

RESPONSE TO PROFESSOR SPITKO'S
*THE WILL AS AN IMPLIED UNILATERAL ARBITRATION
CONTRACT AND AN ALTERNATIVE PROPOSAL*

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I read Professor Gary Spitko's article entitled *The Will As an Implied Unilateral Arbitration Contract* with great interest.¹ Professor Spitko was one of the first trusts and estates scholars to highlight the benefits of the use of arbitration as an alternative to the litigation of wills and trusts disputes. In his groundbreaking article, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*,² Professor Spitko argued persuasively that the arbitration of wills disputes conducted by arbitrators who are chosen by the testator precisely because they are respectful of the cultural values underlying the testator's estate plan would alleviate greatly the documented bias by majority-culture adjudicators (both judges and jurors) against estate plans that bequeath property in a way that is contrary to cultural norms.³ The *Abhorrent Testator* article opened a scholarly dialogue on the advantages and disadvantages of the use of arbitration to resolve wills and trusts disputes.⁴ Hand-in-hand with the scholarly dialogue, some courts and some states (although relatively few) began to examine the issue of the enforceability of clauses that mandated binding arbitration by beneficiaries of wills or trusts even though those beneficiaries were not signatories to the wills or trusts instruments.⁵ From

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1. E. Gary Spitko, *The Will as an Implied Unilateral Arbitration Contract*, 68 FLA. L. REV. 49 (2016) [hereinafter Spitko, *Unilateral Arbitration Contract*].

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

3. The "abhorrent testator" used by Professor Spitko as the focal point of his article was a testator who eschewed the cultural norm of leaving property to his spouse and children in favor of bequeathing his estate to "a non-mainstream religion, a radical political organization, or a same-sex romantic partner." *Id.* at 282 (footnotes omitted).

4. See, e.g., Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure, In Terrorem Clauses, Mediation and Arbitration*, 9 CARDOZO J. OF CONFLICT RESOL. 237 (2008); David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027 (2012); Erin Katzen, *Arbitration Clauses in Wills and Trusts: Defining the Parameters for Mandatory Arbitration of Wills and Trusts*, 24 QUINNIPIAC PROB. L.J. 118 (2011); Bridget A. Logstrom, *Arbitration in Estate and Trust Disputes: Friend or Foe?*, 30 ACTEC J. 266 (2005); S.I. Strong, *Arbitration of Trust Disputes: Two Bodies of Law Collide*, 45 VAND. J. TRANSNAT'L L. 1157 (2012) [hereinafter *Arbitration of Trust Disputes*]; 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 (2012).

5. See Spitko, *Unilateral Arbitration Contract*, *supra* note 1, at 57–66.

2004 to 2006, a task force of the American College of Trust and Estate Counsel (ACTEC)⁶ studied the issue in depth and, in 2006, released a final report in which it advocated for the use of arbitration clauses in wills and trusts and offered model legislation for states to enact to ensure the enforceability of such clauses.⁷ Professor Spitko describes these legislative and judicial developments in Part I of his *Unilateral Arbitration Contract* article.⁸ As he points out, opponents of the enforceability of such clauses have generally been met with success in the courtroom while proponents have succeeded in having a few states enact statutes that make such clauses enforceable, at least in certain contexts and for certain specified types of contests.⁹

Professor Spitko's proposal to characterize a will as an implied unilateral contract between the individual donor (testator) and the state is both novel and far-reaching. It responds to the overarching question of whether the Federal Arbitration Act (FAA) and state arbitration acts, which speak of enforcing arbitration clauses in "contracts" or "agreements," are applicable to wills, trusts, and similar donative instruments.¹⁰ The major challenge for proponents of the use of mandatory arbitration in wills and trusts disputes, as articulated by Professor Spitko, is that neither a will nor a trust is viewed by most as a contract and thus the beneficiaries of the will or trust are not bound by its terms.¹¹ As Professor Spitko discusses, he and other scholars have proposed contract-related theories that respond to this challenge and those theories have been accepted by at least one court.¹² But even in those few instances in which a state has enacted an enforceability statute or a court has required arbitration, the enforcement has been restricted to internal disputes about the meaning or operation of the trust or will. No case or statute allows mandatory arbitration if the challenge is a challenge to the validity of the donative instrument itself.¹³ By characterizing the

6. ACTEC "is a nonprofit association of lawyers and law professors skilled and experienced in the preparation of wills and trusts; estate planning; and probate procedure and administration of trusts and estates of decedents, minors and incompetents. Its more than 2,700 members are called "Fellows" and practice throughout the United States, Canada and other foreign countries." *About Us*, THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL, <http://www.actec.org/about/description-of-the-college/> (last visited Oct. 19, 2016).

7. See Spitko, *Unilateral Arbitration Contract*, *supra* note 1, at 63.

8. See Spitko, *Unilateral Arbitration Contract*, *supra* note 1, at 57–66.

9. See *id.* at 59, 64–65.

10. See *id.* at 55.

11. See *id.* at 66.

12. See *id.* at 60–63. Professor Spitko describes the case of *Rachal v. Reitz*, 403 S.W.3d 840 (Tex. 2013), in which the Texas court applied these theories to uphold a mandatory arbitration clause in a trust. See *id.* at 60.

13. See, e.g., FLA. STAT. § 731.401 (2016), which renders enforceable an arbitration clause in the case of a will or trust dispute, "other than disputes of the validity of all or a part of a will or trust."

will as an implied unilateral contract between the donor and the state, Professor Spitko masterfully resolves the question of whether the actual validity of a donative instrument can be the subject of mandatory arbitration. This question has remained as the last “hold-out,” even for those scholars, courts, and state legislatures that favor otherwise the enforceability of arbitration clauses in wills and trusts. If Professor Spitko’s argument is accepted by the courts, the arbitration that testators and settlors desire when they include mandatory arbitration clauses in their donative instruments is virtually assured. Finally, in Part IV of his article, Professor Spitko also addresses the question of whether a court or an arbitrator should decide whether the arbitration clause is enforceable and argues persuasively that, in most cases, it is the arbitrator who should do so.

By way of background, I have for years advocated strongly in favor of the use of mediation to resolve will challenges and other disputes relating to fiduciary law.¹⁴ I am also a relatively recently-converted proponent of the enforcement of mandatory arbitration clauses in will and trusts disputes. As such, I applaud Professor Spitko for his theory and would fervently like for courts to see the wisdom of his approach. However, the pragmatic and albeit cynical aspect of my intellectual temperament leads me to play devil’s advocate. The arguments I present here against Professor Spitko’s approach are admittedly simplistic, but they have forced me to attempt to come up with an alternative approach that may serve as a back-up in the event that courts do not see the wisdom of Professor Spitko’s theory.

The first question that I raised with Professor Spitko upon reading a draft of his article is whether there are other circumstances in which a similar individual-state contract theory has been espoused. Neither he nor I are aware of any such circumstance. That being the case, I fear that the courts, tied as they are to precedent, will be reluctant to embrace a theory that has no counterpart in any other area of the law. My hope, however, is that Professor Spitko’s article will be an inspiration for those who are more familiar with social contract theory to offer other examples of the application of this or a similar theory that might shore up the viability of Professor Spitko’s approach.

The second question I raised with Professor Spitko arises from his comparison of the individual donor-state contract with an employment

14. See, e.g., Mary F. Radford, *Using Mediation in Guardianship Cases*, in *MEDIATION FOR ESTATE PLANNERS: MANAGING FAMILY CONFLICT* (2016); Mary F. Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?*, 31 *STETSON L. REV.* 611 (2002); Mary F. Radford, *Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters*, 1 *PEPP. DISP. RESOL. L.J.* 241 (2001); Mary F. Radford, *An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters*, 34 *REAL PROP., PROB. & TR. J.* 601 (2000).

contract in which the employer promises a year-end bonus.¹⁵ My question revolves around the “consideration” given by the individuals who are parties to the implied contract with the state. Professor Spitko notes accurately that testamentary freedom “is an incentive to industry and saving.”¹⁶ Thus, he posits that an individual donor performs her part of the donor-state contract by working industriously and producing wealth that can then be transmitted after death through the legal means provided by the state.¹⁷ Professor Spitko likens this contract to a bonus offered by an employer to an employee upon completion of a successful year.¹⁸ If the employee performs as expected, then the employer will pay the bonus. But what happens if the employee does not perform? Obviously, no bonus is paid—that is, the employer is not required to fulfill its part of the contract. Is the same true for the individual who never becomes a productive member of society or who wastes whatever assets she has? Is the state still obligated to perform its part of the contract? It may be argued that this question is irrelevant, given that the lazy or wasteful individual will have no assets to pass at death. However, it must not be forgotten that there may be cases in which an individual accumulates wealth immediately prior to her death, through little or no effort of her own. For example, the individual may win the lottery the night before she dies. Or she may be seriously injured in an accident, with the result that pain and suffering damages are awarded to her estate. She has not performed her part of the bargain, so is the state still bound to perform its part? This question, although a minor one, remains unanswered in Professor Spitko’s approach.

As noted earlier, the opportunity to explore and respond to Professor Spitko’s thoughtful piece caused me to probe the existing law to try to find a solution therein that could reach the same result. Scholars, judges, ACTEC, and state legislatures have already made significant progress toward responding to the question of whether a will or trust is a “contract” or “agreement” and whether mandatory arbitration clauses inserted by testators and settlors in donative instruments should be enforced.¹⁹ So the remaining gap—the gap that Professor Spitko’s article is the first one to fill—is whether an attack on the validity of the donative agreement itself can be forced into arbitration. The prevailing theory is that this issue cannot be arbitrated because the individual who is attacking the will is not choosing to take under that instrument but rather to increase her share of the decedent’s estate by invalidating the will and taking by intestacy.²⁰

15. See Spitko, *Unilateral Arbitration Contract*, *supra* note 1, at 67–68.

16. *Id.* at 72.

17. *Id.*

18. *Id.*

19. See *supra* notes 5–8 and accompanying text.

20. See Spitko, *Unilateral Arbitration Contract*, *supra* note 1, at 61 & n.59.

My proposal (which is admittedly in its infancy) was inspired both by Professor Spitko's article and by the approach taken by Jonathan Blattmachr, a renowned expert in the field of trusts and estates, in his article entitled *Reducing Trust and Estate Litigation Through Disclosure, In Terrorem Clauses, Mediation and Arbitration*.²¹ At the risk of simplifying his approach, in his article Mr. Blattmachr suggested that donors transform the traditional "in terrorem" clause²² to a clause that would result in forfeiture of whatever a beneficiary was due to take under a will or trust only if the beneficiary refused to engage in mediation or arbitration.²³ "In terrorem" clauses have not been enforced by some courts or some states because they robbed the challenger of the right to contest in court a will that may not be valid.²⁴ But, requiring a beneficiary to submit a dispute to mediation or arbitration does not have the same draconian result. In the former, the mere filing of the lawsuit results in the forfeiture, and thus the beneficiary is forced to assess whether the risk is worth it. In the latter case, the testator is not forcing forfeiture for the actual act of challenging the will, but rather forcing the challenger to engage in a particular type of dispute resolution. The dispute is still "litigated" and the question still raised in front of a neutral party; it is only the choice of forum that is taken away from the individual.²⁵

Mr. Blattmachr's approach reflects the long-held theory that the intent of a testator or donor as to the distribution of her property should be respected absent a violation of public policy.²⁶ But, as Mr. Blattmachr explains, this approach would not be viable in a case in which the validity of the donative instrument is challenged by a person who has nothing to lose—that is, by an individual who is not named as a beneficiary under the instrument but rather would take (e.g., by intestacy) if the instrument is invalidated.²⁷ Thus, there exists again the gap that Professor Spitko's theory is designed to fill—that is, whether a challenge to the validity of the will by an heir who is not mentioned in the will but would rather take by intestacy can be forced into arbitration.

21. Blattmachr, *supra* note 4.

22. A traditional "in terrorem" clause (which may also be referred to as a "forfeiture" or "disinheritance" clause) is a clause that states that if an individual who is named as a beneficiary in the will challenges the will, the sheer fact of the challenge will cause that individual to forfeit whatever she would take under the will. *Id.* at 245.

23. *See id.* at 258–61.

24. *See id.* at 246, 247.

25. As Mr. Blattmachr points out, the party challenging the will still has her day in "court," albeit in an arbitration forum rather than a traditional courtroom. *Id.* at 260.

26. *See, e.g.,* Basile v. Aldrich, 70 So. 3d 682, 686 (Fla. 1st Dist. Ct. App. 2011), *rev. granted*, 103 So. 3d 138 (Fla. 2012); Corbin v. Manley, 164 S.W. 2d 394, 396 (Ky. 1942); Will of Pace, 400 N.Y.S. 2d 488, 491 (N.Y. 1977).

27. *Id.* at 266.

My suggested alternative approach brings into play a statute that is included in the 1990 amendment to the Uniform Probate Code.²⁸ Contrary to common law, UPC § 2-101 allows an individual to use a clause in a will to disinherit completely any heir²⁹ regardless of whether that heir is named as a beneficiary in the instrument.³⁰ Thus, for example, a will might include the clause: “My brother Hector is not to receive any of my property.”³¹ Thus, Hector is disinherited, whether or not he is slated to receive anything under the decedent’s will. I will refer to this clause in this article as a “negative inheritance clause.”³²

In a state that recognizes the enforceability of a negative inheritance clause, it should be possible for a testator to condition an inheritance upon the heir’s agreement to take her contest of the will to binding arbitration rather than to the courts. If the will disinherits the heir completely or only in part, and the heir seeks to enlarge her share of the testator’s estate by challenging the will’s validity and taking under the state’s intestacy statute, then the clause would require her to take her dispute to arbitration or forfeit her intestate portion of the testator’s estate. This approach can be examined in the context of a hypothetical testator who disinherits his sole daughter (who is his sole intestate heir) due to the undue influence of his new girlfriend. Under the testator’s will, the girlfriend will take all of the testator’s estate. An *in terrorem* clause is useless in this situation to discourage the daughter from challenging the will because, in effect, she has nothing to lose.

On the other hand, a blanket negative inheritance clause (“It is my intention that my daughter take nothing from my estate either under this will or by intestacy”) may be so harsh that a court may refuse to apply it, particularly if there is good cause for challenging the validity of the will. However, a negative inheritance clause that integrates an arbitration provision may be more palatable. Such a clause would read: “I direct that any dispute related to the validity of this instrument or to the administration of my estate shall be resolved through mandatory

28. UNIF. PROBATE CODE § 2-101 gen. cmt. 1 (amended 2010).

29. I use the term “heir” to refer to an individual who would take the decedent’s estate were the decedent to die intestate—that is, without a will.

30. UNIF. PROBATE CODE § 2-101(b) provides

A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent’s intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his [or her] intestate share.

31. See UNIF. PROBATE CODE § 2-101 gen. cmt. 1 (amended 2010).

32. I purposely am not using the term “disinheritance clause” because that term is used in some states as a synonym for an “*in terrorem*” clause. See Blattmachr, *supra* note 4, at 245.

arbitration that will be binding upon on all of the beneficiaries named in this will and all of my heirs. Should a beneficiary named in this will refuse to participate in arbitration, he or she shall forfeit all benefits under this will even if a court of law determines that the will itself is valid. Should any of my heirs refuse to participate in arbitration, he or she shall not take any portion of my intestate estate and shall be treated as having predeceased me even if a court of law shall find this will to be invalid.” Under this clause, those who would challenge the will do not risk forfeiture due to the mere fact of the challenge but rather only if they refuse to take the challenge to the forum chosen by the testator.

The approach of using an integrated negative inheritance/arbitration clause is subject to the same criticism of any arbitration clause in a will—that is, if the will itself is invalid, is it not necessarily true that the arbitration clause contained within it is also invalid? And if that is the case, how is it 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”?³³ The response to this has already been masterfully handled by Professor Spitko in Part IV of his article. In this portion of the article, Professor Spitko enlightens those of us “who know a great deal about the law of donative transfers but little or nothing about the law of arbitration.”³⁴ Professor Spitko explains that, under the doctrine of separability, an arbitration contract is separable from the larger “container contract” in which it is found and a challenge to that larger instrument is not necessarily a challenge to the arbitration contract.³⁵ Additionally, Professor Spitko examines arbitration case law that makes it clear that a court must step in only if the challenge in question is a challenge specifically to the arbitration contract.³⁶ If the challenge is to the larger container contract, the arbitrator may resolve the dispute.³⁷ Professor Spitko then analyzes the application of the separability doctrine to various challenges to a will’s validity, including challenges based on a non-compliance with the required formalities of will execution, challenges based on fraud or undue influence, and challenges based on the testator’s lack of the required level of testamentary capacity.³⁸ Professor Spitko’s analysis persuasively shows that most of these challenges can be resolved by an arbitrator. The final type of challenge—one based on testamentary capacity—presents a special set of difficulties that would need to be further examined by later scholarship.

33. Spitko, *Unilateral Arbitration Contract*, *supra* note 1, at 92.

34. *Id.*

35. *See id.* at 92–93.

36. *See id.* at 93.

37. *See id.*

38. *See id.* at 94.

I present my alternative approach in all humility, knowing that I have not spent the years of analysis that culminated in Professor Spitko's offering of the theory of the will as an implied unilateral arbitration contract. I also realize that this approach will be successful only to the degree that states are willing to adopt negative inheritance laws similar to that set forth in UPC § 2-101. In short, as noted above, my alternative theory is in its infancy. I thank Professor Spitko for instigating this chain of thought and debate on this burgeoning issue and hope that he and those other proponents of will arbitration (perhaps most importantly, the scholars and practitioners mentioned in this article) will continue to work together to push the current bounds of understanding by both those "who know a great deal about the law of donative transfers" and those who know a great deal about the law of arbitration. As has been noted by Professor S.I. Strong, "it is high time that these two areas of specialization—trust [and wills] law and arbitration law—came together to address questions relating to the arbitration of internal trust disputes [and will disputes] through inclusion of an arbitral provision in the trust instrument [or a will]."³⁹

39. Strong, *Arbitration of Trust Disputes*, *supra* note 4, at 1166.