UPON FURTHER CONSIDERATION: THE CASE FOR TRUSTS AS CONTRACTS

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I. Introduction

Every year, first-year law students, or "1Ls" as they are known within the legal community, arrive on campus wide-eyed, ready to begin their studies and embark on a legal career. During this first year of coursework, most law schools offer no instruction on niche areas of law.[1] Similarly, fun or intersectional electives (e.g., "Law and Economics") are non-existent for a great majority of 1Ls.[2] Instead, 1Ls dive headfirst into the foundational subjects that form the elements of legal knowledge and, presumably, cultivate skills that will transfer into other practice areas.[3] Most attorneys and law students know these core "doctrinal courses" by heart: Torts, Criminal Law, and Constitutional Law are the names of a few.

Out of all the doctrinal courses, Contracts may be the most fundamental, as the field of contracts arguably forms the cornerstone of the American legal system. The field of torts touches on settlement agreements, which are contracts.[4] Criminal Law teaches students about plea deals, which are contracts.[5] Even constitutions are social contracts between governments and their people.[6]

Viewing contracts as the backbone of nearly all areas of law can drastically change the understanding of the area of trust law, which, in addition to being an upper-level elective for law students, provides today's clientele with many vehicles for estate planning. This Article will argue that trusts are, at their core, contracts between a trust maker (a "settlor") and a trust manager (a "trustee"). Finally acknowledging this reality of trust law will necessarily create many reforms in the field, such as alternative methods of challenging trusts, and allow for more innovations in trust law practice.

II. Background

This Part provides a basis for understanding current trust and contract law notions in U.S. jurisprudence and explains how the legal system developed these understandings.

A. History of Trusts

Trusts are arrangements where a trustee holds the legal title to property, subject to a duty to maintain the property for the benefit of other individuals (the "beneficiaries").[7] They are a common law concept dating back to Medieval times, when Crusaders would "trust" their close friends to provide for their loved ones while

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[1] *See* Samantha Weller, *First Year Law School Curriculum: What to Expect*, BARBRI L. PREVIEW, https://lawpreview.barbri.com/law-school-curriculum/ (last updated May 1, 2024).

[2] *Id.*

[3] *Id.*

[4] Meade v. City of Rockford, 40 N.E.3d 141, 151–52 (Ill. App. Ct. 2015).

[5] United States v. Bownes, 405 F.3d 634, 636 (7th Cir. 2005).

[6] Cruz-Guzman v. State, 998 N.W.2d 262, 287 (Minn. 2023).

[7] *Definition of a Trust*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/definition-of-a-trust (last updated Jan. 30, 2025).

they were away and if they did not return from battle.[8] Over time, the concept of trusts made its way across the pond to the United States of America; however, the motivation of creating trusts to provide for the care of friends and family after death has remained a driving force for settlors.[9] Currently, trusts are often used as substitutes for last wills and testaments (hereinafter, "wills"). Trusts allow individuals to dispose of property upon their death without some of the disadvantages of wills, such as being subject to a court proceeding called probate.[10]

Frequently, will substitutes take the form of "revocable living trusts," rather than other varieties of trusts.[11] In the case of a revocable living trust, a settlor can undo or amend the terms of the trust during their lifetime and serve as trustee while living, managing the assets in manners in the same way they would manage the assets if there were no trust at all.[12] Then, upon the death of the settlor, the trust becomes irrevocable and is afforded treatment that is similar to a will.[13]

While revocable living trusts do not offer all of the estate tax mitigation benefits of those trusts that cannot be revoked or amended ("irrevocable trusts"), revocable living trusts do allow the settlor to maintain control over the assets while living, in the same way he or she would with a simple will, *with* an added benefit of avoiding probate as to those assets that are properly titled to the trustee.[14] Naturally, there are requirements to establish a valid trust. Trusts must have: (1) a settlor; (2) a trustee; (3) property held in trust (a "corpus" or "res"); (4) beneficiaries; (5) defined natures and qualities as to each beneficiary's interest; and (6) a defined manner and time in which the trust is to be performed.[15]

Over the centuries, the basic arrangement and requirements of trusts have remained unchanged, and law has developed on how to treat trusts. Theoretically, a trust could be viewed as a legally distinct entity from the trustee and the beneficiaries. To be sure, American law has created a robust set of precedent in viewing business entities in this way, especially as to corporations, which have even been afforded some constitutional rights that are given to so-called "natural persons."[16]

Certainly, support for viewing trusts as akin to corporations exists. This was especially true during the American Gilded Age, when ultra-wealthy industrialists like John D. Rockefeller had trustees hold their business interests in trusts ("corporate trusts") in ways similar to how major corporations would be managed.[17] During this period, corporate trusts and big business were practically synonymous, thus creating a new field of law: antitrust.[18] Over time, the use of corporate trusts fell out of favor in American business law practice, with Standard Oil, the vanguard of the corporate trust, abandoning this structure in 1892.[19] However, the use of corporate trusts did persist through the middle of the twentieth century.[20]

Further supporting an entity-type understanding of trusts, the vernacular sometimes casually, but incorrectly, refers to trusts as though they were entities separate from the trustee (similar to corporations).[21]

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[8] Robert Whitman, *Can Estate Planners and Trust Administrators Offer Help to Trust Beneficiaries Who Want to Learn to Make Positive Life Planning Decisions?*, 1 EST. PLAN. & CMTY. PROP. L.J. 387, 389–90 (2009).
[9] Danielle Pierce, *The History of Trusts: A Journey from Roman "Fideicommissum' to Modern Asset Management*, PIERCE LEGAL GRP. (July 26, 2023), https://pierce-legal.com/2023/07/26/history-of-trusts/.
[10] Miller v. Commonwealth, 84 A.3d 620, 621, 624 (Pa. 2013).
[11] *Your Guide to a Living Trust*, ILL. STATE BAR ASS'N (2017), https://www.isba.org/public/guide/livingtrust.
[12] *Id.*
[13] *See* Turner v. Blue (*In re* Estate of Edwards), 120 N.E.2d 10, 12 (Ill. 1954) ("[A] joint will of a husband and wife with reciprocal provisions is presumed to be executed pursuant to a contract and therefore irrevocable upon the death of one of the testators.").
[14] *Your Guide to a Living Trust*, *supra* note 11.
[15] Albrecht v. Brais, 754 N.E.2d 396, 398 (Ill. App. Ct. 2001).
[16] Citizens United v. FEC, 558 U.S. 310, 342–43 (2010) (holding that corporations have a right to free speech).
[17] Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605, 610–11 (2012).
[18] *Id.* at 606–07.
[19] *Id.* at 616.
[20] Victor v. Hillebrecht, 90 N.E.2d 751, 752 (Ill. 1950) (describing litigation between holders of trust certificates and their trustee).
[21] Robert H. Sitkoff, *Trust Law as Fiduciary Governance Plus Asset Partitioning*, *in* THE WORLDS OF THE TRUST 428, 436 (Lionel Smith ed., 2013).

Despite the similarities between corporations and trusts, American courts have resisted the reification of trusts.[22] Instead, for legal classification purposes, courts treat trusts as special relationships between trustees and beneficiaries, not as separate entities or legal persons.[23] For example, while a corporation can own property,[24] a trustee, not the trust, holds the legal title to trust property, with the beneficiary owning the equitable title (that is, the right to enjoy the trust property).[25]

B. Overview of Contracts

The development of trust law can be compared with another common law area: contract law. Contracts, or legally enforceable mutual promises between parties,[26] are ubiquitous and have existed around the world for thousands of years.[27]

In the American legal system, a promise needs to meet certain requirements to be a legally enforceable contract. As any passing 1L can recite from memory, an enforceable contract under common law[28] must have: (1) an offer, (2) acceptance, and (3) consideration.[29] Offer and acceptance are two sides of the same coin—one party's proposition will form a contract once accepted by the other party, *if* there is consideration.[30]

Consideration is perhaps the hardest to comprehend of all contractual requirements. It may be viewed as a detriment to one party, a benefit to another party, or the exchange of mutual promises.[31] Because of the mutual nature of a contract, as opposed to the one-way nature of a generally unenforceable gratuitous promise, consideration is best thought of as a two-way street between the contracting parties. As the Supreme Court of New Jersey has written, "No contract is enforceable, of course, without the flow of consideration—both sides must 'get something' out of the exchange."[32]

However, American courts do not generally like to decide whether a contract has "enough" consideration––doing so would have the effect of undoing the bargained-for exchanges to which contracting parties agreed. Therefore, many courts have held that any amount of consideration is acceptable for a valid contract, even a mere "peppercorn."[33]

Some older authority describes how contracts require a "meeting of the minds" to be valid, meaning that the parties to the contract must come to the same understanding of the contract.[34] However, the modern trend is to find the presence of a meeting of the minds if the parties to a contract make the outward manifestations of mutual assent,[35] thus blurring the line between a meeting of the minds and the respective components of offer and acceptance.

Note that the parties to the contract do not actually need to be the parties benefiting from the contract.[36] In the case of third-party beneficiary contracts, the third party's benefit is the consideration that is bargained for.[37] Thus, most jurisdictions recognize not only the validity of third-party beneficiary contracts, but also the rights of third-party beneficiaries to maintain legal action against the promisors under such contracts.[38]

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[22] Swartz v. Sher, 184 N.E.2d 51, 53–54 (Mass. 1962).
[23] Jimenez v. Corr, 764 S.E.2d 115, 122 (Va. 2014). However, note that trusts are treated as separate entities for federal income tax purposes. *See* 26 U.S.C. § 641.
[24] Boshernitsan v. Bach, 276 Cal. Rptr. 3d 109, 115 n.8 (Cal. Ct. App. 2021) ("Unlike trusts, however, corporations can hold title to property. . . .").
[25] Eagle Oil & Gas Co. v. TRO-X, L.P., 619 S.W.3d 699, 706 (Tex. 2021).
[26] 1 CORBIN ON CONTRACTS § 1.3 (2024).
[27] Tim Harford, *How the World's First Accountants Counted on Cuneiform*, BBC (June 12, 2017), https://www.bbc.com/news/business-39870485 (describing written contracts from Ancient Mesopotamia).
[28] Note that contracts for the sale of goods may be different under the Uniform Commercial Code. *E.g.*, 810 ILL. COMP. STAT. 5/2-105 (2025).
[29] Runzheimer Int'l, Ltd. v. Friedlen, 862 N.W.2d 879, 885 (Wis. 2015).
[30] *Id.*
[31] *Id.* at ¶ 21.
[32] Cont'l Bank of Pa. v. Barclay Riding Acad., 459 A.2d 1163, 1171 (N.J. 1983).
[33] *E.g.*, Lucht's Concrete Pumping, Inc. v. Horner, 255 P.3d 1058, 1061 (Colo. 2011).
[34] Sweeten v. Trade Envelopes, 938 S.W.2d 383, 386 (Tenn. 1996).
[35] *Meeting of the Minds*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/meeting_of_the_minds (last updated July 2023).
[36] *Third-Party Beneficiary*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/third-party_beneficiary (last updated January 2025).
[37] *Id.*
[38] Cleveland Trust Co. v. Elbrecht, 30 N.E.2d 433, 435 (Ohio 1940).

III. Analysis

This Part will first analyze trusts under contract law principles to determine whether they meet the contractual requirements. Then, this Part will consider counterarguments to a contractual understanding of trusts.

A. Viewing Trusts as Contracts

To be sure, trusts do resemble corporations to the naked eye.[39] It is well-documented, however, that courts have resisted expanding corporate treatment to trusts; instead, courts categorize trusts as special relationships between trustees and beneficiaries, rather than separate legal entities.[40] Certainly, the disparate treatment of trusts and corporations may be preferable in the wake of *Citizens United*.[41]

It would be circular to say that a trust is a trust because trustees and beneficiaries share a trust relationship. The *essence* of a trust must be determined. Thus, the natural question is as follows: How should the legal community view the special trust relationship? It is not an entirely new idea that the trustee/beneficiary relationship is contractual. Acclaimed trust law expert Professor John H. Langbein argued as much in his 1995 article *The Contractarian Basis of the Law of Trusts*, providing that a trust is essentially a contract between the settlor and the trustee.[42] Langbein argued that the powers and responsibilities of the trustee are the consideration that the trustee offers in the contract.[43]

Expanding on this view, one can see that the settlor also gives consideration, as each trust must have a corpus[44] and the trustee may compensate himself or herself from said corpus for their services as trustee.[45] Thus, the common legal fiction of initially funding revocable living trusts with ten dollars cash[46] creates a res, which in turn allows the trustee to receive a fraction of that res for services rendered.[47] Assuming that the trust is actually funded, the right to compensation is only a "peppercorn" of consideration, but only a "peppercorn" is needed to make a valid contract.[48]

Accordingly, as Professor Langbein noted, the offer, acceptance, and consideration between the settlor and trustee makes trusts virtually indistinguishable from modern third-party beneficiary contracts.[49] This makes sense: third-party beneficiaries can bring actions to enforce their rights under a contract like beneficiaries can bring actions to enforce their rights under a trust.[50]

There is a complication regarding revocable living trusts. In a common revocable living trust scenario, the settlor and the trustee are often the same individual during the settlor's life and capacity, with a new individual assuming the role of trustee only upon the settlor's death or incapacity.[51] This variation on the standard fact pattern does not make trusts any less contractual than ordinary, dime-a-dozen contracts. Clearly, individuals can contract with themselves in other capacities; for example, as owner of a wholly owned corporation.[52] Thus, it should follow that an individual, as settlor, may contract with himself or herself, as trustee.

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[39] Swartz v. Sher, 184 N.E.2d 51, 53 (Mass. 1962).
[40] Jimenez v. Corr, 764 S.E.2d 115, 121 (Va. 2014).
[41] Citizens United v. FEC, 558 U.S. 310, 343 (2010) (holding that corporations have freedom of speech under the U.S. Constitution).
[42] *See generally* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995).
[43] *See id.* at 627.
[44] Albrecht v. Brais, 754 N.E.2d 396, 398–99 (Ill. App. Ct. 2001).
[45] Parker v. Day, 49 N.E. 1046, 1047 (N.Y. 1898).
[46] *See Suggested Language for Trusts (per Publication 557)*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/suggested-language-for-trusts-per-publication-557 (last updated Oct. 9, 2025).
[47] *Parker*, 49 N.E. at 1047.
[48] Lucht's Concrete Pumping, Inc. v. Horner, 255 P.3d 1058, 1061 (Colo. 2011).
[49] Langbein, *supra* note 42, at 627.
[50] Salina Canyon Coal Co. v. Klemm, 290 P. 161, 167 (Utah 1930) ("All courts hold that a beneficiary under a trust may sue to protect his rights, especially in a case where his interests are hostile to those of the trustee.").
[51] *Your Guide to a Living Trust*, *supra* note 11.
[52] *See* Baker v. McDel Corp., 191 N.W.2d 846, 851 (Wis. 1971) (describing how an individual assigned his rights in a lease to his wholly-owned corporation).

Similarly, it is an uncontroversial tenet of contract law that contractual rights and obligations can be assigned to new parties, who then "step into the shoes" of the assignor.[53] Hence, the successor trustee, by virtue of his or her assent to the terms of the trust, steps into the shoes of the initial trustee, giving the trust a new manager, but leaving the terms of the trust otherwise unchanged. In the event that an individual who is nominated as successor trustee under the trust instrument does not wish to serve, the next individual under the instrument who accepts trusteeship would step into the initial trustee's shoes. Accordingly, even the revocable living trust is still a contract under contract law principles, notwithstanding its somewhat unusual surrounding circumstances.

B. Viewing Trusts as Non-Contracts

To a certain extent, the contractual nature of trusts is implicitly acknowledged by the trust law bar. For example, practitioners commonly refer to the instruments that govern trusts as trust "agreements."[54] In this way, the trust law field adopts the language of written contracts, which are also known as agreements.[55]

Nonetheless, the legal community has avoided explicitly acknowledging this seemingly inherent truth, maintaining that trusts are distinct from contracts. For example, the highly persuasive Restatement (Third) of Trusts maintains that there are differences between trusts and contracts, conceding that these differences are "matters of detail," but remaining agnostic as to what precisely these details are.[56] Some courts have gone even further, explicitly holding that trusts are not contracts.[57]

What exactly are these supposed details that separate trusts and contracts? As discussed above, a trust is essentially a trustee's promise to care for a settlor's property, and this promise meets all the legal formalities to be legally enforceable (i.e., a contract).[58] In an attempt to unpack these amorphous differences between trusts and contracts, the remainder of this Section will (1) address some supposed contractual deficiencies that trusts have and (2) raise counterpoints to prove trusts' contract-worthiness.

i. Consideration

As discussed above, trustees receive consideration in the form of compensation for their services as trustee.[59] However, some courts have held that trusts are legally enforceable, even if the trustee "receives no consideration."[60] Presumably, this refers to how a trustee may refuse compensation for services rendered, even if he or she is entitled to it.[61] A trustee might decide to do this for a number of reasons: for example, to preserve family harmony when serving as trustee of a trust created by a deceased loved one.

Yet refusing to take compensation does not invalidate that the trustee had a contractual right to compensation. Rather, it is an example of a contractual waiver, yet another basic principle of contract law that is taught in the first year of law school.

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[53] *See generally* LFP Consulting, LLC v. Leighton, 543 P.3d 188 (Wyo. 2024).
[54] *See generally In re* Edmonds, 21 N.E.3d 447 (Ill. 2014).
[55] *Agreement*, BOUVIER LAW DICTIONARY (2012) ("In many instances there is no distinction between a contract and an agreement, and many . . . written contracts are entitled 'agreement.'").
[56] RESTATEMENT (THIRD) OF TRUSTS § 2 (Am. L. Inst. 2012).
[57] *E.g.*, Moore v. Kieber, 990 P.2d 1085, 1088 (Ariz. Ct. App. 1999).
[58] *See* discussions *supra* Sections II(B), III(A).
[59] *See* discussion *supra* Section III(A); *see also* Parker v. Day, 49 N.E. 1046, 1047 (N.Y. 1898).
[60] *Moore*, 990 P.2d at 1088.
[61] Lyons v. Holder, 163 P.3d 343, 348 (Kan. App. 2007) ("Many courts have recognized that a trustee can waive compensation under a variety of circumstances.").

Contractual terms may be waived if a party, expressly or implicitly, chooses not to enforce a right under the contract.[62] However, a waiver does *not* invalidate a contact as a whole—it only affects the waived rights.[63] Thus, although the trustee may not actually take compensation under the trust,[64] the trust is still an enforceable contract under contract law principles (like waiver), and not simply magically non-contractual because the arrangement is labeled as a "trust."

Still, another way a trustee might receive no remuneration for services is a court denying a request for compensation. This can happen, for example, if a trustee does not keep adequate records of the time that he or she spent on trust administration.[65] However, such a poorly-organized trustee would still receive consideration in this circumstance.

Consider, for example, an employment agreement where an employer agrees to pay an employee an hourly wage. If the employee fails to meet the necessary burden in proving the hours that he or she worked, the employer may deny compensation to the employee.[66] This lack of compensation does not invalidate the employment agreement. Implicitly, the employee and the employer bargained for an arrangement where the employee would be compensated for claimed hours *that could be substantiated*. It would be inconceivable to think that the employer would want to enter into an agreement where the employee must be compensated for all hours purportedly worked, even if there were no factual support for the employee's claims.

In the same way, a settlor creates a trust with the understanding that the trustee could only receive compensation for the hours that can be supported with proper records. Hence, when a trustee is denied compensation for this reason, the trust contract is not defeated, but rather works just as the trustee had intended.

ii. Meeting of the Minds

One may argue that the contractual "requirement" of a meeting of the minds is absent upon the creation of many trusts. After all, revocable living trusts are seemingly unilaterally created. However, note that the meeting of the minds does not describe a physical meeting between the parties to a contract. Rather the phrase means the parties should come to the same understanding of the agreement.[67] Thus, it is of no import whether the trustee physically meets with the settlor.

Still, even under a correct understanding of the meeting of the minds, one can see that any arguable deficiency would not defeat the contractual nature of a trust. Under an agreement where the settlor creates a trust with himself or herself as trustee, it is obvious that the parties are of the same mind. Legal fictions aside, they are, quite literally, the same person. Then, upon the settlor's death or incapacity, the successor trustee takes the place of the initial trustee by stepping into his or her shoes,[68] thereby preserving the initial meeting of the minds.

Finally, a meeting of the minds is not strictly necessary under the modern trend, even if a person accepts the position of successor trustee after the resignation or removal of an earlier trustee.[69] Thus, even if the settlor and the trustee would subjectively have different understandings of the trust, the required formalities of accepting trusteeship (such as verbal assent, signing necessary documentation, etc.) would meet the requisite elements of offer and acceptance.[70] So, although the creation of many trusts involves a meeting of the minds, modern contract law renders this criticism moot in many jurisdictions.

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[62] Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P., 850 N.E.2d 653, 657 (N.Y. 2006).
[63] *See* Am. Cont'l Life Ins. Co. v. Ranier Constr. Co., 607 P.2d 372, 374 (Ariz. 1980) ("The waiver of one right under a contract does not necessarily waive other rights under the contract.").
[64] *Parker*, 49 N.E. at 1046, 1047.
[65] *See In re* Pamela Andreas Stisser Grantor Tr., 818 N.W.2d 495, 508 (Minn. 2012) (providing that the trustee's lack of record keeping left the court in no position to grant her claim for compensation).
[66] *See* Barios v. Brooks Range Supply, Inc., 26 P.3d 1082, 1087 (Alaska 2001) (affirming the superior court's holding that the employee did not meet her burden in proving that she had worked unpaid overtime).
[67] Sweeten v. Trade Envelopes, 938 S.W.2d 383, 386 (Tenn. 1996).
[68] *See generally* LFP Consulting, LLC v. Leighton, 543 P.3d 188 (Wyo. 2024).
[69] *Meeting of the Minds*, *supra* note 35.
[70] *See id.*

iii. Fiduciary Duty

One might further argue, as the *Naarden Trust* court did, that a trust is not a contract due to how trustees are fiduciaries under state law,[71] meaning that the trustee must act in the best interests of the beneficiaries.[72] However, this argument also falls apart. Other contractual relationships have fiduciary duties imposed on one party; for example, when a client hires an attorney.[73]

Yet courts—rightly—hold that the retainer agreements that begin an attorney/client relationship are, in fact, contracts.[74] It is therefore irrational to think that trusts, despite otherwise meeting the requirements to be contracts, are somehow not contractual in nature due to the fiduciary relationships they create. Doing so could potentially create a slippery slope, unnecessarily undoing the contractual nature of many other professional relationships, like those between clients and accountants or patients and doctors.[75]

As a matter of course, it is clear that a contract can create fiduciary duties under the law. In short, the fiduciary nature of the trustee/beneficiary relationship should have no effect on whether a trust is a contract—it is simply irrelevant.

IV. Recommendation

Trusts are clearly contracts for the reasons articulated above. However, one might wonder about the practical effect of recognizing this reality. Although the characterization of trusts may seem purely academic, recognizing the contractual nature of trusts could greatly alter the existing trust law jurisprudence. By applying contract law principles to trusts, the legal community would open the doors for alternative legal strategies. Additionally, this new reality would make desirable trust law innovations easier to obtain.

A. Modification

Understanding trusts as contracts would provide alternative means of modifying them and thereby undoing incorrect, misguided, or unwanted instructions.

Many settlors use trusts as will substitutes.[76] Through this lens, trusts may (erroneously) be considered more or less the same instrument as a will. Wills are not contracts, but rather legally-recognized written instructions for the posthumous disposition of property.[77] This misunderstanding can have devastating effects on beneficiaries' ability to change the terms and provisions of trusts.

To elaborate, there are many ways to modify a contract.[78] Not only can a contract be invalid for a lack of the requirements discussed above,[79] contract law also offers a lot of flexibility to modify the terms of a contract.

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[71] *See* Moore v. Kieber, 990 P.2d 1085, 1088 (Ariz. Ct. App. 1999).
[72] Moeller v. Super. Ct., 947 P.2d 279, 285 (Cal. 1997).
[73] *See generally* Pippen v. Pedersen & Houpt, 986 N.E.2d 697 (Ill. App. Ct. 2013).
[74] *E.g.*, Hannafan & Hannafan, Ltd. v. Bloom, 959 N.E.2d 1280 (Ill. App. Ct. 2011) ("The retainer agreement is a contract.").
[75] Smith v. Sushka, 659 N.E.2d 875, 879 (Ohio Ct. App. 1995); Stigliano by Stigliano v. Connaught Lab'ys., Inc., 658 A.2d 715, 720 (N.J. 1995) (describing the relationship between doctors and patients as fiduciary in nature).
[76] Miller v. Commonwealth, 84 A.3d 620, 621 (Pa. 2013).
[77] *E.g.*, Isler v. Griffin, 67 S.E. 854, 855 (Ga. 1910) ("A contract is an agreement between the parties to it. A will is no contract at all, but a unilateral disposition of property.").
[78] RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. a (Am. L. Inst. 1981).
[79] *See* discussion *supra* Section II(B).

As previously mentioned, a party can waive its rights under the contract and choose not to enforce a certain term or provision.[80] Additionally, an unforeseeable act of God, or force majeure, can relieve a party of its obligations under a contract.[81] Even lesser changes in circumstances can lead to modification in contractual terms if they make strict adherence impracticable.[82] Sometimes, contracts can even be unenforceable because they are unconscionable, meaning that a contract (or a portion of a contract) is so unfair that a court refuses to enforce it.[83]

On the other hand, courts afford considerable deference to wills.[84] While wills can be invalidated on certain grounds, such as not following the required statutory formalities (e.g., proper witnessing),[85] courts generally have a policy goal of respecting testamentary freedom—the idea that individuals have a right to determine who receives their property upon their deaths.[86] Thus, instructions in wills or will substitutes will often be given legal effect, even if they produce results that are arguably unconscionable, such as disinheriting relatives.[87]

Again, since trusts are oftentimes will substitutes, the policy goals that govern the law of wills significantly reduce the number of legal methods available to challenge or invalidate trusts when compared to agreements that are uncontroversially contractual. Like wills, trusts can be invalidated if there is shown to be some sort of deficiency in their creation (e.g., undue influence upon the settlor or lack of capacity).[88] However, absent these issues, courts generally honor the terms of irrevocable trusts due to the policy goal of respecting testamentary freedom.[89] Accordingly, even in spite of circumstances that may not have been contemplated by the settlor, courts will generally not alter the strict terms of a trust.[90]

This stubbornness can yield absurd results. Suppose a father created a revocable living trust as part of an estate plan that he created as a young parent. During this time, his three children were elementary school aged. Not being able to tell the future, the settlor restricted his children's access to the money, held by the trustee, until the children each reached 50 years of age. Tragically, the settlor died shortly thereafter. Fast-forward 15 years: all the settlor's children have proven themselves to be prodigies. They completed post-secondary schooling in their teenage years and are now doctors and engineers. However, their maturity notwithstanding, inflexibility in the name of testamentary freedom would limit all children's rights to funds held by the trustee for decades to come. However, if trusts were governed by contract law principles, the children would have some equitable arguments to allow them to access trust assets before they reach middle age.

Admittedly, there are now more options to reform irrevocable trusts than there were in the past. For example, some states allow for trust "decanting": This, akin to the vinous term, involves pouring an old trust into a new trust.[91] Furthermore, some states allow for "trust protectors," who are designated individuals with the power to reform irrevocable trusts.[92] Yet these options are not without their limitations. To begin, a limited number of states recognize these methods of reform: for example, only 36 states have enacted decanting statutes as of September 2022.[93]

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[80] Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P., 850 N.E.2d 653, 657 (N.Y. 2006).
[81] Pacific Vegetable Oil Corp. v. C.S.T., Ltd., 174 P.2d 441, 448 (Cal. 1946).
[82] Silverman v. Charmac, Inc., 414 So. 2d 892, 894 (Ala. 1982).
[83] Personal Finance Co. v. Meredith, 350 N.E.2d 781, 789 (Ill. App. Ct. 1976) ("An unconscionable contract was unenforceable at common law in Illinois as were individual clauses to the extent they produced an unconscionable result . . . [and a]n unconscionable contract has been described as a one-sided contract or one which no man in his senses and not under delusion would make and no honest and fair man would accept." (internal citations omitted)).
[84] *In re* Estate of Peters, 526 A.2d 1005, 1013 (N.J. 1987).
[85] *Id.* at 1011.
[86] *See In re* Estate of Feinberg, 919 N.E.2d 888, 895 (Ill. 2009) ("The public policy of the state of Illinois as expressed in the Probate Act is, thus, one of broad testamentary freedom . . . .").
[87] Ladd v. Estate of Kellenberger, 334 S.E.2d 751, 755 (N.C. 1985) ("Moreover the very freedom to make a will implies a concomitant freedom of every person to disinherit by will persons who would otherwise inherit his property if the testator had died intestate." (internal citations omitted)).
[88] Slosberg v. Giller, 876 S.E.2d 228, 234 (Ga. 2022).
[89] *Estate of Feinberg*, 919 N.E.2d at 895 (applying the goal of testamentary freedom in a trust analysis).
[90] Harris Tr. & Sav. Bank v. Donovan, 582 N.E.2d 120, 123 (Ill. 1991).
[91] *See generally* 760 ILL. COMP. STAT. 3/1201 (2025).
[92] *See, e.g.*, *id.* § 3/808(d).
[93] Roger A. McEowen, *Modifying an Irrevocable Trust – Decanting*, AGRIC. L. & TAX'N BLOG (Sept. 18, 2022), https://www.calt.iastate.edu/taxplace-article/modifying-irrevocable-trust-decanting.

Even if a state recognizes such opportunities for trust reform, the reformation process can be burdensome. Trust decanting involves the drafting of a new instrument (the "second trust") which must then be executed by the trustee.[94] Then, the trustee may need to retitle the assets held in trust to show that the assets are owned by the trustee as the trustee of the second trust and not as trustee of the initial trust.[95] This may require further administrative work (communications with financial institutions, recording new deeds, etc.) which, apart from being cumbersome, may deplete the trust of its resources due to legal fees and trustee compensation.[96]

However, if trusts were viewed as third-party beneficiary contracts, the modification process would be much more straightforward. If the trustee wanted to stray from the strict terms of the trust instrument, the trustee would terminate the first trust instrument, and sign a novation (really a trust amendment) between himself or herself and the trust beneficiaries.[97] While not recommended, a trustee could also potentially stray from the terms of the trust and rely on the contract defenses discussed earlier in this Section (e.g., force majeure). Finally, a trustee who is unconvinced of sufficient changes in circumstances could also choose to honor the terms set by the settlor.

To be sure, there would initially be many gray areas surrounding the limits on trust modification that courts would have to sort through after recognizing the contractual nature of trusts. Certainly, the policy goal of respecting testamentary freedom and deferring to wills (and will substitutes) would have to be balanced against the contractual principles that allow for modification. Nonetheless, contract treatment would allow for greater flexibility in the face of changed circumstances.

B. Trust Contests

Just as the recognition of trusts as contracts could lead to more flexibility in modifying trusts, it could also provide practitioners with another strategy on how to invalidate the trust upon its creation: arguing a want of consideration.

As mentioned above, a purported contract will be unenforceable if there is a lack of consideration.[98] Each side must receive something from the transaction.[99] However, courts generally dislike determining whether the amount of consideration is acceptable.[100] Therefore, the common law developed the general rule that even a peppercorn of nominal consideration is sufficient.[101] Perhaps the theory of peppercorn consideration offers the strongest support for trusts being contracts, since the ten dollars cash that nominally funds many trusts gives the trustee an opportunity to earn the peppercorn.[102]

However, it is questionable whether many trusts are ever actually funded with the ten dollars cash. There is a dearth of research empirically studying how many such ten-dollar transactions actually occur. It is likely that these funding provisions are, in reality, treated as "magic words" to create a trust and satisfy the requirement that a trust has a res[103] (and, by extension, that the contract has consideration). Thus, the fictitious transfer is merely a recital.

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[94] *See* 760 ILL. COMP. STAT. 3/1202 (2025) (describing second-trust instrument as the instrument for a second trust).
[95] *See id.* (defining a decanting power to include the power to distribute a trust's property into a second trust).
[96] *See* Parker v. Day, 49 N.E. 1046, 1047 (N.Y. 1898) (discussing trustee compensation).
[97] *See* Redewill v. Matzenauer, 255 P. 486, 487 (Ariz. 1927) (describing how the parties to an initial contract may be substituted via another contract called a novation).
[98] Cont'l Bank of Pa. v. Barclay Riding Acad., 459 A.2d 1163, 1171 (N.J. 1983).
[99] *Id.*
[100] Lucht's Concrete Pumping, Inc. v. Horner, 255 P.3d 1058, 1061 (Colo. 2011).
[101] *Id.*
[102] *See* discussion *supra* Section III(A).
[103] Albrecht v. Brais, 754 N.E.2d 396, 398 (Ill. App. Ct. 2001).

A mere recital for consideration, not actually received, is not enough to turn an arrangement into a valid contract.[104] In fact, some jurisdictions even permit challengers to offer evidence to dispute whether the consideration was actually received.[105] Accordingly, a contract might be successfully challenged by arguing that the consideration expressed in a recital was never actually exchanged. After all, a contract with no consideration is no contract at all. While a peppercorn of consideration may be enough, a court might draw the line at imaginary consideration.

Under the current model of viewing trusts as analogous to wills, there is only a limited number of ways to invalidate a trust.[106] However, under this Article's proposed model (i.e., viewing trusts as contracts) challengers could bring forth evidence that the nominal initial trust funding was never actually received, thus allowing trust litigators to use a contest strategy that may be used by their contract litigator counterparts.

Note that many trusts are funded after the trust instrument is signed, thereby later satisfying the res requirement under trust law, and the consideration requirement under contract law. Imagine, however, a case where a settlor executes a trust instrument, but never actually funds the trust during the settlor's lifetime. Instead, settlors rely on "pour-over wills," common fallback options recommended in trust-based estate plans, to posthumously pour over their assets into the trust.[107] In this case, proving that the initial trust funding was fictitious could be fatal to the trusts that are created after setting the precedent that trusts are contractual. As a matter of public policy, this precedent should not apply retroactively, as doing so could open the door to contesting trusts that are valid under the current state of the law.

Presumably, practitioners would have a mixed reaction to such a result under contract law. While estate planners (i.e., front-end trust law practitioners) may cringe at the idea of their work product being undone by a settlor's inaction, trust litigators would likely welcome another strategy at their disposal. Both sides would have strong arguments to make.

However, the settlor would bear only a small burden to survive such a challenge—any amount of lifetime trust funding, even writing a ten-dollar check to a trust account, would defeat a challenge based on want of consideration. This low burden for the settlor, combined with another method for trust contests, means an enforced consideration requirement for trusts would net a benefit to the trust law field.

C. Enforceable Contractual Provisions

This Section describes several avenues which exist within contract law which are applicable to trusts under the proposed framework.

i. Arbitration

Trust law practitioners are always looking for ways to improve their work product. In recent years, one such way is the increasing inclusion of arbitration provisions in trust instruments.[108] Nevertheless, it is questionable whether courts in all American jurisdictions would honor such provisions.

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[104] *See In re* Estate of Little, 721 P.2d 950, 959 (Wash. 1986) (discussing how some courts do not allow mere recitals to transform a gratuitous gift into a contract).

[105] *See* Cottle v. Tomlinson, 16 S.E.2d 555, 560 (Ga. 1941) ("Where the consideration in a deed is expressed merely by way of recital, it is permissible to show by parol testimony that the true consideration is in fact different from that expressed in the instrument.").

[106] *See* discussion *supra* Section IV(A).

[107] *See Pourover Will*, BOUVIER LAW DICTIONARY (6th ed. 1856) ("A pourover will is a last will and testament that includes a provision dedicating funds to be transferred to a trust . . . .").

[108] *But see* Steve R. Akers et al., *Heckerling Musings 2023 and Estate Planning Current Developments*, BESSEMER TRUST, at 1 (Apr. 12, 2023), https://www.bessemertrust.com/insights/heckerling-musings-2023-and-estate-planning-current-developments (describing courts backing off of allowing arbitration as a current event discussed at a major estate planning conference).

Arbitration clauses in contracts (or, if the entire contract pertains to arbitration, "arbitration agreements") are expressions that the parties thereto wish to settle their disputes under the contract through a nonjudicial process called arbitration.[109] Arbitration clauses are generally enforceable as part of the parties' bargained-for exchange.[110] In fact, from a public policy perspective, courts may favor arbitration clauses;[111] in part because arbitration reduces courts' caseloads, thereby increasing judicial economy.[112]

Turning to a contract's parties: individuals might bargain for an arbitration clause because arbitration is faster and more informal compared to litigation.[113] These benefits can be especially desirable when the parties to a contract share a close, familial relationship.[114] Since trusts are often established for the benefit of family members and loved ones, it follows that settlors would want their beneficiaries to resolve their disagreements outside of court (with hopefully less expense taken from the trust corpus).

After all, family trust disputes can turn messy, especially if there are large sums of money involved. Consider the Pritzkers, a family of multi-billionaires with interests in multiple trusts.[115] When some members of the Pritzker family accused trustees of improperly using trust funds, litigation followed.[116] When the litigation finally ended in a settlement agreement, the parties decided to establish arbitration procedures for future disputes to avoid such conflict in the future.[117] One can imagine that after the litigation process, many of the Pritzkers involved, if not all of them, wished that the trusts at issue simply gave direction for beneficiaries to arbitrate upon the genesis of a conflict.

Notwithstanding family members' desires to prevent litigation between friends and family, it is an open question whether arbitration clauses in trusts are enforceable. In part, the murkiness in this field is due to the conflation of trusts with wills, which do not have enforceable arbitration clauses in all jurisdictions.[118] The misunderstanding of trusts being non-contractual further contributes to this lack of certainty. For example, in 2022, the Virginia Supreme Court held that neither the Virginia Uniform Arbitration Act nor the Federal Arbitration Act compel trust beneficiaries to comply with arbitration clauses because, according to the court, trusts are not contracts.[119]

For reasons discussed above, enforceable arbitration clauses in trusts would bring benefits to settlors and beneficiaries alike. Under a noncontractual understanding of trusts, there are alternative ways to make arbitration clauses in trusts enforceable. For example, jurisdictions may enact legislation expressly providing for the enforcement of arbitration clauses in trusts.[120]

The American College of Trust and Estate Counsel ("ACTEC") supports the public policy of enforcing arbitration provisions in trusts. In 2007, its Arbitration Task Force drafted a model statute in the hope that states would enact it in some form.[121] In part, ACTEC endorsed the legislative path because legislation can be seen as more proactive, and therefore more desirable, than leaving issues to the courts to decide.[122]

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[109] Acad. of Med. of Cincinnati v. Aetna Health, Inc., 842 N.E.2d 488, 492–93 (Ohio 2006).
[110] Rizzio v. Surpass Senior Living LLC, 492 P.3d 1031, 1034 (Ariz. 2021) ("Arbitration agreements are widely utilized for resolving a variety of disputes and are generally enforceable.").
[111] Innovative Images, LLC v. Summerville, 848 S.E.2d 75, 81 (Ga. 2020).
[112] Reed v. Farmers Ins. Grp., 720 N.E.2d 1052, 1058 (Ill. 1999).
[113] Forsythe Int'l., S.A. v. Gibbs Oil Co. of Texas, 915 F.2d 1017, 1022 (5th Cir. 1990).
[114] *See* Faherty v. Faherty, 477 A.2d 1257, 1261 (N.J. 1984) (describing how arbitration agreements can be used in the context of disputes under separation agreements).
[115] *Inside the Pritzker Family Feud,* CHI. TRIB. (Aug. 22, 2021, 6:53 PM CST), https://www.chicagotribune.com/2005/06/12/inside-the-pritzker-family-feud/.
[116] *Id.*
[117] *Id.*
[118] *In re* Estate of Hekemian, No. A-1774-21, 2023 N.J. Super. Unpub. LEXIS 60, at *29–30 n. 6 (Jan. 13, 2023) ("Nine states have recognized either by statute or case law that arbitration clauses in trusts, as opposed to wills, are enforceable.").
[119] Boyle v. Anderson, 871 S.E.2d 226, 230 (Va. 2022).
[120] Stephen W. Murphy et al., *Virginia Supreme Court: Arbitration Clauses in Trusts Are Not Enforceable Against Beneficiaries*, MCGUIREWOODS (May 12, 2022), https://www.mcguirewoods.com/client-resources/alerts/2022/5/virginia-supreme-court-arbitration-clauses-trusts-are-not-enforceable-against-beneficiaries/.
[121] Gerardo J. Bosques-Hernández, *Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective*, INDRET, at 18–19 (Oct. 2008), https://indret.com/wp-content/uploads/2008/07/559_en.pdf.
[122] *Id.* at 19.

To date, some states have enacted such arbitration-enabling statutes.[123] For example, Section 401 of the Florida Probate Code expressly provides that a "provision in a [trust] requiring the arbitration of disputes [other than disputes of the validity] . . . is enforceable."[124] Florida is not alone. Other states such as Arizona, South Dakota, and Washington have enacted similar legislation.[125]

The legislative approach has drawbacks, a major one being the slow-moving process of turning bills into statutes. Only a few states have actually enacted legislation to bless arbitration clauses in trusts.[126] While awaiting such legislation, arbitration clauses remain left to judicial interpretation anyway.

However, if courts begin seeing trusts for the contracts they are, no enabling legislation would be needed. In that case, arbitration clauses would be honored either under general contract law principles[127] or under contract law legislation such as the Federal Arbitration Act.[128] Thus, recognition of trusts' contractual nature is not only a distinction without a difference: it could expedite recognition of arbitration clauses in trusts and therefore serve the policy goals of discouraging litigation and efficiently resolving family disputes.[129]

Furthermore, recognizing trusts as contracts would open the door to the enforceability of many other boilerplate contract provisions that are frequently contained in trust agreements.

ii. Mediation

One example of other standard contract provisions that could enter the trust realm is mediation. As another method of alternative dispute resolution, mediation is like a sibling to arbitration, offering alternatives to the time consuming and confrontational process of litigation.[130] This is especially true for mediation which, as a process where a third-party facilitates discussion, can be even more collaborative than arbitration.[131] In the context of family disagreements, like many trust disputes, the mediation process might best preserve harmony between the opposing sides. It therefore follows that it is in the public interest to honor mediation clauses in trust instruments.

Like arbitration, legislation can "bless" mediation provisions in trusts in the absence of judicial recognition of trusts' contractual nature. In fact, some states have recognized arbitration and mediation provisions in trusts via the same statute.[132] However, judicial recognition of trusts as contracts would render such legislation extraneous and, perhaps, offer a quicker path to the desired result.[133]

iii. Assignability and Restrictions

It stands to reason that, on the new frontier of a contractual understanding of trust law, beneficiaries could transfer their interests under trusts to other parties. After all, contractual beneficiaries can generally assign away their rights.[134] Yet again this new treatment could be a double-edged sword. Many beneficiaries would welcome new ways to accelerate receiving their interests, while many settlors would want to retain their rights to control the use of their assets from beyond the grave. Luckily, the settlor can avoid this scenario with proper drafting.

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[123] *Id.* at 18.
[124] FLA. STAT. § 731.401 (2025).
[125] Leah Albert, *The Case for Arbitration of Trust and Estate Disputes*, MILES MEDIATION & ARB. (June 5, 2023) https://milesmediation.com/blog/learn-why-arbitration-should-be-used-for-trust-and-estate-disputes.
[126] Murphy et al., *supra* note 120.
[127] Rizzio v. Surpass Senior Living LLC, 492 P.3d 1031, 1034 (Ariz. 2021).
[128] Boyle v. Anderson, 871 S.E.2d 226, 230 (Va. 2022) ("The FAA by its plain terms applies to contracts.").
[129] *See* Reed v. Farmers Ins. Grp., 720 N.E.2d 1052, 1057 (Ill. 1999); *Inside the Pritzker Family Feud*, *supra* note 115.
[130] *See* Berg v. Berg, 170 N.E.3d 224, 228 (Ind. 2021) (explaining the policy reasons why Indiana courts support mediation and negotiation).
[131] Tegra Corp. v. Boeshart, 967 N.W.2d 165, 187 (Neb. 2022) ("Mediation means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.").
[132] *See* MO. REV. STAT. § 456.2-205 (2025).
[133] *See* discussion *supra* Section IV(C)(i).
[134] Folquet v. Woodburn Pub. Schs., 29 P.2d 554, 555 (Or. 1934) ("As a general rule contracts and the rights growing out of them are assignable.").

Those settlors that oppose these new opportunities can build those restrictions into the trust agreement—contracts can (and frequently do) have terms that restrict assignability.[135] For example, if a settlor did not like the idea of his grandson selling his interest in trust income for a new car, the trust agreement could easily have a few sentences either limiting or completely restricting a beneficiary's right to sell or otherwise transfer the rights under that instrument.

On the other hand, those who want to embrace the contractual nature of trusts can permit beneficiaries to sell their beneficial interest on the market. Again, the flexibility of contracts resolves a potential issue.

V. Conclusion

While trusts have been around for nearly 1,000 years,[136] American courts have struggled with identifying precisely what they are.[137] While trusts resemble corporations in some ways, and in fact have been used as alternatives to corporations,[138] they are not afforded corporation-like treatment under the law.[139] Thus, trusts are best categorized as third-party beneficiary contracts because they meet the requirements for such treatment under basic common law principles.[140]

Judicial recognition of the contractual nature of trusts would be positive for the trust law field because it would allow for new ways to modify or contest irrevocable trusts, as well as give certainty as to the legal effect of innovative provisions in trust agreements such as arbitration and mediation clauses.[141] However, the best reason for contractual treatment of trusts is not because it is preferable as a matter of public policy—it is because it is the logical answer under the law.

Many fields, from tort law[142] to constitutional law,[143] have pieces of contract law within them. However, under the basic contract law principles of offer, acceptance, and consideration, it is not merely a 1L-level exam answer that trusts are simply another manifestation of contracts. It is elementary that they clearly are.

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[135] *See* Ohio Pub. Works Comm'n v. Vill. of Barnesville, 223 N.E.3d 346, 354 (Ohio 2022) ("[N]o rule, statute, or other authority supports a complete ban on transfer restrictions.") (quoting Siltstone Res., L.L.C. v. Ohio Pub. Works Comm'n, 200 N.E.3d 125, 134 (Ohio 2022)).
[136] Whitman, *supra* note 8, at 389–90.
[137] *See*, *e.g.*, Swartz v. Sher, 184 N.E.2d 51, 53 (Mass. 1962).
[138] Orbach & Rebling, *supra* note 17.
[139] *See Swartz*, 184 N.E.2d at 53.
[140] *Supra* Part III.
[141] *Supra* Part IV.
[142] Meade v. City of Rockford, 40 N.E.3d 141, 152 (Ill. App. Ct. 2015).
[143] Cruz-Guzman v. State, 998 N.W.2d 262, 287 (Minn. 2023).