IN THE

Indiana Supreme Court

Supreme Court Case No. 21S-TR-452

Roger D. Rotert,
Appellant,

–v–

Connie S. Stiles,
Appellee.

Argued: June 2, 2021 | Decided: October 8, 2021

Appeal from the Jackson Circuit Court
No. 36C01-1802-TR-13
The Honorable Richard W. Poynter, Judge

On Petition to Transfer from the Indiana Court of Appeals
Case No. 20A-TR-773

Opinion by Justice Slaughter

Chief Justice Rush and Justices David and Massa concur.
Justice Goff concurs in result with separate opinion.

Slaughter, Justice.

When Marcille Borcherding died, she left her estate in trust for her children. 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 will and not to other dispositions. We thus decline to apply the restraint-against-marriage prohibition to Borcherding's trust provision. We hold further that her son's ancillary due-process claim fails.

I

In 2009, Borcherding executed a revocable living trust that divided her property between her son, Roger Rotert; her daughter, Connie Stiles; and her four stepchildren. The trust contained a subtrust for Rotert's share (which included cash assets and real property) and appointed Stiles as trustee. The trust contained the following provision:

> 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.

Rotert had been married to his third wife, Donna, for at least eight years when Borcherding executed the trust. But before the trust's execution, Donna had filed for divorce. The couple later reconciled and were married when Borcherding died in 2016. After Borcherding's death, Stiles and Rotert disagreed about whether his interests must be held in trust. Attempting compromise, Stiles as trustee distributed the subtrust's cash assets, and Rotert agreed that his real property would stay in the subtrust. He later sued, alleging the challenged provision in the revocable trust is a void restraint against marriage.

In the trial court, both Rotert and Stiles moved for summary judgment. After Stiles filed her motion, Rotert declined to file a response brief; he

opted instead to file a motion to strike certain affidavits attached to Stiles's motion. The trial court, after a hearing, found that the trust's terms were not void for public policy; it thus denied Rotert's motion for summary judgment and granted Stiles's motion. At the end of the hearing, Rotert noted that he had not responded to Stiles's summary-judgment motion, having filed a motion to strike instead. He asked for a few days to decide whether to respond, and the trial court granted his request. It did so with the understanding that Rotert would "inform the Court in a short period of time if [he] fe[lt] like [he] need[ed] to file a Response". But Rotert never responded or informed the court he planned to. The court entered judgment against Rotert, and he later filed a motion to correct error, which the trial court denied.

Rotert appealed and argued, first, that the trial court violated his due-process rights by not permitting him to respond to Stiles's cross-motion for summary judgment; and, second, that the challenged trust provision is void as a restraint against marriage. The court of appeals held that the challenged provision is an impermissible restraint against marriage and found in Rotert's favor, *Rotert v. Stiles*, 159 N.E.3d 46, 53 (Ind. Ct. App. 2020), but declined to address his due-process claim, *id.* at 53 n.1. Stiles then sought transfer, which we grant today, thus vacating the appellate decision.

II

We review summary-judgment decisions de novo. *Perkins v. Mem'l Hosp. of South Bend*, 141 N.E.3d 1231, 1234 (Ind. 2020). Here, Rotert argued that the trial court's summary-judgment order both violated his due-process rights and was wrong as a matter of law because the challenged provision is void on public-policy grounds. We reject those arguments. First, the due-process claim fails because Rotert had reasonable notice and a meaningful opportunity to respond to Stiles's motion, yet he failed to do so. Second, the statutory rule prohibiting restraints against marriage does not apply because it governs only testamentary devises to a spouse in a will. Here, the challenged disposition is from parent to child in a revocable trust. Thus, we affirm the trial court's entry of judgment for Stiles and against Rotert.

A

We begin with the due-process claim. The Fourteenth Amendment to the United States Constitution bars states from depriving persons of their property without due process of law, which requires reasonable notice and a meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Rotert argues that the trial court deprived him of these protections by granting Stiles's cross-motion for summary judgment before Rotert could respond.

We reject Rotert's argument because it mischaracterizes the record; he had both notice and multiple opportunities to be heard. After he moved for summary judgment, Stiles responded with her own motion for partial summary judgment. Rotert did not respond to Stiles's motion; he moved to strike certain portions of it. During the hearing on the motions but after the judge ruled, Rotert asked if he could notify the court within a few days about whether he wanted to respond to Stiles's cross-motion. He asked only for leave to file a status report with the court "if [he] fe[lt] like [he] need[ed] to file a Response". He made his request with full knowledge that the court's order would be entered in the meantime; he had asked the court to "just let the Order stay" if he did not file a status report seeking leave to file an additional brief. Despite his request, Rotert did not file a status report. He thus had both notice and multiple opportunities to be heard—after Stiles filed her cross-motion, during the hearing, and after the hearing. Rotert cannot now claim to be deprived of an opportunity to be heard after he voluntarily chose not speak. His due-process claim fails.

B

We turn next to the claim that the disputed trust provision is void as an unlawful restraint against marriage. Recall that the provision outlines two scenarios. If Rotert is unmarried at Borcherding's death, he receives his interest outright. But if married, his share goes into a trust. Rotert argues the provision is void on public-policy grounds. Stiles argues the provision is a permissible "limitation" on Rotert's interest, not an impermissible "condition". We agree that Stiles is entitled to relief, but we do so on a different ground. We hold that the statutory prohibition of

restraints against marriage applies only to dispositions to a spouse by will and not to dispositions by trust. We thus affirm the trial court without deciding whether this provision is a condition or a limitation.

First, the Indiana Probate Code says that "[a] devise to a spouse with a condition in restraint of marriage shall stand, but the condition shall be void." Ind. Code § 29-1-6-3. Thus, our probate code prohibits restraints against marriage only if the restraint is in a "devise to a spouse". Subsection 29-1-1-3(a) sets out the definitions that "apply throughout this article", referring to the probate code. When used as a noun in the probate code, "devise" means "a testamentary disposition of either real or personal property or both." *Id.* § 29-1-1-3(a)(6). And a "testamentary disposition", though not defined by subsection 29-1-1-3(a), is something our Court has long considered 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). We therefore consider wills as "tak[ing] effect after . . . death", *ibid.*, while recognizing that revocable trusts "are popular substitutes for wills" that allow settlors "to retain control and use of their assets during their lifetimes", *Fulp v. Gilliland*, 998 N.E.2d 204, 205 (Ind. 2013). Thus, the legislature's use of "devise" as a noun under subsection 29-1-1-3(a)(6) is consistent with its use as a verb under subsection 29-1-1-3(a)(7): "'devise' . . . means to dispose of either real or personal property or both by will."

Hence, under section 29-1-6-3's plain language, its prohibition applies only to devises, i.e., gifts made by will. And the statute applies only to devises "to a spouse". Here, we have neither a testamentary devise nor a devise to a spouse but a disposition by a revocable trust to a child. The statutory prohibition under our probate code does not apply.

Second, neither does the Indiana Trust Code prohibit the challenged provision. In fact, the trust code does not prohibit conditions in restraint of marriage at all. What it 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.*; accord *Fulp*, 998 N.E.2d at 207 (explaining a court's "primary purpose in construing a trust instrument is to ascertain and give effect to the settlor's intention" as long as applying the trust's terms does not violate the trust code) (cleaned up). Here, Rotert points to nothing in the trust code that "clearly prohibit[s] or restrict[s]" the challenged provision, and we know of none. Given this section's mandate to honor Borcherding's intent, we decline to invalidate the challenged provision or to restrict what the legislature does not forbid.

Our holding today is contrary to that in *In re Estate of Robertson*, 859 N.E.2d 772 (Ind. Ct. App. 2007). There, the court of appeals applied the probate code's restraint-against-marriage prohibition to a trust, although this prohibition is not in the trust code. *Id.* at 776. The trust provision in *Estate of Robertson* said:

> The Trustee shall allow my husband, . . . if he survives me, to continue 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.

Id. at 774. The court found that this provision was a restraint against marriage. *Id*. at 777. It reasoned that the provision was void as against public policy because the provision would be void in a will or contract. *Id.* at 775. But this reasoning is flawed for two reasons. First, the probate code's statutory bar applies to wills, so extending the rule to trusts cannot be justified when the trust code is silent. Second, as applied to contracts, *Robertson* cited only *Stauffer v. Kessler*, 81 Ind. App. 436, 438, 130 N.E. 651,

652 (1921), where the court of appeals summarily concluded—without citing any authority—that the prohibition of restraints against marriage was a "well-settled general rule of law". *Robertson*, 859 N.E.2d at 775. We have not found support for such a statement, and we decline to adopt it. For these reasons, we disapprove of *Robertson*. Absent a clear indication from the legislature that trusts are subject to a general prohibition against restraints of marriage, we reject such a view.

The concurrence acknowledges that section 30-4-1-3 governs the "[a]pplication and interpretation of rules of law and terms of trust" and that the "terms of the trust [] control unless the rules of law clearly prohibit or restrict the article which the terms of the trust purport to authorize." *Post*, at 1–2. It nonetheless argues that the trust code prohibits conditions in restraint of marriage as a violation of public policy. *Id.* at 1. According to the concurrence, because the trust code does not define "rules of law", we should look to the Trust Code Study Commission's comment on section 30-4-1-3 as a guide to construction, which section 30-4-1-7 permits. *Id.* at 2–3. And, because the study commission's comment references public policy, the concurrence concludes, courts should include public policy under "rules of law" when interpreting section 30-4-1-3. *Id.* at 2.

In response, we note a few things. To begin, the phrase "rules of law contained in this article" is unambiguous. Under our interpretive canons, we look first to a term's plain meaning. *Rogers v. Martin*, 63 N.E.3d 316, 327 (Ind. 2016) (citation omitted). If, given the term's ordinary meaning, the statute is unambiguous, then no construction is needed, *ibid.*, and we simply apply the statute. Because neither "rules of law" nor "contained in this article" is ambiguous, it is improper to resort to commission comments to construct legislative meaning.

Further, even were we unsure about the definition of "rules of law contained in this article", the study commission's section 30-4-1-3 comment does not define this clause. Instead, it reads: "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). Thus, the comment does not define a "rule of law" but undertakes to add to section 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 is aware of one section of the trust code referencing public policy. Section 30-4-2-12(a) says "[t]he 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." No one—not the parties, not the lower courts, not the concurrence—argues that this section applies here. The section's natural reading suggests it is the trustee's "act" that must be contrary to public policy and not the trust's "terms". No Indiana court has been squarely presented with this question, and we decline to reach it here.

But even assuming section 30-4-2-12 could shoehorn a general public-policy limitation into section 30-4-1-3, we part ways with the concurrence on other grounds. It concludes that restraints against marriage violate public policy. *Post*, at 2. Yet it points to nothing in the trust code providing that restraints against marriage in trust provisions violate public policy. Instead, it relies on the Restatement (Third) of Property (Wills & Don. Trans.) § 10.1 cmt. c (2003), which is not the law in Indiana and 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.

Finally, although the parties dispute whether the challenged provision is a condition or limitation, we need not answer this question today because our decision rests on other grounds. We wonder, though, whether the historic distinction between a condition (impermissible) and a limitation (permissible) will survive when squarely before us. See, e.g., *Summit v. Yount*, 109 Ind. 506, 508, 9 N.E. 582, 583–84 (1886). According to traditional thought, a limitation is a durational restriction on an interest, while a condition is a restriction that can deprive a person of an interest. *Ibid.* In other words:

> 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. The one specifies the utmost time of continuance, and the other marks some event which, if it takes place in the course of that time, will defeat the estate.

Id. at 583. In *Summit v. Yount*, where the devisor phrased the restriction as "so long as she remains my widow", we held it was a limitation, not a condition, and was therefore valid. *Id.* at 583–84. This reasoning was reflected in a string of cases from our Court in the late 1800s. *Id.* at 584 (collecting cases). We do not decide today whether *Yount*'s distinction impermissibly elevates form over substance. But we pause to note Justice Dauman's comment, more than 100 years ago, that "the distinction between a condition and a limitation is wholly without merit." *Thompson v. Patten*, 70 Ind. App. 490, 493, 123 N.E. 705, 706 (1919) (Dausman, J., concurring in result on *stare decisis* grounds); accord *Robertson*, 859 N.E.2d at 779 ("[H]aving two interpretations here, one considered acceptable and the other invalid, makes no sense.") (Robb, J., dissenting).

* * *

Because Rotert's due-process claim fails on this record, he is not entitled to relief. And because the probate code's bar against restraints on marriage does not apply to trusts or gifts to children, Borcherding's disposition by a revocable trust to her son is valid. We thus affirm the trial court's entry of summary judgment for Stiles and against Rotert.

Rush, C.J., and David and Massa, JJ., concur.
Goff, J., concurs in result with separate opinion.

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I agree with the Court that Rotert, having had notice of, and multiple opportunities to respond to, Stiles' cross-motion for summary judgment, is entitled to no relief for his due-process claim. I also agree that Rotert loses on his restraint-of-marriage claim. On this latter issue, however, I would conclude that the prohibition against restraints on marriage should apply to testamentary trusts, not just to wills. And based on that conclusion, I would affirm the trial court by holding that, because Rotert's interests in the estate vested "at the time of" the settlor's death, the terms of the Trust amounted to permissible conditions of acquisition rather than impermissible conditions of retention.

I. Our Trust Code prohibits conditions in restraint of marriage as a violation of public policy.

The Court holds "that the statutory prohibition of restraints against marriage applies only to dispositions to a spouse by will and not to dispositions by trust." *Ante*, at 4–5. As such, the Court declines to address whether the terms of the Trust here amount to a permissible limitation on Rotert's interest in the estate or whether they impose an impermissible condition. *Id.* at 5. The Court cites two reasons for this approach: the plain language of our Probate Code, which prohibits restraints on marriage only in a testamentary devise made to a spouse (rather than to children); and the lack of an express prohibition on such restraints in our Trust Code. *Id.* at 5–6, 9.

While I question the Court's refusal to extend the principles underlying our Probate Code to testamentary trusts, *see id.* at 6–7, I need not rely on the law governing wills because our Trust Code, in my opinion, suffices to resolve the issue.

Indiana Code section 30-4-1-3 governs the "[a]pplication and interpretation of rules of law and terms of trust." That section of our Trust Code specifically calls for the "terms of the trust [to] control unless the

rules of law clearly prohibit or restrict the article which the terms of the trust purport to authorize." I.C. § 30-4-1-3. While the Trust Code doesn't define "rules of law," the editor's note from the Trust Code Study Commission clarifies that the terms of the trust are "controlling unless it is in violation of **some positive rule of law or against public policy**." I.C. Ann. § 30-4-1-3 (West 2009), Trust Code Study Comm'n Comm., ed. n. (emphasis added). And a restraint on marriage is, generally speaking, a violation of public policy. *See* Restatement (Third) of Property (Wills & Don. Trans.) § 10.1 cmt. c (2003) (noting that, "[a]mong the rules of law that prohibit or restrict freedom of disposition" include "those relating to spousal rights; creditors' rights; **unreasonable restraints on** alienation or **marriage**; **provisions promoting separation or divorce**; impermissible racial or other categoric restrictions; provisions encouraging illegal activity; and the rules against perpetuities and accumulations") (emphases added).[1]

Still, the Court asserts that Rotert himself "points to nothing in the trust code that 'clearly prohibit[s] or restrict[s]' the challenged provision." *Ante*, at 6 (quoting I.C. § 30-4-1-3). But, while acknowledging the Trust Code's silence on the prohibition of restraints on marriage, he still insists that such restraints "arising in testamentary trust instruments are similarly void as against public policy." Appellant's Br. at 12 (quoting *Estate of Robertson*, 859 N.E.2d 772, 776 (Ind. Ct. App. 2007)). And just because Rotert didn't direct us to the Trust Code Study Commission's comment

[1] Prominent legal organizations, including the American Law Institute (ALI) and the National Conference of Commissions on Uniform State Laws (NCCUSL), routinely consider trusts that impose restraints on marriage as a violation of public policy. *See* Unif. Trust Code § 404 cmt. ("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.") (emphasis added); Restatement (Third) of Trusts § 29 cmt. j (2003) (noting that "a trust provision is ordinarily invalid if it tends seriously to interfere with or inhibit the exercise of a beneficiary's freedom to obtain a divorce . . . or the exercise of freedom to marry"). Although not controlling, the "Restatements promulgated by The American Law Institute are entitled to great weight . . . as an authoritative exposition of the law on the subject considered." *Bd. of Comm'rs of Decatur Cty. v. Greensburg Times*, 215 Ind. 471, 482, 20 N.E.2d 647, 647–48 (1939). *See also Merrill v. Wimmer*, 481 N.E.2d 1294, 1298–99 n.2 (Ind. 1985) (citing both ALI and NCCUSL for similar purposes).

doesn't mean this Court can't rely on it. In fact, the legislature has expressly permitted us to consult the "report of the Trust Code Study Commission" for purposes of determining "the reasons, purpose and policies of [the Trust Code]" and "as a guide to [the Trust Code's] construction and application." I.C. § 30-4-1-7.

The Court opines that "the phrase 'rules of law contained in this article' is unambiguous." *Ante*, at 7. And for this reason, the Court considers it "improper to resort to commission comments to construct legislative meaning." *Id.* I respectfully disagree. A "rule of law" may refer to several things. As one treatise describes it, "Rule of law is **one of a number of overlapping ideas**, including constitutionalism, due process, legality, justice, and sovereignty, that make claims for the proper character and role of law in well-ordered states and societies." Martin Krygier, *Rule of Law*, *in* The Oxford Handbook of Comparative Constitutional Law 233, 233 (Michel Rosenfeld & András Sajó eds., 2012) (emphasis added). The most relevant definition in *Black's* would seem to be a "substantive legal principle." Black's Law Dictionary (11th ed. 2019). But a "substantive legal principle," even one "contained in" a particular section or article of our Code (without definition), is certainly broad enough, in my view, to garner different views.

In any case, whether the phrase "rules of law contained in this article" is ambiguous or not is irrelevant. The plain language of Indiana Code section 30-4-1-7 permits us to consult the Commission comments not just for "construction and application" of the Trust Code but also for the broader purpose of "determin[ing] the reasons, purpose and policies" behind it.

Finally, I'm concerned that, 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). But if the Court "decline[s] to invalidate the challenged provision" because "our trust code does not prohibit [it]," *ante*, at 5–6, why would it do anything different in those other situations? This is especially concerning since "[r]evocable trusts have become popular estate planning tools and substitutes for wills" in recent decades. *Fulp v. Gilliland*, 998 N.E.2d 204, 207 (Ind. 2013).

Having concluded that the prohibition against restraints on marriage should apply to testamentary trusts and not just to wills, I now turn to the merits of the parties' claims.

II. Only conditions that operate to *divest* a beneficiary of property upon the occurrence of some event are void.

Stiles argues that the Trust imposed a permissible limitation because Rotert's rights weren't affected until Borcherding's death, at which point, any change to his marital status was inconsequential. Pet. to Trans. at 13–14. What's more, she contends, precedent from this Court recognizes an exception to restraints on marriage for a "condition precedent annexed to a devise of land," and for "conditions of acquisition" (rather than conditions of retention). *Id.* at 11–12 (quoting *Crawford v. Thompson*, 91 Ind. 266, 273 (1883); *Dickey v. Citizens' State Bank of Fairmount*, 98 Ind. App. 58, 180 N.E. 36, 39 (1932)). For his part, Rotert simply argues that the Trust provision here is void as against public policy because it "encourage[s] divorce." Resp. to Trans. at 4. The terms of the Trust, he insists, force him to decide whether "to remain married to his spouse or [to] inherit his full devise." *Id.* at 7.

When construing a trust, a court's primary goal is to determine the settlor's intent. *In re Hanson*, 779 N.E.2d 1218, 1221 (Ind. Ct. App. 2002). If

the settlor's intent is clear from the plain language of the instrument, and not against public policy, the court must honor the settlor's intent. *Id.*

Conditions in devises of property that limit a beneficiary's future ability to marry are void. *Crawford v. Thompson*, 91 Ind. 266, 273 (1883). But in applying this principle (to wills), this Court has distinguished between **valid limitations** and **void conditions**: "Words of limitation mark the period which is to determine the estate." *Summit v. Yount*, 109 Ind. 506, 508, 9 N.E. 582, 583 (1886) (internal quotation marks omitted). Words of condition, on the other hand, "render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before determination of the estate, or completion of the period described by the limitation." *Id.* (internal quotation marks omitted).

For example, Indiana courts have construed the language "so long as she remains my widow" as a valid limitation because that language serves as a reference point—or a "measuring stick"—for determining the length of time the testator intended for such property rights to last. *In re Est. of Robertson*, 859 N.E.2d 772, 777 (Ind. Ct. App. 2007). *See, e.g.*, *Hibbits v. Jack*, 97 Ind. 570, 571, 577 (1884) (holding that a devise to the testator's wife "so long as she shall remain my widow" did not contain a condition in restraint of marriage, but rather a mere limitation) (italics omitted). But when the conditions operate to divest a beneficiary of property upon the happening of some subsequent event, courts have held such conditions void. *See, e.g.*, *Robertson*, 859 N.E.2d at 774, 777 (holding that a will permitting the testator's spouse "to continue to live at" a certain residence "as if he had been devised a life estate" in that residence "or until he remarries or allows any female companion to live with him who is not a blood relative" is an invalid condition in restraint of marriage because "such [lifetime] tenure would subsequently be cut short if he were to remarry").

A. Because Rotert's property interests vested at the time of Borcherding's death, the Trust imposed permissible conditions of acquisition (rather than impermissible conditions of retention).

Ultimately, whether a provision in restraint of marriage is a valid limitation or a void condition ultimately depends on the terms used in the instrument of conveyance. *See Crawford*, 91 Ind. at 273 (resolution of this question "must depend, to a great extent, upon the circumstances of particular cases"). The Trust here specified that Rotert would receive his share of the estate outright "[i]n the event that [he] is unmarried at the time of [Borcherding's] death." Appellant's App. Vol. 2, p. 37. But "in the event that he is married at the time of [Borcherding's] death," the Trust devised all property to Stiles as trustee for Rotert's benefit. *Id.*

A majority of the Court of Appeals held that this language signaled "the event which will defeat Rotert's absolute rights to his inheritance." *Rotert v. Stiles*, 159 N.E.3d 46, 52 (Ind. Ct. App. 2020). But this is an inaccurate reading of the applicable precedent. Impermissible words of condition indicate "some event which," if it occurs during "the period which is to determine the estate" or "before the determination of the estate," will divest the intended beneficiary of his or her portion of the estate. *Summit*, 109 Ind. at 508, 9 N.E. at 583. In other words, conditions that operate **only** to divest a beneficiary of property upon the occurrence of some event (e.g., marriage) **subsequent to** the vesting of that property are void. *See Aldred v. Sylvester*, 184 Ind. 542, 560, 111 N.E. 914, 919 (1916) (conditions subsequent "tend to destroy estates") (internal quotation marks omitted). Here, by the terms of the Trust, Rotert held no vested interest in the estate **prior to** Borcherding's death. *See Dickey*, 98 Ind. App. at 64, 180 N.E. at 38 (concluding that the "testator did not intend that title to the property vest unless the conditions contemplated by him were in existence at the time of the life tenant's death"). And when a property transfer becomes effective on "the date of death of a testator, there is no **condition precedent** in restraint of marriage, but merely a description of the circumstances under which the transferee is intended to take."

Restatement (Second) of Property, Don. Tran. § 6.1 cmt. b, at 255 (1983) (emphasis added).

This principle follows precedent from this Court. As explained in *Crawford*, conditions "annexed to gifts, legacies and devises in restraint of marriage" are generally void "**except a condition precedent** annexed to a devise of land, which though it be in complete restraint will, if broken, prevent the taking effect of the devise." 91 Ind. at 273 (emphasis added). In other words, conditions that determine **whether a transfer of property is effective in the first place** do not amount to restraints on marriage. *Id.* at 277.

The reason for this exception is straightforward: "settlors of revocable trusts continue using the trust property during their lives and retain the power to revoke or amend the trust at any time."[2] *Fulp*, 998 N.E.2d at 207. And this freedom of disposition "necessarily includes the right to withhold or attach terms and conditions to the gift, regardless of how capricious or unreasonable the conditions may seem to others, unless they violate some established principle or statute." *Dickey*, 98 Ind. App. at 63, 180 N.E. at 38.

To be sure, the applicable precedent, on first impression, seems to leave open the possibility of an impermissible testamentary condition operating to divest a beneficiary of his interest in an estate "if the event expressed in the condition [*e.g.*, marriage] **arises before determination of the estate**." *See Summit*, 109 Ind. at 508, 9 N.E. at 583 (defining void conditions in restraint of marriage) (emphasis added). But the "determination of [an] estate" has nothing to do with whether an intended beneficiary **acquires** a vested interest in an estate to begin with. Rather, in matters of property conveyance, "determination" refers to the "**ending or expiration** of an

[2] The same principle applies to wills: An heir apparent has a mere **expectancy interest** in an estate, and that interest "becomes a vested right **only on the death of the person** to whom he is potentially an heir, **if ever it vests**." *A. B. v. C. D.*, 150 Ind. App. 535, 549, 277 N.E.2d 599, 609 (1971) (emphasis added). *See also Allman v. Malsbury*, 224 Ind. 177, 191, 65 N.E.2d 106, 112 (1946) ("A will speaks only from the time of death, for prior thereto, it may be changed at any time.").

estate or interest in property" once it's vested. Black's Law Dictionary (11th ed. 2019) (emphasis added). *Accord Summit*, 109 Ind. at 508, 9 N.E. at 583 (noting that "words of condition render the estate liable to be defeated . . . if the event expressed in the condition arises before determination of the estate, **or completion of the period described by the limitation**") (emphasis added).

B. Once Rotert's share of the estate vested, no Trust conditions operated to divest him of that share upon the happening of some subsequent event—whether divorce or continuation of the marriage.

Because the terms of the Trust specify that Rotert's marital status matters only "at the time of [Borcherding's] death," the Trust offers no inducement for divorce (or continuation of marriage, for that matter). *See* J.F. Ghent, *Wills: Validity of Condition of Gift Depending on Divorce or Separation*, 14 A.L.R.3d 1219 § 2 (1967) ("Bequests which vest depending on the marital status of the recipient at the time of the testator's death are also generally upheld on the basis that no continuing inducement to divorce or separation is thereby offered.").

The Court of Appeals decision in *Dickey*, cited by the dissent below and by Stiles, is analogous. In that case, the court upheld a will provision that permitted the testator's son to receive property upon the death of the testator's wife, so long as the son "shall be living and shall have married and is at that time living with his said wife." 98 Ind. App. at 60, 180 N.E. at 37. The will deprived the son of nothing, the court reasoned, because the "conditions were conditions of acquisition of title by the appellant, and not of retention." *Id.* at 66, 180 N.E. at 39. In *Crawford*, by contrast, the testator left to her widowed daughter, by will, a certain sum annually "as long as she should live," but stipulated that if she remarried she "should not be entitled to said legacy from that time on." 91 Ind. at 271 (italics omitted). This Court held that, because the gift was made upon a condition subsequent (to the vesting of the property interest), the condition was void as a restraint of a subsequent (second) marriage. *Id.* at 275, 277.

On other hand, neither of the cases on which Rotert and the majority below relied—*Robertson* and *Owen*—support Rotert's position. In *Robertson*, the Court of Appeals held as an impermissible condition on a life estate a trust provision calling for a husband, upon testator-wife's death, "to continue to live at said real estate . . . until he remarries or allows any female companion to live with him who is not a blood relative." 859 N.E.2d at 774. The restriction in the trust was not a permissible limitation, the court reasoned, because the "measuring stick" for the husband's property interest "was not such period of time until he remarried or cohabitated with a female companion, but instead was his lifetime." *Id.* at 777. Husband's life estate, in other words, "would subsequently be cut short if [husband] were to remarry." *Id*. Similarly, in *Estate of Owen*, the Court of Appeals considered a will in which the testator granted her daughter a life estate in a property but prohibited her from "rent[ing] that residence if she is married **at that time** to [her husband]." 855 N.E.2d 603, 610 (Ind. Ct. App. 2006) (emphasis added). Because the daughter could only remove the rental restriction (**after her life estate had vested**) by divorcing her husband, the court held that it was an impermissible restraint on marriage. *Id.* at 611–12.

Unlike in either of these two cases, the Trust here did **not** grant to Rotert a property interest that could later be altered or restricted by his marital status. Rather, the Trust determined the property interest Rotert would receive upon Borcherding's death and permitted no subsequent change in that property interest, regardless of Rotert's marital status.

Conclusion

For the reasons above, I agree with the Court that Rotert is entitled to no relief for either his due-process claim or his restraint-of-marriage claim. However, I would conclude that the prohibition against restraints on marriage applies to testamentary trusts and not just to wills. And based on that conclusion, I would affirm the trial court by holding that, because Rotert's interests in the estate vested "at the time of" the testator's death, the terms of the Trust amounted to permissible conditions of acquisition rather than impermissible conditions of retention.