

# THE WILL AS AN IMPLIED UNILATERAL ARBITRATION CONTRACT

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## Abstract

A consensus has begun to develop in the case law, the academic commentary, and the statutory reform movement that a testator's provision in her will mandating arbitration of any challenge to the will should not be enforceable against a beneficiary who has not agreed to the arbitration provision, at least where the will contestant, by his contest, seeks to increase his inheritance outside the will. Grounding this consensus is the widespread understanding that a will is not a contract. This Article seeks to challenge both the understanding that a will is not a contract and the opposition to enforcement of testator-compelled arbitration provisions that arises from that understanding.

This Article argues that a will is part of an implied unilateral contract between the testator and the state in which the state offers to honor the testator's donative intent, and the testator accepts and provides consideration for the offer by creating and preserving wealth. Importantly, the greater contract respecting donative freedom of which the will is a part also includes a provision for the distribution of an individual's intestate property in line with that individual's imputed intent should the individual fail to execute an effective estate plan. Similar to a testator, a property owner who has failed to make an effective estate plan accepts this offer of intestate distribution through her industry and thrift. This Article's theory borrows from the law respecting implied unilateral contracts arising from employee handbooks in concluding that it should be of no moment that the property owner is unfamiliar with the specifics of the state probate code. Rather, the critical factor should be that the state has, through its offer to respect donative intent, created an atmosphere that is "instinct with an obligation" and that encourages diligence and the prudent management of wealth.

The conclusion that a will is a contract between the testator and the state grounds this Article's additional argument that the Federal Arbitration Act (FAA) and state arbitration statutes require enforcement of a testator-compelled arbitration provision contained in a will even against a beneficiary who has not agreed to the arbitration provision. Settled arbitration law in conjunction with third-party beneficiary theory

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or direct benefits estoppel theory supports binding the beneficiary to the will's arbitration contract. A virtue of this Article's theory—that the will and the intestacy statutes are both clauses in a greater donative freedom contract—is that the analysis escapes the limitations inherent in the dominant understanding that a will's arbitration clause, if enforceable at all, can be enforced only against a beneficiary who seeks, by his will contest, to increase his inheritance under the will as opposed to circumstances in which the donee seeks to increase his intestate inheritance. According to the conventional wisdom, even if arbitration clauses are enforceable in some testamentary instruments, they govern only a narrow range of claims. This Article's implied unilateral contract theory goes further and expands the universe of arbitrable contests. Specifically, this Article's theory is the first that encompasses even a will contest that seeks to render the will a complete nullity.

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#### INTRODUCTION

The use of arbitration to resolve a probate dispute that parties would otherwise litigate in court has much to recommend it.<sup>1</sup> Arbitration of a will dispute offers the potential for a faster and less expensive resolution than probate litigation in court.<sup>2</sup> Will contest arbitration also typically has

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1. See, e.g., *Pray v. Belt*, 26 U.S. (1 Pet.) 670, 680 (1828) (commenting that an arbitration clause in a will was “given for the purpose of preserving peace, and preventing expensive and frivolous litigation”).

2. See Dominic J. Campisi, *Alternatives to Litigation in Trust and Probate Proceedings*, 42 *ARB. J.* 30, 31–32 (1987); David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 *N.C. L. REV.* 1027, 1030, 1035–36 (2012); Stanard T. Klinefelter & Sandra P. Gohn, *Alternative Dispute Resolution: Its Value to Estate Planners*, 22 *EST. PLAN.* 147, 151

the virtue of being private, keeping the private and personal facts at issue in the dispute out of public view.<sup>3</sup> Moreover, arbitration of a probate dispute allows for the selection of a decision maker with expert knowledge relating to the matter in dispute.<sup>4</sup> Such expertise typically might include, for example, specialized knowledge of the tax aspects of estate planning.<sup>5</sup> It also might include a familiarity with the testator's values and thus a fuller appreciation of how those values influenced the testator's estate plan.<sup>6</sup> The hope is that the decision of an arbitrator with

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(1995); Bridget A. Logstrom, Bruce M. Stone & Robert W. Goldman, *Resolving Disputes with Ease and Grace*, 31 ACTEC J. 235, 235 (2005) (“Our collective gut tells us that the administration of a will or trust would run more efficiently and at less cost if we could resolve disputes arising in those proceedings through the use of an arbitral, rather than judicial, forum.”); Stephen Wills Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, 26 OHIO ST. J. ON DISP. RESOL. 627, 630, 635 (2011).

3. Horton, *supra* note 2, at 1035–36; Bridget A. Logstrom, *Arbitration in Estate and Trust Disputes: Friend or Foe?*, 30 ACTEC J. 266, 267 (2005) (“Arbitration hearings are not public record and, therefore, may help to keep private details of family disputes private.”); Murphy, *supra* note 2, at 635–36; cf. Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L.J. 713, 725–26 (2006) (describing how the details of a trust that otherwise would have remained private might become public during trust litigation in the civil court system); Lela P. Love & Stewart E. Sterk, *Leaving More Than Money: Mediation Clauses in Estate Planning Documents*, 65 WASH. & LEE L. REV. 539, 553–54 (2008) (asserting in support of the use of mediation clauses in estate planning instruments: “A decedent who fears contest of her dispositions would undoubtedly prefer to avoid the spectacle of a trial in which her mental capacity, or her susceptibility to undue influence, is the central issue”); John R. Phillips, Scott K. Martinsen & Matthew L. Dameron, *Analyzing the Potential for ADR in Estate Planning Instruments*, 24 ALTERNATIVES TO HIGH COST LITIG. 1, 15 (2006) (“For some clients, the primary impetus for implementing the dispute resolution processes into trusts is confidentiality, often overriding concern about litigation costs.”).

4. Cf. S.I. Strong, *Arbitration of Trust Disputes: Two Bodies of Law Collide*, 45 VAND. J. TRANSNAT'L L. 1157, 1184 (2012) [hereinafter Strong, *Arbitration of Trust Disputes*] (suggesting that because “trust law can be quite specialized as a matter of both procedural and substantive law,” the settlor of a trust might especially value a decision maker with expertise in the subject matter).

5. See Robert L. Freedman et al., *ADR in the Trusts and Estates Context*, 21 ACTEC NOTES 170, 171 (1995) (“In many areas of the country the probate judges are becoming less and less specialized, while the trusts and estates practice, especially the tax aspects, has become increasingly specialized. Would it not be better in the future to try a trusts and estates case before an ACTEC Fellow than before a probate judge or a jury?”).

6. 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, 297 (1999) [hereinafter Spitko, *Protecting the Abhorrent Testator*]; see also Richard Z. Kabaker, Joseph F. Maier & Frank Gofton Ware, *The Use of Arbitration in Wills and Trusts*, 17 ACTEC NOTES 177, 183 (1991) (“A testator's choice of executor, friend, or relative as umpire is logical given their personal knowledge of the testator's desires.”); Blaine Covington Janin, Comment, *The Validity of Arbitration Provisions in Trust Instruments*, 55 CALIF. L. REV. 521, 532 (1967) (“Because the settlor or the parties are free to select those whom they wish to decide future controversies, arbitrators may be chosen either on the basis of their knowledge in areas

a fuller appreciation regarding the testator's estate plan would be less likely to be grounded in ignorance or prejudice.<sup>7</sup> In sum, arbitration of a probate dispute seems to offer many of the virtues that have made arbitration an increasingly popular means for dispute resolution in other contexts, such as with respect to the resolution of commercial and employment disputes.<sup>8</sup>

The weight of available evidence, however, strongly suggests that arbitration is not extensively utilized to resolve will contests.<sup>9</sup> It is reasonable to suspect that unsettled questions relating to the enforceability of testator-compelled arbitration provisions contribute to this underutilization<sup>10</sup>: Given that typically a party's principal motive for

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most likely to become the subject of dispute or because of their familiarity with the settlor and beneficiaries.”).

For an argument that arbitration theory and doctrine should more fully embrace arbitration's potential to promote the autonomy of disputants to pursue shared values, see Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 2999–3000 (2015).

7. Spitko, *Protecting the Abhorrent Testator*, *supra* note 6, at 296–97 (arguing that arbitration allows a minority-culture testator to appoint a decision maker who is familiar with and respectful of the values that informed the drafting of the estate plan and, thus, to overcome biases inherent in traditional probate litigation).

8. To facilitate arbitration of disputes relating to wills and trusts, the American Arbitration Association has promulgated “Wills and Trusts Arbitration Rules and Mediation Procedures.” See AM. ARBITRATION ASS'N, WILLS AND TRUSTS ARBITRATION RULES AND MEDIATION PROCEDURES (2012), [www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_024438](http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_024438); see also E. Gary Spitko, *A Critique of the American Arbitration Association's Efforts to Facilitate Arbitration of Internal Trust Disputes*, in ARBITRATION OF INTERNAL TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW (S.I. Strong ed.) (forthcoming Oxford Univ. Press 2016) [hereinafter Spitko, *Arbitration of Internal Trust Disputes*]. The introduction to those rules and procedures asserts that “[a]rbitration is an effective way to resolve these disputes [relating to wills and trusts] privately, promptly, and economically, utilizing as the arbitrator a lawyer or lawyers with substantial experience in the area of wills, trusts and estates.” AM. ARBITRATION ASS'N, *supra*, at 6.

9. See Freedman et al., *supra* note 5, at 170 (“Arbitration . . . is rarely used in the trusts and estates context.”); Robert D. W. Landon, II & John L. McDonnell, Jr., *Using Alternative Dispute Resolution in Trust and Estate Planning and Contested Matters*, course materials from the ACTEC Summer 2003 meeting, St. Paul, Minnesota (June 2003) (reporting on an “informal” survey of 122 ACTEC Fellows from California and Florida that found that 111 of the fellows reported never having used a mandatory requirement of arbitration in an estate planning document, while eight of the fellows reported having used a mandatory arbitration requirement between one and ten percent of the time).

10. See Logstrom, Stone & Goldman, *supra* note 2, at 237–38 (commenting that estate planners and their clients desire a more certain answer to the question of whether an arbitration provision in a will or trust would be enforceable); Strong, *Arbitration of Trust Disputes*, *supra* note 4, at 1163 (“[T]he minimal use of mandatory arbitration provisions in trusts may be due to concerns about the enforceability of such clauses.”).

This Article is concerned with the enforcement of executory arbitration clauses in wills, which call for arbitration of disputes arising in the future. The enforcement of arbitration

utilizing arbitration is to save time and expense in resolving a dispute, a likelihood that the estate will have to invest time and expense in litigating the enforceability of a testator-compelled arbitration clause would tend to discourage the use of such a clause.<sup>11</sup>

In general, the issue of whether a testator may force his intestate heirs and the takers under his will to arbitrate any challenge to his will remains unresolved in most jurisdictions.<sup>12</sup> Very little modern case law addresses the enforceability of arbitration clauses in wills or in other estate planning instruments such as trusts.<sup>13</sup> The sparse case law and academic commentary that exists on this point, however, suggests that a consensus is developing that a testator may not compel arbitration of contests to her will.<sup>14</sup>

Part I of this Article demonstrates that the principal impediment to the acceptance of the validity of a testator-compelled arbitration clause in a will is the widely shared and long-held understanding that a will is not a

submission agreements, which call for arbitration of existing probate disputes, is somewhat less problematic and is not the focus of this Article.

11. Cf. Strong, *Arbitration of Trust Disputes*, *supra* note 4, at 1163 (asserting with respect to trust litigation that “[n]o lawyer wants his or her client to be the precedent-setting test case in a developing area of law, even if the outcome is ultimately in the client’s favor”).

12. Horton, *supra* note 2, at 1030; Erin Katzen, *Arbitration Clauses in Wills and Trusts: Defining the Parameters for Mandatory Arbitration of Wills and Trusts*, 24 QUINNIPIAC PROB. L.J. 118, 119 (2011); S.I. Strong, *Empowering Settlers: How Proper Language Can Increase the Enforceability of a Mandatory Arbitration Provision in a Trust*, 47 REAL PROP., TR. & EST. L.J. 275, 287 (2012) [hereinafter Strong, *Empowering Settlers*] (noting that “many U.S. states have not yet addressed issues” concerning the enforceability of mandatory trust arbitration).

13. See *McArthur v. McArthur*, 224 Cal. App. 4th 651, 656 (Ct. App. 2014) (noting the lack of case law on the issue of whether a trust’s arbitration clause can bind a trust beneficiary); *Rachal v. Reitz*, 403 S.W.3d 840, 848 (Tex. 2013) (“There is a dearth of authority as to the validity of an arbitration provision in a trust . . . .”); 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, 354 (2007) (“[T]he extent to which courts will enforce such [trust mandatory arbitration] clauses under existing law is unclear.”); Logstrom, Stone & Goldman, *supra* note 2, at 237–38 (commenting that “[t]he question with a less obvious answer is whether arbitration can be mandated by a testator or settlor in a will or trust in a way that is enforceable,” but suggesting that “[t]he answer appears to be ‘yes’”); Phillips, Martinsen & Dameron, *supra* note 3, at 10 (“Just as there is little case law or scholarly commentary about arbitration clauses in estate planning documents, there is even less authority regarding the ability to bind the trust beneficiaries to an arbitration clause involving disputes relating to the trust.”).

14. See *In re Calomiris*, 894 A.2d 408, 409–10 (D.C. 2006) (holding that a will is not a written contract to arbitrate subject to enforcement under the District of Columbia’s version of the Uniform Arbitration Act); Murphy, *supra* note 2, at 641; cf. *Schoneberger v. Oelze*, 96 P.3d 1078, 1084 (Ariz. Ct. App. 2004) (holding that a trust is not a written contract within the purview of the Arizona statute providing for enforcement of arbitration agreements), *superseded by statute*, ARIZ. REV. STAT. ANN. § 14-10205 (2015), *as recognized in* *Jones v. Fink*, No. 1 CA-SA 10-0262, 2011 WL 601598, at \*2 (Ariz. Ct. App. Feb. 22, 2011).

contract.<sup>15</sup> This understanding has influenced the case law on testator-compelled arbitration.<sup>16</sup> It has also arguably cabined the thinking of scholars and the ambitions of reform efforts in this area.<sup>17</sup>

It is indeed axiomatic that arbitration is a creature of contract.<sup>18</sup> It is unquestionable as well, however, that the first principle of American donative transfer law is respect for the donor's wishes<sup>19</sup>: The *Restatement (Third) of Property* states, "Property owners have the nearly unrestricted right to dispose of their property as they please."<sup>20</sup> Indeed, American law respects freedom of testation to a greater extent than does the law anywhere else in the world.<sup>21</sup>

These bedrock principles—arbitration as a creature of contract and respect for donative freedom—on their face appear incompatible in a case in which a testator has directed in his will that any challenge to the will

15. See Tzena Mayersak, *Examining the Use of Arbitration and Dealing with Decedent's Wishes in Wills, Trusts and Estates*, 12 EUR. J.L. REF. 404, 404–05 (2010) (commenting that "[o]ne of the biggest obstacles regarding the use of arbitration in areas associated with estate planning is that wills and trusts are not considered contracts" and proposing as a partial solution the use of pre-drafting contracts between a testator or settlor and those who would be the beneficiaries); Murphy, *supra* note 2, at 639–43 ("[T]he 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."); cf. Strong, *Arbitration of Trust Disputes*, *supra* note 4, at 1209–12 (discussing the enforceability of mandatory arbitration clauses in trusts and explaining that "many jurisdictions require [that] an arbitration agreement . . . reflect certain contractual qualities").

For early assertions of the proposition that the will is not a contract, see *In re Bates' Estate*, 134 A. 513, 513 (Pa. 1926) ("[A] will is not a contract, but a mere expression of intention, to take effect after testator's death, and subject, in the meantime, to revocation or such changes as the maker may deem expedient."); *Martz's Ex'r v. Martz's Heirs*, 66 Va. (25 Gratt.) 361, 365 (1874) ("It cannot be said with any propriety that a will is a contract.").

16. See *infra* notes 36–59 and accompanying text.

17. See *infra* notes 60–74 and accompanying text.

18. See, e.g., *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010) ("The [Federal Arbitration Act (FAA)] reflects the fundamental principle that arbitration is a matter of contract."); *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986).

19. See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmts. a, c (AM. LAW INST. 2003) ("The organizing principle of the American law of donative transfers is freedom of disposition."); Lawrence M. Friedman, *The Law of Succession in Social Perspective*, in *DEATH, TAXES AND FAMILY PROPERTY* 9, 14 (Edward C. Halbach, Jr. ed., 1977) ("It is often said that the principle of freedom of testation dominates the law of the United States."); *id.* at 12 (asserting that testamentary freedom "is a leading principle in the United States").

20. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmts. a, c (AM. LAW INST. 2003).

21. See, e.g., RAY D. MADOFF, *IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD* 6–7, 58–62, 154 (2010) ("American law grants more rights to the dead than any other country in the world."); Friedman, *supra* note 19, at 19 ("American law is quite special too in the degree of freedom of testation that it grants.").

must be arbitrated, yet the will contestant has withheld her consent to arbitrate her will contest. This Article seeks to reconcile these two principles in such circumstances. In sum, this Article argues that enforcement of testator-compelled arbitration is wholly consistent with the general legal and normative principles that ground contract law, arbitration law, and the law of donative transfers.

Part II of this Article argues that the will should be considered a contract within the purview of the Federal Arbitration Act (FAA) and state arbitration statutes. Part II also argues that those who have failed to see a contract in a will have been looking in the wrong place. Courts and commentators are correct that a will is not a contract between the testator and the legatee, the devisee, or the heir. Nonetheless, a will is indeed a contract. A will sets out the terms of a contract between the testator and the state: a will is, in essence, part of an implied unilateral contract pursuant to which the state offers to give effect to the testator's donative wishes at his death, and the testator accepts the offer and gives consideration for the contract by creating wealth, preserving and investing his property, and refraining from wasting his estate.

Moreover, the will is but one clause of a greater contract entered into between the state and its citizen respecting donative freedom. State intestacy statutes are a second important part of this greater "donative freedom contract." Intestacy statutes provide a default estate plan that governs the disposition of a decedent's property to the extent that the decedent did not make an effective alternate plan of disposition during her life.<sup>22</sup> The primary objective of the intestacy statutes is to approximate the donative intent of the typical intestate decedent.<sup>23</sup>

Thus, pursuant to the intestacy clause of the greater donative freedom contract, the state promises that should the property owner fail to express effectively his donative intent with respect to the passing of his property at death, the state will nonetheless honor his imputed intent. The state will do so by passing the intestate decedent's property at his death to his heirs<sup>24</sup>—those whom the state believes the typical intestate decedent most likely would have chosen to favor had he effectively expressed his

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22. See Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 645 (2014). Much of default law allows for contracting out. For example, spouses-to-be may opt out of the law governing equitable distribution of property upon divorce through the use of a premarital agreement. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.02 cmt. a (AM. LAW INST. 2002) ("[T]here is today widespread agreement, in principle, that such [premarital] agreements may be enforceable."). In the inheritance law context, the state's intestacy scheme provides a default law from which one may opt out by means of a will or a will substitute. See Sitkoff, *supra*, at 645.

23. Sitkoff, *supra* note 22, at 645.

24. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.1(b) (AM. LAW INST. 1999).

donative intent. Like the testator, one who has failed to execute an effective estate plan accepts the state's offer and gives consideration for the contract by creating wealth, preserving and investing her property, and refraining from wasting her estate.

A virtue of this Article's theory that the will and the intestacy statutes are both clauses in a greater donative freedom contract is that the analysis escapes the limitations inherent in the dominant understanding, discussed below, which restricts enforcement of testator-compelled arbitration provisions to those circumstances in which the donee seeks by her will contest to increase her inheritance under the will as opposed to circumstances in which the donee seeks by her will contest to increase her intestate inheritance. According to the conventional wisdom, even if arbitration clauses are enforceable in some testamentary instruments, they govern only a narrow range of claims.<sup>25</sup> This Article's implied unilateral contract theory goes further and expands the universe of arbitrable contests. Specifically, this Article's theory is the first one that encompasses even a will contest that seeks to render the will a complete nullity.

Part III of this Article considers generally the extent to which an arbitration clause in a will that is understood to be a contract should be enforceable against a donee who has not consented to arbitrate a dispute related to the will. Part III concludes that the donee's refusal to consent to arbitration should be utterly irrelevant, as a legal and normative matter. Compelling a donee to arbitrate his will contest when he has not agreed to arbitrate is consistent with the law of donative transfers, a cardinal principle of which is that the rights of the donee are wholly derivative of and subordinate to the rights of the testator.<sup>26</sup> Enforcing a testator-compelled arbitration provision against the unwilling donee also is consistent with the law of arbitration. Settled arbitration doctrine provides that a court may compel a non-signatory to an arbitration provision to arbitrate her claim arising from the contract containing the arbitration clause if the relevant state contract law allows the container contract to be enforced against the non-signatory.<sup>27</sup> As Part III further demonstrates, courts may utilize both third-party beneficiary theory and equitable estoppel theory to bind the donee to a will's arbitration clause.

Finally, Part IV of this Article addresses the argument that an arbitrator who derives his authority to decide a will dispute from the will should not have the power to adjudicate a challenge to the validity of that will. The argument, in short, is that if the will itself is invalid, then the grant of authority to the arbitrator is also necessarily invalid. Implicit acceptance of this argument appears in the limited nature of recent

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25. See *infra* Part I.

26. See *infra* notes 159–68 and accompanying text.

27. See *infra* notes 169–90 and accompanying text.

statutory reform efforts. For example, some reform efforts seek to validate testator-compelled arbitration with respect to suits to construe a will but stop short of authorizing an arbitrator to decide a contest to the validity of the will.<sup>28</sup> Part IV also discusses the arbitration doctrine of separability and differentiates between the circumstances under which the doctrine should confer authority on an arbitrator to adjudicate a challenge to the validity of a will that gave rise to her authority to serve as the arbitrator in the first place, and the circumstances under which the doctrine should not confer such authority.

#### I. ARBITRABILITY AND THE CONSEQUENCES OF FAILING TO SEE THE WILL AS A CONTRACT

To better appreciate the widespread understanding that a will is not a contract and the argument against the enforceability of a testator-compelled arbitration clause deriving from this understanding, it is helpful to consider whom the testator seeks to bind pursuant to the arbitration clause. A testator's direction that any challenge to his will must be arbitrated would directly affect only those who have standing to challenge his will. Thus, the rules for standing to challenge a will define the universe of those whom the testator might seek to bind with the arbitration clause. To have standing to challenge a will, one must have a direct pecuniary interest in the success of the will contest.<sup>29</sup> Thus, a testator's heir who would take more under the intestacy statutes than she would take under the will would have standing to challenge the will.<sup>30</sup> Also, a legatee or devisee under the will or under a previous will who would take more if the will contest is successful would have standing.<sup>31</sup> The understanding that neither the will nor the arbitration clause contained in the will is a contract relates to the fact that neither the testator's heir nor his beneficiary under the will has consented to the terms of the will or exchanged a promise with the testator in consideration for the terms of the will.<sup>32</sup>

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28. See *infra* notes 74–93 and accompanying text.

29. THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS AND OTHER PRINCIPLES OF SUCCESSION INCLUDING INTESTACY AND ADMINISTRATION OF DECEDENTS' ESTATES § 99, at 519 (2d ed. 1953).

30. *Id.* at 519–20.

31. See *id.* at 521.

32. See *In re Naarden Trust*, 990 P.2d 1085, 1086, 1089 (Ariz. Ct. App. 1999) (concluding that “a trust is not a contract” and “that the undertaking between the settlor and trustee is not properly characterized as contractual and does not stem from the premise of mutual assent to an exchange of promises”); *Lah v. Rogers*, 707 N.E.2d 1208, 1212, 1216 (Ohio Ct. App. 1998) (asserting that a trust is not a contract but rather reflects the settlor’s “unilateral decision” to place her assets into a trust); *Martz’s Ex’r v. Martz’s Heirs*, 66 Va. (25 Gratt.) 361, 365–66 (1874)

The argument against testator-compelled arbitration continues with the language of federal and state arbitration statutes aimed at abrogating the common law hostility to the enforcement of executory arbitration agreements.<sup>33</sup> Section 2 of the FAA provides in relevant part:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>34</sup>

Thus, the FAA's plain language suggests that one may not invoke the FAA to enforce an arbitration provision in a will unless the will is a contract. The Uniform Arbitration Act (UAA) and the Revised Uniform Arbitration Act (RUAA), from which most state arbitration law derives, have provisions substantially similar to Section 2 of the FAA, although the RUAA uses arguably broader language referencing "an agreement contained in a record" to arbitrate.<sup>35</sup>

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(concluding that the will is not a contract and asserting that "[t]he very essence of a genuine will is[] that it is the voluntary, independent, individual act of the testator").

In developing his argument that a trust is a contract between a settlor and a trustee governing the management and distribution of trust assets, Professor John Langbein hints that a will might be treated as a contract between a testator and an executor. See John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 637 (1995) ("[E]xecutorship, like trusteeship, exhibits the twin features of contractarianism—consensual formation and consensual terms.").

33. Many examples exist of judicial hostility toward arbitration in the context of a probate dispute. See, e.g., *In re Meredith's Estate*, 266 N.W. 351, 357 (Mich. 1936) ("No stipulation such as here involved can oust the jurisdiction of the probate court, permit the probate judge to abdicate his jurisdiction and power, or delegate it to a third person not a judicial officer, and no stipulation can provide for the determination of the status of the codicil in any other manner than that provided by statute."); *Taylor v. McClave*, 15 A.2d 213, 216 (N.J. Ch. 1940) ("This court cannot be deprived of its jurisdiction by any direction of the testator to the effect that his executor, or any other person, other than the court, shall construe or define the provisions of a will."); *In re Reilly's Estate*, 49 A. 939, 940–41 (Pa. 1901) ("A testator may not deny to his legatees the right of appeal to the regularly constituted courts."); *In re Will of Jacobovitz*, 295 N.Y.S.2d 527, 531 (Sur. Ct. 1968) ("The probate of an instrument purporting to be the last will and testament of a deceased and the distribution of an estate can not [sic] be the subject of arbitration under the Constitution and the law . . . of New York and any attempt to arbitrate such issue is against public policy.").

34. 9 U.S.C. § 2 (2012).

35. Compare UNIF. ARBITRATION ACT § 1 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1955) ("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, save upon such grounds as exist at law or in equity for the revocation of any contract."), with UNIF. ARBITRATION ACT § 6(a) (UNIF. LAW COMM'N 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 except upon a ground that exists at law or in equity for the revocation of a contract.").

The seminal case declining to enforce an arbitration clause in a will on the ground that a will is not a contract is *In re Calomiris*.<sup>36</sup> In *Calomiris*, the District of Columbia Court of Appeals refused to hear an appeal of an order denying a motion to compel arbitration because the court held that there was no contract containing an arbitration provision.<sup>37</sup> *Calomiris* involved an arbitration provision contained in a will, which directed that parties use arbitration to resolve any material dispute between trustees of a trust that the will established.<sup>38</sup> The court of appeals held that a will is not a contract within the purview of the District of Columbia's version of the UAA and, therefore, the court had no jurisdiction to hear an appeal relating to the will's arbitration provision.<sup>39</sup>

In holding that a will is not a contract, the *Calomiris* court quoted the Arizona Court of Appeals' reasoning in the influential case of *Schoneberger v. Oelze*,<sup>40</sup> which had held that a trust is not a contract within the purview of Arizona's arbitration act.<sup>41</sup> The *Schoneberger* court, in a portion of its opinion that the *Calomiris* court found

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36. 894 A.2d 408 (D.C. 2006).

37. *Id.* at 410.

38. *Id.* at 408.

39. *Id.* at 410–11.

40. 96 P.3d 1078 (Ariz. Ct. App. 2004), *superseded by statute*, ARIZ. REV. STAT. ANN. § 14-10205 (2015), *as recognized in* Jones v. Fink, No. 1 CA-SA 10-0262, 2011 WL 601598, at \*2 (Ariz. Ct. App. Feb. 22, 2011).

41. *See In re Calomiris*, 894 A.2d at 409–10 (discussing *Schoneberger*, 96 P.3d 1078). In *Schoneberger*, the trust settlors included an arbitration provision in each of three trust instruments establishing three irrevocable trusts. 96 P.3d at 1079–80. The arbitration provision provided in part that “disputes in connection with this Trust shall be settled by arbitration in accordance with the rules of the American Arbitration Association.” *Id.* at 1080. Some years later, two of the trusts’ beneficiaries sued the settlors as well as the trustees of the trusts alleging breach of trust and, in particular, that the defendants had mismanaged and dissipated trust assets. *Id.* The defendants moved to compel arbitration under Arizona’s arbitration statute, which was derived from the UAA and, similar to the FAA, provided that “[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, save upon such grounds as exist at law or in equity for the revocation of any contract.” *Id.* (emphasis omitted) (quoting ARIZ. REV. STAT. ANN. § 12-1501 (2015)). The defendants argued that although the beneficiaries had not signed the arbitration agreement, they were obligated to arbitrate as third-party beneficiaries of the contract. *Id.* The defendants argued in the alternative that the beneficiaries were estopped from objecting to arbitration since they sought benefits under the trusts (the contracts). *Id.* The court held that the beneficiaries need not arbitrate their claims against the settlor and the trustee “because such a trust is not a ‘written contract’ requiring arbitration.” *Id.* at 1079. “Under either [third-party beneficiary or equitable estoppel] theory, however, defendants face a fundamental problem that defeats their demand for arbitration: section 12-1501 required defendants to prove the existence of ‘a provision in a written contract to submit to arbitration.’ They failed to make this showing because, as a matter of law, the trusts at issue here were not contracts.” *Id.* at 1082.

“instructive,”<sup>42</sup> emphasized that “[a]rbitration rests on an exchange of promises,” but a trust does not.<sup>43</sup> “The ‘undertaking’ between trustor and trustee,” the *Schoneberger* court concluded, “does not stem from the premise of mutual assent to an exchange of promises’ and ‘is not properly characterized as contractual.’”<sup>44</sup> Thus, the critical issue for the *Calomiris* court in holding that a will is not a contract appears to have been that a will does not rest upon an exchange of promises.<sup>45</sup>

More recently, in the 2013 case of *Rachal v. Reitz*,<sup>46</sup> the Supreme Court of Texas held that despite the absence of an exchange of promises, a settlor-compelled arbitration provision in a trust is enforceable under the Texas Arbitration Act (TAA) to bind a trust beneficiary who seeks benefits under the trust.<sup>47</sup> In *Rachal*, the trust instrument provided that “as to any dispute of any kind involving [the] Trust or any of the parties or persons concerned herewith (e.g., beneficiaries, Trustees), arbitration . . . shall be the sole and exclusive remedy.”<sup>48</sup> Nonetheless, a beneficiary of the trust later sued the trustee, alleging that the trustee had misappropriated trust assets and had failed to provide a proper accounting to the trust beneficiaries.<sup>49</sup> The trustee then moved to compel arbitration.<sup>50</sup>

The *Rachal* court decided the case under the TAA, which, similar to the RUAA, provided that a “written agreement to arbitrate is valid and enforceable.”<sup>51</sup> The court did not hold that the trust or the arbitration provision in the trust could be treated as a contract. Rather, the court held that no formal arbitration contract was necessary, as the TAA required only a written *agreement* to arbitrate.<sup>52</sup> The court interpreted the term *agreement* to mean a manifestation of mutual assent.<sup>53</sup> Finally, the court found that, in the instant case, the beneficiary manifested his assent to the

42. *In re Calomiris*, 894 A.2d at 409.

43. *Schoneberger*, 96 P.3d at 1083.

44. *Id.* (quoting *In re Naarden Trust*, 990 P.2d 1085, 1089 (Ariz. Ct. App. 1999)).

45. See *In re Calomiris*, 894 A.2d at 409–10.

46. 403 S.W.3d 840 (Tex. 2013).

47. *Id.* at 844–47.

48. *Id.* at 842.

49. *Id.*

50. *Id.*

51. TEX. CIV. PRAC. & REM. CODE ANN. § 171.001(a) (West 2015).

52. See *Rachal*, 403 S.W.3d at 844–45; see also Rachel M. Hirshberg, Note, *You Can't Have Your Trust and Defeat It Too: Why Mandatory Arbitration Provisions in Trusts Are Enforceable, and Why State Courts Are Getting It Wrong*, 2013 J. DISP. RESOL. 213, 227–28 (noting that the TAA requires only an *agreement to arbitrate* and arguing for a broad interpretation of the TAA so that an arbitration clause in a trust might be enforceable against a beneficiary).

53. *Rachal*, 403 S.W.3d at 845.

arbitration provision in the trust by seeking to enforce his rights under the trust.<sup>54</sup> In so concluding, the court relied upon the doctrine of direct benefits estoppel. Essentially, this doctrine provides that a non-signatory to an agreement may not seek to benefit under the agreement while simultaneously seeking to avoid the agreement's burdens.<sup>55</sup> Thus, the *Rachal* court held that “[i]n accepting the benefits of the trust and suing to enforce its terms against the trustee so as to recover damages, [the beneficiary]’s conduct indicated acceptance of the terms and validity of the trust.”<sup>56</sup>

The reasoning of the *Rachal* court seemingly applies full force in a case in which an arbitration clause is in a will rather than a trust. Accordingly, a court may find that a legatee or devisee who seeks to benefit under the will has assented to the will’s arbitration clause. The doctrine of direct benefits estoppel would preclude the beneficiary from seeking to benefit under the will while simultaneously seeking to avoid the will’s arbitration provision.

The principal limitations of the *Rachal* court’s holdings would also seem to apply full force in the case of a will’s arbitration provision. First, the *Rachal* court’s analysis is a nonstarter in any case governed by an arbitration statute that makes enforceable only arbitration “contracts” but not arbitration “agreements.” Second, under the *Rachal* court’s analysis, the doctrine of direct benefits estoppel could not be used to find an heir’s assent to the will’s arbitration provision when the heir does not seek to benefit under the will.<sup>57</sup> As the *Rachal* court reasoned with respect to trusts, “One who does not accept benefits under a trust and contests its validity could not be compelled to arbitrate the trust dispute under the doctrine of direct benefits estoppel.”<sup>58</sup> Thus, an heir who seeks to invalidate the will could not be bound by the will’s arbitration clause.<sup>59</sup>

Just as there is a dearth of case law addressing the enforceability of

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54. *See id.* at 845–47.

55. *Id.* at 846.

56. *Id.* at 847.

57. *See* *McArthur v. McArthur*, 224 Cal. Rptr. 3d 651, 653–54, 658 (Cal. Ct. App. 2014) (holding that a trust beneficiary who sought to set aside a trust amendment that purported to alter a trust’s distributive provisions and to add an arbitration clause to the trust was not bound by the arbitration provision given that she had not accepted benefits under the trust amendment); *Horton*, *supra* note 2, at 1060 (“[I]f an omitted heir contends that an entire trust was obtained by undue influence, there is simply no basis to deem him to have acquiesced to any part of the instrument.”); *Murphy*, *supra* note 2, at 649 (“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.”).

58. *Rachal*, 403 S.W.3d at 850.

59. *See id.* at 847 (commenting that a trust beneficiary’s challenge to the validity of the trust “is incompatible with the idea that she has consented to the instrument”).

testator-compelled arbitration, very little scholarship addresses the issue.<sup>60</sup> Professor David Horton has published arguably the most sophisticated academic treatment of the topic.<sup>61</sup> His focus is on whether the FAA governs an arbitration clause found in a will or trust.<sup>62</sup>

Professor Horton acknowledges at the outset that the text of the FAA, on its face, limits the statute's reach to arbitration clauses embedded in "contracts."<sup>63</sup> Moreover, he concludes from the FAA's legislative history<sup>64</sup> that "Congress almost certainly meant to limit the FAA to arbitration clauses in 'contracts.'"<sup>65</sup>

Nonetheless, despite his understanding that a will is not a contract, Professor Horton concludes that "the FAA likely governs arbitration clauses in wills and trusts."<sup>66</sup> Professor Horton reasons that the U.S. Supreme Court, "[t]o further its pro-arbitration agenda," has not applied the law to limit the FAA's coverage to only arbitration clauses in contracts.<sup>67</sup> Rather, the Court has interpreted the FAA so that it applies in situations in which the parties have not contracted to arbitrate but have "agreed" to arbitrate<sup>68</sup>: "As a matter of federal common law," Professor Horton writes, "the FAA hinges on whether the parties have agreed to arbitrate, not whether there is a 'contract' in which the arbitration clause appears. In turn, wills and trusts are capable of giving rise to agreements to arbitrate . . . ."<sup>69</sup>

In considering whether the beneficiary has "agreed" to arbitrate, Professor Horton expressly relies on the same direct benefits estoppel doctrine that subsequently became the center of the *Rachal* court's analysis under the TAA.<sup>70</sup> Professor Horton argues that, quite simply, "parties to an estate plan can agree to arbitrate by accepting benefits under the terms of an instrument that contains an arbitration clause."<sup>71</sup>

Thus, Professor Horton's analysis shares a critical limitation with the *Rachal* court's analysis: The arbitration statute will not compel an heir to

60. See Horton, *supra* note 2, at 1031 n.23 (noting that only one law review article "even mentions the FAA and wills and trusts in passing").

61. See *generally id.* (providing an in-depth analysis of the application of the FAA to wills and trusts).

62. *Id.* at 1031–32.

63. *Id.* at 1049.

64. See *id.* at 1051–54 (reviewing the legislative history of the FAA).

65. *Id.* at 1032.

66. *Id.*

67. *Id.*

68. See *id.* at 1032, 1054–58 (reviewing federal cases in which courts have upheld arbitration clauses despite arguably flawed underlying contracts).

69. *Id.* at 1049.

70. See *id.* at 1061–65 (explaining how the equitable estoppel doctrine applies to beneficiaries of testamentary instruments).

71. *Id.* at 1062.

arbitrate her challenge that seeks to increase her intestate inheritance—probate property passing to the contestant outside of the will.<sup>72</sup> Indeed, Professor Horton concedes that this limitation “may diminish the FAA’s usefulness in probate” given that “[t]estators and settlors place arbitration clauses in wills and trusts largely to minimize the expense and delay caused by individuals who are disappointed with their gifts.”<sup>73</sup> Professor Horton’s analysis also shares a second critical limitation with the *Rachal* court’s analysis. His approach is a nonstarter if the federal or state court concludes that the FAA reaches only those arbitration clauses contained in a contract.

Uncertainty surrounding the question of whether an arbitration clause contained in a testamentary instrument is enforceable has led numerous commentators to call for statutory reform to address the issue.<sup>74</sup> In 2006, for example, after more than two years of studying the issue, the American College of Trust and Estate Counsel (ACTEC) issued a task force report addressing arbitration of wills and trusts disputes and proposing model legislation that would, if enacted, authorize limited enforcement of arbitration clauses in wills and trusts.<sup>75</sup> The ACTEC task force expressed its judgment that private arbitration of disputes relating to wills and trusts utilizing an expert decision maker would lead to the more efficient and cost-effective administration of wills and trusts.<sup>76</sup> The task force acknowledged, however, that uncertainty existed as to “whether arbitration can be mandated by a person in his or her will or trust in a way that is enforceable”<sup>77</sup> and that the widespread understanding that neither a will nor a trust is a contract had contributed to this uncertainty.<sup>78</sup>

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72. See *Rachal v. Reitz*, 403 S.W.3d 840, 846–47 (Tex. 2013); Horton, *supra* note 2, at 1075 (explaining that a litigant who is not seeking to gain the advantages of the testamentary instrument, or who challenges the existence of the instrument itself, cannot be bound by arbitration); see also *id.* at 1064 (arguing that the beneficiaries’ challenge to the validity of a will or trust “is incompatible with the idea that they have consented to the instrument”).

73. Horton, *supra* note 2, at 1075.

74. See, e.g., Bruyere & Marino, *supra* note 13, at 355, 361, 364 (arguing that, given the unsettled state of the law, “the safest route to enforceable mandatory arbitration provisions [in trusts] is through the state legislatures”); Murphy, *supra* note 2, at 661 (rejecting theories that some have offered to validate arbitration provisions in wills and trusts, and arguing that “a better means to properly enforce these clauses would be to act legislatively, through a statutory amendment”).

75. See AM. COLL. OF TR. & ESTATE COUNSEL, ARBITRATION TASK FORCE REPORT 27–33 (2006), <http://msba.mnbar.org/docs/default-source/probate-and-trust-section/actec-arbitration-task-force-report.pdf>. The ACTEC task force first met in the summer of 2004 and issued its report in September 2006. *Id.* at 3.

76. *Id.* at 5.

77. *Id.* at 9.

78. See *id.* at 10–11.

The task force recommended statutory reform to achieve the desired certainty respecting the issue.<sup>79</sup> Specifically, the task force proposed a “Model Enforceability Act,” which states that “[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.”<sup>80</sup> The model act goes on to clarify this language by stating that if a person challenges the validity of the arbitration provision “either expressly or as part of a challenge to the validity of all or a portion of the will or trust containing the arbitration clause, [then] the court shall determine the validity of the arbitration provision and any additional challenge to the validity of the will or trust.”<sup>81</sup>

Thus, under ACTEC’s Model Enforceability Act, one who challenges the validity of any portion of a will or trust would not be bound by the arbitration provision found in the will or trust. The task force members considered but rejected the idea of providing for a separate judicial proceeding addressing only the validity of the arbitration clause to be followed, if the court found the arbitration clause to be valid, by arbitration addressing the merits of the will or trust contest.<sup>82</sup> The drafters feared that a two-step process “would involve two trials involving virtually the same proof” and that the duplication would conflict with their “goal of developing a simpler method of trial resolution.”<sup>83</sup> Therefore, for the drafters, it became necessary to destroy arbitration to save it.<sup>84</sup>

Since ACTEC released its task force report and recommendations in 2006, a few states have enacted legislation providing for the limited enforcement of arbitration provisions in donative instruments. In 2007, Florida enacted a statute based on the ACTEC model law.<sup>85</sup> The Florida

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79. *Id.* at 11 (“We could bring certainty to the issue by a statute allowing a testator or settlor to require by will or trust that disputes involving the estate or trust administration be decided by an arbitrator, rather than a court.”).

80. *Id.* at 27.

81. *Id.* at 28. The ACTEC Arbitration Task Force Report proposes a second model act, the “Model Simplified Trial Resolution Act,” which contains enforceability provisions substantially identical to the ones contained in the Model Enforceability Act but also includes a default process for resolving disputes. *See id.* at 28–33.

82. *Id.* at 28 n.17.

83. *Id.*

84. In contrast, the FAA is unequivocally hostile to such a sentiment with respect to an arbitration contract to which it applies. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985) (holding that the FAA “requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums”).

85. *See* FLA. STAT. § 731.401 (2015); *see also* Murphy, *supra* note 2, at 665–66 (citing an interview with Robert W. Goldman, Chair of the ACTEC Arbitration Task Force, in support of the assertion that the Florida statute was based on ACTEC’s model law).

statute makes enforceable “[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.”<sup>86</sup> Thus, like the Model Enforceability Act, the Florida statute does not apply to a will contest brought by a donee who seeks to increase her inheritance outside of the will by challenging the will in whole or in part, or even to a will contest brought by a donee who seeks to increase her inheritance under one part of the will by challenging another part of the will.

In 2008, in response to the 2004 Arizona Court of Appeals decision in *Schoneberger*, Arizona enacted a statute providing that “[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.”<sup>87</sup> On its face, this statute does not apply to any will contest. Moreover, a natural reading of the statute’s language suggests that the statute also does not apply to any challenge to the validity of all or part of a trust.<sup>88</sup>

Finally, in 2014, both Missouri and New Hampshire enacted legislation authorizing the enforcement of certain arbitration provisions imposed by the settlor of a trust on persons with an interest in the trust.<sup>89</sup> Neither statute applies to arbitration of a will contest. Missouri’s statute states that “a provision in a trust instrument requiring the mediation or arbitration of disputes between or among the beneficiaries, a fiduciary, a person granted nonfiduciary powers under the trust instrument, or any combination of such persons is enforceable.”<sup>90</sup> The statute further states, however, that any provision “requiring the mediation or arbitration of disputes relating to the validity of a trust is not enforceable unless all interested persons with regard to the dispute consent to the mediation or arbitration of the dispute.”<sup>91</sup> New Hampshire’s statute is similar. The New Hampshire statute provides that “[i]f the terms of the trust require the interested persons to resolve a trust dispute exclusively by reasonable

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86. FLA. STAT. § 731.401(1).

87. See ARIZ. REV. STAT. ANN. § 14-10205 (2015).

88. See Murphy, *supra* note 2, at 666 (concluding that “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’” (quoting ARIZ. REV. STAT. ANN. § 14-10205)). *But see* Horton, *supra* note 2, at 1076–77 (asserting that the Arizona statute applies to challenges to the validity of an estate plan).

89. See MO. ANN. STAT. § 456.2-205 (West 2015); N.H. REV. STAT. ANN. § 564-B:1-111A (2015).

90. MO. ANN. STAT. § 456.2-205(1).

91. *Id.* § 456.2-205(2).

nonjudicial procedures, then those interested persons shall resolve that trust dispute in accordance with the terms of the trust.”<sup>92</sup> The statute defines a “trust dispute,” however, to exclude “a determination of the validity of the trust.”<sup>93</sup>

Thus, with respect to arbitration clauses in donative instruments generally and testamentary arbitration clauses specifically, the limited case law, academic commentary, and prominent proposed and enacted statutory reforms all share a common limitation. None support the enforcement of a donor-mandated arbitration provision in the case of a challenge to the validity of the donative instrument.

With respect to testator-compelled arbitration, the root of this limitation is the understanding that a will is not a contract. This mindset informs the conclusion that neither the FAA nor state arbitration statutes support enforcement of a testator-compelled arbitration clause respecting a challenge to the validity of a will. This mindset also arguably has cabined the ambitions of law reform efforts. Given the premise that the donee has not contracted to arbitrate her claims against the will, the conclusion may follow that it would be unfair to force the donee to arbitrate such claims.

This Article turns next to an argument that challenges these dominant understandings. This Article seeks to persuade judges that the courts have sufficient authority under existing federal and state arbitration statutes to enforce a testator-compelled arbitration provision even with respect to a will contestant who does not seek to take under the will or who seeks through his contest to redirect property to the intestate estate that otherwise would pass under the will. At the same time, given the virtue of certainty with respect to the enforceability of any arbitration provision, this Article seeks also to convince legislators that, as a normative matter, it is appropriate to enact legislation that will make more certain the right of a testator to compel arbitration.

## II. THE WILL AS AN IMPLIED UNILATERAL ARBITRATION CONTRACT

This Part strives to demonstrate that a will fits within existing contract law as an implied-in-fact unilateral contract. An implied-in-fact contract, like an express contract, requires an offer, acceptance of the offer, and consideration supporting the contract.<sup>94</sup> Unlike an express contract, an implied contract may arise even though the parties have not expressly agreed to the terms of the contract.<sup>95</sup> A court discerns the terms of the

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92. N.H. REV. STAT. ANN. § 564-B:1-111A(a).

93. *Id.* § 564-B:1-111A(d).

94. *See* 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §§ 3.10, 3.14 (3d ed. 2004).

95. *See id.* § 3.14.

implied contract from the parties' communications and conduct.<sup>96</sup>

In traditional contract analysis, a contract may be either bilateral or unilateral. A bilateral contract involves mutual promises to perform.<sup>97</sup> A unilateral contract, however, involves a promise that a party accepts by performance, rather than by a promise to perform.<sup>98</sup>

As mentioned above, this Article argues that a will is an implied unilateral contract between the testator and the state.<sup>99</sup> The state offers to pass the testator's property at his death to his preferred donees. The testator accepts this offer by creating and prudently managing his wealth. At the time the testator executes his will, the terms of the will "form[] an integrated whole with the [donative freedom] agreement."<sup>100</sup>

This argument borrows heavily from the law governing the workplace relationship between a firm and its worker. For example, consider the retention bonus as an implied unilateral contract. Assume that in January of a given year, an employer posts a notice proclaiming that it will pay a 10% bonus in December of that year to any present employee who remains employed with the firm at that future date. Might this notice give rise to contractual liability on the part of the employer?

Nearly a century ago, the North Carolina Supreme Court held on those facts that the employer might be contractually liable. In *Roberts v. Mays Mills, Inc.*,<sup>101</sup> the court concluded that the firm's announcement of its intention to pay a retention bonus was "not a gift or gratuity."<sup>102</sup> Rather, the announcement constituted an offer by the employer, which the employee accepted by his "setting in to work until the end of the year."<sup>103</sup> The court further noted that the offer was not a selfless act on the part of the employer. Rather, the court reasoned, the employer offered the retention bonus "to procure efficient and faithful service and continuous employment,"<sup>104</sup> which might be a special concern during a time of labor shortages.<sup>105</sup> Courts have reached this same result—finding an implied

96. *Id.* § 3.10.

97. *Id.* §§ 2.3, 3.4.

98. *Id.*; see also *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1267 (N.J. 1985).

99. See *supra* notes 21–25 and accompanying text.

100. *James Family Charitable Found. v. State St. Bank & Tr. Co.*, 956 N.E.2d 243, 248 (Mass. App. Ct. 2011) ("State Street [, a custodian,] agreed to transfer assets in accordance with instructions from James [, a donor,] in the future. . . . Once James gave such instructions [identifying the donee], they supplemented the agreement and identified State Street's obligations with respect to the particular asset to be transferred. In other words, once received, the instructions formed an integrated whole with the agreement.").

101. 114 S.E. 530 (N.C. 1922).

102. *Id.* at 532.

103. *Id.*

104. *Id.*

105. See *id.* at 533 (quoting *Zwolaneck v. Baker Mfg. Co.*, 137 N.W. 769, 772 (Wis. 1912)).

unilateral contract—using similar reasoning in cases in which an employer had promised to pay “dismissal wages” or severance pay if the employer terminated an employee in a reduction in force.<sup>106</sup>

From the line of cases finding an implied unilateral contract in a promise of retention or dismissal pay evolved a line of cases finding an implied unilateral contract (often promising job security) in an employee handbook.<sup>107</sup> Typically, an employee handbook contains a company’s personnel policies and procedures. The treatment of employee handbooks as implied unilateral contracts between employers and employees illustrates the concept at the heart of this Article’s argument: a will is an implied unilateral contract.

*Woolley v. Hoffmann-La Roche*<sup>108</sup> is a seminal case holding that the policies and procedures contained in an employment manual may give rise to contractual liability.<sup>109</sup> Richard Woolley sued Hoffman-La Roche for breach of contract after Hoffman-La Roche terminated his employment.<sup>110</sup> Woolley did not have a written employment contract with Hoffman-La Roche.<sup>111</sup> Rather, he argued that “the express and implied promises in [Hoffman-La Roche]’s employment manual created a contract” that allowed the employer to terminate his employment only for just cause and only after it followed the procedures outlined in the employment manual.<sup>112</sup> More specifically, Woolley argued that his employer’s representations in its employment manual with respect to job security constituted an offer that he accepted by continuing his employment with the employer.<sup>113</sup> Thus, when the employer terminated

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106. See, e.g., *Cain v. Allen Elec. & Equip. Co.*, 78 N.W.2d 296, 300, 302 (Mich. 1956) (“[T]he adoption of the described [severance] policies by the company constituted an offer of a contract. . . . [T]he plaintiff accepted [this offer] . . . by continuing in its employment beyond the 5-year period specified . . . .” (quoting the trial court’s decision)); *Hercules Powder Co. v. Brookfield*, 53 S.E.2d 804, 808 (Va. 1949) (“Ample authority sustains the view that such a promise amounts to an offer, which, if accepted by performance of the service, fulfills the legal requirements of a contract.”).

107. See *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 893 (Mich. 1980) (approving the reasoning from *Cain*); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1267–68 (N.J. 1985) (approving the reasoning from *Toussaint*).

108. 491 A.2d 1257 (N.J. 1985).

109. *Id.* at 1258; see also J.H. Verkerke, *The Story of Woolley v. Hoffmann-La Roche: Finding a Way to Enforce Employee Handbook Promises*, in *EMPLOYMENT LAW STORIES* 23, 24, 62 (Samuel Estreicher & Gillian Lester eds., 2007) (noting the “significant role” that *Woolley* played in establishing the principle that a statement in an employment manual may form the basis for an implied unilateral contract between employer and employee).

110. *Woolley*, 491 A.2d at 1258.

111. *Id.*

112. *Id.*

113. See Verkerke, *supra* note 109, at 41–42 (discussing the specifics of Woolley’s complaint).

his employment without just cause and without following specified procedures, the employer breached an implied unilateral contract.<sup>114</sup> The New Jersey Supreme Court agreed with Woolley's argument that the termination clauses and procedures in the employer's handbook could be contractually binding.<sup>115</sup>

The court first concluded that the termination provisions in the manual could constitute an offer by the employer.<sup>116</sup> The court reasoned that the context in which the employer distributed and maintained the manual made it "almost inevitable" that an employee would believe that the employer had agreed to undertake certain legally enforceable obligations.<sup>117</sup> Given the circumstances, the court concluded, the employer could not avoid the contract merely by asserting that it did not intend to be bound by the provisions in the employment manual: "Our courts will not allow an employer to offer attractive inducements and benefits to the workforce and then withdraw them when it chooses, no matter how sincere its belief that they are not enforceable."<sup>118</sup>

Second, the court concluded that the employee's job performance could serve as both acceptance of and consideration for the unilateral contract, thereby making the employer's promises concerning job security a binding commitment.<sup>119</sup> Indeed, the court held that in certain circumstances an employment manual's job security provisions become binding at the time the employer distributes the manual, and the court suggested in dictum that this might be so even if the employee is not aware of the manual's existence.<sup>120</sup> In support of its holding, the New Jersey Supreme Court approvingly quoted at length the Michigan Supreme Court's dictum in an earlier influential case—*Toussaint v. Blue Cross & Blue Shield of Michigan*<sup>121</sup>—discussing the effect of an employer's distribution of an employment manual and why an employee

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114. See *Woolley*, 491 A.2d at 1258; Verkerke, *supra* note 109, at 41–42.

115. *Woolley*, 491 A.2d at 1258, 1264 (“[A]bsent a clear and prominent disclaimer, an implied promise contained in an employment manual that an employee will be fired only for cause may be enforceable against an employer even when the employment is for an indefinite term and would otherwise be terminable at will.”).

116. *Id.* at 1265.

117. *Id.* at 1265–66 (“Having been employed, like hundreds of his co-employees, without any individual employment contract, by an employer whose good reputation made it so attractive, the employee is given this one document that purports to set forth the terms and conditions of his employment, a document obviously carefully prepared by the company with all of the appearances of corporate legitimacy that one could imagine.”).

118. *Id.* at 1266.

119. *Id.* at 1266–67 (concluding that “the manual is an offer that seeks the formation of a unilateral contract—the employees’ bargained-for action needed to make the offer binding being their continued work when they have no obligation to continue”).

120. See *id.* at 1268 n.10.

121. 292 N.W.2d 880 (Mich. 1980).

should not be required to prove actual reliance on the handbook provision that the employee seeks to enforce:

While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever[] the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "instinct with an obligation."<sup>122</sup>

Thus, under *Toussaint* and *Woolley*, an employer that promulgates an employment policy for the purpose of improving employee performance and morale may not later argue that its promise is illusory.<sup>123</sup>

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122. *Woolley*, 491 A.2d at 1268 (quoting *Toussaint*, 292 N.W.2d at 892). In *Toussaint*, the Michigan Supreme Court held that an employee's claim of wrongful discharge might properly be based upon the employee's "legitimate expectations grounded in his employer's written policy statements set forth in the manual of personnel policies." 292 N.W.2d at 885. The court further held that such policy statements "can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee." *Id.* at 892.

The *Toussaint* court borrowed the phrase "instinct with an obligation" from Judge Benjamin Cardozo. See *Toussaint*, 292 N.W.2d at 892 (quoting *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917)). Judge Cardozo borrowed the phrase from another jurist. See *Wood*, 118 N.E. at 214 (quoting *McCall Co. v. Wright*, 117 N.Y.S. 775, 779 (N.Y. App. Div. 1909)).

123. See *Toussaint*, 292 N.W.2d at 895 ("Having announced the policy, presumably with a view to obtaining the benefit of improved employee attitudes and behavior and improved quality of the work force, the employer may not treat its promise as illusory."); *Woolley*, 491 A.2d at 1271 ("It would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have been made and then to allow the employer to renege on those promises."); see also *Hunter v. Bd. of Trs. of Broadlawns Med. Ctr.*, 481 N.W.2d 510, 513, 515 (Iowa 1992) (asserting that "[i]n exchange for the employer's guarantee not to discharge in the absence of cause or certain specified conditions, the employer reaps the benefits of a more secure and presumably more productive work force" and holding that representations of job security in an employment manual may give rise to contractual liability); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1087-88 (Wash. 1984) (concluding "that the principal, though not

Following *Woolley*, the vast majority of U.S. jurisdictions have firmly established the principle that statements in employer-promulgated handbooks may serve as the basis for contractual protection.<sup>124</sup> As one commentator put it, *Woolley* “has become part of the fabric of contemporary employment law. The proposition for which it stands is now utterly unremarkable. This legal principle is so widely accepted that we note today only the few isolated jurisdictions that still refuse to enforce employee handbook promises.”<sup>125</sup> Many of the jurisdictions that have enforced employee handbook promises have justified the decision using an implied unilateral contract theory.<sup>126</sup> Pursuant to implied unilateral contract theory in its broadest form: (1) the employment manual promise does not have to be explicit; it can be implied;<sup>127</sup> (2) the

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exclusive, reason employers issue such manuals is to create an atmosphere of fair treatment and job security for their employees” and holding that an employer’s creation of such an atmosphere may give rise to “an obligation of treatment in accord with [its] written promises”).

124. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.05 Reporters’ Notes cmt. a (AM. LAW INST. 2014) (adopting “the position of the clear majority of U.S. jurisdictions (39 of 51, as of the May 2014 approval of this Restatement) that unilateral employer policy statements can, in appropriate circumstances, establish binding employer obligations”); Verkerke, *supra* note 109, at 23; Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L.J. 326, 328 (1992); Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMP. LAB. L. & POL’Y J. 313, 344 (2007) (noting that “[f]orty-two jurisdictions allow employee rights arising from implied-in-fact contracts” and that “[t]he implied contract exception [to at-will employment] most often arises in the context of employee handbooks”); *see also, e.g.*, *Cont’l Airlines, Inc. v. Keenan*, 731 P.2d 708, 711 (Colo. 1987); *Duldulao v. Saint Mary of Nazareth Hosp. Ctr.*, 505 N.E.2d 314, 317 (Ill. 1987) (stating that “the overwhelming majority of courts considering the issue have held that an employee handbook may, under proper circumstances, be contractually binding” and citing more than two dozen cases in support of this assertion); *Hunter*, 481 N.W.2d at 515–16; *Libby v. Calais Reg’l Hosp.*, 554 A.2d 1181, 1183 (Me. 1989).

125. Verkerke, *supra* note 109, at 62.

126. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.05 Reporters’ Notes cmt. b (AM. LAW INST. 2014) (citing case law from sixteen jurisdictions “us[ing] some form of unilateral-contract analysis” to enforce employer promises contained in employee handbooks); *see Befort, supra* note 124, at 340–42; *see also, e.g., Keenan*, 731 P.2d at 711 & n.1 (noting the use of unilateral contracts in termination procedures); *Hunter*, 481 N.W.2d at 513 (illustrating that use of an employer’s handbook may constitute a unilateral contract); *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 627 (Minn. 1983) (describing when an employer’s handbook becomes a unilateral contract). To be more precise, although in some cases both the employer’s offer and the employee’s acceptance are implied, more typically the employer’s offer is express and only the employee’s acceptance is implied. *See* 1 FARNSWORTH, *supra* note 94, § 3.14a (making this point generally with respect to implied-in-fact employment contracts).

127. *See, e.g., Wiskotoni v. Mich. Nat’l Bank-W.*, 716 F.2d 378, 385 (6th Cir. 1983) (construing Michigan Supreme Court precedent as holding that employer policies and practices can give rise to an implied contractual right to just-cause employment and citing lower Michigan court cases consistent with the holding).

employee's continued work constitutes her acceptance of the contract;<sup>128</sup> (3) the employee's continued work constitutes her consideration given for the contract;<sup>129</sup> and (4) pursuant to a presumed enhancement theory, courts utilize a presumed acceptance fiction and a presumed consideration fiction—the employee need not even know about the contract; all that is necessary is that the employer has created a work environment that is “instinct with an obligation.”<sup>130</sup>

The implied unilateral contract theory that courts have applied to find a contractual relationship in the context of employee handbooks can be applied with similar effect in the context of a state probate code governing the passing of property at death. In the latter context, the state has created an environment that is instinct with an obligation.<sup>131</sup> Central to this argument is an understanding of *why* donative freedom is the keystone of American inheritance law. This understanding sheds light not only on the state's motive in offering to respect donative intent but also on the donor's means of accepting and providing consideration for the donative freedom contract.

A long-understood and widely accepted rationale for freedom of testation is that donative freedom is an incentive to industry and saving.<sup>132</sup>

128. See, e.g., *Keenan*, 731 P.2d at 711; *Duldulao*, 505 N.E.2d at 318; *Hunter*, 481 N.W.2d at 513; *Pine River State Bank*, 333 N.W.2d at 627.

129. See, e.g., *Sisco v. GSA Nat'l Capital Fed. Credit Union*, 689 A.2d 52, 56–57 (D.C. Cir. 1997); *Keenan*, 731 P.2d at 711; *Duldulao*, 505 N.E.2d at 318; *Hunter*, 481 N.W.2d at 513–14; *Pine River State Bank*, 333 N.W.2d at 627; see also 1 FARNSWORTH, *supra* note 94, § 2.10 (discussing consideration in at-will employment).

130. See 1 FARNSWORTH, *supra* note 94, § 2.10a; see also *Kinoshita v. Canadian Pac. Airlines, Ltd.*, 724 P.2d 110, 117–18 (Haw. 1986) (holding that the employer's rules “constitute a contract enforceable by the employees” and reasoning that “[i]nasmuch as [the employer] circulated the rules with an intention ‘to create expectations and induce reliance by employees as a group[,]’ it ‘should not be able to escape liability on the grounds that a particular employee was unaware of the [rules] and thus did not receive a promise’” (quoting Mark Pettit, Jr., *Modern Unilateral Contracts*, 63 B.U. L. REV. 551, 583 (1983) (last two alterations in original)); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1268 & n.10 (N.J. 1985) (describing when an employer has created a situation instinct with an obligation); *Taylor v. Nat'l Life Ins. Co.*, 652 A.2d 466, 471 (Vt. 1993) (holding “that personnel manual provisions inconsistent with an at-will relationship may be used as evidence that the contract of employment requires good cause for termination despite the fact that the manual was not part of the initial employment agreement,” recognizing “that this holding draws on aspects of both unilateral contract formation and promissory estoppel,” and expressly agreeing with the rationale of *Toussaint*).

131. *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 N.Y. (1917).

132. See, e.g., ATKINSON, *supra* note 29, at 34 (listing “a plan of forced inheritance might discourage individual initiative and thrift” as one of the “grave disadvantages to a rule which would forbid an owner any freedom of determining where his property shall go upon his death”); Edward C. Halbach, Jr., *An Introduction to Chapters 1-4*, in DEATH, TAXES AND FAMILY PROPERTY, *supra* note 19, at 3, 4 (noting that some have argued that freedom of testation is “an encouragement to industry and thrift”).

The state grants to each citizen the right to control the disposition of his property at death “as an incentive to bring forth creativity, hard work, initiative and ultimately productivity that benefits others.”<sup>133</sup> This freedom of disposition serves also as an inducement “to save rather than to consume, and to go on saving long after [one’s] own lifelong future needs are provided for.”<sup>134</sup> Individuals’ savings are thought to be critically important to the health of the overall economy.<sup>135</sup>

Professors Adam J. Hirsch and William K.S. Wang have described the industry and thrift justification for testamentary freedom:

One argument, tracing back to the thirteenth century jurist Henry de Bracton, if not earlier, holds that freedom of testation creates an incentive to industry and saving. Bracton’s assumption—shared by modern social scientists—was that persons derive satisfaction out of bequeathing property to others. To the extent that lawmakers deny persons the opportunity to bequeath freely, the subjective value of property will drop, for one of its potential uses will have disappeared. As a result, thwarted testators will choose to accumulate less property, and the total stock of wealth existing at any given time will shrink. Testamentary freedom accordingly fulfills the normative goal of wealth maximization, which is advanced by its proponents as the best available barometer of utility maximization.<sup>136</sup>

Thus, a principal reason why the state offers in its probate code to distribute a future decedent’s property in accordance with the property owner’s expressed or implied wishes is quite similar to a principal reason why an employer offers in an employee handbook to provide a measure of job security to its worker. In both cases, the offeror hopes to induce a more productive workforce. Moreover, the property owner accepts and provides consideration for the donative freedom contract in a manner similar to that by which an employee accepts the unilateral contract for job security in an employee handbook. In both cases, the offeree’s performance in the form of hard work constitutes her acceptance of the contract and her consideration given for the contract. More precisely, the property owner accepts the state’s offer to honor his donative intent and provides consideration for the donative freedom contract by being

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133. Halbach, *supra* note 131, at 5.

134. *Id.* at 6.

135. *Id.* (explaining that “savings of individuals are vital to the economy’s capital base and thus to its level of employment and to the productivity of other individuals”).

136. Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 *IND. L.J.* 1, 7–8 (1992) (footnotes omitted); *see also id.* at 16 (discussing the productivity-incentive theory of testamentary freedom as applied to the right to bequeath future interests).

economically productive and by saving and investing his estate rather than consuming it.

Under the broad reasoning of *Woolley* and its progeny, it is of no moment to the implied unilateral contract analysis that a particular testator or indeed the citizenry in general is ignorant of the specifics of the probate code. It is sufficient that the citizenry has a general sense that the government respects the right of each person to do as she pleases with her property at death. The American citizenry certainly does have this sense.<sup>137</sup> The right to pass property at death by will is so much a part of the American culture that any alternative seems unthinkable.<sup>138</sup> Professor Ray D. Madoff has observed with respect to this point:

If you ask an American about the legal rights of dead people, you will probably get an answer having to do with [living] people's rights to control who gets their property after they die. This right to control the disposition of property at death is central to the American psyche. Although people are often vague in their understanding about many aspects of the law, one thing they do know is that they can write a will that controls who will—and who will not—get their property after they die.<sup>139</sup>

Given that the state has chosen to establish a right to pass one's property at death and has made this right known to the citizenry, the productivity of the state's citizens "is presumably enhanced."<sup>140</sup> The state secures a productive citizenry, and the productive citizen enjoys the peace of mind that comes from knowing that the state will respect her donative wishes at her death. To paraphrase the Michigan Supreme Court in *Toussaint*, "No [ante-mortem] negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the [donor] knows nothing of the particulars of the [probate code] or that the [state] may change them unilaterally."<sup>141</sup> All that is required is that the state has chosen "to create an environment in which the [donor] believes

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137. See, e.g., MADOFF, *supra* note 21, at 57–58 (asserting that most Americans view the right to control the passing of their property at their death "as essential to the very notion of private property").

138. See, e.g., Friedman, *supra* note 19, at 19 (noting American familiarity with wills and adding that "[t]he law of inheritance has its technical side; but its basic institutions (the will, for example) are widely known, and accepted as part of the machinery of life"); MADOFF, *supra* note 21, at 57 (commenting on how the American arts frequently explore the theme of one's ability to control the disposition of one's property at death and the related theme of how this right enables one to exert control over others during one's life).

139. MADOFF, *supra* note 21, at 57.

140. See *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 892 (Mich. 1980).

141. See *id.* (footnote omitted).

that, whatever the [probate code specifics], they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each [donor]. The [state] has then created a situation ‘instinct with an obligation.’”<sup>142</sup>

To be sure, courts and commentators have raised serious objections to *Woolley* and its progeny.<sup>143</sup> The principal criticism centers on the understanding that traditional unilateral contract doctrine requires that the offeror communicate an offer to the offeree and that the offeree commence his performance in exchange for the offered terms.<sup>144</sup> That is, in the traditional case of a unilateral contract, the offeror must seek the offeree’s performance in exchange for the offeror’s promise, and the offeree must give his performance in exchange for that promise.<sup>145</sup> Certainly then, under traditional contract doctrine, no contract exists when the offeree performs without knowledge of the offer.<sup>146</sup>

Under *Woolley* and its progeny, however, a court implies the offer, acceptance, and consideration elements rather than require an intent of the parties<sup>147</sup>: In most cases of employee handbooks, the employer does not intend to make an offer by circulating its employment manual, and the employee does not mean for her continued employment to serve as acceptance of an offer or consideration for the promise.<sup>148</sup> Thus, the *Woolley* doctrine employs legal fictions pursuant to which the court presumes an offer, acceptance, and consideration.<sup>149</sup>

In defense of *Woolley*, courts make use of those legal fictions in light

142. *See id.* (quoting *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917)).

143. *See, e.g.*, RESTATEMENT OF EMPLOYMENT LAW § 2.05 cmt. b (AM. LAW INST. 2015) (calling application of unilateral contract theory in the case of employee handbooks “a conceptually awkward fit,” noting that employees rarely are aware of the terms of employer-issued statements, asserting that “traditional principles of consideration and bargained-for exchange rarely, if ever, apply when the employer’s unilateral statements are not made in response to a prospective employee’s expressed concerns or an employee’s threat to resign,” and resting its endorsement of enforcement of employee handbook promises on “general estoppel principles” rather than unilateral contract theory).

144. *See id.*

145. 1 FARNSWORTH, *supra* note 94, § 3.4.

146. *See, e.g.*, *Broadnax v. Ledbetter*, 99 S.W. 1111, 1111–12 (Tex. 1907) (holding that no contract to pay a reward existed where the citizen who captured and returned an escaped prisoner did so without knowledge of the offer of a reward).

147. *See Verkerke, supra* note 109, at 55; *Befort, supra* note 124, at 341–43.

148. *See Befort, supra* note 124, at 343; *see also* 1 FARNSWORTH, *supra* note 94, § 2.10 (noting that in employee handbook cases, “there is rarely any evidence that the promise played any role in the employee not quitting” and concluding that “[t]hese cases represent a significant erosion of the requirement of bargain”).

149. *See Verkerke, supra* note 109, at 55; *Befort, supra* note 124, at 341 (explaining how the court in *Pine River State Bank* implied the offer, acceptance, and communication).

of the practical realities that: (1) employers distribute employment manuals to their employees in part to enhance the employment relationship; and (2) employee handbooks further this goal in part because employers encourage workers to rely on the promissory statements set forth in these handbooks.<sup>150</sup> Therefore, implying a unilateral contract prevents the unjust enrichment of the employer who secures a motivated and compliant workforce by inducing worker reliance on its promissory statements.<sup>151</sup>

Moreover, the criticism of the law's reliance on legal fictions to supply an offer, acceptance, and consideration in the context of a job security provision in an employee handbook arguably has much less force in the context of the donative freedom contract. In contrast to the typical employer, which ordinarily does not intend to make an offer of job security when it issues an employee handbook,<sup>152</sup> the state does intend and expect to be bound by the offer in its probate code to pass a property owner's estate at his death to his preferred donees. Also, given that a principal justification for the respect that the state shows for donative freedom is the belief that such donative freedom serves as an incentive for industry and thrift,<sup>153</sup> the state more realistically should be understood as seeking the property owner's performance in exchange for the state's promise to respect donative freedom.

Further, compared to the typical employee, who ordinarily does not intend by her continued employment to accept or provide consideration for the employer's "offer" of job security contained in an employee handbook, it seems more realistic to impute to the typical property owner—especially one who executes a will—an intent to accept the state's offer by being economically productive and by saving and investing her estate rather than consuming her estate. As discussed above, the typical citizen is likely to appreciate that she is free to dispose of her property at her death as she sees fit.<sup>154</sup> The citizen who executes a will evidences this understanding by the very act of executing the will. Again, given the understanding that donative freedom is an incentive to industry and saving, the property owner more realistically should be understood

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150. See Befort, *supra* note 124, at 337–39.

151. See *id.* at 339, 343, 370; see also Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 199, 207–08 (2005) (arguing for the enforcement of workplace norms pursuant to relational contract theory, citing to the *Toussaint* court's use of implied contract doctrine as an example of a court applying relational principles in the employment context, and explaining that "an employer commits relational opportunism when it encourages employee loyalty through implied promises of job security and fair treatment and then retracts that security and fair treatment when they prove inconvenient").

152. Befort, *supra* note 124, at 343.

153. See *supra* notes 131–35 and accompanying text.

154. See *supra* notes 136–38 and accompanying text.

as truly giving her performance in exchange for the state's promise to respect her wishes for the disposition of her property at death. Moreover, the fact that the property owner has multiple motivations for acquiring and preserving her assets does not prevent the performance from serving as consideration for the state's donative freedom promise.<sup>155</sup> Thus, the case for applying the *Woolley* framework is much stronger in the context of inheritance than it is in the employee handbook context in which courts have widely accepted it.<sup>156</sup>

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155. See RESTATEMENT (SECOND) OF CONTRACTS § 81(2) (AM. LAW INST. 1981) (“The fact that a promise does not of itself induce a performance or return promise does not prevent the performance or return promise from being consideration for the promise.”). What of the property owner who shows industry and thrift, but is not motivated whatsoever by the state's offer of donative freedom? Alternatively, what of the spendthrift sloth who does her best to waste all that she has received and to avoid any productive activity? Such property owners would be similarly situated to most employees under the broad reading of *Woolley* and its progeny in that they do not truly mean for their actions to constitute acceptance of or consideration for the implied unilateral contract. Thus, under *Woolley* and its progeny, the court will imply such property owners' acceptance and consideration. Cf. 1 FARNSWORTH, *supra* note 94, § 3.14a (“Although such holdings are a radical departure from traditional contract law, they produce the salutary result that all employees—those who read the handbook and those who did not—are treated alike.”). The spendthrift sloth who manages to dissipate her entire fortune would be treated like an employee who is offered job security but quits her employment.

156. Applying unilateral contract theory in the inheritance law context should not preclude the state from modifying its probate code from time to time. Again, the law of employee handbooks is instructive. A substantial number of jurisdictions have held that an employer may prospectively modify a binding policy statement by providing affected employees with reasonable advance notice of the modification. See RESTATEMENT OF EMPLOYMENT LAW § 2.06 Reporters' Notes cmt. a (AM. LAW INST. 2015) (endorsing the position that “[a]bsent circumstances giving rise to nonmodifiable . . . or accrued employee rights, . . . [where] employer obligations are predicated solely on prior unilateral statements[, such obligations] can be modified or rescinded prospectively by the same mechanism that created them—unilateral employer promulgation with reasonable advance notice given to affected employees” and citing numerous cases in support); see also *Asmus v. Pac. Bell*, 999 P.2d 71, 76, 81 (Cal. 2000) (holding that “[a]n employer may terminate a written employment security policy that contains a specified condition, if the condition is one of indefinite duration and the employer makes the change after a reasonable time, on reasonable notice, and without interfering with the employees' vested benefits” and noting that “the majority of other jurisdictions that have addressed the question” have reached a similar conclusion).

Moreover, the fact that the property owner may alter the specific terms of the donative freedom contract from time to time—by execution, revocation, or amendment of his will or codicil—does not preclude contract formation. See RESTATEMENT (SECOND) OF CONTRACTS § 34(1) (AM. LAW INST. 1981) (“The terms of a contract may be reasonably certain even though it empowers one or both parties to make a selection of terms in the course of performance.”); *id.* § 34 cmt. a (“A bargain may be concluded which leaves a choice of terms to be made by one party or the other. If the agreement is otherwise sufficiently definite to be a contract, it is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties.”).

### III. THE INSIGNIFICANCE OF THE DONEE'S LACK OF CONSENT TO ARBITRATE

Even if one accepts that a will is a contract within the purview of the FAA and state arbitration statutes, one might still object to testator-compelled arbitration given that a will contestant is not a party to that contract. The implied unilateral contract that contains the express arbitration clause—the will—is between the testator and the state. Neither the testator's legatee or devisee under the will nor his heir pursuant to the intestacy statutes is a party to the donative freedom contract entered into between the donor and the state.<sup>157</sup> Neither has consented, therefore, to the will's arbitration clause. Given arbitration dogma that “arbitration is a creature of contract”<sup>158</sup> and the reality that neither the will beneficiary nor the heir has contracted to arbitrate her will contest, the argument must be addressed that it would be inappropriate therefore to compel either the will beneficiary or the heir to arbitrate her challenge to the testator's will.

One virtue of conceptualizing a will as a contract between the testator and the state is that doing so brings into sharp relief the true nature of the will beneficiary and the heir with respect to the arbitration clause in that contract.<sup>159</sup> These donees are bystanders to the contracting process. They are third-party beneficiaries of the donative freedom contract between the property owner and the state. Appreciating this true nature of the donee allows for a better understanding of the arguments that compelling a donee to arbitrate his will contest when he has not agreed to arbitrate is consistent with both the law of wills and the law of arbitration.

As for the law of wills, it is well-established in the law of donative transfers that the rights of the donee are derivative of and subordinate to the rights of the testator.<sup>160</sup> The testator's right to disinherit his children

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157. Cf. *Martz's Ex'r v. Martz's Heirs*, 66 Va. (25 Gratt.) 361, 365 (1874) (“The legatees are parties interested in the will, but they are in no sense parties to the making of it.”).

158. *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 570–71 (1960) (“[S]ince arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute.”); see also *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010) (“The FAA reflects the fundamental principle that arbitration is a matter of contract.”); *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) (noting that arbitration is a matter of contract).

159. Cf. Strong, *Arbitration of Trust Disputes*, *supra* note 4, at 1174 (“Although theory can often seem entirely divorced from the practice of law, this [issue of mandatory trust arbitration] is one instance where the manner in which a device [(the trust)] is conceptualized can make a difference in how it is treated in court.”).

160. See *In re Morgan's Estate*, 72 A. 498, 499 (Pa. 1909) (discussing the justification for enforcement of a trust spendthrift provision and commenting that “[i]t is always to be remembered that consideration for the beneficiary does not even in the remotest way enter into the policy of the law. It has regard solely to the rights of the donor.”); Spitzko, *Protecting the Abhorrent*

serves as the most powerful example of this principle. As Professor Edward C. Halbach Jr. has stated, “inheritance may grant wealth to *donees* without regard to their competence and performance, but the economic reasons for allowing inheritance are viewed in terms of proper rewards and socially valuable incentives to the *donor*.”<sup>161</sup> In the context of testator-compelled arbitration, this first principle speaks to the unfairness argument—it would be unfair to force the will beneficiary to arbitrate her will contest when the beneficiary has not consented to the arbitral forum. There can be no unfairness or unconscionability arising from a donor conditioning his gift on the donee’s consent to arbitrate any dispute relating to the gift.<sup>162</sup>

Indeed, American inheritance law guarantees the testator tremendous latitude in attaching conditions to her donative transfer.<sup>163</sup> The sole limitation is that the condition must not violate public policy.<sup>164</sup> In general, courts have applied this limitation sparingly.<sup>165</sup> Courts have noted frequently in upholding conditions on testamentary gifts that “since the heirs could have been disinherited entirely, they cannot complain about having conditions imposed on their bequests.”<sup>166</sup>

Thus, it is fully in accord with the law of donative transfers that the

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*Testator*, *supra* note 6, at 300 (arguing that “the heir’s or putative legatee’s ‘rights’ in the decedent’s property are wholly derivative of the decedent’s right to pass her property to the persons of her choosing at her death”); *cf.* *Whalen v. Prosser*, 719 So. 2d 2, 6 (Fla. Dist. Ct. App. 1998) (explaining with respect to a claim of tortious interference with an expectancy that the “the beneficiary is authorized to sue to recover damages primarily to protect the testator’s interest rather than the disappointed beneficiary’s expectations”).

161. Halbach, *supra* note 132, at 6.

162. See Langbein, *supra* note 32, at 651 n.136 (“Because the trust deal originates in a gift, a unilateral transfer, the concerns about information cost and market failure that motivate unconscionability limits on party autonomy for exchange transactions in contract law have less sway in trusts.”); Strong, *Arbitration of Trust Disputes*, *supra* note 4, at 1241 (“Since there can be no inequality of bargaining power in a donative relationship, trust arbitration cannot be problematic in this sense.”).

163. See *Shapira v. Union Nat’l Bank*, 315 N.E.2d 825, 826, 832 (Ohio Ct. Com. Pl. 1974) (holding that public policy does not preclude a testator from conditioning his gift on the donee marrying, within seven years of the testator’s death, a Jewish woman whose parents are both Jewish); see also MADOFF, *supra* note 21, at 6 (“Americans [in passing property at death] are largely free to impose whatever conditions they want, and their plans can often be imposed for as long as they want, even in perpetuity.”). See generally *id.* at 72–76 (discussing conditional bequests and noting that “American law has been very liberal in terms of allowing individuals posthumous control over the behavior of others through the use of conditional trusts”).

164. MADOFF, *supra* note 21, at 73.

165. *Id.* (“[C]ourts have generally been loath to use their authority to restrict these conditions, seeing it as outside their bailiwick.”).

166. *Id.*

testator may condition his gift on the donee acceding to his direction that disputes relating to the gift be resolved by arbitration.<sup>167</sup> Indeed, several courts in the nineteenth century expressly relied upon conditional gift theory in upholding the right of a testator to appoint an arbitrator to interpret the testator's will and to resolve disputes arising under the will.<sup>168</sup> For example, in 1886, the Supreme Court of West Virginia spoke at length on the relationship between testamentary freedom and testator-compelled arbitration:

Of course a will is not an agreement between two or more contracting parties, but it is certainly *no less binding upon the parties who take a benefit under it than if they had contracted with the testator for that benefit*. The testator has full dominion over his property with the absolute right, subject only to the limitations fixed by law, to do with and dispose of it in any manner or to whomever his will or caprice may suggest. Within the rules of law he may subject it to any limitation, restriction or condition he chooses, and the devisee or legatee, if he elects to take under the will, will be bound to respect and observe the same. It, therefore, seems to me entirely clear that a testator has the power not only to appoint a person or arbitrator to interpret and settle difficulties among the devisees and legatees growing out of the dispositions made by the will, but that he has the right to make the decision of such arbiter, if made without fraud or corruption, final and conclusive upon the beneficiaries under the will.<sup>169</sup>

As for the law of arbitration, settled arbitration doctrine provides that a court may compel a non-signatory to a contract containing an arbitration

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167. Cf. Janin, *supra* note 6, at 525 (“The distinguishing characteristic of such [arbitration] provisions is that the interests given by the testator or settlor are conditioned by the terms of his will or conveyance. Those who wish to take under the instrument are obliged to submit all disputes thereafter arising to arbitration.”).

168. See, e.g., *Wait v. Huntington*, 40 Conn. 9, 11–12 (Conn. 1873) (“It is familiar law that a testator may confer on executors and on others absolute power of appointment and disposition over his property. So he may annex conditions and qualifications to his bequests not repugnant to law and good policy.”); *In re Phillips’s Estate*, 10 Pa. C. 374, 380 (Orphans’ Ct. 1891) (holding that if a testator may designate a third person as an executor, a testator should also have the power to designate a third person to address questions of distribution or construction that arise out of his will); *Moore v. Harper*, 27 W. Va. 362, 374 (1886) (noting that with a testator’s right to implement restrictions and conditions into his will also comes the right to appoint an arbitrator to interpret that will).

169. *Moore*, 27 W. Va. at 374 (emphasis added).

clause to arbitrate his claim arising from the contract.<sup>170</sup> Indeed, courts may use at least six theories to compel a non-signatory to a contract containing an arbitration clause to bring any claims under the contract in arbitration: (1) agency; (2) alter ego or veil-piercing; (3) assumption; (4) incorporation by reference; (5) third-party beneficiary; and (6) equitable estoppel.<sup>171</sup> Of these, only third-party beneficiary and equitable estoppel are relevant to a discussion of testator-compelled arbitration.

The principal concern in arbitration law with binding a non-signatory to an arbitration contract is not that the nonparty has not signed the contract. Although the FAA, UAA, and RUAA require a written contract or agreement before they apply to an arbitration provision, they do not require that the entity against whom it will be enforced sign the writing.<sup>172</sup> Moreover, an enforceable written arbitration contract can arise from an implied unilateral contract.<sup>173</sup> Thus, an arbitration contract may be “written” even though the offeree’s acceptance is implied.<sup>174</sup> For example, an employee can accept an arbitration contract offered by her employer in a written employee handbook by continuing her employment.<sup>175</sup>

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170. See, e.g., *Bridas S.A.P.I.C. v. Gov’t of Turkm.*, 345 F.3d 347, 355 (5th Cir. 2003); *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 776 (2d Cir. 1995); *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 129, 131 (Tex. 2005).

171. *Bridas*, 345 F.3d at 356–63 (listing the six theories and discussing agency, alter ego, estoppel, and third-party beneficiary); *Thomson-CSF*, 64 F.3d at 777–80 (discussing incorporation by reference, assumption, agency, alter ego, and estoppel); *Rachal v. Reitz*, 403 S.W.3d 840, 846 n.5 (Tex. 2013).

172. See, e.g., *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 736 (7th Cir. 2002) (“Although § 3 of the FAA requires arbitration agreements to be written, it does not require them to be signed.”); *Valero Ref., Inc. v. M/T Lauberhorn*, 813 F.2d 60, 63–64 (5th Cir. 1987) (affirming that the FAA requires a written arbitration agreement but does not require that the parties sign the written agreement); *Rachal*, 403 S.W.3d at 851 (noting that the Texas Arbitration Act requires an arbitration provision to be in writing but holding that a court may compel a non-signatory to the written arbitration provision to arbitrate her claim arising under the written instrument); *Hurley v. Fox*, 520 So. 2d 467, 467, 469 (La. Ct. App. 1988) (holding that Louisiana’s statute on the validity of arbitration agreements requires an arbitration contract to be in writing but does not require that the parties sign the contract).

173. See, e.g., *Seawright v. Am. Gen. Fin. Servs. Inc.*, 507 F.3d 967, 972 (6th Cir. 2007); *Metro E. Ctr. for Conditioning & Health v. Qwest Commc’ns Int’l, Inc.*, 294 F.3d 924, 926 (7th Cir. 2002).

174. See, e.g., *Seawright*, 507 F.3d at 978; *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1369 (11th Cir. 2005).

175. See, e.g., *Seawright*, 507 F.3d at 970 (holding that an employee’s “knowing continuation of employment after the effective date of the arbitration program constituted acceptance of a valid and enforceable contract to arbitrate”); *Caley*, 428 F.3d at 1369, 1374; *Tinder*, 305 F.3d at 731, 734 (concluding that an arbitration contract arose from a brochure that the employer stuffed into the envelope containing the employee’s paycheck and holding that an employee’s continued employment may provide both the employee’s acceptance of the arbitration

Rather, the more serious concern with binding a non-signatory to an arbitration contract is that the non-signatory has not consented to the contract. As the Supreme Court suggested in *Arthur Andersen LLP v. Carlisle*,<sup>176</sup> however, pursuant to the FAA a court may compel a nonparty to an arbitration contract to arbitrate in accordance with the arbitration contract where state contract principles allow a court to enforce the contract against the nonparty.<sup>177</sup> In *Carlisle*, the Court considered whether a litigant who was not a party to the written arbitration contract that other litigants in the case had entered into might be entitled under Section 3 of the FAA to a stay of the litigation pending arbitration pursuant to the arbitration contract.<sup>178</sup> The Court first noted that, in general, state contract law determines which arbitration agreements are binding under Section 2 of the FAA and enforceable under Section 3 of the FAA, and against whom the agreements are enforceable, provided that the state contract law “arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.”<sup>179</sup> The Court further noted that “‘traditional principles’ of state law allow a contract to be enforced by or against nonparties to the contract through ‘assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel’”<sup>180</sup> Thus, the Court held that “a litigant who was not a party to the relevant arbitration agreement may invoke § 3 if the relevant state contract law allows him to enforce the agreement.”<sup>181</sup>

Although *Carlisle* involved a nonparty to an arbitration contract seeking to enforce the contract against parties to the agreement, courts may apply *Carlisle*’s reasoning generally to cases in which a party to an arbitration contract seeks to compel arbitration against a nonparty to the arbitration contract: under Section 2 of the FAA, state law determines

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contract and the employer’s consideration for the arbitration contract); *Brown v. St. Paul Travelers Cos.*, 559 F. Supp. 2d 288, 291 (W.D.N.Y. 2008); *In re Halliburton Co.*, 80 S.W.3d 566, 569 (Tex. 2002).

176. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009).

177. *See id.* at 632.

178. *Id.* at 629.

179. *Id.* at 630–31 (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987)).

180. *Id.* at 631 (quoting 21 R. LORD, WILLISTON ON CONTRACTS § 57:19 (4th ed. 2001)).

181. *Id.* at 632; *see also id.* at 631 n.6 (“There is no doubt that, where state law permits it, a third-party claim is ‘referable to arbitration under an agreement in writing.’” (quoting 9 U.S.C. § 3 (2012)); *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 126–27 (2d Cir. 2010) (“Under principles of estoppel, a non-signatory to an arbitration agreement may compel a signatory to that agreement to arbitrate a dispute” when there exists “a relationship among the parties of a nature that justifies a conclusion that the party which agreed to arbitrate with another entity should be estopped from denying an obligation to arbitrate a similar dispute with the adversary which is not a party to the arbitration agreement” (quoting *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354, 359 (2d. Cir. 2008)).

whether an arbitration contract may “be enforced by or against nonparties to the contract.”<sup>182</sup> Thus, for example, the U.S. Court of Appeals for the Fifth Circuit concluded that *Carlisle* was controlling in a case—*Todd v. Steamship Mutual Underwriting Ass’n*<sup>183</sup>—in which a party to an arbitration contract sought to stay litigation involving a nonparty to the arbitration contract and to compel that nonparty to arbitrate his claims against the party pursuant to the arbitration agreement.<sup>184</sup>

In *Todd*, Anthony Todd filed a suit against Steamship in Louisiana state court to collect on his judgment against his now-insolvent employer for injuries he suffered on the job.<sup>185</sup> At the time of Todd’s injury, Steamship insured Todd’s employer against liability the employer might incur because of injuries to its employees.<sup>186</sup> Steamship’s insurance contract with Todd’s employer contained a clause requiring the employer to arbitrate its disputes with Steamship.<sup>187</sup> After Steamship removed the case to federal court, Steamship sought to stay the litigation and compel arbitration.<sup>188</sup>

Steamship argued that the court should compel Todd to arbitrate his claims against Steamship because those claims derived from the employer’s contract with Steamship, which contained an arbitration clause.<sup>189</sup> In addressing this argument, the Fifth Circuit recognized that *Carlisle* effectively overruled Fifth Circuit precedent that had reasoned that “[t]he FAA does not require arbitration unless the parties to a dispute have agreed to refer it to arbitration. . . . [and] the mandatory stay provision of the FAA does not apply to those who are not contractually bound by the arbitration agreement.”<sup>190</sup> Accordingly, the Fifth Circuit remanded the case to the district court for a determination as to whether

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182. See *Carlisle*, 556 U.S. at 631 (“If a written arbitration provision is made enforceable against (or for the benefit of) a third party under state contract law, the [FAA]’s terms are fulfilled.”).

183. 601 F.3d 329 (5th Cir. 2010).

184. *Id.* at 331.

185. *Id.* at 330–31.

186. *Id.* at 331.

187. *Id.*

188. *Id.*

189. *Id.* Steamship brought its motions to stay litigation and compel arbitration pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly referred to as the New York Convention. *Id.* The New York Convention implementing legislation incorporates the FAA to the extent that the FAA does not conflict with the Convention. *Id.* at 331–32. The *Todd* court concluded, “*Carlisle* and other cases discussing whether nonsignatories can be compelled to arbitrate under the FAA are relevant for this case governed by the New York Convention.” *Id.* at 334–35.

190. *Id.* at 333 (quoting *Zimmerman v. Int’l Cos. & Consulting, Inc.*, 107 F.3d 344, 346 (5th Cir. 1997)).

the court could compel Todd to arbitrate as a non-signatory under applicable law.<sup>191</sup>

Thus, if one accepts that a will is a contract, under the reasoning in *Carlisle*, the FAA will provide for enforcement of testator-compelled arbitration so long as state contract law would bind the will contestant to the will's arbitration clause. As asserted above, courts may utilize both third-party beneficiary theory and equitable estoppel theory to make the will's arbitration clause binding on the will contestant.<sup>192</sup> The two theories are similar but distinct. For example, the third-party beneficiary doctrine focuses on the intentions of the contracting parties at the time of the contract's execution, while the equitable estoppel doctrine focuses on post-contracting conduct.<sup>193</sup>

To demonstrate that a nonparty to a contract is a third-party beneficiary of the contract, it is not sufficient to show merely that the nonparty would benefit incidentally from enforcement of the contract. Rather, it must be shown that a party to the contract—or in some jurisdictions, both parties to the contract—intended that the nonparty benefit from the contract and that performance of the contract would complete a gift intended for the nonparty or would satisfy a debt owed to the nonparty.<sup>194</sup> Courts will bind a third-party beneficiary to a contract's arbitration clause when the claim that the third-party beneficiary seeks to assert arises from the contract that contains the arbitration clause and for which the third party was the intended beneficiary.<sup>195</sup> These principles support an argument that the beneficiary of a will and the intestate heir should be considered third-party beneficiaries of the donative freedom contract, of which the will is a part, and should be bound to arbitrate any contest arising under the donative freedom contract that contains an arbitration clause.

It is undeniable that the testator executes her will for the purpose of benefitting her will beneficiary and that performance of the will contract would complete a gift intended for the beneficiary.<sup>196</sup> The cases in which

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191. *Id.* at 332.

192. *See supra* note 171 and accompanying text.

193. *Bridas S.A.P.I.C. v. Gov't of Turkm.*, 345 F.3d 347, 362 (5th Cir. 2003); *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 n.7 (3d Cir. 2001).

194. 3 FARNSWORTH, *supra* note 94, § 10.3. In some jurisdictions, one must also show that the contracting parties' intent to benefit the third party was a material purpose of the parties in entering into the contract. *See, e.g., E.I. DuPont*, 269 F.3d at 196.

195. *E.I. DuPont*, 269 F.3d at 195.

196. *See* RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. c, illus. 4 (AM. LAW INST. 1981) (stating that a "donee beneficiary" is an intended beneficiary under Section 302(1)(b) and illustrating the point with a will substitute example: "A, an insurance company, promises B in a

an intended will beneficiary brings suit against the testator's attorney for malpractice in the drafting or execution of the will speak to these points. Numerous courts have held that an intended will beneficiary whose testamentary gift is lost due to the negligence of the testator's attorney may bring a contract claim against the attorney as a third-party beneficiary of the contract between the testator and the attorney.<sup>197</sup>

The more complicated argument is that a will contestant who challenges a will containing an arbitration clause necessarily seeks to assert a claim arising from the contract. The argument derives from an understanding that the will is but one part of a greater donative freedom contract, which also contains a provision providing for the intestate passing of a decedent's property where the decedent failed during his life to execute an effective estate plan. This argument also applies to a direct benefits estoppel analysis; therefore, this Article develops this argument directly below in connection with a discussion of direct benefits estoppel.

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policy of insurance to pay \$10,000 on B's death to C, B's wife. C is an intended beneficiary under Subsection (1)(b)").

197. 3 FARNSWORTH, *supra* note 94, §§ 10.1, 10.3; *Fabian v. Lindsay*, 765 S.E.2d 132, 137, 141 (S.C. 2014) (noting that "[a] majority of jurisdictions now recognize a cause of action by a third-party beneficiary of a will or estate planning document against the lawyer whose drafting error defeats or diminishes the client's intent," and holding that South Carolina law will now recognize such causes of action, "both in tort and in contract"); *cf.* John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 185 (1997) ("The difference between a trust and a third-party beneficiary contract is largely a lawyers' conceptualism.").

The fact that the heir or will beneficiary was unknown or unnamed at the time of contracting does not prevent the eventual heir or will beneficiary from being classified as a third-party beneficiary of the donative freedom contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 308 (AM. LAW INST. 1981) ("It is not essential to the creation of a right in an intended beneficiary that he be identified when a contract containing the promise is made."); *id.* § 308 cmt. a, illus. 1 (stating that "there is no requirement of identification prior to the time for enforcement of the right" and illustrating the point with the example of a will substitute (life insurance contract) beneficiary whose future interest was contingent at the time of contracting); *see also* *James Family Charitable Found. v. State St. Bank & Tr. Co.*, 956 N.E.2d 243, 244, 248 (Mass. App. Ct. 2011) (holding that a charitable foundation, which was the donee of certain mutual fund shares and which alleged that the former custodian of the shares breached its custodianship agreement with the prior owner of the shares by delaying transfer of the shares to the charitable foundation, was a third-party beneficiary of the custodianship agreement between the donor and the custodian and that "[i]t makes no difference that [the] foundation was not identified as an intended beneficiary at the time the agreement was entered into"); *In re Citgo Petroleum Corp.*, 248 S.W.3d 769, 773, 776-77 (Tex. App. 2008) (holding that even though the arbitration contract between an employer and its employee did not name the employer's customer specifically, "the agreement is sufficiently clear to establish that the parties intended to cover entities in th[e] category [of the employer's customers]"; therefore, the employer's customer is a third-party beneficiary of the arbitration contract between the employer and the employee and may compel arbitration of the employee's suit against the customer).

There are two quite distinct versions of equitable estoppel that courts have used to compel arbitration between a signatory to an arbitration contract and a non-signatory to the contract: direct benefits estoppel and intertwined claims estoppel.<sup>198</sup> Only direct benefits estoppel is relevant to the instant discussion.<sup>199</sup> Under direct benefits estoppel theory, a nonparty to a contract “is estopped from repudiating an arbitration clause in a contract which he has previously embraced.”<sup>200</sup> Thus, the nonparty who seeks to enforce a contract may not simultaneously disavow the arbitration clause in the contract.<sup>201</sup> As the Supreme Court of Texas commented in a discussion of direct benefits estoppel theory in the arbitration context, “A nonparty cannot both have his contract and defeat it too.”<sup>202</sup>

For example, the district court in *Todd v. Steamship Mutual Underwriting Ass’n*,<sup>203</sup> on remand from the Fifth Circuit, applied direct benefits estoppel theory to bind Todd to the arbitration contract entered into between Todd’s employer and the employer’s insurance company, Steamship.<sup>204</sup> Recall that Todd was not a party to the insurance contract containing the arbitration clause but sued Steamship to enforce the insurance contract to collect on a judgment that his now-insolvent employer owed him but failed to pay.<sup>205</sup> After finding that Louisiana law controlled the question of whether Todd, as a non-signatory to the

198. See *Bridas S.A.P.I.C. v. Gov’t of Turkm.*, 345 F.3d 347, 361–62 (5th Cir. 2003); *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 778–79 (2d Cir. 1995); see also Alexandra Anne Hui, Note, *Equitable Estoppel and the Compulsion of Arbitration*, 60 VAND. L. REV. 711, 714, 726–39 (2007) (explaining the two different strands of equitable estoppel).

199. The version of equitable estoppel referred to as “intertwined claims estoppel” is not relevant to the instant discussion. In intertwined claims estoppel, a court estops a signatory to the arbitration contract from avoiding arbitration with a non-signatory at the non-signatory’s insistence when the signatory has entered into an arbitration contract with a party closely related to the non-signatory and “the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.” *Thomson-CSF*, 64 F.3d at 779; see also *Bridas*, 345 F.3d at 360–61 (explaining intertwined claims estoppel).

200. *Todd v. S.S. Mut. Underwriting Ass’n*, No. 08-1195, 2011 U.S. Dist. LEXIS 38638, at \*20 (E.D. La. Mar. 28, 2011); accord *Thomson-CSF*, 64 F.3d at 779; *Bridas*, 345 F.3d at 361–62.

201. *Todd*, 2011 U.S. Dist. LEXIS 38638, at \*21; see also *Becker v. Davis*, 491 F.3d 1292, 1300 (11th Cir. 2007) (“[I]f a party relies on the terms of a written agreement in asserting the party’s claims, that party is equitably estopped from then seeking to avoid an arbitration clause within the agreement.”).

202. *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 135 (Tex. 2005). The party seeking to avoid arbitration in *In re Weekley Homes* sued in tort rather than under the contract. See *id.* at 132. Nonetheless, the Texas Supreme Court held that the party’s “prior exercise of other contractual rights and her equitable entitlement to other contractual benefits prevents her from avoiding the arbitration clause” contained in the contract. *Id.* at 135.

203. No. 08-1195, 2011 U.S. Dist. LEXIS 38638 (E.D. La. Mar. 28, 2011).

204. *Id.* at \*1–3, \*20, \*32–33.

205. *Id.* at \*1–2, \*19.

insurance contract, could be bound by the contract's arbitration provision, the district court rejected Todd's argument that he could not be bound by the arbitration clause because he had never agreed to arbitrate his dispute with the insurance company.<sup>206</sup> Rather, in holding that the court could compel Todd to arbitrate as a non-signatory, the district court reasoned that "[b]ecause Todd is seeking to enforce the terms of the contract between Steamship and [his employer], he has embraced that contract such that, under both Louisiana and federal case law, he is estopped from repudiating the arbitration clause in that contract."<sup>207</sup>

To more fully appreciate how direct benefits estoppel might be applied in the context of testator-compelled arbitration, it is useful initially to divide into two categories the types of claims that a will contestant might bring. The first category consists of claims pursuant to which the contestant seeks to increase her inheritance under the will.<sup>208</sup> The second category consists of claims pursuant to which the contestant seeks to increase her inheritance under the intestacy scheme.<sup>209</sup>

The first category of claims can be further subdivided into two groups: suits to construe the will and suits that challenge a testamentary gift to someone other than the contestant, which, if successful, would result in the gift being redirected under the will to the contestant. In a suit to construe the will, the contestant concedes that the will is valid and argues for a certain understanding of the meaning of the will that would benefit him.<sup>210</sup> The suit might concern issues such as the identity of a beneficiary,<sup>211</sup> identification of the property to which a certain beneficiary is entitled,<sup>212</sup> or specification of the time for distribution of property to the beneficiary.<sup>213</sup> Application of the direct benefits estoppel theory in the context of a suit to construe the will is straightforward: The party seeking to have the will construed in a manner that will favor him has embraced the will contract; thus, he is estopped from repudiating the contract's arbitration clause.<sup>214</sup>

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206. *Id.* at \*13, \*18–19, \*22.

207. *Id.* at \*22.

208. *See* Horton, *supra* note 2, at 1074; Murphy, *supra* note 2, at 629.

209. *See* Horton, *supra* note 2, at 1075; Murphy, *supra* note 2, at 629.

210. Love & Sterk, *supra* note 3, at 555–56.

211. *See, e.g., In re Estate of Barbey*, 32 N.Y.S.2d 191, 193 (Sur. Ct. 1941) (holding that a testator may authorize an executor to determine which employees qualify to receive certain property under the will).

212. *See, e.g., Coutts v. Holland*, 107 S.W. 913, 914–15 (Tex. Civ. App. 1908) (“The power [that the testator gave to executors] to determine what the will means, in its every part and provision, involves, as well, the power to decide what property it operates upon . . .”).

213. Love & Sterk, *supra* note 3, at 555–56.

214. *Cf.* Love & Sterk, *supra* note 3, at 557 (“Because all of the parties to any potential construction proceeding concede the validity of the will, a testator who includes a mediation

Alternatively, the will contestant who seeks to increase her inheritance under the will might argue that a testamentary gift to someone other than the contestant should fail and, consequently, be redirected under the will to the contestant.<sup>215</sup> Consider, for example, a sole residuary legatee who challenges a provision of the will that bequeaths \$100,000 to *A*. The residuary legatee is entitled to the portion of the probate estate that is left over after each non-residuary beneficiary has received her gift. Thus, the residuary legatee's successful challenge to *A*'s \$100,000 bequest would increase the residuary legatee's inheritance by \$100,000. The residuary legatee might allege that *A* used fraud, duress, or undue influence to procure the challenged bequest or that the gift was the product of the testator's insane delusion. Such allegations, if proven, would invalidate only *A*'s \$100,000 bequest but not the remainder of the will.<sup>216</sup> Where the will contestant's challenge pertains only to a portion of the will and the contestant seeks to take more under the will than she would take absent the will contest, direct benefits estoppel should bind the contestant to the arbitration clause. The contestant seeks to enforce the portion of the will contract that she does not challenge; accordingly, she may not simultaneously disavow the will contract's arbitration clause.<sup>217</sup>

The second category of claims that a will contestant might bring, consisting of challenges pursuant to which the contestant seeks to increase his inheritance under the intestacy statutes, can also be further subdivided into two groups.<sup>218</sup> The first type of challenge within this category alleges that the testator failed to comply with the relevant jurisdiction's formalities for the execution of a will, and thus the will is

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provision in the will can legally bind the parties to any will construction dispute." (footnote omitted)); *Merrill Lynch, Pierce, Fenner & Smith v. Eddings*, 838 S.W.2d 874, 876, 879 (Tex. App. 1992) ("[T]he settlor and beneficiaries of a trust [who did not sign the arbitration agreement at issue] are bound by a clause in an account agreement [signed by the trustee] to arbitrate the claims arising out of transactions in the trust's account.").

Notwithstanding the straightforward application of direct benefits estoppel to such a situation, it might be prudent for the testator to state expressly that a beneficiary's choice to take under the will shall constitute acceptance of the will's arbitration provision. *Cf.* Strong, *Empowering Settlers*, *supra* note 12, at 311–12 (recommending this approach with respect to an arbitration agreement contained in a trust).

215. One variation of this scenario would present the contestant who challenges a codicil to a will but not the will aside from the codicil, where the will itself contains the arbitration clause.

216. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3(a) (AM. LAW INST. 2003) ("A donative transfer is invalid to the extent that it was procured by undue influence, duress or fraud."); *id.* § 8.1 cmt. s ("A particular donative transfer is invalid . . . to the extent that it was the product of an insane delusion.").

217. *Cf.* Strong, *Arbitration of Trust Disputes*, *supra* note 4, at 1219 ("If a party bases its claim on any portion of the trust, then the arbitration clause will remain in effect, since it is impossible to make a claim under the trust while simultaneously denying its validity.").

218. *See* Love & Sterk, *supra* note 3, at 560.

of no effect.<sup>219</sup> The second type of challenge alleges that an event or condition at the time of the will's execution affected the testator's testamentary intent—either the intent to make a will or the intent to execute a particular dispositive scheme—and therefore some or all of the property that the will purports to gift should pass by intestacy.<sup>220</sup> This second type of challenge might allege, for example, that the testator lacked the mental capacity needed to execute a will.<sup>221</sup> Where the testator lacked sufficient mental capacity to execute a will, the entire will is necessarily invalid.<sup>222</sup> This second type of challenge also might be based on allegations of fraud, duress, undue influence, or an insane delusion.<sup>223</sup> A testamentary gift is invalid to the extent that it was the product of fraud, duress, undue influence, or an insane delusion.<sup>224</sup> Thus, each of these conditions might result in the total invalidity of the will or merely in the invalidity of a particular gift under the will that might then pass by intestacy if the gift is not otherwise redirected under the will. For example, if an heir were to argue successfully that a will's residuary clause was the product of fraud, duress, undue influence, or an insane delusion, the residuary property would then pass by intestacy.

The heir who challenges a will in the hope of increasing her intestate inheritance does not raise a claim arising under the will. One might reason, therefore, that such an heir should not be bound by the will's arbitration clause.<sup>225</sup> In the language of third-party beneficiary theory, the testator did not intend that the heir benefit from the will contract that contains the arbitration clause, and performance of the will contract would not complete a gift intended for the heir. One might conclude, then, that the heir should not be bound by the will's arbitration clause under third-party beneficiary theory. In the language of direct benefits estoppel theory, the heir has not “embraced” the will contract.<sup>226</sup> Thus, there is an argument that the heir should not be estopped from repudiating the will

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219. *Id.*

220. *See id.*

221. *Id.*

222. ATKINSON, *supra* note 29, at 241.

223. Love & Sterk, *supra* note 3, at 560–61.

223. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3(a) (AM. LAW INST. 2003) (“A donative transfer is invalid to the extent that it was procured by undue influence, duress or fraud.”); *id.* § 8.1 cmt. s (“A particular donative transfer is invalid . . . to the extent that it was the product of an insane delusion.”).

225. *See Clark v. Clark*, 57 P.3d 95, 98–99 (Okla. Civ. App. 2002) (holding that the beneficiary of a trust was not bound by an arbitration agreement contained in a contract between the trustee of the trust and a financial institution where the beneficiary's claim against the financial institution did not arise from the contract).

226. *See Todd v. S.S. Mut. Underwriting Ass'n*, No. 08-1195, 2011 U.S. Dist. LEXIS 38638, at \*20 (E.D. La. Mar. 28, 2011).

contract's arbitration clause.

The heir who challenges a will in the hope of increasing his intestate inheritance does, however, raise a claim arising under a separate provision of the greater donative freedom contract between the donor and the state. This greater contract includes not only provisions governing the passing of property by will, but also provisions governing the passing of property by intestacy and by will substitutes, such as the revocable *inter vivos* trust. As the heir seeks to take under the greater donative freedom contract, he should be bound by any applicable arbitration clause in the contract.<sup>227</sup> Thus, under this Article's theory, the heir should be bound by a will's arbitration provision even when the heir's will contest seeks to render the will a complete nullity.

The key to understanding this argument is to appreciate that the intestacy scheme itself is an implied unilateral contract between the donor and the state. The implied unilateral intestacy contract looks a great deal like the implied unilateral will contract. As a means to secure a more productive citizenry, the state offers in its probate code to distribute a future decedent's property in accordance with the property owner's implied wishes.<sup>228</sup> The property owner accepts and provides consideration for the intestacy contract by performance, specifically by being economically productive and by saving and investing her estate rather than consuming it. Under the broad reasoning of *Woolley* and its progeny, the intestacy contract is formed even if neither the property owner specifically nor the citizenry generally is conversant with the intricacies of the state's intestacy statutes.<sup>229</sup> Rather, the critical factor is that the state has created a situation that is "instinct with an obligation"<sup>230</sup> in conveying to the citizenry the general sense that the state will promote the implied wishes of each property owner by allowing the property owner's closest relations to succeed to her intestate estate at her death.

This understanding of the nature of the implied unilateral intestacy contract between the donor and the state leads to the conclusion that the heir who seeks to increase his intestate inheritance by challenging a will should be bound by the will's arbitration clause under third-party beneficiary theory. The state enacts its intestacy statutes with the intent that the statutes will benefit the heir whose very status as heir is a creature of the statutes. Moreover, performance of the intestacy statutes would

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227. *Cf. Elder v. Elder*, 120 A.2d 815, 819 (R.I. 1956) (discussing the validity of a no-contest clause and commenting that "[i]t is also a familiar principle of equity that one may not claim a gift from the bounty of a testator to which he had no original right, while at the same time attacking the validity of the instrument which makes the gift. He must take the devise or bequest together with its burden as well as its benefits.").

228. *See* Sitkoff, *supra* note 22, at 645.

229. *See supra* notes 108–30 and accompanying text (discussing *Woolley* and its progeny).

230. *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 892 (Mich. 1980) (quoting *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917)).

complete a gift intended for the heir. Thus, the heir is a third-party beneficiary of the intestacy provisions of the greater donative freedom contract. As the heir seeks to assert rights arising from the greater donative freedom contract, he should be bound by the arbitration clause contained in the will contract provisions of the greater donative freedom contract.

The same understanding of the nature of the implied unilateral intestacy contract between the donor and the state also leads to the conclusion that the heir who seeks to increase her intestate inheritance by challenging a will should be bound by the will's arbitration clause under direct benefits estoppel theory. The heir's will contest challenges only a portion of the greater donative freedom contract. Indeed, the heir seeks to enforce the portion of the greater donative freedom contract that she does not challenge. Accordingly, having embraced the greater donative freedom contract, even if only in part, she may not simultaneously disavow the greater donative freedom contract's arbitration clause.<sup>231</sup>

Thus, this Article's implied unilateral contract theory enables enforcement of a will's arbitration clause in circumstances where the clause would not be enforceable under the various theories discussed in Part I that seek to bind the donee to a will's arbitration provision in the absence of any contract. Such theories are nonstarters if the court holds that the governing arbitration statute makes enforceable only arbitration provisions contained in a contract. Moreover, such theories would not allow for testator-compelled arbitration where the will contestant seeks by his contest to increase his intestate inheritance.<sup>232</sup> Given the prevalence of such claims in the universe of will contests, such theories are of limited utility.

This Article's implied unilateral contract theory, however, will not mandate arbitration of all challenges to a will that contains a testator-compelled arbitration provision. To conclude that a will contestant should be bound by a will's arbitration clause, whether under third-party beneficiary theory, direct benefits estoppel theory, or both, is not necessarily to conclude that the will contestant must arbitrate her will contest. Rather, under separability theory, a court rather than an arbitrator should decide the will contestant's claim where the contest specifically or necessarily challenges the will's arbitration provision.<sup>233</sup>

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231. It is of no moment that some of the terms of the intestacy contract are not written. What matters under the FAA and state arbitration law is that the arbitration clause itself is "[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract." See 9 U.S.C. § 2 (2012).

232. See *supra* notes 46–73 and accompanying text.

233. The parties to an arbitration contract may agree to a delegation clause that will alter the separability scheme so that an arbitrator will have the authority to decide even a challenge to the

#### IV. SEPARABILITY AND THE ARBITRATION OF WILL CONTESTS

Scholars and practitioners who know a great deal about the law of donative transfers but little or nothing about the law of arbitration might have difficulty comprehending the notion that an arbitrator who derives his authority from a will or trust might have the power to adjudicate a challenge to the validity of that will or trust.<sup>234</sup> After all, if the arbitrator determines that the donative instrument is not valid, is it not necessarily the case that the arbitrator (who derives his authority from the donative instrument) never had any authority to adjudicate the dispute? Such an understanding among donative transfers experts that an arbitrator may not adjudicate the validity of an instrument from which he derives his authority to serve as arbitrator may account, in part, for the limited nature of recently proposed and enacted statutory reforms validating arbitration clauses found in wills and trusts—ACTEC’s Model Enforceability Act as well as the Arizona, Florida, Missouri, and New Hampshire statutes discussed above exclude challenges to the validity of the donative instrument.<sup>235</sup>

The arbitration doctrine of separability, however, suggests that an arbitrator may well have the authority to adjudicate a challenge to the validity of a will or trust from which her authority to serve as arbitrator arises.<sup>236</sup> In short, the doctrine of separability provides that an arbitration clause found within a contract is itself a contract separate and apart from the container contract within which it is found.<sup>237</sup> Thus, under the separability doctrine, a challenge to the validity of the container contract is not a challenge to the arbitration clause found within the container

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arbitration agreement. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010) (“[T]he delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement.”). In such a case, the court will have the authority to decide only a challenge specific to the delegation clause. *Id.* at 68–72; *see also* AM. ARBITRATION ASS’N, WILLS AND TRUSTS ARBITRATION RULES & MEDIATION PROCEDURES R. 7(a) (2012), [https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_024438](https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_024438) (“The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.”). For a more extensive discussion of delegation clauses in the context of will or trust dispute arbitration, see Spitko, *Arbitration of Internal Trust Disputes*, *supra* note 8.

234. *Cf.* S.I. Strong, *Mandatory Arbitration of Internal Trust Disputes: Improving Arbitrability and Enforceability Through Proper Procedural Choices*, 28 *ARB. INT’L* 591, 594 (2012) (offering as an explanation for why the arbitral community has not successfully worked to provide a set of specialized arbitral rules for arbitration of internal trust disputes, “that the traditional isolation of trust law has meant that few specialists in arbitration were experienced enough in trust law to undertake this kind of analysis”).

235. *See supra* notes 75–93 and accompanying text.

236. *See* Spitko, *Protecting the Abhorrent Testator*, *supra* note 6, at 303–07.

237. *See* *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006).

contract.<sup>238</sup>

In 1967, in the landmark case of *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,<sup>239</sup> the U.S. Supreme Court held that the FAA provides for such a separability scheme in cases to which the FAA applies.<sup>240</sup> In *Prima Paint*, the Court focused its analysis on Section 4 of the FAA, which provides that a court hearing a motion to compel arbitration “upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue . . . shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.”<sup>241</sup> Section 4 further provides that when “the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.”<sup>242</sup> The Court interpreted this language to mean that if a party directs a claim of invalidity specifically at the arbitration provision of the contract, then a court may adjudicate the claim.<sup>243</sup> The Court went on to conclude, however, that “the plain meaning of the statute” required that in a case such as the one before it, in which a party alleged fraud in the inducement of the entire contract, an arbitrator rather than a court should resolve the claim.<sup>244</sup> Nearly forty years later, in *Buckeye Check Cashing, Inc. v. Cardegna*,<sup>245</sup> the Court made clear that *Prima Paint*’s rule of separability applies not only in a case in which a party alleges that the container contract is voidable but also in a case in which a party alleges that the container contract is void *ab initio*, such as where a party alleges the illegality of the container contract.<sup>246</sup>

Thus, under the doctrine of separability, a court rather than an arbitrator should decide a challenge that goes specifically to the will’s arbitration clause. Conversely, an arbitrator rather than a court should decide any claim that challenges a specific provision of the will other than the arbitration clause. Such a claim undeniably does not put the making of the arbitration clause in issue.

In the context of a will contest that seeks to invalidate the will as a whole, application of the separability doctrine should require that an arbitrator decides the will contest unless the contest *necessarily*

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238. *Id.* at 445–46.

239. 388 U.S. 395 (1967).

240. *Id.* at 402–04. The RUAAs expressly adopts the separability scheme. See UNIF. ARBITRATION ACT § 6(c) (UNIF. LAW COMM’N 2000) (“An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.”).

241. *Prima Paint*, 388 U.S. at 403 n.11 (quoting 9 U.S.C. § 4 (2012)).

242. 9 U.S.C. § 4.

243. *Prima Paint*, 388 U.S. at 403–04.

244. *Id.* at 404.

245. 546 U.S. 440 (2006).

246. *See id.* at 446–49.

implicates the arbitration provision. Consider first a challenge to a will asserting that the entire will is invalid because the testator failed to comply with the formalities statutorily required for the execution of a will—specifically, that two witnesses did not sign the will. An arbitration contract need not be witnessed. Thus, the will contest does not implicate the arbitration clause even if the will containing the clause is alleged to be entirely invalid. An arbitrator, therefore, should decide the execution challenge.

Consider another challenge alleging that a testator's entire dispositive scheme is the product of fraud in the inducement, duress, undue influence, or an insane delusion. If any such allegation is proven to be true, the testator's will in its entirety should be invalid.<sup>247</sup> Nonetheless, the allegation does not implicate the will's arbitration provision as there is no allegation that the arbitration provision specifically is the product of fraud in the inducement, duress, undue influence, or an insane delusion. Conceptually, it makes sense to argue that fraud in the inducement, duress, undue influence, or an insane delusion affected the dispositive scheme but did not affect the arbitration provision. Thus, an arbitrator should decide the fraud, duress, undue influence, or insane delusion challenge.

A mental capacity challenge to a will containing an arbitration clause presents a more difficult separability puzzle.<sup>248</sup> As noted above, a testator's lack of mental capacity necessarily invalidates her entire will executed while the testator lacked mental capacity.<sup>249</sup> Thus, a will contestant's mental capacity challenge necessarily goes to the entire will. One might conclude, therefore, that a straightforward application of *Prima Paint* requires that an arbitrator decide the mental capacity challenge to a will where the will contains an arbitration clause.<sup>250</sup>

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247. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 8.1 cmt. s, 8.3(a) (AM. LAW INST. 2003).

248. The Supreme Court has noted that its separability cases have dealt with the issue of whether a contract is valid but not with the issue of “whether any agreement . . . was ever concluded.” *Buckeye*, 546 U.S. at 444 n.1. In *Buckeye*, the Court included “whether the signor lacked the mental capacity to assent” as an example of an issue related to the conclusion of a contract. *Id.* Professor Stephen Ware has argued that the Court's broader FAA jurisprudence “should be read to converge into a coherent whole consisting of the rule that the separability doctrine does not apply to the question whether a particular party *formed* a contract containing an arbitration clause but does apply to questions about *defenses* to the enforcement of that contract.” Stephen J. Ware, *Arbitration Law's Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEV. L.J. 107, 115 (2007). However, Professor Ware has argued further that incapacity is a defense to contract enforcement and thus would fall within the list of questions to which the separability doctrine would apply under such an approach. *See id.* at 115–16, 118–19.

249. *See supra* note 222 and accompanying text.

250. A Pennsylvania superior court has held on public policy grounds that an arbitrator may not decide issues of mental capacity. *In re Trust of Harold*, 604 A.2d 263, 265–67 (Pa. Sup. Ct.

Indeed, the U.S. Court of Appeals for the Fifth Circuit in *Primerica Life Insurance Co. v. Brown*<sup>251</sup> applied *Prima Paint* to require arbitration of a breach of contract claim where the contract at issue contained an arbitration clause<sup>252</sup> even though the district court had found that the party seeking to avoid arbitration “ha[d] been profoundly retarded since birth” and lacked the mental capacity to enter into a contract under the relevant state law.<sup>253</sup> In holding that the merits of the underlying dispute were for the arbitrator rather than for the district court to decide, the Fifth Circuit first noted that “Brown’s capacity defense is a defense to his entire agreement with CitiFinancial and not a specific challenge to the arbitration clause.”<sup>254</sup> The court went on to reason that “[t]herefore, Brown’s capacity defense is part of the underlying dispute between the parties which, in light of *Prima Paint* and its progeny, must be submitted to the arbitrator.”<sup>255</sup>

With respect to separability, however, a mental capacity defense to contract enforcement can be distinguished meaningfully from the fraud and illegality defenses to contract enforcement presented respectively in *Prima Paint* and *Buckeye*.<sup>256</sup> In sum, unlike with respect to a fraud in the inducement defense or an illegality defense, separability with respect to a mental capacity defense is conceptually nonsensical.<sup>257</sup> Fraud that induces a container contract is most unlikely to relate in any specific way to the contract’s arbitration clause. Thus, in *Prima Paint*, the party seeking to avoid arbitration of its fraud claim pled fraud in the inducement relating to the contract as a whole but, on the facts alleged, could not have pled fraud relating to the contract’s arbitration

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1992). The court expressed its concern with “unwanted ramifications” of an arbitrator’s finding of incompetency such as uncertainty as to whether the arbitrator might appoint a guardian for the donor and, if so, whether the guardian might commit the donor to a hospital or otherwise prescribe medical treatment for the donor. *Id.* at 267. These concerns are irrelevant when the donor is deceased as in the case of testator-compelled arbitration.

251. 304 F.3d 469 (5th Cir. 2002).

252. *Id.* at 470–71.

253. *Id.* at 471; *id.* at 472 (Dennis, J., concurring).

254. *Id.* at 472 (majority opinion) (emphasis added).

255. *Id.*

256. *Cf.* Love & Sterk, *supra* note 3, at 561 (arguing that courts are unlikely to apply the separability doctrine in the context of a will contest “because contestants are typically arguing that the testator had no capacity to execute the will or that the will reflects the wishes of someone other than the testator; and, unlike the situation of an arbitration clause embedded in an otherwise unenforceable contract, the disputing parties themselves never agreed to the use of the process”).

257. Autumn Smith, *You Can’t Judge Me: Mental Capacity Challenges to Arbitration Provisions*, 56 BAYLOR L. REV. 1051, 1076 (2004) (“In most situations, a mental capacity challenge cannot logically be directed at a specific portion of a contract, where conduct-based defenses clearly can.”).

provision.<sup>258</sup> Moreover, it is difficult to imagine how illegality infecting a purported container contract might relate specifically to the contract's arbitration provision. Therefore, the parties in *Buckeye* seeking to avoid arbitration of their illegality claim pled the illegality of the purported container contract but, on the facts alleged, could not have pled the illegality of the contract's arbitration provision.<sup>259</sup>

In contrast, the alleged facts that give rise to a mental capacity challenge to a contract necessarily will also give rise to a mental capacity challenge to the contract's arbitration provision.<sup>260</sup> Thus, any party who can plead facts alleging that she lacked the mental capacity to enter into a contract can also plead facts alleging that she specifically lacked the mental capacity to enter into the contract's arbitration clause. The latter pleading should suffice to put "the making of the arbitration agreement . . . in issue" in the words of Section 4 of the FAA.<sup>261</sup> The reality that the very same facts will support both a conclusion that a party lacked the mental capacity to enter into a contract, and also a conclusion that the party specifically lacked the mental capacity to enter into the arbitration clause suggests that *Primerica's* reasoning grounding its application of *Prima Paint* is simplistic. The *Primerica* court failed to address adequately the argument that a mental capacity defense is both a defense to the entire contract *and* a specific challenge to the contract's arbitration clause.<sup>262</sup>

The U.S. Court of Appeals for the Tenth Circuit has recognized this fundamental distinction between a mental capacity defense and a contract

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258. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 397–98 (1967) (discussing the facts giving rise to *Prima Paint's* claim that Flood & Conklin fraudulently induced their container contract by representing "that it was solvent and able to perform its contractual obligations, whereas it was in fact insolvent and intended to file a [bankruptcy] petition").

259. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 442–43 (2006) (discussing the facts giving rise to the allegation that "Buckeye charged usurious interest rates and that the [container contract at issue] violated various Florida lending and consumer-protection laws, rendering it criminal on its face").

260. Alan Scott Rau, "Separability" in the *United States Supreme Court*, 2006 STOCKHOLM INT'L ARB. REV. 1, 15–17 (arguing that *Prima Paint* "does not merely preserve for the courts challenges that are 'restricted' or 'limited' to 'just' the arbitration clause alone" but rather "preserves for the courts any claim at all that necessarily calls an agreement to arbitrate into question" and citing a mental capacity challenge as such a claim); Smith, *supra* note 256, at 1073 ("A litigant would be unable to make an independent challenge to an arbitration agreement based on his or her mental capacity, as a litigant's mental capacity to sign a contract and mental capacity to enter into an arbitration agreement contained in that contract will be identical in most cases.").

261. 9 U.S.C. § 4 (2012).

262. See Rau, *supra* note 260, at 14–15 & n.40 (describing *Primerica* as "[a]n astonishing decision" and arguing that "it should be obvious that a challenge can be 'to the arbitration clause itself' without being 'specifically to [its] arbitration provision[s]'" (quoting *Buckeye*, 546 U.S. at 445–46)).

defense such as fraud in the inducement with respect to a separability analysis. In *Spahr v. Secco*,<sup>263</sup> the Tenth Circuit specifically rejected the Fifth Circuit's reasoning in *Primerica* and held that *Prima Paint's* separability rule does not apply where a party has asserted a mental capacity defense to a contract's enforcement.<sup>264</sup> In concluding that "the analytical formula developed in *Prima Paint* cannot be applied with precision when a party contends that an entire contract containing an arbitration provision is unenforceable because he or she lacked the mental capacity to enter into the contract," the court found it critical that "[u]nlike a claim of fraud in the inducement, which can be directed at individual provisions in a contract, a mental capacity challenge can logically be directed only at the entire contract."<sup>265</sup> Thus, the court held that a "mental incapacity defense naturally goes to *both* the entire contract and the specific agreement to arbitrate in the contract" and necessarily places the agreement to arbitrate in issue.<sup>266</sup>

The blanket rule in *Spahr* should be qualified for present purposes to take account of temporal issues that may arise in will contests. Assume, for example, that the relevant arbitration provision appears in a codicil executed subsequent to the execution of the contested will. In theory, a testator might lack sufficient mental capacity at one moment yet possess sufficient capacity the next.<sup>267</sup> An allegation that the testator lacked the mental capacity necessary to execute the will, therefore, would not be a mental capacity challenge specific to the arbitration clause contained in the codicil. Assume in the alternative, for example, that the arbitration clause is contained in a will executed prior to a contested codicil. Similarly, an allegation that the testator lacked the mental capacity needed to execute the codicil would not be a mental capacity challenge specific to the arbitration clause contained in the will.

In sum, when a will contestant specifically challenges the validity of an arbitration clause found in the will, a court should decide the challenge to the arbitration clause. A court also should decide a challenge to the will that necessarily also challenges the validity of the arbitration clause found in the will. Otherwise, the arbitrator, whose authority to adjudicate arises from the will, should decide the will contest.

## CONCLUSION

A consensus is developing in the case law, the academic commentary,

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263. 330 F.3d 1266 (10th Cir. 2003).

264. *Id.* at 1272.

265. *Id.* at 1273.

266. *Id.*

267. ATKINSON, *supra* note 29, at 241.

and the statutory reform movement that a testator's provision in her will mandating arbitration of any challenge to the will should not be enforceable against a beneficiary who has not agreed to the arbitration provision, at least where the contestant, by his contest, seeks to increase his inheritance outside the will.<sup>268</sup> Grounding this consensus is the understanding that a will is not a contract. This understanding has influenced not only the case law but also the scholarship and legal reform efforts focusing on the issue.<sup>269</sup>

This Article argues that a will is a contract, albeit not one between the testator and her beneficiary. A will is part of an implied unilateral contract between the testator and the state in which the state offers to honor the testator's donative intent and the testator accepts and provides consideration for the offer by creating and preserving wealth. Importantly, the greater donative freedom contract of which the will is a part also provides for the distribution of an individual's intestate property in line with the individual's imputed intent should the individual fail to execute an effective estate plan. Similar to the testator, the property owner who has failed to make an effective estate plan accepts this offer of intestate distribution through her industry and thrift. This Article's theory borrows from the law respecting implied unilateral contracts arising from employee handbooks in concluding that it should be of no moment that the property owner is unfamiliar with the specifics of a state probate code. Rather, the critical factor should be that the state has, through its offer to respect donative intent, created an atmosphere that is "instinct with an obligation" and that encourages diligence and the prudent management of wealth.

The conclusion that a will is a contract grounds this Article's additional argument that the FAA and state arbitration statutes require enforcement of testator-compelled arbitration provisions contained in a will. Settled arbitration law in conjunction with third-party beneficiary theory or direct benefits estoppel theory supports binding the beneficiary to the will's arbitration contract. Neither the fact that the beneficiary has not signed the will nor the fact that the testator's acceptance of the donative freedom contract is implied defeats this argument.

That a will is a contract also supports a normative argument that the law should enforce testator-compelled arbitration provisions contained in a will. It is only fair that one who claims a right arising under a contract be subject to the arbitration provision relating to claims arising under that contract. This normative argument is bolstered by conditional gift theory, which provides a cardinal principle in the law of donative transfers—the

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268. *See supra* Part I.

269. *See supra* Part I.

rights of the donee are derivative of and subordinate to the rights of the donor.<sup>270</sup>

Finally, an arbitrator whose authority to arbitrate arises from a will should have the power to adjudicate a challenge to the validity of that will unless the challenge speaks specifically to the validity of the arbitration provision. Pursuant to the arbitration doctrine of separability, the arbitration provision within a will should be understood to be a contract separate and apart from the will. A challenge to the validity of the will contract as a whole may also focus specifically on the validity of the arbitration contract. Where the will contest does not focus specifically on the validity of the will's arbitration provision, the arbitrator's authority has gone unchallenged.

Despite the merits of enforcing testator-compelled arbitration provisions contained in a will, the enforceability of such provisions remains an unresolved issue in most jurisdictions.<sup>271</sup> This uncertainty imperils the arbitration virtues of speed, economy, and finality, and it threatens to add a layer of cost and delay to the contest of a will. Thus, this uncertainty likely discourages testators from including arbitration provisions in their wills. Therefore, legislation authorizing testator-compelled arbitration, including in cases where the contestant seeks to increase his inheritance outside of the will, would bring much needed certainty to the law in this area.

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270. *See supra* note 160 and accompanying text.

271. *See supra* notes 12–13 and accompanying text.

