



Testamentary Freedom vs. Public Policy

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A recent wave of Canadian case law has shone some light on testamentary freedom, and the exceptions to this freedom.

An individual has the freedom to dispose of his or her estate as he or she wishes. A clear and established exception to this freedom is when a testator has an obligation to a dependent (for example, a spouse, minor child, adult child or other person who is financially dependent on the testator). Another less clear exception to this freedom is when a Will contravenes public policy. The circumstances under which a Will may contravene public policy are varied and have recently been considered by lower provincial Courts and the Court of Appeal of Ontario.

In 2014, the Court of Queen's Bench in New Brunswick considered whether the deceased's Will, in which he left everything in his Estate to the National Alliance, a neo-Nazi group in the United States, was void for being illegal and contrary to public policy. The Court held that the monetary gift to the National Alliance should fail because the established mandate of the National Alliance was in contravention of section 319(2) of the Criminal Code of Canada (which prohibits hate propaganda) and because administering the testator's Estate pursuant to his wishes and funding an association like this would not be in the best interests of society: (*McCorkill v. Streed*, 2014 NBB 148).

In *Spence v. BMO Trust Company* (2016 ONCA 196), a recent decision of the Ontario Court of Appeal, the deceased left his Estate to one of his two daughters, Donna, and to her two sons. In his Will, Mr. Spence specifically excluded his other daughter, Verolin, and her children because "she has had no communication with me for several years and has shown no interest in me as a father." In reality, Verolin and her father were very close, having immigrated together to Canada from the United Kingdom, and Mr. Spence and Donna had virtually no contact over many years. The trouble began when Verolin had children with a man who was not white, much to Mr. Spence's dismay. As a result, he ceased communicating with her during the last 11 years of his life and changed his Will to exclude her and her children. Verolin brought a claim against the Estate, arguing that her exclusion from the Will was for racist reasons and was therefore void for public policy. These racist intentions were reported by family and friends who had knowledge of it from personal conversations with Mr. Spence. Justice Gilmore of the Superior Court of Justice of Ontario agreed with Verolin, finding that Mr. Spence's reasons for disinheriting his daughter were based on a clearly-stated racist principle and that the provisions of the Will offended "not only human sensibilities but also public policy." The case was successfully appealed to the Court of Appeal of Ontario in 2016. Mr. Spence's Will was very clear with respect to his testamentary intentions and did not contain any clauses that were expressly racist. As the Will was unambiguous, the Court of Appeal held that there was no reason to consider any other evidence



about Mr. Spence's intentions, such as the recollections of family and friends. The Court of Appeal therefore held that the Will was not void for being contrary to public policy, and Mr. Spence's Estate could be distributed as he wished.

In another recent Ontario case, *Royal Trust Corporation of Canada v. The University of Western Ontario et al.*, 2016 ONSC 1143, the Court held that the deceased's Will was, in fact, void for offending public policy. In this case, Dr. Priebe created a Will that created a scholarship for white, single, heterosexual, female or male science students who are not feminists or athletes. Justice Mitchell of the Superior Court of Justice of Ontario relied on a similar 1990 case about another discriminatory scholarship, and found that Dr. Priebe's scholarship and the qualifications relating to "race, marital status, and sexual orientation and, in the case of female candidates, philosophical ideology" are void for being contrary to public policy. Even though the Will did not expressly show that Dr. Priebe was misogynistic, homophobic or a white supremacist, Justice Mitchell found that there was no doubt as to Dr. Priebe's views and that his intention was to discriminate. It is unclear as of August 2016 whether this case has been appealed.

Courts take testamentary freedom very seriously; however, they take Canadian criminal laws and human rights and freedoms very seriously as well. It seems as though the Courts will intervene when a Will is expressly discriminatory, or where the administration of an Estate would place an Executor in a position to contravene public policy or criminal laws. Every case is different, and it is important to discuss

your Will and Estate plans with a lawyer to ensure that your wishes are enforceable.

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