SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1774-21

IN THE MATTER OF THE ESTATE OF SAMUEL P. HEKEMIAN, deceased.

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Argued October 13, 2022 – Decided January 13, 2023

Before Judges Gooden Brown, DeAlmeida and Mitterhoff.

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. P-000479-21.

Lawrence T. Neher argued the cause for appellants Peter Hekemian and Edward G. Imperatore (Berkowitz, Lichtstein, Kuritsky, Giasullo & Gross, LLC, attorneys; Lawrence T. Neher, Roy J. Thibodaux III and Eric A. Carosia, on the briefs).

Tanya M. Mascarich argued the cause for respondent Richard E. Hekemian (O'Toole Scrivo, LLC, attorneys; James B. Garland, Tanya M. Mascarich and William J. Metcalf, on the brief).

PER CURIAM

Defendants Peter Hekemian and Edward Imperatore, Esq., were appointed co-executors of the last will and testament (LWT) of the decedent, Samuel Hekemian. Peter[1] is one of the decedent's four sons, and Imperatore is the decedent's longtime friend, family advisor, and attorney. Plaintiff Richard Hekemian is another son and a beneficiary of trusts established under his father's LWT. Plaintiff filed a verified complaint seeking to compel defendants in their capacity as executors to provide a formal accounting pursuant to Rule 4:87-1 and N.J.S.A. 3B:17-2, which, collectively, allow an interested party to file an action to compel an executor to settle the estate's accounts after the first year of the executor's appointment. In response, defendants moved to compel arbitration pursuant to an arbitration provision in the LWT, which requires interested parties to submit any dispute arising out of the interpretation or administration of the LWT to binding arbitration. The Chancery Division judge denied the motion in a February 7, 2022 order, from which defendants now appeal. Having considered the arguments and applicable law, we affirm.

[1] We use first names to avoid confusion caused by the common surname and intend no disrespect.

I.

We glean these facts from the record. Samuel Hekemian died on August 21, 2018, survived by his wife and their four sons, Richard, Peter, Jeffrey and Mark Hekemian. Prior to his death, decedent executed a LWT dated August 27, 2002. The LWT appointed Peter and Imperatore as co-executors of decedent's estate and "co-trustees of several trusts to be created pursuant to the [LWT]," specifically, (1) the "Credit Shelter Trust"; (2) the "Generation-Skipping Marital Trust"; and (3) the "Residuary Marital Trust" (collectively, the trusts).

The Credit Shelter Trust provides for the distribution of "trust income and principal" to decedent's wife, children, and grandchildren at the "discretion" of "the [co-]trustees." The Generation-Skipping Marital Trust and the Residuary Marital Trust provide for the distribution of trust income to decedent's wife during her lifetime and permit the co-trustees to distribute "so much of the principal . . . or the whole thereof" to decedent's wife "as the [co-]trustees in their sole and absolute discretion may determine."

Article Twelfth of the LWT "grant[s] to any fiduciary acting hereunder" the authority "[t]o make loans to any person . . . , including any beneficiary of [the] estate or a trust hereby created, or to pledge any property held hereunder

to secure the repayment of any loan made to any beneficiary of [the] estate or a trust hereby created."

Article Seventeenth of the LWT contains an arbitration clause stating:

> Any dispute regarding the interpretation [of] this [LWT] and the trusts created hereunder, or arising out of administration by the executors and/or others acting hereunder in a fiduciary or other capacity, shall be submitted for settlement by arbitration, in the following manner:
>
> (A) Any interested party may initiate arbitration by giving written notice by certified mail to the executors and/or trustees of the intention to arbitrate the dispute. Such notice shall explain the nature of the dispute and any remedy or remedies sought. If the party initiating such arbitration and the executors and/or trustees shall be unable to agree upon a single arbitrator within sixty (60) days of the mailing of the notice to arbitrate, each of them may designate his or her own arbitrator (with the executors and/or trustees to designate one and only one arbitrator for the executors and/or trustees, collectively), none of whom shall be an interested party hereunder. All such designated arbitrators shall then meet and decide upon a single, mutually acceptable arbitrator to resolve the dispute serving as sole arbitrator thereof.
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> (B) The arbitrator shall decide the dispute by applying the substantive law of the State of New Jersey. Procedures for the arbitration shall be established by agreement of the interested parties, or in the absence of such an agreement by the arbitrator. The decision of the arbitrator shall be final and binding upon all interested parties and shall not be appealable to any court of law. Costs of the arbitration shall be paid from

> such trust, or assessed against the parties as may be determined by the arbitrator, as part of the decision.
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> (C) Arbitration shall be the exclusive remedy for resolving disputes concerning th[e] [LWT] and the trusts created hereunder, including but not limited to the administration of th[e] [LWT] and such trusts; provided, however, that an interested party may bring an action at law or equity to enforce any decision and/or award of an arbitrator hereunder.

After receiving letters testamentary, on September 13, 2018, defendants probated the LWT with the Bergen County Surrogate. No party challenged any provision of the LWT. See R. 4:85-1 (prescribing time frames within which to contest the probate of a will or the issuance of letters testamentary). After the LWT was probated, plaintiff requested from defendants a distribution or loan from the trusts as well as information about the funding of the trusts. Plaintiff's requests were ignored or denied. On September 27, 2021, plaintiff, as "a beneficiary of the [e]state and the [t]rusts," filed a verified complaint and order to show cause against defendants "in their capacity as co-executors and co-trustees," seeking to compel a "full accounting of the [e]state and the [t]rusts

that were to be established pursuant to the [d]ecedent's [w]ill" under Rules 4:87-1(b) and 4:87-3.[2]

In the complaint, plaintiff asserted that in 2020, he and his wife made several unsuccessful attempts to purchase a home. After being "rejected by multiple mortgage lenders due to lack of income, high debt . . . and tightened lending standards dictated by the pandemic," in a September 10, 2020 letter to defendants, plaintiff "request[ed] a distribution from the Credit Shelter Trust and/or loan from the Credit Shelter Trust, Generation-Skipping Marital Trust and/or Residual Marital Trust." Defendants denied plaintiff's request. On September 25, 2020, plaintiff again reached out to defendants about "his prior request for a distribution or loan from the [t]rusts . . . and . . . asked for a meeting with [d]efendants to discuss his request." Defendants did not respond.

According to the complaint, Donald Perry, an attorney at Imperatore's firm, had prepared the estate's tax returns and had issued a memo on November 18, 2019, indicating that decedent's "total [e]state was very substantial." Peter had provided copies of the memo to his brothers. In the complaint, plaintiff

[2] Rule 4:87-1 sets forth the procedure for settling an executor's accounts and permits "an interested person" to file a complaint "to compel" an executor "to settle" the estate's account. Rule 4:87-3 governs the form and contents of the accounting.

asserted that on December 28, 2020, and January 14, 2021, he had sent e-mails to Perry inquiring "about the administration of the [e]state," whether the "[t]rusts had been established pursuant to . . . [the LWT], and if so, the amounts of each that had been funded." Perry did not respond to either inquiry.

Defendants moved to dismiss the complaint and compel arbitration in accordance with Article Seventeenth of the LWT despite acknowledging that there was no authority in New Jersey addressing the enforceability of a testamentary instrument's arbitration clause against a beneficiary. Instead, defendants relied on Rachal v. Reitz, 403 S.W.3d 840 (Tex. 2013), where the Texas Supreme Court held that "an arbitration provision contained in an inter vivos trust" was enforceable against a non-signatory beneficiary who sued the trustee to enforce the terms of the trust. Id. at 842.

The court summarized its rationale as follows:

> First, the settlor determines the conditions attached to her gifts, and we enforce trust restrictions on the basis of the settlor's intent. The settlor's intent here was to arbitrate any disputes over the trust. Second, the [Texas Arbitration Act (TAA)[3]] requires enforcement of written agreements to arbitrate, and an agreement requires mutual assent, which we have previously concluded may be manifested through the doctrine of direct benefits estoppel. Thus, the beneficiary's acceptance of the benefits of the trust and suit to

[3] Tex. Civ. Prac. & Rem. Code Ann. § 171.001(a) (West 2021).

> enforce its terms constituted the assent required to form an enforceable agreement to arbitrate under the TAA.
>
> [Ibid.]

Plaintiff opposed the motion, arguing that an arbitration provision in a will had no legal effect in New Jersey, rendering Article Seventeenth unenforceable. Following oral argument, in a February 7, 2022 order, Judge Edward A. Jerejian denied defendants' motion to compel arbitration. In an accompanying written opinion, the judge reasoned:

> [I]n determining whether an arbitration agreement is enforceable, a New Jersey [c]ourt's initial inquiry must be "whether the agreement to arbitrate all, or any portion of a dispute is the product of mutual assent, as determined under customary principles of contract law." Kernahan v. Home Warranty Adm'r of Fla. Inc., 236 N.J. 301, 319 (2019) (internal quotations omitted).
>
> Here, there is a lack of mutual assent regarding the Article Seventeenth arbitration clause. The LWT is a statement of testamentary intent, not an instrument that reflects a consensual understanding between parties. In short, a will is not a contract, nor is it an agreement as defined in Rachal.
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> No court in New Jersey has ruled that a will is an agreement between the testator and their beneficiaries for the purposes of arbitration provisions because there lacks a consensual understanding between parties in the will context where only one party has expressed an intent to arbitrate. . . .

> Therefore, on basic contract principles, the lack of mutual assent to the provision renders the provision unenforceable and [p]laintiff cannot be compelled to arbitrate.

Further, the judge explained that the equitable estoppel theory asserted by defendants was not a substitute for the mutual assent necessary to compel arbitration because "[p]laintiff has yet to receive any benefits from the [e]state." According to the judge, plaintiff did not file the action to make a claim for benefits under the LWT but instead "to seek an accounting because he [was] not receiving information a[s] to the status of the [e]state" and, under N.J.S.A. 3B:17-2, he was entitled to an accounting.

The judge likewise rejected defendants' argument that "detrimental reliance" applied "where a non-signatory has embraced the agreement or sought to obtain benefits flowing from it" because under "New Jersey case law[,] . . . one party may not compel the other party to arbitrate unless the benefits of the underlying arbitration agreement have extended to the non-signatory party 'based on the traditional principles of contract and agency law.'"

Finally, the judge stressed that "New Jersey case law is clear that for an arbitration clause to be valid, there must be a clear waiver of the right to sue." The judge then found that the arbitration provision was unenforceable because, "even assuming the LWT was found to constitute an agreement or a contract,

the . . . arbitration provision fail[ed] to apprise [p]laintiff of his right to sue, and [p]laintiff ha[d] no opportunity to expressly waive this right." This appeal followed.

On appeal, defendants raise the following points for our consideration:

> I. THE TRIAL COURT ERRED IN FAILING TO IMPLEMENT THE TESTATOR'S EXPRESS INTENT THAT ANY DISPUTES CONCERNING THE ADMINISTRATION OF HIS ESTATE OR THE TRUSTS CREATED THEREUNDER BE SUBMITTED TO ARBITRATION.
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> II. THE TRIAL COURT ERRED IN CONCLUDING THAT THE NEW JERSEY ARBITRATION ACT [(NJAA),] N.J.S.A. 2A:23B-1 TO [-]32[,] DOES NOT PERMIT A LAST WILL AND TESTAMENT TO CONTAIN AN ENFORCEABLE ARBITRATION CLAUSE.
>
> > A. The Arbitration Provision In The Decedent's LWT Is Valid And Enforceable Pursuant To The Clear Language Of The NJAA.
> >
> > B. The Trial Court Erred In Ascribing Limitations To The NJAA That The Legislature Plainly Did Not Include.
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> > C. The Decision Of The Texas Supreme Court[,] Which Found An Arbitration Provision In A Testamentary Instrument Valid Under Substantially Similar Circumstances And Based Upon The Same Principles Regularly Applied By New Jersey Courts[,] Is Instructive And Was

Not Properly Considered By The Trial Court.

III. THE TRIAL COURT ERRED IN CONCLUDING THAT THE PLAINTIFF HAS NOT SOUGHT OR RECEIVED ANY BENEFITS FROM THE ESTATE WHICH WOULD COMPEL HIM TO SUBMIT HIS CLAIMS TO ARBITRATION.

II.

We begin by setting forth the principles that guide our analysis. The enforceability of an arbitration agreement is a question of law, which we review de novo. Skuse v. Pfizer, Inc., 244 N.J. 30, 46 (2020). "Similarly, the issue of whether parties have agreed to arbitrate is a question of law that is reviewed de novo." Jaworski v. Ernst & Young U.S. LLP., 441 N.J. Super. 464, 472 (App. Div. 2015). "[W]hen parties have not expressly agreed to arbitrate their disputes—as is the case here . . .—careful scrutiny is necessary to determine whether arbitration is nonetheless appropriate." Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 196 (2013).

In conducting our review, "we are mindful of the strong preference to enforce arbitration agreements, both at the state and federal level." Id. at 186. Indeed, "the affirmative policy of this State, both legislative and judicial, favors arbitration as a mechanism of resolving disputes." Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 133 (2020) (quoting Martindale v. Sandvik, Inc., 173 N.J. 76,

92 (2002)). That preference, "however, is not without limits." Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001).

The New Jersey Arbitration Act (NJAA) provides, in part, that "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." N.J.S.A. 2A:23B-6(a) (emphasis added). N.J.S.A. 2A:23B-1 broadly defines "record" as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." Under the NJAA's expansive definition, the arbitration provision in Article Seventeenth satisfies the "record" requirement.

Unlike "record," the NJAA does not define "agreement." See N.J.S.A. 2A:23B-1. When interpreting a statute, our objective "'is to effectuate legislative intent,' and '[t]he best source for direction on legislative intent is the very language used by the Legislature.'" Bozzi v. City of Jersey City, 248 N.J. 274, 283 (2021) (alteration in original) (quoting Gilleran v. Township of Bloomfield, 227 N.J. 159, 171-72 (2016)). Words in a statute are to "be given their generally accepted meaning" and are "read and construed with their context." N.J.S.A. 1:1-1. Furthermore, "phrases having a special or accepted

meaning in the law, shall be construed in accordance with such . . . special and accepted meaning." Ibid.

"If the language is clear, the court's job is complete." In re Expungement Application of D.J.B., 216 N.J. 433, 440 (2014). Courts, however, are not to "'write in . . . additional qualification[s] . . . ,' or 'engage in conjecture or surmise which will circumvent the plain meaning of the act.'" DiProspero v. Penn, 183 N.J. 477, 492 (2005) (citations omitted) (first quoting Craster v. Bd. of Comm'rs, 9 N.J. 225, 230 (1952); and then quoting In re Closing of Jamesburg High Sch., 83 N.J. 540, 548 (1980)). Applying these rules of statutory construction, we must "ascribe" to the term "agreement" its "ordinary meaning and significance," and read the term "in context with related provisions so as to give sense to the legislation as a whole." Ibid.

Black's Law Dictionary states that an "'[a]greement is in some respects a broader term than contract, or even than bargain or promise. It covers executed sales, gifts, and other transfers of property.'" Black's Law Dictionary 84 (11th ed. 2019) (quoting 1 Samuel Williston, A Treatise on the Law of Contracts § 2, at 6 (Walter H.E. Jaeger ed., 3d ed. 1957)). "'An agreement, as the courts have said, "is nothing more than a manifestation of mutual assent" by two or more . . . legally competent persons to one another.'" Ibid. (quoting Williston,

§ 2, at 6). Adopting Black's Law Dictionary's definition, we believe an appropriate definition for "agreement" under the NJAA is a manifestation of mutual assent by two or more persons. Ibid.

An agreement reflects "[a] mutual understanding between two or more persons about their relative rights and duties," but does not necessarily create legally enforceable obligations between parties. Ibid. A contract, on the other hand, "'is an agreement resulting in obligation enforceable at law.'" Goldfarb v. Solimine, 245 N.J. 326, 339 (2021) (quoting Borough of West Caldwell v. Borough of Caldwell, 26 N.J. 9, 24 (1958)). Unlike an "agreement," which requires only mutual assent, "[t]he basic features of a contract" under New Jersey law are "offer, acceptance, consideration, and performance by both parties." Ibid. (quoting Shelton v. Restaurant.com, Inc., 214 N.J. 419, 439 (2013)). Because contract formation requires the satisfaction of these additional conditions, "'[e]very contract is an agreement, but not every agreement is a contract.'" Black's Law Dictionary 84 (11th ed. 2019) (quoting 2 Henry J. Stephen, Stephen's Commentaries on the Laws of England 5 (L. Crispin Warmington ed., 21st ed. 1950)).

Both "contract" and "agreement" are used as discrete terms in the NJAA. See N.J.S.A. 2A:23B-6. Thus, it is clear that the Legislature did not intend to

impose the technical requirements of contract formation upon the creation of "valid, enforceable" arbitration provisions as defined by N.J.S.A. 2A:23B-6(a). See State v. Regis, 208 N.J. 439, 449 (2011) ("[L]egislative language must not, if reasonably avoidable, be found to be inoperative, superfluous or meaningless." (internal quotation marks omitted) (quoting Franklin Tower One, L.L.C. v. N.M., 157 N.J. 602, 613 (1999))).

Although technically distinct from contracts, arbitration agreements are nonetheless subject to revocation based "upon a ground that exists at law or in equity for the revocation of a contract." N.J.S.A. 2A:23B-6(a). To that end, "[a] court must first apply 'state contract-law principles . . . [to determine] whether a valid agreement to arbitrate exists.'" Hirsch, 215 N.J. at 187 (second and third alterations in original) (quoting Hojnowski v. Vans Skate Park, 187 N.J. 323, 342 (2006)); see also N.J.S.A. 2A:23B-6(b) ("The court shall decide whether an agreement to arbitrate exists . . . .").

"This preliminary question, commonly referred to as arbitrability, underscores the fundamental principle that a party must agree to submit to arbitration," Hirsch, 215 N.J. at 187, because "[p]arties are not required 'to arbitrate when they have not agreed to do so.'" Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 442 (2014) (quoting Volt Info. Scis. v. Bd. of Trs., 489

U.S. 468, 478 (1989)); see also Garfinkel, 168 N.J. at 132 (noting "[i]n the absence of a consensual understanding, neither party is entitled to force the other to arbitrate their dispute" (alteration in original)).

Under our State's customary contract law principles, "[a]n agreement to arbitrate . . . 'must be the product of mutual assent.'" Atalese, 219 N.J. at 442. (quoting NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 424 (App. Div. 2011)). "Mutual assent requires that the parties have an understanding of the terms to which they have agreed." Ibid. "By its very nature, an agreement to arbitrate involves a waiver of a party's right to have [his or] her claims and defenses litigated in court," and "[a]n effective waiver requires a party to have full knowledge of his [or her] legal rights and intent to surrender those rights." Ibid. (first quoting Foulke Mgmt. Corp., 421 N.J. Super. at 425; and then quoting Knorr v. Smeal, 178 N.J. 169, 177 (2003)).

Because arbitration provisions involve the waiver of rights, "the waiver 'must be clearly and unmistakably established.'" Id. at 444 (quoting Garfinkel, 168 N.J. at 132). "An arbitration clause, like any contractual clause providing for the waiver of a constitutional or statutory right, must state its purpose clearly and unambiguously." Id. at 435. While "[n]o particular form of words is necessary to accomplish a clear and unambiguous waiver of rights," id. at 444,

at minimum, the arbitration clause must "explain that the plaintiff is giving up [his or] her right to bring . . . claims in court or have a jury resolve the dispute." Id. at 447.

"After finding the existence of an arbitration clause, a court then must evaluate whether the particular claims at issue fall within the clause's scope. A court must look to the language of the arbitration clause to establish its boundaries." Hirsch, 215 N.J. at 188; see also Wollen v. Gulf Stream Restoration & Cleaning, LLC, 468 N.J. Super. 483, 497 (App. Div. 2021) ("When reviewing a motion to compel arbitration, courts apply a two-pronged inquiry: (1) whether there is a valid and enforceable agreement to arbitrate disputes; and (2) whether the dispute falls within the scope of the agreement."). "Importantly, 'a court may not rewrite a contract to broaden the scope of arbitration.'" Hirsch, 215 N.J. at 188 (quoting Garfinkel, 168 N.J. at 132).

Applying these principles here, we are persuaded that arbitration is not required under the present circumstances. The arbitration clause in Article Seventeenth was not the product of mutual assent under traditional contract principles. "A will . . . is a unilateral disposition of property" that does not require a "meeting of the minds" to be effective. Fidelity Union Tr. Co. v. Price, 18 N.J. Super. 578, 589 (Ch. Div.), rev'd on other grounds, 11 N.J. 90, 93 (1952);

see also Kernahan, 236 N.J. at 319 (noting that a "meeting of the minds" is a prerequisite to enforceability under general contract principles). Critically, Article Seventeenth does not "accomplish a clear and unambiguous waiver of rights" because it fails to explain that plaintiff is relinquishing his right to bring a claim in court. Atalese, 219 N.J. at 444.

Additionally, plaintiff's request for an accounting pursuant to N.J.S.A. 3B:17-2 is not a "dispute" within the scope of the arbitration clause. Article Seventeenth states that "[a]rbitration shall be the exclusive remedy for resolving disputes concerning th[e LWT] and the trusts created hereunder, including but not limited to the administration of the [LWT] and such trusts." (Emphasis added). The plain language of Article Seventeenth indicates that only "disputes" trigger the arbitration provision.

Under Rule 4:87-1, any interested party may file a complaint to compel an executor to settle the estate's account after the first year of the fiduciary's appointment. See N.J.S.A. 3B:17-2. Defendants do not contest the expiration of the one-year period or otherwise deny plaintiff's entitlement to an accounting. As such, plaintiff's verified complaint simply invokes a statutory right. Standing alone, that invocation has not created a dispute requiring arbitration under the terms of the LWT. If an accounting later leads to a claim that defendants have

been derelict in their duties as fiduciaries, then a dispute may arise, triggering the Article Seventeenth arbitration provision. However, that issue is not presently before us.

Defendants argue that even if plaintiff did not mutually assent to Article Seventeenth's arbitration clause, plaintiff is nevertheless bound under equitable principles. Specifically, defendants asserts that although plaintiff is a non-signatory to the LWT, he is bound by the LWT's arbitration provision under the doctrine of equitable estoppel. Defendants concede that New Jersey courts have never applied the "direct benefits estoppel" approach that the Rachal Court employed to enforce an arbitration agreement against a non-signatory. Instead, defendants argue that New Jersey courts apply "the substantially similar doctrine of equitable estoppel" and "have found that third-party beneficiaries and other non-signatories may still be required to arbitrate where they have sought to receive the benefits of or otherwise enforce their rights under the instrument containing an arbitration provision."

In Rachal, a trust beneficiary sued a trustee for "misappropriat[ing] trust assets and fail[ing] to provide an accounting to the beneficiaries as required by [Texas] law." 403 S.W.3d at 842. The trustee moved to compel arbitration under the trust instrument, which included an arbitration provision. Ibid. A

divided Texas appellate court held that the provision was unenforceable because "a binding arbitration provision must be a product of an enforceable contract between the parties." Id. at 843. The appellate court determined "that such a contract does not exist in the trust context" because there is no exchange of consideration and "trust beneficiaries have not consented to such a provision." Ibid. In reversing the appellate court, the Texas Supreme Court held that the trust instrument's arbitration provision was valid and enforceable. Id. at 842.

In reaching its decision, the Texas Supreme Court began its analysis with the settlor's intent. Id. at 844. Under Texas law, courts "enforce the settlor's intent as expressed in an unambiguous trust over the objections of beneficiaries that disagree with a trust's terms." Ibid. The Texas Supreme Court concluded that because the trust instrument's language was "unambiguous, [the Court] must enforce the settlor's intent and compel arbitration if the arbitration provision is valid and the underlying dispute is within the provision's scope." Ibid.

New Jersey also recognizes that a decedent's intentions expressed in a testamentary will are to be honored and effectuated. See N.J.S.A. 3B:3-33.1(a) ("The intention of a testator as expressed in his will controls the legal effect of

his dispositions . . . .").[4] Like the courts in Texas, New Jersey courts "enforce the testator's expressed intent with respect to a testamentary trust." In re Est. of Bonardi, 376 N.J. Super. 508, 515 (App. Div. 2005) (citing Fidelity Union Tr. Co. v. Margetts, 7 N.J. 556, 566 (1951)).

Next, the Rachal Court interpreted the Texas Arbitration Act (TAA) to determine whether the arbitration provision in the trust instrument satisfied the TAA's "agreement" requirement. 403 S.W.3d at 844-45.[5] Like the NJAA, "the TAA does not define agreement." Id. at 845. As a result, the Rachal Court looked to Black's Law Dictionary for a definition and interpreted "agreement" as a "manifestation of mutual assent by two or more persons." Ibid. (citing

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[4] Notwithstanding New Jersey's strong policy of effectuating donative intent on the testator's part, the probate code invalidates "non-contestability" or "in terrorem" clauses in wills as against public policy. Specifically, N.J.S.A. 3B:3-47 provides that "[a] provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings." See Haynes v. First Nat'l State Bank, 87 N.J. 163, 189 (1981) ("We . . . decline to enforce an in terrorem clause in a will or trust agreement where there is probable cause to challenge the instrument.").

[5] The TAA mirrors the NJAA. Under the TAA, "[a] written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that: (1) exists at the time of the agreement; or (2) arises between the parties after the date of agreement." Tex. Civ. Prac. & Rem. Code Ann. § 171.001(a). The TAA further provides that "[a] party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a contract." Id. at § 171.001(b).

Black's Law Dictionary 78 (9th ed. 2009)). Thus, the Court determined that a contract was not necessary for an arbitration clause to be valid. Ibid. Instead, an agreement "supported by mutual assent" was sufficient for an arbitration clause to be valid and enforceable. Ibid.

The Rachal Court then addressed whether the trust instrument's arbitration provision "was supported by the mutual assent required to render the trust an agreement and the arbitration provision valid." Ibid. The Court reasoned that "under the doctrine of direct benefits estoppel," "non[-]signatories to arbitration provisions" may manifest assent, and thus be bound, by "obtain[ing] or . . . seeking substantial benefits under an agreement." Id. at 845-46. The Court noted that because trust beneficiaries may "opt out of the arrangement proposed by the settlor," "a beneficiary who attempts to enforce rights that would not exist without the trust manifests . . . assent to the trust's arbitration clause." Id. at 847.

The Court explained:

> [A] beneficiary who brings a claim for breach of fiduciary duty seeks to hold the trustee to her obligations under the instrument and thus has acquiesced to its other provisions, including its arbitration clause. In such circumstances, it would be incongruent to allow a beneficiary to hold a trustee to the terms of the trust but not hold the beneficiary to those same terms.

[Ibid.]

Applying these principles, the Rachal Court determined that the beneficiary "did not disclaim an interest in the trust" after the settlor's death. Ibid. On the contrary, the beneficiary "accept[ed] the benefits of the trust and su[ed] to enforce its terms against the trustee so as to recover damages." Ibid. As a result, the Court held that the beneficiary's "conduct indicated acceptance of the terms and validity of the trust," and therefore the beneficiary was barred under the doctrine of direct benefits estoppel from "claim[ing] that the arbitration provision in the trust [was] invalid." Ibid.

However, the Court cautioned "that the doctrine of direct benefits estoppel will not provide the mutual assent necessary to compel arbitration in all circumstances." Id. at 850. The Court emphasized that an individual "who does not accept benefits under a trust and contests its validity could not be compelled to arbitrate the trust dispute under the doctrine of direct benefits estoppel." Ibid.

A close review of New Jersey's equitable estoppel doctrine reveals considerable differences from the doctrine of direct benefits estoppel applied in Rachal. As our Supreme Court explained in Hirsch,

[e]quitable estoppel has been defined as

> the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed . . . as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse . . . .
>
> The doctrine is designed to prevent a party's disavowal of previous conduct if such repudiation would not be responsive to the demands of justice and good conscience.
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> [215 N.J. at 189 (alterations in original) (quoting Heuer v. Heuer, 152 N.J. 226, 237 (1998)).]

"To establish equitable estoppel, parties must prove that an opposing party 'engaged in conduct, either intentionally or under circumstances that induced reliance, and that [they] acted or changed their position to their detriment.'" Ibid. (alteration in original) (quoting Knorr, 178 N.J. at 178). "In other words, equitable estoppel, unlike waiver, requires detrimental reliance." Ibid. See McDade v. Siazon, 208 N.J. 463, 480 (2011) ("Equitable estoppel 'is conduct, either express or implied, which reasonably misleads another to his prejudice so that a repudiation of such conduct would be unjust in the eyes of the law.'" (quoting Dambro v. Union Cnty. Park Comm'n, 130 N.J. Super. 450, 457 (Law Div. 1974))).

"Equitable estoppel is applied only in very compelling circumstances . . . 'where the interests of justice, morality and common fairness clearly dictate that course.'" Hoelz v. Bowers, 473 N.J. Super. 42, 53 (App. Div. 2022) (quoting Davin, LLC v. Daham, 329 N.J. Super. 54, 67 (App. Div. 2000)). In that regard, the Hirsch Court "acknowledged that, as a matter of New Jersey law, courts properly have recognized that arbitration may be compelled by a non-signatory against a signatory to a contract on the basis of agency principles." Id. at 192. However, the Court maintained that the use of equitable estoppel "as a basis to compel arbitration" had "limited applicability" outside of that context. Ibid.

The Hirsch Court reasoned that "[a]pplication of estoppel to compel arbitration, when the rationale rests solely on the connection between the parties and claims, overlooks our case law emphasizing that parties are giving up their right to sue in court when they agree to . . . arbitration." Ibid. Therefore, the Court rejected "intertwinement [of parties and claims] as a theory for compelling arbitration when its application is untethered to any written arbitration clause between the parties, evidence of detrimental reliance, or at a minimum an oral agreement to submit to arbitration." Id. at 192-93.

Here, there is no evidentiary support for defendants' claim that equitable estoppel is a basis to compel arbitration. As the judge noted, plaintiff never

received any distribution or loan from the estate or the trusts. Critically, there is no evidence of detrimental reliance on the part of defendants and "the doctrine of equitable estoppel does not apply absent proof that a party detrimentally rel[ied] on another party's conduct." Id. at 193.

Defendants posit that "through his requests for a loan or distribution from the [e]state or [t]rusts and his efforts to . . . litigate his dispute through his subsequent [v]erified [c]omplaint for an accounting, [p]laintiff is actively seeking to enforce his rights as a beneficiary of the LWT and [t]rusts" and should therefore be bound by the arbitration provision under the doctrine of equitable estoppel. In support of their equitable estoppel argument, defendants rely on Jansen v. Salomon Smith Barney, Inc., 342 N.J. Super. 254 (App. Div. 2001).

In Jansen, the decedent opened two retirement accounts with the defendant brokerage house and named his three sons and his wife as beneficiaries. Id. at 256-57. The decedent's sons were to receive collectively a one-half interest in each account with the remaining interests going to the decedent's wife. Id. at 257. Upon opening the two accounts, the decedent executed a client agreement, which contained an arbitration clause that bound the decedent and his heirs to arbitrate "[a]ny controversy arising out of or relating to any of [decedent's] accounts, . . . th[e] agreement, or the breach thereof." Id. at 256. Upon the

decedent's death, the brokerage house distributed to his sons their one-half interest from one of the accounts but "refused to distribute" the proceeds from the other account due to federal law that prohibited distribution therefrom "to anyone other than the decedent's spouse absent the spouse's written waiver and consent." Id. at 257.

The sons sued the "defendant brokerage house and its employee claiming that defendants' negligent financial advice to their deceased father deprived them of their portion of [the] decedent's retirement account," and the defendants moved to compel arbitration. Id. at 255-56. We determined that "[a]lthough [the decedent's sons] did not sign the arbitration provision, they were the intended successors to [the decedent's] interest in the accounts." Id. at 261. We determined "a substantial nexus exist[ed] between the subject matter of the arbitration agreement and the claim raised by" the decedent's sons because their "claim arose out of [the] defendants' alleged failure to abide by the terms of the [c]lient [a]greement." Ibid. As a result, we held the decedent's sons were "bound by the arbitration clause." Ibid.

In contrast, here, there is no "substantial nexus" between Article Seventeenth's arbitration provision and plaintiff's statutory right to receive an accounting under N.J.S.A. 3B:17-2. Unlike the decedent's sons in Jansen, who

received benefits from one of the decedent's retirement accounts and sued when they were deprived of the proceeds from the other account, plaintiff has yet to receive any distribution under the LWT and the trusts created thereunder. Thus, we discern no "compelling circumstances" warranting the application of equitable estoppel principles as a basis to compel arbitration. Hoelz, 473 N.J. Super. at 53.

Defendants also argue that "[t]he [t]rial [c]ourt . . . erred when it ascribed restrictions to the scope and application of the NJAA not actually contained in the NJAA to categorically exclude the validity of arbitration provisions in testamentary instruments." Defendants assert that "[t]he [t]rial [c]ourt's attempt to issue a blanket prohibition on the application of the NJAA to testamentary instruments . . . is inconsistent with the intentions of the New Jersey Legislature in enacting the NJAA, established canons of statutory construction, and New Jersey Supreme Court jurisprudence." We do not interpret the judge's decision in such an expansive manner. In fact, the judge precisely tailored his ruling to the enforceability of the arbitration provision against plaintiff in the present circumstances. Indeed, the judge held that under New Jersey case law and the NJAA, as "[a]pplied to the instant case, [p]laintiff cannot be compelled to arbitrate."

We acknowledge, however, that under NJAA's predecessor, N.J.S.A. 2A:24-1 to -11, arbitration clauses were only valid if the "provision [was] in a written contract." The NJAA, which superseded N.J.S.A. 2A:24-1 to -11 in 2003, replaced the contract requirement with "[a]n agreement contained in a record," N.J.S.A. 2A:23B-6(a), thus broadening the medium for valid arbitration clauses. In addition, the New Jersey Legislature has expressly excluded certain agreements from the NJAA's reach. For example, the NJAA does not govern "agreements to arbitrate . . . between an employer and a duly elected representative of employees under a collective bargaining agreement or collectively negotiated agreement." N.J.S.A 2A:23B-3(a).

While the NJAA neither expressly includes nor excludes wills from its purview, three states have codified the enforceability of arbitration clauses in wills: Florida, Fla. Stat. § 731.401 (2022) ("A provision in a will or trust requiring the arbitration of disputes, other than disputes of the validity of all or a part of a will or trust, . . . is enforceable."); Utah, Utah Code. Ann. § 75-1-312 (West 2022) ("A will[] [or] trust . . . may include a provision, enforceable by a court, that requires the resolution of disputes . . . outside of a court of record.");

and Nevada, Nev. Rev. Stat. §164.930 (2021) ("A provision in a will or trust instrument requiring the arbitration of disputes . . . is enforceable . . . .").[6]

Looking to our neighboring states, both Pennsylvania and New York have a history of hostility toward arbitrating disputes in the probate context. In In re Reilly's Estate, 49 A. 939 (Pa. 1901), the testator "attempt[ed] . . . to confer exclusive authority upon the executors to define the provisions of [a] will, and make their decision final and conclusive." Id. at 940. The Pennsylvania Supreme Court held that "[a] testator may not deny to his legatees the right of appeal to the regularly constituted courts," even if it is contrary to the testator's express intention. Id. at 940-41.

In In re Will of Jacobovitz, 295 N.Y.S.2d 527 (Sur. Ct. 1968), a surrogate court addressed "whether the validity of a will and the disposition of an estate can be the subject of an arbitration proceeding under the laws of [New York]."

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[6] Nine states have recognized either by statute or case law that arbitration clauses in trusts, as opposed to wills, are enforceable: Arizona, Ariz. Rev. Stat. Ann. § 14-10205 (2022); Arkansas, Ark. Code Ann. §§ 28-73-111, 28-73-816(23) (2022); Kansas, Kan. Stat. Ann. § 58a-205 (2022); Missouri, Mo. Rev. Stat. § 456.2-205 (2022); New Hampshire, N.H. Rev. Stat. Ann. § 564-B:1-111A (2022); Ohio, Ohio Rev. Code Ann. §5802.05 (West 2022) (explicitly excluding testamentary trusts); South Dakota, S.D. Codified Laws § 55-1-54 (2022); Tennessee, see Harvey ex rel. Gladden v. Cumberland Tr. & Inv. Co., 532 S.W.3d 243 (Tenn. 2017); and Texas, see Rachal v. Reitz, 403 S.W.3d 840 (Tex. 2017).

Id. at 530. In Jacobovitz, four beneficiaries of the testator's estate agreed to submit all probate issues to an arbitration tribunal. Id. at 529. However, the surrogate court ruled that a will "[cannot] be the subject of arbitration under the Constitution and the law as set forth by the Legislature of the State of New York." Id. at 531. The court reasoned that probate judges are tasked under New York law with determining "the testamentary capacity of the decedent, the genuineness of the will, and the validity of its execution." Id. at 530. Therefore, the court determined that "even without objections to probate," any attempt to bypass the probate court and arbitrate probate issues was "against public policy." Id. at 531.

Similarly, the New Jersey Legislature has expressly allotted probate powers to the courts under N.J.S.A. 3B:2-2, which grants the superior courts "full authority to hear and determine all controversies respecting wills, trusts and estates." New Jersey's statutory scheme provides courts with mechanisms to protect the interests of beneficiaries and provides trustees and executors with guideposts for acting in their fiduciary capacities. See e.g., N.J.S.A. 3B:3-17 (authorizing superior courts to "take depositions to wills, admit the same to probate, and grant . . . letters testamentary or letters of administration with the will"); N.J.S.A. 3B:10-23 (placing "personal representative[s] under a duty to

settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and applicable law, and as expeditiously and efficiently as is consistent with the best interests of the estate"); N.J.S.A. 3B:10-26 (requiring a personal representative to "observe the standards in dealing with the estate assets that would be observed by a prudent [person] dealing with the property of another"); N.J.S.A. 3B:31-57 (defining "prudent person" standard as "exercis[ing] reasonable care, skill, and caution" in "considering the purposes, terms, distributional requirements, and other circumstances of the trust"); N.J.S.A. 3B:31-64 (requiring a trustee to "keep adequate records of the administration of the trust" and to "keep trust property separate from the trustee's own property"); N.J.S.A. 3B:31-71 (granting courts broad discretionary powers "[t]o remedy a breach of trust").

While we need not decide whether a will may include a valid and enforceable arbitration provision under New Jersey law to resolve the issue presented in this case, we note that arbitration clauses that eliminate the courts' expected role in resolving will disputes are inconsistent with the detailed statutory scheme vesting the superior courts with the authority to adjudicate such issues.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION