Taming the "Unruly Horse" of Public Policy in Wills and Trusts

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TAMING THE “UNRULY HORSE” OF PUBLIC POLICY IN WILLS AND TRUSTS*

By
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Synopsis: Issues involving “public policy” in wills and trusts (outside of cases involving the Rule Against Perpetuities) do not often arise. Most involve restraints on marriage and conditions encouraging divorce. Since such questions arise infrequently, courts usually were satisfied to state the rules in the area and ignore examination of the tests for and sources of public policy.

This situation is changing. Recent interest of clients in restrictions and incentive clauses, coupled with a new proposal in the Restatement (Third) of Trusts, has generated scholarly discussions on restraints on marriage and divorce. This article uses the Restatement’s new test as a springboard to examine the process by which public policy in wills and trusts should be determined. After examining the new Restatement test and finding it wanting, the article develops a more objective and useful test from earlier formulations of public policy in the wills and trusts area. The Article concludes by analyzing restraints on marriage and conditions encouraging divorce in light of the public policy test developed in the Article, and finds that public policy should no longer find such conditions violate public policy.

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I. INTRODUCTION

Public policy has long been an enigma in wills and trusts. It is a matter often invoked\(^1\) but almost never examined. The “public policy” is never evaluated or examined nor its source stated. The decisions simply state that something is public policy and go no further.

Scholars are little better. Although articles on public policy exist,\(^2\) in the main they explore public policy in constitutional law and in areas other than estate planning. Possibly this is because most “public policy” in wills and trusts involves a narrow area: restraints on marriage and provisions encouraging divorce. Questions on such clauses are not among the more significant questions in the area, nor do they arise with great frequency. Therefore, it was often sufficient to simply state the rules in this area (which are relatively well-established)\(^3\) and ignore the larger questions regarding public policy.

This situation is changing. Apparently, clients are becoming more interested in restrictive and incentive clauses. Several recent and important articles have been written on such clauses.\(^4\) Presentations on the subject are increasing.\(^5\) And a recent and well-publicized case involving a restraint on

\(^1\) To give just two examples of many which could be cited: In Fineman v. Central Nat. Bk., 161 N.E.2d 557, 558 (Ohio Prob. 1959), the court stated that “... a condition in a will by which an inducement is offered to a married person to obtain a divorce... is contrary to public policy, and held to be invalid.” (Citing 3 PAGE ON WILLS 812 (Lifetime Ed.)). And, dissenting in Young v. Ohio Dept. of Human Services, 668 N.E.2d 908 (Ohio 1996), Justice Stratton argued that, “I strongly believe it would be against public policy to allow a parent to create a trust where the trust income or trust corpus can go to the child at the discretion of the trustee, except where such distributions would render the child ineligible for medical assistance from the government” (despite the fact, as pointed out in the majority opinion, the Medicaid statute and regulations permitted such a trust to avoid Medicaid disqualification).

\(^2\) E.g., Alan B. Handler, Judging Public Policy, 31 RUTGERS L.J. 301 (2000).

\(^3\) See Section II, infra. See also Olin L. Browder, Jr., Conditions and Limitations in Restraints of marriage, 39 MICH. L. REV. 1288, 1288, 1305 (1941).


\(^5\) See, e.g., Lauren J. Wolver, Drafting Considerations for Intergenerational Wealth Transfers 4-4 through 4-12, 4-18 through 4-20 (ACTEC 2011 Big10 Regional Meeting (Chicago, IL Dec. 10, 2011) Jon J. Gallo, Eileen Gallo and James Grubman, The Use and Abuse of Incentive Trusts: Improvements and Alternatives, Presentation at 45th Annual Heckerling Institute on Estate Planning (Jan. 3, 2011); Louis Mezzullo, Incentive Trusts: A
marriage was decided in late 2009 in Illinois. Lastly, the Restatement (Third) of Trusts has proposed a new and more encompassing definition of what should constitute public policy in trusts. These developments have generated renewed interest in the considerations surrounding the development of public policy in trusts.

One major caution should be made clear before beginning this inquiry. Although I shall discuss the cases involving conditions on divorce and restraints on marriage because they comprise almost all the cases on public policy in the field, the major theme of this article is what should be public policy in wills and trusts. What is the test for whether something is (or should be) or is not (or should not be) public policy? Where does public policy come from? Second, I do not intend to discuss all the cases on restrictions on marriage and divorce. This has already been well done by Professor Jeffery Sherman and I cannot improve on his discussion.

The discussion will proceed as follows. Section II will give a brief summary of the rules on restraints on restrictions on marriage and divorce to provide a background for the discussion that follows. Section III will present and evaluate the test of the Restatement (Third) of Trusts for public policy in this area. After finding the Restatement’s test unsatisfactory for several reasons, the article will examine another possible definition of public policy used in earlier Restatements. Next will be an examination of the sources of public policy, primarily the courts (decisions), and the legislature (statutes). Lastly, the article will touch the “public policy” basis behind the development of the rules on conditions on divorce and in restraint of marriage, suggest that such rules were the product of the

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6 In re Estate of Feinberg, 919 N.E.2d 888 (Ill. 2009).
8 Jeffrey G. Sherman, Posthumorous Meddling: An Instrumental Theory of Testamentary Restraints on Conjugal and Religious Choices, 1999 U.I.L.L.Rev. 1273. This is a superb discussion of the cases. I disagree with the recommendation of Professor Sherman, but only because I disagree with him on the strength of the support of Americans for testamentary freedom. Professor Sherman believes that the strength of American preference for testamentary freedom is rather weak. I believe it is quite strong. That question is beyond the scope of this article.
9 Section II, infra.
10 Section III, infra.
11 The test is subjective, can be avoided by language in the will (which again is subject to a subjective test, which is undesirable) and focuses to too great an extent on the idiosyncrasies of the particular beneficiary, which is also undesirable. See Section III, infra.
12 See Section IV, infra.
13 See Section V, infra.
II. SUMMARY OF CURRENT LAW ON CONDITIONS INVOLVING MARRIAGE AND DIVORCE

As convenience to the reader and as background to the discussion which follows, a short summary of the current law concerning the rules on conditions on marriage and divorce follows. This would appear to be helpful since many of the cases and most of the discussion of public policy in the area involves such conditions.

A. Trusts

A condition in a trust that absolutely restrains marriage (that is, if the interest of the beneficiary in a trust is contingent on remaining unmarried), is invalid.\(^\text{14}\) Similarly, a condition which encourages divorce or separation is invalid.\(^\text{15}\) However, restraints on the remarriage of the testator’s widow are valid.\(^\text{16}\) Partial restraints on marriages are also valid (so long as the provision does not unduly restrain the choice of eligible marriage partners).\(^\text{17}\) These rules invalidating restraints on marriage or encouraging a divorce are, however, subject to a major exception. If the dominant motive of the grantor is to provide support for the beneficiary until marriage, or provide for funds needed for living and other expenses in the event of a divorce, the provision is valid.\(^\text{18}\) In support of the exception, one court stated; “Under some circumstances, the surrounding facts might very well

\(^{14}\) RESTATEMENT (SECOND) OF TRUSTS § 62, comment d (1959). It should be noted that earlier Restatements of Property contained similar rules for conditions on non-trust interests subject to a condition that the beneficiary not marry. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.2 (1983). Interestingly, no case has been discovered where the condition, rather than requiring the beneficiary to remain unmarried, required the beneficiary to remain married. The closest to a case of this type is In re Estate of Heller, 159 N.W.2d 82 (Wis. 1968) which made no provision for testator’s daughter, Katie Mau, unless at the time of testator’s death she was married to and living with her present husband. The court ruled the provision valid because it had no restraining effect. See subsection B of this section for elaboration of these summaries. See also Hirsch, supra note 4, at 2194-2196; Browder, supra note 3, at 1298.

\(^{15}\) RESTATEMENT (SECOND) OF TRUSTS, § 62, comment e. (1959)

\(^{16}\) RESTATEMENT (SECOND) OF TRUSTS, § 62, comment h. (1959)

\(^{17}\) Id.

\(^{18}\) RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 6.1, comment e. (1983); RESTATEMENT (SECOND) OF TRUSTS, § 62, comment e. (1959). This exception, which is important to the analysis of the effectiveness of section 29 of the RESTATEMENT (THIRD) OF TRUSTS, will be discussed further in Section III.
warrant a testator in placing [a condition increasing the portion of a trust distributable to a beneficiary who is divorced] in his will. By carefully wording the language, it could be made apparent that the testator was making some provision or establishing some safeguard against the [possibility] of divorce. Certainly a man could provide that a certain allowance should be increased or a payment accelerated in the event that a daughter should be divorced and lose some means of support; . . . 19

B. Wills

The rules on restraints on marriage and encouragement of divorce apply mainly to bequests in trust or in non-trust forms that continue after death (e.g. legal life estates and remainders). This is because to be void against public policy, a condition must influence behavior; it must be an inducement to influence behavior after testator’s death. 20 Since a will becomes effective only on death, an outright bequest in a will with a condition to be satisfied at death (e.g., I give $1,000,000 to my daughter only if she is divorced on the date of my death) cannot induce behavior and is valid. 21

III. THE EXPANSION IN THE RESTATEMENT (THIRD) OF TRUSTS

The Restatement (Third) of Trusts expanded the scope of the public policy doctrine in trusts. This was done not so much in the black letter but in the rationale underlying the section and the comments. The black letter is innocent enough. RESTATEMENT (THIRD) OF TRUSTS § 29 provides:

Purposes and Provisions That Are Unlawful or Against Public Policy

An intended trust or trust provision is invalid if:
(a) its purpose is unlawful or its performance calls for the commission of a criminal or tortious act;
(b) it violates rules relating to perpetuities; or
(c) it is contrary to public policy. 22

A. Preliminary Matters: Criminal or Tortious Act

21 Id.
22 RESTATEMENT (THIRD) OF TRUSTS § 29 (2003).
Section 29 invalidates a trust or provision if the provision is unlawful or requires or encourages the commission of a tortious act. Such provisions are rare\textsuperscript{23} and the invalidity of such provisions is clearly correct.\textsuperscript{24}

B. Rule Against Perpetuities

The inclusion of a violation of the Rule Against Perpetuities in this section is curious. The Rule Against Perpetuities is a rule of law.\textsuperscript{25} Where it is still in effect,\textsuperscript{26} violation of the rule invalidates the interest just as would violation of any other rule of law. There appears to be no purpose in signaling out the Rule Against Perpetuities for specific treatment in this section.

C. Public Policy: The Restatement Rule and Rationale

The Restatement (Third) of Trusts invalidates any condition which “tends to encourage disruption of a family relationship or to discourage formation or resumption of such a relationship.”\textsuperscript{27} Specifically excepted is the termination of an interest in the grantor’s widow on remarriage.\textsuperscript{28} However, the Restatement’s prohibitions are broader than that. The later comments also restrict conditions on religious choices and careers and conduct of the beneficiary if the enforcement of the provision “would tend to restrain the religious freedom of the beneficiary by offering a financial inducement to embrace or reject a particular faith or set of beliefs concerning religion”\textsuperscript{29} or provisions that are “unnecessarily punitive” or “unreasonably intrusive into significant personal decisions or interests, or involves an unreasonable restraint on personal associations.”\textsuperscript{30} And an illustration specifically invalidates a condition terminating a beneficiary’s interest if the beneficiary marries a person “not of [a certain] religion.”\textsuperscript{31}

In sum, the Restatement (Third) of Trusts appears to be least

\textsuperscript{23} Id., Rptr’s notes on comment c.
\textsuperscript{24} See Hirsch, supra note 4, at 2194.
\textsuperscript{26} A majority of states have now repealed the rule completely or for most actual trusts or extended if to long periods (such as 350 or 1,000 years). See THOMAS P. GALLANIS, FAMILY PROPERTY LAW 825 (5th ed. 2011). This topic is beyond the scope of this article.
\textsuperscript{27} RESTATEMENT (THIRD) OF TRUSTS, § 29, comment j. (2003)
\textsuperscript{28} Id.
\textsuperscript{29} Id., comment k.
\textsuperscript{30} Id., comment l.
\textsuperscript{31} Id., comment j, illus. 3. Estate of Feinberg, 919 N.E.2d 888 (Ill. 2009) involved such a condition.
questioning of and possibly invalidating all conditions restraining marriage and divorce (except for remarriage of testator’s widow or widower), restraining the religion of the beneficiary or the person whom the beneficiary marries, and influencing the career and personal conduct choices of the beneficiary (including personal habits). The Restatement justifies its position by the spectre of deadhand control over the living, which limits the conditions which can be attached to interests in trusts.\textsuperscript{32}

D. Evaluation of the Restatement Rule

1. Limits of the Restatement Rule

First, we should identify the self-imposed limits on the Restatement’s public policy rule. The rule applies to invalidate all provisions which interfere with a beneficiary’s personal choices or discourage family relationships. First, the Restatement only invalidates “unreasonable” restrictions, although what is unreasonable is not defined. The closest the Restatement comes to a definition is that a trust is not free to impose conditions on “provisions that the law views as exerting a socially undesirable influence on the exercise or nonexercise of fundamental rights that significantly affect the personal lives of beneficiaries and often others as well.”\textsuperscript{33}

The Restatement also states that the provisions, to be invalid, must “seriously” interfere with a beneficiary’s freedom to obtain a divorce;\textsuperscript{34} that a provision to “encourage a beneficiary to be a productive member of society or to pursue a particular occupation,\textsuperscript{35} or to induce a beneficiary to change his or her personal habits or conduct,” is not contrary to public policy.\textsuperscript{36} Presumably, the purpose of this language is to limit invalidity to severe cases which substantially interfere with a beneficiary’s choices.

2. Subjectivity of Test

The first serious criticism of the Restatement § 29 test is that it is totally subjective. What is a “significant” intrusion into the beneficiary’s personal decisions or interests? What restrictions are “unreasonable”? It is inescapable that, at bottom, the test comes down to what is significant to the

\textsuperscript{32} Id., comment i.
\textsuperscript{33} Id.
\textsuperscript{34} Id., comment j.
\textsuperscript{35} Id., comment l.
\textsuperscript{36} Id.
individual beneficiary. It is hard to imagine a court asking whether most beneficiaries would regard the religion of their prospective spouse as “significant” or whether such a restriction was “unreasonable”. From what sources would a judge determine the answer? Since an objective test is probably not available, the test would have to be a subjective test; would this beneficiary consider the religion of the person she chooses to marry, or her career, or his habit of smoking, a significant matter. Given that the restriction might reduce the interest of the beneficiary, the possibility of the answer being one which leads to the invalidity of the restriction is quite strong. The Restatement’s criteria for invalidating conditions is subject to the criticism that it provides for a subjective judgment.

But that is not the only subjective judgment in section 29. In the interference with family relationship section, the Restatement posits that an otherwise invalid condition might be motivated by concern for the beneficiary’s situation. The Restatement allows a subjective inquiry into the grantor’s reasons for including the provision. Of course, if the grantor is deceased, the possibility of tainted testimony or faulty recall is large. The Restatement’s solution to all this is to allow the judge to reform the provision to remove or minimize “socially undesirable effects” and clearly favors giving broad discretion over distributions to the trustee. The problem here is allowing a subjective inquiry into the settlor’s motives. Public policy should not involve the subjective beliefs of the beneficiary nor the subjective motives of the grantor. The test of whether a provision violates public policy should be divorced from the individuals involved in the particular trust.

3. The Change from Favoring Marriage to Favoring Marital Conduct and Religious Choice

Professor Adam Hirsch has recently compared freedom of testation to freedom of contract regarding public policy questions in wills and trusts. He identifies (as this Article has previously identified) a shift in rationale in the Restatement (Third) of Trusts from a policy favoring marriage to a policy favoring marital choice. Professor Hirsch is clearly correct, as previously discussed in this article. I would, however, broaden his description of the rationale of the Restatement (Third) of Trusts to “beneficiary choice,” because the Restatement applies its test beyond

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37 Id., comment j.
38 Id.
39 Id.
40 Hirsch, supra note 4. See also Scalise, supra note 4, at 1343-44, 1346, 1347-48.
41 Id., at 2199.
marriage to conduct, habits and religion. Professor Hirsch identifies a central problem with this test:

Nevertheless, in assessing the public policy of all conditional bequests, we must remember that the influence they exert comes in the shape of a blandishment, and not a shotgun. The weddings (or bachelorhoods) that ensue stem not from coercion, but form the beneficiary’s appraisal of what matters more to him or her – money or matrimonial preference.42

Professor Hirsch has identified an important question inherent in the Restatement formulation of its public policy test. The underlying assumption of the Restatement is that it is against public policy to influence a beneficiary’s choice in “fundamental matters” by the use of money. The Restatement simply boldly states this assumption as a rule, giving only the weak justification of the necessary compromise of freedom of testation and deadhand control, and the statement that the law views such an intrusion into the beneficiary’s choice as socially undesirable without any basis for that statement.43

The article will later discuss the reasoning behind the early cases invalidating restraints on marriage and conditions encouraging divorce.44 For now, it is enough to point out that the Restatement is deficient in failing to present any rationale, proof or overarching principle for its “socially undesirable” label.

4. Interference with a Beneficiary’s Choice

The Restatement problem appears to be that it finds a settlor’s condition restricting marriage or encouraging divorce to be a socially undesirable interference with a beneficiary’s fundamental rights. This characterization leads to two further criticisms of the Restatement position. First, as also pointed out by Professor Hirsch, the condition does not restrict the beneficiary at all – the beneficiary is absolutely free to marry, to pick his or her spouse, to choose a career, or continue a habit, regardless of the condition. There is no coercion here.45 Second, although the presence of such a condition may influence a choice, it is simply one of many factors in

42 Id.
43 RESTATEMENT (THIRD) OF TRUSTS, § 29, comment i (2003).
44 Section VI A, infra.
45 Hirsch, supra note 4, at 2199. See also Scalise, supra note 4, at 1355.
the process of the beneficiary’s decision making. The condition could be likened to a litigant’s decision to accept or decline a settlement offer in litigation. The litigant will weigh the likelihood of a higher recovery by going to trial verses the costs of trial and the certainty of a payment if the settlement is accepted. In both cases, the money will influence the decision, but in no way control it.46

5. The Economic Cost of Conditions on Marriage and Divorce

I am not an economist. However, Professor Hirsch has recently analyzed the economic costs and benefits of the types of conditions we are discussing and concluded that these conditions neither involve irreversible choices nor entail tangible spillover costs.47 Otherwise said, economic analysis provides no justification for the Restatement’s new test.

6. Allowed Methods of Influencing a Beneficiary’s Choice

An additional factor in evaluating the Restatement’s position is that current law allows many other limits on a beneficiary’s interest. A prime example is the spendthrift trust. A spendthrift clause prevents the creditors of a beneficiary from attaching the beneficiary’s interest in the trust until it becomes possessory and prevents the beneficiary from assigning her interest in the trust to others.48 A spendthrift clause can prevent a beneficiary from pursuing an economic opportunity by use of her interest in the trust as security or otherwise. Yet this restraint is upheld as valid virtually everywhere.49

Second, discretionary trusts (or, as the Restatement (Third) refers to them, discretionary interests), are valid.50 These interests may limit the rights of the beneficiary in any number of ways, from the amounts the beneficiary may receive, to the standards under which the trustee may be attacked for failure to make distributions, to the rights of creditors of the beneficiary to attack the trusts.51 And, of course, there is the fact that no person, outside of the spouse, is entitled to any inheritance under the law of most states, which clearly restricts the rights of beneficiaries. Moreover,

46 See Martin D. Begleiter, Anti-Contest Clauses: When You Care Enough to Send the Final Threat, 26 Ariz.St.L.J., 629, 643-644 (1994), where I made a similar argument against a public policy limiting the enforcement of no contest clauses.
47 Hirsch, supra note 4, at 2200-07.
49 Id., comment a.
50 Id., § 50.
51 Id., §§ 50, 60. Any extended discussion of discretionary trusts is beyond the scope of this Article.
there are numerous and perfectly legal methods of influencing others (although, granted, most of these are used during lifetime). To name just a few; parents often influence or try to influence their children’s choice of a college, a career, conduct and yes, marital partners. So do other family members and acquaintances, as do the person’s peers. Advertisers attempt to influence what we buy and which remedies we use when we are sick. The list goes on and on. With all these ways to influence available, why pick out restrictions on marriage, divorce and conduct in trusts to invalidate?

7. The Practice Effect

When a client approaches a practitioner, the client wants an answer. That is, if he wants to provide that a trust beneficiary who becomes a lawyer, or a surgeon, or marries a person not of X religion gains or loses his interest in the trust he proposes to create, he wants to know whether the provision will be valid or invalid. One of the most significant difficulties with the Restatement (Third) of Trusts test is that it does not provide lawyers with the answer to these questions. Due to its vague terms, its subjective test (depending on what is significant to the beneficiary), its qualified exception for provisions for need of the beneficiary after a divorce, and its extension of these ideas beyond marriage and divorce into religion, conduct and habits, the Restatement has increased, rather than reduced, uncertainty. Practitioners will be unable to answer the client’s questions about the likely validity of the conditions desired.  

E. Summary

The Restatement’s extension of the rule invalidating restraints on marriage and conditions encouraging divorce into conduct, habits, and the

52 The Reporter of the Restatement (Third) of Trusts, to his credit, does state “simple and precise rules of validity or invalidity frequently cannot be stated [in these cases].” Id. § 29 comment i. However, it is this very uncertainty of result that causes problems for practitioners. This is well brought out by a discussion on the floor of the 1999 American Law Institute (ALI) Annual Meeting. At that meeting, the author asked the Reporter if he could say whether a trust provision would be valid or invalid in the following circumstances: Testator, a dedicated pacifist, wanted to create a trust with income to his son for life, but if the son ever worked for a company which manufactured weapons, or any of their components, the trust would terminate and the corpus paid to Amnesty, International. The Reporter answered that under the Restatement (Third) formulation, he could not state whether the provision would be valid or invalid as against public policy. See Proceedings of the 76th Annual Meeting of the American Law Institute 233-36 (1999). A number of other comments from the floor supported the author’s objections and questioned the desirability of the Restatement formulation. Id.
choice of marital partners is problematic. Its change of the test to one of the financial impact of the condition on the beneficiary and the presumption that such a condition is often against public policy as an interference with fundamental rights requires subjective inquiries and determinations by courts, ignores the economic neutrality of such conditions, offers no help to practicing attorneys, and has too many problems to be a test for public policy.

IV. PUBLIC POLICY IN TRUSTS – A BETTER TEST

A. The Courts and Scholarly Commentary

Since, as demonstrated above, the concept of public policy in the Restatement (Third) of Trusts appears inadequate on numerous grounds, we should turn to the views of courts and scholarly treatments on public policy prior to the Restatement (Third) of Trusts to see if they offer any guidance on a definition of public policy. First, we need to be clear that we are here discussing public policy under the common law; that is, the situation where no statute exists on the question involved. The most agreed on statement is that public policy is hard to define and elusive. It has both early and late been described as “an unruly horse.” “Questions of public policy are not fixed and unchanging, but vary from time to time and place to place.” A few courts have attempted to define the concept. Public policy “imparts something that is uncertain and fluctuating, varying with changing economic needs, social customs, and moral aspirations of a people.” It involves “a matter that effects society at large rather than the litigants’

53 Section III, supra.
54 This survey does not intend to, nor purport to be, exhaustive, but rather representative.
55 Tunstall v. Wells, 50 Cal.Rptr. 468, 474 (App. 2006); Grant v. Butt, 17 S.E.2d. 689, 693 (1941); Gerard Trust Co. v. Schmitz, 20 A.2d. 21 (N.J.Ch. 1941); In re Rahn’s Estate, 291 S.W. 120, 122-23 (Mo. 1926); 2 A.W. SCOTT, W. F. FRATCHER & MARK L. ASCHER, SCOTT & ASCHER ON TRUSTS, 473 (5th ed. 2009); IVA W. FRATCHER, SCOTT ON TRUSTS, 308 (4th ed. 1987); Joshua C. Tate, Should Charitable Trust Enforcement Rights Be Assignable, 85 CHICAGO – KENT. L.REV. 1095, 1162 (2010); Alan B. Handler, Judging Public Policy, 31 RUTGERS L.J. 301 (2000).
56 Richardson v. Mellish, 130 Eng.Rep. 304 (1824); RESTATEMENT (THIRD) OF TRUSTS, § 29, general notes to comment c and comments i-i(2) (2003); quoting W. FRATCHER, SCOTT ON TRUSTS (4th ed. 1987), supra note 55.
58 Grant v. Butt, 17 S.E.2d 689, 693 (S.C. 1941) (quoting STORY ON CONTRACTS § 675 (5th Ed.).
purely personal or proprietary interests.” Another court, quoting an earlier case, said “one of the best definitions, perhaps is that of Justice Story, which applied the term to invalidate that which ‘conflicts with the morals of the time, and contravenes any established interest of society...’”

Perhaps closer to a description of the concept, the court in *Gerard Trust Co. v. Schmitz* stated: “Sometimes such public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and connections of the people – in their clear consciousness and conviction of what is naturally and inherently just and right between man and man.” In the same vein, Oliver Wendell Holmes stated; “The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong.”

B. An Alternate Theory of Public Policy

This last formulation – that public policy consists of conceptions prevalent in the community – found expression in the First Restatement of Trusts and the Second Restatement of Trusts. The relevant Restatement (Second) of Trusts provision states:

Whether such provisions [inducing the commission of acts which are not illegal or immoral by giving an improper motive for their commission] are invalid depends upon the conceptions of public policy which are prevalent in the community. Owing to the changing character of ideas of morality, especially in regard to the relations of the sexes and religious matters, and owing to the diversity of ideas in different communities, it is inadvisable, if not impossible, to make categorical statements on these matters.

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60 Gerard Trust Co. v. Schmitz, 20 A.2d 21, 29 (N.J. Ch. 1941), quoting State v. Bowman, 170 S.W. 700, 701 (Mo. 1914).
61 Id. at 21, 29-30.
62 OLIVER WENDELL HOLMES, JR., THE COMMON LAW (ABA 2009). See also Moss v. Cohen, 53 N.E. 8, 10 (N.Y. 1899): “By the term public policy is intended that principal of law which holds that no citizen can lawfully do that which has a tendency to injure the public, or which is against the public good.”; Olin L. Browder, Jr., *Illegal Conditions and Limitations; Miscellaneous Provisions* 1 Okla.L.Rev. 237, 237 (1948) (A provision is against public policy when it “tends to produce socially undesirable consequences.”)
63 *RESTATEMENT OF TRUSTS* § 62, comments c, d (1935).
64 *RESTATEMENT (SECOND) OF TRUSTS* § 62, comment d (1959).
65 Id. Following this statement, a series of comments consider particular types of restrictions on marriage and divorce, and state that such provisions “may be held invalid.”
This theory – that public policy involves widely held beliefs which are prevalent in the community – provides an alternative to the Restatement (Third) of Trusts conception of public policy. This theory needs to be analyzed in the same way as the theory of the Restatement (Third) of Trusts.

C. Analysis of the Theory

1. Vagueness

The theory is general and somewhat vague. It gives no guide as to how to determine the prevalent beliefs of a community. It is not uniform, because the theory admits that public policy may be different in different communities.

2. Objectivity

One of the primary criticisms of the rationale of the Restatement (Third) of Trusts on public policy was that the rationale was subjective, both as to whether the restraint “unreasonably” interfered with a beneficiary and as to whether the “right” involved was so significant to the beneficiary as to be “fundamental,” and as to the motive of the settlor of the trust in creating the restriction. The prevalent in the community test, in contrast, is objective. It does not involve a subjective evaluation of the importance of the right (e.g., marriage, religion, occupation) to the beneficiary nor the motive of the settlor in creating the restriction. To evaluate the validity of the restriction, a court need only determine whether there is a prevalent conception on the question in the community.

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Id. comments e-j.

See Section III, supra. As the reader will recall, the test of RESTATEMENT (THIRD) OF TRUSTS § 29 is that any restriction which “unreasonably” interferes with a beneficiary’s exercise of his or her “fundamental” rights violates public policy.

This will be discussed in greater detail subsequently. See section IV C 6 and note 69, infra.

See section III, supra.

See Hirsch, supra note 4, at 2196, noting that the recent Restatement (Third) of Contracts follows an objective standard on restraints as opposed to the Restatements (Third) of Property and Trusts, which employ a subjective standard. I do not mean to overly simplify the task of the court. Determining the prevalent conception of the community on an issue may cause difficulties for a court. However, there are factors which may help in this court’s quest. See Section IV C 6, infra. And determining the purpose of the settlor in creating a condition is also not an easy task, because the settlor may be deceased.
3. The Judges’ Predilections Are Less Involved

The invocation of public policy has been criticized for allowing the judge to use his or her own politics or feelings as a determinant of public policy. A good example is the dissent of Justice Stratton in Young v. Ohio Dept. of Human Services. Janet Young’s father created a special needs (sometimes referred to as a “supplemental needs”) trust that prohibited the trust from making distributions that would be paid for by the government or make her ineligible for or reduce governmental benefits or Medicaid. Such a provision was specifically allowed by the Ohio administrative regulations. The Supreme Court of Ohio upheld the trust provisions, ruling them as not void on public policy grounds. Justice Stratton dissented, stating:

Where a child has reached the age of majority and the obligation to support has ceased, *I strongly believe it would be against public policy* to allow a parent to create a trust where the trust income or trust corpus can go to the child at the discretion of the trustee, except when such distributions would render the child ineligible for Medicaid assistance from the government. . .

I would find that to allow a trust to distribute income or principal for virtually any purpose except for purposes that would eliminate or reduce Medicaid is against public policy. . .

This sort of declaring one’s own views as public policy is easy under the subjective test of the Restatement (Third) of Trusts. It is much more difficult under the prevalence of community beliefs test.

4. Freedom of Testation

Freedom of testation has been called the most fundamental guiding principal of American inheritance law and a “sacred privilege.”

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71 668 N.E.2d 908 (Ohio 1996).
72 Id. at 909.
73 Id. at 912 (emphasis added).
74 Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Out of Intestacy*, Rutgers Univ. School of Law Newark Research Series (Draft), SSRN-id 1986101, last viewed on 1/17/12.
earlier view that the support for freedom of testation is weak has been contradicted by more recent authors. Clearly, a limited definition of public policy as described in this section is much more supportive of free testation than the intrusive provision of the Restatement (Third) of Trusts.

5. Other Restrictions on Beneficiaries Allowed by Trust Law

Restrictions on beneficiaries of wills and trusts abound in both American law and the law of other countries. “[S]cholars in this country and abroad have noted ‘[a]ll donative transfers are inherently discriminatory as will makers choose the objects of their bounty.’” To use a simple example, a testator may favor one child over another, or may completely disinherit a child. Yet beneficially motivated conditions and incentive clauses have not been challenged. Spendthrift clauses, for example, certainly restrict beneficiaries in taking advantage of opportunities by preventing the beneficiary from assigning her rights or using the trust interest as collateral. Yet spendthrift clauses are held valid, even by the Restatement. Surely many beneficiaries would view a spendthrift clause as an interference with their choices, possibly as significant of whom to marry. Yet spendthrift clauses are valid. Indeed one could argue that trusts

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75 Id. At 6 (quoting LAWRENCE W. DIXON, WILLS, DEATH AND TAXES 3-11 (1977)).
76 Sherman, supra, note 8, at 1281-1284. Sherman believes that “[w]e should allow testation because not to allow it would be harmful. But we should allow it only to the extent necessary to prevent those particular harms. . . allowing [testators] to use their wealth to control other people’s lives is not necessary.” Id. at 1284. That leads to the conclusion that restrictions on restraints of marriage and encouraging divorce are permissible.
77 See Scalise, supra note 4, at 1319-25. Scalise argues that Sherman’s view, note 76, supra, taken to its logical conclusion, would allow little more than outright bequests. Id. at 1319. He criticizes the minimalist view as focusing totally on the beneficiary and ignoring the satisfaction of the testator in having his or her wishes fulfilled. Id. at 1320. He also discusses the existing evidence as indicating strong support of Americans for testamentary freedom. Id. at 1321-24. He notes that incentive bequests also affect beneficiary choices, yet have not been challenged as against public policy. Scalise concludes his examination by stating: “In fact, a robust, rather than a minimalist, theory of testation is more descriptive of rights of testation as they exist in modern American society. . . Courts in various states have noted that there is a ‘strong public policy’ in favor of free testation and that freedom of testation in this country is a ‘jealously guarded right.’” Id. at 1325. See also Hirsch, supra note 4, at 2200.
79 Private discrimination is not prohibited by the Constitution. It is allowed and “happens. . . for good, bad, and arbitrary reasons.” Scalise, supra note 4, at 1348.
80 Id. at 1320.
81 RESTATEMENT (THIRD) OF TRUSTS § 58 (2003).
themselves interfere with significant choices on fundamental rights of beneficiaries by limiting the interests of beneficiaries and their rights to use their interests. Why restrictions on marital rights and divorce are singled out for special treatment is difficult to understand.

A public policy which allowed intervention only for policies which violated beliefs prevalent in the community would limit public policy to its proper scope.

6. Minimal Intervention

Perhaps the most significant change in the public policy test made by the Restatement (Third) of Trusts is the frequency public policy could be used to invalidate restrictions on a beneficiary’s desires. The Restatement would allow intervention any time a restriction infringed on or affects a beneficiary’s freedom of choice on “fundamental rights that significantly affect the personal lives of beneficiaries...”83 This would allow judicial intervention, and modification or invalidation, of many of testator’s restrictions. In addition to restrictions on divorce and restraints on marriage, conditions on careers, conduct and religion are subject to judicial invalidation. And these are only examples. Other, as yet unthought-of, restrictions can also be subject to the Restatement test.

The test proposed in this section would subject many fewer restrictions to judicial scrutiny. I seriously doubt whether there are any generally held beliefs in the community that a testator putting restrictions on a child’s career choice or conduct (e.g., smoking, use of drugs) is invalid. Indeed, if anything, I would expect that generally held beliefs in most communities would favor such restrictions. As the relations between the testator and beneficiary became more distant (for example, nieces and nephews or cousins), perhaps the nature of the beliefs of the community would change. The point, however, is that the test of the earlier Restatements, advocated here, requires a prevalent belief in the community for the courts to intervene, and such a condition will be rare. And that is as it should be. Intervention to invalidate distinctions on the ground of public policy should be rare. It should be reserved for the most serious cases, and cases in which a strong and unified belief in the community exists that the action is

82 Scalise, supra note 4, at 1316.
83 RESTATEMENT (THIRD) OF TRUSTS, § 29, comment i. (2003).
84 Id., comment j.
85 Id., comment l.
86 Id., comment k.
87 Id., comment i(2).
Wrong. Public policy should only invalidate only extremely serious provisions in wills and trusts. The definition in the earlier Restatements accomplishes this much better than the Restatement (Third) of Trusts test.

V. SOURCES OF PUBLIC POLICY

A. Statutes

The previous sections have discussed the role of public policy under common law, where no statute addressed the question involved. We now move to the role of the legislature, courts and administrative agencies in determining public policy.

If one thing is clear in the area of public policy, it is that the statutes passed by the legislature of the state are the prime source of public policy. Both courts and commentators agree completely on this matter. This proposition is so well accepted to almost need no citation, though many more cases could be listed in addition to the representative sample

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89 In re Ruhin’s Estate, 291 S.W. 120, (Mo. 1926); “So it has been held by the appellate courts of our own state that ‘the very highest evidence of the public policy of any state is its statutory law’ and ‘if there is legislation on the subject, the public policy of the state must be derived from such legislation.’” Id. At 123, quoting Moorshead v. Rys. Co., 96 S.W. 261, 271 (Mo. 1906); See also nn. 93-94, infra.

90 Estate of Feinberg, 919 N.E.2d 888, 894-95 (Ill. 2009); Texas Commerce Bank N.A. v. Grizzle, 96 S.W.3d 240, 250 (Tex.App. 2002); (“The State’s public policy is reflected in its statutes.”); Grant v. Butt, 17 S.E.2d 689, 693 (“it may be regarded as well settled that a state has no public policy, properly cognizable by the courts, which is not derivable by clear implication from the established law of the state, as found in it Constitution, statutes and judicial decisions.”)

91 Holmes, supra note 62, at 24, 46 (“in substance the growth of the law is legislative.”), “Public policy, that is to say, legislative considerations, are at the bottom of the matter. . .”, David A. Brennen, The Power of the Treasury; Racial Discrimination, Public Policy, and “Charity” in Contemporary Society, 33 CAL. DAVIS. L. REV. 389, 426 (Congress is the best body to determine the nation’s public policy on race “because it is equipped to balance all the interests involved in deciding what policies are ‘established.’ In deciding where to strike the balance, Congress is empowered to conduct legislative hearings and examine societal perspectives” to determine whether affirmative action is against public policy. Democratic process enable congress to better ensure that the balance struck is reflective of the populace.); Handler, supra note 3, at 306 (“. . . Dworkin was strongly resistant to policy as a ground for legal decision. That is, policy decision-making, which means to serve the collective goals of a community as a whole, is a legislative matter. . .”)
However, some care needs to be exercised even for such a well-accepted rule. The public policy provided by a statute needs to be read with the exceptions and qualifications provided in the statute. That is, the courts should apply public policy, even as derived from statutes, narrowly, in the sense that a court should not declare that the legislature has adopted a broad public policy in a statute if the statute has substantial qualifications and exclusions.

It seems clear to us, therefore, from the great weight of judicial authority, that no act or transaction should be held to be void as against public policy unless it contravenes some positive, well-defined expression of the settled will of the people of the state or nation, as an organized body politic, which expression must be looked for and found in the Constitution, statutes or judicial decisions of the state or nation, and not in the varying opinions and whims of judges or courts, . . . , as to what they themselves believe to be the demands or interests of the public. So it necessarily follows that courts should exercise extreme caution in declaring any act or transaction void as against public policy, unless it clearly appears that the transaction contravenes the Constitution, some positive statute, or some well-established rule of law announced by the judicial decisions of the state or nation.93

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92 See nn. 89-90, supra.
93 In re Rahn’s Estate, 291 S.W. 120, 123 (Mo. 1926).
B. Courts, Constitution and Other Sources

1. Sources

Generally, with some differences in degree, in addition to statutes, the constitution and court decisions are used as sources of public policy.94 Some courts have held that administrative regulations can be a source of public policy.95 At least one state gives court decisions an extremely limited role in public policy.96

2. Courts Development of Public Policy in Statutes

When the source of a public policy is a statute, the courts view their role as deciding whether the statute expresses a public policy and determining the policy.97 The courts are very quick to acknowledge that courts neither declare public policy nor give protection that “the legislature has chosen not to provide under a statutory scheme.”98 What the courts do is determine if public policy has been expressed in a statute.99 As one concurring justice stated; “In general, I believe that courts should refrain from trying to determine or articulate public policy. ... courts should generally abstain from making declarations of public policy. Such pronouncements should be left to other branches of government, particularly the legislature, which is in a far better position than a court to make policy decisions on behalf of the citizenry.”100 Courts proceed cautiously where a statute is involved, and hesitate to “infer a broad public policy from a statute which is limited in scope to specific discriminatory practices.”101 For example, an Illinois court recognized a public policy favoring safe transportation of school children from the Illinois Constitution and several statutes and a policy

96 Taylor v. Beard, 2001 WL 1381355 (Tenn.); Sloan v. Tri-County Electric Membership Corp., 2002 WL 192571 (Tenn); Watson v. Cleveland Chair Co., 789 S.W.2d 538, 540-41 (Tenn. 1989). Tennessee does not discern public policy from the common law, so it must be evidence by an unambiguous statute, regulation or constitutional provision. Stein v. Davidson Hotel Co., 945 S.W.2d 714, 717 (Tenn. 1997).
98 Id. at 765-66.
99 Id. at 765.
favoring protection of the public (including children) from convicted sex offenders, based on the Illinois Sex Offender Registration Act.\textsuperscript{102}

3. Courts Role in Public Policy Where no Statute Exists

Earlier sections of this Article discussed the definition of public policy where no statute exists.\textsuperscript{103} The courts are more liberal in developing public policy when no statute on the subject is involved, but the courts are still cautious. One of the more detailed and well-reasoned explanations of the courts role in such cases was given in In re Rahn’s Estate.\textsuperscript{104} Rahn involved a bequest to the German Red Cross Society by a testator who died in 1920, shortly after the close of World War I. The German counsel petitioned for the money to be paid to him in his official capacity. The executor contended that the bequest was void as against public policy, on the ground that the bequest aided the fighting forces (or their families) of an enemy of the United States. The court reversed the finding that the bequest was void as against public policy, stating:

“Vague surmises and flippant assertions as to what is the public policy of the state, or what would be shocking to the moral sense of its people, are not to be indulged in. . . . The only authentic and admissible evidence of the public policy of a state on any given subject are its constitution, laws and judicial decisions.” . . . \textsuperscript{105}

It seems clear to us, therefore, from the great weight of judicial authority, that no act or transaction should be held to be void as against public policy unless it contravenes some positive, well-defined expression of the settled will of the people of the state or nation, as an organized body politic, which expression must be looked for and found in the Constitution, statutes, or judicial decisions of the state or nation, and not in the varying personal opinions and whims of judges or courts, . . . as to what they themselves believe to be the demands or interests of the public. So it

\textsuperscript{102} Chicago Transit Authority v. Amalgamated Transit Union, 926 N.E.2d 919 (Ill. App. 2010). The court overturned an arbitrator’s award of reinstatement of a school bus driver who had been convicted of aggravated criminal sexual abuse of his 12 year old stepdaughter.

\textsuperscript{103} See Sections III-IV, supra.

\textsuperscript{104} 291 S.W. 120 (Mo. 1926).

\textsuperscript{105} Id. at 123 (quoting Swann v. Swann, 21 F. 301 (E.D. Ark. 1884).
necessarily follows that courts should exercise extreme caution in declaring any act or transaction void as against public policy, unless it clearly appears that the transaction contravenes the Constitution, some positive statute, or some well-established rule of law announced by the judicial decisions of the state or nation.106

Since there was no statute forbidding a bequest to an alien, the court reversed the lower court decision.107

Another court, in a case involving the validity of a no-contest clause, said:

“Public policy” is inherently hard to define. (citation omitted). But notwithstanding this difficulty, the concept has limits, and a court therefore should not freely characterize any potential source of unpleasantness between people as a violation of public policy. It is primarily the prerogative of the Legislature to declare what is against public policy, though courts may find something to be against public policy if it is “clearly injurious to the interests of society.” . . . To help ensure that declarations of public policy are based on more than a particular court’s sense of fairness, the policy in question should involve a matter that affects society at large rather than the litigants’ purely personal or proprietary interests. . . In sum, “it is generally agreed that ‘public policy’ as a concept is notoriously resistant to precise definition, and that courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch.”108

Finally, we come to the most extensive discussion of public policy in the estate and trust cases. It is also the case that goes the farthest into the court making law in this area, rather than simply interpreting a statute or the settled beliefs of the community.

Gerard Trust Co. v. Schmitz109 involved a trust which provided for a distribution of the income in various proportions to four of testator’s six

106 Id. at 123 (emphasis added); See also Estate of Feinberg, 919 N.E.2d 888,894-97 (Ill. 2009).
107 Id. at 124-25, 131.
108 Tunstall v. Wells, 50 Cal Rptr. 3d 468, 474 (App. 2006) (quoting Maryland Casualty Co. v. Fidelity Casualty Co. of N.Y., 236 P. 210 (Cal. App. 1925)).
109 20 A.2d 21 (N.J. Ch. 1941).
brothers and sisters, and the corpus in the same shares after 20 years of the
death of his remaining siblings and their spouses. The trust interests were
contingent on the brothers and sisters who were beneficiaries and their
children having no communication with the remaining brother and sister,
and not living in the same house with either those siblings or their families,
from the date of testator’s death and after notice of the provision “except
such communication as shall be absolutely necessary in the settlement of
[testator’s] father’s estate, and for no other purpose.” Alternate
provisions were included ending the interest in the trust for those siblings
who violated the directions. Three of the beneficiary siblings survived
testator, although one survived him by only a few hours. Neither of
testators’s surviving brother or sister accepted the conditions in the will and
violated them in the time between testator’s death and the hearing. After
repeating the previously described difficulties in determining public
policy and the sources of public policy, the court spent substantial time
quoting cases (none of which involve estates and trusts) for the proposition
that the common law can serve as a source of public policy. Quoting
extensively from an Ohio case, the court says:

More often, however, [public policy] abides only in the
customs and conventions of the people – in their clear
consciousness and conviction of what is naturally and
inherently just and right between man and man. . .
When a course of conduct is cruel or shocking to the
average man’s conception of justice, such course of
conduct must be held to be obviously contrary to public

\[110\] Id. at 24-25.
\[111\] Id. at 26.
\[112\] Id.
\[113\] Id. at 28-29; See Section IV, supra.
\[114\] Id. at 29. See the previous discussion in this Section V, supra. It should be noted
that even in beginning its discussion, the court notes that in “some” jurisdictions, public
policy must be determined from the statutes, constitution and cases, while in others the
courts “may also consider the conventions and customs of the people as expressed in the
common law.” Id. This is important because, as we have seen previously in this section,
the courts, even when considering settled beliefs in the community, are very cautious in
adopting public policy based on such grounds, and that the vast majority of states limit the
sources of public policy to the first category and go beyond that only to interpret other
sources of law. The court’s willingness to accept the conventions and customs of the
people as expressed in the common law,” id., foreshadows the court’s willingness to make
law on this basis.
\[115\] Id. at 29-30.
\[116\] Pittsburgh, Cincinnati, Chicago and St. Louis Railway Co. v. Kenney, 115 N.E.
505, 506 (Ohio 1916).
policy, though such policy has never been so written in the bond, whether it be Constitution, statute, or decree of court.117

The court admits that no statute, no case, and no constitutional provision, and indeed no authority prohibits the condition involved in the case.118 The court then searches the common law for authority to void the provision, finding it in the prohibition on general restraints on marriage119 and the encouragement of divorce cases.120 Citing some treatise writers and legal encyclopedias, the court approves a definition that conditions are void which conflicted “with the morals of the times.”121 Admitting there is no legal duty to support brothers and sisters (and there may have been, at that time in New Jersey, a statute expressly negating such a duty)122 the court then remarkably concludes:

But while there is, perhaps, no legal duty on the part of the brother and sister legatees of the Schmitz will to associate or have social or family intercourse with the proscribed brother and sister, and their respective families, if the public is interested in the maintenance of harmony in the family, and if the family is the cornerstone of civilization, as is claimed by reputable authorities, then there is at least a moral duty on the various brothers and sisters to treat one another with cordiality, at least, and any condition which tends to make any one of these individuals violate this moral duty should, on principle, be held contra bonds mores and void.123

While a detailed evaluation of Schmitz is beyond the scope of this article, some points need to be made. The case represents the outer limit of an expansionist view of a court’s ability to make public policy. The court admits that no statute, precedent, or constitutional provision supports its decision. The court creates a “moral duty” to support one’s siblings. From where does this duty arise? Don’t we all know people who rarely see or speak to their siblings? Can they be sued? How is this “moral duty”
enforced? And even if such a moral duty exists, how can it be said to be a source of public policy? The court did not weigh the moral duty against the admitted strong policy of freedom of testation. Nor did the court inquire as to whether the settled belief of the community justified such a moral duty.

_Schmitz_ was an unusual case. It was not the normal case in this area and did not involve restraints on marriage or encouragement of divorces. It is given significance because it is the most extensive case discussion of a court creating public policy in the absence of statute. We need to remember, however, that _Schmitz_ is the opinion of one judge in a lower court. It disregards the warnings of legions of cases, already mentioned,\(^{124}\) that courts should be extremely cautious in extending public policy in this area to avoid making public policy depend on the beliefs of the particular judge.\(^{125}\) No source is given for the judge’s conclusion that a moral duty to one’s siblings exists, and there is no discussion (other than prior cases on other subjects) as to how the court discovered this moral duty, or what its scope is, or how it can be enforced. The case is an extreme example of an overly broad judicial interpretation of public policy, an outlier, which should not be used to ignore the cautions of so many other cases previously discussed. The case also starkly raises the dangers of the judge using his own opinions as the basis of what he decides is public policy. This subjective approach promotes differences among judges and hinders the search for a usable definition of public policy.

In sum, a court should base public policy on a statute or constitutional provision, and confine its investigation to a determination of and the scope of the policy propounded by the law. If no statute or constitutional provision exists, the court should tread carefully in declaring public policy from judicial decisions and, in doing so, should inquire as to whether the policy declared reflects the substantial belief in the community. In such a case, the court should carefully document the factors which convinced the court that the policy reflects the substantial beliefs of the community, and rigorously avoid the temptation to substitute the judge’s own beliefs for the settled beliefs of the community. Or, as stated by one commentator:

> The courts should only override a settlor’s intention if the purpose of the trust is so offensive to our mores that society cries out in indignation. I doubt whether the settlor’s private views or marriage and religion, which may be sincerely and deeply held, are so offensive that their

\(^{124}\) See this Section V, _supra_.

\(^{125}\) An additional possible indication that this occurred in Schmitz is the citation by the court of the Pauline Doctrine (Romans, 12:10) and the Sermon on the Mount (Mathew, 5) as support for its decision. _Gerard Trust Co. v. Schmitz_, 20 A.2d. 21, 36 (N.J. Ch. 1941).
imposition through trusts after death can unequivocally be said to offend public policy.\textsuperscript{126}

VI. RESTRAINTS ON MARRIAGE AND CONDITIONS ENCOURAGING DIVORCE: PUBLIC POLICY JUSTIFICATIONS AND CURRENT RELEVANCE

And so we come full circle. We began with the primary class of public policy cases in the will and trusts area – conditions encouraging divorce and conditions restraining marriage. Now that we have developed what public policy in the area should be, and where it should be derived from, we need to go back and evaluate the cases which developed the current public policy. Finally, we need to evaluate those policies in light of modern conditions.

A. Restraints on Marriage and Conditions Encouraging Divorce: American Origins and the Bases for the Rules

The rules prohibiting general restraints on marriage and conditions encouraging divorce have roots in Roman\textsuperscript{127} and English\textsuperscript{128} law. The underlying reasons for the development of the rules depended on the view that marriage and divorce were not merely private interests, but involved a legal rule with public expectations and responsibilities.\textsuperscript{129} No less a figure than Chancellor Kent (and his contemporaries) viewed divorce as a public process.\textsuperscript{130} Marriage was for life,\textsuperscript{131} and divorce was allowed only for limited reasons.\textsuperscript{132}

Behind this public role of marriage and divorce were some of the bedrock pillars of society at that time: religion, stability of society, and increasing the size of the population. Witness some of the early cases:

\begin{quote}
It may well be doubted whether the English decisions, so far as they in any respect countenance restrictions upon marriage, are applicable to the exigencies of a newly established nation. Possessing an extent of uncultivated territory almost unlimited, and relying upon the increase of population as the chief element of national strength, it
\end{quote}

\textsuperscript{126} Jones, \textit{supra} note 88, at 128-29.
\textsuperscript{127} Scalise, \textit{supra} note 4, at 1315, 1335-36.
\textsuperscript{128} Browder, \textit{supra} note 3, at 1288-89, 1304.
\textsuperscript{130} Id. at 114. \textit{See} Knost v. Knost, 129 S.W. 663 (Mo. 1910).
\textsuperscript{131} Hartog, \textit{supra} note 129, at 96-97.
\textsuperscript{132} Id. at 114.
would seem to be the policy of this country to
discountenance every restraint upon that legitimate
intercourse which results in the reproduction of the human
race. . . . Marriage is a wise regulation, in harmony with
nature and religion, and is the only efficient preventative of
licentiousness. The happiness of the parties, and the
interests of society, require that it should be free from
either coercion or restraint. Bonds to procure, and
contracts to condition to restrain, are alike forbidden. . . . It
is upon this authorized union that all civilized nations
depend for their prosperity in peace, and their defense in
war.

The principle of reproduction stands next in importance to
its elder born correlative, self-preservation, and is equally a
fundamental law of existence.133

Perhaps the leading early case on the subject noted that conditions
restraining marriage generally are “contrary to public policy, at war with
sound morality, and directly violative of the true economy of social and
domestic life.”134 Another case, quoting a treatise on Roman law, supplies
the justification that “the good of the public rather consists in marriages
than in a state of consistency, it being in the interest of a state to have as
many subjects as possible.”135

Thus, the rules voiding general restraints on marriage were based on the
state’s interest in marriage as supporting a stable society, in increasing
procreation, in raising the children, and in increasing population for defense
purposes.136 While there were some early criticisms of these reasons, most
courts accepted them.137 And in the nineteenth century (and in the early
part of the twentieth century), these were valid considerations inducing this
combination of factors as formulating a public policy. In the early years of
the United States as an independent nation, the country was small and had
been involved in numerous wars. It was surrounded by potential enemies:
France (and later Spain) on the South, Canada (then an English territory) on
the North, and the Native American tribes on the West. The population was

136 Scalise, supra note 4, at 1335-36, 1342; See also Foote v. Foote, 76 S.W.2d. 194
(Tex. App. 1934); Williams v. Cowden, 130 Mo. 211, 213 (1850).
137 Jones, supra note 88, at 127; Browder, supra note 3, at 1288, 1298, 1327; In re
small. Religion was an extremely powerful influence on society. So it would not be surprising that the growth of population would be important, as would the raising of children. Religion supported both goals, and a significant portion of the population was devoutly religious. Most important for our purpose, it was most probable that a vast majority of the population supported these goals. Religion was a large part of the customs and daily life of most of the people. Thus, the voiding of conditions in restraint of marriage and encouraging divorce was probably supported by the public policy considerations as developed in this article at that time. The strength of these decisions was such that the rules lasted even though the policies behind them were changing.

The exceptions to the rules were also justified by the policies of the time. The validity of restraints on remarriage were justified on the grounds that many spouses gave the control of most of his property to his spouse because that was the best means of keeping the family together and providing for the education and comfort of the children. Partial restraints were justified as wise parenting, as a safeguard against ill-advised and improvident marriages. Neither restraints on remarriage nor partial restraints on marriage directly impacts the policies behind the rules on general restraints on marriage and on encouraging divorces; the stability of society, increasing the size of the population, and the stability of the family as the underlying basis of both.

In sum, the early American cases, as discussed above, largely affirmed the Roman and English rules and the exceptions to the rules, but for somewhat unique reasons. American courts were concerned with the stability of society and increasing the country’s population. The family and its stability were viewed as the root of each. The rules supported these aims and were rarely questioned afterward.

B. The Rules on Restraints on Divorce and Marriage in Modern Society

[Public Policy] imports something that is uncertain and fluctuating, varying with the changing economic needs,

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138 DAVID SEHAT, THE MYTH OF AMERICAN RELIGIOUS FREEDOM 51 (2011) (during the first half of the nineteenth century there was a religious explosion in the United States called the Second Great Awakening. During this time “church membership doubled from 17 percent in 1776 to 34 percent in 1850.”)
140 Pacholder v. Rosenheim, 99 A. 672 (Md. 1916); Hogan v. Curtin, 88 N.Y. 162, 171 (1882).
141 Section VI A, supra.
142 Id.
social customs, and moral aspirations of the people.143

Thus, we should evaluate whether the conditions that generated the rules still exist.

The first factor in the rules was that marriage and divorce took on a public persona, with responsibilities and expectations.144 As a consequence, divorce was allowed only for limited reasons and existed to achieve limited public purposes.145 Divorce was used to punish the “guilty” for criminal conduct and to permit the innocent spouse to escape the moral contamination that could happen if cohabitation with a guilty spouse continued.146

The state’s role in enforcing the terms of traditional marriage ended with the enactment of no fault divorce statutes.147 There was no more “public” role in divorce. The grounds were no longer limited. The ending of the state’s role in marriage permitted either spouse, acting alone, to cause an ending of the relationship.148 The ending of the state’s insistence on a public role in marriage leads to major questions as to the state’s right to influence (through court decisions) a testator’s right to condition a trust interest on divorce or remarriage.

Moreover, the remaining basis of the rules restricting restraints on marriage and divorce have also changed. The policy behind the rules was at least partly to encourage an increase in population to enable defense of an America surrounded by potentially hostile factions on every side.149 The current U.S. population (as of March 22, 2012) is 313,227,554 and it is growing.150 We have a large armed services.151 While it can be argued that

144 See Section VI A, supra.
145 Hartog, supra note 129, at 121.
146 Id. However, it should be noted that all grounds of divorce were not always punished criminally. The grounds of divorce were adultery, desertion, extreme cruelty and habitual drunkenness. Theodore Dwight Woolsey, ESSAY ON DIVORCE AND DIVORCE LEGISLATION, WITH SPECIAL REFERENCE TO THE UNITED STATES 197-203 (1869), available at The Making of Modern Law: Legal Treatises 1800-1926. On the question of criminal punishment, See JOEL BISHOP PRENTISS, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, AND EVIDENCE IN MATRIMONIAL SUITS 233-35 (1852), available at The Making of Modern Law: Legal Treatises (1800-1926). The treatment in each state differed somewhat but, outside of adultery, the causes are not punished by penal statutes (except to the extent that the conduct surrounding the act violated the criminal law. WOOLSEY at 213.
148 Id. at 379.
149 See section VIA, supra.
we need to shift the emphasis and composition of the armed services, it can no longer be argued that the institution of marriage is crucial to increasing the population so that America will have a sufficient population for defense. Moreover, the statistics regarding marriage show that a family with two parents is no longer the only method of raising children. A recent article noted that 35 percent of households have children and less than one-quarter of those consist of married couples with children born to both under age 18. The 2010 census reported that more than 20,000,000 households with children under age 18 in them have no spouse living with the householder. Statistics also show that forty percent of children are born to unmarried women, and that number is increasing. And significant numbers of people (26 percent of men and 27 percent of women age 40-44) have been married two or more times. One-third of marriages end in divorce prior to the tenth anniversary of the marriage. After 5 years, one-fifth of all first marriages ended in divorce or the parties were separated. After ten years, the percentage increased to one-third. Cohabitation without marriage has increased dramatically. In fact, only 51 percent of adults are married, and the number of marriages is falling. More statistics could be cited, but these should suffice to show that the stability of the American family is eroding. Any policy based on married persons raising children as a norm in this country needs to be questioned. One need not question the benefit of marriage to society to observe that it no longer

153 Weisbord, supra note 74, at 18-19.
155 Id. at 7-8.
157 Id. at 11.
159 Id.
160 Scalise, supra note 4, at 1361.
161 The Des Moines Register, Thursday, Dec. 22, 2011, 3A.
162 Scalise, supra note 4, at 1361.
plays the role it occupied when the cases voiding restraints on marriage and conditions encouraging divorce were recognized. As noted by one commentator:

The significance of the institution of marriage in today’s society has changed not because of testamentary restrictions but because of changing cultural attitudes, mores, economic demands, and a variety of other social forces that now effect subsequent generations.163

At least one appellate court has recognized a fundamental need to reevaluate the rules on restrictions on divorce and conditions restricting marriage. In re 1942 Gerald H. Lewis Trust164 involved a trust to pay the income to the grantor for life, and on his death to pay one-half of the income to his wife as long as she remains unmarried.165 After reviewing the history of the rule the court, as a matter of first impression, upheld the provision but was not persuaded by the reasoning of courts in other jurisdictions. Remarriage is no longer considered unchaste, immodest, or unfaithful, and archaic principles of coverture have been abandoned. Neither is there any meaningful distinction between marriage and remarriage to be found in the public policy favoring marriage. We see no reason to validate a restraint on marriage based on such theories.

However, we cannot ignore the deterioration of the marital relationship in our society over the last several decades nor pretend blindness to changing social attitudes toward the relationship between men and women. The recognition of such societal changes is the genius of the common law, and the recent developments in judicial decisions in response to changed attitudes toward marriage, . . . persuade us that the policy of the law favoring marriage is without sufficient vigor to overcome the policy in support of effectuating a settlor’s intention.166

163 Id. at 1363.
165 It should be noted that this provision would clearly be upheld under traditional rules under the remarriage of the widow exception. See Section II, supra.
VII. CONCLUSION

The adoption of a new test for common law public policy in the Restatement of Trusts,\(^\text{167}\) the decisions by the Illinois Supreme Court in the “Jewish Clause” case,\(^\text{168}\) and the publication of a number of recent articles on restraints on marriage and divorce have rekindled interest in this topic. This article takes the position that, in order to understand this area of trust law, the concept of public policy in wills and trusts law must be examined and defined. The concept of undesirable influence on the beneficiaries’ lives, used in the Restatement (Third) of Trusts,\(^\text{169}\) was examined and found wanting. The concept is subjective, virtually unlimited, and provides no guidance for drafters. The article then examined the test of first Restatement of Trusts, that the validity of such a restraint depends on the conceptions of public policy prevalent in the community at the time of the creation of the trust,\(^\text{170}\) and found this a far better test for public policy in trusts. It is objective, and by its reference to views prevalent in the community, encourages courts to refrain from voiding conditions on the ground of public policy unless there is substantial agreement in the community that the clause should be voided. Such an interpretation also emphasizes the care and consideration that courts should exercise before interfering with testator’s choice; which courts themselves have repeated again and again. Courts should be extremely cautious in introducing public policy concerns in this area, both to avoid making law and introducing their own views as a substitute for community views and to reinforce a general reluctance to overrule transactions on public policy grounds. Rarely should a court do this.

The article also discussed the sources of public policy. This revealed a different aspect of public policy. When a statute on the subject exists, the court’s only function is to find the policy of the statute. The court’s job when a statute has been enacted is even more circumscribed than when no statute exists. The court must be careful to not overgeneralize the legislative policy, and it must not void transactions the legislature has excluded from the rest of the statute.\(^\text{171}\)

Finally, the article returned to the area of restrictions on marriage and divorce to examine these rules in light of the definition of public policy developed in this article. This examination discovered that the policies underlying the rules have greatly changed since they were developed, and public policy no longer supports any restrictions on conditions in trusts and

\(^{167}\) RESTATEMENT (THIRD) OF TRUSTS § 29 (2003).
\(^{168}\) In re Estate of Feinberg, 919 N.E. 2d 888 (Ill. 2009).
\(^{169}\) RESTATEMENT (THIRD) OF TRUSTS § 29, comment i (2003).
\(^{170}\) RESTATEMENT OF TRUSTS § 62, comment d (1935).
\(^{171}\) See e.g., Young v. Ohio Dept. Human Services, 668 N.E. 2d 908 (Ohio 1996).
divorce or marriage. As public policy changes, so should these rules.