

Reproduced with permission of Leimberg Information Services, Inc (LISI)

Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2952

Date: 12-Apr-22

From: Steve Leimberg's Estate Planning Newsletter

Subject: [Linda Kotis on Rotert v. Stiles and Dead Hand Control: Why Indiana Can't Be Trusted to Prohibit Public Policy Violations](#)

“Dead hand control is still very much alive, as evidenced by an October 2021 decision. In Rotert v. Stiles, the Indiana Supreme Court upheld a trust provision requiring that a beneficiary’s interest remain in trust, due to the beneficiary’s marital status, rather than allowing an outright distribution. The Court’s opinion pitted public policy limitations on trusts imposing conditions on marriage against a settlor’s intent, and the settlor’s intent won. The Court also concluded that a statutory restriction on devises to a spouse applies only to a testamentary disposition through a will and not to dispositions through a revocable trust. There are two glaring incongruities here: (i) that it is permissible to uphold some types of agreements that violate public policy, when such agreements reflect the settlor’s (drafter’s) intent, and (ii) that the same content is a violation of public policy when found in one type of agreement but not when used in another type of instrument.”

Linda Kotis provides members with commentary on [Rotert v. Stiles](#), which examines a court’s interpretation of restraints against marriage in wills and revocable trusts.

Linda Kotis is Of Counsel in the Washington, DC office of **Ivins, Phillips & Barker**, a firm ranked by Chambers in its 2021 *High-Net Worth Guide*. She is a member of the District of Columbia, California, Indiana, and Maryland Bars. Linda advises clients on forming and revising their estate plans and analyzes estate, income, generation-skipping transfer, and gift taxation matters for high-net-worth individuals and families. Linda’s significant experience includes modification of trusts through mergers, decanting, and nonjudicial settlement agreements, analysis of complex state trust administration and non-tax issues, the administration of high-net-worth estates, formation of private foundations, marital agreements, complex guardianships, post-mortem planning, probate matters and court pleadings regarding fiduciary administration issues. For **LISI**, Linda has

written [*Mann Up! Accept that Your Gift of a Deconstructed House is Less than the Sum of its Parts*](#) (March 24, 2021) with co-author Ken Jefferson of Holland & Knight LLP, [*Navigating the Waters of Maryland's New Elective Share Law: How Not to Be Up The Creek without A Paddle*](#) (October 2, 2020) with co-authors Andrea Dykes and Carolyn Rogers of Howard Insurance, [*Look, Up in the Sky. It's a Transfer Tax on Your Plane*](#) (March 19, 2020) with co-author Ken Jefferson, [*Modification Mania: Avoid Trust Code Trip-Ups and Draft Documents to Facilitate Change*](#) (October 31, 2019), [*Reset of the District of Columbia's Estate Tax Exemption*](#) (January 9, 2019) with co-authors Andrea Dykes and Carolyn Rogers, [*Minding the Gap: The Mismatch Between Maryland's 2019 Estate Tax Exemption and the New Federal Estate Tax Exemption*](#) (June 25, 2018), and [*Reform School: Lessons on Rescuing an Undesirable Tax Plan after Death*](#) (April 27, 2017). She is a co-author with Andrea Dykes and Carolyn Rogers of *Maryland Enacts New Elective Share Law: Increased life insurance planning opportunities for states that have adopted the augmented estate concept*, *Wealth Management's Trusts & Estates* (August 11, 2020) and *The 2020 Election in Maryland: It's Not About Politics*, *Probate & Property* magazine (July/August 2020), and the author of *Nonjudicial Settlement Agreements: Your Irrevocable Trust is Not Set in Stone*, *Probate & Property* magazine (March/April 2017), and other articles in *Washington Lawyer*, *Bloomberg BNA Daily Tax Report*, and *Wealth Strategies Journal*. Linda's most recent presentation on estate planning was with co-presenter Kasey Place of Ivins Phillips & Barker at the 2020-2021 DC Bar Communities Guardianship and Probate Program Series on *The Blessings and Burdens of Drafting for and Administering Estates with Charitable Beneficiaries* (February 25, 2021). Other recent presentations were with co-presenter Judith Barnhard of Councilor Buchanan & Mitchell at the Greater Washington Society of CPAs' 2020 Nonprofit Symposium (December 14, 2020) on *Planning to SECURE Charitable Gifts: How the SECURE Act Supports Donations of Retirement Assets*, with co-presenter Kasey A. Place on *Lemons to Lemonade: Making Use of the Delaware Tax Trap* (November 13, 2018) at the DC Bar Communities, Estates, Trusts, and Probate Lunch Series, and as a panelist with Robin Solomon of Ivins, Phillips & Barker at the *Women, Influence & Power in Law* conference (October 4, 2018). Past presentations include meetings of the American Bar Association and the District of Columbia Bar, as well as law firm briefings. Linda is an active member of the Estate Planning Council of Montgomery County, Maryland.

Here is her commentary.

EXECUTIVE SUMMARY:

In *Rotert v. Stiles*, 174 N.E.3d 1067 (2021), Marcille Borcharding had created a revocable trust that would benefit her son, Roger Rotert, her daughter, Connie Stiles, and her four stepchildren upon her death. According to the Court's summary of the facts: "One trust provision says that her son's interest will be distributed to him directly if he is unmarried at the time of her death; but if he is married when she dies, his interest will be held in trust. At issue is whether this provision is an unlawful restraint against marriage. We hold it is not. The statutory prohibition against restraints on marriage applies only to a devise to a spouse by [Last Will and Testament] and not to other dispositions. We thus decline to apply the restraint-against-marriage prohibition to Borcharding's trust provision. We hold further that her son's ancillary due-process claim fails."¹¹

FACTS:

Background on Trial Court and Court of Appeals

Marcille Borcharding executed a revocable trust in 2009 that divided her property distributable on her death between her son, Roger Rotert, her daughter, Connie Stiles, and her four stepchildren. Mr. Rotert's share, which included cash and real property, was to be held in a separate trust created under the revocable trust, with his sister Connie serving as the Trustee. The trust agreement stated as follows:

In the event that [Rotert] is unmarried at the time of my death, I give, devise and bequeath his share of my estate to him outright and the provisions of this trust shall have no effect. However, in the event that he is married at the time of my death, this trust shall become effective, as set out below.

While Mr. Rotert was married to Donna (his third wife) for at least eight years at the time that Mrs. Borcharding had created the trust, his wife had actually filed for divorce before the trust was executed. When Mrs. Borcharding died in 2016, the couple had reconciled and were still married. Mr. Rotert and Ms. Stiles disagreed about whether Mr. Rotert's interests under the revocable trust must continue to be held in a subtrust. In a compromise, they decided that the cash would be distributed outright and

free of trust to Mr. Rotert, while his real property would continue to be held in the subtrust for his benefit. Subsequently, Mr. Rotert filed suit, alleging the challenged provision in the revocable trust constituted a restraint against marriage and therefore was void.

Both Mr. Rotert and Ms. Stiles moved for summary judgment. The trial court granted Ms. Stiles' motion, in part due to Mr. Rotert's procedural missteps in litigation. Mr. Rotert appealed to the Indiana court of appeals, which held as follows:

we conclude that the [trust] provision is a condition in restraint of marriage and therefore void. (Appellant's App. Vol. II, p. 37). Although Rotert is a beneficiary of his mother's estate, the nature of his inheritance turns on whether he is "unmarried at the time of [her] death." (Appellant's App. Vol. II, p. 37). Should Rotert have been unmarried at the time of the opening of the estate, Rotert would have received his entire inheritance outright with right to devise the inheritance to his decedents or beneficiaries, whereas, in case Rotert is married at the time of his mother's passing, his entire inheritance will be placed in trust, with the remainder to Stiles' decedents [sic]. Accordingly, "unmarried at the time of [Marcille's] death" marks the event which will defeat Rotert's absolute rights to his inheritance. (Appellant's App. Vol. II, p. 37).

Nevertheless, "the view has also been followed that if the dominant motive of the testator is to provide support in the event of separation or divorce, the condition to a devise is valid." *In re Estate of Owen*, 855 N.E.2d 603, 611 (Ind. Ct. App. 2006). Furthermore, it has been said that where there is a reasonable economic basis for placing a condition on a bequest or a devise that the beneficiary divorce, courts should not attempt to probe the testator's mind and determine whether in fact his or her motive was to disrupt the beneficiary's marriage. *Id.* Here, in absence of any evidence establishing a support reason or economic basis, the marriage provision simply cannot be interpreted as anything other than an encouragement for Rotert to divorce his wife of almost twenty years upon the opening of the estate and the

condition operates to divest Rotert of an outright ownership of his interest in the Trust estate upon Marcille's death.^[2]

Ms. Stiles sought transfer of the case to the Indiana Supreme Court, which granted the transfer and thus vacated the decision of the court of appeals.

Review of Marriage Restraint in Probate Code

The Indiana Supreme Court began its analysis of the “disputed trust provision” with a review of statutory restrictions on marriage restraints. According to Ind. Code § 29-1-6-3, which is part of the Indiana probate code: “A devise to a spouse with a condition in restraint of marriage shall stand, but the condition shall be void.” The Court noted that the probate code prohibited restraints against marriage only if the restraint is in a “devise to a spouse,” and that the term “devise” as used in the probate code means “‘a testamentary disposition of either real or personal property or both.’ [Ind. Code] § 29-1-1-3(a)(6).”^[3] While acknowledging that the term “testamentary disposition” is not defined in the probate code, the Court proffered its view that this term is “the distinguishing feature of a will. See, e.g., *Castor v. Jones*, 86 Ind. 289, 290–91 (1882) (finding that an instrument, regardless of its form, was a will because its author intended to make a ‘testamentary disposition’). In other words, ‘the essence of a testamentary disposition’ is ‘that it be purely posthumous in operation’. *Heaston v. Kreig*, 167 Ind. 101, 111, 77 N.E. 805, 807 (1906).”^[4]

The Court acknowledged that revocable trusts “‘are popular substitutes for wills’” that allow settlors “‘to retain control and use of their assets during their lifetimes,’” citing *Fulp v. Gilliland*, 998 N.E.2d 204, 205 (Ind. 2013). Nonetheless, it distinguished wills as instruments taking effect following death and concluded that based on the statute’s “plain language, its prohibition applies only to devises, i.e., gifts made by will.”^[5]

Even if the probate code provision were applicable to conditions in a revocable trust, the Court correctly noted that the statute applies only to devises “to a spouse” and the provision in question involved a disposition to a child.

Trust Code, Settlor’s Intent, and Public Policy Limits

The Court examined arguments for recognizing marriage restraints in a trust as a violation of public policy and declined to “restrict what the legislature does not forbid.”^[6] It stated that “extending the rule to trusts

cannot be justified when the trust code is silent.”¹⁷¹ It contended that while marriage restraints are not forbidden, disregarding the settlor’s intent is:

What the Indiana Code prohibits is ignoring the settlor's intent (and where relevant, the trust's purpose) as manifested in the trust's plain terms. According to the statute: "The rules of law contained in this article"—referring to the trust code—"shall be interpreted and applied to the terms of the trust so as to implement the intent of the settlor and the purposes of the trust." *Id.* § 30-4-1-3. As a result, the section continues, "[i]f the rules of law and the terms of the trust conflict, the terms of the trust shall control unless the rules of law clearly prohibit or restrict the article which the terms of the trust purport to authorize." *Ibid.* Thus, a court must implement the settlor's manifested intent unless doing so would clearly violate the "rules of law contained in [the trust code]". *Ibid.*¹⁸¹

The Court addressed the fact that the report of the Trust Code Study Commission (the “Commission”) may be consulted by the courts, based on Ind. Code § 30-4-1-7, “to determine the reasons, purpose and policies of [the trust code], and may be used as a guide to its construction and application.”¹⁸²

The Commission’s comment to Ind. Code § 30-4-1-3 states as follows: “This section retains the prior law that the intent of the settlor as manifested in the terms of the trust of [sic] controlling unless it is in violation of some positive rule of law or against public policy.” Report of the Trust Code Study Comm'n § 3 cmt. (1971).¹⁸³

The Court noted that the Commission’s comment did not define a “rule of law” and also added to Ind. Code § 30-4-1-3 “a public-policy limitation on the settlor's intent. Had the legislature intended this section to contain this additional limitation, it could have added it. But it did not, and we will not rewrite its enactment.”

The Court discussed another trust code section, Ind. Code § 30-4-2-12, in which the term public policy is referenced: “The terms of the trust may not require the trustee to commit a criminal or tortious act or an act which is contrary to public policy.” It set aside the provision as inapplicable because (i) none of the parties, lower courts, or concurrence asserted that this section applied to the instant case, (ii) the section refers to a trustee’s act

as contrary to public policy, rather than the trust provision itself, and (iii) no other court had ruled upon the code section. “[E]ven assuming [Ind. Code §] 30-4-2-12 could shoehorn a general public-policy limitation into [Ind. Code §] 30-4-1-3,” the Court went on to dismiss the concurrence’s reliance on prohibiting marriage restraints based upon the Restatement of the Law:^[11]

[The Restatement] is not the law in Indiana and [it] cannot trump a duly enacted statute. Under Indiana law, we disregard the settlor’s intent only when the trust code clearly ‘prohibit[s] or restrict[s]’ it. We thus hold that trusts in Indiana are not subject to a general prohibition against restraints on marriage.^[12]

The Court noted that its holding was contrary to that in *In re Estate of Robertson*, 859 N.E.2d 772 (Ind. Ct. App. 2007), in which the court of appeals applied the probate code’s restraint against marriage prohibition to a trust provision permitting the decedent’s surviving spouse to live “at said real estate as if he had been devised a life estate in said real estate, or until he remarries or allows any female companion to live with him who is not a blood relative.” The court of appeals concluded that this provision was a restraint against marriage and was void as against public policy since the same provision would be void in a will or contract. The Court disapproved of *Robertson* because the trust code is silent on this issue and the court of appeals “summarily concluded—without citing any authority—that the prohibition of restraints against marriage [in a contract] was a ‘well-settled general rule of law.’”^[13]

COMMENT:

Restatement on Marriage Restraints and UTC on Settlor’s Intent and Public Policy Limitations

As mentioned above, the Restatement addresses restraints against marriage in the context of family relationships. For example, Restatement (Third) of Trusts, § 29, cmt. j (2003), states: “A trust or a condition or other provision in the terms of a trust is ordinarily . . . invalid if it tends to encourage disruption of a family relationship or to discourage formation or resumption of such a relationship. See also Restatement Second, Contracts §§ 189-191.” The comment discusses various examples, and whether they constitute impermissible restraints against marriage.

Restatement (Second) of Contracts, § 189 (1981) states that “a promise is unenforceable on grounds of public policy if it is unreasonably in restraint of marriage.” Its comments address various examples of promises in agreements and the principle that “the freedom of individuals to marry should not be impaired except for good reason.” Restatement (Second) of Contracts, § 189, cmt. a.

The Restatement and public policy limitations upon a trust are cited in the Comments to Uniform Trust Code (UTC) Section 404, which is one of the main UTC provisions about the purpose of a trust. UTC Section 404 states: “A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries.” Comment to UTC Section 404 states in pertinent part:

For an explication of the requirement that a trust must not have a purpose that is unlawful or against public policy, see Restatement (Third) of Trusts §§ 27-30 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts §§ 59-65 (1959). A trust with a purpose that is unlawful or against public policy is invalid. Depending on when the violation occurred, the trust may be invalid at its inception or it may become invalid at a later date. The invalidity may also affect only particular provisions.

. . . .

Purposes violative of public policy include those that tend to encourage criminal or tortious conduct, that interfere with freedom to marry or encourage divorce, that limit religious freedom, or which are frivolous or capricious. See Restatement (Third) of Trusts § 29 cmt. d-h (Tentative Draft No. 2, 1999); Restatement (Second) of Trusts § 62 (1959).

The Uniform Trust Code directly addresses the settlor’s intent in its definition section, UTC Section 103(18): “‘Terms of a trust’ means the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.” Comment to UTC Section 103 states as follows: “Except as limited by public policy, the extent of a beneficiary’s interest is determined solely by the settlor’s intent.” One of the default and mandatory rules in UTC Section 105 is that

the terms of a trust do not prevail over “the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy.”^[14] Comment to UTC Section 105 states that this addition to the Uniform Trust Code is part of the 2001 Amendment to the UTC to clarify “that the settlor may not waive this common law requirement.”

Takeaways

The Indiana Supreme Court refused to sanction two principles elucidated in the Uniform Trust Code and the Restatement: (i) a trust provision violating public policy, even though it reflects the settlor’s intent, should not be upheld; and (ii) a trust provision constituting a restraint against marriage is a violation of public policy. Reasons given were that the Indiana legislature (i) had not expressly added a provision in the Indiana Trust Code mandating that trusts should not violate public policy, and (ii) had not specifically forbidden trust provisions with conditions in restraint against marriage, in contrast to an express prohibition in the Indiana probate code applicable to a devise to a spouse.

There are two glaring incongruities here: (i) that it would be permissible for some types of agreements, but not others, to violate public policy, and (ii) that the form of the agreement would determine whether its contents are to be allowed.

The Indiana Supreme Court’s arguments seem to be more about form rather than substance. Unlike the court of appeals, which noted that the condition imposed in the trust meant that Mr. Rotert’s share of assets would pass to his sister’s descendants on his death and thus he was not free to dispose of the remainder, the Indiana Supreme Court did not address whether the condition itself had an undesirable result. Rather, its opinion largely focused upon the propriety of distinguishing between the validity of conditions based upon the type of dispositive instrument in which the condition is contained. This argument seems tenuous. It is difficult to comprehend the rationale for enforcing any type of agreement which violates public policy. Period.

The result is also out of touch with applicable law elsewhere. Many jurisdictions have adopted the Uniform Trust Code. While Comments to a number of UTC Sections promote the importance of the settlor’s intent, such intent is not allowed, however, to limit a beneficiary’s interest in a

manner that is considered to violate public policy. As discussed above, under the UTC, restraints on marriage are considered to be conditions which violate public policy. Therefore, had this case arisen in a state with a trust code based on the UTC, another court may have acknowledged that a trust should not contain conditions which violate public policy, regardless of whether the state legislature expressly adopted that rule in the trust code, and that the public policy argument against restraints against marriage applies to provisions contained in revocable trusts as well as those contained in wills.

Looking forward, following the Indiana Supreme Court's reasoning is inadvisable, for at least two reasons. First, revocable trusts along with pour over wills are ubiquitous as part of an individual's estate plan. In this manner, the provisions of a revocable trust taking effect at death are in fact "testamentary dispositions." The Court gives no reason as to why the use of a revocable trust with conditions on a beneficiary's inheritance would be more equitable to a beneficiary than a will imposing the same conditions.

Second, the decision may be cited as precedent for upholding conditions in a trust that would otherwise fail if the same provisions had been part of a Last Will and Testament. Judge Goff in the concurrence makes this very point:

absent legislative intervention, the Court's decision, as written, could open a Pandora's Box of unintended and harmful consequences to others. What's to stop a settlor from, for example, imposing a condition on a life estate that calls for the beneficiary, upon the settlor's death, to continue living at a particular residence "so long as" the beneficiary doesn't marry someone of a different race, or "so long as" the beneficiary refrains from paying property taxes. See *generally* G. Bogert, *The Law of Trusts and Trustees* § 211, at 60 (2007) (citing multiple examples of when a "trust, like any other transfer, conveyance, or contract, may be invalid because it is intended to accomplish an illegal purpose"). Surely, the legislature would not have intended such an "unjust or absurd result." See *ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1196 (Ind. 2016) (internal quotation marks omitted).^[15]

Concluding Observations

Perhaps Mrs. Borcharding had legitimate reasons for restricting the outright distribution of Mr. Rotert's inheritance. Possibly she had doubts about her son's financial management skills. Or was troubled by his relationship with his current wife, or the circumstances of his previous marriages. Thus, the expression of her intent in and of itself through the conditions of the trust might have been in the best interest of her son. An alternative approach, however, to protecting her son's financial interests would have been to require him to enter into a prenuptial agreement or a postnuptial agreement as a condition of receiving an outright inheritance.

The Court's ruling that Ind. Code § 29-16-3 only prohibits conditions on marriage when a devise is made to benefit a spouse was correct. The Court's conclusion, however, that a settlor's intent wins out over a violation of public policy, coupled with a blithe examination of the condition manifesting such intent, produces an unsatisfactory result.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Linda Kotis

CITE AS:

LISI Estate Planning Newsletter #2952 (April 13, 2022) at <http://www.leimbergservices.com>. Copyright 2022 Leimberg Information Services, Inc. (**LISI**). Reproduction in Any Form or Forwarding to Any Person Prohibited - Without Express Permission. This newsletter is designed to provide accurate and authoritative information regarding the subject matter covered. It is provided with the understanding that **LISI** is not engaged in rendering legal, accounting, or other professional advice or services. If such advice is required, the services of a competent professional should be sought. Statements of fact or opinion are the

responsibility of the authors and do not represent an opinion on the part of the officers or staff of LISI.

CITATIONS:

^[1] *Rotert v. Stiles*, 174 N.E.3d 1067, 1069-1070.

^[2] *Rotert v. Stiles*, 159 N.E.3d 46, 52 (Ind. Ct. App. 2020).

^[3] *Stiles*, 174 N.E.3d at 1070-1071.

^[4] *Id.* at 1071.

^[5] *Id.*

^[6] *Id.*

^[7] *Id.* at 1072.

^[8] *Id.* at 1071.

^[9] *Id.* at 1072.

^[10] *Id.* at 1072.

^[11] Judge Goff cited the Restatement (Third) of Property (Wills & Don. Trans.) § 10.1 cmt. c (2003) and the Restatement (Third) of Trusts § 29 cmt. j (2003) in his concurrence.

^[12] *Id.* at 1072-1073.

^[13] *Id.* at 1072.

^[14] UTC Section 105(b)(3).

^[15] *Id.* at 1075.