

Docket No. 106982.

**IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS**

In re ESTATE OF MAX FEINBERG, Deceased (Leila R. Taylor v. Michael B. Feinberg *et al.* (Michael B. Feinberg, Appellant; Michele Trull, Appellee)).

Opinion filed September 24, 2009.

JUSTICE GARMAN delivered the judgment of the court, with opinion.

Chief Justice Fitzgerald and Justices Freeman, Thomas, Kilbride, Karmeier, and Burke concurred in the judgment and opinion.

OPINION

This case involves a dispute among the surviving children and grandchildren of Max and Erla Feinberg regarding the validity of a trust provision. The circuit court found the trust provision unenforceable on the basis that it is contrary to the public policy of the state of Illinois. The appellate court affirmed. 383 Ill. App. 3d 992. Michael Feinberg, the Feinbergs' son and coexecutor of their estates, filed a petition for leave to appeal pursuant to Supreme Court Rule 315 (210 Ill. 2d R. 315), which we allowed. We also allowed Agudath Israel of America, the National Council of Young Israel, and the Union of Orthodox Jewish Congregations of America to file a brief

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amicus curiae pursuant to Supreme Court Rule 345 (210 Ill. 2d R. 345).

For the reasons that follow, we reverse.

BACKGROUND

Max Feinberg died in 1986. He was survived by his wife, Erla, their adult children, Michael and Leila, and five grandchildren.

Prior to his death, Max executed a will and created a trust. Max's will provided that upon his death, all of his assets were to "pour over" into the trust, which was to be further divided for tax reasons into two trusts, "Trust A" and "Trust B." If she survived him, Erla was to be the lifetime beneficiary of both trusts, first receiving income from Trust A, with a limited right to withdraw principal. If Trust A were exhausted, Erla would then receive income from Trust B, again with a limited right to withdraw principal.

Upon Erla's death, any assets remaining in Trust A after the payment of estate taxes were to be combined with the assets of Trust B. The assets of Trust B were then to be distributed to Max's descendants in accordance with a provision we shall call the "beneficiary restriction clause." This clause directed that 50% of the assets be held in trust for the benefit of the then-living descendants of Michael and Leila during their lifetimes. The division was to be on a *per stirpes* basis, with Michael's two children as lifetime beneficiaries of one quarter of the trust and Leila's three children as lifetime beneficiaries of the other one quarter of the trust. However, any such descendant who married outside the Jewish faith or whose non-Jewish spouse did not convert to Judaism within one year of marriage would be "deemed deceased for all purposes of this instrument as of the date of such marriage" and that descendant's share of the trust would revert to Michael or Leila.

In addition, the trust instrument gave Erla a limited testamentary power of appointment over the distribution of the assets of both trusts and a limited lifetime power of appointment over the assets of Trust B. Under the limiting provision, Erla was allowed to exercise her power of appointment only in favor of Max's descendants. Thus, she could not name as remaindermen individuals who were not Max's descendants or appoint to a charity. The parties dispute whether Erla's

power of appointment was limited to those descendants not deemed deceased under the beneficiary restriction clause. The trial court did not make a finding on this question and the appellate court did not discuss it.

Erla exercised her lifetime power of appointment over Trust B in 1997, directing that, upon her death, each of her two children and any of her grandchildren who were not deemed deceased under Max's beneficiary restriction clause receive \$250,000. In keeping with Max's original plan, if any grandchild was deemed deceased under the beneficiary restriction clause, Erla directed that his or her share be paid to Michael or Leila.

By exercising her power of appointment in this manner, Erla revoked the original distribution provision and replaced it with a plan that differs from Max's plan in two significant respects. First, Erla altered the distribution scheme from *per stirpes* to *per capita*, permitting each of the grandchildren to take an equal share, rather than favoring Michael's two children over Leila's three children. Second, Erla designated a fixed sum to be distributed to each eligible descendant at the time of her death, replacing Max's plan for a lifetime trust for such descendants. The record suggests that Erla's gifts will deplete the corpus of the trust, leaving no trust assets subject to distribution under Max's original plan. Thus, while Erla retained Max's beneficiary restriction clause, his distribution provision never became operative.

All five grandchildren married between 1990 and 2001. By the time of Erla's death in 2003, all five grandchildren had been married for more than one year. Only Leila's son, Jon, met the conditions of the beneficiary restriction clause and was entitled to receive \$250,000 of the trust assets as directed by Erla.

This litigation followed, pitting Michael's daughter, Michele, against Michael, coexecutor of the estates of both Max and Erla.

The trial court invalidated the beneficiary restriction clause on public policy grounds. A divided appellate court affirmed, holding 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." 383 Ill. App. 3d at 997. In reaching this conclusion, the

appellate court relied on decisions of this court dating back as far as 1898 and, as noted, on the Restatement (Third) of Trusts.

ISSUE PRESENTED

As a threshold matter, we must clarify the issue presented. We need not consider whether Max's original testamentary scheme is void as a matter of public policy because Erla altered his scheme in 1997. Indeed, she could have done so again at any time before her death in 2003, exercising her lifetime or testamentary powers of appointment in any number of ways. For example, she could have named her grandson, Jon, as the sole beneficiary of the entire trust, or excluded the grandchildren entirely, appointing the entire corpus of the trust to Michael and Leila.

Indeed, counsel for Michele acknowledged at oral argument that Max and Erla could have accomplished the goal of benefitting only those grandchildren who married within their religious tradition by individually naming those grandchildren as beneficiaries of the will or the trust, without implicating public policy. Counsel argued that the violation of public policy occurred when Max used a religious description to define a class or category of descendants he wished to benefit, rather than mention them by name.

Of course, at the time Max prepared his estate plan, his grandchildren were too young to marry and it was possible that more grandchildren might have been born before the trust provisions took effect. As a result, Max could not have accomplished his purpose in the manner suggested by Michele. Even by the time Erla exercised her power of appointment, not all of the grandchildren had married.

Thus, the question we must answer is whether the holder of a power of appointment over the assets of a trust may, without violating the public policy of the state of Illinois, direct that the assets be distributed at the time of her death to then-living descendants of the settlor, deeming deceased any descendant who has married outside the settlor's religious tradition. In effect, we are not called upon to consider the validity of Max's estate plan as a whole, which would have continued to hold the assets in trust for the benefit of the grandchildren only so long as they complied with the restriction.

Rather, we must assess Max's beneficiary restriction clause in conjunction with Erla's directions for distribution.

When the issue is clarified in this way, it becomes apparent that many of the arguments raised by Michele are not relevant. For example, under Max's plan, an unmarried grandson would have begun to receive distributions from Trust B upon Erla's death, only to forfeit further such payments if he were to marry a non-Jewish woman who did not convert to Judaism within one year. We need not decide if such a provision would violate public policy because no such provision is implicated in the present case.

Michele also suggests that a granddaughter who was married to a non-Jewish man at the time of Erla's death might subsequently divorce and remarry, this time to a Jewish spouse, and make a claim upon the trust. This circumstance would raise the issue of whether such a descendant, previously deemed deceased, would be "resurrected." Such an occurrence would require construction of the language of the trust document. Under Erla's plan, however, this circumstance cannot arise because a fixed amount became distributable upon her death only to those grandchildren who then met the requirements previously set by Max.

Similarly, Michele's argument that the beneficiary restriction clause is invalid because a court might be called upon to determine whether the spouse of a particular descendant is or is not Jewish is not well taken. It is undisputed in the present case that only one of the five grandchildren meets the requirements established by Max.

STANDARD OF REVIEW

This court has not had occasion to identify the applicable standard of review on the question of whether a provision in a trust document or will is void as a matter of public policy. It is clear, however, that such findings are subject to *de novo* review, because public policy is necessarily a question of law. *Holstein v. Grossman*, 246 Ill. App. 3d 719, 726 (1993), citing *Zeigler v. Illinois Trust & Savings Bank*, 245 Ill. 180 (1910). This conclusion is consistent with the well-established principle that whether a provision in a contract, insurance policy, or other agreement is invalid because it violates public policy is a question of law, which we review *de novo*. *O'Hara v. Ahlgren*,

Blumenfeld & Kempster, 127 Ill. 2d 333 (1989) (affirming grant of summary judgment on basis that fee-sharing agreement offended public policy).

ANALYSIS

Michael argues before this court that the beneficiary restriction clause in his father's trust was intended "to encourage and support Judaism and preservation of Jewish culture in his own family," and that it was not binding upon Erla, who exercised her power of appointment consistently with the provision because it expressed her intent as well as Max's. Michael argues, further, that even if Max's beneficiary restriction was not revocable by Erla, the provision does not violate the public policy of this state when it is given effect via his mother's distribution scheme. He asserts that the distribution scheme is a valid partial restraint on marriage of a type that has long been enforced in Illinois and elsewhere. According to Michael, the beneficiary restriction clause has no prospective effect that might subsequently influence a descendant's decisions regarding marriage or divorce because, upon Erla's death, no contingencies remained. He distinguishes the cases relied upon by the appellate court and urges this court to reject the cited Restatement provision as not accurately stating Illinois law.

Michele defends the Restatement provision and argues that this case comes within a line of cases dating back to 1898 in which this court invalidated testamentary provisions that operated to discourage the subsequent lawful marriage by a legatee or to encourage a legatee to obtain a divorce. Specifically, she argues that under *Ransdell v. Boston*, 172 Ill. 439 (1898), testamentary restrictions on marriage are valid only if they operate to benefit the intended beneficiary. Further, she argues that enforcement of the clause would violate both state and federal constitutions and that it violates public policy by offering a financial inducement to embrace a particular religion.

We note that this case involves more than a grandfather's desire that his descendants continue to follow his religious tradition after he is gone. This case reveals a broader tension between the competing values of freedom of testation on one hand and resistance to "dead hand" control on the other. This tension is clearly demonstrated by the

three opinions of the appellate court. The authoring justice rejected the argument that the distribution scheme is enforceable because it operated at the time of Erla's death and could not affect future behavior, stating that its "clear intent was to influence the marriage decisions of Max's grandchildren based on a religions criterion." 383 Ill. App. 3d at 997. The concurring justice opined that while such restrictions might once have been considered reasonable, they are no longer reasonable. 383 Ill. App. 3d at 1000 (Quinn, P.J., specially concurring). The dissenting justice noted that under the facts of this case, grandchildren who had complied with the restrictions would "immediately receive their legacy" upon Erla's death (383 Ill. App. 3d at 1000 (Greiman, J., dissenting)), and that the weight of authority is that a testator has a right to make the distribution of his bounty conditional on the beneficiary's adherence to a particular religious faith (383 Ill. App. 3d at 1002).

We, therefore, begin our analysis with the public policy surrounding testamentary freedom and then consider public policy pertaining to testamentary or trust provisions concerning marriage.

When we determine that our answer to a question of law must be based on public policy, it is not our role to make such policy. Rather, we must discern the public policy of the state of Illinois as expressed in the constitution, statutes, and long-standing case law. *O'Hara*, 127 Ill. 2d at 341. We will find a contract provision against public policy only " ' "if it is injurious to the interests of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or is at war with the interests of society or is in conflict with the morals of the time." ' ' " *Vine Street Clinic v. HealthLink, Inc.*, 222 Ill. 2d 276, 296 (2006), quoting *E&B Marketing Enterprises, Inc. v. Ryan*, 209 Ill. App. 3d 626, 630 (1991), quoting *Marvin N. Benn & Associates, Ltd. v. Nelson Steel & Wire, Inc.*, 107 Ill. App. 3d 442, 446 (1982). Thus,

"In deciding whether an agreement violates public policy, courts determine whether the agreement is so capable of producing harm that its enforcement would be contrary to the public interest. [Citation.] The courts apply a strict test in determining when an agreement violates public policy. [Citation.] The power to invalidate part or all of an agreement

on the basis of public policy is used sparingly because private parties should not be needlessly hampered in their freedom to contract between themselves. [Citation.] Whether an agreement is contrary to public policy depends on the particular facts and circumstances of the case.” *Kleinwort Benson North America, Inc. v. Quantum Financial Services, Inc.*, 181 Ill. 2d 214, 226 (1998).

Because, as will be discussed below, the public policy of this state values freedom of testation as well as freedom of contract, these same principles guide our analysis in the present case.

Public Policy Regarding Freedom of Testation

Neither the Constitution of the United States nor the Constitution of the State of Illinois speak to the question of testamentary freedom. However, our statutes clearly reveal a public policy in support of testamentary freedom.

The Probate Act places only two limits on the ability of a testator to choose the objects of his bounty. First, the Act permits a spouse to renounce a testator’s will, “whether or not the will contains any provision for the benefit of the surviving spouse.” 755 ILCS 5/2–8 (West 2008). Thus, absent a valid prenuptial or postnuptial agreement (see, e.g., *Golden v. Golden*, 393 Ill. 536 (1946) (wife can effectively bind herself to accept provisions of husband’s will, thereby estopping her from renouncing the will after his death)), the wishes of a surviving spouse can trump a testator’s intentions. Second, a child born to a testator after the making of a will is “entitled to receive the portion of the estate to which he would be entitled if the testator died intestate,” unless provision is made in the will for the child or the will reveals the testator’s intent to disinherit the child. 755 ILCS 5/4–10 (West 2008).

The public policy of the state of Illinois as expressed in the Probate Act is, thus, one of broad testamentary freedom, constrained only by the rights granted to a surviving spouse and the need to expressly disinherit a child born after execution of the will if that is the testator’s desire.

Under the Probate Act, Max and Erla had no obligation to make any provision at all for their grandchildren. Indeed, if Max had died

intestate, Erla, Michael, and Leila would have shared his estate (755 ILCS 5/2-1(a) (West 2008)), and if Erla had died intestate, only Michael and Leila would have taken (755 ILCS 5/2-1(b) (West 2008)). Surely, the grandchildren have no greater claim on their grandparents' testate estates than they would have had on intestate estates.

Similarly, under the Trusts and Trustees Act, “[a] person establishing a trust may specify in the instrument the rights, powers, duties, limitations and immunities applicable to the trustee, beneficiary and others and those provisions where not otherwise contrary to law shall control, notwithstanding this Act.” 760 ILCS 5/3 (West 2008). Thus, the legislature intended that the settlor of a trust have the freedom to direct his bounty as he sees fit, even to the point of giving effect to a provision regarding the rights of beneficiaries that might depart from the standard provisions of the Act, unless “otherwise contrary to law.”

Another legislative enactment that reveals a strong public policy of freedom of testation was the adoption, in 1969, of the Statute Concerning Perpetuities (765 ILCS 305/1 *et seq.* (West 2008)), for the purpose of modifying the common law rule that a will or trust provision that violated the rule against perpetuities was void *ab initio*. 765 ILCS 305/2 (West 2008). The statute permits the settlor of a trust to create a “qualified perpetual trust” by including in the instrument a provision that the rule against perpetuities does not apply and by granting certain specified powers to the trustee. 765 ILCS 305/3 (a-5), 4(a)(8) (West 2008). The statute also specifies other circumstances under which the rule shall not apply. 765 ILCS 305/4(a) (1) through (a)(7) (West 2008). In addition, the statute adopts a set of rules to be applied when determining whether an interest violates the rule against perpetuities. 765 ILCS 305/4 (c)(1) through (c)(3) (West 2008). With regard to trusts, the statute provides that a trust containing a provision that would violate the rule against perpetuities, as modified by the statute, shall terminate 21 years after the death of the last surviving beneficiary who was living at the beginning of the perpetuities period (765 ILCS 305/5(a)(A) (West 2008)) or else at the end of the 21-year perpetuities period if no beneficiary was living when the period began to run (765 ILCS 305/5(a)(B) (West 2008)). Thus, the trust is not