DISINHERITANCE IN NEW YORK STATE: LEGACIES WE DO AND DO NOT LEAVE

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I. INTRODUCTION

"Beneficiary restriction clauses," as described in the recent Illinois case In re Estate of Feinberg,1 exclude a beneficiary from taking under a will for satisfying or failing to satisfy a condition stated in a testamentary instrument. These clauses utilize religious restraints, conditions that concern the legatees' marital status or religious choices (or a combination of the two).

We care for our personal history as much as we wish to protect those that follow in our footsteps. The last will and testament can provide a snapshot of more than the testator's financial affairs and family tree. The document can also yield hints as to the testator's beliefs, aspirations, desires, and the sometimes elusive "intent." Beneficiary restriction clauses are a valuable tool for those that cherish their religious and cultural history. They are a reflection of the testator's intent, acting as a mechanism that hopes to strengthen the connection that a testator's family feels towards the applicable faith.

We are more sensitive people living in a progressive time, gravitating towards a new system that embraces a diversity of unions and without the hindrances and barriers that previous generations imposed. The framework is there, and the desire for change is seen in numerous areas of estate practice. It is only the transformation of beneficiary restriction clauses that has not occurred. The question remains: is the transition necessary? Are we better, or at least equally served, by recognition of religious restraints in modern Surrogate's Court practice?

Once we allow for the disinheritance of distributees2 in the first instance, we encounter a threshold question that every testator asks

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1. 919 N.E.2d 888 (Ill. 2009).
2. A distributee is "[a]ny person entitled to take or share in the property of a decedent under the statutes governing descent and distribution." EPTL § 103 (14). In other words, distributees are related to a decedent by blood and will take or share in
when incorporating a beneficiary restriction clause into an estate plan: why will I disinherit my distributees? As far as this Article is concerned, this is the problematic point. Beneficiary restriction clauses raise even Constitutional concerns about religious and racial intolerance and, in turn, the true scope of testamentary freedom. The question is not whether we can disinherit our children per se; testamentary and economic freedoms demand it. The question is what are the permissible grounds for triggering a beneficiary restriction clause? What are the contours of a beneficiary restriction clause, and should legislatures provide further clarification on the issue? At stake is the testamentary freedom to dispose of one's own estate as a person sees fit, along whatever criteria strikes a person as significant, and whether or not United States courts can insulate testamentary intent along religious or more perverse lines, that is race. Is there a future in estate planning for religious restraints?

This Article considers the religious, cultural, and societal influences that drive testators to disinherit family members for marrying within a particular faith. The Article also inquires into the risks of discrimination through private prejudices and the role of beneficiary restriction clauses in New York State's tendency to include individuals in an inheritance, as exhibited by intestate distribution. The debate appears to juggle between traditional and modern standards. Accordingly, the Article is broken down into two parts. The first part of this Article focuses on the traditional analysis and begins with a foundation for how beneficiary restriction clauses operate, including a discussion of the case law concerning beneficiary restriction clauses. In particular, this Article will discuss In re Estate of Feinberg, a recent Illinois case, and the controversy surrounding it, and then some of the not inconsiderable case law available in New York State. The second

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3. Note that in Nebraska, there is "no public policy against disinheriting any descendant," In re Estate of Ellis, 9 Neb. App. 598 (2000). The In re Estate of Ellis opinion goes on to cite In re Estate of Wahl, 151 Neb. 812 (1949):

[No right of a citizen is more valued and more assured by law than the power to dispose of his property by will. He is entitled to the control of his property while living, and by will to direct its use after his death, subject only to the restrictions which are imposed by statute. A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein, nor does it put any obstacles in the way of the aged or infirm in making disposition of their property by will, provided only, that their mentality conforms to the accepted tests at the time of the execution of such testamentary instrument (emphasis added).]
part breaks down some of the issues presented by the continued use of "religious restraints" under more modern standards: first, the risk of systematic discrimination enforced by state courts; second, the conflicts raised within New York State's greater statutory scheme as laid out in the Estates Powers and Trusts Law4 ("EPTL") with respect to the distribution of wealth and the inclusion/exclusion of family members in non-testamentary dispositions; and third, the Article considers some contrasting alternatives for estate planning presented by domestic and European models, examples which shed light on the multiple purposes underlying estate plans and the varied perspectives regarding family, culture and the distribution of wealth.

Requiring a legatee to marry someone within a particular faith can feel different than requiring a legatee to marry someone outside of a particular faith, a point where a religious moniker acts a substitute for racial identity and cannot be separated from the religious/racial prejudices involved. However, both are permissible. Courts have tacitly approved the common law rule where "there was no prohibition against testamentary conditions in restraint of marriage with particular classes of persons or specific persons,"5 including "[c]onditions not to marry a Papist... or a Scotchman, or not to marry anybody but a Jew."6 The two former classes are highly suspect (if rarely contested) while provisions that utilize the latter are more commonly utilized in practice and, consequently, are more vulnerable to changes in the law. The argument against religious clauses is a normative one, but normative arguments also support their recurring use. Such a provision may be used "in order to preserve religious identity [and] promote marriage within the faith."7 This inherent conflict demands an inquiry into how beneficiary restriction clauses operate in practice and then whether we are achieving desirable (or even permissible) results.

This Article stresses that scholars, judges, and legislators should ask whether religion is a permissible ground for disinherition.8 Tes-

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4. EPTL § 4-1.1.
8. There is a general responsibility to think about what we as a society are doing, to revisit issues on occasion to be sure that we are doing the "right" thing, ensure that nothing slips through the cracks and that we are not acting blindly. This responsibility demands that we periodically reevaluate the motivations, purposes, burdens, and benefits underlying "beneficiary restriction clauses." That suggestion itself necessarily assumes some position with the current use of beneficiary restriction clauses, whether the result is reform or otherwise. It is unnecessary to daft a persuasive document that only serves to validate the author's own opinions. For example, see Fredric Bryan Lesser &
tamentary conditions as they relate to religion, are widely held to be acceptable. In fact, courts carve out a great deal of latitude for religious purposes. Surrogate Collins wrote:

One who accepts a benefit under a will must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it. . . . It is unfortunate that [the legatee] cannot have both a marriage with the man of her choice and the inheritance. Present are considerations which tug at the heart but do not resolve the legal queries propounded by the petition.10

The concern is over this longstanding position of an archaic practice. What began with Professor Pamela Champine's original work on the unidentified biases built into the estate's practice remains an ongoing experiment and exploration. The sting inflicted by racism, or other suspect bias, built into a testamentary plan is seemingly dulled only because the holder of the bias is deceased. However, the passing of an individual does not (or at least should not) render biases more or less excuseable, nor does death automatically bestow an air of neutrality on a testamentary plan upon which United States courts can act.

By design, beneficiary restriction clauses come with an undeniable risk of discrimination, a risk that is both accepted and protected by the Surrogate's Courts throughout New York State. Judicial history constrains judges' decision making ability. Attempting to avoid an injustice, precedent leads to the erection of numerous exceptions, narrow applications of facts, and/or the creation of "new" rules of law as courts move closer to adjustments in the law or the outright repeal of old rules.12 This history necessarily shapes the analysis and limits

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9. "It is generally held that provisions in a will requiring a beneficiary to renounce, embrace or adhere to a particular religious faith are valid as against the contention that they are contrary to public policy generally or to the specific policy embraced in constitutional guarantees of religious freedom. Similarly, testamentary conditions restricting the beneficiary's marriage to a person of a specified faith or requiring the marriage to be performed according to a particular religious form, or that children of the marriage be educated in such faith or form, are generally upheld." In re Estate of Feinberg, 891 N.E.2d 549, 557 (Ill. App. Ct. 2008) (Greimann, J., dissenting) (Quoting Illinois Practice (19 R. Hunter, Illinois Practice §188:11 at 176 (5th ed. 2008)), rev'd, 919 N.E.2d 888 (Ill. 2009)).


12. The resulting opinions can be somewhat abrasive as judges may even risk misapplication or misinterpretation of the law, if not through a desire to achieve a particular result, but to ensure the appearance of impartiality when drafting an opinion that runs contrary to a judge's beliefs.
where the discussion is willing to go. Little is generated by way of reassessment from either the legislature or the judiciary. On account of such strong precedent, the lack of self-evaluation cannot be attributed to any one party. Nonetheless, the post-Feinberg debate suggests that a reassessment of the case law is in order. An inquiry into the judicial and legislative history may reveal impermissible prejudices that go unchecked. Beneficiary restriction clauses may not be consistent with the overall statutory scheme provided for in New York State, as discussed below. Some areas of law demand an outright overhaul, while others require modifications to achieve a consistent application of outstanding legal principles. At the very least, we must recognize the division currently rumbling not just through judicial opinions, but even within religious communities.

In the estates practice, the focus has been and always shall be on the testator's legacy. Though relevant and informative, this legacy does not refer to the actual gifts of tangible property per se, but rather, to that axiomatic compulsion on the part of some testators to "make a difference" in the community and protect their family (usually from itself). This legacy is necessarily influenced by powerful cultural forces: the testator’s family, the predominance of a particular faith in the surrounding community, and a desire to promote a lifetime of practice in younger generations. This historical, religious, and cultural legacy arises out of generations of feelings and ideas that are so relentlessly cultivated and so completely ingrained in a person’s psyche, so as to prompt individuals to cut off legatees from their bequest through the execution of a beneficiary restriction clause, a process that is on display in the applicable case law.

II. TRADITIONAL ANALYSIS, PUBLIC POLICY AND IN RE ESTATE OF FEINBERG

"[E]very person may dispose of his property on death in any manner he sees fit, so long as such disposition does not contravene established rules of law." The desired result is achieved through conditions precedent and conditions subsequent (enforced through annual gifts made from a trust). There are few exceptions. An abso-

15. "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 interest of their donees." In re Estate of Feinberg, 919 N.E.2d 888 (Ill. 2009), citing Ransdell, 172 Ill. at 446.
ute or general restraint on marriage is void as against public policy.\textsuperscript{16} New York State regards a "condition which is calculated to induce a beneficiary to live in celibacy or adultery as a condition in general restraint of marriage and, therefore, void, because contrary to public policy."\textsuperscript{17} Furthermore, a provision that requires "the performance of an act which is malum in se or malum prohibitum, or the omission of a duty or the encouragement of 'such crimes and omissions'"\textsuperscript{18} is also void as contrary to public policy (such as, for example, assassinating your spouse).\textsuperscript{19}

The nature of the available conditions is otherwise unlimited, and, in the testator's discretion, can be as absurd or as preposterous\textsuperscript{20} as the testator desires. Conditions to a testamentary gift, including partial restraints on marriage are widely accepted. Provisions that require a legatee to stop abusing alcohol,\textsuperscript{21} that prohibit marriage before the age of thirty (to avoid frustrating the structure of trust income),\textsuperscript{22} and that demand the cancellation of all outstanding debts due to a corporation\textsuperscript{23} have been upheld. The legatee is thus "driven to a choice between the assumption of the burden and the rejection of the bounty."\textsuperscript{24}

Testamentary intent trumps all other concerns. It is a significant countervailing interest to a potentially larger and overarching policy objective that would seek to restrict the availability of testamentary conditions. "The prerogative granted to a testator by the law of [New York State] to dispose of his estate according to his conscience is entitled to as much judicial protection and enforcement as the prerogative of a beneficiary to receive an inheritance."\textsuperscript{25} However, as the \textit{In re}
Estate of Feinberg decision reveals, the rule should not be so well settled.

A. In re Estate of Feinberg

In In re Estate of Feinberg, the Illinois Appellate Division’s opinion reflects a rift between the several states in how courts will accept and incorporate religious influences in the legal system. The opinion also indicates a shift in thinking on the subject, a transition from traditional rules of law to more contemporary and liberal standards. The case concerned distributions made by the donee of a power of appointment, Erla Feinberg (“Mrs. Feinberg”), which excluded those legatees that married outside of the Jewish faith.

Max Feinberg executed a will instructing that at the death of his wife, Erla Feinberg, assets were to be held in trust for the benefit of his five grandchildren for the duration of their lifetimes, provided they had not married out of the Jewish faith; if the grandchildren did marry outside the Jewish faith, they were “deemed deceased” and those shares would revert to Max and Erla’s two children. Only one grandchild actually married within the Jewish faith. Then, pursuant to a limited lifetime power of appointment granted to Erla, instead of funding the lifetime trusts, she allocated specific sums to each of her two children and to each of her five grandchildren, but still subject to the beneficiary restriction clause. As a result, only one grandchild was to receive any money while the other four were left stranded.

At the Appellate Division, the majority and the dissenting opinions focused primarily along whether contemporary rules should apply, or whether strict principles of stare decisis should control. Eventually reversed on appeal, Justice Cunningham’s opinion sided with the contemporary perspective, looking to recent cases that invalidated beneficiary restriction clauses for various reasons and the Third Restatement of Trusts which indicates that a condition which “tends to encourage disruption of a family relationship” is invalid. Note

27. Id.
29. “A power is an authority to do any act in relation to property, including the creation or revocation of an estate. . . .” N.Y. EST. POWERS & TRUSTS LAw § 10-2.1 (McKinney 2002) and “can be exercised only by a written instrument which would be sufficient to dispose of the estate intended to be appointed if the donee were the actual owner.” N.Y. EST. POWERS & TRUSTS LAw § 4-11(d).
that the language in the Restatement encompasses a wider range of restraints, including those that merely "tend" to disrupt a family as opposed to confining itself to absolute restraints.

The uproar in the wake of the Illinois Appellate Division's decision in In re Estate of Feinberg revealed divisive and passionate opinions from both detractors and supporters. Andrea M. Schleifer, President of the Decalogue Society of Lawyers in Chicago, noted the apparent conflict between testamentary freedom and that religious restraints "echo anti-Semitic provisions which members of the community have historically been subjected to."32 Furthermore, Justice Quinn's special concurrence at the Appellate Division noted that "the position [the dissent] espouses could just as well result in the courts being required to enforce the worst bigotry imaginable."33 Alienating a part of the family for their religious choices is said to be "at war with society's interest in eliminating bigotry and prejudice, and conflicts with modern moral standards of religious intolerance."34 On the other hand, there were protective outcries from the Jewish community35 over the "silent Holocaust."36 There was also concern about the retroactive effect of a rule striking down such provisions over established estate plans; if religious restraints are in fact permissible, then many outstanding wills would require redrafting.

Reversed on appeal in the Illinois Supreme Court, Justice Garman pointed out that if all of the grandchildren had been married, the testator, Max Feinberg ("Mr. Feinberg") could dispose of his property freely37 and without the burden of defining his intent along religious criteria (hear no evil, see no evil, speak no evil) and without interfer-

32. Pauline Dubkin Yearwood, The Jewish Clause: In the first case of its kind ever heard in an Illinois court, judges decide whether someone can disinherit his grandchildren for marrying a non-Jew, THE CHICAGO JEWISH NEWS ONLINE, July 18, 2008, http://www.chicagojewishnews.com/story.htm?id=1&id=252138 (Andrea M. Schleifer, President of the Decalogue Society of Lawyers in Chicago, wrote that "This case is important because it involves compelling Jewish interests on both sides: those who believe that each of us ought to have the right to determine the disposition of our own property; and those who believe that such provisions in a will ought to be prohibited as discriminatory, and echo anti-Semitic provisions which members of the community have historically been subjected to.").

33. Feinberg, 891 N.E.2d at 554 (Quinn, J., Concurring), rev'd, 919 N.E.2d 888 (Ill. 2009).


37. In re Estate of Feinberg, 919 N.E.2d at 892 (Ill. 2009) ("Max and Erla could have accomplished the goal of benefitting only those grandchildren who married within
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ence from the court. It is the mere unfortunate timing of his death that required Mr. Feinberg to identify his intent along religious lines.\textsuperscript{38}

Mr. Feinberg’s surviving spouse and trustee, Mrs. Feinberg, inadvertently dodged the question by making distributions that effectively liquidated the trust and “ignored” the distribution plan laid out by her late husband. Mrs. Feinberg, \textit{pursuant to her limited power of appointment}, distributed the funds consistent with the dispositions provided for in Mr. Feinberg’s will. However, that consistency was not relevant since Mrs. Feinberg, pursuant to her limited powers, made the distributions, not Mr. Feinberg as testator, and, accordingly, the funds were not passed down pursuant to the terms outlined in Mr. Feinberg’s trust instrument. The Illinois Supreme Court neither questioned the trustee’s actions, even if patently consistent (or inconsistent) with a possibly impermissible will provision, nor did the Court address the public policy question presented on account of this twist in the facts of the case: “the Illinois Supreme Court found that the issue is not Max’s original scheme of lifetime trusts for the grandchildren, but the distribution which was authorized by Erla.”\textsuperscript{39} The result effectively sidesteps the issue and disguises a controversial plan with legal jargon. Where we are willing to accept the testator’s bias initially, it can only be easier for a court to accept the actions of a third party, even if or regardless of whether those actions are consistent with the testator’s original exclusionary plan. The opinion relies heavily on whether the interest in the estate properly vested or whether the interest was a mere expectancy; since the interest did not vest, Ms. Feinberg’s religious restraint would hold. Lesson: if you want to disinherit your children, let someone else do it. The restraint remains in force unless the donee of a power of appointment is inclined to act otherwise.\textsuperscript{40}

Justice Quinn’s special concurrence at the Appellate Division also discussed \textit{Shelley v. Kramer},\textsuperscript{41} the iconic United States Supreme Court case that struck down restrictive covenants on the alienation of

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\item[38.] In re Estate of Feinberg, 919 N.E.2d at 892 (Ill. 2009) (“At the time Max prepared his estate plan, his grandchildren were too young to marry and it was possible that more grandchildren might have been born before the trust provisions took effect. . . . Even by the time Erla exercised her power of appointment, not all of the grandchildren had married.”).
\item[39.] Id.
\item[41.] Shelly v. Kramer, 334 U.S. 1 (1948).
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real property defined along racial, not religious, lines. The question is how far the logic of that case reaches. Justice Greiman's dissenting opinion regarded Shelley v. Kramer as inapplicable for two reasons: (1) the In re Estate of Feinberg opinion did not deal with real property, and (2) the restrictions discussed in In re Estate of Feinberg last no more than one or two generations whereas the restriction in Shelley v. Kramer could theoretically last for millennia.

These are distinctions, however, that miss the point of the analogy. The object of the persecution is not less slighted because the propagators pick and choose the targets of their contempt, or because the discriminatory act will terminate in the future. Indeed, some of the restrictions discussed in Shelley v. Kramer were to run with the land for only a limited period of time. Nor is the sting dulled because the propagator's influence extends only so far. In turn, society should not turn a blind eye because a class is discriminated against only a little bit when compared to what others have done. The Shelley v. Kramer decision is actually very relevant to the public policy debate and informative of the pluralistic society we are trying to create.

B. NEW YORK STATE AND THE PUBLIC POLICY DEBATE

New York State yields to the traditional rule: "such prohibitions have not only received the sanction of judicial authority, but we think may be justified by sound reasoning." Religious restraints are favored because they generally promote the legatee's well-being and encourage that legatee's participation in the community. Surrogate

42. Several restrictive covenants were discussed. Among them, one provided that "no part of said property or any portion thereof shall be... occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property... against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race." Shelley v. Kramer, 334 U.S. 4 (1948).

43. However, Drace v. Klinedist, 118 A. 907 (Pa 1922), an early Pennsylvania case, struck down a beneficiary restriction clause as violating public policy along religious lines. The loss of the inheritance, in that case, real property, was regarded as a "punishment," which, while not as physically harsh as, for example, "the stocks, pillory, the whipping post, and other forms of physical chastisement, it would have a more lasting effect." Judge Kephart's opinion foreshadows the concerns laid out in Shelley v. Kramer and cautions us to be mindful of the "days of religious persecution."


45. Shelley v. Kramer, 334 U.S. 4 (1948) ("the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date... [and] that hereafter no part of said property or any... portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.").

46. Rosenthal's, 123 NYS.2d at 333.
Wingate spoke very highly of the potential benefits, noting that “any person who would fully adhere to the tenets of any of the standard religions of the world would closely approximate a model of rectitude.”

This speaks not only to the perceived success rate of beneficiary restriction clauses in promoting particular religions, but to an apparent correlation between religious participation and moral rectitude.

Simply put, in New York State, “[c]onditions not to marry a person of a particular faith or race are not invalid.” Beneficiary restriction clauses are seen in the courts of New York State at least as early as *In re Seaman’s Will* in 1916, which was only the beginning of a series of contested probate proceedings that surged throughout the earlier half of the twentieth century. Perhaps religious restraints are so prevalent and so frequently debated in New York State because a relatively large Jewish community resides within its borders. The

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47. Lesser’s, 287 N.Y.S. at 216. (The complete paragraph is as follows: “It is in the interest of the state that uprightness and morality be fostered and any person who would fully adhere to the tenets of any of the standard religions of the world would closely approximate a model of rectitude. It is a psychological principle that inner grace, if not necessarily a concomitant, is frequently a promoted consequence of outward manifestation. It follows that strict adherence by these children, during their formative years, to the teachings and observances of one of the greatest of present-day religions which had its beginnings before the dawn of secular history, cannot reasonably be considered other than as beneficial to the individuals themselves, and thus, indirectly, to the state.”).

48. *In re Silverstein’s Will*, 155 N.Y.S.2d 598, 599 (Sur. Ct. 1956) (In this case, the daughter and executor of the Decedent sought the construction of a provision including the following language: “The shares of my grandchildren shall be paid to each on the date of their marriage and provided they marry a person of Hebrew faith. In the event that any such grandchild or my son shall be married to a person of Hebrew faith on my decease, he or she shall immediately receive his or her share of my estate. However, should any of my grandchildren or my son aforementioned predecease me unmarried, or not married to a person of Hebrew faith, then his or her share shall be divided by my said executors to the remainder who survive me and marry as aforementioned.”).

49. 112 N.E. 576 (N.Y. 1916).


unique character of the larger population appears to provide further justification for the continued use of beneficiary restriction clauses. The community is ultimately susceptible to religious and cultural dilution on account of the incredible diversity of the environment (and built in pressures to interact with and marry persons within or outside of a particular religion), hence the pressing need to push for the community's preservation.

There are occasions where judges reject these attempts at maintaining religious ties in favor of more conservative distributions (that is, one that benefits the testator's immediate family). *In re Rosenthal's Estate* is one such example which, like the *Feinberg* case, concerned the actions of the donee of a power of appointment, but to different results.

1. *In re Rosenthal's Estate: Powers of Appointment*

   In *In re Rosenthal's Estate*, the traditional rule was not applied to the facts of the case. The petitioner, Jean L. Tanburn, was the testator's great-granddaughter. Her fiancé was not Jewish and under the terms of her great-grandfather's will, if she married her fiancé then she would be deemed to have predeceased the testator and accordingly would not receive her inheritance. However, the testator also granted certain powers of appointment to his grandson, who in turn appointed the petitioner in his own will. The petitioner's interest in the construction of the beneficiary restriction clauses contained in her great-grandfather's will arose out of the resulting power of appointment. The petitioner questioned whether her disqualification as a legatee under the testator's will applied when her right to receive funds from the trusts established by the testator's will "derives from the will of the donee of the power of appointment" as opposed to the testator. Surrogate Collins concluded that the petitioner, "if she is to benefit by the appointment, must assume those conditions included in the original testator's will. The surrogate further stated that a pro-

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53. The twelfth article in this case provided as follows: "In case any child or descendant of mine shall at the time of my death be married or shall thereafter marry, and the spouse of such child or descendant of mine shall be a person who was not born in the Jewish faith and who shall not be of Jewish blood, then upon my death if such marriage shall have occurred prior thereto, or if such marriage shall occur after my death then upon such marriage, all legacies and devises whether of income or of principal to such child or descendant of mine so marrying, and all powers of appointment or of disposition given, devised and bequeathed to such child or descendant of mine so marrying, shall be cancelled, annulled and revoked." *In re Rosenthal's Estate*, 123 N.Y.S.2d at 329 (emphasis added).
vision in a will may be discriminatory, “but to discriminate in the disposition of property is frequently the motivation of a will.”

The Appellate Division reversed the decision for two reasons: (1) “interests resulting from the power of appointment will be measured from the date of creation of said power of appointment,” and, more importantly, (2) the careful inclusion and exclusion of certain terms “indicated[d] that the donor knowingly refrained from extending the ban of his displeasure to the appointee of his grandson.” Accordingly, the exclusion did not apply to the donee of the power of appointment and the Court thus declined to enforce the restriction. The Appellate Division was satisfied that the testator placed a great deal of confidence in his grandson, and it was willing to defer to that confidence. The testator and the donee of the power were fortunate as this case appears to be a result of meticulous lawyering as opposed to deliberate estate planning.

However, we should not be so willing to feign ignorance by avoiding the public policy debate forever. Every testator is not visited by such divine providence as to provide for a power of appointment in the testamentary instrument nor will every testator be so fortunate in the Surrogate’s construction of such “precise” terms. Some judges will inevitably face the public policy debate along either marital or religious lines. For example, Judge Bartlett engaged the public policy debate in one of New York State’s earlier opinions dealing with beneficiary restriction clauses, the In re Seaman’s Will decision.

2. In re Seaman’s Will: An Invitation to Murder

The beneficiary restriction clause at issue in In re Seaman’s Will was directed towards the petitioner in the case, Leo Fassler, the legatee’s spouse and an attorney. The opinion included its (implicit) support for restraints with more particularized references and even broader effect; “not to marry a Papist . . . or a Scotchman . . . [or] anybody but a Jew.” The Seaman opinion had to deal with the dis-
quieting (and absurd?) notion that the testator was attempting to provoke the assassination of the disfavored individual—a suggestion that truly tests the reach of the dead hand.

The petitioner asked Judge Bartlett to consider the possibility that the restraints on marriage were void, not merely because such restraints can theoretically discourage marriage, but, as was the case here, because they allegedly encourage legatees to procure the death of their own spouse. The logic of the argument was exceedingly strained. The last will and testament denied the legatee her bequest unless she was "married to some person other than one Leo Fassler . . . or provided that at the time of my death the said Leo Fassler is dead." The petitioner argued that it "followed" that if the legatee killed Leo Fassler then he would be dead, and therefore the legatee would receive her bequest. Not surprisingly, Judge Bartlett declined to entertain the petitioner's theory, and declined to create a presumption where conditioning a bequest on the death of person amounted to "an invitation to murder" and therefore against public policy and void.

C. WHEN RELIGIOUS DEVOTION BACKFIRES: THE UNSTABLE FAMILY

The testator in In re Seaman's Will, in fact the testators in many of the cases, exhibited an articulated desire to maintain religious and cultural ties throughout their family arising out of an apparent concern that those ties would not extend to subsequent generations. Within the Jewish faith, there are rules defining when it is appropriate to disinherit a child. For example, "a person is not supposed to disinherit his or her children unless they have converted to another religion." Beneficiary restriction clauses can contravene those religious dictates and may exist in spite of the testator's devotion to the Jewish faith. People struggle to impart some attachment to the religious and cultural history of the family, a process which can be achieved through alternative avenues outside of risking their children's economic stability (or apparently the lives of their spouses).

Testators can reasonably encourage younger generations to embrace their religious and cultural history without relying on beneficiary restriction clauses. The methods for this are multiple, often employed in the most natural ways, and can be established at various

63. See Doboll v. Monn, 91 A. 646 (Conn. 1914).
64. In re Seaman's Will, 112 N.E. at 577.
65. Id. at 579.
times in a person’s life, whether deeply rooted in the value systems established during childhood, through prayer at a church, mosque, synagogue, shrine or other venue, as a “newfound” religion post-maturity, or, as often contemplated by religious clauses, upon marriage via conversion (within a certain period of time). Furthermore, new media trends, such as social networking, have made it even easier to establish new relationships based upon a shared religious belief, an asset that could potentially cut through difficulties presented by large and diverse populations.

In contested proceedings, beneficiary restriction clauses take on an entirely different character. Religious and cultural ties to a particular identity help cement familial connections when they are at their most fragile. Participation in the community connects seemingly disparate thoughts, ideas, and perceptions into a singular cohesive decision about socially provocative, even socially repulsive, events. However, in contested proceedings, it is not uncommon for a splintering to occur, (especially when a family member is disinterested in the religious practice) severing familial ties on account of an insistent or irrational connection to a religion.

Furthermore, the contested proceeding may reveal deeply rooted problems beyond a matter of will construction. The beneficiary restriction clause may exist precisely because the family unit was already in a state of disrepair. In In re Seaman’s Will, instead of promoting participation in the Jewish community, the testator appears to have accomplished something else entirely, something that transcended religious devotion and approached a manifestation of animosity within the family. That change in character may stem from any number of sources, whether it is the inherent diversity of some communities against the unavoidable homogeny of others, or the emphasis on a time long past against the drive into an era of change.

Contested probate proceedings can be a relentless burden on the family; the pieces are broken and shattered. The contested proceeding would only serve to reveal the fragile state that already existed. History does not provide a short supply of examples. There is what the testator was “trying” to do and what the testator actually achieved—years of costly litigation and tense family reunions. The

67. For instance, the simplicity with which one can meet individuals within the Jewish sphere is aptly illustrated by websites like JDate.com, an online dating site predominantly populated by Jewish singles.


69. “Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk
litigation arising out of *In re Estate of Feinberg*, 70 “deepened a rift within the Chicago Jewish family whose fortunes it involves.” 71 Some of the negative consequences that arise out of beneficiary restriction clauses, whether intended or regardless of, raise concerns about the legacy we leave to our children, the values we hope to impart, and the messages we send to the rest of the world once the provision enters the public sphere. The contested probate proceeding reflects a great degree of disharmony in the family (which, if absent, would have presumably resulted in either a settlement, compliance with the condition, or acceptance of the testator’s wishes). 72

So a counterargument is presented; if a contested proceeding reveals a broken family, then we are not necessarily serving the typical normative function of testamentary instruments, that is, maintaining continuity between the generations. 73 If that continuity is not served on account of latent issues between the family members, the transfer of property only serves greed, complacence and nepotism. Any supposed connection arising out of a transfer of property supported solely by contentious proceedings is a nullity, in which case, the legatee should not receive the bequest. As a practical matter, this would mean the immediate forfeiture of a bequest simply for commencing the litigation.

The relative disharmony of a family already affects how judges determine whether a restraint had any negative impact on a harmonious marriage. We already see that judges construe the language of a

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70. 919 N.E.2d 888 (Ill. 2009)


72. Note that, from a procedural point, the “Jewish clause” became an issue only after Michelle Trull, one of the grand-daughters in the *Feinberg* case, alleged that the executors misappropriated funds and failed to properly transfer assets. In response, the executors sought to have the case dismissed for Michelle Trull’s lack of standing on account of the “Jewish clause,” at which point Michelle Trull naturally sought to have the provision invalidated. A tense situation was thus further complicated when a religious restraint was utilized, not as mechanism that benefits society, but as a weapon to be used through the course of litigation.

testamentary instrument so that the resulting distributions are consistent with preferred schemes as laid out in intestacy. Judges will also inquire into the state of a marriage when a bequest to a legatee is conditioned upon divorce and the legatee dies before a divorce is finalized. When a marriage is at stake, judges utilize a nuanced, fact intensive inquiry into what discourages a lawful marriage, gauging whether the marriage is pending, already exists, or is currently dissolving.\textsuperscript{74} The answer to that question determines whether the language actually implicates public policy. Simply put, if a couple is in the process of obtaining a divorce, the testamentary language restricting marriage never discouraged anything. The beneficiary restriction clause, in some circumstances, is designed to insulate the assets (as opposed to promote religious participation), thereby preventing them from leaving the family. Where a marriage is already failing, the disinheritance of a spouse is consistent not only with the testator’s intent, but, in an odd way, the disinherited spouse’s intentions as well. Both parties – the legatee and the soon-to-be ex-spouse – are actively seeking to terminate any outstanding relationship. Any attempts on the part of the soon-to-be ex-spouse to share in the estate arises out of the unfortunate timing of the testator’s demise and not, as should be the case, from the testator’s intent.

III. CONTEMPORARY STANDARDS: DISCRIMINATION, INTESTACY, AND WEALTH

While the case law is firm on the matter, the traditional rule is not in accord with modern jurisprudence, nor is it consistent with modern perspectives of diversity, family, and the distribution of wealth. This part of the Article will explore some of these variances, and instead of analyzing beneficiary restriction clauses under the terms laid out in judicial opinions (which are decades old in New York State), it will scrutinize beneficiary restriction clauses under a more contemporary eye. In fact, Justice Quinn pointed out that many of the cases upholding religious restraints are half a century old.\textsuperscript{75} This analysis will include: (1) analogizing the risk of systematic discrimination through marital restrictions with our prior experiences; (2) gauging beneficiary restriction clause’s place in New York State’s statutory scheme; and (3) measuring beneficiary restriction clauses against modern alternatives for estate planning presented by domestic and European models.

\textsuperscript{74} See \textit{In re} estate of Gerbing, 61 Ill.2d 503 (1975).
\textsuperscript{75} \textit{In re} Estate of Feinberg, 891 N.E.2d 549, 554 (Ill. App. Ct. 2008) (Quinn, J., Concurring).
A. Discrimination; Bias and Marriage

Testamentary provisions must take care to ensure that “positive law or public policy is not contravened.” 76 The judicial opinions that address the validity of beneficiary restriction clauses presume that the testator’s intent outweighs any other impermissible purpose without engaging in the balancing question. Indeed, these opinions fail to engage in a balancing test because no such test exists. Without that check, the testator may unwittingly encourage the same discriminatory practices we have struggled so much to destroy.

In the early half of the twentieth century, when the majority of the cases concerning beneficiary restriction clauses were drafted, restrictions on marriage were commonplace. Without great care, we only entrench ourselves deeper into a quagmire of religious and racial intolerance, implicitly endorsed by state actors, through overreliance on opinions that largely predate Korematsu v. United States77 and its progeny. The similarities between religious restraints and previously employed and rejected forms of systematic discrimination are striking.

The United States has a sad history of legislative and judicial interference with a person’s freedom to marry and construct a family. Many of these aberrations are quite recent in our history. To point out a few: anti-miscegenation statutes, gender in-equality, and involuntary sterilization. These and other restrictions on family construction are an ongoing occurrence throughout the world. The Chinese government will sterilize women that violate the country’s “one couple, one child” policy.78 Female genital mutilation remains a prominent practice among certain communities.79 The debate over same sex marriage is still ongoing.80

77. 323 U.S. 214 (1944).
78. While China had considered alleviating some of the restrictions imposed by its ‘one couple, one child’ policy (Jane McCartney, Beijing plan to relax ‘one couple, one child’ policy, January 25, 2010, at http://www.timesonline.co.uk/tol/news/world/asia/article7001773.ece (last visited March 29, 2010)), the government ultimately decided that the policy, designed to maintain a low birth rate, will remain in effect (OneIndia, China to stick to one-child policy, March 5, 2010, http://news.oneindia.in/2010/03/05/china-to-stick-to-one-child-policy.html (last visited March 29, 2010)).
79. See World Health Organization, Female genital mutilation, February 2010, http://www.who.int/mediacentre/factsheets/fs241/en/ (last visited March 29, 2010) (“FGM is often motivated by beliefs about what is considered proper sexual behaviour, linking procedures to premarital virginity and marital fidelity. FGM is in many communities believed to reduce a woman’s libido, and thereby is further believed to help her resist “illicit” sexual acts. When a vaginal opening is covered or narrowed (type 3 above), the fear of pain of opening it, and the fear that this will be found out, is expected to further discourage “illicit” sexual intercourse among women with this type of FGM.”).
80. “Section 2 of the bill adds a new Section 10-a to the Domestic Relations Law (DRL) providing that: (1) a marriage that is otherwise valid shall be valid regardless of
This being our history, we must be cautious when reaching an outcome that affects another “class,” those members of a particular religion. Discrimination can easily, if inadvertently, hide behind what might be called public policy. We experienced unacceptable results when state anti-miscegenation statutes barred individuals from engaging in otherwise happy unions over more “favorable” types. The state does not have a legitimate interest in “maintaining the purity of the races and in preventing the propagation of half-breed children.” As far as religious restraints are concerned, the religion of the chosen spouse is largely out of the new spouse’s control, save conversion; the new spouse is thus deprived of an otherwise anticipated inheritance on account of that religious status.

Alternatively, allowing religious restraints promotes, and is likely rooted in, various freedoms outlined in the United States Constitution, such as freedom of speech or free exercise. Furthermore, a beneficiary restriction clause arises out of a private testator’s interests and not the government’s interests. The Constitution “erects no shield against merely private conduct, however discriminatory or wrongful.” In New York, while blanket restraints are not permitted, partial restraints are enforceable, even if defined along entirely offensive and discriminatory terms. Former New York Surrogate Savarese’s opinion from *In re Silverstein’s Will* states rather simply: “Conditions in partial restraint of marriage which merely impose reasonable restrictions upon marriage are not against public policy. Conditions not to marry a person of a particular faith or race are not invalid.”

The rule is straightforward, but it can be used to enable bigotry that is in many ways nothing short of horrifying. Professor Stephen A. Newman reminds us of the 1942 case, *Skinner v. Oklahoma*, in which the Supreme Court of the United States remarked on involuntary sterilization:

whether the parties to the marriage are of the same or different sex. . . .” New York State Senate, Bill Number S66003 (voted down on Dec. 2, 2009).

81. State v. Brown, 108 So.2d 233, 234 (La. 1959) (“A state statute which prohibits intermarriage or cohabitation between members of different races . . . falls squarely within the police power of the state, which has an interest in maintaining the purity of the races and in preventing the propagation of half-breed children. Such children have difficulty in being accepted by society, and there is no doubt that children in such a situation are burdened, as has been said in another connection, with a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

82. *Brown*, 108 So.2d at 234; see also Stephen A. Newman, *The Use and Abuse of Social Science in the Same Sex Marriage Debate*, 49 N.Y.L. SCH. L. REV. 537 (March 2005) for a further discussion.

86. 316 U.S. 535 (1942).
The power to sterilize, if exercised, may have subtle, far reaching, and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. . . . He is forever deprived of a basic liberty.\textsuperscript{87}

He cautions us to be mindful of displays of state power that could lead to the elimination of entire peoples under ostensibly legitimate purposes. The particular intrusion on the person discussed in the \textit{Skinner} decision is unquestionably brutal and callous. In terms of the physical severity, there is no comparison. While the intrusion is one of the unique horrors of involuntary sterilization, the protectionist and isolationist motivation that supports the continued use of beneficiary restriction clauses arise out of similar fears for the depletion of the native or dominant culture. Advocates of involuntary sterilization feared for the weakening of the majority through interbreeding. Distinct religious groups face a similar concern, if not through Holocaust, then by intermarriage.\textsuperscript{88}

On the other hand, this concern over the gradual dilution of the religion through inter-marriage is among the more heartfelt purposes posited by the supporters of beneficiary restriction clauses. Perhaps it follows that the presence of a minority group warrants greater latitude in testamentary dispositions if only to facilitate preservation. That in mind, there may be a place for such provisions as a mechanism that makes amends for past wrongs inflicted on the minority group by the majority.\textsuperscript{89}

Nonetheless, arguments in favor of even a limited application of beneficiary restriction clauses cannot ignore the unfortunate history of discriminatory practices in the United States and throughout the world under the guise of allegedly legitimate purposes. It may be difficult to acknowledge, but there is no meaningful difference. The similarities between inter-religious marriage and inter-racial marriage do not change. Both arise out of rash and irrational assumptions or beliefs about the object of the distinction, and both can spiral out of control if left unfettered. In a more topical fashion, imagine the provision

\begin{itemize}
    \item \textsuperscript{87} Stephen A. Newman, \textit{The Use and Abuse of Social Science in the Same Sex Marriage Debate}, 49 N.Y.L. Sch. L. Rev. 537, 543 (March 2005), citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
    \item \textsuperscript{88} See Pauline Dubkin Yearwood, \textit{The Jewish Clause: In the first case of its kind ever heard in an Illinois court, judges decide whether someone can disinherit his grandchildren for marrying a non-Jew}, The Chicago Jewish News Online, July 18, 2008, http://www.chicagojewishnews.com/story.htm?sid=1&id=252138 (last visited April 1, 2010).
    \item \textsuperscript{89} However, that is an inquiry into scrutiny that is best reserved for the Supreme Court.
\end{itemize}
that disinherits a child if that child marries a person of Islamic faith or other source of popular prejudice. To reiterate: "Conditions not to marry a person of a particular faith or race are not invalid."⁹⁰

In the end, we are giving effect to private prejudice through the operation of the court, essentially disguising the fact that while a statute effectuates popular prejudice en masse, a will achieves the same goal one family at a time. Of course, the Feinberg opinion points out that "the free exercise clause does not require a grandparent to treat grandchildren who reject his religious beliefs and customs in the same manner as he treats those who conform to his traditions."⁹¹ However, courts do not favor being used as a pawn in a person's private vendetta against members of a particular group: "The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."⁹² That every will must be submitted for probate through the Surrogate's Court does not implicate the Fourteenth Amendment to a lesser degree. Rather, the argument goes the other direction; that process is essentially the only check against any undue influence or other wrongdoing.⁹³ Testators cannot⁹⁴ and should not⁹⁵ expect the cooperation of the Surrogate's Court when trying to enforce religious restraints. Can a judge ascertain the difference between benign encouragement and actual malice? Unless the class described is the testator's own, that test⁹⁶ is exceedingly difficult to describe and apply.

There are several available courses of action: (1) allow Courts to continue to apply the traditional rule and enforce religious restraints, avoiding the policy issue while creating exceptions as appropriate circumstances arise; (2) inquire into the circumstances surrounding a beneficiary restriction clause (the prudence in having courts determine whether a beneficiary restriction clause is benign or fueled with possibly racial animosity is questionable and perhaps should be

⁹¹ In re Estate of Feinberg, 919 N.E.2d 888, 905 (Ill. 2009).
⁹³ An interested party (defined in N.Y. Surr. Ct. Proc Act L.R. § 2205(2) (McKinney 1997 & Supp. 2010), can also petition for a compulsory account under § 2205 (1), but this avenue is only available after letters are issued.
⁹⁴ Shelley v. Kraemer, 334 U.S. 1 at 17 (1948) ("It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process.").
⁹⁵ Shelley v. Kraemer, 334 U.S. 1 at 22 ("The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals.").
avoided altogether; (3) discourage drafting of religious restraints by practitioners in the first place and encourage families to resolve any conflicts (an option which addresses prospective plans, with little benefit to drafted documents, but, would hopefully strengthen familial ties); and (4) systematically strike down religious restraints, resulting in either the anticipated benefit to the legatee, a windfall for the other named legatee(s), or, in rare occasions, a distribution under intestacy.

B. DISTRIBUTION OF ASSETS UNDER INTESTACY

The following discussion details those classes of persons included in intestate distribution and the rare circumstances that lead to exclusion. We see that notions of economic protection between the individual and the state are on divergent paths. While a greater class of people is afforded economic protections under intestacy, testators are given correspondingly increasing latitude with respect to how a person or entire class is disinherited and thus denied otherwise available financial benefits. This contrary motion between the presumably preferred distribution plan and the unfettered alienation of property represents the cornerstone of testamentary freedom.

1. The Expansion of Eligible Distributees

Intestate distribution is a default hierarchy to be applied when the estate administrator has no instrument that dictates distribution. The statute is presumed to reflect the decedent’s intent and, accordingly, the preferred distribution plan when no alternative is specified. New York State’s Estates Powers and Trusts Law97 (“EPTL”) section 4-1.1 provides decedents with a reasonable expectation as to the destination of their assets in the absence of a will. In that regard, intestacy and probate serve different functions: the former being a gap-filler and the latter the ultimate reflection of a testator’s intent.

New York State’s intestacy statute provides that “property of a decedent not disposed of by will shall be distributed as provided in [EPTL section 4-1.1].”98 The hierarchy provided in EPTL section 4-1.199 outlines the eligible distributees to a decedent’s estate not only when a decedent dies without a will, but also when “an instrument purporting to be a Will . . . is either denied probate or for which probate is not instituted.”100 If an entire provision in a will outlining the testator’s plan for distribution is struck down, such as where the pro-

99. Id.
vision runs contrary to public policy, then the estate’s assets will be distributed in accordance with the hierarchy provided for in EPTL section 4-1.1, at least in so far as an alternative plan cannot be gleaned from the rest of the instrument.

The case law discussed above concerned the disinheritance of the testator’s direct descendents, the distributees, that would have received a share in the estate had intestacy applied. Given the recent expansion of eligible distributees under intestacy, are beneficiary restriction clauses (which by definition retreat from that expansion) outliers that necessitate restricted uses?

2. Inclusion

Beneficiary restriction clauses run contrary to what can only be described as a slow progression towards the inclusion of persons, stepping away from common law rules. An estate’s eligible distributees and the definition of a family undoubtedly expanded in recent years. Significantly, under the New York State Estate Powers and Trusts Law, “relatives of the half blood,” and adopted children are included in the distribution scheme. Moreover, any petition for probate now shall “indicate . . . non-maritals.” Such amendments to the New York State Domestic Relations Law err on the side of inclusion over exclusion. Furthermore, the EPTL provides that non-marital children are the legitimate children of both the mother and the father.

This expanded definition also comes with the addition of economic benefits for both the spouse and the children. This inclusionary tendency reveals that protecting an expanded definition of family is a priority in New York State. The benefits of marriage include: (1) tax breaks; (2) health insurance plans; (3) surviving spouse’s right of election; (4) employer benefit packages; and, of course, (5) distribution under intestacy.

102. N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 1998).
103. N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(b) (McKinney 1998).
104. N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(d) (McKinney 1998).
105. 22 N.Y.C.R.R. § 207.16 (2010).
106. See N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a) (1)-(2) (McKinney 1998). On the other hand, the sub sections of EPTL § 4-1.2(a) (2) concerning recognition of a non-marital child by the father define certain restrictions to the applicability of the statute, acting as a ceiling to how far New York State is willing to reach in its expansive view of intestate distribution. The sub sections, while perfectly rationale, do have their roots in the old principles; you always know the identity of the mother, but you can never be too sure about the father.
107. N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 1998).
Note that in New York State, assets do not "escheat" as the term is commonly understood. In intestacy, if the distributees are not ascertained during the initial administration, then the funds are ordinarily held with the New York State Comptroller "for the benefit of the Decedent's unknown distributees." The family is always free to come forward and petition for the withdrawal of the funds. The only caveats are the limits of intestacy (with respect to standing) and the makeup of the particular family; there must be someone that is both closely related to the Decedent and have a worthwhile financial stake in the estate. What does this mean in our discussion on religious restraints? Simply, the state has disavowed any connection or vesting interest in the estate in favor of the interests of the family. New York State provides every available opportunity for the family to obtain the funds, even though the testator is under no obligation to provide for anyone.

New York guarantees the economic security of a surviving spouse, if to a limited extent. The right of spousal election allows a surviving spouse to reject a decedent's will and receive a certain amount of the net estate. If the parties are married at the decedent's date of death, the right of election gives the surviving spouse "the greater of (i) fifty thousand dollars or, if the capital value of the net estate is less than fifty thousand dollars, such capital value, or (ii) one third of the net estate." This holds true in New York even if the parties obtain a religious divorce such as a Get, if the Get is not yet recognized by a foreign state, in particular, the State of Israel, at the decedent's date of death.109

Finally, EPTL section 5-3.2 will also set aside an amount ranging from the child's intestate share to an amount that can be reasonably inferred from other will provisions that describe gifts to the decedent's other children, if any, with respect to as yet unborn children.110 For the most part, these are relatively recent changes, arising out of amendments to the EPTL in the early to mid 1990s, decades after the case law concerning beneficiary restrictions settled.

Regardless of the degree to which society as a whole is prepared to embrace certain modern ideologies, it is clear that we are slowly becoming a society that embraces difference into even the most intimate aspects of our lives. What we should see is the freedom to form families and engage in relationships to which the individual, that is the

108. N.Y. Est. Powers & Trusts Law § 5-1.1-A (a) (2) (McKinney 1998). That section also contains additional information regarding how to calculate the net estate. Id.
We should not be bound to the relationships formed by a parent or grand-parent's perceptions and restrictions when the parameters of those relationships are defined by religious or cultural bias. For some, the choice between receiving a bountiful inheritance and marrying the person you love is no choice at all. Nonetheless, to hinder the growth of an otherwise well-developed family only casts a dark shadow on a favorable situation.

As it is, one of the most distinct benefits of marriage—inheritance by operation of law—disappears with the stroke of a pen. The provision articulated in a will deprives the entire family unit of the apparent bequest and, in turn, the surviving spouse is deprived of that additional economic security the legal conference of a marriage license was supposed to bestow in the first place. Both the disinherited legatee and the spouse would have been more financially secure under the laws of intestacy.

Beneficiary restriction clauses in general deprive families to some degree. If we are expanding our preconceived idea of family, then why can we allow testator's to disinherit family members on arguably impermissible grounds? There is no apparent balance between testamentary freedom and familial responsibility. The answer may lie in the few circumstances where a distributee is cut off from intestate distribution by the state. Do beneficiary restriction clauses have less in common with the first group (inclusion) than the second group (exclusion)?

3. Exclusion

The Estates Powers and Trusts Law\(^{112}\) ("EPTL") provides several permissible exclusions from inheritance, as follows: (1) renunciation; (2) when the parent(s) abandon a child;\(^{113}\) (3) abandonment; and (4) criminal acts. The majority of these exclusions reflect the rare circumstances where the EPTL is willing to punish a distributee for wrongful acts. The exclusions require either affirmative acts on the part of the

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\(^{111}\) Hernandez v. Robles, 7 N.Y.3d 338 (2006) (New York State's Court of Appeals left the matter to the legislature "there is a rational basis for limiting marriage to opposite-sex couples leads us to hold that that limitation is valid under the New York Due Process and Equal Protection clauses, and that any expansion of the traditional definition of marriage should come from the Legislature." 7 N.Y.3d at 361. The bill permitting same-sex couples to marry in New York State was inevitably voted down by the New York State Senate. See Jeremy W. Peters, New York State Senate Votes Down Gay Marriage Bill, NEW YORK TIMES, December 2, 2009, available at http://www.nytimes.com/2009/12/03/nyregion/03marriage.html (last visited April 1, 2010). See also Edith Honan, New York state lawmakers vote against gay marriage, Reuters, December 2, 2009, available at http://www.reuters.com/article/idUSTRE5B157K20091202 (last visited April 1, 2010)).

\(^{112}\) N.Y. EST. POWERS & TRUSTS LAW § 4-1.4 (McKinney 1998)

\(^{113}\) Id.
alleged distributee, or a general failure to act when the duty existed, thus reflecting a failure to fulfill the familial responsibilities. Like marriage, this disfavored conduct is presumably within the control of the alleged distributee. A family member elects to marry a particular person as much as that same person elects to engage in a criminal act. This similarity echoes the results seen in earlier judicial opinions. Or, maybe the happy couple was destined to be together, in which case choice had nothing to do with it.

Trustees can also disinherit children through a process called “de-canting,” whereby a trust's assets are transferred to a new trust which excludes one or more of the original beneficiaries. There is an obvious “concern that this power to exclude a beneficiary may be abused by the trustees.” This particular process peculiarly lends itself to the problems presented here. However, the decanting power is directed more towards the capacity and freedom of the trustee, as opposed to providing a back-alley tool for disinheriting disfavored kin. The decanting power is supposed to provide a planning tool that corrects prior drafting errors in the original trust instrument.

C. ALTERNATIVES

One of the key variances between domestic and European estate planning is the amount of deference or lack thereof afforded the testator. This deference demonstrates that estate planning serves different functions, on account of varying historical and economic roots of the system, and suggests different conceptions about the distribution of wealth. The two systems exhibit a dichotomy between freedom and family. While the United States at large embraces a combination of philanthropy and testamentary freedom, the European Union insulates the family and cultural ties in a way that the United States only employs in intestate distribution. The Internal Revenue Code encourages testators to support their personal ideologies through charitable donations. Meanwhile, an overwhelming majority of European Union nations allocate a portion of the estate not only to the spouse, but to the children as well.116

115. Id.
1. Domestic Alternatives

Once we accept that a testator may freely disinherit the testator’s children, the natural question that arises is what happens to the disinherited child’s share? As discussed above, redistributing the share to other children to support a particular religion is problematic. So what alternative avenues are available for distributing wealth in the United States when a testator seeks to support a particular cause, or religion? There are indeed other estate planning options. Probably the most obvious includes charitable bequests through charitable trusts, private foundations, or donations of the funds outright. These are among the more common places for advocacy to enter the estate planning realm. Such gifts are, of course, favored by the community and the Internal Revenue Service, whose interest in the taxable estate is substantial. Specifically, Internal Revenue Code section 2055 allows a deduction for transfers made not only to charitable organizations but also for gifts made to benefit other favored institutions, including “the United States, any State, any political subdivision thereof, or the District of Columbia, for exclusively public purposes,” veteran organizations, and employee stock ownership plans.

Gifts to religious organizations are among the permissible and favored institutions for receiving testamentary gifts. A gift to a Zionist organization, for example, could and should remain within the testator’s plan and the discretion. Such a gift is not the same to harm the preferred class of beneficiaries on account of the religious status of a spouse as it is to provide a windfall to a non-profit organization, even if the motivation, grounded in religious belief, is the same. Furthermore, a child has an intimate association to the testator that a non-profit organization can never replicate. This association is permanently severed and the legacy of the testator is to some degree tainted in the eyes of the testator’s descendents when a beneficiary

118. As provided in 26 U.S.C.A § 2055(a)(2) (West 2002 & Supp. 2009) charitable institutions include “any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), and the prevention of cruelty to children or animals . . . .”
119. § 2055 (a)(1).
120. § 2055 (a)(4).
121. § 2055 (a)(5).
122. See generally, Shelly Kreiczer-Levy, The Mandatory Nature of Inheritance, Am. J. Juris. vol. 53 (2008) (Here, the argument is framed in terms of continuity between the Giver (the testator) and the Receiver (the legatee). Through testamentary dispositions, a mutual exchange between the two is established that is beneficial for the Giver, the Receiver and society at large).
restriction clause is triggered, albeit to the benefit of a particular religion.

This is not to suggest that disinheriting direct descendants is always an unfavorable option. Disinheriting a child can be a form of tough love. Some children inevitably require a greater amount of motivation to succeed (if not a watchful eye at all times). An all or nothing attitude with respect to estate planning is frequently generated by discomfort felt among older generations over this group. While it comes as no surprise that some children need to be protected from themselves, the asset allocation question is not so cut and dry. Warren Buffet suggests that an excess of doting does more harm than good; while providing for one's children is an admirable task that can lay a solid foundation for future successes, the scales can tip in the other direction and lead to apathy or laziness.123

Furthermore, some children simply do not have to rely on their parents to maintain economic independence or achieve financial success. Several members of Max Feinberg's family did not object to the beneficiary restriction clause, either because they agreed with his choice, or because they were successful in their own right (and therefore they were not in any particular need for the inheritance). This trend is echoed on a larger scale by President Barack Obama with respect to the federal estate tax: "When you've got an estate tax debate that proposes a trillion dollars being taken out of social programs to go to a handful of folks who don't need and weren't even asking for it, you know that we need an injection of morality in our political debate."124 We should be mindful of who is supposed to benefit from the distribution of an estate. That answer is not always obvious, and sometimes it is not the testator's direct descendants.

2. The European Example

The European Union, on the other hand, takes an entirely different approach to the subject. Twenty-six out of twenty-seven European Union nations, all except the United Kingdom,125 allocate and reserve

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123. See Rachel Breitman & Del Jones, Should kids be left fortunes, or left out? USA Today, July 26, 2006, http://www.usatoday.com/money/2006-07-25-heirs-usat_x.htm (last visited Dec. 1, 2009) ("[W]ealthy parents should leave their children with enough money to do anything they want but not so much that they are doomed to do nothing at all.").


a fixed percentage of the decedent's estate to the children, which is not unlike the elective share provided for a surviving spouse under New York law. As seen in a recent article in the Economist, "Charlemagne" writes that throughout Europe a child's claim to "guaranteed, equal shares of an estate feels like a basic human right." Children are protected heirs.

It is a system of forced heirship that is non-existent in the United States. The United States provides an opt-in/opt-out approach. What remains is a balance between conflicting yet legitimate interests: (1) the testator's intent in United States courts; (2) the birthright of the eldest children - tradition; (3) solidarity of the family; and (4) freedom, markets, and private property rights. "Charlemagne" attributes some of the differences to historical roots.

126. Also note that the European Union recently issued a Green Paper, a questionnaire, to "address the practical problems encountered by individuals in connection with succession and wills." Succession and Wills (Green Paper), http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/16017_en.htm (last visited November 20, 2009). Relevant here are questions that deal with not only the disinheritance of distributees (Question 2.5), but, perhaps most importantly, the choice of law question which in turn impacts the percentage allocated for the reserve (Question 2.4).

127. "Our weekly column on the European Union is named after one of the continent's early unifiers: Charlemagne, born in 742 and crowned first Holy Roman Emperor in 800." http://www.economist.com/research/articlesBySubject/display.cfm?id=3856661 (last visited April 14, 2010).


129. The European perspective is seemingly at odds with cultural rights - human rights recognized in, most European nations, the South African Constitution, and the United Nations. The right to participate is a personal choice. The role of cultural rights to each individual is quite malleable as beauty is in the eye of the beholder. Cultural rights are an indefinable set of protected rights that satisfy the needs of the community and the individuals within the community. Cultural rights encourage diversity, acceptance, and understanding for varied rights, customs, and practices. They are not so easily confined to hard and fast rules, especially rules that attempt to control religious dictates. Cultural rights are both tangible and intangible attributes that go directly to an individual's identity, even going so far as to affect how that individual constructs relationships with the surrounding world, effectively insulating an individual's choice from scrutiny. The situations we encounter with respect to beneficiary restriction clauses concern the conflicting choices of two people, the testator and the legatee: whose choice trumps the others? The question arises: do we protect the those individuals that choose to reject their past to benefit the legacy of a third party spouse?


132. Id.
IV. SUMMARY

The recent Illinois case, *In re Estate of Feinberg*, revealed a divisive split in how society responds to beneficiary restriction clauses, those provisions in a testamentary instrument that disinherit legatees, often on account of their marital status and religious choices. Some feel that such provisions are well within a testator's intent while others feel that they do little more than give widespread effect to private prejudice. Unrecognized harms and discrimination are a common theme in the twentieth century. We must take care to ensure that we are not acting on ancient biases. The trusts and estates practice is particularly susceptible to longstanding prejudice and practices on account of the substantial amount of deference afforded to the testator's intent. Furthermore, a strong history of judicial precedent in favor of beneficiary restriction clauses creates a considerable barrier to change. The definition of the modern family and the scope of freedoms afforded to individuals have expanded substantially in recent years and has become the object of heated debate, well on display with respect to same sex marriages. The trusts and estates practice is not immune to these changes. In fact, many progressive changes are reflected directly within the language of the Surrogate's Court Procedure Act and the Estate Powers and Trusts Law. There may come a time when we must account for the risks presented by the systematic endorsement of private prejudice through the use of beneficiary restriction clauses but not while ignoring the deeply personal meaning of such provisions to the testator and their benefits to the families and communities which they support.

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133. *In re Estate of Feinberg*, 919 N.E.2d 888 (Ill. 2009).