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Illinois  
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In a typical trust, a grantor may direct a portion of his trust estate to be allocated to his descendants upon his death.<sup>1</sup> Grantors sometimes attach conditions onto the receipt of the trust estate, such as the beneficiary being employed or in school.<sup>2</sup> One such condition was examined by the Illinois Supreme Court in *In re Estate of Feinberg*, where the grantor stipulated that only descendants who married within the Jewish faith could receive a portion of the trust estate.<sup>3</sup> In their analysis of the legality of this stipulation, the Illinois Supreme Court referred to the provision as a “beneficiary restriction clause.”<sup>4</sup>

Beneficiary restriction clauses have been analyzed by Illinois courts in the context of restrictions on remarriage<sup>5</sup> and restrictions on divorce.<sup>6</sup> Additionally, scholars have predicted how courts would analyze beneficiary restriction clauses that restrict LGBT descendants from receiving a portion of the trust estate.<sup>7</sup>

Even before the *Dobbs* decision, reproductive rights have been a point of contention among individuals in the United States.<sup>8</sup> With abortion being an emotional and political topic, it is not unlikely that a grantor may decide to

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<sup>1</sup> 35 Ill. Law and Prac. Trusts § 1.

<sup>2</sup> Lauren J. Wolven, *Incentive Trusts and Planning Across Generations*, SA020 A.L.I.-C.L.E. 175 (2019).

<sup>3</sup> *In re Estate of Feinberg*, 919 N.E.2d 888, 891 (Ill. 2009).

<sup>4</sup> *Id.*

<sup>5</sup> See *Matter of Estate of Gehrt*, 480 N.E.2d 151 (Ill. App. Ct. 1985).

<sup>6</sup> See *In re Gerbing’s Estate*, 337 N.E.2d 29 (Ill. 1975).

<sup>7</sup> See Julian Valdes, *From the “Jewish Clause” to the “Homosexual Clause”: An Analysis of Beneficiary Restriction Clauses Which Restrict Same-Sex Marriage in Illinois*, 43 S. ILL. UNIV. L.J. 771 (2019).

<sup>8</sup> Julie Rovner, *Roe v. Wade Turns 40, But Abortion Debate is Even Older*, NPR (Jan. 22, 2013), <https://www.npr.org/sections/health-shots/2013/01/22/169637288/roe-v-wade-turns-40-but-abortion-debate-is-even-older>.

condition the receipt of the trust estate on a descendant not having received an abortion. The enforceability of a trust provision that impacts the reproductive decision-making of descendants has yet to be analyzed by courts.

When the validity of any beneficiary restriction clause is in question, courts determine whether the provision is against public policy.<sup>9</sup> Illinois courts will find a provision to be void against public policy if "...the agreement is so capable of producing harm that its enforcement would be contrary to the public interest."<sup>10</sup> Examining the enforceability of a trust provision that conditions receipt of inheritance on whether or not a beneficiary has received an abortion warrants an analysis balancing two facets of Illinois public policy: reproductive freedom and testamentary freedom.

### **Illinois Public Policy**

#### *Reproductive Freedom*

Illinois has a history of safeguarding reproductive freedom. In 2019, Illinois legislature passed the Reproductive Health Act.<sup>11</sup> This act codified the principle that the choice of an individual to birth a child or to terminate a pregnancy is a fundamental right.<sup>12</sup> The act further prevents the state from interfering with an individual's decision-making about her reproductive health.<sup>13</sup>

Recently, Illinois passed the Youth Health and Safety Act.<sup>14</sup> This act repealed the Parental Notification Act of 2021.<sup>15</sup> The result is that a pregnant minor is now able to make decisions about her reproductive health with or

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<sup>9</sup> In re Estate of Feinberg, 919 N.E.2d at 894.

<sup>10</sup> *Id.*

<sup>11</sup> 755 ILL. COMP. STAT. 55 (2019).

<sup>12</sup> 755 ILL. COMP. STAT. 55/1-5 (2019).

<sup>13</sup> *Id.*

<sup>14</sup> H.B. 370, 102d Gen. Assemb. (Ill. 2021).

<sup>15</sup> Press Release, State of Ill., *Gov. Pritzker Signs Legislation to Further Protect Reproductive Rights* (Dec. 17, 2021), <https://www.illinois.gov/news/press-release.24287.html>.

without the involvement of a family member or guardian.<sup>16</sup> The Youth Health and Safety Act states that “it is in the public policy interest of the State to ensure that Illinois residents...are safe and free from barriers to access...when accessing reproductive health care.”<sup>17</sup>

Further, shortly after the draft of the *Dobbs* opinion was released, Governor Pritzker stated in a press release that “...no matter what atrocity of an opinion the Supreme Court officially rolls out this summer in regards to *Roe versus Wade* – abortion will always be safe and legal here in Illinois.”<sup>18</sup> The legislature of Illinois reflects that the state has a commitment to protecting an individual’s right to make a decision about her pregnancy.

#### *Testamentary Freedom*

In *In re Estate of Feinberg*, the Illinois Supreme Court noted that “...the public policy of the state of Illinois protects the ability of an individual to distribute his property, even after his death, as he chooses, with minimal restrictions under state law.”<sup>19</sup> This policy is supported by both Illinois legislation and caselaw.

The *Feinberg* court analyzed the Probate Act, which limits testators in only two regards.<sup>20</sup> First, the actions of a surviving spouse can trump the intentions of a testator.<sup>21</sup> Second, if a testator wishes to disinherit a child born after the instrument is created, the testator must expressly disinherit the child.<sup>22</sup>

In addition to the Probate Act, the Illinois Trust Code supports broad testamentary freedom. The code states that the terms of the trust instrument

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<sup>16</sup> Press Release, State of Ill., Gov. Pritzker Speaks Out Against Overturning of *Roe v. Wade*, Affirms Reproductive Rights (May 3, 2022), <https://www.illinois.gov/news/press-release.24841.html>.

<sup>17</sup> HB 0370 H.B. 370, 102d Gen Assemb., §5(6), (Ill. 2021).

<sup>18</sup> Press Release, St. Ill., Gov. Pritzker Speaks Out Against Overturning of *Roe v. Wade*, Affirms Reproductive Rights (May 3, 2022).

<sup>19</sup> *In re Estate of Feinberg*, 919 N.E.2d at 896.

<sup>20</sup> *Id.* at 895.

<sup>21</sup> 755 ILL. COMP. STAT. 5/2-8(a); *In re Estate of Feinberg*, 919 N.E.2d at 895.

<sup>22</sup> 755 ILL. COMP. STAT. 5/2-3(c); *In re Estate of Feinberg*, 919 N.E.2d at 895.

will govern unless they are contrary to law.<sup>23</sup> The Probate Act and the Illinois Trust Code minimally restrict a testator's freedom, therefore supporting the policy of broad testamentary freedom.

This freedom is further supported by Illinois caselaw. Illinois courts have noted that "a testator has the right to distribute her property as she wishes"<sup>24</sup> and that the role of the court is to determine and carry-out the intent of the testator.<sup>25</sup> This caselaw echoes the trend of Illinois legislation to protect the right of a grantor to allocate his estate as he sees fit.

### **Application of Illinois Public Policy**

Public policy on testamentary and reproductive freedom do not outwardly conflict. However, the two policies would be in opposition in the event that a grantor conditioned receipt of an inheritance on descendants not having received an abortion. If an Illinois court were called upon to analyze the validity of such a beneficiary restriction clause, the court would likely find the provision to be void as against public policy.

Enforcing the provision would be contingent with the Illinois policy to uphold the intentions of the grantor. However, it would also contravene the long-held commitment to safeguarding reproductive freedom. Even though caselaw and legislation supports broad testamentary freedom, the dialogue surrounding the policy lacks the dedication found in reproductive legislation.<sup>26</sup>

This analysis would be different for states that have restricted abortion post *Dobbs*. For example, in states like Missouri where abortions are highly

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<sup>23</sup> 760 ILL. COMP. STAT. 3/105(a).

<sup>24</sup> *In re Estate of Mank*, 699 N.E.2d 1103, 1107 (Ill. App. Ct. 1998).

<sup>25</sup> *National City Bank v. Northern Ill. Univ*, 818 N.E.2d 453, 458 (Ill. App. Ct. 2004).

<sup>26</sup> See Press Release, State of Ill., *Gov. Pritzker Speaks Out Against Overturning of Roe v. Wade, Affirms Reproductive Rights* (May 3, 2022) (Gov. Pritzker, Lt. Gov. Stratton, House Speaker Welch, and fellow Illinois politicians are quoted adamantly disagreeing with the draft of the *Dobbs* opinion).

restricted, excluding beneficiaries that have had an abortion would be consistent with the policy of the state.

### **Conclusion**

Legislation regarding reproductive freedom continues to evolve post *Dobbs*.<sup>27</sup> Because the legislation surrounding reproductive rights varies between states, it is important to understand how other areas of the law will operate within the specific legislation and public policy of each state. In Illinois, it is likely that the state will continue to govern with an eye towards reproductive freedom and void beneficiary restriction clauses that infringe upon an individual's right to reproductive freedom.

Edited by Allison Frisella

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<sup>27</sup> Sarah McCammon, *Two Months After the Dobbs Ruling, New Abortion Bans are Taking Hold*, NPR (Aug. 23, 2022), <https://www.npr.org/2022/08/23/1118846811/two-months-after-the-dobbs-ruling-new-abortion-bans-are-taking-hold>.