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Missouri's Ultimate Dead Hand Control: The Development and Relationship Between Donative Arbitration Provisions and No-Contest Clauses in Wills & Trusts

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MISSOURI'S ULTIMATE DEAD HAND CONTROL: THE DEVELOPMENT AND RELATIONSHIP BETWEEN DONATIVE ARBITRATION PROVISIONS AND NO-CONTEST CLAUSES IN WILLS & TRUSTS

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I. INTRODUCTION

In *Epigrams of a Cynic*, Ambrose Bierce wrote "death is not the end; there remains the litigation over the estate."[1] As true as that statement was in 1912, it does not take a cynic to see the role that probate and litigation play in our world today. In 2022, Americans will spend over two billion dollars on probate.[2] The probate system has always been one the most important foundations of the U.S modern legal system.[3] In Missouri alone, there were over 15,000 cases filed in the probate court in 2021.[4] It seems that death and conflict are inseparable. The idea that this is a new phenomenon would be an egregious misconception. For centuries wars have been fought over birthrights, claims, and inheritances. Today, these wars are no longer fought on the battlefield, instead they are being fought in the courtroom. These probate conflicts have become a double-edged sword: for families these conflicts have cost relationships, reputation and wealth, while for estate attorneys these conflicts have provided opportunity.

However, an estate attorney's role is to further the best interest of the client, which is often to prevent litigation. Although an attorney cannot always prevent familial conflict, they can provide strategic planning, wise counseling, and competent drafting. But no matter how well an attorney counsels, plans, or drafts, the risk of litigation remains relatively high. Is there more that an estate attorney can do? To fully serve the best interest of the client, estate attorneys should consider the impact of using no-contest clauses and donative arbitration clauses in a will or trust.

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1. AMBROSE BIERCE, A CYNIC LOOKS AT LIFE (Haldeman-Julius ed., 1912), https://www.gutenberg.org/cache/epub/16340/pg16340-images.html.

2. Mario A. Godoy, *Probate Facts and Figures,* EST. AND PROB. LEGAL GRP. BLOG, https://estateandprobatelegalgroup.com/probate-facts-and-figures (last visited Mar. 10, 2022).

3. Harry Munsinger, *History of Inheritance: Part II*, SAN ANTONIO LAW. (July/Aug. 2020), https://issuu.com/sanantoniobar/docs/sal-julaug20-digital/s/10782762.

4. *Table 25 – Circuit Court FY 2021 – Civil, Juvenile, & Probate Cases Filed, Disposed, and Pending,* MO. CTS., https://www.courts.mo.gov/file.jsp?id=185360 (last visited Mar. 10, 2023).

In general, a non-contest clause revokes a beneficiary's interest if they contest a testamentary document and a donative arbitration clause is a mandatory arbitration clause in a will or trust that requires all or certain disputes to be arbitrated.[5]

Looking ahead, this comment will document the recent development of both donative arbitration clauses and no-contest clauses and analyze the impact of using the clauses in conjunction with each other. Part II will dive into arbitration clauses in wills and trusts and determine whether these clauses are enforceable generally and within Missouri specifically. Part III will look at no-contest clauses in wills or trusts and determine their enforceability generally and within Missouri. Next, Part III will also look at Missouri's safe harbor provisions for no-contest clauses. Lastly, Part IV will analyze the effect of inserting both a no-contest clause and donative arbitration clause in the same will or trust instrument, concluding that until Missouri addresses this legal issue settlors' and testators' will be able to have the ultimate dead hand control over their trust or estate.

II. ARBITRATION PROVISIONS IN WILLS AND TRUSTS

As the world increasingly finds arbitration provisions springing up in everyday documents, it is important to note that arbitration provisions are not a new phenomenon in the estate planning world. In fact, George Washington pioneered the first known arbitration provision in a will in 1799.[6] Washington's will provides the first example of a donative arbitration clause, stating that if any dispute were to arise then "three impartial and intelligent men" would declare the testator's intention and their decision would be binding.[7] Written over two hundred years ago, Washington's provision was and still is a good example of an arbitration clause. Today, Black's Law Dictionary defines arbitration as "the investigation and determination of a matter or matters of difference between contending parties, by one or more unofficial persons, chosen by the parties, and called arbitrators, or referees."[8] While arbitration is used primarily for contract disputes, the process is the same in the estate planning context. This note focuses primarily on donative arbitration provisions, which are defined as mandatory arbitration provisions in testamentary instruments, and all general references to arbitration provisions are within this context.[9] The law on enforceability differs significantly between contractual arbitration clauses and donative arbitration clauses. When it comes to including arbitration provisions in estate planning instruments, the American Arbitration Association provides an example of a donative arbitration clause in their Wills and Trusts Arbitration Rules and Mediation Procedures.[10]

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5. Stephen W. Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, 26 OHIO ST. J. ON DISP. RESOL. 627, 632 (2011); Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure, in Terrorem Clauses, Mediation and Arbitration*, 9 CARDOZO J. CONFLICT RESOL. 237, 245 (2008).

6. Edward F. Sherman, *Arbitration in Wills and Trusts: From George Washington to an Uncertain Present*, 9 ARB. L. REV. 83 (2017).

7. *Id*.

8. *Arbitration*, BLACK'S LAW DICTIONARY (11th ed. 2019).

9. *See generally* Jessica Beess und Chrostin, *Mandatory Arbitration Clauses in Donative Instruments: A Taxonomy of Disputes and Type-Differentiated Analysis*, 49 REAL PROP. TR. & EST. L.J. 397 (2014).

10. *Wills and Trusts Arbitration Rules and Mediation Procedures,* AM. ARB. ASS'N (June 1, 2012) ("In order to save the cost of court proceedings and promote the prompt and final resolution of any

A testators' or settlors' first step in deciding whether to include a donative arbitration clause in his or her estate planning instruments is to determine his or her purpose for including such a clause. There are many reasons why an individual would consider using arbitration over litigation when it comes to estate planning, the most obvious of which are expediency and decreased cost.[11] In fact, arbitration is generally known to be a cheaper and quicker way to resolve a dispute than litigation, with few exceptions.[12] However, when it comes to arbitration within the context of estate planning, arbitration provides four uniquely tailored benefits beyond cost and expediency.

First, arbitration can be successfully done with an abbreviated discovery and litigation process.[13] This saves both time and money. As mentioned above, this is true in almost all contexts. However, due to the nature of probate disputes, the benefit of quick and cheap litigation is even more important.[14] This is due in part to the fact that attorney costs come out of the trust or estate funds.[15] Essentially, when beneficiaries want to bring a claim, they are draining the exact trust or estate that they are trying to inherit or preserve.[16] Therefore, arbitration clauses can encourage dispute resolution in such a way as to not drain the funds or assets of an estate or trust.

Second, arbitration can reduce and prevent conflict between families.[17] Estate planning is most akin to family law, and litigation in both areas is known to instigate familial conflict and disdain.[18] By including an arbitration clause, a testator or settlor can make sure that any dispute that arises will not be "left to fester through long and painful litigation."[19] The potential for conflicts between beneficiaries is especially likely in a dispute over a trust or an estate, where both money and emotional family ties are involved.[20] Through arbitration, family members can resolve their disputes quickly.

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dispute regarding the interpretation of my will (or my trust) or the administration of my estate or any trust under my will (or my trust), I direct that any such dispute shall be settled by arbitration administered by the American Arbitration Association® under its AAA Wills and Trusts Arbitration Rules and Mediation Procedures then in effect. Nevertheless, the following matters shall not be arbitrable: questions regarding my competency, attempts to remove a fiduciary, or questions concerning the amount of bond of a fiduciary. The arbitrator(s) shall be a practicing lawyer licensed to practice law in the state whose laws govern my will (or my trust) and whose practice has been devoted primarily to wills and trusts for at least 10 years. The arbitrator(s) shall apply the substantive law (and the law of remedies, if applicable) of the state whose laws govern my will (or my trust). The arbitrator 's decision shall not be appealable to any court, but shall be final and binding on any and all persons who have or may have an interest in my estate or any trust under my will (or my trust), including unborn or incapacitated persons, such as minors or incompetents. Judgment on the arbitrator 's award may be entered in any court having jurisdiction thereof."), https://www.adr.org/sites/default/files/Commercial%20Wills%20and%20Trusts%20Rules%2012813%20-%20Archieve%202015%20Oct%2021%2C%202011.pdf.

11. S.I. Strong, *Arbitration of Trust Disputes: Two Bodies of Law Collide*, 45 VAND. J. TRANSNAT'L L. 1157, 1182 (2012).

12. Stephen W. Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, 26 OHIO ST. J. ON DISP. RESOL. 627, 635 (2011).

13. *Id*.

14. *Id.* at 636.

15. *See* MO. REV. STAT. § 473.153 (1989); MO. REV. STAT. § 456.10-1004 (2005).

16. *See* § 473.153; § 456.10-1004.

17. Murphy, *supra* note 12.

18. *Id*.

19. *Id*.

20. *Id* at 636.

Third, arbitration, unlike litigation, is not a public proceeding and the documents shared within arbitration are not for public record.[21] When it comes to an individual's trust or estate, privacy can be a major factor.[22] Trusts are already a private matter and by using arbitration a settlor or beneficiary can make sure to keep the contents of the trust private.[23] Essentially, "arbitration can shield both the trust and the personal affairs of the interested parties from the public eye."[24] This benefit of privacy can appeal to most settlors and in some circumstances, testators.

Fourth, arbitration clauses can protect a testator who belongs to a cultural minority. Gary Spitko, a professor of law at Santa Clara School of law, argues that within the context of trust and will litigation, arbitration clauses can protect a settlor who belongs to a cultural minority from having the substantive merits of their claims decided by a court or jury who often enforce majoritarian views.[25] Spitko argues that an arbitration clause allows a settlor or testator to pick or designate an arbitrator who better aligns with their views.[26] Protecting the cultural minority within the context of estate planning is essential, especially given how the main focus of any will or trust dispute is to follow the settlor's or testator's intent. According to Spitko, "arbitration is a viable method for avoiding cultural bias in decision makers, and adopting this approach will ensure that the donor's testamentary freedom and life-style choices are respected."[27]

However, one scholar, Jessica Beess und Chrostin, recently addressed whether the benefits of arbitration actually translate to the field of will and trust law.[28] The argument is split into two categories: (1) classic arbitration benefits do not translate to validity disputes and (2) arbitration by its nature is inconsistent with the core principles of administrative disputes.[29] A validity dispute has to do with whether the testamentary document, as a whole or in part, is valid, while an administrative dispute has to do with how the testamentary document is being administered and followed. First, it is argued that, in the context of validity contests, arbitration in practice fails to offer benefits of speedy recovery, confidentiality, and cultural bias.[30] This is because of the worst evidence problem.[31] The worst evidence problem arises because evidence within a will or trust dispute is often only proven through circumstantial evidence meant to appeal towards sympathy and conveyed using persuasive storytelling.[32] This type of evidence is so prevalent within will or trust validity disputes that many of the benefits that arbitration can offer are often canceled out.[33] For instance, due to the nature of these testimonial disputes, most cases are appealed

21. *Id*.
22. *Id*.
23. Murphy, *supra* note 12.
24. *Id*.
25. E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RSRV. L. REV. 275, 276 (1999).
26. *Id*. at 277.
27. Beess und Chrostin, *supra* note 9, at 402.
28. *Id.* at 403.
29. *Id*.
30. *Id.* at 405.
31. *Id*.
32. *Id.*
33. Beess und Chrostin, *supra* note 9, at 406.

after arbitration.[34] This means that arbitration does not always avoid the court nor does it, in some circumstances, provide a simpler and quicker resolution.[35]

Second, the scholar argues that, in the context of administrative disputes, arbitration by its very nature is "inconsistent with the irreducible core of the fiduciary relationship."[36] This is because the fiduciary duties of a trustee or executor were designed to be strictly enforced by courts.[37] By forcing a beneficiary to arbitrate they lose their ability to hold the fiduciary liable in a court of law. [38]

Overall, even though there appears to be some criticism, donative arbitration provisions may provide a settlor or testator with unique benefits ranging from privacy to affordability.[39] These arbitration provisions, although not for everyone, can give a drafter the ability to better serve their goals when estate planning.

A. Current State of Enforceability of Donative Arbitration Provisions

Consider this hypothetical: suppose Logan Roy's trust leaves all his shares in his company to his eldest son Kendall, who he wants to succeed him as the owner of Waystar RoyCo. Logan fears that his two younger children, Shiv and Roman, also beneficiaries under the trust, will contest the trust. To avoid his children being caught in long and costly litigation, Logan wants to include an arbitration clause in the trust so that any disputes get resolved quickly and quietly. Is this clause enforceable? [40]

When it comes to the enforceability of pre-dispute arbitration provisions,[41] the most important document is the Federal Arbitration Act of 1925 (FAA).[42] The FAA is the congressional statute that both allows and governs U.S. arbitration disputes.[43] The role of the FAA has also become even more increasingly important since *Southland Corp. v. Keating,*[44] in which the Supreme Court held that the FAA applies in state courts as well as federal courts.[45] Although the FAA is the leading authority on arbitration law in the United States, it provides no mention of donative arbitration clauses.[46] The FAA instead focuses solely on arbitration provisions within contractual agreements.[47] One reason why the FAA has such narrow scope is because Congress's power to create the act stems from its constitutional right to regulate

34. *Id.* at 407.
35. *Id.* at 405–06.
36. *Id* at 405.
37. *Id*. at 404.
38. *Id*. at 414.
39. Beess und Chrostin, *supra* note 9, at 402.
40. 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) (it should also be noted that this example can relate to a will instrument as well).
41. All references to arbitration provisions within this note are under the context of pre-dispute arbitration provisions.
42. Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, 201–208, 301–307, 401–402 (1925).
43. *Id*.
44. Southland Corp. v. Keating, 465 U.S. 1, 3 (1984).
45. *See State Courts and the Federalization of Arbitration Law*, HARV. L. REV. (Jan. 11, 2021), https://harvardlawreview.org/2021/01/state-courts-and-the-federalization-of-arbitration-law/.
46. 9 U.S.C. §§ 1–16, 201–208, 301–307, 401–402.
47. *See id*.

interstate commerce.[48] The FAA's absence of donative arbitration clauses means that states are left with little to no guidance on whether they can enforce an arbitration clause in a will or trust. Without federal guidance, courts have refused to enforce donative arbitration clauses unless there is state legislation requiring it.[49] This means that those who try to enforce an arbitration provision in a will or trust based on common law will most likely come up empty.

The few courts that have addressed whether a donative arbitration clause is enforceable have all reached a unanimous decision: a will or trust is not a contract and therefore falls short of being enforceable under the FAA or similar state statutes.[50] However, in Rachel v. Reitz,[51] the Texas Supreme Court was still able to apply their state arbitration statute to upholding a donative arbitration agreement in a trust under the common law approach of Benefit Theory, this is discussed later in more detail. There the court did enforce the arbitration agreement, but ultimately also came to the conclusion that a trust is still not enforceable as a contract.[52] This case is an outlier. All other courts that have addressed this issue tried to reconcile donative arbitration provisions as enforceable under common law and failed.[53] There is little precedent that allows for a donative arbitration clause to be enforceable under common law.[54] However, scholars have offered three different theories in which a court could find that donative arbitration clauses fall under the common law.[55] The theories offered are Contract Theory, Benefit Theory (also known as Conditional Transfer Theory), and Intent Theory.[56]

i. Contract Theory

The first theory offered is Contract Theory. The Contract Theory argues that there is no longer any distinction between the modern trust and a contract, therefore there should not be a legal distinction between the two.[57] This argument asserts that trusts should fall under the law of contracts. Under this lens, a donative arbitration clause, as it relates to trusts only, would be enforceable under common law as well as enforceable under the FAA.[58] However, this theory does suffer from two major flaws. The first flaw is that the Contract Theory is over-inclusive in its application.[59] The issue is that if a court is willing to equate a trust to a contract under common law for the purpose of donative arbitration clauses, then theoretically all trust law could be subject to or displaced by contract law.[60] There are still too many

48. *See generally* Isham R. Jones III, *Federal Arbitration Act and Section 2's Involving Commerce Requirement: The Final Step Towards Complete Federal Preemption over State Law and Policy – Allied-Bruce Terminix v. Dobson, The*, 1995 J. DISP. RESOL. 327, 333 (1995).

49. Katzen, *supra* note 40, at 119.

50. *See* Schoneberger v. Oelze, 96 P.3d 1078, 1084 (Ariz. Ct. App. 2004); *In re* Naarden Trust, 990 P.2d 1085, 1086 (Ariz. Ct. App. 1999); *In re* Calomiris, 894 A.2d 408, 410 (D.C. 2006).

51. Rachel v. Reitz, 403 S.W.3d 840 (Tex. 2013).

52. *Id.* at 845, 851.

53. *See Shoneberger*, 96 P.3d at 1084; *In re Naarden Trust*, 990 P.2d at 1086; *In re Calomiris*, 894 A.2d at 410.

54. Murphy, *supra* note 12, at 639.

55. *Id*. at 645.

56. *Id.*at 645, 648.

57. *Id.* at 645–46.

58. *See id* at 646.

59. *Id*. at 647.

60. Murphy, *supra* note 12, at 647.

distinctions between trusts and contracts for the Contract Theory to be a viable solution for the enforceability of donative arbitration clauses.[61] The second issue with the Contract Theory is that it is also under-inclusive, because the theory does not account for will instruments.[62] Unlike trust law, wills and contracts are not as reconcilable and are governed by distinctly different principles.[63] If a court were to uphold a donative arbitration clause under Contract Theory, there would still be no guidance on enforceability of donative arbitration clauses in wills.[64]

ii. Benefit Theory

The second theory offered is Benefit Theory. The theory argues that when a beneficiary accepts the benefits from a will or trust, that beneficiary ultimately agrees to be bound by its terms.[65] This would make a donative arbitration clause "an 'agreement' under state arbitration statutes".[66] This is the approach of the Texas Supreme court in Rachel v. Reitz.[67] There the court held that the donative arbitration agreement in the contested trust, although not a contract, was still considered an agreement under the Texas Arbitration Act and therefore the clause was held enforceable.[68] Similar to Contract Theory, Benefit Theory also suffers from being too under-inclusive.[69] Here, even under Benefit Theory, a beneficiary who chooses to contest the will or trust can still bring that action in court outside of the arbitration clause because a beneficiary can contest the validity without having expressly or impliedly agreed to be bound by its terms.[70] Another issue of under-inclusivity is that the Benefit Theory only applies to beneficiaries and therefore they cannot enforce an arbitration clause against a trustee or executor.[71] This is because a trustee or executor does not directly benefit from a trust or will but rather only receives compensation for their services rendered.[72]

iii. Intent Theory

The last theory offered is Intent Theory. Intent Theory is offered to enforce donative arbitration clauses while trying to avoid the problems of Contract and Benefit Theory.[73] Intent Theory suggests that donative arbitration clauses would be enforceable because these provisions resulted from a clear manifestation of the donor's intent.[74] Although Intent Theory was meant to fix the problems with the other theories, there is still some criticism.[75] One flaw of Intent Theory is that, unlike

61. *See id.* at 647–48.
62. *Id.* at 648.
63. *Id*.
64. *Id*.
65. *Id.* at 648–49.
66. Murphy, *supra* note 12, at 648.
67. Rachel v. Reitz, 403 S.W. 3d 840 (Tex. 2013).
68. *Id.* at 850–51.
69. Murphy, *supra* note 12, at 648–49.
70. *Id.* at 649.
71. *Id*.
72. *Id*.
73. *Id.* at 652–53.
74. *Id.* at 653.
75. Murphy, *supra* note 12, at 653.

Contract Theory, the donative arbitration clause would still "fall outside of the protection of the state arbitration statute, and thus it would be disfavored by courts."[76] Furthermore, Intent Theory would only go so far as the courts would be willing to allow it.[77] Although intent is at the core of will and trust law, courts in the past have had no problem in restricting certain provisions in will or trust instruments even though they were manifest by the settlor's or testator's intent. [78]

Ultimately, courts are reluctant to enforce donative arbitration clauses under the common law. Although scholars have offered three theories in which courts could enforce these provisions, only one court has been willing to accept or use any of these theories.[79] Each theory has its own flaws and limitations that make it impractical for courts to be willing to change the common law regarding donative arbitration clauses. Instead of forcing courts to accept and use these theories, it would be easier and more beneficial for the state legislatures to pass statutes regarding the enforceability of these clauses.[80]

B. Current State of Enforceability of Arbitration Provisions Within Wills in Missouri

Missouri testators' beware, because Missouri has not codified the enforceability of these provisions as they relate to wills. This means the current enforceability of donative arbitration clauses in a will instrument in Missouri is still up for debate. Since Missouri has not created any statutory authority on the issue, it seems unlikely that a court would be willing to enforce these provisions. As noted above, it is possible, albeit unlikely, that Missouri courts would be willing to embrace one of the three theories to help establish that common law within the state allows for the enforcement of donative arbitration clauses in wills.[81] It should also be noted that a Missouri court can opine a different theory, not one of the leading theories mentioned here. Ultimately, Missouri has never heard a case on whether these clauses in a will can be enforced, nor has the legislature acknowledged this issue.[82] It is still uncertain how many Missouri testators have included these provisions in their wills.[83]

C. Current State of Enforceability of Arbitration Provisions Within Trusts in Missouri

Unlike testators, there is good news for settlors in Missouri who wish to include an arbitration clause in their trust: Missouri has codified the enforceability of arbitration provisions in trusts. Therefore, there is no need for a court in Missouri to

76. *Id.* at 657.
77. *Id*.
78. *Id*.
79. There are no known cases, outside of Rachel v. Reitz, in which a court has accepted one of these three theories in enforcing donative arbitration clauses.
80. Murphy, *supra* note 12, at 662.
81. *Id*.
82. There is yet to be a case of first impression on this issue in the state of Missouri.
83. There exists no empirical data on the number of Missouri testators who include a donative arbitration clause in their will.

adopt any of the three theories for enforcing these provisions within a trust.[84] Section 456.2-205 of the Missouri Statutes provides, "A provision in a trust instrument requiring the… arbitration of disputes between or among the beneficiaries, a fiduciary, a person granted non fiduciary powers under the trust instrument, or any combination of such persons is enforceable."[85] However, the statute does not allow for the enforceability of an arbitration provision as it relates to validity disputes.[86] The statute provides that "a provision in a trust instrument requiring the… 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… arbitration of the dispute."[87] Since its enactment in 2014, Missouri has joined a growing list of other states to codify the enforcement of donative arbitration provisions for trusts only.[88] However, it should also be noted that the Missouri statute has never been challenged. This is important to note because a few states have held that enforcing a donative arbitration provision violates their state constitution or other state statutes.[89] These states—New York, Michigan, and Pennsylvania—each found that an arbitration clause was invalid in wills because all issues of testamentary capacity fell within the jurisdiction of the court, be it by statute or constitution.[90] Although the Missouri statute does not relate to wills, this is significant because Missouri's requirement for capacity for a revocable trust is testamentary capacity.[91] Until a challenge arises, it is not beyond question whether Section 456.2-205 of the Missouri Statutes is per se valid.

III. NO-CONTEST CLAUSES IN WILLS AND TRUSTS

Another major tool for estate planners besides a donative arbitration clause, is a no-contest clause, also known as an In Terrorem Clause: a provision within a will or trust instrument that provides for the forfeiture of some or all of a person's beneficial interest by any beneficiary who brings a contest, lawsuit or legal challenge to the validity, terms, provisions or administration of the instrument.[92] The purpose behind a testator's or settlor's use of such a clause is often to preserve peace, reduce litigation, and add a measure of protection when enforcing their intent.[93] Although a no-contest clause can be used to preserve the validity of the instrument itself, most litigation involving estates and trusts is not a challenge to the validity of the instrument, but rather "litigation arising from a construction of the instrument, the choice of fiduciaries, or how the fiduciaries administer the estate or trust."[94] Because the litigation that arises can often be broad and unique, it may not be certain whether a

84. MO. REV. STAT. § 456.2-205.
85. *Id*.
86. *Id*.
87. *Id*.
88. Murphy, *supra* note 12, at 643; David M. English, *Arbitration and the United States Uniform Trust Code*, *in* ARBITRATION OF TRUST DISPUTES 143 (S. I. Strong ed., 2016).
89. Murphy, *supra* note 12, at 643–44.
90. *In re* Will of Jacobovitz, 295 N.Y.S.2d 527, 530 (N.Y. App. Div.1968); I*n re* Fellman, 604 A.2d 263, 267 (Pa. Super. Ct. 1992); *In re* Estate of Meredith, 266 N.W. 351, 357 (Mich. 1936).
91. MO. REV. STAT. § 456.6-601 (2022).
92. Mo. *ex rel.* Bank of Am. N.A. v. Kanatzar, 413 S.W.3d 22, 30 n.2 (Mo. Ct. App. 2013); MO. REV. STAT. § 456.4-420 (2022).
93. *See* Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure, In Terrorem Clauses, Mediation and Arbitration*, 9 CARDOZO J. CONFLICT RESOL. 237, 264–65 (2008).
94. *Id.* at 255.

no-contest clause may be used to deter certain types of challenges, such as various administrative disputes.[95]

A. Current State of Enforceability of No-Contest Clauses of Wills & Trusts in Missouri

When it comes to the enforcement of no-contest clauses, there is little uniformity among the States. In fact, two states—Alabama & Vermont—have yet to even address the question of enforceability.[96] For the States that have addressed this question, there are four major approaches to enforcing these provisions: "(1) void as a matter of public policy, (2) absolutely valid, (3) invalid because of certain provisions, or (4) valid except if the contest was brought in good faith or upon probable cause".[97] The fourth approach, exceptions for contest for wills based upon probable cause or good faith, is the leading standard and has been adopted by the Uniform Probate Code (UPC) and twenty-two states.[98] However, the Uniform Trust Code (UTC) is silent on this enforceability for trusts.[99] The UTC is not alone in its silence on the enforceability of these provisions as they relate to trusts, as twenty-six states do not have any statutes or cases in which they address the enforceability of no-contest clauses in trusts.[100] However, Missouri addressed this issue for both wills and trusts in 1959.[101]

Missouri does not take any of the four approaches above, but instead enforces no-contest clauses for both wills and trusts so long as the element of intent is meant.[102] In 1959, the Supreme Court of Missouri held in *Cox v. Fisher*[103] that "a no-contest… provision is to be enforced where it is clear that the trustor (or testator) intended that the conduct in question should forfeit a beneficiary's interest under the indenture (or will)."[104] This sole element has been upheld each time Missouri has re-addressed the question of enforceability.[105]

In fact, in 2020 the Missouri Supreme Court once again heard a case on the enforceability of a no-contest clause.[106] In *Knopik v. Shelby Investments, LLC.*,[107] a beneficiary filed suit for the breach of a trustee and the removal of said trustee.[108] The trust contained a no-contest clause which unambiguously applied to beneficiaries' claims.[109] On this appeal, the beneficiary asserted that the no-contest clause was

95. *Id*.
96. T. Jack Challis & Howard M. Zaritsky, *State Laws: No-Contest Clauses*, AM. COLL. TR. & EST. COUNS., https://www.actec.org/assets/1/6/State_Laws_No_Contest_Clauses_-_Chart.pdf?hssc=1 (last visited Mar. 11, 2023).
97. Robert M. Kincaid, *In Terrorem Clauses and Arbitration Clauses in Wills and Trusts in Ohio*, 27 Ohio Prob. L.J. no. 1, 2016, at NL 2.
98. Challis & Zaritsky, *supra* note 96.
99. *See id.*
100. *Id*.
101. Cox v. Fisher, 322 S.W.2d 910, 914 (Mo. 1959).
102. *Id*.
103. *Id.*
104. *Id.*
105. *See generally* Knopik v. Shelby Invs., LLC, 597 S.W.3d 189, 193 (Mo. 2020).
106. *Id*.
107. *Id.*
108. *Id*. at 190.
109. *Id*. at 192.

unenforceable.[110] The beneficiary provided the court with two arguments: "(1) that no-contest clauses do not apply to actions for breach of trust and/or removal of a trustee; (2) that no-contest clauses are subject to a good faith/probable cause exception."[111]

For the first argument, the court looked to the 1959 case of *Cox v. Fisher*.[112] The court noted, "When a settlor explicitly and unambiguously describes the type of conduct by a beneficiary that will cause forfeiture, the settlor's clear intent cannot be overlooked."[113] Here, the court found that the element of the settlor's intent was met because the settlor unambiguously included this breach in the no-contest clause, demonstrating that it was their intent, and therefore the no-contest clause was enforceable.[114]

For the second argument the court decided not to answer whether Missouri should adopt the UPC good faith or probable cause exception, because the case could be decided on narrower grounds.[115] The court held that "because of the Beneficiary's failure to utilize section 456.4-420, this Court need not reach the issue of either delineating specific exceptions to the application of no-contest clauses or deciding whether a good faith or probable cause exception should be introduced in Missouri."[116] Section 456.4-420 is Missouri's Safe Harbor provision which is a complex procedure for testing no-contest clauses.[117]

Ultimately, *Knopik v. Shelby Investments, LLC.*,[118] demonstrates (1) when it comes to the enforceability of no-contest clauses for both will and trust instruments Missouri still looks to the intent of the settlor/testator as the sole element; and (2) whether Missouri will introduce the UPC approach of a good faith or probable cause exception is still uncertain.[119]

B. Safe Harbor

When it comes to a no-contest clause, beneficiaries often are not clear on whether their contest would evoke the provision. Many times, the beneficiaries decided to litigate thinking that they may be in the clear but end up triggering a forfeiture.[120] Many states combat this problem by creating what are known as Safe Harbor laws, "which allow a beneficiary to obtain a court's determination as to whether certain conduct will trigger forfeiture."[121] As of 2016, Missouri joined these other states by implementing Section 456.4-420 of the Revised Missouri Statute.[122] Under this statute, "if a trust that has become irrevocable contains a no-contest clause, an 'interested person' may file a petition seeking a court order

110. *Id*.
111. *Knopik*, 597 S.W.3d at 193.
112. Cox v. Fisher, 322 S.W.2d 910, 914 (Mo. 1959).
113. *Knopik*, 597 S.W.3d at 193.
114. *Id*.
115. *Id*.
116. *Id*.
117. MO. REV. STAT. § 456.4-420 (2014).
118. *Knopik,* 597 S.W.3d at 193.
119. *Id*.
120. *No Contest Clauses In Wills & Trusts, Safe Harbor*, THE ELSTER LAW OFFICE, https://elsterlaw.com/missouri-law-blog/contest-clauses-wills-trusts-safe-harbor-provision/ (last visited Mar. 12, 2023).
121. *Id*.
122. § 456.4-420.

determining whether certain conduct would trigger application of the no-contest clause and/or whether the clause is enforceable."[123] This statute also provides a list of actions which as a matter of public policy cannot trigger a forfeiture.[124] These limits provided in Section 456.4-420 are not an exhaustive list, which means that a Missouri court may determine other limitations under common law.[125]

IV. ANALYSIS

The case law and legal analysis surrounding the use of both no-contest clauses and donative arbitration provisions within a will or trust instrument is miniscule. This area of law is currently in the midst of rapid development.[126] As the use of both of these different provisions has become increasingly popular, courts and legislatures have had to respond to numerous issues and questions within this area of law. The more these provisions become routine, the more courts and various states are hearing cases of first impression. However, even with this rapid development, not a single jurisdiction has had a case of first impression regarding the use of a no-contest clause and an arbitration provision within the same instrument.

One speculation as to why this might be the case is because few states have even addressed the enforceability of one of these provisions let alone addressed the enforceability of both provisions within the same document.[127] Fortunately for future Missouri estate planners, Missouri, both legislatively and judicially, has at least begun to address the enforceability of both of these provisions to some degree.[128] It should be noted that, even though Missouri has upheld the enforceability of both these provisions, there are still many unanswered questions. For instance, Missouri has statutorily authorized the use of donative arbitration provision for trusts but has yet to determine, statutorily or judicially, the enforceability of these provisions in a will.[129]

Even though the law surrounding these provisions are not completely settled, it is still important to consider the usage of these provisions in conjunction with each other. On face value there seems to be incredibly compelling reasons on why a settlor or testator would want to include both provisions. In fact, when used in conjunction with each other, these provisions can be such a powerful tool that it can

123. *No Contest Clauses In Wills & Wills & Trusts, Safe Harbor*, *supra* note 120.

124. § 456.4-420. The statutory list of actions that cannot trigger a forfeiture under a no-contest against an interested person are: "Filing a motion, petition, or other claim for relief objecting to the jurisdiction or venue of the court over a proceeding concerning a trust, or over any person joined, or attempted to be joined, in such a proceeding; Filing a motion, petition, or other claim for relief concerning an accounting, report, or notice that has or should have been made by a trustee, provided the interested person otherwise has standing to do so under applicable law, including, but not limited to, section 456.6-603; Filing a motion, petition, or other claim for relief under chapter 475 concerning the appointment of a guardian or conservator for the settlor; Filing a motion, petition, or other claim for relief under chapter 404 concerning the settlor; Disclosure to any person of information concerning a trust instrument or that is relevant to a proceeding before the court concerning the trust instrument or property of the trust estate, unless such disclosure is otherwise prohibited by law; Filing a motion, pleading, or other claim for relief seeking approval of a nonjudicial settlement agreement concerning a trust instrument, as set forth in § 456.1-111," *id.*

125. § 456.4-420.

126. *See* Kincaid, *supra* note 97.

127. Challis & Zaritsky, *supra* note 96.

128. *Id*.

129. § 456.2-205.

only be described as what one scholar called the ultimate "dead hand control."[130] Dead hand control is the testators' or settlors' power to control the means by which beneficiaries exercise their rights and the remedies they may use to enforce those rights.[131] This type of control allows a testator or settlor an enormous amount of power even after death.

On the surface, no-contest clauses and donative arbitration provisions seem to be trying to attain a similar, if not identical goal.[132] There is scholarship around the idea that these provisions can be interchanged with each other.[133] However, trying to equate a no-contest clause to a substitute for a donative arbitration clause (or vice-versa) drastically misconceives the reach and goal of both provisions.[134] A typical no-contest clause will bar the interested parties from challenging the validity of the document. The scope of these provisions is quite narrow and not conventionally used for barring various administrative disputes, although the limits on no-contest clauses in Missouri are still in question. As seen in the Missouri case *Knopik v. Shelby Investments*,[135] the court upheld the usage of a no-contest clause in an administrative dispute.[136] Just like the case of *Kopik v. Shelby Investments*,[137] broad clauses are becoming increasingly common and the trend appears to be that no-contest clauses are more commonly applied to administrative disputes.[138] That being said, donative arbitration clauses fundamentally apply to a wider range of disputes. However, the Missouri Revised Statute governing donative arbitration clauses specifically excludes the enforceability of donative arbitration provisions for validity disputes.[139]

This exclusion is one reason why using these provisions in conjunction with each other can provide a positive result to a settlor or testator. By inserting both provisions within a trust, a settlor within the state of Missouri will be able to guarantee that all interested parties must use arbitration to settle disputes. This is because the only way in Missouri to get around a donative arbitration clause in a trust is to argue that the instrument is invalid or that the provision is invalid. If an interested party can successfully argue that the provision or the instrument itself is invalid then the dispute would need not be arbitrated, but instead could be litigated. However, suppose a settlor included a no-contest clause as well as a donative arbitration provision. In this scenario, the no-contest clause would bar any interested party from receiving under the instrument if they challenged the validity instrument or the arbitration provision. This would force a rationale beneficiary/interested party from seeking litigation and instead would force them to take the less risky option of seeking justice in arbitration.

Finally, it appears that these clauses on their surface could provide a powerful tool for preventing litigation. As this area of law continues to develop, it will be likely to see more of these provisions in will and trust instruments. There seems to be little reason why the testator or settlor would not be ambitious and implement

130. Murphy, *supra* note 12, at 639.
131. *Id*.
132. *Id*.
133. *Id*. at 657.
134. *Id*.
135. 597 S.W.3d 189, 193 (Mo. 2020).
136. *Id*.
137. *Id*.
138. Deborah S. Gordon, *Forfeiting Trust*, 57 WM. & MARY L. REV. 455, 512 (2015).
139. MO. REV STAT § 456.4-420 (2016).

both provisions. Estate attorneys will need to be prepared for when Missouri will hear a case of first impression. The big question will be if Missouri will honor this potentially all-powerful statutory authority or if the courts would create a new major limitation under common law.

V. CONCLUSION

As the law surrounding arbitration and no-contest clauses continue to develop, testators and settlors will be left with more questions on the impact these provisions will have in conjunction with each other. Each year, states are passing more and more legislation regarding the enforceability of these provisions. It is up to the estate attorneys to acknowledge the benefits and consequences these clauses bring with them. Missouri is at the forefront of the legal acceptance of these clauses and the benefits they bring. Missouri is one of only a few states that allow for both provisions, each to varying degrees. This has allowed Missouri settlors and testators to receive the ultimate dead-hand control. By using these clauses in conjunction with each other, Missouri testators and settlors can have an added layer of protection when forcing beneficiaries, executors, and trustees to arbitrate disputes. Whether Missouri courts or legislature will acknowledge the impact the clauses will have on the legal community is still up for debate, but Missouri testators and settlors should begin to take advantage of the power these clauses can give them.