

Daily Journal

www.dailyjournal.com

FRIDAY, JULY 10, 2026

Can a will discriminate when the dead hand controls the future?

California strongly protects testamentary freedom, but wills and trusts that discriminate on the basis of race, religion or other protected traits may cross a legal line.

By Clifford Klein

Imagine Romeo and Juliet as a probate case with two lovers from families with long-standing, deep-seated animosities. Romeo's parents, from the House of Montague, are concerned about their legacy. To ensure that none of their property ever goes to a Capulet, their trust has been written to disinherit their son if he marries Juliet.

Shakespeare didn't disclose the source of the families' infamous dispute, but it may have been, at heart, tied to the religious dispute between the Pope and the Holy Roman Empire. The bard's play might have involved two enmity scenarios: one based on family, the other on religion.

Disinheritance of children might seem cruel, but if based on simple animosity between families, the disenfranchised heir probably has no recourse. Romeo may have cried foul, but the Montagues were free to do whatever they wanted with their property, including leaving him entirely out of their estate. The property was theirs to do with as they chose, and they could direct it to whomever they wanted. Such has been the law for centuries.

But what if the real reason for the Montagues' animosity and Romeo's disinheritance was Juliet's religion? Or her nationality (recall the rivalries between Venice and Genoa)? Or some other immutable characteristic over which she had no control? Shakespeare's plays may be timeless, but so are the reasons for a purported disinheritance.



Shutterstock

"Suspect" reasons

Imagine that the reason Romeo was targeted for disinheritance was because of Juliet's race, religion, sex or national origin — not just some old family grudges. Now we're looking at an entirely different probate case. If Romeo violated the terms of his father's trust by marrying someone from a "suspect class," could he be immediately written out of the estate, with no heirlooms, jewelry or castle to inherit?

Alas, we'll never know; poor Romeo predeceased his dad. But the "suspect class" conflict continues to show up in modern probate cases.

Such cases raise a host of questions: Are "suspect" clauses enforceable? Can the government intrude into this deeply personal and private decision? Does religious freedom for individuals and families outweigh any compelling public interest against discrimination? On what grounds might the government be able to extend laws originally intended to protect public accommodations and employment into private family matters?

A modern will or trust could be drafted to disinherit a beneficiary if they marry a person who is Black, gay, gentile or foreign. That document sets up a classic battle be-

tween testamentary freedom and public policy. Whether it can be enforced may depend on where the probate occurs and which suspect class is involved.

Years ago, I attended a statewide seminar for judges on trusts and estates at which the instructors summarily dismissed the question of enforceability with no discussion. These experienced judges stated simply that a testator had the right to give his or her property to whomever they wished. It's a troubling issue, and the law offers little help in clarifying it. But recall the landmark case of *Shelley vs. Kraemer*

348 U.S.1 (1948), the U.S. Supreme Court outlawing restrictive covenants based on race that are enforced through state action. Imagine a trust whose principal asset is a house, and that trust disinherits a beneficiary who marries a Black person. Is it now a case of housing discrimination?

Donor's intention

The Restatement (Third) of Property: Wills and Other Donative Transfers (Restatement) says that property owners have an almost unrestricted right to dispose of property, with donor intention as the controlling factor. California Probate Code Section 21102 likewise provides that the "intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument."

But there is a caveat: Under the Restatement, courts are obligated to effectuate their intent "to the maximum extent allowed by law." This means that even though they cannot substitute their judgment or values for those of a testator, courts must intervene if an intended disposition leads to a result prohibited or restricted by law or public policy. Trust provisions are unenforceable under the Restatement if they "are contrary to public policy." "Among the rules of law that prohibit or restrict freedom of disposition in certain instances are those relating to ...impermissible racial or other categorical restrictions..."

The Restatement has been cited by California courts, including the California Supreme Court (See *Estate of Duke*, 61 Cal.4th 571 (2015), *Dudek v. Dudek*, 34 Cal.App.5th 154 (2019)), so arguably it serves as a precedent in California. American and state law thus curtail freedom of disposition to the extent that the donor intends to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law, including rules and principles derived from the U.S. Constitution, state constitutions or public policy. It should therefore prohibit or restrict dispositions that involve impermissible racial or other "suspect" categorical restrictions.

Restraints on marriage

The Restatement distinguishes between total restraints on marriage, which are invalid, and partial re-

straints, which could be valid if the person disinherited still has reasonable opportunities to marry. Civil Code section 710 provides that "[c]onditions imposing restraints upon marriage ... are void; but this does not affect limitations where the intent was not to forbid marriage, but only to give the use until marriage."

In California, restraints on marriage and remarriage are void, even if the testator clearly intended the restraint and the will or trust expressly conditioned inheritance on compliance with that restraint. (See *Estate of Duffill* (1919) 180 Cal. 748.) Under Civil Code Section 710, any conditions imposing restraints upon marriage — except upon the marriage of a minor — are void. Some commentators see a distinction between partial restraints limiting the pool of eligible partners and total restraints, and disinheritance tied to an event that has already happened might be treated differently

While outright restraints on marriage involving "suspect" categories have been held to be unenforceable (See *Loving vs. Virginia*, 388 U.S. 1 (1967) and *Obergefell vs. Hodges*, 576 U.S. 644 (2015)), some state courts have shown tolerance for partial restraints, especially those involving religion. These clauses, the courts have reasoned, were not restraints on marriage per se, just conditions for the receipt of estate benefits.

In Massachusetts, for example, a parent's will provided that if the child married "a person not born in the Hebrew faith," his interest would go to the next in line as if "such beneficiary had died before becoming entitled by the provisions hereof to such portion or portions, interest or interests, without leaving lawful issue." The son's wife, from a Roman Catholic family, converted to Judaism after the parent's death. The court said that the restraint was reasonable and that at the time of marriage, the wife "was not in any sense Jewish or Hebrew and it could not then be said that she was born in the Hebrew faith." (*Gordon v. Gordon*, 124 N.E.2d 228, 332 Mass. 197 (1955))

In the California case of *Estate of Guidotti* (90 Cal.App.4th 1403 (2001)), the appellate court cited early 20th century decisions inval-

idating clauses that restrain marriage generally or marriage to a particular person. It ruled that if the settlor's intent would discourage remarriage or cohabitation, it violated public policy and was therefore invalid.

In California, a trust or will that attempts to strip a beneficiary of their inheritance simply because they got married or remarried will not be honored. California courts will strike the restriction and allow the beneficiary to keep their inheritance free and clear of the condition.

Beyond restraints

California law ostensibly honors testator intent, but the state has one of the strongest public-policy frameworks in the country. This includes the California Constitution, art. 1, Section 7 (equal protection) and Civil Code Sections 51-53 (the Unruh Civil Rights Act). State courts have consistently struck down private actions that result in racial and religious discrimination in public accommodations and, more recently, they have expanded protection when discrimination is based on gender, gender identity and disability.

Any will or trust condition that results in discriminatory acts could thus be held invalid. The Unruh Civil Rights Act, however, is expressly limited to public accommodations, services and housing. The law has not been applied to so-called "private" clubs. Might California courts expand the Unruh Act's public policy foundation to "private" family decisions such as wills and trusts?

In *Commonwealth of Pennsylvania vs. Brown* 392 F.2d 120 (1968), the U.S. Court of Appeals for the 3rd Circuit held that a charitable trust could not discriminate on the basis of race by leaving property to a civic organization dedicated to assisting "poor white male orphans" and that tax deductions for the charity could also be challenged.

In its 1948 *Shelley v. Kraemer* decision, the U.S. Supreme Court held that even if private individuals could theoretically agree to restrictive covenants, state courts could not enforce them without violating the Equal Protection Clause of the Fourteenth Amendment. "Enforcement" is the critical word: Would enforcement of a challenged will or trust with a discriminatory clause make the court an active party to discrimination against a suspect class?

California courts may treat race, religion or other discriminatory clauses in wills or trusts as "marriage restraints," but they might also invalidate such clauses on independent grounds. Chief among these is the public policy against racial, religious and other forms of discrimination.

There will always be difficult cases. An apparently "discriminatory" clause might not be motivated by racial animus but by some other, benign, intent. A trust might, for example, state that specific items brought over from pre-Holocaust Europe have special value to a Jewish family, a priceless connection to their Jewish heritage. Can they insist that these items only go to a Jewish home? How does a family manage succession for a business that is a Kosher restaurant?

Where are the cases?

In the Illinois case of *In re Estate of Max Feinberg* (919 N.E.2d 888 (2009)), just as in the *Gordon* case in Massachusetts, the state's top court upheld a trust that directed that assets be distributed to descendants except those who married outside the Jewish faith or to a spouse who did not convert. The court found that Illinois statutes "clearly reveal a public policy in support of testamentary freedom." There was no "dead hand" controlling the future conduct of beneficiaries should they marry outside their faith, only an intent to restrict their actions at the time of the testator's death. Such religious restraints were explicitly distinguished by the court from racial discrimination.

There have been no published California cases involving discriminatory clauses in wills or trusts based on race or religion. This may be because such clauses haven't survived in the trial courts or because they settled once attorneys recognized that the provisions were likely unenforceable after lengthy and expensive appellate review. A parent might also have disinherited their child without stating a reason.

As a practical matter, few judges will want to sign their names to published opinions enforcing racial discrimination — recall the opprobrium attached to the authors of *Plessy v. Ferguson* or the *Dred Scott* decisions. In my judicial career, the closest I've come to such a case in-

volved a gift to a school that could not be used for its cheerleaders. As I recalled the jealousy and resentment of other girls toward high school cheerleaders (whether deserved or not), I bravely upheld this discriminatory clause.

Conclusion

California courts have issued published opinions about restraints on marriage, and those decisions make clear the state's discomfort with such restrictions. Does it logically

follow that there should be other limits on testamentary freedom? Or could the state's courts identify a fundamental right at the end of life to distribute one's assets based on personal beliefs and values?

Despite the scarcity of case law, California's strong support of public policy and the Restatement's clear position on discrimination should provide adequate legal basis for courts to hold that restrictions touching on race, nationality, gender and other protected categories will not be enforced.

Until there is a published decision on the issue, however, we may never definitively know whether a person's final act can discriminate based on "suspect" categories. Alas, Romeo and Juliet may have ultimately had the last laugh.

Hon. Clifford Klein (Ret.) is a neutral with Signature Resolution. He previously served as a probate judge overseeing estates and trusts, guardianships, and probate and LPS conservatorships.

