REACHING FROM THE GRAVE? THE VALIDITY OF TESTAMENTARY CONDITIONS PRECEDENT RESTRICTING MARRIAGE IN ILLINOIS: *IN RE ESTATE OF FEINBERG*, 919 N.E.2D 888 (ILL. 2009)

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I. INTRODUCTION

"Dead hand control," a term dating back to 1880,[1] refers to "legal doctrines that allow a decedent's control of wealth to influence the conduct of a living beneficiary . . . ."[2] Because this ancient notion may be difficult to conceptualize, a modern illustration from *Friends* is helpful. The situation: Phoebe's grandmother, Frances, kept the true identity of Phoebe's father a secret, as per the wishes of Phoebe's deceased mother.[3] When Phoebe confronted Frances regarding the deception, Frances said, "It was your mother's idea . . . I didn't want to go along with it. But then she died, and it was harder to argue with her!"[4] Frances' excuse made light of the circumstances, but has serious undertones: the dead may control the actions of the living long after they are gone. In Phoebe's situation, her mother expressed her wishes while living, and Frances felt compelled to respect those wishes, although no consequences other than a guilty conscience would result.[5]

Frances' excuse highlights the problem with allowing the dead to control the living: the dead cannot be reasoned with and cannot change their minds.[6] The problem is exacerbated when the decedent not only expresses his wishes, but expresses them in a legal document in which a condition

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1. This term was coined in SIR ANTHONY HOBHOUSE, THE DEAD HAND (1880). Ronald Chester, *Essay: Is the Right to Devise Property Constitutionally Protected? – The Strange Case of* Hodel v. Irving, SW. U. L. REV. 1195, 1199 (1995).
2. BLACK'S LAW DICTIONARY 456 (9th ed. 2009).
3. *Friends: The One with Phoebe's Dad* (NBC television broadcast Dec. 14, 1995).
4. *Id.*
5. *Id.*
6. *See* Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 99 U. ILL. L. REV. 1273, 1278 (1999).

must be met to receive property. Because such documents are enforced under the law, more than a guilty conscience is at stake when the wishes of the dead are defied. Those who do not abide by the wishes of the dead may cheat themselves out of any gifts they may have otherwise received.[7] Thus, the living are exceptionally compelled to conform to the wishes of the dead, who, as Frances puts it, are hard to argue with.

Illinois courts have struggled with the extent to which the dead may control the living by use of such testamentary restrictions.[8] *In re Estate of Feinberg* is an intriguing case because the plaintiff sought to invalidate a testamentary provision restricting her right to marry, implicating the competing concepts of testamentary freedom and dead hand control over a fundamental right of the living.[9] Prior to *Feinberg*, Illinois courts imposed only minimal restrictions on testators' use of conditions in giving away their property under the principle that a testator's intent should be given effect so long as it is not contrary to public policy.[10] The Illinois Supreme Court remained consistent with this principle in *Feinberg*, refusing to invalidate the restriction.[11] The Court correctly decided that the testator's restraint on marriage was not against public policy in Illinois. Because the restriction placed on the *Feinberg* grandchildren was a condition precedent, it did not implicate dead hand control, but rather, competing rights of living parties.

Section II of this note will provide an overview of the validity of different types of restrictive conditions on donative property transfers. Then, Section III will discuss the facts of *Feinberg*, and the divergent opinions of the Illinois Appellate Court for the First District and the Illinois Supreme Court. Finally, Section IV will discuss why the Illinois Supreme Court was correct in deciding the condition precedent was valid, despite its lack of explanation for such a conclusion.

II. LEGAL BACKGROUND

Donors may restrict the transfer of their property in a number of ways, but important to the *Feinberg* decision is donors' ability to restrict beneficiaries' personal conduct.[12] Generally, restrictions on personal

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7. *See generally* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS §§ 5.1–8.3 (1983) [hereinafter RESTATEMENT 2D].
8. *Compare In re* Estate of Feinberg, 891 N.E.2d 549, 550–51 (Ill. App. Ct. 2008), *with In re* Estate of Feinberg, 919 N.E.2d 888, 894 (Ill. 2009).
9. *Feinberg*, 919 N.E.2d at 894.
10. *See id.* at 894–96; Donnan v. Donnan, 86 N.E. 279 (Ill. 1908); *In re* Estate of Mank, 699 N.E.2d 1103 (Ill. App. Ct. 1998).
11. *Feinberg*, 919 N.E.2d at 903.
12. *See generally* RESTATEMENT 2D, *supra* note 7, at §§ 5.1–8.3.

conduct are valid unless they violate public policy or a rule of law.[13] To determine whether a restriction violates public policy, courts look to the type of personal conduct the donor is attempting to restrict. Donors commonly attempt to restrict three types of personal conduct: (1) personal habits and education or occupation, (2) religion, and (3) marital relationships.[14] Many restrictions relating to personal choices are valid, but courts give special scrutiny to restrictions on religion and marriage.[15]

A. Restrictions on Personal Habits and Education or Occupation

As a general principle, courts have typically held that provisions restricting personal habits, such as smoking and consuming alcohol, are valid.[16] Provisions requiring the donee to acquire or continue a particular education or occupation are also generally valid.[17] "As such restraints are designed to promote the general welfare through the betterment of the individual or the perpetuation of an economic organization, no societal objection to their use exists."[18] If the effect of the provision is punitive or so rewarding that it is coercive, however, the provision may be held invalid.[19] Under this standard, the provision may encourage a career path or personal habit, but may not do so unreasonably, as the risk that the beneficiary will make an unsuitable decision affecting both his and others' lives outweighs society's interest in freedom of disposition.[20]

B. Restrictions on Religion

The Restatement (Second) of Property and the Restatement (Third) of Trusts differ in their approaches to the validity of restrictions on religion. According to the Restatement (Second) of Property, provisions restricting

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13. *Id.* at § 5.1; RESTATEMENT (THIRD) OF TRUSTS § 29 (2003) [hereinafter RESTATEMENT 3D].
14. *See generally* RESTATEMENT 2D, *supra* note 7, at §§ 5.1, 6.1, 7.1, & 8.1; RESTATEMENT 3D, *supra* note 13, at § 29 cmts. j, k, & l.
15. *See generally* RESTATEMENT 2D, *supra* note 7, at §§ 5.1, 6.1, 7.1, & 8.1; RESTATEMENT 3D, *supra* note 13, at § 29 cmts. j, k, & l.
16. *See* Holmes v. Conn. Trust & Safe Deposit Co., 103 A. 640 (Conn. 1918).
17. *See* Webster v. Morris, 28 N.W. 353 (Wis. 1886); Shepard v. Shepard, 17 A. 173 (Conn. 1889); *In re* Estate of Weller, 164 A. 140 (Pa. Super. Ct. 1933); *In re* Scott's Will, 204 N.Y.S. 478 (Sur. Ct. 1924).
18. RESTATEMENT 2D, *supra* note 7, at § 8.3 cmt. a.
19. RESTATEMENT 3D, *supra* note 13, at § 29 cmt. l.
20. *Id.* For example, a provision providing for the educational expenses of a beneficiary if he chooses a certain career path would be valid. *Id.* However, a provision terminating a beneficiary's interest if he leaves a certain career path would be invalid because it is unreasonably coercive, potentially forcing the beneficiary to choose an unsuitable choice significantly affecting the lives of the beneficiary and others. *Id.*

religion are generally valid.[21] Under this rule, testators are free to "promote [their] theological views" via testamentary dispositions of property.[22] The justification for this rule is that society is not concerned with the particular religious beliefs of individuals, and thus, individual donors may encourage others to adopt the donors' beliefs by putting a religious restraint on a gift of property.[23] Consequently, donors may promote their views by forbidding donees to marry outside of a particular faith.[24]

According to the Restatement (Third) of Trusts, provisions restricting religion are generally invalid.[25] Under this rule, while individuals may normally encourage their loved ones to adopt a particular theological view during their lifetimes, they may not use "trusts that create financial pressure regarding the future religious choices of beneficiaries . . . ."[26]

While not denying that society is insensitive to individuals' particular religious choices, the Restatement (Third) of Trusts recognizes that society is concerned that individuals have the freedom to make those choices.[27] The Restatement (Third) of Trusts also acknowledges, however, that an individual may encourage his loved ones to adopt a certain religion during his lifetime, suggesting that this societal interest in freedom of religion is outweighed by donors' freedom to dispose of property as they wish during their lives.[28]

C. Restrictions Affecting Marital Relationships

Courts have typically given greater scrutiny to restrictions granting property to a donee (1) until the donee marries or (2) in the event of divorce or separation from a spouse.[29] This rule results from society's interest in perpetuation of the race, dating back to the Roman policy of encouraging population growth and thereby facilitating strong armies.[30] As one judge noted, "the reason for the doctrine, which was assigned by the writers on civil law, was intelligible, because peculiar to the policy of a warlike people . . . every impediment to marriage enfeebled the military power of the

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21. RESTATEMENT 2D, *supra* note 7, at § 8.1.
22. *Id*. at § 8.1 cmt. a.
23. *Id*.
24. *Id*. at § 8.1 cmt. c.
25. RESTATEMENT 3D, *supra* note 13, at § 29 cmt. k.
26. *Id.*
27. *Id*. at § 29 rep. note to cmt. k.
28. *Id*. at § 29 cmt. k.
29. *See* RESTATEMENT 2D, *supra* note 7, at §§ 6.1, 7.1; RESTATEMENT 3D, *supra* note 13, at § 29 cmt. j.
30. *See In re* Langfeld's Estate, 1887 WL 5023, at *2 (Pa. Orph. 1887); Commonwealth. v. Stauffer, 10 Pa. 350, 355 (1849).

state."[31] Still, courts have recognized several exceptions to the rule that restrictions affecting marital relationships are invalid, including exceptions for (1) a motive to provide support to the donee, (2) partial restrictions on marriage, and (3) conditions precedent restraining marriage.

1. Support Exception

Notwithstanding the rule that restraints encouraging marriage or discouraging divorce are invalid, if the primary motive for such a restriction is to provide support in the event of a divorce or until marriage, the restriction is valid.[32] The exception is justified by the courts' view that while attempts to coerce abstention from marriage or to bring about divorce are "antisocial," when donors' motives are to provide support until marriage or in case of divorce, these attempts at coercion are not present.[33]

The Illinois Supreme Court recognized this exception in *Ransdell v. Boston*, upholding a condition that property be held in trust until the donee became "sole and unmarried," because the grantor's intent was to provide for the donee when his already pending divorce became final.[34] However, in *Winterland v. Winterland* and *In re Estate of Gerbing*, the court struck down provisions conditioned on the beneficiaries' divorces because the donors' motives were to encourage divorce; no intent to provide for the beneficiaries after divorce was present.[35]

2. Partial Restraint Exception

Although complete restraints on marriage are generally invalid unless the donor's motive is to provide support, donors may guide their loved ones in choosing whom to marry by way of partial restraints, such as limiting the age at which the donee may marry.[36] Restrictions which forbid a donee from taking an interest in property in the event of certain marriages are valid so long as "the restraint does not unreasonably limit the [donee's]

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31. *Langfeld*, 1887 WL 5023, at *2.
32. *See* Lewis v. Searles, 452 S.W.2d 153 (Mo. 1970); Trenton Trust and Safe Deposit Co. v. Armstrong, 62 A. 456 (N.J. Ch. 1905); Patee v. Riggs Nat'l Bank, 124 F.Supp. 552 (D.D.C. 1954); Hood v. St. Louis Union Trust Co., 66 S.W.2d 837 (Mo. 1933); Hunt v. Carroll, 157 S.W.2d 429 (Tex. Civ. App. 1941).
33. RESTATEMENT 2D, *supra* note 7, at §§ 6.1 cmt. a, 7.1 cmt. a; RESTATEMENT 3D, *supra* note 13, at § 29 cmt. j.
34. Ransdell v. Boston, 50 N.E. 111, 112-14 (Ill. 1898).
35. *See* Winterland v. Winterland, 59 N.E.2d 661 (Ill. 1945); *In re* Estate of Gerbing, 337 N.E.2d 29 (Ill. 1975).
36. RESTATEMENT 2D, *supra* note 7, at § 6.2 cmt. a.

opportunity to marry."[37] Judge Story, commenting on the justification for this rule, said:

> But the same principles of public policy which annul such conditions when they tend to a general restraint of marriage will confirm and support them when they merely preserve such reasonable and prudent regulations and sureties as tend to protect the individual from those melancholy consequences to which and over-hasty, rash, or precipitate match would probably lead.[38]

Thus, this rule furthers the policy of perpetuating the human race by ensuring that (1) individuals have enough choices in partners that they may still marry and (2) they will make decisions leading to long-lasting marriages.[39]

In keeping with this policy, donors may restrict donees from marrying a particular person, as this limited restriction leaves an adequate number of potential spouses from which the donee may choose.[40] Restrictions requiring the consent of another before the donee may marry are also generally valid, as long as the donor expects that consent will not be unreasonably withheld, and as long as consent is not required beyond the maturity of the donee.[41]

In addition, donors generally may restrict marriage until the donee attains a certain age, because "provisions designed to prevent hasty or imprudent marriages are to be encouraged."[42] However, the age limit must be reasonable; the limitation may not unduly postpone marriage.[43] In *Shackelford v. Hall*, the Illinois Supreme Court recognized this rule, upholding a provision that a beneficiary would be divested of her future interest if she married before age twenty-one.[44]

The Restatement (Second) of Property and Restatement (Third) of Trusts differ in their approaches to the validity of restrictions on marriage within or outside a particular group, such as a religious group. Under the

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37. *Id*. at § 6.2.
38. 1 STORY, COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA § 281 (13th ed.1886).
39. *See id.*; RESTATEMENT 2D, *supra* note 7, at § 6.2 cmt. a.
40. *See* Turner v. Evans, 106 A. 617 (Md. 1919); *In re* Seaman's Will, 112 N.E. 576 (N.Y. 1916); RESTATEMENT 2D, *supra* note 7, at § 6.2 cmt. b.
41. *See* Pacholder v. Rosenheim, 99 A. 672 (Md. 1916); *In re* Roeser's Will, 155 N.Y.S.2d 108 (Sur. Ct. 1956); Hogan v. Curtin, 88 N.Y. 162 (1882).
42. RESTATEMENT 2D, *supra* note 7, at § 6.2 cmt. d; RESTATEMENT 3D, *supra* note 13, at § 29 cmt. j.
43. RESTATEMENT 2D, *supra* note 7, at § 6.2 cmt. d; RESTATEMENT 3D, *supra* note 13, at § 29 cmt. j.
44. Shackelford v. Hall, 19 Ill. 212 (1857). However, the court held that the beneficiary was not divested of her future interest even though she violated the condition subsequent because she lacked notice of the condition. *Id*. at 218.

Restatement (Second) of Property, this type of provision would be upheld, although, as with other partial restrictions on marriage, the donee must have an adequate number of eligible future spouses from which to choose.[45] In contrast, the Restatement (Third) of Trusts holds that such a provision is invalid, as demonstrated in an illustration:

> A transfers property to T Trust Co. in trust for her nephew, N. N is to receive discretionary payments until age 18, after which he is to receive all the current net income periodically and discretionary principal payments until age 30, when he is to receive outright distribution of all of the trust property.
>
> [A] marriage condition terminates all of N's rights if, before termination of the trust, he "should marry a person who is not of R Religion," with same gift over to C College. The condition is an invalid restraint on marriage; the trust and N's rights will be given effect as if the marriage condition and the gift over to C College had been omitted from the terms of the trust.[46]

Finally, donors may prevent their donees from marrying a second time, but only under certain circumstances. When the donor is the spouse of the donee, the restraint will be upheld.[47] If the donor is not the spouse of the donee, the restraint must be reasonable.[48] The exception carved out for restrictions on remarriage is difficult to reconcile with the overarching policy considerations regarding restraints on marriage, because society's interest in the perpetuation of the race would seem to be furthered by disallowing restraints on second marriages.[49] Consequently, "[t]he validation of such restraints has frequently been based upon an element of possessiveness, the desire of the testator to compel fidelity to his memory even after death."[50] Another justification is that the testator's property is

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45. RESTATEMENT 2D, *supra* note 7, at § 6.2 cmt. c. Constitutional questions may arise with judicial enforcement of this type of restriction, which could be deemed "state action resulting in a denial of the equal protection of the law." *Id.* The fact that a provision meets the requirements of property law does not mean the provision is valid; further inquiry into the requirements of the Constitution may be necessary, especially if the restraint is defined to preclude marriage from a particular group of people. *Id.*

46. RESTATEMENT 3D, *supra* note 13, at § 29 cmt. j, illus. 3.

47. RESTATEMENT 2D, *supra* note 7, at § 6.3; RESTATEMENT 3D, *supra* note 13, at § 29 cmt. j. *See also* Raulerson v. Saffold, 61 So.2d 926 (Fla. 1952); Mooney v. Mooney, 115 N.Y.S.2d 167 (N.Y. Sup. Ct. 1952); *In re* Lambert's Estate, 46 N.Y.S.2d 905 (Sur. Ct. 1944).

48. *See* RESTATEMENT 2D, *supra* note 7, at § 6.3 cmt. f; RESTATEMENT 3D, *supra* note 13, at § 29 rep. note to cmt. j.

49. E.S.O. & H.A.W., Annotation, *Conditions, Conditional Limitations, or Contracts in Restraint of Marriage*, 122 A.L.R. Fed. 7, 10 (1939).

50. RESTATEMENT 2D, *supra* note 7, at § 6.3 cmt. c.

less likely to be given to those who are not the children of the testator and the restrained spouse if the restrained spouse is not permitted to marry a second time.[51]

3. Condition Precedent Exception

The form of a restraint as a condition precedent or a condition subsequent also affects the validity of restrictions on marriage.[52] A condition precedent is "[a]n act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises."[53] A condition precedent is one that restricts a donee from taking property at all if the condition is not met; the property does not vest in the donee unless the condition is met.[54] For example, if a testator provided that his nephew should receive $50,000 if he completed college by the testator's death, the restriction would be a condition precedent because the nephew would have to finish college before he received any money.

A condition subsequent is "[a] condition that, if it occurs, will bring something else to an end; an event the existence of which, by agreement of the parties, discharges a duty of performance that has arisen."[55] A condition subsequent is one that restricts a donee's actions after property has already been vested in the donee; if the donee violates the condition subsequent, the donee is divested of the property he was previously given.[56] For example, if a testator provided that his nephew should receive $50,000 at the testator's death, but would forfeit the gift if he did not receive an undergraduate degree by age 30, the restriction would be a condition subsequent, since it would take away a gift already given.

The distinction between conditions precedent and conditions subsequent has a significant bearing on the validity of restrictions on marriage. If the form of a restriction on marriage is a condition precedent, where the donee must be unmarried at the time the property is conveyed (e.g., at the testator's death), courts have held the condition is not actually in restraint of marriage.[57] Rather, the restraint is characterized as a mere "description of circumstances under which the transferee may take," and therefore, is valid, even if the restriction would otherwise have been a complete restraint on marriage without a dominant motive to provide

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51. *Id*.
52. *See id.*
53. BLACK'S LAW DICTIONARY 334 (9th ed. 2009).
54. *See* Ransdell v. Boston, 50 N.E. 111, 114 (Ill. 1898).
55. BLACK'S LAW DICTIONARY 334 (9th ed. 2009).
56. *See* Shackelford v. Hall, 19 Ill. 212, 213 (1857).
57. RESTATEMENT 2D, *supra* note 7, at § 6.1 cmt. b.

support.[58] However, no exception is carved out if the restriction is a condition subsequent; the general rule that restrictions in restraint of marriage are void unless the donor has a motive to support the donee, or the restriction is a partial restraint on marriage, applies to conditions subsequent.[59]

The Illinois Supreme Court recognized this rule in *In re Estate of Gehrt*, which involved a provision in a will restricting remarriage of a beneficiary who was not the testator's spouse.[60] The court ruled that the restriction was a condition precedent, and therefore, the court did not need to consider whether the condition, as one imposed by a person other than the beneficiary's spouse, was reasonable.[61] As a condition precedent, the restriction did not prevent the beneficiary from marrying during her lifetime; rather, it concerned the beneficiary's status at the time of the testator's death.[62] Because a will speaks at the death of the testator, the condition precedent was valid.[63] The court also acknowledged this rule in *Ransdell*, holding:

> [A] condition precedent annexed to a devise of land, even if in complete restraint [of marriage], will, if broken, be operative and prevent the devise from taking effect. … [However,] [w]hen the condition is subsequent and void it is entirely inoperative, and the donee retains the property unaffected by its breach.[64]

The distinction between conditions precedent and subsequent played a major role in the *Feinberg* case, resulting in divergent opinions by the

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58. *Id*.
59. *Id*.
60. *In re* Estate of Gehrt, 480 N.E.2d 151, 151 (Ill. 1985).
61. *Id.* at 152.
62. *Id.*
63. *Id.* at 153. Interestingly, the provisions at issue in *Winterland* and *Gerbing* (*supra* note 35), which involved restrictions encouraging divorce, were conditions precedent. Winterland v. Winterland, 59 N.E.2d 661, 663 (Ill. 1945); *In re* Estate of Gerbing, 337 N.E.2d 29, 35 (Ill. 1975). However, the court struck down the provisions because they encouraged divorce, despite their status as conditions precedent. *Winterland*, 59 N.E.2d at 663; *Gerbing*, 337 N.E.2d at 35. Following the reasoning of *Gehrt*, the type of restriction (whether encouraging divorce or restricting marriage) should not matter if the condition is precedent. One explanation may be that the conditions in *Winterland* and *Gerbing* were attached to trust, and not will, provisions. The reasoning in *Gehrt* may make less sense as applied to trusts, since trusts do not speak at the time of the donor's death. Favata v. Favata, 394 N.E.2d 443, 446 (Ill. App. Ct. 1979). Thus, the question of whether a condition is precedent or subsequent does not vary in step with the death of the testator, complicating the analysis. However, this rationale was not cited by the courts in either *Winterland* or *Gerbing*. *See Winterland*, 59 N.E.2d 661; *Gerbing*, 337 N.E.2d 29.
64. Ransdell v. Boston, 50 N.E. 111, 114 (Ill. 1898) (quoting 2 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE § 933(b) (1892)).

Illinois Appellate Court for the First District and the Illinois Supreme Court.[65]

III. EXPOSITION OF *FEINBERG*

Feinberg gave Illinois courts the opportunity to review and apply the general rule that restrictions on marriage are invalid, in the context of a testator's desire to prohibit his offspring from marrying outside the Jewish faith.[66] The Illinois Supreme Court held the testator's restriction valid because it was a condition precedent and had no prospective effect on the beneficiaries' conduct after the distribution of property.[67] Thus, the restriction posed no danger of dead hand control.[68]

A. Statement of Facts

Max Feinberg died in 1986.[69] He was survived by his wife, Erla, his children, Michael and Leila, and five grandchildren.[70] Max created two trusts, called "Trust A" and "Trust B."[71] If Erla survived Max (which she did), she would be the lifetime beneficiary of both trusts, first receiving income from Trust A, then, if Trust A was exhausted, from Trust B.[72] When Erla died, any remaining assets in Trust A were to be combined with Trust B.[73]

At Erla's death, Trust B was to be distributed to Max's descendants according to what the Illinois Supreme Court refers to as the "beneficiary restriction clause."[74] Half of the assets in trust were to be held for Max's grandchildren on a *per stirpes* basis (one quarter being held for Michael's two children and the other quarter being held for Leila's three children).[75] However, the grandchildren were to be "deemed deceased for all purposes of [the] instrument" if they married outside the Jewish faith or their non-Jewish spouses did not convert to Judaism within one year of marriage.[76]

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65. *Compare In re* Estate of Feinberg, 891 N.E.2d 549, 550–51 (Ill. App. Ct. 2008), *with In re* Estate of Feinberg, 919 N.E.2d 888, 894 (Ill. 2009).
66. *Feinberg*, 919 N.E.2d at 891.
67. *Id.* at 905.
68. *Id.*
69. *Id.* at 891.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*

The trust instrument also 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.[77] Pursuant to her lifetime appointment power, Erla altered Max's original plan and directed that upon her death, $250,000 was to be given to each of her children and grandchildren who had complied with Max's beneficiary restriction clause.[78] This kept Max's beneficiary restriction clause intact, but gave each grandchild a fixed sum on Erla's death, rather than leaving the assets in a lifetime trust.[79] Under Erla's altered plan, if any grandchild did not comply with the beneficiary restriction clause, that grandchild's share was to be given to the grandchild's parent, i.e., Michael or Leila.[80]

All five grandchildren were married for at least one year before Erla's death in 2003.[81] The only grandchild who met the conditions of the beneficiary restriction clause, however, was Leila's son Jon.[82]

B. Procedural History

Michael's daughter, Michele, brought suit against her father, who was the executor of both Max's and Erla's estates.[83] The trial court held that the beneficiary restriction clause was invalid.[84] A split appellate court affirmed, holding that the clause was against public policy because it limited individuals' rights to choose whom they wanted to marry.[85]

The majority of the appellate court found that Illinois precedent cases dating back to 1898 stated an "underlying principle that testamentary provisions are invalid if they discourage marriage or encourage divorce," relying on *Ransdell*, *In re Estate of Gerbing*, and *Winterland v. Winterland*.[86] The court noted that the language and circumstances of the *Ransdell*, *Gerbing*, and *Winterland* clauses were "strikingly similar" to the *Feinberg* clause.[87] Next, the court relied on the Restatement (Third) of

77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 892.
82. *Id*.
83. *Id*.
84. *Id*.
85. *In re* Estate of Feinberg, 891 N.E.2d 549, 552 (Ill. App. Ct. 2008). The appellate court did not consider any constitutional issues related to the clause. It held the clause was invalid under property law alone, and thus, decision on constitutional issues was not necessary. *Id.*
86. *Id.* at 550–51.
87. *Id.* at 551. The court found the *Feinberg* provision "strikingly similar" to the *Ransdell*, *Gerbing*, and *Winterland* provisions because all affected marital relationships, despite the fact that the *Ransdell*, *Gerbing*, and *Winterland* provisions encouraged divorce, while the *Feinberg* restriction discouraged marriage. *Id*. at 550.

Trusts, which generally invalidates any clause that encourages divorce or discourages marriage, specifically referring to section 29, comment j, illustration 3.[88]

The court held that the form of the restraint as a condition precedent was not relevant.[89] Although the restraint would not affect future behavior of the grandchildren, the court stated that "[t]he provision's clear intent was to influence the marriage decisions of Max's grandchildren based on a religious criterion, and thus, to discourage marriage by the grandchildren other than to those of the Jewish faith."[90]

Justice Quinn concurred, stating that while partial restrictions on marriage, such as the *Feinberg* clause, may once have been acceptable, a "static jurisprudence" should not be followed, and the progressive rules of the Restatement (Third) of Trusts should be upheld in Illinois.[91] Quinn noted that the majority of the decisions relied upon by the dissent were over 50 years old and did not consider the Restatement (Third) of Trusts.[92]

Justice Greiman, dissenting, stated his belief that Max's purpose in writing the clause was to preserve his heritage, and that the restriction should be upheld.[93] Greiman disagreed with the majority that *Ransdell*, *Gerbing*, and *Winterland* were applicable to the case, because the clauses involved in those cases encouraged divorce rather than discouraged marriage.[94] The dissent also differentiated the cases because the *Feinberg* restriction was a condition precedent. Max's beneficiaries were not affected after Max's death, and they either qualified to receive Max's transfer at the time of his death or did not.[95] Justice Greiman concluded by stating that most jurisdictions would have upheld the clause as reasonable and not contrary to public policy, and Illinois was placed among "the minority of jurisdictions [considering] [the] issue."[96]

Michael Feinberg filed a petition with the Illinois Supreme Court for leave to appeal the appellate court's decision, and the Illinois Supreme Court granted the petition.[97]

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88. *Id*. at 552 (citing RESTATEMENT 3D, *supra* note 13, at § 29 cmt. j, illus. 3).
89. *Id*.
90. *Id*.
91. *Id.* at 555 (Quinn, J., concurring).
92. *Id.* at 554.
93. *Id.* at 555 (Greiman, J., dissenting).
94. *Id*.
95. *Id*.
96. *Id.* at 558. Justice Greiman also voiced his opinion that the restriction would be valid not only under property law but also under the Constitution. *Id*. at 557.
97. *In re* Estate of Feinberg, 919 N.E.2d 888, 891 (Ill. 2009).

C. Holding and Reasoning of the Illinois Supreme Court

The Illinois Supreme Court reversed, holding the beneficiary restriction clause valid.[98] The court began by noting the tension between testamentary freedom and dead hand control.[99] The court looked first to public policy considerations related to testamentary freedom, noting several Illinois statutory provisions which suggested that individuals may distribute property as they see fit with only minimal restrictions.[100] The court stated that case law also supports the principle that the testator's intent should be given effect so long as it is not contrary to public policy.[101]

The court next turned to the three cases that the appellate court determined invalidated the beneficiary restriction clause on public policy grounds: *Ransdell*, *Winterland*, and *Gerbing*.[102] The court distinguished the three cases from *Feinberg* because in those cases, restrictions were deemed invalid if they encouraged divorce, not if they discouraged marriage.[103] This distinction was significant because the exception to the general rule of invalidity for restrictions affecting marital relationships carved out for conditions precedent in restraint of marriage is not applicable to restrictions encouraging divorce.[104] Thus, the court was able to employ the condition precedent exception to invalidity of marital restrictions by recognizing the restriction as one in restraint of marriage, not a restraint encouraging divorce.[105]

Next, the court distinguished between a condition precedent and a condition subsequent, recounting its case law regarding the validity of

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98. *Id.* at 906.
99. *Id.* at 894.
100. *Id.* at 895. The Illinois Supreme Court stated:

> [O]ur 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.' Thus, absent a valid prenuptial or postnuptial agreement, 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.
> 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.

Id.
101. *Id.* at 896.
102. *Id.*
103. *Id.* at 899.
104. *See* discussion *supra* Part II.C.3.
105. *See Feinberg*, 919 N.E.2d at 899.

provisions restricting marriage taking either form.[106] *Gehrt* held that an interest either vests or not at the testator's death; a condition precedent is not a restraint on marriage and is valid because it depends on the beneficiary's marital status at that time and not some later time.[107] *Ransdell* held that a condition precedent which would otherwise be void as a complete restraint on marriage is operative.[108] In contrast, a condition subsequent that is void as a complete restraint on marriage will be inoperative, and the donee will keep the property that has been vested in him, even if the condition subsequent is breached.[109]

The court pointed out that the issue in *Feinberg* was not whether Max's original scheme was valid, but whether the scheme, as altered by Erla, was valid.[110] Therefore, the court reasoned, it was *not* determining whether the trust under Max's plan, which would have continued to hold assets for Max's grandchildren only so long as they complied with the restriction, was valid.[111] In *Feinberg*, the grandchildren did not receive a vested interest at Max's death; Erla was given a power of appointment, making the grandchildren's interests contingent on whether she exercised her ability to change Max's plan.[112] The court held that under these circumstances, even a complete restraint on marriage would be upheld.[113]

The court then analyzed the appellate court's reliance on the Restatement (Third) of Trusts to invalidate the beneficiary restriction clause.[114] The court stated that the appellate court improperly relied on comment j, illustration 3, which invalidates restraints on marriage outside a particular religion.[115] The court distinguished the Restatement (Third) of Trusts illustration from the *Feinberg* restriction because the illustration exemplified a condition subsequent, which, like Max's original scheme, made the gift "subject to termination if [the beneficiaries] should violate the marriage restriction."[116] The court emphasized that by allowing conditions precedent to restrain marriage, both testamentary freedom and an absence of dead hand control were achieved.[117]

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106. *Id.* at 900-03.
107. *Id.* at 901 (citing *In re* Estate of Gehrt, 480 N.E.2d 151, 152 (Ill. App. Ct. 1985)).
108. *Id.* at 903 (citing Ransdell v. Boston, 50 N.E. 111, 114 (Ill. 1898)).
109. *Id.* (citing *Ransdell*, 50 N.E. at 114).
110. *Id.* at 892.
111. *Id.*
112. *Id.* at 902.
113. *Id.* at 903.
114. *Id.* at 902.
115. *Id.* (citing RESTATEMENT 3D, *supra* note 13, at § 29, cmt. j, illus. 3).
116. *Id.* at 902-03.
117. *Id.* The court did not expressly decide whether conditions subsequent in partial restraint of marriage, which effectively give the beneficiaries an interest and then take it away, are valid, since it did not consider whether Max's scheme, if it was unaltered by Erla, would have been

The court concluded that because the grandchildren did not have vested interests and, therefore, Erla's plan could not divest any interests, the plan had no prospective application, and the beneficiary restriction clause did not violate public policy.[118]

IV. ANALYSIS

Many courts have struggled with the rule that conditions restraining marriage are invalid, reworking the rule to the point that it is now "literally eaten out with exceptions," and inviting "speculation that the rule rests on authority rather than reason . . . ."[119] As such, there is a valid question to be raised regarding the legitimacy of distinguishing between conditions precedent and conditions subsequent.[120]

The Illinois Supreme Court was correct in holding the beneficiary restriction scheme as altered by Erla was valid, although the court lacked a sufficient explanation for its conclusion. As Justice Quinn, concurring in the appellate court's judgment acknowledged, a "static jurisprudence" should not be followed without questioning the propriety of the underlying policy rationales.[121] The question becomes not whether the court followed case law correctly, but whether Illinois case law itself is correct in making this distinction.

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valid. *See id*. ("Whatever the effect of Max's original trust provision might have been, Erla did not impose a condition intended to control future decisions of their grandchildren . . . .").

118. *Id*. at 905. The court also addressed additional arguments made by Michele, including her argument that the right to marry is a constitutional right and is afforded constitutional protections. *Id*. at 903–05. The court responded that a testator is not a state actor, and therefore, the Constitution does not restrict the testator's choice of beneficiaries. *Id*. at 904–05. Michele relied on *Shelley v. Kraemer*, in which the United States Supreme Court held that when a state's judiciary is used to enforce a racially restrictive covenant, it is a state action violating the 14th Amendment. *Id*. at 905 (citing Shelley v. Kraemer, 334 U.S. 1,19 (1948)). The court stated that it was reluctant to apply *Shelley* in similar situations because the only reason the action was considered that of a state was because a state court was the forum for the dispute. *Id*.

119. E.S.O. & H.A.W., *supra* note 49, at 9.

120. *See* Sherman, *supra* note 6, at 1277–78. Sherman states:

> [A] testator is permitted to stipulate . . . that a particular bequest is to be paid to her nephew only if he is unmarried at the date of her death. But if the testator's will conditions [the gift] on the nephew's remaining unmarried – even after her death – such a provision probably will be declared invalid on public policy grounds. . . . [W]hy is the former condition . . . permissible, while the latter . . . is not?

Id.

121. *In re* Estate of Feinberg, 891 N.E.2d 549, 555 (Ill. App. Ct. 2008) (Quinn, J., concurring).

A. Fundamental Rights Trump Freedom to Control through Conditions Subsequent

One theory regarding the sensibility of the distinction between conditions precedent and subsequent is the so-called "continuing influence" rationale.[122] Under this theory, a restraint is struck down if it "continues beyond the testator's death and therefore exerts its influence when it is no longer amendable by appeal to transferor's reason and reflection upon changed circumstances."[123] That is, restrictions influencing beneficiaries' lives after testators' deaths are struck down because testators who have passed on, like Phoebe's mother, are hard to argue with.[124]

The continuing influence rationale, however, does not fully explain the distinction. Under this rationale, every testamentary disposition with a condition subsequent attached would be invalid because the testator would have no opportunity to change his mind after his death.[125] For example, the testamentary dispositions "To A, but if A marries, then to B," and "To A, but if A does not go to college to become an M.D., then to B" would be invalid under this theory.[126] Both of these dispositions involve circumstances under which property changes hands when a condition is met after the testator dies. Under the "continuing influence" theory, the testator's will should not be followed in either situation because the conditions of the will would occur after the death of the testator, when the testator could not change his mind.[127]

However, courts have treated the foregoing provisions differently, upholding the provision restraining occupation and striking down the provision restricting marriage (with some exceptions).[128] Therefore, the "continuing influence" rationale does not offer a complete resolution of the issue. More than an outright objection to dead hand control must be at work; otherwise both provisions, equally escaping the testator's discretion to change his mind after he has died, would be invalid.[129]

In the past, the difference in treatment between restrictions on marriage and occupation was explained by the policy that marriage should not be restricted in order to perpetuate the human race, while occupation

122. Sherman, *supra* note 6, at 1278.
123. *Id*.
124. *Friends: The One with Phoebe's Dad*, *supra* note 3.
125. Sherman, *supra* note 6, at 1279.
126. *Id.*
127. *Id.*
128. *See generally* RESTATEMENT 2D, *supra* note 7, at §§ 6.1, 8.3.
129. Sherman, *supra* note 6, at 1278.

could be restricted in order to perpetuate economic organization.[130] Yet, with as "much force [as the policy of perpetuation of the human race] may have had in a state of society where military strength was highly desirable, and where the ravages of disease formed an ever-present check on population," this explanation for the difference in treatment probably does not make as much sense in today's society.[131] As one judge noted, "[H]ow far the Romans were driven, by waste of life in their ceaseless wars . . . to force the growth of population by concubinage as well as marriage, and by the imposition of a mulct upon celibacy, is a matter of schoolboy history."[132]

Although the policy of perpetuating the human race does not make as much sense in modern times, the reason for the difference in treatment can be explained by a policy of protecting fundamental individual rights. When society views a right as fundamental, it trumps the testator's right to exert dead hand control by distributing his property as he wishes. When a right is less fundamental, testamentary freedom wins out.

Courts have held the fundamental right of marriage is weighted more heavily than a right to dead hand control.[133] For example, the Missouri Supreme Court has held: "Upon the general proposition, the preservation of domestic happiness, the security of private virtue, and the rearing of families in habits of sound morality and filial obedience and reverence, are deemed to be objects too important to society to be weighted in the scale against individual or personal will."[134]

In Illinois, the right to marry is likewise considered a fundamental right.[135] The Illinois Supreme Court has described marriage as "that basic human right that is 'fundamental to our very existence and survival.'"[136] However, Illinois regards individuals' rights to pursue the occupation of their choosing as less fundamental, upholding restrictions imposed by both state and private actors on the right to pursue a particular occupation.[137]

Although Illinois has regarded the right of testation as purely statutory, the Illinois Probate Act imposes minimal limitations on this right, expressing a public policy of broad testamentary freedom.[138] Further, Illinois case law has recognized the importance of testation, holding that a

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130. *See In re* Langfeld's Estate, 1887 WL 5023 at *2 (Pa. Orph. 1887); Commonwealth v. Stauffer, 10. Pa. 350, 355 (1849); RESTATEMENT 2D, *supra* note 7, at § 8.3 cmt. a.
131. E.S.O. & H.A.W., *supra* note 49, at 10–11.
132. *Stauffer*, 10 Pa. at 355.
133. Williams v. Cowden, 13 Mo. 211 (1850).
134. *Id*. at 213.
135. Rose v. Pucinski, 746 N.E.2d 800, 809 (Ill. App. Ct. 2001).
136. Dralle v. Ruder, 529 N.E.2d 209, 214 (Ill. 1988) (quoting Loving v. Virginia, 388 U.S. 1 (1967)).
137. Miller v. Dep't of Prof'l Regulation, 658 N.E.2d 523, 532 (Ill. App. Ct. 1995); Scheffel & Co., P.C. v. Fessler, 827 N.E.2d 1, 5 (Ill. App. Ct. 2005).
138. *In re* Estate of Feinberg, 919 N.E.2d 888, 895 (Ill. 2009).

testator may dispose of property "in any manner he sees fit . . . and the justice or propriety of the disposition made of the property is not a question for courts and juries to pass upon . . . ."[139] Thus, both the Illinois Probate Act and Illinois case law recognize the right to testamentary freedom as extremely wide-ranging.

In comparing the rights of choice in marriage and occupation to the right of a testator to use conditions subsequent to dispose of his property, the essential question is whether the rights of the living surpass the rights of the dead. The right to testation, including the right to dead hand control, is so far-reaching in Illinois that only considerably salient rights of the living will overtake that right.[140] In Illinois, the right to choice in marriage has been consistently held as such a crucial right, and thus, it should exceed the right of dead hand control.[141] In contrast, the right to choice in occupation has been held less important, and therefore it should not defeat the right to dead hand control.[142]

B. Conditions Precedent Achieve a Proper Balance between Fundamental Rights of the Living

When a testator uses conditions precedent, in contrast to conditions subsequent, to encourage his loved ones to make certain choices, the testator does not make any attempt to control the future behaviors of beneficiaries. Therefore, dead hand control is not implicated, and an entirely different analysis is necessary to evaluate the validity of conditions precedent.

An individual has an absolute right to dispose of his property in any way he wishes while living.[143] For example, a father could, during his lifetime, tell his daughter that he would give her one million dollars, but if she married within X religion, he would take it away. If the daughter married outside X religion during the father's lifetime, the father would

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139. Donnan v. Donnan, 86 N.E. 279, 281 (Ill. 1908).

140. *Feinberg*, 919 N.E.2d at 895 (discussing the minimal limitations placed upon testamentary freedom by the Illinois Probate Act); *Donnan*, 86 N.E. at 281 (holding that judges generally should not question the moral propriety of testamentary dispositions).

141. *See Miller*, 658 N.E.2d at 531; *Fessler*, 827 N.E.2d at 5. It is interesting that the right to choice in marriage does not always surpass the right of dead hand control. Marriage may be partially restricted, such as through an age restriction, as long as it is reasonable. Shackelford v. Hall, 19 Ill. 212, 214 (1857). One explanation for this anomaly is that marriage is not only a right, but also a valued institution in the United States, and society desires to protect the sanctity of that institution. *See* RESTATEMENT 2D, *supra* note 7, at § 6.2 cmt. c ("[P]rovisions designed to prevent hasty or imprudent marriages are to be encouraged.").

142. *See Miller*, 658 N.E.2d at 531; *Fessler*, 827 N.E.2d at 5.

143. *See In re* Estate of Gehrt, 480 N.E.2d 151, 153 (Ill. 1985).

have the absolute right to take the money away from his daughter.[144] As such, the living can control the living in ways the dead may not; rather than comparing the rights of the dead to the rights of the living, the rights of both the donor and donee, as living parties, are implicated.

In *Gehrt*, the Illinois Supreme Court compared the right of testators to use conditions precedent to control beneficiaries to the right of living persons to influence their loved ones.[145] The court noted that conditions precedent in a will are equivalent to living individuals' conditional gifts of property, because both affect beneficiaries' conduct only during the donor's life; the donor does not exert influence over the beneficiaries' future decisions.[146] As such, allowing conditions precedent in wills is no different than allowing living persons to influence loved ones with conditional gifts during their lifetimes; dead hand control is not implicated in either situation.[147]

Nevertheless, some might argue that conditions precedent violate public policy because they allow testators to interfere with fundamental rights, even if the testators are doing so while living. Testators, while they are living, could still coerce future beneficiaries to comply with the testators' wishes by telling the beneficiaries of their potential rights under a will and the conditions attached to them. The rule allowing conditions precedent gives testators a license to infringe on fundamental rights; why should they be barred from offending these rights after death, but allowed to violate such rights while living? For example, the *Feinberg* appellate decision expressly considered whether the *Feinberg* restriction's form as a condition precedent rendered it valid, but found that despite its form, the intent of the restriction was to discourage marriage, and was therefore invalid.[148]

Although the appellate decision in *Feinberg* was correct in stating that the intent of the restriction was to discourage marriage, the court failed to recognize the significance of the Feinberg restriction's form as a condition precedent. By using conditions precedent, which do not implicate dead hand control, testators ensure that beneficiaries are able appeal to the testators' sense of reason.[149] Unlike the introductory example to this note, in which Phoebe's mother was "harder to argue with" after she died,[150] beneficiaries have the opportunity to argue with testators who use

144. *See id.*
145. *Id.* at 152–53.
146. *Id*.
147. *Id*.
148. *In re* Estate of Feinberg, 891 N.E.2d 549, 552 (Ill. App. Ct. 2008).
149. *See* Sherman, *supra* note 6, at 1278.
150. *Friends: The One with Phoebe's Dad*, *supra* note 3.

conditions precedent. The importance of the right to testamentary freedom is not tainted by its use as a control over beneficiaries beyond the grave.

In cases in which testamentary conditions precedent restricting marriage are at issue, two important rights of the living, testamentary freedom and freedom of marriage, are in conflict, rather than a right of the living and a right of the dead. When a court enforces a condition precedent, it is merely carrying out the testator's wishes within a short time after death, and it can presume that the condition represents what the testator would have done while alive. Enforcing a condition subsequent, however, assumes a testator would never change his mind. As such, the distinction between conditions precedent and conditions subsequent strikes the right balance by preserving testamentary freedom but disallowing such freedom in cases in which dead hand control over fundamental rights is implicated.

In *Feinberg*, the court narrowly framed the issue as whether Max's testamentary scheme as altered by Erla was valid, and did not determine whether Max's original scheme was valid.[151] This narrow framing of the issue allowed the court to distinguish between the two schemes, finding that Erla's scheme created a condition precedent, while Max's scheme created a condition subsequent.[152] After this distinction was made, the court's analysis was fairly simple; several precedent cases held that conditions precedent, even if in complete restraint of marriage, would be valid.[153] Although the court did not give adequate consideration to the public policies at stake in the case, the court reached the correct result. The court fulfilled a compelling public policy rationale: preserving testamentary freedom in cases in which dead hand control is not at issue, and the testator is amenable to pleas for modification to his testamentary scheme.

V. CONCLUSION

By upholding Max's beneficiary restriction clause, the Illinois Supreme Court properly preserved the right of testation when the testator does not seek to control beneficiaries beyond the grave. The court did not provide an appropriate analysis of the public policy involved, but nonetheless fulfilled a sound public policy objective. Because the *Feinberg* restriction was a condition precedent, the rights of two living parties, Erla and the grandchildren, were implicated. As the grandchildren were able to appeal to Erla for changes in the disposition during her life, dead hand control was not involved. Therefore, the appropriate balance between

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151. *In re* Estate of Feinberg, 919 N.E.2d 888, 892 (Ill. 2009).
152. *Id.* at 903.
153. Ransdell v. Boston, 50 N.E. 111, 114 (Ill. 1898); *In re* Estate of Gehrt, 480 N.E.2d 151, 152 (Ill. 1985).

testamentary freedom of the living, and freedom to control beneficiaries' future actions affecting fundamental rights, was maintained.