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If You Will It, It Is No Dream:¹ Balancing Public Policy and Testamentary Freedom

Orly Henry*

ABSTRACT

*In September 2009, the Supreme Court of Illinois issued an opinion in the case of *In re Estate of Feinberg*, which explores the limits of testamentary freedom where a private will intersects with the public policy of the state of Illinois. The supreme court reversed the lower court's decision, holding that a grandchild could be deemed deceased for the purposes of a will where the grandchild violated the beneficiary restriction clause, which required that the grandchild be married either to a person of the Jewish faith or to a spouse that converted to Judaism within a year after marriage to be eligible to receive their bequest. The Illinois supreme court based its decision on the fact that (1) several Illinois statutes support broad testamentary freedom, (2) the cases used to support the appellate court's decision were inapposite, and (3) the Restatement (Third) of Trusts was inapplicable because the provision in question was from a will, not a trust. This Note attempts to analyze and evaluate the supreme court's decision.*

The supreme court's opinion was narrowly tailored to the facts of the Feinberg case and thus leaves many open questions. This Note analyzes the court's decision and argues that the Feinberg decision should be broadly construed; in particular, courts should apply the Feinberg precedent to future cases involving trust provisions and where the plaintiff is an heir at law. Moreover, attorneys and testators should consider closely the implications of Feinberg and either draft restrictive testamentary provisions carefully to avoid violating public policy or promote personal beliefs and values using other means that are less susceptible to being challenged in court.

I. INTRODUCTION

¶1 On September 24, 2009, the Illinois Supreme Court decided *In re Estate of Feinberg*, a case which explores the limits of testamentary freedom where a private document, a will, intersects with the public policy of the state of Illinois.² This case pit family member against family member, calling into question personal life decisions, including one's choice of spouse. The case is also personal because the testamentary provision in question was an expression of the testators' lifelong dedication to their

¹ This phrase, a Zionist slogan, was adapted from the title page of Theodor Herzl's *Old-New Land*. THEODOR HERZL, OLD-NEW LAND ("ALTNEULAND") (Lotta Levensohn, trans., 2nd ed. 1960). The original phrase is "If you will it, it is no fable." *Id.*

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² *In re Estate of Feinberg*, 919 N.E.2d 888 (Ill. 2009).

religious tradition and their desire to see their grandchildren perpetuate the same tradition. At the same time, this case also addresses broader concerns, examining Illinois public policy and how far it extends into the private sphere.

¹² *Feinberg* involves the wills of Max and Erla Feinberg, both of whom were deceased.³ They were both deeply committed to Judaism and sought to “encourage and support Judaism and preservation of Jewish culture.”⁴ To that end, Max created a trust which contained a beneficiary restriction clause,⁵ a provision that conditioned the receipt of an inheritance by each of their five grandchildren on whether or not each grandchild married a spouse of the Jewish faith (or someone who converted to Judaism within one year of marriage).⁶ As a result of the clause, only one grandchild⁷ was eligible to receive any money from the estate.⁸ In *Feinberg*, the case brought by disinherited granddaughter Michele Trull to challenge the beneficiary restriction clause, the Illinois Supreme Court explored whether the clause should be upheld or voided as contrary to public policy.⁹

¹³ Public policy in Illinois is to support, encourage, and safeguard the institution of marriage, and to promote marital harmony where possible.¹⁰ However, the state of Illinois also supports broad testamentary freedom, meaning that testators are generally given wide latitude to do as they please within the limits of the law and the state’s public policy.¹¹ Beneficiary restriction clauses and other similar testamentary provisions can present an issue of public policy because these clauses may be disruptive to marital harmony, whether or not the testator intended such an effect. These clauses can be construed as coercive, forcing potential beneficiaries to choose between an inheritance and a love that does not meet the conditions of the clause.

¹⁴ *In re Estate of Feinberg* is worthy of study because of the competing interests it presents and the extensive interest and commentary that it precipitated as it wended its way through the Illinois state court system.¹² For obvious reasons, many feel strongly

³ *Id.* at 890. Max passed away in 1986. *Id.* at 891. Erla passed away in 2003. *Id.* at 892.

⁴ *Id.* at 893.

⁵ The Illinois Supreme Court used the term “beneficiary restriction clause” to refer to the provision which conditioned the descendants’ receipt of their inheritance on whether or not they married someone who was Jewish or converted to Judaism within one year of marriage. *See id.* at 891. Therefore, this note has adopted that term as well.

⁶ *Id.* at 891.

⁷ *Id.* at 892. Four of the five grandchildren married non-Jewish spouses who did not convert to Judaism within a year of marriage. *Id.*

⁸ *Id.*

⁹ Following Erla’s 2003 death, several suits were brought with regards to the Feinberg estate, pitting the executors against the disinherited grandchildren. One of the grandchildren accused Michael, Leila, and Leila’s husband of prematurely accessing Erla’s funds. Aaron Gavant, *In re Estate of Feinberg: Even When You Will It, It’s Still a Dream*, JEWISH LAW, <http://www.jlaw.com/Articles/EvenWhenYouWillIt.pdf>. Another grandchild accused Leila Feinberg of misusing family funds. *Id.* However, the courts considered only the issue of whether or not the beneficiary restriction clause was void as against public policy. *Id.*

¹⁰ *Feinberg*, 919 N.E.2d at 897.

¹¹ *Id.* at 895 (“[O]ur statutes clearly reveal a public policy in support of testamentary freedom.”).

¹² *Feinberg* has garnered much attention, both within and outside of legal circles. Recognizing the interest of religious organizations in the case, the Illinois Supreme Court allowed three Jewish organizations, Agudath Israel of America, National Council of Young Israel and Union of Orthodox Jewish Congregations of America, to submit an amicus brief together. Brief for Agudath Israel of America et al. as Amici Curiae Supporting Appellant, *In re Estate of Feinberg*, 919 N.E.2d 888 (Ill. 2009) (No. 106982). The amici curiae approached the case from a religious perspective, arguing that the provision should be upheld based on public policy in favor of testamentary freedom and in favor of free exercise of religion, the

that individuals should be able to distribute their money and assets as they please with minimal interference from the government.¹³ Yet, at the same time, many believe strongly that individuals should have the freedom to make their own life choices without undue outside influence exerted through dead-hand control¹⁴ in the form of a beneficiary restriction clause. *Feinberg* pits these two competing and compelling social interests in direct opposition.

¶5 Beyond the mere facts of the *Feinberg* case, those who study the law of estates and trusts are interested in how the holding of this case will be applied in the future. Estate planning is an area of law that is particularly susceptible to personal whims and idiosyncrasies.¹⁵ Wills may be deeply reflective of the testator's character, beliefs, and values;¹⁶ as a result, they may contain endless variations that result in litigation. Therefore, it is essential to consider how the *Feinberg* holding might be applied to different fact patterns to determine the significance of its precedential value.

¶6 Owing to the newness of this decision, few scholarly articles have addressed it.¹⁷ This is not true of the public media sources, however, which covered the case fairly extensively due to the sensational facts of the family feud, the religious implications, and the parties' willingness to discuss the matter publicly.¹⁸ Articles discussing *In re Estate of Feinberg* appeared in local and national newspapers,¹⁹ legal and professional publications,²⁰ and publications by religious organizations.²¹ These articles attracted a large number of responses, with people arguing vehemently for both sides of the case.²²

First Amendment and the Illinois and United States constitutions, Jewish law and concerns about the future of the Jewish people, and the Illinois Religious Freedom Restoration Act (RFRA).

¹³ See citation, for a discussion of the arguments for and against testation, Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1290–1301 (1999).

¹⁴ Dead-hand control is “[t]he convergence of various legal doctrines that allow a decedent’s control of wealth to influence the conduct of a living beneficiary; especially, the use of executory interests that vest at some indefinite and remote time in the future to restrict alienability and to ensure that property remains in the hands of a particular family or organization. Examples include the lawful use of conditional gifts, contingent future interests, and the *Clafin*-trust principle. The rule against perpetuities restricts certain types of deadhand control” BLACK’S LAW DICTIONARY 456 (9th ed. 2009) (defining “deadhand control”).

¹⁵ Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 CASE W. RES. L. REV. 65, 100 (2005) (“Sometimes people do write wills that are unreasonable, quirky, idiosyncratic, and even antisocial.”).

¹⁶ See *id.*

¹⁷ See, e.g., Ronald Volkmer, ‘Beneficiary Restriction’ Clause is Upheld on Appeal, 37 ESTCLANNER 45 (2010); Jeremy Macklin, Comment, *The Puzzling Case of Max Feinberg: An Analysis of Conditions in Partial Restraints of Marriage*, 43 J. MARSHALL L. REV. 265 (2009).

¹⁸ See *infra* notes 19–20.

¹⁹ See, e.g., 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, available at http://articles.chicagotribune.com/2008-08-25/news/0808240494_1_illinois-supreme-court-jewish-judges (discussing *In re Estate of Feinberg* generally, including quotations from the parties’ lawyers and the parties themselves); Dan Slater, *Marry Goyim, You Get Bupkis; Illinois Court Strikes ‘Jewish Clause,’* WALL ST. J.L. BLOG (Aug. 25, 2008, 10:42 AM), <http://blogs.wsj.com/law/2008/08/25/marry-goyim-you-get-bupkis-illinois-court-strikes-jewish-clause/> (briefly explicated *In re Estate of Feinberg* after the appellate court struck down the beneficiary restriction clause; there were sixty-five responses to the article in the form of reader comments supporting both sides of the case, most quite vehemently).

²⁰ See, e.g., Helen Gunnarsson, *Illinois Supreme Court Upholds Jewish-Marriage Clause in Trust Provision*, 97 ILL. B.J. 549 (providing a general description of the Illinois Supreme Court’s *In re Estate of*

¶7 This Note argues that the Illinois Supreme Court correctly upheld the beneficiary restriction clause of the Feinberg will as not violative of public policy because the clause sought neither to unreasonably restrict marriage nor to induce divorce. This Note begins by presenting the *Feinberg* case. Sections II and III discuss the facts and the details of its disposition in the lower courts, respectively. Section IV proceeds to discuss the decision by the Illinois Supreme Court, analyzing the supreme court's decision in detail, considering and evaluating the reasoning employed by the Justices, with particular scrutiny directed at the different justifications offered for the decision. This Note continues in Section V by examining the case law in this area prior to *Feinberg* and assessing whether *Feinberg* is consistent with or represents a break from an established line of jurisprudence in Illinois as well as in other jurisdictions. Finally, in Sections VI and VII, this Note examines the potential consequences of *Feinberg* and whether the *Feinberg* precedent should be applied more broadly in the future.

II. FACTS OF IN RE ESTATE OF FEINBERG

¶8 Max Feinberg executed a will. He also created a trust in which, upon his death, all of his assets were to be placed.²³ The trust was divided for tax purposes into two trusts, "Trust A" and "Trust B."²⁴ Erla, his wife, was the lifetime beneficiary of those trusts.²⁵ She had the right to invade the corpus²⁶ of the trusts as a means of income.²⁷ Max arranged the trusts so that Erla would draw income from Trust A until its assets were exhausted, and only then would she be entitled to draw on the assets of Trust B.²⁸ Upon Erla's death, any assets remaining in the trusts after paying estate taxes were to be combined in Trust B, a lifetime trust.²⁹

Feinberg decision and cautioning that the court's close framing of the issue and fact-specific inquiry sidesteps the questions of whether religious restrictions are broadly permissible in testamentary instruments); John T. Brooks & Erika A. Alley, *The Jewish Clause: How Far Can a Testator Go in Putting Conditions on Inheritances*, TRUSTS AND ESTATES, Jan. 27, 2009, http://trustsandestates.com/wealth_watch/inheritance_conditions_0127/ (discussing the appellate court's *In re Estate of Feinberg* opinion, suggesting that the Illinois Supreme Court's willingness to hear the case suggests that all provisions restraining marriage, religion and family relationships may not automatically be struck down as against public policy).

²¹ See, e.g., Gavant, *supra* note 9 (criticizing the appellate court's *In re Estate of Feinberg* decision).

²² See, e.g., Posting of Solomon Grundy to Slater, *supra* note 19, (Aug. 25, 2008, 12:09 PM) (supporting the appeals court's decision to strike the provision); Posting of Diogenes to Slater, *supra* note 19, (Aug. 25, 2008, 11:12 AM) (disagreeing with the appeals court's decision to strike the provision); Posting of Liberal Angel to Christopher Wills, 'Jews Only' Inheritance Plan Allowed By Illinois Supreme Court, HUFFINGTON POST, Sept. 28, 2009, (9/28/09, 9:34PM), http://www.huffingtonpost.com/2009/09/24/jews-only-inheritance-pla_n_298962.html (supporting the Illinois supreme court's decision to uphold the provision).

²³ *In re Estate of Feinberg*, 919 N.E.2d 888, 891 (Ill. 2009). Max arranged for two trusts to be created upon his death. *Id.* All of his assets were contained in the two trusts. *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ The corpus of the trust means, literally, the "body" of the trust. This refers to all of the property transferred to a trust. See BLACK'S LAW DICTIONARY 395 (9th ed. 2009) (defining "corpus" as "the trust principal.").

²⁷ *Feinberg*, 919 N.E.2d at 891.

²⁸ *Id.*

²⁹ *Id.* A lifetime trust holds assets in trust during the lifetime of the beneficiary. BLACK'S LAW DICTIONARY 1508 (9th ed. 2009).

¶9 Based on Max’s plan (which assumed that Erla would outlive him), upon Erla’s death, fifty percent of the assets in the trust were to go to Max and Erla’s two children, Michael Feinberg and Leila Taylor, who would serve as co-executors of Erla’s estate.³⁰ Max’s will directed that the other fifty percent of the assets be held in trust for the living descendants of Michael and Leila, divided on a per stirpes basis.³¹ Each grandchild’s receipt of the trust assets was subject to the beneficiary restriction clause,³² which was intended to benefit those descendants who honored and furthered Max and Erla’s commitment to Judaism by marrying within the faith.³³ The provision from Max’s trust agreement that includes the beneficiary restriction clause stated:

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 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.³⁴

¶10 Additionally, Max’s will granted Erla a limited lifetime power of appointment³⁵ over the assets of Trust B.³⁶ As a result, Erla had the ability to exercise her power of appointment in favor of Max’s descendants only.³⁷ Thus, Erla’s power of appointment was limited to their children and grandchildren.

¶11 Max died in 1986.³⁸ In 1997, Erla exercised her power of appointment over the trust.³⁹ Erla revoked Max’s original distribution scheme and altered it in two significant ways.⁴⁰ First, she changed the distribution method from per stirpes to per capita.⁴¹ Second, she specified that her children and any grandchildren not deemed deceased were to receive a fixed sum—a one-time payment of \$250,000—upon her death.⁴² Significantly, she did not alter the essence of Max’s original beneficiary restriction

³⁰ See *Feinberg*, 919 N.E.2d at 891–92, 905.

³¹ *Id.* at 891. In this case, the division of the trust on a per stirpes basis meant that Michael’s two children would split one quarter of the trust assets, while Leila’s three children would divide one quarter of the trust assets among them. *Id.*

³² *Id.* at 891.

³³ *Id.* at 892.

³⁴ *In re Estate of Feinberg*, 891 N.E.2d 549, 550 (Ill. App. Ct. 2008).

³⁵ Power of appointment refers to the ability of a testator to select a person who will be vested with the authority to dispose of property under a will or other testamentary instrument. Power of appointment may be transferred only in writing, such as by will or trust. Power of appointment may be “general” if there are no restrictions with regards to whom the property may be distributed, or otherwise “limited.” BLACK’S LAW DICTIONARY 1290 (9th ed. 2009) (defining “power of appointment”). A general power of appointment is one where the donee can dispose of the donor’s property “in favor of anyone at all,” whereas a limited power of appointment “restricts to whom the estate may be conveyed.” *Id.*

³⁶ *Feinberg*, 919 N.E.2d at 891.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* Unlike a per stirpes distribution, a per capita distribution permitted each grandchild to take an equal share of the assets. *Id.* Under the per capita distribution scheme, each grandchild was treated equally, whereas the per stirpes distribution scheme favored Michael’s two children over Leila’s three.

⁴² *Id.* The \$250,000 was to be paid out of the assets of Trust B. *Id.*

clause. If any grandchild was deemed deceased under the clause, his or her share would be paid to either Michael or Leila.⁴³

¶12 Between 1990 and 2001, all five grandchildren married.⁴⁴ Erla died in 2003.⁴⁵ At that time, all five grandchildren had been married for more than one year.⁴⁶ Only one grandchild, Leila's son Jon, met the requirements of the beneficiary restriction clause and was entitled to receive \$250,000 of the trust assets.⁴⁷ One of the grandchildren deemed deceased under the clause, Michael's daughter Michele Trull, filed suit, seeking to invalidate the beneficiary restriction clause on public policy grounds.⁴⁸

III. PROCEDURAL HISTORY OF THE *FEINBERG* LITIGATION

¶13 Controversy surrounding Erla's estate arose almost immediately after her 2003 death. Three suits were filed.⁴⁹ Granddaughter Michele Trull was a plaintiff in two of the suits.⁵⁰ The co-executors, Michael and Leila, along with Leila's husband Marshall, sought to have two of the suits dismissed on grounds that Michele had no interest in the estate because she was deemed deceased under the beneficiary restriction clause.⁵¹

¶14 The trial court invalidated the beneficiary restriction clause after a trial on the merits, holding that the provision tended to encourage divorce or bring about a separation and was therefore void as a matter of public policy.⁵² Although the court stated that a provision intended to provide support in the event of a divorce or separation was an exception to this general rule,⁵³ it determined that this exception was not at play in *Feinberg*.⁵⁴ Instead, the trial court determined that the provision represented an impermissible restraint on marriage.⁵⁵

¶15 On appeal, the Appellate Court for the First District, in a split decision, affirmed the circuit court's decision.⁵⁶ Citing the principle that testamentary provisions will be held to be invalid if they either discourage marriage or encourage divorce,⁵⁷ the appellate

⁴³ *Id.* Leila and Michael were not restricted in how they used the money they received from the estate. They could have given the shares that reverted back to them to their children if they so pleased, regardless of whether the children had been deemed deceased for the purposes of the will. *In re Estate of Feinberg*, 891 N.E.2d 549, 553 (Ill. App. Ct. 2008) (noting that being deemed deceased for the purposes of Erla's will would not prevent a "deceased" grandchild from inheriting the funds from a parent).

⁴⁴ *Feinberg*, 919 N.E.2d at 892.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 891.

⁴⁸ *Id.*

⁴⁹ *In re Estate of Feinberg*, 891 N.E.2d 549, 550 (Ill. App. Ct. 2008). The first suit was the probate of Erla's estate; the second, brought by granddaughter Michele Trull, alleged that Michael Feinberg and Leila and Marshall Taylor "conspired to evade estate taxes and misappropriated millions of dollars" from Max and Erla's estates; the third case involved stock certificates registered to Max that the co-executors held and had failed to transfer to Max's estate. *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *In re Estate of Feinberg*, No. 04P5093, 2006 WL 6304910 (Ill. Cir. Aug. 23, 2006).

⁵³ *Id.*

⁵⁴ *Id.* ("The subject provision is clearly not one which meets the criteria of the exception to the rule, . . . which was meant to provide support in the event of a divorce or separation.")

⁵⁵ *Id.*

⁵⁶ *In re Estate of Feinberg*, 891 N.E.2d 549, 549 (Ill. App. Ct. 2008).

⁵⁷ *Id.* at 550.

court held that the beneficiary restriction clause was void because “it seriously interferes with and limits the right of individuals to marry a person of their own choosing.”⁵⁸ The court based its findings primarily on the Restatement (Third) of Trusts, observing that the Restatement “provides that trust provisions which are contrary to public policy are void.”⁵⁹ For example, the court asserted that “a provision that all of a beneficiary’s rights to a trust would terminate if he married a person who was not of a specified religion” would be void.⁶⁰ The court also drew heavily on Illinois case law, some of which dated as far back as 1898, for the proposition that testamentary provisions which act as a restraint on marriage or induce divorce are void as against public policy.⁶¹ Although the court did acknowledge that a number of other states had upheld similar testamentary provisions, it declined to follow suit.⁶²

¶16 In his dissent, Judge Greiman opined that the Illinois case law relied on by the majority was “wholly inapposite” to the *Feinberg* case.⁶³ He lamented that “the majority [opinion] places us in the minority of jurisdictions that have considered this issue,”⁶⁴ and he advocated for adopting the approach taken by several other states, especially in light of the greater factual similarities that he observed between the *Feinberg* case and case law from other jurisdictions.⁶⁵ Additionally, the dissent minimized the importance of the Restatement (Third) of Trusts⁶⁶ and suggested greater reliance on American Law Reports, which concludes that the “weight of authority, however, is to the effect that a testator has the right to make the enjoyment of his bounty dependent on the condition that the recipient renounce, embrace, or adhere to a particular religious faith.”⁶⁷

¶17 Following the decision by the divided appellate court, the co-executors appealed the case to the Illinois Supreme Court. Because the case implicated public policy, the standard of review was de novo.⁶⁸

IV. DISPOSITION IN THE ILLINOIS SUPREME COURT

¶18 As a preliminary matter, the supreme court declined to view the case as involving a religious issue, specifically rejecting a constitutional religious freedom argument presented by the plaintiff.⁶⁹ Rather, the court understood *Feinberg* to involve “two potentially competing public policies,” one supporting the institution of marriage and the

⁵⁸ *Id.* at 552.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 550–51 (relying on *In re Estate of Gerbing*, 337 N.E.2d 29 (Ill. 1975); *Winterland v. Winterland*, 59 N.E.2d 661 (Ill. 1945); *Ransdell v. Boston*, 50 N.E. 111 (Ill. 1898)).

⁶² *Id.* at 551–52 (“[O]ther states do not follow the uniform precedent of Illinois in validating such precedents.”). The court cited to three examples of courts that upheld similar provisions. *Id.* (citing *Shapira v. Union Nat’l Bank*; 39 Ohio Misc. 28 (Ohio Ct. Common Pleas 1974); *In re Silverstein’s Will*, 155 N.Y.S.2d 598 (N.Y. Surr. Ct. 1956); *Gordon v. Gordon*, 124 N.E.2d 228 (Mass. 1955)).

⁶³ *Id.* at 555 (Greiman, J., dissenting).

⁶⁴ *Id.* at 558.

⁶⁵ *Id.* at 555–57.

⁶⁶ *Id.* at 557 (“[T]he Restatement . . . has absolutely nothing to do with the case at bar.”).

⁶⁷ *Id.* at 556 (citations omitted) (internal quotation marks omitted).

⁶⁸ *In re Estate of Feinberg*, 919 N.E.2d, 888, 893 (Ill. 2009).

⁶⁹ *Id.* at 905 (“[T]he free exercise clause does not require a grandparent to treat grandchildren who reject his religious beliefs and customs in the same manner as he treats those who conform to his traditions.”).

other supporting testamentary freedom.⁷⁰ The court sought to determine whether the holder of a power of appointment over the assets of a trust may, without violating Illinois public policy, direct that the assets be distributed at her death to her descendants, deeming deceased any descendant who has married outside of the testator's religious faith.⁷¹

¶19 Authored by Justice Garman, the Feinberg opinion covered three main areas: it discussed and offered evidence of Illinois public policy regarding freedom of testation;⁷² it rejected the reasoning of the appellate court by distinguishing the main cases the appellate court had relied upon and by explaining why the Restatement (Third) of Trusts was not applicable to the case at bar;⁷³ and finally, it rejected additional sundry arguments proffered by the plaintiff, Michele Trull.⁷⁴

A. *Illinois Law Supports Broad Testamentary Freedom*

¶20 Noting that neither the United States Constitution nor the Constitution of the State of Illinois addresses the issue of testamentary freedom,⁷⁵ the supreme court looked instead to state statutes. The supreme court identified several areas of Illinois law that bear witness to a public policy that supports a broad freedom of testation.⁷⁶ First, the Probate Act,⁷⁷ which governs administering and probating estates, places only two limits on a testator's ability to choose his beneficiaries,⁷⁸ neither of which was implicated in the case at bar. Given the testator's nearly unrestricted freedom to choose the object of his bounty under the Probate Act, the court noted that Max and Erla had no obligation to give anything to their grandchildren.⁷⁹ In fact, had Erla died intestate,⁸⁰ the estate would have been shared between the two children, Michael and Leila.⁸¹ "Surely," the court noted, "the grandchildren have no greater claim on their grandparents' estate than they would have had on intestate estates."⁸²

¶21 Second, like the Probate Act governing wills, its statutory counterpart, the Trusts and Trustees Act,⁸³ grants broad freedom with regard to the creation and administration

⁷⁰ *Id.* at 897.

⁷¹ *Id.* at 892.

⁷² *Id.* at 895–96.

⁷³ *Id.* at 896–903.

⁷⁴ The plaintiff's additional arguments were dismissed rather summarily. *Id.* at 903–05. Thus, they will not be discussed at length in this Note.

⁷⁵ *Id.* at 895.

⁷⁶ *Id.* at 895–96.

⁷⁷ 755 ILL. COMP. STAT. 5/1 et seq. (2008).

⁷⁸ First, a surviving spouse may renounce a testator's will, regardless of whether the spouse was to receive any benefit from it. 755 ILL. COMP. STAT. 5/2-8 (2008). Second, a child born to a testator after the will has been made is entitled to receive the portion of the estate to which he would be entitled if the testator died intestate, unless provision for the child was made in the will or the testator's intentions to disinherit the child are made clear in the will. 755 ILL. COMP. STAT. 5/4-10 (2008).

⁷⁹ *Feinberg*, 919 N.E.2d at 895.

⁸⁰ A decedent is deemed to have died intestate when she dies without having executed a will. BLACK'S LAW DICTIONARY 898 (9th ed. 2009) (Intestate is "[o]f or relating to a person who has died without a valid will").

⁸¹ 755 ILL. COMP. STAT. 5/2-1(b) (2008).

⁸² *Feinberg*, 919 N.E.2d at 895.

⁸³ 760 ILL. COMP. STAT. 5/1-21 (2008).

of trusts. Under the Trusts and Trustees Act, a settlor⁸⁴ may specify in the trust instrument “rights, powers, duties limitations and immunities applicable to the trustee, beneficiary and others” and those provisions will control even if they depart from the standard provisions of the Act, provided that they are not contrary to or violative of the law.⁸⁵ Essentially, settlors are given broad freedom to tailor their trusts to their personal specifications.

¶22 Two other Illinois statutes further express the state’s strong public policy in favor of freedom of testation by weakening or abolishing contrary common law rules. First, the 1969 adoption of the Statute Concerning Perpetuities⁸⁶ dampened the effect of the long-standing common law rule against perpetuities.⁸⁷ The Statute Concerning Perpetuities modifies the common law rule so that a will or trust provision violating the rule against perpetuities⁸⁸ would not be void ab initio,⁸⁹ but rather would be terminated at the conclusion of the perpetuities period. Second, the Rule in Shelley’s Case Abolishment Act⁹⁰ abolished a common law rule⁹¹ which provided that a life estate to A with a remainder to A’s heirs will instead give A the conveyance in fee simple.⁹² The Rule in Shelley’s Case frustrated the testator’s intent by effectively changing the conveyance from a life estate, which allowed A use of the property for the duration of her life, to fee simple, an unrestricted form of ownership which would permit A to sell the property or leave it to someone other than A’s heirs. Abolishing the Rule allowed for greater testamentary freedom by giving full effect to the testator’s devise.

¶23 As the supreme court correctly identified, these four statutes—the Probate Act, the Trusts and Trustees Act, the Statute Concerning Perpetuities, and the Shelley’s Case Abolishment Act—are consistent in their general thrust: Illinois state law supports a public policy of broad testamentary freedom.⁹³

B. The Supreme Court Distinguished the Main Cases Relied upon by the Appellate Court

¶24 In its *Feinberg* decision, the supreme court examined its three prior decisions on which the appellate court had relied—*Ransdell v. Boston*,⁹⁴ *Winterland v. Winterland*,⁹⁵ and *In re Estate of Gerbing*⁹⁶—and distinguished each of them from the case at bar.

⁸⁴ A settlor is a person who establishes a trust. BLACK’S LAW DICTIONARY 1497 (defining “settlor”) (9th ed. 2009).

⁸⁵ 760 ILL. COMP. STAT. 5/3 (2008).

⁸⁶ 1969 ILL LAWS 2893.

⁸⁷ The rule against perpetuities “limit[s] the testator’s power to earmark gifts for remote descendants.” RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW 394 (2d ed. 1977).

⁸⁸ The rule against perpetuities is a “common-law rule prohibiting a grant of an estate unless the interest must vest, if at all, no later than 21 years . . . after the death of some person alive when the interest was created.” BLACK’S LAW DICTIONARY 1447 (9th ed. 2009).

⁸⁹ Void ab initio means invalid from the outset. See BLACK’S LAW DICTIONARY 1709 (9th ed. 2009) (noting ab initio means “from the beginning”).

⁹⁰ 1953 ILL LAWS 1479

⁹¹ 765 ILL. COMP. STAT. 345/1 (1990).

⁹² Fee simple is full ownership without restriction. BLACK’S LAW DICTIONARY 691 (9th ed. 2009) (Fee simple is “[a]n interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs . . .”).

⁹³ *In re Estate of Feinberg*, 919 N.E.2d, 888, 895–96 (Ill. 2009).

⁹⁴ *Ransdell v. Boston*, 50 N.E. 111 (Ill. 1898).

¶25 In *Ransdell*, an 1898 case, the court established the general rule that testamentary provisions that act as a restraint on marriage or encourage divorce are void as against public policy.⁹⁷ Nevertheless, the *Ransdell* court upheld a provision giving the testator's son a life estate in certain property with the stipulation that title would be conveyed to him only upon the death of his wife or their divorce.⁹⁸ The court recognized this provision as falling under an exception to the general rule, for the testator's purpose was "simply to secure the gift to his son in the manner which, in his judgment, would render it of the greatest benefit to him, in view of the relations then existing between him and his wife."⁹⁹ In *Feinberg*, the appellate court interpreted *Ransdell* as providing one narrow exception to the general rule:¹⁰⁰ where separation has already occurred and divorce is pending, conditioning an inheritance on divorce is acceptable and will not be viewed as encouraging separation or divorce.¹⁰¹

¶26 The supreme court, however, construed *Ransdell* more broadly. The court determined that *Ransdell* did not stand for just one exception, but rather that it opened the door to exceptions to the rule generally so that given "certain facts and circumstances,"¹⁰² a restrictive provision could be deemed valid. For example, such a provision can be viewed as intended to provide support in the event of divorce or death. The supreme court further extrapolated from *Ransdell* that testators should be given broad freedom to dispose of their assets as they please, because "there is nothing illegitimate about a testator's preference for supporting a particular cause, value, or personal interest over the interests of potential beneficiaries, so long as the condition stated in the will or trust does not, at the relevant time, violate public policy."¹⁰³

¶27 The supreme court also considered *Winterland* and *Gerbing*, distinguishing them from the case at bar.¹⁰⁴ In *Winterland*, the court invalidated a provision wherein a father directed that his son's share of a trust be held in trust for him for the duration of his life "or until his present wife shall have died or been separated from him by absolute divorce,"¹⁰⁵ though the son and his wife were neither separated nor contemplating divorce.¹⁰⁶ The *Winterland* court distinguished *Ransdell*, where the son and his wife were already separated and heading toward divorce.¹⁰⁷ The *Winterland* court found that the provision, which provided a significant financial reward for divorce where no

⁹⁵ *Winterland v. Winterland*, 59 N.E.2d 661 (Ill. 1945).

⁹⁶ *In re Estate of Gerbing*, 337 N.E.2d 29 (Ill. 1975).

⁹⁷ *Ransdell*, 50 N.E. at 114–15.

⁹⁸ *Id.*

⁹⁹ *Id.* at 114.

¹⁰⁰ Not only does *Ransdell* provide an exception to the general rule, but it also stands for the proposition that a court will consider the motive of the testator when evaluating the validity of a testamentary provision. *Id.* at 114.

¹⁰¹ *In re Estate of Feinberg*, 891 N.E.2d 549, 550 (Ill. App. Ct. 2008) ("[T]he court in *Ransdell* found that this rule was inapplicable to the facts before it because it was clear that the marriage at issue was already in disrepair, with the parties separated, at the time the provision was created.").

¹⁰² *Ransdell*, 50 N.E. at 113–14.

¹⁰³ *In re Estate of Feinberg*, 919 N.E.2d, 888, 904 (Ill. 2009).

¹⁰⁴ *Id.* at 896–99.

¹⁰⁵ *Winterland v. Winterland*, 59 N.E.2d 662 (Ill. 1945).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 663.

separation or divorce was contemplated, had a “natural tendency . . . to encourage divorce.”¹⁰⁸

¶128 In *Gerbing*, the court invalidated a provision that terminated the testator’s trust and gave the contents of the trust to the testator’s son in the event that the son’s wife predeceased him or they divorced and remained divorced for two years.¹⁰⁹ The court restated the exception established in *Ransdell*,¹¹⁰ but refused to ascribe such an innocent motive to the testator in the case at bar.¹¹¹ The court determined instead that the testator was seeking to provide an incentive for divorce rather than support to her son in the event of a divorce.¹¹² The court held that the condition was void as against public policy, concluding that “[p]lainly the condition . . . is capable of exerting such a disruptive influence upon an otherwise normally harmonious marriage.”¹¹³

¶129 Unlike the appellate court, the supreme court found that both *Winterland* and *Gerbing* were factually inapposite to *Feinberg*.¹¹⁴ First, the provisions being challenged in *Winterland* and *Gerbing* provided a monetary incentive to divorce.¹¹⁵ In contrast, the *Feinberg* court determined that the beneficiary restriction clause “does not implicate the principle that trust provisions that encourage divorce violate public policy” because the provision in question addressed only marriage and choice of spouse.¹¹⁶ The provision neither encouraged divorce nor offered any incentive for a grandchild to either divorce a non-Jewish spouse or to remarry a Jewish spouse.¹¹⁷ Indeed, the provision does not even use the word “divorce,” or make any reference to a separation or termination of marriage. Rather, the intent of Erla’s provision was to reward with a bequest “those grandchildren whose lives most closely embraced the values she and Max cherished” at the time of her death.¹¹⁸

¶130 In Illinois, it is well settled that a will speaks as of the date of the testator’s death.¹¹⁹ In the instant case, after Erla exercised her power of appointment,¹²⁰ all contingencies would be settled as of the date of Erla’s death¹²¹ because the determination as to whether the grandchildren would receive their share of the trust assets was dependent on their marital status as of that date, as well as whether there remained any assets in the trust to

¹⁰⁸ *Id.*

¹⁰⁹ *In re Estate of Gerbing*, 337 N.E.2d 29, 31 (Ill. 1975).

¹¹⁰ *Id.* at 32.

¹¹¹ *Id.* at 32–33.

¹¹² *Id.* at 33.

¹¹³ *Id.*

¹¹⁴ *In re Estate of Feinberg*, 919 N.E.2d 888, 896–99 (Ill. 2009).

¹¹⁵ *Winterland v. Winterland*, 59 N.E.2d 662 (Ill. 1945) (Testator’s son George’s shares shall be kept in trust “so long as he may live or until his present wife shall have died or been separated from him by absolute divorce.”); *Gerbing*, 337 N.E.2d at 31 (“[I]n the event Arlie Gerbing and Frank Gerbing, Jr. are divorced . . . my trustee is directed to pay . . . the remaining principal of the trust property and all accrued dividends or interest accumulated thereon to my said son.”).

¹¹⁶ *Feinberg*, 919 N.E.2d at 899.

¹¹⁷ *See id.*

¹¹⁸ *Id.* at 903.

¹¹⁹ *Matter of Estate of Gehrt*, 480 N.E.2d 151, 153 (Ill. App. Ct. 1985) (“In Illinois, it is well established that the will only speaks as of the date of death of the testator.”).

¹²⁰ Erla exercised her power of appointment only partially. She could have eliminated the beneficiary restriction clause entirely, but rather she chose to retain the provision, altering only the distribution scheme. *Feinberg*, 919 N.E.2d at 892.

¹²¹ *Id.* at 900–01.

distribute.¹²² Nothing that occurred after the date of Erla's death would affect the disposition of Erla's assets for the purposes of the beneficiary restriction clause.¹²³

¶31 The beneficiary restriction clause did not provide that a grandchild deemed deceased for the purpose of the will could be "resurrected" to receive their share of the trust assets upon subsequently divorcing the non-Jewish spouse or remarrying to a Jewish spouse.¹²⁴ Indeed, the *Feinberg* court noted that because no contingencies remained at Erla's death—all of the grandchildren were married and the will provided for a one-time payment based on circumstances at the time of her death¹²⁵—the *Feinberg* provision had no prospective effect that might influence a descendant's choice to marry or divorce.¹²⁶

¶32 Erla's appointment created a condition precedent, meaning that a condition had to be met before the grandchildren would receive their share of the trust assets.¹²⁷ In this case, of course, that condition was that the grandchildren had to marry a Jewish spouse or a non-Jewish spouse who converted within one year of marriage.¹²⁸ The supreme court found that a condition precedent would generally be upheld¹²⁹ because until the condition was satisfied, the beneficiary only had an expectancy interest.¹³⁰ Thus, the beneficiary restriction clause did not seek to exert dead-hand control¹³¹ or to influence the future conduct of the grandchildren because the provision did "not operate prospectively to encourage the grandchildren to make certain choices regarding marriage."¹³² On the date of Erla's death, the condition was either met or not met based on the marital status of the grandchildren.¹³³ There was nothing the grandchildren could have done to change their eligibility.¹³⁴ Ultimately, the court found that the grandchildren's right to marry was not restricted by the will, though the court did acknowledge that their choices had expensive consequences.¹³⁵

¶33 In addition to finding *Winterland* and *Gerbing* factually inapposite,¹³⁶ the supreme court noted without further comment that the line of cases relied on by the appellate court dated back to 1898.¹³⁷ Curiously enough, however, the supreme court cited *Shackelford*

¹²² *Id.* at 891, 903.

¹²³ *See id.* at 903.

¹²⁴ *Id.*

¹²⁵ *Id.* at 891–92.

¹²⁶ *See id.* As far as the provision was concerned, there was nothing to be gained from a divorce or remarriage after Erla's death. *Id.* at 903.

¹²⁷ *Id.*

¹²⁸ *Id.* at 891.

¹²⁹ *Id.* at 897. In contrast, a condition subsequent, such as a blanket prohibition on marriage, would likely be invalidated. *Id.*

¹³⁰ *Id.*

¹³¹ Posner's book, *Economic Analysis of the Law*, discusses dead-hand control exerted through conditional gifts. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* § 18.7 (7th ed. 2007) (contrasting testamentary gifts with inter vivos gifts and suggesting that courts should have the power to modify conditions placed on testamentary gifts because of the impossibility of "recontracting" by testator and devisee).

¹³² *Feinberg*, 919 N.E.2d at 903.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 898–99 ("We disagree with the appellate court's conclusion regarding the similarity of the present case to the cited cases.").

¹³⁷ *Id.* at 892.

v. Hall,¹³⁸ a 1857 case from the Illinois Supreme Court. The court found *Shackelford* to be factually apposite to the case at bar because the challenged provision involved the decision to marry, rather than a provision providing an incentive to divorce.¹³⁹ In *Shackelford*, the testator left his estate to his widow until she remarried,¹⁴⁰ with the remainder to his four children, subject to the condition that they not marry before the age of twenty-one.¹⁴¹ If any of his children married before the age of twenty-one that child would receive one dollar only.¹⁴² In upholding the provision, the court concluded that “the testator may impose reasonable and prudent restraints upon the marriage of the objects of his bounty, by means of conditions precedent, or subsequent, or by limitations.”¹⁴³ As an example of an impermissible restraint, the court noted that the testator “may not . . . impose perpetual celibacy upon the objects of his bounty.”¹⁴⁴ Generally, the testator may impose a partial restraint on marriage, but may not absolutely prohibit the marriage of a party.¹⁴⁵

¶34 Despite finding that the partial restraint on marriage was reasonable, the *Shackelford* court still allowed the daughter who violated the provision to receive the inheritance.¹⁴⁶ In so ruling, the court relied upon her ignorance of the restrictive provision and a fraudulent representation by her brother, an executor of the will, whom the court indicated had a financial interest in depriving his sister of her inheritance.¹⁴⁷ *Feinberg* presented no such circumstances. The *Feinberg* court accepted the *Shackelford* conclusion that a partial restraint on marriage was reasonable, but ultimately found that the beneficiary restriction clause did “not operate as a restriction on marriage” at all because “it operated only upon Erla’s death to determine which grandchildren, if any, would share in the proceeds of the trust.”¹⁴⁸ The supreme court noted, a “will speaks as of the date of death of the testator.”¹⁴⁹

¶35 Unlike *Shackelford*, where the children’s interests vested upon the death of their father,¹⁵⁰ the *Feinberg* grandchildren had a mere expectancy interest because the terms of the trust were subject to change at any time before Erla’s death if she chose to exercise her power of appointment.¹⁵¹ Since Max gave Erla testamentary and appointment power

¹³⁸ *Id.* at 899–901.

¹³⁹ *Id.* at 899.

¹⁴⁰ *Shackelford v. Hall*, 19 Ill. 211, 213 (Ill. 1857).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 214.

¹⁴⁴ *Id.*

¹⁴⁵ As a general rule, a testator may not impose a complete restraint on marriage, but rather only a reasonable partial restraint on marriage. *See id.* at 214. However, there is one exception to the rule. A testator may impose a condition whereby the testator’s spouse will forfeit any right to the spouse’s estate by subsequently remarrying. *Id.* at 214–15.

¹⁴⁶ *Id.* at 218.

¹⁴⁷ *Id.* at 217–18 (finding that “it would be a monstrous piece of injustice to enforce this forfeiture against her” because her brother, the executor of the will, kept the plaintiff in ignorance of the condition for his own monetary benefit).

¹⁴⁸ *In re Estate of Feinberg*, 919 N.E.2d, 888, 903 (Ill. 2009).

¹⁴⁹ *Id.* at 901.

¹⁵⁰ *Shackelford v. Hall*, 19 Ill. 211, 213 (Ill. 1857).

¹⁵¹ *In re Estate of Feinberg*, 919 N.E.2d at 900–01.

over the trusts, the grandchildren only had an expectancy¹⁵² that they might receive some of the trust assets when Erla's life estate was over at her death.¹⁵³ Nothing was settled until Erla's death. Erla could have exercised her appointment power to exclude the grandchildren entirely. Or, even if Erla still provided for the grandchildren in her will, she could have exhausted the assets in the trust so the grandchildren would not have received anything from the estate. In essence, it was not a certainty that the grandchildren would receive anything from Max and Erla's estate.

¶36 Moreover, unlike the *Shackelford* daughter,¹⁵⁴ the grandchildren were not heirs at law.¹⁵⁵ Heirs at law usually include the decedent's spouse (if alive) and children. In Illinois, and as a general matter, grandchildren are not considered heirs at law.¹⁵⁶ Outside of being named as beneficiaries in the will, therefore, the Feinberg grandchildren had no legal claim to their grandparents' estate. In fact, had the grandchildren not been named in the will, Michele Trull would likely not have had standing to challenge the will. In dicta, the *Feinberg* court noted an additional consequence of the grandchildren not being heirs at law: it determined that notice of the provision in question, though of critical importance in *Shackelford*,¹⁵⁷ was not relevant in *Feinberg* because the grandchildren were not heirs at law.¹⁵⁸ This underscores the court's position that the grandchildren possessed fewer legal rights and had a weaker claim to the trust assets because they were not heirs at law.

C. The Supreme Court Rejected the Restatement (Third) of Trusts

¶37 Next, the supreme court rejected the applicability of the Restatement (Third) of Trusts,¹⁵⁹ a source of law on which the appellate court had relied rather heavily.¹⁶⁰ The

¹⁵² In the lexicon of trusts and estates, an expectancy interest refers to a situation where an individual expects to receive something, such as property, but is not assured that they will receive it. See BLACK'S LAW DICTIONARY 658 (9th ed. 2009) (defining "expectancy"). For example, if Tom's will contains a provision devising a sum of money to Susan, Susan has only an expectancy interest in the money because Tom could alter the will to exclude Susan at any time before his death.

¹⁵³ *Feinberg*, 919 N.E.2d at 900–01.

¹⁵⁴ *Shackelford*, 19 Ill. at 215.

¹⁵⁵ *Id.* An heir at law, or simply an heir, is someone who would be the beneficiary of all or a share of an estate if the owner of the estate was to die intestate, or without a will. BLACK'S LAW DICTIONARY 791 (9th ed. 2009) (defining "heirs").

¹⁵⁶ The laws of intestacy generally determine who shall be heirs at law and what share of a decedent's estate heirs at law shall receive by examining executed wills to determine who decedents tend to provide for and what percentage of their estate they give to a type of beneficiary. BLACK'S LAW DICTIONARY 898 (9th ed. 2009) (defining "intestate").

¹⁵⁷ *Shackelford*, 19 Ill. at 217–18.

¹⁵⁸ *In re Estate of Feinberg*, 919 N.E.2d 888, 901 (Ill. 2009) ("[W]hile the record is unclear whether any or all of the grandchildren were aware of the existence of the beneficiary restriction clause, because they had no vested interest to protect, they were not entitled to notice of the condition.").

¹⁵⁹ *Id.* at 902–03 (finding that the Restatement (Third) of Trusts was not applicable because, among other reasons, "[t]he validity of a trust provision is not at issue"). In addition to deeming the Restatement inapplicable to the case at bar, the court also made clear that it had not yet accepted or endorsed the Restatement (Third) of Trusts, commenting that "this court has, on several occasions, cited various sections [of the Restatement (Second) of Trusts] with approval" and further noting that "[w]e have not yet had reason to consider whether any section of the Restatement (Third) of Trusts, which was adopted in 2003, is an accurate expression of Illinois law and we need not do so in this case." *Id.* at 902.

supreme court explained that “[t]he validity of a trust provision is not at issue, as the distribution provision of Max’s trust was revoked when Erla exercised her power of appointment. Her distribution scheme was in the nature of a testamentary provision.”¹⁶¹

¶38 The Restatement (Third) of Trusts may have been germane to Max’s original instrument, which created a lifetime trust and provided for the trust assets to be divided among his children and grandchildren upon Erla’s death.¹⁶² However, after Erla exercised her power of appointment, the beneficiary restriction clause, which now provided for a one-time, fixed-sum payment of \$250,000 to each of her children and grandchildren, became a testamentary provision,¹⁶³ rather than a trust provision.¹⁶⁴ The difference is that Max’s distribution scheme divided the trust and paid money out to his beneficiaries, his children and grandchildren, pursuant to the trust documents, whereas Erla’s distribution scheme called for a one-time \$250,000 payment to be paid pursuant to a provision in her will.¹⁶⁵

¶39 The supreme court was correct in drawing the distinction between Max’s trust provision and Erla’s testamentary provision.¹⁶⁶ This seems simple enough, yet the confusion lies in the fact that Erla’s testamentary provision still implicates the trust. Under Erla’s testamentary provision, the money for the \$250,000 payments was to come from the trust assets.¹⁶⁷ Be that as it may, the involvement of the trust was merely incidental to Erla’s distribution scheme as governed by the testamentary provision.

¶40 It is critical to note that trusts and wills are distinct legal instruments. It would be misleading and mistaken to extend the applicability of the Restatement (Third) of Trusts to other testamentary instruments. Trusts and wills share many similarities and are often used in tandem, but they are not governed by all of the same rules and laws. As a result, the two may not be treated interchangeably. Moreover, regardless of its applicability to the subject matter in question, the Restatement is not controlling.¹⁶⁸ Though considered persuasive authority, it is important to note that Restatements are not law and courts are not required to defer to them.¹⁶⁹

¶41 The supreme court correctly held that the appellate court’s reliance on the Restatement (Third) of Trusts was unjustified because Erla’s payment scheme was not

¹⁶⁰ See *In re Estate of Feinberg*, 891 N.E.2d 549, 552 (Ill. App. Ct. 2008) (“We hold that under Illinois law and under the Restatement (Third) of Trusts, the provision in the case before us is invalid because it seriously interferes with and limits the right of individuals to marry a person of their own choosing.”).

¹⁶¹ *Feinberg*, 919 N.E.2d at 902.

¹⁶² Note that Restatements are not law; however, they are generally accorded persuasive authority by courts. See *id.*; *Feinberg*, 891 N.E.2d at 998 (“The Restatement (Third) of Trusts has previously been cited as persuasive authority by this court.”).

¹⁶³ The \$250,000 payments were to come from assets that, incidentally, were held in trust, but the distribution scheme operated as a testamentary provision, not a trust provision. *Feinberg*, 919 N.E.2d at 902.

¹⁶⁴ *Id.* at 891–92.

¹⁶⁵ *Id.* at 891.

¹⁶⁶ *Id.* at 902.

¹⁶⁷ *Id.* at 891–92.

¹⁶⁸ *Id.* at 902 (noting that various sections of the Restatement (Second) of Trusts have been cited with approval by the Illinois supreme court, but that the court has not yet had reason to consider any section of the Restatement (Third) of Trusts, and does not see fit to do so in the case at bar).

¹⁶⁹ The supreme court noted that the Restatement (Third) of Trusts had not yet been considered by the court. *Id.*

detailed in a trust provision, and even if it was, the Restatement is only persuasive authority.¹⁷⁰

V. THE *FEINBERG* DECISION IS JUSTIFIABLE LEGALLY, MORALLY, AND SOCIALLY

A. *Feinberg Is Legally Sound but not Solidly Supported*

¶42 The supreme court was correct in distinguishing *Winterland* and *Gerbing* as factually inapposite in that both provisions in question discussed the contingency of divorce. The provisions in those cases, unlike in *Feinberg*, provided an incentive, a monetary award, for divorce, thus undercutting the public policy of promoting the institution of marriage by tending to induce divorce.

¶43 The supreme court's decision, while well-reasoned, should have provided a more solid foundation for its decision. The greater part of the decision focused on explaining defects in the appellate court's reasoning, rather than setting forth positive law in support of upholding the beneficiary restriction clause. The supreme court deemed the cases cited by the appellate court factually inapposite, and distinguished them accordingly.¹⁷¹ It also explained why the appellate court's reliance on the Restatement (Third) of Trusts was misplaced.¹⁷² However, the court neglected to consider other states' case law on the subject, which, by providing positive law to underpin the decision, would have provided the most persuasive authority in support of its holding.

¶44 In its opinion invalidating the beneficiary restriction clause, the appellate court briefly acknowledged the wealth of case law supporting the opposite conclusion.¹⁷³ The appellate court disposed of these cases quickly, corraling them into a single paragraph.¹⁷⁴ Judge Greiman's dissent seized on this weakness in the majority's opinion.¹⁷⁵ Greiman relied primarily on case law from other jurisdictions and pointedly noted that the majority's opinion would place Illinois in the minority of states invalidating such restrictions.¹⁷⁶

¶45 In its own opinion, however, the supreme court failed to discuss case law from other jurisdictions. For the most part, this case law leans heavily toward upholding such testamentary provisions. In so doing, the supreme court let pass an important opportunity to bolster its holding. Instead, the court's decision is very narrowly tailored to the facts of the case at bar, and the opinion leaves open many questions as to the disposition of similar cases in the future. If the court had better explained and supported its decision, Illinois law would benefit from greater predictability.

¶46 Cases from other jurisdictions such as *Gordon v. Gordon*,¹⁷⁷ *Shapira v. Union National Bank*,¹⁷⁸ *In re Estate of Keffalas*,¹⁷⁹ and *In re Silverstein's Will*,¹⁸⁰ which were

¹⁷⁰ *Id.* at 902.

¹⁷¹ *Id.* at 896–99.

¹⁷² *Id.* at 902–03.

¹⁷³ *In re Estate of Feinberg*, 891 N.E.2d 549, 551–52 (Ill. App. Ct. 2008).

¹⁷⁴ *See id.*

¹⁷⁵ *See id.* at 555.

¹⁷⁶ *Id.*

¹⁷⁷ *Gordon v. Gordon*, 124 N.E.2d 228 (Mass. 1955).

¹⁷⁸ *Shapira v. Union Nat'l Bank*, 39 Ohio Misc. 28 (Ohio Ct. Common Pleas 1974).

¹⁷⁹ *In re Estate of Keffalas*, 233 A.2d 248 (Pa. 1967).

cited in the appellate court decision,¹⁸¹ are factually very similar to *Feinberg* and support the supreme court's decision. The reasoning in those opinions is well-founded and would have provided additional support for the supreme court's holding.

¶47 In *Shapira v. Union National Bank*, a 1974 case from the Court of Common Pleas of Ohio, a testator stipulated that his son was to receive his share of the testator's estate only if he was married to a Jewish woman at the time of the testator's death, or if he married a Jewish woman within seven years of the testator's death.¹⁸² The court upheld the provision, finding that partial restraints on marriage¹⁸³ are reasonable and not contrary to public policy,¹⁸⁴ and that inheritances conditioned on the beneficiary's marrying within a particular religious faith are reasonable.¹⁸⁵ Additionally, the court noted that "this court is not being asked to enforce any restriction upon Daniel Jacob Shapira's constitutional right to marry. Rather, this court is being asked to enforce the testator's restriction upon his son's inheritance."¹⁸⁶ The provision imposed a partial restraint on marriage for the limited purpose of receiving an inheritance, but did not impose a restraint on marriage in the general sense. The partial restraint was found to be reasonable given the son's access to eligible Jewish women¹⁸⁷ and the generous time frame—seven years—he was given to find a Jewish mate.¹⁸⁸ Finally, the court noted that the fact that the money was to be gifted over to the State of Israel in the event that the son did not marry a Jewish woman within seven years was evidence of the testator's non-punitive intent.¹⁸⁹

¶48 Similar to *Shapira*, the supreme court in *Feinberg* noted that the beneficiary restriction clause did not truly constrain the descendants in any way, but rather merely created consequences, albeit financially significant consequences, for their choice of spouse.¹⁹⁰ Even if the beneficiary restriction clause could be considered a restraint on marriage, it was only a partial restraint because it conditioned, but did not entirely prevent, marriage. Additionally, as the *Feinberg* court pointed out, it was clear that Max and Erla's provision was not intended for control purposes; rather, they wished to reward those grandchildren who married within the Jewish faith.¹⁹¹

¶49 In *In re Silverstein's Will*,¹⁹² the Surrogate's Court of Queens County, New York upheld a testamentary provision whereby the testator provided that his grandchildren's shares of his estate were to be "paid to each on the date of their marriage and provided

¹⁸⁰ *In re Silverstein's Will*, 155 N.Y.S.2d 598 (N.Y. Surr. Ct. 1956).

¹⁸¹ *Feinberg*, 891 N.E.2d at 551–52.

¹⁸² *Shapira*, 39 Ohio Misc. at 28–29.

¹⁸³ The *Shapira* court further noted that the condition in question was a partial restraint on marriage, not a restraint on the freedom of religious practice. *Id.* at 33–34. The court indicated that a testamentary gift conditioned on marriage to someone of a particular religion was distinguishable from a testamentary gift conditioned on the religious faith of the beneficiary and that the latter might be invalidated by the invocation of the free exercise clause. *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 31.

¹⁸⁷ *Id.* at 37.

¹⁸⁸ *Id.* at 38.

¹⁸⁹ *Id.*

¹⁹⁰ *In re Estate of Feinberg*, 919 N.E.2d 888, 903 (Ill. 2009) ("Michele's choices regarding when to marry and whom to marry were entirely unrestricted, even though, as it turns out, those choices did have consequences for her.").

¹⁹¹ *Id.* at 903.

¹⁹² *In re Silverstein's Will*, 155 N.Y.S.2d 598 (1956).

they marry a person of Hebrew faith.”¹⁹³ The court accepted the general rule that partial restraints on marriage, provided they are reasonable, do not violate public policy.¹⁹⁴ The court further construed reasonable partial restraints on marriage to mean that “[c]onditions not to marry a person of a particular faith or race are not invalid.”¹⁹⁵

¶50 In *Gordon v. Gordon*,¹⁹⁶ a 1955 case from the Supreme Judicial Court of Massachusetts, the testator’s will provided that any of the testator’s children who married a person not born in the Jewish faith was to be deemed deceased for the purpose of the instrument.¹⁹⁷ Thus, the testator’s condition was more restrictive than that in *Feinberg*.¹⁹⁸ In *Gordon*, one son, Harold, married a non-Jewish woman in a civil ceremony. The woman subsequently converted to Judaism. Following the conversion, Harold and his wife underwent a rabbinical ceremony of marriage. The court adopted the rule that partial restraints on marriage are considered valid unless found to be unreasonable,¹⁹⁹ and construed the rule to mean that “an inducement by way of gift to adopt or adhere to a particular religious belief is not a denial of religious freedom.”²⁰⁰ The court opined that the condition did not restrict religious freedom because it did not consider or seek to restrict the spouse’s religious beliefs at the time of marriage, but merely stipulated that the spouse’s parents must have been of the Jewish faith at the time that the spouse was born.²⁰¹ Ultimately, the court concluded that even a restriction conditioned on the religion of the parents of a prospective spouse was reasonable.²⁰² The *Gordon* restriction is significantly more stringent than the *Feinberg* beneficiary restriction clause; the *Feinberg* beneficiary restriction clause does not specify that the spouse has to be of Jewish parentage, and explicitly accepts converts.²⁰³

¶51 In *In re Estate of Keffalas*,²⁰⁴ a 1967 case from the Supreme Court of Pennsylvania, the testator left a bequest of \$2,000 to each of his children, provided that they marry a spouse of “true Greek blood and descent and of Orthodox religion,”²⁰⁵ thus imposing a condition on both the ethnic heritage and religion of the prospective spouses. The will also provided the same \$2,000 bequest to any child who initially married a non-Greek but

¹⁹³ *Id.* at 599.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Gordon v. Gordon*, 124 N.E.2d 228 (Mass. 1955).

¹⁹⁷ *Id.* at 230.

¹⁹⁸ According to Jewish law, the religion of a child is passed down through the mother. Rebecca Weiner, *Who Is a Jew?*, JEWISH VIRTUAL LIBRARY, <http://www.jewishvirtuallibrary.org/jsource/Judaism/whojew1.html>. Thus, a child born of a Jewish mother and a non-Jewish father would be Jewish. *Id.* However, some Jews reject this and consider a child Jewish only if born of two Jewish parents. *Id.* Other Jews are less strict, and consider a child Jewish if either one of the parents is Jewish, if the child is reared in a Jewish household, or if the child observes Jewish customs and rituals. *Id.* The *Feinberg* beneficiary restriction clause did not specify that the grandchildren’s spouses had to be born of two Jewish parents, ostensibly accepting any spouse who considered themselves Jewish by birth or conversion, regardless of parentage. Therefore, the *Feinberg* provision is less strict than the *Gordon* provision.

¹⁹⁹ *Gordon*, 124 N.E.2d at 234.

²⁰⁰ *Id.* at 233.

²⁰¹ *Id.* at 235.

²⁰² *Id.* at 234.

²⁰³ See *supra* note 198 and accompanying text.

²⁰⁴ *In re Estate of Keffalas*, 233 A.2d 248 (Pa. 1967).

²⁰⁵ *Id.* at 250.

later, following either death or divorce, remarried to a person of Greek heritage and the Orthodox religion.²⁰⁶ The court invalidated the provision as conducive to divorce.²⁰⁷ Furthermore, the court named as the distinguishing factor “whether the disposition is reasonably related to the contingency of divorce.”²⁰⁸ The court found that providing a monetary incentive, even as little as \$2,000, for divorce and remarriage to someone of Greek heritage and the Orthodox religion was conducive to divorce.²⁰⁹

¶52 As the cases above make evident, the case law from other jurisdictions supports the holding of the *Feinberg* court. Most other cases involve the testator’s children, who would inherit in the event that their parent died intestate, thus making them heirs at law. *Feinberg* is a unique case because it involves the testator’s grandchildren, who are not heirs at law. The grandchildren had an expectancy that they might inherit at the conclusion of Erla’s life estate based on how Erla had exercised her appointment power; however, they had no vested interest until Erla died without having changed the testamentary scheme to exclude them.²¹⁰ Because they had no vested interest, the supreme court determined that they were not entitled to notice of the beneficiary restriction clause.²¹¹

¶53 The *Feinberg* holding is largely restricted to the facts of the case as a result of the reasoning and support the supreme court utilized. Case law from other jurisdictions, as discussed above, supports the holding and helps define the contours of the rule by including a more diverse set of similar factual situations. Had the supreme court included case law from other jurisdictions for support, it would have established a more clear precedent rather than potentially limiting the precedent established in *Feinberg* to the case’s particular facts. A more well-supported decision would provide greater guidance to the lower courts, thus leading to the correct outcome more often in similar cases.

B. Feinberg Correctly Favors the Public Policy Goal of Allowing Testamentary Freedom

¶54 Socially, the *Feinberg* decision strikes an appropriate balance between the competing public policies of supporting testamentary freedom and safeguarding the institution of marriage. Testators should have the right to distribute their assets as they see fit, especially when the provision is not punitive in nature, but rather is intended as an extension or fulfillment of a deeply-held belief. The court accepted Michael Feinberg’s argument that the clause was “intended to encourage and support Judaism and preservation of Jewish culture in [Max’s] family.”²¹² Max and Erla’s method, though surely frustrating for at least some of their grandchildren, was benign and intended to advance their beliefs.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 251.

²⁰⁸ *Id.* at 250.

²⁰⁹ *Id.* at 250–51.

²¹⁰ *In re Estate of Feinberg*, 919 N.E.2d 888, 900–01 (Ill. 2009).

²¹¹ *Id.* at 901.

²¹² *Id.* at 893 (internal quotation marks omitted).

¶55 Courts generally investigate the testator's motive when determining whether or not to uphold a testamentary provision.²¹³ Where a provision is punitive in nature or motivated by an interest in furthering a prejudicial, bigoted, or malevolent agenda, the provision is likely to be held unenforceable.²¹⁴ For example, if Max and Erla had imposed the beneficiary restriction clause with the express intent to avoid intermarriage with non-Jewish people because they believed that non-Jewish people were an inferior class, the court would have had a responsibility to consider the state's public policy interest and not act in furtherance of a prejudicial belief. The *Feinberg* court competently performed a balancing test by evaluating the nature of the clause and the testator's motive and weighing those factors against the value of testamentary freedom. The court correctly found the beneficiary restriction clause to be non-punitive in nature and benevolently motivated; therefore, having laid the public policy concerns to rest, testamentary freedom triumphed.

C. *The Feinberg Decision Is Morally Correct*

¶56 The grandchildren had no natural legal claim to Max and Erla's assets. As the Illinois supreme court noted, had Max and Erla died intestate, their estate would have been divided between their two children.²¹⁵ Therefore, to include their grandchildren in the disposition of their estate was a voluntary and purposeful act of beneficence and largesse. Max and Erla accumulated these assets over their lifetimes. The grandchildren had no legal right to this money.²¹⁶

¶57 Moreover, contrary to the plaintiff's arguments,²¹⁷ the supreme court appropriately relied on the fact that the *Feinberg* beneficiary restriction clause did not restrict the grandchildren's action in any way.²¹⁸ As a matter of course, courts consider the impact of a restrictive provision on the beneficiaries.²¹⁹ In this case, it was clear that the beneficiary restriction clause did not unduly restrict the grandchildren's marital choices, in light of the fact that four of the five grandchildren married non-Jewish spouses. In fact, the *Feinberg* grandchildren acted freely in choosing their spouses. Just as the grandchildren were free to marry whomever they pleased, so too should Max and Erla be free to distribute their wealth as they saw fit.

²¹³ See, e.g., *Shapira v. Union Nat'l Bank*, 39 Ohio Misc. 28, 38 (Ohio Ct. Common Pleas 1974) (finding that a "gift over" clause providing that if a son failed to marry a Jewish spouse his share of the estate would go to the state of Israel demonstrates the "depth of the testator's provision" and indicates that the purpose of the clause was not punitive in nature); see also Sherman, *supra* note 13, at 1307. Courts may void a testamentary provision that tends to disrupt marital harmony or induce divorce regardless of whether the testator's motives are benign, malicious, or indifferent. *Id.* at 1310–11.

²¹⁴ Sherman, *supra* note 13, at 1307.

²¹⁵ *In re Estate of Feinberg*, 919 N.E.2d 888, 895 (Ill. 2009) ("Surely, the grandchildren have no greater claim on their grandparents' testate estates than they would have had on intestate estates.").

²¹⁶ See *supra* notes 155–158 and accompanying text.

²¹⁷ *Id.* at 904–05 (noting that plaintiff Michele Trull argued that the beneficiary restriction clause "discourages lawful marriage and interferes with the fundamental right to marry, which is protected by the constitution").

²¹⁸ *Id.* at 903 ("Michele's choices regarding when to marry and whom to marry were entirely unrestricted.").

²¹⁹ William A. Drennan, *Wills, Trusts, Schadenfreude, and the Wild, Wacky Right of Publicity: Exploring the Enforceability of Dead-Hand Restrictions*, 58 ARK. L. REV. 43, 64–65 (2005).

¶58 The plaintiff's arguments never acknowledge any benign purpose to the beneficiary restriction clause. Rather, the plaintiff suggests that the clause was punitive in nature and interfered with her right to marry.²²⁰ Yet, both Max and Erla and their grandchildren had something to lose based on the beneficiary restriction clause. Had the grandchildren married within the Jewish faith, they would have been entitled to receive the \$250,000 payment, and they also would have honored and furthered Max and Erla's commitment to the Jewish faith—a gain for both sides. Yet at the same time, when the grandchildren did as they pleased by marrying outside of the faith, they repudiated Max and Erla's wishes, and lost their opportunity for \$250,000. What the grandchildren had no right to, as the supreme court recognized, was to reject their grandparents' clearly expressed beliefs and still expect to collect \$250,000—especially where the grandchildren were only included in the will thanks to the grandparents' generosity.

VI. FEINBERG SHOULD BE CONSTRUED BROADLY

¶59 The unique nature of the *Feinberg* decision raises many questions about its impact on future cases. The supreme court determined that Max's trust provision was not at issue because the distribution provision of Max's trust was revoked when Erla exercised her power of appointment.²²¹ In so doing, the court left open the question of whether *Feinberg* will be applicable to trust provisions.

¶60 *Feinberg* should be applicable to trust provisions. The supreme court's pronouncement that the Restatement (Third) of Trusts²²² was not applicable to the case at bar should not be construed to mean that the Restatement is at odds with the holding. Indeed, the court construed the beneficiary restriction clause consistently with the Restatement. The applicable Restatement comment only invalidates a trust provision "if it tends to encourage disruption of a family relationship or to discourage formation or resumption of such a relationship."²²³ The Restatement comment continues, saying that "a trust provision is ordinarily invalid if it tends to seriously to interfere with or inhibit . . . the exercise of freedom to marry."²²⁴ Consistent with that provision, the *Feinberg* court determined that the beneficiary restriction clause did not, in fact, inhibit the descendants' freedom to marry.

¶61 Moreover, though the supreme court distinguished the three cases relied on by the appellate court—*Ransdell*, *Winterland*, and *Gerbing*—it did so because of their factual differences from *Feinberg*, not because they involved trust provisions, rather than testamentary provisions. The court distinguished these cases as factually inapposite because the provisions they addressed essentially offered a financial incentive to divorce, which was not the case with the provision in question in *Feinberg*.

¶62 The *Feinberg* decision also raises the question of whether its holding should extend to cases where the plaintiff is an heir at law. The answer is clearly yes. The *Feinberg* court distinguished between heirs at law and the plaintiff, a grandchild with a mere expectancy interest.²²⁵ The court did not, however, address whether a provision like the

²²⁰ *Feinberg*, 919 N.E.2d at 904–05.

²²¹ *Id.* at 902.

²²² Restatement (Third) of Trusts § 29 cmt. j. (2003).

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *In re Estate of Feinberg*, 919 N.E.2d, 888, 900–01 (Ill. 2009).

beneficiary restriction clause should be equally valid where it applies to heirs at law, such as the children of a testator. On this point the applicable cases from other jurisdictions, discussed earlier in this Note, are instructive. *Shapira*, *Silverstein*, and *Gordon* all pit children, heirs at law, against their testator parents.²²⁶ In each of these cases, where the plaintiffs were heirs at law with a vested interest in the estate, the courts upheld the provisions in question as valid on the basis that the provisions were partial, reasonable restraints on marriage and provided no inducement to divorce.²²⁷ Thus, similar provisions should be held to be equally applicable to heirs at law. However, as the court determined in *Shackelford*, heirs at law and others with a vested interest are entitled to the additional benefit of notice of the operative provision so that they may act with knowledge.²²⁸

VII. POTENTIAL CONSEQUENCES OF THE *FEINBERG* DECISION

¶63 *Feinberg* primarily affects two parties: attorneys who practice in the area of estate planning, and private individuals who might look to a testamentary provision to promote personal beliefs. *Feinberg* made clear that to be upheld, a testamentary provision that places conditions on a beneficiary's share of the estate must strike a balance so as to not be so restrictive as to be voided as contrary to public policy. One way to do this is to make clear that the intent of the provision is beneficent and not punitive or intended to promote hatred or prejudice.²²⁹

¶64 Though the beneficiary restriction clause in *Feinberg* was upheld, it is clear that such provisions will continue to be subject to scrutiny by courts. Moreover, *Feinberg* does not provide clear guidance because the court carefully narrowed the issue to the facts before it, concluding "[b]ecause no grandchild had a vested interest in the trust assets and because the distribution plan . . . has no prospective application . . . the beneficiary restriction clause does not violate public policy."²³⁰ To avoid the uncertainty that remains in this area of law due to *Feinberg's* limited precedential value, estate planners and testators should consider skirting the issue entirely. There are other means of promoting personal beliefs and values that are less likely than testamentary provisions to become the subject of litigation. Some options include inter vivos gifts,²³¹ which avoid the issue of dead-hand control; life estates, a transfer of interests which can be effectuated without the use of a will and can therefore avoid probate;²³² and insurance, which also passes outside of probate.²³³

²²⁶ See *Shapira v. Union Nat'l Bank*, 39 Ohio Misc. 28 (Ohio Ct. Common Pleas 1974); *In re Silverstein's Will*, 155 N.Y.S.2d 598 (N.Y. Surr. Ct. 1956); *Gordon v. Gordon*, 124 N.E.2d 228 (Mass. 1955).

²²⁷ See *supra* notes 186–209 and accompanying text.

²²⁸ *Shackelford v. Hall*, 19 Ill. 211, 215–16 (Ill. 1857) (finding that a provision restricting marriage of the testator's children until the age of twenty-one is presumably valid, but for the fact that the plaintiff did not have notice of the provision).

²²⁹ See, e.g., *Shapira*, 39 Ohio Misc. at 38.

²³⁰ *In re Estate of Feinberg*, 919 N.E.2d, 888, 905–06 (Ill. 2009).

²³¹ See Sherman, *supra* note 13, at 1301.

²³² *Id.*

²³³ *Id.*

VIII. CONCLUSION

¶65 In *Feinberg*, the Illinois Supreme Court correctly held that a beneficiary restriction clause which disinherited grandchildren who married outside the Jewish faith did not violate public policy, which clearly supports both broad testamentary freedom and the institution of marriage. The court determined that the beneficiary restriction clause had no prospective effect, and therefore did not seek to exert dead-hand control over the grandchildren. The beneficiary restriction clause did not restrict the grandchildren's ability to marry, or their choice of spouse. Moreover, the supreme court found that the clause did not induce divorce because it did not mention or provide any incentive for divorce or remarriage. In addition to legal concerns, the *Feinberg* decision is also justifiable on moral and social grounds and is consistent with case law from other jurisdictions. Therefore, the *Feinberg* case should be considered instructive by attorneys practicing in the area of trusts and estates as to what types of restrictive conditions and clauses will be upheld. Finally, the *Feinberg* holding, though narrow, should be construed broadly in its application to future cases because public policy supporting testamentary freedom should trump the intrusion of the state into matters that are private and personal, such as who should have the right to decide how the fruits of a lifetime of hard work are distributed.