Anne E. Posno
416-865-3095
aposno@litigate.com

February 3, 2015

Racist Will Thrown Out for Being Contrary to Public Policy

An Ontario decision has expanded the application of public policy to void a will, and in so doing has raised concerns of floodgates and abuse. In *Spence v. BMO Trust Company* , 2015 ONSC 615, Justice Gilmore determined that the deceased, who was black, disinherited his adult daughter because she had a child with a Caucasian man – "a clearly stated racist principle".

Justice Glimore looked beyond the otherwise valid will, and held that the underlying reason for the deceased to deliberately deprive his daughter of any inheritance offended "not only human sensibilities but also public policy".

The public policy doctrine is rarely exercised by courts. It contravenes a person's freedom to dispose of his or her assets as he or she chooses. While an intolerable intent of the deceased, it is questionable that the public policy doctrine should have been applied:

1. The will said nothing that would contravene public policy or create harm to the public.
2. The will provided an explanation for the disinheritance of the daughter, which was valid on its face.

Further, it is unclear how the Applicant's extrinsic evidence, in the form of a third-party affidavit, was even admissible at law.

Two significant factors seemed to sway the court to fix the unfair will – the uncontradicted racist attitude of the deceased toward the applicant daughter, and the complete absence of any response to the application by the second adult daughter, who was gifted the entire estate.

The court concluded that it could not give effect to the will. To do so would sanction racist conduct. The will was set aside, and pursuant to the *Succession Law Reform Act*, an intestacy arose, with the effect that the daughters divided the deceased's estate equally.

The unfortunate effects of this decision include an invitation to courts to police people's underlying motivations, and the encouragement of the use of extrinsic, inadmissible evidence to challenge the intention of the testator.

To what extent the wills & estates Bar treats *Spence* as an

invitation to litigate remains to be seen, but one consequence is that a person's last wishes are no longer sacrosanct if they would taint the integrity of the court in carrying them out.

For further analysis and commentary, see Lawyers Weekly article quoting Anne Posno, published by Lexis Nexis Canada Inc.