

**WILLS THAT “SHOCK THE CONSCIENCE”:
AN AUSTRALIAN PERSPECTIVE ON *SPENCE V BMO TRUST COMPANY***

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I INTRODUCTION

Is there any judicial recourse for the child of a deceased person who finds themselves excluded from their parent’s will for what is believed to be a discriminatory motivation?

The 2015 decision of *Spence v BMO Trust Company*¹ determined by Gilmore J in the Ontario Superior Court of Justice, and the related 2016 appeal decision of the same name² decided by Justices of Appeal Cronk, Lauwers and van Rensburg in the Court of Appeal for Ontario, address this question in the context of a will made by a testator that excluded one of his two daughters from provision on the basis that the excluded daughter had given birth to a child fathered by a white man. At first instance, Gilmore J held that the testator’s will was void for reasons of public policy. On appeal, the decision was overturned and the will was held to be valid.

The decisions traverse various issues, including the paramountcy of testamentary freedom in the history of succession law, the extent to which public policy considerations may curtail that freedom of testation, principles in the construction of wills, and the admissibility of extrinsic evidence in succession matters. This article considers the two recent Ontario decisions and the approach of Australian courts.

II *SPENCE V BMO TRUST COMPANY*

A The Decision at First Instance

The decision of *Spence v BMO Trust Company* was heard at first instance on 13 January 2015 and determined by Gilmore J on 27 January 2015. The applicants were Verolin Spence (“Verolin”) and her son Alexander Spence (“Alexander”), aged 11 at the time of making the application and in respect of whom Verolin acted as a litigation guardian. Verolin sought a

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¹ [2015] ONSC 615.

² *Spence v BMO Trust Company* [2016] ONCA 196.

declaration from the Ontario Superior Court of Justice that the last will dated 12 May 2010 of her father, Rector Emanuel Spence (“the deceased”, also known as “Eric”), be set aside on the grounds that it was void for public policy reasons.³

The deceased’s will appointed BMO Trust Company (the defendant in the proceedings) as estate trustee, excluded Verolin from provision, and gifted the estate to the deceased’s only other child, Verolin’s sister Donna Spence (“Donna”), and Donna’s two minor children.⁴ Clause 5(h) of the deceased’s will set out express reasons for the exclusion of Verolin from provision:

I specifically bequeath nothing to my daughter, Verolin Spence, as she has had no communication with me for several years and has shown no interest in me as a father.⁵

The essence of Verolin’s application was that the deceased’s will should be held to be void for public policy reasons on the basis that the exclusion of Verolin from provision was discriminatory. Verolin led evidence that, during the deceased’s lifetime, her father had vehemently disapproved of the fact that she had conceived a child (Alexander) with a Caucasian man. Verolin had shared an ‘excellent relationship’⁶ with her father up until the point at which she told him of the pregnancy in September 2002. She avowed that the deceased was ashamed of her and restricted further communication with her until his death, making clear that ‘he would not allow a white man’s child in his house’.⁷

To support her contention that the deceased’s testamentary motivations were discriminatory, Verolin also relied on the evidence of Imogene Parchment (“Imogene”), a long-term friend of the deceased. Imogene deposed in an affidavit filed in the proceedings that the deceased had disinherited Verolin in his will specifically because the father of her son was white, and had made provision for Donna and her sons as the father of Donna’s sons was black.⁸

The effect of a declaration that the deceased’s will was void on the basis of public policy was that the deceased would die intestate, and both Donna and Verolin would share equally in his estate as his children according to the rules of intestate succession in that jurisdiction.

³ *Spence v BMO Trust Company* [2015] ONSC 615, [2].

⁴ *Ibid* [2].

⁵ *Ibid* [22].

⁶ *Ibid* [18].

⁷ *Ibid* [19].

⁸ *Ibid* [26].

Interestingly, neither Donna nor any representative for Donna's children filed an appearance in the matter, and Donna had had little or no contact with the deceased for many years.⁹

In a relatively short analysis, Gilmore J considered the arguments for and against a determination that the deceased's will be set aside. In favour of setting the will aside, Her Honour cited what she called the 'leading authority'¹⁰ on public policy, *Canada Trustco v Ontario (Human Rights Commission)*,¹¹ in which the Ontario Court of Appeal struck out the terms of a trust that expressly limited the recipients of scholarships from the trust to persons who were white, Christian, British, and 75% of which had to be male, on the basis that the terms were discriminatory in nature and 'contravened contemporary public policy'.¹² Gilmore J also considered BMO Trust Company's counter-argument that the deceased's will in fact made 'no mention'¹³ whatsoever of any discriminatory reason for Verolin's disinheritance, and that there was no authority in support of admitting extrinsic evidence as to a deceased person's testamentary intentions in situations where there was no ambiguity on the face of the will itself.¹⁴

Although conceding that 'the relevant paragraph in the deceased's will does not, on its face, offend public policy',¹⁵ Gilmore J ultimately relied on the 'uncontradicted evidence'¹⁶ of Imogene that the deceased's motivations in making the will were discriminatory, and concluded that the will must be set aside as the deceased's actions offended 'not only human sensibilities but also public policy'.¹⁷

B Appeal Decision

On appeal, the decision of Gilmore J was unanimously overturned by a bench of three judges of the Court of Appeal for Ontario. The keynote decision was delivered by Cronk JA, who examined the first instance judgment on a number of grounds.

The first concept upon which the decision was examined is the doctrine of testamentary freedom. Cronk JA cited several Ontario authorities confirming that testamentary freedom, or

⁹ Ibid [21].

¹⁰ Ibid [35].

¹¹ (1990) 74 OR (2d) 481.

¹² *Spence v BMO Trust Company* [2015] ONSC 615, [37].

¹³ Ibid [38].

¹⁴ Ibid [42].

¹⁵ Ibid [44].

¹⁶ Ibid [33].

¹⁷ Ibid [49].

the right of a person to dispose of his or her property by will as he or she sees fit, is a ‘deeply entrenched common law principle’¹⁸ and not one that is to be ‘interfered with lightly, but only in so far as the law requires’.¹⁹ Her Honour provided several bases upon which the law might require interference with testamentary freedom, including the application of dependant’s relief protection legislation (similar to family provision legislation in Australia) and public policy constraints.

Cronk JA was not satisfied that the deceased’s will was open to a determination of invalidity on the basis of public policy. Her Honour referred to categories of cases where public policy had been invoked to invalidate a conditional testamentary gift – that is, gifts made in wills that were subject to the fulfilment of a particular condition offensive to public policy, such as a restraint on marriage, a restraint on religious freedom or an incitement to commit a crime or engage in illegal activity.²⁰

Cronk JA noted:

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 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 court will intervene to void the offending testamentary conditions on public policy grounds.²¹

However, in *Spence v BMO Trust Company*, Her Honour concluded that ‘no such condition appears in Eric’s will’,²² and as such the will did not offend public policy.

Interestingly, Cronk JA surmised that even if the deceased expressly stated in his will that his reasons for disinheriting Verolin were because she had had a son fathered by a white man, ‘the bequest would nonetheless be valid as reflecting a testator’s intentional, private disposition of his property – the core aspects of testamentary freedom’.²³ Further, Her Honour did not consider that either Ontario’s *Human Rights Code* or the *Charter of Rights*

¹⁸ *Spence v BMO Trust Company* [2016] ONCA 196, [30].

¹⁹ *Ibid* [31].

²⁰ *Ibid* [55].

²¹ *Ibid* [56].

²² *Ibid* [57].

²³ *Ibid* [73].

and Freedoms applied so as to justify curial interference with the will, as ‘neither reaches testamentary dispositions of a private nature’.²⁴

Cronk JA also observed that, in any event, extrinsic evidence as to a testator’s motives was not admissible in cases such as *Spence v BMO Trust Company*. Extrinsic evidence positing a third party’s belief as to why the deceased made his will was inadmissible where the will was ‘clear and unambiguous on its face’.²⁵ Her Honour commented that a contrary conclusion would unnecessarily open the floodgates by encouraging disappointed beneficiaries to challenge wills based on a testator’s alleged improper motives, causing uncertainty in estate law.²⁶

Ultimately, Cronk JA concluded that the deceased’s will bore no qualities which warranted that it be set aside on the basis of public policy. Extrinsic evidence alleging an improper discriminatory motive for the making of the will was not admissible. In any event, ‘the desire to guard against a testator’s unsavoury or distasteful testamentary dispositions cannot be allowed to overtake testamentary freedom’,²⁷ and it is not the court’s role to ‘police’ or ‘supervise’ legitimate testamentary dispositions.²⁸

III THE AUSTRALIAN POSITION

A The Guiding Principle of Testamentary Freedom

The Australian position on testamentary freedom is analogous to that in Ontario as referred to and relied upon by the Court of Appeal for Ontario in *Spence v BMO Trust Company*. Testamentary freedom as a concept suggests that individuals should have ‘unfettered discretion’²⁹ to freely dispose of their property by will and in accordance with their own wishes. It has been described as ‘one of the most valuable of the rights incidental to property’³⁰ and underpins common law jurisprudence in the area of succession law.³¹

Australia does not have in place a Charter or Bill of Rights, and the various pieces of anti-discrimination legislation in existence do not apply to or restrict freedom of testamentary

²⁴ Ibid [74].

²⁵ Ibid [90].

²⁶ Ibid [100].

²⁷ Ibid [85].

²⁸ Ibid [112]. See also the concurring judgment of Lauwers JA, which comments that ‘Ontario could choose to legislate to give effect to the value of equality in estates, but it has not done so.’ (at [124]).

²⁹ *Banks v Goodfellow* (1870) LR 5 QB 549, 564 (Cockburn CJ) (“*Banks v Goodfellow*”).

³⁰ Ibid 564 (Cockburn CJ).

³¹ G L Certoma, *The Law of Succession in New South Wales* (LBC Information Services, 3rd ed, 1997) 6.

disposition. Australian case law upholds testamentary freedom as a fundamental doctrine of succession law and practice.

Importantly, from early times it has been recognised that testamentary freedom includes ‘a freedom to be unfair, unwise or harsh with one’s own property...[it] may even seem morally wrong to some’.³² As Gleeson CJ held in an iconic statement in the High Court of Australia decision *Re Estate of Griffith (deceased); Easter v Griffith and Others*:³³

There may be cases in which one person’s estimation of another’s claims may seem harsh and unwarranted, and perhaps even unnatural... A person may disinherit a child for reasons that would shock the conscience of most ordinary members of the community, but that does not make the will invalid.³⁴

These comments echo the observations in *Thorsnes v Ortigoza*,³⁵ relied on and quoted by Cronk JA in *Spence v BMO Trust Company*:

...a person has the right...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.³⁶

Accordingly, the prospect that an individual may have harsh, unfair and even discriminatory motivations in the making of various dispositions does not invalidate the testamentary gifts he or she may make and is consistent with testamentary freedom. If a set of facts analogous to those in *Spence v BMO Trust Company* arose in Australia, it is likely that Australian courts would take a similar view to that adopted by the Court of Appeal for Ontario and determine that the deceased’s motives, whilst ‘distasteful’, do not, of themselves, invalidate the dispositions made.

³² *Re Estate of Griffith (deceased); Easter v Griffith and Others* (1995) 217 ALR 284 (“*Easter v Griffith*”), 294 (Kirby P). See also *Banks v Goodfellow*, where Cockburn CJ stated that as long as a testator has capacity, he or she may in his or her ‘unfettered discretion’, make a will that is founded on ‘caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence’ (at 564), and Knight Bruce VC’s comment in the earlier case of *Bird v Luckie* (1850) 8 Hare 301; 68 ER 375 that ‘a testator is permitted to be capricious and improvident’ in the disposition of his or her property (at 306; 378).

³³ (1995) 217 ALR 284.

³⁴ *Ibid* 291 (Gleeson CJ).

³⁵ [2003] MBQB 127; 174 Man R (2d) 274.

³⁶ *Ibid* 174, cited in *Spence v BMO Trust Company* [2016] ONCA 196, [111].

B Public Policy Considerations

“Public policy” refers to ‘some overriding qualification of legal rules in the public interest’³⁷ – that is, a restraint on a freedom of the individual that is curtailed in the interest of the greater public good or some higher order public good.³⁸ With regard to testation, it refers to restraints on an individual’s testamentary freedom.

As with the position in Ontario, in Australian law there exist various public policy grounds which, if established, may warrant a declaration that a testamentary disposition or will is void. For example, testamentary gifts may be set aside where they are illegal,³⁹ attempt to restrain or require a beneficiary’s marriage to a particular person⁴⁰ or the practise of a particular religious faith⁴¹ (such as by making the testamentary disposition conditional upon such behaviour), or limit a beneficiary’s freedom to alienate his or her property.⁴²

However, it is important to note that not all challenges to wills on the basis of public policy are successful. The 2006 Queensland decision of *Ellaway v Lawson & Anor*⁴³ is a case in point. The testator made a will appointing one of her two daughters as executor and naming both daughters as beneficiaries. While one of the daughters was entitled to her bequest immediately under the terms of the deceased’s will, the will also stipulated that the other daughter was unable to receive her bequest until such time as she divorced her current husband or upon the death of the husband.⁴⁴ The affected daughter challenged the validity of her mother’s testamentary disposition on the basis that the condition requiring the death of, or a divorce from, her husband before she would be entitled to the bequest was contrary to public policy.

In the Supreme Court of Queensland, Douglas J examined the case law and held that the disposition was not invalid as the will did not in fact create any obligation for the testator’s daughter to seek a divorce from her husband.⁴⁵ The will merely provided that the daughter would only receive her inheritance at such time as her husband might die or in the event that

³⁷ Rosalind F Atherton and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 2nd ed) 2003) 533.

³⁸ *Ibid.*

³⁹ *Ibid* 545 [14.18].

⁴⁰ *Ibid* 553 [14.27].

⁴¹ *Ibid* 550 [14.23].

⁴² *Ibid* 562 [14.34].

⁴³ [2006] QSC 170.

⁴⁴ *Ibid* [1].

⁴⁵ *Ibid* [13].

they did divorce. Douglas J relied on the comments made by Starke J in *Ramsay v Trustees Executors and Agency Co Ltd*⁴⁶ that in order to offend public policy, the disposition in question must have a ‘general tendency to injure public interests’⁴⁷ in the sense that there is a serious or real temptation that the beneficiary will do something harmful and, thus, contrary to public policy. Starke J did not consider it to be a realistic contention that a person would in fact seek to divorce his or her spouse in order to inherit from a testator’s estate, as such a position ‘ignores...the moral standards and conduct of decent and ordinary members of the community and concludes that these standards would be wholly insufficient to withstand the temptation of the pecuniary advantage arising under the terms of the will.’⁴⁸

Indeed, Starke J further remarked that:

...testators frequently, I am afraid, cut off their children with the proverbial penny for marrying against their will. Dispositions of this character, unjust though they may be, do not infringe any rule of public policy.⁴⁹

These comments demonstrate the underlying and overarching concept of testamentary freedom, which remains a fundamental tenet of succession law and testation. Accordingly, Australian courts are unlikely to interfere with the seemingly unjust motivations of testators, whether apparent on the face of the will or not, unless the relevant dispositions harm public interests by causing particular detrimental behaviour. It is unlikely that an Australian court faced with a similar fact scenario to *Spence v BMO Trust Company* would be inclined to find that the will is invalid for public policy reasons. In particular, the case law reveals no general public policy that a will or testamentary disposition made for an alleged discriminatory motivation may be held to be void.

C Other Grounds

In *Spence v BMO Trust Company*, Cronk JA made a passing observation that, in Ontario, testators do not have a statutory duty to provide for adult independent children. Adult independent children are not eligible for ‘dependant’s relief protection’ under the *Succession*

⁴⁶ (1948) 77 CLR 321.

⁴⁷ Ibid 330 cited in *Ellaway v Lawson & Anor* [2006] QSC 170, [10].

⁴⁸ Ibid.

⁴⁹ Ibid.

Law Reform Act, R.S.O, 1990 of Ontario as they are not ‘dependants’ for the purposes of the legislation.⁵⁰

This is a point of difference between the Australian law and the law of Ontario. Although ‘dependant’s relief protection’ does not exist in Australia, each Australian state and territory has family provision legislation in place that enables various categories of eligible persons to apply for better or further provision out of a deceased person’s estate if they are able to satisfy the relevant court that adequate and proper provision for the applicant’s maintenance, education and advancement in life has not been made for him or her under the deceased person’s will or on intestacy. The categories of eligible persons are expansive. For example, in New South Wales, the categories include:

1. a spouse of the deceased at date of death;
2. a person with whom the deceased was in a de facto relationship at date of death;
3. any child of the deceased;
4. a former wife or husband of the deceased;
5. a dependent grandchild of the deceased;
6. a person who was dependent on the deceased and a member of the deceased’s household at any time (and not necessarily at the same time); and
7. a person who was in a close personal relationship with the deceased at date of death.⁵¹

The first three categories of eligible persons noted above are entitled to apply for family provision “as of right”, and do not need to prove any further entitlement in order to make their application. However, inherent in the making of any family provision application is the necessity of establishing that the applicant demonstrates a level of financial need that warrants interference with the testator’s testamentary intentions. Family provision legislation is not intended to be used to create fairness or justice where this may be lacking in a testator’s dispositions, but only to make provision for an eligible person where the deceased had a moral obligation to provide for him or her and failed to do so.

⁵⁰ *Spence v BMO Trust Company* [2016] ONCA 196, [37].

⁵¹ *Succession Act 2006* (NSW) s 57.

Arguably, if a similar fact scenario to that in *Spence v BMO Trust Company* arose in Australia, rather than attempting a claim on public policy grounds which, for the reasons expressed above, is likely to fail, the plaintiff would be better advised to make a family provision claim as an adult child of the deceased. Indeed, the availability of a family provision application and the preference for making this type of claim instead of one on the basis of public policy was recognised by Douglas J in *Ellaway v Lawson & Anor.*⁵²

Notably, an applicant for family provision is able to rely on evidence demonstrating the deceased's testamentary intentions which, as in the case of *Spence v BMO Trust Company*, could include evidence of the discriminatory reasons behind the testamentary dispositions made.⁵³ Of course, in order to be successful, it would be necessary for the family provision applicant to establish that he or she has a level of financial need and that the deceased has not adequately provided for the applicant's proper maintenance, education and advancement in life.

Although the success of a family provision application is never guaranteed, it may have better prospects of success at trial (or via a settlement out of court) than a claim to set aside the will or disposition on the basis that it is contrary to public policy.

IV CONCLUSION

The case of *Spence v BMO Trust Company* presented an unusual situation in which a disinherited child sought to invalidate her father's will according to what she alleged to be a discriminatory motivation on the part of her father, but which was not apparent on the face of the will itself. The Court of Appeal for Ontario's decision to overturn the trial judge's declaration that the will was void on the grounds of public policy was consistent with upholding the doctrine of testamentary freedom which is fundamental to succession law. The fact that the will itself revealed no discriminatory comments or intentions made the application to set it aside speculative and reliant upon allegations contained in third party evidence that the testator's intentions were discriminatory in nature. Challenging the validity of a will or disposition on the ground of the will-maker's distasteful or discriminatory motivations is not a sound basis to attack the will, and entertaining such a ground arguably

⁵² At [17].

⁵³ See, eg, *Succession Act 2006* (NSW) s 60, which provides that one of the factors the court may have regard to for the purpose of determining the outcome of the family provision application is 'any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person'.

risks opening the floodgates to disappointed beneficiaries relying on irrelevant extrinsic evidence.

If a similar fact scenario arose in Australia, it is likely that Australian courts would reach a similar conclusion to that reached by the Court of Appeal for Ontario. However, as a point of difference, the availability of family provision applications in Australia provides an alternative approach by a person claiming an entitlement from a deceased's estate.

In any event, it cannot help but be commented that with the size of the estate in question – just shy of \$400,000.00 – it is hoped that unnecessary litigation might in all cases be avoided in favour of a negotiated resolution.