Domestic Relations -- Conditions and Limitations -- Restraints on Marriage and Remarriage

Thomas L. Norris Jr.

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol37/iss4/8

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
Domestic Relations—Conditions and Limitations—Restraints on Marriage and Remarriage

_Shackleton v. Food Mach. and Chem. Corp._ was a recent federal district court decision concerning the validity, under Illinois law, of a contract provision purporting to be a restraint on plaintiff's remarriage. In this case there was a written agreement between plaintiff's brothers and the predecessor corporation of defendant whereby the corporation agreed to pay plaintiff's mother a royalty on each of certain machines sold by the company during her life. Upon the mother's death, like royalties were to be paid to plaintiff "provided she shall not have theretofore remarried; such royalties to be paid to her until her death or remarriage."2 Plaintiff, with knowledge of this agreement, remarried before her mother's death and brought this action to recover under the contract, alleging that the provision quoted above was in restraint of marriage and therefore void as against public policy. Defendant contended that (1) it was a condition precedent which was to have been complied with before the royalties should vest, and (2) if not, that restraints on remarriage are not within the rule which declares void unreasonable restraints on marriage. In construing the provision, the court said that the parties intended to impose a total restraint upon plaintiff's marriage by means of a condition subsequent, and therefore that the provision was void. In its discussion of conditions subsequent which restrain remarriage, the court stated that such conditions, if otherwise invalid under Illinois law, would be valid only if imposed by one spouse on the other, or invoked by way of an antenuptial contract.3

As a general rule, conditions which totally or unreasonably restrain marriage are held to be void as against public policy.4 The major difficulty encountered, however, is not in determining whether a restraint is total or unreasonable, but in determining whether it is imposed by way of a condition.5 Provisions similar to the one in the principal case have been construed by courts as limitations,6 conditions precedent,7 and conditions subsequent.8

Limitations which purport to restrain marriage are generally held

---

2 Id. at 637.
3 While this point had never squarely been passed on in Illinois, the federal court interpreted earlier pronouncements of the Illinois court to mean that such restraints on remarriage would be valid only as between spouses, or where an antenuptial contract was involved.
4 See, e.g., Mann v. Jackson, 84 Me. 400, 24 Atl. 886 (1892). For a general discussion of the history of the rule, see Annot., 122 A.L.R. 8 (1939).
5 For a complete discussion of the subject and cases see Browden, _Conditions and Limitations in Restraint of Marriage_, 39 Mich. L. Rev. 1288 (1941).
8 Mack v. Mulcahy, 47 Ind. 68 (1874).
valid for the reason, say the courts, that the donor did not intend to restrain marriage, but merely to provide support until the donee marries, or remarries. Conditions precedent are those conditions which must be satisfied before an estate can vest. If there is a condition precedent attached to a gift of personality, such condition is void if in total or unreasonable restraint of marriage and will not prevent the gift from vesting; but if the gift is of real property, the condition may be valid regardless of the reasonableness of the restraint. A condition subsequent is said to exist when an estate has vested, subject to being divested upon the happening of an event such as marriage of the donee; if a condition subsequent is found to be in general or unreasonable restraint of marriage, it is held to be void.

Although the majority of courts have adopted this distinction between conditions and limitations, an analysis of the cases indicates that there are no fixed guides which can be set forth to determine whether a particular provision is a condition or a limitation. The courts have created a welter of irreconcilable propositions; and qualifications are

---

9 Mann v. Jackson, 84 Me. 400, 24 Atl. 886 (1892).
11 In Re Liberman, 279 N.Y. 458, 18 N.E.2d 558 (1939).
14 Meek v. Fox, 118 Va. 774, 88 S.E. 161 (1916).
16 The distinction between conditions and limitations is said to be that "words of limitation mark the period which is to determine the estate; but words of condition render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate or completion of the period described by the limitation." Schaeffer v. Messersmith, 10 Pa. County Ct. 366, 369 (1890).

One group of cases has taken the position that before determining the legality of a provision, the first consideration must be whether it is a condition or a limitation; for a provision which may be void if construed to be a condition, would be valid if found to be a limitation. See, e.g., Maddox v. Yoe, 122 Md. 288, 88 Atl. 225 (1913); Irwin v. Irwin, 179 App. Div. 871, 167 N.Y.S. 76 (2d Dept. 1917). Another group says the distinction is purely technical and irrelevant to policy determinations, because marriage is as much restrained by a limitation as a condition and to hold otherwise would allow one to elude public policy by a mere choice of words. See, e.g., Langfeld's Estate, 4 Pa. County Ct. 82 (1886); Commonwealth v. Stauffer, 10 Pa. 350 (1849).

Also, in construction, words appropriate to describe conditions have been constructed to be limitations. See, e.g., Nunn v. Justice, 278 Ky. 811, 129 S.W.2d 564 (1939); Appleby v. Appleby, 100 Minn. 408, 111 N.W. 305 (1907). At least one court has said that the substance and not the form of the language must be decisive. Schaeffer v. Messersmith, supra.

Still another construction has involved gifts over. One group of cases holds that the mere presence of a gift over turns what would otherwise be a condition into a limitation. See, e.g., Bennett v. Packer, 70 Conn. 357, 39 Atl. 739 (1899); Eastham v. Eastham, 191 Ky. 617, 231 S.W. 221 (1921). Other cases say that the absence of a gift over creates a condition of what otherwise would have been a limitation. Kennedy v. Alexander, 21 App. D.C. 424 (1903); Stillwell v. Knapper, 69 Ind. 558 (1880). See also Annot., 122 A.L.R. 8 (1939); Browden, Conditions and Limitations in Restraint of Marriage, 39 Mich. L. Rev. 1288 (1941).
imposed to such an extent that the rule declaring conditions in general or unreasonable restraint of marriage to be against public policy is often weakened.\textsuperscript{17}

In addition to the condition-limitation distinction, some courts have said that a condition pertaining to a gift of personalty, otherwise reasonable but with no gift over, is merely \textit{in terrorem}, i.e., unenforceable except in its ability to enforce compliance with the condition by a beneficiary who might not know it was void.\textsuperscript{18}

Further, if the provision is found to be a condition that totally or unreasonably restrains marriage, the court may still uphold it if it is in restraint of a second marriage.\textsuperscript{19} However, here also are found very divergent views among courts: some say that any restraint on remarriage is valid;\textsuperscript{20} others say that the validity is limited to restraints imposed by one spouse upon the other;\textsuperscript{21} still others say that no such restraint should be valid, if otherwise void, merely because it is placed upon remarriage and not upon initial marriage.\textsuperscript{22}

Regarding the principal case, it is submitted that even if the court reached a proper result, its construction of the provision pertaining to remarriage is questionable. The provision consists of two clauses. Taken separately, the first one may be found to be a condition precedent in that the plaintiff must not have theretofore remarried in order to receive the royalties. This, if taken alone, seemingly would not prevent the royalties from vesting since the gift is one of personalty and the condition creates a total restraint on marriage. However, the latter clause clearly appears to be a limitation, with royalties to be paid to plaintiff

\textsuperscript{17}See Browden, \textit{Conditions and Limitations in Restraint of Marriage}, 39 MicH. L. Rev. 1288 (1941).


\textit{In terrorem} is a fiction devised by the court of chancery because of differences in the common law and the ecclesiastical courts. By this doctrine, if in a case dealing with personal property the donor had included no gift over in case the condition was breached, the court said that he did not intend for the condition to be enforced but only meant to frighten the beneficiary into performance. If there was a gift over, the court said the rule at common law applied and the donor was said to have meant to have the condition enforced. The common law rule applied in all cases dealing with real property, and the condition was enforced whether there was a gift over or not. Of course, if the condition were not \textit{in terrorem}, it still had to satisfy the general requirements as to reasonableness in order to be upheld. See Annot., 122 A.L.R. 8, 94 (1939).

There are also some cases holding that a gift over is not necessary to render inoperative a condition against remarriage of a widow, but they evidently confuse the rule against restraints with the \textit{in terrorem} rule. \textit{Pomeroy, Equity Jurisprudence} § 933(b) (5th ed. 1941).

\textsuperscript{19}See, e.g., Chapin v. Cooke, 73 Conn. 72, 46 Atl. 282 (1900). For a discussion of the rationale of this exception, see Annot., 122 A.L.R. 8, 32 (1939).

\textsuperscript{20}See, e.g., Anderson v. Crawford, 202 Iowa 207, 207 N.W. 571 (1926); Nunn v. Justice, 278 Ky. 811, 129 S.W.2d 564 (1939).


\textsuperscript{22}See, e.g., Kennedy v. Alexander, 21 App. D.C. 424 (1903); Binnerman v. Weaver, 8 Md. 517 (1855).
until her remarriage (or death)—and no longer. Thus, it might well be said that the intent of the parties was to provide support for plaintiff only during that period which the parties contemplated she should need it, and that on her remarriage, payment of royalties would cease automatically by the self-contained limitation on the gift. Nevertheless, the court in construing the two clauses together found that the intent of the parties was to totally restrain marriage by means of a condition subsequent. After determining the nature of the provision, however, it is felt that the court quite properly refused to apply the rule which would except restraints on remarriage simply for the reason that the marriage to be restrained was a second marriage.

The problem faced by the court in the principal case is but an example of the difficulties encountered in attempting to construe such provisions in those jurisdictions which recognize the condition-limitation distinction.

North Carolina has recognized this distinction since the early case of 

Foust v. Ireland. In that case the court construed the testamentary provision “so long as she remain my widow” to be a condition, even though the language is usually considered to create a limitation. The intent of the testator was deemed to be controlling. In Monroe v. Hall, words of similar import were construed as a limitation.

The next case before the court touching upon the subject was Watts v. Griffin. There, the testatrix gave certain property to her sons, but if either of them married “a common woman” they would not have an interest in the property. The court said they took a fee, subject to a condition, but that the condition was void because of uncertainty.

In the case of In Re Miller, the court construed a will by which testator gave real property to his wife and daughter for their natural lives, “but in case either or both marry again, this becomes void.” At the death or marriage of both, the estate was to go to his son. In holding the provisions to be a limitation, the court stated:

“[T]here is well-considered authority to the effect that, although the terms used may ordinarily import a condition if, from a perusal of the entire will and the facts and circumstances permissible in aid of a proper interpretation, it appears that the testator intended to make provision for a beneficiary while she remained single, and that the words were not used and intended as a restraint upon marriage, the qualifying words will be given effect according to testator’s devise as intended and expressed in the will.”

---

23 46 N.C. 184 (1853).  
24 Id. at 186.  
25 97 N.C. 206, 1 S.E. 651 (1887) (“as long as either of them is single”).  
26 137 N.C. 572, 50 S.E. 218 (1905).  
27 Id. at 573, 50 S.E. at 218.  
28 159 N.C. 123, 74 S.E. 888 (1912).  
29 Id. at 124, 74 S.E. at 888.  
30 Id. at 127, 74 S.E. at 889.
However, in *Gard v. Mason*, a provision in a fee simple deed to the effect that if the grantee married the property would revert back to the grantor or his heirs was held to be an absolute conveyance upon a condition subsequent in general restraint of marriage, and therefore void. The court distinguished the *Miller* case by saying that in that case there was language on the face of the will tending to show that a conditional limitation was intended.

The condition-limitation question was left undecided in *Bryan v. Harper*. Here the will gave the residue, of whatever kind, to testator's wife and three children, but provided that "in the event my wife . . . shall remarry after my death and during the minority of either of my children by her," then her share of the estate would be equally divided among the children. The court said the "condition or limitation" was valid because conditions against remarriage of the testator's widow are valid.

And, in *Griffin v. Doggett*, after a life estate in the widow, real property was given in fee to testator's daughter provided she did not marry; but in case she should marry, to be sold and the proceeds divided among certain grandchildren. The court stated that it was not the purpose of the testator to prevent his daughter's marriage, but rather to aid her during celibacy. It then held that, though the words used would ordinarily denote a condition subsequent, under the rule of the *Miller* case they were to be construed as a limitation.

From the foregoing cases it is evident that the North Carolina court has looked primarily to the intent of the grantor or testator, and not to the form in which the gift was made. That is, the court first determines intent as drawn from the instrument and then applies the label best fitting that intent, regardless of the words used. It is also seen that in the *Bryan* case the court said that conditions otherwise void would not be so held when imposed by one spouse against the other. However, there was a strong dissent in that case, and the question may not be completely settled as yet.

Thus, as may be seen by a close examination of the principal case and the North Carolina cases, it is practically impossible to predict with any degree of certainty whether such provisions will be construed to be conditions or limitations. Both courts have said that they were trying to ascertain the intent of the donors; then they placed upon the provisions the labels which most nearly approached this apparent intention. It is submitted that this approach obscures the entire area of conditions and limitations pertaining to marriage.

---

31 169 N.C. 507, 86 S.E. 302 (1915).  
32 177 N.C. 308, 98 S.E. 822 (1919).  
33 Id. at 308, 98 S.E. at 822.  
34 Id. at 309, 98 S.E. at 823.  
35 199 N.C. 706, 155 S.E. 605 (1930).
A limitation may restrain marriage as effectively as a condition, despite the intention of the donor; and the public policy which is said to be the basis for holding void general and unreasonable restraints of marriage, is defeated by a mere choice of words. It would seem that if there are sufficient public policy reasons for declaring invalid conditions which are in general or unreasonable restraint of marriage, these same reasons should apply to limitations. It is apparent that at least some courts have been following this reasoning, and apply the label of limitation to those restraints which appear reasonable, while applying that of condition to those which appear unreasonable. However, this approach also creates such confusion that it becomes impossible to distinguish technically between conditions and limitations.\(^{36}\)

Therefore, it is suggested that the labels be dropped and that the basis which is now being used be recognized for what it is: the reasonableness rule. As the rule against restraints of marriage applies not to all restraints, but only to those restraints which are unreasonable under the circumstances of the case, courts can reach the proper conclusion without purporting to rely on technical distinctions which, if properly applied, do not themselves assure a proper result. The validity of the restraint should depend not on whether it is total or partial, or whether it is in the form of a condition or a limitation, but whether in the particular case the provision serves a legitimate purpose.

Included in the factors determining the reasonableness of the restraint should be the relation of the parties. It has been said that when the person upon whom the restraint is designed to operate is the spouse of the testator or donor, the nature of their relationship serves to set this situation apart from others restraining remarriage and overcomes the public policy against remarriage.\(^{37}\) However, it is submitted that the proper rule is that to uphold a restraint against a second marriage, the restraint imposed must be, under the circumstances, reasonable and intended to serve a proper and meritorious purpose;\(^{38}\) for while argument might conceivably be made in favor of validating all restraints of marriage, none seems logical in favor of the rule which validates restraints on remarriage and declares invalid those against initial marriage.\(^{39}\)

THOMAS L. NORRIS, JR.

\(^{36}\) Knost v. Knost, 229 Mo. 170, 176, 129 S.W. 665, 666 (1910).
\(^{38}\) Cowan v. Cowan, 247 Iowa 729, 75 N.W.2d 920 (1956).