IN RE ESTATE OF FEINBERG:

EVEN WHEN YOU WILL IT, IT'S STILL A DREAM

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"…Max and Erla Feinberg seek to preserve their 4,000-year-old heritage by providing that upon their death, a grandchild who married outside the Jewish faith shall be deemed to have predeceased the testators…[they] had a dream with respect to the provisions of their will and if you will it, it is no dream..."

-Justice Alan Greiman in dissent in *Feinberg*[1]

In *In re Feinberg*,[2] the Appellate Court for the First District of Illinois voided a testamentary provision purporting to disinherit testator's grandchildren who married outside of the Jewish faith as against public policy.[3] In so doing, the Court misapplied the few cases it cited as Illinois precedent, ignored persuasive authority from across the national spectrum, and selectively cited only those scholarly sources that it claimed supported its conclusory opinion. While the relevant legal authority seems to indicate that clauses such as that one at issue should generally be upheld, in that it was choosing to apply a new rule, the Court should, at the very least, have phrased its ruling prospectively and exempted the clause in the instant case from revision.

I. The Case

Max Feinberg, a prominent Chicago dentist, and his wife Erla left two children – Michael and Leila – and five grandchildren - Michele Trull, Aron Feinberg, Lisa Taylor-Schroeder, Jon Taylor, and Aimee Taylor-Severe – upon their respective deaths in 1986 and 2003.[4] In documents prepared before their deaths, Max and Erla established trusts to distribute their assets

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[1] *In re Feinberg*, 891 N.E.2d 549, 555-558 (Ill. App. 1st Dist. 2008)(Greiman, J. dissenting).
[2] *Id*.
[3] *Id*. at 553.
[4] Ron Grossman, *"Jewish clause" Divides a Family*, CHICAGO TRIBUNE, Aug. 25, 2008, 2008 WLNR 16033902.

amongst those children and grandchildren upon their demise. Clause 3.5(e) of Max's trust stated:

> "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."[5]

Michael claimed that Max conceived of this "Jewish clause" when he discovered that one of his grandchildren was taking a non-Jewish girlfriend to his junior prom.[6] According to Michael, Max let it be known that "he wasn't happy with the idea of diluting the family's Jewishness."[7] Max was a "traditionalist in his work ethic as well as his feelings about intermarriage."[8]

As per the Feinbergs' testamentary documents, after Max's death, his assets went into a trust for the benefit of his wife Erla.[9] Michael and Leila served as co-executors of that trust, managing all of Erla's financial affairs until the time of her death.[10] During that time, four out of Erla's five grandchildren married outside of the Jewish faith.[11] Only one married a spouse who converted to Judaism within the allotted time.[12]

Almost immediately upon Erla's death in 2003, controversy began to swirl amongst her descendants. By the time the issues surrounding the estate reached the First District of Illinois, three cases had been instituted relating to the disposition of the Feinbergs' assets. The first was the probate of Erla's estate. In the second, Michelle Trull, filed suit accusing Michael, Leila and Leila's husband, Marshall Taylor, of mishandling the estate and causing millions of dollars in

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[5] *In re Feinberg*, 891 N.E.2d at 550.
[6] Grossman, *supra* note 4.
[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] Grossman, *supra* note 4. One grandchild claimed that Erla had attended his wedding and did not warn him that marrying a non-Jew could cost him his inheritance.
[12] Patrick O'Brien, *Son Wants Religious Preference Put Back Into Trust*, 154 CHI. DAILY L. BULL. 162, 8/18/08 Chi. Daily L. Bull. 1 (2008).

damage by evading estate taxes and dipping into the estate funds prematurely.[13] In particular, Michelle accused Leila and Marshall, of taking $1.6 million "not for Erla's benefit, but solely for their own" to "finish the floors in [their] house and buy a car and a summer home."[14] Michael Feinberg essentially admitted to some wrongdoing stating in a deposition that he took money as "an advance on [his] inheritance."[15] In the third and final related suit, Michael and Leila were accused of failing to transfer stock certificates, registered to Max, to the estate in the nearly twenty years since his death.[16]

Before any of these cases could be decided on the merits, Michael, Leila and Marshall sought to have the second and third cases dismissed on the grounds that Michelle did not have any interest in the estate in that she had married outside of the Jewish faith and was thus deemed to be deceased.[17] In response, in March 2006, Michelle filed a motion in the first case seeking to have the "Jewish clause" invalidated.[18]

Cook County Circuit Judge Susan M. Coleman consolidated these three cases and proceeded to invalidate the Jewish clause as against Illinois public policy. In adopting reasoning which would later be picked up by the appellate court, Judge Coleman explained that both the Illinois Supreme Court and Restatement (Third) of Trusts had "articulated a general rule that conditions on bequests that tend to discourage lawful marriage are against public policy."[19] Michael, Leila and Marshall then filed an interlocutory appeal with the Appellate Court for the First District of Illinois seeking to overturn Judge Coleman's decision.

II. Court's Reasoning

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[13] *In re Feinberg*, 891 N.E.2d at 550.
[14] *See* Grossman, *supra* note 4.
[15] *Id*.
[16] *In re Feinberg,* 891 N.E.2d 549 at 550.
[17] *Id*.
[18] *Id*.
[19] *See* O'Brien, *supra* note 12.

A. Majority

In *In re Estate of Feinberg*, the Appellate Court for the First District of Illinois affirmed the order of the Circuit Court of Cook County and struck a testamentary clause purporting to disinherit a testator's grandchildren who married outside of the Jewish faith. In reaching its decision that such a clause was against Illinois state public policy, the Court relied on three main cases – *Ransdell v. Boston*,[20] *In re Estate of Gerbing*,[21] and *Winterland v. Winterland*.[22] While the Court briefly refers to related decisions from other jurisdictions, as well as scholarly sources such as the Restatement (Third) of Trusts, it quickly dismisses the relevance of the former, and only briefly mentions the latter without fully delving into its relevance.

The *Feinberg* Court begins its decision by laying out the general rule, first referred to in Illinois in *Ransdell v. Boston*[23] in 1898, that testamentary provisions which act as restraints on marriage, by encouraging separation or divorce, are void as against public policy.[24] While acknowledging that the *Ransdell* Court found the rule inapplicable in the case before it, the majority insisted that "subsequent Illinois courts have reaffirmed the underlying principle that testamentary provisions are invalid if they discourage marriage or encourage divorce."[25]

In particular, the majority cites marriage-restraining clauses which were found to be against public policy in two ensuing Illinois cases, as the main basis for striking the Jewish clause at issue in the *Feinberg* case. In the first, *In re Estate of Gerbing*,[26] the Illinois Supreme Court invalidated a clause which provided for the corpus of a trust to be transferred to a testator's son if

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[20] 50 N.E. 111 (Ill. 1898).
[21] 337 N.E.2d 29 (Ill. 1975).
[22] 59 N.E.2d 661 (Ill. 1945).
[23] 50 N.E. 111 (Ill. 1898).
[24] 891 N.E.2d at 551 citing *Ransdell*, 50 N.E. 111 (1898).
[25] *Id*.
[26] 337 N.E.2d 29 (Ill. 1975).

and when the son obtained a divorce.[27] In the second, *Winterland v. Winterland*,[28] the same court struck a clause which left a life estate to the testator's wife and a remainder to all of his children except one whose share was contingent on his having divorced his wife.[29] The *Feinberg* court found the clauses in both cases to be "strikingly similar to the instant case,"[30] and thus, because Illinois courts had found such clauses to be void as against policy, saw no reason to depart from that "well-established principle."[31]

Next, the majority tersely alludes to cases in other jurisdictions which have upheld similar clauses.[32] In *Shapira v. Union National Bank*[33] for instance, an Ohio court upheld a testamentary provision requiring testator's son to marry a Jewish girl within seven years of testator's death. Similarly, in *In re Silverstein's Will*,[34] a New York court upheld a clause in a will requiring inheritors to marry within the Jewish faith. The *Feinberg* Court chooses not to delve into the reasoning of any these cases, instead choosing to merely refer to a law review article - arguing that no testamentary restraints on a legatee's personal behavior should be enforced - [35] as providing an "excellent discussion of this area of the law,"[36] and an American Law Reports compendium, of cases dealing with the validity of will provisions regarding religious faith,[37] as another source for "general discussion" of the area.[38]

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[27] *Id*. at 33.
[28] 59 N.E.2d 661 (Ill. 1945).
[29] *Id*. at 662-63.
[30] *In re Feinberg*, 891 N.E.2d at 551.
[31] *Id*.
[32] *Id*. at 552.
[33] 315 N.E.2d 825 (Ohio Com.Pl. 1974).
[34] 155 N.Y.S.2d 598 (N.Y.Sur., 1956).
[35] *In re Feinberg,* 891 N.E.2d at 552 *citing* J. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices,* 1999 U. Ill. L.Rev. 1273 (1999).
[36] *Id*.
[37] *Id. citing* Annotation, *Validity of Provisions of Will or Deed Prohibiting, Penalizing, or Requiring Marriage to One of a Particular Religious Faith,* 50 A.L.R.2d 740 (1956).
[38] *Id*.

In the final section of its opinion, the *Feinberg* Court briefly refers to the Restatement (Third) of Trusts which, in its comments section, specifically portrays a clause such as the one at issue in this case as an example of one which would be void as against public policy.[39] The majority then finishes its opinion by emphasizing that it was not persuaded that it was applying a "new rule which should only be applied prospectively"[40] noting "similar holdings in which Illinois courts have found similar provisions to be against public policy dat[ing] back to 1898."[41]

B. Concurrence

In a concurring opinion,[42] presiding Justice Patrick Quinn supplements several of the majority's arguments and defends them from attacks by the dissent. First, the concurrence attacks any attempt to portray Max and Erla as interested in preserving their Jewish heritage, in that their wills say nothing about their children marrying gentiles, only their grandchildren.[43] Next, Quinn notes the age of the cases cited by both the majority and the dissent,[44] and notes that four of the dissent's cases were decided under the Restatement (Second) of Trusts.[45] As a follow-up to this somewhat extraneous point, the concurrence cites to a separate Illinois case - *Peck v. Froehlich*[46] – which cites the Restatement (Third) of Trusts for the proposition that "that the trustee's discretion should be exercised in a manner that will avoid expending trust funds for

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[39] *Id*.
[40] *Id*.
[41] *Id*. at 552.
[42] *In re Feinberg*, 891 N.E.2d. 553-55 (Quinn, J. concurring).
[43] *Id*. at 553 ("This noble defense of 'the Jewish Clause' is refuted by the appellants themselves. As the appellants point out in their reply brief, 'If Max were truly trying to prevent marriages outside the Jewish faith, Michael asserts he would have included his children [the appellants] as being subject to the Jewish Clause.'")
[44] *Id*. at 554. Two cases less than fifty years old by the dissent and one for the majority
[45] *Id*. While assumedly the dissent is attempting to show that the dissent only cited cases based on a supposedly now-defunct version of the Restatement, he neglects to mention that all three of the majority's cases were similarly decided under either the First or Second Restatements of Trusts as well.
[46] 853 N.E.2d 927 (Ill. App. 2006).

purposes for which public funds would otherwise be available"[47] - as proof that Illinois courts generally rely on the Third Restatement.[48]

C. Dissent

In a scathing dissent, Justice Alan Greiman takes the majority to task for preventing Max and Erla Feinberg from preserving their 4,000 year old heritage.[49] With regards to the relied-upon Illinois cases, Greiman points out that in all three, the testator was attempting to cause a then-married couple to divorce - refusing to give a legatee the principal of an estate if he or she were to remain married.[50] That situation is quite different than the circumstances at issue in the *Feinberg* case in which the relevant clause either disqualified those members of the testator's family who had already married non-Jews, or attempted to influence future marriage decisions.

Next, in response to the majority's brusque dismissal of cases from other states, the dissent emphasizes that an "examination of cases from other jurisdictions…indicates that we would be in the minority if we failed to uphold Max and Erla's limitation."[51] In addition similar clauses relating to testators' children's religious education have been upheld from New York,[52] to Delaware,[53] to Pennsylvania[54] amongst others.[55]

Lastly, with regards to scholarly sources, the dissent points out that there are an equal number of sources holding that provisions such as the "Jewish clause" should be upheld including a newer American Law Reports compendium and an Illinois Practice Manual.[56]

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[47] *Id*. at 931 citing Restatement (Third) of Trusts § 50, Comment e (4), at 273-74 (2003).
[48] *In re Feinberg*, 891 N.E.2d at 553 (Quinn, J. dissenting).
[49] *Id*. at 555 (Greiman, J. dissenting).
[50] *Id*.
[51] *Id*.
[52] *Id*. at 556 citing *In re Kempf's Will*, 252 A.D. 28, 32 (N.Y. 1937).
[53] *In re Feinberg*, 891 N.E.2d at 556 (Greiman, J dissenting) citing *Delaware Trust Co. v. Fitzmaurice*, 31 A.2d 383 (Del Ch.1943).
[54] *Id*. at 557 citing In *re Estate of Laning*, 339 A.2d 520, 521 (Penn. 1975).
[55] *Id*.
[56] *Id*. at 557 citing 89 A.L.R.3d § 2b at 986 (1979); 19 R. Hunter, Illinois Practice § 188:11 at 176 (5th ed.2008).

Furthermore, the dissent points out that the opinion to which the concurrence points to as "proof" that Illinois has adopted the Restatement (Third) of Trusts, instead of the First or Second, is a case on a totally different topic. Adopting the reasoning from one section of the Restatement does not inherently mean that the entire restatement has been adopted.[57]

III. Analysis

The majority in *In re Feinberg* claims to be on very solid legal ground, painting its decision to strike the testamentary provision at issue as "similar [to] holdings in which Illinois courts have found similar provisions to be against public policy dat[ing] back to 1898."[58] In reality, however, the Court fashions a new rule and then attempts to enforce it with regards to a clause some of its members are apparently uncomfortable with. With regards to the "uniform precedent of Illinois," it refers to, the Court cites a bare-minimum of three cases - the most recent being over 30 years before the instant case - all of which deal with clauses attempting to force a husband and wife to divorce. Furthermore, after noting that "some other states do not follow the uniform precedent of Illinois in validating such provisions"[59] as the one at issue in *Feinberg,* and mentioning four such states, the Court completely ignores this contrary authority.[60] Lastly, the Court arbitrarily points to several scholarly sources that seem to side with its general discomfort with testamentary restraints on personal behavior.[61] Based on this fragile legal basis, the Court should not have enunciated any new rules but at the very least should have done so strictly on a prospective basis.

A. The Illinois Case Law to Which the Feinberg Court Refers is Sparse and Distinguishable

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[57] *Id*. at 557 ("The concurring opinion mentions the reference to the Restatement (Third) of Trusts in the majority opinion and then cites Peck v. Froehlich, which has absolutely nothing to do with the case at bar.").
[58] *Id*. at 552.
[59] *In re Feinberg*, 891 N.E.2d at 552.
[60] *Id*. The two halves of the paragraph in which this contrary authority is mentioned are in fact seemingly totally unrelated.
[61] *Id*.

All three cases that the *Feinberg* majority cites as the "uniform precedent" against clauses such as the one in Max's will, discuss clauses which specifically require a legatee to divorce his or her spouse in order to be able to inherit - a situation distinct from the one at issue in *Feinberg*. In the first, *Ransdell v. Boston*[62] The clause at issue specified:

> "…If the said John P. Ransdell shall during his life be legally absolved from the bonds of matrimony whereby he is now joined in wedlock to Julia Ransdell, then, upon the happening of such event…the one-half of the residue of my estate hereinbefore devised to my wife for her life, or in trust for her for life, shall immediately vest in the said John P. Ransdell absolutely. ."[63]

Despite upholding the provision, the *Ransdell* Court emphasized that "conditions annexed to a gift the tendency of which is to induce husband and wife to live separate or be divorced are, upon grounds of public policy and public morals, held void."[64] The only reason the *Ransdell* Court chose to uphold the provision was because the particular husband and wife at issue had already started divorce proceedings prior to execution of the will. Thus, it could not be said "that the condition tended to encourage either the separation or the bringing of a divorce suit, both having take place long prior to the execution of the will."[65]

In the second case, *In re Gerbing*,[66] the Illinois Supreme Court invalidated a testamentary provision similar to the one in *Ransdell*, in that, as opposed to *Ransdell*, it did in fact encourage divorce. In that case, the clause at issue stated:

> "…[I]n the event Arlie Gerbing and Frank Gerbing, Jr.. are divorced and remain divorced for a period of two (2) years…this trust shall terminate and my trustee is directed to pay, turn over and deliver the remaining principal of the trust property and all accrued dividends or interest accumulated thereon to my said son [Frank]..."[67]

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[62] 50 N.E. 111 (1898). Incidentally, *Ransdell* is the only case the court cites to between 1898 and 1945 and yet the majority unabashedly asserts extensive Illinois precedent on the topic "dating back to 1898."
[63] *Id*. at 112.
[64] *Id*.
[65] *Id*.
[66] 337 N.E.2d 29 (1975).
[67] *Id*. at 31.

In striking the clause as against public policy, the *Gerbing* Court found that its enforcement would "encourage a wronged husband or wife to seek the remedy of divorce" as opposed to a less extreme solution, and exacerbate normal martial differences "until they assume serious proportions and supply the grounds for divorce."[68]

The third and final case the *Feinberg* majority cites is again an "induction to divorce" case. In *Winterland v. Winterland*,[69] the clause at issue stated:

> "…I now modify the Third Clause of said Original Will and direct and will that the equal share therein contemplated to be given to my son, George Winterland, if he should survive me, is given, devised and bequeathed to my son Henry Winterland, but in trust nevertheless that he shall keep said share safely invested and pay the income therefrom in cash into the hands of my said son George, so long as he may live or until his present wife shall have died or been separated from him by absolute divorce..."[70]

In striking the clause, the Illinois Supreme Court relied on the "public policy of [the] state to safeguard and protect the marriage relation."[71] Any testamentary conditions which "have a tendency to encourage or induce a separation or divorce" are thus void.[72]

The facts at issue in *In re Feinberg*, as well as the testamentary clause itself, are distinguishable from the common set of facts and clauses at issue in *Ransdell*, *Gerbing*, and *Winterland*. In those cases, the Illinois Supreme Court addressed the issue of what to do with clauses that encouraged the break up of marriages. The Court relied on its public policy power – which is merely a way of invoking a state's police power – to strike the clauses. In other words, the Court intuited a state interest in keeping married couples together to the degree possible. In that outside conditions, such as testamentary provisions conditioned on divorce, exacerbate bad

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[68] *Id*. at 33.
[69] 59 N.E.2d 661 (Ill. 1945)
[70] *Id*. at 662.
[71] *Id*. at 663.
[72] *Id*.

marriages, and have the power to adversely affect even good marriages, the state has a powerful interest in preventing their enforcement.

The "Jewish clause" at issue in *In re Feinberg*, on the other hand, has nothing to do with divorce and preventing the breakup of marriages. At worst, it merely limits the pool from which the Feinberg's grandchildren could choose a spouse and still inherit from the estate. The clause does not encourage or discourage divorce - it merely attempts to influence the marriage decisions of the legatees before they are made. While the state may have some interest in keeping families together, that interest is in no way implicated by the *Feinberg* clause.

Furthermore, divorce is not even mentioned in the *Feinberg* clause. Instead, all the provision mentions is that "as of the date" of a grandchild's marriage to a non-Jew, he or she is to be considered deceased for inheritance purposes. The clause does *not* state that if the grandchild at issue divorces his or her non-Jewish spouse he or she will be "resurrected" for estate purposes. Once the frowned-upon marriage occurs, the donee is cut out of the inheritance.

As of the date of Erla's death - the execution date of the clause - four out of the Feinbergs five grandchildren were married to non-Jews and none of the four non-Jewish spouses had converted within one year of the marriage, as required by the clause. Thus, as of one year after their marriages, these grandchildren were considered deceased for estate purposes. Under the plain meaning of the clause there was nothing they could do about that status. Thus, the policy issue behind the invalidation of the clauses in *Ransdell*, *Gerbing* and *Winterland* is simply not present in *Feinberg*. Nothing about Max's "Jewish clause" induces divorce.

B. The Feinberg Court Refers to and then Ignores Other Relevant Authority

Not only does the *Feinberg* Court fail to acknowledge the glaring distinction between the clauses in the Illinois cases it cites and the "Jewish Clause" in the *Feinberg* will, but it refuses to

confront the reasoning enunciated in other jurisdictions dealing with similar clauses despite explicitly acknowledging its existence.[73] In *Shapira v. Union National Bank*,[74] for instance, an Ohio Court upheld a clause which conditioned a testator's devise to his children on their being "married at the time of [testator's] death to a Jewish girl whose both parents were Jewish,"[75] highlighting the fact that the "great weight of authority in the United States is that gifts conditioned upon the beneficiary's marrying within a particular religious class or faith are reasonable."[76] Similarly, in *In Re Silverstein's Will*,[77] a New York court upheld a testamentary provision which limited distribution to the testator's grandchildren who married "a person of the Hebrew faith" stating unequivocally that "conditions not to marry a person of a particular faith or race are not invalid."[78]

The emphasis in both of these cases was on the fact that the provisions in question did not encourage divorce and acted as only a partial restraint on marriage.[79] Both Courts cited a plethora of sources which indicated that only total restraints on marriage were void as against public policy, not partial ones such as those that restricted the religion into which a beneficiary could marry.[80] Rather than facing the weight of this authority head on, and perhaps addressing it in light of society's changing views of morality and religion in the 21st century, the *Feinberg* Court simply ignores it. Instead, it merely refers to an "an excellent discussion of this area of the

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[73] See *In re Feinberg*, 891 N.E.2d at 551-52;
[74] 315 N.E.2d 825 (1974).
[75] Id. at 826.
[76] Id. at 829.
[77] 155 N.Y.S.2d 598 (1956).
[78] Id. at 599 citing
[79] *Shapira*, 315 N.E.2d at 828-29; In *re Silverstein*, 155 N.Y.S.2d at 599.
[80] *See, e.g., Shapira*, 315 N.E.2d at 829 *citing* 5 Bowe-Parker: Page on Wills 460, Section 44.25; 56 Ohio Jurisprudence 2d 243, Wills, Section 729; 52 American Jurisprudence 2d 1023, Marriage, Section 181; 1 Prentice-Hall, Estate Planning, Law of Wills, 373, Paragraph 375.20; 1 Restatement of the Law, Trusts 2d, 166, Section 62(h); *National Bank v. Snodgrass* 275 P.2d 860 (1954); *Gordon v. Gordon*, 124 N.E.2d 228 (1955); *In re Harris*, 143 N.Y.2d 746 (1955); *In re Seaman* 112 N.E. 576 (1916); *In re Liberman*, 18 N.E.2d 658 (1939); *In re Silverstein's Will*, 155 N.Y.S.2d 598 (1956); *In re Clayton's Estate*, 13 Pa.D. & C. 413 (Phila.Co.Pa.1930); *Pacholder v. Rosenheim* , 99 A. 672 (Md. 1916);

law" in a law review article discussing instrumentalist theory with regards to testamentary restraints on behavioral choices,[81] and an American Law Reports annotation which specifically states that conditions restraining marriage are void only when they are total, not partial.[82]

Thus, the *Feinberg* Court ultimately refers to dozens of sources refuting its decision and cites as countervailing evidence a philosophical law review article and an A.L.R. annotation which contradicts it. Combined with the fact that the "uniform Illinois precedent" it cites is in fact merely three cases all of which seem to be distinguishable on their face, the general rule that the *Feinberg* Court announces seems to be on shaky legal ground at best.

C. Prospective Application of the *Feinberg* Holding

As perhaps a last resort, the *Feinberg* Court points to the Restatement (Third) of Trusts which indicates that a clause similar to the one at issue in *Feinberg* should be considered void as against public policy.[83] While the Court is correct, in that the Third Restatement does seem to invalidate such clauses, nowhere in the explanatory notes do the authors of the Restatement justify their break with the heavy weight of precedent including both the First and Second Restatements of Trusts. Furthermore, the Restatement (Third) of Trusts has almost never been referred to as persuasive authority in Illinois courts. This is evidenced by the fact that the concurring opinion is only able to point to one Illinois state case which cited the Third Restatement and even there, on a completely different issue.[84]

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[81] J. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices,* 1999 U. Ill. L.Rev. 1273, 1329.

[82] 50 A.L.R.2d 740 at §2. "Where the restraint is partial, that is, limited in time or applicable *to a restricted class of person*s [emphasis added], as where the gift or grant is on condition that the donee or grantee refrain from marriage for two years or refrain from marrying a member of a designated class of persons, it is valid or invalid according to whether it is reasonable or unreasonable…The decisions herein support that conclusion, and indicate further that *restriction of a beneficiary's marriage to persons of a designated faith is generally regarded as not unreasonable* [emphasis added]."

[83] *In re Feinberg*, 891 N.E.2d at 552 citing Restatement of Trusts § 29, Explanatory Notes, Comment j, Illustration 3, at 62-64 (3d ed.2003).

[84] *Id*. at 553 (Quinn, J. concurring) citing Peck v. Froehlich, 853 N.E.2d 927 (Ill. 2006).

That being said, even if the *Feinberg* Court was convinced by the Third Restatement of Trusts, based on the overwhelming authority upholding such clauses, its ruling should have been applied only prospectively. The only justification the *Feinberg* Court points to, to back up its assertion that it was not announcing a new rule, is that "Illinois courts have found similar provisions to be against public policy date back to 1898."[85] The explicit reference to 1898 is clearly an allusion to *Ransdell* and its progeny which, as mentioned, dealt with totally different circumstances then those at issue in *Feinberg*.[86] Thus, the Feinbergs, and their estate planners, could not have been on notice that such clauses could be struck as against public policy. As such, in all fairness, if the Court was going to enunciate a new rule going against the heavy weight of nationwide precedent, it should have done so only prospectively.

IV. Conclusion

In our modern era of enlightenment and pluralism, many of us are unnerved by those who would rather remain insular with regards to their faith and religion. Religions which frown upon intermarriage or mingling with others make many of us – including the Appellate Court for First District of Illinois – uncomfortable. That being said, while states and courts do have a role in ensuring equal treatment and fairness to all, "it is no less important that persons of sound mind and memory, free from restraint and undue influence, should be allowed to dispose of their property by will, with such limitations and conditions as they believe for the best interests of their donees."[87] While society in general may frown upon testamentary provisions such as Max and Erla Feinberg's "Jewish clause," they, like anyone else, should be able to dispose of their assets in a way they deem best for their children and grandchildren.

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[85] *Id*. at 552.
[86] *See supra* §III(A).
[87] *Ransdell,* 50 N.E. 111 (1898).