

ESTATE PLANNING

D E V E L O P M E N T S

for Texas Professionals

MANIPULATING THE CONDUCT OF BENEFICIARIES WITH CONDITIONAL GIFTS

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Clients have a strong desire to transfer the fruits of their lifelong efforts upon death to the individuals they prefer. Though not constitutionally protected, this ability is often viewed as a right, rather than a mere privilege. See *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942) (“Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.”). Although the Texas legislature and the courts are unlikely to eliminate this privilege, they often get involved when a client attempts to place restrictions on what the beneficiary must do or not do to receive the offered bounty.

Some conditions are relatively benign such as a provision requiring property to be held in trust until the beneficiary reaches a specified age. However, testators and settlors may use conditions to control or influence nuances of the beneficiary’s behavior. For example, a testator left his house and \$30,000 to his wife on the condition that she smoke five cigarettes per day for the rest of her life to get even for her distain of his practice. See *Widow Fumes at Order to Start Smoking*, SAN ANTONIO EXPRESS-NEWS Sept. 10, 1993, at 6A. Will the court force a beneficiary to engage in a dangerous habit to receive the property? If not, would the wife get the property free of the condition or would the property pass under other provisions of the testator’s will? What about a will provision providing \$500 per month for the police officer who gives the most traffic tickets to motorists for double-parking? *Dead Man Had Will, Way to Get Double-Parkers*, WASH. POST, Aug. 25, 1998, at A2. This month’s article explores conditional gifts and focuses on how to increase the likelihood that the court will enforce the conditions.

I. FORCES ACTING AGAINST CONDITIONAL GIFTS

The testator may condition a specified gift on the occurrence or non-occurrence of a stated event, the conduct of the beneficiary, or the truth of a given statement. Conditional gifts are generally upheld unless they are against public policy or violate some rule of law. See *In re Kasschau*, 11 S.W.3d 325 (Tex. App.—Houston [14th Dist.] 1999, no writ). Many forces may act to make the enforcement of a conditional gift problematic.

A. Illegality

Courts will not enforce provisions that are unconstitutional or require the beneficiary to take illegal action to receive a benefit. Some courts set such conditions aside and allow the beneficiary to take the gift as if the condition did not exist while other courts void the gift and return the property to the donor or the donor’s successors in interest.

B. Violation of Public Policy

Public policy dictates that courts cannot enforce provisions in wills and trusts that injure the public at large or have the potential to do so. Many conditions that are not illegal per se are invalidated on public policy grounds because they may be deleterious to the public welfare. Courts may also use public policy arguments to justify invalidating provisions when they can find no settled reason, other than that such provisions are manifestly unfair or unreasonable.

C. Insufficiency in Drafting

1. Failure to Show “Proper” Intent

For a court to uphold a condition, not only must the will or trust demonstrate the donor’s intent to create a conditional gift, but the instrument should also demonstrate “proper” intent. Though a particular condition may arguably violate public policy, it could still be upheld based on the finding of “good” intent. For example, a court upheld a condition providing for the support of the testator’s daughter if she became divorced or outlived her husband. *Hunt v. Carroll*, 157 S.W.2d 429 (Tex. Civ. App.—Beaumont 1941, writ dism’d). The condition is arguably against public policy because it provides for a benefit upon divorce or survival of a spouse, both of which could result from behavior that society seeks to discourage. However, because the donor’s intent was to provide support for the beneficiary if the beneficiary found herself without the support of a spouse, the court upheld the provision.

2. Inadequate Provision for a Failed Condition

Courts look unfavorably on a condition when the donor does not provide a consequence for an unsatisfied condition. Courts may construe the failure of the donor to consider the ramifications of an unsatisfied condition as reflecting a lack of true intent for the gift to be unsuccessful if the condition is not met. Courts may set aside provisions that do not provide an adequate consequence and allow the beneficiary to take the property even without fulfilling the condition.

3. Type of Condition

a. Condition Precedent

A condition precedent is an event that must occur before the beneficiary can receive the benefit. See *Deviney v. NationsBank*, 993 S.W.2d 443 (Tex. App.—Waco 1999, pet. denied). For example, a provision providing for a gift to a daughter if she is married at the time of the donor’s death is a condition precedent. If the daughter is indeed married, the condition will be satisfied. Because many beneficiaries learn about a condition precedent only after the time at which satisfaction of the condition is determined such as at the time of

the testator's death, the provision cannot influence a beneficiary's future behavior. Courts often favor condition precedents because they do not exert a continuing influence on the beneficiary.

b. Condition Subsequent

A condition subsequent is a condition that, if it occurs, divests the beneficiary of a benefit already received. *Id.* An example of a condition subsequent is a devise of property to a son "so long as alcohol is not consumed on the premises, but if alcohol is sold, my heirs may reenter and terminate the estate." If the son were to hold a wine tasting event on the premises, then he would lose his benefit. Because the beneficiary has already received the benefit, the fear of losing this benefit is likely to provide strong motivation to comply with the condition. For this reason, courts view conditions subsequent as exerting a strong continuing influence and are more likely to strike such a provision because of its possible perverse influence.

II. TYPES OF CONDITIONS

A. Restraints on Marriage

Marriage is often seen as the foundation of the family unit and therefore one of the pillars upon which our society is based. Because of the importance of marriage, Texas courts generally have found restraints on marriage unenforceable whether resulting from a promise not to marry or a condition forfeiting rights in case of marriage. See *Southwestern Bell Tel. Co. v. Gravitt*, 551 S.W.2d 421 (Tex. Civ. App.—San Antonio 1976, writ denied). Further, the United States Supreme Court has found marriage to be a constitutional right as an aspect of liberty protected by the Due Process Clause of the Constitution. *Zablocki v. Redhail*, 343 U.S. 374 (1978). Any limitation on the right to marry would seem unconstitutional and therefore unenforceable by courts, as the government actors enforcing provisions in wills and trusts. Interestingly, in spite of these policies, some conditional limitations on marriage, especially those where the dominant motive is to provide support for an unmarried or suddenly separated, divorced, or single-by-death beneficiary, are upheld.

1. Restraints on First Marriage

Provisions providing for no benefit should a beneficiary marry for the first time, though seemingly in violation of public policy, are upheld in a majority of jurisdictions including Texas. See *Hunt v. Carroll*, 157 S.W.2d 429 (Tex. Civ. App.—Beaumont 1941, writ dismissed). The court may view this type of condition not as an impediment to marriage, but rather as providing support until the time of marriage when a spouse becomes responsible for support. While not an enlightened view of marriage, a court may still uphold such provisions.

Conditions requiring a beneficiary to marry within a particular category of individuals based on religion, ethnicity, or some other easily recognized delineation are generally upheld. Courts usually apply a reasonableness analysis based on the effect the provision has on the available "pool" of potential mates and the size of the pool remaining after the condition takes effect. Generally speaking, as the pool of potential candidates grows smaller, the provision risks becoming unreasonable and therefore invalid. See *In re Feinberg*, 919 N.E.2d 888 (Ill. 2009) (upholding an inheritance condition based on marrying within the Jewish faith).

2. Restraint on Marriage Before a Certain Age

Provisions providing for a benefit only if a marriage occurs after a certain designated age, in an attempt to prevent marriage until a certain maturity level is reached, are often considered valid. Courts usually find that these provisions do not prevent marriage, but instead seek to protect the beneficiary from making a hasty or imprudent decision to marry at a young age.

Provisions requiring that a beneficiary not marry until a very high age, seventy for example, present a unique facet to the issue. Courts would likely find such a high age requirement to be of unreasonable duration, as it would continue throughout most of a person's life. Such a provision also unreasonably reduces the potential partners in two ways. First, many potential partners of similar age

would likely already be married or perhaps disinterested in marriage. Second, the number of non age-appropriate partners (those willing to marry outside their own age group) is proportionately quite small in the absence of other motivating factors.

3. Restraints Requiring Consent by a Designee

Provisions requiring the consent of a designee, such as a parent, before marriage have been found to be valid. See *Pacholder v. Rosenheim*, 99 A.2d 672 (Md. 1916). As with the requirement of attaining a certain age, such conditions protect the beneficiary from hasty decision-making.

4. Conditions Requiring a Beneficiary to Become Married

A provision requiring marriage as a condition to receiving a benefit is unlikely to be struck down because it fosters what courts consider to be a useful purpose. (Unless perhaps, it is phrased as follows, "I leave my estate to my spouse on the condition that my spouse remarries, so there will be at least one person who regrets my death.") Courts consider that such a provision has the effect of inducing an act beneficial to society. This type of provision is generally meant to provide support in the event of marriage and possibly to increase the attractiveness of a beneficiary to a potential spouse. Arguably, such a provision may induce imprudent decision-making on the part of the beneficiary, such as getting married only to receive the benefit. In addition, it is important to indicate the number of times the beneficiary may get married to receive a distribution. In one case, the settlor instructed the trustee to pay the beneficiary \$250,000 when he got married; he got married 13 times. *J. Peder Zane, Six Feet Under and Overbearing*, N.Y. TIMES, Mar. 12, 1995, § 4, at 5.

5. Conditions Requiring a Beneficiary Remain Married

Provisions requiring a person to remain married to his or her original spouse are often struck down. Courts have found that the requirement for a beneficiary to remain in an untenable relationship to be against public policy. See *Knost v. Knost*, 129 S.W. 665 (Mo. Ct. App. 1910).

6. Conditions Requiring a Beneficiary Be Married

A provision requiring that a beneficiary be married at the time of a donor's death is generally found to be reasonable when phrased appropriately as a condition precedent rather than a condition subsequent. Courts reason that a beneficiary is unlikely to be aware of such a provision and therefore there is no influence over a potential beneficiary's actions. *Foote v. Foote*, 76 S.W.2d 194 (Tex. Civ. App.—San Antonio 1934, writ refused).

7. Conditions Preventing the Remarriage of Spouse

Conditions divesting a beneficiary of a gift when the beneficiary remarries are often upheld. In Texas, such a provision has been recognized as early as 1858. *Little v. Birdwell*, 21 Tex. 597 (1858). Because one marriage has already taken place, reasonableness standards regarding general restraints do not apply. See *Haring v. Shelton*, 114 S.W. 389 (Tex. Civ. App.—Houston 1908, writ denied). Also, a testator's desire to compel fidelity to the former relationship has been considered valid. See *In re Lambert's Estate*, 46 N.Y.S.2d 905 (N.Y. App. Div. 1944). However, perhaps the most compelling reason is the intent to provide for the offspring of the original marriage between the donor and the beneficiary. See *Haring v. Shelton*, 114 S.W. 389 (Tex. Civ. App.—Houston 1908, writ denied). If the spouse remarries, it is likely that assets derived from the first marriage will be used for the benefit of persons arising outside of the original marriage. Further, it is likely that the fruits of the first marriage may pass by gift or intestacy to offspring of a second marriage. See *Foote v. Foote*, 76 S.W.2d 194 (Tex. Civ. App.—San Antonio 1934, rehearing denied).

B. Conditions Encouraging Divorce or Separation

1. Benefit Conditioned on Divorce of Current Spouse

As a general rule, conditions that a beneficiary must be divorced to receive a benefit have been found to be contrary to public policy. In Texas, however, a provision requiring divorce as a precursor to receipt of a benefit was upheld where the testator's dominant motive was to provide support for the beneficiary

if the beneficiary became divorced or widowed. *Hunt v. Carroll*, 157 S.W.2d 429 (Tex. Civ. App.—Beaumont 1941, writ ref'd).

2. Condition Requiring that a Beneficiary's Spouse be Deceased

A provision in a will requiring the death or demise of a beneficiary's spouse to receive a benefit could conceivably be invalidated. Such a provision, arguably encouraging the hastening of a spouse's demise, would be against public policy as well as void for illegality. However, Texas courts have upheld the condition based on a finding that the donor's intent was shown to provide for a beneficiary outliving a spouse instead of becoming destitute upon losing the support of the spouse. *Ellis v. Birkhead*, 71 S.W. 31 (Tex. Civ. App. 1902, writ ref'd).

C. Conditions Involving Religion

1. Joining or Adhering to a Particular Faith

The rights to freedom of religion and to be free from religious persecution are tenets upon which our nation is founded. Accordingly, conditions attempting to limit a person's freedom of religion, a fundamental constitutional right, are generally not upheld.

2. Raising a Child in a Particular Faith

Requirements that a child be raised in a particular faith have been upheld though they may be contested on the grounds of interference with freedom of religion. Courts upholding such provisions cite a child's ability to choose his or her own religion when old enough to make an informed decision. See *In re Estate of Laning*, 339 A.2d 520 (N.J. Sup. Ct. App. Div. 1975).

D. Conditions Involving Behavior

Another major area where a donor attempts to control the actions of beneficiaries is that of personal behavior. Often such conditions are intended to correct some unacceptable trait or prevent the occurrence of some proscribed act. However, this is not always the case. Some donors attempt to force beneficiaries to behave in ways they would not ordinarily act. Remember the earlier example requiring a beneficiary to smoke five cigarettes a day as a condition to a gift. In Texas and a majority of jurisdictions, such provisions regarding behavior, provided they are not illegal, in violation of public policy, or immoral, are upheld as within a donor's right. See Paul A. Meints, *Value-Based Estate Planning: Using Trusts to Promote and Reward Behavior*, 87 ILL. B.J. 138 (1999).

1. Being Drug, Alcohol, or Other Vice Free

A condition that a beneficiary be drug or alcohol free is a frequent condition. It is well settled in a majority of jurisdictions that such provisions are valid because they not only promote public policy, but also operate for the welfare of the beneficiary.

2. Not Being Involved in Crime

A condition that a beneficiary not be involved in criminal activity would likely be upheld because it promotes public policy and public welfare.

3. Acquiring a Certain Level of Education

The requirement that a beneficiary attain a certain level of education is common in will and trust provisions. These provisions promote public policy and public welfare because society encourages education and productivity.

4. Attaining a Certain Age

Requirements of attaining a certain age, and hopefully commensurate maturity, before receiving a benefit are also common and generally upheld. Immature beneficiaries often squander gifts due to lack of the sophistication and responsibility which usually comes with age. However, if the prescribed age is high, seventy-five, for example, courts might invalidate the restriction as operating for an unreasonable duration. Of course, the evidence may show that the donor's intent was to provide for a donee in old age.

5. Waiving Rights

A deceased spouse may attempt to condition a gift to the surviving spouse on the surviving spouse waiving certain rights. In *Mangrum v. Conrad*, 185 S.W.3d 602 (Tex. App.—Dallas 2006, pet. denied), the court impliedly upheld a gift conditioned on the surviving spouse waiving her homestead rights and her other rights as a surviving spouse because the court focused on whether her conduct amounted to a waiver of those rights.

6. Not Placing Surviving Spouse in Nursing Home

In *Marion v. Davis*, 106 S.W.3d 860 (Tex. App.—Dallas 2003, pet. denied), the testator imposed a condition on all gifts in his will and testamentary trust that the share of any beneficiary who attempts to place his wife into a nursing home before all estate assets are exhausted would be forfeited and distributed to the remaining beneficiaries. The court held that the condition was not against public policy.

E. Other Personal Conduct

Courts have not established bright line rules regarding differing attempts by donors to influence the conduct of beneficiaries. These conditions must be evaluated on a case by case basis.

1. Requiring that Beneficiaries Not Communicate with Disinherited Siblings

A Texas court invalidated a clause in a will providing that a gift would revert to others if the beneficiary gave any portion of the gift to certain named relatives. *Barmore v. Darragh*, 231 S.W. 472 (Tex. Civ. App.—Austin 1921), rev'd on other grounds, 242 S.W. 714 (Tex. Com. App. 1922). The court cited the importance of communication among family members as sufficient public policy on which to invalidate the clause.

2. Not Joining the Military

A Texas court determined that a condition requiring that a beneficiary not join the military was within the prerogative of the donor to promote the welfare of the beneficiary. *Van Hoose v. Moore*, 441 S.W.2d 597 (Tex. Civ. App.—Amarillo 1969, writ ref'd n.r.e.).

3. Requiring a Beneficiary to Resume or Maintain a Family Name

A provision requiring a beneficiary to assume or carry on a family name has been found valid in a number of states. While not specifically addressed in Texas, other jurisdictions have upheld these provisions.

F. Character

Benefits conditioned upon subjective standards as "good character" have a greater chance of being upheld if the donor appoints a neutral and detached designee to make a determination of the satisfaction of a condition. Failure to provide standards or appoint a designee whose discretion is to be used may invalidate the condition as being too vague to enforce.

G. Residence

Provisions prescribing the location of a residence often involve minor beneficiaries who have been orphaned. In such instances, a condition requiring a minor beneficiary to reside with certain relatives should they become orphaned is likely to be upheld. Alternatively, provisions dictating the residence of adult beneficiaries may be found to violate the constitutionally recognized right to travel. A provision requiring a child to live with a person other than a surviving parent is likely to be found contrary to public policy as it is against the recognized rights of parental control.

III. DRAFTING SUGGESTIONS

Proper drafting should be able to overcome almost all impediments to the enforceability of conditional gifts. Keeping in mind the types of possible restrictions a donor may impose on a beneficiary coupled with common

forces acting against these conditional provisions, an attorney can enhance the likelihood of the court upholding a conditional gift. See generally Harriet Lang Chappell, *Conditional Bequests: Control from Beyond the Grave*, PROB. & PROP., Mar./Apr. 1988, at 7, 8.

A. Reveal Testator's Intent

By gaining clear insight into a testator's intent and wishes, courts are less likely to strike down a provision as mean-spirited or pointless and more likely to uphold a contentious provision unless the testator's intent is actually inappropriate. The donor's intent should be set out in the document creating the gift because courts will first look within the four corners of the document to ascertain intent. Precatory, non-binding language should be avoided. It is necessary that the intention be of the type which courts are willing to accept and enforce. So-called "good" intent is especially necessary when creating conditions that are likely to be challenged.

B. Create Condition Precedent

The phrasing of a condition can exert influence on a court's position depending upon the continuing influence that a donor is exerting on a beneficiary. Whenever possible, a condition should be expressed as a condition precedent. These conditions are seen by courts as not exerting a continuing influence on a beneficiary, and therefore are more likely to be carried out. Courts view a condition subsequent as exerting a strong continuing influence and thus are more likely to be struck down.

C. Include the Consequences of a Failed Condition

Because courts consider the donor's failure to provide for the disposition of the property if the condition is not satisfied, conditional gifts should clearly state the ramifications of the condition not being satisfied. The will or trust should provide for the gift to pass to another party or revert to the donor upon failure of the condition.

Perhaps the most successful and motivating gift ever provides for the property to pass to an individual or organization detestable to the original beneficiary. The thought of someone the beneficiary despises receiving the benefit as the result of the beneficiary's failure to meet the condition may provide incentive for the beneficiary to comply with the condition.

D. Consider the Implications of Impossibility of Performance

A donor should also take into consideration the possibility that performance or satisfaction of the condition may become impossible. For example, the gift may be conditioned on the beneficiary caring for a pet animal which died

prior to the testator's death. The donor should indicate what should happen to the gift in this eventuality; is performance excused permitting the beneficiary to take the gift or does the property pass to someone else?

E. Anticipate Attack on Condition as Being Contrary to Public Policy

Improperly worded conditions that conflict with public policy could render a conditional gift susceptible to a successful challenge. Conditions should be carefully considered and any which are potentially in conflict with public policy or any other negating force should be carefully worded to document the intent necessary to defeat such a challenge.

F. Providing Objective Standards for Conditions

Conditions that include ambiguous standards for measuring completion might be considered impossible to fulfill and therefore void. Whenever possible, clearly articulated quantitative guidelines indicating the successful completion of a condition should be included in the will or trust.

G. Specifying Who Will Determine Subjective Standards

A discretionary designee whose responsibility it is to determine whether subjective standards have been met should be neutral and have nothing to gain from the failure of the provision. Further, to lend credence to such a condition, a discretionary designee should be of good reputation.

H. Include a No Contest Clause

The donor may include a no contest or *in terrorem* clause providing that if the beneficiary contests the conditional gift then the beneficiary is automatically removed as a beneficiary. If enforced, such a clause may render a conditional gift virtually incontestable because beneficiaries have nothing to gain and everything to lose. If the contest is based on just cause and is brought in good faith, however, the no contest provision is unenforceable. See TEX. PROB. CODE § 64 and TEX. PROB. CODE § 112.038.

IV. CONCLUSION

Conditional bequests may be an effective way to carry out a testator's or settlor's intent. Courts uphold a wide array of conditions as long as they are phrased appropriately, not contrary to public policy, and not illegal. Some provisions not meeting these criteria might still endure if the instrument contains an effective no-contest clause. Whether to provide incentive for accomplishment, motivation for achievement, protection for the naive, or revenge from the grave, well-drafted conditional gifts may survive to do the bidding of the dead.

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