Florida Shows the Way*, TR. & EST., July 2008, at 22.

⁹ John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 64-66 (1978).

¹⁰ *Id.*; see also Schoenblum, *supra* note 7, at 652-59.

trust or estate itself pays for its share of the legal fees.¹¹ Because of these features of American law, the party contesting the instrument has the upper hand. Therefore, trusts or estates often decide to quietly settle litigation rather than have the donor's decisions dragged into the public eye.¹² Indeed, Professor John H. Langbein noted that "the odor of the strike suit hangs heavily over this field."¹³

Even when parties admit the existence of a will or a trust, litigation can still drag on over the interpretation and administration of its terms. When Michael Jackson died in 2009, he left a tangled estate that commentators have referred to as an "economic stimulus package" or "lifetime annuity for . . . trust and estate lawyers."¹⁴ Even the once-harmonious family of the late Martin Luther King, Jr. is not immune: two of his children have sued the third child, claiming that he stole from the estate, and the defendant has counterclaimed, arguing that the other two are improperly withholding documents and blocking a book deal.¹⁵ And in one less-publicized Florida case, a dispute over a trust lasted more than ten years.¹⁶

Arbitration provides one method with which to avoid a protracted court battle and to settle disputes quickly, privately, and inexpensively. George Washington led the way in this regard; his will provided that any disputes that "unhappily" arose should be decided by three individuals, who would resolve the dispute "unfettered by Law, or legal constructions" and instead

¹¹ Langbein, *supra* note 9, at 64–66. In fact, the plaintiff gains all of the reward, while he only shares in a portion of the risk. The plaintiff retains all of the winnings, minus his attorney's fees, while the costs of defending the suit are shared by all the beneficiaries. *Id.*

¹² *Id.*

¹³ *Id.* at 66.

¹⁴ *Michael Jackson's Estate: Economic Stimulus Package for Lawyers*, <http://www.flprobate litigation.com/articles/trust-and-estates-litigation-in-the-news/> (June 30, 2009, 17:28 EST); *What Is Michael Jackson's Estate Worth?*, <http://blogs.wsj.com/wealth/> (June 26, 2009, 10:24 EST). Jackson died with about \$500 million in debt, but his assets will probably still amount to \$200 million or more, including stakes in several corporations that will be difficult to disentangle. Ethan Smith, *Jackson Will from 2002 in Spotlight*, WALL ST. J., June 30, 2009, at B1.

¹⁵ CNN.com, *Judge Troubled by King Estate Management, Orders Meeting*, Sept. 18, 2009, http://www.cnn.com/2009/US/09/18/king.estate/index.html?eref=rss_latest.

¹⁶ *Staup v. Wachovia Bank, N.A.*, 2008 WL 2598005 (S.D. Fla. June 27, 2008); see S.D.Fla.: Trust Litigation Bounced from Federal Court: Federal Trial Courts Lack Jurisdiction to Review Final Judgments of State Courts, <http://www.flprobate litigation.com/articles/new-probate-cases/will-and-trust-contests/> (July 9, 2008).

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based on “their sense of the Testators [sic] intention.”¹⁷ This amounted to an arbitration clause; Washington’s heirs would therefore be forced to bring their claims before private decisionmakers, rather than before the courts.

Arbitration offers other benefits to a donor who fears a contest. More than a decade ago, Professor Gary Spitko suggested that arbitration should be made available as a tool for donors who were concerned that their alternative lifestyles—such as homosexuality or a relationship with a younger partner—would bring about suspicion, perhaps even claims of undue influence or lack of capacity, from their family members.¹⁸ A heterosexual couple could get married, thereby preventing other family members from having standing to contest a will. However, if a testator is not legally allowed to marry the donee, then his or her family members often retain standing to challenge the will. Additionally, judges and juries usually decide contests consistently with majoritarian cultural norms, and hence the court system may be more likely

¹⁷ George Washington, *Last Will and Testmont*, in JEROME T. BARRETT & JOSEPH BARRETT, *A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, SOCIAL, AND CULTURAL MOVEMENT* 46 (2004). In this arbitration provision, Washington humbly stated that he attempted to make his will clear and accessible to the layperson, even to the point of making it “crude and incorrect.” He continued:

But having endeavoured [sic] to be plain, and explicit in all the Devises—even at the expence [sic] of prolixity, perhaps of tautology, I hope, and trust, that no disputes will arise concerning them; but if, contrary to expectation, the case should be otherwise from the want of legal expression, or the usual technical terms, or because too much or too little has been said on any of the Devises to be consonant with law, My Will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants—each having the choice of one—and the third by those two. Which three men thus chosen, shall unfettered by Law, or legal constructions, declare their sense of the Testators [sic] intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States.

GEORGE WASHINGTON & MARTHA WASHINGTON, *THE LAST WILL AND TESTAMENT OF GEORGE WASHINGTON AND SCHEDULE OF HIS PROPERTY: TO WHICH IS APPENDED THE LAST WILL AND TESTAMENT OF MARTHA WASHINGTON* 28 (John C. Fitzpatrick ed., 4th ed. 1972).

This arbitration provision was never invoked. According to historian John C. Fitzpatrick, “There were no disputes over the provisions of the Will. A minor controversy was carried into court, but this was unconnected with the direct bequests.” *Id.* at 41 n.57. Fitzpatrick does not elaborate on what that “minor controversy” was.

¹⁸ E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 *CASE W. RES. L. REV.* 275 (1999).

to strike down a will or trust that reflects a counter-cultural norm.¹⁹ Spitko argued that donors should be able to specify a particular individual, who is neutral to the dispute but sympathetic to their alternative lifestyle, to settle future disputes fairly, without being overly affected by majoritarian cultural norms.²⁰

An arbitration provision in a will or trust is therefore an attractive alternative because it would force beneficiaries and fiduciaries to arbitrate their disputes. This article will refer to such a provision as a “donative arbitration clause.”²¹ However, a court would not enforce this type of provision in most jurisdictions.²² Beneficiaries and trustees do not sign the will or trust itself, and thus under current law those parties cannot be bound by any arbitration provision contained therein.²³ A small group of commentators argue that such clauses should be enforceable, and a smaller group of states—Hawaii, Florida, and Arizona—have considered legislation

¹⁹ See *id.* (making this argument).

²⁰ *Id.*

²¹ This phrase is borne out of convenience. The term “arbitration clause in a will or a trust” is too cumbersome for a lengthy discussion. “Donative” transactions would cover both wills and trusts, because each has a donative element; although, admittedly, the Restatement makes a distinction between “trusts” and “wills and other donative transfers.” Compare RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 7.1 (2000) (covering wills and will substitutes, in Vol. 2, Division II, Part 7) with RESTATEMENT (THIRD) OF TRUSTS (covering trust law in three volumes).

The term “donative” may be over-inclusive. There are various sorts of “donative” transactions that fall outside of the basic categories of wills and trusts. One might imagine an arbitration clause inserted into a deed conveying a defeasible fee. For example, a deed of gift might convey property as a fee simple determinable, such as the ownership of property “so long as” it is used as a memorial hospital for men of a particular county. See, e.g., *Wood v. Bd. of County Comm’rs of Fremont County*, 759 P.2d 1250, 1251–52 (Wyo. 1988) (interpreting the language of a deed that conveyed land “for the purpose of constructing and maintaining thereon a County Hospital in memorial to the gallant men of the Armed Forces of the United States of America from Fremont County, Wyoming”). The donor might insert into the deed a requirement that the owners of the property and those with the future interest submit to arbitration any dispute over whether the property was still used as a hospital, or whether the hospital’s identity was still sufficiently connected to contemplated memorial’s purpose.

It may be the arguments herein would apply to an arbitration clause included in a deed of gift that created a defeasible fee, or in some other conditional gift. But such an issue must be the topic of a future study; such a case is beyond the scope of this article.

²² See *infra* Part II.B.1 (arguing that such clauses are unenforceable under current statutory schemes).

²³ See *id.* (noting that current arbitration statutes only enforce arbitration clauses in agreements and contracts, whereas the courts that have considered the matter have held that wills and trusts are not agreements or contracts).

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to that effect.²⁴ This article will discuss the arguments of those commentators, analyze the legislation in the aforementioned states, and evaluate and critique those efforts.

This article analyzes the movement while it is still in its nascent stage. The article seeks to identify the myriad issues that courts and legislators should look to as they consider these clauses, and it seeks to give a framework for more thoughtful and deliberate consideration of the issue.

This analysis will be easier now, before the movement gains momentum and additional states enact statutes that enforce arbitration provisions in those instruments. State legislatures often change their laws to favor the settlor's intent, in an effort to attract trust funds and their attendant management fees.²⁵ Most prominently, many states have abolished or relaxed the Rule Against Perpetuities in the hopes of attracting more trust accounts.²⁶ One study showed that this tactic was successful. Relaxing the Rule resulted in a dramatic shift of trust funds, increasing overall trust assets by 20% and average trust sizes by \$200,000 in states that relaxed the Rule versus states that maintained it.²⁷ Donative arbitration clauses should therefore be carefully studied sooner rather than later.

²⁴ For commentators who advance such a position, see Michael P. Bruyere & Meghan D. Marino, *Mandatory Arbitration Provisions: A Powerful Tool to Prevent Contentious and Costly Trust Litigation, but Are They Enforceable?*, 42 REAL PROP. PROB. & TR. J. 351 (2007); Gerardo J. Bosques-Hernández, *Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective* (InDret: Revista para el Análisis del Derecho, 2008), available at <http://www.raco.cat/index.php/InDret/article/viewFile/124284/172257>; and Robert W. Goldman, *Simplified Trial Resolution: High Quality Justice in a Kinder, Faster Environment*, 41st Annual Heckerling Institute on Estate Planning, University of Miami School of Law, Jan. 2007. These arguments are discussed *infra* Part III. The states that have considered this legislation are Hawaii, Florida, and Arizona. For a discussion of statutory reform efforts in these states, see *infra* Part IV.

²⁵ See *infra* notes 140–42 and accompanying text (discussing trends in state legislation to relax the Rule Against Perpetuities and to allow self-settled asset-protection self-settled asset-protection trusts, in an effort to attract trust business).

²⁶ Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1311–19 (2003) (arguing that the growing number of states that have abolished the Rule Against Perpetuities is due in part to “competition among the states to cater to” settlors and to attract their trusts to that jurisdiction).

²⁷ Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 410–12 (2005). Sitkoff and Schanzenbach caution that not all pro-settlor changes in state trust law attract trust business. Their study showed an increase in trust business in a state after a relaxation of the Rule Against Perpetuities, but that study did not conclusively show a similar shift to states that allowed self-settled asset-protection trusts, which allow a settlor

Some commentators have suggested that courts need not wait for statutory change to enforce donative arbitration clauses.²⁸ Those commentators argue that courts can enforce these clauses under current statutory regimes.²⁹ This article analyzes these arguments and concludes that such positions are initially compelling, but ultimately unsatisfactory.

Therefore, this article argues that the clauses can only be enforced through statutory change. The fact that these clauses can be enforced only after statutory enactments presents not a problem, but an opportunity. The enforcement of the clauses would implicate a broad range of issues, and therefore the clauses should not be taken lightly or enforced in haste. Enacting a statute that would make donative arbitration clauses enforceable would require the consideration of a number of factors. These factors include: who should have the final say as to whether a case is arbitrated; differences between forms of dispute resolution; differences between wills and trusts; and the rights of beneficiaries to access the judiciary.

This article proceeds in five parts. Part I describes current law regarding the enforceability of arbitration clauses in wills and trusts. Part II evaluates several theoretical justifications that would allow the enforcement of donative arbitration clauses under current statutes. Although these arguments are at times compelling, none presents a workable and properly tailored resolution to the issue. Thus, these arguments merely highlight the need to pursue statutory change. Therefore, Part III of this article analyzes current experiments in statutory reform, using original research of legislation and interviews of legislators and policymakers. Even where such statutes have been passed, they have only been a rough fix to the problem. Accordingly, Part IV of this article presents several useful distinctions to help guide state legislators and policymakers through the competing concerns inherent in a statute that would enforce arbitration clauses in wills and trusts. Finally, Part V lays out brief recommendations for legislators who may consider passing such a statute.

to create a trust that would shield his own assets from creditors. Critics of Sitkoff and Schanzenbach's study have argued that allowing self-settled asset-protection trusts did cause a change, but that Sitkoff and Schanzenbach missed the trend because they only looked at federal data and not state bank records. *See id.* at 387–88, 411–12 (noting that data was collected from four federal regulatory banking agencies and did not represent all trust data).

²⁸ *See infra* Part III (discussing various proposals for enforcing donative arbitration clauses under current law, including Contract Theory, Benefit Theory, and Intent Theory, as well as “no-contest-in-court” provisions and separate contracts with each party).

²⁹ *See id.*

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II. CURRENT LAW ON DONATIVE ARBITRATION CLAUSES

A. Particular Benefits of Alternative Dispute Resolution for Wills and Trusts

Alternative dispute resolution (ADR), such as arbitration and mediation, provides an efficient and effective alternative to litigation. Mediation is a non-binding system in which the dispute is brought before a neutral, who helps the parties voluntarily reach a compromise.³⁰ In arbitration, by contrast, parties submit a dispute to a third party, but the decision of that third party is binding.³¹ Of course, parties to any dispute can always ask arbitrators to resolve their disputes in a binding fashion. However, many commercial contracts go further and contain “pre-dispute” arbitration clauses in which parties agree that they will submit any *future* disputes to arbitration, before any such disputes actually arise.³² This article will focus on pre-dispute arbitration clauses in wills and trusts, or donative arbitration clauses, because their binding nature can often have the greatest benefit for the parties to a later litigation, and the greatest burden on their rights.

Arbitration has three general benefits. First, because arbitration can take place with abbreviated discovery and litigation procedures, it saves time and money. Second, arbitration can reduce and prevent conflict; disputes are not left to fester through long and painful litigation. Third, arbitration proceedings and results can be kept private, whereas litigation takes place in public.³³

These three general benefits of arbitration are even more pronounced for a donor of a trust or estate. First, most disputes over trusts and estates need not linger for months and years in litigation. They often require less discovery than standard litigation, and thus arbitration can produce a faster

³⁰ Lela P. Love & Stewart E. Sterk, *Leaving More Than Money: Mediation Clauses in Estate Planning Documents*, 65 WASH. & LEE L. REV. 539, 545 (2008).

³¹ JEROME S. AUERBACH, JUSTICE WITHOUT LAW? 4–15 (1983).

³² *Id.*

³³ See generally SUSAN M. LEESON & BRYAN M. JOHNSTON, ENDING IT: DISPUTE RESOLUTION IN AMERICA: DESCRIPTIONS, EXAMPLES, CASES, AND QUESTIONS 47 (1988) (noting these three benefits of ADR, and adding that parties can also control the standards by which their dispute is resolved); AUERBACH, *supra* note 31, at 4–15 (Auerbach discusses the benefits of ADR and argues that ADR was conceived as an informal system governed by the parties. He states that ADR is now used primarily as a tool by an “overburdened legal system,” and that a “professional community of lawyers and judges has wrenched mediation and arbitration from local communities that once resisted law as an alien value system.”).

result without adversely affecting the fact-finding process. Such savings might be especially important to the donor because litigation is often funded, at least in part, by the trust or estate.³⁴ Second, the potential for conflicts between beneficiaries is especially likely in a dispute over a trust or an estate, where both money and emotional family ties are involved. Through arbitration, family members can resolve their disputes quickly and come to some sort of resolution. Third, privacy can be a special concern in litigation over the assets and wishes of a wealthy decedent. A will is already a public document, and litigation makes a trust public.³⁵ Arbitration can shield both the trust and the personal affairs of the interested parties from the public eye. John Langbein noted that the public nature of some disputes, such as an all-out contest of a will or trust, may put particular pressure on a fiduciary to settle.³⁶ As Langbein put it, fiduciaries “are typically put to the choice of defending a lawsuit in which a skilled plaintiff’s lawyer will present evidence to a jury at a public trial touching every eccentricity that might cast doubt upon the testator’s condition, . . . thereby overriding the disposition desired by the testator and rewarding the contestants for threatening to besmirch his name.”³⁷

Because of these benefits of arbitration for the donor, some commentators suggest that donors should include a pre-dispute arbitration clause in their will or trust.³⁸ These clauses would allow a donor to require the fiduciaries and beneficiaries to submit disputes to arbitration, rather than pursue litigation.

Donative arbitration clauses are a flexible tool for donors, and a donor can tailor the arbitration provision in myriad ways.³⁹ For example, the clause can specify how arbitrators are to be selected. But perhaps most importantly, the clause can spell out which types of disputes will be submitted to arbitration. On one hand, that class of disputes can be broad. The clause can

³⁴ Langbein, *supra* note 9, at 64–66.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 66.

³⁸ For commentators who advance such a position, see Bruyere & Marino, *supra* note 24; Bosques-Hernández, *supra* note 24; and Goldman, *supra* note 24. Their arguments are discussed *infra* Part III.

³⁹ Perhaps the best illustration of this proposition is a negative one. Under the Federal Arbitration Act, courts can only vacate or modify an award for certain egregious acts by an arbitrator, and parties are not permitted to use an arbitration clause to expand a court’s judicial review of the arbitrators’ decisions. See *Hall St. Assocs, LLC v. Mattel, Inc.*, 552 U.S. 576, 585–86 (2008).

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allow the arbitrators to resolve all disputes between the parties,⁴⁰ whether or not a given dispute relates to the instrument itself,⁴¹ or the clause can even allow the arbitrators to determine whether a given trust or contract as a whole is unconscionable.⁴²

On the other hand, a donor can strictly limit the class of disputes covered by the arbitration clause. For example, the clause might be drafted to cover only disputes between a lifetime beneficiary and a trustee over whether a disbursement should be made to the lifetime beneficiary, a dispute that frequently arises in trusts. Fairly or not, trustees are generally considered to favor remaindermen over lifetime beneficiaries, perhaps out of a selfish desire to keep the trust fund—and their trust commissions—as high as possible, and to avoid personal liability for an erroneous distribution to a lifetime beneficiary.⁴³ As the law currently stands, a disaffected lifetime beneficiary must bring a long and costly suit each time the trustee denies his request, through a separate and discrete action to compel a particular

⁴⁰ Virginia case law provides some guidance to drafters of such clauses. For example, in Virginia, an arbitration clause covering “[a]ny claim or controversy arising out of or relating to this Agreement or a breach hereof,” was held to apply to a transaction that was separate from the contract but “related to” that contract. *See McMullin v. Union Land & Mgmt. Co.*, 410 S.E.2d 636, 638–39 (Va. 1991). Meanwhile, an arbitration clause that applied to disputes “arising out of” the agreement was held to cover only disputes regarding the specific transactions in the contract. *See id.* at 638; Stephen Wills Murphy, Note, *Judicial Review of Arbitration Awards Under State Law*, 96 VA. L. REV. 887, 900 nn.47–49 (2010) (discussing these attempts to define the scope of arbitral power).

⁴¹ In another case out of Virginia, an arbitration clause that covered disputes “arising out of, or relating to, the Contract Documents,” was held to cover only disputes about documents that had been made part of the contract. *See Trs. of Asbury United Methodist Church v. Taylor & Parrish*, 452 S.E.2d 847, 852–53 (Va. 1995) (holding that a purchase order was not part of the “Contract Documents,” and therefore a dispute over that order could not be submitted to arbitration). *See* Murphy, *supra* note 40, at 900 nn.47–49. In the case of a will or trust, such a clause should be altered slightly, to provide that the clause would cover only disputes “arising out of, or relating to, the *Will* or [*Trust Instrument*].” *Id.*

⁴² *See Rent-A-Center, W. v. Jackson*, 130 S. Ct. 2772, 2776–79 (2010) (holding that under the Federal Arbitration Act the parties may delegate to the arbitrators the issue of whether the contract as a whole is unconscionable).

⁴³ For a discussion of the reasons why a trustee might favor a remainderman over a lifetime beneficiary, see Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 676 (2004).

distribution.⁴⁴ In response to this concern, an arbitration clause might force these disputes into arbitration but allow other disputes to proceed to litigation.

A further example of the unique benefits of arbitration clauses comes in the context of trust and estate administration. Donors often wish to appoint co-trustees or co-executors. One reason for such an arrangement is to allow one individual with specialized knowledge to have oversight over the management of a particular piece of the trust or estate, such as an art collection.⁴⁵ However, trusts and estates attorneys often advise against the sharing of power among fiduciaries, because of the potential for disputes between them. The disputes might lead to contentious and expensive litigation—all of which would be funded by the trust or estate.⁴⁶ An arbitration clause could allow for the speedy resolution of such disputes between fiduciaries without affecting the rights of other beneficiaries.

The American Arbitration Association (AAA) provides a generalized, broad arbitration clause for parties to include in their wills and trusts.⁴⁷ The sample provision reads:

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. . . . Nevertheless the following matters shall not be arbitrable[:] questions regarding my competency, [or] attempts to remove a fiduciary [for misconduct]. . . . [A]rbitration may be waived by all . . . 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

⁴⁴ See *DUKEMINIER ET AL.*, *supra* note 6, at 533–40 (discussing beneficiaries' rights under a trust and analyzing the case of *Marsman v. Nasca*, 573 N.E.2d 1025 (Mass. App. Ct. 1991)).

⁴⁵ See Bridget J. Crawford, John P. Sare, Genevieve L. Fraiman & Jennifer Jordan McCall, *Estate Planning for Authors and Artists*, 815 TAX MGMT. (BNA) ESTATES, GIFTS, AND TRUSTS (2004) (suggesting the appointment of an "Arts Executor" to supervise the management, sale, or disposition of an art collection).

⁴⁶ See *e.g.*, *The Dangers of Co-Executors*, http://www.deathandtaxesblog.com/2006/09/the_dangers_of_coexecutors.html (Sept. 5, 2006) (warning clients of the downsides of co-fiduciaries and citing sources).

⁴⁷ See AM. ARBITRATION ASS'N, *WILLS AND TRUSTS ARBITRATION RULES*, available at <http://www.adr.org/sp.asp?id=22005>.

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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 . . . including unborn or incapacitated persons, such as minors or incompetents.⁴⁸

Yet arbitration provisions, if enforced, come at a price. Allowing the donor to control the means by which beneficiaries exercise their rights gives the decedent significant control over not only the rights of the parties, but the remedies they may use to enforce those rights. This type of "dead hand control" by an individual can last throughout the long life of a trust.⁴⁹ Notably, in most jurisdictions parties to arbitration give up the right to have a court review the arbitrators' findings of fact or conclusions of law.⁵⁰

Because of the restrictions that they place on beneficiaries, donative arbitration clauses are largely a novel development in the law. Indeed, a donor who wishes to require arbitration of disputes over his trust or will would encounter several obstacles.

B. Threshold Difficulties in Enforcing Arbitration Provisions in Wills and Trusts Under Current Law

Despite the compelling arguments in favor of donative arbitration clauses, these clauses are probably not enforceable under the current law in most states for two reasons. First, arbitration statutes themselves only enforce arbitration clauses in contracts, but courts have held that wills and trusts are not contracts.⁵¹ Second, provisions in constitutions and other statutes have been construed to require certain disputes to be resolved in court.⁵² Each of these is a substantial barrier to enforcing donative arbitration clauses under current law. This article will now consider each of these restrictions.

1. Statutory Restrictions in Arbitration Statutes as a Barrier to Donative Arbitration Clauses

Pre-dispute arbitration clauses were not favored under the common law given that they required parties to give up access to the courts. It was perhaps

⁴⁸ *Id.*

⁴⁹ See THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 619–20 (2007) (discussing the problems with "dead hand control").

⁵⁰ See generally Murphy, *supra* note 40.

⁵¹ See *infra* notes 63–79 and accompanying text.

⁵² See *infra* Part II.B.2.

not surprising that courts did not look kindly upon such clauses. Courts generally believed that arbitration clauses “oust[ed] the jurisdiction” of the courts, and thus substantially impaired an individual’s ability to seek redress for some future wrong.⁵³ In response to this reluctance by courts to enforce arbitration clauses in contracts, legislatures passed statutes expressly authorizing them. The Uniform Arbitration Act, which enforces such clauses, was first promulgated by the Commissioners on Uniform State Laws in 1956, and it has been adopted by thirty-eight states and the District of Columbia.⁵⁴ Congress has also passed the Federal Arbitration Act, and another nine states have adopted arbitration statutes modeled on the federal act.⁵⁵

Under the Uniform Arbitration Act, an arbitration clause is only enforceable if it is contained in a “written agreement” or “a provision in a written contract.”⁵⁶ Similarly, the Federal Arbitration Act and state statutes that follow its lead require that an arbitration clause be a “written provision in . . . a contract.”⁵⁷ Recently, the United States Supreme Court affirmed that arbitration is a matter of *contract* between the parties. In *Rent-A-Center, West v. Jackson*, the Court concluded that the Federal Arbitration Act reflects “the fundamental principle that arbitration is a matter of contract” and that an

⁵³ See Murphy, *supra* note 40, at 896 n.34. The phrase “oust the jurisdiction [of the court]” was originally attributed to *Kill v. Hollister*, (1746) 95 Eng. Rep. 532 (K.B.), and the phrase has persisted as a rallying cry for opponents to binding arbitration. *Id.*; see also *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 983 n.9 (1942) (noting the “hypnotic power of the phrase”).

⁵⁴ Murphy, *supra* note 40, at 897–98.

⁵⁵ Only three states have adopted arbitration statutes not based on the Uniform or Federal Acts: Alabama, New Hampshire, and West Virginia. See Murphy, *supra* note 40, at 891–92 nn.15–17.

⁵⁶ UNIF. ARBITRATION ACT § 1 (1956) (“[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable”); see also REV. UNIF. ARBITRATION ACT § 6(a) (2000) (“An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable. . . .”).

⁵⁷ 9 U.S.C. § 2 (2011) (“[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising . . . or . . . an existing controversy . . . shall be valid, irrevocable, and enforceable. . . .”). See also *AT&T Techs. Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 648 (1986) (“Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960))).

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arbitration clause under the statute is “on equal footing with other contracts.”⁵⁸

Although only an arbitration provision in a *contract* is enforceable, the courts that have considered donative arbitration clauses have held that wills and trusts instruments are not contracts.⁵⁹ The enforceability of donative arbitration clauses has only been squarely addressed by the courts of Arizona and Washington, D.C.⁶⁰ To those courts, the answer is simple: wills and trusts are not “contracts” or “agreements,” and therefore arbitration clauses contained in such instruments fall outside the arbitration statute.⁶¹ Accordingly, those arbitration clauses are read under the common law, which refuses to enforce them.⁶²

The issue was first taken up by a court in 2004, in a case before the intermediate Court of Appeals of Arizona. The court held that a trust is not a contract, and therefore the arbitration provision in the trust could not be enforced.⁶³ In that case, *Schoneberger v. Oelze*, beneficiaries had sued the trustee, and the trustee moved to compel arbitration under the trust’s arbitration clause.⁶⁴ The trustee conceded that the trust was not technically a contract between the beneficiaries and the trustee, but he argued that the arbitration provision could nevertheless be binding on the third-party beneficiaries of a contract.⁶⁵ The court rejected the argument, holding that while a *contract* “may end up binding (or benefitting) nonsignatories,” a trust is not a contract to begin with, as it “does not rest on an exchange of promises.”⁶⁶ Rather, a trust “merely requires a trustor to transfer a beneficial

⁵⁸ *Rent-A-Center, W.*, 130 S. Ct. at 2776. See generally David Horton, *The Mandatory Core of Section 4 of the Federal Arbitration Act*, 96 VA. L. REV. IN BRIEF 1, 2, n.7 (2010) (discussing Supreme Court cases on the contractual nature of arbitration clauses).

⁵⁹ See *infra* notes 63–79 and accompanying text.

⁶⁰ See *id.*

⁶¹ See *id.*

⁶² See *id.* For a discussion of the common law’s hostility to arbitration clauses, see *supra* note 53 and accompanying text.

⁶³ Arizona’s legislature has since amended its laws to allow the arbitration of certain disputes over trusts. See *infra* Part IV.D. Nevertheless, the *Schoneberger* opinion stands as persuasive precedent for courts in jurisdictions who still operate under a law similar to Arizona’s former statute. Indeed, the reasoning of the *Schoneberger* court was adopted by the high court of the District of Columbia in *Calomiris*, discussed *infra* notes 76–79 and accompanying text.

⁶⁴ *Schoneberger v. Oelze*, 96 P.3d 1078 (Ariz. Ct. App. 2004).

⁶⁵ *Id.*

⁶⁶ *Id.* at 1083.

interest in property to a trustee who, under the trust instrument . . . holds that interest for the beneficiary.”⁶⁷

The court in *Schoneberger* based its holding on an earlier case, *In re Naarden Trust*, in which the same Arizona court held that a trust was not a contract.⁶⁸ In *Naarden Trust*, a woman brought a claim against her ex-husband and a trustee.⁶⁹ The trustee tried to establish that the trust was contractual, because he could receive attorney’s fees only if the claim was contractual in nature.⁷⁰ The court held that a trust was not a contract,⁷¹ and in reaching that conclusion relied on both the Restatement (Second) of Trusts (1959)⁷² and the Restatement (Second) of Contracts (1981).⁷³ In principle, the court noted that different interests are created by a trust and a contract: “[T]he beneficiary of a trust gains a beneficial interest in the trust property,” the court reasoned, “while the beneficiary of a contract gains a personal claim against the promissor.”⁷⁴ The court noted other, more specific legal differences between the law of trusts and the law of contracts, which provided different answers to the questions of who may enforce the agreement; what statute of limitations applies; and what consideration and manifestation of intent are required to establish the interest.⁷⁵

While *Schoneberger* refused to enforce an arbitration provision in a trust, two years later the Court of Appeals of the District of Columbia applied the Arizona court’s reasoning in *Naarden* and *Schoneberger* to strike down an arbitration provision in a will. In the case of *In re Mary Calomiris*, a dispute arose between the trustees of a marital trust.⁷⁶ For procedural reasons, the court was forced to determine the narrow question of whether there was a written agreement to arbitrate.⁷⁷ In concluding that no such agreement existed, the D.C. Court of Appeals found the Arizona court’s reasoning to be

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *In re Naarden Trust*, 990 P.2d 1085, 1086–87 (Ariz. Ct. App. 2000).

⁷⁰ *Id.*

⁷¹ *Id.* at 1086; *see also id.* at 1089 (“[T]he duties of the trustee are implied by the law because of the relationships created by the trust, and . . . such relationships are not contractual.”).

⁷² *Id.* at 1088 (quoting RESTATEMENT (SECOND) OF TRUSTS § 14 cmt. f and § 13 & cmt. a).

⁷³ *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. f).

⁷⁴ *Id.* (quoting RESTATEMENT (SECOND) OF TRUSTS § 14 cmt. a).

⁷⁵ *Naarden Trust*, 990 P.2d at 1088 (quoting RESTATEMENT (SECOND) OF TRUSTS § 14 cmts. c, d, and f).

⁷⁶ *In re Mary Calomiris*, 894 A.2d 408, 408 (D.C. 2006).

⁷⁷ *Id.*

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“instructive.”⁷⁸ The D.C. court concluded that just as a trust is not a contract, “a will is not a contract either.”⁷⁹

Thus, the few courts that have considered the matter have agreed that an arbitration provision in a trust or a will is not binding on its beneficiaries or trustees, because arbitration provisions are only binding when included in a written contract. The fact that only two courts have considered the issue leaves hope for proponents of donative arbitration clauses. These proponents seek to persuade other courts to see the matter differently. Nevertheless, both the Arizona and D.C. courts found the case to be an easy one. This leaves proponents of donative arbitration clauses in need of a particularly compelling argument to enforce such clauses under current statutes.⁸⁰

2. Further Restrictions on Enforceable Arbitration Clauses in Wills: Constitutional and Statutory Concerns for Wills

Even if a court were to buck the modest trend of the Arizona and D.C. courts and enforce a donative arbitration clause under a given state’s arbitration statute, other constitutional and statutory barriers remain. Some state constitutions and statutes foreclose a court from enforcing those provisions in a will.⁸¹

Specifically, courts in New York, Pennsylvania, and Michigan have held that testamentary capacity must be determined in court, and thus it cannot be delegated to another party, such as an arbitrator.⁸² In New York, the courts reached this rule based on a particular provision of the state’s constitution. The New York State Constitution provides that “[t]he surrogate’s court shall have jurisdiction over all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates and actions and proceedings arising thereunder or pertaining thereto.”⁸³ One New York court,

⁷⁸ *Id.* at 409, n.3 (citing *Schoneberger*, 96 P.3d at 1083, and *AT&T Techs., Inc.*, 475 U.S. at 648).

⁷⁹ *Id.* at 410; *see also* *Robsham v. Lattuca*, 797 N.E.2d 502 (Mass. App. Ct. 2003) (unpublished table decision) (holding that trusts are generally not enforceable as contracts). *But see In re Estate of Washburn*, 581 S.E.2d 148, 152 (N.C. Ct. App. 2003) (referring to “a trust agreement or other contract”) (citation and quotation omitted). According to the ACTEC Task Force on Arbitration, the enforceability of these provisions is generally “debatable in some jurisdictions and clearly not the case in others.” Goldman, *supra* note 24, at 1600.

⁸⁰ These arguments are discussed *infra* Part III.

⁸¹ *See generally* Goldman, *supra* note 24, at 12–14.

⁸² *See infra* notes 83–89 and accompanying text.

⁸³ N.Y. CONST. art. 6, § 12(d).

invoking this provision, held that the state constitution thereby gives courts “the duty to determine [testamentary capacity and the genuineness of the instrument] on its own initiative,” and thus the constitution precludes a court from delegating this responsibility to another forum.⁸⁴ A New York statute seems to confirm this interpretation of the state’s constitution; it requires that “[b]efore admitting a will to probate *the court* must inquire particularly into all the facts and must be satisfied with the genuineness of the will and the validity of its execution.”⁸⁵

Similarly, in Pennsylvania and Michigan, courts have held that issues of testamentary capacity cannot be submitted to arbitration—although these courts based their holdings on state statutes, not on state constitutional provisions.⁸⁶ A Pennsylvania statute provides the allegedly incapacitated person the right to be present at, and request a jury at, his incapacity hearing,⁸⁷ and the Pennsylvania Superior Court read this statute to require that “as a matter of public policy, issues of incompetency cannot be submitted to arbitration.”⁸⁸ In Michigan, the state’s highest court has similarly held that the issue of testamentary capacity is vested in the court and cannot be passed to another individual—even to the executor, and even by consent of the parties.⁸⁹

At the very least, the constitutional and statutory restrictions identified by the New York, Pennsylvania, and Michigan courts suggest that courts are not necessarily free to enforce an arbitration provision in a will under current law. These restrictions highlight the need for statutory changes to ensure the enforceability of such provisions. Still, it is worth noting that in New York a statutory change may not be enough. The courts there have held that the constitution itself requires certain issues be decided in court.⁹⁰ Interestingly, New York’s constitutional provision, which vests authority over estates in the court, is by no means unique.⁹¹ Therefore, proponents of statutory change must be particularly wary of the pitfalls presented by state constitutions.

⁸⁴ *In re Will of Jacobovitz*, 295 N.Y.S.2d 527, 530 (N.Y. Civ. Ct. 1968).

⁸⁵ N.Y. SURR. CT. PROC. ACT § 1408(1) (Gould 2005) (emphasis added).

⁸⁶ See *infra* notes 86–89 and accompanying text (discussing case law from Pennsylvania and Michigan).

⁸⁷ 20 PA. CONS. STAT. § 5511(a) (2007).

⁸⁸ *In re Fellman*, 604 A.2d 263, 267 (Pa. Super. Ct. 1992).

⁸⁹ *In re Meredith’s Estate*, 266 N.W. 351, 357 (Mich. 1936).

⁹⁰ See *supra* notes 83–85 and accompanying text.

⁹¹ Goldman, *supra* note 24, at 13 n.9.

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III. EXTRA-STATUTORY ARGUMENTS FOR THE ENFORCEABILITY OF DONATIVE ARBITRATION CLAUSES

Despite the rulings by the Arizona and Washington, D.C. courts, proponents of donative arbitration clauses have argued that other courts can and should enforce those clauses, even without a statutory revision. Their proposals rely on one of three different justifications: “Contract Theory;” “Benefit Theory;” or “Intent Theory.” In addition, some commentators suggest using two other existing mechanisms to require arbitration: a form of “no-contest” clause, or separate contracts with each party that each contain an arbitration provision. At first, each proposal seems compelling, but ultimately none provides a properly tailored and workable means to enforce donative arbitration clauses. This part will deal with each in turn.

A. *Contract Theory and Over- and Under-Inclusiveness*

Contract Theory provides one potential justification to enforce a donative arbitration clause under existing law. This theory stands in opposition to the Arizona court’s holdings in *Naarden Trust* and *Schoneberger*. The commentators that propound this theory propose that courts abandon the outdated and “ill-advised distinction” between a trust and a contract that formed the basis for the Arizona court’s rulings.⁹² If a trust is considered a contract, the state arbitration statute would enforce any arbitration clause contained therein.

In particular, these commentators argue that the courts in *Naarden Trust* and *Schoneberger* uncritically relied on the Restatements of Trusts and of Contracts. These Restatements distinguished between a trust and a contract. For example, according to the Restatement of Trusts, a trust is “conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract.”⁹³

Critics of *Schoneberger* argue that the Arizona court “made little attempt to look beyond the Restatement definition to discover either the underlying similarities between a trust and a contract or the original foundation for the Restatement view.”⁹⁴ And courts might have reason to be suspicious of the

⁹² Bruyere & Marino, *supra* note 24, at 361; *see also* Bosques-Hernández, *supra* note 24.

⁹³ Bruyere & Marino, *supra* note 24, at 361 (citing RESTATEMENT (SECOND) OF TRUSTS § 197 cmt. b (1959) (continuing the language of comment b of RESTATEMENT (FIRST) OF TRUSTS § 197 (1935))).

⁹⁴ *Id.* (emphasis omitted).

distinction between trusts and contracts made by the Restatements of Trusts and of Contracts. This distinction was based on the scholarship of one man: Austin W. Scott, who wrote an influential article in 1917 that laid out the fundamental differences between the law of trusts and the law of contracts.⁹⁵ Scott noted the general distinctions between a trust and a contract. For example, in his time, trustees were generally not compensated, and thus different rules applied to them than applied to parties to a contract.⁹⁶ Moreover, Scott noted that the common law of contracts could not account for a trust, in two important respects. First, if a trust was to be compared to a contract, it seemed most analogous to a third-party contract because a trustee and a settlor agree to an arrangement for the benefit of a third party, the beneficiary.⁹⁷ Yet under English contract law, courts did not recognize a third-party beneficiary contract.⁹⁸ Second, Scott noted that contract law was unable to enforce certain trust agreements.⁹⁹ For example, contract law could not account for the two-party trust, in which one party serves as both grantor and trustee, because one party cannot make a contract with herself.¹⁰⁰

But two attorneys and commentators, Michael P. Bruyere and Meghan D. Marino, argue that the law of trusts has changed to the extent that these underlying distinctions between a trust and a contract no longer exist, and thus courts should dispense with the legal distinction between the two.¹⁰¹ Indeed, the landscape of the law of trusts is quite different from that of Scott's time. Today, trustees are compensated.¹⁰² Additionally, under current American law, third-party beneficiary contracts are enforceable, as evidenced by the fact that the *Schoneberger* court conceded it would have enforced an arbitration clause in a third-party beneficiary contract.¹⁰³ Of course it remains true that under current contract law a party cannot contract with herself. Bruyere and Marino admit that the contract approach may be "unsuitable" for the two-party declaration of trust in which one party serves as both grantor and trustee.¹⁰⁴ However, they maintain that the unsuitability

⁹⁵ Austin W. Scott, *The Nature of the Rights of the Cestui Que Trust*, 17 COLUM. L. REV. 269, 270 (1917); see also Bruyere & Marino, *supra* note 24, at 361.

⁹⁶ Scott, *supra* note 95, at 270; see also Bruyere & Marino, *supra* note 24, at 361.

⁹⁷ Scott, *supra* note 95, at 270; see also Bruyere & Marino, *supra* note 24, at 361.

⁹⁸ Bruyere & Marino, *supra* note 24, at 362.

⁹⁹ *Id.* at 361.

¹⁰⁰ *Id.* at 361–62.

¹⁰¹ *Id.*

¹⁰² *Id.* at 362.

¹⁰³ *Schoneberger*, 96 P.3d at 1083; Bruyere & Marino, *supra* note 24, at 362.

¹⁰⁴ Bruyere & Marino, *supra* note 24, at 362.

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of this particular type of trust “in no way invalidates the contract approach to the more traditional three-party trust where the grantor does not act as the trustee.”¹⁰⁵

Bruyere and Marino argue that the law of trusts has changed so radically that it can be subsumed within the law of contracts.¹⁰⁶ In responding to Scott’s earlier scholarship, they rely on the scholarship of John H. Langbein, who concluded that a modern trust fits nicely within contract law. Langbein argued, “the three-cornered relation of settlor, trustee, and [beneficiary] . . . is easily explained in the modern law in terms of a contract for the benefit of a third party.”¹⁰⁷ For Langbein, the basic elements of a trust and a contract are the same: (1) a consensual formation, because no individual can be forced to act as trustee; and (2) party autonomy, because trust law applies only where the trust does not supply contrary terms.¹⁰⁸

More recent developments in contract law have brought that body closer to trust law. Courts have been more willing to accept specific performance in contract law, and a “good faith” requirement has spread into contracts, which “shadows trust law’s fiduciary duty requirements.”¹⁰⁹

For these commentators, then, the Arizona court’s refusal to recognize and enforce an arbitration clause in a trust is “limited to a narrow view of . . . contractual theory,” and an outdated view of trusts.¹¹⁰ They argue that the courts “focused exclusively on the definitional difference between a trust or will versus a contract” in the Restatements and thus maintained the “ill-advised distinction” between a trust and a contract.¹¹¹

At first pass, Contract Theory is indeed compelling. If the fundamental differences between trusts and contracts have indeed faded, then it seems wholly formalistic to recognize arbitration clauses in contracts but not in trusts. Yet in the context of arbitration clauses, Contract Theory suffers from two particular flaws. First, the theory is over-inclusive in its application. If a court were to equate a trust with a contract, then arbitration clauses in trusts would be enforceable, but all of trust law would potentially be displaced by contract law. As the Arizona court in *Naarden Trust* recognized, there are many ways in which trust law still differs from contract law. Under trust law,

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 361–62.

¹⁰⁷ *Id.* at 362 (quoting John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 *YALE L.J.* 625, 643 (1995)).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 362–63 (citing Langbein, *supra* note 106, at 652–53).

¹¹⁰ Bosques-Hernández, *supra* note 24, at 17.

¹¹¹ Bruyere & Marino, *supra* note 24, at 361.

the settlor generally does not have standing to enforce the trust, whereas a party to a contract can enforce the contract; the statute of limitations often differs under contract law and trust law; and the requisite manifestation of intent differs under contract law and trust law.¹¹² The differences between the two bodies of law were illustrated in *Naarden Trust*. In that case, if the court had held that a trust was a contract, then the prevailing party could have recovered attorney's fees.¹¹³

If a trust were a contract, then, as Bruyere and Marino recognize, "there is little doubt as to the enforceability of the arbitration clause."¹¹⁴ But if a trust were a contract, then contract law would also spill over and affect other substantive areas of trust law. The Arizona court was rightly wary of such a sweeping change in trust law.

Second, Contract Theory is under-inclusive. Bruyere and Marino's arguments are limited to the modern law of trusts. Even if they could successfully argue that a trust is a contract, their arguments do not necessarily apply to wills. A court operating under Contract Theory would enforce an arbitration provision in a trust but not in a will. This is not to suggest that a will is entirely different from a contract; a will might very well be considered a contract between a trustee and an executor, to benefit a third party. In fact, Contract Theory would apply to *testamentary* trusts, and thus it would again seem formalistic to refuse to apply the theory to the testament itself.

Nevertheless, the bodies of the law of wills and the law of contracts remain distinct, and applying Contract Theory to wills faces the problem of over-inclusiveness: this route would enforce arbitration clauses in wills, but it would also threaten to displace all of the law of wills in favor of the law of contracts.

B. Benefit Theory and the Right/Remedy Distinction of a Donor's Restrictions on Gifts

A court might also enforce a donative arbitration clause based on principles of Benefit Theory, also known as Conditional Transfer Theory. This theory states the broad rule that a beneficiary who accepts benefits from a will or trust either impliedly agrees to be bound by its terms (thus making the donative arbitration clause an "agreement" under state arbitration statutes), or is estopped from challenging the validity of the terms of the will

¹¹² *Naarden Trust*, 990 P.2d at 1088.

¹¹³ *Id.* at 1086–87.

¹¹⁴ Bruyere & Marino, *supra* note 24, at 363.

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or trust (thus preventing the beneficiary from challenging the donative arbitration clause in the first place).¹¹⁵

Benefit Theory has some advantages over Contract Theory as a means of justifying the enforcement of a donative arbitration clause. Benefit Theory is not over-inclusive. Unlike Contract Theory, Benefit Theory would not force a court to supplant all of trust law with contract law. Benefit Theory is also not under-inclusive in the same way that Contract Theory is, because Benefit Theory could apply to a beneficiary who accepts a benefit from a will, as well as from a trust.

However, Benefit Theory may still be under-inclusive in two important respects. First, Benefit Theory would apply only to beneficiaries who accepted benefits from a will. If the arbitration clause was enforced based on Benefit Theory, but a beneficiary chose to contest the will or trust, then she could still bring that action in court, outside of the arbitration clause. Second, this theory might not apply to trustees or executors under a will. A trustee or executor is not considered to benefit from a trust or will; instead, they receive compensation for services rendered. Thus, Benefit Theory could justify a court's enforcement of an arbitration clause against a beneficiary, but a trustee or executor would be able to litigate if he or she chose to do so.

Moreover, Benefit Theory may have limits that would prevent a court from using it to enforce any arbitration clause. Under current law in most jurisdictions, the donor may only attach *lawful* conditions to the receipt of a gift from a trust or estate.¹¹⁶ Courts have refused to enforce some restrictions, such as a requirement that the beneficiary marry a person of a particular race, restrictions that operate as a ban on marriage,¹¹⁷ or a restriction that serves to

¹¹⁵ Goldman, *supra* note 24, at 9–10; Bosques-Hernández, *supra* note 24, at 12 n.56; *see e.g.*, *Tennant v. Satterfield*, 216 S.E.2d 229, 231–32 (W. Va. 1975) (“The general rule with regard to acceptance of benefits under a will is that a beneficiary who accepts such benefits is bound to adopt the whole contents of that will and is estopped to challenge its validity.”).

¹¹⁶ Bosques-Hernández, *supra* note 24, at 12 (citing *Am. Cancer Soc., St. Louis Div. v. Hammerstein*, 631 S.W.2d 858, 864 (Mo. Ct. App. 1981)). Jonathan Blattmachr suggests that a donor can avoid this complication by requiring arbitration or mediation as a condition subsequent to the gift taking effect. However, this drafting technique still runs into the general problem that testators may only attach lawful conditions to a gift. *See* Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure, in Terrorem Clauses, Mediation and Arbitration*, 9 CARDOZO J. CONFLICT RESOL. 237, 264–65 (2008).

¹¹⁷ *See, e.g.*, *Maddox v. Maddox's Adm'r*, 52 Va. (11 Gratt.) 804 (1854) (striking down a provision in a will as an unlawful restriction on marriage, when the will required the woman to marry a Quaker in order to receive her bequest, but there were only five Quaker men in the village). *But see* *Shapira v. Union Nat'l Bank*, 315 N.E.2d 825, 826,

disrupt family harmony.¹¹⁸ Recall that under the common law, arbitration clauses were often struck down by courts because they restricted an individual's ability to seek redress.¹¹⁹ And if the court has not adopted Contract Theory, then the arbitration clause would still be outside the protection of the jurisdiction's arbitration statute—and thus disfavored by the courts. Thus, although Benefit Theory would justify some restrictions imposed on a beneficiary, a court might still refuse to enforce an arbitration clause if the court saw it as an unlawful restriction on the party—for example, if the party had not expressly and voluntarily agreed to it.

One might respond that donative arbitration clauses are not analogous to “unlawful” restrictions like restraints on marriage, but are rather akin to other clauses that limit a beneficiary's causes of action, such as “no-contest” clauses and “exculpatory” clauses. The courts of most jurisdictions currently enforce no-contest clauses, which provide that if a beneficiary contests a will or trust, then he or she would forfeit all benefits under the instrument.¹²⁰ Of course, even no-contest provisions have their limits; in most states, a court will not enforce such a clause if probable cause exists to challenge the instrument,¹²¹ or if the contestant alleges a particular type of deficiency in

830–32 (Ohio Ct. Com. Pl. 1974) (upholding a requirement in a will that the testator's son take his share only if he marry “a Jewish girl whose both parents were Jewish,” because there were sufficient Jewish girls in the region that the requirement did not act as a restraint on marriage as it had in *Maddox, supra*); see also RESTATEMENT (SECOND) OF PROP.: WILLS AND DONATIVE TRANSFERS § 6.2 (1983) (providing that a gift conditioned on a marriage within a religious faith is valid “if, and only if, under the circumstances, the restraint does not unreasonably limit the transferee's opportunity to marry”). See generally DUKEMINIER ET AL., *supra* note 6, at 26–30.

¹¹⁸ See e.g., *Girard Trust Co. v. Schmitz*, 20 A.2d 21, 37 (N.J. Ch. 1941) (striking down a provision that the testator's children must not communicate with the children that the testator did not like, and refusing to “lend [the court's] hand to help the testator use the power of his wealth to disrupt this family”). See generally DUKEMINIER ET AL., *supra* note 6, at 26–30.

¹¹⁹ See *supra* note 53 and accompanying text.

¹²⁰ DUKEMINIER ET AL., *supra* note 6, at 167.

¹²¹ This language is used by UNIF. PROBATE CODE § 3-905. The Restatement similarly would provide that the court would enforce the clause “*unless* probable cause existed” for the contest. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.5 (2003). Under the Restatement, “probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful.” *Id.* at cmt. c. See *In re Estate of Shumway*, 9 P.3d 1062, 1066–67 (Ariz. 2000) (adopting this definition of probable cause).

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the will, such as forgery.¹²² Nevertheless, the availability of no-contest clauses suggests that a court would not find an arbitration clause to be an unlawful restriction: If a court will allow a donor to restrict his beneficiaries' access to a court altogether through a no-contest clause, it stands to reason that a court would allow a donor to restrict his beneficiaries' access to court but provide another forum for resolving disputes.

Similarly, courts enforce exculpatory clauses in trusts and wills.¹²³ These provisions absolve a trustee of all liability except for misconduct that reaches a certain specified level, such as reckless indifference, bad faith, or willful neglect.¹²⁴ Of course, a trust cannot absolve a trustee of any and all wrongdoing, since such a trust would be "a trust in name only."¹²⁵ If a court

¹²² The "probable cause" exception to the no-contest clause is used by a majority of states, the Uniform Probate Code, and the current Restatement. *See* UNIF. PROBATE CODE §§ 2-517, 3-905; RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.5 (2003). For arguments against using the "probable cause" exception, see Martin D. Begleiter, *Anti-Contest Clauses: When You Care Enough to Send the Final Threat*, 26 ARIZ. ST. L.J. 629 (1994).

A minority of jurisdictions enforce the no-contest clause unless the contestant contests the will based on one of an enumerated class of grounds, such as a forgery, revocation, or a later will, or a provision that benefits the drafter of the will. *See, e.g.*, CAL. PROB. CODE § 21311 (a)(1)–(3) (2011) (providing that a no-contest clause will not be enforced if the will is contested on one of these three grounds). *See generally* DUKEMINIER ET AL., *supra* note 6, at 167; Begleiter, *supra* note 121; Gerry W. Beyer, Robert G. Dickinson & Kenneth L. Wake, *The Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses*, 51 SMU L. REV. 225 (1998).

Some other states take a much stricter view on no-contest clauses, and would enforce them no matter what claim is brought by the contestant. In Virginia, for example, a no-contest clause is triggered by any "resort to the means provided by law for attacking the validity of a will," including "an allegation of lack of testamentary capacity, fraud, undue influence, improper execution, forgery, or subsequent revocation by a later will." *Womble v. Gunter*, 95 S.E.2d 213, 216, 219 (Va. 1956); *see also Keener v. Keener*, 682 S.E.2d 545, 548 (Va. 2009) (stating that a no-contest clause should be "strictly enforced according to its terms," because of "[t]he compelling reasons for such strict enforcement . . . [such as] the protection of the testator's right to dispose of his property as he sees fit, and the societal benefit of deterring the bitter family disputes that will contests frequently engender").

¹²³ DUKEMINIER ET AL., *supra* note 6, at 541–43.

¹²⁴ *See Marsman*, 573 N.E.2d at 1027 (upholding an exculpatory clause that held a trustee liable only for "willful neglect or default"); *see also* GEORGE G. BOGERT & GEORGE T. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 542, at 188–89, 208–09 (rev. 2d ed. 1993); UNIF. TRUST CODE §§ 1008(a)(1), 105(b)(2) (2005); RESTATEMENT (SECOND) OF TRUSTS § 222 (2) (1959).

¹²⁵ *See McNeil v. McNeil*, 798 A.2d 503, 509 (Del. 2002) (holding that a provision in a trust stating that the trustee's decisions were "not subject to review by any court"

can enforce such an exculpatory clause and limit beneficiaries' rights in this substantial way, the argument goes, a court can also enforce a clause that limits the forum in which a beneficiary can bring a grievance.¹²⁶

However, a key distinction exists between no-contest and exculpatory clauses, on the one hand, and arbitration clauses, on the other. No-contest provisions restrict a party's ability to contest the validity of an instrument; exculpatory clauses restrict the rights of a party against the trustee.¹²⁷ Arbitration clauses, by contrast, restrict a party's ability to sue for his rights under that contract.¹²⁸ One might say that courts distinguish between limiting a party's *rights*, which is generally permissible, and limiting a party's *remedies*, which is not. The gravity of restricting one's remedies fueled common-law hostility to arbitration agreements in the first place.¹²⁹

Thus, despite the permissibility of no-contest and exculpatory clauses in trusts and wills, there remains doubt that these would provide sufficient analogs to donative arbitration clauses to allow their enforcement. Moreover, even if a donative arbitration clause is enforced under Benefit Theory, that clause might still bind only beneficiaries, not trustees or executors.

C. Intent Theory and Restrictions on a Donor's Ability to Limit Remedies

Intent Theory is a further suggestion for enforcing donative arbitration clauses, which seeks to avoid the problems presented by Contract Theory and Benefit Theory. Whereas Benefit Theory focuses on the actions of the beneficiaries in accepting benefits under an instrument, Intent Theory returns to the core values of trust and estate law and focuses on the donor's rights.¹³⁰

could only be read to absolve the trustee of gross negligence, because "[a] trust in which there is no legally binding obligation on a trustee is a trust in name only and more in the nature of an absolute estate or fee simple").

¹²⁶ This argument is propounded in DUKEMINIER ET AL., *supra* note 6, at 541–43.

¹²⁷ See *supra* notes 119–21 and accompanying text (discussing no-contest clauses) and notes 122–25 and accompanying text (discussing exculpatory clauses).

¹²⁸ See, e.g., *supra* notes 40–41 and accompanying text (citing examples of arbitration clauses that restricted the parties' ability to sue for particular disputes arising out of the contract or transaction).

¹²⁹ The distinction of rights and remedies was suggested to the author by Barry Cushman, James Monroe Distinguished Professor of Law at the University of Virginia School of Law. For a discussion of the common-law hostility to arbitration clauses, see *supra* note 53 and accompanying text.

¹³⁰ See Bosques-Hernández, *supra* note 24, at 10–12.

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This justification would enforce a donative arbitration clause because it resulted from a clear manifestation of the donor's intent.

The intent of the donor has always been a cornerstone of Western estate law. The Uniform Trust Code defines "terms of a trust" as the manifestation of the settlor's intent.¹³¹ Similarly, the Restatement of Wills and Other Donative Transfers recognizes that "[t]he controlling consideration in determining the meaning of a donative document is the donor's intention."¹³² Even John Locke emphasized that natural law required that the testator be able to dispose of his property upon his death as he wished.¹³³

Therefore, the theory need not be over- or under-inclusive. Unlike Contract Theory, Intent Theory would not import all of contract law. And like Benefit Theory, Intent Theory could apply equally to arbitration clauses in wills and trusts, because intent is already central to the interpretation of both instruments. But unlike Benefit Theory, Intent Theory is not based on the rights of beneficiaries, and therefore Intent Theory would enforce arbitration clauses against fiduciaries as well.

However, Intent Theory may be founded upon a flawed proposition, even given the fact that the law of trusts and estates uses the intent of the donor as its lodestar. The law of trusts and estates does not blindly adhere to the intent of the donor; the bodies of law still place some restrictions on the donor's intent.¹³⁴ This article has already noted the fact that a testator cannot use his will to unreasonably restrict the right to marry, or to disrupt his family.¹³⁵ Furthermore, a testator cannot completely disinherit his spouse through his

¹³¹ See *id.* at 10 (citing UNIF. TRUST CODE § 103 (2000)).

¹³² See *id.*; accord RESTATEMENT (THIRD) OF TRUSTS § 4 (2003).

¹³³ In his *Two Treatises*, John Locke asserts that property rights extend beyond life, and states that the decedent may do with his property as he wishes, and, if he does not otherwise dispose of it, it passes to his children. Locke writes, "that thing, that possession, if he dispos'd not otherwise of it by his positive grant, descended Naturally to his Children, and they had a right to succeed to it, and possess it." JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* § 87 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). Yet elsewhere, Locke places more emphasis on the rights of the children to inherit support from their parents. He states that children have a "natural Right . . . to inherit the Good of their Parents," which is "founded in the Right they have to the same Subsistence and Commodities of Life, out of the Stock of their Parents." *Id.* § 97. Scholars and commentators continue to debate Locke's views of the rights of the parent versus the rights of the children to inherit. See generally J.J. Waldron, *Locke's Account of Inheritance and Bequest*, 19 J. HIST. PHIL. 39, 47-48 (1981).

¹³⁴ See *supra* notes 115-17 and accompanying text.

¹³⁵ See *id.*

will,¹³⁶ and a court can pierce a trust's spendthrift protection to satisfy the beneficiary's obligations for support of a child, spouse, or former spouse.¹³⁷

Of course, those restrictions remain the exceptions, rather than the rule. Indeed, a decedent remains able to disinherit a child in every United States jurisdiction except Louisiana—and even in that state, a child only has a right against disinheritance in limited circumstances.¹³⁸ In fact, other seeming restrictions on a decedent's intent underscore, rather than undercut, the importance of the donor's intent. For example, omitted spouse and omitted children statutes provide that in certain circumstances, if a testator married or had a child after the will's creation, the will does not control.¹³⁹ Yet these provisions aim to *affect* a decedent's intent; those statutes presume that a decedent would have provided for a spouse or child if he had considered the matter. These statutes are overridden if the testator provided some clear

¹³⁶ The elective share does not seek to effect the testator's intent; to the contrary, the statute overrides the testator's intent in order to prevent disinheritance of the spouse. The operation of the law reflects the desire to prevent fraud. Typically, this "elective" share was a set portion of the estate. For example, in Virginia, the spouse could claim one-third of the augmented estate if the testator left descendants, or one-half of the estate if the testator left no descendants. VA. CODE ANN. § 64.1-16 (West 2010). The elective share under the Uniform Probate Code is a percentage based on a sliding scale pegged to the number of years of marriage. If the marriage has lasted for fifteen or more years, the spouse will receive 50% of the augmented estate. See UNIF. PROBATE CODE § 2-202(a) (1990). But note that each of these laws is based on an "augmented" estate, which includes the testator's probate estate and gifts made to his spouse during life. The principle of an augmented estate reflects the desire to ensure that while the testator cannot defraud his or spouse by giving *less* than the statute requires, the spouse cannot defraud the decedent by taking *more*.

And while each of these laws seeks to prevent disinheritance, the underlying rationale for such a law's operation differs among jurisdictions. Jurisdictions vary on whether the goal should be an equitable distribution of property obtained during marriage or to ensuring support during life for the surviving spouse. The UPC seems to endorse the former, because its sliding scale increases with the duration of the marriage, thereby suggesting that more property has transformed into co-owned property. The traditional position, as taken by Virginia, seems to endorse the latter, because the amount of property does not increase with the duration of the marriage or otherwise depend on whether the property was separate under divorce laws.

¹³⁷ See UNIF. TRUST CODE § 503(b) (2000) (refusing to enforce a spendthrift provision against a child, spouse, or former spouse); see also *id.* § 504(a)(1) (similarly allowing a court to reach a discretionary trust to satisfy a child, spouse, or former spouse).

¹³⁸ See LA. CIV. CODE ANN. § 1621(A) (2004) (providing that a testator cannot disinherit a child under the age of 23, or a child who is disabled, except for "just cause").

¹³⁹ See UNIF. PROBATE CODE §§ 2-301, 2-302 (1990) (providing the omitted spouse and child statutes, respectively).

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indication, in his will or otherwise, that he intended to leave no property to his spouse or to particular children.¹⁴⁰

Some recent changes in the law of trusts and estates have renewed an emphasis on the donor's intent. For example, several states have removed or substantially limited the Rule Against Perpetuities.¹⁴¹ The recent allowance of self-settled asset-protection trusts is a further case in point. Many jurisdictions have long allowed "spendthrift" provisions in trusts, which enable a settlor to establish a trust for the benefit of another individual and to shield that trust from that individual's creditors.¹⁴² In recent years, at least six jurisdictions have allowed a settlor to place his own assets in trust and shield those assets from his *own* creditors.¹⁴³

The relaxation of the Rule Against Perpetuities and the allowance of self-settled asset-protection trusts does not necessarily demonstrate that states are still guided by a desire to effect the settlor's intent. Instead, these laws are aimed more at attracting trust business; the fact that they are pro-settlor might be incidental. This article has already noted that the relaxation of the Rule Against Perpetuities by some states had the effect of increasing trust revenue in those states.¹⁴⁴ The movement to enforce self-settled asset-

¹⁴⁰ As for omitted spouse statutes, *id.* § 2-301 provides that if the testator married a spouse after creating his will, that spouse receives his or her intestate share. Because intestate shares are themselves based on the legislature's best guess of what a testator would have wanted, this provision attempts to effect what the settlor would have intended had he revised his will after the marriage. In fact, if the testator has expressed a contrary intent, then the provision does not apply; the testator can override the omitted spouse statute by contemplating marriage to that spouse in his will, by expressly stating that his will applies despite a subsequent marriage, or by providing a bequest to his spouse outside of the will. *See id.* § 2-301(a)(1)–(3).

As for omitted child statutes, *id.* § 2-302 provides that a child who was born after the will was created gets the greater of his intestate share or the smallest gift to a current child. Again, this provision clearly attempts to approximate the bequest that the testator would have intended to give to the child, had the testator considered the matter. Moreover, this provision does not apply if the testator has expressed a contrary intent; for example, the provision does not apply if the testator left all or substantially all of the estate to that child's parent. *See id.*

¹⁴¹ *See supra* note 27 and accompanying text.

¹⁴² *See, e.g.*, UNIF. TRUST CODE § 502 (2000) (allowing spendthrift provisions in trusts).

¹⁴³ Alaska, Delaware, Nevada, Oklahoma, Rhode Island, and Utah all allow such trusts, although other jurisdictions are moving to allow some form of those trusts. *See generally* DUKEMINIER ET AL., *supra* note 6, at 558–60; Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1043–44 (2000).

¹⁴⁴ *See* Sitkoff & Schanzenbach, *supra* note 27, at 410–12 (studying the effects of the relaxation of the Rule Against Perpetuities on various states' trust industries).

protection trusts is fueled by a similar desire. The first domestic jurisdiction to enforce a self-settled asset-protection trust was Alaska, where a statute was inspired by a discussion of trust attorneys in that state on how to boost the local trust industry.¹⁴⁵ When Delaware passed a law similar to Alaska's, it overtly stated that its goals were to attract trust business and to keep Delaware as a "favored" jurisdiction for trusts.¹⁴⁶

Thus, it would put the cart before the horse to say that the relaxation of the Rule Against Perpetuities and the allowance of self-settled asset-protection trusts was due to a renewed devotion to the settlor's intent in trust law. Instead, these movements were driven by a desire to maintain or increase the local trust industry. Indeed, statutes that enforce self-settled asset-protection trusts have carve-outs which prohibit a settlor from defrauding current creditors, a spouse, and children. In the Cook Islands, which was one foreign jurisdiction that allowed such trusts, the trusts were enforced if the settlor was not a resident of the Cook Islands.¹⁴⁷ These exceptions demonstrate that the enforcement of these trusts did not signal an effort to remove all restrictions on a settlor's intent.

It would therefore go too far to say that the intent of the settlor necessarily guides all facets of the law of trusts and estates, or even that fidelity to the intent of the settlor is fueling current statutory reform in the area. It was only coincidental that such reforms would remove obstacles to effecting the settlor's intent. But the coincidence is not unexpected; after all, it is the settlor who chooses where his trust will be located and which state's laws shall govern his trust.

Yet it remains true that long before the rise of the modern trust industry, and with few exceptions, the law of trusts and estates has been guided by the intent of the donor. For Bruyere and Marino, the law's emphasis on the intent of the settlor highlights the fundamental problem with the courts' refusal to enforce a donative arbitration clause. According to these commentators, the Arizona courts "lost sight of this precept" of the settlor's intent and thus, ironically, "[t]he resulting opinions are manifestly inconsistent with the grantor's intent."¹⁴⁸

Intent Theory can apply to executors and trustees as well as beneficiaries, and thus it has an advantage over Benefit Theory. However, Intent Theory as a vehicle for enforcing arbitration clauses suffers from the same fundamental defect as Benefit Theory. While courts and the Restatements have stated that

¹⁴⁵ See *DUKEMINIER ET AL.*, *supra* note 6, at 559, n.25.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Bruyere & Marino, *supra* note 24, at 363–64; *see also id.* at 363, n.59.

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the donor's intent controls the meaning of the instrument and the rights of the parties, courts have not allowed the instrument to dictate the *remedies* that parties can seek.¹⁴⁹ Additionally, if a court adopted Intent Theory but not Contract Theory, then the donative arbitration clause in question would still fall outside of the protection of the state arbitration statute, and thus it would be disfavored by courts. As a result, Intent Theory suffers from the same limitations as Benefit Theory: if a court found the donative arbitration clause to be an unlawful or unreasonable restriction on beneficiaries, then the court would refuse to enforce it.

D. “No-Contest-in-Court” Provisions Under Current Law

Some commentators have suggested that arbitration provisions can be effectively enforced under current law through a form of the “no-contest” clause,¹⁵⁰ called a “no-contest-in-court” clause.¹⁵¹ This clause would penalize a party who brings an unsuccessful suit in court, but it would allow a party to bring that suit in an alternative forum without fear of consequences.¹⁵² However, the no-contest-in-court clause could not apply to all disputes that arise over a will or trust.

The proposition that a no-contest-in-court clause can substitute for a donative arbitration clause misconceives the reach of a no-contest clause. A typical no-contest clause restricts a party's ability to contest the validity of an instrument, but it does not restrict a party's ability to sue to determine their rights under that instrument, such as the administration or interpretation of that instrument.¹⁵³

As an initial matter, no-contest clauses only apply to all-out challenges to a will, and not merely to disputes over the interpretation and administration of that instrument, such as a beneficiary's dispute with a fiduciary. Will contests themselves may make up a small proportion of overall disputes over wills and trusts. One study found that less than one percent of wills probated

¹⁴⁹ See *supra* note 129.

¹⁵⁰ See *supra* notes 119–21 and accompanying text.

¹⁵¹ Bosques-Hernández, *supra* note 24, at 7–8; see also Blattmachr, *supra* note 115, at 259–60 (laying out variations of this concept and suggesting that a donor might include a no-contest clause but provide that a party might keep his benefits under the will if he submits the dispute to arbitration, or if he first participates in mediation in good faith).

¹⁵² Bosques-Hernández, *supra* note 24, at 7–8.

¹⁵³ See *Womble*, 95 S.E.2d at 219 (stating that the contests prohibited by a no-contest clause depend on the wording of the clause and the facts and circumstances of the case, but that such a clause usually would not prohibit a suit for “construction” of the terms of a will).

were actually contested.¹⁵⁴ Whether one percent is a high or low number is for the reader to decide, but that number does at least indicate the infrequency with which no-contest provisions would apply at all, assuming, of course, that contestants were not already deterred by a no-contest provision.¹⁵⁵ A donative arbitration clause, by contrast, can apply to all disputes over a will or trust, and not only to contests.

Therefore, any species of no-contest clause has a much narrower application than a donative arbitration clause. A donative arbitration clause can apply to all disputes under a will or trust, and not merely those that challenge the validity of the underlying instrument.

Furthermore, in some jurisdictions, a no-contest-in-court clause in a will might have no effect. In states like New York, which require that issues of validity be determined in court, a contest could not take place under arbitration.¹⁵⁶ In those jurisdictions, a no-contest-in-court clause would operate like a no-contest clause. Because court would be the only forum in which the contestant could challenge the will, the contestant could bring a challenge in court and risk forfeiture, or accept his share under the will.

Nevertheless, in those jurisdictions that allow the arbitration of a will contest, a no-contest-in-court clause might provide a useful, though limited alternative that would force certain contests into arbitration. In fact, a no-contest-in-court provision might remove some of the incentives for the trust or will to settle a strike suit.¹⁵⁷ The use of arbitration for these disputes would ensure that any such contests take place behind closed doors. Thus, if it can be enforced, a no-contest-in-court clause may be an option to help a donor protect his trust or estate from certain types of litigation.

E. *Separate Contracts with Each Fiduciary and Beneficiary*

As an alternative, donative arbitration clauses could be made enforceable not through the trust or will *qua* contract, but through a separate contract with those parties that includes an arbitration provision. An arbitration clause in such a document would certainly fall within a state's arbitration statute,

¹⁵⁴ See Schoenblum, *supra* note 7 and accompanying text.

¹⁵⁵ Such a question was beyond the scope of Schoenblum's study, which was admittedly "only a starting point" for the empirical study of will contests. See Schoenblum, *supra* note 7, at 659.

¹⁵⁶ See *supra* Part II.B.2 (discussing the laws of New York, Michigan, and Pennsylvania).

¹⁵⁷ See *supra* notes 9–13 and accompanying text (citing Langbein, *supra* note 9, at 64–66). Recall that contestants might threaten a public hearing over the donor's capacity and eccentricities in order to force a settlement.

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and it would therefore be enforceable.¹⁵⁸ But just as a no-contest-in-court clause could not apply to all disputes, separate contracts with parties might not apply to all beneficiaries and fiduciaries.

Like the no-contest-in-court clause, the use of separate contracts provides a fix under current law to some of the shortcomings of other means to require parties to submit to arbitration. While the use of separate contracts might seem expedient in the short term, this fix loses effect over time, as present beneficiaries pass away (either during the life of the donor or after his death) and new beneficiaries enter the picture. It is unclear whether future beneficiaries can be bound by a contract signed by earlier beneficiaries—even if a personal representative is appointed to look after the concerns of unborn beneficiaries. Moreover, if a trust required that a future beneficiary sign an arbitration clause before his rights might vest, then the Rule Against Perpetuities might invalidate the trust.¹⁵⁹ Thus, while this option may provide an expedient alternative to the uncertainties of arbitration clauses, it falls prey to uncertainty over its enforceability.

Nevertheless, the use of separate contracts might be effectively used to fill gaps left by a court that enforced donative arbitration clauses under Benefit Theory. Recall that under Benefit Theory, a court could enforce a donative arbitration clause as to beneficiaries, but not against fiduciaries.¹⁶⁰ If a court adopted Benefit Theory and enforced arbitration clauses against beneficiaries, a donor in that jurisdiction could fill the gap by providing in

¹⁵⁸ Such a contract would be enforceable under state law. This article has argued in Part III.B that a restriction on a beneficiary's gift might be unlawful if that gift required arbitration. While a requirement that the beneficiary submit the dispute to arbitration without his or her consent may be unlawful, the state statutes that authorize arbitration clauses would enforce any contract that beneficiaries entered into, provided that the contract itself was not unconscionable or illegal for other reasons. *See, e.g.*, UNIF. ARBITRATION ACT § 1 (1956) (providing that an arbitration agreement is enforceable except "upon such grounds as exist at law or in equity for the revocation of any contract"); *see also* Federal Arbitration Act of 1925 § 2, 9 U.S.C. § 2 (2000) (same); UNIF. ARBITRATION ACT § 6 (2000) (maintaining language of other two acts due to widespread usage).

¹⁵⁹ Under the Rule Against Perpetuities, an interest is void if it does not vest or fail within a certain period of time; an interest is vested if it is given to a presently ascertainable person and it is not subject to a condition precedent. If a future beneficiary (even an ascertainable one) would be required to sign a contract before his rights vest, then his interest would be contingent. Thus, the Rule Against Perpetuities might void that interest if it would not vest by a particular date. *See* DUKEMINIER ET AL., *supra* note 6, at 674–75 (summarizing the Rule).

¹⁶⁰ *See supra* Part III.B.

his trust or will that a fiduciary could only serve if he or she signed their own arbitration clause.

F. Critique of Extra-Statutory Means of Enforcing Donative Arbitration Clauses

The theories for enforcing donative arbitration clauses under current law each suffer from a fatal flaw. Contract Theory would bring a donative arbitration clause under the state statute, but the theory is both over- and under-inclusive. If a court were to determine that a trust is a contract, it would be difficult to keep the two bodies of law distinct. Benefit Theory and Intent Theory are neither over- nor under-inclusive, in that these two theories would leave the law of trusts, the law of wills, and the law of contracts distinct, and they would apply with equal force to trusts and to wills.¹⁶¹ But both Benefit Theory and Intent Theory would still leave the donative arbitration clause outside the state arbitration statute, and thus subject to the court's traditional hostility.¹⁶² Of Benefit Theory and Intent Theory, Intent Theory has the advantage that it would apply to trustees and executors, as well as to beneficiaries. Yet both Benefit Theory and Intent Theory are still limited by the fact that the law of trusts and estates only enforces lawful restrictions and provisions.¹⁶³

Finally, no-contest-in-court clauses and the use of separate contracts offer some limited means to require certain parties to submit certain disputes to arbitration.¹⁶⁴ But neither provides a comprehensive means to require *all* beneficiaries and fiduciaries to submit *all* of their disputes to arbitration. The no-contest-in-court clause only applies to full contests of the will or trust, and separate contracts may not apply to future beneficiaries.

Despite the three theories of justifying the enforcement of donative arbitration clauses under current statutory and case law, those courts who have addressed such clauses have adopted the straightforward distinction between a contrast and a will or trust, and those courts have refused to

¹⁶¹ See *supra* Part III.B (discussing Benefit Theory and its application to wills and trusts) and Part III.C (discussing Intent Theory and its application to wills and trusts).

¹⁶² See *supra* Part II.B (arguing that arbitration clauses are not enforceable under current statutory scheme).

¹⁶³ See *supra* notes 115–28 and accompanying text (discussing the restrictions a donor can place on a gift and arguing that arbitration clauses do not fit within such lawful restrictions).

¹⁶⁴ See *supra* Part III.D (discussing no-contest-in-court provisions) and Part III.E (discussing separate contracts with each beneficiary and fiduciary).

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enforce the clauses.¹⁶⁵ As a result, the commentators who propose such justifications acknowledge that a change in statutory law is required to make these clauses enforceable.¹⁶⁶ Bruyere and Marino put it best: “If this ill-advised distinction [between a trust and a contract] continues to be the majority approach, a substantive change in the law is necessary to ensure judicial enforcement of arbitration clauses in trust agreements.”¹⁶⁷

Furthermore, the present discussion has demonstrated that even if a court were inclined to enforce a donative arbitration clause under current law, such a judicial move may not be advisable. This discussion of these theories has brought to light the shortcomings of each of these approaches. Each of Contract Theory, Benefit Theory, and Intent Theory paints with too broad a brush. Contract Theory would threaten to swallow all of trust law within contract law, whereas several distinctions still exist between the two bodies of law that may be worth preserving.¹⁶⁸ Meanwhile, Benefit Theory and Intent Theory give the donor too much power in determining not only the rights of the parties, but what remedies those parties have in the event of a violation of their rights.

Thus, these proposals and justifications for means of enforcing donative arbitration clauses under current law only highlight the fact that their enforcement entails the balancing of competing concerns, not the least of which is the balancing of the intent of the donor against the rights and remedies of the beneficiaries. Instead of pushing courts to adopt these theories, then, a better means to properly enforce these clauses would be to act legislatively, through a statutory amendment. This response could be tailored to fit certain facets as they exist within a given jurisdiction, such as the goals of alternative dispute resolution, the goals of trusts and estate law, and the intent and interests of all of the parties involved. Some jurisdictions have even attempted to amend their statutes. It is to these legislative proposals that this article now turns.

¹⁶⁵ See *supra* notes 63–79 and accompanying text.

¹⁶⁶ See *e.g.*, Bruyere & Marino, *supra* note 24, at 361; Bosques-Hernández, *supra* note 24, at 17.

¹⁶⁷ Bruyere & Marino, *supra* note 24, at 361; see also DUKEMINIER ET AL., *supra* note 6, at 543 (discussing *Schoneberger* and developments in this area of the law). Dukeminier and his co-authors argued that “in view of the growing support for arbitration, it seems unlikely that *Schoneberger* will be the last word on the enforcement of a mandatory arbitration clause in a trust.” *Id.* To this statement, Bosques-Hernández replied, “I cannot agree more.” Bosques-Hernández, *supra* note 24, at 17.

¹⁶⁸ See *supra* notes 111–13 and accompanying text.

IV. RECENT STATUTORY REFORM EFFORTS TO ENFORCE DONATIVE ARBITRATION CLAUSES

Thus far, this article has argued that donative arbitration clauses may only be properly enforced through statutory amendment. This article now seeks to discuss how one might pass a statute that would enforce donative arbitration clauses, and what such a statute would look like. This discussion need not take place in a vacuum. Within the past five years, the legislatures of Florida and Arizona each passed a statute that enforces donative arbitration clauses.¹⁶⁹ This legislation was in part because of the attention paid the issue by a task force of the American College of Trust and Estate Counsel.¹⁷⁰ Nor are Florida and Arizona entirely alone; an earlier provision was attempted, but failed, in Hawaii.¹⁷¹ A study of this legislation, including the history of each proposal and the views of the policymakers behind it, brings to light the key features of these efforts at statutory reform, and it provides some clues to the circumstances that contributed to their passage or failure.

A. *An Early Attempt in Hawaii (2005)*

In 2005, a state senator in Hawaii introduced the Probate Mediation and Choice Act—the first bill in the United States that attempted to make a donative arbitration clause enforceable.¹⁷² But the bill was never submitted to committee, and it thus expired, per Hawaii law, two years later.¹⁷³ The bill would have specifically made arbitration and mediation clauses in wills and trusts enforceable. It provided in pertinent part,

(a) An arbitration clause in a will or a trust instrument shall be given the same force and effect as to interested parties as if the clause was an agreement by the interested parties.

¹⁶⁹ See *infra* Part IV.C (discussing legislation in Florida) and Part IV.E (discussing legislation in Arizona).

¹⁷⁰ See *infra* Part IV.B (discussing the Goldman) and Part IV.C (discussing the influence of the Goldman on legislation in Florida).

¹⁷¹ See *infra* Part IV.A (discussing legislation in Hawaii).

¹⁷² Telephone Interview with Daniel Bent, Dispute Resolution and Prevention, Inc. (June 30, 2009).

¹⁷³ *Id.*

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(b) A mediation clause in a will or trust instrument shall be binding upon all interested parties and shall be subject to the mediation rules for probate, trust, and guardianship of the property, if any.¹⁷⁴

As we shall see, later bills in other states would expressly apply only to issues of interpretation, and not to issues of validity; under those later bills, a donor could not force parties to arbitrate issues of validity or capacity.¹⁷⁵ It is unclear whether the bill in Hawaii would have only allowed the arbitration of issues of a will or trust's terms, or whether it would have also allowed arbitration of the validity of the will or trust, or of the capacity of the donor. But the bill was broad in its application. A further subpart of the proposed bill provided that the "interested parties" that are subject to the arbitration or mediation clause included "beneficiaries, heirs, omitted beneficiaries, trustees, successor trustees, personal representatives, successor personal representatives and anyone acting as a duly appointed guardian, attorney-in-fact, or personal representative for any of the foregoing."¹⁷⁶ It seems that a dispute between these parties could be read to include a dispute over the validity of the will, such as a challenge to the capacity of the donor.¹⁷⁷ But the Hawaii courts never had a chance to interpret the statute.

The Hawaii bill was a product of unique circumstances; it was not connected to a broader national discussion or movement. It was developed (and possibly drafted) by Dan Bent, a mediator in Hawaii; Bent could not recall whether he himself actually drafted the proposed legislation.¹⁷⁸ Bent proposed the bill for a simple reason: he plans to live in Hawaii until his death, and he hopes that one day his estate will be able to take advantage of an arbitration or mediation clause.¹⁷⁹ More generally, Senator Suzanna Chun Oakland, a co-sponsor of the bill, explained that the bill might have first come about in Hawaii because the state has a large sector of elderly citizens, including "the highest longevity in the nation and largest growth in our elders

¹⁷⁴ Probate Code Mediation and Arbitration Choice Act, S. 1314, 23d. Leg., Reg. Ses. (Haw. 2005).

¹⁷⁵ See *infra* Part IV.C (discussing the Florida statute) and Part IV.D (discussing the Arizona statute).

¹⁷⁶ Probate Code Mediation and Arbitration Choice Act, S. 1314, 23d. Leg., Reg. Ses. (Haw. 2005).

¹⁷⁷ See *DUKEMINIER ET AL.*, *supra* note 6, at 141–91 (discussing will contests based on lack of mental capacity, undue influence, fraud, and duress).

¹⁷⁸ Interview with Daniel Bent, *supra* note 172.

¹⁷⁹ *Id.*

per capita (growing rate of 300% for 85-year-olds and older).¹⁸⁰ Explained Senator Chun Oakland, “we are trying to be proactive in addressing many aging issues,” including “looking at mediation and less contentious forms of problem solving in the legal system.”¹⁸¹ Despite such general support, the bill lacked a champion who would push it through committee. Even Bent recalls that he did not have the time or energy to support the bill.¹⁸² As a result, the bill failed.¹⁸³ But quite distinct from this proposal in Hawaii, the idea was gathering support on the mainland.

B. *The ACTEC Model Act (2004–2007)*

In 2004, independent of the bill in Hawaii, donative arbitration clauses caught the attention of the American College of Trusts and Estates Counsel (ACTEC), which formed a Task Force to study the issue.¹⁸⁴ The committee was deliberately diverse, both in terms of geography and in terms of practice area within trusts and estates.¹⁸⁵ The report that resulted concluded that statutory change was required to make such clauses enforceable, and that report included a “Model Act” that could be adopted by state legislatures.¹⁸⁶

The ACTEC Model Act contained two sections relevant to the discussion here. First, the act made enforceable a donative arbitration clause. The Act provided:

A provision in a will or trust requiring the arbitration of disputes between or among the beneficiaries, a fiduciary under the will or trust, or any combination of them, is enforceable.¹⁸⁷

¹⁸⁰ E-mail from Alisha Leisek, Office of Senator Suzanne Chun Oakland (June 26, 2009) (on file with author).

¹⁸¹ *Id.*

¹⁸² Interview with Daniel Bent, *supra* note 172.

¹⁸³ *Id.*

¹⁸⁴ See Goldman, *supra* note 24, at 1–3; see also Telephone Interview with Robert Goldman, Chair of ACTEC Task Force on Arbitration (July 24, 2009).

¹⁸⁵ The Task Force had members from California, Florida, Minnesota, Oklahoma, Pennsylvania, and Texas. Goldman, *supra* note 24, at 2–3. According to the chair of the Task Force, Bob Goldman, the attorneys also represented a broad array of practice areas within trusts and estates. Interview with Robert Goldman, *supra* note 184.

¹⁸⁶ In general, the Task Force worried that term “arbitration” had negative connotations. Instead, they preferred the term “Simplified Trial Resolution.” Interview with Robert Goldman, *supra* note 184.

¹⁸⁷ Goldman, *supra* note 24, at 13.

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Second, and unlike the Hawaii bill, the ACTEC Model Act specifically provided that the *validity* of a will or trust could not be submitted to arbitration through the arbitration clause.¹⁸⁸

C. The Florida Act (2007)

In 2007, Florida became the first state to enforce donative arbitration clauses by statute.¹⁸⁹ In that year, as part of a bill that updated various probate matters, the legislature passed a statute that was based on the ACTEC Model Act.¹⁹⁰ That the Model Act would gain such traction in Florida was not surprising; Florida's statute was drafted by the Real Property, Probate and Trust Law ("RPPTL") Section of the Florida Bar, and many of the leaders of the RPPTL Section are also members of ACTEC.¹⁹¹ The RPPTL Section had gained the respect of the Florida Legislature, which offered little resistance to the measure.¹⁹² In fact, the legislature had already shown that it was not opposed to arbitration; Florida had earlier adopted a "Voluntary Trial Resolution" system, in which litigants could rent a judge and a trial room and save time—and taxpayer dollars.¹⁹³

Florida's statute reads in full:

A provision in a will or trust requiring the arbitration of disputes, other than disputes of the validity of all or a part of a will or trust, between or among the beneficiaries and a fiduciary under the will or trust, or any combination of such persons or entities, is enforceable.¹⁹⁴

¹⁸⁸ Moreover, the Model Act contained specific procedures to avoid the default procedures of the American Arbitration Association, which the Task Force believed to be too costly and complicated. For example, a challenge of arbitrators' findings would not proceed to a trial court, which usually confirms or vacates arbitration awards under state statutes. Instead, the contest of the award would be heard by an appellate court, which would have more facility at considering appeals while leaving untouched issues of fact or law. *See id.* at 17.

¹⁸⁹ Bruyere & Marino, *supra* note 8, at 22.

¹⁹⁰ Interview with Robert Goldman, *supra* note 184.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* (discussing FLA. STAT. ANN. § 44.104 (2010)).

¹⁹⁴ FLA. STAT. ANN. § 731.401 (2010).

The Florida statute paralleled the Model Act in many ways. Like the ACTEC Model Act, the Florida statute specifically excluded from the arbitrators' jurisdiction disputes over the validity of the will or trust.¹⁹⁵

D. *The Arizona Act (2008)*

Recall that it had been the appellate court of Arizona that first considered—and rejected—an attempt to enforce an arbitration clause in a trust, and it was the reasoning of this court that the appellate court of the District of Columbia found persuasive.¹⁹⁶ But in 2008, Arizona's legislature acted specifically to overturn those cases¹⁹⁷ through a new statute that made certain alternative dispute resolution measures in a trust enforceable. The law now provides:

A trust instrument may provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons or among interested persons with regard to the administration or distribution of the trust.¹⁹⁸

Like the Florida law, the Arizona provision does not allow the arbitration of the validity of the trust instrument itself; that determination must be made by the court, since the Arizona law only provides for the resolution of disputes “with regard to the *administration or distribution* of the trust” (emphasis added).¹⁹⁹

But the Arizona law differs from Florida's in two key respects. First, and most notably, the Arizona law applies only to trusts, and not to wills.²⁰⁰ Second, the Arizona law allows not only provisions that require “arbitration,” but also provisions that require any “reasonable procedures” to resolve disputes.²⁰¹

¹⁹⁵ But the Florida act did stray from the ACTEC recommendations in one key respect. Whereas the ACTEC Task Force would prefer to build on the simplified arbitration procedures laid out in the Model Act, the Florida act instead applied Florida arbitration law, and it thus took a baby step in this regard in order to ensure the bill's passage. Interview with Robert Goldman, *supra* note 184.

¹⁹⁶ *Mary Calomiris*, 894 A.2d at 409, n.3 (citing *Schoneberger*, 96 P.3d at 1083 (Ariz. Ct. App. 2004)).

¹⁹⁷ Les Raatz, *The Arizona Trust Code*, ARIZONA LAW., Jan. 2009, at 22–23.

¹⁹⁸ ARIZ. REV. STAT. ANN. § 14-10205.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

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It is unclear what sorts of procedures can be considered “reasonable” under this language, and the origin of this particular phrasing is similarly unclear.²⁰² Because the statute refers to “mandatory” and “exclusive” means of resolving disputes, arbitration and mediation would certainly be enforceable by the statute under any standard of reasonableness.²⁰³ But one wonders whether a clause could empower a certain individual, such as the *trustee himself*, to resolve disputes, even those involving himself, through an exercise of discretion similar to his empowerment under an exculpatory clause. Under a typical state arbitration statute, an arbitrator cannot be biased in the dispute; but since the Arizona law does not invoke the state’s arbitration statute to govern arbitration clauses in trusts and estates, it is unclear the extent to which those procedures would be, or could be, imported.²⁰⁴ Further, one wonders if a settlor could require that dispute be settled by a coin-flip, which would certainly save time and money, but which may be cavalier with the rights of the parties.

Moreover, it is unclear from which body of law the statute borrows this “reasonable” standard, and how that standard should be applied. Significantly, disputes over what procedures are “reasonable” will take place not on the legislative floor, but rather case by case, in Arizona’s court systems. The statute only allows arbitration of the administration and distribution of the trust, and not the arbitration of the validity of the arbitration clause itself.²⁰⁵ Therefore, disputes over whether a given procedure is “reasonable” will be determined not in arbitration or mediation, but in full litigation, with its attendant cost in time and money.

The circumstances of this bill’s passage might explain why the legislature settled for the broad and ambiguous term “reasonable,” rather than hammering out a list of acceptable procedures or even a more specific standard. The bill was passed not in isolation, but rather as part of an

²⁰² These provisions were drafted by the Arizona Trust Code Sub Committee to the Probate and Trust Section of the Arizona State Bar, which was chaired by James W. Ryan, an Arizona attorney. Two other attorneys involved with the subcommittee suggested that Ryan was the individual who drafted the language of the provision. E-mail from Les Raatz, Chair of the Arizona Trust Code Comment Committee of the Probate and Trust Law Section (August 5, 2009) (on file with author); e-mail from Anthony Ehmann, Member of the Arizona Trust Code Sub Committee to the Probate and Trust Section (August 17, 2009) (on file with author). As of this date, attempts to reach Mr. Ryan for comment have been unsuccessful.

²⁰³ ARIZ. REV. STAT. ANN. § 14-10205.

²⁰⁴ See UNIF. ARB. ACT § 12(2) (1956) (providing that a court may vacate an arbitration award in the event of “evident partiality or corruption in the arbitrators”).

²⁰⁵ ARIZ. REV. STAT. ANN. § 14-10205.

overhaul of the Arizona Trust Code.²⁰⁶ In 2003, Arizona adopted the Uniform Trust Code, which caused such an outcry among the state's attorneys that the Code was repealed before it took effect.²⁰⁷ A committee was given the task of revising the Arizona Trust Code in a more deliberate fashion, and the resulting new Code was passed in 2008.²⁰⁸ Because the arbitration provision was part of such a large statutory structure, the drafters' energy and attention was probably, and justifiably, divided among a number of issues.²⁰⁹ Some additional scrutiny to this provision may have challenged its drafters to adopt more specific language about the permissible procedures of dispute resolution, thereby saving future litigants time and money.

The ambiguity of the bill's language is exacerbated by the time delay between the drafting and effectuation of many trusts, which only take effect upon the death of the settlor.²¹⁰ Thus, the nature of trusts may perpetuate the statutory uncertainty for some time to come. It may be many years before sufficient litigation makes it through the court system for the courts to determine what constitutes "reasonable" procedures for dispute resolution.

E. *Lessons from Hawaii, Florida, and Arizona*

Admittedly, it is difficult to make broad conclusions about the legislative process behind these bills from such a small sample. Nevertheless, the reform efforts in these three states suggest some factors that contribute to a likelihood of success. First, and most obviously, the successful bills in Florida and Arizona were backed and drafted by the state bar association, which was respected and trusted by the legislature. By contrast, the bill in Hawaii was drafted by a lone attorney; although several legislators in Hawaii supported the bill, it lacked a set of prime supporters who could champion the bill through its passage. Meanwhile, the bills in Florida and Arizona

²⁰⁶ Les Raatz, *supra* note 196.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See BILL SUMMARY, H.R., 2806, 48th Leg., 2008 Reg. Sess. (Ariz. 2008) (not discussing this provision at length, but merely mentioning that "[s]ome new additions" to the Code include "[p]ermitting trust disputes to be settled by arbitration if the settlers require it").

²¹⁰ Whether a trust is created during life or upon death, the trust's provisions often provide a benefit to the settlor during life and pass to the beneficiaries upon death. Thus, a donative arbitration clause contained in such an instrument would only become relevant upon the settlor's death. See *DUKEMINIER ET AL.*, *supra* note 6, at 489–96 (discussing the parties to a trust and their interests).

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could count on the state bar association not only to draft the bill, but to advocate for the legislation in committee.

Second, the Arizona and Florida bills were included in larger bills that updated that state's trust and estate code. This arrangement may have shielded the specific arbitration provision from any controversy it may have caused on its own. Yet in Arizona, this lack of scrutiny may have ultimately worked to the detriment of the legislation: Arizona's allowance of "reasonable" dispute resolution procedures is surely broad enough to cover existing methods of dispute resolution, but such a loose definition will lead to litigation in the future.

But perhaps most importantly, each of these three states has a large and growing population of the elderly; meanwhile, other states have not seen the introduction of such a bill—even those states which were represented in the membership of the ACTEC Task Force on the issue.²¹¹ Therefore, it seems most likely that a state with a growing population of the elderly, combined with a strong and influential trusts and estates bar willing to back the measure, will prove to be the most fertile ground for statutory reform efforts.

Finally, some commentators have suggested that this type of statute should be passed not on its own, but rather as a piece of a statute promulgated as part of a revision to the Uniform Arbitration Act, Uniform Trust Code, or Uniform Probate Code.²¹² The advantages and disadvantages of these options are discussed in more detail below.²¹³ But suffice it to say here that the movement to enforce donative arbitration clauses has had the most traction in some states with a growing population of the elderly.²¹⁴ The absence of such proposals in other states should give pause to advocates who might suggest that such a reform would find ready champions in other states.

²¹¹ When interviewed by the author, the ACTEC Task Force members from California, Minnesota, Pennsylvania, and Texas were not aware of a bill to this effect in their home states. E-mail from John T. Rogers, Jr. (from California), Member of the ACTEC Task Force on Arbitration (August 4, 2009) (on file with author); e-mail from Bridget Logstrom (from Minnesota), Member of the ACTEC Task Force on Arbitration (August 4, 2009) (on file with author); e-mail from Margaret Sager (from Pennsylvania), Member of the ACTEC Task Force on Arbitration (August 10, 2009) (on file with author); e-mail from Sharon Gardner (from Texas), Member of the ACTEC Task Force on Arbitration (August 4, 2009) (on file with author).

²¹² For example, ACTEC Task Force member Bruce Stone proposed that the "impetus" should come from the Commissioners on Uniform State Laws, who could insert provisions in the Uniform Trust Code and Uniform Probate Code. E-mail from Bruce M. Stone (August 15, 2009) (on file with author).

²¹³ See *infra* Part V.E.

²¹⁴ The legislation was considered in Hawaii, Florida, and Arizona, each of which has a large population of elderly citizens. See *supra* Part IV.A, C–D.

V. DIFFERENT STROKES FOR DIFFERENT FOLKS; OR, CONTEXTUALIZING ENFORCEABLE DONATIVE ARBITRATION CLAUSES: KEY DISTINCTIONS FOR AN ANALYTICAL FRAMEWORK

Thus far, those who favor enforceable ADR provisions in wills and trusts have painted with a broad brush. The proposals by legislators to enforce ADR provisions treat all ADR the same, no matter the context.²¹⁵ Further, the proposals by commentators to enforce those provisions under current law treat those clauses as an all-or-nothing game: the proposals would view all such clauses as either enforceable, or as null and void.²¹⁶

This generalized approach has been either by necessity, design, or expedience. The proposals to allow courts to enforce these clauses under current law have been so sweeping by necessity. For example, the proponents of Contract Theory have suggested that arbitration clauses in trusts be made enforceable by common-law judges, who could equate trusts with contracts. Yet such a move would leave such provisions in wills unenforceable. Similarly, Benefit Theory could not compel fiduciaries to submit to arbitration.

Yet even when legislators have an opportunity to craft a bill to target specific issues, the resulting statutes have seemingly paid little more attention to the differences between different forms of ADR and the different roles that ADR can play in various disputes about a trust or estate.²¹⁷

This article takes a different tack. It proposes that jurisdictions not only consider a statute that would enforce all ADR clauses in trusts and wills, but also that they take a closer look at the goals they seek to attain and develop a response that is properly tailored to those goals. Pursuant to this more deliberate approach to such statutes, this section will critique both current statutory and extra-statutory proposals, by suggesting several useful distinctions that will help individual jurisdictions and donors evaluate the goals they seek through the enforcement of these clauses, and determine the best means of obtaining their stated objectives.

²¹⁵ The legislation in Hawaii, Florida, and Arizona to enforce donative arbitration clauses would have enforced arbitration or mediation clauses; indeed, the legislation in Arizona enforces any “reasonable” means of mandatory dispute resolution. *See supra* Part IV.A, C–D.

²¹⁶ *See supra* Part III.A–C (discussing Contract Theory, Benefit Theory, and Intent Theory as a means of requiring a court to enforce an ADR provision in a will or trust).

²¹⁷ *See supra* Part IV.A, C–D.

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A. *Different Forms of ADR for Different Goals: Arbitration versus Mediation*

As discussed above, arbitration and mediation can save parties time and money, reduce conflict, and allow for privacy.²¹⁸ But in each case, a donor might rank these goals in different priority—and that rank might change over the life of a trust. While all forms of ADR have certain benefits when compared to litigation, arbitration and mediation each realize different benefits when compared to one another.²¹⁹

Yet neither commentators nor legislators seem to have paid much attention to these subtle distinctions within ADR. The Arizona statute refers to “reasonable” means to resolve disputes in trusts only.²²⁰ The proposed bill in Hawaii specifically made arbitration and mediation clauses enforceable.²²¹ Meanwhile, Florida focused on “binding arbitration” as the default.²²² Yet each of these avenues privileges certain goals of ADR over others. If these distinctions are considered, they might lead a jurisdiction to enforce one form of ADR, but not another.

First and foremost, then, this article will establish some subtle differences between an enforceable *arbitration* clause and an enforceable *mediation* clause. Arbitration saves time and money, by submitting the dispute to a binding decisionmaker outside of the lengthy judicial process.²²³ Florida certainly had arbitration in mind when it adopted its version of the ACTEC Model Act; this is not surprising, given that Florida had already enacted a system of Voluntary Trial Resolution, in which parties could conduct trials using state courtrooms and judges, but on their own schedule.²²⁴ But while arbitration saves time and money, it is still adversarial in nature, and thus it may not reduce conflict as effectively as mediation may. In fact, arbitration awards can potentially lead to an *increase* in lingering conflict between parties, since the discretion given to arbitrators, and the lack

²¹⁸ See *supra* notes 34–38 and accompanying text (discussing the benefits of ADR in the context of disputes over wills and trusts).

²¹⁹ See *infra* notes 222–29 and accompanying text.

²²⁰ ARIZ. REV. STAT. ANN. § 14-10205.

²²¹ Probate Code Mediation and Arbitration Choice Act, S. 1314, 23d. Leg., Reg. Ses. (Haw. 2005).

²²² FLA. STAT. ANN. § 731.401 (2010)(b) (“Unless otherwise specified in the will or trust, a will or trust provision requiring arbitration shall be presumed to require binding arbitration.”).

²²³ See *supra* note 31 and accompanying text.

²²⁴ See FLA. STAT. ANN. § 44.104 (2010).

of meaningful judicial review of arbitral awards, may lead the losing party to feel that his rights were violated. This is hardly a recipe for harmony at the family picnic.

If one's primary goal is to reduce conflict, rather than to save time and money, mediation would be the best method. Mediation brings the parties together in the hopes that they might reach a voluntary compromise.²²⁵ This process can be especially helpful to resolve conflicts when more than mere money is at stake, because mediators can put together creative resolutions that take the parties' values and feelings into account—such as providing for a resolution in which one party issues an apology to the other side.²²⁶

Hawaii's bill would have made both arbitration and mediation clauses enforceable.²²⁷ Dan Bent, the developer of that bill and a mediator himself, had the aforementioned benefits of mediation in mind.²²⁸ And more generally, Hawaii already favors mediation. Rule 2.1 of the Hawaii Probate Code authorizes the court to require mediation; yet Bent found that an enforceable mediation clause would be even better at heading off conflicts than waiting for a lawsuit or a court order.²²⁹ Bent explained that, by the time a court is sufficiently involved to order mediation, "the litigation gears are engaged and . . . much of the damage to the family may already have been done."²³⁰ Yet although mediation may be better at preventing conflict if it is successful, if unsuccessful, mediation is a waste of time and money.

Thus arbitration and mediation serve very different policy goals: arbitration can effectively save parties—and taxpayers—time and money; mediation, by contrast, may waste time and money, but it seeks to reduce conflict and promote harmony between the parties. In drafting future bills on ADR provisions, the legislative drafter would do well to consider what particular goals of ADR his state sees as most important. One might imagine jurisdictions in which policymakers would enforce only arbitration clauses; enforce only mediation clauses; or allow donors to choose between the two. Similarly, if a statute allows both arbitration and mediation, then a donor

²²⁵ See *supra* note 30 and accompanying text.

²²⁶ Roselyn L. Friedman, *Using Mediation to Stem the Tide of Litigation in the Ocean of Family Wealth Transfers*, 59 DISP. RESOL. J. 36, 38 (2004).

²²⁷ Probate Code Mediation and Arbitration Choice Act, S. 1314, 23d. Leg., Reg. Ses. (Haw. 2005).

²²⁸ Interview with Daniel Bent, *supra* note 172.

²²⁹ *Id.*

²³⁰ Daniel Bent, *My Bequest to My Heirs: Years of Contentious, Family Splitting Litigation...*, 8 HAW. B. J. 28 (2004).

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should consider whether arbitration or mediation would best suit his needs under foreseeable circumstances.

B. Different Goals of ADR in Different Contexts: Wills versus Trusts

A second important distinction to make in this discussion is the particular benefit that ADR provides in resolving a dispute under a will versus under a trust. Statutory and extra-statutory efforts to enforce arbitration clauses have often advocated positions that would apply differently to wills and trusts. The Arizona statute, and Contract Theory advocated by Marino and Bruyere, apply only to trusts.²³¹ Again, this preference seems more a matter of necessity than design; the Arizona legislation began in 2003 as an attempt to revise its trust code, and Contract Theory was based on shifts in contract and trust law.²³² By contrast, the legislation in Florida and Hawaii, and Benefit Theory and Intent Theory, would apply equally to a will or a trust.²³³

Yet there is good reason to consider applying ADR differently, if at all, to wills and trusts. Distinctions between a will and a trust mean that those clauses can grant different powers to the settlor and to the testator. In particular, the concern of “dead hand control” by one party is much more pronounced in a trust than in a will,²³⁴ because of the potential long life of a trust. Trusts can last for generations—and even longer, in jurisdictions that have significantly relaxed the Rule Against Perpetuities.²³⁵ If a settlor inserts an arbitration provision in his trust instrument, then the settlor can control for generations not only the rights of the interested parties, but also the means by which they can settle their disputes.²³⁶

²³¹ See *supra* Part III.A (discussing Contract Theory and its application to trusts) and Part IV.D (discussing the Arizona statute, passed as part of Arizona’s reformation of its Trust Code).

²³² See *supra* Part III.A (discussing the basis for Contract Theory) and Part IV.D (discussing the Arizona statute, passed as part of Arizona’s reformation of its Trust Code).

²³³ See *supra* Part IV.A (discussing the Hawaii bill); Part IV.C (discussing the Florida statute); Part III.B (discussing Benefit Theory and its application to wills and trusts); and Part III.C (discussing Intent Theory and its application to wills and trusts).

²³⁴ See MERRILL & SMITH, *supra* note 49, at 619–20 (discussing the problems with “dead hand control”).

²³⁵ Dukeminier & Krier, *supra* note 26, at 1311–19 (discussing the potential for a long-lived trust under current statutory revisions).

²³⁶ See *supra* notes 115–25 and accompanying text (discussing a donor’s potential to determine the rights of beneficiaries under current law and to determine the remedies of beneficiaries through a donative arbitration clause).

The control of a long-past settlor can be especially problematic in future generations, when those ADR clauses serve different goals than he originally intended. Take, for example, the often competing concerns of saving time and money versus avoiding conflict. We have already seen that arbitration and mediation might serve each goal in different ways.²³⁷ Yet those goals might also change over time. First, as for the goal of saving money, a settlor might find that saving money is of prominence or of little importance at inception, but that this goal lessens or grows in importance over the life of the trust. In a trust whose assets have been largely dispersed, the goal of saving money would serve the settlor's purpose of ensuring that the money goes to the beneficiaries—and not to their lawyers. Alternatively, in a trust whose corpus has grown considerably over time, the settlor might have preferred to expend some money in legal fees in order to ensure that his wishes were properly carried out—rather than saving money by letting an arbitrator settle the dispute in a rough fashion.

Second, as for the goal of conflict resolution, under certain circumstances a settlor might have placed less emphasis on family harmony in later generations than earlier generations. Over time, divergent branches of the family may already treat each other at arm's length. Then again, the conflict resolution aspect of ADR may serve an additionally important role in those families; because those family branches do not begin with an incentive to resolve their disputes without conflict, those disputes might rage all the more fiercely. But in either scenario, the goal of conflict resolution may rise and fall over time, depending on existing family dynamics.

A will, by contrast, is designed to settle matters and distribute assets more quickly.²³⁸ Thus, in a will, ADR would seem to protect against more immediate damage: saving time, saving money (relative to the amount of the estate), preventing conflict, and safeguarding privacy. Nevertheless, some aspects of wills may endure. For example, a condition placed on a gift, such as the use of property as long as it is used by a charity for a particular purpose, may lead to disputes over whether a given use serves that purpose.

With these long-term consequences of trusts in mind, the drafter of a statute or an ADR provision should consider limiting the ADR provisions of a trust to a certain length of time, or building into the trust code some way of overriding the settlor's stated intention over time or if circumstances have changed, or limiting the ADR provision to only bind members of certain

²³⁷ See *supra* Part V.A.

²³⁸ See *DUKEMINIER ET AL.*, *supra* note 6, at 36 (summarizing estate administration and stating that “[t]he personal representative of an estate is expected to complete the administration and distribute the assets as promptly as possible”).

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generations. Those limitations would ensure that the ADR provisions apply to foreseeable problems with trust administration, and would also ensure that the settlor is able to put the ADR procedures in place based on his specific intent for the foreseeable future.

C. Disputes over Capacity versus Disputes over Interpretation, Administration, and Distribution

The ACTEC Model Act and the bills of Florida and Arizona share one prominent feature: they only enforce ADR provisions over the administration and distribution of the assets, and they require that disputes over the *validity* of the instrument be settled in court, through traditional litigation.²³⁹ Notably, some states have already reserved to their courts—whether by constitution or statute—jurisdiction over disputes regarding the validity of a will or trust and regarding the capacity of a donor.²⁴⁰

Despite the agreement of these states that the validity of the instrument should not be submitted to arbitration, the goals of arbitration would suggest that such disputes are a prime candidate for arbitration. Contests over a will or trust often center on the capacity of the donor, or on claims of undue influence by one beneficiary.²⁴¹ Those disputes can bring to light embarrassing and insulting episodes in the life of the donor, or might fixate on the testator's odd behavior.²⁴² Even if allegations of undue influence and lack of capacity are ultimately rejected by a court, such damage is permanent. Moreover, those disputes often drag on for a long period of time.²⁴³ But even assuming *arguendo* that these disputes could be resolved relatively quickly in a courtroom, the additional goals of conflict-resolution and privacy seem to necessitate a means to resolve those disputes outside of the public, adversarial judicial setting.

²³⁹ Goldman, *supra* note 24, at 13; FLA. STAT. ANN. § 731.401 (2010); ARIZ. REV. STAT. ANN. § 14-10205.

²⁴⁰ See *supra* Part II.B.2 (discussing the laws of New York, Michigan, and Pennsylvania).

²⁴¹ See DUKEMINIER ET AL., *supra* note 6, at 141–91 (discussing will contests based on lack of mental capacity, undue influence, fraud, and duress).

²⁴² See e.g., *In re Estate of Wright*, 60 P.2d 434, 436 (Cal. Ct. 1936) (reviewing the evidence from a challenge to a testator's capacity, and stating of the testator that "on one or more occasions he ran out of the house only partly dressed and they had to follow him and had difficulty in getting him back to bed; ... that he picked up paper flowers from the garbage cans, and waste, and pinned them on his rose bushes in his yard and took the witness to look at his roses").

²⁴³ See *supra* notes 1–5 and 14–16 and accompanying text.

Thus, because the statutes in Arizona and Florida do not allow arbitration of the validity of the instrument and the capacity of the individual, such arbitration clauses lose a significant part of their potential benefit. Indeed, it seems that a clause that provides for arbitration of these questions would be attractive to donors because through such clauses they could ensure that disagreements over their mental capacity be discussed out of the public eye. Nevertheless, in order for such a clause to be enforceable, a state would first need to pass a statute enabling such a clause, and to dodge the potential constitutional questions posed by such state constitutions as New York's.²⁴⁴

Yet the privacy of arbitration has a negative side that might lead legislators to keep issues of capacity in court. Many contests over capacity focus not on mental acuity, but on the extent to which an eccentric or alternative lifestyle reflects on an individual's testamentary capacity, or whether it reveals an insane delusion or undue influence. For example, one court in 1947 struck down a testator's bequest to the National Women's Party.²⁴⁵ The court held that the bequest was a product of an insane delusion; the court found that the gift resulted from the testator's "insanity" and "paranoic" attempt to expose men as not necessarily protectors of women's rights and interests.²⁴⁶ And in 1964, another court struck down a bequest to the male testator's younger male partner, concluding that the gift was a result of an "unnatural, insidious influence."²⁴⁷ Of course, one might hope that current judges and juries would not strike down a gift to an alternative political movement or to a homosexual partner, and later cases have upheld similar gifts.²⁴⁸ Yet it would seem that the possibility of injustice is least if those disputes are resolved in the open and with an appellate structure and with the benefit of developing precedent, as opposed to behind closed doors.

Then again, these cases in which alternative or eccentric testators had their bequests struck down might cut in the other direction, and one might similarly argue that those decisions about an alternative lifestyle should not be decided by a court or a jury, which is more likely to reflect majoritarian values because it is drawn from the general public. Professor Gary Spitko has suggested that a donor should be free to choose to have his lifestyle evaluated

²⁴⁴ See *supra* Part II.B.2 (discussing constitutional and statutory obstacles to passing a statute that would enforce donative arbitration clauses).

²⁴⁵ *In re Strittmater*, 53 A.2d 205, 205 (N.J. 1947).

²⁴⁶ *Id.* (affirming those findings by the trial court).

²⁴⁷ *In re Kaufman's Will*, 247 N.Y.S.2d 664, 684 (App. Div. 1964), *aff'd*, 205 N.E.2d 864 (N.Y. 1965).

²⁴⁸ See *e.g.*, *Estate of Sarabia*, 270 Cal. Rptr. 560 (Cal. App. 1990) (finding no undue influence). See generally *DUKEMINIER ET AL.*, *supra* note 6, at 174-76.

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by a particular arbitrator who is neutral to the dispute but who is not necessarily hostile to a given minoritarian culture.²⁴⁹

Yet ultimately, Spitko's position, that donors should be free to choose a minoritarian arbitrator only serves to qualify the argument in favor of having those disputes held in open court. If held in open court, those disputes have the benefit of publicity and precedent. If such bequests are upheld, then future donors might have the benefit of more confidence that their bequests will be honored—indeed, such cases might also keep individuals with minoritarian views from feeling as if they are beyond even the protection of the courts. Yet if this is the purpose of holding such hearings on capacity in public, then it is based not on the benefit to the donor in question, but instead on a more general public policy favoring the building of precedent for the benefit of *future* donors. Such a public policy decision should be left to the legislature.

Even assuming the need for a public hearing on alternative lifestyles is a compelling reason to keep those disputes in the courtroom, that argument does not necessarily lead one to require *all* disputes over capacity to be litigated. Instead, an individual with an alternative lifestyle, or who expects such conflicts, might be better served by opting not to include an arbitration provision in the first place. Meanwhile, the legislature can allow for arbitration of these disputes and leave it to individual donors to decide if their capacity should be determined in public, with the benefit of appeals, or in private, where their eccentricities will not be paraded before the press and the public.

D. Reaching Beyond the Enforceability of Donative Arbitration Clauses: Enforcing Arbitration Clauses Versus Enabling the Court to Order Arbitration

Empowering the donor to require arbitration certainly has its merits—as Intent Theory emphasizes, trusts and estates law still uses the donor's intent as its benchmark.²⁵⁰ Yet a public policy favoring arbitration might be best served not by waiting on the donor to order arbitration, but by empowering a judge to order arbitration—whether or not the donor required it.

Many jurisdictions already empower their judiciary to make liberal use of ADR. The state of Washington, for one, empowers the court to order

²⁴⁹ See Spitko, *supra* note 18, at 294–97.

²⁵⁰ See *supra* notes 130–32 and accompanying text.

arbitration.²⁵¹ After the court orders arbitration, a party can object within twenty days.²⁵² However, even if a party objects, the court will only reject arbitration for good cause.²⁵³ Note that under the Washington statute a donative arbitration clause would not be dispositive for requiring the parties to submit to arbitration—but neither would it be irrelevant. Instead, the court could take such a clause into consideration when determining whether to order arbitration or to deny it. Similarly, several states have policies empowering their judiciary to make use of mediation. Washington requires that mediation be exhausted or deemed unnecessary before allowing arbitration.²⁵⁴ In Hawaii, Michigan, and New Jersey, the court is empowered to require mediation,²⁵⁵ and several other jurisdictions specifically require mediation of probate disputes.²⁵⁶

Empowering a court to order arbitration or mediation, or to refuse to order them, seems to offer a ready solution to excessive “dead hand control” after circumstances have changed. Yet in the face of a provision that requires arbitration—or perhaps more interestingly, a provision that prohibits it—the discretion of the court may seem to butt against the preference for the intent of the donor. One might imagine that the court would generally honor the preference of the donor; yet even allowing the court this discretion is both assuring and troubling. Legislatures should consider this alternative carefully before blindly concluding that their interest in arbitration provisions is best served by *requiring* the enforcement of donative arbitration clauses. Those interests may be better served by granting the court the ability to expand or restrict the operation of those clauses.

E. Differing Avenues of Statutory Change: Individual State Statutes Versus Action by the Commissioners on Uniform State Laws

This part of the article has laid out various distinctions—between arbitration and mediation, between wills and trusts, between disputes over

²⁵¹ Trust and Estates Dispute Resolution Act, WASH. REV. CODE ANN. § 11.96A.260 to 11.96A.360 (2009).

²⁵² WASH. REV. CODE ANN. § 11.96A.310(3).

²⁵³ *Id.*

²⁵⁴ WASH. REV. CODE ANN. § 11.96A.310(1)(a)–(b).

²⁵⁵ See HAW. PROB. R. 2.1; MICH. PROB. R. 5.143; N.J.R. 1:40-6(A).

²⁵⁶ Los Angeles County requires mediation of estates, trusts, and conservatorships. See Los Angeles Super. Ct. Rule 12.12-13 (2010). See generally Steven K. Mignogna, *Mediation on the Rise: As Estate Disputes Increase, the Use of Mediation and Arbitration Will Become More Frequent*, 187 N.J. L.J. 416 (2007).

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capacity and disputes over administration, and between empowering the donor to require arbitration and empowering the court to order arbitration. These distinctions would help a legislature tailor arbitration laws to best serve its particular needs.

But this article should therefore address one more distinction: whether laws enforcing donative arbitration clauses should be left to develop state-by-state, or should proceed by a single model statute promulgated by the Commissioners on Uniform State Laws, such as the Uniform Arbitration Act, the Uniform Probate Code, or the Uniform Trust Code. Given this article's preoccupation with the various concerns that must be taken into consideration in drafting a given statute, it is unsurprising that the author here advocates a state-by-state, piecemeal approach. Under such an approach, different states can adopt specific policies that serve their needs—and, further, different states can serve as “laboratories” of innovation to test these policies against one another.²⁵⁷

Just as it would be over- and under-inclusive to enforce an arbitration clause in a trust by calling a trust a contract, so too if one were to adopt one overarching regime for donative arbitration clauses, one would miss the opportunity to tailor a regime to fit the needs and judgments of a given jurisdiction. Those judgments are many. They involve the goals of ADR provisions, and whether a statute should focus more on saving time and money or on resolving conflicts. Those judgments also involve questions of which actors are more trustworthy to effect what the donor would have wanted, and to best serve public policy goals. But more specifically, in considering how best to frame a statute for a particular jurisdiction, those judgments involve questions of which members of the government are better-suited to decide which regime is best: the legislature, which may carve out rules governing this process, or judges, who may exercise discretion on a case-by-case basis, but who might sacrifice the intent of the donor in doing so. Because ADR clauses in wills and trusts stand at the intersection of so many judgments over the proper goals of ADR and the proper decision-makers in that process, this fledgling movement is best left to develop, if at all, under the oversight of the individual states.

²⁵⁷ The idea of states as laboratories for experimentation in legislation was most famously expressed by Justice Louis D. Brandeis in 1932. *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

VI. CONCLUSION AND RECOMMENDATIONS

This discussion has largely served to guide legislators, courts, and parties through the various issues at play in enforcing donative arbitration clauses. Overall, the extra-statutory proposals to enforce those clauses were not sufficient to enable a court to enforce them under current law, but the reasoning of those proposals still informs this debate. Contract Theory emphasized that there is little reason to apply a different set of rules for contracts than for trusts and estates, and thus removed at least one conceptual barrier to the enforcement of arbitration clauses in those instruments. Benefit Theory and Intent Theory emphasized the intent of the donor and his ability to condition gifts on any number of requirements, such as a no-contest clause or exculpatory clause. And given that much litigation over trusts and estates uses significant portions of the donor's own assets, there seems no reason to stand in the donor's way in requiring arbitration. And to the extent that such proposals might be insufficient to enforce a donative arbitration clause, separate contracts with ascertainable beneficiaries would enable a rough means of enforcing those clauses, at least with those beneficiaries.

This article can offer two broad recommendations for a framework of a state's arbitration law on the subject. First, legislatures should be careful to empower the donor to require arbitration in all cases for the life of the trust or will, even if circumstances later change, and even if a given dispute is not foreseen by the donor. States can decide for themselves *who* should have the final say on that invocation—whether it be the court or the donor—and what sorts of overrides should be in place, if any. Concerns over dead-hand control of dynastic trusts weigh in favor of court supervision, which would provide some check on a donor's requirement of arbitration, and provide a safety value if circumstances change beyond what a donor originally intended. Nevertheless, even if the court will determine whether to require arbitration, it would be consistent with trusts and estates law to give some deference to the donor's intent. That is, if the donor included a donative arbitration clause, the court should employ a rebuttable presumption that the donor intended the matter to be resolved by arbitration, unless the court can determine by clear and convincing evidence that he would not have desired arbitration in a given scenario. Indeed, it would be most efficient to allow the arbitrators to determine the donor's intent on this issue, to avoid another lengthy court battle.

Second, states should consider allowing arbitration or mediation not only for disputes over interpretations of an instrument or the management of a trust or estate, but also for disputes over the validity of a trust or will. Disputes over testamentary capacity and undue influence are prime

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candidates for arbitration or mediation: they are long, costly, and public disputes over volatile issues. Yet these disputes can often be resolved quickly with minimal discovery, without hampering the fact-finding process.

In the meantime, trusts and estates attorneys would do well to advise their clients on the benefits of arbitration and mediation, and to include provisions in their will or trust that would take advantage of such statutes, should they be passed in the future. Those provisions might include precatory language that would encourage parties—and the court—to refer the matter to mediation or arbitration, or full-blown language that requires arbitration, with possible limits on the circumstances and time periods during which that clause would be effective.

Disputes over trusts and estates are inevitable. But with the enactment of a framework that enforces arbitration or mediation clauses in wills and trusts, state legislatures can minimize the time, cost, publicity, and acrimony caused by those disputes. Yet in passing such a statute, legislators must make other, smaller decisions about who should decide whether the dispute proceeds to arbitration and what disputes can be addressed through this process. But if a legislature moves deliberately on these issues, it can develop a framework for arbitration of trusts and estates that reflects its decisions about the value of arbitration, and about the proper roles of the courts, settlors, testators, and parties in resolving their disputes.

