Steve Leimberg's Estate Planning Email Newsletter - Archive Message #1533

Date: 13-Oct-09
From: Steve Leimberg's Estate Planning Newsletter
Subject: **FEINBERG – Illinois Supreme Court Overturns Appellate Court and Upholds Provision in Trust Restricting Benefits to Descendants who Marry within the Jewish Faith**

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In Estate Planning Newsletter #1472, **LISI** alerted members to the fascinating Illinois appellate court decision of *Taylor v. Feinberg*.

That appellate court decision upheld a trial court ruling finding unenforceable (as against the public policy of the state of Illinois) a restriction in Max Feinberg's trust defining descendants for purposes of the Trust to only include those lineal descendants who married within the Jewish faith, or married spouses who converted within a year of marriage.

The Feinberg case was at the convergence of the freedom of testation and the freedom to marry. As **LISI** noted, the decision weighed and balanced such fundamental issues as:

> "It is it is the duty of a court to honor a testator's intention (within the limitations of law and of public policy).
>
> The *question* is (the questions are):
>
> At what point does the balance tip?
>
> At what point must an *individual's* rights give way to a *society's rules*?

> *Whose* freedom should be protected, the testator or the beneficiary's?
>
> More specifically for purposes of the instant case, does (should) a testator have the right to burden the enjoyment of his bounty and make his gift *dependent* on the *condition* that the recipient renounce, embrace, or adhere to a particular religious faith?
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> Is the prerogative granted to a testator by state law to *dispose* of his estate according to his conscience entitled to as much – or less - judicial protection and enforcement as the prerogative of a beneficiary to *receive* an inheritance?
>
> At what point do you have an unconstitutional encouragement of discrimination?
>
> If you don't satisfy a testamentary condition, do you even have a claim?

On September 24, 2009, the Illinois Supreme Court (the "Ill. Supreme Court") weighed in on these touchy issues *overturning* the prior trial court and appellate decision and finding the restrictions to be enforceable.

Here is Jeff's commentary on this important case:

EXECUTIVE SUMMARY:

The fundamental issue presented in this case was whether a court can enforce a will provision treating a lineal descendant who married outside a religious faith as predeceased for purposes of defining the class of beneficiaries. As stated in the decision, the Ill. Supreme Court noted:

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

Initially, a divided appellate court affirmed the trial court holding that the Feinberg plan presented a religious restriction clause that appeared to impair the rights of beneficiaries to marry as they choose and thus said restriction was *invalid* and unenforceable because it was against public policy.

The appellate court held that the restriction seriously interfered with and limited the right of individuals to marry the person of their choice. The Ill. Supreme Court, however, disagreed and found such restriction did not violate the public policy of the state; however, the decision narrowly focused on the very fact-specific issues of this case, and makes an important distinction between conditions precedent and conditions subsequent which may leave the door open to future challenges of similar issues where the drafting might work in a different manner.

FACTS:

Max and Erla Feinberg established trusts to distribute their considerable assets after their deaths. Max died on December 4, 1986; Erla died on October 1, 2003.

Max and Erla were survived by two children, Michael and Leila. They were also survived by five grandchildren, Michele Trull, Aron Feinberg, Lisa Taylor-Schroeder, Jon Taylor, and Aimee Taylor-Severe.

At the time of Erla's death, all of the grandchildren were married; however, only Jon was married to a person of the Jewish faith, by birth or conversion. Max's trust contained the following provision, which the Ill Supreme Court refer to as "the beneficiary restriction clause":

> *A descendant of mine other than a child of mine who marries outside the Jewish faith (unless the spouse of such descendant has converted or converts within one year of the marriage to the Jewish faith) and his or her descendants shall be deemed to be deceased for all purposes of this instrument as of the date of such marriage.*

Erla subsequently exercised a power of appointment she'd been granted in Max's trust to change the disposition of the trusts upon her death. This intervening act may have been the key issue the case hinged on. The Ill. Supreme Court noted:

> Erla exercised her lifetime power of appointment over [the Trust] ... in 1997, directing that, upon her death, each of her two children and any of her grandchildren who were not deemed deceased under Max's beneficiary restriction clause receive $250,000. In keeping with Max's original plan, if any grandchild was deemed deceased under the beneficiary restriction clause, Erla directed that his or her share be paid to Michael or Leila.
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> By exercising her power of appointment in this manner, Erla revoked the original distribution provision and replaced it with a plan that differs from Max's plan in two significant respects.
>
> First, Erla altered the distribution scheme from *per stirpes* to *per capita*, permitting each of the grandchildren to take an equal share, rather than favoring Michael's two children over Leila's three children.
>
> Second, Erla designated a fixed sum to be distributed to each eligible descendant at the time of her death, replacing Max's plan for a lifetime trust for such descendants. The record suggests that Erla's gifts will deplete the corpus of the trust, leaving no trust assets subject to distribution under Max's original plan. Thus, while Erla retained Max's beneficiary restriction clause, his distribution provision never became operative.

No less than three cases evolved out of the beneficiary restriction clause and Erla's exercise of her power of appointment, but they were all

consolidated in the appellate process.

Essentially, the case on appeal to the Ill. Supreme court was the claim brought by Michele Trull, Max and Erla's granddaughter and Michael's daughter, against the co-executors of Erla's estate, Leila Taylor and Michael Feinberg, alleging that the beneficiary restriction clause was void as against the public policy of the state of Illinois and thus not enforceable against her, and thus she was entitled to a share of the trust estate.

As we know from the comments in **LISI** Estate Planning Newsletter #1472, a divided appellate court ultimately sided with the trial court in finding this beneficiary restriction clause *un*enforceable. But the Ill. Supreme Court disagreed and overturned the decision and concluded that the decedent's beneficiary restriction clause did not violate the public policy of the state of Illinois.

COMMENT:

A NARROW DECISION?

The issue of Will/Trust clauses retraining marriage is not new to the courts of Illinois. Since the late 1800s (1898 to be more exact), the Illinois supreme court has held testamentary provisions which act as a restraint upon marriage or which encourage divorce, are void as against public policy. Subsequent Illinois courts have reaffirmed that underlying principle, as have other state's courts. However, the Ill. Supreme Court in this decision found a narrow way to rule on this tough issue, which perhaps leaves the door open for future challenges.

FUNDEMENTAL RIGHT TO LEAVE IT AS YOU LIKE IT:

First, in its opinion, the Ill. Supreme Court spent a great deal of time discussing the fundamental right of testation and all of the law supporting the issue of enforcing a testator's intent in applying and interpreting Will/Trust provisions.

BEFORE AND AFTER – IT DOES MAKE A DIFFERENCE!

Next, the Ill. Supreme Court did something very important. It distinguished between conditions precedent and conditions subsequent. The court noted that it was permissible to impose conditions precedent relative to marriage to a devise. Doing so simply defined the qualifications to be a beneficiary and the testator has a right to define those he/she wishes to benefit. Even a clause defining the class as relating to marriage (for example, I leave my estate in equal shares to all of my children who are not married at the time of my death) does not necessarily invoke a state public policy regarding marriage, as it does not work to cause divorce or dissuade marriage.

Similarly, the Court noted, a living grandparent may use moral suasion or even economic coercion to seek to impose certain behaviors in grandchildren, and that is not against public policy. Thus, imposing a

restriction at the moment of death similarly was not violative of public policy. The court noted it is even fair to say that someone will only be a beneficiary if that person is not married at the time of death, and such a clause is not void as against public policy – since the condition precedent does not seek to change behavior.

Alternatively, the court noted, a condition subsequent might violate public policy. A condition subsequent would work to divest a beneficiary of rights if certain behaviors or actions were taken or were not taken. For example, if a Will says that someone can only be a beneficiary if they subsequently file for divorce after the testator's death, that clause will tend to encourage divorce, and will likely be deemed an impermissible condition subsequent as it is designed to coerce post-death behavior in a manner violative of state public policy.

Finding the beneficiary restriction clause in the Feinberg case to be a condition precedent allowed the court to uphold it as enforceable, while leaving the door open that in other contexts similar clauses (perhaps even clauses similar to that clause initially drafted by Max, had the trust not had the power of appointment) might be unenforceable as conditions subsequent.

DOES IT ENCOURAGE BAD BEHAVIOR?

Next, the Ill. Supreme Court distinguished all of the key Illinois cases on the subject of the state's public policy regarding Will/Trust terms affecting the right of marriage and/or encouraging divorce. Systematically, the Ill. Supreme Court distinguished all of the relevant precedents: *Ransdell*, 172 Ill. 439, *Winterland v. Winterland*, 389 Ill. 384 (1945), and *Estate of Gerbing*, 61 Ill. 2d 503 (1975) (which overruled *Winterland* in part).

The key aspect of the ruling is that the beneficiary restriction clause in Feinberg read in conjunction with the exercise of the power of appointment simply set a condition on which beneficiaries would be members of the class and had no impact on behavior whatsoever. The court said:

> We disagree with the appellate court's conclusion regarding the similarity of the present case to the cited cases. The beneficiary restriction clause as given effect by Erla's distribution scheme does not implicate the principle that trust provisions that encourage divorce violate public policy. That is, the present case does not involve a testamentary or trust provision that is "capable of exerting *** a disruptive influence upon an otherwise normally harmonious marriage" by causing the beneficiary to choose between his or her spouse and the distribution. *Gerbing*, 61 Ill. 2d at 508. The challenged provision in the present case involves the decision to marry, not an incentive to divorce.
>
> We conclude, reading *Ransdell*, *Shakelford*, *Gerbing*, and *Gehrt* together, that no interest vested in the Feinberg's grandchildren at the time of Max's death because the terms of his testamentary trust were subject to change until Erla's death. Because they had no

> vested interest that could be divested by their noncompliance with the condition precedent, they were not entitled to notice of the existence of the beneficiary restriction clause. Further, because they were not the Feinbergs' heirs at law, the grandchildren had, at most, a mere expectancy that failed to materialize for four of them when, at the time of Erla's death, they did not meet the condition established by Max. ...
>
> As this court noted in *Ransdell*, a condition precedent, even if a "complete restraint" on 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." *Ransdell*, 172 Ill. at 447, quoting 2 Pomeroy, Equity Jurisprudence §933B (1881).
>
> Max's will and trust created no vested interests in the children or grandchildren because Erla retained a power of appointment until her death. No vested interests were created in 1997 by Erla's exercise of her power of appointment. Her actions created a mere expectancy, contingent on her dying without further amending the distribution scheme. Because no interest vested in any of the grandchildren until Erla's death, her appointment created a condition precedent. As we noted in *Ransdell*, under these circumstances, even a complete restraint on marriage (*i.e.*, distribution only to unmarried grandchildren) would be operative.
>
> Thus, this is not a case in which a donee will retain benefits under a trust only so long as he continues to comply with the wishes of a deceased donor. As such, there is no "dead hand" control or attempt to control the future conduct of the potential beneficiaries. 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 regarding marriage or the practice of Judaism; rather, she made a bequest to reward, at the time of her death, those grandchildren whose lives most closely embraced the values she and Max cherished.
>
> The trial court and the appellate court erred by finding a violation of public policy in this case. While the beneficiary restriction clause, when given effect via Erla's distribution provision, has resulted in family strife, it is not "so capable of producing harm that its enforcement would be contrary to the public interest."

Finally, the Ill. Supreme Court shot down Michele's claim that the restriction on religion was violative of the Equal Protection clause. She asserted that using religion as a criterion implicated federal constitutional issues and protected classes.

Dismissing her argument the court said:

> Because a testator or the settlor of a trust is not a state actor, there are no constitutional dimensions to his choice of beneficiaries. Equal protection does not require that all children be treated

equally; due process does not require notice of conditions precedent to potential beneficiaries; and the free exercise clause does not require a grandparent to treat grandchildren who reject his religious beliefs and customs in the same manner as he treats those who conform to his traditions.

CONCLUSION: WHAT'S SAID AND UNSAID:

The Ill. Supreme court's narrow presentation of the decision's scope makes for fascinating reading. It appears that the court wanted to say (and perhaps did say but not quite directly) that the provision in Max's Trust would have violated public policy but for the power of appointment of Erla to change the beneficiaries and the unique way in which she exercised that power.

IT AIN'T OVER TILL IT'S OVER:

As the validity of the clause at the moment of Max's death (had there not been a power of appointment) was not relevant to its ruling, the Ill. Supreme Court declined to comment. However, reading the opinion and the interesting fashion in which the court narrowly fashioned its holding, the ruling appears to leave the door open for future litigation over religious clauses that impose conditions subsequent.

WHAT PLANNERS NEED TO THINK ABOUT MOST:

The "take-away" for planners from this holding may well be the importance of looking at any restrictive clauses we draft to consider if they create conditions precedent or conditions subsequent. If a client's preference is for a condition subsequent, then we may need to shift our planning, as it appears conditions subsequent may run against state public policies, such as the policy supporting freedom of marriage and the policy not to enforce clauses that encourage divorce.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Jeff Baskies

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CITES:

Docket No. 106982. IN THE SUPREME COURT OF THE STATE OF ILLINOIS, *In re ESTATE OF MAX FEINBERG*, Deceased (Leila R. Taylor v. Michael B. Feinberg et al. (Michael B. Feinberg, Appellant;

Michele Trull, Appellee)). Opinion filed September 24, 2009; *Taylor v. Feinberg (In re Estate of Feinberg)*, 229 Ill. 2d 667, 900 N.E.2d 1118, 2008 Ill. LEXIS 1531 (2008); *Taylor v. Feinberg (In re Estate of Feinberg)*, 2009 Ill. LEXIS 269 (Ill., Mar. 9, 2009); 383 Ill. App. 3d 992, *; 891 N.E.2d 549, **; 2008 Ill. App. LEXIS 657, ***; 322 Ill. Dec. 534 ; *Ransdell v. Boston*, 172 Ill. 439, 445, 50 N.E. 111, 114 (1898); *In re Estate of Gerbing*, 61 Ill. 2d 503, 507-08, 337 N.E.2d 29, 32-33 (1975); *Winterland v. Winterland*, 389 Ill. 384, 386-87, 59 N.E.2d 661, 662 (1945).