ANOTHER PERSPECTIVE ON TESTAMENTARY ARBITRATION

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The American law of succession is remarkable both for its expansive concept of testamentary freedom and for its antiquated and cumbersome probate system. In principle, a testator enjoys virtually unlimited freedom to dispose by will of property owned at death, but enforcement of the testator's directions generally requires a proceeding in a probate court to prove the will and appoint an executor to administer the estate. To avoid the expense and delay of court proceedings, transferors routinely use revocable trusts and other devices that replicate the effects of a will but operate outside the probate system. Moreover, some transferors seek to prevent their wills and trusts from becoming embroiled in litigation by requiring that disputes be resolved by private arbitration. The twin phenomena of probate avoidance and mandatory arbitration clauses stem from a common desire on the part of transferors to control the process as well as the substantive terms governing the disposition of their accumulated wealth. While transferors are generally free to dispose of property during life or at death without unnecessary court involvement, mandatory arbitration clauses raise controversial questions of enforceability and procedural fairness.

I. NONPROBATE TRANSFERS

Probate administration generally involves court proceedings of a more or less formal nature, replete with elaborate procedural safeguards to protect the interests of devisees, heirs, creditors, and other interested parties. Requirements of published notice, professional appraisals, surety bonds and the like can be explained historically in terms of "the wealth patterns of the small-farm, small-enterprise economy of the nineteenth century,"[1] and they undoubtedly provide a high level of protection against careless or dishonest executors. Today, however, the probate system seems inordinately costly and burdensome, and it has acquired "a lamentable reputation for expense, delay, clumsiness, makework, and worse."[2] Moreover, efforts to modernize and streamline probate administration have encountered resistance from an entrenched "service monopoly"[3] of court officials, lawyers, appraisers, publishers, and bond companies with a vested interest in preserving the inherently local and specialized jurisdiction of probate courts.

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1. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1119 (1984).

2. *Id.* at 1116.

3. Richard V. Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453, 462 (1970); *see id.* at 489, 496–501 (discussing bond and notice requirements).

It is hardly surprising, therefore, that transferors have found ways to circumvent the probate system in transferring property at death to their designated beneficiaries. The funded revocable trust has emerged as the most versatile and successful of the myriad will substitutes that operate as "free-market competitors of the probate system."[4] A revocable trust mimics the effect of a will in the sense that it passes beneficial enjoyment of property at death to the settlor's beneficiaries while leaving the settlor with unfettered beneficial enjoyment and control during life. However, because the revocable trust is formally classified as a lifetime transfer, the underlying property is not subject to administration as part of the settlor's probate estate; instead, the property is administered and distributed as provided by the terms of the trust. The primary advantage of the revocable trust is that, to the extent it is funded before death, the trust generally operates without any court proceedings. Indeed, in the absence of a contest or a dispute, the trust not only avoids probate administration at the settlor's death but also functions as a substitute for guardianship proceedings in the probate court, providing asset custodianship and management if the settlor becomes incapacitated during life. Furthermore, the trust instrument is generally exempt from wills act formalities, and its terms need not be disclosed to the public.[5]

Nevertheless, even when a transferor relies primarily on a revocable trust rather than a will to dispose of property at death, the efficacy of the nonprobate transfer depends on the probate system in several important ways. To the extent that the revocable trust is not fully funded during life, additional property can be transferred to the trust at death by a pourover will. Of course, such a pourover arrangement does not avoid probate. The will must be admitted to probate, and the additional property must go through administration as part of the settlor's probate estate before it becomes part of the trust. Furthermore, in administering the settlor's estate, the executor may be required to reach nonprobate assets to pay a surviving spouse's elective share, creditors' claims, estate taxes, and similar items. Finally, if a dispute arises concerning the validity of a will or a trust instrument, the interpretation of its terms, or the administration of the estate or the trust, the dispute ordinarily is resolved through adjudication in the probate court or in a court of general jurisdiction. Thus, the vaunted efficiency and convenience of revocable trusts and other will substitutes rests on the implicit assumption—often but not always justified—that the transfer of property to a deceased owner's designated beneficiaries is a routine, ministerial task that can be carried out without any court proceedings. In those "easy" cases, the transfer can be executed outside the probate system, as long as the courts are available

4. Langbein, *supra* note 1, at 1108.

5. *See* Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 557 (2008).

as a "backstop" to resolve disputes in the residual "hard" cases.[6]

II. TESTAMENTARY FREEDOM

Aside from routine estate administration, which arguably need not involve court proceedings, critics of the probate system have pointed out shortcomings in the mechanism for determining the validity of a disputed will. One problem arises from procedural and evidentiary features of the probate system: the inability to examine the testator (who by definition is no longer alive) concerning the circumstances surrounding the will's execution; the broad discretion allowed to juries, whose verdict may reflect sympathy for a disinherited contestant; the general rule against cost-shifting, which forces the estate to bear the costs of defense; and the uneven quality of the probate bench.[7] Taken together, these features encourage disappointed heirs (or beneficiaries under earlier wills) to challenge the validity of a will for the purpose of extracting a settlement, even if they cannot realistically expect to prevail on the merits. The problem might be ameliorated if the validity of a will could be determined during the testator's lifetime, but ante-mortem probate proceedings seem not to be widely used even in the few states where they are available.

Critics have also argued that the probate system is systematically biased against testamentary dispositions that deviate from prevailing social norms. Although courts pay lip service to the concept of testamentary freedom, in fact they apply a heightened level of scrutiny to dispositions that are perceived as "immoral, unjust or improper."[8] The circumstantial nature of the evidence, coupled with the indeterminate, open-ended standards for determining testamentary capacity and undue influence, provide ample scope for factfinders to impose their own notions of morality, fairness, and propriety. Indeed, a careful analysis of litigated will contests suggests that a contested will is more likely to be upheld if it leaves the estate to family members than if it reflects "bad judgment or immoral instincts."[9]

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6. *See* Langbein, *supra* note 1, at 1120 ("[T]he nonprobate system rides 'piggyback' on the probate system. Financial intermediaries execute easy transfers and shunt the hard ones over to probate. . . . In the nonprobate system, genuine disputes still reach the courts, but routine administration does not.").

7. *See* John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2043–45 (1994) (focusing specifically on contests alleging lack of testamentary capacity).

8. Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 258 (1996); *see also* Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 629 (1997); 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, 278-86 (1999).

9. Leslie, *supra* note 8, at 268; *see id.* at 243–68 (analyzing cases involving undue influence and execution formalities). Similarly, Professor Madoff concludes that undue influence doctrine fails to protect testamentary freedom and instead operates to protect family members

The charge of systematic bias rests on an expansive view of testamentary freedom. Because the substantive grounds for contesting a will apply equally to revocable trusts and other will substitutes, any proposed remedy should also address nonprobate transfers. One possible approach would constrain the discretion of judges and juries in contested cases by narrowing the substantive grounds for contest, limiting the range of admissible evidence, or both.[10] A different approach, advanced several years ago by Gary Spitko, would allow a transferor to circumvent court proceedings altogether by directing that any dispute concerning a will or a revocable trust be subject to binding arbitration.[11] According to Professor Spitko, the primary advantage of mandatory arbitration is that it would allow the transferor to dictate not only the terms of a testamentary disposition but also the method of its implementation, thereby insulating the disposition from the implicit cultural bias of judges and juries and vindicating the transferor's right to exercise freedom of testation.[12] The idea of mandatory arbitration for disputes concerning wills and trusts is by no means new, but its growing popularity in recent years has prompted a reappraisal of its doctrinal foundations and policy implications.

III. MANDATORY ARBITRATION

Arbitration is widely used to resolve commercial disputes without full-fledged court proceedings. By submitting a dispute to an arbitrator (or a panel of arbitrators), the parties can obtain a prompt, binding determination (an "award") without the expense, publicity, and procedural complexities of traditional litigation. Agreements between trustees and third-party investment advisers and fund managers routinely require that "external" disputes arising from the agreement be resolved by arbitration, and such agreements are generally valid and enforceable. It is less clear, however, whether a transferor can unilaterally require that "internal" disputes between beneficiaries, heirs, and fiduciaries involving a will or a trust be resolved by arbitration.

The case law exhibits two contrasting views of testamentary arbitration. Under one view, a mandatory arbitration clause in a will or a

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from disinheritance. *See* Madoff, *supra* note 8, at 629; *see also* Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 210 (2001) ("[J]udges and juries manipulate mental capacity doctrines . . . to reach results more in accord with the family paradigm.").

10. One commentator recommends that undue influence be abolished as a ground for contest. *See* Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 KAN. L. REV. 245 *passim* (2010).

11. *See* Spitko, *supra* note 8, at 286–97. Although Professor Spitko's primary focus is on wills, presumably his proposal is equally relevant for revocable trusts, which function as will substitutes and are subject to contest on the same grounds as wills. *See id.* at 285–86.

12. *See id.* at 294–97.

trust is merely an exercise of testamentary freedom. Like any other condition or restriction imposed by the transferor, such a clause should be enforceable unless it is illegal or contrary to public policy. Thus, courts have held that a testator may authorize an executor or another person to settle disputes among beneficiaries concerning the interpretation of a will or the administration of an estate, subject to implied requirements of honesty, fairness, and good faith.[13] A discretionary power of this sort may be viewed as functionally similar to a traditional power, held in a fiduciary or a nonfiduciary capacity, to designate beneficiaries and their respective shares. Courts have upheld a power to settle disputes even when the holder of the power is also a beneficiary,[14] but they have also insisted that an exercise of the power be subject to judicial review for fraud, error, or abuse of discretion.[15]

The other view of testamentary arbitration emphasizes the essential role of court proceedings, especially in determining the validity of a will or a trust. Courts have consistently refused to enforce mandatory arbitration clauses against heirs or disappointed beneficiaries who contest the validity of the governing instrument, on the public policy ground that a transferor cannot unilaterally deprive an interested party of access to the courts.[16] The underlying rationale—that courts have inherent jurisdiction to determine the validity and effect of wills and trusts—is consistent with judicial review of discretionary powers.[17] However, unlike a beneficiary who seeks to enforce an interest arising from a will or a trust, a party who contests the validity of a transfer generally seeks to assert an interest arising outside the governing instrument (i.e., under a different instrument or under the intestacy laws).[18] A contest of a will

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13. *See* Wait v. Huntington, 40 Conn. 9, 11–12 (1873); Am. Bd. of Comm'rs of Foreign Missions v. Ferry, 15 F. 696, 700 (W.D. Mich. 1883); Moore v. Harper, 27 W. Va. 362, 373–74 (1886); Phillips's Estate, 10 Pa. C. 374, 380 (Phila. Cty. Ct. 1891).

14. *See Wait*, 40 Conn. at 12; *Am. Bd. of Comm'rs of Foreign Missions*, 15 F. at 700–02.

15. *See* Pray v. Belt, 26 U.S. 670, 679–81 (1828); *In re* Reilly's Estate, 49 A. 939, 940–41 (Pa. 1901); Taylor v. McClave, 15 A.2d 213, 215–16 (N.J. Ch. 1940); *cf.* Stix v. Comm'r, 152 F.2d 562, 563 (2d Cir. 1945) ("[N]o language, however strong, will entirely remove any power held in trust from the reach of a court of equity.").

16. *See* Carpenter v. Bailey, 60 P. 162, 163 (Cal. 1900); *In re* Meredith's Estate, 266 N.W. 351, 355–57 (Mich. 1936); *In re* Trust of Fellman, 604 A.2d 263, 266–67 (Pa. Super. Ct. 1992). Some courts hold that disputes concerning probate of a will or distribution of a decedent's estate must be resolved in a court proceeding and are not subject to arbitration. *See In re* Will of Jacobovitz, 295 N.Y.S.2d 527, 530–31 (Sur. 1968); *In re* Berger, 437 N.Y.S.2d 690, 691–92 (App. Div. 1981).

17. *See In re Reilly's Estate*, 49 A. at 940–41; *Taylor*, 15 A.2d at 215–16.

18. Nevertheless, one can imagine a case where a beneficiary contests a specific provision of a will or a trust without contesting the validity of the entire transfer. For example, a residuary beneficiary might challenge another beneficiary's gift (or a restriction on the contestant's own gift) on grounds of fraud or undue influence. *See* David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1074–75 (2012).

or a trust calls into question the legitimacy of the mandatory arbitration clause that the beneficiaries seek to enforce. Perhaps the closest analogy is to "no-contest" clauses, which are generally held to be unenforceable against a contestant who has "probable cause" for challenging the validity of a will or a trust.[19] The rule limiting enforcement of no-contest clauses may be viewed as implementing rather than defeating testamentary freedom, in the sense that it protects the right of interested parties to determine the authenticity of the transferor's directions in a court proceeding. Conceivably, a transferor might leave a substantial gift to a potential contestant on condition that any dispute concerning the validity, interpretation, or administration be resolved through arbitration rather than court proceedings.[20] The remaining question, then, is whether a disappointed beneficiary can be compelled to accept arbitration as a substitute for traditional litigation.

Arbitration is essentially a consensual process. Under federal and state arbitration statutes, a written agreement to submit an existing or future controversy to arbitration is generally enforceable, subject to grounds for revocation of a contract.[21] Conversely, a party who has not agreed to submit a dispute to arbitration cannot be compelled to do so.[22] Courts have been reluctant to compel arbitration of disputes involving wills and trusts pursuant to general arbitration statutes,[23] and several states have responded by enacting statutes that expressly authorize testamentary arbitration.[24] Even in the absence of such a statute, however, at least one

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19. UNIF. PROBATE CODE § 2-517 (amended 2010), 8 pt. I U.L.A. 235 (2013); *id.* § 3-905, 8 pt. II U.L.A. 353 (2013); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.5 (2003).

20. Such an "arbitrate-or-else" clause is a variation on the traditional technique of coupling a no-contest provision with a substantial gift to a potential contestant. Spitko, *supra* note 8, at 297–98; *see also* Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure, In Terrorem Clauses, Mediation and Arbitration*, 36 ACTEC L.J. 547, 569 (2010).

21. *See* FEDERAL ARBITRATION ACT, 9 U.S.C. § 2 (2012); UNIF. ARBITRATION ACT (2000) § 6(a), 7 pt. IA U.L.A. 25 (2009); UNIF. ARBITRATION ACT (1956) § 1, 7 pt. IA U.L.A. 106 (2009).

22. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648 (1986) (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)).

23. *See* Schoneberger v. Oelze, 96 P.3d 1078, 1079 (Ariz. Ct. App. 2004) ("[A] trust is not a 'written contract' requiring arbitration."); *see also In re* Calomiris, 894 A.2d 408, 409–10 (D.C. 2006); Diaz v. Bukey, 125 Cal. Rptr. 3d 610, 614–15 (Ct. App. 2011), *vacated and transferred*, 287 P.3d 67 (Cal. 2012).

24. *See* ARIZ. REV. STAT. ANN. § 14-10205 (2015) (overruling *Schoneberger*); FLA. STAT. § 731.401 (2015); MO. REV. STAT. § 456.2-205 (2015); N.H. REV. STAT. ANN. § 564-B:1-111A (2015); S.D. CODIFIED LAWS § 55-1-54 (2015). The Florida statute applies to wills as well as trusts; the other statutes apply to trusts but do not mention wills. So far, the enforceability of mandatory arbitration clauses in wills and trusts has been tested primarily under state law. For a careful, thoughtful discussion of issues arising under the Federal Arbitration Act, including

court has enforced a mandatory arbitration clause against a trust beneficiary who sued a trustee for breach of fiduciary duty.[25] The court found that by accepting benefits from the trust, the beneficiary accepted the terms of the trust and was estopped from challenging the mandatory arbitration clause.[26] Interestingly, as the court acknowledged, its rationale applies only to a beneficiary who accepts benefits under a will or a trust; a party who asserts rights arising outside the governing instrument would be free to challenge the instrument's validity in court.[27] Furthermore, a similar distinction appears in the recently-enacted testamentary arbitration statutes, which make mandatory arbitration clauses enforceable in disputes concerning the interpretation or administration of a governing instrument but not in disputes concerning the instrument's validity.[28]

IV. TESTAMENTARY ARBITRATION UNDER A "DONATIVE FREEDOM CONTRACT"

Under existing law, it seems fairly clear that a nonconsenting party cannot be compelled to submit a dispute concerning the validity of a will or a trust to arbitration, even if the governing instrument contains a mandatory arbitration clause. Thus, the absence of actual or constructive consent would seem to pose an insuperable obstacle to Professor Spitko's proposal of "testator-compelled arbitration" for will contests.[29] Recently, however, Professor Spitko has advanced a novel and provocative argument for enforcing a mandatory arbitration clause against an unwilling contestant. He posits an "implied unilateral contract" under

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potential preemption of state law restrictions on testamentary arbitration, see Horton, *supra* note 18, at 1073–90.

25. *See* Rachal v. Reitz, 403 S.W.3d 840, 844–51 (Tex. 2013).

26. *See id.* at 844–48.

27. *See id.* at 847 (noting that "a beneficiary who attempts to enforce rights that would not exist without the trust manifests her assent to the trust's arbitration clause," but "a beneficiary is . . . free to challenge the validity of a trust" because a contest "is incompatible with the idea that she has consented to the instrument"); *accord* McArthur v. McArthur, 168 Cal. Rptr. 3d 785, 790–91 (Ct. App. 2014).

28. *See* ARIZ. REV. STAT. ANN. § 14-10205 (2015); FLA. STAT. § 731.401(1) (2015); MO. REV. STAT. § 456.2-205(2) (2015); N.H. REV. STAT. ANN. § 564-B:1-111A(d) (2015); S.D. CODIFIED LAWS § 55-1-54 (2015). The Florida, Missouri, New Hampshire, and South Dakota statutes expressly exclude disputes concerning the "validity" of all or part of the governing instrument; the Arizona statute impliedly excludes such disputes because it applies only to disputes concerning "administration or distribution." Arguably, the exclusion should be limited to cases in which the contestant has not accepted benefits arising under the challenged will or trust instrument. *See supra* note 18.

29. Spitko, *supra* note 8, at 294–97; *see also* E. Gary Spitko, *The Will as an Implied Unilateral Arbitration Contract*, 68 FLA. L. REV. 49, 52–53 (2016) (attributing "underutilization" of testator-compelled arbitration to "unsettled questions" of enforceability, while acknowledging that "a consensus is developing that a testator may not compel arbitration of contests to her will").

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."[30] At first glance, the notion of an implied contract might appear merely as a rhetorical buttress for an expansive view of testamentary freedom,[31] but on closer inspection it emerges as the linchpin of a doctrinal end-run around the consent requirement for testator-compelled arbitration. According to Professor Spitko, the "donative freedom contract" between the testator and the state comprises not only the will itself but also the intestacy laws governing the disposition of property not effectively disposed of by will.[32] The function of the implied contract now becomes clear. The third-party beneficiaries of the implied contract include not only the beneficiaries under the will, but also any potential contestants (i.e., heirs and beneficiaries under earlier wills). Moreover, by asserting the right to an intestate share (or a share under an earlier will), a contestant is estopped from challenging the validity of a mandatory arbitration clause in the will, "unless the contest *necessarily* implicates the arbitration provision."[33] Thus, Professor Spitko argues that in many (but not all) cases, a mandatory arbitration clause should be enforceable and the will contest should therefore be determined by an arbitrator rather than by a court.[34]

Professor Spitko's concept of testamentary freedom—more specifically, testator-compelled arbitration—as an enforceable contractual right raises several issues of doctrine and policy that merit closer scrutiny. One preliminary question arises from the unspecified, generic nature of "the state" with which a testator enters into an implied contract. Logically, the relevant state would appear to be the jurisdiction whose laws govern the validity and effect of the testator's will—typically, the state where the testator is domiciled at death (or the situs of

30. Spitko, *supra* note 29, at 55.

31. *See id.* at 74 ("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.").

32. *Id.* at 55.

33. *Id.* at 93–94 (emphasis in original). An heir who contests a will and claims an intestate share is "a third-party beneficiary of the intestacy provisions of the greater donative freedom contract" and is estopped from challenging a mandatory arbitration clause in the will unless "the contest specifically or necessarily challenges the will's arbitration provision." *Id.* at 91. Professor Spitko derives this result from the "separability" doctrine, which "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." *Id.* at 92.

34. According to Professor Spitko, a contest on the ground of testamentary incapacity ordinarily implies a specific challenge to a mandatory arbitration clause and should therefore be decided by a court. Contests on other grounds (e.g., fraud, duress, undue influence, insane delusion, or noncompliance with testamentary formalities), however, should ordinarily be subject to arbitration unless they necessarily "implicate" a mandatory arbitration clause. *See id.* at 94–97.

real property disposed of by the will). Leaving aside potential choice-of-law issues in connection with ancillary administration, the testator may change domicile many times during life, making it impossible to identify any particular state before death as a party to the implied contract. Given the notoriously local nature of probate codes, it seems awkward to treat a living testator as relying on any specific guarantee of testamentary freedom, much less as entering into an implied contract with an unspecified party.

A second, related issue involves the changeable nature of a state's guarantee of testamentary freedom over time. Short of "total abrogation" of the right to leave property by will,[35] states routinely impose myriad formal, substantive and procedural restrictions on the exercise of testamentary power; those restrictions are the essence of the probate code, and they may be changed at any time with little or no advance warning.[36] Relying on an employment law analogy, Professor Spitko argues that his unilateral contract theory "should not preclude the state from modifying its probate code," at least with "reasonable advance notice."[37] All this means, however, is that the probate code in force at the testator's death governs the validity and effect of the disposition of the testator's estate. Professor Spitko does not suggest that the testator's acceptance of the unilateral contract during life (i.e., by accumulating wealth) in any way obligates the state to maintain the existing level of testamentary freedom without change until the testator's death. In other words, unless the state can credibly bind itself not to modify its probate laws before the testator's death, an implied promise of testamentary freedom may be largely illusory.

Nevertheless, under the implied contract, the state "seek[s] the property owner's performance in exchange for the state's promise to respect donative freedom" and the property owner "accept[s] the state's offer by being economically productive and by saving and investing her estate rather than consuming her estate."[38] Thus, in exchange for the state's promise to enforce its own probate laws as they exist at the testator's death, the testator accumulates wealth during life. While this sort of notional bargain is commonly cited to justify an expansive view of testamentary freedom as an incentive for capital formation,[39] Professor

35. Hodel v. Irving, 481 U.S. 704, 716 (1987).

36. *Cf. id.* at 729–34 (Stevens, J., concurring) (stating that change of succession law without "reasonable notice and opportunity for compliance" violated due process).

37. Spitko, *supra* note 29, at 77 n.156.

38. *Id.* at 76.

39. *See* Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 8 (1992) ("[F]reedom of testation creates an incentive to industry and saving."), *quoted in* Spitko, *supra* note 29, at 73; Edward C. Halbach, Jr., *An Introduction to Chapters 1–4*, *in* DEATH, TAXES AND FAMILY PROPERTY 3, 5 (Edward C. Halbach, Jr. ed., 1977) (noting that

Spitko breaks new ground in arguing that it should be enforceable as an implied contract. His implied contract theory raises interesting issues concerning performance (or nonperformance) on the testator's part. Any correlation between a particular testator's lifetime activities and his or her accumulated wealth at death may be largely fortuitous. Indeed, given the markedly unequal distribution of talents, temperaments, and opportunities among different individuals, it would be hazardous to assume that a testator who leaves a large estate at death was "economically productive" or financially prudent during life.[40] Nevertheless, the value of testamentary freedom is greatest for testators who leave large estates, whether accumulated through "industry and thrift,"[41] inheritance, or blind luck. Conversely, it has no value for those who for whatever reason leave no property at death.[42] Although the prospect of controlling the disposition of property at death may enhance a testator's lifetime enjoyment of wealth, and even encourage some testators to accumulate additional wealth, it may be difficult to determine whether a particular testator's lifetime activities constitute acceptance of the implied contract.

Under Professor Spitko's implied contract theory, the state's only obligation is to dispose of the decedent's estate in accordance with the probate code, including the provisions governing will contests. Thus, the implied contract adds nothing to the substantive rights of the interested parties; its sole function is apparently to provide a doctrinal basis for enforcing testator-compelled arbitration of will contests.[43] A more direct route to the same goal would be to amend the probate code to authorize arbitration of disputes concerning the validity of wills. As previously noted, however, recently-enacted statutes authorizing testator-compelled arbitration apply only to disputes concerning the interpretation or administration of wills and trusts, not to disputes concerning the validity of the governing instrument.[44] Presumably the reason for this limitation—consistent with the case law enforcing testator-compelled arbitration—is that the enforceability of a mandatory arbitration clause in

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freedom of testation serves "as an incentive to bring forth creativity, hard work, initiative and ultimately productivity"), *quoted in* Spitko, *supra* note 29, at 73.

40. Spitko, *supra* note 29, at 74.

41. *Id.* at 76.

42. In Professor Spitko's hypothetical example, a "spendthrift sloth" who deliberately squanders a fortune or shirks productive activity leaves no property at death and therefore receives no benefit from the state's guarantee of testamentary freedom. *Id.* at 77 n.155. Of course, a decedent who leaves no property is not necessarily lazy or profligate; many testators are prevented from accumulating or preserving wealth by lack of opportunity, bad luck, or other circumstances.

43. Professor Spitko elaborates the implied contract theory as it applies to wills. Presumably, the theory should also apply to revocable trusts, which function as will substitutes and are subject to contest on the same grounds as wills. *See supra* note 11.

44. *See supra* note 28 and accompanying text.

a will or a trust depends on the validity of the governing instrument, and compelling an unwilling contestant to submit the question of validity to arbitration would assume the conclusion sought to be proved. Professor Spitko's implied contract theory would treat a will contestant as having consented to arbitration without receiving any consideration other than the preexisting right to an intestate share. The consideration given for the contestant's deemed consent appears to be illusory.

In theory, the goal of arbitration is not to skew the outcome of a dispute but merely to facilitate a prompt and private resolution with the consent of the interested parties. Realistically, however, the primary goal of testator-compelled arbitration of will contests is to improve the chances of upholding a "nonconforming" testamentary plan by circumventing "systemic bias" in the judicial system.[45] Ironically, testator-compelled arbitration seeks to avoid the majoritarian cultural preferences of judges and juries but at the same time relies on the courts for validation and enforcement. As a general matter, an arbitration award can be vacated on grounds of "corruption," "fraud," "evident partiality," or "misconduct," but not for mere errors of fact or law.[46] Thus, in the absence of overt bias or misconduct, an arbitration award upholding a contested will would generally be insulated from judicial review. Nevertheless, even under Professor Spitko's proposal, it seems likely that many will contests would end up in court, either through a direct challenge to the enforceability of a mandatory arbitration clause or through an application to vacate an award on grounds of bias or misconduct. Ultimately, just as the probate system functions as an indispensable backstop for will substitutes and nonprobate transfers, the court system will continue to play an essential role in determining the validity of wills and trusts and in safeguarding the rights of interested parties.

45. Spitko, *supra* note 8, at 276.

46. FEDERAL ARBITRATION ACT, 9 U.S.C. § 10(a) (2012); UNIF. ARBITRATION ACT (2000), § 23(a), 7 pt. IA U.L.A. 77 (2009); UNIF. ARBITRATION ACT (1956) § 12(a), 7 pt. IA U.L.A. 514 (2009).