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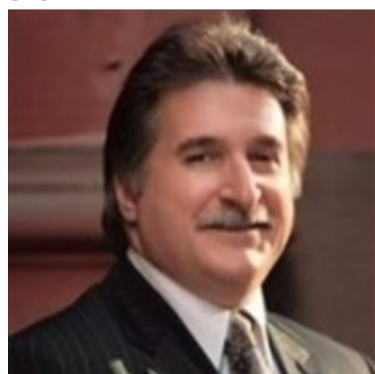


Estates & Wills & Trusts

# Judge should not have rejected alleged racist will: appeal court



THE CANADIAN PRESS



TORONTO — An Ontario judge overstepped the law in rejecting a man's decision to disinherit his daughter over allegations he did it because she had a child with a white man, the Court of Appeal ruled Tuesday.

The desire to prevent discrimination does not allow the court to challenge the validity of an "absolute, unequivocal and unambiguous" will based on third-party allegations of racism, the three-judge panel said.

"The law does not require a testator to explain, let alone to defend, her reasons for her testamentary dispositions. Indeed, in my view, the privacy of those reasons is inherent in the principle of testamentary freedom," Justice Eleanore Cronk wrote in the decision.

"The court's power to interfere with a testator's testamentary freedom on public policy grounds does not justify intervention simply because the court may regard the testator's testamentary choices as distasteful, offensive, vengeful or small-minded."

Allowing such challenges would only encourage disappointed beneficiaries to allege improper motives in order to increase their share of an estate, fostering "unnecessary litigation" and causing confusion, Cronk said.

In an interview with [AdvocateDaily.com](http://AdvocateDaily.com), Toronto-area estate litigator [Charles Ticker](#) says, "This is the decision the estates bar has been waiting for. Even though many people might disagree with the decision and feel that it's not fair, I think the court made the right decision." [See prior story.](#)

Ticker, who did not act in this matter but has been following the legal saga closely, says testamentary freedom is a long-standing, common-law principle and the Court of Appeal of Ontario agrees.

He says of particular interest was an obiter comment from Cronk that noted even if the testamentary bequest had been facially repugnant in the sense that it disinherited the testator's daughter for expressly stated discriminatory reasons, the bequest would nonetheless be valid as reflecting a testator's "intentional, private disposition of his property — the core aspect of testamentary freedom."

Ticker says while not absolute, testamentary freedom is very close to an absolute right — subject to any limitations imposed by statute or in very limited circumstances.

"I know there will be much debate about this decision and these issues," he says.

"It's an interesting case and I think there will be both criticism and support of the court's ruling," Ticker says.

"On a strict reading of law and precedent, it was probably the right decision but perhaps it is time for the Legislature to revisit this area and give the courts some authority to deal with these types of situations," Ticker adds.



The case is an important one dealing with "the intersection of human rights law and the law of wills and estates," said David Freedman, who teaches estate law at Queen's University.

"The balance of the competing policy interests — freedom to enjoy property and our response to unjustified discrimination — is a really hard one," he said in an email.

"The Court of Appeal is not saying it has struck the balance of rights correctly, but that this is a decision that needs the legislature to strike an appropriate balance."

The will was thrown out early last year by a judge who found Rector Emanuel Spence had disinherited his daughter "based on a clearly stated racist principle," which offended "not only human sensibilities but also public policy."

BMO Trust Company, which administers the estate, filed an appeal arguing the evidence about Spence's intentions should have been inadmissible because it contradicted what was written in his will, and that the judge "unjustifiably interfered" with Spence's testamentary freedom.

Spence, who was born in Jamaica and went by the name Eric, died in 2013 at age 71, leaving behind two adult daughters from a previous relationship.

The eldest, Verolin Spence, challenged his will as against public policy after finding that he had specifically excluded her and her son, leaving everything to her sister Donna and Donna's two sons.

"I specifically bequeath nothing to my daughter, (Verolin) as she has had no communication with me for several years and has shown no interest in me as her father," the will stated.

In an affidavit, Verolin Spence, 52, said she and her father enjoyed a close relationship until she told him she was pregnant with a white man's child.

Spence had lived with her father on and off for more than a decade, immigrating with him to Canada when he left England in 1979 following the end of his previous marriage, court has heard.

Her sister Donna Spence, 51, stayed with their mother in England and had no contact with the pair after they moved.

"My father made it very clear to me that he would not allow a 'white man's child' in his house. The reason my father severed the relationship with me is because I gave birth to a child fathered by a white man," Verolin Spence said in her affidavit.

A family friend who acted as Eric Spence's caregiver also filed an affidavit saying the man had a falling out with both daughters and cut ties with Verolin after finding out the father of her child was not black.

But the appeal court found the purpose of that evidence was not to establish the motive for the will, but rather to contradict the reasons explicitly laid out in the document and substitute a different and allegedly unlawful motive."

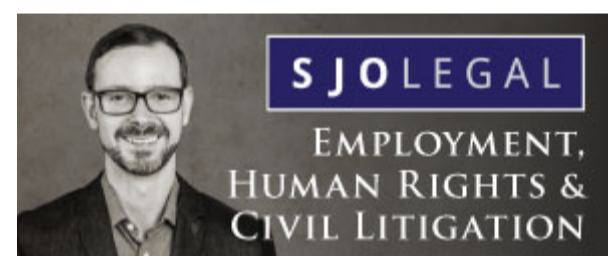
"I see no basis at law for the admission of wholly contradictory, extrinsic evidence of motive for this purpose. In my view, the courts should be loath to sanction such an indirect attack, which the deceased cannot challenge, on a testator's expressed motive and testamentary choices," the ruling reads.

A lawyer for BMO Trust said the company is "content" with the decision and would not comment further.

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