PUBLIC POLICY OR POLITICAL CORRECTNESS: ADDRESSING THE DILEMMA OF APPLYING PUBLIC POLICY TO INHERITANCE ISSUES

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I. BACKGROUND

Take the following scenario: You are a newly budding attorney, just a few years out of law school, and you have just opened up a solo practice in a small town. Mr. Henderson walks into your office requesting help in setting up a trust, as he is having an ongoing battle with his health and does not expect to be around much longer. He has several children, all of them full-grown, and he wants to ensure that they each receive a generous portion of his estate. However, he has reason to believe his daughter Kimberley is being badly abused by Jim, her permanently unemployed boyfriend of three years. She has been hospitalized several times over the last six months for everything from falling down the stairs to walking into a coat rack. His daughter was never so accident-prone before she started seeing Jim.

Mr. Henderson begged his daughter several times to leave Jim and come back home until she figures things out, but she refuses and insists that Jim is good to her. Mr. Henderson wants to help her as best he can before he passes, but he knows that if he leaves anything to his daughter, Jim will squander it as soon as she receives it. He wants to set aside a generous portion of his estate for his daughter on the condition that she permanently leave Jim, and he wants to know if the courts would uphold such a clause.

You do your research and are not very satisfied with what you find. You discover that in your state, most courts have held that any type of will provision placing restrictions on relationships is void as against public policy. You also discover that in two bordering states, very similar provisions are valid and not against public policy. You do more research, but you are never able to discover the origins of this public policy stipulation in your state. The earliest case you find is one where the judge cites the Restatement and declares that such is the public policy of the state. So what do you recommend? If you are uncertain, then you are one of many lawyers across the nation who is baffled by the amorphous concept of public policy regarding wills and inheritance issues.

II. INTRODUCTION

The Feinberg family of Illinois is facing a similar uncertainty.[1] Although the testamentary provision at stake is not nearly as humanitarian as the hypothetical, the narrow holding by the Illinois Court of Appeals for the First District and the contentious dissent indicate that the ultimate answer is no clearer either.[2] The provision at issue in *In re Estate of Feinberg* is the so-called "Jewish Clause" of Max Feinberg's trust.[3] The clause reads as follows:

> 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.[4]

Essentially, Max's trust terminates the inheritance of any grandchild and his or her descendants who marry outside of the Jewish faith.[5] Needless to say, the grandchildren who already married outside of the faith were not too happy to discover that they had already died in the eyes of

1. *In re* Estate of Feinberg, 891 N.E.2d 549, 550 (Ill. App. Ct. 2008).
2. *Id*. at 551-58.
3. *Id*. at 550.
4. *Id.*
5. *See id*.

their grandfather.[6] One of the grandchildren challenged the validity of the clause in court, and the Illinois Court of Appeals for the First District found the Jewish Clause to be against public policy and therefore, unenforceable.[7] As of September 2009, the children who wish to see the clause enforced have a pending appeal to the Supreme Court of Illinois.[8]

Although the case raised a stir within the Feinberg family and the region, the idea that public policy concerns affect controversial inheritance provisions is not a new one.[9] Over the past few centuries, many wills and trusts contained such provisions that placed restrictions on who one may marry, what religion one may join, or what life decisions one may make.[10] Unfortunately, the precedent established by the plethora of cases is anything but consistent.[11] The courts have failed to establish a formulaic approach for determining what the public policy is, where it comes from, and what testamentary restrictions might be declared void or valid through its overreaching grasp.[12]

This comment posits that before deeming an inheritance provision invalid as against public policy, a court must point to specific legal authority upon which to infer its interpretation of public policy, rather than reaching into the amorphous cloud of public policy as applied to inheritance.[13] Additionally, the court must ensure that its application of public policy in any situation is consistent with the application of public policy in all situations, regardless of the medium of the controversial provision.[14]

By providing a history of the power of testation and an analysis of the inconsistent application of public policy across the states, this comment will analyze the various definitions the courts have provided, as well as the Supreme Court's guidance to solving the dilemma.[15] It will also analyze the other proposed solutions to dealing with the dilemma, before reaching the ultimate conclusion that the courts must seek actual inferential authority before declaring a provision invalid. If such provision is declared invalid,

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6. Ron Grossman, *State Courts Weigh in on a Man's Will That Disinherited Any Descendant Who Married a Gentile*, CHICAGO TRIBUNE REPORTER, August 25, 2008, *available at* http://archives.chicagotribune.com/2008/aug/25/nation/chi-jewish-clauseaug25.

7. *Feinberg*, 891 N.E.2d at 552.

8. *Id*.

9. *See, e.g.*, *In re* Beale's Estate, 113 N.W.2d 380, 383 (Wis. 1962).

10. *See, e.g.*, *id*.

11. *Compare In re* Will of Pace, 400 N.Y.S.2d 488, 492 (N.Y. Sup. Ct. 1977) (holding that conditions can violate public policy); *with In re* Estate of Lena Heller, 159 N.W.2d 82, 85 (Wis. 1968) (holding that conditions are merely a choice and a person can decide to give up rights without violating public policy).

12. *See infra* Part III.A.

13. *See infra* Part VIII.

14. *See infra* Part XI.

15. *See infra* Part VIII.

then it must be invalid regardless of whether it is found in a contract, will, trust, or other medium.[16]

III. THE PUBLIC POLICY DILEMMA

A. Disparate Results

The Restatement (Third) of Trusts aptly summarizes the positions held in most jurisdictions regarding the validity of trust provisions.[17] The Restatement holds: "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."[18] The obviousness of the first two characteristics need no discussion, nor is there any problem determining when one of those characteristics occurs to invalidate a trust provision. However, the courts have a difficult time determining whether a specific trust provision violates public policy or whether it is valid and should be upheld.[19] Although the Restatement gives various examples of what may and may not be against public policy, it provides no clearer definition of public policy than the patchwork of legal precedent that courts have established.[20]

In *Feinberg*, the Appellate Court of Illinois for the First District declared that under Illinois law and per the Restatement (Third) of Trusts, the Jewish-Clause was invalid.[21] In justifying its decision, the court pointed to *Ransdell v. Boston*, an Illinois Supreme Court case from 1898.[22] However, the *Ransdell* court came to the opposite conclusion regarding the controversial provision in question.[23] The majority in *Feinberg* cited *Ransdell* for "[t]he general rule that testamentary provisions which act as a restraint upon marriage or which encourage divorce are void as against public policy."[24] However, after stating the general rule, the *Ransdell* court went on to say, "[i]t is no less important that persons . . . should be allowed to dispose of their property by will, with such limitations and conditions as they believe for the best interest of their donees."[25]

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16. *See infra* Part XII.
17. *See* RESTATEMENT (THIRD) OF TRUSTS § 29 (2003).
18. *Id*.
19. *See, e.g.*, Lewis v. Searles, 452 S.W.2d 153, 155 (Mo. 1970).
20. *See* RESTATEMENT (THIRD) OF TRUSTS §29 (2003).
21. *In re* Estate of Feinberg, 891 N.E.2d 549, 552 (Ill. App. 2008).
22. *Id*. at 550 (citing Ransdell v. Boston, 50 N.E. 111, 114 (Ill. 1898)).
23. Ransdell v. Boston, 50 N.E. 111, 114 (Ill. 1898).
24. *Feinberg*, 891 N.E.2d at 550 (citing Ransdell v. Boston, 50 N.E. 111, 113-14 (Ill. 1898)).
25. *Ransdell*, 50 N.E. at 114.

In *Ransdell*, the testator left much of his estate in fee to his son provided that he obtain a divorce from his current wife.[26] Despite the "general rule," the court decided to interpret the will as merely providing one provision in case they were divorced and one if they were not.[27] The court found that because the son and his wife were already having marital problems and were separated, there was no desire on behalf of the testator to encourage a divorce.[28] However, one can see how another court could have decided this situation another way. Perhaps the son and his wife had been making amends, or perhaps they were considering reconciliation. It is difficult to see how providing a large gift for obtaining a divorce could do anything but encourage a divorce; but the court felt otherwise.[29]

This inconsistent application of public policy tends to allow judges plenty of room for a case-by-case determination of how public policy might affect an individual situation.[30] This unbridled judicial discretion and inconsistent application by the courts "[h]as led to a 'welter of conflict and confusion' from which it is difficult to distill any consistent principles."[31]

Such confusion and variations are not isolated and confined to a specific region.[32] Further examples include an Indiana testator, who in bequeathing his estate to his children, forbade his daughter from renting out the farming residence so long as she remained married to her husband.[33] The Indiana court declared that because the provision tended to encourage divorce, it was void as against public policy.[34] Reaching this same conclusion, a New York court declared that a testamentary restriction requiring that the testator's daughter obtain a divorce in order to receive her portion of the inheritance was void as against public policy.[35]

From reading only these cases, one might jump to the conclusion that there is a general public policy against any type of an inheritance provision that might affect the marital relationship or encourage divorce. However, other courts have come to opposite conclusions on similar matters.[36] In *In re Jacobs' Estate*, the testator created a provision in which she would bequeath a sum of five thousand dollars to her cousin if, at the time of the testator's death, her cousin was divorced from her current husband.[37] Surprisingly, this court found the provision valid, dismissing the arguments

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26. *Id*. at 111.
27. *Id*. at 114.
28. *Id*. at 113-14.
29. *See id*.
30. *See* Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 99 U. ILL. L. REV. 1273, 1277 (1999).
31. *Id*. (quoting Lewis v. Searles, 452 S.W.2d 153, 155 (Mo. 1970)).
32. *See infra* notes 33-35 and accompanying text.
33. *In re* Estate of Owen, 855 N.E.2d 603, 610 (Ind. App. 2006).
34. *Id*. at 612.
35. Will of Pace, 400 N.Y.S.2d 488, 492 (N.Y. Sur. Ct. 1977).
36. *See, e.g.*, *In re* Jacobs' Estate, 112 N.Y.S.2d 281 (N.Y. Sur. Ct. 1952).
37. *Id*.

that it was void as against public policy because it was "[a]dmitted that the legatee had no knowledge of the execution of the will and was not familiar with its contents."[38] In other words, because the beneficiary did not know the provision allotted the money if she was divorced, the provision was not an incentive to get divorced; therefore, it was not against public policy.[39] The court then held that even if she had known, the provision would still not violate public policy because the testator simply wanted to provide for her cousin in the event of a divorce.[40] The court stated that a court should never infer a bad motive when a valid motive is equally apparent.[41] In *In re Clarke's Estate*, the testator left a conditional will that allotted different amounts to her son in the event that his wife was deceased or if he was divorced from her at the time of the testator's death.[42] If the wife was still alive and the two were still married at the time of the testator's death, the son would receive a sum of five thousand dollars.[43] However, if the wife predeceased the testator, or if the two were divorced at the time of the testator's death, then the son would receive one-third of the entire estate.[44] Although it was argued that it was against public policy as it encouraged divorce, the Colorado court felt otherwise, holding that because they will did not speak until the testator's death, at that point it would be too late for the son to change his marital status in order to obtain a greater inheritance.[45]

One of the most relevant cases to demonstrate the disparities between the courts is the Ohio case of *Shapira v. Union National Bank*.[46] *Shapira* presented an extremely similar situation to the one in *Feinberg*, but the court came to the exact opposite result.[47] In *Shapira*, the father, David Shapira, died leaving his sons to discover a clause very similar to the Jewish Clause in *Feinberg*.[48] The will essentially allotted to each of his three sons an equal portion of the estate but required that each should receive his share only if he married a Jewish girl with two Jewish parents by the time of the testator's death.[49] If the son was not married at the time of death, then the executor was to maintain that son's portion of the estate for a period up to seven years, during which the son could attempt to

38. *Id.* at 282.
39. *Id.*
40. *Id.*
41. *Id.*
42. *In re* Clarke's Estate, 57 P.2d 5, 5 (Colo. 1936).
43. *Id.*
44. *Id.*
45. *Id.* at 11.
46. Shapira v. Union Nat. Bank, 315 N.E.2d 825, 825 (Ohio Misc. 1974).
47. *Id.*
48. *Id.* at 826.
49. *Id.*

comply with the clause.[50] If, after the seven years, the son did not comply, then the State of Israel would inherit that portion of the estate absolutely.[51]

The sons challenged the clause on a variety of bases, including that the clause was void as against the public policy of Ohio.[52] However, the court pointed out that if David Shapira had made an inter-vivos gift to a son conditioned on the son's marriage to a Jewish girl within a seven-year period, then there would be no way for the son to force his father to convey the gift absent fulfilling the condition.[53] In affirming the validity of the provision, the court held:

> His purpose was not merely a negative one designed to punish his son for not carrying out his wishes. His unmistakable testamentary plan was that his possessions be used to encourage the preservation of the Jewish faith and blood, hopefully through his sons, but, if not, then through the State of Israel. Whether this judgment was wise is not for this court to determine. But it is the duty of this court to honor the testator's intention within the limitations of law and of public policy.[54]

Unlike the *Feinberg* court which held the contested provision invalid because of its restrictions on marital choices, the *Shapira* court placed the desires of the testator, rather than those of the legatees, in higher esteem.[55] Additionally, the *Shapira* court partially viewed the trust as more of an agreement between the living rather than the meddling hand of testator attempting to execute his desires beyond the grave.[56]

Because judges have broad discretion in determining the public policy of the state, it is almost impossible to find any type of consistency between the various jurisdictions even when the facts are nearly identical. The written precedent provides no consistent basis from which one may derive a solid foundation.[57]

B. Further Problems

Although the disparities between the jurisdictions and the inconsistent application of public policy have led to a "[w]elter of conflict and confusion," the public policy dilemma does not end there.[58] In fact, even within a single jurisdiction, there are greater difficulties that arise when a

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50. *Id.*
51. *Id.*
52. *Id.* at 828.
53. *Id.*
54. *Id.* at 832.
55. *Id.*
56. *See id.*
57. *See supra* text accompanying notes 21-55.
58. *Supra* note 31.

wholly new issue is challenged as against public policy, or when a controversial provision shows up through another medium, such as a contract.

For example, what if a father left the family estate to his daughter upon her completion of medical school? What if the daughter desired to be an actor? Is there an argument that dictating her future career path is against public policy? What are the bounds of public policy? What if a wealthy widow left an estate to her son provided that he abstain from homosexual behavior? A judge could look around and see that society has become much more accepting of those with different sexual orientations and thus decide that such a provision is against public policy. However, what if the court resides in a state that has forbidden same-sex marriage? Such an indication may lead the judge to the opposite conclusion.

While there may be quite a few cases discussing the legality of placing restrictions on religious or marital choices, when a new issue arrives, what prevents a court from delivering an opinion based solely on the political bias or opinion of the presiding judge?[59] How can an attorney prepare to challenge or defend such a provision?

Additionally, what if a controversial provision shows up in another form—such as a contract? Even though case history indicates that such a provision would be invalid in an inheritance situation, what if both living parties agreed to the terms? Should it make a difference? This comment seeks to provide answers for each of these questions, but first it is necessary to understand the arguments for, and history of, public policy.

IV. ARGUMENT FOR PUBLIC POLICY ANALYSIS AND CONTROL

Although this lack of precedent allows the judges broad latitude in determining the fate of a testator's wishes, there are several arguments that such discretion is necessary and that courts should be able to declare certain things against public policy. One of the major reasons is what is termed as "deadhand control."[60] Deadhand control refers to the attempt made by a deceased testator to continue a controlling influence over his beneficiaries through testamentary provisions and restrictions.[61]

At common law, a private trust is often respected because of the ability that it provides property owners to plan for and provide financial and otherwise beneficial interests to their children and further posterity.[62] However, it is also argued that these advantages should be balanced against

59. *See, e.g.*, *In re* Will of Pace, 400 N.Y.S.2d 488, 492 (N.Y. Sur. Ct. 1977).

60. *See* RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. (C)(i) (2003); *see also* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 70 (Harvard University Press 2004).

61. BLACK'S LAW DICTIONARY 426 (8th ed. 2004).

62. *See* RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. (C)(i) (2003).

other values and effects of this control on the freedoms of those benefitting from the testation.[63]

While some argue that if a testator could legally do something while she was alive, then she should also be able to do it with her property after her death, others argue that there is a greater need for protection of community interests after the death of the testator.[64] That argument holds that while the testator is still alive, her own self-interest will prevent her from placing unreasonable restrictions and making unpopular decisions.[65] However, after she has passed on, there is no more restraint from self-interest, and public policy should prevent this testator from imposing arbitrary or pointless restrictions on her property.[66]

V. THE POWER OF TESTATION

In order to fully analyze the dilemma faced by courts today regarding public policy, it is necessary to understand both the history of the power of testation and the source of an individual's right to testate his property according to his desires. The earliest origins of the rights of testation trace back to the early Roman Empire.[67] In dealing with American and English law, until the Statute of Frauds in approximately 1540, the property of the deceased almost always passed on to the spouse or family without any restrictions.[68] Some have surmised that the reasoning might be to promote the integrity of the family or economic certainty.[69] However, England's passage of the Statute of Wills allowed a testator more control over his mortal possessions than the testator previously possessed.[70] The Statute of Wills allowed the testator to define exactly who his family was, just as one might through the process of divorce or adoption.[71]

Although the United States bases much of its legal origins on English precedent, United States courts have held that there is no fundamental right to make a will.[72] The Supreme Court also affirmed that state control over the power of testation is complete, and nothing in the Constitution prevents

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63. *See id*.

64. *See Pace*, 400 N.Y.S.2d at 492.

65. *See id*.

66. *See id*.

67. *See* Max Rheinstein, *Comparative Studies in Society and History* 349 (CAMBRIDGE UNIVERSITY PRESS, Vol. 3, No. 3 (1961).

68. Willis J. Spaulding, *Testamentary Competency: Reconciling Doctrine with the Role of the Expert Witness*, 9 LAW & HUM. BEHAV. 113, 116 (1985).

69. *See, e.g.*; *id.*

70. *See, e.g.*; *id.*

71. *See, e.g.*; *id.*

72. *See, e.g.*, Fullam v. Brock, 155 S.E.2d 737, 739 (N.C. 1967) ("The right to make a will is not a natural, inalienable, inherited, fundamental, or inherent right, and it is not one guaranteed by the Constitution. The right to make a will is conferred and regulated by statute.").

a state from abolishing the power.[73] As a result of the states' power over testation, several states provided protections for testation in their state constitutions.[74] Because the power of testation remains with the states, the Supreme Court rarely steps in to provide any guidance, and the U.S. Constitution generally remains out of a court's opinion regarding the validity of a trust provision.[75] There are a few exceptions though, mostly dealing with the Fourteenth Amendment and the Supreme Court decision in *Shelley v. Kraemer*.[76]

VI. THE FOURTEENTH AMENDMENT

In *Feinberg*, the concurring judge partially relied on the Fourteenth Amendment as applied in *Shelley v. Kraemer* to justify the position taken by the court in invalidating the provision.[77] The Fourteenth Amendment states, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws."[78] In *Shelley v. Kraemer* the Supreme Court struck down a restrictive covenant created by members of a neighborhood who sought to prevent African-Americans from purchasing real estate among them.[79] The Court found that since the covenants required the local courts to step in to prevent African-Americans from purchasing a home, an act which the African-Americans would otherwise legally be able to do, the local court's actions were considered state action and in violation of the Fourteenth Amendment.[80]

The vast majority of courts have not considered *Shelley* in performing an analysis as to the validity of a trust provision.[81] In fact, only three courts, including *Feinberg*, cite to the holding in *Shelley*, and the two courts other than *Feinberg* both found it to be irrelevant to their respective cases.[82] The most compelling reason as to why the Fourteenth Amendment should not apply to the present cases comes directly from the Supreme Court in *Shelly*:

> [T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That

73. Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942).
74. *See, e.g.*, *In re* Beale's Estate, 113 N.W.2d 380, 383 (Wis. 1962).
75. *See, e.g.*, Irving Trust Co., 314 U.S. at 562.
76. Shelley v. Kraemer, 334 U.S. 1 (1948).
77. *In re* Estate of Feinberg, 891 N.E.2d 549, 554 (Ill. App. Ct. 2008).
78. U.S. CONST. amend. XIV, § 1.
79. *Shelley*, 334 U.S. at 23.
80. *Id*. at 18-19.
81. Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 99 U. ILL. L. REV. 1273, 1315 (1999).
82. *Id*.

> Amendment erects no shield against merely private conduct, however discriminatory or wrongful.[83]

Essentially, the holding of *Shelley* is that the courts will not interfere with the private actions of parties, but only the judicial enforcement of such conduct.[84] The holding of the *Shelley* case has been coined the "attribution rationale," and it has not gone without much scrutiny.[85] The attribution rationale derives from the logic that while the agreements of the private parties themselves were not unconstitutional, the state enforcement of the agreements is.[86]

Therefore, under this theory, a court could only enforce agreements actually enacted into law, which is clearly not the case.[87] While one could probably not pass a law to keep someone from speaking about a certain subject, courts routinely allow, and even enforce, confidentiality agreements in which someone voluntarily agrees to limit his speech under a contractual agreement.[88] Citizens are even allowed to contractually waive their own due process rights if they so desire.[89] This attribution rationale has been rejected by virtually all courts across the nation, without any real explanation why.[90]

Additionally, it has also been pointed out that court intervention in enforcing a community discrimination pact is different from the type of court action in disposing of the desires of a testator.[91] The former required the court to act in a non-neutral position to prevent a mutual agreement for the sale of property to an African-American family.[92] However, a probate court distributing a testator's property is simply a neutral act, as the court is merely doing what it always does, irrespective of who the testator is.[93]

Because courts, for the most part, have tended to stray from applying the *Shelley* decision to cases of testation, there does not seem to be much logic for the concurring judge in *Feinberg* to bring it into consideration, nor does there seem to be much Fourteenth Amendment applicability to testation issues as a whole.[94]

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83. *Shelley*, 334 U.S. 1 at 13.

84. *See id*.

85. *See* Mark Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451, 453 (2007).

86. *See id*. at 454.

87. *See id*.

88. Lawprofessor.com—Online Legal Portal and Directory: Confidentiality Agreements, http://www.lawprofessor.com/contracts/confidentiality-agreement (last visited Jan. 6, 2009).

89. *See* Fuentes v. Shevin, 407 U.S. 67, 94 (1972).

90. Mark Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451, 460 (2007).

91. *See, e.g.*, Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 99 U. ILL. L. REV. 1273, 1316-17 (1999).

92. *See, e.g.*, *id*.

93. *Id*.

94. *See* discussion *supra* note 46.

VII. DEFINITIONS OF PUBLIC POLICY

Although many courts simply declare something void as against public policy without citing the statutory or concrete basis behind the decision, in reaching a testation issue, some courts have provided further definitions and descriptions of the origins and bases of public policy.[95] Indeed, even the Supreme Court weighed in on the issue on more than one occasion.[96] In deciding *United States v. Trans-Missouri Freight Ass'n* in 1897, the Supreme Court provided an early definition for the basis of public policy:

> The public policy of the government is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts.[97]

While this may seem like a somewhat direct approach to defining public policy, the subsequent precedent from other courts show that it has still been rather difficult to apply.[98] Some courts have provided similar definitions in determining their state's public policy, whereas other states have provided much broader definitions that go beyond the written constitutions and state laws to encompass the supposed feel and ideology of the society as a whole.[99]

In *Pittsburgh v. Kinney*, the plaintiff was severely injured in the course of her employment by one of the employer's trains.[100] In suing her employer for damages, the employer raised as one of its defenses a contract provision in which the plaintiff agreed that she would assume all risks incident to her employment with the defendant.[101] In determining that such a provision was void as against public policy, the Supreme Court of Ohio attempted to provide analysis and clarification for the state's definition of public policy:

> What is the meaning of 'public policy?' A correct definition, at once concise and comprehensive, of the words 'public policy,' has not yet been formulated by our courts . . . . In substance it may be said to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare and the like. It is that general and well-settled

95. *See, e.g.*, Pittsburg v. Kinney, 115 N.E. 505, 507 (Ohio 1916).
96. *See, e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 340 (1897).
97. *Id.*
98. *See, e.g.*, *Pittsburgh*, 115 N.E. at 507.
99. *See, e.g.*, *id.*
100. *Id.* at 506.
101. *Id.*

> public opinion relating to man's plain, palpable duty to his fellowmen, having due regard to all the circumstances of each particular relation and situation.[102]

Clearly, this is a much broader definition of public policy and leaves the individual judges broad latitude in determining how the "[c]ommunity common sense and common conscience" might lead to a specific holding in a particular case.[103]

The Supreme Court of Missouri, however, took a much narrower approach in addressing the public policy dilemma.[104] In *In re Rahn's Estate*, the decedent, in his 1916 will, directed the executor to donate a large portion of his estate to a German charity.[105] The executor attempted to avoid doing so by claiming that it was void as against public policy because it aided enemies or their relatives, and because the organization by the identified name was no longer in existence.[106] The Supreme Court of Missouri disagreed, holding that the clause was valid and must be enforced.[107] The court emphasized that any court should exercise extreme caution before declaring something void as against public policy.[108] Pointing to the Supreme Court decision in *United States v. Trans-Missouri Freight Ass'n.,* the court stated its reasoning:

> [N]o 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, charged with the interpretation and declaration of the established law, as to what they themselves believe to be the demands or interests of the public.[109]

The contrast between the two definitions is quite stark.[110] The former simply allows the court to refer to the overall community mindset, whereas the latter requires that not only must the court look to the statutes, constitutions, and judicial decisions in order to determine the public policy,

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102. *Id*. at 506-07.
103. *See id*.
104. *See In re* Rahn's Estate, 291 S.W. 120, 123 (Mo. 1926).
105. *Id*. at 121.
106. *See id*. at 122.
107. *Id*. at 123.
108. *Id*.
109. *Id*.
110. *Compare In re Rahn's Estate*, 291 S.W. at 123 (finding that public policy can only be found in "[t]he Constitution, statutes, or judicial decisions of the state or nation.") *with* Pittsburgh v. Kinney, 115 N.E. 505, 506 (Ohio 1916). (finding that public policy is "[g]eneral and well-settled public opinion").

but it also must find a definite answer indicating prohibition if it is to declare the provision invalid.[111]

Perhaps sensing the inconsistent application of public policy across the nation, in 1945 the Supreme Court spoke again regarding public policy in *Muschany v. United States*, providing further clarification for its previous definition:

> Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. As the term 'public policy' is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy.[112]

Clearly, the Supreme Court of Missouri's definition aligns more closely with the latter Supreme Court definition.[113]

VIII. A MATTER OF INTERPRETATION: ARGUMENTS FOR BOTH SIDES

Perhaps the Ohio definition is too broad and grants judges too much discretion in arbitrarily determining the outcome of a case.[114] On the other hand, perhaps the Missouri definition is too narrow and will over-restrict the judges to the point where virtually any provision, regardless of how offensive to the public it may be, would be considered valid.[115]

One of the main goals of legal precedent is to establish consistency.[116] A lawyer should be able to look to the books and determine whether there exists a decent cause of action, or whether an action cannot be taken for fear of violation of law.[117] Additionally, it is a venerable principle of the law that ignorance is no defense.[118] If ignorance of the law is no defense, then surely one must be able to educate herself sufficiently to prevent ignorant violation of such laws.[119] However, how can one educate herself if there is nothing remotely solidified in the law to provide the necessary guidance?

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111. *Compare In Re Rahn's Estate*, 291 S.W. at 123, *with Kinney*, 115 N.E. at 507.

112. Muschany v. United States, 324 U.S. 49, 66 (1945).

113. *See In re Rahn's Estate*, 291 S.W. at 123.

114. *See Pittsburgh*, 115 N.E. at 507.

115. *See In re Rahn's Estate*, 291 S.W. at 123.

116. Grant Hamond, *Precedent and Analogy in Legal Reasoning*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, (Edward N. Zalta ed., Fall 2008 ed.) *available at* http://plato.stanford.edu/entries/legal-reas-prec/ (last visited Oct. 28, 2009).

117. *See generally* Hamond, *supra* note 117 ("[i]f an institution has dealt with an issue in one way in the past, then that creates the expectation that it will do so in the future—an expectation which people use to plan their lives and enjoy some control over their situations"). *See* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 15 (1989).

118. Ratzlaf v. United States, 510 U.S. 135, 149 (1994).

119. *See id*.

How can a testator determine that a provision she desires to place in her will or trust will be upheld by the legal system?

Along these same lines, it seems inconsistent to allow judges to arbitrarily decide the whim and will of the people in determining whether a will or trust provision is valid; indeed, it would seem quite contrary to the purposes of the legal system.[120] If judges are not bound to decide based on written law or precedent, then there is nothing to provide solid guidance to those seeking to know whether their wills or trusts will be able to withstand legal scrutiny.[121]

On the other hand, should public policy not be more flexible and applicable to a variety of decisions, rather than being bound to a scant amount of legal precedent that may be applicable to the provision at hand?[122] This seems to be more consistent with the Ninth Circuit statement that "the purpose of our legal system is not to provide an abstract code of rigid rules; rather it is to promote values that are compatible with the vision of a just existence for all individuals."[123]

There also seems to be a logical fallacy with requiring public policy to be determined by concrete statute or law. If a provision is declared invalid because of public policy only because that policy merely points to a statute, is it not invalid because of the statute and not the policy?[124] In its *Kinney* decision, the Supreme Court of Ohio pointed this out:

> It has frequently been said that such public policy, is a composite of constitutional provisions, statutes, and judicial decisions, and some courts have gone so far as to hold that it is limited to these. The obvious fallacy of such a conclusion is quite apparent from the most superficial examination. When a contract is contrary to some provision of the Constitution, we say it is prohibited by the Constitution, not by public policy. When a contract is contrary to a statute, we say it is prohibited by a statute, not by a public policy. When a contract is contrary to a settled line of judicial decisions, we say it is prohibited by the law of the land, but we do not say it is contrary to public policy. Public policy is the cornerstone—the foundation—of all Constitutions, statutes, and judicial decisions; and its latitude and longitude, its height and its depth, greater than any or all of them. If this be not true, whence came the first judicial

120. *See* United States v. Kozminski, 487 U.S. 931, 951 (1988) ("[I]t would be quite another thing to tolerate the arbitrariness and unfairness of a legal system in which the judges would develop the standards for imposing criminal punishment on a case-by-case basis."). While this is a criminal case, it still seems analogous to a judge arbitrarily determining the desires of a testator on a case-by-case basis.

121. *See id*.

122. *See* Kennedy v. Lockyer, 379 F.3d 1041, 1065 (9th Cir. 2004) (O'Scannlain, J., dissenting) (citing Stephen Reinhardt, *The Role of Social Justice in Judging Cases*, Keynote Speech at the University of St. Thomas Law Journal Symposium Honoring Judge John T. Noonan, Jr. (Oct. 18, 2003)).

123. *Id.*

124. *See* Pittsburgh v. Kinney, 115 N.E. 505, 507 (Ohio 1916).

> decision on matter of public policy? There was no precedent for it, else it would not have been the first.[125]

Under this rationale, the concept of public policy is the foundation upon which the entire legal system and all legal precedent is established.[126] Thus, according to this concept, a judge should look beyond the mere written constitutions and statutes to the overall idea that preceded them.[127] This seems to be a logical approach because much of our legal precedent and statutes derived largely from common law, which at least theoretically, derived from the unwritten common concerns and values of the people.[128] Constitutions and statutes are largely written embodiments of common law values, so it would seem that public policy derived from the same common law origins and concepts.[129]

However, as one may imagine, that concept is probably harder to apply than it is to conceptualize; bringing us back to the dilemma of determining whether a judge really looked back at the foundational principles, whatever those may be, or just looked to his own personal bias or opinion.[130]

So even though the chicken may have come before the egg, or rather constitutions and statutes may be merely codifications of an already-existing ethereal foundation of public policy, would those very constitutions and statutes not be the best indicators of this policy foundation?[131] Does legislation and policy not derive from the very same source?[132] While idealistically it may be best to look to the roots of society to determine whether a provision conforms with the original ideas and principles, if the original roots are not to be ascertained, the next best option for review would seem to be the fruit of those roots.[133]

IX. DIFFERENT APPROACHES TO THE PUBLIC POLICY DILEMMA

While no approach currently exists to handle the public policy dilemma, there are several novel approaches that have been attempted or theorized; specifically, the minimalist approach and the codification of unacceptable trust provisions.[134]

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125. *Id.*

126. *See id*.

127. *See id*.

128. Julie S. Rial, *Origins of Common Law*, (Dec. 20, 2002), http://www.iejs.com/Law/origins_of_common_law.htm.

129. *See id*.

130. *In re* Rahn's Estate, 291 S.W. 120, 123 (Mo. 1926).

131. *See id*. (holding that the best indications of public policy are to be derived from the acts of the legislature).

132. *See id*.

133. *See id*.

134. *See* discussion *infra* text and accompanying notes 135-54.

A. The Minimalist Testation Approach

In 1999, Professor Jeffrey Sherman developed a proposed solution to the public policy dilemma, which he termed the "minimalist testation theory."[135] This minimalist approach simply holds that any testamentary condition that restricts the beneficiary's personal conduct should not be enforceable.[136] This is a very simple solution to a very perplexing problem.[137] This approach would alter the current system of testation in two major ways.[138] First, the minimalist approach would invalidate any type of testamentary restraint—even ones which attempt to restrict the conduct of the beneficiary during the life of the testator.[139] Currently, many courts still uphold the validity of such provisions because the testator is not trying to exercise control beyond the grave.[140] Second, and perhaps more importantly, it would also prohibit the enforcement of testamentary provisions that society would likely support and consider positive.[141]

This approach would effectively provide a solution to the public policy dilemma.[142] The minimalist approach would take the burden of defining public policy from the hands of judges, and apply a blanket rule that would provide clarity and consistency to the judicial process in determining the validity of will and trust provisions.[143] However, such clarity does not come without a price. As stated, if one wanted to place a restriction on the conduct of a beneficiary, even if the restriction could lead to a positive impact on the beneficiary and on society as a whole, such restrictions would be prohibited by the minimalist approach.[144] Applying the approach to our hypothetical, Mr. Henderson would not likely be happy with the answer he receives. Under this approach, Mr. Henderson's desired testamentary provision, even though good-hearted and possibly good for his daughter, would be invalidated.

B. Codification Approach

Another possible approach would be to codify the more controversial areas of the law that the state deems inappropriate for testamentary

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135. Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 99 U. ILL. L. REV. 1273, 1329 (1999).

136. *Id.*

137. *Id.*

138. *Id.* at 1304.

139. *Id.*

140. *Id.* at 1278.

141. *Id.* at 1304.

142. *See id.*

143. *See id.*

144. *See id.*

restriction. This approach has actually been implemented in many states.[145] One example is in the California Civil Code: "Conditions imposing restraints upon marriage, except upon the marriage of a minor, are void; but this does not affect limitations where the intent was not to forbid marriage, but only to give the use until marriage."[146] North Dakota provides a statute virtually identical to the California statute, except it includes an extra exception regarding widows.[147]

This approach has several advantages and disadvantages when compared to the minimalist approach. One of the greatest advantages is that it is already in place in many states and works hand-in-hand with the current public policy case law.[148] As most judges are to look to the constitutions and statutes to determine the public policy; a statute that specifically prohibited placing any restrictions on who one may marry would easily identify the public policy of the jurisdiction, indeed, that is the law.[149] It would provide a similar clarity to the issue: it would be simple for an attorney to search among the statutes and find concrete rules that guide the provisions placed into a will or trust.[150]

However, it also does not come without limitations. While it is clearly a step toward providing clarity to the situation, as codification can work with the existing framework of public policy interpretation and application without destroying the ability to create testamentary restrictions, it still has some disadvantages.[151] For example, if we apply the North Dakota statute to our hypothetical, the result may be the same as if we applied the minimalist approach.[152] Since the North Dakota statute prohibits restrictions on marriage, surely the requirement that a beneficiary leave her boyfriend, and potential future spouse, would fall under such a prohibition.[153]

Additionally, a strict codification policy would not be able to handle the many nuances of potentially positive inheritance provisions. For example, if a state did not want a testator to be able to restrict the beneficiary's choice of marriage, but would allow the restriction if the potential spouse was abusive or if the spouse was a convicted pedophile, the legislature would have to write the law to include every possible exception.

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145. *See infra* notes146-47.

146. CAL. CIV. CODE § 710 (West 2007).

147. N.D. CENT. CODE § 47-02-25 (1999) ("Conditions imposing restraints upon marriage, except upon the marriage of a minor, or of the widow of the person by whom the condition is imposed, are void. This does not affect limitations when the intent was not to forbid marriage but only to give the use until marriage.").

148. *See id*.

149. *See supra* Part VIII.

150. *Id*.

151. *Id*.

152. *See supra* Part IX.A.

153. *See* N.D. CENT. CODE § 47-02-25 (2009).

Such a task would be quite unwieldy and would likely result in overbroad restrictions that would provide too many prohibitions with too few exceptions.

X. PUBLIC POLICY: THE INTENTION OF THE SUPREME COURT

Although both solutions provide viable alternatives to the current public policy dilemma, both come with serious drawbacks.[154] This comment suggests that the best solution to the public policy dilemma is to simply apply the Supreme Court's definition of public policy and to apply that definition consistently across all cases in which public policy is involved.[155]

Although the Ohio court pointed out the fallacy of declaring something void per public policy merely because there was law that actually made it void, there is arguably more to the Supreme Court's definition than it was given credit for.[156] If we analyze both definitions provided by the Supreme Court, we see a clarification or an evolution from the former to the latter. The first definition provided that the public policy be "[f]ound in its statutes . . . then in the decisions of the courts."[157] As the Supreme Court of Ohio pointed out, this definition appears to be redundant if one reads it from a narrow perspective.[158] Indeed, if something is void because of a statute, then there is no need to claim it void under the notion of public policy.[159]

However, the second definition provided by the Supreme Court adds much needed clarification, holding that the "[p]ublic policy is to be *ascertained* by *reference* to the laws and legal precedents . . . there must be found definite *indications* in the law to justify the invalidation . . . ."[160] The Court was not stating that there must be a direct law on point in order for a court to determine the public policy.[161] Rather, the Court was simply saying that, by looking to or referencing the laws and legal precedents, a court should be able to ascertain what the public policy is.[162] This definition simultaneously embraces and rejects the Ohio definition of public policy.[163] This guidance by the Court acknowledges the existence of a greater purpose beyond the literal text of the words, but holds that in order to ascertain that greater purpose the courts must look to the attempted embodiments of that purpose: namely the constitutions and laws of the

154. *See supra* Part IX.
155. *See* Muschany v. United States, 324 U.S. 49, 66 (1945).
156. *See* Pittsburgh v. Kinney, 115 N.E. 505, 507 (Ohio 1916).
157. United States v. Trans-Missouri Freight Ass'n., 166 U.S. 290, 340 (1897).
158. *See Pittsburgh*, 115 N.E. at 507.
159. *See id*.
160. *Muschany*, 324 U.S. at 66 (emphasis added).
161. *See id*.
162. *Id.*
163. *See id*.

state.[164] This definition is a compromise between allowing judges to pull equitable solutions out of thin air and requiring actual statutory authorization to fashion a remedy.[165] It allows judges to derive equitable solutions, but only ones that actually conform to the values of the society they live in, as indicated by inference to the laws and legal precedents of the community.[166] In other words, this compromise allows the judge room to develop a unique remedy, but still binds him by requiring him to first *reference* law or legal precedent that would authorize such a remedy.

XI. ONE PUBLIC POLICY . . . OR TWO?

After having established the proper definition of public policy based on the Supreme Court's guidance, we are halfway towards addressing the public policy dilemma.[167] It is equally important to recognize that public policy must also be consistently applied to all cases in the individual states, regardless of the medium with which the controversial provision may be affixed.[168] As stated, public policy is broadly considered the "principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society."[169] Accordingly, courts generally use public policy synonymously in cases regarding contract disputes and inheritance issues.[170] In other words, it can be said that there is not a different version of public policy that applies solely to contracts and one which applies solely to wills and trusts.[171]

Since the same public policy places restrictions on both what someone may place in a contract and what someone may place in a will or trust, it seems logical that the application of this public policy analysis to void a contract or a testamentary provision should be consistent in both situations.[172] In other words, if someone could not legally obligate oneself to perform an act under contract, then a testator should not be able to bind

164. *See id*.
165. *See supra* Part VIII.
166. *Id*.
167. *See supra* Part X.
168. *See infra* Part XII.
169. BLACK'S LAW DICTIONARY 1267 (8th ed. 2004).
170. *See, e.g.*, *In re* Rahn's Estate, 291 S.W. 120, 123-24 (Mo. 1926). In deciding the validity of a will provision, the court looked to the Supreme Court's previous clarification on public policy regarding a contract dispute. *Id*. *See also In Re* Estate of Robertson, 859 N.E.2d 772, 775 (Ind. Ct. App. 2007) (noting that if a restriction on marriage is prohibited by public policy, it makes no difference whether it is via trust or contract).
171. *See supra* note 170.
172. *See generally* Girard Trust Co. v. Schmitz, 20 A.2d 21, 28 (N.J. Ch. 1941) (using public policy as applied to wills and contracts interchangeably, and stating, "[W]hatever is bad as a covenant, or contract, must be bad [in a will] as a condition . . . .").

the beneficiary by a similar provision, and vice versa.[173] Although this seems to be a logical conclusion, this is not a step that is always taken.[174]

The following is a hypothetical to aid in understanding the comparison between contract provisions and will and trust provisions. A presents B with a construction contract. A requires B to build an office building for a certain sum of money. B reads the price and the terms, sees them as reasonable, and agrees to perform the work under the specified terms for the specified price. Shortly after digging out the foundation, B gets tired of A's exacting demands and wants out of the contract, but does not want to pay A any potential damages. Perhaps B can show the court that some of A's demands are immoral or hazardous to the public and should be deemed void per public policy. If B is successful, he will be released from the contract, and he will not owe A anything. However, it would seem rather absurd for B to go to court, complain that the requirements are against public policy, and then demand that B receive the entire contract price, though he complied with virtually none of the terms, and the contract is left unfinished.

Compare that hypothetical with another. A dies, leaving B, his son, a large portion of his estate, provided that B obtains a PhD from an accredited university before he gets married or has any children; otherwise, the entire estate will go to B's older sister. B, who at the age of 20 finally graduated high school, is known for his "loose" ways when it comes to women. Four years later, after finally finishing his second year of college, B gets his latest girlfriend pregnant, and they decide to keep the baby and get married. Obviously, B still wants the inheritance, but he has not complied with the terms of the inheritance. What does B do? He hires a lawyer who contends that the provision restricting B's right to marry and to have children is void because it is the public policy of the state to place any restrictions on one's choice to marry or procreate.[175] B demands that the requirement be declared invalid, that the court reform (or remove) the provision, and that he receive his entire portion of the estate.

Is this not just as absurd as contractor B attempting to receive the entire contract price even though he has not complied with the contract in the least? What if B contracted with a still-living A to perform according to A's terms? Would a court likely force A to render the portion of the estate without his conditions being fulfilled? It seems unlikely. This is quite like the analogy Judge Henderson pointed out in *Shapira*: if the testator agreed to make an inter-vivos gift to his son, then there is no way his son could force him to make the gift free of the condition.[176] If there is one public policy, what difference should it make whether the interest is conveyed

173. *See id*.
174. *See infra* Part XIII.
175. *See supra* note 24 and accompanying text.
176. *See Shapira*, 315 N.E.2d at 829 (Ohio Misc. 1974).

through a will, a trust, a conditional gift, or a contract? Unfortunately, it seems to make a great difference.[177]

Historically, even though courts may occasionally strike down a contract for a public policy violation, they are extremely reluctant to do so, and they usually do not allow one party to enforce the other contracting party's obligations without enforcing the obligations of both parties.[178] However, per the Restatement (Third) of Trusts, if the conferral or termination of an interest in a trust is subject to the occurrence of a condition, and that condition is deemed invalid per public policy, then the interest immediately becomes effective or is conferred as though no condition existed.[179] For example, the Court of Appeals for Maryland stated that it is "[l]ong held that where . . . a condition is invalid on the ground of public policy . . . , the condition will not be enforced by awarding the bequest to an alternative beneficiary; instead, the illegal condition will be excised."[180] Using this logic, even though the will lists B's sister as an alternative beneficiary, if the court declares the condition to be against public policy, then B would still receive the inheritance in its entirety.[181]

Under contract law, however, the results may differ. The Restatement (Second) of Contracts points out that if a provision or requirement is declared invalid per public policy, then the court must follow the legislative mandate as applied to the provision (which probably means the non-enforcement of the provision), but the rest of the contract may still be enforceable.[182] Therefore, if B had substantially complied with the condition and obtained his PhD, then perhaps he would still receive the inheritance under the restrictive terms.[183] However, the Restatement also holds that if the provision is essential to the terms of the contract, then equity insists that the entire agreement is unenforceable.[184] So, in cases where only one condition must occur for the inheritance to pass, and that condition is declared invalid, it seems likely that a court would declare the entire agreement invalid, and both parties would be left without any obligation to perform.[185] While losing an entire inheritance because of the

177. *See infra* notes 178-86 and accompanying text.

178. *See* Campitelli v. Johnston, 761 A.2d 369, 372 (Md. 2000); A.Z. v. B.Z., 725 N.E.2d 1051, 1058 (Mass. 2000). As matter of judicial restraint, the Court of Appeals is reluctant to "invoke broad nostrums of public policy to void private bargains." Westvaco Corp. v. United Paperworkers Int'l. Union, 171 F.3d 971, 978 (4th Cir. 1999). "Although a court may question the validity of a contract on the grounds of public policy, this measure is extreme . . . ." Whirlpool Corp. v. Ziebert, 539 N.W.2d 883, 884 (Wis. 1995).

179. *See* RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. i(1) (2003).

180. RESTATEMENT (THIRD) OF TRUSTS § 29 cmt, i(1) (2003) (citing Home for Incurables of Balt City v. Univ. of Md. Med. Sys. Corp., 797 A.2d 746, 751 (Md. 2002)).

181. *See* RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. i(1) (2003).

182. *See* RESTATEMENT (SECOND) OF CONTRACTS § 178 cmt. a (1981).

183. *See id*.

184. *See id*.

185. *See id*.

non-occurrence of a required condition may seem harsh, there is still the argument that it is no harsher than enforcing the entire transfer of the inheritance without fulfilling any of the testator's desire.[186]

XII. PROPOSAL FOR CONSISTENCY

Clearly one can contract to refrain from doing something he would otherwise legally be able to do.[187] As previously indicated, someone who signs a confidentiality agreement in order to obtain a new job has agreed to give up the right to discuss a matter in order to obtain a greater benefit.[188] As with any contract, he has weighed the benefits and the detriment, and has decided that he is willing to give up something in order to obtain something he deems of greater importance.[189] While a statute could not legally require someone to be silent on an issue, if this person has voluntarily agreed to do so, then a court would likely enforce the contract provision.[190]

This comment posits that courts should approach the inheritance issue and the public policy dilemma in the same manner they handle contract issues with public policy problems.[191] Courts should view restrictive inheritance provisions merely as contract provisions that require the contracting party (the beneficiary) to perform or refrain from performing in a certain way.[192] As with contracts, the beneficiary has no obligation to agree to the terms.[193] If the beneficiary deems the restrictions placed on the reception of the inheritance too great, then he can walk away.[194] No beneficiary is required to conform his actions to those restrictions.[195] However, if, as with contracts, the beneficiary weighs and balances the benefits and the restrictions, and he decides that the former outweighs the latter, then, as with a contract, he will be bound to adhere to those provisions or otherwise forfeit the benefit he may receive.[196] At all times it is the beneficiary's choice whether to adhere to the requirements of the provision or to refuse them and be no worse off for it.[197]

Applying public policy consistently across all possible applications would maximize the benefits of testation and minimize any

186. *See* discussion *supra* Part VIII.
187. *See supra* Part VI.
188. *Id.*
189. *Id.*
190. *Id.*
191. *See supra* Part XII.
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*

disadvantages.[198] Unlike with the minimalist approach, good restrictions, ones that perform an overall beneficial effect upon society or the beneficiary, would still likely be permitted.[199] As indicated earlier, testation is only subject to state power, so discrepancies between the states are inevitable to a degree.[200] However, ensuring that courts apply public policy consistently among all mediums ensures that the intrastate discrepancies are minimal.

XIII. PROACTIVE PROVISIONS AND PROPER MOTIVES

In addition to requiring judges to look to a definite law or legal precedent and to apply public policy equally across all mediums, courts should still only strike down provisions that proactively violate public policy, or purposefully encourage such violations. As the court in *In re Clark's Estate* pointed out, the will does not "speak" until after the death of the testator, and thus, cannot be deemed to violate public policy until after the testator's death.[201] A provision that only acts on decisions already made does not have the same public policy concerns as one that would encourage future violation.

In other words, a provision that may require a beneficiary to get divorced within a certain amount of time after the death of the testator may be a violation of public policy, while a condition that merely requires that someone already be divorced at the time of the testator's death can hardly be said to encourage divorce. The only time it might encourage divorce is if the potential beneficiary actually knew about the provision before the death of the testator. Even in that situation, however, the court still does not know the actual intent of the testator. The testator's intent could be that he desired to provide for his daughter and for her children in the event she got divorced and had to provide for her family, not that the testator necessarily desired to encourage the divorce.

When a court steps in to strike down a testamentary provision looking retrospectively, it acts to punish past behavior rather than prevent future violations of public policy. It is a precarious situation in which a judge is allowed to delve into the mind of the deceased to find an intention that may never have existed, thereby punishing the testator for his supposed unpopular thoughts that will not bear an impact on the future.

This comment simply posits that when the improper provision only acts retrospectively, that is, it makes a final determination at the time of death and will not encourage future actions that may violate public policy, then the court should not infer an improper motive when there is a proper

198. *See supra* Part IX.
199. *Id.*
200. *See supra* Part V.
201. *In re* Clarke's Estate, 57 P.2d 5, 5 (Colo. 1936).

motive equally available. As the court in *In re Jacobs' Estate* held, "An inference that one is moved by an improper or unlawful motive should never be drawn, when a legitimate purpose is just as apparent."[202]

XIV. CONCLUSION

Put simply, resolving the public policy dilemma is a two-pronged attack.[203] First, the court must determine the public policy of the state by making logical and proper inferences from state law and legal precedent.[204] If there is no legal precedent, statutory provision, or constitutional basis from which a logical and *direct* inference can be found, then judges must refrain from declaring a provision invalid.[205] In order to invalidate such a provision, a court must point to a solid statute or legal precedent.[206] Second, the application of this public policy definition should be consistent in all of its applications.[207] If the state public policy specifically forbids an action, then the court should not sustain the action, regardless of the media with which it is affixed.[208] If one cannot legally obligate oneself to do something via contract, then a trust provision that attempts to do the same should likewise be invalid.[209] On the other hand, just because the subject matter may be unpleasant or unpopular, if one could legally obligate oneself to perform accordingly in a contract, then the court should view a similar will or trust provision no differently.[210] Courts should interpret a conditional will or trust as merely a contract between the living and the dead, and the court should only use reformation in the rarest circumstances.[211] Finally, if the provision only concerns decisions already made and does not encourage future action that may violate public policy, then the court should assume that the testator acted with a proper motive if one is available.[212]

XV. FINAL NOTE

As such changes are unlikely to occur anytime in the immediate future, there are still several steps estate planning attorneys might undertake to ensure that the desires of the testator are fulfilled as much as possible.

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202. *In re* Jacobs' Estate, 112 N.Y.S.2d 281, 283 (N.Y. Sur. Ct. 1952).
203. *See supra* Part XII.
204. *Id.*
205. *See* Muschany v. United States, 324 U.S. 49, 66 (1945).
206. *Id.*
207. *See supra* Part XI.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *See supra* Part XII.

Because it is extremely difficult to determine whether an individual court will declare a provision void as against public policy, attorneys assisting in the planning of an estate should ensure the existence of alternative or fallback provisions that instruct the court how to proceed with the remainder of the estate plan if the court deems such provisions invalid.[213] No doubt, such alternative provisions alone could prevent many of the legal dilemmas that courts face today in this realm of public policy.[214]

For example, referring back to our original hypothetical, you could recommend to Mr. Henderson that an alternative provision be drawn up to replace the "Jim-the-abusive-boyfriend" provision if the court deems the provision is invalid.[215] If deemed invalid for any reason, a simple line instructing the court that in such case Kimberly's portion of the estate should be distributed equally among his other children is all that is needed. By providing this fallback provision, even if Kimberly were to successfully challenge the initial provision in court, Kimberly would still receive nothing under the inheritance because the court would likely still follow the fallback instructions.[216] Such provisions should provide at least a degree of protection for the desires of the testator in most situations.[217]

XVI. CASE UPDATE

On September 24, 2009, the Supreme Court of Illinois reversed and remanded the decision of the Illinois Court of Appeals for the First District.[218] The court performed an exhaustive analysis of the legal precedent within the state to determine the applicable public policy, going through both the Probate Act and the Trusts and Trustees Act to determine that public policy weighs in favor of allowing a testator to distribute his property as he wishes, with minimal state interference.[219] The court also looked at the Restatements, which the appellate court cited largely for its decision, to point out that even though the Restatement (Second) of Trusts was cited approvingly by the court, never had the court provided any language to adopt the Restatement (Third) of Trusts as the appellate court had.[220]

However, the ultimate conclusion rested on the fact that Max's wife, Erla, retained power of appointment over the trust and modified it

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213. *See* RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. i(1) (2003).

214. *See supra* Part I.

215. *Id*.

216. *See* RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. i(1) (2003) (pointing out that if the settlor provides for an alternative disposition if a provision is declared invalid, the court will usually respect the provision with limited exceptions).

217. *See id*.

218. *In Re* Feinberg, --- N.E.2d ---, 2009, WL 3063395 (Ill. 2009).

219. *Id*. at *5-*7.

220. *Id*. at *13.

during her lifetime.[221] Even though Erla retained the beneficiary restriction clause, the original distribution would never become active because Erla designated a fixed amount to be distributed *at her death*, rather than retain a lifetime trust as Max had originally intended.[222] Because it acted only upon her death, it did not proactively encourage divorce, and thus, did not attempt any "dead hand" control over the potential beneficiaries.[223] In other words, the condition under Erla's amended trust was merely a condition precedent; therefore, the grandchildren only had a possible expectation under the inherence rather than any vested interest. In sum, because it was a condition precedent to be determined upon Erla's death, there was nothing to encourage the grandchildren to divorce.

In light of the previous discussion, this comment contends that the court reached the right decision in this case. The court performed a thorough analysis of both the statute and case precedent to identify the appropriate public policy. Rather than relying on the Restatements that were not adopted by the courts, the court made proper *references* based on the actual *indications* of legal precedent. Additionally, the court recognized that restrictions that are merely conditions precedent, do not have the same public policy implications that a condition subsequent might.

By coming to this conclusion, the court is not inferring that conditions that actually encourage divorce would withstand a public policy analysis—far from it. The court specifically points out that a condition subsequent which would prohibit marriage would surely be void as against public policy.[224] However, a condition, such as the modified version under Erla's administration, which was already determined at the time of death, would survive, because it would not act to encourage divorce and violate the public policy.

221. *Id.* at *2.
222. *Id.* at *2.
223. *Id.* at *2, *14.
224. *Id.* at *9.