

## A TRIO OF RECENT TESTAMENT DECISIONS

By Fredric Bryan Lesser and Kathleen M. Hogan \*

Three recent Probate/Trust decisions highlight fissures in the law. This trio touch upon issues as diverse as the right to marry, consumer protection and the jurisdictional time limit for a will contest. Yet all three illuminate deep problems in the testamentary transfer of wealth.

### I. THE RIGHT TO MARRY; ESTATE OF MAX FEINBERG<sup>1</sup>

Max Feinberg died, leaving a trust providing benefits for his grandchildren, but with the following caveat:

3.5(e) 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. (the "Jewish Clause").<sup>2</sup>

Of Max's five grandchildren, all were married but only one was married within the Jewish faith. The Circuit Court of Cook County found that the Jewish Clause was void as against public policy.<sup>3</sup> The First District Appellate Court, in a rare three opinion decision, agreed.<sup>4</sup>

#### A. Majority Opinion.

The majority opinion relies upon the Restatement (Third) of Trusts<sup>5</sup> and three Illinois cases: *Ransdell v. Boston*,<sup>6</sup> *Winterland v. Winterland*,<sup>7</sup> and *Estate of Gerbing*.<sup>8</sup> The Illinois courts have long recognized that wills and trusts which condition gifts upon the donee obtaining a divorce can be declared void as a matter of public policy. The Court in *Ransdell* quoted from

Justice Story on Equitable Jurisprudence to explain the rationale: “[C]onditions 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.”<sup>9</sup>

The *Ransdell* Court, however, made it clear that all such conditions are not void. The courts must look to both the individual circumstances and the testator’s intent. In *Ransdell*, the Court found that because the donee and his wife had been in divorce proceedings for two years when the will was written, the testator’s intent was not to encourage a divorce but rather to prevent his daughter-in-law from making a claim to the inheritance.<sup>10</sup> Preserving an inheritance was a permissible goal and so the will was upheld.

In each of the remaining cases relied upon by the *Feinberg* majority, the invalid clauses were very similar, stating in essence: “If my child A is married to current spouse B, then the gift to A will be held in trust for A’s benefit. If A later divorces B, then A will receive the gift unconditionally.” These clauses were aimed at specific people whom the testator disliked and did not involve larger social issues. The majority opinion states that these clauses were “strikingly similar” to *Feinberg*,<sup>11</sup> but in reality these were very different clauses with very different purposes than Max Feinberg’s Jewish Clause.

The majority opinion, however, finds stronger ground in relying upon the Restatement (Third) of Trusts. In an illustration, the Restatement says that the following is an invalid restraint: “The marriage condition terminates all of [settler’s nephew] N’s rights if, before termination of the trust, he should marry a person who is not of R religion.”<sup>12</sup> This example is comparable to the Jewish Clause, although it is a stretch to rely solely upon an illustration in commentary to fashion a governmental policy such as declaring a religious marriage clause void.

B. Dissent.

Justice Greiman wrote a beautiful dissent in support of Max's shiksa-free plan: Max and Erla Feinberg seek to preserve their 4,000-year-old heritage.<sup>13</sup> The dissent points out the wide gulf between the Illinois precedent and the majority opinion. Despite that gulf, the dissent had no more luck in finding solid Illinois precedent than did the majority. Instead, the dissent relied upon cases from other states, in particular Massachusetts, New York, Ohio and Maryland, where similar clauses have been enforced.<sup>14</sup> The dissent also relied upon commentary, an ALR annotation and R. Hunter, Illinois Practice, which both expressly state that clauses requiring a person to be married in a particular faith are generally upheld.<sup>15</sup> Neither source, however, cites any binding or even persuasive authority.

C. Concurring Opinion.

Justice Quinn wrote a specially concurring opinion defending the majority opinion against the attack of the dissent. In defense of the majority, Justice Quinn pointed out the practical difficulties in which the courts can become entangled when trying to enforce religious clauses, such as determining whether a beneficiary was sufficiently Catholic.<sup>16</sup>

The issues in *Feinberg* alone are enough to create an animated debate in the legal community. To add fuel to the fire, *Feinberg* contains a striking disagreement between the dissent and the special concurrence over the applicability of *Shelley v. Kramer*<sup>17</sup> to this circumstance. In *Shelley*, the U.S. Supreme Court struck down privately executed restrictive covenants prohibiting real estate from being used or occupied by any person except those of the Caucasian race.<sup>18</sup> The *Feinberg* dissent says that enforcing racial covenants in perpetuity is completely different from a decision over whether or not a particular grandchild inherits.<sup>19</sup> The

special concurrence asks: What if Max Feinberg had said the grandchildren would not inherit if they married a black person or any other group Max did not like?<sup>20</sup>

The special concurrence extols the forward thinking Restatement, implicitly admitting that *Feinberg* is a change in the law. Justice Quinn contrasted the Restatement, which changes over time, with the static philosophy of "original intent" espoused by U.S. Supreme Court Justice Antonin Scalia. Justice Quinn wrote, "While many jurists, notably the Justices of the United States Supreme Court who adhere to the principle of following the 'original intent' of the framers of the constitution believe in static jurisprudence, the authors of the Restatement do not."<sup>21</sup>

*Feinberg* illustrates a deep division in the law, one of changing public policy to adapt to modern day life versus maintaining the status quo. This division leads to great uncertainty in practicing estate planning. It would not be surprising, and would indeed be a great benefit to trusts and estates law, if the Illinois Supreme Court chose to consider this case.

## II. CONSUMER PROTECTION; LANDHEER V. LANDHEER<sup>22</sup>

In *Landheer*, two children brought suit to invalidate a purported amendment to a trust, prepared by their brother and signed by their father shortly before the father's death. The brother stated that the father told the brother that the father didn't trust appraisers' valuations. Instead, the father wanted to specify \$675,000 as the value of the land the brother was to receive as the brother's share of the inheritance upon his father's death.<sup>23</sup> The brother took notes on what his father told him, took the notes home, and drafted a document on his own entitled "Last Will And Testament."<sup>24</sup> The brother brought the document to his father and the father signed the document.<sup>25</sup> Eight days later, the father died, while holding the land in his living trust.<sup>26</sup> It

should come as no surprise that the father's other children believed the land was worth much more than \$675,000.<sup>27</sup>

The other children filed a declaratory judgment action to declare the document void alleging that the document was not an effective amendment of the father's trust.<sup>28</sup> The brother who prepared the document filed a counterclaim to declare that it was an effective amendment.<sup>29</sup>

The other children moved to dismiss the counterclaim on the basis of the Illinois Consumer Fraud and Deceptive Business Practices Act.<sup>30</sup> The Act provides, in pertinent part:

The assembly, drafting, execution, and funding of a living trust document or any of those acts by a corporation or a nonlawyer is an unlawful practice within the meaning of this Act. Any person who violates this Section is guilty of a Class A misdemeanor. A person who is convicted of a second or subsequent violation of this Section is guilty of a Class 4 felony.<sup>31</sup>

The other children argued that under the Consumer Protection Act, the document was void because it was not prepared by an attorney.<sup>32</sup> The trial court granted the motion to dismiss, stating that even if father had written the document himself, because he was not an attorney, the document would be void.<sup>33</sup>

The brother appealed, arguing that the Act did not prohibit drafting a document which merely amends a living trust, rather than creating one, and that in the alternative, he was merely the scrivener putting on paper what his father said.<sup>34</sup>

The appellate court held that the Act "expressly prohibits the assembly, drafting, execution, and funding of a living trust document by a nonlawyer."<sup>35</sup> The Act covers "trust documents" regardless of whether it is the original trust or an amendment.<sup>36</sup> "We find, therefore, that the plain language of Section 2BB prohibits a nonlawyer from drafting a document that amends a living trust for another person."<sup>37</sup> The appellate court did state that an individual could

write their own trust or amendment, because to find otherwise would be to ignore the whole purpose of the Consumer Protection Act.<sup>38</sup>

The appellate court further found that the brother was not a mere scrivener, because he listened to his father's concerns, decided upon the appropriate language to put into the disputed document, and even added provisions that defendant thought would be important. .<sup>39</sup> The appellate court concluded: "The disputed document was drafted by a nonlawyer for another person in violation of section 2BB of the Act and does not constitute a valid amendment to the trust."<sup>40</sup>

So far as can be gleaned from the decision, it was not discussed or determined whether the other children's claim met the standards for a private cause of action under the Illinois Consumer Protection Act or whether declaring the amendment void was the appropriate remedy. On its face, Section 2BB simply creates a criminal penalty, which could be enforced by the state prosecutor.<sup>41</sup>

The Illinois Consumer Protection Act, does, however, include a private right of action. That right, however, requires proof of three elements:

To state a claim under the Illinois Consumer Fraud Act, the plaintiff must allege "(1) a deceptive act or practice; (2) an intent by the defendant that the plaintiff rely on the deception; and (3) that the deception occurred in the course of conduct involving a trade or commerce."<sup>42</sup>

It is highly questionable whether the other children had a private right of action to make a claim under the Illinois Consumer Protection Act. The brother was not engaged in trade or commerce in preparing the document. There was no evidence or testimony that he charged his father to prepare the amendment or that he prepared any other amendments or that he was in the

business of preparing trust documents. Thus, the third element necessary to state a claim under the Illinois Consumer Fraud Act was missing.

Further, there is no discussion as to why declaring a presumptively valid trust amendment was the appropriate remedy. The "consumer" was the father. There was no proof that he lacked testamentary capacity or that he was under undue influence, although the brother's conduct reeks of undue influence. A transaction which violates the Illinois Consumer Protection Act is merely voidable, not void. The consumer is free to keep and enforce a contract which violated the Act.

Moreover, the action is normally one for money damages, although injunctive relief is available to prevent ongoing consumer frauds.<sup>43</sup> If the consumer is defrauded by a door-to-door salesman building garages, the appropriate remedy is not to tear down the garage. The salesman may not be able to enforce the contract for payment, but the garage stays up. The opinion did not discuss why the appropriate remedy was to declare the amendment void, rather than money damages.

On an intuitive level, the result in *Landheer* feels correct. Beneficiaries should not be able to draft their own bequests. The logic, however, leaps a chasm to find the document void. While Section 2BB should be more zealously enforced against trust salesmen and other nonlawyer drafters who are taking advantage of consumers, it is not applicable to the *Landheer* case. The concerns in *Landheer* over the competency of the drafting and the likelihood of undue influence do not lead to the conclusion that the brother Son was defrauding any consumer. While the other children deserve to be congratulated for inventive lawyering, the grounds on which this case was decided remain shaky.

### III. JURISDICTIONAL TIME LIMITS IN WILL CONTESTS; ESTATE OF ELLIS<sup>44</sup>

The *Ellis* case serves to clarify the jurisdictional time limits on will contests. In *Ellis*, the decedent had a will for many years which would have benefited Shriners Hospital.<sup>45</sup> About four years before her death, she signed a new will which instead benefited her pastor.<sup>46</sup> When she died, the pastor had the will admitted to probate and sent the required notices to the decedent's heirs, but sent no notice to Shriners Hospital.<sup>47</sup> Shriners was not entitled to notice since it was not an heir-at-law.<sup>48</sup> The heirs timely contested the validity of the will and settled with the pastor.<sup>49</sup>

Three years later, Shriners sued to contest the will and for tortious interference with an inheritance expectancy.<sup>50</sup> Shriners argued that the tort count was not a will contest and should not be barred by the Probate Act requirement that any will contest must be filed within six months of the admission of the will to probate.<sup>51</sup> The First District held that an action for interference with expectancy was a will contest and was subject to the same jurisdictional time limit, which could not be tolled by fraudulent concealment or other tortious conduct.<sup>52</sup>

*Ellis* appears to be the first case in which the appellate court has expressly held that an action for tortious interference with expectancy is subject to the six month time limit to file a will contest.<sup>53</sup> The *Ellis* case is more important, however, as an example of a great inequity in Probate Law: There is no duty to notify a legatee in a prior will that a subsequent will has been admitted to probate. The heirs are entitled to notice, but not the prior legatees. No matter how egregious the fraud, no matter how apparent the invalidity of the admitted will, no matter what steps the perpetrator takes in concealing the fraud, once six months after admission has expired, there is nothing a prior legatee can do once the six month period has passed. There is a risk that the testator's true wishes may be frustrated and preying on the elderly for profit may be protected

and rewarded because legatees who were improperly removed from estate plans have no right to notice.

#### IV. CONCLUSION

*Feinberg*, *Landheer* and *Ellis* address three separate problems in the law of Trusts and Estates. All three recent cases reveal problems in the field; one of changing and uncertain public policy, a second of uncertainty as to the appropriate remedy, and a third of inequity in probate. Only the Illinois Supreme Court can answer the debates in *Feinberg* and *Landheer*, and only the legislature can cure the inequity in *Ellis*.

---

\* Fredric Bryan Lesser is the managing partner and Kathleen M. Hogan is an associate attorney at Lesser, Lutrey & McGlynn, LLP, in Lake Forest, Illinois, where they concentrate in trusts, estates, and probate planning, administration and litigation.

<sup>1</sup> Estate of Max Feinberg, \_\_\_\_ Ill App 3d \_\_\_\_, 2008 WL 2610165 (2008).

<sup>2</sup> Id at \*1.

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> RESTATEMENT (THIRD) OF TRUSTS (2003).

<sup>6</sup> 172 Ill 439 (1898).

<sup>7</sup> 389 Ill 384 (1945).

<sup>8</sup> 61 Ill 2d 503 (1975).

<sup>9</sup> Ransdell, 172 Ill at 445.

<sup>10</sup> Id at 446.

<sup>11</sup> Feinberg, 2008 WL 2610165 at \*3.

<sup>12</sup> Id at \*3 (citing RESTATEMENT (THIRD) OF TRUSTS §29 cmt J, illus 3(2003)).

<sup>13</sup> Id at \*7.

<sup>14</sup> Id at \*7.

<sup>15</sup> Id at \*8.

<sup>16</sup> Id at \*6 (citing *In re Kempf Will*, 252 AD 28, 297 NYS. 307 (1937)).

<sup>17</sup> 334 U.S. 1, 92 L.Ed. 1161, 68 SCt 836 (1948).

<sup>18</sup> Id.

<sup>19</sup> Feinberg, 2008 WL 2610165 at \*9.

<sup>20</sup> Id at \*5.

<sup>21</sup> Id at \*6.

<sup>22</sup> Landheer v. Landheer, \_\_\_\_ Ill App 3d \_\_\_\_, 2008 WL 2581748 (2008).

<sup>23</sup> Id at \*2.

<sup>24</sup> Id at \*2.

<sup>25</sup> Id at \*2.

<sup>26</sup> Id at \*2.

<sup>27</sup> Id.

<sup>28</sup> Id at \*2.

<sup>29</sup> Id at \*2.

<sup>30</sup> Id at \*3; ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT, 815 ILCS 505/2BB (West 2003).

<sup>31</sup> 815 ILCS 505/2BB (West 2003).

<sup>32</sup> Landheer, 2008 WL 2581748 at \*2.

---

<sup>33</sup> Id at \*3.  
<sup>34</sup> Id at \*3.  
<sup>35</sup> Id at \*4.  
<sup>36</sup> Id at \*4.  
<sup>37</sup> Landheer, 2008 WL 2581748 at \*4.  
<sup>38</sup> Id at \*4.  
<sup>39</sup> Id at \*4.  
<sup>40</sup> Id at \*4.  
<sup>41</sup> ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT, 815 ILCS 505/2BB (West 2003).  
<sup>42</sup> *Azimi v. Ford Motor Co.*, 977 F.Supp. 847, 852 (N.D.Ill.,1996); *Thacker v. Menard, Inc.*, 105 F.3d 382, 386 (7th Cir.1997); *Martin v. Heinold Commodities, Inc.*, 163 Ill.2d 33, 75 (1994).  
<sup>43</sup> 815 ILCS 505 (West 2003).  
<sup>44</sup> Estate of Ellis, 381 Ill App 3d 427, 887 NE2d 467 (2008).  
<sup>45</sup> Id at 468.  
<sup>46</sup> Id at 468.  
<sup>47</sup> Id at 468.  
<sup>48</sup> 755 ILCS 5/9-4, 9-5 (West 2008).  
<sup>49</sup> Ellis, 887 NE2d at 468.  
<sup>50</sup> Id at 468-69.  
<sup>51</sup> Id at 469 (citing 755 ILCS 5/8-1).  
<sup>52</sup> Id at 471-72.  
<sup>53</sup> *Cf.*, *Robinson v. First State Bank of Monticello*, 97 Ill.2d 174, 184, 454 N.E. 2d 288, 293 (1983) (Supreme Court held that claim for tortuous interference with expectancy, although filed after six month time limit, was barred by settlement agreement).