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Should Racism Be a Bar to Testamentary Freedom?

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In a common law jurisdiction, freedom of testation is generally regarded as one of the guiding principles of modern succession law. However, courts are prepared to impose limits upon the rights of a testator, including a principle as fundamental as testamentary freedom. Historically recognized limits to testamentary freedom include the requirement to leave adequate support for a surviving spouse and other dependants, the incapacity to benefit from gifts contingent on the commission of a crime, protection of creditors, and limitations under the *Perpetuities Act.*

Granting a testator complete latitude in disposing of his or her estate has the potential to harm others and/or to impose a cost on the rest of society.[1] Racism and the violence that it inspires impose great social costs. In a jurisdiction such as Ontario, where it is clear that testamentary freedom is not absolute, a testamentary instrument based on an offensive, racist belief may, under certain circumstances, be altered or set aside.

Spence v. BMO Trust Company[2]

A recent decision of the Ontario Superior Court of Justice saw the invalidation of a Last Will and Testament on the basis that it was motivated by racism and offended public policy.

Verolin Spence, the daughter of the testator, Rector Emanuel Spence, had a loving relationship with her father for nearly 40 years. Their relationship, however, came to an abrupt end when Verolin announced to her father that she was pregnant by a man of a different skin colour.

Based on the uncontested affidavit evidence of a disinterested third party, the testator's close friend and neighbour, the Court held that the testator had disinherited Verolin (in favour of his other daughter, from whom he had been estranged for many years), the natural object of his bounty, as a result of racist motives. Justice Gilmore set aside the Will on the basis that the testator's racist motives offended public policy.

The appeal of the decision of the Ontario Superior Court of Justice was heard on September 4, 2015. The Respondents to the appeal argued that a testamentary instrument should be altered or set aside for public policy reasons when it is based on an offensive, discriminatory principle that impinges on the dignity of life.

The appeal focused on two primary issues: (1) whether extrinsic evidence is admissible, absent explicit racism or ambiguity on the face of the Will; and (2) under what circumstances can and should a Will be set aside because it offends public policy? As of the date of this writing, the Court of Appeal has not yet released its decision.

Admissibility of Extrinsic Evidence

Generally, extrinsic evidence is not admissible for the purpose of ascertaining a testator's intentions, unless there is ambiguity on the face of the Will or equivocation. While no ambiguity or equivocation existed on the face of the testator's Will in *Spence v. BMO Trust*, the Respondents to the appeal argued that the general inadmissibility of extrinsic evidence did not apply

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because the issue at hand was not the testator's intentions, but his motives, being distinct from intentions, which answer the question of *what* the testator wanted to do with his or her property, rather than *why* the testator disposed of his or her property as her or she did.

Canadian courts have previously admitted extrinsic evidence in cases involving (racist) motives, even where there was no ambiguity on the face of the document. In *McCorkill v. McCorkill Estate*,[3] for example, there was no ambiguity regarding the intentions of the testator or the terms of his Will. However, the Court nonetheless admitted extrinsic evidence to demonstrate that the testator's intended beneficiary - an American-based neo-Nazi organization - was racist, promoted hatred, and, as a result, was incapable of accepting the racially-motivated gift.

Are we opening the floodgates?

Some who disagree with the Ontario Superior Court of Justice's decision in *Spence v. BMO Trust* might posit that upholding a decision that allows an unambiguous and otherwise valid Will to be set aside, by reason of racist motives supported only by extrinsic evidence, would open the floodgates for litigation by any disappointed beneficiary who could allege discrimination on a number of different grounds, including gender, sexual orientation, religion, and many other differences that may exist between the testator and expectant beneficiaries. However, there are certain safeguards in place that would help prevent potential beneficiaries from challenging a Will on the basis of motivation by a belief that is contrary to public policy where the claim has no merit.

Costs consequences and evidentiary burdens may deter individuals who challenge a Will on the basis of motivation that offends public policy when such an allegation is not supported by evidence.

In response to the floodgates argument advanced by the Respondent in *McCorkill Estate*, Justice Grant pointed out that, while public policy has been recognized for centuries, there has been no "deluge of cases where the courts have intervened in an estate or trust or even a contract on the grounds of public policy."[4]

It is also noteworthy that a Will challenge on the basis of racist motives would only be available to persons who were the natural objects of the testator's bounty. In other words, the class of potential claimants is somewhat limited.

Conclusion

Chief Justice McLachlin has suggested that, if the law refuses to intervene in instances of discrimination based on the freedom of personal choice, then the law has adopted an "ethic of passive tolerance of inequality", which "allow[s] discrimination to continue and thereby reinforce[s] the ethic of exclusion and subordination."[5]

While public policy should be invoked to restrict testamentary freedom with caution, racist motivation clearly offends public opinion and may justify varying or eliminating the estate plan implemented by a racially-motivated Will.

The Court of Appeal will ultimately have to consider how far Ontario courts should go to identify and invalidate Wills motivated by racism. Whatever the Court decides, its reasons may have a significant impact, not only on estate law, but also on our larger society and how its values are reflected by the common law.

[1] Daniel B. Kelly, "Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications" (2013) 82(3) Fordham L Rev 1125 at 1163. The idea of "externality" is not new. See James M. Buchanan and William Craig Stubblebine, "Externality" (1962) 29(116) Economica 371.
[2] 2015 ONSC 615 (CanLII).
[3] 2014 NBQB 148 (CanLII), affirmed 2015 CanLII 14497 (NB CA).
[4] *Ibid* at para 88.
[5] McLachlin, CJC, "Racism and the Law: The Canadian Experience" (2002) 1 JL & Equality 7-24 at paras 13, 14, online: QL (JOUR).

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