COURT OF APPEAL FOR ONTARIO

CITATION: Spence Estate (Re), 2016 ONCA 196
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Cronk, Lauwers and van Rensburg JJ.A.

In the Estate of Rector Emanuel Spence, also known as Eric Spence, deceased

BETWEEN

Verolin Spence and A.S.

Applicants (Respondents)

and

BMO Trust Company, Donna Spence,
K. S.-P. and K. S.-P.

Respondents (Appellant)

Justin W. de Vries and Angela Casey, for the appellant

Earl A. Cherniak, Q.C., Jasmine T. Akbarali and Michael S. Deverett, for the respondents

Heard: September 4, 2015

On appeal from the judgment of Justice Cory A. Gilmore of the Superior Court of Justice, dated January 13, 2015, with reasons reported at 2015 ONSC 615.

Cronk J.A.:

[1] Is it open to the courts to scrutinize an unambiguous and unequivocal residual bequest in a will, with no discriminatory conditions or stipulations, if a

disappointed beneficiary or other third party claims that the bequest offends public policy? Is third-party extrinsic evidence of the testator's alleged discriminatory motive for making the bequest admissible on an application to set aside the will on public policy grounds?

[2] This appeal raises these important issues. They are matters of first impression for this court.

I. Background Facts

(1) The Parties

[3] Rector Emanuel Spence, also known as Eric Spence ("Eric"), was born in Jamaica. He died in Ontario on January 25, 2013 at 71 years of age. He was predeceased by his wife, Norma Spence ("Norma"). Eric and Norma had no children.

[4] Eric and his previous partner had separated in about 1964 or 1965. They had two children: the respondent Verolin Spence, born in England in 1963, and Donna Spence, born in England in 1964. Verolin is now 52 years of age. Donna is 51 years of age.

[5] After their parents separated, Verolin lived with her father and Donna lived with her mother. The two sisters did not communicate with each other after the separation.

[6] Eric immigrated to Canada from England in 1979. Verolin joined him in 1984. She lived with her father in Canada, except for periods of educational study abroad, until approximately 1993. Donna lived with her mother in England. She continues to live there, with her children.

[7] According to Verolin, she and her father enjoyed a positive relationship for many years. However, as I will describe in more detail later in these reasons, she claims that their relationship changed in September 2002 when she told Eric that she was pregnant. Verolin says that Eric, a black man, began to restrict his communications and any other contact with her when he learned that the father of her child was white.

[8] Verolin gave birth to her son A.S. on April 26, 2003. A.S. is now almost 13 years old. Unfortunately, he never met Eric.

(2) The Will

[9] Eric made a will on May 12, 2010, almost eight years after Verolin alleges that he cut off all contact with her (the "Will"). The Will makes no provision for Verolin or A.S. Instead, it provides that: i) Donna's two sons are to inherit Eric's jewellery; ii) Norma or, if Norma predeceased Eric, Donna, is to inherit Eric's personal and household articles; iii) the residue of Eric's estate is to be divided in equal shares among Donna and her sons; and iv) one of Eric's cousins is the remainder beneficiary of Eric's estate.

[10] Eric expressly excluded Verolin from sharing in any part of his estate. Clause 5(h) of the Will states:

> 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.

[11] The appellant, BMO Trust Company ("BMO Trust"), was issued a Certificate of Appointment of Estate Trustee with a Will on May 1, 2013 and began to administer the estate.

(3) The Litigation

[12] Verolin and A.S. did not challenge the Will or BMO Trust's appointment as estate trustee in the probate proceeding. Instead, in mid-October 2014, they applied in the Superior Court under r. 75.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and ss. 58 and 60 of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (the "*SLRA*") for: i) a declaration that the Will was void, in whole or in part, because it was contrary to public policy; ii) leave to proceed with a dependant's relief application under the *SLRA*; and iii) directions from the court.

[13] In support of the application, Verolin filed her own affidavit, together with an affidavit sworn by Imogene Parchment ("Imogene"), one of Norma's friends who had acted as Eric's occasional caregiver after Norma's death. In both affidavits, the affiants alleged that Eric's decision to exclude Verolin and A.S. from his Will was racially-motivated. Neither Verolin nor Imogene were cross-

examined on their affidavits. I will refer to their affidavit evidence, collectively, as the "Extrinsic Evidence".

[14] Verolin described the nature of her relationship with her father in her affidavit. She said, among other things, that she and Eric enjoyed a very good relationship as father and daughter from the time of her birth. However, Verolin alleged that this changed dramatically in the fall of 2002:

> In about September 2002, my relationship with my father came crashing down. That is the time when I told my father that I was pregnant. When he found out that the father of my child to be was white, my father told me that he was ashamed of me. From that point onwards, my father restricted his communications with me.
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> ...
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> My father made it very clear to me that he would not allow a "white man's child" in his house.
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> ...
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> The reason my father severed the relationship with me is because I gave birth to a child fathered by a white man.

[15] Imogene's affidavit supported Verolin's version of the reason for her estrangement from her father and exclusion from the Will. Imogene swore that: i) Eric had told her on several occasions that he disinherited Verolin and A.S. because A.S.'s father was a white man; ii) Eric had told her that he changed his Will on May 12, 2010 "because he wanted to exclude Verolin and include Donna and her two sons, since the father of Verolin's son was white and the father of

Donna's sons was black"; and iii) based on her relationship with Eric, it was "very clear" to her that the reason he excluded Verolin from his Will, and included Donna and her sons, was "because he wanted to discriminate against Verolin because the father of her son was a white man".

[16] Verolin also swore in her affidavit that, in about 1992, Eric told her that he had made a will specifying that she was to inherit his home on his death. In her affidavit, Imogene indicated that Eric had told her that he "changed his will" in 2010 essentially to disinherit Verolin and benefit Donna and her two sons. No other evidence regarding the alleged existence of this earlier will forms part of the record before this court. In any event, the Will contains a standard revocation clause, revoking all prior wills, codicils and testamentary dispositions by Eric.

[17] Based on the Extrinsic Evidence, and contrary to the plain language of clause 5(h) of the Will, Verolin argued before the application judge that the real reason she was disinherited by her father was because she gave birth to a child fathered by a white man. She asserted that, because her disinheritance was motivated by racial discrimination on Eric's part, the Will was void by reason of public policy and should be set aside.

(4) Application Judge's Decision

[18] The application judge held that, on its face, clause 5(h) of the Will did not offend public policy (at para. 44). She also stated, at para. 49: "Were it not for

the unchallenged evidence of Ms. Parchment and Verolin, the court would have no alternative but to go no further than the wording in the [W]ill."

[19] The application judge further held that, given the "uncontradicted" and "clear" Extrinsic Evidence, Eric's reason for disinheriting Verolin was "based on a clearly stated racist principle" and that the provisions of the Will favouring Donna and her sons to the exclusion of Verolin offended "not only human sensibilities but also public policy" (at para. 49).

[20] The application judge therefore set aside the Will, in its entirety, on the basis that it violated public policy against discrimination on racial grounds. She also granted declarations that an intestacy in Eric's estate thereby resulted by operation of the *SLRA* and, consequently, that the estate was to be divided equally between Verolin and Donna. Notably, the effect of these declarations was to wholly disinherit Donna's sons, named beneficiaries under Eric's Will. The application judge granted costs to Verolin and A.S. ($11,300) and to BMO Trust, payable out of Eric's estate.

[21] In light of her decision to set aside the Will, the application judge concluded that it was unnecessary to address Verolin and A.S.'s request for leave to proceed with a dependant's relief claim under the *SLRA*. Nonetheless, she indicated that, if the leave application had to be decided, she would have denied leave as the test for leave had not been made out.

[22] BMO Trust appeals the application judge's decision setting aside the Will on public policy grounds. Verolin and A.S. do not cross-appeal the application judge's ruling on their *SLRA* claim. Donna and her sons took no part in the proceedings before the application judge or this court.[1]

II. Issues

[23] As argued, the appeal raises four issues:

(1) Was the Extrinsic Evidence admissible before the application judge?

(2) If the answer to question (1) is 'yes', did the application judge err in her assessment of the Extrinsic Evidence?

(3) Did the application judge err by improperly interfering with Eric's testamentary freedom?

(4) In any event, did the application judge err by setting aside the entire Will, rather than only the residual bequest?

III. Analysis

(1) Parties' Positions

[24] BMO Trust makes four main arguments. First, it submits that the Extrinsic Evidence, as evidence of Eric's intention behind disinheriting Verolin and benefiting Donna and her two sons, was inadmissible. Further, and in any event,

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[1] On March 25, 2015, Huscroft J.A. of this court, sitting in chambers, approved the Office of the Children's Lawyer's (the "OCL's") abandonment of its appeal from the application judge's decision. The OCL did not participate in this appeal.

it submits that the application judge erred by placing any weight on the Extrinsic Evidence because it is contradictory and internally inconsistent.

[25] Second, BMO Trust argues that the application judge unjustifiably interfered with Eric's testamentary freedom, which allows him to distribute his property as he chooses, subject only to certain statutory requirements that are inapplicable in this case.

[26] Third, BMO Trust says that, for various reasons, the application judge did not have jurisdiction to set aside the entire Will. And, fourth, allowing the application judge's decision to stand would increase uncertainty in estates law and open the floodgates to litigation in estates matters.

[27] In response to the first argument, Verolin and her son submitted in their factum that the Extrinsic Evidence was properly admissible "to evaluate whether Eric's intention to disinherit Verolin and benefit Donna and her children offends public policy". During oral argument, this position shifted. At the appeal hearing, Verolin and A.S.'s counsel acknowledged that evidence of Eric's intentions in disposing of his property under his Will was inadmissible on the authority of this court's decision in *Rondel v. Robinson Estate*, 2011 ONCA 493, 106 O.R. (3d) 321, leave to appeal to S.C.C. refused, [2011] S.C.C.A. No. 536. Nonetheless, they maintained that the Extrinsic Evidence was properly admissible because it

relates, not to Eric's intention, but rather, to his specific discriminatory motive for disinheriting Verolin.

[28] Verolin and A.S. submit that the Extrinsic Evidence supports the application judge's finding that the Will is based on offensive racist principles. Further, the application judge made no palpable and overriding error in her assessment of the Extrinsic Evidence. As a result, she did not err in concluding that the Will must be set aside as contrary to public policy against discrimination.

(2) Testamentary Freedom

[29] I begin my analysis of the issues on appeal with consideration of the important principle of testamentary freedom.

[30] A testator's freedom to distribute her property as she chooses is a deeply entrenched common law principle. As this court emphasized in *Canada Trust Co. v. Ontario (Human Rights Commission)* (1990), 74 O.R. (2d) 481, at p. 495, citing *Blathwayt & Lord Cawley*, [1976] A.C. 397, [1975] 3 All E.R. 625 (H.L.):

> The freedom of an owner of property to dispose of his or her property as he or she chooses is an important social interest that has long been recognized in our society and is firmly rooted in our law.

[31] The Supreme Court has also recognized the importance of testamentary autonomy, holding that it should not be interfered with lightly, but only in so far as the law requires: *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, at p. 824.

[32] The freedom to dispose of her property as a testator wishes has a simple but significant effect on the law of wills and estates: no one, including the spouse or children of a testator, is entitled to receive anything under a testator's will, subject to legislation that imposes obligations on the testator.

[33] *Tataryn* is a case in point. In *Tataryn*, the Supreme Court was concerned with the principles to be applied to s. 2(1) of the British Columbia *Wills Variation Act*, R.S.B.C. 1979, c. 435. Under that section, if a testator failed to make adequate provision for the proper maintenance and support of a surviving spouse and children, including independent adult children, the court was authorized to order provision from the estate that it considered "adequate, just and equitable in the circumstances" for the claimant.[2]

[34] In considering the purposes and scheme of the British Columbia statute, the Supreme Court held that the legislation protected two interests: i) adequate, just and equitable provision for the spouses and children of testators; and ii) testamentary autonomy. With respect to testamentary autonomy, the Supreme Court observed, at p. 816:

> The Act did not remove the right of the legal owner of property to dispose of it upon death. Rather, it limited that right. The absolute testamentary autonomy of the 19th century was required to yield to the interests of

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[2] The *Wills Variation Act* has since been replaced in British Columbia by the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13. Section 60 of that statute affords the courts the same authority as previously set out in s. 2(1) of the *Wills Variation Act*.

> spouses and children to the extent, and only to the extent, that this was necessary to provide the latter with what was "adequate, just and equitable in the circumstances". [Emphasis in original.]

[35] *Tataryn* holds that, in British Columbia, a testator's broad right of testamentary freedom is constrained by, but only to the extent of, the specific obligation imposed by the British Columbia legislature on testators to provide what is "adequate, just and equitable in the circumstances" for the testator's wife, husband or children after the testator's death.

[36] Even when required to enforce a statutory requirement of this kind, *Tataryn* instructs, at pp. 823-24, that the courts should be cautious in interfering with a testator's testamentary freedom:

> In many cases, there will be a number of ways of dividing the assets which are adequate, just and equitable. In other words, there will be a wide range of options, any of which might be considered appropriate in the circumstances. *Provided that the testator has chosen an option within this range, the will should not be disturbed. Only where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms, should the court make an order which achieves the justice the testator failed to achieve. In the absence of other evidence a will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate* in the best interests of the persons and institutions closest to him. *It is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only in so far as the statute requires*. [Emphasis added.]

[37] I note at this point that, unlike the legislation addressed in *Tataryn*, in Ontario there is no statutory duty on a competent testator to provide in her will for an adult, independent child, whether based on an overriding concept of a parent's alleged moral obligation to provide on death for her children or otherwise: see *Verch Estate v. Weckwerth*, 2013 ONSC 3018, at paras. 43–44, aff'd 2014 ONCA 338, at paras. 5-6, leave to appeal to S.C.C. refused, [2014] S.C.C.A. No. 288. Adult independent children are not entitled to dependant's relief protection under the *SLRA* because they do not meet the definition of "dependant" under that statute. Ontario law accords testators the freedom to exclude children who are not dependants from their estate distribution.

[38] Notwithstanding the robust nature of the principle of testamentary freedom and its salutary social interest dimensions, the courts have recognized that it is not an absolute right. Apart from limits imposed by legislation, it may also be constrained by public policy considerations in some circumstances.

[39] *Canada Trust* is instructive in this regard. *Canada Trust* involved a charitable trust, established in 1923, that provided educational scholarships. By the express terms of the trust instrument, both the eligibility of students to receive scholarships and that of educational institutions to serve as places of study for scholarship students were subject to overt discriminatory conditions based on race, religion and gender. For example, the terms of the trust stipulated that the scholarships were available only to white, Protestant, British subjects and that no

more than 25 percent of the scholarship funds could be allocated annually to female students.

[40] The trusts operated in conformity with these conditions for about 65 years. However, when the Ontario Human Rights Commission challenged the trust in the 1980s, the trustees sought directions from the court as to the trust's validity. The issues before the court were whether the terms of the trust were contrary to public policy and, if so, whether the trust law cy-près doctrine could be applied to preserve the trust. In the Supreme Court of Ontario, the trust was upheld in its entirety. On appeal to this court, this decision was reversed unanimously.

[41] Justice Robins of this court, Osler J. (*ad hoc*) concurring, took account of the Supreme Court of Canada's admonition in *Re Millar*, [1938] S.C.R. 1, at p. 7, that public policy "should be invoked only in clear cases, in which harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds". He noted the public or quasi-public nature of the trust and held that there are cases "where the interests of society require the court's intervention on the grounds of public policy" (at p. 495). In Robins J.A.'s view, the terms of the trust were antithetical to Canadian values and its continued operation was against the public interest. He reasoned, at p. 496:

> The settlor's freedom to dispose of his property through the creation of a charitable trust fashioned along these [discriminatory] lines must give way to current principles of public policy under which all races and religions are

> to be treated on a footing of equality and accorded equal regard and equal respect.

[42] Justice Robins explained that the foundation for the court's intervention on public policy grounds rested on the unique terms of the trust. He emphasized, at pp. 496-97, that the trust was valid and not contrary to public policy when created in 1923. However, with changing social attitudes, public policy had also changed. As a result, the continuation of the trust as originally contemplated was no longer in the community interest. Rather, it had become "impracticable to carry it on in the manner originally planned by the settlor".

[43] Justice Robins was satisfied that the settlor of the trust intended the whole of the trust property to be devoted to the educational purpose of the charitable trust. In these circumstances, in his view, the trust should not fail. Instead, it was appropriate to apply the cy-près doctrine and to invoke the court's inherent jurisdiction to bring the trust into conformity with public policy so that the settlor's general charitable trust intent to advance education or leadership through education could be continued. Consequently, he struck the offending conditions of the trust indenture, leaving the charitable trust intact and the trust administrators to carry on the trust without regard to its original discriminatory stipulations.

[44] In his separate, concurring reasons, Tarnopolsky J.A. also concluded that the discriminatory trust provisions were void as contravening public policy. He,

too, at pp. 514-15, endorsed the proposition that, as "[i]mportant as it is to permit individuals to dispose of their property as they see fit, it cannot be an absolute right."

[45] Importantly, Tarnopolsky J.A. also stressed the distinction between private trusts and public charitable trusts. He stated, at p. 515:

> 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. ... It is [the] 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*. [Emphasis added.]

[46] Thus, Tarnopolsky J.A. viewed the public nature of the charitable trust as central to the determination whether interference with testamentary freedom was warranted on public policy grounds in light of the explicit discriminatory provisions of the trust indenture. In the end, like the majority, he agreed that the charitable trust should not fail, that the trust could be applied under the doctrine of cy-près, and that the offending discriminatory provisions should be deleted from the trust instrument.

[47] The scope of testamentary freedom and the court's role in limiting that freedom in light of *Tataryn* and *Canada Trust* are central issues in this case.

[48] BMO Trust submits that Eric's gift of the residue of his estate and his disinheritance of Verolin are unambiguous, unequivocal and unconditional and that clause 5(h) – the 'disinheritance clause' of the Will – contains none of the unsavoury or patently discriminatory provisions of the type at issue in *Canada Trust*. Additionally, Eric's bequest of the residue of his estate is of a private, rather than a public, nature. In these circumstances, BMO Trust says, the application judge erred by unjustifiably interfering with Eric's testamentary freedom in circumstances where Verolin and A.S. have no legal right to share in Eric's estate.

[49] Verolin and A.S. counter that the courts have jurisdiction to assess whether testamentary bequests should be set aside as offending public policy. They contend that there was admissible evidence before the application judge establishing that Eric's motive for disinheriting Verolin and benefiting Donna and her sons was racist. Since racial equality is firmly embedded in the public policy of Canada and the destructive force of racism is contrary to Canadian public policy, the application judge did not err in setting aside the Will on grounds of public policy.

[50] I turn now to consideration of these arguments.

(3) Unavailability of a Public Policy-Based Inquiry Regarding the Validity of the Will

[51] Three factual aspects of this case are especially significant. First, as I have already emphasized, under Ontario law Verolin and A.S. have no legal entitlement to share in Eric's estate. This is not a case like *Tataryn*, where a statutory constraint on a testator's testamentary freedom is in play. In order to share in her father's estate, Verolin must succeed in setting aside the Will.

[52] Second, this is not a wills construction case. The terms of the Will gifting the residue of Eric's estate to Donna and her sons and disinheriting Verolin are unequivocal and unambiguous. No interpretive question arises concerning the meaning of the Will.

[53] Third, unlike *Canada Trust*, the Will imposes no conditions that offend public policy. It provides unconditionally for the distribution of the residue of Eric's estate to Donna and her sons and states, at clause 5(h), that no provision was made for Verolin because "she has had no communication with me for several years and has shown no interest in me as a father". Although this may reflect the sentiments of a disgruntled or bitter father, it is not the language of racial discrimination. The application judge held that clause 5(h) of the Will "does not, on its face, offend public policy". I agree, and would add that the same may also be said of clause 5(f) of the Will, the residual bequest provision.

[54] In these circumstances, was a public policy-based inquiry regarding the validity of Eric's Will available? Was judicial interference with his testamentary freedom warranted? I conclude that they were not, for the following reasons.

[55] The fact that Eric's residual bequest imposes no conditions or stipulations is significant. The courts have recognized various categories of cases where public policy may be invoked to void a conditional testamentary gift. These include cases involving: i) conditions in restraint of marriage and those that interfere with marital relationships, *e.g.*, conditional bequests that seek to induce celibacy or the separation of married couples;[3] ii) conditions that interfere with the discharge of parental duties and undermine the parent-child relationship by disinheriting children if they live with a named parent;[4] iii) conditions that disinherit a beneficiary if she takes steps to change her membership in a designated church or her other religious faith or affiliation;[5] and iv) conditions that incite a beneficiary to commit a crime or to do any act prohibited by law.[6]

[56] The pivotal feature of these cases is that the conditions at issue required a beneficiary to act in a manner contrary to law or public policy in order to inherit

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[3] See *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell 2012) at pp. 335, 338.
[4] See for example, *Re Thorne* (1922), 22 O.W.N. 28 (H.C.); *Waters' Law of Trusts in Canada*, at p. 341
[5] See *Murley Estate v. Murley* (1995), 130 Nfld. & P.E.I.R. 271 (S.C. (T.D.)). These cases must be contrasted to those involving charitable bequests that simply restrict the class of eligible beneficiaries to members of a particular religious faith. Cases in the latter category have been held not to offend public policy: see for example, *University of Victoria Foundation v. British Columbia*, 2000 BCSC 445; *Ramsden Estate, Re* (1996), 139 D.L.R. (4th) 746 (P.E.I. T.D.) (In Chambers).
[6] *Re Elliot*, [1952] Ch. 217; Francis Barrow et al., ed., *Williams on Wills*, 9th ed., vol. 1 (London, UK: LexisNexis Butterworths, 2002), at 34.12.

under the will, or obliged the executors or trustees of the will to act in a manner contrary to law or public policy in order to implement the testator's intentions. In these circumstances, the courts will intervene to void the offending testamentary conditions on public policy grounds.

[57] In this case, however, no such condition appears in Eric's Will. Eric's residual beneficiaries are not obliged to act in a manner contrary to law or public policy in order to inherit the residue of his estate. Nor is BMO Trust required to act in a manner contrary to law or public policy in order to implement Eric's intentions. This case, therefore, is markedly different from those in which judicial interference with a testator's wishes has been justified on public policy grounds.

[58] Verolin and A.S. rely heavily on the recent decision of the New Brunswick Court of Queen's Bench in *McCorkill v. McCorkill Estate*, 2014 NBQB 148, aff'd 2015 NBCA 50, leave to appeal to S.C.C. requested, to argue, in effect, that the courts have overarching authority to examine the validity of a testamentary residual bequest on public policy grounds. On their argument, this authority extends to cases where the terms of the bequest do not include discriminatory conditions but evidence is tendered that a testator's alleged motive in making the bequest offends public policy. I see no support in the established jurisprudence for the acceptance of such an open-ended invitation to enlarge the scope of the public policy doctrine in estates cases.

[59] In *McCorkill*, the testator left the residue of his estate to the National Alliance, a neo-Nazi organization in the United States. The testator's sister, supported by numerous interveners, challenged the validity of the will, arguing that the residual bequest was void as "illegal and/or contrary to public policy". The executor and another intervener defended the bequest. They argued that only facially repugnant testamentary conditions could be set aside on public policy grounds and that the nature or quality of the intended beneficiary was irrelevant.

[60] The application judge disagreed. In his view, the 'worthiness' of the residual beneficiary was a central consideration. On the basis of extensive extrinsic evidence regarding the residual beneficiary, much of it generated by the beneficiary itself, he held, at para. 75, that the National Alliance's entire purpose was contrary to the public policy of Canada because it stood for "anti-Semitism, eugenics, discrimination, racism and white supremacy". The effect of the testator's gift to such an organization was to finance hate crimes, contrary to s. 319 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 and Canadian human rights legislation and international commitments. As a result, the application judge held, at para. 89, that voiding the gift was justified on the ground of illegality, as well as public policy, because the beneficiary's "*raison d'être* is contrary to public policy". In so holding, the application judge expressly accepted

that voiding the residual bequest based "on the character of the beneficiary is, and will continue to be, an unusual remedy".

[61] The Court of Appeal for New Brunswick, in brief reasons, upheld the application judge's ruling, stating that it was "in substantial agreement with the essential features" of his reasons: *Canadian Association for Free Expression v. Streed*, 2015 NBCA 50, at para. 1.[7]

[62] The decision in *McCorkill* is significant in at least two respects. First, prior to *McCorkill*, public policy-based justification for judicial interference with a testator's freedom to dispose of her property had been advanced only in respect of conditional testamentary gifts. In *McCorkill*, as in this case, the testator's residual gift was absolute, not conditional.

[63] Second, before *McCorkill*, Canadian law recognized two kinds of "unworthy heirs": i) beneficiaries who claimed entitlement to a testator's property after having killed the testator; and ii) terrorist groups who, contrary to ss. 83.02 and 83.03 of the *Criminal Code*, sought to benefit from a testator's financial support. *McCorkill*, however, recognizes a third kind of "unworthy heir": a beneficiary whose self-declared reasons for existence involve activities that constitute offences under Canadian criminal law and run contrary to Canadian public policy against discrimination.

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[7] As at the date of these reasons, the leave application to the S.C.C. in *McCorkill* remains pending.

[64] *McCorkill* has been the subject of academic scrutiny and some criticism. Professor Bruce Ziff, in an article entitled "Welcome the Newest Unworthy Heir" (2014) 1 E.T.R. (4th) 76, argues that *McCorkill* is but the latest judicial attempt "to find the proper demarcation between acceptable and intolerable discriminatory private conduct". He suggests that the extension of public policy to void absolute gifts is warranted in certain circumstances, *e.g.* when, as in *McCorkill*, it would be illegal to donate money to an unworthy heir because of its status as a hate organization.

[65] However, Professor Ziff also acknowledges that, even in unworthy heir cases like *McCorkill*, the invocation of public policy considerations to void an unconditional testamentary bequest may overreach the proper ambit of the public policy doctrine. He observes:

> *The more challenging problem with McCorkill is that it may be overbroad. That is so because this gift, uniquely, was invalidated even though it involved an unqualified and absolute transfer of legal and beneficial title. As noted above, all previous cases in which the doctrine of public policy was applied involved terms embedded in the granting document.*
>
> Fixing on such stipulations is important for several reasons. Such terms expressly recite the discriminatory preferences and thereby provide cogent proof of the predilection. The stipulations also give the stated preferences teeth, for failure to comply can have legal consequences. Moreover, as an incidental effect, a focus on such stated terms will necessarily limit the number of cases in which challenges can be brought; the litigation floodgates do not open. [Emphasis added.]

I agree.

[66] In this case, relying on *McCorkill*, the application judge held, at para. 44, that notwithstanding the clear terms of the Will, "the matter bears further scrutiny". She went on to conclude, at para. 49, that in view of the Extrinsic Evidence, Eric's motive for disinheriting Verolin was based "on a clearly stated racist principle" that violated public policy as well as "human sensibilities".

[67] With respect, the application judge's reliance on *McCorkill* for this purpose was misplaced. *McCorkill* must be understood in the context of its unique factual circumstances. In *McCorkill*, the implementation of the testator's intentions would have facilitated the financing of hate crimes, contrary to Canada's criminal and human rights laws, by funding an organization dedicated to such illegal and discriminatory ends – an unworthy heir. In contrast, nothing in this case indicates that Eric's residual beneficiaries are unworthy heirs, or that they would use their bequest for purposes contrary to law. Verolin and A.S. do not suggest otherwise.

[68] Further, I underscore that the Will does not require BMO Trust to engage in discriminatory or unlawful conduct in order to carry out Eric's testamentary intentions. In *Canada Trust*, this court's interference with the settlor's right to dispose of his property as he saw fit was triggered by blatantly discriminatory conditions in the trust indenture that required the trust administrators, in carrying out the settlor's intentions concerning the operation of a public charitable trust, to

engage in discriminatory conduct in the selection of scholarship candidates and eligible academic institutions. It was this requirement for discriminatory action on the part of the trust administrators in the operation of a public charitable trust that triggered the public policy-based intervention of the court.

[69] Similarly, in *Peach Estate (Re)*, 2009 NSSC 383, an estate trustee would have been required to take affirmative steps in violation of provincial human rights legislation in order to carry out the testator's intentions regarding the sale of his property. On this basis, the court held that the relevant condition in the testator's will regarding the class of persons to whom his property might be sold was of no force or effect.

[70] These, and analogous cases, confirm that Canadian courts will not hesitate to intervene on the grounds of public policy where implementation of a testator's wishes requires a testator's executors or trustees or a named beneficiary to act in a way that collides with public policy.

[71] That is not this case. Unlike *Canada Trust* and *Peach Estate (Re)*, where implementing the settlor's or testator's intentions required discriminatory acts in contravention of public policy, carrying out Eric's gift of the residue of his estate does not require discriminatory conduct by BMO Trust or by Donna and her sons. Nor, in contrast to *Canada Trust*, does it involve the creation or operation of a

public charitable trust or other public entity so as to require conformity to the public policy against discrimination.

[72] And this leads, in my view, to a second, pertinent consideration. As I have said, Eric's Will does not "facially offend public policy." But what if it did? Was it open to Eric to disinherit Verolin in his Will on discriminatory grounds, that is, on the express basis that the father of her son was a white man, without triggering review by the courts on the grounds of public policy?

[73] This question lies at the very heart of Eric's exercise of his testamentary freedom. It must be remembered that the bequest at issue is of a private, rather than a public or quasi-public, nature. Recall Tarnopolsky J.A.'s caution in *Canada Trust*, at p. 515, that it was the "public nature of charitable trusts which attracts the requirement that they conform to the public policy against discrimination". Here, assuming that Eric's testamentary bequest had been facially repugnant in the sense that it disinherited Verolin for expressly stated discriminatory reasons, the bequest would nonetheless be valid as reflecting a testator's intentional, private disposition of his property – the core aspect of testamentary freedom.

[74] In these hypothetical circumstances, neither Ontario's *Human Rights Code*, R.S.O. 1990, c. H.19 nor the *Charter of Rights and Freedoms* would apply to justify court interference with the testator's intentions. The *Human Rights*

Code, of course, ensures that every person has a right to equal treatment with respect to services, goods and facilities without discrimination based on race and other enumerated grounds. The *Charter* pertains to state action. Neither reaches testamentary dispositions of a private nature.

[75] 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. To conclude otherwise would undermine the vitality of testamentary freedom and run contrary to established judicial restraint in setting aside private testamentary gifts on public policy grounds.

[76] Verolin and A.S. rely on *Fox v. Fox Estate* (1996), 28 O.R. (3d) 496 (C.A.), to resist this conclusion. I do not think that *Fox* assists Verolin and A.S.

[77] The central issue in *Fox* was whether an executrix's decision to disinherit a beneficiary on allegedly discriminatory grounds was against public policy. In *Fox*, a testator had bequeathed his wife a 75 percent life interest and their son a 25 percent life interest in the residue of his estate. On the wife's death, the son was to receive the residue of the estate. The will gave the wife, as the testator's sole executrix, wide power to encroach on the capital of the estate for the benefit of the testator's grandchildren. The testator's son had two children, both born after the testator's death. Also after the testator's death, the son divorced and

subsequently re-married a woman who did not share his faith (Judaism). His mother was upset and responded by making a new will of her own in which she disinherited the son. She later exercised her discretionary encroachment power under the testator's will to transfer all the residue of the testator's estate to her grandchildren – the son's children.

[78] The son challenged his mother's exercise of discretion in encroaching on the capital in this fashion, alleging, in part, that it was driven by a discriminatory purpose. The trial judge found that, by exercising her power to encroach on the capital of the estate in favour of the grandchildren and to the exclusion of the son, the wife acted properly and within the parameters of the powers given to her under the will.

[79] On appeal, this court dealt directly with the son's public policy-based attack on his mother's exercise of her discretionary encroachment power. Justice Galligan was of the view that, on the trial judge's findings, the only reason the wife transferred the residue of the estate to her grandchildren was to disinherit the son because he had married a gentile – a clearly discriminatory purpose. He stated, at pp. 501-502:

> It is abhorrent to contemporary community standards that disapproval of a marriage outside of one's religious faith could justify the exercise of a trustee's discretion. It is now settled that it is against public policy to discriminate on grounds of race or religion.

[80] Justice Galligan concluded, at p. 502, that the wife's exercise of her discretion was improper and must be set aside:"[I]t would be contrary to public policy to permit a trustee effectively to disinherit the residual beneficiary because he dared to marry outside the religious faith of his mother".

[81] However, it was the wife's exercise of discretion in her capacity as executrix and trustee of her late husband's estate that attracted judicial scrutiny and condemnation. Justice Galligan reasoned, at p. 502, that, just as public policy restrained the settlor in *Canada Trust* from disposing of property in a manner that required discriminatory action by the trust administrators, public policy also "prohibit[ed] a trustee from exercising her discretion for racial or religious reasons". He elaborated, at p. 503:

> It is of course a given, assuming testamentary capacity, that a person is entitled to dispose of property by will in any fashion that he or she may wish. *The exercise of a testator's right of disposition is not subject to supervision by the court. But a trustee's exercise of discretion is subject to curial control. Admittedly, because he would not be subject to judicial supervision, [the testator] if alive, could have disinherited [his son] for reasons which would have contravened public policy. ... [The testator's wife], while acting as trustee, on the other hand is subject to judicial control* and that control can and must prevent her from exercising her discretion in a fashion which offends public policy. [Emphasis added.]

[82] In separate, concurring reasons, McKinlay and Catzman JJ.A. agreed in the result. Justice McKinlay accepted that if the wife had exercised her discretion

as executrix because of her religious bias, her exercise of discretion was unsustainable. However, she also viewed the wife's actions as reflecting the wife's erroneous belief that she was free to deal with her husband's assets as if they were her own, without regard to the terms of his will. Because it was the obvious intent of the husband that the son have a life income from his estate and the remainder outright following his mother's death, all the wife's encroachments on capital constituted breaches of trust.

[83] Justice Catzman agreed with the latter conclusions, but disagreed that the trial judge had clearly found that the wife's encroachment on capital was driven solely by a prohibited, discriminatory purpose. In his opinion, the trial judge's reasons could be read as indicating that the wife had dual purposes for the exercise of her discretion, one legitimate (concern for the financial welfare and security of her grandchildren) and one illegitimate (her displeasure with her son's choice of spouse). He therefore declined to dispose of the appeal on public policy grounds.

[84] *Fox* is of limited application to this case. First, and most obviously, unlike *Fox*, this case does not involve a trustee's exercise of discretionary authority. As stated above, Eric's residual bequest to Donna and her sons is unconditional. Second, in *Fox*, the will created an entitlement; the son was entitled to a life income and, on the death of his mother, to the residue of his father's estate.

Here, Verolin and A.S. have no entitlement to any part of Eric's estate, whether under the terms of the Will or as a matter of law.

[85] I conclude that to apply the public policy doctrine to void an unconditional and unequivocal testamentary bequest in cases where, as here, a disappointed potential heir has been disinherited absolutely in favour of a different, worthy heir, would effect a material and unwarranted expansion of the public policy doctrine in estates law. Absent valid legislative provision to the contrary, or legally offensive conditional terms in the will itself, the desire to guard against a testator's unsavoury or distasteful testamentary dispositions cannot be allowed to overtake testamentary freedom. The need for a robust application of the principle of testamentary freedom is especially important, in my opinion, in the context of a testator's central right to choose his or her residual beneficiaries.

[86] It follows that, on the facts of this case, there was no foundation for the public policy-driven review undertaken by the application judge. With respect, she erred by going behind the testator's expression of his clear intentions regarding the disposition of his property.

[87] This conclusion is dispositive of this appeal regardless of the admissibility of the Extrinsic Evidence. However, as the admissibility of that evidence was fully argued before this court, I will address this issue.

(4) Admissibility of the Extrinsic Evidence

[88] The Extrinsic Evidence was the lynchpin of the application judge's ruling. Yet, in relying on it to set aside the Will, the application judge failed to consider whether it was properly admissible. In fairness, it appears that BMO Trust may not have put the admissibility of the Extrinsic Evidence in issue before the application judge. Regardless, its proper admission was a pre-condition to its use by the application judge. And without the Extrinsic Evidence, there was nothing to ground the claim that Verolin's disinheritance was racially-motivated.

[89] In my view, the application judge erred by admitting the Extrinsic Evidence. I say this for the following reasons.

[90] As a general rule, extrinsic evidence of a testator's intentions is not admissible when the testator's will is clear and unambiguous on its face. On the initial application in *Rondel,* reported at 2010 ONSC 3584, the court considered whether a testator really intended to revoke a previous will, despite a standard revocation clause in the will. Affidavit evidence was tendered regarding the testator's intentions in executing the second will. The application judge ruled, at paras. 45-46, that the evidence was not admissible and that, absent any suggestion of a drafting error, the court could not rectify a clear and unambiguous will based on extrinsic evidence, stating that to do so would be "a significant change in the law".

[91] This court upheld the application judge's ruling, noting, at para. 23, that while "the fundamental purpose of the law of wills is to give effect to the testamentary intentions of the testator for the distribution of her estate", the court will determine those intentions "from the words used in the will, and not from direct extrinsic evidence of intent". The court warned, at para. 27:

> 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.

[92] There are, however, exceptions to the general rule against the admission of extrinsic evidence offered in proof of a testator's intentions. In *Rondel*, this court recognized two such exceptions. First, direct extrinsic evidence of intention may be admissible where a will is equivocal, that is, where the words used in the will may be read as applying equally to two or more persons or things. Second, evidence of the testator's circumstances or the circumstances surrounding the formation of a will may also be admissible in cases where the will is or may be ambiguous.

[93] These exceptions are concerned with assisting in the construction of a will. James Mackenzie expresses the principle succinctly in *Feeney, The Canadian Law of Wills*, loose-leaf (Rel. 40–11/2012), 4th ed. (Toronto: LexisNexis Butterworths, 2000) at 10.30: "[I]ndirect extrinsic evidence may be used as an aid

in construction when the nature and effect of that evidence is to explain what the testator has written, but not what he or she intended to write."

[94] This is not a wills interpretation case and the application judge was not sitting as a court of construction. Here, it is accepted that the terms of the Will are unambiguous and unequivocal. Consequently, the established exceptions to the general exclusionary rule regarding evidence of a testator's intentions are not engaged.

[95] I acknowledge that the Extrinsic Evidence may be said to be of a different character than that recognized under the established exceptions to the general exclusionary rule concerning evidence of a testator's intentions. As Verolin and A.S. point out, the Extrinsic Evidence bears on Verolin's relationship with Eric and his reasons for making his testamentary dispositions of his property, rather than what testamentary dispositions he intended to make. Precisely because it is not evidence of the testator's intentions, but rather the testator's motives, Verolin and A.S. argue that *Rondel* and other "intention cases" are irrelevant. They contend that there is no bar to the admission of extrinsic evidence of motive seeking to establish that a testator's reason for a testamentary bequest offends public policy, *e.g.* where the proffered extrinsic evidence indicates that the testator's motive was racially-motivated.

[96] I think that this proposition must be soundly rejected.

[97] It need hardly be said that public policy in Canada precludes discrimination on the basis of race and other discriminatory characteristics. The public policy against discrimination is reflected in the *Charter* and the human rights legislation of every province in Canada, including Ontario's *Human Rights Code*.

[98] But the desirability of affirming the public policy against discrimination does not lead to the conclusion that third-party extrinsic evidence of a testator's alleged discriminatory motive is admissible to challenge the validity of a will where, as here, the testator's residual bequest to a private beneficiary is absolute, unequivocal and unambiguous. Quite the opposite. If, as *Rondel* holds, extrinsic evidence is not admissible to establish *what* a testator intended, still less should it be admissible to question *why* the testator made a particular bequest.

[99] In *Rondel*, this court identified various dangers that would arise from relaxation of the general exclusionary rule regarding the admission of extrinsic evidence of a testator's intentions. *Rondel* warns, for example, that the admission of such evidence would lead to increased estates litigation and create uncertainty where uncertainty does not otherwise exist.

[100] The same concerns arise regarding extrinsic evidence of a testator's alleged motive in disposing of her property. As with evidence of a testator's intentions, where the testator's wishes are neither ambiguous nor equivocal, the

admission of third-party extrinsic evidence about a testator's alleged motive would undercut faithful implementation of a testator's intentions as expressed in her written will. It would also encourage disappointed beneficiaries to seek an estate distribution different from that intended by the testator based on extrinsic evidence of alleged improper motive by the testator, thereby fostering unnecessary litigation and leading inevitably to confusion, uncertainty and indeterminacy in estates law. Where possible, such mischief must be avoided.

[101] *Rondel* also cautions that third-party evidence of a testator's intentions gives rise to both credibility and reliability issues. As Juriansz J.A. explained, at para. 37, credibility issues arise "because would-be beneficiaries can, without fear of contradiction by the deceased, exaggerate their relationship and fabricate the promises of bequests". Reliability issues arise "because testators are not obliged to write their wills to accord with the sincere or mendacious assurances they may have given to those close to them". Thus, the evidence of third parties, "who cannot directly discern the mind of the testator, is logically incapable of directly proving the testator's intent".

[102] These comments are apposite to third-party evidence of a testator's motive. Consider that would-be beneficiaries can, without opportunity for rebuttal by the testator, exaggerate or fabricate the testator's predilections or utterances and conduct during life in an effort to ground a discriminatory motive claim. Just as a would-be beneficiary cannot "directly discern" the intentions of a testator, so

too is a would-be beneficiary unequipped to "directly discern" a testator's true motive in making a particular bequest. The law does not require a testator to explain, let alone to defend, her reasons for her testamentary dispositions. Indeed, in my view, the privacy of those reasons is inherent in the principle of testamentary freedom.

[103] Nor do the applicable authorities support the admission of third-party evidence of a testator's motive for the purposes urged here. In *Fox*, the testator's motive was not in issue. Only the wife's motive in exercising her encroachment discretion was relevant to whether she had improperly exercised her discretion and failed to discharge her obligations as trustee.

[104] Moreover, I do not read *McCorkill* as endorsing the admission of third-party evidence of a testator's alleged motive to support a public policy-based attack on a testator's will. Although extensive extrinsic evidence was admitted and considered by the *McCorkill* court, it was not directed at the testator's motive in naming the National Alliance as his residual beneficiary. Rather, it bore on the nature of the National Alliance organization and its communications and activities in support or rebuttal of the claim that it was a known, right-wing extremist group that engaged in racist, white supremacist and hate-inspired activities. In other words, the extrinsic evidence in *McCorkill* was focused on the quality of the residual beneficiary and its illegal purposes, rather than on the testator's motive.

[105] In these circumstances, the application judge held in *McCorkill*, at para. 72: "While the jurisprudence on voiding bequests on the grounds of public policy tends to deal with conditions attached to specific bequests, in my opinion the facts of this case are so strong that they render this case indistinguishable from those." He elaborated, at paras. 76-77:

> The evidence before the court convinces me that in the case of the [National Alliance] the purpose for which it exists is to promote white supremacy through the dissemination of propaganda which incites hatred of various identifiable groups which they deem to be non-white and therefore unworthy. *Those purposes and the means they advocate to achieve them are criminal in Canada and that is what makes this bequest repugnant*.
>
> *It is also what makes this situation comparable, in my view, to a gift to a trustee for a purpose that is contrary to public policy. The law of wills is concerned with the intent of the testator and from the very fact that Mr. McCorkill left his entire estate to the [National Alliance] I infer that he intended it to be used for their clearly stated, illegal purposes*. [Emphasis added.]

[106] Thus, it was the illegality of the prospective use of the residual bequest and the unlawful nature of the residual beneficiary's communications and activities that drove the decision in *McCorkill*. These critical considerations are simply not in play here.

[107] Verolin and A.S. also point to *Canada Trust* as authority for the proposition that the courts will consider evidence of a testator's motive when a public policy-

based challenge to the testator's disposition of property is mounted. I disagree. In my view, *Canada Trust* does not stand for this proposition.

[108] In *Canada Trust*, this court took account of the recitals in the challenged trust indenture, even though they might be characterized as going only to the settlor's motive in establishing the charitable trust, because they afforded an explicit reason for the establishment of the trust and gave meaning to its restrictive criteria: *Canada Trust*, at para. 35. But the settlor's motive was expressed in the trust indenture itself. Evidence of motive was relevant in *Canada Trust* because it formed part of the trust deed at issue.

[109] In this case, the Will expressly discloses Eric's motive, at clause 5(h). That clause provides an explanation, from the testator himself, for his decision to exclude Verolin from the Will, namely, that "she has had no communication with me for several years and has shown no interest in me as her father".

[110] Viewed in this fashion, the purpose of the Extrinsic Evidence was not to establish Eric's motive for the residual bequest in his Will but, rather, to contradict the lawful motive for the bequest disclosed by the plain language of the Will and to substitute, in its stead, a different and allegedly unlawful motive. I see no basis at law for the admission of wholly contradictory, extrinsic evidence of motive for this purpose. In my view, the courts should be loath to sanction such

an indirect attack, which the deceased cannot challenge, on a testator's expressed motive and testamentary choices.

[111] As I have indicated in these reasons, the scope for judicial interference with a testator's private testamentary dispositions is limited. So, too, is the reach of the public policy doctrine in estates cases. And for good reason. The court's power to interfere with a testator's testamentary freedom on public policy grounds does not justify intervention simply because the court may regard the testator's testamentary choices as distasteful, offensive, vengeful or small-minded. As the court observed in *Thorsnes v. Ortigoza*, 2003 MBQB 127, 174 Man. R. (2d) 274, at para. 14, "a person has the right, subject to fulfilling specific legal obligations to dependants, to dispose of his or her estate in an absurd or capricious manner, whatever others may think of the fairness or reasonableness of the dispositions".

[112] The application judge's decision in this case implicitly endorses a general supervisory role for the courts in policing a testator's unqualified and legitimate choice of her heirs on the ground of enforcing the public policy against discrimination. This proposition, if accepted, would significantly erode and arguably displace meaningful testamentary freedom.

(5) Other Grounds of Appeal

[113] I have concluded that the application judge erred by embarking on a public policy-based review of the impugned terms of Eric's Will and that she further erred by admitting the Extrinsic Evidence tendered in this case. It follows that I would allow the appeal. As a result, I do not reach BMO Trust's other grounds of appeal.

IV. Disposition

[114] For the reasons given, I would allow the appeal.

[115] At the appeal hearing, the parties informed the court of their agreement that the parties' costs should be paid out of Eric's estate. The court was also informed that the value of the estate is slightly less than $400,000, that the parties' costs of the proceeding before the application judge, which were also ordered to be paid by the estate, totalled approximately $31,500, and that the parties' claimed costs of the appeal total about $71,000. Accordingly, payment by the estate of all awarded or claimed costs associated with this litigation, including the costs of the appeal, would reduce the value of Eric's estate by approximately 25 percent.

[116] In these circumstances, the court would benefit from further written submissions by the parties regarding the costs of the appeal, including with respect to the relevance in this case of this court's decision in *McDougald Estate*

v. Gooderham (2005), 255 D.L.R. (4th) 435. BMO Trust shall deliver its brief written costs submissions by March 24, 2016 and Verolin and A.S. shall deliver their responding brief submissions by April 8, 2016, to the Registrar of this court.

Released: MAR - 8 2016

SAC

S.A. Chowle J.A.

I agree. K. van Rensburg J.A.

Lauwers J.A. (Concurring):

[117] I agree with my colleague that the appeal should be allowed for the reasons she gives, which I wish to supplement briefly.

[118] The respondents submit that public policy supports the decision under appeal on the basis that: "equality of the races forms part of the public policy of Canada," and cite in support particularly s.15 of the *Canadian Charter of Rights and Freedoms*, and s.1 of the *Human Rights Code.*

[119] In this case the respondents ask this court to expand the public policy exception to testamentary freedom, by subjecting Mr. Spence's will to the test of whether it is discriminatory in its motivation or intention, because there was no bequest to Verolin.

[120] Would such a judicial move by this court be warranted? In my view, it would not, for two basic reasons.

[121] I begin with the "slippery slope" argument, not because it is the most important reason for refusing to create a new public policy exception, but because it shows the full scope of the respondents' proposal.

[122] Although the respondents expressly confine their submissions to racist motivations and intentions, there is no logical reason to limit the reach of the proposed new exception to racial discrimination alone. The true scope and extent of this proposed expansion of the public policy exception is much larger.

[123] There is therefore considerable merit in BMO Trust Company's argument that allowing the application judge's decision to stand would increase uncertainty in estates law and open the litigation floodgates. The respondents' proposal would greatly extend both the court's jurisdiction and its burden, and would disrupt estates law, which now functions smoothly to pass property from one generation to the next.

[124] Second, I address the proposed extension of the public policy exception to testamentary freedom as a matter of principle. There is no law in Ontario that entitles Verolin to share in her father's estate. No law has deprived her of any right. The *Charter* value of equality that she asserts does not afford her such an entitlement. Ontario could choose to legislate to give effect to the value of equality in estates, but it has not done so.

[125] In that regard, it is instructive to recall that the *Charter* exists to control the activities of government, as provided in s. 32, in order to protect personal autonomy and freedom from governmental activities. The *Charter* does not reach or seek to affect the private conduct of individuals in their relations with each other. See *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573, at pp. 598-99.

[126] Similarly, the reach of the *Code* is limited. The *Code* does not regulate the actions of individuals unless they are supplying "services, goods [or] facilities" as

provided in s.1, or “accommodation” under s.2, in the market. Individuals are otherwise free to hold and to act on their prejudices, however unsavoury, so long as they do not breach the criminal law. The *Code* obliges them to act rightly only in the market, whatever their private thoughts might be. Putting it differently, it is not the *Code*'s purpose to force people to think and act rightly everywhere and at all times.

[127] Finally, I address Mr. Cherniak's submission that a *Charter* hook is available under s.32 as a means for this court to interfere with Mr. Spence's will. He argues that by probating Mr. Spence's will under the *Estates Act*, R.S.O. 1990 c. E.21, the court is a state actor, and is therefore obliged to expand the public policy exception to testamentary freedom in accordance with *Charter* values.

[128] I reject this submission for two reasons. First, what is being attacked is Mr. Spence's will, which is a quintessentially private act of personal expression. There is no doubt that Mr. Spence's act is not itself state action caught by the *Charter* or the *Code*, neither of which interferes with the bequests of testators.

[129] Second, in probating Mr. Spence's will there is no state action that engages the *Charter* in the relevant sense. The court's jurisdiction in matters of probate in Ontario is narrow, as described by Cullity J. in *Otis v. Otis*, [2004] O.J. No. 1732. The basic probate question is whether the will itself is formally valid,

the testator was of sound mind, and the will was not made in suspicious circumstances. In probating a will the court is not concerned about the validity of specific bequests and does not require proof that bequests in a valid will are non-discriminatory. The court neither condones nor approves of particular bequests.

[130] For these concurring reasons, in addition to those advanced by my colleague, I would allow the appeal.

"Lauwers J.A."