

The “Jewish clause”

Americans are free to dispose of their property at death in any manner that they see fit, as a general rule (with the exception that a surviving spouse may not be disinherited). There is no requirement, for example, that children or grandchildren be treated fairly, or even rationally. On the other hand, conditions on an inheritance that have the tendency to induce spouses to get divorced or live apart are void because they are against public policy, and so will not be enforced. The Illinois Supreme Court was recently called upon to balance these two competing interests.

Max Feinberg’s will established two trusts for his wife, Erla, for her life. By so doing, he secured for the family the benefit of two exemptions from the federal estate tax. At Erla’s death the trusts were to be combined and distributed in accordance with a “beneficiary restriction clause.” Max and Erla had two children Michael and Leila, and five grandchildren. One-quarter of the trust would pass to Michael’s two children, another quarter to Leila’s three children. However, the trust further provided that any grandchild who married outside the Jewish faith or whose non-Jewish spouse did not convert to Judaism within a year of the marriage would be “deemed deceased for all purposes of this instrument as of the date of such marriage.” The share of such a child would revert to Michael and Leila.

Erla was given a limited testamentary power of appointment over the trusts. She could alter the distribution of the trust remainder among her and Max’s descendants, but she could not direct the money outside the family or to a charity. Erla exercised the power of appointment, converting the grandchild bequest from a trust interest to \$250,000 outright, and making it per capita instead of per stirpes, so that each grandchild would be treated equally. (Under Max’s per stirpes approach, each of Michael’s two children could receive half of a quarter of the trust, a one-eighth interest, while Leila’s three children would divide their quarter three ways, a one-twelfth interest.)

Erla’s exercise of her power of appointment expressly preserved the beneficiary restrictions on marriage from Max’s will. When she died, only one of the

five grandchildren satisfied the requirement of having married within the Jewish faith. The disinherited grandchildren filed a lawsuit, challenging the restriction.

The trial court and the appellate court invalidated the restriction because it is against public policy. The Illinois Supreme Court reversed. The Court distinguished between a *condition precedent* and a *condition subsequent*. Max's original estate plan had a condition subsequent. For example, an unmarried grandchild could have inherited a trust interest and subsequently lost that interest if he married outside the faith. That clause probably would be unenforceable, but that is not the case presented. The condition subsequent was eliminated by Erla's exercise of the power of appointment. She instead created a condition precedent, a one-time test. At her death which grandchildren satisfied the requirement and which did not? Erla did not impose a condition that might control the future religious or marital decisions of her children, which would not be allowed. She did make a provision that rewarded those who most closely shared the values that she and Max embraced. Such provisions will be enforced in Illinois.

The disappointed grandchildren have threatened to take the case to the U.S. Supreme Court, but the U.S. Constitutional grounds for overturning the Illinois state court decision are weak.

"Values-based estate planning" has emerged in recent years as an important new element in inheritance management, and Max and Erla would seem to be pioneers in this new direction. However, one wonders if they would have included their "Jewish clause" had they realized how much litigation and family strife would result from it. That is the other balancing test required in estate planning.