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RECENT DECISIONS

Testamentary Restraint on Marriage

In *United States National Bank v. Snodgrass*, 275 P. 2d 860 (Ore. 1954), testator created a trust for his daughter, income of which was to be paid to her until she reached the age of thirty-two, at which time she would receive the entire fund upon conclusively proving to the trustee that she had not become a member of the Catholic faith nor had ever married a man of that faith. Upon reaching the age of thirty-two, the daughter sought payment of the corpus of the trust. The trustee resisted payment on the grounds that by marrying a Catholic, the daughter had forfeited her rights in the trust corpus, and brought an action for a declaratory judgment to determine the validity of the will provision. The lower court held the condition valid. The daughter appealed on the ground that the provision was against public policy. In affirming the decision of the lower court, the Supreme Court of Oregon pointed out that traditionally a testator in the State of Oregon is allowed great freedom in disposing of his property according to his own religious views and prejudices. The court stated that the First and Fourteenth Amendments to the United States Constitution are not violated by such will provisions since they prohibit state interference with religion and do not seek to regulate individual conduct. The court further held that a condition in partial restraint of marriage such as the provision in question was not unreasonable since the daughter was free to marry a non-Catholic at any time and a Catholic once she had become thirty-two years of age.

Although the court was not called upon

to determine the validity of the provision in the will that the daughter would receive the funds on her proving that she had not become a member of the Catholic faith, it is interesting to note that somewhat similar provisions have been upheld in other jurisdictions. Thus in *Magee v. O'Neill*, 19 Shand. 170 (S.C. 1883), a condition in a will making a legacy payable to a child if she were educated in the Roman Catholic faith was held valid. The court stated that it was not against the spirit of the Constitution for a member of a religious denomination "to endeavor by peaceable and legal means to extend his faith and to influence his children and grandchildren to adhere to the Church of his fathers." [*Magee v. O'Neil, supra* at 187].

In *Barnum v. Baltimore*, 62 Md. 275 (1884), a condition in a will making the bequest dependent upon the legatee's withdrawal from the priesthood and refraining from becoming a member of a church society was held valid by the Maryland court. [See also *Mitchell v. Mitchell*, 18 Md. 405 (1862)]. So too, where the testator imposed the condition that the legatee be brought up in a particular faith, the courts have held the condition to be valid and not contrary to any public policy. [*Matter of Lessor*, 158 Misc. 895, 287 N.Y. Supp. 209 (Surr. Ct. 1936) (grandchildren had to be raised as Orthodox Jews); *Matter of Kempfs*, 252 App. Div. 28, 297 N.Y. Supp. 307, *aff'd*, 278 N.Y. 613, 16 N.E. 2d 123 (1937) (grandchildren had to be raised as Roman Catholics)].

A Wisconsin court upheld a condition which required the legatee to attend the regular meetings of worship of a religious

group for fifteen years as not being void for uncertainty and indefiniteness. [*Matter of Paulson*, 127 Wis. 612, 107 N.W. 484 (1906)].

Pennsylvania courts have held testamentary conditions calling for adherence to a particular religion violative of public policy because they are in the nature of an interference with the rights of conscience under Pennsylvania constitutional provisions which state that "No human authority can, in any case whatsoever, control or interfere with the rights of conscience." [See *Drace v. Klinedinst*, 275 Pa. 266, 118 Atl. 907 (1922); *Matter of Devlin*, 284 Pa. 11, 130 Atl. 238 (1925)].

The validity of will provisions requiring marriage within a certain faith have been considered by many jurisdictions. Thus, several cases have held that provisions in the will which required the legatee to marry within the Jewish faith have been upheld where the restrictions were not unreasonable. [*Pacholder v. Rosenheim*, 129 Md. 455, 99 Atl. 672 (1916); *Matter of Salomon*, 156 Misc. 445, 281 N.Y. Supp. 827 (Surr. Ct. 1935); *Matter of Weil*, 124 Misc. 692, 209 N.Y. Supp. 779 (Surr. Ct. 1925), *aff'd mem.*, 216 App. Div. 701, 213 N.Y. Supp. 933 (1st Dep't 1926); *Gordon v. Gordon*, 124 N.E. 2d 228 (Mass. 1954) (subsequent conversion deemed ineffectual to satisfy condition)]. In *Matter of Tanburn, re Will of Rosenthal*, 307 N.Y. 715, 121 N.E. 2d 539 (1954), the court assumed the validity of such a provision, but held that the testator had not included an appointee of a power within the scope of the prohibition. If the will contains a provision prohibiting the legatee from marrying a specific person, the courts will sustain the condition. In a New Jersey case upholding a condition to a gift which stipulated that the

legatee was not to marry a certain girl, whom the testator supposed had influenced his son to become a "Romanist," the court said that a father "may annex to a gift a condition that it shall be void if his child shall marry a particular person, or one of a specified class, as a Scotchman, a Papist, or a Baptist." [*Graydon's Executors v. Graydon*, 23 N.J. Eq. (8 C. E. Greene) 229 (1872), *rev'd on other grounds*, 25 N.J. Eq. 561 (1874)].

However, where the restriction, though apparently partial is shown to be in effect a general restriction on marriage, the court will declare the provision void. Thus where a testator's daughter in order to retain her legacy was required to remain a member of the Society of Friends, and the Society expelled her upon her marriage to a non-member, the Virginia court held, that in view of the fact that there were only six male Quakers in her town, the condition was tantamount to a general prohibition against marriage, and was therefore void. [*Maddox v. Maddox' Adm'r*, 11 Grat. 804 (Va. 1854)].

If a will provision, which restricts marriage of the legatee to persons of a particular faith, also requires consent of guardians, the provision is valid. [*Pacholder v. Rosenheim*, 155 Md. 455, 99 Atl. 972 (1911)]. However, where this same restriction that the legatee may not marry outside the Jewish faith was coupled with a requirement of consent of other beneficiaries, who would profit by withholding consent, the court held the condition invalid because the beneficiaries' interest was an inducement to their withholding consent, and tended, therefore, to restrain all marriage. [*Matter of Liberman*, 279 N.Y. 458, 18 N.E. 2d 658 (1939); *Bayeaux v. Bayeaux*, 8 Paige Ch. 333 (N.Y. 1840)].

A Georgia statute [Ga. Code Ann. §53-

107] declares restraints on marriage to be void, except certain specified partial restraints which look to the interest of the person to be benefited. A California statute [Cal. Civil Code §710], voiding restraints upon marriage of persons other than minors, forbids partial as well as general restraints.

In the *Snodgrass* case, the court considered at length the contention that testamentary religious restrictions on marriage were an unconstitutional interference with freedom of religion, and were discriminatory, under the First and Fourteenth Amendments to the Constitution. The court rejected the argument, holding that these amendments regulate governmental action and not individual action. Furthermore, the court felt that the doctrine of *Shelley v. Kraemer*, 334 U.S. 1 (1948), holding that restrictive racial covenants were unenforceable since state courts cannot aid discrimination, was inapplicable to the present factual situation. However, it has been suggested that a decision construing such testamentary restraints on marriage does constitute state action, since the court is enforcing the prejudices of the testator, and is an interference with the right to marry, violative of the Fourteenth Amendment. [Crane, *Constitutionality of Testamentary Racial or Religious Restraints on Marriage*, 6 *Hastings L.J.* 351 (1955); see also Gould, *Public Policy Applied to Wills*, 41 *A.B.A.J.* 50 (1955)].

Regulation of Cemeteries

Recently, the Supreme Court of Illinois held that an ordinance granting municipalities power to prohibit the establishment of cemeteries within one mile from the municipal limits conferred not an absolute power to prohibit cemeteries, but a power limited by considerations of public health, welfare

or safety.

The City of Park Ridge and the Village of Niles brought an action in the Circuit Court of Cook County to enjoin the defendants, American Bank and Trust Company of Chicago, as trustee, and the Catholic Bishop of Chicago, from establishing a cemetery on property located within the prescribed limits. The plaintiffs alleged that the intended use of the tract would be in violation of an ordinance adopted in pursuance to Section 23-84 of the Revised Cities and Villages Act.* Defendants filed a counterclaim to enjoin the plaintiffs from interfering with the proposed use of the property. Relying chiefly on plaintiffs' admissions in the pleadings to defendants' allegations that such use would not endanger public health, safety or welfare the Supreme Court affirmed the Circuit Court's decision, declaring the ordinance void as to the proposed utilization of defendants' land as a cemetery and granting defendants' counterclaim. [*Park Ridge v. American National Bank*, 4 Ill. 2d 144, 122 N.E. 2d 265 (1954)].

The regulation and prohibition of cemeteries falls within the scope of the police power. This phase of the police power may be delegated by a state to a municipality by means of a statute such as the one in the instant case. Zoning regulations encompassing cemeteries have frequently been held constitutional. [*Shumaker v. Dalton*, 51 F. 2d 793 (M.D. Pa. 1931)].

*Ill. Rev. Stat. c. 24, §23-1. *Grant of Powers*. The corporate authorities of a municipality shall have the powers enumerated in Sections 23-2 to 23-111 inclusive.

§23-84. *Establish and Regulate Cemeteries*. To establish and regulate cemeteries within or without the municipal limits; to acquire lands therefor, by purchase or otherwise; to cause cemeteries to be removed; and to prohibit their establishment within one mile of the municipal limits.

An area of contention revolves around the requirement that a rule, regulation or ordinance in order to be a valid exercise of the police power must be based upon some consideration of public health, safety or welfare. In *Los Angeles v. Hollywood Cemetery Ass'n*, 124 Cal. 344, 57 Pac. 153 (1899), the court stated that regulations as to cemeteries may be justified when confined to the limits of a city but unreasonable and without sufficient justification when put in operation in all parts of a large town. The establishing of cemeteries has usually been successfully prohibited when attempted in the midst of thickly settled cities or near dwelling houses. [*Pflegler v. Groth*, 103 Wis. 104, 79 N.W. 19 (1899)]. A prohibition against cemeteries within half mile of a reservoir was upheld as valid by the New York Court of Appeals in a memorandum decision. [*City of New York v. Kelsey*, 213 N.Y. 638, 107 N.E. 1074 (1914)]; see also *Cushing v. Town of Bluehill*, 92 A. 2d 330 (Me. 1952)].

It would seem that any consideration reasonably referable to the public health or safety will serve to justify the existence of an ordinance such as the one in the *Park Ridge* case. However, the weight attached to considerations remote from public health and safety and dealing rather with offenses to the aesthetic sense may not be as firmly embedded in the law of the various jurisdictions.

In Illinois the Supreme Court has held that although a cemetery may be objectionable to the taste of an adjoining owner its use cannot be enjoined merely because it is offensive to the aesthetic sense. [*Village of Villa Park v. Wanderer's Rest Cemetery*, 316 Ill. 226, 147 N.E. 104 (1925)]. In *Abbey Land and Improvement Co. v. San Mateo County*, 167 Cal. 434, 139 Pac. 1068

(1914), the court held that even in the face of a showing that surrounding property depreciated in value because of the presence of a cemetery such objection merely involved aesthetics and would therefore not serve as a basis for a police power prohibition of cemeteries. [*Cf. Fairlawn Cemetery Ass'n, Inc. v. Zoning Commission of Bethel*, 138 Conn. 434, 86A. 2d 74 (1942)].

On the other hand, in a recent Supreme Court decision, Justice Douglas speaking for a unanimous eight man court stated that:

The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.

Partly on the strength of this reasoning the Court upheld the constitutionality of a District of Columbia slum clearing statute over an objection by petitioners that property could not be confiscated by the government under a police power measure merely to develop a more attractive community. [*Berman v. Parker*, 348 U. S. 26 (1954)]. Although the fact situation in the *Berman* case is hardly "on all fours" with the state decisions involving prohibitions against the establishment of cemeteries, state courts may, in the future, utilize similar reasoning to broaden the area of justifiable cause for an exercise of the police power.

In the consideration of all police power ordinances there is a presumption of validity. Prohibitions such as the one in the case under discussion will be held invalid only if patently unreasonable or arbitrary. It is presumed that the legislature considered all

circumstances and found that there was a reason grounded in public health, welfare or safety. The onus is upon the party seeking to avoid the ordinance to show clearly the invalidity of the measure.

The *Park Ridge* case is unusual in this regard; the issue in this case was restricted by the plaintiffs' motion to strike the answer of defendants which motion admitted the defendants' material allegations of fact. Among these were the defendants' allegations that no reason for the ordinance founded in public health, safety or welfare existed. Therefore the question involved here in no way dealt with the sufficiency of the reason for the ordinance but rather turned upon whether or not such a measure could be sustained as an absolute prohibition where it has been agreed that there is no justifying cause. The court held it could not.

The Illinois court in the *Park Ridge* case expressly overruled an earlier decision of that court in *Catholic Bishop of Chicago v. Palos Park*, 287 Ill. 400, 121 N.E. 561 (1918), wherein a similar statute was upheld even without a showing that its exercise was necessitated by some consideration involving the public welfare. The court in that case erroneously reasoned that since no absolute denial of the right to bury, but merely a limitation on that right, resulted from the ordinance, the limitation could be validly effected without the reasons necessary in other instances of police power exercise.

Peddling Religious Books

In the recent case of *People v. Hennacy*, the New York Court of Appeals reversed

Hennacy's conviction for having violated Article 6 of the Administrative Code of the City of New York which makes it "unlawful for any person to act as a peddler, without a license therefor from the commissioner." The ordinance expressly exempts those who sell newspapers and periodicals. Hennacy, however, in addition to selling copies of a newspaper, *The Catholic Worker*, of which he was associate editor, also sold copies of his book, *Autobiography of a Catholic Anarchist*, on a New York City street. The Court of Appeals held unanimously "that the People failed to prove that the defendant was selling books in the street as a commercial venture." The Court gave no further opinion but cited the case of *People v. Barber*, 289 N. Y. 378, 46 N.E. 2d 329 (1943).

In the *Barber* case the defendant was a member of Jehovah's Witnesses and was convicted for selling Bibles on the street in violation of the licensing ordinance of the town of Irondequoit. The ordinance involved was very similar to the one in the *Hennacy* case and the Court of Appeals there, too, reversed the conviction holding that it was not applicable to the defendant.

It appears from the above decisions, that Article 6 of the Administrative Code is limited to commercial ventures only, and that the mere fact that the distributor sells, rather than gives away the literature, does not make him a commercial vendor within meaning of the ordinance.

In neither case did the Court discuss or decide whether the ordinance, if it *did* apply to those disseminating their written political or religious opinions, would violate the constitutional guarantees of freedom of the press, speech and religion.