Estate Litigation

Spence v. BMO – An Update

In our December 2015 Wills, Estates & Trusts Newsletter, we discussed the controversial decision of *Spence v. BMO Trust Company*. You might recall that this case had two important aspects in that the Court looked outside the will at extrinsic evidence of motive and then determined that extrinsic evidence of a motive that was contrary to public policy could void an otherwise valid and unambiguous will that was not discriminatory on its face. The highly anticipated appeal was released in March 2016 and the Court of Appeal reversed the findings reported in our last newsletter.

The Court of Appeal considered whether:

(1) It is open to the courts to scrutinize an unambiguous and unequivocal bequest in a will, with no discriminatory conditions or stipulations, if a disappointed beneficiary or third party claims that the bequest offends public policy due to the motive of the testator and,

(2) Third-party extrinsic evidence of the testator's alleged discriminatory motive for making the bequest is admissible to set aside the will on public policy grounds.

The facts briefly are: Rector Emanual Spence (the "Deceased") excluded his adult daughter, Verolin, and her minor son, A.S., from his Will and directed that the estate was to be distributed to his other daughter and her two minor children. Verolin and A.S. commenced an application to set aside the Will arguing that the Will was contrary to public policy, as Clause 5(h), which disinherited Verolin, was racially motivated. Clause 5(h) read as follows:

> "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 application judge heard evidence that went to the Deceased's motives, accepted the evidence that the clause was racially motivated and set aside the Deceased's Will in its entirety.

In overturning this decision the Court of Appeal emphasized and affirmed the common law doctrine of testamentary freedom.

The Court of Appeal found that Verolin had no statutory entitlement to her father's estate as she was not a dependent and her father could in fact disinherit her. The Court confirmed that in Ontario, no one is entitled to receive any thing under a will, subject to legislated protections for dependents.

The Court found that the terms of the Will were unequivocal, unambiguous and unconditional; the Will was not facially discriminatory and therefore did not offend public policy. The wording of Clause 5(h) was not racist. The Will imposed no conditions, that offended public policy and the Deceased's residual beneficiaries and estate trustee were not obliged to act contrary to law or public policy in order to give effect to the provisions of the Will. The Court confirmed that extrinsic evidence of a testator's intention is not admissible when the will is clear and unambiguous on its face. Courts may not interfere with a testator's testamentary freedom on public policy grounds just because the court may regard the testator's testamentary choices as "distasteful, offensive, vengeful or small-minded".

According to the Court, even if the deceased's Will had disinherited Verolin expressly for discriminatory reasons, the bequest would still be valid as it reflected the testator's intentional and private disposition of his property.

Importantly the Court of Appeal reaffirmed that testamentary freedom protects a testator's right to unconditionally dispose of their property even on discriminatory grounds. This freedom explicitly includes the ability to disinherit an adult (non-dependent) child based on discriminatory grounds. Testamentary freedom may be constrained by public policy considerations in some circumstances, such as where a public trust is created or where conditions are imposed that would require the Estate Trustee or beneficiary to act contrary to public policy in order to give effect to the Will.

Both of these exceptions were at play in a recent decision in Superior Court, in *Royal Trust Corp. of Canada v. University of Western Ontario*, where the Court stressed the importance of the distinction between private trusts and public charitable trusts as central to the determination of whether interference with testamentary freedom was warranted on public policy grounds.

In *Royal Trust*, the 1994 Will of the deceased, Dr. Priebe appointed Royal Trust as the estate trustee but required the trust to be administered in a way that was now contrary to public policy.

The following provisions were found in a charitable purpose clause of the Will:

> Paragraph 3(d)(ii): My Trustee shall expend the balance of the income of my estate…to carry out **all** such purposes at such time and times as it determines:
>
> . . .
>
> (E) To provide funds, from time to time and in the discretion of my Trustee for awards or bursaries to **Caucasian (white)** male, **single**, **heterosexual** students in scientific studies…Further, to similarly provide funds for an award...to go to a hard-working, **single**, **Caucasian white** girl **who is not a feminist or lesbian**, with special consideration, if she is an immigrant, but not necessarily a recent one.
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> (Emphasis added)

The Court found this provision of the Will void as being contrary to public policy by virtue of it being discriminatory on the basis of race, gender and sexual orientation. The qualifications in paragraph 3(d)(ii)(E) left no doubt as to Dr. Priebe's views and his intention to discriminate. This case differed from Spence in several important respects: the trust created was public; the clause was discriminatory on its face; and it required Royal Trust to contravene public policy to implement the provisions.

Takeaway

After last year's controversial decision, the Ontario Court of Appeal has strongly reaffirmed the doctrine of testamentary freedom. If a Will does not impose conditions that, on its face, offend public policy, and if the devise is a private one, the Court will not interfere regardless of the testator's intentions and even if the bequest is facially repugnant. However, Canadian courts will intervene where a public trust contains a discriminatory clause, particularly where the clause requires the trustee or the beneficiary to contravene public policy in order to give effect to the terms of the will.

It remains to be seen whether the Applicant in *Spence* will seek leave to appeal to the Supreme Court of Canada.

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Pallett Valo Estate Litigation Practice

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