
In re Estate of Feinberg: When Legal Fees Consume an Estate— Restrictive Clauses Are Moot

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Editor's Synopsis: The authors explore the boundaries of how far a testator can go in influencing the behavior of beneficiaries. In so doing, they focus on a recent case in which, given very unique facts, a clause purporting to disinherit grandchildren who married outside the Jewish faith was ultimately upheld by the Illinois Supreme Court against public policy-based challenges. The authors also address the impact on the testator's plan of the enormous financial and emotional costs of the litigation.

Introduction

Estate planning attorneys routinely provide guidance regarding the testamentary disposition of wealth. Clients share with attorneys their most closely guarded family secrets and provide details regarding their values and estate planning desires. The estate planning attorney is entrusted to develop a comprehensive estate plan that will satisfy the client's disposition wishes within the constructs of the law.

Estate plans often include provisions constructed to encourage certain personal conduct of beneficiaries. This article uses the word "restrain" or "restraint" to refer to those testamentary conditions designed to deter a beneficiary from engaging in certain conduct

or to encourage preferential conduct. These testamentary provisions are not really "restraints" as that term is usually used,¹ as these provisions neither impose obligations on the beneficiaries nor limit the liberty of the beneficiary in any manner, yet act to provide a financial incentive to influence the beneficiary to make certain decisions. These provisions may be no more evil than the loving hand that raised the beneficiary from an infant, and can range from simple terms that encourage a beneficiary to graduate from an accredited college to complex structures that promote marriage to persons of a preferential religion.

A testator does not possess a constitutional right to make arrangements for the testamentary disposition of his or her assets. The power of testation in the United States is generally considered a positivistic² right rather than a natural right. That is, the testator's power to dispose of his or her assets is created by and regulated by the state. The very right of an ancestor to own assets as private property is not a natural right protected by the Federal Constitution, but rather a civil right granted by the state.³ The Federal Constitution does not in any way forbid a state from limiting, conditioning, or even eliminating testamentary powers over property under its jurisdiction.⁴ In the testamentary disposition of his or her wealth, the testator acts at the will of the state.

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¹ BLACK'S LAW DICTIONARY defines restraint as follows: 1: confinement, abridgment, limitation; 2: prohibition of action; holding back. See Black's Law Dictionary (8th ed. 2004). Merriam-Webster's online dictionary defines restrain as follows: 1: a) to prevent from doing, exhibiting, or expressing something; b) to limit, restrict, or keep under control; 2: to moderate or limit the force, effect, development, or full exercise of; 3: to deprive of liberty. <http://www.merriam-webster.com/dictionary/restrain>.

² Legal positivism is the theory that legal rules are valid only because they are enacted by an existing political authority or accepted as binding in a given society, not because they are grounded in morality or in natural law. See BLACK'S LAW DICTIONARY (8th ed. 2004).

³ "The right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive at first view that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is

certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no natural, but merely a civil, right." SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Book 2, Chapter 1 (1765-1769).

⁴ The rights of a testator are complex and suitable for review in a lengthy article. In *Hodel v. Irving*, the U.S. Supreme Court upheld a New York statute granting the surviving spouse the right to renounce the decedent spouse's will and claim an intestate share of the decedent spouse's estate. *Hodel v. Irving*, 481 U.S. 704 (1987). The U.S. Supreme Court was quite clear in the rights of the testator: "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942); See also *Mager v. Grima*, 49 U.S. 490 (1850); *United States v. Fox*, 94 U.S. 315 (1876); *United States v. Perkins*, 163 U.S. 625 (1896); *Randall v. Kreiger*, 90 U.S. 137 (1874).

A testator is generally free to dispose of assets during his or her lifetime. A decedent, however, may not retain assets after death. If a testator does not establish a plan of disposition during his or her lifetime, a disposition plan is provided by the state.⁵ Testators often use trusts to manage and control the disposition of wealth after death. Trusts provide a defined set of fiduciary principals for wealth management and distribution, and are the mechanism that allow the testator to divorce the ownership of assets from its benefits. Trusts facilitate the testator's influence over future generations through "dead hand" terms and provisions that govern the enjoyment of the trust property.

Once irrevocable, trusts are subject to laws that limit trust purposes and provisions in a number of ways. While these laws are not uniform, the laws generally limit the duration and purposes of trusts. One such rule, the rule against perpetuities, provides a limitation on the power of testation and holds that property shall not stay in trust for a term longer than some life in being at the creation of the interest plus twenty-one years.⁶ The rule essentially limits a decedent's authority to influence behavior to those persons known to the testator during his or her life. The common law rule against perpetuities has its origin in the *Duke of Norfolk's Case* of 1682.⁷ The common law rule has been amended by statutes in an attempt to reduce its sometimes harsh results.⁸ A recent movement in the United States to abolish the rule against perpetuities has resulted in the complete repeal or essential repeal of the rule in numerous states.⁹ The repeal of the rule against perpetuities means that the "dead hand" of the testator, left unchecked, may now govern the use and development of property for many generations and, in some states, potentially forever.

Laws allowing and restricting the use of trusts reflect a compromise between the free hand of testation and other social values. Courts have traditionally upheld testamentary conditions calculated to restrain

the personal conduct of beneficiaries, unless the conditions violate public policy.¹⁰ Public policy, however, is difficult to determine. This article reviews the recent, somewhat troubling *Feinberg* decisions, issued by the Illinois Appellate Court and the Illinois Supreme Court, with a focus on public policy as it applies to marriage and religious preference, and considers alternative estate planning provisions that may be used to satisfy estate planning goals.

Feinberg

Facts

Max Feinberg was a Jewish American.¹¹ Max married Erla Feinberg, and the couple went on to have two children, Michael and Leila.¹² Michael later married and had two children, and Leila married and had three children.¹³

Max was a successful dentist who was very proud of his Jewish heritage.¹⁴ The son of immigrants, Max was a strong traditionalist in his work life, wearing a suit and tie while working in his dental practice, often working seven days a week.¹⁵ Max was also a traditionalist in his home life, which brought with it strong feelings about intermarriage.¹⁶ Max felt so strongly that his descendants marry within the Jewish faith that he expressed in his will his wish to disinherit descendants who chose to marry outside of the faith:

"3.5(e) A descendant of mine other than a child of mine who marries outside the Jewish faith (unless the spouse of such descendant has converted or converts within one year of marriage to the Jewish faith) and his or her descendants shall be deemed to be deceased for all purposes of this instrument as of the date of such marriage."¹⁷

⁵ The probate assets of a decedent who dies intestate (without a will) is distributed according to the intestacy laws where the decedent was domiciled or where real property owned by the decedent is located. Intestacy laws are established by the states and, consequently, vary from state to state. In Illinois, rules of descent and distribution for intestate estates are provided in the PROBATE ACT OF 1975 at 755 ILCS 5/2-1.

⁶ See generally JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* (4th Ed. 1942).

⁷ 3 Ch. Cas. 1, 22 Eng. Rep. 931 (Ch. 1682).

⁸ Many statutes amend or alter the common law rule against perpetuities. For example, the Uniform Statutory Rule Against Perpetuities has been adopted by many states and essentially softens application of the common law rule by providing a minimum 90 year period in which property may be held in trust. http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-

[fs-usrap.asp](http://www.law.harvard.edu/news/bulletin/2008/winter/ask.php).

⁹ <http://www.law.harvard.edu/news/bulletin/2008/winter/ask.php>; JOHN J. O'SULLIVAN, *DISINHERIT THE IRS*, Revised Edition 70 (Career Press 2003).

¹⁰ See *In re Laning's Estate*, 339 A.2d 520, 524-25 (Penn. 1975).

¹¹ See Ron Grossman, 'Jewish Clause' Divides a Family: State Courts Weigh in on a Man's Will that Disinherited any Descendant Who Married a Gentile, CHI. TRIB. Aug. 25, 2008.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *In re Estate of Feinberg*, 891 N.E. 2d 549 (Ill. App. Ct. 2008).

This clause, which has since become widely known (and will be referred to in this article) as the “Jewish Clause,”¹⁸ became the focal point of the *Feinberg* case.

Max died in 1986.¹⁹ Max’s estate plan established trusts to provide for his wife Erla during her lifetime. Max granted Erla a power to appoint the trust property among his descendants. Any property remaining in the trusts at Erla’s death was distributable 50% per stirpes among Max’s descendants and 25% per stirpes among the descendants of each of Michael and Leila, in each case to be retained in trust for his or her benefit.

Shortly after Max’s passing, Erla exercised her power of appointment and directed the distribution at her death of the property held in the trusts established by Max. Erla directed a distribution of \$250,000 to each of her children and grandchildren, and specifically provided that if a grandchild was deemed deceased (presumably under the Jewish Clause) that grandchild’s gift would be distributable equally to the parents of such grandchild.²⁰ A review of Max’s trust instrument, as amended, suggests that Erla could appoint the trust property only to descendants of Max that were not deemed deceased under the Jewish Clause.²¹ Little did Erla suspect that her decision to exercise her power of appointment to give each child and grandchild \$250,000 would lead to litigation which would reduce the value of the trust to the point that the gifts would consume the entire estate and render the Jewish Clause inoperative.

Max named his two children, along with Leila’s husband, Marshall Taylor, as co-executors of his estate.²² Erla died in 2003, seventeen years after Max.²³ Three separate lawsuits arose from the administration of the estates of Max and Erla. The first case was the probate of Erla’s estate. The second case was brought by Michael Feinberg’s daughter, Michele

Trull, against the co-executors of Max and Erla’s estates, alleging tax evasion and misappropriation of assets. The third case involved Max’s estate and was filed when it was discovered that the co-executors were allegedly holding stock certificates registered to Max which were not properly administered as a part of his 1986 estate.

The three cases evidenced deep rifts within the family. Although the cases were eventually consolidated,²⁴ prior to the consolidation, the co-executors sought to have Michele’s lawsuit dismissed because, under the Jewish Clause, Michele was deemed predeceased and, consequently, had no interest in the estate and no standing to bring the lawsuit.²⁵ It should be noted that if the co-executors were successful, three of the four grandchildren (in addition to Michele) would also have been disinherited, as all of Max and Erla’s grandchildren except for one had married outside of the Jewish faith prior to the date of Erla’s death.²⁶ The co-executors were not deterred from pursuing this route, however, knowing that if the court ruled against Michele on the standing issue, the estate assets in question would revert to Michael and Leila.²⁷

In response, Michele filed a motion seeking to have the Jewish Clause invalidated and the trust funds distributed pursuant to Erla’s power of appointment.²⁸ On the issue of whether or not the Jewish Clause was invalid, the trial court sided with Michele, holding that the clause was invalid because it violated public policy.²⁹ Leila appealed the trial court decision, and the appellate court affirmed the trial court’s ruling.³⁰ Michele’s father, Michael, appealed the case to the Illinois Supreme Court, which overturned the findings of both the trial and appellate courts by finding the restrictions in the Jewish Clause to be enforceable.³¹ The Supreme Court’s decision, however, was narrowly focused on fact-specific issues regarding the effect of Erla’s power of appoint-

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ It should be noted that the power of appointment that Max granted to Erla does not include as permissible appointees both parents of the deceased grandchild as it only includes descendants of Max. It appears that this language is read to include only the parent of a descendant of Max that also is a descendant of Max.

²¹ Section 3.3(c) of Max’s Trust, as amended, reads as follows: “The principal of [the trust] shall be distributed to or in trust for any one or more of my descendants in the manner and proportions as my spouse may appoint during my spouse’s lifetime or may appoint by will making specific reference to this power.” As cited in the text of the article above, the Jewish Clause applies “for all purposes of this instrument...” With respect to the application of the Jewish Clause to Erla’s exercise of the power of appointment, the Supreme Court stated: “The parties dispute whether Erla’s power of appointment was limited to those descendants not deemed deceased under the beneficiary restriction clause. The trial

court did not make a finding on this question and the appellate court did not discuss it.” See *In re Estate of Max Feinberg*, 2009 Ill. LEXIS 1299, at 2-3. Please note that at the time of publication of this article, the Illinois Supreme Court decision had not been officially published. Therefore, all references to the Supreme Court’s decision refer to the LexisNexis publication of the Illinois Supreme Court’s decision in this matter, cited as 2009 Ill. LEXIS 1299.

²² *Feinberg*, *supra* note 17, at 550.

²³ *Id.* at 549.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Grossman*, *supra* note 11.

²⁷ *Id.*

²⁸ *Id.*; *Feinberg*, *supra* note 17, at 550.

²⁹ *Feinberg*, *supra* note 17, at 550.

³⁰ *Id.*

³¹ *Feinberg*, *supra* note 21.

ment, and did not address public policy issues associated with the Jewish Clause. In doing so, the Supreme Court decision provided little comfort to testators seeking certainty in the disposition of their estates.

Appellate Court and Supreme Court Holdings

Appellate Court

The ruling of the Illinois Appellate Court focused on the validity and enforceability of the Jewish Clause subject to the constraints of public policy. In reaching its decision that the Jewish Clause was invalid, the appellate court cited several Illinois cases which, in its opinion, had “similar holdings” when dealing with similar provisions, and which stood for the fact that “testamentary provisions which act as a restraint upon marriage or which encourage divorce, are void as against public policy.”³² Whether or not the holdings of these cited cases were actually “similar” is certainly arguable.

The first relevant case is *Ransdell v. Boston*,³³ an Illinois Supreme Court case dating back to 1898. In *Ransdell*, the testator left a life interest to his surviving spouse with the remaining property to be held in trust for his son and distributed outright to the son on the dissolution of the son’s marriage.³⁴ It appears from the facts of *Ransdell* that the testator, aware that the son had been separated from his wife and that a divorce suit had been pending for years, added the divorce restriction to his estate plan in an effort to best secure for his son the benefits of the gift. The *Ransdell* court relied on cases from other states that upheld questionable restrictions where it was determined that the dominant motive of the testator was not to encourage the divorce of the beneficiary and her spouse, but rather to provide support to the beneficiary following a divorce.³⁵ While the court in *Ransdell* acknowledged that the testamentary clause “impress(ed) one with the belief that [the testator] desired his son to obtain a divorce from his wife, and that he conditioned his gift to him with a view to encourage that result,” the court upheld the provision, on the whole, as not being contrary to public policy.³⁶

The *Ransdell* court stated, “[w]hile it is of the first importance to society that contract and testamentary gifts which are calculated to prevent lawful marriages or to bring about the separation or divorcement of husband and wives should not be upheld, it is no less important that persons of sound mind and memory, free from restraint and undue influence, should be allowed to dispose of their property by will, with such limitation and conditions as they believe for the best interests of their donees.”³⁷ The *Ransdell* court recognized that questions of when “conditions in restraint of marriage” are void and when such conditions are valid involves “great uncertainty and confusion.”³⁸ The appellate court referred to the general statement of law set forth in *Ransdell*, but did not give much weight to the *Ransdell* court’s inclination to uphold the free will of the testator.

Another case cited by the appellate court was *In re Estate of Gerbing*, an Illinois Supreme Court ruling, this one from 1975.³⁹ In *Gerbing*, the court invalidated a trust provision providing that the trust would terminate and distribute the trust property outright to the beneficiary upon the death of the beneficiary’s wife or their divorce, provided they remain divorced for a period of two years. The *Gerbing* court deemed the *Ransdell* holding inapplicable because the beneficiary in *Ransdell* was separated and initiated divorce proceedings prior to the testator’s execution of the will, and the condition of divorce, accordingly, could not encourage or influence the behavior of the beneficiary.⁴⁰ The *Gerbing* court stated, “a condition annexed to a devise or bequest, the tendency of which is to encourage divorce or bring about a separation of husband wife is against public policy, and the condition is void.”⁴¹ Along the same lines, the appellate court cited a third Illinois Supreme Court case, *Winterland v. Winterland*, a 1945 case, in which the Court again invalidated a will provision which provided that one of the testator’s children was only to receive the entire corpus of his trust upon the divorce or death of his wife.⁴²

In concluding that the facts and circumstances in *Gerbing* and *Winterland* are “strikingly similar to the instant case,”⁴³ Justice Cunningham saw “no reason to depart from the well-established principle” that

³² *Feinberg*, *supra* note 17, at 551.

³³ *See id.* at 500; *Ransdell v. Boston*, 172 Ill. 439 (1898).

³⁴ *See generally Ransdell*, *supra* note 33.

³⁵ *Id.*; *see Born v. Horstman*, 80 Cal. 452 (1889); *see Thayer v. Spear*, 85 Vt. 327 (1886).

³⁶ *Born*, *supra* note 35, at 444-445.

³⁷ *Id.*

³⁸ *Id.* at 445, citing 1 STORY, EQ. JUR. § 291a, 291e, citing 2 REF. WILLS, 293, *Conrad v. Long*, 33 Mich. 78, and POM. EQ. JUR. § 933, note 1.

³⁹ *See Feinberg*, *supra* note 17, at 550; *In re Estate of Gerbing*, 61 Ill. 2d 503 (1975).

⁴⁰ *Gerbing*, *supra* note 39, at 507.

⁴¹ *Id.* at 506.

⁴² *See Feinberg*, *supra* note 17, at 550; *Winterland v. Winterland*, 389 Ill. 384, 387-88 (1945).

⁴³ This conclusion is questionable, as all three of these cases involved testamentary clauses that were held to be in violation of public policy because they encouraged divorce. The testamentary clause in question in *Feinberg* has nothing to do with the encouragement of divorce.

testamentary provisions which either act as a restraint upon marriage or which encourage divorce, or both, are void as against public policy.⁴⁴

Disagreeing with the majority's conclusion, a strong dissent was written by Justice Greiman,⁴⁵ who maintained that, in including the Jewish Clause in their estate planning documents, "Max and Erla Feinberg seek to preserve their 4,000-year-old heritage,"⁴⁶ and have every right to do just that. Justice Greiman's argument centered around his belief that the three cases cited by the majority are inapposite to the facts of the *Feinberg* case. In the cases cited, he argued, the main objective of the testator was to encourage the potential legatee to divorce their current spouse by providing that the legatee was to receive no trust principal if they remained married to that spouse, which he believes "[c]learly ... was an effort to direct the legatee-descendants to obtain a divorce."⁴⁷ He argued that the promotion of divorce was not an issue in the Jewish Clause, which, in contrast, had nothing to do with divorce and only took effect if and when a descendant of Max and Erla married.⁴⁸ Greiman concluded the dissent by stating that the vast majority of courts which have considered such testamentary issues have upheld such provisions as being reasonable and not in violation of public policy, and that the holding by the majority in this case "places us in the minority of jurisdictions that have considered this issue."⁴⁹ But, Greiman's dissent is just that, and had no bearing on the ultimate outcome of the appellate court decision.

Justice Cunningham's opinion recognized that other states have not historically followed the "uniform precedent of Illinois in validating such provisions."⁵⁰ He cited an Ohio case, *Shapira v. Union National Bank*, in which the court upheld a provision requiring a decedent's son to marry, within seven years of the testator's death, a Jewish girl born to two Jewish parents.⁵¹ He also cited a New York case, *In re Silverstein's Will*,⁵² which upheld the requirement in a will that a descendant wishing to inherit marry within the Jewish faith, as well as a Massachusetts case, *Gordon*

v. Gordon,⁵³ which upheld language in a will revoking gifts to beneficiaries who married persons not born in the Jewish faith. The concurring opinion of Justice Quinn also referenced older cases that upheld conditions that designated beneficiaries not marry "Papists" or Scots and argued that blindly following dated cases could lead to the worst bigotry imaginable.⁵⁴

Perhaps realizing the division within the appellate court and the fact that the three Illinois Supreme Court cases cited in support of its holding are all fairly dated (with the *Gerbing* case being more than 30 years old and the *Ransdell* case being more than 110 years old), Justice Cunningham arguably relied most heavily on the Restatement (Third) of Trusts (hereinafter, the "Restatement (Third)") and the explanatory notes and associated comments.⁵⁵ The Restatement (Third) was updated in 2003, and thus a much more recent source, and, in the eyes of the appellate court, perhaps more indicative of modern public policy. Whether or not this reliance on the Restatement (Third) was appropriate is unclear and arguable at best.

Justice Cunningham ruled that under Illinois Law and the Restatement (Third), the Jewish Clause is invalid as it "seriously interferes with and limits the right of individuals to marry a person of their own choosing."⁵⁶ A specially concurring opinion by presiding Justice Quinn and a harsh dissenting opinion by Justice Greiman evidence the strong opinion and the great uncertainty and confusion of the law in this area.

Supreme Court

The Illinois Appellate Court's ruling in Feinberg evidenced an abrupt departure from established Illinois law and suggested a marked change in public policy. In accepting the case, and perhaps recognizing the dramatic change in the law apparently established by the appellate court, the Illinois Supreme Court signaled a willingness to enter the fray and provide to the citizens of Illinois and other states reliable guidance

⁴⁴ See *Feinberg*, *supra* note 17, at 550.

⁴⁵ See *Feinberg*, *supra* note 17, at 555-58.

⁴⁶ *Id.* at 555.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 558.

⁵⁰ *Id.*

⁵¹ *Shapira v. Union National Bank*, 39 Ohio Misc. 28, 29-39 (1974).

⁵² *In re Silverstein's Will*, 155 N.Y. S.2d 598, 599-600 (Sur. Ct. 1956).

⁵³ *Gordon v. Gordon*, 332 Mass. 197, 203-208 (1955).

⁵⁴ See *Feinberg*, *supra* note 17, at 554.

⁵⁵ The Restatement (Third) provides that trust provisions

which are contrary to public policy are void. RESTATEMENT (THIRD) OF TRUSTS § 29 (3d ed. 2003). The Restatement (Third) gives a specific example of a trust clause centered on religion, which it would consider void as being against public policy:

j. Family relationships. A trust or a condition or other provision in the terms of a trust is ordinarily invalid if it tends to encourage disruption of a family relationship or to discourage formation or resumption of such a relationship.

In addition, a trust provision is ordinarily invalid if it tends seriously to interfere with or inhibit the exercise of a beneficiary's freedom to obtain a divorce or the exercise of freedom to marry by limiting the beneficiary's selection of a spouse.

⁵⁶ See *Feinberg*, *supra* note 17, at 552.

regarding the validity of testamentary clauses which may or may not be void as against public policy.

The Supreme Court highlighted three key factors that narrowed the scope of its decision:

- 1) *Max's Grandchildren were Contingent Trust Beneficiaries*: Max's grandchildren were mere contingent beneficiaries because Max granted Erla a lifetime and testamentary power of appointment to alter the distribution of the trust property.
- 2) *Erla Exercised the Power of Appointment*: Erla exercised the power of appointment and directed at her death a \$250,000 gift to each of her children and to each of her grandchildren that were not deemed deceased under the Jewish Clause.
- 3) *Max's Estate plan is Inoperative*: Erla's exercise of the power of appointment disposed of all of the assets in the trust such that Max's estate plan was inoperative.

In light of these facts, the Supreme Court phrased the question presented as whether "the holder of a power of appointment over the assets of a trust may, without violating the public policy of the state of Illinois, direct the assets be distributed at the time of her death to the then-living descendants of the settlor, deeming deceased any descendant who has married outside the settlor's religious tradition."⁵⁷

In stating that it must "discern the public policy of the state of Illinois as expressed in the constitution, statutes, and long-standing case law,"⁵⁸ the Supreme Court indirectly admonished the appellate court and proclaimed that it is not the role of the court to make public policy. The Supreme Court proceeded to document Illinois' long standing support of testamentary freedom and its willingness to give effect to the intent of a deceased testator. Acknowledging that there is no question that a grandparent during his or her lifetime can attempt to influence the marital or religious decisions of his or her grandchildren, even with financial incentives, the Court suggested that it is not appropriate to curtail Max's testamentary freedom.⁵⁹

The Supreme Court carefully reviewed the

Ransdell, *Gerbing* and *Winterland* cases which, as discussed above, were somewhat questionably cited by the appellate court as "strikingly similar" to the facts in *Feinberg*. The Supreme Court made particular note of the *Ransdell* Court's support of testamentary freedom and of the *Gerbing* court's careful consideration of the testator's intent and disposition desires. The restrictive provisions in these cases were "capable of exerting ... a disruptive influence upon an otherwise normally harmonious marriage"⁶⁰ by forcing the beneficiary to choose between his or her spouse and a distribution. The Supreme Court disagreed with the appellate court's conclusion regarding the similarity of facts in *Feinberg* to the cited cases and flatly stated that the challenged provision involved "the decision to marry, not an incentive to divorce."⁶¹

The Supreme Court cited *Shackelford*,⁶² an 1857 Supreme Court case, as its first case addressing marital restrictions. In *Shackelford*, the testator left his estate to his wife for life or until she remarried, with the remainder to his four children, subject to the condition that they not marry before age 21.⁶³ Any child who married before reaching age 21 was to receive only one dollar.⁶⁴ The testator's daughter, Eliza, married just a few months before her twenty first birthday.⁶⁵ Eliza's older brother, the executor of the father's estate, approved of the marriage.⁶⁶ The *Shackelford* Court went no farther than to note that courts rarely hold conditions affecting marriage as void, even though the condition may appear unreasonable, provided that the provision does not prohibit the marriage of a beneficiary within the period that issue of the marriage might be expected.⁶⁷ The Court declared the condition valid, but then held that the children were the testator's heirs at law, had an expectation of an inheritance, and therefore the interest in the estate could not be divested unless it was shown that the beneficiary had knowledge of the condition before the breach of the condition.⁶⁸ The Court may have been persuaded, in part, by the injustice that would be created if Eliza was deprived of an inheritance for breaching a marital condition, with the consent of the executor who stood to benefit from the breach, just months before expiration of the condition.

The Supreme Court cited *In re Estate of Gehrt*⁶⁹ in final support of its ruling. This recent appellate court decision validated a testamentary provision

⁵⁷ See *Feinberg*, *supra* note 21, at 6-7.

⁵⁸ *Id.* at 12.

⁵⁹ *Id.*

⁶⁰ *Id.* at 25-26.

⁶¹ *Id.*

⁶² *Shackelford v. Hall*, 19 Ill. 211 (1857).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *In re Estate of Gehrt*, 134 Ill. App. 3d 308 (1985).

based on the marital status of the legatee. In this case, Forrest Gehrt left a portion of his estate to six beneficiaries.⁷⁰ Upon the death of one of these beneficiaries, Forrest executed a codicil leaving a portion of the estate to the widow of his deceased friend, provided that she remained unmarried at the time of his death.⁷¹ The widow remarried prior to Forrest's death and sought to have the restriction declared void as against public policy.⁷² The appellate court invoked a rule of reasonableness and noted that the restriction did not forbid the beneficiary from marrying or divest an interest in the case that the beneficiary married in the future, but rather merely defined the beneficiary based upon marital status at the time of the testator's death.⁷³ The appellate court quoted a Louisiana ruling stating "[c]ertainly, such a provision is not against good morals, and we know of no law prohibiting the same."⁷⁴ The appellate court also recited the "well-established principal that a will speaks as of the date of death of the testator"⁷⁵ and held that Forrest was free to express the condition precedent for the gift by defining a beneficiary in his codicil by reference to her marital status.

Erla's power of appointment directed the distribution of all trust property and thereby eliminated the operation of Max's estate plan and made moot any discussion of its terms and provisions. Given that the trial and appellate courts failed to seize on this important fact, it is possible that the costs associated with the estate litigation reduced the value of the trust to the point where the gifts directed under the power of appointment exceeded the value of the trust assets, thereby dramatically narrowing the issues presented by the Jewish Clause. The Supreme Court indicated that it was unclear if Erla's exercise of the power of appointment was "a product of her own wisdom, good legal advice, or mere fortuity."⁷⁶ The Supreme Court ultimately upheld the Jewish Clause because Erla's exercise of the power of appointment (a) operated as a condition precedent determining who benefited from the estate rather than divesting a vested beneficiary, and (b) implemented an outright distribution plan that did not provide for a prospective application of the Jewish Clause and, accordingly, had no ability to exert a disruptive influence.⁷⁷ Essentially, the Supreme Court viewed Erla's exercise of her power of appointment similar to the estate disposition in *Gehrt*.

Public Policy

Estate planning attorneys cannot be certain that carefully drafted restrictive clauses will withstand the scrutiny of a court construing public policy. Simple rules of validity and invalidity are not available because of the court's need to weigh the objectives of the testator against the undesirable influence on the lives of the beneficiaries and others. As such, estate planning attorneys should carefully advise their clients of the risk that their estate planning desires may not be satisfied and work to best structure estate plan provisions to avoid invalidity based on the interests of public policy.

The appellate court's ruling in *Feinberg* was based on public policy and revealed a willingness of the justices to strike restrictive clauses and advance a modern evolving view of public policy. The Supreme Court overturned the appellate court and issued a fact specific ruling that focused on the exercise of a power of appointment and a limited application of the Jewish Clause. Because the Supreme Court's ruling was not dependent on a defense of the Jewish Clause on public policy grounds, the 24 page ruling failed to establish legal precedent regarding public policy. In fact, many practitioners are likely to view the Supreme Court's decision in *Feinberg* as a mere extension of existing testamentary law to certain limited circumstances involving the exercise of powers of appointment.

What exactly is "public policy," and what role does it play in our legal system? Although there is no precise definition of the term, *Black's Law Dictionary* describes public policy as "principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society."⁷⁸ "In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively."⁷⁹ However, courts have varied greatly in how public policy should be addressed, and with how or even if the concept should factor into a court's decision. For example, a California court has taken the view that public policy should be narrowly defined, and therefore, to be given any weight or consideration, must be articulated in the state's constitution or as a statute or regulation.⁸⁰ Some courts have viewed the concept on a much broader scale, looking to both federal and state laws in deciding how to apply it,⁸¹ while other courts have dismissed and criticized

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 311, quoting *Succession of Ruxton*, 226 La. 1088, 1091 (1955).

⁷⁵ See *Feinberg*, *supra* note 21, at 33.

⁷⁶ *Id.* at 45.

⁷⁷ *Id.* at 46.

⁷⁸ See *BLACK'S LAW DICTIONARY* (8th ed. 2004).

⁷⁹ *Palmateer v. Int'l Harvester Co.*, 421 N.E. 2d 876, 878 (1981).

⁸⁰ *Gantt v. Sentry Ins.*, 1 Cal. 4th 1083 (1992).

⁸¹ See *Peterson v. Browning*, 832 P.2d 1280 (Utah 1992).

such an approach, insisting that looking to federal law as a source is far too broad and leaves the concept too widely open to interpretation.⁸² What is clear from all of the varying interpretations of public policy is that what would be considered acceptable behavior from a public policy standpoint in one jurisdiction could easily and just as soon be rejected as violating the acceptable standards in a neighboring jurisdiction.

Illinois is one of the states that has historically taken a more hard-line approach in its interpretation of the role of public policy in society and in the legal system.⁸³ The Supreme Court in *Feinberg* stated that the court does not make public policy, as such policy must be discerned from the “constitution, statutes, and long-standing case law.”⁸⁴ An Illinois court has even held that it would be improper to turn to other states’ laws for guidance on a policy matter when the policy can be found in the Illinois’ constitution, statutes and judicial decisions.⁸⁵

While it is impossible to predict how the Supreme Court would have viewed a prospective application of the Jewish Clause as set forth in Max’s estate plan, the *Feinberg* decision suggests that the Supreme Court would review the public policy issues based on guidance available in the Illinois constitution, statutes and long-standing case law. The Illinois Constitution is generally silent on marriage,⁸⁶ and the only explicit public policy position addressing marriage in the Illinois statutory scheme deals with same-sex marriages.⁸⁷ Prior to *Feinberg*, very few Illinois judicial decisions specifically addressed conditions restricting the rights of persons to marry. The Supreme Court in *Feinberg* referenced *Shackelford*, the Illinois Supreme Court case from 1857 discussed above, which focused on very modest restrictions to marry before a set age, and *Gehrt*, which was based on a condition precedent that could not operate to influence the future behaviors of a beneficiary. Although the *Ransdell*, *Gerbing* and *Winterland* opinions each address public policies regarding marriage and divorce, such statements as to marriage are merely dicta in that the underlying cases focused on conditions affecting divorce rather than conditions affecting marriage. Further, prior to *Feinberg*, the Illinois Supreme Court had not even commented on

restrictions and public policy in nearly 35 years, when it last ruled that conditions encouraging divorce were invalid.⁸⁸ Were it forced to do so, it is possible that the Supreme Court would have struck down the Jewish Clause as set forth in Max’s estate plan.

The *Feinberg* case did not present the Supreme Court with an appropriate opportunity to develop the law regarding the prospective application of restrictive clauses. We understand that Michele has filed or will soon file an appeal requesting a rehearing on the assumption that Max’s estate plan is operative because the power of appointment will not result in the complete distribution of the trust. This may provide the Supreme Court with the avenue to address the important public policy issues in a precedent setting manner. However, until the Supreme Court takes another look at the case, the following questions, and many others, are not addressed in any way by the *Feinberg* ruling: 1) Was Max’s original estate plan with its prospective application of the Jewish Clause invalid as against public policy? 2) Could Erla have successfully challenged the validity and enforceability of the Jewish Clause as an invalid restraint on her power to appoint trust property to all of Max’s descendants? 3) Could the grandchildren have successfully challenged the validity and enforceability of the Jewish Clause if Erla had not exercised the power of appointment in a manner that disposed of all trust property?

Feinberg is important because it is an Illinois Supreme Court ruling that highlights the unsettled nature of the law regarding public policy and restrictive conditions. The ruling also overturns the appellate court’s abrupt departure from established Illinois law and sets a course for the proper determination of public policy. The case also provides a very important lesson to testators and planners alike. Max and Erla could not possibly have imagined that the Supreme Court would rule in 2009 on issues regarding the disposition of their estates. Moreover, Max could not have imagined the amount of litigation expenses created by the addition of the Jewish Clause. Ironically, the Supreme Court ruling implies that legal fees and expenses of litigation reduced the value of the trust to

⁸² See *Guy v. Travenol Labs*, 812 F.2d 911 (4th Cir. 1987).

⁸³ See *Miller v. Ousley*, 334 Ill. 183, citing *Griffiths & Sons Co. v. Fireproofing Co.*, 310 Ill. 331 (1923); see also *People ex rel. Nelson v. Wiersema State Bank*, 197 N.E. 537 (1935) (public policy of state is found in its Constitution and statutes and in decisions of its courts, where Constitution and statutes are silent upon the subject); see also *McClure Engineering Ass., Inc. v. Reuben H. Donnelly Corp.*, 447 N.E. 2d 400 (1983) (public policy, a principle of law which declares that no one may lawfully do that which has a tendency to be injurious to the public welfare, is found in the State Constitution, statutes and judicial decisions).

⁸⁴ *Feinberg*, *supra* note 21, at 12.

⁸⁵ See *State Farm Mut. Auto. Ins. Co. v. Collins*, 629 N.E.2d 762 (1994). Given this approach, one can certainly question Justice Cunningham’s heavy reliance on the Restatement (Third) of Trusts in support of the appellate court’s holding that the Jewish Clause was in violation of public policy.

⁸⁶ Ill. Const. available at <http://www.ilga.gov/commission/lrb/content.htm>.

⁸⁷ Illinois Marriage and Dissolution of Marriage Act, 750 IL St Ch Act 5 at §231.1.

⁸⁸ *Gerbing*, *supra* note 39.

the point that the Jewish Clause was no longer restrictive in a manner that violated public policy.

Prudent advisers should implement restrictive provisions in a manner that avoids the potential for invalidity based on public policy concerns. Two simple techniques, as illustrated by the facts in *Feinberg*, could be used to reduce the implications of public policy:

Condition Precedent

The *Feinberg* case highlights the well established law that public policy concerns of the “dead hand” control of the living are not applicable to outright bequests of property. While a testator is generally free to choose the beneficiary or beneficiaries of his or her estate, it does not necessarily follow that a testator can place restraints on such bequests. For example, a condition that requires a beneficiary to divorce his spouse might be void as against public policy.⁸⁹ A similar provision requiring that a beneficiary divorce a spouse before the testator’s death, however, would be valid.⁹⁰ This is the case even if the beneficiary is aware of the condition prior to the testator’s death.⁹¹ As detailed in *Feinberg*, a will is said to “speak” at the time of death of the testator and, accordingly, a condition precedent at death cannot influence the behavior of the beneficiary and invoke the cries of public policy. The so-called “rigor mortis” of dead hand control cannot set in while the testator is able to revise his or her estate plan and respond to changing family circumstances.

The Supreme Court in *Feinberg* held that Erla’s exercise of the power of appointment was akin to a testator’s bequest under a will. Although the *Feinberg* Court upheld the Jewish Clause as implemented through Erla’s exercise of the power, Erla may have had standing to successfully challenge the Jewish Clause as an invalid restraint on her power of appointment. While the Jewish Clause ultimately was upheld, it is unclear if the provision would withstand the

scrutiny of a court applying public policy if Erla had not exercised her power of appointment. Prudent practitioners will avoid planning uncertainty and implement restrictive clauses in a manner that is not dependent on the exercise of a power of appointment.

Max and Erla could have made subtle adjustments to the provisions they made for their grandchildren. The survivor of Max and Erla could have bequeathed a sum to each of their grandchildren who was not married to a gentile. Alternatively, Max and Erla could have identified each grandchild by name or referenced the group that they wished to receive bequests as a class. Although such gifts might not have been wise or may have been viewed as prejudiced, the bequests likely would have been upheld. In sum, bequests subject to conditions precedent should not fail for violating public policy.

Discretionary Provisions

A discretionary trust is one in which the testator grants the trustee authority over the trust to use discretion in the timing and amount of distributions to the beneficiaries.⁹² A trust that does not impose any specific standard that the trustee must apply in making a distribution is often referred to as a pure discretion trust. A beneficiary of a pure discretion trust may obtain judicial review to determine whether the trustee has abused discretion, but such review is generally limited to a determination that the trustee acted or failed to act in good faith.⁹³ A court will generally not question the reasoned determination of the trustee.⁹⁴

Modern estate plans occasionally designate a “protector” with broad powers to oversee an acting trustee and to make desirable adjustments to trust provisions. The protector may even have an exercisable limited power of appointment over trust property or similar broad trust “decanting” type powers. Estate planning documents grant the protector broad powers

⁸⁹ *Id.*

⁹⁰ RESTATEMENT (THIRD) OF TRUSTS, *supra* note 55, at § 29, scope note i(2); Will of Collura, 98 Misc. 2d 1104 (1979); *See generally* *Feinberg*, *supra* note 21; *See also* Gehrt, *supra* note 69.

⁹¹ Matter of Jacobs, 112 N.Y.S. 2d 281 (1952).

⁹² RESTATEMENT (THIRD) OF TRUSTS, *supra* note 55, at §§ 50, 60.

⁹³ “Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as ‘absolute’, ‘sole’, or ‘uncontrolled’, the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.”

UNIF. TRUST CODE Section 814(a). “Absent proof of fraud, abuse of discretion or bad faith, a trustee’s exercise of discretion is not subject to interference by the court.” *Taxy v. Worden*, 536 N.E. 2d 901, 908 (Ill. App. 1989).

⁹⁴ RESTATEMENT (SECOND) OF TRUSTS, at § 187, comment e; RESTATEMENT (THIRD) OF TRUSTS, *supra* note 55, at §50(1), comments a, b. “... [A] court is not in position to substitute its judgment if the trustee’s acts are within the bounds of reasonable judgment.” *Taxy*, *supra* note 93, at 908. Indeed, the courts have on countless occasions refused to interfere with a trustee’s exercise of discretion when the trustee had not engaged in an abuse of discretion.

that are not subject to fiduciary constraints⁹⁵ so that he or she can make difficult trust administration decisions and alter trust provisions in a manner that may not be consistent with the fiduciary obligations that a trustee would owe to trust beneficiaries. These powers allow the protector to carry out the desires of the testator with unfettered discretion.

Discretionary distribution provisions limit public policy concerns because the acting party is not bound to the “dead hand” of the testator and is intentionally empowered to respond to changed circumstances. The acting party would probably be best served to carefully document distribution decisions on broad themes, including the best interests of the beneficiaries, and avoid matching distributions directly to desired beneficiary behavior. Testators intent on influencing the actions of beneficiaries, however, may tend to favor explicit control provisions and may not be satisfied with an estate disposition plan that empowers a protector or establishes a pure discretion trust. The testator may also have difficulties identifying acceptable trustees or protectors. Most importantly, the testator on his death bed cannot be certain that his dying wishes will be satisfied and must have great faith in the named trustee or protector.

Max and Erla could have established a pure discretion trust for their grandchildren and named a trusted friend as protector with full authority to direct the distribution of the trust property at any time to any one or more of their grandchildren and more remote descendants. In order to subvert any fears that Max and Erla may have had regarding a lack of any discretionary standard in their estate planning documents, Max and Erla could have privately advised the named protector of their distribution desires. After the death of the survivor of Max and Erla, the protector could have exercised distribution powers to carry out the desired program. Alternatively, Max and Erla could have empowered an independent trustee to carry out

the distribution plan. Had Max and Erla chosen to go the route of the discretionary trust rather than adding restrictive clauses to their gifts, their estate disposition desires would likely have been satisfied.

Conclusion

Max and Erla worked hard for their wealth and developed with a trusted attorney an estate plan that would carry out their estate disposition desires. They attached certain restrictions on the gifts to their grandchildren, such restrictions reflecting their long held morals and traditional values. The so-called Jewish Clause was designed to terminate the interest of a grandchild that married outside of the Jewish faith and, as Max desired, benefit those grandchildren who opted to honor his commitment to Judaism by marrying within the faith. Max, Erla and their attorney could not possibly have anticipated the family strife and litigation that the Jewish Clause would eventually create.

The Illinois Appellate Court departed from existing law and held the Jewish Clause invalid as against public policy. In a troubling decision, the court took a most unconventional approach when it established new public policy. The Illinois Supreme Court overturned the lower court rulings and upheld the Jewish Clause in a narrow fact specific decision dependent on the surviving spouse’s appointment of all trust property in a manner that a) terminated Max’s estate plan, b) directed distributions to those grandchildren who were not deemed deceased under the Jewish Clause, and c) provided for the outright distribution of the trust property such that the Jewish Clause could not operate prospectively. The Supreme Court essentially held that Erla was free to identify the beneficiaries of a power of appointment by name or by class and viewed the exercise of the power of appointment like a bequest in a will. In fact, many practitioners are likely

⁹⁵ The term protector has recently been mentioned in state statutes. Several states have enacted statutes explicitly authorizing or defining trust protectors, with the first known reference being a statute enacted by South Dakota in 1997. These statutes generally insulate trustees from liability for following directions issued by the protector. In most cases, the protector can be subject to or excluded from fiduciary obligations in accordance with the statute. The Uniform Trust Code (“UTC”) also makes provision for trust protectors. The UTC does not grant trustees absolute immunity from liability for following the directions of a trust protector. Section 808 of the UTC provides that the trustee shall act in accordance with the exercise of a power held by a protector “unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of

the trust.” Consequently, in many cases, there is minimal oversight responsibility required by a trustee following the directions of the protector. UNIFORM TRUST CODE SECTION 808(d).

Reliable case law has yet to develop regarding whether a trust protector is a fiduciary with duties owed to trust beneficiaries or is an independent party with no duties owing the beneficiaries. Many states do not have laws authorizing trust protectors and trust instruments grant protectors a variety of powers in a number of different manners. Some recent cases involving directed trustees suggest that courts may impose some fiduciary obligations when a protector exercises powers normally reserved for a trustee. *Duemer v. Wilmington Trust Co.*, C.A. No. 20033 N.C. (Del. Ch. 2004); *Rollins v. Branch Banking and Trust Company of Virginia*, 56 Va. Cir. 147 (Va. Cir. Ct. 2002); *McGinley v. Bank of America, N.A.*, 109 P.3d 1146 (2005).

to view the Supreme Court's decision in *Feinberg* as a mere extension of existing testamentary law to certain limited circumstances involving the exercise of powers of appointment.

The *Feinberg* decision does very little to advance the law regarding restrictive clauses and estate planning attorneys should tread carefully when implementing a restrictive clause. The *Feinberg* case is a fine example of what can go wrong with a restrictive clause and the unexpected and differing views judges may take when reviewing the same condition. Note also that the Jewish Clause failed to elicit the desired

behavior (only one of five grandchildren married within the faith) and was a central part of intra-family litigation that ripped a family apart and culminated in an Illinois Supreme Court ruling. Estate planning attorneys looking to implement restrictive clauses should consider various strategies that reduce public policy implications, such as outright bequests subject to a condition precedent, or pure discretionary trusts. In a twisted bit of irony, the costs of the litigation in *Feinberg* appear to have reduced the value of the trust to the point that the Jewish Clause no longer operates in violation of public policy.