TESTAMENTARY CONDITIONS IN RESTRAINT OF THE MARRIAGE OF HOMOSEXUAL DONEES

Emalee G. Popoff[*]

ABSTRACT

Courts generally enforce conditions on inheritance; however, conditions restricting the conjugal choices of donees are sometimes held unenforceable on public policy grounds. These policies have not yet been applied to testamentary conditions in restraint of the marriage of homosexual donees.

Today, attitudes toward homosexuality are changing. At the same time, the use of incentive trusts and other conditional testamentary gifts is on the rise. Given the political trend in many jurisdictions toward treating homosexual relationships like heterosexual relationships, the resulting backlash against homosexuality, and the recent increase in the use of incentive trusts and other conditional testamentary gifts, testamentary gifts conditioned on the conjugal choices of homosexual donees are likely to become more common.

There is reason to believe that, in certain circumstances, courts would not consider a donee's sexual orientation relevant to such conditions' enforceability, even with respect to conditions restricting the donee's marriage to a person of a particular sex. This Note argues that courts should consider a donee's sexual orientation in determining whether a condition in restraint of the donee's marriage is enforceable or void as against public policy.

TABLE OF CONTENTS

---

* J.D. Candidate, 2015, Drexel University Thomas R. Kline School of Law; M.A., University of Missouri—St. Louis; B.S., Virginia Polytechnic Institute and State University. I would like to thank Professor Deborah Gordon for her extraordinary insights, advice, and guidance throughout the writing process; Professor Alex Geisinger for his invaluable feedback on drafts of this Note; and the members of the *Drexel Law Review*, especially the Executive Board, for their diligent assistance and excellent suggestions. I would also like to thank my fiancé, John Welsh, and my parents, Mari-Lynn and John Gornik, for their unfailing love, support, and encouragement.

INTRODUCTION

Deceased Manhattan businessman Frank Mandelbaum used his will to attempt to induce his gay son Robert to marry a woman.[1] Mandelbaum did this by excluding from a testamentary trust created for the benefit of his grandchildren any child Robert might have unless Robert married the child's mother within six months of the child's birth.[2] When Robert and his longtime partner Jonathan O'Donnell married shortly after their son Cooper's birth via a surrogate, Robert argued that the will entitled Cooper to a share of the trust because Jonathan was the only "mother" Cooper had ever known.[3] Robert and the guardians of Mandelbaum's other grand-

1. Kathianne Boniello, *Manhattan Businessman's Will Ordered Gay Son to Marry Woman Who Gave Birth to His Child*, N.Y. POST (Aug. 19, 2012), http://nypost.com/2012/08/19/manhattan-businessmans-will-ordered-gay-son-to-marry-woman-who-gave-birth-to-his-child/.

2. *Id.*

3. *Id.*

children eventually reached a settlement regarding the trust,[4] but these circumstances raise an issue that is likely to become increasingly common: Should courts enforce testamentary conditions that might interfere with the conjugal choices of homosexual donees?[5]

Courts generally enforce conditions on inheritance as long as the conditions are "'reasonably definite' and not contrary to public policy."[6] Conditions on inheritance that impose requirements related to the conjugal choices of donees are one type of condition that is frequently held unenforceable as against public policy.[7] Complex rules determine the enforceability of testamentary conditions in restraint of marriage and conditions encouraging separation or divorce.[8] These rules have not yet been applied to testamentary conditions in restraint of the marriage of homosexual donees.

Historically, homosexual donees have been treated differently than heterosexual donees for purposes of property transfers at death. For example, as principal beneficiary and proponent of a will, the lover of a homosexual testator may face a more difficult time than would the lover of a heterosexual testator in defending against

---

4. *Id.*

5. This Note is concerned with conditions on transfers of property effective upon a donor's death, and is not concerned with the form of the transfer or where the condition is found (whether will or trust). Thus, this Note uses "donor/donee," "inheritance," "legacy," "testamentary conditions," and "conditions on inheritance" to mean any mode of transfer at death, whether by will, trust, or other instrument. *See* Jeremy Macklin, *The Puzzling Case of Max Feinberg: An Analysis of Conditions in Partial Restraint of Marriage*, 43 J. MARSHALL L. REV. 265, 270–71 (2009). *But see* Orly Henry, *If You Will It, It Is No Dream: Balancing Public Policy and Testamentary Freedom*, 6 NW. J. L. & SOC. POL'Y 215, 229 (2011) ("It is critical to note that trusts and wills are distinct legal instruments. . . . Trusts and wills share many similarities and are often used in tandem, but they are not governed by all of the same rules and laws.").

6. Ronald J. Scalise, Jr., *Public Policy and Antisocial Testators*, 32 CARDOZO L. REV. 1315, 1326 (2011); Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445, 453 (2006).

7. *See, e.g.*, Vaughn v. Lovejoy, 34 Ala. 437, 438–39 (1859); *In re* Duffill's Estate, 183 P. 337, 338 (Cal. 1919); Chapin v. Cooke, 46 A. 282, 283 (Conn. 1900); Phillips v. Medbury, 7 Conn. 568, 571 (1829); Bradford v. Culbreth, 10 A.2d 534, 540 (Del. Super. Ct. 1939) *aff'd*, 18 A.2d 143 (Del. 1941); Wilmington Trust Co. v. Houlehan, 131 A. 529, 535 (Del. Ch. 1925); Jenkins v. Merritt, 17 Fla. 304, 330–31 (1879); Huiet v. Atlanta Gas Light Co., 28 S.E.2d 83, 84 (Ga. Ct. App. 1943); Logan v. Hammond, 117 S.E. 428, 430–31 (Ga. 1923); Bowman v. Weer, 104 A.2d 620, 622 (Md. 1954); *In re* Dunbar's Will, 71 N.Y.S.2d 287, 291 (Sur. Ct. 1947); *see also* Macklin, *supra* note 5, at 270–71; *Conditions, Conditional Limitations, or Contracts in Restraint of Marriage*, 122 A.L.R. 7 (1939).

8. Natalie Lorenz, *Reaching From the Grave? The Validity of Testamentary Conditions Precedent Restricting Marriage in Illinois:* In re Estate of Feinberg, 36 S. ILL. U. L.J. 183, 186–87, 190 (2011); Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 99 U. ILL. L. REV. 1273, 1317 (1999) ("It is somewhat difficult to catalog the results of the marriage-related cases in any meaningful or systematic way or to observe the emergence of any pattern of decision.").

claims of undue influence.[9] In the past, a decedent's same-sex spouse has been denied a right of election against the decedent's will.[10] Furthermore, until *United States v. Windsor*, a donor's same-sex spouse could not qualify for the federal estate tax marital deduction.[11]

Today, attitudes toward homosexuality are changing. Nineteen states and the District of Columbia have legalized same-sex marriage and the Supreme Court held that the federal Defense of Marriage Act's definition of "marriage" as between a man and a woman violated the Fifth Amendment's Equal Protection Clause.[12] This trend is not without its critics. The legalization of same-sex marriage and other gay rights issues have proven divisive in many jurisdictions.[13] At the same time, the use of incentive trusts and other conditional testamentary gifts is on the rise.[14] Given the political trend in many jurisdictions toward treating homosexual relationships like heterosexual relationships, the resulting backlash, and the recent rise in the use of incentive trusts and other conditional testamentary gifts, there is likely to be an increased incidence of testamentary gifts conditioned on the sexual orientation and relationships of donees.

---

9. Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 244–45 (1981); *see, e.g.*, *In re* Kaufmann's Will, 247 N.Y.S.2d 664, 691 (App. Div. 1964) (Witmer, J., dissenting) (stating that the relationship between the male testator and male devisee "may be likened to that of one who has a mistress" and that the jury verdict finding undue influence "rests upon surmise, suspicion, conjecture, and moral indignation and resentment, not upon the legally required proof"), *aff'd sub nom.* Weis v. Kaufmann, 205 N.E.2d 864 (N.Y. 1965).

10. *E.g.*, *In re* Estate of Cooper, 592 N.Y.S.2d 797, 797 (App. Div. 1993). *But see, e.g.*, Vasquez v. Hawthorne, 33 P.3d 735, 737 (Wash. 2001) (en banc) (holding that genuine issue of material fact existed regarding what property acquired during the twenty-eight-year same-sex relationship of the decedent and the survivor was subject to equitable division).

11. 133 S. Ct. 2675, 2696 (2013).

12. *Id.*; *see also Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage*, NAT'L CONF. ST. LEGISLATURES (Sept. 26, 2014), http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx#1 [hereinafter *Defining Marriage*].

13. NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 95–97 (Michael Bronski ed., 2008) ("These advances in a small number of states have produced a backlash.").

14. JESSE DUKEMINIER ET. AL., WILLS, TRUSTS, AND ESTATES 35–36 (8th ed. 2009); Marjorie J. Stephens, *Incentive Trusts: Considerations, Uses, and Alternatives*, 29 ACTEC J. 5, 9 (2003); Tate, *supra* note 6, at 448; Catherine M. Allchin, *In Some Trusts, the Heirs Must Work for the Money*, N.Y. TIMES, Jan. 29, 2006, § 3, at 36. Although they are increasingly common, conditional testamentary gifts are not new: *Yelverton v. Newport* is the oldest case in chancery relating to a marriage condition. 4 BRITISH RULING CASES FROM COURTS OF GREAT BRITAIN, CANADA, IRELAND, AUSTRALIA, AND OTHER DIVISIONS OF THE BRITISH EMPIRE 70 (The Lawyers Coop. Publ'g Co. 1915) (citing Yelverton v. Newport (1593–94) 21 Eng. Rep. 144; Tothill 129 ("The plaintiff's wife had given her by her father's will £300 conditional that she should not marry without the consent of friends, refused to pay, yet ordered.")).

As yet, no court has explicitly accounted for the sexual orientation of a donee in determining whether a condition in restraint of the donee's marriage is an unenforceable violation of public policy. There is reason to believe that courts might not consider a donee's sexual orientation relevant to a determination of the enforceability of a condition restricting the donee's marriage to a person of a particular sex. This Note argues that courts should consider a donee's sexual orientation in determining whether a condition in restraint of the donee's marriage is enforceable or void as against public policy. This Note further argues that conditions on inheritance that require the heterosexual marriage of homosexual donees and conditions that forbid a donee from marrying a member of the same sex should be held unenforceable as against public policy.

Part I of this Note describes the tests that determine the enforceability of testamentary conditions in restraint of marriage: the objective reasonableness test and the subjective motivation test.[15] Part I also notes that mechanical application of the objective reasonableness and subjective motivation tests might not capture a donee's sexual orientation as a factor relevant to either test. Part II argues, first, that a preference for marriage over singlehood is the central policy underlying both the objective reasonableness and subjective motivation tests and, second, that this preference for marriage over singlehood can be best served by considering a donee's sexual orientation in determining whether a condition in restraint of the donee's marriage is enforceable. Part III identifies the protection of donees' personal freedom and avoiding enforcement of a donor's impermissible motivations as two additional policies underlying the objective reasonableness test and subjective motivation test, respectively. Part III argues that these additional policies can be best served if courts do not ignore the sexual orientation of donees in evaluating the enforceability of testamentary conditions in restraint of marriage. This Note concludes that courts should consider the sexual orientation of donees in evaluating the enforceability of testamentary conditions in restraint of marriage.

15. *E.g.*, Jenkins v. Merritt, 17 Fla. 304, 330–31 (1879); Taylor v. Rapp, 124 S.E.2d 271, 272 (Ga. 1962); U.S. Nat'l Bank of Portland v. Snodgrass, 275 P.2d 860, 867–68 (Or. 1954) (en banc); Harbin v. Judd, 340 S.W.2d 935, 938–939 (Tenn. Ct. App. 1960); s*ee* Ruth Sarah Lee, *Over My Dead Body: A New Approach to Testamentary Restraints on Marriage*, 14 MARQ. ELDER'S ADVISOR 55, 56 (2012); Scalise, *supra* note 6, at 1317.

I. TESTAMENTARY CONDITIONS IN RESTRAINT OF MARRIAGE

As long as a testamentary condition in restraint of marriage is "'reasonably definite' and not contrary to public policy," courts will generally enforce it.[16] The public policy that can invalidate conditional legacies is found in statutes and common law rules as well as more "amorphous and unarticulated" sources.[17] Importantly, "conditions in restraint of marriage" do not in fact restrain a donee's right to marry.[18] Still, unreasonable conditions in restraint of marriage impose a "socially undesirable inducement for beneficiaries to exercise or not to exercise fundamental rights that seriously affect their personal interests and lives, and usually also those of others."[19] In addition to being a deeply personal choice of momentous importance to individuals, marriage supports the family structure that is critical to the functioning of society.[20]

Faced with circumstances in which donors have provided that donees' inheritances depend on conditions "prohibiting all marriage, prohibiting marriage at a particular time, prohibiting or encouraging marriage to a particular person or kind of person, or requiring or encouraging divorce[] if [the donee] is already married," courts have applied rules of enforceability that can be quite complex.[21] The rules of enforceability take into consideration, among other things, the form of the condition, whether the condition is a

16. *See* Scalise, *supra* note 6, at 1326; Tate, *supra* note 6, at 458; Sherman, *supra* note 8, at 1276; *see, e.g.*, Vaughn v. Lovejoy, 34 Ala. 437, 438–39 (1859); *In re* Duffill's Estate, 183 P. 337, 337 (Cal. 1919); Chapin v. Cooke, 46 A. 282, 283 (Conn. 1900); Phillips v. Medbury, 7 Conn. 568, 571 (1829); Bradford v. Culbreth, 10 A.2d 534, 540 (Del. Super. Ct. 1939) *aff'd*, 18 A.2d 143 (1941); Wilmington Trust Co. v. Houlehan, 131 A. 529, 535 (Del. Ch. 1925); *Jenkins*, 17 Fla. at 330–31; Huiet v. Atlanta Gas Light Co., 28 S.E.2d 83, 84 (Ga Ct. App. 1943); Logan v. Hammond, 117 S.E. 428, 430 (Ga. 1923); Bowman v. Weer, 104 A.2d 620, 623 (Md. 1954); *In re* Dunbar's Will, 71 N.Y.S.2d 287, 291 (Sur. Ct. 1947).

17. Scalise, *supra* note 6, at 1327.

18. They instead restrict the donee's inheritance on the basis of some condition related to the donee's marriage that is imposed by the donor. *See* Shapira v. Union Nat'l Bank, 315 N.E.2d 825, 829 (Ohio Ct. Com. Pl. 1974), *quoted in* Scalise, *supra* note 6, at 1350 ("An Ohio court in *Shapira v. Union National Bank* held . . . [that t]he condition in the legacy did not constitute a restriction on the legatee's 'constitutional right to marry.' Instead, it was merely a 'restriction upon . . . [the] inheritance' of the testator's son."); *In re Duffill's Estate*, 183 P. at 338; *Chapin*, 46 A. at 283.

19. RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. f (2003).

20. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."); POLIKOFF, *supra* note 13, at 99.

21. Scalise, *supra* note 6, at 1327; *see Huiet*, 28 S.E.2d at 84; Sherman, *supra* note 8, at 1317.

general or partial restraint, and whether the condition applies to the donee's first or a subsequent marriage.[22]

In general, courts apply two different tests: an objective test that focuses on the reasonableness of the condition and a "subjective" test that inquires into the form of the condition as a proxy for determining the motivations and intentions of the donor in imposing the condition.[23]

A. Objective Reasonableness Test

For certain types of testamentary conditions in restraint of marriage, enforceability depends on the objective reasonableness of the condition as it applies to the donee.[24] Generally, courts apply a test of objective reasonableness to conditions in partial restraint of marriage and to conditions in general restraint of second or subsequent marriages.[25]

Conditions in partial restraint of marriage include any restriction on a donee's marriage that does not forbid the donee to marry anyone at any time.[26] Examples of partial restraints include conditions restricting or requiring marriage only at a particular time;[27] conditions forbidding the donee to marry a particular person that the donor did not care for;[28] or conditions restricting or requiring marriage to persons of a particular religious faith, race, or other group.[29]

---

22. *See* Vaughn v. Lovejoy, 34 Ala. 437, 438–39 (1859); *In re* Alexander's Estate, 85 P. 308, 308 (Cal. 1906); Phillips v. Medbury, 7 Conn. 568, 570 (1829); Jenkins v. Merritt, 17 Fla. 304, 330–31 (1879); Scalise, *supra* note 6, at 1327–33.

23. *See* Henry, *supra* note 5, at 234; Lee, *supra* note 15, at 56–57; Scalise, *supra* note 6, at 1342–58; *see, e.g.*, *Conditions, Conditional Limitations, or Contracts in Restraint of Marriage*, *supra* note 7, at 55 (quoting White v. Equitable Nuptial Ben. Union, 76 Ala. 251 (1884)); *see, e.g.*, *In re* Fitzgerald's Estate, 119 P. 96, 97 (Cal. 1911); *Jenkins*, 17 Fla. at 330–31; *In re* Lambert's Estate, 46 N.Y.S.2d 905, 909–10 (Sur. Ct. 1944).

24. Lee, *supra* note 15, at 56; *see Jenkins*, 17 Fla. at 330–31; *Lambert's Estate*, 46 N.Y.S.2d at 905; *Conditions, Conditional Limitations, or Contracts in Restraint of Marriage*, *supra* note 7, at 55 (quoting White v. Equitable Nuptial Ben. Union, 76 Ala. 251 (1884)). *But see* Scalise, *supra* note 6, at 1330 n.90 ("Some states, however, have enacted statutes that always focus on the intent of the testator and thus prohibit testamentary conditions concerning marriage, except 'where the intent was not to forbid marriage, but only to give the use until marriage.'").

25. Scalise, *supra* note 6, at 1330; Sherman, *supra* note 8, at 1319–20; *see, e.g.*, Crawford v. Thompson, 91 Ind. 266, 273–74 (1883); Turner v. Evans, 106 A. 617, 618 (Md. 1919); *In re* Osbourne, 21 Pa. D. & C. 293, 295 (Ct. Com. Pl. 1934); Barnes v. Hobson, 250 S.W. 238, 242–43 (Tex. Civ. App. 1923).

26. Scalise, *supra* note 6, at 1347.

27. *See id.* at 1328.

28. *E.g.*, *In re* Duffill's Estate, 183 P. 337, 338 (Cal. 1919); Taylor v. Rapp, 124 S.E.2d 271, 272 (Ga. 1962); *Turner*, 106 A. at 618; *see* Scalise, *supra* note 6, at 1329.

29. *E.g.*, Cmty. Nat'l. Bank & Trust Co. v. Rapaport, 213 So. 2d 316, 317 (Fla. Dist. Ct. App. 1968); *see* Lee, *supra* note 15, at 55 ("Testators (usually parents) write wills prohibiting, penal-

"[R]estraints on marriage that are partial rather than general are allowed, at least to the extent the partial restraint is not so broad as to constitute a general one."[30] For partial restraints, "[t]he motive or purpose of the testator is irrelevant."[31] However, unreasonable limits on a donee's opportunity to marry are void as contrary to public policy.[32] A condition that seriously limits or otherwise interferes with the right of an individual to marry a person of his or her own choosing is unreasonable.[33] Another articulation of the reasonableness rule states that the condition is unreasonable and therefore unenforceable if "a marriage permitted by the restraint is not likely to occur."[34] Thus, whether a partial restraint is reasonable or unreasonable is a question of fact to be determined under the circumstances of the particular case.[35] Some commentators have noted that the test of reasonableness "becomes . . . a temporal and geographical test of how many viable marriage candidates are accessible to the [donee]."[36]

Conditions restricting or requiring marriage only at or before a particular time, such as at the time of the donor's death, are widely regarded as reasonable restraints and are therefore held to be enforceable.[37] Accordingly, when a donor creates a condition on inheritance requiring only that the donee not be married at the time of the donor's death, a court will sometimes enforce it.[38] Courts reason that where the condition is not one "forbidding the donee to marry during her lifetime o[r] even for a fixed period of time, nor one that directs [that] the legacy shall lapse in case the [donee] should marry in the future, but rather one that is conditioned upon her status at the time of the testator's death . . . such a provision is not against good

---

izing, or requiring marriage to one of a particular religious faith or ethnicity as an attempt to shape the beneficiary's (usually the child's) romantic decisions.").

30. Scalise, *supra* note 6, at 1329; *e.g.*, Gordon v. Gordon, 124 N.E.2d 228, 234 (Mass. 1955).

31. Scalise, *supra* note 6, at 1329.

32. *See, e.g.*, U.S. Nat'l Bank of Portland v. Snodgrass, 202 Or. 530, 546–47 (1954); Harbin v. Judd, 47 Tenn. App. 604, 613 (Ct. App. 1960); 1A SCOTT ON TRUSTS § 62.6 (William Franklin Fratcher ed., 4th ed. 1987); Scalise, *supra* note 6, at 1327; *Conditions, Conditional Limitations, or Contracts in Restraint of Marriage*, *supra* note 7.

33. Watts v. Griffin, 50 S.E. 218, 219 (N.C. 1905); Henry, *supra* note 5, at 221.

34. RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 6.2 cmt. a (1983).

35. *See* Scalise, *supra* note 6, at 1329.

36. Lee, *supra* note 15, at 63.

37. *See, e.g.*, Collier v. Slaughter's Adm'r, 20 Ala. 263, 266–68 (1852); Bradford v. Culbreth, 10 A.2d 534, 540 (Del. Super. Ct. 1939), *aff'd*, 18 A.2d 143 (Del. 1941); *see* Scalise, *supra* note 6, at 1328.

38. *See Collier*, 20 Ala. at 266–68; *In re* Alexander's Estate, 149 Cal. 146, 151 (1906); *In re* Heller's Estate, 39 Wis. 2d 318, 323–24 (1968) (stating that public policy regarding restraints on marriage is only concerned with continuing inducements).

morals . . . ."[39] Another factor affecting whether a condition is reasonable is whether the donor used good judgment in restraining the donee's marriage.[40] According to the Restatement (Second) of Property, "guidance by parents and other donors, with respect to a particular marriage, validly may be exercised by means of partial restraints."[41]

Conditions prohibiting marriage to a particular person are generally enforceable because they do not unreasonably reduce the donee's opportunities to marry.[42] The rationale is that although the donee cannot receive the inheritance if he or she marries a particular person, the donee is still free to receive the inheritance and marry someone else.[43] For similar reasons, conditions requiring a donee to marry a particular named person are generally unenforceable because they unreasonably limit the donee's opportunity to marry—a condition allowing for only one permissible mate is too restrictive.[44] After all, perhaps the donor's choice would not be acceptable to the donee.[45]

Conditions in partial restraint of marriage that depend on the religious faith or heritage of the donee's mate are a relatively common incarnation of conditional inheritance.[46] Restricting a donee's marriage to persons of a particular religious group yields enforceable conditions on inheritance to the extent that "there are presumably enough potentially eligible mates to give the beneficiary a realistic

---

39. Succession of Ruxton, 226 La. 1088, 1091 (1955).

40. *See Conditions, Conditional Limitations, or Contracts in Restraint of Marriage*, *supra* note 7, at 55 (quoting White v. Equitable Nuptial Ben. Union, 74 Ala. 251 (1884)); Lee, *supra* note 15, at 65 ("In reality, the courts are making judgments about the testator's judgment. When a testator's explicit restraint is pronounced 'unreasonable'—so 'unreasonable' that the court refuses to enforce it—that pronouncement is in [and] of itself a statement about the testator's judgment.").

41. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.2 cmt. a (1983); *see, e.g.*, *Collier*, 20 Ala. 263, 269; *Conditions, Conditional Limitations, or Contracts in Restraint of Marriage*, *supra* note 7, at 55 (quoting *White*, 74 Ala. at 260).

42. Scalise, *supra* note 6, at 1329–30; *Conditions, Conditional Limitations, or Contracts in Restraint of Marriage*, *supra* note 7.

43. *See, e.g.*, Taylor v. Rapp, 124 S.E.2d 271, 272 (Ga. 1962); Turner v. Evans, 106 A. 617, 618 (Md. 1919); *Conditions, Conditional Limitations, or Contracts in Restraint of Marriage*, *supra* note 7.

44. *Conditions, Conditional Limitations, or Contracts in Restraint of Marriage*, *supra* note 7.

45. Also, perhaps the mate chosen by the donor is not interested in marrying the donee. *See* Lee, *supra* note 15, at 67 n.49.

46. *See, e.g.*, *In re* Estate of Feinberg, 919 N.E.2d 888, 891 (Ill. 2009); Gordon v. Gordon, 124 N.E.2d 228 (Mass. 1955); *In re* Silverstein's Will, 155 N.Y.S.2d 598, 599 (Sur. Ct. 1956); Shapira v. Union Nat'l Bank, 315 N.E.2d 825, 828 (Ohio Com. Pl. 1974); *In re* Keffalas' Estate, 233 A.2d 248, 251 (Pa. 1967).

opportunity for marriage."[47] The pool of potential mates available to the donee under the condition is the most relevant factor in determining the condition's enforceability.[48] Considering modern communication and transportation technology, one might think that under most circumstances a donee has a reasonable opportunity for marriage within a particular religious faith no matter where he or she lives.[49]

Like conditions in partial restraint of marriage, courts sometimes hold that conditions in restraint of second or later marriages are valid.[50] Conditions in restraint of remarriage are almost always imposed by a decedent upon his or her surviving spouse.[51] In such circumstances, courts do not generally inquire into the motive of the donor and will typically enforce the condition.[52] In the rare case in which a condition on remarriage is imposed on a donee other than the donor's surviving spouse, the restraint on marriage must be "reasonable under all the circumstances."[53]

Courts generally apply a test of objective reasonableness to conditions in partial restraint of marriage and to conditions in general restraint of the second or subsequent marriage of a donee other than the testator's surviving spouse.

B. Subjective Motivation Test

To evaluate the enforceability of certain other types of testamentary conditions in restraint of marriage, courts consider the donor's

---

47. Scalise, *supra* note 6, at 1329; *see, e.g.*, *Silverstein*, 155 N.Y.S.2d at 599 (holding that "Conditions not to marry a person of a particular faith or race are not invalid.").

48. But there are also other factors affecting the likelihood of marriage that are not considered by courts. *See* Lee, *supra* note 15, at 66 n.49 ("There is a wealth of literature in both scholarship and popular media speculating on the factors that make marriage more likely. . . . There are also prominent social theories about the [e]ffect of age on likelihood of marriage, especially for older women.").

49. Scalise, *supra* note 6, at 1329.

50. JEFFREY A. SCHOENBLUM, PAGE ON THE LAW OF WILLS § 44.25 (LexisNexis Matthew Bender 2012); Scalise, *supra* note 6, at 1330 ("In fact, even in some states that have statutorily-enacted prohibitions on conditions restraining marriage, exceptions are made for conditions imposed upon a 'widow' or 'spouse.'"); Sherman, *supra* note 8, at 1319; *see, e.g.*, Phillips v. Medbury, 7 Conn. 568, 570 (1829); Wilmington Trust Co. v. Houlehan, 131 A. 529 535–36 (Del. Ch. 1925); Doyal v. Smith, 28 Ga. 262, 264 (1859); Snider v. Newsom, 24 Ga. 139, 145 (1858). *But see* FREDERICK C. BRIGHTLY, REPORTS OF CASES DECIDED BY THE JUDGES OF THE SUPREME COURT OF PENNSYLVANIA 93 (James Kay, Jun. & Bro. 1851) (reporting opinion in Middleton v. Rice (Pa. 1845) ("Why should a widow . . . be restrained from marrying more than if she had never been married?")).

51. Scalise, *supra* note 6, at 1330.

52. *Id.*

53. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.3 (1983).

"subjective" motivations in creating the condition.[54] In particular, courts evaluate conditions in general restraint of a donee's first marriage and conditions requiring the donee to separate from or divorce his or her spouse under the subjective motivation test.[55]

Typically, "[a] condition in general restraint of a first marriage is contrary to public policy and void."[56] However, this rule is subject to an exception: a condition in general restraint of a first marriage is likely enforceable where the donor had beneficent intentions in creating the condition.[57] Such permissible beneficent intentions include protection of the donee and support of the donee until marriage.[58]

In determining whether a donor's motive was beneficent, courts look to the form of the condition.[59] Beneficent intentions are likely to be found where the restraint on marriage is formulated as a condition subsequent.[60] A condition subsequent is "[a] condition that, if it occurs, will bring something else to an end; an event the existence of which . . . discharges a duty of performance that has arisen."[61] For example, a condition providing for payments to the donee "until she marries" is likely to be enforced on the ground that, although the donee's receipt of inheritance payments depends on whether or not the donee marries, the donor's probable intent was to support the donee until marriage and thus is worthy of being enforced by the courts.[62]

On the other hand, conditions precedent are interpreted as having impermissible motives.[63] A condition precedent is "[a]n act or event,

---

54. *See, e.g.*, Wilmington Trust Co. v. Houlehan, 131 A. 529, 535 (Del. Ch. 1925); *In re* Troicke's Will, 67 N.Y.S.2d 881, 884 (Sur. Ct. 1947). The test does not precisely look into the donor's subjective motivations because it inquires into the form of the condition and the donor's intention as evidenced by the testamentary document. Subjective motivations of the donor are not usually susceptible of proof by extrinsic evidence. *See, e.g.*, *In re* Alexander's Estate, 85 P. 308, 310 (Cal. 1906); *In re* Fitzgerald's Estate, 119 P. 96, 97–98 (Cal. 1911); Chapin v. Cooke, 46 A. 282, 283 (Conn. 1900); Jenkins v. Merritt, 17 Fla. 304, 329–31 (1879).

55. Sherman, *supra* note 8, at 1318.

56. Scalise, *supra* note 6, at 1327 (quoting 5 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 44.25 (2005)); *see* Knost v. Knost, 129 S.W. 665, 666 (Mo. 1910); Harbin v. Judd, 340 S.W.2d 935, 937 (Tenn. Ct. App. 1960) ("[T]otal restraints of marriage are void."); Lee, *supra* note 15, at 61; Sherman, *supra* note 8, at 1317.

57. Sherman, *supra* note 8, at 1319.

58. *See* Bradford v. Culbreth, 10 A.2d 534, 539–40 (Del. Super Ct. 1939), *aff'd*, 18 A.2d 143 (1941); Jenkins v. Merritt, 17 Fla. 304, 305 (1879); Vaughn v. Lovejoy, 34 Ala. 437, 440–41 (1859).

59. *See* Logan v. Hammond, 117 S.E. 428, 431 (Ga. 1923); Sherman, *supra* note 8, at 1317–18; Scalise, *supra* note 6, at 1328.

60. Scalise, *supra* note 6, at 1328.

61. BLACK'S LAW DICTIONARY 334 (9th ed. 2009).

62. *See* Sherman, *supra* note 8, at 1318.

63. Scalise, *supra* note 6, at 1328.

other than a lapse of time, that must exist or occur before a duty to perform something promised arises."[64] For example, a condition providing that the donee may inherit "only if he does not marry" is likely to be held unenforceable as against public policy because it indicates that it is the donor's objective to prevent the donee from marrying.[65] A donor's desire to prevent a donee from marrying by imposing a condition on the donee's inheritance is an impermissible motivation that courts generally refuse to enforce.[66]

Courts similarly consider the donor's motivation in evaluating conditions that might have the effect of encouraging the separation or divorce of donees.[67]

> If a testator who conditioned A's bequest on A's divorcing B actually intended to induce A to divorce B, the condition will be held void. But if the testator's intention was economic—for example, to insulate A from B's prodigality or to provide A with additional funds in the event A ceased to be entitled to look to B for support—then the condition will be upheld.[68]

Some courts hold that a condition encouraging divorce will be upheld "even if one of the testator's motives for imposing the condition is to induce divorce, as long as some other motive was economic."[69] Courts often find that a donor's motive in creating a condition that encourages a donee to divorce or separate from his or her spouse is an impermissible inducement, and therefore, such conditions are frequently held to be contrary to public policy.[70]

---

64. BLACK'S LAW DICTIONARY 334 (9th ed. 2009).

65. Scalise, *supra* note 6, at 1328.

66. *See* Collier v. Slaughter's Adm'r, 20 Ala. 263, 266, 268 (1852); *In re* Fitzgerald's Estate, 119 P. 96, 98 (Cal. 1911); Chapin v. Cooke, 46 A. 282, 283 (Conn. 1900).

67. 1A SCOTT ON TRUSTS § 62.4 (William F. Fratcher ed., 4th ed. 1987); Sherman, *supra* note 8, at 1308 ("Probably in the last analysis the question is whether the settlor is . . . [using] his property in order to induce the disruption of a family relation of which he does not approve, or whether he is . . . making provision for the object of his bounty in such a way as to give her support when she has no husband to support her or to give her an opportunity to enjoy his bounty free from the injurious control of it by her husband.").

68. Sherman, *supra* note 8, at 1308.

69. See *id.* at 1308–09, for an interesting discussion on the role of gender in answering questions about the donor's intent in conditioning inheritance on divorce; *see In re* Estate of Donner, 623 A.2d 307, 307 (N.J. Super. Ct. App. Div. 1993).

70. *See* RESTATEMENT (THIRD) OF TRUSTS § 29 cmts. i–m (2003); Scalise, *supra* note 6, at 1331; Tate, *supra* note 6, at 453; *see, e.g.*, Thorpe v. Collins, 263 S.E.2d 115, 117 (Ga. 1980); *In re* Gerbing's Estate, 337 N.E.2d 29, 32 (Ill. 1975); Graves v. First Nat'l Bank in Grand Forks, 138 N.W.2d 584, 588–89 (N.D. 1965); *In re* Dunbar's Will, 71 N.Y.S.2d 287, 289–90 (Sur. Ct. 1947); *In re* Troicke's Will, 67 N.Y.S.2d 881, 882–84 (Sur. Ct. 1947). But note that

> a testamentary condition requiring that the legatee divorce his spouse before the

Thus, the enforceability of various kinds of testamentary conditions in restraint of marriage can depend either on the objective reasonableness of the condition as applied to the donee or on the subjective motivations of the donor, as evidenced by the form of the condition.

C. Courts Applying Objective Reasonableness and Subjective Motivation Tests Might Fail to Consider Sexual Orientation of Donees

Courts have not yet considered a donee's sexual orientation in determining whether a condition in restraint of the donee's marriage is enforceable under either the objective reasonableness test or the subjective motivation test. Faced with a condition in restraint of same-sex marriage, courts might mechanically apply the current tests of enforceability, consider only the factors typically considered, and ignore the donee's sexual orientation. This risk arises under both the objective reasonableness test and the subjective motivation test.

Under the objective reasonableness test, there is a risk that courts will fail to consider a donee's sexual orientation when it may be relevant. The objective reasonableness test as it is generally applied assesses the number of mates available to the donee under the condition within a reasonable "temporal and geographical" range.[71] One might expect that a genuine calculation of the likelihood of a donee's marriage would lead courts to consider the geographic census information of the donee's neighborhood or city as well as the donee's "social skills, level of education and income, age, and physical attractiveness."[72] Although courts consider a donee's religion or race when the condition makes those facts relevant, they generally do not consider other aspects of the donee that might affect the likelihood

---

> testator's death would be regarded universally as valid. In *In re Clarke's Estate*, the testator made alternative bequests to her son Eugene W. Clarke: if she was still married to Clara Clarke on the date of the testator's death, he would receive only $5,000; if he was divorced from Clara (or if she had predeceased him) by the date of the testator's death, he would receive one-third of the residue of the testator's estate. The court upheld the conditions against a challenge that the conditions were contrary to public policy because they encouraged divorce. . . . '[T]here was nothing that Eugene W. Clarke could do to increase or diminish the amount he would receive under the will. His portion was fixed absolutely as of the time of the death of the testatrix and his then status with respect to his wife, Clara. There was no inducement for him to destroy the marriage status, for it could avail him of nothing.'

Sherman, *supra* note 8, at 1278–79 (quoting In re Clarke's Estate, 57 P.2d 5, 8 (Colo. 1936)).

71. Lee, *supra* note 15, at 63; *see* Watts v. Griffin, 50 S.E. 218, 219 (N.C. 1905); Petition of Osborne, 21 Pa. D. & C. 293, 295 (Com. Pl. 1934).

72. Lee, *supra* note 15, at 67.

of a match, such as his or her physical attractiveness, education, and age.[73] If courts do not consider these other facts about the donee, they may similarly ignore the donee's sexual orientation. Thus, there is some reason to be concerned that courts might not consider the donee's sexual orientation as relevant to the objective reasonableness test.

Under the subjective motivation test, the risk that a court may fail to consider a donee's sexual orientation when it may be relevant arises because the test focuses on the donor's motivations rather than on facts about the donee.[74] Focus on the donor's motivations under the subjective motivation test manifests as close attention to the form of the condition without regard to its factual context.[75] Courts look to whether the condition as drafted is a condition precedent or a condition subsequent.[76] They also look to whether the testamentary document contains a gift-over that would help determine whether the condition was benevolently motivated.[77]

However, as discussed above, courts sometimes look beyond the four corners of the testamentary document under the subjective motivation test and consider whether the condition is in restraint of the donee's first or a subsequent marriage.[78] Still, such an inquiry is not particularly fact- or context-dependent because it merely creates a presumption regarding the donor's motivation based only on whether the donee has previously been married. Whether the donor subjectively intended to provide for the donee until marriage, or rather, intended to prevent the donee from marrying, is not directly investigated under the subjective motivation test.[79] Because the subjective motivation test relies so heavily on the form of the condition rather than on the donor's subjective state of mind, it might be possible for "badly" motivated donors to draft conditions that would

73. *Id.* at 66–68.

74. *E.g.*, *In re* Fitzgerald's Estate, 119 P. 96, 96, 98 (Cal. 1911); Bradford v. Culbreth, 10 A.2d 534, 540 (Del. Super. Ct. 1939), *aff'd*, 18 A.2d 143 (Del. 1941); Logan v. Hammond, 117 S.E. 428, 431 (Ga. 1923); Scalise, *supra* note 6, at 1328; Sherman, *supra* note 8, at 1317–18.

75. Scalise, *supra* note 6, at 1328; Sherman, *supra* note 8, at 1317–18.

76. *See In re* Alexander's Estate, 85 P. 308, 308 (Cal. 1906); Scalise, *supra* note 6, at 1328; Sherman, *supra* note 8, at 1318.

77. *E.g.*, Phillips v. Medbury, 7 Conn. 568, 570 (1829); Chapin v. Cooke, 46 A. 282, 282 (Conn. 1900).

78. *E.g.*, *Phillips*, 7 Conn. at 570; Wilmington Trust Co. v. Houlehan, 131 A. 529, 534–35 (Del. Ch. 1925).

79. *See In re Fitzgerald's Estate*, 119 P. at 97, 98; *Chapin*, 46 A. at 282. *But see* Jenkins v. Merritt, 17 Fla. 304, 305 (1879) (considering witness testimony regarding the donor's intent).

survive the subjective motivation test unless courts are encouraged to take notice of the donee's sexual orientation.[80]

Mechanical application of both the objective reasonableness test and the subjective motivation test creates a risk that courts may not consider the donee's sexual orientation when faced with a condition in restraint of the marriage of homosexual donees. As of yet, no court has explicitly considered a donee's sexual orientation as a factor relevant to evaluating whether a condition in restraint of the donee's marriage was enforceable. This Note argues that the risk that courts will ignore the sexual orientation of homosexual donees in applying the current tests of enforceability threatens to undermine the policies that underlie these tests.

II. ENCOURAGING MARRIAGE

A. Encouraging Marriage Is the Central Policy Underlying the Objective Reasonableness and Subjective Motivation Tests

The complex rules that determine the enforceability of conditions on inheritance restrictive of marriage are said to be grounded in public policy.[81] Deciphering which policies motivate courts to validate or invalidate conditions is difficult because they are rarely explicit about the content of the policies that underlie their analyses in this area.[82] The public policy relied on is not stated in states' statutes; the determination whether a condition in restraint of marriage violates public policy is nebulous. This Note argues that the public policies underlying the objective reasonableness test and subjective motivation test are the courts' implicit yet pervasive support for: (1) marriage over singlehood; (2) protecting both the testamentary freedom of donors and the personal freedom of donees;[83] and (3) protecting the testamentary freedom of donors while not enforcing donors' "bad" motivations.[84]

Support of marriage over singlehood is the central policy underlying courts' decisions regarding whether or not to enforce conditions

80. *In re* Holbrook's Estate, 62 A. 368, 369 (Pa. 1905) ("It is a reproach to the law that, of two donors intending to do exactly the same thing, one shall succeed and the other fail as a violator of law, merely because one scrivener knew what he was about and wrote, 'so long as the donee remains unmarried,' and the other was ignorant or careless, and wrote, 'for life, if so long the donee remains unmarried.'" (citation omitted)).

81. Scalise, *supra* note 6, at 1326; Tate, *supra* note 6, at 453.

82. Scalise, *supra* note 6, at 1317; Sherman, *supra* note 8, at 1276–77.

83. *See infra* Part III.A.

84. *See infra* Part III.B.

on inheritance in restraint of the marriage of donees.[85] Courts often explain their skeptical approach to general restraints on first marriage by noting that "[m]arriage is encouraged by the law."[86] However, the content of and reasons for a public policy in support of marriage remain largely unexamined in judicial opinions and in scholarship.

The principal reason that courts carefully examine testamentary conditions in restraint of marriage is that marriage, as the chief organizing principle of families, is essential to the functioning of society.[87] Encouraging marriage and discouraging licentiousness are other likely historical bases for the rules regarding the enforceability of conditions in partial restraint of marriage and encouraging separation or divorce.[88] A supporting rationale seems to be society's interest in promoting procreation.[89] Thus, the policy of encouraging marriage and discouraging divorce seems to consist mainly in the following: (1) marriage and the family structure promote societal stability,[90] (2) marriage discourages immorality,[91] and (3) marriage encourages procreation.[92]

---

85. *See* Huiet v. Atlanta Gas Light Co., 28 S.E.2d 83, 84 (Ga. Ct. App. 1943) ("Marriage is encouraged by the law, and every effort to restrain or discourage marriage by contract, condition, limitation, or otherwise, shall be invalid and void.") (quoting GA. CODE ANN. § 53–107 (1933)); Scalise, *supra* note 6, at 1327–31.

86. GA. CODE ANN. § 19–3–6 (2010); *see also* Maddox v. Maddox, 52 Va. (11 Gratt.) 804, 806 (1854).

87. *See* Sterling v. Sinnickson, 5 N.J.L. 756, 761 (1820) ("Marriage lies at the foundation not only of individual happiness, but also of the prosperity, if not the very existence, of the social state; and the law, therefore, frowns upon, and removes out of the way, every rash and unreasonable restraint upon it, whether by way of penalty or inducement."); *Maddox*, 52 Va. (11 Gratt.) at 806 ("It will not be questioned that marriages of a suitable and proper character, founded on the mutual affection of the parties, and made upon free choice, are of the greatest importance to the best interests of society, and should be by all proper means promoted and encouraged."); *Conditions, Conditional Limitations, or Contracts in Restraint of Marriage*, *supra* note 7, at 55 (quoting White v. Equitable Nuptial Benefit Union, 76 Ala. 251, 259 (1884) ("[T]he institution of marriage is the fundamental support of national and social life, and the promoter of individual and public morality and virtue.")).

88. Sherman, *supra* note 8, at 1305.

89. *See Maddox*, 52 Va. (11 Gratt.) at 806 ("The purity of the marriage relation and the happiness of the parties will, to a great extent, depend upon their suitableness the one for the other, and the entire freedom of choice which has led to their union; and upon these, in their turn, in a great degree must depend the successful rearing of their children, and the proper formation of their character and principles."); Richard Stith, *On the Legal Validation of Sexual Relationships*, *in* THE JURISPRUDENCE OF MARRIAGE AND OTHER INTIMATE RELATIONSHIPS 143, 147 (Scott FitzGibbon, Lynn D. Wardle, and A. Scott Loveless eds., 2010).

90. Tate, *supra* note 6, at 453; Scalise, *supra* note 6, at 1326.

91. Sherman, *supra* note 8, at 1305.

92. Tate, *supra* note 6, at 458.

In addition to holding that certain conditions that restrict donees' marriages are unenforceable, courts often refuse to enforce conditions encouraging the separation or divorce of married donees.[93] One possible rationale behind courts' tendency to hold unenforceable conditions on inheritance that encourage separation or divorce is that such conditions are objectionable because "it is an offensive spectacle for the state, at the behest of a dead person, to shift wealth from B to A as a reward for A's obtaining the divorce the decedent desired."[94] Thus, the preference for marriage over singlehood is borne out by the rules governing the enforceability of conditions encouraging separation or divorce as well as by the rules governing the enforceability of conditions in restraint of marriage.[95] The policies underlying rules regarding the enforceability of conditions encouraging separation or divorce are therefore essentially the same as those underlying the rules regarding the enforceability of conditions in restraint of marriage.

This Note proposes that public policy encouraging marriage and discouraging divorce consists in recognizing that: (1) marriage and the family structure promote societal stability,[96] (2) marriage discourages immorality and promotes the welfare of individuals,[97] and (3) marriage encourages procreation.[98] If these are the goals courts seek to achieve when they promote marriage over singlehood, then they should promote same-sex and heterosexual marriage alike because both serve these goals.[99]

B. Courts Can Best Encourage Marriage by Considering the Donee's Sexual Orientation in Applying the Objective Reasonableness and Subjective Motivation Tests

Policy preferences for marriage over singlehood depend on the premises that marriage and the family structure promote societal stability, that marriage discourages immorality and promotes the

93. FREDRICK K. HOOPS ET. AL., FAMILY ESTATE PLANNING GUIDE § 17:24 (4th ed. 2009).

94. Sherman, *supra* note 8, at 1311. However, perhaps courts should look to the objective effect of the condition rather than to the donor's motive because "[t]o justify a restraint on the ground that the testator's intention was not to restrain marriage but to provide for the support of a particular beneficiary does not make the restraint any the less offensive if it does indeed discourage marriage or remarriage." GARETH H. JONES, THE DEAD HAND AND THE LAW OF TRUSTS IN DEATH, TAXES, AND FAMILY PROPERTY 119, 127 (Edward C. Halbach, Jr. ed., 1977).

95. Hoops, *supra* note 93, at § 17:24.

96. Scalise, *supra* note 6, at 1326; Tate, *supra* note 6, at 453.

97. Sherman, *supra* note 8, at 1305.

98. Tate, *supra* note 6, at 458.

99. POLIKOFF, *supra* note 13, at 99.

welfare of individuals, and that marriage encourages procreation and has benefits for child-rearing. These considerations as readily support a preference for same-sex marriage over singlehood as a preference for opposite-sex marriage over singlehood.

Marriage and stable family structures promote societal stability, regardless of whether the spouses are of one or opposite sexes.[100] A longitudinal study of same-sex couples in Vermont found that couples who had not entered civil unions were more likely to have ended their relationships than couples who had, suggesting a possible stabilizing effect of civil unions.[101] The institution of marriage supports society through various rights and protections, both legal and financial, "including eligibility for public housing and housing subsidies, automatic financial [and medical] decision-making authority on behalf of one's spouse, . . . access to spousal benefits of worker's compensation, [and] the ability to file joint income tax returns and benefit from family-related deductions," among other things.[102] Additionally, a 2004 study found that gay men in civil unions were closer to their families of origin than gay men not in civil unions, suggesting that extended families benefit from legal recognition of same-sex relationships.[103] Same-sex marriage makes partners feel more committed to their relationships, "cementing them in both financial and emotional ways."[104] In fact, 53.7% of same-sex couples perceived changes in their love and commitment for each other as a

100. *See id*.; Michael King & Annie Bartlett, *What Same Sex Civil Partnerships May Mean for Health*, 60 J. OF EPIDEMIOLOGY & COMMUNITY HEALTH, 188, 188 (2006) (stating that marriage would "increase the stability of same-sex relationships").

101. Kimberly F. Balsam, Theodore P. Beauchaine, Esther D. Rothblum, & Sondra E. Solomon, *Three-Year Follow-Up of Same-Sex Couples Who Had Civil Unions in Vermont, Same-Sex Couples Not in Civil Unions, and Heterosexual Married Couples*, 44 DEV. PSYCHOL. 102, 110 (2008). If civil unions are stabilizing, there is little doubt that marriages would be at least as stabilizing. "Importantly, however, this study did not establish a causal relationship between civil unions and relationship commitment: It is possible that couples who obtained civil unions . . . were more committed to their relationships in the first place." ABBIE E. GOLDBERG, LESBIAN AND GAY PARENTS AND THEIR CHILDREN: RESEARCH ON THE FAMILY LIFE CYCLE 26–27 (2010). Thus, more research is needed into dissolution rates among same-sex couples who have legalized their relationships either through civil union or marriage. *Id*.

102. GOLDBERG, *supra* note 101, at 38.

103. Sondra E. Solomon, Esther D. Rothblum & Kimberly F. Balsam, *Pioneers in Partnership: Lesbian and Gay Male Couples in Civil Unions Compared with Those Not in Civil Unions, and Married Heterosexual Siblings*, 18 J. FAM. PSYCHOL. 275, 284 (2004).

104. GOLDBERG, *supra* note 101, at 40.

result of having a civil union.[105] Marriage symbolizes monogamy and a recognizable status as a family.[106]

Marriage likewise discourages immorality and promotes the welfare of individuals in both same-sex and opposite-sex marriages.[107] Because "marriage supports mental and physical health," the well-being of homosexual persons is compromised by not being able to marry.[108] There are few differences between same-sex and opposite-sex committed relationships in terms of relational health and conflict.[109] There is evidence that marriage, whether it is opposite- or same-sex, improves both the physical and emotional well-being of married persons by "reduc[ing] discrimination, increas[ing] the stability of same sex relationships, and lead[ing] to better physical and mental health."[110] Also, getting married creates an added sense of "security, support, and validation."[111] On the other hand, studies have shown that both gay male partners and lesbian partners have higher levels of autonomy than heterosexual partners, and that "an increase in personal autonomy over time appears to be associated with a greater risk of relationship dissolution in lesbian and gay couples."[112] Still, the bulk of the evidence supports the conclusion that if there are significant policy reasons to support heterosexual marriage, those reasons apply as well to same-sex couples.

The premise that marriage should be supported because it encourages procreation ill-fits this modern, population-dense world.[113] In the contemporary "time of population explosion and increased population density, [encouraging procreation] hardly seems necessary, and in fact promotion of such a policy may be viewed as irre-

105. Sondra E. Solomon, Esther D. Rothblum, & Kimberly F. Balsam, *Money, Housework, Sex, and Conflict: Same-Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings*, 52 SEX ROLES 561, 565 (2005).

106. GOLDBERG, *supra* note 101, at 40.

107. *See* POLIKOFF, *supra* note 13, at 99.

108. Gilbert Herdt & Robert Kertzner, *I Do, but I Can't: The Impact of Marriage Denial on the Mental Health and Sexual Citizenship of Lesbians and Gay Men in the United States*, 3 SEXUALITY RES. AND SOC. POL'Y: J. NSRC 33, 43 (2006).

109. Letitia Anne Peplau & Adam W. Fingerhut, *The Close Relationships of Lesbians and Gay Men*, 58 ANN. REV. PSYCHOL. 405, 411 (2007); *see also* GOLDBERG, *supra* note 101, at 25–26.

110. King & Bartlett, *supra* note 100, at 188.

111. Alden Mahler Levine, *Psychological Association Calls for Legalization of Same-Sex Marriage*, CNN U.S. (Aug. 4, 2011), http://www.cnn.com/2011/US/08/04/psychologists.gay.marriage/index.html.

112. GOLDBERG, *supra* note 101, at 28. Autonomy is "the degree to which one maintains a sense of self separate from the relationship." *Id.* (citing Catherine Goodman, *Intimacy and Long Term Marriage*, J. GERONTOLOGICAL SOC. WORK 83 (1999)).

113. Scalise, *supra* note 6, at 1342.

sponsible."[114] Additionally, many children today are born outside of marriage.[115] However, even if promoting procreation were ultimately a legitimate reason to prefer marriage to singlehood, this consideration applies just as well to same-sex couples—studies have shown that "gay men in civil unions were more likely to be fathers, compared to gay men not in civil unions."[116]

Finally, the idea that marriage is good for raising children applies equally well to same-sex and opposite-sex couples.[117] "[M]arriage between a child's parents *uniformly* is good for children. It advances child welfare to permit—and indeed promote—marriage where there are children."[118] Marriage-equality advocates agree "that marriage is good for children and that raising children outside marriage damages both them and society."[119] Additionally, "nonmarital birth is [still] widely viewed as undesirable," and thus children of same-sex parents face the "stigma of 'illegitimacy' and 'bastardy'" just as much, if not more than, children of unmarried opposite-sex parents.[120] "[A]ll children deserve to know that their family is worthy of respect" and, in this society, that often requires that the child's parents are married.[121] Therefore, the policy of encouraging marriage to enhance child rearing applies as well to homosexual and heterosexual donees.

---

114. *Id.*

115. Forty percent of children born in the United States are born outside of marriage. *Births and Natality*, CTRS FOR DISEASE CONTROL AND PREVENTION (Nov. 2013), www.cdc.gov/nchs/fastats/births.htm (last updated June 12, 2014).

116. See Solomon, *supra* note 103, at 280, 282, but note that this study does not establish the causal conclusion that joining a civil union makes it more likely for such couples to have children. An alternative explanation would be that gay men who want to have children are more likely to get married or be in a civil union. *But see* Stith, *supra* note 89, at 155 (arguing that "it is not the joint sexual act but the joint adoptive act that is a matter of public interest . . . adoption by same-sex couples is a good reason to grant legal recognition to their unions, but only at the time of each adoption—not before.").

117. *See* CARLOS A. BALL, SAME-SEX MARRIAGE AND CHILDREN: A TALE OF HISTORY, SOCIAL SCIENCE, AND THE LAW 87 (2014) ("The studies that have looked at the psychological adjustment and social functioning of children have found no differences in outcomes between the children of lesbian and gay parents and children of heterosexual ones."); POLIKOFF, *supra* note 13, at 103 ("[T]he research on children of gay parents uniformly finds no damage to them.").

118. POLIKOFF, *supra* note 13, at 102 (citing Brief for National Association of Social Workers as Amici Curiae in support of Plaintiffs-Appellants at 8, 12, Lewis v. Harris, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005) (No. A–2244–03T5)).

119. POLIKOFF, *supra* note 13, at 100; *see* LISA BENNETT & GARY J. GATES, HUMAN RIGHTS CAMPAIGN FOUNDATION REPORT THE COST OF MARRIAGE INEQUALITY TO CHILDREN AND THEIR SAME-SEX PARENTS, 8–13 (2004).

120. POLIKOFF, *supra* note 13, at 102.

121. *Id.* at 103 (citing EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY (2004)).

Further, conditions in restraint of marriage or encouraging separation or divorce might be seen as encouragement to engage in fraud or, at the very least, sham marriages.[122] "Indeed, if the legatee is, say, a gay man, a legacy conditioned on his marrying a woman could be regarded as an inducement to perform a fraudulent act."[123] Inducements to engage in sham marriages are in no way consistent with the policy, outlined above, preferring marriage to singlehood. Instead, inducements to engage in sham marriages tend to undermine rather than support the family structure that is beneficial to societal stability.[124] They are likely to decrease the individual welfare of donees by encouraging them to live a lie.[125]

A research-based approach to these public policies suggests that same-sex marriage is beneficial in ways similar to heterosexual marriage, including by promoting social stability, enhancing individual welfare, and benefitting child rearing. Because same-sex and heterosexual marriages are beneficial to society in similar ways, courts should take the sexual orientations of donees into account when determining the enforceability of conditions in restraint of same-sex marriage. A condition restricting a donee's marriage to a person of the same sex will discourage the donee from marrying as much, if not more, than a condition in restraint of marriage based on factors such as religion, race, or time constraints. Because the effect on the likelihood of the donee's marriage will be the same for conditions based on sex as for conditions based on other factors, courts should not ignore the donee's sexual orientation in evaluating the enforceability of such conditions. Where the donee's sexual orientation is relevant, it should be considered.

III. BALANCING TESTAMENTARY FREEDOM AGAINST OTHER CONSIDERATIONS

Whether to enforce a condition on inheritance depends on two competing considerations even more basic than the policy of encouraging marriage: freedom of testation on one hand and concerns about dead hand control on the other.[126] First, in this property sys-

122. Sherman, *supra* note 8, at 1305–06.

123. *Id.*

124. Scalise, *supra* note 6, at 1358; Tate, *supra* note 6, at 457–58.

125. *But see* Shapira v. Union Nat'l Bank, 315 N.E.2d 825, 831 (Ohio Ct. Com. Pl. 1974) (noting that a donee "should not gain the advantage of the avoidance of the condition by the possibility of his own impropriety").

126. On one hand, "many feel strongly that individuals should be able to distribute their money and assets as they please with minimal interference from the government. Yet, at the

tem, the right to dispose of one's property is fundamental and is generally extended to the right to dispose of one's property on death.[127] On the other hand, society has concerns about donors using their wealth and the power that comes with that wealth to control the living long after the donors themselves are gone.[128] Any discussion of the policies underlying particular tests of enforceability, to be complete, must recognize the omnipresent tension between these two considerations.

"[T]estamentary freedom exists in America to an extent unimaginable in some foreign jurisdictions."[129] An expansive view of freedom of testation would suggest that courts should enforce conditions on inheritance no matter their form or effect: "a robust theory of testation includes within it the right to condition legacies on personal, arbitrary, and sometimes ill-advised and foolish motives."[130] Still, courts balance the broad testamentary freedom of donors against the desire to limit their "dead hand control."[131] Excessive opportunity for dead hand control allows "myopic and intolerant" donors to impose undesirable conditions on the living that last long after the donor's death.[132] This problem is especially acute because a deceased testator cannot respond to changes in circumstances that may occur after his or her death or be persuaded by the donee to relax or abandon conditions placed on the property transfer.[133] For example, in *In re Estate of Feinberg*, the court noted that one reason to uphold a condition precedent giving an inheritance to any grandchild who had married a spouse of the Jewish faith (or someone who had converted to Judaism within one year of the marriage) was

---

same time, many believe strongly that individuals should have the freedom to make their own life choices without undue outside influence exerted through dead-hand control." Henry, *supra* note 5, at 216–17; *see also In re* Estate of Feinberg, 919 N.E.2d 888, 897–98 (Ill. 2009).

127. LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 46 (2009).

128. *Id.* at 125.

129. Scalise, *supra* note 6, at 1367.

130. *Id.*

131. Sherman, *supra* note 8, at 1284 (citing M. Meston, *The Power of the Will*, 1982 JURID. REV. 172, 173) ("Making a will is an exercise of power without responsibility. Free of the constraint of what the neighbours would think; free, above all, of the constraint of requiring houses and assets for their own use, testators can sometimes be so awed by the infinite wisdom of their own plans for the future as to feel justified in controlling other people's lives—for their own good, naturally.").

132. Scalise, *supra* note 6, at 1364.

133. *Id.* at 1366 (quoting RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 18.6 (5th ed. 1998)); Sherman, *supra* note 8, at 1279.

that conditions precedent "d[o] not seek to exert dead-hand control."[134]

Courts' concerns about dead hand control can be divided into two categories, each accounting for one of the two tests currently used to evaluate conditions on inheritance in restraint of marriage.[135] Preventing deceased donors from unduly interfering with the personal freedom of donees underlies the objective reasonableness test applied to evaluate conditions in partial restraint of marriage.[136] Concerns that courts should not involve themselves in enforcing the impermissible "bad" motivations of donors underlie the subjective motivation test generally applied to evaluate conditions in general restraint of marriage and conditions encouraging separation and divorce. [137] Thus, courts limit dead hand control for two basic reasons: to protect the individual freedom of donees and to avoid judicial involvement in promoting prejudicial or punitive conditions on inheritance.[138]

A. Courts Can Best Balance Protecting the Testamentary Freedom of Donors Against Protecting the Personal Freedom of Donees by Considering Donees' Sexual Orientations in Applying the Objective Reasonableness Test

As this Note argued above, the central policy underlying the objective reasonableness test is a preference for marriage over singlehood.[139] However, the unenforceability of unreasonable conditions in restraint of marriage can also be explained by courts' desire to protect the personal freedom of donees.[140] Even starting from the perspective of broad testamentary freedom, public policy limitations on conditions in restraint of marriage "are necessary to restrain some of the more intrusive and overreaching conditional dispositions."[141] The objective reasonableness test is the method courts use

134. Henry, *supra* note 5, at 226; *In re* Estate of Feinberg, 919 N.E.2d 888, 903 (Ill. 2009).

135. Lee, *supra* note 15, at 56; Sherman, *supra* note 8, at 1277.

136. *See* Lee, *supra* note 15, at 61–65 (discussing how a partial restriction may be unenforceable should it effectively remove all nearby marriage candidates).

137. Scalise, *supra* note 6, at 1343–44.

138. Sherman, *supra* note 8, at 1284.

139. *See supra* Part III.A.

140. *See* 1A SCOTT ON TRUSTS § 62.6 (William Fratcher ed., 4th ed. 1987); Scalise, *supra* note 6, at 1329, 1348 ("[T]he real problem with marital conditions in donations is that they interfere with the beneficiary's ability to make important life choices (e.g., choosing a mate) for himself."); *see, e.g.*, *In re* Estate of Feinberg, 919 N.E.2d. 888, 899 (Ill. 2009).

141. Scalise, *supra* note 6, at 1367.

to balance donors' testamentary freedom against the personal freedom of donees.

Courts balance donees' personal freedom with the testamentary freedom of donors by enforcing conditions in partial restraint of marriage if they are objectively reasonable with respect to time and geographic proximity, regardless of whether the donee's freedom has otherwise been diminished by the condition.[142] For example, a condition restricting a donee's marriage to a person of a particular religious group is enforceable if the pool of potential mates available to the donee under the condition is sufficient to provide the donee with a reasonable opportunity to marry.[143] This is true even if the condition eliminates the potential mates for whom the donee actually has a preference.[144]

Homosexual donees should be protected by the same reasonableness limitation on dead hand control as heterosexual donees. Until courts recognize the relevance of the sexual orientation of donees to a reasonableness analysis, homosexual donees will not be protected by this limitation. Ignoring the sexual orientation of homosexual donees when conducting a reasonableness analysis amounts to ignoring the factor most affecting the reasonableness of the condition as it applies to these donees—the factor upon which their personal freedom most clearly depends.

A condition requiring a homosexual donee to marry a person of the opposite sex would most likely be interpreted under the current doctrine as a condition in partial restraint of marriage, subject to an objective reasonableness test of enforceability.[145] Under the objective reasonableness test, courts typically consider factors such as the time limit imposed by the restriction, the size of the remaining pool of available mates, and the geographic proximity of such available mates to the donee.[146] Considering only these factors, a court would likely conclude that a condition requiring a homosexual donee to marry a person of the opposite sex would be an enforceable reasonable restraint on the donee's marriage. The remaining pool of avail-

142. *Id.* at 1329. *See, e.g.*, Shapira v. Union Nat'l Bank, 315 N.E.2d 825, 831–32 (Ohio Ct. Com. P. 1974) (stating that a seven-year time limit to marry a woman of the Jewish faith "would be a most reasonable grace period, and one which would give the son ample opportunity for exhaustive reflection and fulfillment of the condition without constraint or oppression").

143. Scalise, *supra* note 6, at 1329.

144. Sherman, *supra* note 8, at 1306 n.148, 1320 n.219.

145. This is the most likely interpretation because a condition restricting marriage to persons of a particular sex would not forbid the donee from marrying anyone at any time, as a general restraint would.

146. *See* Watts v. Griffin, 50 S.E. 218, 219 (N.C. 1905); Lee, *supra* note 15, at 63–64.

able mates would likely be reasonably large because it would include all members of the opposite sex of the donee. Further, members of the opposite sex could presumably be found within a reasonable geographic proximity to the donee. Assuming that the time limitation imposed by the condition was reasonable, such a condition would likely be held enforceable under the objective reasonableness test as it is currently applied.

However, if courts also consider the sexual orientation of the donee, as this Note advocates, a partial restraint that conditions a homosexual donee's inheritance on marrying a person of the opposite sex would be held per se unenforceable under the objective reasonableness test because it would constitute a per se unreasonable limit on the donee's opportunity to marry. The unreasonableness of such a condition does not arise from geographical or temporal limitations but from the fact that the condition will *inevitably* eliminate the donee's only viable and desirable choice of mates from the possible pool.

Enforcing conditions on inheritance in restraint of same-sex marriage can interfere with some of a donee's most important and profoundly personal life choices.[147] Society has increasingly recognized the meaning and import of marriage as a personal choice to engage in a partnership with another that includes romance, companionship, and love as much as it does economic and familial connections.[148] "Moreover, a will partially restraining marriage from one's intended can have the same effect as a will prohibiting marriage in toto."[149]

The objective reasonableness test is a minimal limitation on a donor's ability to achieve dead hand control. Some commentators find

147. *See* Maddox v. Maddox, 52 Va. (11 Gratt.) 804, 806–07 (1854) ("[N]ot only should all positive prohibitions of marriage be rendered nugatory, but all unjust and improper restrictions upon it should be removed, and all undue influences in determining the choice of the parties should be carefully suppressed."); *Conditions, Conditional Limitations, or Contracts in Restraint of Marriage*, *supra* note 7, at 55 (quoting White v. Equitable Nuptial Ben. Union, 74 Ala. 251, 259 (1884)). In fact, some commentators, believing that current law does not do enough to limit dead hand control, argue that "testamentary restraints on legatees' conjugal and religious choices are per se undesirable; society's aid should not be enlisted to enforce such restraints, even if the restraints can pass some sort of 'reasonableness' test." Sherman, *supra* note 8, at 1284.

148. *See* STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 4–5 (2005).

149. Scalise, *supra* note 6, at 1347 ("In describing the plight faced by a woman prevented from marrying her true love, one seventeenth century court poetically observed that although 'she [is] being only prohibited to marry with one man by name, . . . nothing in the whole fair garden of Eden would serve her turn, but his forbidden fruit.'" (quoting Jarvis and Ux. v. Duke, (1681) Eng. Rep. 274)).

the reasonableness approach to limiting dead hand control to be "puzzling . . . [because it] seems to treat potential spouses as fungible goods . . . ."[150] Additionally, this approach is inconsistent with the recognition of the personal significance of marriage decisions.[151] But given that the reasonableness approach is the test courts have decided to use to balance broad testamentary freedom with the personal freedom of donees, it is important that the objective reasonableness test recognize the relevance of the donee's sexual orientation to a reasonableness determination.

That a condition imposed by a donor purports to interfere with the life choices of a donee does not necessarily mean that the condition will effect the outcome the donor desired. One might argue that courts should not bother protecting donees from the conditions imposed by donors using the objective reasonableness test because if the donee is resolute enough, no promise of inheritance will sway him or her from his or her path.[152]

> Although testamentary conditions are often referred to as testamentary restraints or restrictions, there is no "restraint" or "restriction" involved in these cases. To be sure, there is pressure; there is influence; and there is persuasion. Restraint or restriction, however, goes too far. The words "restriction" or "restraint" conjure images of a deprivation of freedom . . . . But giving a gift or leaving a bequest to someone under the condition that they do something is hardly a restraint. In fact, a better description of these situations would be to think of them as gifts with "strings attached" or, in some cases, as the proposal of a contractual relationship. In any event, "marital conditions in wills are a far cry from physically coerced marriage (or bachelorhood), which the state has an obvious interest in preventing."[153]

However, the criticism that conditions in restraint of marriage are mere influences, rather than restrictions, assumes that the state has an interest only in preventing the most egregious restraints on the personal freedom of donees. Instead, deceased donors should be prevented from controlling the most personal choices of their donees at all if that control is in any way unreasonable, unwise, or im-

---

150. *Id.*

151. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967); Williams v. Cowden, 13 Mo. 211, 213 (1850); POLIKOFF, *supra* note 13, at 99.

152. *See, e.g.*, Shapira v. Union Nat'l Bank, 315 N.E.2d 825, 827–28 (Ohio Ct. Com. Pl. 1974).

153. Scalise, *supra* note 6, at 1355 (footnotes omitted).

prudent.[154] "Although no 'restraint' exists by virtue of a conditional legacy, some find even the influence of money . . . to be objectionable."[155] Invalidating such conditions may be in the best interests of donees, as well as of society as a whole. Allowing dead hand control, even minimal control, must be avoided in any circumstance in which the donor's interest in testamentary freedom is outweighed by the condition's interference with the donee's personal freedom.[156] Such conditions—unreasonable conditions—should always be considered undesirable.[157]

B. Courts Can Best Balance Protecting the Testamentary Freedom of Donors Against Avoiding Enforcing "Bad" Motivations of Donors by Considering the Donee's Sexual Orientation in Applying the Subjective Motivation Test

In addition to refusing to enforce conditions that unreasonably interfere with the personal freedom of donees, courts are also reluctant to enforce the whims of antisocial donors whose desires to control donees go beyond mere eccentricity or imprudence, and actually threaten societal harm.[158] "Where a provision is punitive in nature or motivated by an interest in furthering a prejudicial, bigoted, or malevolent agenda, the provision is likely to be held unenforceable."[159] For example, when the donor, in creating the condition in restraint of marriage, is found to have intended to punish the donee for marrying a person of whom the donor did not approve, the condition is likely to be held unenforceable.[160]

---

154. *See* Jenkins v. Merritt, 17 Fla. 304, 306 (1879) ("[I]t is against the policy of all governments to throw *any* obsta[c]les in the way of marriages." (emphasis added)); Taylor v. Rapp, 124 S.E.2d 271, 272 (Ga. 1962) ("Marriage is encouraged by the law, and *every* effort to restrain or discourage marriage . . . shall be invalid and void." (emphasis added) (quoting Ga. Code § 53–107)); *Conditions, Conditional Limitations, or Contracts in Restraint of Marriage*, *supra* note 7, at 55 ("[T]o secure well-assorted marriages, there must exist the *utmost* freedom of choice." (emphasis added)).

155. Scalise, *supra* note 6, at 1357.

156. *See* Sterling v. Sinnickson, 5 N.J.L. 756, 761 (1820) ("Marriage lies at the foundation not only of individual happiness, but also of the prosperity, if not the very existence, of the social state; and the law, therefore, frowns upon and removes out of the way every rash and unreasonable restraint upon it, whether by way of penalty or inducement.").

157. *See* Williams v. Cowden, 13 Mo. 211, 213 (1850) ("[T]he preservation of domestic happiness, the security of private virtue, and the rearing of families in habits of sound morality and filial obedience and reverence, are deemed to be objects too important to society, to be weighed in the scale against individual or personal will.").

158. Henry, *supra* note 5, at 234; Sherman, *supra* note 8, at 1308–09.

159. Henry, *supra* note 5, at 234.

160. *See id.*

When a condition is impermissibly motivated, a court will not enforce the condition.[161] In *In re Feinberg*, for example, if the donors had imposed a condition on the inheritance "with the express intent to avoid intermarriage with non-Jewish people because they believed that non-Jewish people were an inferior class, the court would have had a responsibility to consider the state's public policy interest and not act in furtherance of [the] prejudicial belief."[162]

Courts do not explain their refusal to enforce "badly" motivated conditions beyond pointing to the inconsistency of such conditions with an unidentified public policy.[163] It is widely accepted that there is no constitutional restriction that prevents enforcement.[164] Therefore, what constitutes an impermissible motivation does not depend on constitutional categories. The rationale behind the subjective test of enforceability seems to be, instead, that courts want to avoid their own involvement in the spiteful, prejudicial, or wasteful agendas of deceased donors.[165] This rationale may be grounded in the repugnance of such motivations or merely in a desire to protect the reputation of the courts. Courts have a responsibility to invalidate conditions that are imposed on the basis of the donor's impermissible motives because courts should not be involved in promulgating prejudice, fraud, and wasteful arbitrariness by enforcing such conditions.

Conditions in restraint of the marriage of homosexual donees will almost certainly be the result of prejudice rather than beneficent motives, whether they are written as conditions precedent or as conditions subsequent. It is difficult to imagine a scenario in which a donor, knowing that a donee would prefer a spouse of the same sex, would require the donee not to marry a person of the same sex or to marry a person of the opposite sex for some reason other than prejudice or disagreement with the donee's lifestyle. Further, a condition requiring the heterosexual marriage of a homosexual donee or forbidding same-sex marriage could not possibly be motivated by a desire to provide financially for the donee until marriage because, under the condition, the donee's inheritance would be withdrawn upon some possibilities of the donee's marriage but not others.

---

161. *See id.*

162. Henry, *supra* note 5, at 234.

163. *See* Sherman, *supra* note 8, at 1276–77.

164. Macklin, *supra* note 5, at 276–80.

165. Although courts use public policy as a rationale to hold that prejudicial conditions are unenforceable, they do not go so far as to hold that enforcing such conditions is state action under *Shelley v. Kraemer*. *See* Shelley v. Kraemer, 334 U.S. 1, 14–15 (1948); Scalise, *supra* note 6, at 1349–50; Sherman, *supra* note 8, at 1314–16.

One might argue that the testamentary freedom of donors must outweigh the rights of a donee to make important life choices free from the influence of a conditional inheritance. This argument fails to recognize the substantial extent to which society's help is necessary for the donor to carry out his or her wishes after he or she is dead.[166]

> A testator requires society's aid, to an extent an inter vivos donor does not, to effect the wealth transfers she wishes to make, and certainly the impulses of saving for one's family and achieving immortality through beneficence deserve society's support. But given our respect for individual autonomy, a testator is not similarly entitled to enlist society's aid in her quest for posthumous control over her successors' lives.[167]

Because the testator requires society's help in carrying out his or her wishes, testamentary freedom is not an independent exertion of the donor, as it might at first seem. "As to the intrusiveness point, a dead person is no more entitled to enlist society's aid in posthumously inducing marriage than in posthumously discouraging it."[168]

A central argument in favor of broad testamentary freedom is referred to as the "father-knows-best" hypothesis.[169] According to the father-knows-best hypothesis, most testamentary conditions should be enforced because a permissive approach "permits more intelligent estate planning: the testator knows his family members better than anyone else and can distribute property in accordance [with] each family member's needs."[170] Proponents of the father-knows-best hypothesis argue that not only will potential donees be better off if donors have broad powers to control and condition inheritances, but also that society as a whole will be better off.[171] But enforcing "badly" motivated conditions is not supported by the father-knows-best hypothesis. Impermissibly motivated conditions do not distribute the donor's property in accordance with each donee's needs. Be-

166. Sherman, *supra* note 8, at 1284.

167. *Id.* at 1300.

168. *Id.* at 1305.

169. Tate, *supra* note 6, at 484.

170. *Id.*

171. *See id.*; THOMAS HILL GREEN, LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION 223 (Longmans et al. eds., 1963) (1882) ("[A]s a general rule, the father of a family, if left to himself and not biassed [sic] by any special institutions of his country, is most likely to make that distribution among his children which is most for the public good.").

cause courts must enforce conditions on inheritance, intrusive conditions that do not have the redeeming quality of being benevolently motivated should be held invalid.

Courts should not be involved in enforcing the prejudice of donors against homosexual donees. The best balance between protecting the testamentary freedom of donors and avoiding enforcing their "bad" motivations can be struck by considering the donee's sexual orientation in applying the subjective motivation test.

CONCLUSION

Testamentary conditions in restraint of marriage and conditions encouraging separation or divorce are sometimes held unenforceable on public policy grounds.[172] The rules that determine whether a particular condition is enforceable have not yet been applied to testamentary conditions in restraint of the marriage of homosexual donees. Due to rapidly changing attitudes toward homosexuality and an increased use of conditional testamentary gifts, the incidence of testamentary gifts conditioned on the sexual orientation and relationships of donees is likely to rise.[173] Courts should consider the sexual orientation of donees in applying the objective reasonableness and subjective motivation tests.

To return to the example discussed at the beginning of this Note, Frank Mandelbaum attempted to induce his gay son Robert to marry a woman by excluding from a testamentary trust any child Robert might have unless Robert married the child's mother.[174] Robert and his partner Jonathan welcomed a child via surrogate, and the two married a short time later.[175] Robert's sexual orientation is undoubtedly relevant to whether the condition his father put into place was motivated by spite or rather by his desire to encourage Robert to undertake fatherhood only in marriage. Taking Robert's sexual orientation into account and given that Frank Mandelbaum knew of Robert's long-term relationship with Jonathan, it is clear that Frank Mandelbaum intended to place an obstacle in the way of Robert's marrying whom he wished. As this Note has argued, Robert's marriage to a person of his choosing can be profoundly beneficial to himself, to his child, and to society as a whole. Therefore, the long-

172. *See, e.g.*, Tate, *supra* note 6, at 453; Scalise, *supra* note 6, at 1326; Sherman, *supra* note 8, at 1276.

173. *See* United States v. Windsor, 133 S. Ct. 2675, 2715–16 (2013); DUKEMINIER, *supra* note 14, at 35–36; Tate, *supra* note 6, at 448; *Defining Marriage, supra* note 12.

174. Boniello, *supra* note 1.

175. *Id.*

standing and pervasive public policy in favor of his marriage should make courts very reluctant to place malevolently motivated obstacles in its way. Courts faced with a situation such as this in the future should hold the testamentary condition invalid.