Laws required so courts can nix discriminatory wills

BY MICHAEL MCKIERNAN
For Law Times

Some trusts and estates lawyers say legislative action is needed to ensure courts can invalidate discriminatory wills or bequests on public policy grounds after the Supreme Court of Canada declined a chance to rule on the interplay between testamentary freedom and human rights law.

Verolin Spence, the appellant in *Spence v. BMO Trust Company*, initially succeeded in her quest to overturn her father Eric's will after an Ontario Superior Court judge allowed the introduction of evidence that suggested his disinheritance of her was based on a "racist principle," rather than their estrangement, as cited by Eric Spence in the will.

Affidavits from Verolin Spence and her father's caregiver alleged Eric Spence, a black man, was racially motivated in leaving his daughter out of the will because she had a child with a white father.

However, Ontario's appeal court reversed the decision, ruling that the judicial interference with Eric Spence's testamentary freedom was unwarranted, and this month, the nation's top court denied leave to hear Verolin Spence's appeal.

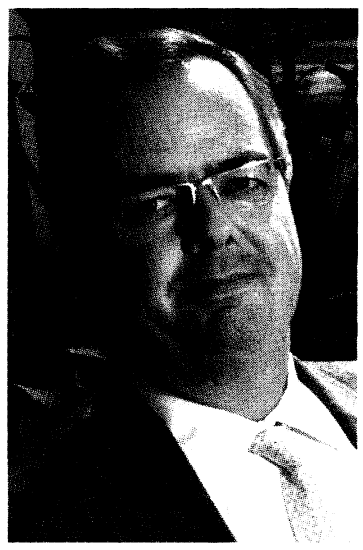
Even if the elder Spence had stated an explicitly racist reason for leaving his daughter out of the will, Ontario Appeal Court Justice Eleanore Cronk ruled "the bequest would nonetheless be valid" because neither the Charter nor Ontario's Human Rights Code come into play for "testamentary dispositions of a private nature."

"Absent valid legislative provision to the contrary, the common law principle of testamentary freedom thus protects a testator's right to unconditionally dispose of her property and to choose her beneficiaries as she wishes, even on discriminatory grounds," Cronk continued in her March 8 decision.

Ian Hull, the co-founding partner of Toronto estates law boutique Hull and Hull LLP, says he is "troubled" by that conclusion, noting that other appeal court decisions have cast doubt on the privacy of wills, especially in the context of disputes or applications for probate.

"I think the lay person looking at this case, and the evidence of racist motivation, can be quite properly surprised by the result," Hull says, adding that the time may have come to fill the legislative gap identified by the appeal court.

"I don't think it's unfair for courts to expect some legislative guidance on when they can look behind testamentary decisions if someone can show that they have been made based on discriminatory motivations," Hull says. "I think we do need the legislature to do that, rather than the courts."



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Matthew Furrow, a lawyer with Toronto trusts and estates firm Goddard Gamage Stephens LLP, says the *Spence* decision highlights "peculiarities" in the law regarding wills that offend public policy. For example, while the appeal court found Eric Spence was entitled to disinherit his daughter for discriminatory reasons, the decision suggests he could have violated public policy by making the disinheritance conditional on the same discriminatory reasons.

"I think testamentary freedom is extremely important, and if you ask any estates lawyer, they will say the same thing. But I also believe that human rights law is very important," Furrow says. "One dates back centuries, while the other is much more recent and developing, and I think there needs to be a reckoning there. Society needs to grapple with where the boundaries should be, and that may have to happen through legislation rather than the courts."

At the same time as its denial of leave in *Spence*, the Supreme Court of Canada also refused to hear an appeal in the case of Robert McCorkill, a New Brunswick man who left the residue of his estate, reportedly worth up to $1 million, to a neo-Nazi organization based in the U.S. A New Brunswick judge voided the unconditional bequest on public policy grounds, ruling that the group's white supremacist character made it an unworthy heir.

Paula Lester, who practises with Ottawa firm Nelligan O'Brien Payne LLP, says there is one big difference between the New Brunswick and Ontario cases.

"McCorkill actually made a positive bequest, which is much easier to find void than a lack of a bequest," she says.

Despite the Supreme Court steering clear of the cases, will drafters can still draw lessons from both, according to Lester.

"Any lawyer who is asked to place conditions on a gift that would require executors or trustees to act in a way that is against public policy would be well advised to let clients know that they are likely to be struck out by a court," she says. "*McCorkill* tells us that clients need to be careful who they give their gifts to. In that case, it was a gift to a neo-Nazi group that the court found void, but lawyers should ask clients what their groups do, because it's possible the principle could be expanded to other groups where things are a little less clearcut. For younger clients, I think it's a good idea to point out that what is against public policy can change with time."

Furrow says he was "kind of surprised" by the Supreme Court's decision to deny leave in both cases.

"It seemed like an opportunity to see where the law is, and maybe develop it a little," he says. LT