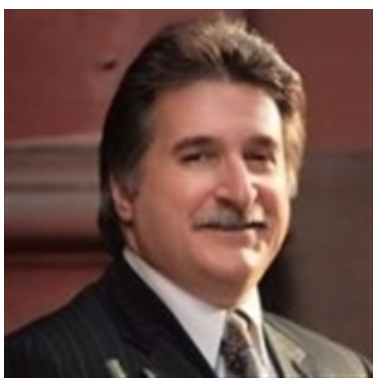
Estates & Wills & Trusts

Overturning of 'racist will' runs contrary to common law



The Ontario Superior Court ruling in *Spence v. BMO Trust Company*, 2015 ONSC 615 (CanLII) is commendable for its principles but is troubling with regards to the investigation of a testator's intentions, says Toronto-area estate litigator Charles Ticker.

In *Spence*, Justice Cory Gilmore set aside the will of the deceased Rector Emanuel Spence, who had disinherited his daughter Verolin Spence while leaving his estate to his other daughter Donna Spence and her two children.

Applicant Verolin Spence asserted that the will was void for public policy reasons due to the deceased's racist views and should be set aside resulting in an intestacy, which would result in the two sisters equally sharing the estate.

The deceased's will specifically included a clause related to Verolin Spence's disinheritance, which stated "I specifically bequeath nothing to my daughter, Verolin Spence, as she has had no communication with me for several years and has shown no interest in me as a father."

However, at trial, an affidavit from a friend and caretaker of the deceased stated that the reason the deceased excluded Verolin Spence and her son from his will was because she had a child with a man who was not black and he "had no further use for her."

Ticker tells AdvocateDaily.comile Justice Gilmore's decision to set aside the will in the interest of public policy is laudatory for its principles, it is a bit troubling with respect to the common law that has developed in this area of law.

"What came across to me as being somewhat interesting and unusual about this case is that it has taken the common law and interpretation of wills and investigation of a testator's intentions quite a bit beyond anything we've seen to date," he says.

Ticker says it's surprising to see the court go beyond the wording of a will that appeared on its face to be clear and unambiguous.

"There's nothing about racism on the face of the will. There's nothing that seems to contradict public policy in the wording of the deceased's will. There's no ambiguity, so why was it necessary to admit extrinsic evidence from third parties as to the intention of the testator?" he says.

He also wonders, "What would have been the result in *Spence* if one of the residuary beneficiaries was a charity? Would the judge have ruled differently?"

This ruling appears to run contrary to what Ontario courts have said about the admissibility of extrinsic evidence to determine a testator's intentions, except in certain limited circumstances where there is some ambiguity on the face of the will or in the circumstances surrounding the making of the will or some mistake has been made by the

drafting lawyer.

Ticker points to the Court of Appeal's well-known decision in *Rondel v. Robinson Estate*, 2011 ONCA 493 (CanLII), leave to appeal to the Supreme Court of Canada refused. In that case, he says, the court looked at when you can go outside the will to determine the testator's intentions.

In *Rondel*, the Court of Appeal held:

"The law properly regards the direct evidence of third parties about the testator's intentions to be inadmissible. There would be much uncertainty and estate litigation if disappointed beneficiaries like Dr. Rondel could challenge a will based on their belief that the testator had different intentions than those manifested in the will."

Ticker says the application judge in *Spence* did not refer to *Rondel*, but instead focused on another Court of Appeal decision, *Canada Trust Co. v. Ontario Human Rights Commission* (C.A.), 1990 CanLII 6849 (ON CA), which is the leading authority on public policy .

In *Canada Trust*, the deceased left money in trust to create scholarships for students, but limited the recipients to mainly white Christian men. The distinction between the two cases, says Ticker, is that *Spence* deals with a private beneficiary while *Canada Trust* included members of the public.

In *Canada Trust*, Justice Tarnopolsky wrote: "A finding that a charitable trust is void as against public policy would not have the far-reaching effects on testamentary freedom which some have anticipated. This decision does not affect private, family trusts. By that I mean that it does not affect testamentary dispositions or outright gifts that are not also charitable trusts.

"Historically, charitable trusts have received special protection: (1) they are treated favourably by taxation statutes; (2) they enjoy an extensive exemption from the rule against perpetuities; (3) they do not fail for lack of certainty of objects; (4) if the settlor does not set out sufficient directions, the court will supply them by designing a scheme; (5) courts may apply trust property cy-près, providing they can discern a general charitable intention. This preferential treatment is justified on the ground that charitable trusts are dedicated to the benefit of the community (Waters, supra, 502). It is this public nature of charitable trusts which attracts the requirement that they conform to the public policy against discrimination. Only where the trust is a public one devoted to charity will restrictions that are contrary to the public policy of equality render it void," Justice Tarnopolsky continues.

The applicants in *Spence* also relied on *McCorkill v. McCorkill Estate*(CanLII). In that case, the court determined that the payment or transfer of the residue of the McCorkill Estate to the National Alliance was against public policy, as the organization had a long history of inspiring and carrying out hate-motivated violence and terror.

The court held that the dissemination of hate propaganda by the National Alliance violated the public policy of Canada and the residual bequest to the National Alliance in the will of the deceased was found to be void.

Ticker says the court's decision in *Spence* could open the doors for disgruntled beneficiaries to bring will challenges to court.

"Obviously there is going to have to be some guidance as to when a court will embark upon an inquiry as to the motivations for the testator's bequest," he says. "The *Spence* case is apparently being appealed so we will have to wait for the Court of Appeal's decision for further direction."

Ticker adds that it's important to keep in mind that there is nothing in Ontario law that says that adult children must be treated equally or are guaranteed a right to their parents' estate.

"I get calls all the time from adult children left out of a parent's will and they are very surprised to hear they don't have an automatic right unless they are a dependent," he says.

"It's certainly generating a lot of comment and a lot of interest and I'm sure we'll be hearing and seeing a lot more written about *Spence*."

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