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Colorado enacted the Colorado Uniform Trust Code ("CUTC") in 2018, with an effective date of January 1, 2019.[1] This article discusses the approach Colorado has taken to alternative dispute resolution in the CUTC, and highlights approaches taken by other states in this area.

I. Colorado.

Colorado opted to include both of the Uniform Trust Code's provisions regarding the use of alternative dispute resolution in trusts: section 111, authorizing parties to use nonjudicial settlement agreements to resolve disputes regarding trusts,[2] and section 816(23), granting the trustee the power to "resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternate dispute resolution."[3] In addition to these uniform sections, the CUTC also includes its own section 15-5-113:

> *CUTC 15-5-113. Alternate dispute resolution.*
>
> (1) A settlor may designate in the trust instrument a method of nonjudicial alternate dispute resolution that is valid, enforceable, and irrevocable, except on a ground that exists at law or in equity for the invalidation of a trust. Such methods of nonjudicial dispute resolution may include rules of notice and procedure. The settlor may bind beneficiaries and assigns to the methods of dispute resolution.
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> (2) A method of nonjudicial dispute resolution provided by the settlor in the trust instrument does not preclude the court's authority to enter an order of alternate dispute resolution,

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1 Colo. Rev. Stat. § 15-5-101 (2019).

2 Unif. Trust Code § 111 (Unif. Law Comm'n 2010).

3 Colo. Rev. Stat. § 15-5-816(1)(w); Unif. Trust Code § 816(23). The official comments to UTC section 816(23) state that "[t]he drafters of this Code encourage the use of such alternate methods for resolving disputes. Arbitration is a form of nonjudicial settlement agreement authorized by Section 111 . . . Settlors wishing to encourage use of alternate dispute resolution may draft to provide it. For sample language, see American Arbitration Association, Arbitration Rules for Wills and Trusts (1995)."

> which does not eliminate or negate the method of nonjudicial dispute resolution provided by the settlor except on a ground that exists at law or in equity for the invalidation of a trust.[4]

The CUTC defines "alternate dispute resolution" (ADR) as a method of nonjudicial dispute resolution "which may include but is not limited to a method prescribed pursuant to the [Colorado] Uniform Arbitration Act."[5] This is intended to encompass a broad range of methods, including but not limited to mediation and binding or non-binding arbitration. Importantly, section 113 places limits on the enforceability of a settlor's directive.

First, section 15-5-113(1) provides that a settlor's directive regarding the use of ADR will not be enforceable if the subject matter of the dispute is the validity of the trust instrument itself.[6] Here, the CUTC took concepts from Colorado's Uniform Arbitration Act (CUAA), stating that a method of ADR designated by a settlor in a trust instrument is "valid, enforceable, and irrevocable, except on a ground that exists at law or in equity for the invalidation of a trust."[7] Grounds for the invalidation of a trust under the CUTC include the settlor's lack of capacity or lack of intent to create a trust, and for a non-charitable trust, lack of a definite beneficiary;[8] having an unlawful purpose or being contrary to public policy;[9] and fraud, duress and undue influence.[10] This approach is consistent with established case law holding that issues of validity, such as the decedent's capacity to make a will or trust, the genuineness of the will or trust, or execution formalities, are not proper subjects for arbitration.[11]

Second, under section 15-5-113(2), a settlor's directive does not preclude a court's power to order the parties to engage in a method of

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4 COLO. REV. STAT. § 15-5-113.

5 *Id.* § 15-5-103(2).

6 *Id.* § 15-5-113(1).

7 *Id. See also id.* § 15-5-103(2) (referring to Colorado's Uniform Arbitration Act, COLO. REV STAT. § 13-22-201).

8 *Id.* § 15-5-402.

9 *Id.* § 15-5-404.

10 *Id.* § 15-5-406.

11 *See, e.g.*, Gibbons v. Anderson, 575 S.W.3d 144 (Ark. Ct. App 2019) (refusing to enforce an arbitration clause in a trust instrument where issues of fraud were present); *In re* Jacobovitz's Will, 295 N.Y.S.2d 527, 531 (N.Y. Surr. Ct. 1968). In *Jacobovitz*, four of the estate's 16 distributees had agreed to arbitration by a Rabbinical Court, including as to the will's validity. The court refused to enforce the arbitration agreement, stating that the "probate of an instrument purporting to be the last will and testament of a deceased . . . can not be the subject of arbitration under the Constitution and the law as set forth by the legislature of the State of New York and any attempt to arbitrate such issue is against public policy."

ADR that "does not eliminate or negate" the method provided by the settlor.[12]

Third, section 15-5-113 is a default provision under the CUTC, not a mandatory provision – and one of the mandatory provisions in the CUTC is that a court retains the power "to take such action and exercise such jurisdiction not inconsistent with a settlor's intent as may be necessary in the interests of justice."[13] Thus, if the terms of a settlor's directive were so unreasonable as to be contrary to the interests of justice, a court could refuse to enforce part or all of them, and order the parties to engage in a different method of ADR that is reasonable and consistent with settlor intent.

Colorado has no reported case law on the enforceability of a settlor's directive for ADR in a trust. The CUAA, and cases interpreting it, will likely bear on a future Colorado court's interpretation of section 15-5-113.[14] Colorado-specific practicalities will also likely bear on a future Colorado court's interpretation of section 15-5-113.

In Colorado, the City and County of Denver is the only county in the state with a designated probate court.[15] Some of the larger counties have a dedicated probate registrar, but in many counties, judges are assigned various dockets, including general civil, criminal, and trust and estate cases, on a rotating basis. For litigants in contested trust disputes, this means they may or may not get a judge with expertise in trust and estate law — and for lawyers, it means that outcomes for clients can be hard to predict. In addition, over the past decade, some of the busier courts, burdened with exploding mental health dockets and an ever-greater lack of financial and staffing resources, now send trust and estate litigants to mediation first, as a matter of course, having determined this is a more efficient and effective way of resolving fact-sensitive disputes involving family dysfunction and high emotions. The CUTC's recognition of a settlor's ability to bind beneficiaries to a method of dispute resolution was a compromise public policy position arrived at by mem-

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12 COLO. REV. STAT. § 15-5-113(2) (2019).

13 *Id.* § 15-5-105(2)(m).

14 *Id.* § 13-22-206.

> . . . (2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.
>
> (3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.
>
> (4) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

15 COLO. CONST. art. VI, § 14.

bers of the Colorado trust and estate bar – many of whom expressed widely varying opinions about the relative merits of ADR, and specific concerns about binding arbitration – but who also recognized the practical limitations facing Colorado courts.

II. Other States.

Case law on the enforceability of settlor directives for ADR in other states has gone both ways. Several states now have statutes addressing this issue. One point on which many cases turn is the interpretation of the term "agreement" as used in the state's arbitration code, and whether this term is broad enough to encompass a settlor's directive for ADR in a trust.

In *Rachal v. Reitz*, the trust provided that "I intend that as to any dispute of any kind involving this Trust or any of the parties or persons concerned herewith (e.g., beneficiaries, Trustees), arbitration as provided herein shall be the sole and exclusive remedy . . . . Judgment on any arbitration award pursuant hereto shall be binding and enforceable on all parties."[16] The beneficiary, Reitz, sued the trustee, Rachal, alleging misappropriation of assets and failure to provide accountings. Rachal then moved to compel arbitration. The trial court refused to enforce the arbitration provision, and the appellate court affirmed, reasoning that the Texas Arbitration Act requires a written agreement to arbitrate, and no "contract" existed between the parties. The Texas Supreme Court reversed, finding that a) the meaning of "agreement" under the Texas Arbitration Act is broader than "contract," and could encompass a trust instrument; b) the court's fundamental duty is to honor settlor intent, and c) the fact that Reitz had previously accepted benefits from the trust constituted his assent to its terms, and therefore the doctrine of direct benefits estoppel applied, and it would be "incongruent" to hold a trustee to a trust's specific terms, but not hold the beneficiary to the same.[17]

Conversely, in *In re Calomiris*, the District of Columbia Supreme Court came to the exact opposite conclusion, holding that the meaning

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16 Rachal v. Reitz, 403 S.W.3d 840, 842 (Tex. 2013). For more in-depth treatment of this case, the enforceability of settlor directives for arbitration, and model clauses from ACTEC's 2006 Arbitration Task Force Report and other sources, see Steven D. Baker, Rachal v. Reitz *and the Efficacy and Implementation of Mandatory Arbitration Provisions in Trust*, 9 Est. Plan. & Cmty. Prop. L.J. 191 (2017); *see also Arbitration Task Force Report*, Am. Coll. of Tr. & Est. Counsel Found. (2006), https://www.mnbar.org/docs/default-source/sections/actec-arbitration-task-force-report.pdf?sfvrsn=2.

17 *Rachal,* 403 S.W.3d at 844-45, 847, 849.

of "contract" under its arbitration code was not broad enough to include a trust instrument.[18]

The Arizona Trust Code now states that a trust "may provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons or among interested persons with regard to the administration or distribution of the trust."[19] This statute negated a 2006 decision by the Arizona Court of Appeals, which had held that a mandatory arbitration clause in a trust instrument was not enforceable, as it could not be used to deprive a trust beneficiary of his right to access the courts.[20]

The Florida Probate Code also now states that "[a] provision in a will or trust requiring the arbitration of disputes, other than disputes of the validity of all or part of a will or trust, between or among the beneficiaries and a fiduciary under the will or trust, or any combination of such persons or entities, is enforceable," and that such a provision is presumed to require binding arbitration unless the document states otherwise.[21] In addition, the statute provides that if an arbitration under the Florida Probate Code is governed by Florida's Arbitration Code, then the arbitration provision in the trust "shall be treated as an agreement" for purposes of applying the arbitration code.[22]

The Ohio Trust Code mirrors the language used in Florida's 731.401, but excludes testamentary trusts, and does not include the "shall be treated as an agreement" language present in the Florida statute.[23]

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18 *In re* Calomiris, 894 A.2d 408, 409 (D.C. 2006).

19 ARIZ. REV. STAT. ANN. § 14-10205 (2019). Arizona's Trusts, Estates and Protective Proceedings Code also provides that a court may order arbitration or other methods of ADR to resolve disputes. *See* ARIZ. REV. STAT. ANN. § 14-1108.

20 Schoneberger v. Oelze, 96 P.3d 1078, 1083-84 (Ariz. Ct. App. 2004); *superseded by statute*, ARIZ. REV. STAT. ANN. § 14-10205.

21 FLA. STAT. § 731.401 (2019).

22 *Id.*

23 OHIO REV. CODE ANN. § 5802.05 (LexisNexis 2019).