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Say a Little Prayer for Your Beneficiaries

Navigating religious conditional bequests

For many, religion can be very personal and important, especially when attending to familial matters. Many religious individuals wish to pass on their personal beliefs, values and traditions to future generations. On occasion, individuals who value religion may want to add provisions to their estate-planning documents to ensure that their heirs continue to honor and respect their religious beliefs and traditions. However, attorneys should take care when preparing estate-planning documents with religious provisions to ensure they're explicit and defensible. Individuals have been including religious requirements in their estate-planning documents for 130 years,[1] if not longer, but courts haven't always upheld these provisions when challenged. Religious provisions often can lead to disputes between the beneficiaries and the fiduciaries if they're not drafted properly, and worse yet, don't honor the testator/grantor's wishes. We'll briefly address conditional bequests in general, analyze how the law on religious requirements in conditional bequests has developed over the years and discuss the modern approach. We'll also provide recommendations for attorneys with clients who wish to include religious requirement provisions in their testamentary documents.

Conditional Bequests

Testators of wills and grantors of trusts often include bequests conditioned on the beneficiary doing (or not doing) a certain thing. Such provisions allow a testator or grantor to incentivize a beneficiary's behavior by requiring that the beneficiary meet the condition to receive the bequest due to her under the governing instrument. Historically, courts have upheld conditional bequests, provided the conditions are: (1) not illegal, (2) not contrary to public policy, and (3) able to be performed.[2] Testamentary freedom often is cited as the primary reason for the wide berth granted to individuals who wish to dispose of their wealth subject to conditions. A common restriction found in many wills and trusts is adherence to religious traditions.[3] In the case of conditional bequests relating to religious practices, courts tend to focus on whether the conditions are contrary to public policy (typically by encouraging divorce) and whether the conditions are clear enough to be able to be performed, as we'll see in the cases discussed below.

Development of Modern Approach

As early as 1883, courts were asked to determine the validity of provisions in wills that required beneficiaries to meet certain religious conditions in order to inherit. In *Magee v. O'Neill*, a decedent died leaving a will that provided for a trust for his granddaughter, Elizabeth Magee, with the following language:

> [P]rovided she is educated in some Roman Catholic female seminary or school, and is reared as a Roman Catholic in the communion and faith of her deceased father, the said Arthur Magee; and on her day of marriage, or attaining the age of twenty-one years, the bequest—the whole amount—shall be paid over to her and her heirs, forever freed from all trusts whatever. But if the said Elizabeth Magee is not educated at a Catholic seminary or school, and reared as a Roman Catholic in the faith of the Roman

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> Catholic Church, then it is my intention, will and direction that the bequest shall accumulate, the interest or income as it arises shall be added to the principal until the said Elizabeth Magee's death or marriage or attaining the age of twenty-one years, when, on the happening of either of these events, the whole amount—principal and interest—shall be divided and paid over to the trustees of my daughter Elizabeth West.[4]

The facts of *Magee* indicate that Elizabeth Magee wasn't educated at a Catholic seminary or school, and there was no evidence that she was reared as a Roman Catholic in the faith of the Roman Catholic Church.[5] Elizabeth argued that it was impossible, practically speaking, to meet the conditions set forth in the will and contended that the conditions set forth in the will were against public policy.[6] The Supreme Court of South Carolina rejected both contentions, stating first that "the condition cannot be disregarded upon the ground that it could not be performed in whole or at least in part."[7] Explaining that the condition also wasn't void as against public policy, the court focused on the testator's freedom to dispose of his property as he wished. The court stated:

> We do not understand that there was anything in this bequest which can be properly called coercion, or that Elizabeth was 'deprived' of the liberty of conscience. Terms were attached to the bequest which may seem to us exacting, unkind and unnecessary, but we cannot say they were unlawful or that they were complied with.[8]

More than 80 years later, courts began to call religious conditional bequests into question. In *In re Keffalas' Estate*, the decedent died leaving a will that provided to each of his children except one daughter, a bequest of $2,000 on the condition that the child marry an individual of "true Greek blood and descent and of Orthodox religion."[9] The excluded daughter had married prior to the execution of the will; for her, the will provided a bequest of $2,000 on the condition that she remarry a man of true Greek blood and descent and of Orthodox religion after her first marriage was terminated by death or divorce.[10] The will also included a bequest of $2,000 to any child who originally married a non-Greek individual but later, as a result of death or divorce, remarried a Greek individual.[11]

> The wording of such conditional bequests is crucial as to whether the grantor's or testator's intent will be upheld.

Unlike most prior court rulings, the *Keffalas* court held that religious provisions that encouraged divorce were against public policy, but the provisions that were subject to a marriage condition were upheld.[12] Specifically, the Supreme Court of Pennsylvania stated:

> The condition . . . although not violative of freedom of religion, was conducive to divorce and thus violative of public policy. We cannot accept the contentions of appellants that evidence of an actual subjective intent to cause divorce is a prerequisite to striking down a condition based on divorce. On the contrary, the distinguishing factor seems to be whether the disposition is reasonably related to the contingency of divorce. . . . In the instant case, an additional gift is conditioned on divorce (or death) and remarriage to a Greek. The disposition is not logically related to the changed circumstances of the child, but is rather a channel for the testator's ethnocentricity and an encouragement to divorce.[13]

The *Keffalas* court did, however, uphold the disposition of the testator's business establishments to his three eldest sons on the condition that they marry an individual of "true Greek blood and descent and of Orthodox religion":

> Testator intended one potential gift of $2,000 to each child on condition of either marriage or remarriage to a Greek. The conditions on those $2,000 bequests are, indeed, tainted, and fall as conducive to divorce. However, the remarriage conditions, the fly in the ointment, do not

> attach to the gifts of the businesses in Paragraphs Twelfth and Thirteenth. As we have seen, the marriage conditions of themselves are valid.[14]

In short, the conditional bequests that reward divorce were deemed to be against public policy, but those that simply encouraged marriage within a particular faith were validated.

Notably, after the *Keffalas* ruling, some courts continued to uphold provisions relating to a beneficiary's spouse's religion. The wording of such conditional bequests is crucial as to whether the grantor's or testator's intent will be upheld. For example, in *Shapira v. Union National Bank*, the decedent died leaving a will with the following condition for the bequest to his son:

> My son Daniel Jacob Shapira should receive his share of the bequest only, if he is married at the time of my death to a Jewish girl whose both parents were Jewish. In the event that at the time of my death he is not married to a Jewish girl whose both parents were Jewish, then his share of this bequest should be kept by my executor for a period of not longer than seven (7) years and if my said son Daniel Jacob gets married within the seven year period to a Jewish girl whose both parents were Jewish, my executor is hereby instructed to turn over his share of my bequest to him. In the event, however, that my said son Daniel Jacob is unmarried within the seven (7) years after my death to a Jewish girl whose both parents were Jewish, or if he is married to a non Jewish girl, then his share of my estate, as provided in item 8 above should go to The State of Israel, absolutely.[15]

At the time of the decedent's death, Daniel was 21 years old and unmarried.[16] In court, Daniel argued that the condition on his inheritance was: (1) unconstitutional because it was a restriction on his constitutional right to marriage, (2) contrary to public policy as a restriction on marriage, and (3) unenforceable because of its unreasonableness.[17] Seven years after the *Keffalas* decision, the Court of Common Pleas of Ohio upheld the provision, noting that the condition wasn't a restriction on marriage, but a restriction on a beneficiary's ability to take under the will.[18] The court specifically held that: "It is a fundamental rule of law in Ohio that a testator may legally entirely disinherit his children. . . . This would seem to demonstrate that, from a constitutional standpoint, a testator may restrict a child's inheritance."[19] Unlike the language in *Keffalas,* which was deemed problematic, the language at issue in *Shapira* was rewarding Daniel for marrying a Jewish girl rather than rewarding him for divorcing a current spouse.

Application of Modern Approach

The provisions must not restrain marriage. Across the country, courts generally have found religious requirements in conditional bequests to be reasonable and not against public policy or constitutional law, so long as they're not conditions in total restraint of all marriage or to induce divorce. "Courts have consistently upheld restrictions that require a beneficiary to observe certain religious practices. . . . The reasoning behind permitting religious restraints is that society is not concerned with an individual's religious beliefs or practices."[20] However, courts may look more skeptically at provisions that promote divorce.

The *Restatement (Third) of Trusts (Restatement Third)* confirms that trust provisions that are contrary to public policy are void and sets forth as a specific example of such contrary language a provision that states that all of a beneficiary's rights to a trust would terminate if she married an individual who wasn't of a specified religion. The example provides that:

> . . . the marriage condition terminates all of [settlor's nephew 'N'] N's rights if, before termination of the trust, he 'should marry a person who is not of R Religion,' with the same gift over to C College. The condition is an invalid restraint on marriage; the trust and N's rights will be given effect as if the marriage condition and the gift over to C College had been omitted from the terms of the trust.[21]

As noted in the *Keffalas* case, "[w]hen a disposition tends to lead to divorce, as this one does, despite the relatively small amounts involved, then it is void."[22] While the *Restatement Third* asserts, in the above example and the related Comment, that attempting to influence religious choices of adults is contrary to public policy and would make such a provision void, it also cautions that "Some of the personal relationships or freedoms

considered [in the Comment] may be protected in some fashion by federal or state statutes or constitutions (such as religious freedom)."[23] Further, the *Restatement Third* states that it disagrees with the holding in *Shapira* and with the rule set forth in the *Restatement (Second) Property (Donative Transfers)* Section 8.1, which states that language drafted to prevent the acquisition or retention of property on account of adherence to or rejection of certain religious beliefs or practices on the part of the transferee is valid.[24] However, it also notes that most of the few U.S. decisions on this point support the position taken by the *Restatement (Second) Property (Donative Transfers)* (that is, the validity of conditional gifts based on religion).[25] Accordingly, perhaps little weight should be given to the *Restatement Third* on this point.

It's essential that any conditions included for a testamentary bequest be drafted with the utmost clarity and attention to detail.

Thus, while individuals have broad freedom to require the beneficiaries of their bounty to adhere to religious practices, it's crucial that the draftsperson avoid requirements specifically rewarding the beneficiaries to divorce. For example, the court in *Keffalas* may have upheld the language at issue if the will didn't explicitly incentivize the married daughter with a bequest if she divorced and remarried a Greek Orthodox man. Instead, the will could have simply provided for specific bequests of cash to the decedent's children who were married to a Greek Orthodox individual, without the mention of the termination of prior marriages or divorce. In sum, "[a] condition which in terms is in general restraint of marriage is void . . . but conditions forbidding the marriage of a beneficiary to a certain person or to a nonmember of a certain faith are valid."[26] Many modern courts likely would try to find a donative intent that was consistent with public policy even if there was also an effect on freedom to marry.

The provisions must be able to be performed. Furthermore, as noted in the above cases, when a beneficiary challenges a conditional testamentary gift, the claim typically will also focus on whether the terms of the condition are too ambiguous for the condition to be performed. When the conditions required to receive a bequest are poorly drafted so that they can't be met, either due to impossibility or vagueness, a court usually will find such conditions to be void and unenforceable. This concern arose in *In re Lesser's Estate*, in which the will at issue included the following provisions:

> To pay said sums to the children, that may survive me, of my son, Max Lesser, on their respective twenty-first birthdays, provided these children are given a normal Jewish, liberal education including an ability to read Hebrew, up to and including at least their fourteenth year: and, further provided that the Jewish dietary laws are observed by their parents up to and including the confirmation of these my present grandchildren: provided, however, that these my present grandchildren visit my grave at least once a year up to and including the twenty-first birthday of my youngest grandchild. If these conditions are not complied with to the complete satisfaction of my executor or his successor or successors, then the funds herein bequeathed are to go to the 'Federation for the Support of Jewish Philanthropic Societies of New York City,' . . . [27]

The will also directed that the residue of his estate was to be paid to his grandchildren "provided in the opinion of my executor, his successor or successors, they and their parents have complied with all the terms and conditions of [the above quoted language]: otherwise, then, the funds herein bequeathed are to go to the 'Federation for the Support of Jewish Philanthropic Societies of New York City.'"[28]

Some of the beneficiaries under the will contested these provisions, claiming in part that some of the terms of the conditions couldn't be implemented.[29] They argued, for example, that the will didn't set forth the duration of grave visitations that were to be measured by the age of the decedent's "youngest grandchild."[30] The beneficiaries contended that the will didn't take into account grandchildren born after the death of

the decedent, who could be deemed to be the decedent's "youngest grandchild," thus continually changing the duration of the grave visitations required for the beneficiaries to receive funds from the decedent's estate.[31]

The Kings County Surrogate's Court ultimately disagreed, stating that issue didn't require serious attention because the will "speaks from the date of death of the testator."[32] The court found that the decedent's "youngest grandchild" meant the youngest grandchild who had been conceived—but not necessarily born—as of the decedent's death, explaining that this question was "presently academic" because the youngest living grandchild of the testator was born slightly over eight months after the testator's death.[33] "It was obviously 'alive' *in ventre sa mere* at the time of the decedent's demise and is not only entitled to the benefits which he gave to the specified class of grandchildren . . . but comes within the description of the person whose minority is to measure the period of grave visitation."[34]

Similarly, in *In Re Paulson's Will*, the Supreme Court of Wisconsin was asked to interpret vague provisions in a testamentary document that provided that if the decedent's son "attend the regular meetings of worship of the Emanuel Church near the village of Cashton, Wisconsin, when not sick in bed, or prevented by accident or other unavoidable occurrence," he would receive his bequest.[35] The son claimed that the condition didn't include clear criteria for what would constitute "regular" meetings or "unavoidable occurrence" and thus was unenforceable due to uncertainty and indefiniteness.[36] The court held that it was proper for a court to provide clarity on these questions:

> It is said there is nothing to indicate when the attendance at church is to commence, nor how long it is to continue, nor who is to judge whether Peter Paulson has attended the 'regular meetings' of the church named, and, if he has not attended, who is to be the judge whether or not he was 'sick in bed.' But we think all of these questions are properly for the determination of the court in case judicial determination should be necessary. It does not seem that they are incapable of judicial determination, or that the conditions are so uncertain and indefinite that a court could not determine whether they had been performed . . . while the period of time of attendance is not stated, we think it a proper matter of judicial determination under all the terms of the will.[37]

Another example of a vaguely drafted conditional bequest involves a will that revoked certain bequests to the decedent's children if the children were married to non-Jewish individuals.[38] Several years after the decedent's death, the decedent's only son married a woman who wasn't Jewish.[39] A few months after their civil ceremony wedding, the son's wife converted to Judaism, and they had a Jewish wedding ceremony while she was pregnant.[40] The decedent's other children petitioned the court to determine whether the son had lost his rights to the decedent's estate based on the provision.[41] Ultimately, the Supreme Judicial Court of Massachusetts interpreted the conditional bequest to mean that the future spouse of a child of the decedent must be Jewish as of the date of the legal marriage between the child and the future spouse.[42] "Regardless of the dogmatic dispute as to the retroactive effect of conversion, we think that the provision as to marriage with 'a person not born in the Hebrew faith' must be judged in this case on the facts as they stood on May 11, 1949 [the date of the son's civil ceremony wedding]."[43] A properly drafted will could have avoided the time and cost necessary to obtain a judicial determination of these conditions. It's worth noting that the court upheld the religious provisions. It's essential, therefore, that any conditions included for a testamentary bequest be drafted with the utmost clarity and attention to detail. While the courts upheld

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the provisions, a judicial interpretation of a decedent's testamentary document may not actually follow what the testator intended. In addition, poorly drafted religious requirements in a testamentary document could lead to costly legal actions to ensure the conditions are properly met.

Sample Provisions/Suggestions

Thus, when drafting a testamentary document with a religious condition, the draftsperson should consider the mechanisms of the condition and how the executors or trustees, as the case may be, will be able to determine if the condition is met. What constitutes "regular" church attendance? For how long must the religious practice be observed? What's the measuring life governing the duration of the conditions to be met? What's the relation of the beneficiaries to the grantor or testator? It's notable, for example, that a majority of the cases upholding restraints on religion in donative transfers have involved situations in which the transferor and transferee were related by blood, marriage or adoption.[44] A court might conclude that such restraints shouldn't be upheld when the beneficiary at issue isn't related to the transferor. In addition, draftspersons may need to include language in the document to specify how to determine whether an adopted descendant or a descendant conceived through artificial reproductive technology (ART) is considered to be born a member of the particular faith of the testator or grantor. If the governing instrument isn't clear on how the condition can be performed, it may lead to burdensome disputes between beneficiaries and fiduciaries and the possible invalidation of the condition.

It's possible for testators and grantors to include in their testamentary documents and trusts, religious requirements for the beneficiaries so long as the documents are well-drafted.

Below is a sample provision that expresses the grantor's donative intent with regard to the grantor's descendants' spouses without encouraging divorce:

> The grantor places great significance on the grantor's descendants being Protestant. Nothing herein is intended to express disapproval of the decision of a descendant of the grantor to marry or the choice of his or her spouse. If a child of the grantor after the date of this agreement (i) marries an individual who is not a Protestant or (ii) converts to a religion or faith based organization other than Protestantism, such child of the grantor shall not be considered a beneficiary at such time.

Alternatively, such language could be incorporated directly into the dispositive provisions of the trust as follows:

> Upon her attainment of the age of thirty-two years (the 'Determinative Date') by the grantor's daughter, Ann, the trustees shall distribute one-half of the then-remaining principal of the trust to Ann, provided that from date of her attainment of the age of majority through and including the Determinative Date, Ann shall have not (i) married an individual of the Episcopalian faith or (ii) baptized any child of hers in the Episcopalian faith.

The below language provides guidance for a draftsperson to consider when a bequest is conditioned on a descendant's parent being of a particular faith when there's a possibility that descendants will be born or have been born through the use of ART:

> If a descendant of the grantor is conceived by artificial reproductive technology through the use of a donor oocyte or zygote (the 'Donor Egg') [an 'ART Descendant'], the following shall be applicable for such ART Descendant to be a beneficiary:
>
> (i) If such ART Descendant is married, such ART Descendant is married to a Catholic Individual;

(ii) Either (A) such ART Descendant converted to Catholicism, (B) the donor of the Donor Egg used for the conception of the ART Descendant is Catholic if such donor is a child or more remote descendant of the grantor, or (C) the director of the fertility center providing the Donor Egg for the conception of such ART Descendant certified in an acknowledged writing that the donor of such Donor Egg provided for the conception of such ART Descendant is Catholic if the donor of the Donor Egg used for the conception of such ART Descendant is not a biological or adopted child or more remote descendant of the grantor; and

(iii) Such ART Descendant has not converted to a religion or faith based organization other than Catholicism.

Well-Drafted Documents

It's possible for testators and grantors to include in their testamentary documents and irrevocable trusts, religious requirements for the beneficiaries so long as the documents are well-drafted:

> Having chosen to make [a particular beneficiary] an object of his bounty, the testator had the right to burden his gift with conditions. If those conditions are legal, the petitioner can't disregard the burden and successfully demand the bounty.[45]

When drafting a will or trust that will include restrictions based on the religious practices of the beneficiaries under the instrument, the draftsperson must ensure that such provisions: (1) can't be construed as promoting divorce but rather merely donative intent, and (2) are clear and reasonable enough to be achieved by the beneficiary should the beneficiary wish to do so. With proper and careful drafting, attorneys can provide their clients with excellent service by ensuring their estate-planning documents accurately express their testamentary intent and include religious provisions in these documents.

Endnotes

1. *Magee v. O'Neill*, 19 S.C. 170 (1883).
2. *See, e.g., ibid; Barnum v. Baltimore*, 62 Md. 275 (Md. Ct. App. 1884); *In Re Paulson's Will*, 127 Wis. 612 (1906).
3. Lauren J. Wolven and Shannon L. Hartzler, "Carefully Craft Conditions on Lifetime and Testamentary Gifts," *Estate Planning Journal* (August 2011).
4. *Supra* note 1, at p. 178.
5. *Ibid.*, at p. 179.
6. *Ibid*, at p. 180.
7. *Ibid.*, at pp. 184-85.
8. *Ibid.*, at p. 190.
9. *In re Keffalas' Estate*, 426 Pa. 432, 434 (1967).
10. *Ibid.*
11. *Ibid.*
12. *Ibid.*, at p. 435.
13. *Ibid.*, at pp. 435-36.
14. *Ibid.*, at pp. 436-37.
15. *Shapira v. Union National Bank*, 39 Ohio Misc. 28, 29 (Ohio Com. Pleas 1974).
16. *Ibid.*
17. *Ibid.*, at pp. 29-30 and 33-35.
18. *Ibid.*, at p. 39.
19. *Ibid.*, at p. 32.
20. *See supra* note 3.
21. *Restatement (Third) of Trusts (Restatement Third)* Section 29, Explanatory Notes, Comment j, Illustration 3, at pp. 62-64 (2003).
22. *See supra* note 9, at p. 435.
23. *See supra* note 21, at p. 62.
24. *Ibid.*, at p. 91.
25. *Ibid.*, at p. 93.
26. *In re Kempf's Will*, 252 A.D. 28, 32-33 (N.Y. App. Div. 1937).
27. *In re Lesser's Estate*, 158 Misc. 895, 897 (N.Y. Surr. Ct. Kings Co. 1936).
28. *Ibid.*, at p. 897.
29. *Ibid.*, at p. 898.
30. *Ibid.*
31. *Ibid.*
32. *Ibid.*
33. *Ibid.*
34. *Ibid.*, at p. 899.
35. *In Re Paulson's Will*, 127 Wis. 612, 615-16 (1906).
36. *Ibid.*, at p. 618.
37. *Ibid.*, at pp. 620-21.
38. *Gordon v. Gordon*, 332 Mass. 197, 198-200 (1955).
39. *Ibid.*, at p. 199.
40. *Ibid.*, at pp. 199-200.
41. *Ibid.*, at pp. 200-01.
42. *Ibid.*, at p. 201.
43. *Ibid.*
44. *Restatement (Second) Property (Donative Transfers)* Section 8.1, Reporter's Note 3, at p. 323 (1983).
45. *Supra* note 26, at p. 32.