3-1-2008

Till [My Parents'] Death Do Us Part: Exposing Testamentary Restrictions Placed on Marriages That Perpetuate Prejudice

Christina V. Bonfanti

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"TILL [MY PARENTS’] DEATH DO US PART: EXPOSING TESTAMENTARY RESTRICTIONS PLACED ON MARRIAGES THAT PERPETUATE PREJUDICE

Christina V. Bonfanti

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I. Introduction

This Note contemplates marital restrictions in wills and trusts and illustrates that it is still possible for the testator to continue to discriminate through use of a basic right: The right to devise his property through the use of testamentary instruments. This discussion is essential to dismantling the

* J.D. Candidate, 2008, Washington and Lee University School of Law. This Note is dedicated to my mother, late father, and their beautiful marriage of thirty years. I thank God for the gifts He has given me, my father for his inspiration, and my mother for all her love and support. Additionally, I must thank Professor Brown for her invaluable guidance and insight throughout this arduous process.
perpetuation of prejudicial attitudes, particularly within the family unit. This Note will argue that clauses restricting marriage in any manner should be considered as operating "in terrorem,"\(^1\) as they are unreasonable, coercive restraints, and thus, should be held invalid.

It is virtually undisputed that marriage\(^2\) is the most intimate relationship a couple can enjoy. In the American tradition, this act has been deemed the most sacred and emotionally invested union of two individuals; consequently, the right to marry has become fundamental.\(^3\) The freedom to marry is recognized and understood as a vital personal right essential to one’s pursuit of happiness,\(^4\) guaranteed by the Fourteenth Amendment to the U.S. Constitution.\(^5\) It is good public policy to promote the solidity of a marriage and to regard its dissolution as unattractive.\(^6\) Without marriage, there are no family units, and without family units, there is no legitimate procreation; the marriage of two people is deemed fundamental to humanity's "very existence and survival."\(^7\)

In the United States, however, during the dark era of slavery and spilling over into the post-Civil Rights period of the late 1950’s and 1960’s, laws prohibiting interracial marriage\(^8\) were regularly upheld.\(^9\) In pre-civil war America, it was legal for states to restrict marriages between black slaves and free whites.\(^10\) It was also common for states to pass legislation that prohibited

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\(^1\) See infra note 139 (discussing the concept of an "in terrorem" clause).

\(^2\) This Note shall focus on heterosexual couples and marriage, though the ideas set forth in this piece can be applied to homosexual couples as well.

\(^3\) See Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (holding that the right to marry is part of one’s fundamental “right of privacy” implicit in the Fourteenth Amendment’s due process clause). See also Loving v. Virginia, 388 U.S. 1, 12 (1967) (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”) (citing Skinner v. Oklahoma, 316 U.S. 535 (1942)).

\(^4\) See Loving, 388 U.S. at 12 (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness.”).

\(^5\) See id. (“The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations.”).

\(^6\) See, e.g., In re Peterson’s Estate, 365 P.2d 254, 256 (Colo. 1961) (“It is the policy of the law to encourage the permanency and continuity of a marriage and to took with disfavor upon its dissolution.”); see also Bd. of Educ. v. Bentley, 383 S.W.2d 677, 680 (Ky. 1964) (“It is accepted, of course, that marriage is favored by public policy.”); Githens v. Githens, 78 Colo. 102, 105 (1925) (“The states of the Union generally encourage the permanency and continuity of the marital relation. They look with disfavor upon divorces.”).

\(^7\) Loving, 388 U.S. at 12.


\(^9\) Numerous states propagated legislation in order to prevent the intermingling of Caucasian blood with that of any other race—particularly that of African-Americans. States such as Delaware, Georgia, Virginia, and California all had anti-miscegenation statutes for a majority of their history. See Paul Sipkard, MIXED BLOOD: INTERMARRIAGE AND ETHNIC IDENTITY IN TWENTIETH-CENTURY AMERICA 374 (The University of Wisconsin Press 1989) (describing state laws forbidding intermarriage).

intermarriage between indentured servants and black slaves.\textsuperscript{11} Even during and after Reconstruction, laws forbidding 'Negros' to marry Caucasians were widespread. It was not until \textit{Loving v. Virginia}\textsuperscript{12} in 1967 that America was forced to recognize miscegenation. Scholar Rachel Moran eloquently stated that "\textit{Loving} made clear that public officials could not reform decisions about romance, even racist ones, because of Americans' fundamental freedom to make sexual and marital choices for themselves."\textsuperscript{13}

Nevertheless, states still tried to interfere with martial relationships. In \textit{Zablocki v. Redhail},\textsuperscript{14} a father was refused a marriage license because he owed child support. The Supreme Court held that no state could compel state approval of a marriage based on a parents' child support status (paid or unpaid).\textsuperscript{15} The Court further narrowed states' abilities to interfere with marriage, holding that a state statute which "directly and substantially interferes with the decision to marry"\textsuperscript{16} must be supported by important state interests and closely tailored to effectuate those interests.\textsuperscript{17} \textit{Zablocki} virtually eliminated the states' ability to control marriage.

Even so, though states can no longer limit the choice to marry a person of another race, such a decision is still subject to private interference. Private interference may not be surprising, but court enforcement of racist motives is. Testators can, and do, condition inheritance on marriage to those within their race, ethnicity, or religion. There are those who, even on their deathbed, would try to remove any possibility that color could infiltrate their family ranks. By restricting an heir's ability to take a share in the testator's estate, that testator may influence an heir's decision to marry a certain "undesirable" person by conditioning bequests of property.

\textsuperscript{11} See SPIKARD, supra note 9, at 374 (describing state laws prohibiting or disfavoring marriage between enslaved blacks and indentured servants); see also EDWARD BYRON REUTER, RACE MIXTURE: STUDIES IN INTERMARRIAGE AND MISCEGENATION 78 (1931) (explaining that if a slave and an indentured servant married, the indentured servant would become a slave and their offspring would be slaves for the first thirty years of their lives).


\textsuperscript{13} MORAN, supra note 10, at 111.


\textsuperscript{15} \textit{Id.} at 389 ("This 'collection device' rationale cannot justify the statute's broad infringement on the right to marry.").

\textsuperscript{16} \textit{Id.} at 396.

\textsuperscript{17} See G.G. v. R.S.G., 668 So. 2d 828, 831 (Ala. Civ. App. 1995) (citing \textit{Zablocki}, 434 U.S. at 388) ("[S]tate regulations that interfere with the fundamental right to remarry will be subject to strict scrutiny and will be upheld only if they are 'supported by sufficiently important state interests and [are] closely tailored to effectuate only those interests.'"); see also Granville v. Dodge, 985 P.2d 604, 610–11 (Ariz. Ct. App. 1999) (holding that reasonable regulations that do not significantly interfere with decision to enter into the marital relationship may legitimately be imposed).
Section I of this Note has provided some history on the evolution of marriage between ethnicities. Section II illustrates the general current rule of marital restrictions within wills. In Sections III and IV, this Note will examine the existing state of the law concerning testamentary will restrictions that are generally upheld, followed by those exceptions that are a bit contradictory. Sections V and VI explain why marital restrictions primarily based on ethnicity should be declared void despite their construction.

II. The Current State of the Law on Testamentary Marriage Restrictions

Generally, a testator may condition her devises as she pleases. It is established public policy to give great latitude to a testator in the final disposition of her estate. A court's primary objective is effectuating the testator's intent, and thus, her intention is to be given effect to the maximum extent allowed by law. It is not the court’s place "to question the [testator’s] wisdom, fairness or reasonableness" in her division of property. The testamentary devise of both real and personal property responds to the cherished ideal of preserving the testator's dominion over his own property. Nonetheless, the right to make a testamentary disposition is purely a creation of statute and under legislative control. Therefore, dispositions must remain legal.

The testator is limited in attaching certain conditions to the distribution of his property. For instance, a testamentary condition barring a devisee’s marriage is void as contrary to the public policy favoring marriage. Still, the courts have been divided when confronted with a testator’s conditions restricting the devisee’s uninhibited freedom to marry.

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18 See U.S. Nat'l Bank v. Snodgrass, 275 P.2d 860, 867–68 (Or. 1954) (holding that a testamentary provision requiring, as a condition to beneficiary’s taking, that the heir prove that she had not embraced a particular religious faith or married a man of that faith, before the age of thirty-two, did not unreasonably restrict freedom of beneficiary’s choice).

19 RESTATEMENT (THIRD) OF PROPERTY WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (2003) ("The controlling consideration in determining the meaning of a donative document is the donor’s intention. The donor’s intention is given effect to the maximum extent allowed by law."). Note as well that the Donor’s intention may be referred to as his "actual intention" as opposed to the donor’s attributed intention. To determine the donor’s intention, all relevant evidence, whether direct or circumstantial, may be considered, including the text of the donative document and relevant extrinsic evidence. Id. at 53.

20 See id. cmt. c. ("American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law.").

21 See id. ("American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law.").

22 See infra note 34; see also Watts v. Griffin, 137 N.C. 572, 572 (1905) (holding that a condition stating that if a devisee married a common woman, he would not have any interest in the house and lot given to him in the will is void for uncertainty and operated only to divest and not to prevent the vesting of the interest so given); Shackelford v. Hall, 19 Ill. 212, 212 (1857) (holding that a condition absolutely restraining marriage is void as against public policy). But see Turner v. Evans, 106 A. 617, 617 (Md. 1919) (finding that partial limitation of marriage is valid unless it unreasonably limits the right of the beneficiary to marry).
A. Marriage Restrictions Traditionally Upheld

As a general rule, restrictions, conditions, and limitations in partial restraint of marriage are upheld if they do not unreasonably restrict the freedom of the beneficiary’s choice of spouse. Case law suggests that an unreasonable handicap on the devisee’s choice of spouse is void. Common law, however, has dictated that virtually all partial restrictions on the devisee’s marriage in order to take are valid and reasonable—that is to say, only restrictions generally restricting marriage are void. In U.S. National Bank of Portland v. Snodgrass, the decedent’s daughter sued to have property given to her under the will despite the conditional provisions requiring her to refrain from marrying a Catholic man before her thirty-second birthday. The court found that the provision requiring the condition precedent was a valid, partially restrictive devise, and did not allow the devisee to take because she had married a Catholic man. The court based its reasoning primarily on a constitutional argument—that neither the invasion of a beneficiary’s right to religious freedom, nor unconstitutional discrimination, nor a violation of public policy arising from either category (religion or age) had occurred, thus the restrictions were therefore reasonable. Because the testator was not wholly or "generally" inhibiting the devisee’s right to marry by use of the restriction allowing the devisee to marry anyone who was not of the Catholic faith, the devise was only partially restrictive.

It is the courts’ duty to determine which partial marital restraints are reasonable and which are not. Courts have been fairly consistent in defining what testamentary restrictions will be upheld. These conditions include the right to limit the marriage to a certain individual or to a certain family or ethnicity. In Hall v. Eaton, for example, the court’s holding validated attempts by parents or guardians to prevent unmarried children from marrying named individuals, marrying before a certain age, marrying without consent, as well as attempts to

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23 See Snodgrass, 275 P.2d at 868 ('The general rule seems to be well settled that conditions and limitations in partial restraint of marriage will be upheld if they do not unreasonably restrict the freedom of the beneficiary's choice.').
24 Id. at 868 (discussing the presumption that where the restraint is not general, but merely partial, then the restraint may or may not be void).
25 Id. at 860 (holding that a testamentary provision requiring, as a condition to beneficiary's taking, that the heir prove that she had not, embraced a particular religious faith or married a man of that faith, before the age of thirty-two, did not unreasonably restrict freedom of beneficiary's choice).
26 Id. at 862 (discussing the decedent's devise).
27 Id. at 862 ("The appellant asserts that the ... provision of the will which disinherited her because of her marriage to a member of the Catholic faith before she was thirty two years old [is invalid].").
28 Id. at 867 (discussing the fact that there is a time limitation on the restriction—after age thirty two, the daughter was free to marry a Catholic and also receive her inheritance).
29 WILLIAM H. PAGE, PAGE ON THE LAW OF WILLS § 44.25.
prevent remarriage of spouses. Hall filed suit seeking a declaration that the condition in her father’s will providing that she not be married in order to receive her devise of an undivided one-half interest in a remainder to real estate was null and void as against public policy. The court reasoned that it is less desirable to encourage a child to divorce a certain individual as opposed to, at an earlier stage, to encourage a child not to marry that particular individual. However, attempts to prevent unmarried children from marrying at all (general restraints) are contrary to public policy and void—thus defining the line between general and partial restrictions of marriage.

Additionally, marital testamentary restrictions have been upheld when concerning a particular person. In Re Stone’s Estate held valid a provision against the marriage of a devisee, Grace Heile. The testamentary clause provided, "I give and bequeath to Grace Heile . . . the sum of one thousand ($1,000.00) dollars provided she does not marry Thomas Brazil. If she does enter into a marriage with the said Thomas Brazil, then this bequest is void." The right of Grace Heile to receive the legacy was dependent upon her ability to meet the condition "that she does not marry Thomas Brazil", it was at the time of the death of the testatrix that the gift to her was to take effect, provided she had not married Thomas Brazil. The condition "required by the testatrix was one of fact, and that was to be determined as it existed when the will took effect. The auditor found that the legatee did not marry Thomas Brazil, and this fact [was] undisputed." Therefore, the court found that the devisee was entitled to receive the legacy bequeathed to her. It necessarily follows that if one had married the "undesirable candidate" that the devise would be void. Barring any unforeseen circumstances, had Grace Heile married Thomas Brazil, the devise would have been void for violating the condition.

31 Id. at 808 ("[A]ttempts to prevent unmarried children from marrying named individuals (partial restraints), or from marrying before a certain age, or from marrying without consent, are valid.").
32 Id. at 806 ("Cynthia Ann Hall brought suit asking the trial court to declare null and void a condition imposed by her father’s will upon his devise to her of an undivided one-half interest in a remainder to real estate.").
33 See infra note 123.
34 See ibid., 631 N.E. 2d at 805 (holding that a condition imposed upon a testator’s daughter for devise of his property that she not be married at the time of his or his wife’s death did not encourage divorce, in violation of public policy, where testator’s motive was to protect daughter from misappropriation by her husband); see also Olin Browder, Conditions and Limitations in Restraint of Marriage, 39 Mich. L. Rev. 1288, 1323 (1941) (conceding that a general restraint of marriage is not upheld, but there are other ways to limit marriage of a devisee).
35 In re Stone’s Estate, 57 Pa. D. & C. 284, 288–98 (1947) (determining that the legatee did not marry the named person and so was entitled to receive the legacy).
36 Id. at 288.
37 Id.
38 Id. (providing that the condition became effective at the time of death of the testatrix).
39 Id.
40 Id. (finding that Grace Heile was entitled to receive her devise).
Generally, a testator can limit or restrict the marriage to a certain individual because the restriction of choice is not "unreasonable."\(^{41}\) The court in Maddox v. Maddox implies that simply reducing the eligible pool of bachelors or bachelorettes by one leaves open the great possibility that another suitable marriage partner is still available.\(^{42}\) The court gives no credence to the possibility that there may truly exist only one love for each person, considering only legality rather than a devisee’s personal preference. Thus, eliminating one, two or even an entire minority group, such as African-Americans in the United States, is reasonable because there are still approximately two hundred billion more people from which to choose whom are not of African-American descent.\(^{43}\)

*In re Liberman*\(^{44}\) establishes that one may also legally prevent a devisee from taking under the will by conditioning the devise upon marriage to a person of a certain ethnic background. In *Liberman*, the testator conditioned one devise to a child upon his marrying a "Jewess."\(^{45}\) The court stated that "conditions not to marry a Papist, or a Scotchman, or not to marry anybody but a Jew have been held good."\(^{46}\) Conditions such as these "seem to have been sustained whenever challenged."\(^{47}\) The testator in *Liberman* made it clear that he intended to restrain his son from marrying anyone but a Jewess.\(^{48}\) Subsequently, the court reasoned

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\(^{41}\) See Maddox v. Maddox, 52 Va. 804, 804 (1854) (holding that the "condition imposed by the bequest . . . to Ann Maria Maddox, which in effect forbade her to marry any other than a member of the Society of Friends, was an undue and unreasonable restraint upon the choice of marriage, and ought to be disregarded").

\(^{42}\) Id. ("[E]ven in those cases in which restraints of a partial character may be imposed on marriage, as in respect of time, place or person, they must be such only as are just, fair and reasonable.").


\(^{44}\) In re Liberman, 18 N.E.2d 658, 661 (N.Y. 1939) (citing Hodgson v. Halford, (1879) L. R. 11 Ch. Div. (Eng.) 959) (finding that limiting marriage to a person of a certain ethnic background, such as a Papist, is a valid marital restriction). It is important to note that despite the mature nature of many of these cases, the law remains valid. Most recent cases do not involve such restrictions as professional calling or the fortune of the potential spouse or ethnic affiliation. It is probable that these restrictions exist but are either (1) complied with or (2) settled out of court regularly. However, it is still possible for testators to restrict the marriage of their kin based on the race or ethnicity and religious affiliation of the potential spouse. See RESTATEMENT (SECOND) OF PROPERTY § 6.2 rep. n.4 (stating that "[n]o partial restraints on marriage outside a particular racial group were found. Possibly courts would be more reluctant to enforce a partial restraint in this area in light of the Civil Rights Acts of 1866 and 1968").

\(^{45}\) Liberman, 18 N.E.2d at 660. The devise also required that his siblings approve the marriage—otherwise they get his share.

\(^{46}\) Id. (citing Pacholder v. Rosenheim, 129 Md. 455 (1916)).

\(^{47}\) Id.; see, e.g., Pacholder v. Rosenheim, 129 Md. 455, 455 (1916) (holding that marriage through consent of parents is a partial restraint of marriage, both reasonable and valid); Hodgson v. Halford, (1879) 11 Ch. D. 959, 959 (U.K.) (finding that limiting marriage to a person of a certain ethnic background, such as a Papist, is a valid marital restriction).

\(^{48}\) Liberman, 18 N.E.2d at 659 ("[E]xtrinsic evidence establishes that the purpose of the condition, imposed by the testator, was to restrain his son from marrying any but a Jewess."). Yet, the point is moot in this case since other interested beneficiaries were required to approve his marriage or else they would get the property. Id. at 660.
that although it was acceptable to impose reasonable restrictions on marriage according to the standards of the testator, under the circumstances present here the restriction was void as against public policy.\textsuperscript{49}

Moreover, holding that a restrictive gift generally calculated to induce a beneficiary to marry or not to marry in a manner desired by testator may be valid, the \textit{Liberman} court held that "whether a condition [annexed to a testamentary gift] in restraint of marriage is reasonable depends, not upon the form of the condition, but upon its purpose and effect under the circumstances of the particular case."\textsuperscript{50} The court clarified by saying that what has been decided in previous cases may often guide decisions in analogous cases, but no rigid rule based on ancient precedents dictates a decision where the circumstances are different and reason points to another conclusion.\textsuperscript{51} This allows courts to decide these cases on a case-by-case basis, not to simply fall back on ancient principle.

Finally, the courts have traditionally upheld all marital limitations relating to a potential spouse's social position. In \textit{Greene v. Kirkwood},\textsuperscript{52} the court held that a gift over in the event of the devisee marrying a man "beneath her in social position" was valid.\textsuperscript{53} \textit{In re Harris' Will}\textsuperscript{54} established the courts' approval of testamentary conditions in restraint of marriage within particular classes of persons, similar to \textit{In re Stone's Estate's}\textsuperscript{55} holding relating to specific persons. The courts' reasoning in these cases rests principally on the historical perspective, and both primarily cite to \textit{Matter of Seaman's Will}.\textsuperscript{56}

\textsuperscript{49} \textit{Id.} at 650 ("[T]he natural tendency of the condition contained in the will is to restrain all marriage and for that reason it is void."). The court continued:

\begin{quote}
When the condition is considered in its complete setting it becomes evident that the intention of the testator, as expressed in his will, is not merely to prevent the beneficiary from marrying any person other than a Jewess or even from entering into an ill-advised marriage, but to prevent any marriage not approved by the very persons who by approval would lose the benefit of a legacy which they might otherwise keep. Both reason and authority dictate the conclusion that such a condition is invalid.
\end{quote}

\textit{Id.}\textsuperscript{50} \textit{Id.} at 661.

\textit{Id.} at 662.

\textit{Greene v. Kirkwood}, [1895] 1 I.R. 130 (Ir.) (holding that a gift over of real estate valid if the devisee marries a man other than her same social class).

\textit{Id.; see also Jenner v. Turner}, (1880) 16 Ch. D. 188, 188 (U.K.) (holding that a condition that the devisee shall not marry a domestic servant, or any person who has been a domestic servant, is valid).

\textit{See In re Harris' Will}, 143 N.Y.S. 2d 746, 748 (1955) (holding that testamentary restrictions in general restraint of marriage are void as against public policy, but partial restraints are not void).

\textit{See In re Stone's Estate}, 57 Pa. D. & C. 284, 288–89 (1947) (holding that if a devisee has fulfilled the condition for the gift at the time the will is executed, she is entitled to that gift).

\textit{In re Seaman's Will}, 112 N.E. 576 (N.Y. 1916). Here the will provided a third share to the testator's daughter, "provided, that at the time of my decease my said daughter shall be married to some person other than one Leo Fassler who now resides in the city of New York and is there engaged in the practice of law, or provided that at the time of my death the said Leo Fassler is dead." \textit{Id.} at 577. \textit{See, e.g.}, \textit{In re Harris' Will}, 143 N.Y.S.2d 746, 748 (1955) (stating that "conditions [in] general restraint of marriage were regarded at
It is apparent that in each of these cases, though they purport to take each case on its own merit, the historical reasoning is a primary and uniting characteristic. Even so, *Matter of Seaman's Will* was predicated on *In Graydon's Executors v. Graydon*. In *Graydon's Executors*, the Chancellor held lawful a restraint on marriage condition imposed upon a bequest to a devisee (his son). Such gift would be void should the son marry a daughter of a person named in the will, within a stated period of time. The court reasoned that:

[It is the duty of the courts to favor this or any other legal means which a father may adopt to enforce the authority which the law, for wise purposes, has given to him over his minor children, and that regard for his wishes and counsel in the more important concerns of their lives after maturity, which the untrammeled testamentary power conferred by our law is calculated to secure.]

This rule at common law, when first implemented, was created to protect minor children—that is, those who had not attained marriageable age or become of age to engage in self-determination. Thus, the testator implementing these marriage restrictions originally retained this discerning power because he was thought of as protecting his offspring before they could make their own informed decisions about their potential marriage partner.

Because courts depend heavily on the concept of what is "reasonable or uncertain," there emerges another common thread amongst the cases discussed above. Attributes that the courts hold enforceable in a marriage restriction (skin color, ethnicity, personal identity in the cases where one person is "forbidden" to a devisee, religion, social status) are generally thought to be *certain* characteristics: Those which are known characteristics for the most part and are generally permanent in nature. What is most peculiar about these various marital restrictions is that the court upholds such restrictions where the devisee (and his potential spouse) have no control over the circumstances (other than to choose another willing partner). These restrictions concern the potential spouse's permanent attributes, such as his race, ethnicity, or family culture. These are "certain" and unchanging characteristics of the individual. Traits such as family lineage and race are permanent, both of which the testator is permitted to

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58 *Graydon's Ex'rs v. Graydon*, 23 N.J. Eq. 229 (1888).
59 *Id.* The restraint was deemed lawful despite the fact that it required the son to break an engagement of marriage into which he had entered before he knew of the provision in his father's will and before the will was executed.
60 *Id.*
discriminate against. Other characteristics, such as occupation or financial situations, are changeable both for the better and for the worse; these are generally overruled.

Perhaps courts are deferring to a testator’s reasoning, not simply his intention. In this way, fathers can protect their daughters and mothers can protect their sons from what they "know" about an ethnic group or do not care for in a specific person or vice versa. By deferring to these wishes, however, courts are indirectly endorsing the values and ideals the testator holds by confirming a facially intentional, bigoted testamentary restriction, or at least letting the hatred or misconception concerning a particular person or group persist and simmer in the minds of the devisee (whether or not he chooses to conform). A man can not change his color, ethnicity, or familial roots. It is curious why courts enforce restrictions on marriage to a person of a specific race or ethnicity but not of a profession.

B. Partial Marital Restrictions Traditionally Overruled

As previously discussed, it has been held that no restriction that is uncertain or unreasonable will be legitimate. This subjective conception of "reasonableness" has been left to the courts to determine on an individual basis. What has traditionally been included in the category of voided restrictions are general restraints to marriage, marrying one from a certain profession or fortune, as well as marrying one of a certain social stature or group.

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61 See infra Part II.B for further discussion.
62 See supra note 23 (discussing unreasonable restriction of freedom of choice).
63 See supra note 51 (determining that courts should look at restrictions on a case-by-case basis rather than letting "ancient precedents" dictate decisions).
64 See In re Liberman, 18 N.E.2d 658, 660 (N.Y. 1939) (holding that although a testator may choose the objects of his own bounty, the court may deny validity to a condition contrary to public policy). States also universally have held that conditioning a devise on an heir never marrying (which is a general restraint) is void. See RESTATEMENT (SECOND) OF PROPERTY DONATIVE TRANSFERS § 6.2 cmt. a (2000) ("While complete prohibitions of marriage fail, guidance by parents and other donors, with respect to a particular marriage, validity may be exercised by means of partial restraints.").
65 See Conditions, Conditional Limitations, or Contracts in Restraint of Marriage, 122 A.L.R. 7, 30 (citing 1 Eq. Cas. Abr. 110, pl. 2) (stating that "it is said that a devise upon condition not to marry at all, or not to marry a person of such a profession or calling, is void, whether there be a limitation over or not; but if it were upon condition not to marry a Papist, or a certain person by name, it may be good"). But cf. Jenner v. Turner, (1880) 16 Ch. D. 188, 188 (U.K.) (holding that a condition that the devisee shall not marry a domestic servant, or any person who has been a domestic servant, is valid).
66 See Keily v. Monck, 3 Ridg. P. C. 205, 205 (1795) (holding that a condition that the legatee shall not marry any man who does not own at the time of his marriage an unencumbered estate in fee simple with a yearly value of £500, is invalid as amounting practically to a prohibition of marriage). A condition not to marry a man of a particular profession, or who lives in a named town or country, or who does not own an estate, are also in general restraint of marriage and are therefore void. Id.; see also State v. Lifer, 392 N.Y.S.2d 175, 177 (1976) (holding that marriage brokerage contracts are void as against public policy).
67 See Turner v. Evans, 106 A. 617, 617 (Md. 1919) (holding that wills which vest an estate to a
For instance, in *Turner v. Evans* the testator tried to limit his daughter's devise if she insisted on marrying one whom the testator failed to approve. The provision read, "provided she does not intermarry with the person who is now paying court to her, it being my intention not to interfere with my said daughter marrying any person whom I regard as her social equal, but so far as in my power to prevent her contracting an unsuitable marriage." The *Turner* court held this provision inoperable because the term, "social equal" is ill defined as well as uncertain in its determination. However, the court did consider the phrase "the person now paying court to her" as not unreasonable or uncertain (as the testator was aware of the suitor in question) but the restriction operated as mutually exclusive from the latter restriction of social equality and so, was upheld.

*Keily v. Monck* discusses the determination that a testamentary provision of requiring the devisee to marry someone of a certain fortune is invalid. *Keily* held that a provision that the legatee (a woman) shall not marry any man who does not own at the time of his marriage an unencumbered estate in fee simple with a yearly value of £500, is invalid as amounting practically to a prohibition of marriage. Though the court did not enumerate or quantify numerically, they implied that since the restriction cut off so many other eligible bachelors in favor of one who was quite substantially more affluent, that it effectively and unreasonably limited the daughter's choice of spouse.

Though Section A outlined that generally a person's religion was a valid testamentary restriction, some jurisdictions have forbidden the testator to condition devise on a potential spouses' religious beliefs. *Lasnier v. Martin* and *Maddox v. Maddox* held that to condition a devisee's taking on her marrying within a certain religion was void for uncertainty. In *Lasnier* the testator devised the residuary of his estate as follows: "After 21 years elapse after the death of my beloved wife, should the building be sold the amount to be divided amongst and between the children of my brothers and sisters that have daughter on the condition that she marry "some one who is her social equal" is void for uncertainty).
remained good Catholics and good Citizens." The devise was overruled as an unreasonable testamentary restriction. Similarly in Maddox, it was held that the devise to a daughter was unreasonable. The court invalidated the testamentary marriage restriction requiring a daughter to remain in the Society of Friends by picking a husband from among the congregation's eligible bachelors. In Maddox, it was found that there were merely five or six bachelors belonging to the Society of Friends in Virginia. Surely if a woman had only five or six men from which to choose, this would be unduly burdensome for her, but what arbitrary number would the courts set to determine the restriction reasonable and not unduly restrictive? Ten? One hundred? Three hundred? The court failed to elaborate.

C. Restrictive Devises Overruled in Other Areas

In re Potter's Will, the testator had directed that income derived from residue of his estate be dispersed "to and for the use support maintenance and education of the poor white citizens of Kent County generally." The court invalidated the devise as written. The court reasoned that the devise constituted a manner of governmental entwinement with affairs of a charitable trust protected by the Fourteenth Amendment, and the government could not enforce discriminating devises and motives.

Instead of invalidating the will altogether, the court chose to reform the devise using the cy pres doctrine. This doctrine seeks to preserve the

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76 Lasnier, 171 P. at 645
77 Id. at 647.
78 Maddox, 52 Va. at 807 (holding that "the condition imposed by the bequest of the third in remainder to Ann Maria Maddox, which in effect forbade her to marry any other than a member of the Society of Friends, was an undue and unreasonable restraint upon the choice of marriage, and ought to be disregarded").
79 Presently known as Quakers. See generally Brief of Plaintiff-Appellant, Packard v. U.S., No. 98-6223 (2d Cir. Dec. 21, 1998) (clarifying the synonyms for Quakers which have been previously used).
80 Maddox, 52 Va. at 804 ("When M arrived at a marriageable age, there were but five or six unmarried men of the society in the neighborhood in which she lived.").
81 In re Potter’s Will, 275 A.2d 574, 583 (Del. Ch. 1970) (holding a devise to assist "poor white citizens" invalid and against public policy).
82 Id. at 576.
83 See id. at 583 (finding that the Fourteenth Amendment applied in this situation due to entanglement doctrine as applied to a trustee corporation substantially owned by the state).
84 See id. at 582 (highlighting the fact that the state owned a 49% interest in the trustee corporation and appointed one third of the board of directors).
85 See id. at 583 (opining that cy pres doctrine can serve to meet the desires of the devisee while circumventing effects prohibited by the Fourteenth Amendment). The doctrine of cy pres is a rule of equity, and before it may be applied, three prerequisites must be met: (1) the court must determine whether the gift creates a valid charitable trust; (2) it must be established that it is impossible or impractical to carry out the specific purpose of the trust; and (3) and the court must determine whether, in creating the charitable trust, the testator or settlor had a general charitable intent. The doctrine can only be applied where the specific purpose of the trust fails due to impossibility, illegality, or impracticability. See In re Rood's Estate, 200 N.W.2d 728, 734
substantial intention of the testator at the expense of changing the form of the devise. In this case, the trust was changed to include non-white citizens, since between the time the testator had written the instrument and the effective date all people (African-Americans now included) became recognized as citizens. This saving device is applied so that when the specific purpose of a settlor cannot be carried out, his charitable intention will be fulfilled as nearly as possible. The court took the liberty of interpreting the terms of the devise, presuming the intent of the testator was to "aid the poor citizens of his county," in order to effectuate the best use of the trust instead of effectively voiding it altogether by revoking its tax-exempt status.

The Fourteenth Amendment does not prohibit racial or religious discrimination in private transactions unless state action is involved. The freedom to dispose of property at death, however, is still not considered a fundamental constitutional right. Indeed, the "right to testamentary disposition and the right to succession by will of property within the jurisdiction of a state exists only by statutory enactment by such state so providing and may be regulated, limited, conditioned, or wholly abolished by such state." Courts have held that at times a prohibition against alienating except to a small class of persons such as the testator's heirs is void. In Williams v. McPherson, the testator's aim was to restrict the use or ownership of his property to only his family. The provision was deemed void as contrary to public policy as a restraint upon alienation. This case mimics the concern that

(Mich. App. 1972) (stating that the cy pres doctrine is a saving device which could be applied in this case when the specific purpose of the settlor cannot be carried out, allowing his charitable intention to be fulfilled as nearly as possible); In re Lung's Estate, 5 Pa. D. & C. 3d 602, 613 (Pa. Com. Pl. 1978) (holding that where a will creates a fund for the establishment of an asylum for "white women" and it is clear that the primary purpose of the testator was charitable, the will shall be amended to remove the restrictions as to race and sex); In re Cramp's Estate, 77 A. 814, 815 (Pa. 1910) (deciding that the court may, under general jurisdiction of the court, have "the power to vary the precise terms of a charitable trust, when necessary").

See supra note 85 (describing the doctrine of cy pres).

86 See In re Potter's Will, 275 A. 2d 574, 581 (Del. Ch. 1970) (finding that devise was penned prior to recognition of universal citizenship).

87 See id. at 584 (applying cy pres doctrine to preserve the intent of the settlor).

88 See id. at 583 (using cy pres doctrine to preserve testator's intent).

89 See U.S. CONST. amend. XIV, § 1 (["N]or shall any state deprive any person of life, liberty or property, without due process of law.").

90 Heckler v. United Bank of Boulder, 476 F.2d 838, 841 (10th Cir. 1973) (citing Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 48 (1944)).

91 See Bank of Powhattan v. Rooney, 72 P.2d 993, 994 (Kan. 1937) (holding that a provision in a will preventing property from being alienated except to a particular class of persons is invalid); Williams v. McPherson, 5 S.E.2d 830, 831 (N.C. 1939) (holding that restraints upon alienation are void); Carpenter v. Allen, 248 S.W. 523, 525 (Ky. 1923) (finding no distinction between deed and will in regards to validity of prohibitions against alienation).

92 See id. at 830 (noting that testator's will provided that property could not be sold or bought except by testator's heirs).

93 See id. at 831 (finding that any prohibition of alienation is void and contrary to public policy).
the testator has in conditioning devises through marriage—they simply do not wish the "outsider" or "undesirable" person to have the use of their property. Most likely the property would be given to those that uphold the testator's ethical or belief system—one who would not allow the undesirable to use the property.

III. Arguments for Marriage Restrictions Being Upheld

There are various arguments which suggest that a testator's restrictions, whether they are based on marriage or not, should be upheld. The first, and perhaps the most prevalent argument, is that a testator's intent is the most important factor to courts and thus should be executed at all times. Thus, it follows that the court's main objective is to effectuate this intent to the extent that the intent does not violate state or federal laws. After all, the testator's property being devised is just that—the testator's. He is generally allowed to do with it as he pleases in life and does so upon his death with the use of a last will and testament.

Still others would argue that despite the case law, restricting marriage "partially" or in any other way should not be prohibited based on the four corners of the U.S. Constitution. This Constitutional argument first appeared in United States National Bank of Portland v. Snodgrass, which began to define the boundaries of modern-day marriage restrictions by stating:

[I]t is not until actions motivated by the intolerant extremes of bigotry contravene the positive law or invade the boundaries of established public policy that the law is quickened to repress such illegal excesses and in proper cases levy toll upon the offenders as reparation to those who have been damaged thereby.

Until the testator's devises are used in a way that offends the law, they are considered private, which the law must respect. The court noted that

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96 See Lauer v. Hoffman, 88 A. 496, 499 (1913) (discussing devise of property to testator's wife and daughter with a restriction on sale).
97 See Shelton v. King, 229 U.S. 90, 100 (1913) (holding "there is no higher duty which rests upon a court than to carry out the intentions of a testator when the provision is not repugnant to public policy"); see also Evans v. Abney, 396 U.S. 435, 439-40 (1970) (noting that Georgia law specifically allowed racial restrictions within devises); Claflin v. Claflin, 20 N.E. 454, 456 (Mass. 1889) (upholding a trust as valid against creditors despite age restrictions).
98 See RESTATEMENT (THIRD) OF PROPERTY § 10.1 (2003) ("The donor's intention is given effect to the maximum extent allowed by law.").
99 See PAGE, supra note 29, § 1.6 (discussing testator's discretion in devising property).
101 Id. at 863.
102 See id. at 864 (stating that the court will not modify a will unless it offends public law or policy).
Two general and cardinal propositions give direction and limitation to our consideration. One is the traditionally great freedom that the law confers on the individual with respect to the disposition of his property, both before and after death. The other is that greater freedom, the freedom of opinion and right to expression in political and religious matters, together with the incidental and corollary right to implement the attainment of the ultimate and favored objectives of the religious teaching and social or political philosophy to which an individual subscribes.

Thus, a testator would be free to devise his property as he wishes unless the disposition violated a state or federal law. Under this reasoning, every partial devise deemed "unreasonable" for reasons other than violating the Constitution or State law would be held valid.

The law has not approached marital restrictions in this way though. In Shapira v. Union National Bank, the provision in question provided that a son was not to take under his mother’s will unless he was married at the time of her death to a Jewish woman with Jewish parents. The court addressed both the constitutional and public policy arguments but ultimately focused on the reasonableness of the bequest. They found that the bequest was reasonable because of the ample time given to the son to find a suitable bride, but more importantly, because the will contained a gift-over to the State of Israel, the bequest did not operate in terrorem and was therefore valid. Because the testamentary restriction placed on him was not unreasonable, unconstitutional or against public policy, the son was not entitled to any of the estate because he had not complied with its terms.

The last key argument addressed in favor of a testator’s absolute autonomy considers the right to devise as a protected form of free speech as well as a freedom of religion. With few limitations, one of those areas with wide latitude of sufferance is found in the construction of one’s last will and testament. It is a field wherein no court will question the correctness of a testator’s religious views or prejudices. In Snodgrass, the court explains that

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103 Id.
105 See id. at 826 (finding a devise that only allowed disbursement if the testator’s son married a Jewish woman before his mother’s death was valid).
106 See id. at 831–32 (focusing on the clarity, definiteness and depth of the testator’s conviction in creating the condition for his son’s devise).
107 See infra Part VI (discussing the difference between in terrorem and non-in terrorem clauses).
108 See Shapira, 315 N.E.2d at 828 (reasoning that by enforcing the testamentary marital restriction, they were simply enforcing the restriction to take under the will, not the son’s uninhibited right to marry).
109 See id. at 832 ("It is the duty of this court to honor the testator’s intention within the limitations of law and of public policy.").
110 See Watts v. Griffin, 137 S.E. 572, 572 (N.C. 1905) (stating that the law refuses to enforce
"[o]ur exalted religious freedom is buttressed by another freedom of coordinate importance. In condemning what may appear to one as words of offensive religious intolerance, we must not forget that the offending expression may enjoy the protection of another public policy—the freedom of speech."111

But it is clear that courts have not adopted the above belief system; quite to the contrary, they have made numerous exceptions to legitimizing various whims of the testator (discussed briefly above).112 In order to effectuate the testator's intent to the fullest extent possible, the courts often utilize a balancing test when faced with the nature of dispute discussed below.113

IV. The Balancing Test: To Uphold or Not to Uphold?

*United States National Bank of Portland v. Snodgrass* established that:

> [n]o matter . . . how narrow and no matter how prejudiced or dogmatic the arguments of devotees of one belief may appear to others . . . , the right of either to so express himself is so a part and parcel of our public policy that it will be defended and protected . . . to the uttermost, unless it is found that the fanatical and unrestrained enthusiasm of its followers results in acts offensive to the positive law.

that no one may question it's authority. This is the prevailing view, and yet courts still play the balancing game when it comes to the interests of the testator versus the interests of the devisees and the state.115

For example, in *Hall v. Eaton*116 the testator imposed a condition upon the devise of property to his daughter that she not be married at the time of the latter of either his or his wife's death.117 The court held that this testamentary condition did not encourage divorce in violation of public policy.118 It reasoned

conditions in restraint of marriage or those offending the law).

112 See supra note 97–113 and accompanying text (discussing the policy of enforcing testamentary intent).
113 See Eyerman v. Mercantile Trust Co., 524 S.W.2d 210, 217 (Mo. Ct. App. 1975) ("No benefits are present to balance against this injury and we hold that to allow the condition in the will would be in violation of the public policy of this state.") (emphasis added).
114 Snodgrass, 275 P.2d at 864.
115 See RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. g (1959) (outlining the balancing test for capricious purposes and those that offend public policy); see also Eyerman, 524 S.W.2d at 217 (balancing positive benefits against injurious possibilities in following will as written).
117 See id. at 806 ("In the event that my daughter . . . shall be married at the date of the death of the latter to die of my spouse and myself, I give that portion of the estate which would have passed to my daughter, to Mercantile Trust and Savings Bank.").
118 See id. at 809 (upholding the validity of the testamentary condition).
that "[n]ot every encouragement of divorce is objectionable," especially where a testator's motive is to protect a child from an inharmonious marriage or a spendthrift spouse.\footnote{119} If the court had decided this condition did violate public policy, the invalidity of that part of the will would have defeated the decedent's overall testamentary intent and may have invalidated the entire will.\footnote{120}

According to \textit{Snodgrass}, the intent of the testator is the first and foremost priority of the court.\footnote{121} However, when a devisee is married at the time of the devise, the court should void as contrary to public policy any restriction of the testator's that encourages divorce.\footnote{122} It is not possible for the court to reach the result that it does without taking the testator's motive into account. In fact, the Hall court admits that if motive were not taken into account "[a] condition to a devise, the tendency of which is to encourage divorce or bring about separation of husband and wife, is against public policy, and void."\footnote{123} This holding is totally at odds with the maxim that the motive is not to be taken into account when determining the intent of the testator.\footnote{124} The court wanted to reach the correct and intended result, but could not have a fair outcome without looking into the testator's intended purpose and motivations.\footnote{125} Whether a testamentary condition in restraint of marriage is reasonable, and therefore valid, depends not upon the form of condition, but upon its purpose and effect under the circumstances of the particular case.\footnote{126}

\footnote{119} See id. at 808 (discussing instances in which encouragement of divorce would not be seen as violative of public policy). Incidentally, a divorce at the time suit was filed would have no effect upon the interest which daughter took. \textit{Id.} ("[O]nce the trust came into existence, once it was determined that Hall was married at the time of her mother's death, [she] had nothing to gain by a divorce. Even if [she] then divorced her husband she would not be entitled to principal unless she became 'a widow.'").

\footnote{120} \textit{Id.} at 807 (citing Williams v. Crickman, 405 N.E.2d 799, 804 (Ill. 1980)) ("Invalidity of part of the will based on one of these grounds, if it would defeat decedent's overall testamentary intent and scheme, may invalidate the entire will.").

\footnote{121} See U.S. Nat'l Bank v. Snodgrass, 275 P.2d 860, 866 (Or. 1954) ("In view of this liberality of testamentary power, we find no occasion to narrow the freedom of a testator's right to dispose of his accumulations unless we are compelled to bend before some other public law or policy establishing limitations not presently apparent.").

\footnote{122} See \textit{In re Peterson's Estate}, 365 P.2d 254, 256 (Colo. 1961) (reversing and remanding a decision disinheritning a widow who remarried and stating that the "law has been resourceful in developing policies which give stability to the marriage state and seek to preserve it as a basic institution in our society").


\footnote{124} See PAGE, supra note 29, § 30.7 (discussing the consideration of testator's intent).

In construing a will the court has no power to make a will for the testator or to attempt to improve upon the will which testator actually made. The court cannot begin by inferring testator's intention and then construe the will so as to give effect to this intention, however probable it may be.\ldots

\footnote{125} \textit{See Hall}, 631 N.E.2d. at 808–09 (expounding on the various reasons a testator may have for placing marital restrictions on a devise and applying that reasoning to the case at hand).

\footnote{126} See \textit{In re Harris' Will}, 143 N.Y.S.2d 746, 748 (Surr. Ct. 1955) (describing the precedent established
William Drennan refined his own balancing test and proffers that this approach is truly what should be considered given that the testamentary restriction is lawful to begin with. His test takes the following four factors into account: (1) nature of the property involved; (2) type of restriction imposed; (3) testator’s purpose in imposing the restriction; and (4) likely impact of the restriction on the heirs and society in general. This Note endorses this test, but argues that the last element should be accorded the most weight. The fact that the decedent no longer benefits from the property upon his demise, but may still effectively influence the lives of the living, is not a small concern. Moreover, the court discourages waste in general and to that end, it has the power to declare restrictions unreasonable if they impede the progression of society.

The "testator’s purpose," however, should also be given more weight. Drennan proffers that the purpose behind a testamentary will restriction simply requires the court to examine the testator’s reasonableness in making the devise. By taking the decedent’s purpose into account, it forces the court to look beyond the mere effect of the restriction and scrutinize the catalyst that is prompting the exclusion. The courts would be forced to realize and acknowledge the malicious and often bigoted reasons for conditioning a gift in such a way, and therefore, would be provided with a basis for declaring the devise void.

V. Marriage Restrictions Should be Held as Void

The constitutionality of marital restrictions has been argued and defeated on the ground that the fundamental right to marry was not being impeded directly. However, the argument that coercive will restrictions are protected

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127 See generally William Drennan, Wills Trusts, Schadenfreude, and the Wild, Wacky Right of Publicity: Exploring the Enforceability of Dead-Hand Restrictions, 58 ARK. L. REV. 43 (2005) (discussing the balancing test courts must carry out between a testator’s dead-hand restriction on the use of devised property and an heir’s ability to have that restriction declared unenforceable).
128 See id. at 47 (describing the factors courts consider when they cannot void a use restriction based on the technical rules of construction).
129 In the case of real property, if there is an unreasonable restriction inhibiting the use when there is no alternate devise or gift-over, the court will render the restriction unenforceable. The property then falls into residuary or the offending language is disregarded. See In re Scott’s Will, 93 N.W. 109, 109 (Minn. 1903) (examining whether a bequest is truly revoked when the new disposition instructs the executor to "destroy all the rest and residue of the money or cash or other evidence of credit that to me or to my estate may belong").
130 See Drennan, supra note 127, at 49 (discussing the differing respect accorded by courts to dead-hand restrictions that appear arbitrary versus restrictions that elucidate concrete concerns of the testator).
131 See id. at 62 (noting of court decisions that "[w]hen it appears that the testator was motivated by mere caprice, the [restriction] is likely to be unenforceable").
132 See Shapira v. Nat’l Union Bank, 315 N.E.2d 825, 827 (Ohio Misc. 1974) (distinguishing between the court being asked restrict an individual’s freedom to marry as compared to being asked to enforce the testator’s restriction upon his devisee’s inheritance).
on freedom of religion or speech grounds also fails by the reasoning of some courts. The Snodgrass court initially explained freedom of religion as:

[t]he right to espouse any religious faith or any political cause short of one dedicated to the overthrow of the government by force carries with it the cognate right to engage as its champion in the proselytization of followers or converts to the favored cause or faith. To that end its disciples are free to emphasize and teach what is believed by them to be its superior and self-evident truths and to point out and warn others against what its votaries deem to be the inferior, fallacious or dangerous philosophical content of opposing faiths or doctrines. 133

Since marriage is often closely linked with religion, restrictions upon it necessarily cause ethical dilemmas. Although a certain person or group of people may be excluded based on a testator's religious prejudice, this prejudice represents her belief system, no matter how obscure or non-mainstream. 134 Even so, the testator is imposing his religious views upon his daughter or son. In Snodgrass, at the time the will was written, the daughter was merely ten years old—not nearly old enough to formulate her own opinions and personal preferences, especially those concerning a marriage partner. 135 The fact that this testator would coerce and compel a young child into his way of thinking shows, or at least raises the possibility, that the daughter may not have chosen the same path on her own. Restricting an heir this way is essentially interfering with the heir’s "liberty of conscience." 136 Like one's choice of religion, "liberty of conscience" may be construed to apply to the choice of spouse.

It appears that in cases concerning marriage restrictions, courts are simply content to rely on precedent. In Snodgrass, for example, the court observes that "it has long been a firmly-established policy in Oregon to give great latitude to a testator in the final disposition of his estate, notwithstanding that the right is not an inherent, natural or constitutional right but is purely a creation of statute and within legislative control." 137 Laws have evolved greatly

134 See id. at 863 ("It is not until actions motivated by the intolerant extremes of bigotry contravene the positive law or invade the boundaries of established public policy that the law is quickened to repress such illegal excesses and in proper cases levy toll upon the offenders as reparation to those who have been damaged thereby.").
135 See id. at 861 (describing the facts of the case).
136 See PAGE, supra note 29, § 44.28 (explaining that some jurisdictions have found conditions restricting an individual's religion invalid and contrary to public policy as "interfering with the liberty of conscience").
137 See Snodgrass, 275 P.2d at 865 (relying on the precedential value of In re Leet's Estate, 206 P. 548 (Or. 1922)); see also Eyerman v. Mercantile Trust Co., 524 S.W.2d 210, 214 (Mo. Ct. App. 1975) (stating that "the taking of property by inheritance or will is not an absolute or natural right but one created by the laws of the
within the last one hundred and fifty years, particularly concerning various ethnicities. Looking at historical accounts of what marital restrictions have and have not been enforced, then, is not warranted.

VI. Marital Restrictions Should Be Held as In Terrorem Per Se "Making a will is an exercise of power without responsibility." 138

This section looks critically at the intent of the testator, comparing the in terrorem 139 clause to the non-in terrorem clause and concluding that the validity of the restrictive devise should not depend on its construction. Indeed, this Note proposes that all marriage restrictions should be considered in terrorem and thus held void. This section shall draw a further parallel between coercive behavior that has voided testamentary devises and those restrictive devises that wrongly emulate coercive behavior and have been upheld.

The courts will uphold a restriction of partial character 140 where it is both reasonable in itself and does not operate purely in terrorem. 141 The "in terrorem" rule was derived from the civil law and is defined as a condition subsequent which is against "public policy, public decency or good manners will be treated as in terrorem and void unless there is a specific devise over" (e.g., a 'gift over'). 142 A clause that is said to be operating in terrorem, is one that

138 See Hirsch & Wang, infra note 161, at 13 (citing M. Meston, The Power of the Will, 1982 JURID. REV. 172, 173) (discussing dead-hand restrictions and proposing that lawmakers consider not only how long a testator effectively control property, but in what ways that testator proposes to control the property).

139 Courts have generally not favored in terrorem clauses and have construed these clauses strictly in order to prevent forfeitures of a testator's property. See DiMaria v. Silvester, 89 F. Supp. 2d 195, 199 (D. Conn. 1999) (stating that although recognized as valid in principle, an 'in terrorem' clause is not favored by the courts and is to be narrowly construed in order to prevent forfeitures). An in terrorem clause is a "provision designed to threaten one into action or inaction; esp., a testamentary provision that threatens to dispossess any beneficiary who challenges the terms of the will." BLACK'S LAW DICTIONARY 1073 (8th ed. 2004).

140 See Turner v. Evans, 106 A. 617, 617 (Md. 1919) (finding that partial limitation of marriage is valid unless it unreasonably limits the right of the beneficiary to marry).

141 See Watts v. Griffin 50 S.E. 218, 218 (N.C. 1905) (holding that a clause in testator's will providing that should the testator's "sons, Frank, Eugene and Sam, at any time marry common women, or if either of them marry a common woman, then in such event they shall not have any interest in the house and lot devised in paragraph first of this will," is void for uncertainty); see also RESTATEMENT (THIRD) OF TRUSTS § 29 (2003) ("[A]lthough one is free to give property to another or to withhold it, it does not follow that one may give in trust with whatever terms or conditions one may wish to attach. This is particularly so of provisions that the law views as exerting a socially undesirable influence. . . ."); In re Coleman's Estate, 317 A.2d 631, 633-34 (Pa. 1974) (declaring void a provision prohibiting persons married to non-Protestants from being appointed as trustees as a provision that overburdens the judicial system and merely reflects a settler's "personal vagaries" unrelated to the trust purpose).

142 In re Alexander's Estate, 19 A.2d 374, 375 (1941) (quoting In re Carr's Estate, 22 A. 18 (Pa. 1890)). Provisions against marriage and against contest of the will are the conditions to which the rule is most frequently applied. The rule does not extend to conditions precedent. See generally In re Estate of Wells, 983 P.2d 279 (Kan. App. 1999); In re Estate of Hamill, 866 S.W.2d 339 (Tex. App. 1993); In re Estate of Peppler, 971 P.2d 694 (Colo. Ct. App. 1998).
operates to discourage, intimidate, and terrorize one into doing what one might not do otherwise.\textsuperscript{143} This clause will be sustained where the will especially directs that the share of the person violating the condition shall be added to the residuary gift.\textsuperscript{144} The mere absence of such a gift-over suggests the \textit{in terrorem} mode of the gift.\textsuperscript{145} A testator's failure to give the devise to another if the heir fails to comport with the restriction is viewed as spiteful and void. What will be viewed as spiteful, malevolent, or even capricious may depend on whether the testator includes a gift of the restricted property to another for their enjoyment.

In \textit{Maddox v. Maddox},\textsuperscript{146} the testator, a member of the Society of Friends,\textsuperscript{147} devised to his niece the remainder after a life interest, "during her single life, and forever, if her conduct should be orderly, and she remain a member of the Society of Friends."\textsuperscript{148} When the niece became of age, there were only "five or six unmarried men of the Society in the neighborhood in which she lived."\textsuperscript{149} When she subsequently married a man who was not a member of the Society of Friends, she ceased to be a member of the Society and thus forfeited her rights to the remainder interest.\textsuperscript{150} According to \textit{Shapira},\textsuperscript{151} the court should have enforced the marital restriction because she failed to follow the terms of the devise; however, in \textit{Maddox}, the devise was void for unreasonableness.\textsuperscript{152} The court found it unreasonable that a woman would be forced to choose a spouse from only six candidates and implying that one should not be forced to look beyond one's surrounding neighborhood.\textsuperscript{153} This holding clearly shows that the court is taking the totality of the circumstances into account in direct conflict with \textit{Shapira}.\textsuperscript{154}

\textsuperscript{143} In general, gifts that are given on condition subsequent, gifts that inspire fear or dread, have been termed by courts as \textit{in terrorem} gifts. \textit{See In re Andrus' Will}, 281 N.Y.S. 831, 845 (Surr. Ct. 1935) ("What makes them \textit{in terrorem} in character is the fact that the legacy becomes null and void if the legatee fails to observe the condition and there is a gift over to persons other than through the residuary clause."). The court went on to state: "It is a method of bringing pressure to induce the surrender of something. It is termed the doctrine of \textit{in terrorem}.").

\textsuperscript{144} Id. (determining that clauses are \textit{in terrorem} if the gift over is by a means "other than through the residuary clause").

\textsuperscript{145} \textit{See supra note} 79 and accompanying text (discussing the Society of Friends).

\textsuperscript{146} \textit{Maddox v. Maddox}, 52 Va. 804 (1854).

\textsuperscript{147} \textit{Maddox}, 52 Va. at 804.

\textsuperscript{148} Id.

\textsuperscript{149} Id. ("[B]y that act she ceased to be a member of the society.").

\textsuperscript{150} Id. ("[T]he condition imposed by the bequest of the third in remainder to Ann Maria Maddox, which in effect forbade her to marry any other than a member of the Society of Friends, was an undue and unreasonable restraint upon the choice of marriage, and ought to be disregarded.").

\textsuperscript{151} Id. ("To say there were members of the society residing in other counties, is no answer to the objection.").

\textsuperscript{152} \textit{Shapira}, 315 N.E.2d at 831 (deciding not to take into account the population of available Jewish women or the fact that the testator's son could look for a potential spouse outside his community).
The court in *Taylor v. Rapp* did not consider the testator’s devise *in terrorem* because of a clear gift-over to the younger daughter, Jeannette Rapp. The devise provided for a:

> 'remainder . . . to my two daughters, NANNETTE and JEANNETTE RAPP, in equal parts, share and share alike. However, if my oldest daughter does marry JODY TAYLOR, a boy I do not like and care for in any respects; said daughter NANNETTE RAPP does not share in any respects with my youngest daughter JEANNETTE RAPP.'

was found not to operate. Had the gift to the other sister not been made, the clause presumably would be held null and void as operating *in terrorem*. The testator has the freedom to dispose of his property; however, the doctrine of *in terrorem* was clearly designed to catch malicious intent. By restricting gifts this way, the testator intimidates and discourages an heir into thinking that she is not competent to make her own decisions regarding her marital future. Even with such a gift over, however, it cannot be considered good or decent to dictate the color or ethnicity of a relative’s future mate.

The simple insertion of this "gift-over clause" should not prevent an heir from taking under the will. In the *Taylor* example, the father’s apparent dislike for a probable suitor or acquaintance of his daughter clearly is the reason behind his forbidding marriage between the two. However, the father is only prohibiting marriage to one individual, not an entire ethnic or racial group. The testator’s intent to influence and coerce an heir into the testator’s moral belief system does not change simply by adding the gift over provision. Undoubtedly, if "a Mexican" or "an Arab" replaced the name "Jody Taylor" in the example above, more eyebrows would rise and the testator’s bigotry would shine through, regardless of the presence of a gift-over clause.

Conditioning spousal choice though bribery and heavy inducement of a testamentary gift is barely better than coercion, if at all. In general, coercion is defined as "conduct that constitutes the improper use of economic power to compel another to submit to the wishes to one who yields it." In the laws of probate, a will itself is declared invalid if it is found that the testator had "any pressure upon the testator’s mind, which overpowers it. . . . The fact that it is not physical coercion is sometimes indicated by calling it moral coercion." Simply
because a testator subsequently adds a gift over clause to one that otherwise would be considered *in terrorem*, does not side-step the reality that the testator’s intent is coercion or at best, influence over the lives of those which the testator has no legal control and should have no influence. The testator no doubt realizes this and so attaches incentive for the devisee to adopt the testator’s way of thinking or effectuate the testator’s wishes. This is, in essence, coercion. The testator has no interest in another’s marriage, or the lives of the living in general, since he is dead and derives no benefit one way or another. They are reluctant to look outside the document to give property to a rightful heir who may have married wrongly in the testator’s eyes; by the same token, the court indirectly endorses a testator’s intolerance, and often-prejudicial attitudes. Instead, courts defer to the testator’s concept of “reasonableness,” discussed above. One must ask whether if it is truly right to bully or coerce another into one’s own way of thinking?

Although these restrictions may not operate as legally *in terrorem*, suffice it to say that perpetuating the terrifying motive of bigotry is certainly the intended outcome of these restricted dispositions and should not play any part in the choices one makes for a mate. Forbidding a marriage to one, or any class of persons for that matter, should per se be considered *in terrorem*.

In reality, to avoid such restrictions testators may be inclined to disinherit their children completely (that is, those who put their own ideals before their blood). It is also possible, however, that the temperature of the testators would generally change and testators may become more sympathetic to a devisee’s matrimonial decision. Then again, it is possible to draw up a will restricting devises on other legal characteristics. Though this last alternative may not completely solve issues of a discriminatory motive on the part of the testator, it would keep the devises legal and outwardly less controversial.

**VII. Conclusion**

*My strongest convictions as to the future of the negro race therefore is, that his will not be expatriated nor annihilated, nor will he*

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160 In fact this may be the case. The testator’s thought process may lead him to devise his property in such a way as to effect his most desirable wishes, if he cannot effectuate those, he may opt to give his property to another who he believes is more apt to share his moral values in that respect or other secondary concerns.

161 There is a lot to be said for this type of approach; production of evidence can be a very tedious, lengthy and strenuous process. There is also a great chance of fraud. However, in these circumstances, there is a compelling argument against allowing the dead hand to enter a marital relationship. See generally Drennan, *supra* note 127; Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6–14 (1992).
forever remain a separate and distinct race from the people around him, but that he will be absorbed, assimilated and it will only appear finally... in the features of a blended race.\textsuperscript{162}

The courts have been wrongly upholding marital restrictions based on race and ethnicity. Race may be certain but is certainly not a reasonable restriction to impose on devisees. Moreover, the courts have looked beyond the face of the document where a devisee may be slighted into the intent of the devise and voided those sections which yield an unpleasant outcome. Further, these ethnic and race conscious devises should be held in terrorem as coercive tactics despite the gift over, due to the fact that the malicious intent is apparent with or without the gift-over clause. Allowing these ethnic and albeit partial marital restrictions only perpetuates racially divided attitudes.

There are many personal reasons for a testator to want to limit an heir's choices of spouse, but the courts fail to address a testator's motive (for the most part) despite the belief that motive fuels intent.\textsuperscript{163} Ultimately, a testator must decide for himself when drawing a will if the heir's happiness is worth sacrificing for one's own selfish prejudices. The country, much less the world, becomes a better, more forward thinking, tolerant place without the in terrorem spousal restrictions imposed by the dead. To completely eradicate discrimination, the freedom to marry needs to continue at death.

Though most agree with the fact that one should be able to dispose of his private property as he likes, such restrictions severely restrict the enjoyment of the property being disposed of by those the testator clearly considers eligible to own it. In effect, the testator is placing his ideal before the person to whom he wishes to devise his property and creating uncomfortable situations in the process. Because the power to devise is given by statute, states retain the power to amend and enact legislation to overcome the discriminatory intent of testators in devising their property. Therefore, this Note urges states to reconsider letting the dead dictate to their heirs with whom they can spend the rest of their lives.

\textsuperscript{162} SPIKARD, supra note 9, at 297 (citing Frederick Douglass).

\textsuperscript{163} JOHN H. WIGGAMORE, A STUDENTS' TEXTBOOK OF THE LAW OF EVIDENCE 76 (1935) (stating that, "[t]he term 'motive' is unfortunately ambiguous to that of intent. That feeling which internally urges or pushed a person to do or refrain from doing an act is an emotion, and is of course evidential towards his doing or not doing the act").