FROM THE "JEWISH CLAUSE" TO THE "HOMOSEXUAL CLAUSE": AN ANALYSIS OF BENEFICIARY RESTRICTION CLAUSES WHICH RESTRICT SAME-SEX MARRIAGE IN ILLINOIS

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INTRODUCTION

In 2012, New York City Judge Robert Mandelbaum challenged his late father's will.[1] Judge Mandelbaum married his partner, Jonathan O'Donnell, in 2011 shortly after their son, Cooper, was born.[2] The will provided the late testator's grandchildren shall inherit money via trust.[3] However, the will also specified "grandchildren" "shall specifically not include . . . a biological child of Robert, if Robert shall not be married to the child's mother within six months of the child's birth . . . "[4] This posed a problem; Robert is a gay man who recently married his husband.[5] Because Robert married his husband, Cooper will not be eligible to take his inheritance.[6]

This issue arose in New York, but it is foreseeable a similar issue could rise in an Illinois court. Illinois courts are tasked with determining whether certain will conditions can effectively restrict a beneficiary from taking property. Examples of these restriction clauses include prohibitions on interreligious marriage,[7] restrictions on marriage before a certain age,[8] and restrictions on remarriage.[9] Illinois courts, however, have not addressed the issue of beneficiary restriction clauses which restrict same-sex marriage. For example, the testator conveys, by will, to A if A is not married to a person of the same sex at the time of the testator's death. Or, the testator conveys to a trust for the benefit of A for a term of years, but if A marries a person of the

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1 Alyssa Newcomb, *Gay Man Told to Marry Woman or Son Would Lose Inheritance*, ABC NEWS (Aug. 20, 2012), http://abcnews.go.com/US/gay-man-mary-woman-son-lose-inheritance/story?id=17043550.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 Feinberg v. Feinberg (*In re* Estate of Feinberg), 919 N.E.2d 888, 891 (Ill. 2009).

8 Shackelford v. Hall, 19 Ill. 211, 212-13 (1857).

9 *In re* Estate of Gehrt, 480 N.E.2d 151, 151 (Ill. App. Ct. 1985).

same sex, then, during the term, remaining balance to B.[10] For the former examples, a challenge to the beneficiary restriction typically involves a question of whether the clause should be void as against public policy.[11] How should Illinois courts analyze the latter restriction clauses if a beneficiary claims these conditions are against public policy?

Currently, Illinois courts undergo a reasonableness analysis with a focus on determining whether the beneficiary's potential mate pool is unreasonably limited.[12] At first glance, a restriction clause which restricts same-sex marriage appears to unreasonably limit A's potential mate pool because A is effectively barred from marrying (assuming A would never marry a person of the opposite sex). Is this to imply that testators may never restrict its beneficiary's ability to marry a person of the same sex? This implication seems to conflict with the concept of testamentary freedom; testators should be allowed to decide how to dispose of their property. After all, it is the testator's property. Testators can refrain from giving a person property on the basis of same-sex marriage during life. There is no law indicating a testator could not do so during life. The way the restriction clause is written may change this analysis. Conditions precedent and conditions subsequent operate differently, but should this will construction determine whether a restriction on the basis of, essentially, A's sexuality, is against public policy? This comment will explore these questions and how they intersect.

Part I of this article will discuss the foundational legal principles that will come into play for the remainder of the discussion. First, this note discusses the principles behind testamentary freedom and dead hand control. Second, this comment discusses the right to marry and Illinois legislation in support of same-sex marriage. Third, this comment discusses the mechanics of restraints on marriage in the context of wills. Fourth, this comment briefly explains the Illinois Supreme Court's decision in *In re Estate of Feinberg*.[13]

Part II of this comment applies the current Illinois analysis to two clauses which restrict same sex marriage: one tailored as a condition precedent and the other tailored as a condition subsequent. After this analysis, this comment will discuss various scholar's views on the strengths and weaknesses of the *Feinberg* decision.

Part III of this comment will look to other scholar's suggestions on how to tackle the public policy problem of beneficiary restriction clauses. The suggestions discussed are: (1) courts should consider a beneficiary's sexual

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10 One example might be where a will leaves money in trust and that money is distributed to the beneficiary, subject to the condition, over time.

11 *Feinberg*, 919 N.E.2d at 894.

12 *Id.* at 899.

13 *Id.* at 888.

orientation when conducting a public policy analysis; (2) testators should be completely prohibited from creating restriction clauses that restrict conjugal choices; (3) courts should consider the coercive effect of restriction clauses on beneficiaries; and (4) restriction clauses should be viewed under the same lens as contracts.

Part IV of this comment suggests an alternative approach to the Illinois courts' current reasonableness analysis. This comment proposes a complete ban on beneficiary restriction clauses tailored as conditions subsequent which restrict same-sex marriage because this ban would further Illinois values of preserving marriage, promoting testamentary freedom, and restricting dead hand control.

I. LEGAL BACKGROUND

Before turning to other scholarly suggestions and presenting a solution to the issue at hand, a discussion of the applicable legal principles follows. The principles and case law are discussed to the extent necessary to understand the later application and discussion.

A. Testamentary Freedom

Neither the United States Constitution nor the Illinois Constitution contain provisions regarding a public policy towards testamentary freedom, so this public policy must be within state statute or case law.[14] When analyzed, Illinois statutes reveal a strong public policy of freedom of testation.[15]

Four Illinois statutes are relevant to the discussion of testamentary freedom.[16] The first relevant statute is the Probate Act of 1975.[17] The Probate Act sets only two limits on a testator's ability to dispose of the testator's property after death.[18] First, the Probate Act allows a spouse to renounce the testator's will.[19] Second, the Probate Act entitles a child born after the testator made his or her will to a portion of the estate as if the testator died intestate, unless a provision in the will exists for the child or the will showed the testator's intention to disinherit the child.[20] The second relevant

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14 Orly Henry, *If You Will It, It Is No Dream: Balancing Public Policy and Testamentary Freedom*, 6 NW. J. L. & SOC. POL'Y 215, 222 (2011).

15 *Feinberg*, 919 N.E.2d at 895-96.

16 *Id.*

17 755 ILL. COMP. STAT. ANN. 5/1 (LexisNexis 2017).

18 *Feinberg*, 919 N.E.2d at 895.

19 755 ILL. COMP. STAT. ANN. 5/2-8 (LexisNexis 2017).

20 *Id.* § 5/4-10.

statute is the Trusts and Trustees Act.[21] This act provides a person creating a trust may specify 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."[22] The third relevant statute is the Statute Concerning Perpetuities.[23] This statute has provisions allowing an instrument to include a provision that the rule against perpetuities[24] does not apply,[25] setting out the circumstances where the rule against perpetuities shall not apply,[26] and explaining when an instrument violates the rule against perpetuities.[27] The fourth relevant statute is the Rule in Shelley's Case Abolishment Act.[28] This statute abolishes the rule in Shelley's Case.[29]

These statutes demonstrate that Illinois has a policy of protecting the ability of an individual to distribute his property, even after death, as he or she chooses with minimal restrictions under Illinois law.[30] The latter two statutes regarding the rule against perpetuities and the rule in Shelley's Case are not important to the later discussion, but they are worth noting to show Illinois favors freedom of testation.

Illinois case law also demonstrates a public policy of strong testamentary freedom by striving to give effect to the intent of the decedent.[31] Courts have stated the first purpose in construing a trust is to discover the settlor's intent, which the court will effectuate if not contrary to public policy.[32] The Illinois Supreme Court in *Ransdell v. Boston* stated while it is important that restrictions that are intended to prevent marriage or encourage divorce should not be upheld, "it is no less important that persons of sound mind and memory, free from restraint and undue influence, should be allowed to dispose of their property by will, with such limitations and conditions as they believe for the best interest of their donees."[33] Illinois

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21 760 ILL. COMP. STAT. ANN. 5/1 (LexisNexis 2017).

22 *Id.* § 5/3(1).

23 765 ILL. COMP. STAT. ANN. 305/1 (LexisNexis 2017).

24 10-324 *Midwest Transaction Guide* § 324.22 (2017) ("The rule against perpetuities requires that an interest in real or personal property, whether legal or equitable, must vest, if at all, no later than twenty-one years after some life in being at the creation of the interest.").

25 765 ILL COMP. STAT. ANN. 305/3(a-5) (LexisNexis 2017); *id.* § 305/4(a)(8).

26 *Id.* § 305/4(a)(1)–(a)(8).

27 *Id.* § 305/4(c)(1)–(c)(3).

28 765 ILL. COMP. STAT. ANN. 345/1 (LexisNexis 2017).

29 *Id.*; *see also* RESTATEMENT (THIRD) OF PROPERTY § 16.2 cmt. a (AM. LAW INST. 2003) (explaining the Rule in Shelley's Case as a remainder interest in land in favor of the life tenant's heirs passed to the life tenant if the remainder was of the same quality as that of the life estate).

30 Feinberg v. Feinberg (*In re* Estate of Feinberg), 919 N.E.2d 888, 896 (Ill. 2009).

31 *Id.*

32 Harris Tr. & Sav. Bank v. Donovan, 582 N.E.2d 120, 123 (Ill. 1991); *see also In re* Estate of Matthews, 948 N.E.2d 187, 191 (Ill. App. Ct. 2011).

33 Ransdell v. Boston, 50 N.E. 111, 114 (Ill. 1898).

courts will attempt to give effect to wills provided the testator's intentions in creating the will are not against public policy.[34]

The policy of strong testamentary freedom competes with the doctrine of "dead hand" control.[35] Dead hand control refers to "legal doctrines that allow a decedent's control of wealth to influence the conduct of a living beneficiary . . . ."[36] The primary concern of dead hand control is the testator retains the ability to control or attempt to control the future conduct of his or her beneficiaries after death.[37] While this topic will be explored further, it is worth initially noting dead hand control is often seen as competing with both testamentary freedom[38] and preserving the right to marriage.[39]

B. Marriage

The United States Constitution protects the right to marry.[40] Specifically, this is a fundamental right under the 14th Amendment of the United States Constitution.[41] In the 2015 decision in *Obergefell v. Hodges*, the United States Supreme Court recognized same-sex couples may also exercise the right to marry.[42] The United States Supreme Court stated, "the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."[43]

The Illinois Supreme Court has also held the freedom to marry is a fundamental right.[44] The Illinois Supreme Court has described marriage as a basic human right, fundamental to our very existence and survival.[45] The State of Illinois, however, recognized the right to same-sex marriage before the 2015 decision in *Obergefell*. Effective June 1, 2014, pursuant to Public Act 98-0597, Illinois changed its definition of marriage from being between "a man and a woman" to between "2 persons."[46]

The Illinois General Assembly, aside from redefining marriage, passed two more laws, effective at the same time as the new definition of marriage,

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34 *Feinberg*, 919 N.E.2d at 896.
35 *Id.* at 894.
36 Natalie Lorenz, Note, *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)*, 36 S. ILL. U. L. J. 183, 183 (2011) (quoting BLACK'S LAW DICTIONARY 456 (9th ed. 2009)).
37 *Feinberg*, 919 N.E.2d at 903.
38 *Id.* at 894.
39 Lorenz, *supra* note 36, at 199.
40 Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).
41 52 AM. JUR. 2D *Marriage* § 4 (2017).
42 *Obergefell*, 135 S. Ct. at 2599.
43 *Id.*
44 8 LexisNexis, *Illinois Jurisprudence* § 1:07 (2015) (citing Boynton v. Kusper, 494 N.E.2d 135, 140 (Ill. 1986)).
45 Dralle v. Ruder, 529 N.E.2d 209, 214 (Ill. 1988).
46 750 ILL. COMP. STAT. ANN. 5/201 (LexisNexis 2017).

to further guarantee same-sex couples marital protection and benefits.[47] The Religious Freedom and Marriage Fairness Act provides marriage laws shall apply equally to same-sex couples as they do to different-sex couples.[48] Same-sex couples are also provided the same benefits, protections, and responsibilities as different-sex couples.[49] Similarly, the Illinois Religious Freedom Protection and Civil Union Act gave those in civil unions the same legal obligations, responsibilities, protections, and benefits that married couples receive under state law.[50] This Act also allows those in civil unions to convert the civil union to a marriage.[51]

C. Restrictions on Marriage

Restriction clauses which discourage marriage or encourage divorce are generally found to be invalid.[52] Restrictions can come in two forms: total (or general) restraints and partial restraints.[53] A restraint upon marriage is generally valid, but a total restraint is not.[54] Because the mechanics of these restrictions will become important in determining whether restrictions which prohibit same-sex marriage are allowed, an analysis of these restrictions follows.

A testator may not impose a total restraint upon marriage as a condition of a devise.[55] These are restraints that are unrestricted in time or number.[56] The Illinois Supreme Court has described these conditions as those which are general and absolute.[57] The example where a testator leaves property to A, provided A never marries demonstrates this type of restraint.[58] This restriction, as a total restraint of marriage, is void and inoperative.[59] The exception to this general rule comes in instances where the testator's intention is to provide support for the beneficiary.[60]

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47 *See* 750 ILL. COMP. STAT. ANN. 80/1 (LexisNexis 2017); *see also* 750 ILL. COMP. STAT. ANN. 75/1 (LexisNexis 2017).

48 750 ILL. COMP. STAT. ANN. 80/10(a) (LexisNexis 2017).

49 *Id.* § 80/10(b).

50 750 ILL. COMP. STAT. ANN. 75/20 (LexisNexis 2017).

51 *Id.* § 75/65(a).

52 RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. j (AM. LAW INST. 2012).

53 Jeremy Macklin, *The Puzzling Case of Max Feinberg: An Analysis of Conditions in Partial Restraint of Marriage*, 43 J. MARSHALL L. REV. 265, 270 (2009).

54 1-8 Gunnar J. Gitlin, *Gitlin on Divorce* § 8-34 (2017).

55 Glass v. Johnson, 130 N.E. 473, 474 (Ill. 1921).

56 Macklin, *supra* note 53, at 270.

57 Ransdell v. Boston, 50 N.E. 111, 114 (Ill. 1898).

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

59 *Ransdell*, 50 N.E. at 114.

60 Lorenz, *supra* note 36, at 187.

A partial restraint is one where the testator conditions a transfer of property on the passage of time or the grantee pursuing certain conditions set forth by the testator.[61] Partial restraints on marriage are allowed to the extent the restraint is not so broad as to constitute a general one.[62] A court may look to the availability of potential mates in determining whether a partial restraint in effect is a total restraint.[63] The validity of these conditions depends on whether the restraint is reasonable or unreasonable.[64] In assessing this, courts will look to whether the beneficiary's ability to marry is unreasonably limited.[65]

The general rule is testamentary provisions which act as a restraint upon marriage or which encourage divorce are void as against public policy.[66] These restrictions on marriage are further subdivided into two methods of restriction: conditions precedent and conditions subsequent. The Court in *Ransdell* explained the effects on both conditions precedent and subsequent: a condition precedent, even if a complete restraint on marriage, will, if broken, be operative and prevent the devise from taking effect; a condition subsequent, if void (by a court), will be entirely inoperative, and the beneficiary retains the property unaffected by its breach.[67] As such, it is very important to first determine whether the restriction clause at hand is tailored as a condition precedent or condition subsequent. This determination can initially determine whether the condition is allowed.

D. *In re Estate of Feinberg*

In 2009, the Illinois Supreme Court decided the case of *In re Estate of Feinberg*.[68] Authors have referred to this case as the case with the "Jewish Clause."[69] This is a case about religious intermarriage and inheritance.[70]

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61 Macklin, *supra* note 53, at 271.

62 Ronald J. Scalise, Jr., *Public Policy and Antisocial Testators*, 32 CARDOZO L. REV. 1315, 1329 (2011); Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273 (1999).

63 Scalise, *supra* note 62, at 1329.

64 Macklin, *supra* note 53, at 271; Emalee G. Popoff, *Testamentary Conditions in Restraint of the Marriage of Homosexual Donees*, 7 DREXEL L. REV. 163, 169 (2015).

65 Lorenz, *supra* note 36, at 187-88.

66 Feinberg v. Feinberg (*In re* Estate of Feinberg), 919 N.E.2d 888, 898 (Ill. 2009).

67 Ransdell v. Boston, 50 N.E. 111, 114 (Ill. 1898).

68 *Feinberg*, 919 N.E.2d 888.

69 *See, e.g.*, Aaron H. Kaplan, *The "Jewish Clause" and Public Policy: Preserving the Testamentary Right to Oppose Religious Intermarriage*, 8 GEO. J. L. & PUB. POL'Y 295, 317 (2010); *see also, e.g.*, Ron Grossman, *'Jewish Clause' Divides a Family*, CHI. TRIB. (Aug. 25, 2008), http://articles.chicagotribune.com/2008-08-25/news/0808240494_1_illinois-supreme-court-jewish-judges.

70 *Feinberg*, 919 N.E.2d 888.

While religious intermarriage is not the topic at hand, the underlying principles in the *Feinberg* decision are important to this discussion.

Max Feinberg, prior to his passing in 1986, executed a will and created a trust.[71] The will provided upon his death, all of Max's assets shall go into the trust.[72] The trust was further split into two trusts, Trust A and Trust B.[73] Trust A is used to support Feinberg's wife, Erla, for the remainder of Erla's life, and Trust B, along with Trust A if not exhausted, is distributed to Feinberg's descendants after Erla's death.[74] The provision of the will relevant here is the beneficiary restriction clause. This restriction clause provided any descendant of Feinberg's children 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 the trust as of the date of such marriage.[75] If the descendant did not meet the condition, that descendant's share of the trust reverts to one of Feinberg's children.[76]

In addition, Max's trust gave his wife, Erla, a limited testamentary power of appointment which she exercised in 1997.[77] Erla "direct[ed] 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."[78] When Erla died in 2003, only one of her five grandchildren satisfied the beneficiary restriction clause and was entitled to receive $250,000.[79] One granddaughter challenged the beneficiary restriction clause.[80]

As the beneficiary restriction clause considered any descendant deceased if the required conditions were not met, the parties to the litigation disputed "whether Erla's power of appointment[81] was limited to those descendants not deemed deceased under the beneficiary restriction clause."[82] The court framed the issue as "whether the holder of a power of appointment over the assets of a trust may, without violating public policy, direct that the assets be distributed at the time of the holder's death to then-living

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71 *Id.* at 891.
72 *Id.*
73 *Id.*
74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.*
78 *Id.*
79 *Id.* at 892.
80 *Id.*
81 "A power of appointment gives the donee of the power (usually a trust beneficiary) an opportunity to change the dispositive terms of the trust." 1-8 LexisNexis, *Illinois Estate Planning* § 8.17 (2017).
82 *Feinberg*, 919 N.E.2d at 891.

descendants of the settlor, deeming deceased any descendant who has married outside the settlor's religious tradition."[83]

The court found upon Feinberg's death, the descendants did not receive a vested interest in the trust money; rather, the descendants merely had an expectation because their interests were contingent on whether and in what manner Erla would exercise her power of appointment.[84] This contingency created a condition precedent which did not create a vested interest.[85] The court found this condition precedent will be operative, even if a complete restraint on marriage.[86]

II. ANALYSIS UNDER CURRENT LAW

Before looking to how Illinois courts should address restriction clauses which restrict same-sex marriage, it is important to first discuss how Illinois courts would likely address these clauses under the current *Feinberg* precedent. This section will provide two examples of restriction clauses on same-sex marriage. One is tailored as a condition precedent and the other is tailored as a condition subsequent. In both examples, two presumptions stand: first, it is presumed A is homosexual and second, it is presumed A, as a homosexual, is unwilling to marry a person of the opposite sex.

A restriction on same-sex marriage in the form of a condition precedent may say something to the effect of "to A if A is not married to a person of the same-sex at the time of my death." Considering the current precedent on condition precedent, this is not a complex analysis. In this example, A takes if A is either unmarried or married to a person of the opposite sex at the time of the testator's death. If A is married to a person of the same-sex, A will not take. A court would not find this an invalid restraint on marriage because the condition is tailored as a condition precedent; the condition precedent, even though a complete restraint of marriage, will prevent A from taking.[87] It is important to emphasize the presumption made here: this condition precedent is considered a complete restraint on marriage under the assumption that A, as a homosexual, is unwilling to marry a person of the opposite sex.

A restriction on same-sex marriage in the form of a condition subsequent may say something to the effect of "to trust for the benefit of A for a term of years, but to B if A marries a person of the same sex during the term." This clause differs from the first because it imposes an obligation on A to never marry a person of the same sex if A wants to keep the property.

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83 *Id.* at 892.
84 *Id.* at 900-01.
85 *Id.* at 903.
86 *Id.*
87 *Id.* (citing Ransdell v. Boston, 50 N.E. 111, 114 (Ill. 1898)).

On its face, the restriction is a partial restriction on marriage. Much like the restriction in the *Feinberg* decision,[88] the restriction clause here restricts marriage only to a class of people and does not place a complete restriction on marriage. However, a restriction against same-sex marriage is distinctly different from a restriction on religious intermarriage. In the *Feinberg* decision, the restriction clause required Feinberg's descendants to marry persons of Jewish faith or lose their eligibility to take.[89] It then follows that in the pool of potential mates for Feinberg's descendants, non-Jewish people are eliminated; Feinberg's descendants remained free to marry people of Jewish faith. Here, the pool of potential mates eliminated for A are all people of the same sex. If a court were to disregard sexual orientation in this analysis, a court would say the restriction is a partial restriction on marriage, restricting marriage only against a class of people and that A still has a reasonable number of mates available, namely, people of the opposite sex. However, when a court analyzes this restriction properly, a court will realize the restriction eliminates all potential mates for A because, presumably, A will only want to marry someone of the same sex. Facially, this restriction is a partial restraint on marriage because A still has potential mates, those of the opposite sex, available. But, in effect, this is a total restraint on marriage because A is effectively restricted from marrying if A is to take. This condition subsequent is therefore void and entirely inoperative, and A will take unaffected by A's breach if A marries a person of the same sex.[90] This analysis, however, hinges on the assumption that a court would analyze this issue as laid out in this comment. If a court were to conduct this analysis differently, a court may find the restriction clause does not violate public policy.

This analysis is consistent with the principles reinforced by the *Feinberg* decision.[91] Some scholars suggest while the holding of the *Feinberg* decision was correct, the court's reasoning could be better.[92]

One scholar suggested that the Illinois Supreme Court in the *Feinberg* decision could have better explained its analysis on how the restriction clause was valid as a condition precedent.[93] For example, in *In re Estate of Gerht*, a case which the *Feinberg* court discussed, the Illinois Supreme Court explained conditions precedent in a will are equivalent to a living individual's conditional gift of property because both only affect conduct that occurred during the testator's life.[94] This eliminates concerns about dead hand control

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88 *Id.* at 891.
89 *Id.*
90 *Id.* at 903 (citing Ransdell v. Boston, 50 N.E. 111, 114 (Ill. 1898)).
91 *See id.*
92 Henry, *supra* note 14, at 230; Lorenz, *supra* note 36, at 197.
93 Lorenz, *supra* note 36, at 184.
94 *In re* Estate of Gerht, 480 N.E.2d 151, 153 (Ill. App. Ct. 1985).

because the testator does not exert influence over the beneficiary's future decisions.[95] In essence, this scholar argued although the holding was correct, the *Feinberg* court did not give adequate considerations to the public policies at play.[96] Another scholar suggested that the *Feinberg* decision was narrowly tailored to the facts and missed an opportunity to set forth positive law.[97] The court could have strengthened its holding by discussing cases from other jurisdictions that are factually similar to the *Feinberg* decision which also lean towards upholding similar testamentary provisions.[98] This case law analysis could have helped define the contours of the rule which would lead to more correct and consistent outcomes in future cases.[99]

On the other end, one scholar suggested the Illinois Appellate Court[100] analyzed the issue incorrectly and the Illinois Supreme Court analyzed the issue correctly.[101] This scholar claimed the Illinois Supreme Court's holding was correct because it analyzed the issue in accordance with a factor based test the scholar promotes.[102] This factor test considers, *inter alia*, the testator's belief on the validity of the restriction, historical validity of similar clauses, the need for judicial supervision, strain on an existing family, the extent of the restriction, and legislative and judicial support of a holding "against public policy."[103]

III. DIFFERING VIEWS ON HOW TO ADDRESS THIS ISSUE

As there is some conflict on the strength of the *Feinberg* court's rationale, it is worth discussing alternative views on how to address the issue at hand. These other views may help provide guidance on how to better view restriction clauses which prohibit not only same-sex marriage but also clauses which prohibit marriage in other ways.

A. Court Awareness of Beneficiary Sexual Orientation

One scholar suggested courts should consider the beneficiary's sexual orientation in determining whether a restriction clause can stand, stating "[h]omosexual donees should be protected by the same reasonableness

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95 *See id.*
96 Lorenz, *supra* note 36, at 202.
97 Henry, *supra* note 14, at 230.
98 *Id.*
99 *Id.* at 233.
100 Taylor v. Feinberg (*In re* Estate of Feinberg), 891 N.E.2d 549 (Ill. App. Ct. 2008).
101 Kaplan, *supra* note 69, at 317.
102 *Id.*
103 *Id.* at 314-15.

limitation on dead hand control as heterosexual donees."[104] A court which considers the sexual orientation of the beneficiary can ensure that restriction clauses tailored as partial restraints will be held unenforceable because there will be an unreasonable limitation on the number of potential mates for the beneficiary.[105] This appears to be a simple solution to the issue, especially in instances where the restriction is one which restricts the beneficiary's ability to marry a person of the same sex. A court analyzing a restriction on same-sex marriage would likely consider the beneficiary's sexual orientation as the restriction clause would likely prompt the court to do so; it would not make much sense for a court to analyze same-sex marriage without asking whether the restriction is truly one which, in effect, restricts a beneficiary's opportunity to marry. If A was a heterosexual, A's pool of potential mates is likely not unreasonably limited as those of the same sex were never desirable partners to begin with (presumably). Therefore, it is likely a court would consider this in the public policy analysis, but it is still worth reinforcing the principle.

B. Complete Ban on Restriction Clauses for Conjugal Choices

Similarly, another scholar proposed a complete ban on a testator's ability to impose restraints on a beneficiary's conjugal choices.[106] Limiting conjugal choices of beneficiaries is not necessary to advance the policies behind testamentary freedom;[107] instead, this policy is served by allowing the testator to merely choose its beneficiaries and the amounts they are to receive.[108]

While this is an interesting suggestion, this proposal conflicts with Illinois' policy in favor of strong testamentary freedom. As restriction clauses tailored as conditions precedent are viewed as similar to a testator gifting before death,[109] a complete ban on restrictions on conjugal choices would likely be seen as similar to telling a testator that the testator is unable to dispose of property as the testator sees fit during the testator's lifetime. As Illinois courts are willing to uphold these restrictions in the form of condition precedent, even when a complete restraint on marriage,[110] this would directly conflict with the precedent on the issue. Conceptually, this ban could work

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104 Popoff, *supra* note 64, at 186.

105 *Id.* at 187.

106 Sherman, *supra* note 62, at 1302.

107 *Id.* at 1301-02 (describing the concern with testation as ensuring that families do not conceal testators' deaths if testators were not allowed to bequeath, thereby giving incentive for families to conceal the death so they could continue to benefit from the testator's resources).

108 *Id.* at 1302.

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

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

with restriction clauses tailored as conditions subsequent. A complete ban on conjugal choices could eliminate concerns of dead hand control as there would be no ability to influence future behavior of beneficiaries. If a legislature were to introduce a complete ban on restriction clauses which restrict conjugal choices, the ban would need to be limited to banning these restriction as conditions subsequent. This sets a good balance between the competing values of testamentary freedom by allowing testators to implement these restrictions in a will through conditions precedent and eliminates the risk of dead hand control of the beneficiaries.[111]

C. The Coercion Test

Other scholars suggested courts use different tests in analyzing whether various restriction clauses are valid.[112] One analysis is to invalidate a will provision only when the court finds that it is coercive, known as the coercion test.[113] To be coercive, the restriction must require the beneficiary to "be in a situation economically desperate enough to choose the unpalatable choice or otherwise have no alternative."[114] One scholar explained if courts are going through a reasonableness analysis to determine whether a restraint on marriage puts an unreasonable burden on the beneficiary, it makes more sense to look to the actual effect of the restraint rather than the testator's reasonableness.[115] It is argued the coercion test compensates for the shortcomings of the traditional reasonableness analysis because it (1) ignores the donor's intention and focuses on how the condition exploits the beneficiary, (2) provides an empirically easier method for courts to determine whether a condition should be void, (3) provides more consistent results, and (4) furthers the public policy against dead hand control.[116]

Given the policy in favor of strong testamentary freedom, this proposal would likely be incompatible with Illinois values on the issue of testation. While it is important to ensure that testamentary provisions do not prevent marriage or encourage divorce, it is equally important that testators be "free from restraint and undue influence [and] be allowed to dispose of their property by will, with such limitations and conditions as they believe for the

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111 *See id.* at 894 (explaining that the values of testamentary freedom and resistance to dead hand control compete).

112 *See* Ruth Sarah Lee, *Over My Dead Body: A New Approach to Testamentary Restraints on Marriage*, 14 MARQ. ELDER'S ADVISER 55 (2012); *see also* Christopher T. Elmore, *Public Policy or Political Correctness: Addressing the Dilemma of Applying Public Policy to Inheritance Issues*, 2 EST. PLAN. & CMTY. PROP. L. J. 199 (2009).

113 Lee, *supra* note 112, at 75.

114 *Id.* at 78.

115 *Id.*

116 *Id.* at 81-82.

best interest of their donees."[117] This test places the primary inquiry on the effect of the restriction clause on the beneficiary, but Illinois courts held courts should try to construe a will in such a way as to give it effect.[118] This scholar, however, raises an important point that courts can utilize; it is important for courts to carefully consider the effect of a restriction clause on a beneficiary.[119]

D. Beneficiary Restriction Clauses as Contracts

Another scholar suggested restriction clauses should be viewed similar to contract clauses, considering the idea that the beneficiary has no obligation to agree to the terms.[120] The beneficiary should consider the terms of the condition and if the beneficiary agrees to the condition, the beneficiary will be bound by it.[121] This view places responsibility on the beneficiary to determine whether the beneficiary will be better or worse off if accepting the conditions.[122] If a court is tasked with determining whether the restriction is against public policy, courts should adopt a two-stepped approach: first, determine the public policy from state law and legal precedent; and second be consistent in the application of the definition of public policy.[123] If there is no legal precedent or statute from which the public policy can be drawn, courts should avoid declaring a restriction invalid on those grounds.[124]

This view would also likely be incompatible with Illinois values because of the way courts undertake public policy analyses of restriction clauses. For example, the *Feinberg* court stated a court may declare a contract provision against public policy only if it is injurious to the interests of the public, is contrary to some established interest of society, is against good morals, interferes with the public safety, is in conflict with the interests of society, or is in conflict with the morals of the time.[125] As made clear, like wills, contract provisions can be found to be against public policy.[126] So, while it can make sense to place responsibility on a beneficiary to decide whether to subject him or herself to the testator's condition, this may not

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117 Ransdell v. Boston, 50 N.E. 111, 114 (Ill. 1898).
118 Harris Tr. & Sav. Bank v. Donovan, 582 N.E.2d 120, 123 (Ill. 1991).
119 Lee, *supra* note 112, at 78.
120 Elmore, *supra* note 112, at 221.
121 *Id.*
122 *Id.*
123 *Id.* at 223.
124 *Id.*
125 Feinberg v. Feinberg (*In re* Estate of Feinberg), 919 N.E.2d 888, 894 (Ill. 2009) (citing Vine St. Clinic v. HealthLink, Inc., 856 N.E.2d 422, 436 (Ill. 2006)).
126 *Id.* at 894.

completely solve the problem as Illinois courts are willing to void contract provisions if they are against public policy.[127]

IV. BAN ON RESTRICTION CLAUSES TAILORED AS CONDITIONS SUBSEQUENT

This section discusses an alternative approach to analyzing restriction clauses under the lens of public policy. This part will first reiterate the policy goals Illinois seeks to advance. Then, this part will discuss the benefits of a ban on restriction clauses tailored as conditions subsequent which restrict same-sex marriage, and how this alternative compares to other scholarly suggestions.

First, it is important to clearly identify the three relevant public policies the Illinois General Assembly and courts advance. First, Illinois favors preserving marriage and the right to marry. The State of Illinois recognizes this right as a basic human right.[128] Second, Illinois values the freedom of testation.[129] This is demonstrated through Illinois case law and statutes.[130] Third, Illinois favors restricting the influence of dead hand control.[131]

Illinois courts can better advance these policies by implementing a complete ban on restriction clauses tailored as conditions subsequent which prohibit same-sex marriage. As seen from the application in Part II, the condition subsequent restriction clause, even when written as a partial restraint on marriage, fails the reasonableness test because in effect it unreasonably limits, and likewise entirely eliminates, A's potential mate pool. As a practical matter, if these sorts of restrictions are not banned, it is possible testators may create these sorts of restriction clauses in hopes that courts will construe these clauses in such a way that they will be valid. The courts must strictly apply the reasonableness test to determine whether a restriction clause violates public policy.[132] Further, it is known Illinois courts will attempt to give effect to wills provided the testator's intentions in creating the will are not against public policy.[133] Therefore, although the reasonableness analysis appears to be straightforward, application of this test has the possibility of reaching inconsistent results. The adoption of a ban on restriction clauses on same-sex marriage tailored as conditions subsequent ensures that courts will treat these clauses consistently because courts will

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127 *Id.*

128 Dralle v. Ruder, 529 N.E.2d 209, 214 (Ill. 1988).

129 *Feinberg*, 919 N.E.2d at 895.

130 *Id.* at 895-96.

131 *Id.* at 894.

132 *See* Kleinwort Benson N. Am. v. Quantum Fin. Servs., 692 N.E.2d 269, 275 (Ill. 1998) (citing J&K Cement Constr., Inc. v. Montalbano Builders, Inc., 456 N.E.2d 889 (1983)).

133 *Feinberg*, 919 N.E.2d at 896.

not be stripped of any discretion in trying to construe the restriction clause as one that is reasonable. Allowing a court to consider factors such as the testator's belief on the validity of the restriction, the need for judicial supervision, and strain on an existing family gives courts greater discretion in analyzing whether a restriction clause violates public policy.[134] This complete ban on conditions subsequent will create a more black and white analysis; the restriction clause is either a condition subsequent and therefore violates public policy, or is a condition precedent and does not violate public policy.

In addition to providing more consistent results in the courtroom, this proposal also strikes the appropriate balance of allowing testamentary freedom while preserving marital integrity. Property rights Illinois citizens enjoy include the right to use, the right to enjoy, and the right to dispose.[135] Because Illinois courts view wills as "speak[ing] as of the date of the death of the testator,"[136] implementing a complete ban on restriction clauses which restrict same-sex marriage, regardless of its construction as a condition precedent or a condition subsequent, would in effect be similar to restricting a testator's ability to dispose of property during life. If a gift is contingent, "it is not an estate, but merely the possibility of acquiring one."[137] While it is important to ensure testators are not affecting an undue influence on their beneficiaries' ability to marry, ensuring testators have the freedom to convey by will in the ways the testator believes are best is equally important. One scholar makes the distinction between the right to marry and the right to take property in situations involving testamentary bequests.[138] The right to take property by devise or descent is a privilege granted by law and not a natural right.[139] A ban on these restriction clauses as conditions subsequent creates an appropriate balance because it gives effect to both values while considering reasonable limits upon both. The ban eliminates concerns about dead hand control because conditions subsequent, which affect a continuing influence upon beneficiaries, are eliminated.[140]

This ban on conditions subsequent furthers similar policy goals the coercion test author sought to advance while ensuring testators can freely dispose by will. As discussed above, the ban provides an empirically easier way for courts to determine whether the restriction clause is void by tasking courts solely with the duty of determining whether the restriction clause is a

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134 Kaplan, *supra* note 69, at 315.

135 15 LexisNexis, *Illinois Jurisprudence* § 1.1 (2017).

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

137 Harris Trust & Sav. Bank v. Beach, 513 N.E.2d 833, 841 (Ill. 1987) (citing Hull v. Adams, 77 N.E.2d 706, 712 (Ill. 1948)).

138 Macklin, *supra* note 53, at 277.

139 Magoun v. Illinois Tr. & Sav. Bank, 170 U.S. 283, 288 (1898).

140 Lee, *supra* note 112, at 82.

condition precedent or a condition subsequent.[141] The ban also provides for more consistent results by making the issue black and white; the restriction clause is either void as a condition subsequent or is valid as a condition precedent.[142] However, while the coercion test and the condition subsequent ban ignore the testator's intentions for creating the restriction clause as a condition subsequent, the two proposals differ on considering how the restriction clause exploits the beneficiary.[143] The coercion test alters the reasonableness test and suggests courts utilize the reasonableness test as considering the effect of the restriction clause on the beneficiary.[144] This ban considers the exploitive effect of the restriction clause on the beneficiary but does not give courts discretion to determine the extent of the coercive effect. Instead, the ban recognizes restrictions on same-sex marriage as inherently coercive because they require the beneficiary to make a choice between giving up the right to marry and taking property. While the coercion test may have elements which further Illinois policy goals, the ban on restriction clauses on same-sex marriage tailored as conditions subsequent better advances these goals.

The contract view to these restriction clauses is attractive because it is hard to argue against a proposition that a beneficiary should undergo a thoughtful analysis to determine whether subjecting him or herself to the condition is beneficial or harmful to the beneficiary. This proposal, however, does not completely solve the problem because contract provisions, like will conditions, can be found to be void as against public policy.[145] A court may find contracting away your right to marriage, which Illinois recognizes as a fundamental right,[146] may be injurious to the interests of the public, contrary to some established interest of society, against good morals, interfere with the public safety, in conflict with the interests of society, or in conflict with the morals of the time.[147]

One possible criticism of this proposal is it draws the line at restriction clauses tailored as conditions precedent. If this proposal truly advances Illinois values of preserving marriage, the ban would include both conditions precedent and conditions subsequent. It is true the ban on conditions subsequent does not fully address the issue. This proposal, however, does provide a good balance between preserving marriage and testamentary

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141 *Id.* at 81.
142 *Id.* at 82.
143 *Id.* at 81.
144 *Id.*
145 Feinberg v. Feinberg (*In re* Estate of Feinberg), 919 N.E.2d 888, 894 (Ill. 2009).
146 8 LexisNexis, *Illinois Jurisprudence* § 1:07 (2017) (citing Boynton v. Kusper, 494 N.E.2d 135, 140 (Ill. 1986)).
147 *Feinberg*, 919 N.E.2d at 894 (citing Vine St. Clinic v. HealthLink, Inc., 856 N.E.2d 422, 436 (Ill. 2006)).

freedom. By implementing minimal restraints on a testator's ability to distribute his or her property after death,[148] the General Assembly, and therefore the people of Illinois, established the importance of testamentary freedom. By the same logic, the recent passage of legislation also indicates the people's desire to protect not only marriage but marriage equality for same-sex couples. This proposal advances both policy goals by ensuring beneficiaries are not unduly burdened by restriction clauses tailored as conditions subsequent and allowing testators to create similar restrictions instead as conditions precedent.

V. CONCLUSION

Illinois can best advance its policies by voiding restriction clauses which restricts a beneficiary's ability to take property on the basis of which sex the beneficiary marries when the restriction is tailored as a condition subsequent. Illinois should allow testators to create any restrictions on marriage based on sexual orientation as the testator sees fit by way of condition precedent. First, this ban on conditions subsequent protects a beneficiary's ability to marry without restriction. Second, the ban on conditions subsequent does not unduly restrict Illinois' policy in favor of testamentary freedom because testators are free to create restriction clauses on same-sex marriage as conditions precedent. Third, the ban on conditions subsequent eliminates concerns of dead hand control because it prohibits testators from influencing their beneficiaries' behavior by way of will for years after death. By limiting this testamentary ability to conditions precedent, Illinois courts will be able to strike an appropriate balance of preserving marriage, testamentary freedom, and restricting dead hand control when conducting a public policy analysis.

Suggesting a complete ban on a testator's ability to dispose of property in one specific scenario begs another question: how far can this prohibition extend? One argument could be made that given the nature of same-sex marriage and the fact that a restriction on same-sex marriage effectively eliminates a beneficiary's ability to marry, this situation is unique and not applicable to other situations. However, there could be some reasonable extensions of this doctrine to other restrictions. For example, this ban could be applicable to a restriction which restrict religious intermarriage involving a religious group with a small number of followers. Similarly, the religious part of the prior restriction could be changed to an ethnic group. If a restriction clause required a beneficiary only to marry a person of Mongolian descent, which may constitute a low percentage of the population in the town

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148 *Id.* at 895-96.

or city the beneficiary lives in, a similar ban could benefit the beneficiary. Further analysis would need to be done in these situations, but it is worth noting that this ban has the capability to be applied to other types of beneficiary restriction clauses.