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# A Minor Problem with Arbitration: A Proposal for Arbitration Agreements Contained in Employment Contracts of Minors


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# A Minor Problem with Arbitration: A Proposal for Arbitration Agreements Contained in Employment Contracts of Minors

Richard A. Bales\* and Matthew Miller-Novak\*\*

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### ABSTRACT

*The Supreme Court has interpreted the Federal Arbitration Act (FAA) as strongly favoring the enforcement of arbitration agreements. An issue that the Supreme Court has not yet addressed—and on which state and federal courts are split—is the enforceability of employment arbitration agreements signed by minors. This Article argues that arbitration agreements in minors’ employment contracts should be voidable, with three exceptions: when (1) the arbitration agreement (or container employment agreement) is signed by the minor’s guardian on the minor’s behalf, (2) the minor is emancipated, or (3) the minor is suing to enforce the employment contract.*

### I. INTRODUCTION

Susie has just been hired at the local diner. She is sixteen years old. Every weekend, Susie wakes up and goes to the diner to serve breakfast. Unfortunately, one of the cooks begins making overtly sexual comments to Susie. Eventually, he begins touching her inappropriately. Susie mentions this conduct to the manager, but the manager fires her for being a “trouble-maker.” Her attorney files a complaint in court, and the diner’s attorney files a motion to compel arbitration because Susie had signed an arbitration agreement in her employment contract with the diner. Susie’s attorney replies to the court that Susie is a minor and that minors’ contracts are voidable. The court is now faced with the question of whether an arbitration agreement contained within an employment contract can be enforced against a minor.

The enforcement of arbitration agreements is favored by the Supreme Court of the United States<sup>1</sup> regardless if the underlying claim is contractual or a statutory discrimination claim.<sup>2</sup> Courts have generally not enforced arbitration agreements against minors.<sup>3</sup> However, courts addressing arbitration agreements

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1. See *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 26 (2011) (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985)) (holding that when a complaint contains both arbitrable and nonarbitrable claims, the FAA requires courts to compel arbitration of pendent arbitrable claims when a party files a motion to compel, even where the result would be an inefficient resolution of a dispute involving separate forums); see also *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (stating that there is a liberal federal policy favoring arbitration agreements); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (stating that the FAA was designed to overrule the judiciary’s history of refusing to enforce arbitrate agreements).

2. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (holding that an arbitration was an appropriate forum to litigate a claim of age discrimination); see also *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (holding that an arbitration agreement may cut off a claimant’s right to create a class action and that “States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons”).

3. *H & S Homes, L.L.C. v. McDonald*, 823 So. 2d 627, 630 (Ala. 2001) (“[I]nfancy is a valid defense to the enforcement of a properly supported motion to compel arbitration of disputes arising out of a contract.”); see

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within minors' *employment* contracts have been inconsistent. One federal district court and one state court have compelled arbitration agreements included in minors' employment contracts.<sup>4</sup> One federal district court and one state court have refused to compel minors' arbitration agreements in employment contracts.<sup>5</sup>

This Article argues that, with certain exceptions, arbitration agreements should be enforced against a minor only if that minor's parent has signed the agreement on the minor's behalf. Part II of this Article discusses the development of arbitration enforceability. Part III briefly explains minors' place in contract law. Part IV discusses the cases on-point relating to arbitration agreements contained within the employment contracts of minors. Part V analyzes the cases on point and proposes a solution for the courts.

## II. BRIEF DISCUSSION OF THE ENFORCEABILITY OF ARBITRATION AGREEMENTS

### A. *The Federal Arbitration Act*

At common law, courts were hostile to arbitration agreements.<sup>6</sup> Either party could revoke an arbitration agreement so long as the arbitrator had not yet issued an award.<sup>7</sup> However, the Federal Arbitration Act (FAA), which was "enacted in 1925 and re-codified in 1947, however, required courts to enforce arbitration agreements related to commerce and maritime transactions."<sup>8</sup> Up to the mid-1950s, arbitration clauses were found in commercial contracts where commercial parties specifically sought them.<sup>9</sup> However, the Supreme Court radically widened this narrow reach of arbitration in the following decades.<sup>10</sup>

The Supreme Court has held that the legislative history of the FAA establishes that it was created to ensure "judicial enforcement of privately made agreements to arbitrate."<sup>11</sup> Furthermore, the FAA only mandates the arbitration of

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*also* Wilkie *ex rel.* Wilkie v. Hoke, 609 F. Supp. 241, 242 (W.D.N.C. 1985) (holding that an arbitration agreement is voidable by a minor).

4. Sheller *ex rel.* Sheller v. Frank's Nursery & Crafts, Inc., 957 F. Supp. 150 (N.D. Ill. 1997); Douglass v. Pflueger Haw., Inc., 135 P.3d 129, 138 (Haw. 2006) ("[T]he infancy doctrine . . . is not applicable in the employment context.").

5. Stroupes v. Finish Line, Inc., No. 1:04-cv-133, 2005 WL 5610231 (E.D. Tenn. Mar. 16, 2005); *In re Mexican Rests., Inc.*, Nos. 11-04-00154-CV, 11-04-00155-CV, 2004 WL 2850151 (Tex. Ct. App. Dec. 2, 2004).

6. Richard A. Bales, *Contract Formation Issues in Employment Arbitration*, 44 BRANDEIS L.J. 415, 418 (2006) [hereinafter Bales, *Contract Formation Issues*].

7. Richard A. Bales, *The Laissez-Faire Arbitration Market and the Need for a Uniform Federal Standard Governing Employment and Consumer Arbitration*, 52 U. KAN. L. REV. 583, 588 (2004).

8. *Id.*

9. Drew M. Gulley, Note, *The Enhanced Arbitration Appeal Amendment: A Proposal to Save American Jurisprudence from Arbitration, Modeled on the English Arbitration Act of 1996*, 36 HOFSTRA L. REV. 1095, 1100 (2008).

10. *Id.*

11. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985).

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claims upon the motion of a party to a “privately negotiated arbitration agreement[.]”<sup>12</sup> The Court has looked to the House Report accompanying the FAA as clarifying “that its purpose was to place an arbitration agreement ‘upon the same footing as other contracts, where it belongs, and to overrule the judiciary’s longstanding refusal to enforce’” arbitration agreements.<sup>13</sup>

The FAA Section 2 savings clause provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>14</sup> The Supreme Court has taken this to mean that when a court decides “whether the parties agreed to arbitrate a certain matter, courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.”<sup>15</sup> The Court has also expanded the FAA to apply to statutory claims<sup>16</sup> and has held that the FAA preempts state laws targeting arbitration agreements.<sup>17</sup>

#### B. Supreme Court’s Favor of Arbitration Agreements

In *Wilko v. Swan*, the Supreme Court held that the Securities Act voids stipulations that prospectively waive “judicial trial and review.”<sup>18</sup> Consequently, the lower federal courts “interpreted *Wilko* as creating a ‘public policy’ defense to the enforcement of arbitration agreements . . . when statutory claims were at issue.”<sup>19</sup>

Title VII, enacted in 1964, prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin.”<sup>20</sup> Subsequently, other federal statutes extended legal protection to include age,<sup>21</sup> pregnancy,<sup>22</sup> and disability.<sup>23</sup> State legislatures also began to pass similar statutes.<sup>24</sup> This explosion in employment rights founded in federal statutory law was followed by a steep increase in employment claims.<sup>25</sup>

Consequently, whether or not these statutory rights could be arbitrated was soon at issue. In 1974, the Supreme Court in *Alexander v. Gardner-Denver Co.*

12. *Id.*

13. *Id.* (citing H.R. Rep. No. 96, 68th Cong., 1st Sess., at 1 (1924)).

14. 9 U.S.C. § 2 (2006) (emphasis added); *see also* Bales, *Contract Formation Issues*, *supra* note 6, at 418 (citing 9 U.S.C. § 2).

15. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

16. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

17. Bales, *Contract Formation Issues*, *supra* note 6, at 422.

18. 346 U.S. 427, 437, 438 (1953); *see also* Bales, *Contract Formation Issues*, *supra* note 6, at 418.

19. Bales, *Contract Formation Issues*, *supra* note 6, at 419.

20. 42 U.S.C. § 2000e-2 (2006).

21. Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (2006).

22. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k).

23. 42 U.S.C. §§ 12101–13.

24. Bales, *Contract Formation Issues*, *supra* note 6, at 419.

25. *Id.*

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held that an employee did not waive his statutory discrimination claim by first submitting to arbitration pursuant to a collective bargaining agreement.<sup>26</sup> Subsequently, however, in the *Mitsubishi* Trilogy, the Court overruled *Wilko* and enforced arbitration agreements concerning antitrust, securities, and racketeering statutory claims.<sup>27</sup> The Court reasoned that “we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.”<sup>28</sup>

Thereafter, in a landmark decision, the Court held that arbitration agreements would be binding upon statutory claims.<sup>29</sup> In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court required a non-union employee to arbitrate rather than litigate an age discrimination claim due to a pre-dispute arbitration agreement that he signed as a condition of his employment.<sup>30</sup> The Court reasoned that an agreement to arbitrate a statutory claim is not to surrender a right to a claim, but it is an agreement to resolve the claim in a venue other than the courts.<sup>31</sup>

In general, the Court has stated that the reading of an arbitration agreement should be liberal and favor its enforcement.<sup>32</sup> This makes any agreement to arbitrate binding on the parties despite state policies contrary to enforcement.<sup>33</sup> Although the intentions of contracting parties remain important, their intentions are construed as to favor arbitrability.<sup>34</sup>

### C. *The FAA and Preemption*

In *Southland v. Keating*, a number of franchisees sued a franchisor claiming it had violated certain disclosure requirements of the California Franchise Investment Law.<sup>35</sup> Despite the arbitration clause, the California Supreme Court held that the claims were not arbitrable.<sup>36</sup> The California Supreme Court based its decision on a provision in the California Franchise Investment Law that declared

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26. 415 U.S. 36, 38, 60 (1974).

27. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

28. *Mitsubishi Motors Corp.*, 473 U.S. at 626–27. *See generally* Bales, *Contract Formation Issues*, *supra* note 6, at 419–20 (discussing the Supreme Court’s jurisprudence concerning arbitration of statutory claims).

29. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

30. *Id.* at 23–27.

31. *Id.* at 26; *see also Mitsubishi Motors Corp.*, 473 U.S. at 628 (stating that when a person agrees to arbitrate, they do not give up a substantive right, he only agrees to an arbitral venue to state his claim).

32. *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983).

33. *Id.*

34. *Mitsubishi Motors Corp.*, 473 U.S. at 626.

35. 465 U.S. 1, 3–4 (1984).

36. *Id.* at 5.

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void “[a]ny condition, stipulation or provision purporting . . . to waive compliance with any provision of this law.”<sup>37</sup> The California statute demanded judicial consideration of franchisor-franchisee disputes.<sup>38</sup> Because the arbitration provision waived the right to a jury trial, the California Supreme Court held that the arbitration clause “was void under the anti[-]waiver provision.”<sup>39</sup>

The United States Supreme Court reversed the decision and held that the FAA applied in state court and it preempted the California statute’s anti-waiver provision.<sup>40</sup> The Court concluded that in enacting Section 2 of the FAA, Congress declared a national policy favoring arbitration and intended to limit the power of the states to require a judicial forum for the resolution of claims that the contracting parties had agreed to arbitrate.<sup>41</sup>

Thereafter, in *Perry v. Thomas*, the Court held that the FAA preempted a California statute that enabled suits to collect wages regardless of the existence of any private agreement to arbitrate.<sup>42</sup> In a footnote, the Court stated that general defenses to contracts, such as unconscionability, are available if the defenses are used to govern general issues concerning the validity, revocability, and enforceability of contracts.<sup>43</sup> However, the Court stated that a court may not focus on an agreement to arbitrate in and of itself as a basis for holding that an agreement is unconscionable.<sup>44</sup>

In *Allied-Bruce Terminix Cos. v. Dobson*, the Court again enforced an arbitration clause.<sup>45</sup> The arbitration agreement, despite an Alabama law precluding the enforcement of such arbitration agreements, was contained within a home extermination contract.<sup>46</sup> While summarizing the FAA Section 2 savings clause, the Court held that states may regulate contracts, including arbitration clauses, under general principles of contract, and states may invalidate an arbitration clause “upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>47</sup> However, states may not decide that a contract is fair enough to enforce while refusing to enforce an arbitration agreement

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37. *Id.* at 10 (quoting CAL. CORP. CODE ANN. § 31512 (West 1977)).

38. *Id.*

39. *Id.*

40. *Id.* at 10–16.

41. *See id.* *See generally* Bales, *Contract Formation Issues*, *supra* note 6, at 422.

42. 482 U.S. 483, 491 (1987).

43. *Id.* at 492 n.9; Bales, *Contract Formation Issues*, *supra* note 6, at 423 (citing *Perry*, 482 U.S. at 492).

44. *Perry*, 482 U.S. at 492 n.9; Bales, *Contract Formation Issues*, *supra* note 6, at 423 (citing *Perry*, 482 U.S. at 492).

45. 513 U.S. 265 (1995).

46. *Id.*; Bales, *Contract Formation Issues*, *supra* note 6, at 423.

47. *Allied-Bruce*, 513 U.S. at 281 (emphasis and internal quotation marks omitted); Bales, *Contract Formation Issues*, *supra* note 6, at 423.

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contained within it.<sup>48</sup> Any such state policy contradicts the FAA because such a policy would place arbitration clauses on an unequal footing.<sup>49</sup>

In *Doctor's Associates, Inc. v. Casarotto*, the Supreme Court invalidated a Montana statute that required an arbitration clause to be “typed in underlined capital letters on the first page of the contract.”<sup>50</sup> The Montana Supreme Court had held that the notice provision was consistent with the FAA and was consequentially not preempted.<sup>51</sup> The Montana Court had concluded that the goal of the FAA was to promote arbitration that was knowingly agreed to by the parties; however, it was not the FAA’s goal to do so at any cost.<sup>52</sup> The United States Supreme Court rejected this argument and held that any state judicial or legislative law that specifically targeted voiding arbitration agreements, rather than contracts in general, was preempted by the FAA, regardless of whether the purpose of the law was to promote the “knowing choice of arbitration.”<sup>53</sup>

More recently, in *Green Tree Financial Corp. v. Bazzle*, the Court addressed whether a state court could order class-wide arbitration.<sup>54</sup> Reasoning that the arbitration agreement at issue did not address a class-wide arbitration, the South Carolina Supreme Court ordered the arbitration.<sup>55</sup> In a plurality opinion, the United States Supreme Court held that the arbitrator, instead of the state court, should decide whether an arbitration agreement permits class-wide arbitration.<sup>56</sup> However, three dissenters argued that the state court “imposed a regime that was contrary to the express agreement of the parties as to how the arbitrator would be chosen,” and that, therefore, the FAA preempted the order of class-wide arbitration.<sup>57</sup>

In *Preston v. Ferrer*, the Court addressed the issue of whether the FAA preempted a state law requiring parties to have their claims decided by an administrative board.<sup>58</sup> In *Preston*, an attorney who provided services for Ferrer (“Judge Alex”) in the television industry initiated an arbitration proceeding against Ferrer for claims relating to fees under their contract.<sup>59</sup> The Court held that when parties agree to arbitrate all claims arising from a contract, the FAA

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48. *Allied-Bruce*, 513 U.S. at 281; Bales, *Contract Formation Issues*, *supra* note 6, at 423.

49. *Allied-Bruce*, 513 U.S. at 281; Bales, *Contract Formation Issues*, *supra* note 6, at 423; *see also* 9 U.S.C. §§ 1–16 (2006).

50. 517 U.S. 681, 684, 688 (1996) (internal quotation marks omitted) (quoting MONT. CODE ANN. § 27-5-144 (4) (1993)); Bales, *Contract Formation Issues*, *supra* note 6, at 424.

51. *Doctor's Assocs. Inc.*, 517 U.S. at 685.

52. *See id.* at 684–85; Bales, *Contract Formation Issues*, *supra* note 6, at 424.

53. *Doctor's Assocs. Inc.*, 517 U.S. at 688; Bales, *Contract Formation Issues*, *supra* note 6, at 424.

54. 539 U.S. 444, 447 (2003).

55. *Id.* at 450.

56. *Id.* at 454.

57. *Id.* at 459–60 (Rehnquist, C.J., and O'Connor & Kennedy, JJ., dissenting); *see also* Bales, *Contract Formation Issues*, *supra* note 6, at 424.

58. 552 U.S. 346, 346–48 (2008).

59. *Id.*



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preempts state laws requiring another forum, “whether judicial or administrative.”<sup>60</sup>

Recently, in *AT&T Mobility LLC v. Concepcion*, the Court expanded the FAA’s preemption to address a general California state policy against class-action waivers in adhesion consumer contracts.<sup>61</sup> This particular AT&T arbitration agreement provided that all consumer claims would be subject to arbitration and that class-wide arbitration would not be permitted, which was contrary to California law generally prohibiting class-action waivers in consumer adhesion contracts.<sup>62</sup> The Court held that while the FAA allowed for general state contract laws that apply to *any* contract to invalidate an arbitration agreement, “nothing in [the FAA] suggests the intent to preserve [state contract laws] that stand as an obstacle to the accomplishment of the FAA’s objectives.”<sup>63</sup> Since the goal of arbitration is to provide a process more expedient than litigation, the Court held that a law refusing to recognize a class-action waiver is repugnant to the goals of the FAA.<sup>64</sup>

Finally, in 2012, the Court established that a state public policy against the arbitration of wrongful death claims regarding nursing homes was preempted by the FAA.<sup>65</sup> In *Marmet Health Care Center, Inc. v. Brown*, three plaintiffs sued a nursing home for the death of a family member due to negligent conduct.<sup>66</sup> The West Virginia Supreme Court invalidated the arbitration agreements contained on the entrance application due to a state policy against the arbitration of such claims.<sup>67</sup> The United States Supreme Court vacated the ruling on grounds that the state policy specifically targeted an arbitration agreement and therefore was preempted by the FAA.<sup>68</sup>

Thus, general state contract law may defeat the enforcement of an arbitration agreement.<sup>69</sup> However, any state law specifically targeting the enforcement of an arbitration agreement will be preempted by the FAA.<sup>70</sup> Furthermore, state policy that acts as an “obstacle” to the goals of the FAA may also be preempted by the FAA.<sup>71</sup>

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60. *Id.* at 359.

61. 131 S. Ct. 1740 (2011). *See generally* Ian D. Mitchell & Richard A. Bales, *Concepcion and Preemption Under the Federal Arbitration Act*, 2012 PENN. ST. Y.B. ON ARB. & MED. (forthcoming 2013) (on file with the *McGeorge Law Review*).

62. *Concepcion*, 131 S. Ct. at 1744.

63. *Id.* at 1748.

64. *See id.* at 1749.

65. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012).

66. *Id.* at 1201–03.

67. *Id.* at 1203.

68. *Id.* at 1204.

69. *See, e.g., supra* notes 45–49.

70. *See Marmet Health Care Ctr., Inc.*, 132 S. Ct. at 1204.

71. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).

### III. BACKGROUND OF MINORS' OBLIGATIONS IN CONTRACT AND ARBITRATION AGREEMENTS

#### A. *The Infancy Doctrine and the Doctrine of Necessities*

Society has a natural inclination to want to protect its children, and the law of contracts is no exception. The infancy doctrine is designed to protect minors in their dealings with adults.<sup>72</sup> Generally, minors do not have the capacity to enter into a valid contract, and contracts created by minors are considered voidable when the minor reaches the age of majority, as opposed to automatically void at the time the contract is formed.<sup>73</sup> Minors are able to disaffirm their contracts during minority, majority, or within a reasonable time after emancipation, but minors may also ratify their contracts after reaching the age of majority.<sup>74</sup> Nevertheless, while a minor can disaffirm his or her own contract, a minor cannot disaffirm a contract made by a parent or guardian on his or her behalf.<sup>75</sup>

Contracts for necessities are an exception to the infancy doctrine.<sup>76</sup> The term "necessities" refers to articles and services that are required for the minor's well-being.<sup>77</sup> Classifying an article as a necessity depends on the "actual need" for that article by the minor, rather than just the nature of the article the minor contracted for.<sup>78</sup> To determine if the minor has actual need for the article, the courts often look at the circumstances existing at the time the minor receives delivery of the article.<sup>79</sup> This concept of actual need is directly addressed in some state statutes that require a minor to be emancipated for a contract to be deemed one of necessity.<sup>80</sup> Furthermore, in multiple jurisdictions, courts will not hold a contract

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72. *Michaelis v. Schori*, 24 Cal. Rptr. 2d 380, 381 (Ct. App. 1993) ("It is the policy of the law to protect a minor against himself and his indiscretions and immaturity as well as against the machinations of other people and to discourage adults from contracting with an infant.").

73. See 1 DONALD T. KRAMER, *Legal Rights of Children* § 10:1 (Rev. 2d ed. West 2005).

74. *Id.*

75. *Id.*

76. *Id.* § 10:2.

77. *Id.* § 10:2 n.2.

78. 42 AM. JUR. 2d *Infants* § 61.

79. *Id.*

80. CAL. FAM. CODE § 6712 (West 2004).

A contract, otherwise valid, entered into during minority, may not be disaffirmed on that ground either during the actual minority of the person entering into the contract, or at any time thereafter, if all of the following requirements are satisfied: (a) The contract is to pay the reasonable value of things necessary for the support of the minor or the minor's family. (b) These things have been actually furnished to the minor or to the minor's family. (c) The contract is entered into by the minor when not under the care of a parent or guardian able to provide for the minor or the minor's family.

*Id.*; see also N.D. CENT. CODE ANN. § 14-10-12 (West 2004) ("A minor cannot disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for the minor's support or that of the minor's family, if such contract is entered into by the minor when not under the care of a parent, guardian, or conservator able to provide for such minor or the minor's family.").

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to be one for necessities if the minor has a parent or guardian who is able to pay for them.<sup>81</sup> Other situations, such as homelessness, may require courts to enforce minors' contracts.<sup>82</sup> Several states have created statutory rules demanding that emancipated minors' contracts regarding certain transactions are to be enforced.<sup>83</sup>

As an example, an Oregon statute makes a minor's contract for an apartment enforceable if the minor is over sixteen years old.<sup>84</sup> The purpose of this statute is to combat the problem of homeless minors.<sup>85</sup> Absent the assurance this Oregon statute provides, a landlord would find a lease with a minor undesirable because the lease would work only one way: the lease would be binding on the landlord, but it would not be binding on the minor. The purpose of this legislation is to encourage landlords to lease to minors by assuring landlords that the contracts will be enforceable.<sup>86</sup> As another example of such legislation, Texas allows a minor to remove his or her "disabilities" to contract if he or she is emancipated under its code.<sup>87</sup>

#### B. Arbitration Agreements and Minors

Like contracts in general, a minor may typically void arbitration agreements.<sup>88</sup> However, contracts entered into by a legal guardian on behalf of a minor can be enforceable against the minor,<sup>89</sup> and several courts have followed this principle by allowing parents to bind their minor children into arbitration agreements for medical treatment.<sup>90</sup> Thus, minors who normally would not have the capacity to contract, and who normally are protected from waivers of their

81. See, e.g., *Young v. Weaver*, 883 So. 2d 234, 238–40 (Ala. Civ. App. 2003).

82. See, e.g., OR. REV. STAT. § 109.697 (2011).

83. See, e.g., *id.*; TEX. FAM. CODE ANN. § 31.001(a) (West 2008).

84. OR. REV. STAT. § 109.697.

85. *Id.* (“[T]he Legislative Assembly finds that there are in the State of Oregon unemancipated minors who are living apart from their parents and are homeless. Many of these minors are able financially to provide housing and utility services for themselves and their children, but cannot contract for these necessities due to perceived legal limitations affecting contracts with minors. The purpose of this legislation is to address those limitations.”).

86. *Id.*

87. TEX. FAM. CODE ANN. § 31.001(a) (“A minor may petition to have the disabilities of minority removed for limited or general purposes if the minor is: a resident of the state; 17 years of age, or at least 16 years of age and living separate and apart from the minor’s guardian; and self-supporting and managing the minor’s own financial affairs.”).

88. *Wilkie ex rel. Wilkie v. Hoke*, 609 F. Supp. 241, 242 (W.D.N.C. 1985) (“Under common law, plaintiff, as a minor, can elect to void the agreement to arbitrate controversies.”); see also *H & S Homes, L.L.C. v. McDonald*, 823 So. 2d 627, 630 (Ala. 2001) (“[I]nfancy is a valid defense to the enforcement of a properly supported motion to compel arbitration of disputes arising out of a contract.”).

89. *Latham v. Wedeking*, 412 N.W.2d 225, 227 (Mich. Ct. App. 1987); see also *Doyle v. Giuliucci*, 401 P.2d 1, 3 (Cal. 1965); George K. Walker, *Family Law Arbitration: Legislation and Trends*, 21 J. AM. ACAD. MATRIMONIAL LAW. 521, 625 (2008) (“South Dakota legislation allows natural parents with custody of a minor child to enter into a binding arbitration agreement on behalf of the child for medical services.”).

90. See, e.g., *Doyle*, 401 P.2d at 3.

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rights by a parent, may still be bound to the terms of a contract for medical necessities.<sup>91</sup> Public policy compels this rule; otherwise, minors would regularly disaffirm medical-care contracts and “medical groups would be disinclined to extend such protection to minors.”<sup>92</sup> Any contract that medical groups enter into regarding the treatment of minors would work only one way: the treating medical group would be subject to any liabilities resulting from the treatment, but the minor would not be bound to his or her obligations contained within the contract.

A California appellate court extended a parent’s ability to bind a minor child to an arbitration agreement beyond the parent’s living children to children that will be born to the parent in the future.<sup>93</sup> If a parent seeks medical treatment and agrees to arbitrate any claims resulting from the treatment, the parent’s children would also need to arbitrate any claim resulting from the treatment of the parent. This principle applies to all claims that could arise out of the medical treatment.<sup>94</sup> Consequently, if a parent’s child were to bring a wrongful death action due to a mishap of her parent’s treatment, the action would be bound by the parent’s agreement to arbitrate the claim, regardless of whether the child was born or unborn at the time the parent signed the agreement.<sup>95</sup> However, the action is not bound by the parent’s agreement to arbitrate the claim if the child is no longer a minor.<sup>96</sup>

A parent’s ability to bind a minor to arbitration can be considered “implicit in the parent’s right and duty to care for the child.”<sup>97</sup> The strong impact of a parent’s review of a contract is the assurance that somebody the law recognizes as able to enter into binding agreements is representing a vulnerable minor.<sup>98</sup> When deciding whether to enforce a minor’s arbitration agreement regarding medical treatment, the courts and state legislatures have balanced the pressing concerns of protecting minors and the doctors’ concern for medical malpractice costs.<sup>99</sup>

However, courts are split on whether to enforce an arbitration agreement against a minor when the arbitration clause is contained within an employment contract. Two courts have held that arbitration agreements in employment

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91. *MN MedInvest Co. v. Estate of Nichols ex rel. Nichols*, 908 So. 2d 1178, 1179 (Fla. Dist. Ct. App. 2005).

92. *Allgor v. Travelers Ins. Co.*, 654 A.2d 1375, 1379 (N.J. Super. Ct. App. Div. 1995).

93. *See Bolanos v. Khalatian*, 283 Cal. Rptr. 209, 212 (Ct. App. 1991) (“We see no logic in not applying this subdivision for medical services to a minor who at the time was unborn.”).

94. *Id.*

95. *Id.*

96. *Buckner v. Tamarin*, 119 Cal. Rptr. 2d 489, 492 (Ct. App. 2002).

97. Jennie K. Ferguson, *Can Arbitration Play a Saving Role in Women’s Health? The Use of Arbitration in the OB/GYN Specialty*, 21 OHIO ST. J. ON DISP. RESOL. 1005, 1026 (2006).

98. *Id.*

99. *Crown ex rel. Comfort v. Shafadeh*, 403 N.W.2d 465, 466 (Mich. Ct. App. 1986) (holding that because the state legislature had an important interest in enforcing arbitration agreements regarding medical malpractice, compelling a minor to arbitrate when parents signed was not in violation of the Equal Protection Clause).

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contracts should be enforced against minors.<sup>100</sup> Two other courts have refused to enforce arbitration agreements against a minor regardless of the agreement's position within an employment contract.<sup>101</sup>

#### IV. ENFORCEABILITY OF AN ARBITRATION AGREEMENT IN A MINOR'S EMPLOYMENT CONTRACT

This Article will now discuss the four decisions that have directly addressed whether an arbitration agreement contained within a minor's employment contract should be enforceable against the minor. This Part will first discuss the cases that determined that the arbitration agreement was enforceable against the minor. This Part will then discuss the cases where the arbitration agreement was held not to be enforceable.

##### A. Courts Enforcing Arbitration Agreements Against Minors

In *Sheller ex rel. Sheller v. Frank's Nursery & Crafts, Inc.*, the Northern District Court of Illinois refused to allow minors to disaffirm their agreement to arbitrate claims arising from their employment.<sup>102</sup> The defendant, Frank's Nursery & Crafts, Inc., employed plaintiffs Rebecca Bennett and Kimberly Sheller before firing them when the two girls were both minors.<sup>103</sup>

Rebecca and Kimberley's signed employment application provided:

[A]ny claim that I may wish to file against the Company . . . must be submitted for binding and final arbitration before the American Arbitration Association; arbitration will be the exclusive remedy for any and all claims unless prohibited by applicable law. \* \* \* I have reviewed, understand and agree to the above.<sup>104</sup>

After their termination, Rebecca and Kimberly filed a sexual discrimination claim with the Equal Employment Opportunity Commission (EEOC) and the Illinois Department of Human Rights.<sup>105</sup> The EEOC then issued a right-to-sue letter, which allowed the girls to proceed in court rather than through the Commission.<sup>106</sup>

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100. See *Douglass v. Pflueger Haw., Inc.*, 135 P.3d 129, 145 (Haw. 2006); see also *Sheller ex rel. Sheller v. Frank's Nursery & Crafts, Inc.*, 957 F. Supp. 150, 154 (N.D. Ill. 1997); see also *infra* Part IV.A.

101. *In re Mexican Rests.*, Nos. 11-04-00154-CV, 11-04-00155-CV, 2004 WL 2850151, at \*2 (Tex. Ct. App. Dec. 2, 2004); see also *Stroupes v. Finish Line, Inc.*, No. 1:00-cv-133, 2005 WL 5610231, at \*6 (E.D. Tenn. Mar. 16, 2005); see also *infra* Part IV.B.

102. 957 F. Supp. at 153.

103. *Id.* at 152.

104. *Id.* (internal quotation marks omitted) (omissions in original).

105. *Id.*

106. *Id.*

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Rebecca and Kimberly subsequently sued in federal court, claiming sexual harassment under Title VII of the Civil Rights Act.<sup>107</sup> Rebecca and Kimberly alleged that “they were subjected to a constant hostile work environment due to the sexual harassment by Defendant’s assistant manager” during the course of their employment.<sup>108</sup> In its opinion, the court addressed whether the plaintiffs’ status as minors rendered the arbitration clause voidable.<sup>109</sup>

The parties agreed that state law determines whether a contractual arbitration clause is binding as to a minor.<sup>110</sup> The court acknowledged that under the infancy doctrine, with an exception for necessities, a minor’s contract is “voidable and may be repudiated by the minor during minority or within a reasonable time upon achieving majority absent a ratification.”<sup>111</sup> The court stated that “[t]he infancy law doctrine exists to protect the inexperienced minor from the consequences of dealing with” more experienced adults.<sup>112</sup> The court also stated that the minor’s right to repudiate existed despite the potential for harm to the other contracting party.<sup>113</sup> However, the court stated that a minor could use the infancy doctrine only as a “shield” and never as a “sword.”<sup>114</sup>

The court reasoned that permitting Rebecca and Kimberly to void their contract would be “inconsistent with the public policy reasons underlying the infancy law doctrine.”<sup>115</sup> Even though the court recognized that the rationale behind the infancy doctrine is to protect the inexperienced minors in their dealings with others, the court stated that Rebecca and Kimberly’s status as minors was “irrelevant to their signing of the employment application agreeing to arbitrate all claims against the company.”<sup>116</sup> The court noted that Frank’s Nursery also required its adult employees to sign the same contract.<sup>117</sup> Because Rebecca and Kimberly would not have been employed or have been able to bring the suit unless they signed the arbitration agreement, the court found that the two minors

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107. *Id.* (bringing suit pursuant to 42 U.S.C. § 2000e).

108. *Id.*

109. *Id.* at 153.

110. *Id.*

111. *Id.* (internal quotation marks omitted) (quoting *Iverson v. Scholl, Inc.*, 483 N.E.2d 893, 897 (Ill. App. Ct. 1985)).

112. *Id.* (citing *Old Mutual Casualty Co. v. Clark*, 368 N.E.2d 702, 705 (Ill. App. Ct. 1977)); *see also Iverson*, 483 N.E.2d at 897.

113. *Sheller*, 957 F. Supp. at 153 (citing *Iverson*, 483 N.E.2d at 897).

114. *Id.* (internal quotation marks omitted) (quoting *Shepherd v. Shepherd*, 97 N.E.2d 273, 282 (Ill. 1951)) (arguing that “a minor’s right to [disaffirm upon coming of age, like the right to] disaffirm in any other case, should be exercised with some regard to the rights of others, certainly with as much regard to those rights as is fairly consistent with adequate protection of the rights of the minor himself”).

115. *Id.*

116. *Id.*

117. *Id.* at 154.

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would retain an advantage from a transaction they had repudiated.<sup>118</sup> The court concluded that Illinois law would not permit such a thing to occur.<sup>119</sup>

Similarly, in *Douglass v. Pflueger Hawaii, Inc.*, the Supreme Court of Hawai'i followed in *Sheller's* footsteps and enforced against a minor an arbitration agreement within an employment contract.<sup>120</sup> The defendant, Pflueger Acura, hired the plaintiff, Adrian Douglass, as a lot technician at its car lot in Honolulu, Hawai'i.<sup>121</sup> Adrian was less than four months shy of his eighteenth birthday at the time Pflueger hired him.<sup>122</sup> Adrian attended an employee orientation and was issued "Pflueger's Employee Handbook."<sup>123</sup> The Employee Handbook contained "policies and procedures regarding Pflueger's anti-harassment/discrimination policies and an arbitration provision."<sup>124</sup> The provision provided that "[a]ny and all claims arising out of the employee's employment with the Company and his/her termination shall be settled by final binding arbitration in Honolulu, Hawai'i, in accordance with the arbitration provisions of the Federal Arbitration Act and the rules and protocol prevailing with the American Arbitration Association."<sup>125</sup>

After receiving the Employee Handbook, Adrian "was injured on the job when a coworker sprayed him in the buttocks with an air hose."<sup>126</sup> Subsequently, Adrian complained of the conduct to the Hawai'i Civil Rights Commission (HCRC).<sup>127</sup> The HCRC issued Adrian a right-to-sue letter in response to his election to pursue the matter in court rather than through the Commission.<sup>128</sup> Thereafter, Adrian sued Pflueger in the circuit court.<sup>129</sup> The complaint asserted that the air-hose assault constituted a hostile work environment, sexual assault and discrimination, and negligent training and supervision.<sup>130</sup>

The Supreme Court of Hawai'i began by discussing the infancy doctrine and the general ability of minors to disaffirm their contracts.<sup>131</sup> The court continued by discussing the doctrine of necessities and the limited circumstances that minors may be bound to their contracts.<sup>132</sup> Specifically, the court discussed the

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118. *Id.*

119. *Id.*

120. 135 P.3d 129 (Haw. 2006).

121. *Id.* at 132.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 133.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 134–35.

132. *Id.* at 135.

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legislature's decision to carve out two exceptions to the infancy doctrine.<sup>133</sup> First, the legislature decided to bind minors to their contracts for medical treatment.<sup>134</sup> Second, the legislature decided that contracts entered into for treatment of alcohol and drug abuse would be binding upon minors.<sup>135</sup>

The court focused on the decision of the state legislature to no longer require certain work certificates once required of sixteen and seventeen year olds.<sup>136</sup> The court stated that "the legislature clearly viewed minors in this particular age group—being only one to two years from adulthood—as capable and competent to contract for gainful employment and, therefore, should be bound by the terms of such contracts."<sup>137</sup> The court also stated that such a contract for a minor under the age of sixteen signed by a parent on behalf of the minor would also be binding.<sup>138</sup> Finally, the court held that the general rule that allows a minor to disaffirm his or her contracts does not apply in the employment context.<sup>139</sup> Therefore, the court concluded that an arbitration agreement within a minor's employment contract is enforceable in Hawai'i.<sup>140</sup>

Despite this holding, the court did not force Adrian to arbitrate.<sup>141</sup> Pflueger gave Adrian the arbitration agreement within an employee handbook, and the court decided that Adrian was not put on proper notice of the arbitration agreement therein.<sup>142</sup> Furthermore, the employee handbook was subject to change at any time by Pflueger and was consequently held by the court to provide illusory consideration.<sup>143</sup> Even though the arbitration could have been enforced against Adrian, in the end he was not compelled to arbitrate because of consent and consideration issues.<sup>144</sup>

*B. Courts Not Enforcing Arbitration Agreements Against Minors*

Just as two courts have held that arbitration agreements are enforceable against minors, two courts also have held that such agreements are not enforceable. In *In re Mexican Restaurants, Inc.*, a Texas court of appeals refused

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133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 136–38.

137. *Id.* at 138.

138. *Id.*

139. *Id.*

140. *Id.*

141. *See id.* at 139–45.

142. *Id.* For a general discussion of notice issues arising in employment arbitration agreements, see Bales, *Contract Formation Issues*, *supra* note 6, at 434–58.

143. *Douglass*, 135 P.3d at 139–45. For a general discussion of the enforceability of arbitration agreements with unilateral-modification provisions, see Richard A. Bales & Michael L. DeMichele, *Unilateral-Modification Provisions in Employment Arbitration Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 63 (2006).

144. *Douglass*, 135 P.3d at 139–45.



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to enforce an arbitration agreement within an employment contract against two minor girls because the two girls were not emancipated.<sup>145</sup> “Elizabeth Kamali and Tab Kamali, as next friend of Priscilla Kamali, filed suit against Mexican Restaurants, Inc. . . . , Diamond Vinson, and Jerry McCord alleging sexual harassment, assault and battery, . . . as well as other tort and statutory claims.”<sup>146</sup> As part of their employment agreements, Elizabeth and Priscilla each signed an arbitration agreement with the restaurant.<sup>147</sup> The arbitration agreement stated “that the Federal Arbitration Act shall apply to all disputes arising under the agreement.”<sup>148</sup> When they signed their arbitration agreements, Elizabeth was seventeen and Priscilla was fifteen.<sup>149</sup> After the claim was filed, the trial court refused to compel arbitration because the arbitration agreement was voidable.<sup>150</sup> Disagreeing with the decision of the trial court, the restaurant filed for mandamus to order the district court to compel arbitration.<sup>151</sup>

On appeal, the restaurant took the position that the two girls were emancipated; they paid for their own apartment and helped support their parents.<sup>152</sup> Furthermore, the restaurant argued that one of the girls was the sole provider to her own dependent son.<sup>153</sup>

The appellate court stated that emancipation under Texas law required “an agreement by the parent to relinquish his parental rights to control the minor and to the minor’s services and earnings.”<sup>154</sup> Although the two girls lived apart from their father, the court recognized that the girls still turned their checks over to him and received an allowance.<sup>155</sup> Although the girls were able to support themselves and help support their father, the father still exercised control over the girls’ earnings; therefore, the court held that Elizabeth and Priscilla were not emancipated.<sup>156</sup> Consequently, because Texas law dictates that a minor’s contract is voidable unless the child is emancipated,<sup>157</sup> the court held that the arbitration agreement was not enforceable.<sup>158</sup>

Similarly, in *Stroupes v. Finish Line, Inc.*, the United States District Court for the Eastern District of Tennessee refused to enforce an arbitration agreement

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145. Nos. 11-04-00154-CV, 11094099155-CV, 2004 WL 2850151, at \*2 (Tex. Ct. App. Dec. 2, 2004).

146. *Id.* at \*1.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *See id.*

152. *Id.*

153. *Id.*

154. *Id.* (citing *Pioneer Casualty Co. v. Bush*, 457 S.W.2d 165, 168 (Tex. Civ. App. 1970)).

155. *Id.* at \*2.

156. *Id.*

157. TEX. FAM. CODE ANN. § 31.001 (West 2008).

158. *In re Mexican Rests., Inc.*, 2004 WL 2850151, at \*2.

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within a minor's employment contract.<sup>159</sup> Lindsey Stroupes was sixteen years old and a sophomore in high school.<sup>160</sup> Lindsey was hired by Finish Line and Anthony Bradley as a sales associate.<sup>161</sup> In connection with her new position, Lindsey signed an employment agreement.<sup>162</sup> The employment agreement required that "all claims against Finish Line be submitted to binding arbitration, as detailed in Finish Line's 'Employee Dispute Resolution Plan.'"<sup>163</sup> Lindsey subsequently alleged that Anthony Bradley sexually harassed her, "by requesting intimacies, by pursuing, and touching, and attempting to touch her body; by kissing her and embracing her, by telephoning her at home, and by stating that he desired to take her away," and "do other things to her."<sup>164</sup>

Lindsey sued Finish Line for sexual harassment, battery, and outrageous conduct.<sup>165</sup> Lindsey asserted that her employment contract was voidable pursuant to the infancy doctrine because she was sixteen years old when she began working at Finish Line.<sup>166</sup> Finish Line responded that the infancy doctrine should not apply to a minor's employment contracts, and supported this assertion by citing *Sheller*,<sup>167</sup> discussed above in Part III.A, and *Dodson v. Shrader*.<sup>168</sup> The court quickly distinguished *Dodson* because it involved a minor's purchase of goods, but it spent considerable time distinguishing *Sheller*.<sup>169</sup>

Although the court agreed with *Sheller* that the infancy doctrine should be "used as a shield and not a sword," the court did not agree that a minor is using the doctrine as a sword when the only issue addressed by the minor's use of the infancy doctrine is the appropriate forum to adjudicate a claim.<sup>170</sup> Moreover, the court did not agree with *Sheller* that a claimant's status as a minor is "irrelevant" if all employees, including adults, signed the same agreement.<sup>171</sup> The court was concerned that if it enforced the agreement against the minor because an adult had also signed the agreement, this reasoning could easily be extended from the

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159. No. 1:00-cv-133, 2005 WL 5610231, at \*6 (E.D. Tenn. Mar. 16, 2005).

160. *Id.* at \*2.

161. *Id.* at \*2-3.

162. *Id.* at \*3.

163. *Id.*

164. *Id.* at \*17.

165. *Id.* at \*15.

166. *Id.* at \*5-6.

167. *Id.* at \*6; *Sheller ex rel. Sheller v. Frank's Nursery & Crafts, Inc.*, 957 F. Supp. 150 (N.D. Ill. 1997).

168. 824 S.W.2d 545, 549 (Tenn. 1992) (holding that when a contract is a fair and reasonable one, and the minor has actually paid money and has used the article purchased, the minor could not recover the amount paid without allowing the vendor reasonable compensation for the use of, depreciation, and willful or negligent damage to the article purchased).

169. *Stroupes*, 2005 WL 5610231, at \*6-8.

170. *Id.* \*9 (internal quotation marks omitted) (quoting *Shepherd v. Shepherd*, 97 N.E.2d 273, 282 (Ill. 1951)).

171. *Id.* at \*10.

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employment context to the consumer context.<sup>172</sup> Thus, contracts signed by minors to purchase an automobile would not be voidable “because adults are also bound by the same agreement.”<sup>173</sup> The court stated that if such things were true, the infancy doctrine “would cease to exist.”<sup>174</sup>

Furthermore, the court understood *Sheller* as holding that a minor cannot both disaffirm a contract and sue on the contract.<sup>175</sup> However, the court countered this reasoning by stating that although “a minor suing an employer for sexual harassment could not maintain the suit but for the employment, which requires signing the employment contract,” this fact does not create the result that a statutory claim for sexual harassment against an employer is actually a claim based on the employment contract itself.<sup>176</sup> The court consequently concluded that employment contracts and the arbitration agreements contained within are voidable by a minor.<sup>177</sup>

## V. ANALYSIS OF CASES AND PROPOSAL

Courts are split on whether to enforce against a minor an arbitration agreement contained in the minor’s employment contract. As seen above, some jurisdictions view the container-employment contracts as a necessity that cannot be disaffirmed by the minor. Other jurisdictions have made no distinction between the employment contract and any other contract that the minor enters; these jurisdictions allow minors to disaffirm the arbitration agreements contained within the employment contracts. This Article now will analyze the arguments on each side of the issue.

### A. *Reasons for Enforcing Arbitration Agreements Within Minors’ Employment Contracts*

Although courts are reluctant to bind minors to their agreements, there are several circumstances in which courts may want to enforce arbitration agreements within employment contracts against minors. First, if a minor is still employed with the employer when he or she brings an action, the minor is able to retain the benefits of the contract without returning the favor. *Sheller* referred to this as the minor being able to utilize the contract as both a sword and a shield.<sup>178</sup>

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172. *Id.*

173. *Id.* at \*10–11.

174. *Id.* at \*11.

175. *Id.* at \*12.

176. *Id.*

177. *Id.* at \*13–14; *see also* H & S Homes, L.L.C. v. McDonald, 823 So. 2d 627, 630 (Ala. 2001) (holding that infancy is a valid defense to the motion to compel arbitration).

178. *See Sheller ex rel. Sheller v. Frank’s Nursery & Crafts, Inc.*, 957 F. Supp. 150, 153–54 (N.D. Ill. 1997).

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However, in *Sheller*, the minors no longer were working for the nursery at the time they filed their claims.<sup>179</sup> The court stated that a minor's right to bring a lawsuit is a retained benefit of the employment contract.<sup>180</sup> This reasoning is incorrect for two reasons. First, a formal employment contract is not a necessity for the right to bring a lawsuit and does not empower an employee with the right to sue. Discrimination claims are statutory; tort claims are common-law; neither arise from an employment contract. Consequently, legal claims are not a benefit of the contract. Second, in *Sheller*, the plaintiffs brought a lawsuit to address harms they suffered.<sup>181</sup> Harassment is not a benefit to an employment contract; an employee contracts to be paid, not to be harassed. Therefore, the harassment of an employee is a harm caused by another employee of the employer independent of the contract.

Nevertheless, if the minor were still employed, non-enforcement of the arbitration clause within the employment contract would allow the minor to retain benefits of the contract that he or she is attempting to disaffirm. For example, if a minor who signs a contract to purchase a car could terminate the contract at any time and only have to return the car, no car dealer would sell a car while aware of such a possible outcome. Therefore, if a minor files a claim while still employed and retaining the benefits of the employment contract, it is sensible to consider enforcing the arbitration agreement. By doing so, the minor would not be able to use the contract as both a sword and a shield.<sup>182</sup>

The second circumstance in which courts may want to enforce minors' arbitration agreements within employment contracts is if a minor is emancipated. Employment is a necessity for an emancipated minor. As discussed in Part III, a contract for necessities is a contract necessary to sustaining life, given a minor's circumstances.<sup>183</sup> If a minor is emancipated from his or her parents, employment is not just a source of money to go to the movies with his or her friends; employment is a means to support him or herself.

As discussed above in Part III, the Oregon State Legislature drafted a statute to ensure the availability of housing for minors in need.<sup>184</sup> California passed a law prohibiting minors from disaffirming medical contracts on the reasoning that "the public interest in encouraging pregnant minors to seek and doctors to provide medical care related to pregnancy outweighed the public policy designed to protect minors from their own improvidence."<sup>185</sup> A California appellate court also reasoned that if minors seeking pregnancy-related care were not able to enter into binding arbitration agreements, certain "physicians and medical groups will

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179. *Id.* at 152.

180. *Id.* at 153.

181. *Id.* at 152.

182. *See id.* at 153.

183. *See* KRAMER, *supra* note 73.

184. OR. REV. STAT. § 109.697 (2011).

185. *Michaelis v. Schori*, 24 Cal. Rptr. 2d 380, 381 (Ct. App. 1993).

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refuse to render medical services unless a parent or guardian signs.”<sup>186</sup> Such a minor may forgo acquiring the proper care because she may be fearful to enlist the presence of her guardian.<sup>187</sup> If the above exceptions have been carved out of the infancy doctrine to ensure that minors have housing and medical treatment available, it may be sensible to require arbitration agreements within employment contracts to be enforced against emancipated minors to ensure they have access to available employment.

The third circumstance in which courts may want to enforce minors’ arbitration agreements within employment contracts is where a minor seeking employment also is seeking out the responsibilities of adult life. In *Douglass*, the Supreme Court of Hawai’i reasoned that a minor who is only one to two years from adulthood was viewed by the legislature as being “capable and competent to contract for gainful employment.”<sup>188</sup> Therefore, the court held that “a minor so close to adulthood” should be bound by the terms of such contracts.<sup>189</sup> Furthermore, the possibility of the minor’s parent(s) or guardian(s) being aware of the minor’s employment is high. If the guardian(s) have permitted and encouraged the minor to seek out employment and take on such adult responsibilities, the guardian could also be charged with taking a proactive role in educating the minor in his or her employment affairs rather than waiting for post-employment disputes to ensue.

#### *B. Reasons for Not Enforcing Arbitration Agreements Within Minors’ Employment Contracts*

Although there are sensible reasons for enforcing a minor’s employment arbitration agreement, there are also valid reasons why enforcing such arbitration agreements may be repugnant to the infancy doctrine. First, an arbitration agreement, whether or not it is contained within an employment contract, is a waiver of a judicial forum and a complex notion for a minor to understand. As stated in Part III, arbitration agreements are generally unenforceable against minors.<sup>190</sup> Although minors are approaching adulthood at the age of sixteen, they are still not adults. Furthermore, a minor who contracts for employment does so as a fresh inductee of the world of the employed. He or she has no extensive resume and has little experience dealing with managers or binding agreements. Although a minor may be able to understand some of the more simplistic obligations of an employment contract, some of the more complex clauses,

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186. *Id.* at 382 (internal quotation marks omitted) (quoting defendants).

187. *Id.*

188. *Douglass v. Pflueger Haw., Inc.*, 135 P.3d 129, 138 (Haw. 2006).

189. *Id.*

190. *See H & S Homes, L.L.C. v. McDonald*, 823 So. 2d 627, 630 (Ala. 2001).

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including the waiver of a judicial forum, are likely beyond the capacity of most minors.

Second, unless a minor is emancipated from his or her parents, the circumstances will rarely exist that would establish his or her employment as a necessity. Although some courts have enforced arbitration agreements against minors in the medical and drug treatment context, the minors involved in those agreements had needs greater than the employment needs of unemancipated minors.<sup>191</sup>

Third, enforcing an arbitration agreement with no additional safeguard to protect the minor undermines the infancy doctrine. The *Sheller* court enforced the arbitration agreement against the minor because the adults working at Frank's Nursery also had to sign the same agreement.<sup>192</sup> However, as the *Stroupes* court correctly stated, this reasoning in *Sheller* is inapposite to the entire basis of the infancy doctrine.<sup>193</sup> The purpose of the infancy doctrine is to protect inexperienced minors in their transactions with adults.<sup>194</sup> Furthermore, although employment can be a necessity for a minor, it depends on the minor's circumstances.<sup>195</sup>

Nevertheless, minors could be provided protection by the signature of a parent or guardian. *Sheller* and *Stroupes* dealt with the issue of whether to enforce an arbitration agreement within a minor's employment contract.<sup>196</sup> However, when a parent signs a medical contract containing an arbitration agreement, the arbitration agreement is enforceable.<sup>197</sup> Being able to bind one's child to arbitration may "be considered implicit in the parent's right and duty to care for the child."<sup>198</sup> A parent's review of a document provides assurance that somebody the law recognizes as able to enter binding agreements is acting as a buffer for the vulnerable minor.<sup>199</sup> In the medical treatment context, courts have enforced arbitration agreements on the ground that a parent has reviewed them.<sup>200</sup> Employment is no more important than medical care, and employers would hardly be burdened any further by requiring minor employees to have their contract cosigned by a parent. Therefore, if arbitration agreements are to be enforced against minors in the employment context, the safeguard of a parental signature is a useful and simple requirement.

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191. See, e.g., *Douglass*, 135 P.3d 129.

192. *Sheller ex rel. Sheller v. Frank's Nursery & Crafts, Inc.*, 957 F. Supp. 150, 153–54 (N.D. Ill. 1997).

193. *Stroupes v. Finish Line, Inc.*, No. 1:00-cv-133, 2005 WL 5610231, at \*10 (E.D. Tenn. Mar. 16, 2005).

194. See *Sheller*, 957 F. Supp. at 153.

195. See KRAMER, *supra* note 73 (discussing necessity).

196. See *supra* Part IV.

197. See, e.g., *Doyle v. Giuliucci*, 401 P.2d 1 (Cal. 1965).

198. *Ferguson*, *supra* note 97.

199. *Id.* at 1027–28.

200. See, e.g., *Doyle*, 401 P.2d at 3.

## 2013 / Minor Problem with Arbitration

### C. Proposal for Enforcing Arbitration Agreements in Minors' Employment Contracts

This Article will now apply the reasons that the above four cases have illustrated for the enforcement or non-enforcement of arbitration agreements in minors' employment contracts to propose a solution to the issue.<sup>201</sup> The following proposal seeks to balance the need to protect the vulnerable minor and the integrity of the infancy doctrine against the interests of the emancipated minor and the employer. The following four points will address this purpose.

First, arbitration agreements in a minor's employment contract should generally be unenforceable. The infancy doctrine exists to protect minors from such difficult navigations in their dealings with others.<sup>202</sup> Furthermore, unless the minor is emancipated or finds him or herself in another similar circumstance, the employment is unlikely to justifiably qualify as a necessity.<sup>203</sup>

Second, when an arbitration agreement with a minor has been reviewed and signed by a parent, it should be binding against the minor. Because the minor's parent reviewed the agreement on behalf of the minor, the minor has been adequately protected. The parental signature requirement should appropriately balance the need to protect the minor in his dealings with adults and the need for employers to have confidence in the agreement they entered into with the minor employee. In addition, it would be of little inconvenience to an employer to merely require a signature from the parent of the unemancipated minor.

Third, if the minor is still employed and receiving the benefits of the contract, the arbitration agreement should be enforced as to any contractual claims. The right to sue may not be a right that is owed to the contract.<sup>204</sup> As an example, sexual harassment is a statutory right, and it is not an action born out of the agreement, such as a dispute over vacation time. If a minor brings such a discrimination suit after employment, a minor would no longer be enjoying the benefits of the employment agreement. However, if a minor is still employed and brings a contract-based claim, he or she would still be enjoying the benefits of the contract. By allowing a minor to disregard the contained arbitration agreement, a court may be allowing a minor to use the contract as both a sword and a shield.<sup>205</sup> Therefore, any such contractual claims by a minor who is still employed should be brought pursuant to the existing arbitration agreement.

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201. *Douglass v. Pflueger Haw., Inc.*, 135 P.3d 129 (Haw. 2006); *Sheller ex rel. Sheller v. Frank's Nursery & Crafts, Inc.*, 957 F. Supp. 150 (N.D. Ill. 1997); *In re Mexican Rests., Inc.*, Nos. 11-04-00154-CV, 11-04-00155-CV, 2004 WL 2850151 (Tex. Ct. App. Dec. 2, 2004); *Stroupes v. Finish Line, Inc.*, No. 1:00-cv-133, 2005 WL 5610231 (E.D. Tenn. Mar. 16, 2005).

202. *Michaelis v. Schori*, 24 Cal. Rptr. 2d 380, 381 (Ct. App. 1993) ("It is the policy of the law to protect a minor against himself and his indiscretions and immaturity as well as against the machinations of other people and to discourage adults from contracting with an infant.").

203. See, e.g., *In re Mexican Rests.*, 2004 WL 2850151, at \*1.

204. *Stroupes*, 2005 WL 5610231, at \*4.

205. See *Sheller*, 957 F. Supp. at 153-54.

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Finally, the arbitration agreement should be enforceable against a minor who is emancipated from the legal protection of his guardian or parent. This is especially important because if a parental signature were to be required to enforce the agreement to arbitrate, the minor who has no parental representation may be unemployable. Furthermore, it is this type of minor who likely has the greatest need for employment and who, as a result of his or her emancipation, likely has the most experience entering into contracts. Therefore, to ensure that the emancipated minor can find work and that the employer's interest for the enforceability of his agreement is protected, there should be an exception to requiring a parental signature for the emancipated minor.

## VI. CONCLUSION

In Susie's case of being harassed by the cook at the local diner,<sup>206</sup> whether she will be compelled to arbitrate her sexual harassment claim will depend on her jurisdiction. First, the court will discuss the Supreme Court's view favoring the enforcement of arbitration clauses. The court then will look to her status as a minor and the relevant law regarding necessities in the jurisdiction. The court may look to the local legislative view of emancipated minors and determine whether Susie qualifies as an emancipated minor. Finally, the court may create a bright-line rule determining whether minors are bound to the terms of their employment contracts and either enforce or refuse to enforce the arbitration agreement on that determination alone.

However, rather than a ruling determined by a jurisdictional view of employment contracts and minors, courts should examine the arbitration agreement in the same manner as courts view any contract entered into by a minor. The courts should focus on the circumstances of the minor and other safeguards in place to protect the minor from his inexperience in contracting. By refocusing in this manner, courts can more effectively balance the minor's inexperience with the minor's ability to use the infancy doctrine as both a sword and a shield.<sup>207</sup> First, arbitration agreements in minors' employment contracts should generally be seen as voidable. Second, as in the case in many decisions regarding medical treatment agreements, courts should make an exception for arbitration agreements containing the signature of the minor's guardian on his or her behalf. Third, the arbitration agreement should be enforced if the minor is still employed while bringing a contract-based suit. Finally, the arbitration agreement should be enforced if the minor is emancipated. In summary, a minor who is not still employed during a contract-based suit, emancipated, or does not have the protection of guardian review of the contract should not be bound by an arbitration agreement contained within an employment contract.

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206. See *supra* Part I.

207. See *Sheller*, 957 F. Supp. at 153-54.