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Trusts-Purpose Contrary to Public Policy

Michael J. Aranson

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Another proposal suggests mandatory insurance coverage for all corporations which can be waived only upon showing of sufficient capitalization. Since the Zubik case involves maritime law there is a third possible remedy. The historic purpose of maritime laws is to preserve and protect maritime shipping and commercial interests. The Zubik decision jeopardizes these interests by permitting individuals to operate thinly capitalized corporations on our waters free from any risk of personal liability. In order to protect and perpetuate these interests the maritime tort claimant should not have to bear the heavy burden of proof required by Zubik before the corporate entity will be disregarded. It is submitted that the Zubik court did not give adequate consideration to the protective purposes of maritime law.

Salvatore J. Cucinotta

TRUSTS-PURPOSE CONTRARY TO PUBLIC POLICY—The Pennsylvania Supreme Court clarifies and updates its views on the validity of marriage and re-marriage conditions which are annexed to a testamentary trust, relating to the religion and national origin of the spouse of a beneficiary.

In re Estate of Keffalas, 426 Pa. 432, 233 A.2d 248 (1967).

John Keffalas died testate on April 19, 1956. His last Will and Testament, dated December 8, 1944, was admitted to probate on May 1, 1956. The relevant paragraphs in the will are as follows:

"Fourth: To my daughter, Dorothy J. Keffalas Gregory, I give one-hundred dollars... Should my daughter Dorothy either by divorce [sic] or death remarry a man of true Greek blood and descent and of Orthodox religion, ... she shall after one year of successful marriage receive the sum of two-thousand ($2,000) from my trust funds." [Dorothy had married a non-Greek prior to execution of the will].

Fifth through Eleventh: A conditional bequest to each child but Dorothy of $2,000.00, on condition that such child marry a person of "true Greek blood and descent and of Orthodox religion."

Twelfth and Thirteenth: Disposed of testator's business to his three eldest sons, upon the same condition.

29. The Pennsylvania Senate has passed a new Business Corporation Law where the close corporation is defined to consist of 30 or less stock holders. Senate Bill No. 1169 (1967): Chap. B, Art. III, Sec. 1(4).
2. Id.
"Fourteenth: Should any of my children marry a person not of true Greek blood and descent and Orthodox religion and either by divorce or death remarry a person of true Greek blood and descent and Orthodox religion, . . . he or she shall after at least one year of successful marriage receive the sum of two-thousand dollars ($2,000.) from my trust funds."

Characterizing the will of the testator as "an example of bigotry and prejudice,"4 the Orphans' Court of Butler County found void as against public policy, all gift provisions of the will dealing with the marriages and/or remarriages to Greeks of Orthodox religion. In so holding, the full amounts of the conditional gifts were awarded, as if there had been no conditions annexed to them. From this decision, the executors appealed.

The Supreme Court of Pennsylvania, in a vague but unanimous opinion written by Justice O'Brien, affirmed the invalidity of Paragraphs Fourth and Fourteenth, while reversing the degree on invalidity of Paragraphs Fifth through Thirteenth. The reasoning of the court is set out below:

"the court below held, and we agree, that the condition in Paragraphs Fourth and Fourteenth, although not violative of freedom of religion, was conducive to divorce and thus violative of public policy."5 (No mention is made of Paragraphs Fifth through Thirteenth having the same fault.)

"When a disposition tends to lead to divorce, as this one does, . . . it is void." (Relating to Paragraphs Fourth and Fourteenth as indicated immediately above).

"However, we do not agree with the learned court below that the invalidity of . . . Paragraph Fourteenth taints all other provisions of the will subject to a marriage condition. . . . The marriage conditions are of themselves valid."6 (Paragraph Fourth contains a re-marriage condition, as does Paragraph Fourteenth, and they are declared invalid, but the mere marriage conditions of Paragraphs Fifth through Thirteenth are permitted to stand as written).

In so reasoning and deciding, the court held, that marriage conditions dealing with certain religious and nationality requirements may be valid, but that re-marriage conditions awarding gifts to beneficiaries who separate by death or divorce from non-qualifying spouses and later marry spouses who do qualify, are conducive to divorce and are against public policy, and that such conditions are invalid and will be ignored.

3. Id.
5. 426 Pa. at 434, 233 A.2d at 250.
6. Id. at 435, 233 A.2d at 251.
At Common Law there was a well-defined interest in preserving the freedom of marriage and religion, and in the preservation of the family relation. As has been stated by Professor Scott:

It is against public policy to permit a disposition of property in such a manner as to offer a financial inducement to the doing of certain acts, innocent in themselves, but which ought not to be encouraged by holding out pecuniary rewards for the doing of them.

Pennsylvania has followed the general Common Law principles in holding that such provisions may be invalid. As was stated in Justus's Estate, "In Pennsylvania the right of a man to do as he will with his own has always been liberally construed. Accordingly, a donor, not under any obligation to give, may give with such conditions as he pleases, subject only to the restriction that the conditions shall not be clearly illegal." In the Justus case, the testator left his daughter $500 per annum for life, with the added provision that should she survive her husband, or separate from him and have nothing to do with him, then, and in either event, she was to have one-half of the income from his very large estate. The Justus court held that the condition was intended to tempt and induce the daughter to abandon her husband, and was therefore unlawful as against public policy, thus the condition was exised, vesting the gift.

Much confusion has arisen on the subject of exactly what a testator must or must not do to stay within the confines of Justus's Estate. It now appears the validity of conditions such as these is not governed by the actual words employed within the condition, but by what the testator's intention was when the will, complete with conditions, was executed. If the testator's intention was contra to public policy, then so is the condition. The following cases illustrate this point.

7. G. Bogert, Trusts and Trustees § 211 (2d ed. 1965).
8. A. Scott on Trusts § 62.3 (3d ed. 1967).
10. Id. at 750.

(1) An otherwise effective condition precedent, special limitation, condition subsequent, or executory limitation which is designed to prevent the acquisition of an interest in land or in things other than land in the event of some, but not all first marriages, is valid, except as stated in Subsection (2).

(2) A provision such as described in Subsection (1) is invalid if the circumstances under which a marriage is permitted are such that a permitted marriage is not likely to occur, unless the dominant motive of the conveyor is to provide support until such marriage or in the event of such marriage, in which case the restraint is valid.

c. Some marriages—Members of a group. Restraints frequently are employed to induce the conveyee to marry within the membership of a designated religious faith, or to refrain from marrying a member of such group. Whether or not the restraint is merely partial frequently depends upon the type and strength of the religious
In *Morton Estate,*\(^\text{12}\) property in Philadelphia was left to a daughter, "providing that my daughter is divorced from her husband. . . ."\(^\text{13}\) The orphan's court stated:

Where the testator's purpose, in imposing a condition, is to induce future separation or divorce of husband and wife, the condition is void as against public policy and the devise or legacy takes effect. [Citing Cases] If the will, however, merely provides for the contingency of divorce, and does not express an intent to bring it about, the provision is valid.\(^\text{14}\)

The *Morton* Court attempted to ascertain testatrix's intent and concluded that the sole purpose was to induce divorce, and was therefore invalid as against public policy.

In *Rininger's Estate,*\(^\text{15}\) testator provided for a life income to his son, and provided further, "in the event that my son, Joseph E. Rininger, shall become unmarried, either through death of his wife, Ada Rininger, or by process of law, . . . "\(^\text{16}\) then the entire amount held in trust shall be paid over to him. It was held that the gift was not intended to induce divorce, but only provided for a contingency of it, and the gift and the condition were held valid of it, and the gift and the condition were held valid. The supreme court decided that the intention of the testator was to provide an assured income if his son was married, but that such assured income was not necessary if the son was not married.

In *Fisher Estate,*\(^\text{17}\) testator provided that the income from his estate should be paid to his daughter for life, with the provision, "If, however, my daughter, Evelyn Fisher Sperlbaum, should become widowed or divorced from her husband, her portion of my estate otherwise held in trust shall thereupon be paid to her absolutely."\(^\text{18}\) In this case, the orphan's court looked at all possible evidence in trying to ascertain the testator's intention, even admitting extrinsic evidence of the testator's great dislike for his son-in-law, and concluded that the testator's intent
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was to induce a divorce, and struck down the condition as offensive to public policy.

In affirming the invalidity of Paragraphs Fourth and Fourteenth in the instant case, limited discussion is made by the court as to John Keffalas's intention when executing the conditions within these paragraphs. It is submitted that perhaps it could have been found that the intention was other than inducing divorce, and/or that there could have been other reasons for the holding. Provisions have been upheld when the conditions have been equally shocking, such as $30,000 in trust to pay the income to Helen Morton for life, or so long as she remains unmarried,\(^{19}\) with a gift over to another in the event of her marriage or death; or a devise to a son in trust, providing that title shall vest absolutely "if he separates from his wife by death or divorce;"\(^{20}\) or where a will provided that if legatee married out of his religious faith, that he would forfeit his share.\(^{21}\)

Paragraphs Fifth through Thirteenth dealt with only marriage conditions, and were different from the divorce, death and re-marriage conditions of Paragraphs Fourth and Fourteenth. In those paragraphs the conditions dealt with the separation from a non-qualifying spouse, followed by a marriage to one that did qualify. The Paragraphs now under discussion dealt with original marriage to a non-qualifying spouse, and the final adjudication of the validity of those conditions of the Keffalas will.

In Clayton's Estate,\(^{22}\) a gift was made to William Clayton that would vest only when William, at his death, had issue of a Roman Catholic mother, or was survived by a Roman Catholic wife, or in the event that his last wife, if she predeceased him, was a Roman Catholic. This provision was upheld, the orphan's court making a statement that also serves to uphold Paragraphs Fifth through Thirteenth of the Keffalas will:

a religious restriction operating only on the choice of a wife is too remote to be recognized as coercive of religious faith. . . . a condition which tends to coerce religious faith is void, at least one that coerces the faith of a beneficiary. Nothing in these conditions affects the faith of William H. Clayton or of his issue, or to anyone who can benefit directly under the will.\(^{23}\)

In dealing with conditions that tend to restrain marriage, Professor Scott states: "A disposition of property may be illegal on the ground of its tendency to restrain marriage,"\(^{24}\) The Restatement (Second) of Trusts has a comment directly on point:

22. Id.
23. Id. at 416.
24. A. Scott on Trusts § 62.6 (3d ed. 1967).
Restraining Marriage. A provision in the terms of the trust may be held invalid on the ground that its enforcement would tend to restrain the marriage of the beneficiary. Thus, a provision in the terms of the trust divesting the interest of a beneficiary if he or she should ever marry anyone may be invalid. Such a provision with respect to the remarriage of a widow, however, is valid. So also, such a provision is not invalid if it does not impose an undue restraint on marriage. Thus, a provision divesting the interest of the beneficiary if he or she should marry a particular person, or should marry before reaching majority, or should marry without the consent of the trustee, or should marry of a particular religious faith, or one of a different faith from that of the beneficiary, is not ordinarily invalid. So also, where the settlor manifests an intention not to restrain marriage of the beneficiary, but to furnish maintenance to the beneficiary while single, the provision is valid.\(^\text{25}\)

It has been aptly stated:

Respected men and women, as well as eccentric people, sometimes make sound, and sometimes eccentric wills. Courts, heirs, and excluded beneficiaries often wish (1) they could change or delete clear and plain and specific language, or (2) rewrite a will to expand or change the testator's bounty in order to conform to what they believe would be fair and wiser, or to conform to what they think the testator would have said if he had foreseen the existing facts and circumstances. But that is not and never has been the law of Pennsylvania.\(^\text{26}\)

The final matter in the discussion of Keffalas is the inquiry into what becomes of gifts whose conditions have been declared illegal. In England, there was never any concern for the testator's intent, and rules of law, rather than construction, were used to dispose of property subject to conditions.\(^\text{27}\) In trusts of real property, if the condition was illegal, the gift failed, and there was a resulting trust back to the estate to be disposed of through the residuary clause if there was one, or through the rules of intestacy. As for trusts of personalty, if the condition was *malum in se*, the gift failed and was treated the same as an illegal gift of real property. If the condition was merely *malum prohibitum*, the condition failed, and the gift was absolute, awarded free of the condition. It is fortunate that in the United States such arbitrary rules of law are not present. In this country the tendency is to give effect to the testator's intention. Thus, if the testator provides for a gift over if a condition

\(^{25}\) Restatement (Second) of Trusts § 62, comment g.
\(^{27}\) A. Scott on Trusts § 65.3 (3d ed. 1967).
should be found illegal, or if he states that if any conditions shall be found illegal that beneficiaries should take free of them, there is no problem. Difficulty arises, however, when the testator has not considered the possibility of illegality. In such cases, the courts must determine how he would have disposed of the property had the possibility of illegality been known to him. In the absence of a contrary intent, the inference is that the settlor would have intended that the gift be absolute rather than fail altogether, and the more recent cases have indicated that there is indeed a rule of construction, and that the gift is absolute, as if no condition was ever attached to it.28 The Restatement (Second) of Trusts also agrees that there is a rule of construction to be followed wherever possible in cases of this nature,29 and gives the following example:

Thus, if a testator bequeaths money to trustees to pay the income to a man if he should first divorce his wife, and the condition is illegal, the beneficiary is entitled to the income, whether or not he divorces his wife, unless a contrary intent of testator is shown.30

It thus appears that there is ample authority for the holding of the supreme court in the Kefalas decision. The court applied common law principles as supplemented by Pennsylvania case law, and reached a result that is generally in accord with the textwriters, as well as the Restatements. It is suggested, however, that the next time a case of this type comes before the Pennsylvania Supreme Court that steps be taken to clarify some of the ambiguity surrounding the wording of this decision, and that workable rules be set down that can be easily understood and interpreted.

Michael J. Aranson


29. RESTATEMENT (SECOND) OF TRUSTS § 65, comment f: "Where, as is ordinarily the case, the settlor has made no provision as to what should happen if the condition should be held illegal, the beneficiary is entitled to the interest whether or not the event happens unless it appears from properly admitted evidence that it would probably have been the intention of the settlor that if the condition should be illegal the interest of the beneficiary should fail altogether.

30. Id.