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THE PUZZLING CASE OF MAX FEINBERG:

AN ANALYSIS OF CONDITIONS IN PARTIAL RESTRAINT OF MARRIAGE

JEREMY MACKLIN*

I. INTRODUCTION

A. Traditions Become Uncertain

"On the other hand, can I deny my own daughter? On the other hand, how can I turn my back on my faith, my people?"[1] Tevye's monologue from the motion picture "Fiddler on the Roof" provides a glimpse into the archetypal mindset of an individual heavily valuing tradition. Legally, a person can assert control over future generations in an attempt to preserve tradition; however, there are limits as to how far and in what ways a person can assert that control.

In the United States, a person, upon reaching a certain age, can lawfully determine how and to whom his or her property will pass upon death.[2] Illinois courts, however, have attempted to limit this right,[3] creating uncertainty as to how a person can legally dispose of his or her money and property.

B. The Story of Max Feinberg

The story of Max Feinberg and the controversy surrounding the Illinois Appellate and Supreme Courts' decisions have the potential to affect people across the country. Max Feinberg was a hard-working dentist, working seven days a week to support his family.[4] He valued his Jewish heritage, as evidenced by his

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1. FIDDLER ON THE ROOF (United Artist 1971).

2. WILLIAM HERBERT PAGE, PAGE ON THE LAW OF WILLS 28 (Anderson Publ'g Co. 2003) (1960). Traditionally, a person transmits his or her remaining property to surviving children or grandchildren. John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 736 (1988).

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

4. George D. Hanus, *You Can't Govern from the Grave*, WORLD JEWISH DIG., Oct. 2008, at 11.

observance of the customary Jewish traditions and membership at several synagogues.[5]

In order to preserve his Jewish faith, Max added a testamentary provision in his trust that excluded, from his hard-earned wealth, grandchildren who married outside his Jewish faith.[6] His goal was to "guarantee his family's Jewish lineage by drafting a will with monetary compensation."[7] At his death, only one of Max's five grandchildren had married within the Jewish faith.[8] The Illinois Appellate Court considered the following question: Can a person do what he wants with his money?[9] More specifically, whether a testator can create a testamentary provision that is conditioned on the potential beneficiary marrying within a certain class of people?

After answering that question in the negative, the issue was brought before the Illinois Supreme Court, which took a vastly different approach than the appellate court: instead of assessing the validity of Max's provision, it focused on Max's surviving wife's power of appointment over the distribution of the trusts at issue.[10] The Illinois Supreme Court avoided assessing Max's trust provision and instead held that his wife altered his disputed testate scheme by exercising her power of appointment.[11] While the Court addressed some of the concerns raised by the appellate

5. *Id.* Max's adherence to the Jewish faith and ideals was further evident in his frightened response when his grandson took a non-Jewish girl to the high school prom. *Id.*

6. *In re Estate of Feinberg*, 891 N.E.2d at 550. *See also In re* Estate of Feinberg, 919 N.E.2d 888, 891-92 (Ill. 2009) (discussing the provisions of Max's will). Max executed a "pour over" will, which transferred his assets into a trust upon his death. *Id.* at 891. The trust contained the following provision:

> 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 the 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.

In re Estate of Feinberg, 891 N.E.2d at 550.

7. Hanus, *supra* note 4, at 11.

8. *Id.*

9. Ron Grossman, *"Jewish Clause" Divides a Family*, CHI. TRIB., Aug. 25, 2008, *available at* http://archives.chicagotribune.com/2008/aug/25/nation/chi-jewish-clauseaug25.

10. *In re Estate of Feinberg*, 919 N.E.2d at 891. Max's wife, Erla, actually exercised her power of appointment by revoking "the original distribution provision" and replacing it with a plan that gave each grandchild an equal share, thereby concretizing the amount of money each eligible descendant would receive at her death. *Id.* at 891-92.

11. *Id.* at 902. The Illinois Supreme Court found that "[t]he "validity of a trust provision [was] not at issue, as the distribution provision of Max's trust was revoked when Erla exercised her power of appointment." *Id.*

court,[12] it left open the question of whether Max's provision, without a corresponding power of appointment, would be valid if used by individuals in the future.[13]

C. The Need For Certainty

Indeed, the answer to the question posed by the Illinois Appellate Court is uncertain and has been the source of great confusion in both English and American courts alike.[14] State courts disagree in their analyses of such provisions. While the Illinois Appellate Court found Max's provision void,[15] other state courts, such as Ohio and Massachusetts, have found identical provisions wholly valid.[16] The analysis turns on two issues: first, whether judicial enforcement of certain testamentary provisions involves a Fourteenth Amendment constitutional violation;[17] and second, whether public policy considerations vary depending on the overall effect of the testamentary provision.[18]

Part II of this Comment provides a background on wills and trusts and explains the various types of marriage restraints commonly employed in conditional testamentary provisions. Part III assesses the constitutional issues by contrasting the right to marry with the privilege of inheritance. This section argues that the judicial enforcement of discriminatory conditions is not the type of state action the Supreme Court intended to preclude in its

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12. *See infra* pp. 275-76 (discussing the reasoning of both the Illinois Appellate Court and Illinois Supreme Court).

13. *In re Estate of Feinberg*, 919 N.E.2d at 893 (writing that the court "need not consider whether Max's original testamentary scheme is void as a matter of public policy."); Debra Cassens Weiss, *Grandkids Who Lost Inheritance for Marrying Non-Jews Lose Appeal*, A.B.A. J., Sept. 2009, http://www.abajournal.com/news/article/grandkids_who_lost_inheritance_for_marrying_non-jews_lose_appeal/.

14. *See* Ransdell v. Boston, 50 N.E. 111, 113 (Ill. 1898) (explaining that there is always uncertainty in defining which conditions in restraint of marriage are void and which are valid).

15. *In re Estate Feinberg*, 891 N.E.2d at 552.

16. *See* Shapira v. Union Nat'l Bank, 315 N.E.2d 825, 827-32 (Ohio Misc. 1974) (upholding a provision requiring the decedent's son to marry a Jewish girl with Jewish parents); Gordon v. Gordon 124 N.E.2d 228, 231-33 (Mass. 1955) (upholding a provision that revoked gifts to beneficiaries who married individuals not born into the Jewish faith).

17. *See Shapira*, 315 N.E.2d at 827 (discussing the plaintiff's argument that the right to marry is protected by the Fourteenth Amendment to the Constitution of the United States).

18. *See, e.g.*, Winterland v. Winterland, 59 N.E.2d 661, 663 (Ill. 1945) (holding that a "testamentary provision tending to disturb or destroy an existing marriage" by encouraging divorce is against public policy); *see also In re* Silverstein's Will, 155 N.Y.S.2d 598, 599 (N.Y. Sur. Ct. 1956) (holding that "[c]onditions in partial restraint of marriage "which merely impose reasonable restrictions upon marriage are not against public policy.").

Shelley v. Kraemer decision. Part IV analyzes the public policy issues surrounding testamentary dispositions and argues that partial restraints conditioning the receipt of property on a person marrying within a certain class of persons are distinguishable from those encouraging divorce and thus are generally valid. Part IV also argues that testamentary provisions that do not act as continuing inducements cannot contravene public policy. Part V analyzes the contradictions between the Restatement (Third) of Trusts and the Restatement (Second) of Property (Donative Transfers) and proposes that in order to provide certainty to those creating testamentary provisions and effectuate the relevant competing policies, state legislatures need to codify a statute or regulation based on the Restatement (Second) of Property (Donative Transfer) and its "unreasonable limitation" approach.

II. BACKGROUND

A. *Wills and Trusts*

It is important to start with an understanding of the basic definitions and rules that govern wills and trusts. When a person dies, his or her property passes to another person through either intestacy, dying without a valid will or trust, or a testamentary method.[19] This Comment focuses on two testamentary methods: wills and trusts.

1. *Wills*

A will is a written document that contains the dying wishes of a person; it details how and to whom his or her property will be distributed upon death.[20] A person creating a will may attach conditions to the receipt of the estate,[21] subject only to those conditions not being illegal or against public policy.[22] The disposition of the property takes effect upon the death of the instrument's creator.[23] In order to become effective, however, the

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19. WILLIAM HERBERT PAGE, A TREATISE ON THE LAW OF WILLS, 1 (Anderson Publ'g Co. 2003) (1901).

20. *Id.*

21. WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS 488 (The W.H. Anderson Co. 2005) (1901). A will provision is only conditional when it vests, enlarges, or defeats a property interest. *Id.* Conditions can be either precedent or subsequent. *Id.* A condition precedent is a condition vesting or enlarging an estate when an event occurs or fails to occur. *Id.* A condition subsequent determines an estate already vested upon a certain event happening or not happening. *Id.* at 488-89. When construing conditions, those provisions "which tend to defeat estates are construed quite strictly." *Id.* at 493.

22. *Id.* at 494.

23. *See, e.g.*, Kidwell v. Rhew, 268 S.W.3d 309, 312 (Ark. 2007).

person seeking to receive the property must prove that the will was properly executed and that the creator, or testator, had testamentary capacity[24] at the time he or she created the instrument.[25] Thus, the law uses the term "probate property" to refer to property that is transferred through a will.[26]

2. Trusts

A trust is another way of disposing of property, distinct from a will,[27] and can be created by a will or other written instrument.[28] A private trust exists where one or more people, called trustees, hold property but are obligated to convey that property for the benefit of a person,[29] known as the beneficiary.[30] Such a conveyance is subject to the terms set forth by its creator, the settlor.[31] An important distinction between a trust and a will is that a trust is effective as of its delivery and does not require probate.[32] With respect to donative transfers given upon death or

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24. Testamentary capacity refers to the competency of the testator; the law requires that the testator be an adult who comprehends the nature of his property, those people benefiting from the testamentary instrument, and the property being distributed. JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 141 (Erwin Chemerinsky et al. eds., Aspen Publishers 7th ed. 2005).

25. DANIEL SMITH REMSEN, THE PREPARATION AND CONTEST OF WILLS 5 (Baker, Voorhis & Co. 1907).

26. DUKEMINIER, *supra* note 24, at 28.

27. *Kidwell*, 268 S.W.3d at 312.

28. THOMAS CONYNGTON ET AL., WILLS, ESTATES, AND TRUSTS 364 (The Ronald Press Co. 1921). A trust need not be formally written. THOMAS L. SHAFFER, THE PLANNING AND DRAFTING OF WILLS AND TRUSTS 90 (Harry W. Jones ed., The Foundation Press Inc. 2nd ed. 1979) (1972). A trust can be treated as a will and given the same effect when characterized as testamentary. *Id.* at 94. However, if the trust does not take effect at the testator's death, "it is inoperable as a will." BOWE & PARKER, *supra* note 21, at 134.

29. 76 AM. JUR. 2D *Trusts* § 1 (2008); *see also* RESTATEMENT (THIRD) OF TRUSTS § 2 (2003) (stating that a trust is "a fiduciary relationship with respect to property . . . which arises as a result of a manifestation of an intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee").

30. CONYNGTON, *supra* note 28, at 359. While private and charitable trusts are both executed for a beneficiary, a charitable trust benefits public communities. Kathryn F. Voyer, *Continuing the Trend Toward Equality: The Eradication of Racially and Sexually Discriminatory Provisions in Private Trusts*, 7 WM. & MARY BILL RTS. J. 943, 954 (1999). This principle difference necessitates a different Fourteenth Amendment analysis for private trusts distinct from charitable trusts, as will be discussed in Part III.

31. DUKEMINIER, *supra* note 24, at 30.

32. REMSEN, *supra* note 25, at 5. A trust avoids probate because the trust creator, while still living, "transfers assets into the name of the trustee or name of the trust." Shelley Steiner, *Incentive Conditions: The Validity of Innovative Financial Parenting by Passing Along Wealth and Values*, 40 VAL.

contingent on future events, wills and trusts accomplish the same purpose, and their provisions are generally subject to the same requirements of legality and consistency with public policy.[33]

B. Restraints—General and Partial

A person creating a will or a trust may disinherit descendents for any reason if that exclusion is unconditionally stated.[34] For example, a father can write in his will that his son or daughter should not receive any of his money or property when he dies, with or without an explanation. A problem arises, however, when testators attempt to influence the behavior of beneficiaries by attaching conditions to the inheritance of money and property.[35] Conditional restraints surface in two forms: total (or general) restraints and partial restraints. A total restraint is one that is "unrestricted in time or number."[36] In particular, a will provision conditioning property on the transferee never marrying[37] or not remarrying once becoming a widow or widower,[38] function as total

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U. L. REV. 897, 903 (2006).

33. *Id.*

34. Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 99 U. ILL. L. REV. 1273, 1277 (1999); *see also In re* Liberman, 18 N.E.2d 658, 660 (N.Y. 1939) (holding that a testator can exclude children or other descendants from benefiting from his wealth for any reason at all, whether sound or unreasonably prejudicial). A parent may disinherit a child for no reason at all. *See* Sloger v. Sloger, 186 N.E.2d 288, 290 (Ill. 1962) (holding that "[t]he fact that the testator's property was divided unequally between those presumably having a claim on his bounty may be attributed to any number of reasons, either fair or unfair."). A parent may also disinherit a child for discriminatory reasons. *See* Clapp v. Fullerton, 34 N.Y. 190, 197 (1866) (holding that "[t]he right of a testator to dispose of his estate depends neither on the justice of his prejudices nor the soundness of his reasoning.").

35. JAMES A. CASNER, AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES 591 (A. James Casner ed., Little, Brown and Co.) (1952).

36. E. LeFevre, Annotation, *Validity of Provisions of Will or Deed Prohibiting, Penalizing, or Requiring Marriage to One of a Particular Religious Faith*, 50 A.L.R. 2D 740, § 2 at 740 (1956).

37. *Id.*; *see also* Watts v. Griffin, 50 S.E. 218, 220 (N.C. 1905) (holding that a condition not to marry "common women" was a general restraint on marriage).

38. Sherman, *supra* note 34, at 1317. But some testamentary provisions conditioning money on a person refraining from remarrying have been held valid. *See* Glass v. Johnson, 130 N.E. 473, 474 (Ill. 1921) (holding that a testator may condition his or her living spouse benefiting from the will upon that spouse remaining unmarried); Raulerson v. Saffold, 61 So. 2d 926, 926 (Fla. 1952) (upholding a provision whereby the husband devised property on the condition that his wife not remarry); Baldwin v. Baldwin, 2 N.W.2d 23, 24-25 (Neb. 1942) (upholding a provision bequeathing property to the testator's wife provided that she remained single).

restraints on marriage. Total restraints are generally held to be contrary to public policy and, thus, invalid.[39]

A partial restraint, on the other hand, is one where the testator conditions a transfer of property on the passage of time or the grantee pursuing certain actions set forth by the testator.[40] A partial restraint is subject to a reasonableness test; the restraint will be "valid or invalid according to whether it is reasonable or unreasonable."[41] Determining the reasonableness of a partial restraint requires courts to investigate the facts surrounding the restraint, the terms the provision employs, the relationship of the parties, and the purpose for which the restraint was imposed.[42] The purpose of this Comment is to examine partial restraints that influence the marriage of those who are situated to benefit from the testator's trust or will[43] and analyze the legal as well as policy

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39. LeFevre, *supra* note 36, § 2 at 740; *see also Watts*, 50 S.E. at 219 (holding that "law will not recognize and enforce conditions in restraint of marriage"); *Glass*, 130 N.E. at 474 (holding that "a testator may not impose a total restraint upon marriage as a condition of a devise").

40. LeFevre, *supra* note 36, § 2 at 740. Conditions requiring the transferee to take action in order to receive money from the testator are also referred to as incentive conditions. Steiner, *supra* note 32, at 897.

41. LeFevre, *supra* note 36, § 2 at 740. A partial restraint is unreasonable when its effect approaches that of a general restraint. CASNER, *supra* note 35, at 655. Reasonable does not necessarily mean objective or unbigoted, since many conditions are upheld as valid that may be deemed "bigoted" by the term's common meaning. ALEXANDER A. BOVE, JR., THE COMPLETE BOOK OF WILLS, ESTATES & TRUSTS 76 (Henry Hold & Co. 2nd ed. 2000) (2000). Partial restraints imposing reasonable restrictions are generally valid. BOWE & PARKER, *supra* note 21, at 556. "The likely effect of the provisions of a will on the person to be influenced rather than the personal purpose of the testator" will determine whether the provision is valid or void. *In re* Will of Collura, 415 N.Y.S.2d 380, 381 (N.Y. Sur. Ct. 1979).

42. Harbin v. Judd, 340 S.W.2d 935, 939 (Tenn. Ct. App. 1960); *see also* Crawford v. Thompson, 91 Ind. 266, 273 (1883) (holding that the reasonableness of partial restraints depends largely "upon the circumstances of particular cases.").

43. A restraint "unreasonably limits the transferee's opportunity to marry if a marriage permitted by the restraint is not likely to occur." RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.2 cmt. a (1983). This analysis inevitably turns on the facts of each case to determine the likelihood of marriage. *Id.* Conditions in restraint of marriage date back to the age of the Romans. CASER, *supra* note 35, at 643. The Romans prohibited such provisions fearing "depopulation resulting from the civil wars." *Id.* At English law,

> all conditions in wills restraining marriage whether precedent or subsequent, whether there was any gift over or not, and however qualified, were absolutely void; and marriage simply was a sufficient compliance with a condition requiring marriage with consent, or with a particular individual, or under any other restrictive circumstances.

THOMAS JARMAN, A TREATISE ON WILLS 1514 (Sweet & Maxwell 1951). The English rationale was founded on the idea that "such restraints promote

concerns surrounding the transfer of property.[44]

C. Partial Restraints on Marriage

Partial restraints on marriage generally fall into four main categories: (1) requiring consent to marry; (2) refraining from marriage until attaining a certain age; (3) requiring divorce from a spouse; and (4) requiring that the beneficiary's spouse belong to a particular group.[45]

1. Consent Conditions

The first class of marriage restraints centers on consent by a designated person that the transferee can marry a certain individual.[46] A testator creates this type of condition by conferring property on the condition that a third party consents to the beneficiary marrying his or her chosen mate, such as a testator requiring his son to consent to his daughter's chosen husband in order for her to benefit.[47] Courts generally hold that such conditions are void.[48] But there is authority upholding a finding to the contrary where the intentions of the party withholding consent are reasonable.[49]

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licentiousness and offend the divinely inspired precept that multiplication of the human race shall be by the medium of matrimony." CASNER, *supra* note 35, at 644. However, the English Court of Chancery acknowledged that public policy concerns surrounding general restraints have no application to partial restraints. *Id.* "The state of the American authorities is strikingly parallel to that of the English." *Id.* at 646. United States courts generally allow conditions in partial restraint of marriage. JARMAN, *supra* note 43, at 1514.

44. *See Matter of* Estate of Walker, 476 N.E.2d 298, 300 (N.Y. 1985) (holding that the "law permits a person possessing testamentary capacity to dispose of property to any person in any manner and for any object or purpose so long as such disposition is not illegal or against public policy").

45. *See generally* McCoy v. Flynn, 151 N.W. 465, 467 (Iowa 1915) (explaining that conditions not to marry until a certain age, without the consent of parents, guardians, or trustees, or not to marry a particular person, or a person belonging to a specific religious group are conditions in partial restraint of marriage).

46. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.2 cmt. e (1983). The Restatement provides the following example of a restraint based on consent: "O, by an otherwise effective will, bequeaths $200,000 to T in trust to pay the income thereof 'to my daughter D for her life, but if she ever marries without the consent of T, said income shall be paid to my son S for his life.'" *Id.* § 6.2 cmt. e, illus. 7.

47. *See, e.g., Liberman*, 18 N.E.2d at 659 (describing a will provision conditioning the money a son could receive on the beneficiary's brother and sister consenting to his choice of a proper spouse).

48. *Id.* at 662 (holding that "the natural tendency of the condition contained in the will is to restrain all marriages and for that reason it is void").

49. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.2 cmt. e (1983). A consent condition is unreasonable if it extends "beyond the maturity

2. *Age Conditions*

A testator can also condition the receipt of money or property on a person refraining from marriage until attaining a certain age.[50] For example, courts have enforced a provision where a testator conditioned the transfer of property on a transferee not marrying until the age of twenty-one.[51] Despite the express condition, the age set forth by the testator cannot preclude marriage beyond a reasonable age.[52]

3. *Divorce Conditions*

Testators also attempt to exert control by enticing the transferee to obtain a divorce from his or her current spouse.[53] Authorities agree that provisions requiring divorce are invalid and cannot be given effect.[54] The underlying rationale for invalidating such conditions is in keeping with the importance of protecting the family.[55] Some courts, however, look to whether the testator intended a legal or an illegal divorce.[56]

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of the transferee." *Id.*

50. *Id.* Language effecting this type of condition may take the following form: "to my son S and his heirs, but if he marries before attaining the age of 25, to my daughter D and her heirs." *Id.* § 6.2 cmt. d, illus. 5.

51. *See* Shackelford v. Hall, 1857 WL 5691, at *1 (Ill. Dec. 1857) (upholding a provision forfeiting a child's receipt of money on abstaining from marriage until the age of twenty-one). Conditions in restraint of marriage until a certain age should be distinguished from those where the testator's clear intent is to provide support until marriage. *See* Mann v. Jackson, 24 Atl. 886, 888 (Me. 1892) (holding that a testator's devise of his home to his daughter until she married was valid because the testator clearly intended to "furnish support until other means should be provided").

52. *See, e.g.*, Fletcher v. Osborn, 118 N.E. 446, 452 (Ill. 1917) (holding a clause conditioning money on the transferee not marrying before a certain age valid because "it did not absolutely prohibit the marriage of the party, within the period wherein issue of the marriage might be expected"). In reaching that holding, the Illinois Supreme Court also reasoned that the testator did not "impose perpetual celibacy upon the objects of his bounty." *Id.*

53. *See In re* Estate of Gerbing, 337 N.E.2d 29, 31 (Ill. 1975) (describing a will provision where the testator turned over property to his son upon the son obtaining a divorce and remaining divorced for two years).

54. *See* RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. j (2003) (explaining that a trust provision may not "confer a beneficial interest upon a beneficiary if he or she obtains a divorce or legal separation"); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 7.2 (1983) (describing that a provision is "invalid where the dominant motive of the transferor was to promote such a separation"); *Gerbing*, 337 N.E.2d at 33 (holding that provisions designed to induce divorce exert "a disruptive influence upon an otherwise normally harmonious marriage" and thus are void).

55. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 7.2 cmt. a (1983).

56. *Compare* Baker v. Hickman, 273 P. 480, 486 (Kan. 1929) (upholding a will provision where the testator intended a legal separation pursuant to a

4. *Marriage Within a Class Conditions*

The last variety of marriage restraint is the kind that Max Feinberg attempted to use to encourage his grandchildren to marry within a particular class of people, the Jewish community.[57] This type of restraint may take many forms, for example, marrying within the same culture[58] or religion.[59] Courts are split as to whether restraints of this sort are valid.[60]

The two relevant Restatements of the law take extremely different approaches.[61] The Restatement (Third) of Trusts takes

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statute), *with* Fleishman v. Bregel, 197 A. 593, 597-98 (Md. 1938) (finding invalid a trust provision attempting to induce a divorce where the husband and wife were happily married). An illegal divorce is one tending to induce a couple to live separately or to be divorced where there is no ground for divorce. *Id.* at 598. A legal divorce is that which is based on some ground recognized by the law, and a condition restricting a legal divorce is "valid if it is made by way of provision for an existing or an anticipated separation, or for any other reason does not operate as an inducement to a separation." *Id.*

57. *In re Estate of Feinberg*, 891 N.E.2d at 550.

58. *See In re* Estate of Keffalas, 233 A.2d 248, 250 (Pa. 1967) (describing a will conditioning a gift on the testator's children marrying individuals of Greek blood).

59. *See, e.g.*, Phillips v. Ferguson, 8 S.E. 241, 241 (Va. 1888) (describing a will conditioning the bequest of money on the testator's children not marrying into a specific family). Testamentary provisions of this nature are generally upheld. *See Shapira*, 315 N.E.2d at 826 (describing a will provision gifting the testator's son property only if he married a girl of the Jewish faith). People have also written testamentary provisions attempting to prohibit marriage within a certain class of people or to a certain person. *See* Taylor v. Rapp, 124 S.E.2d 271, 271-72 (Ga. 1962) (upholding a will provision devising the testator's money on the condition that the testator's daughter not marry a certain individual). This affirmed a Georgia statute stating the following: "Prohibiting marriage to a particular person or persons, or before a certain reasonable age, or other prudential provisions looking only to the interest of the person to be benefited, and not in general restraint of marriage, will be allowed and held valid." *Id.*; *see also Hall v. Eaton*, 631 N.E.2d 805, 808 (Ill. App. Ct. 1994) (holding that "[a]ttempts to prevent unmarried children from marrying named individuals (partial restraints), or from marrying before a certain age, or from marrying without consent, are valid.").

60. *Compare* U.S. Nat'l Bank of Portland v. Snodgrass, 275 P.2d 860, 862-72 (Or. 1954) (upholding a testamentary provision conditioning the bequest of property on the beneficiary not marrying an individual of the Catholic faith), *and* Gordon v. Gordon, 124 N.E.2d 228, 231-33 (Mass. 1955) (upholding a provision that revoked gifts to beneficiaries who married individuals not born into the Jewish faith), *with In Re Estate of Feinberg*, 891 N.E.2d at 549 (finding invalid a trust provision that revoked gifts to beneficiaries that married individuals not born into the Jewish faith), *and* Maddox v. Maddox, 52 Va. (1 Gratt.) 804, 817-18 (1854) (finding void a will provision requiring the testator's daughter to marry a member of a religious society).

61. The two Restatements relevant in the area of trusts and estates are the Restatement (Second) Property (Donative Transfers) and the Restatement (Third) of Trusts. MARK REUTLINGER, WILLS, TRUSTS, AND ESTATES 7 (Aspen Publishers, Inc. 1998) (1993). "Restatements are not themselves law, but they

the position that any condition attempting to limit the beneficiary's selection of a spouse is invalid, blurring together the aforementioned categories of restraints.[62] In contrast, the drafters of the Restatement (Second) of Property (Donative Transfers) would uphold this type of partial restraint with two minor exceptions: (1) where the transferee's religious belief is substantially different from that required by the condition, so that marriage will not likely occur; or (2) where the number of potential spouses eliminated by the condition is negligible.[63]

D. *The Feinberg Decisions*

The Illinois Appellate Court decision holding Max Feinberg's testamentary provision invalid as against public policy, while overruled by the Illinois Supreme Court,[64] still sheds light on the "broader tension between the competing values of freedom of testation on one hand and resistance to 'dead hand' control on the other."[65] First, the majority treated Max's testamentary condition as one encouraging divorce rather than restricting marriage to a particular class. Justice Cunningham compared Max's clause to will provisions in three prior Illinois Supreme Court cases where the testators conditioned the testamentary bequest on the beneficiary obtaining a divorce.[66] Additionally, the majority relied on the Restatement (Third) of Trusts in finding that the condition violated public policy,[67] when in fact the case law cited as authority for its proposition is unrelated to the Feinberg case and

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can strongly influence the enactment of reform and state legislation." *Id.* The drafters of the Restatements intent was to simplify or restate the common law of the United States. GEORGE LEFCOE & DAVID A. THOMAS, THOMPSON ON REAL PROPERTY, SECOND THOMAS EDITION 5 (David A. Thomas ed., Lexis Publ'g 2000) (1994). However, "in recent years the Restatements have often become proposals for change." REUTLINGER, *supra* note 61, at 6.

62. RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. j (2003). The Restatement (Third) of Trusts lumps conditions limiting the transferee's choice of spouse to a certain class with those encouraging divorce or separation. *Id.*

63. RESTATEMENT OF PROP.: DONATIVE TRANSFERS § 6.2 cmt. c (1983). The Restatement justifies this rule by explaining that "[f]reedom in the choice of a mate is favored by public policy, but, like all freedoms, is subject to qualification." *Id.* § 6.2 cmt. a (1983).

64. While the Illinois Supreme Court reversed the appellate court's decision, the split in reasoning among the appellate justices is still relevant in assessing the validity of such provisions.

65. *In re Estate of Feinberg*, 919 N.E.2d at 894.

66. *In re Estate of Feinberg*, 891 N.E.2d at 550-51. The majority described the language used by the testator in the three cases (*Ransdell v. Boston*, 50 N.E. 111 (1898), *Gerbing*, and *Winterland*) as "strikingly similar to the instant case" and saw "no reason to depart from the well-established principle." *Id.* at 551.

67. *Id.* at 552.

thus sheds no light on whether that particular Restatement provision is persuasive authority in Illinois.[68]

In his concurring opinion, Justice Quinn noted that such provisions may violate the Fourteenth Amendment; however, the majority never fully addressed this seemingly dormant constitutional issue.[69] Justice Greiman's dissent pointed to various flaws in the majority's argument and made an equally compelling case for upholding the provision, pointing to more analogous cases in other jurisdictions.[70] Thus, the disagreement among the appellate court justices, conflicting laws in sister states, and avoidance of this precise issue by the Illinois Supreme Court signify the uncertainty surrounding this issue and the need for a clear answer.

III. THE CONSTITUTIONAL FACTOR

While the testamentary document itself does not violate any constitutional guarantee, courts have considered whether judicial enforcement of testamentary provisions in wills and trusts violates the Federal Constitution.[71] The Fourteenth Amendment forbids a state from denying any person "life, liberty, or property, without due process of law . . . [or] the equal protection of the laws."[72] While the right to marry is protected by the Fourteenth Amendment, this right only applies when the government discriminates against citizens and generally not when private citizens discriminate against other citizens.[73] Private conduct may

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68. *Id.* at 557 (Greiman, J., dissenting).

69. *Id.* at 554 (Quinn, J., concurring). Justice Quinn wrote that *Shelley v. Kraemer*, 334 U.S. 1 (1948), in holding that courts cannot enforce racially restrictive terms of an agreement, applied to provisions like the one Max Feinberg created. *Id.* Additionally, he wrote that asking courts to enforce such a provision would be enforcing "the worst bigotry imaginable." *Id.* Although the *Shapira* court held that there were no constitutional issues (distinguishing between a right to marry and a privilege of inheritance), Justice Quinn found that the court's "rationale may be a distinction without a difference." *Id.*

70. *Id.* at 555-56 (Greiman, J., dissenting). Justice Greiman stated that the Illinois case law cited as persuasive authority by the majority involved testamentary provisions through which the testator made "an effort to direct the legatee-descendants to obtain a divorce," which is not analogous to *Feinberg*. *Id.* Justice Greiman also noted that "there is precedent to the contrary in other states" founded on case law more factually related to Max Feinberg's case than those cases cited by the majority. *Id.*

71. *See Matter of* Estate of Adolph Donner, 623 A.2d 307, 308 (N.J. Ct. App. Div. 1993) (holding that testamentary dispositions should be enforced unless contrary to a rule of law). A private discriminatory agreement by itself does not violate any Fourteenth Amendment guarantees or rights. *Shelley*, 334 U.S. at 13.

72. U.S. CONST. amend. XIV.

73. The Civil Rights Cases, 109 U.S. 3, 13 (1883). The Supreme Court held

only violate the Fourteenth Amendment when the state becomes entangled in the private conduct of citizens.[74] The United States Supreme Court found such entanglement in *Shelley v. Kraemer*, where it held that a court enforcing racially discriminatory restrictive covenants was a state action that violates the Constitution.[75]

A. *Restricting the Privilege of Succession, Not the Right to Marry*

Few other courts have addressed the state action doctrine as applied to discriminatory restrictive conditions in wills and trusts.[76] The principal argument for invalidating a condition in partial restraint of marriage arises under the Fourteenth Amendment's requirement that a person's freedom to choose a spouse not be infringed upon by discrimination.[77] The Court has emphasized that the right to marry is a right protected by the Fourteenth Amendment, labeling the right as "fundamental."[78] Thus, in theory, a court enforcing such a condition could violate the Fourteenth Amendment.

The right to marry, however, should be distinguished from the right to take property. The Court in *Magoun v. Illinois Trust & Savings Bank* held that the right to take property by devise or descent is a privilege and not a natural right.[79] The Court recognized this dichotomy between rights protected by the

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that the Fourteenth Amendment "is not general legislation upon the rights of the citizen, but corrective legislation." *Id.*; *see also* Burton v. Wilmington Parking Auth., 365 U.S. 715, 721 (1961) (holding that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful"). Private individuals do not have to act in compliance with the Constitution. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 507 (Aspen Publishers 2006) (1997).

74. CHEMERINSKY, *supra* note 73, at 527.

75. *Shelley*, 334 U.S. at 14. There, the Court wrote that "action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment." *Id.*

76. *See Gordon*, 124 N.E.2d at 228 (discussing the validity of a will provision revoking the testator's testamentary gift to his children if they married "a person not born in the Hebrew faith"); *see also Shapira*, 315 N.E.2d at 826 (discussing the validity of a will provision where the testator conditioned the gift of money on his son marrying "a Jewish girl whose both parents were Jewish").

77. *Shapira*, 315 N.E.2d at 827.

78. Loving v. Virginia, 388 U.S. 1, 12 (1967). The freedom to marry lies with the individual and cannot be infringed on by the states. *Id.*

79. 170 U.S. 283, 288 (1898). In *Magoun*, an individual asserted that the right to inherit was a natural right. *Id.* at 283; *see also Shapira*, 315 N.E.2d at 827 (noting that the court was not enforcing a restriction upon the right to marry, but rather a testator's restriction placed upon inheritance).

Fourteenth Amendment[80] and the privilege to take property in the area of inheritance taxes.[81] The Court, in holding that states taxing the right to succeed property does not violate the Fourteenth Amendment, reasoned that the tax was on the privilege of succession and not on the property itself.[82]

A marked analogy can be drawn between testamentary conditions based on marrying within a certain class of people. A court enforcing a testamentary provision is affecting the individual's privilege of receiving property and not the fundamental right to marry. In the same way that a tax is seemingly placed on property, it may appear to an ordinary person that a condition is placed on the beneficiary's actions. However, just as the Court clarified that the tax was on the transfer of the property between individuals, the marriage condition is, in the same way, on the transfer of property between individuals and not on any individual rights.[83]

Thus, since the right to take property by succession is the only relevant right involved, judicial enforcement of Max Feinberg's testamentary conditions does not violate any constitutional guarantee.[84]

B. Even if a Right to Marry Were Implicated, Judicial Enforcement of Testamentary Provisions Does Not Violate the Fourteenth Amendment

Shelley does not apply to judicial enforcement of private testamentary provisions restricting marriage[85] because a court

80. The right to own property is a right protected by the Due Process Clause of the Fourteenth Amendment, which precludes states from depriving any person of "life, liberty, or property without due process of law." U.S. CONST. amend. XIV.

81. *See Magoun*, 170 U.S. at 288 (holding that an inheritance tax does not violate the Fourteenth Amendment because the tax is not on the property itself, but on the succession of the property).

82. *Id.*; *see also* Maxwell v. Bugbee, 250 U.S. 525, 541 (1919) (affirming that an inheritance tax did not violate the Fourteenth Amendment because the tax was "not upon property, but upon the privilege of succession"); Keeney v. Comptroller of N.Y., 222 U.S. 525, 535 (1912) (holding that an inheritance tax is a tax on the transfer of the property "intended to take effect in possession or enjoyment at or after the death of [the] grantor" and not on the property itself).

83. While it may be argued that inheritance taxes are distinguishable from taking property through testamentary methods, the privilege of acquiring property through trusts and wills has "frequently been classed with death duties, legacy and inheritance taxes." *Keeney*, 222 U.S. at 533-34.

84. *See Magoun*, 170 U.S. at 288 (holding that the right to take property by devise may be taxed by the states, and states may even go so far as to discriminate between relatives).

85. *See Snodgrass*, 275 P.2d at 866 (holding that *Shelley* is limited to the

enforcing such a condition is not the type of government participation the Court intended to preclude through its holding. In *Shelley*, the Court declined to divest title to land out of petitioners' name, which would have required it to affirmatively eject them from their property.[86] The Court used a "but for" test, describing that but for the active judicial enforcement of the covenant, the "petitioners would have been free to occupy the propert[y]."[87] Therefore, the Court, in defining state action, intended merely to prevent active intervention of state courts into private disputes.[88] Following this decision, the Court has failed to clarify or alter its holding.[89] The Court's true intent can only be discovered through a fact-based analysis of subsequent cases invoking the judicial enforcement exception.[90]

In *Barrows v. Jackson*, the United States Supreme Court refused to step in and enter an award for damages on the basis that imposing a monetary sanction on those individuals not abiding by racial covenants would encourage the use of discriminatory restrictive covenants.[91]

The Seventh Circuit in *Dunham v. Frank's Nursery & Crafts*

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mere proposition that courts violate the equal protection clause of the Fourteenth Amendment by enforcing covenants "in a deed restricting the use and occupancy of real property to persons of the Caucasian race" and nothing more). *But see* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.2 cmt c. (1983) (cautioning that judicial enforcement of a restraint designed to prevent the marriage of a transferee to an individual of a different race may be state action, possibly violating the transferee's rights to equal protection of the law under the Fourteenth Amendment). The Ohio Court of Common Pleas posited that had the right to marry been affected by the discriminatory provision at issue, the doctrine outlined in *Shelley* would apply. *Shapira*, 315 N.E.2d at 827-28.

86. *Shelley*, 334 U.S. at 6.

87. *Id.* at 19.

88. *Id.* Justice Vinson, who wrote for the majority in *Shelley*, reiterated in a later decision that judicial enforcement of private discrimination only applies when the court's decision operates "directly against" the person seeking to invalidate the discriminatory provision. Barrows v. Jackson, 346 U.S. 249, 261 (1953) (Vinson, J., dissenting).

89. Louis Henkin, Shelley v. Kraemer*: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 474 (1962). Even legal scholars have trouble attempting to explain the holding of the case. Mark D. Rosen, *Was* Shelley v. Kraemer *Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451, 454 (2007).

90. *See* Dunham v. Frank's Nursery & Crafts Inc., 919 F.2d 1281, 1284 (7th Cir. 1990) (describing that a state action determination "must be based on the specific facts and the entire context of a given case"). "Only by sifting facts and weighing circumstances can the nonobivious involvement of the State in private conduct be attributed its true significance." *Id.*

91. *Barrows*, 346 U.S. at 253-54. The Court explained that sanctioning the respondent for failure to abide by the discriminatory covenant would have the effect of coercing her into using the property in a discriminatory manner. *Id.* at 254.

used the *Shelley* doctrine in analyzing the district court's enforcements of a litigant's peremptory challenge on racial grounds.[92] In finding state action, the Seventh Circuit reasoned that enforcing the discrimination would require the judge to affirmatively excuse a juror, thereby placing its power behind the discrimination.[93] The Court also addressed a court's participation in peremptory challenges, explaining that state action by courts requires "overt, significant assistance of the court."[94]

The District Court of Rhode Island in *Ciba-Geigy Corp. v. United Textile Workers* also used the *Shelley* framework in finding that a court enforcing a collective bargaining agreement was state action, violating the Fourteenth Amendment.[95] By enforcing such an agreement, the court would be required to affirmatively implement the arbitration provision set forth in the agreement,[96] amounting to state action.

When a court is asked to enforce a testamentary provision in a will, its task is to determine the testator's intent by analyzing the words used and then construing them in accordance with their common meaning;[97] that intent controls, and the court must do no more.[98] To enforce a similar provision in a trust, the judiciary determines the creator's intent and then applies the necessary law to allow the continued administration of that trust.[99]

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92. 919 F.2d at 1282.

93. *Id.* at 1286. The court emphasized the trial judge's "control over the jury and its selection procedures." *Id.* Judge Ripple, writing for the dissent, would have required even more judicial involvement to rise to the level of state action; he explained that a judge takes no affirmative role in preemptory challenges and insisted on a more narrow reading of *Shelley*. *Id.* at 1294-95.

94. Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 624 (1991). The *Edmonson* Court emphasized that the purpose of a peremptory challenge would be frustrated without the "indispensable participation of the judge." *Id.* The same cannot be said for enforcement of conditional testamentary dispositions, which can be enforced on a purely private level.

95. 391 F. Supp. 287, 298 (D.C. R.I. 1975). Collective bargaining agreements generally contain provisions requiring arbitration. *Id.* at 292.

96. *Id.* at 298-99.

97. *Walker*, 476 N.E.2d at 300.

98. *Id.*

99. *In re* Estate of Wilson, 452 N.E.2d 1228, 1237 (N.Y. 1983). *But see* Voyer, *supra* note 30, at 969 (writing that probate courts sanction discrimination by validating and enforcing testamentary trusts). It is important now to outline the important differences between private and charitable trusts in the state action context, as many courts have ruled and experts have written on the subject matter. The state is much more involved in charitable trusts; the state grants such trusts tax immunity, gives the terms a modern meaning through *cy pres*, and plays a key role in designating and regulating the trustees. Elias Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L. J. 979, 1003-04 (1957). Thus, judicial enforcement of charitable trusts, while not discussed in great detail in this Comment, is vastly different from private trusts.

In enforcing will and trust provisions, the court is a neutral party that permits the discriminatory contractual instruments without direct involvement.[100] This permissive involvement is in stark contrast with awarding damages, dismissing a juror, and strictly compelling arbitration. The first is not the type of full judicial coercive power,[101] active intervention,[102] or act directly against an individual's rights[103] that *Shelley* meant to preclude; the court is not itself discriminating, compelling another to discriminate, or allowing another person or entity to discriminate on its behalf.[104] So long as the judges are not motivated by any discriminatory intent in enforcing testamentary conditions, there should be no state action.[105]

When applying this analysis to a *Feinberg*-type provision, it becomes quite apparent that an Illinois court enforcing Max's provision would not be considered a state actor that violates the Constitution. Instead, the judge would merely be permitting the trustee to distribute the money in accordance with Max's terms. The Illinois Supreme Court, albeit in dicta, recognized this notion and explained that the court has "been reluctant to base a finding of state action 'on the mere fact that a state court is the forum for the dispute.'"[106]

Experts agree that such a broad application of *Shelley* would essentially extend the Fourteenth Amendment to all action, both private and public,[107] a consequence the United States Supreme

100. *See Wilson*, 452 N.E.2d at 1236 (noting that the state court's "neutral regulation of contracts permitting parties to enter discriminatory agreements" did not give rise to state action in *Shelley*, but rather its "exercise of its judicial power [that] directly effected a discriminatory act" made it a state actor).

101. *Shelley*, 334 U.S. at 19.

102. *Id.*

103. *Barrows*, 346 U.S. at 261 (Vinson, J., dissenting).

104. *Wilson*, 452 N.E.2d at 1235. The *Wilson* court held that a court applying trust principles that permit private discrimination is not state action, so long as it does not "encourage, affirmatively promote, or compel it." *Id.* at 1237. The court even went so far as to say that a court replacing a trustee who is unwilling to act is not state action. *Id.* Courts have echoed this notion that a court appointing a fiduciary is not state action. *See, e.g.*, Wilcox v. Horan, 178 F.2d 162, 165 (10th Cir. 1949) (holding that a court appointing a guardian to assume custody is not sufficient state action under the Fourteenth Amendment).

105. *See* Evans v. Abney, 396 U.S. 435, 445-46 (1970) (factoring into the state action analysis the Georgia court's lack of racial animus or discriminatory intent in construing and enforcing the will).

106. *In re Estate of Feinberg*, 919 N.E.2d at 905.

107. *See* CHEMERINSKY, *supra* note 73, at 528 (explaining that if state court decisions are state action, "then ultimately all private actions must comply with the Constitution."); *see also* Rosen, *supra* note 89, at 453 (writing that applying *Shelley* in a broad sense would blur the distinction between state and private action).

Court justices did not foresee.[108] Further, courts mainly apply *Shelley* to racial discrimination,[109] suggesting the Court's holding is contextually limited.

While not formally addressed in this Comment, it is important to note other possible constitutional concerns regarding discriminatory conditions in wills and trusts, including violations of the First Amendment's guaranty of religious freedom,[110] the privileges and immunities clause and due process clause of the Fourteenth Amendment,[111] and 42 U.S.C. §§ 1981 and 1982.[112]

IV. THE PUBLIC POLICY FACTOR

Courts should also analyze public policy concerns in determining the validity of a testamentary disposition conditioned on marriage to a particular class of individuals.[113] United States law places great importance on marriage, family[114] and the freedom to bequeath property, resulting in a clash between the policies in favor of marriage and the freedom of testation.[115] Thus,

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108. *See* Henkin, *supra* note 89, at 477.

109. *See* Rosen, *supra* note 89, at 458 (explaining that courts have not extended *Shelley* outside the context of racial discrimination).

110. *Gordon*, 124 N.E.2d at 234-35. The *Gordon* court addressed the First Amendment argument by simply stating, "There is no condition based on the religious belief of anyone at the time of marriage." *Id.* at 235. *But see Keffalas*, 233 A.2d at 250 (holding that a condition influencing the choice of a spouse is "too remote to be regarded as coercive" of the beneficiary's religious faith).

111. *Gordon*, 124 N.E.2d at 234-35.

112. Florence Wagman Roisman, *The Impact of the Civil Rights Act of 1866 on Racially Discriminatory Donative Transfers*, 53 ALA. L. REV. 463, 467 (2002). While Section 1982 only applies to race discrimination, the Supreme Court has recognized that Jews "were among the people then considered to be distinct races and hence within the protection of the statute." Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617-18 (1987). Roisman applied Section 1982 to *Shapira* and argued that the federal statute prevents a person "from exercising a property interest because of the race of a person with whom he will or may associate," an unlawful act. Roisman, *supra* note 112, at 538-39.

113. *See Donner*, 623 A.2d at 308 (holding that a court must consider public policy as well as any positive rules of law in deciding whether to enforce a testamentary disposition).

114. Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 583-84 (2001). The law makes opposite-sex marriage extremely accessible, and when those opposite-sex couples divorce, the law makes it just as easy to remarry. *Id.* at 584.

115. *Id.* at 588. The Supreme Court has suggested that the right of a testator to dispose of property has been recognized as such for hundreds of years. Hodel v. Irving, 481 U.S. 704, 716 (1987). One expert even suggested that *Hodel* stands for the proposition that the right to pass on property at death is a constitutionally protected right. Ronald Chester, *Is the Right to Devise Property Constitutionally Protected? – The Strange Case of* Hodel v.

when analyzing public policy concerns of testamentary conditions, courts are bound to perform a balancing test, weighing the right of the testator to dispose of his or her property against the impact the provision will have on preventing lawful marriages.[116]

As a result, courts have reached inconsistent results when attempting to balance both of these important and competing policies.[117] This Comment seeks to clarify which types of testamentary conditions in restraint of marriage are valid and to distinguish those that are against public policy.

Part II of this Comment described partial restraints and the reasonableness test to which those restraints are subjected.[118] As previously discussed, the reasonableness of a condition depends largely upon the facts and circumstances of the case.[119] In other words, reasonableness depends on whether or not the condition unfairly limits the beneficiary's opportunity to marry under the circumstances of the case.[120] While the reasonableness analysis is fact based, certain principles of general application have arisen in two scenarios: conditions tending to induce divorce and those tending to restrict marriage.[121]

A. Encouraging Divorce Is Different from Encouraging Marriage to a Certain Class of Individuals

The distinction between conditions encouraging divorce and those encouraging marriage to a certain class is key to understanding public policy concerns; the two are different, and the separate policy concerns relating to each should not be confused or misapplied.

It is a widely accepted principle that testamentary conditions

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Irving, 24 SW. U. L. REV. 1195, 1198 (1995). If Chester is correct, there is a new line of analysis that must necessarily follow.

116. *See Ransdell*, 50 N.E. at 114 (holding that society's emphasis on the importance of lawful marriages is no less important than a testator's freedom to dispose of his property through an instrument like a will); *see also* POWELL ON REAL PROPERTY § 516 (Matthew Bender & Co., Inc., 1974) (writing that courts must balance the freedom of disposition with the conditional behavior set out in the property transfer).

117. Storrow, *supra* note 114, at 588.

118. *See supra* part II (discussing the different types of partial restraints on marriage).

119. *See Winterland*, 59 N.E.2d at 663 (holding that the validity of conditions depends on the "circumstances of each particular case"); *see also In re* Harris' Will, 143 N.Y.S.2d 746, 748 (N.Y. Sur. Ct. 1955) (holding that reasonableness depends on the "purpose and effect under the circumstances of a particular case").

120. POWELL, *supra* note 116, § 516.

121. *Id.*; *see also Hall*, 631 N.E.2d at 807-08 (distinguishing between a condition encouraging divorce and a condition preventing marriage to certain individuals).

that encourage divorce or separation are unreasonable and, thus, against public policy.[122] Quite obvious to this notion is the importance of family;[123] the "social objectionability" of disturbing a harmonious familial relationship outweighs any right to dispose of property.[124]

However, the social considerations surrounding conditions that merely restrain marriage to a certain group are quite different, and several courts have mindfully noted this distinction.[125] There is generally no concern about disrupting the family unit as there is with divorce conditions because such restrictions are typically only on first marriages.[126] Courts are therefore left to consider other policy implications when determining the reasonableness of the condition, such as the transferee's desire to choose whom he or she marries, the transferor's wish in setting the terms of the testamentary gift, and the parent's or guardian's inclination to guide his or her family members.[127] In practice, a testator limiting a transferee's desire to choose a spouse is usually not contrary to public policy unless that

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122. *See id.* at 807 (holding that a condition that tends to encourage divorce or separation of a husband and wife is against public policy); *see also Gerbing*, 337 N.E.2d at 33 (holding that testamentary conditions that tend to "aggravate normal differences" or exert a "disruptive influence upon an otherwise normally harmonious marriage" are against public policy); *Winterland*, 59 N.E.2d at 663 (holding that a testamentary condition that disturbs or destroys an existing marriage is against the public policy of Illinois); Mau v. Heller, 159 N.W.2d 82, 84 (Wis. 1968) (holding that a testamentary condition that "attempts . . . to break up an already existing marriage" is against public policy).

123. Inducing the beneficiary to obtain a divorce is a true restraint on marriage. Storrow, *supra* note 114, at 589. Additionally, preservation of the family has "been a priority of both courts and legislatures" for a long time. *Id.* at 527.

124. POWELL, *supra* note 116, § 78.02.

125. *See, e.g.*, *Liberman*, 18 N.E.2d at 660 (holding that a condition to induce the beneficiary to marry "in a manner desired by the testator" is a reasonable restriction and not contrary to public policy); *see also Hall*, 631 N.E.2d at 808 (holding that a condition to induce beneficiary not to marry a certain class of individuals was reasonable and not against public policy).

126. *See, e.g.*, *Liberman*, 18 N.E.2d at 662 (describing a clause restricting only the beneficiary's first marriage).

127. *Id.* A careful weighing of these factors will normally result in a partial restraint being reasonable, provided there is still the possibility of "some" marriage. *Id.* Restraints premised on the theory of parental guidance are not unreasonable. *Mau*, 159 N.W.2d at 84. This "father-knows-best" principle is effective because a parent presumably knows his or her child better than any other person. Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445, 485 (2006). However, experts have made the argument that this principle is flawed because testators cannot make rational decisions. *Id.* at 484.

choice is unreasonably limited.[128]

Even without a power of appointment, it is clear that this type of provision cannot encourage divorce. A Max Feinberg-type clause is one in partial restraint, conditioning the receipt of money on a potential beneficiary marrying within a certain class of individuals.[129] As soon as one of Max's descendants married outside the Jewish faith, he or she was "deceased for all purposes of this instrument as of the date of such marriage."[130] Thus, the restriction was only on first marriages. Given the different policy implications it is a blatant misapplication of the law to compare a Max Feinberg-type condition with conditions encouraging divorce.[131] The Illinois Supreme Court recognized this common error, noting that Max's provision "involves the decision to marry, not an incentive to divorce."[132] Additionally, should a pure Max Feinberg-type provision be litigated in Illinois courts in the future, the Supreme Court has made clear that "the public policy of the state of Illinois protects the ability of an individual to distribute his property, even after his death, as he chooses, with minimal restrictions under state law."[133] While not entirely dispositive or instructive on how a court will treat such a provision, the court has indicated how courts should balance public policy concerns

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128. *Compare Maddox*, 52 Va. (1 Gratt.) at 809 (holding a provision limiting the beneficiary's choice of potential spouses to five or six men contrary to public policy), *with Shapira*, 315 N.E.2d at 831 (finding that a provision limiting the beneficiary's choice to a Jewish woman with Jewish parents was not against public policy; while the Jewish population in the beneficiary's town was small, the Jewish population around the country was substantial). *But see* Sherman, *supra* note 34, at 1319-22 (arguing that courts apply the reasonable "numbers-based approach" to qualifying spouses inconsistently and that a blanket rule invalidating all provisions limiting a beneficiary's choice of marriage should be used in its place).

Secondary authorities tend to disagree with the blanket approach and, instead, favor the reasonable approach. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.2 (1983) (making clear that a restriction on a donative transfer is valid if it "does not unreasonably limit the transferee's opportunity to marry"); 19 ILL. PRAC., ESTATE PLANNING & ADMIN. § 188:11 (5th ed. 2008) (explaining that testamentary conditions reasonably restricting the beneficiary's marriage to a person of a particular faith are generally upheld). *But see* RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. j (2003) (favoring the blanket approach in finding contrary to public policy any provision that inhibits the beneficiary's selection of a spouse).

129. *In re Estate of Feinberg*, 891 N.E.2d at 550. In order to benefit from Max's trust, a beneficiary had to marry a person whose religious belief aligned with the Jewish faith. *Id.*

130. *Id.* at 550.

131. *Id.* at 550-51. The court cited *Randsdell*, *Gerbing*, and *Winterland*, all cases where the instrument's creator intended to coerce the beneficiary to obtain a divorce. *Id.*

132. *In re Estate of Feinberg*, 919 N.E.2d at 899.

133. *Id.* at 896.

with disputed will and trust provisions.

B. *The Possibility of Continuing Inducements*

Testamentary conditions that encourage divorce or unreasonably restrain the transferee's choice of a spouse must have the "tendency" of accomplishing those results in order to violate public policy.[134] Consequently, given that a testamentary provision does not take effect until the testator dies,[135] the provision correspondingly cannot violate public policy until the testator dies.[136]

This principle has traditionally been applied where the beneficiary's status is fixed and ascertainable at the date of the testator's death and nothing more can be done to change that status.[137] However, the notion that there must be a continuing inducement has also been applied at the time the suit for enforcement is brought.[138] Since the policy analysis is fact based, courts need to look at the circumstances of each case at the time the action is filed and assess whether the restraint on marriage is truly a restraint.[139]

The Illinois Supreme Court, focusing on Max's wife's scheme exercised pursuant to her power of appointment, found no continuing inducement because her plan "operated on the date of her death to determine which . . . grandchildren qualified for distribution on that date."[140] Even absent the power of appointment, a Max Feinberg-type provision is not a true restraint because there is no continuing inducement. Max's provision removed his grandchildren from his trust as soon as he or she married a non-Jewish individual.[141] At the time the action was

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134. *See, e.g.*, *Hall*, 631 N.E.2d at 807 (holding that "[a] condition to a devise, the tendency of which is to encourage or bring about separation of husband and wife, is against public policy.").

135. *Mau*, 159 N.W.2d at 84; *see also* Clarke v. Clarke (*In re* Clark's Estate), 57 P.2d 5, 8 (Colo. 1936) (holding that a will speaks "as though it had been written immediately prior to death").

136. *Clarke*, 57 P.2d at 8; *Mau*, 159 N.W.2d at 84.

137. *See Mau*, 159 N.W.2d at 84-85 (holding that any portion of property the beneficiary was to receive was fixed as of the death of the testator); *see also Clarke*, 57 P.2d at 10 (holding that the right to take the testator's property was determined as of the testatrix's death).

138. *See Hall*, 631 N.E.2d at 808 (holding that at the time the plaintiff brought suit for construction, "the condition in the will had *no* 'tendency to encourage divorce or bring about a separation of husband and wife'").

139. *See, e.g.*, *Mau*, 159 N.W.2d at 85 (holding that public policy should only deal with continuing inducements and not provisions that are not truly restraints).

140. *In re Estate of Feinberg*, 919 N.E.2d at 903.

141. *In re Estate of Feinberg*, 891 N.E.2d at 550. The provision granted each beneficiary a one-year grace period for his or her spouse to convert. *Id.* The

brought and the grandchildren were notified of the provision, all of Max's descendents poised to benefit were married for over one-year,[142] making it impossible to be reinstated into Max's trust.[143] Thus, each descendant's beneficiary status was already determined and unchangeable. As long as a provision does not involve a continuing inducement, it should be upheld.

C. *Judges Cannot Create Public Policy*

The ultimate determination of whether or not a condition violates public policy depends on what the judge believes the underlying policy to be; a judge cannot do so based on mere conjecture or opinion.[144] Therefore, a judge must decide if the provision goes against established law or the spirit of the law.[145]

In the law of succession, public policy considerations have become increasingly important, and courts should be extremely cautious in their analysis.[146] While policies invariably change,[147] precedent should not be overridden by unduly intrusive new policy decisions;[148] where case law provides a guiding standard, that standard should be followed.[149] Many courts, however, view case law governing testamentary marriage conditions as antiquated, according it an insignificant level of importance[150] and instead relying on principles of public policy. To avoid unnecessary reliance on policy, as was the case in the Illinois Appellate Court decision, state legislatures need to take action and codify will and trust laws dealing with testamentary marriage conditions.

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provision did not provide for the "resurrection" or reinstatement of beneficiary status after that one year or if the beneficiary divorced within that year.

142. *In re Estate of Feinberg*, 919 N.E.2d at 892.

143. *In re Estate of Feinberg*, 891 N.E.2d at 550.

144. *See* Magee v. O'Neill, 19 S.C. 170, 185 (1883) (holding that a judge's opinion as to whether public interest would be better advanced by invalidating a provision is an improper basis for such a decision).

145. *Id.* A judge ought to base his decision off of more than just his opinion because public policy is vague. *Id.* Yet policy has become a seemingly important part of judicial action. *Id.* Many see this reliance on public policy as unreasonable. *See* Alan B. Handler, *Judging Public Policy*, 31 RUTGERS L.J. 301, 302 (2000) (writing that public policy has unreasonably invaded judicial decision making).

146. *Snodgrass*, 275 P.2d at 864.

147. *See id.* (cautioning that "at different times very different views have been entertained as to what is injurious to the public"); *see also* POWELL, *supra* note 116, § 516 (explaining that because public policy has changed over time, the precedential value of decided cases has been weakened).

148. Handler, *supra* note 145, at 302.

149. *See id.* at 307 (explaining that newly created public policy should guide judicial decisions only where "precedent and authority fail to guide").

150. *See In re Estate of Feinberg*, 891 N.E.2d at 553 (Quinn, J., concurring) (noting that most cases cited by both the majority and the dissent are over fifty years old).

V. THE NEED FOR UNIFORMITY THROUGHOUT THE COUNTRY: STATUTES CODIFYING ESTATE PLANNING RULES

A. *The Need for Uniformity*

State legislatures should adopt the unreasonable limitation standard for invalidating testamentary conditions, as set forth in the Restatement (Second) of Property (Donative Transfers). As previously mentioned, states courts come down differently on the issue of testamentary incentive conditions based on marriage.[151] The lack of uniformity in validating or invalidating such provisions creates a variety of problems, especially when two or more states are involved in a dispute involving both real and personal property.[152]

With regards to testamentary trusts of personal property, a testator is free to choose the state law that governs the validity of his or her trust, as long as the state has a substantial relation to the trust.[153] With few limitations, a testator may hand pick a state where he is certain his provision will be given effect.[154] Additionally, the validity of a will disposing of personal property is governed by the law of the state in which the property is located;[155] however, probate law varies among states.[156] Thus, regardless of the instrument used to dispose of personal property, there is inevitably the possibility of a problematic conflict of laws between the states, mandating a need for uniformity.

The National Conference of Commissioners on Uniform State Laws ("NCCUSL") already provides states with uniform laws in the estate planning area through the enactment of the Uniform

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151. *See supra* part I (explaining how state courts have reached different conclusions when presented with the provisions that are testamentary incentive conditions based on marriage).

152. GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 291 (2nd ed. 1992).

153. *Id.* § 296. If a testator fails to specify the local law to govern the administration of his trust, then the trust is governed by the state in which the testator was domiciled prior to his or her death. *Id.*; *see also* Amerige v. Attorney Gen., 88 N.E.2d 126, 133 (Mass. 1949) (holding that under ordinary circumstances, the validity of a trust is determined by the law of the state in which the testator is domiciled at his death).

154. *See Amerige*, 88 N.E.2d at 133 (holding as valid testamentary trusts of personal property in a foreign state expressly specified by the testator in his or her trust but invalid in the State of the testator's domicile); *see also* BOGERT & BOGERT, *supra* note 152, § 296 (writing that a trust that would be invalid under the law of the testator's domicile but valid under the law of the testator's chosen state is valid).

155. THE AMERICAN BAR ASSOCIATION, GUIDE TO WILLS & ESTATES 311 (Charles White ed., Random House Reference 2004) (1995).

156. *Id.*

Trust Code[157] and Uniform Probate Code.[158] While both uniform codes attempt to clarify and simplify the law, neither takes a stance on the type of testamentary conditions described in this Comment.[159]

There is a growing trend for adopting the provisions outlined in these codes; nineteen states and the District of Colombia have adopted the Uniform Trust Code[160] and eighteen states have adopted the Uniform Probate Code.[161] The NCCUSL needs to take action and amend these uniform codes to provide guidance to state legislatures on what the uniform law should be regarding testamentary marriage conditions. Once the NCCUSL takes action, states can then either enact the provisions of the uniform codes or create their own legislation consistent with the codes. The question then becomes, what rule should be advanced?

B. States Should Codify a Modified Restatement (Second) of Property Approach

While a number of states have adopted the uniform codes, a handful of states have created their own statues and regulations. These regulations, like the uniform codes, are also deficient in providing clarity with respect to the provisions governing incentive conditions regarding marriage.[162] The lack of state codification

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157. The Uniform Trust Code, the first attempt at codifying uniform trust laws, was created to provide uniform rules where states diverge or on which the law is unclear or unknown. UNIF. TRUST CODE prefatory note (2000).

158. The Uniform Probate Code was created:

> (A) to simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons; (B) to discover and make effective the intent of a decedent in distribution of the decedent's property; (C) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to the decedent's successors; (D) to facilitate the use and enforcement of certain trusts; (E) to make uniform the law among the various jurisdictions.

UNIF. PROBATE CODE § 1-102 (amended 2001).

159. The Uniform Trust Code merely hints at a position by stating that a "trust may be created only to the extent its purposes are lawful, [and] not contrary to public policy. . . ." UNIF. TRUST CODE § 404 (2000). But there is no specific provision in the code that sets forth a specific rule regarding testamentary conditions in partial restraint of marriage.

160. AMY MORRIS HESS, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 7 (3rd ed. 2007). While nearly forty percent of states have adopted the Uniform Trust Code, it is important to note that a "substantial variation" still exists. *Id.*

161. *Id.* States have adopted all or part of uniform probate laws or have set forth statutes codifying all or part of the common law governing will and trusts. REUTLINGER, *supra* note 61, at 4. "Major differences exist in some areas and minor differences in most." *Id.*

162. Steiner, *supra* note 32, at 898. States have the power to regulate the

has led to many negative consequences, including uncertainty as to which testamentary conditions are valid[163] and armies of litigious beneficiaries who will do almost anything to get their money, even sever the same family relations that courts try to protect.[164] It necessarily follows that states codifying regulations or statutes regarding testamentary conditions will resolve uncertainty as to what a testator can or cannot do, curing the problem at its source.

The two relevant Restatements in this area, the Restatement (Second) of Property (Donative Transfers) and Restatement (Third) of Trusts, diverge from other subject areas in that, instead of restating the current law, the drafters suggest new laws that buttress their idea of what the law should be.[165] As discussed in part II,[166] the Restatement (Third) of Trusts is much stricter in assessing testamentary restrictions conditioning marriage to a certain class of people than the Restatement (Second) of Property (Donative Transfers).[167] While these approaches may be both innovative and controversial, the drafters provided two possible analyses that state courts and legislatures can adopt.

The Restatement (Third) of Trusts should not be codified by the states; it places a complete bar on any restriction that is contrary to public policy,[168] suggesting that a condition interfering with a person's exercise of freedom to marry falls within the bar.[169]

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testamentary transfer of property. Mager v. Grima, 49 U.S. (1 How.) 490, 493 (1850). New York, California, Georgia, Indiana, Texas, Washington, Louisiana, Maryland, Oklahoma, and Pennsylvania have already codified trust principles. HESS, *supra* note 160, § 7.

163. Steiner, *supra* note 32, at 898.

164. *See id.* at 931 (writing that potential beneficiaries in wills and trusts and their families often become divided over the distribution relating to the conditions).

165. LEFCOE & THOMAS, *supra* note 61, at 11. Any criticism regarding the Restatement (Second) of Property is also applicable to the Restatement (Third) of Trusts. *Id.* at 37.

166. *See supra* part II (analyzing the differences between the two pertinent Restatements of the law: the Restatement (Second) of Property (Donative Transfers) and Restatement (Third) of Trusts).

167. *See* John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1109 (2004) (writing that the Restatements are divided on whether courts should sustain marriage restrictions).

168. RESTATEMENT (THIRD) OF TRUSTS § 29(c) (2003).

169. *Id.* § 29 cmt. j. The drafters of this Restatement thought it to be inherently dangerous to limit the beneficiary's choice of a spouse or postpone the date of marriage. *Id.* While this Restatement recognizes the innate differences between conditional provisions that encourage divorce and those that may discourage marriage to a certain class, the two categories are lumped together for purposes of analysis. *Id.* The Restatement (Second) of Trusts was written in accordance with the Restatement (Second) of Property (Donative Transfers). *See* Roisman, *supra* note 112, at 472 (writing that the prior

This complete ban on partial restraints is over expansive and "hostile."[170] One expert in support of this "blanket rule" argued that courts applying the rule would reach more consistent results, providing more predictability to creators of testamentary instruments.[171] However, codifying this Restatement (Third) of Trusts will not solve the problem of uncertainty or unnecessary litigation. Courts would still be called on to determine whether or not the condition at issue satisfies the confusing and vague public policy requirement.[172] Additionally, adoption of this approach would completely disregard the transferor's wishes in distributing his wealth.[173]

The Restatement (Second) of Property (Donative Transfers) approach, on the other hand, should be codified by states because it is a more carefully tailored and straightforward approach. It sets forth an unreasonable limitation standard that gives effect to partial restraints unless the beliefs of the transferee are so contrary to the requirements of the provision that marriage is unlikely to ever occur or the number of eligible spouses is negligible.[174] These exceptions provide a safeguard against the public policy concerns surrounding a testator limiting a person's freedom to choose a spouse, while at the same time balancing the personal freedom of the transferee to choose a spouse.

A state codifying this approach effectively instructs the transferor that he or she cannot create conditions that unreasonably limit the transferee's opportunity to marry,[175] providing a very specific guideline for courts to follow (assuming a

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restatement of trusts held that partial restraints on marriage are "not normally invalid."). However, to justify radically changing their stance, the drafters merely stated that the amount and force of the supporting authorities cited in the Restatement (Second) of Trusts was "diminished by close examination." *Id.* (quoting RESTATEMENT (THIRD) OF TRUSTS § 29 Reporter's Notes (Tentative Draft No. 2, 1999)).

170. Langbein, *supra* note 167, at 1109 n.28. Langbein argues that while proponents of the Restatement (Third) of Trusts approach depict all restraints on marriage as "wholly objectionable," there is no legal basis for finding such provisions objectionable or unjustifiable. *Id.*

171. Sherman, *supra* note 34, at 1322. Sherman also argues that creating standards for evaluating partial restraints is a difficult task for courts to achieve. *Id.*

172. *See* Steiner, *supra* note 32, at 931 (writing that codifying the Restatement (Third) of Trusts would be problematic because "courts would be left to determine which particular conditions satisfy the ambiguous statute").

173. *Id.* at 932. There is a "powerful" argument for giving effect to a transferor's wishes. Langbein, *supra* note 167, at 1110.

174. RESTATEMENT (SECOND) OF PROP: DONATIVE TRANSFERS § 6.2 cmt. c (1983). Critics of this "numbers-based" approach argue that the validity turns on the "fortuities of geographic and demographic factors." Sherman, *supra* note 34, at 1321-22.

175. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.2 (1983).

transferor is familiar with the person or persons to whom he or she is transferring his property). Under this method, for example, a transferor should know that provisions conditioning the receipt of money or property on a religious person marrying outside his or her faith[176] as well as provisions limiting the transferee's choice of spouse by culture or gender are expressly prohibited where the transferee has strong views to the contrary.

It is true that not all litigation can be dispelled under this method; since this approach is still fact intensive, litigants may very well want courts to determine whether a restriction unreasonably limits his or her right to take the property in issue. However, the suggested regulatory or statutory guidance will decrease the overall number of controversial cases by instructing transferor's as to what is proper, as well as will best effectuate the balancing of the competing public policies at issue.

VI. CONCLUSION

Trust and will creators often attempt to exert influence over a transferee's work ethic, education, religion, and philanthropic values.[177] While protecting tradition and family values are the main goals of estate planning,[178] "dead hand" control over the actions of the living has its limits.[179] Individuals, like Max Feinberg, creating testamentary instruments need to recognize that older generations place a greater value on tradition than modern generations who crave change over old customs. Faced with this reality, it will become increasingly more difficult to enforce provisions mandating a strict adherence to tradition. The unreasonable limitation standard seems to be the most practical way of accommodating the young-minded belief system with the conservative mentality.

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176. *Id.* § 6.2 cmt. c, illus. 3; *see also* Daphna Lewinsohn-Zamir, *More Is Not Always Better than Less: An Exploration in Property Law*, 92 MINN. L. REV. 634, 645 n.44 (2008) (writing that "a condition requiring that the beneficiary marry a certain person or that a religious recipient marry someone outside her faith would be unreasonable.").

177. Steiner, *supra* note 32, at 897, 908; *see also* Tate, *supra* note 127, at 453 (explaining that conditions in incentive trusts generally fall into three main categories: (1) those that encourage the prospective beneficiary to pursue an education; (2) those that promote a particular way of living; and (3) those that encourage the beneficiary to have a successful career).

178. Steiner, *supra* note 32, at 906.

179. *See* Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 4 (1992) (describing how lawmakers should consider "how long" and in "what ways" a testator proposes to control property after his or her death).