Wills & Estates
Winter Term 2022

Lecture Notes – No. 6

VI. WILL-MAKING

A. INTRODUCTORY ISSUES: TESTAMENTARY FREEDOM AND ITS LIMITS

THE BAR ON DELEGATION OF TESTAMENTARY POWER

It is worthwhile unpacking the non-delegation rule and its application in various contexts. Thus in respect of agency and administrative law both, we look to the maxim *delegatus non potest delegare* ("a delegate can not delegate"). Hudson J. explained some time ago in ***Reference as to the Validity of the Regulations in Relation to Chemicals Enacted by Order in Council and of an Order of the Controller of Chemicals Made Pursuant Thereto*, [1943] SCR 1, 34** as follows:

> The general principle is stated in *Broom's Legal Maxims* at page 570, as follows:
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> > This principle is that a delegated authority cannot be re-delegated: *delegata potestas non potest delegari*, that is, one agent cannot lawfully appoint another to perform the duties of his agency. This rule applies wherever the authority involves a trust or discretion in the agent for the exercise of which he is selected, but does not apply where it involves no matter of discretion, and it is immaterial whether the act be done by one person or another, and the original agent remains responsible to the principal.
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> The principle thus stated is somewhat qualified by *Broom*, at page 572, as follows:
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> > Although, however, a deputy cannot, according to the above rule, transfer his entire powers to another, yet a deputy possessing general powers may, in many cases, constitute another person his servant or bailiff, for the purpose of doing some particular act; provided, of course, that such act be within the scope of his own legitimate authority.
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> And again :
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> > The rule as to delegated functions must, moreover, be understood with this necessary qualification, that, in the particular case, no power to re-delegate such functions has been given. Such an authority to employ a deputy may be

> either express or implied by the recognised usage of trade.
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> The maxim is most frequently applied in matters pertaining to principal and agent but it is also applied in respect of legislative grants of authority…

Thus, as a basic proposition, we seek to maintain the integrity of decision-making in certain sensitive contexts to ensure the person who is trusted is the person who exercises his or her discretion is making the decision in question. It is the *quality* of the decision that is at issue and we seek to foster circumstances that will yield a proper decision being made by the proper decision-maker. However, as with all things, context is everything.

In the testamentary context, the non-delegation rule is "fundamental." In ***Easingwood v. Easingwood Estate*, 2013 BCCA 182 (B.C.C.A.),** Saunders J.A. held:

> [45] ... The "rule" is famously expressed in *Chichester Diocesan Fund v. Simpson*, [1944] A.C. 341. In the context of powers of appointment, Lord McMillan said, in *obiter dicta*:
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> > ... the law, in according the right to dispose of property *mortis causa* by will, is exacting in its requirements that the testator must define with precision the persons or objects he intends to benefit. This is the condition on which he is entitled to exclude the order of succession which the law otherwise provides.
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> [46] And Lord Simonds said:
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> > ... It is a cardinal rule, common to English and to Scots law, that a man may not delegate his testamentary power. To him the law gives the right to dispose of his estate in favour of ascertained or ascertainable persons. He does not exercise that right if in effect he empowers his executors to say what persons or objects are to be his beneficiaries.
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> [47] A useful compendium of earlier cases is found in D.M. Gordon's article, "Delegation of Will-Making Power" (1953) 69 L.Q. Rev. 334, although his strict conclusions are not unanimously accepted: see, for example, I.J. Hardingham, "The Rule Against Delegation of Will-Making Power" (1974) 9 Melb. U.L. Rev. 650. A more complete list of articles on the topic may be found in Re Nicholls (1987), 1987 CanLII 4398 (ON CA), 57 O.R. (2d) 763, 34 D.L.R. (4th) 321 at 323-4 (Ont. C.A.).
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> [48] Mr. Justice Krever, in *Nicholls*, in the context of powers of appointment and after review of authorities and literature, acknowledged a general prohibition against delegation of testamentary power. An application of this understanding is found in *Desharnais v. Toronto Dominion Bank*, 2001 BCSC 1695 (CanLII), 42 E.T.R. (2d) 192 (appeal allowed on different grounds, 2002 BCCA 640 (CanLII)). There, Mr. Justice Clancy found the change of a designated beneficiary of an RSP account was testamentary in nature and therefore invalid.

> [49] It is clear, I consider, that an attorney may not make a testamentary disposition. As expressed in the authorities just cited, amongst other problems encountered, doing so runs afoul of the *Wills Act*, R.S.B.C. 1996, c. 489. Lawson fairly explains this rule as safeguarding the true wishes of the testator as to dispositions after death.

Re Nicholls
(1987), 57 OR (2d) 762 (S.C.J.)

per Krever J:

> **Would any contemporary societal interest be prejudiced by permitting a general power of appointment created by will to be treated by the law in the same way as a general power of appointment created by an inter vivos instrument? I am unable to see how that question can be answered in the affirmative.** I do not rest my answer on the general principle that prefers a construction that will avoid an intestacy. More appropriate, and a better guide, is the principle expressed correctly and succinctly in the Report of the Ontario Law Reform Commission on The Proposed Adoption in Ontario of the Uniform Wills Act, 1968, at p. 9:
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> > The right of an individual to own and dispose of his assets is basic to our law. Any effort to restrict or circumscribe that right should only be permitted where the necessity for restriction clearly justifies interference with the basic freedom of the individual to dispose of his property.
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> I am not persuaded that the formal requirements of Pt. I of the Succession Law Reform Act, formerly the Wills Act, are a sufficient justification. Indeed, the amendment in 1977 by c. 40, s. 6, making holograph wills valid is evidence of the existence of a less formalistic attitude towards testamentary disposition of property.
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> **It has been suggested that it is unrealistic or artificial to regard the giving of a completely unfettered discretion to the holder or donee of a general power of appointment, including, therefore, the power to appoint to himself or herself, as, in essence, not materially different from the gift of property. I do not agree with that criticism. It may be true that it is not clearly evident from the testatrix's language in this case that the testatrix contemplated that the donee of the power would ever direct that the residue be given to him. That, however, is not a complete answer. There is equally nothing in her language that indicates that she would have any objection to his direction that he be given the residue. Her words show that she intended an unfettered discretion, a discretion, so it seems to me, that an absolute owner would have. That, as I interpret his reasons, is what Mr. Justice O'Leary concluded. I have not been persuaded that he was wrong.**

I would suggest that this sort of arrangement – a power of appointment to give to someone other than the done – ought not be used. It will almost certainly result in litigation. I would suggest a testamentary trust instead.

READ IT BECAUSE IT'S FUN

Re Millar
[1938] SCR 1; cb, pp. 161-162

Charles Millar was a Toronto lawyer who was a great practical joker – Google him, it's worth the effort.

The rule: public policy can invalidate a gift but usually for illegality or some really good reason and not capriciousness.

PUBLIC POLICY

McCorkill v. Streed
2014 NBQB 148 (N.B.Q.B.)

In this case the testator made a gift to a white supremacist group, the "National Alliance". In a carefully reasoned decision, Justice Grant held that the gift was invalid.

Per Grant J.:

> [57] This brings me to the first salient question in this application, whether or not the NA disseminates information that is in violation of public policy in Canada.
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> [58] What constitutes public policy is a question that has been considered in many cases. In the case of Re: Wishart Estate (No. 2) 1992 CanLii 2679 (NBQB); (1993) 1992 CanLII 2679 (NB QB), 129 NBR (2d) 397 Riordon, J. considered whether or not a direction in a will to destroy four horses violated public policy. He quoted extensively from the Missouri case of Eyerman et al v Mercantile Trust Co. N.A. et al 524 S.W.2d 210 including the following:
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> > The term 'public policy' cannot be comprehensively defined in specific terms but the phrase 'against public policy' has been characterized as that which conflicts with the morals of the time and contravenes any established interest of society. Acts are said to be against public policy 'when the law refuses to enforce or recognize them, on the ground that they have a mischievous tendency, so as to be injurious to the interests of the state, apart from illegality or immorality'. Dille v. St. Luke's Hospital, 355 Mo. 436; 196 S.W. 2d 615, 620 (1946); Brawner v. Brawner, 327 S.W. 2d 808, 812 (Mo. banc 1959).
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> [59] In *Canada Trust Co. v. Ontario Human Rights Commission* 1990 CanLII 6849 (ON CA), [1990] O.J. No. 615 (O.C.A.) the court considered whether a trust document establishing a charitable trust based on white supremacy, religious supremacy, racism and sexism violated public policy. Writing for the majority, Robins, J.A. stated at paragraph 34:

34. Viewing this trust document as a whole, does it violate public policy? In answering that question, I am not unmindful of the adage that "public policy is an unruly horse" or of the admonition that public policy "should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds": Re Millar, 1937 CanLII 10 (SCC), [1938] S.C.R. 1, [1938] 1 D.L.R. 65 [per Crocket J., quoting Lord Aitkin in Fender v. Mildmay, [1937] 3 All E.R. 402, at p. 13 S.C.R.]. I have regard also to the observation of Professor D.W.M. Waters in his text on the Law of Trusts in Canada, 2nd ed. (Toronto: Carswell, 1984), at p. 240 to the effect that:

> The courts have always recognized that to declare a disposition of property void on the ground that the object is intended to contravene, or has the effect of contravening public policy, is to take a serious step. There is the danger that the judge will tend to impose his own values rather than those values which are commonly agreed upon in society and, while the evolution of the common law is bound to reflect contemporary ideas on the interests of society, the courts also feel that it is largely the duty of the legislative body to enact law in such matters, proceeding as such a body does by the process of debate and vote.
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> Nonetheless, there are cases where the interests of society require the court's intervention on the grounds of public policy. …

[60] In the case of Re Estate of Charles Millar, Deceased 1937 CanLII 10 (SCC), [1938] S.C.R. 1 Duff C.J. stated at p. 4:

> It is the duty of the courts to give effect to contracts and testamentary dispositions according to the settled rules and principles of law, since we are under a reign of law; but there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual. It is, in our opinion, important not to forget that it is in this way, in derogation of the rights and powers of private persons, as they would otherwise be ascertained by principles of law, that the principle of public policy operates.

[61] Public policy, then, embodies the "interests of society" as expressed in the morals of the time, the common law and legislation. In respect to the latter in Canada Trust Co., supra., Tarnopolsky, J.A. stated at paras. 92-94:

> 92 Public policy is not determined by reference to only one statute or even one province, but is gleaned from a variety of sources, including provincial and federal statutes, official declarations of government policy and the Constitution. The public policy against discrimination is reflected in the anti-discrimination laws of every jurisdiction in Canada. These have been given a special status by the Supreme Court of Canada in Ontario Human Rights Comission v. Simpsons-Sears Ltd., 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536, 52 O.R. (2d) 799 (note), 17 Admin. L.R. 89, 9 C.C.E.L. 185, 7 C.H.R.R. D/3102, 86 C.L.L.C.

> Paragraph17, 002, 23 D.L.R. (4th) 321, [1986] D.L.Q. 89 (note), 64 N.R. 161, 12 O.A.C. 241, at p. 547 S.C.R., p. 329 D.L.R.
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> The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment (see Lamer J. in Insurance Corporation of British Columbia v. Heerspink, 1982 CanLII 27 (SCC), [1982] 2 S.C.R. 145 at pp. 157-58), and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional, but certainly more than the ordinary – and it is for the courts to seek out its purpose and give it effect.
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> 93 In addition, equality rights "without discrimination" are now enshrined in the Canadian Charter of Rights and Freedoms in s. 15; the equal rights of men and women are reinforced in s. 28; and the protection and enhancement of our multicultural heritage is provided for in s. 27.
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> 94 Finally, the world community has made anti-discrimination a matter of public policy in specific conventions like the International Convention on the Elimination of All Forms of Racial Discrimination (1965), G.A. Res. 2106 A (XX), and the International Convention on the Elimination of All Forms of Discrimination Against Women (1979), G.A. Res. 34/180, as well as Articles 2, 3, 25 and 26 of the International Covenant on Civil and Political Rights (1966), G.A. Res. 2200 A (XXI), all three of which international instruments have been ratified by Canada with the unanimous consent of all the provinces. It would be nonsensical to pursue every one of these domestic and international instruments to see whether the public policy invalidity is restricted to any particular activity or service or facility.

[62] In my view engaging in activity which is prohibited by Parliament through the enactment of the Criminal Code of Canada falls squarely within the rubric of a public policy violation. In addition, as the applicant has pointed out, the NA's various communications and activities contravene the values set out in the Charter of Rights, provincial human rights legislation as well as the International Conventions which Canada has signed all of which promote equality and the dignity of the person while prohibiting discrimination based on various grounds, including race and ethnic origin.

On appeal, 2015 NBCA 50:

> [1] The application judge invalidated a residual bequest to the beneficiary, National Alliance. He made this determination on the basis that the purposes of the National Alliance, and the activities and communications it undertakes to promote its purposes, are illegal and contrary to the public policy of Canada and New Brunswick. The decision is reported at *McCorkill v. McCorkill Estate*, 2014 NBQB 148 (CanLII), 424 N.B.R. (2d) 21. Having regard to the application judge's comprehensive reasons and his determination that the bequest was void as

> against public policy, we can find no justification to interfere. We are in substantial agreement with the essential features of the carefully considered reasons of the application judge.
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***Spence v. BMO Trust Company*, 2015 ONSC 615 (Ont. S.C.J.); cb, p.168, Note 2** was a shocker when the trial judgment was released. The testator apparently disinherited an adult child due to his racist attitude to her child born of a father of a different race. Regardless of the fact that there were no provisions in the Will that spoke to race or were patently objectionable, Justice Gilmore said:

> [48] In Professor Bruce Ziff's article, Welcome the Newest Unworthy Heir, 1 ETR-CAN-ART 76, Estates and Trust Reports (Articles) 2014 he raises important questions with respect to the application of the doctrine of public policy when it comes to private gifts made through wills. Professor Ziff specifically grapples with the issue in McCorkill, with respect to whether or not a will should be set aside where the granting document itself does not contain any impugned terms. Professor Ziff acknowledges that fixing on stipulations such as terms which expressly recite discriminatory preferences are important but that such elements were not necessary in the McCorkill case because the racist preferences were found memorialized in the published works of the donee. Professor Ziff concludes that despite issues with respect to litigation floodgates and the necessity of having specifically recited terms in the granting document, that there was something absolutely correct about the holding in the McCorkill case.
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> [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 will. However, it is clear and uncontradicted, in my view, that the reason for disinheriting Verolin, as articulated by the deceased, was one based on a clearly stated racist principle. Does it offend public policy that the deceased's other daughter, Donna, should receive the entire estate simply because her children were fathered by a black man? That, in my view, offends not only human sensibilities but also public policy.

On appeal, **2016 ONCA 196 (Ont. C.A.);** Leave to appeal refused, 2016 CanLII 34005 (SCC), Cronk J.A. held in allowing the appeal:

> 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?
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> …

(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 (Ont. C.A.), at p. 495, citing *Blathwayt v. Cawley* (1975), [1976] A.C. 397, [1975] 3 All E.R. 625 (U.K. 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 (S.C.C.), 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 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 v. Weckwerth*, 2013 ONSC 3018 (Ont. S.C.J.), at paras. 43-44, aff'd 2014 ONCA 338 (Ont. C.A.), at paras. 5-6, leave to appeal to S.C.C. refused, [2014] S.C.C.A. No. 288 (S.C.C.). 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.

…

(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 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 (N.B. Q.B.), aff'd 2015 NBCA 50 (N.B. C.A.), leave to appeal to S.C.C. requested [2015 CarswellNB 479 (S.C.C.)], 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 Assn. for Free Expression v. McCorkill Estate*, 2015 NBCA 50 (N.B. C.A.), 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.

64 *McCorkill v. McCorkill Estate* 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.

B. REQUIREMENTS FOR A VALID WILL AND ONUS PROBANDI

In **Scott v. Cousins (2001), 37 E.T.R. (2d) 119, para. 39 (Ont. Sup. Ct.),** Cullity J. summarized the law:

> 1. The person propounding the will has the legal burden of proof with respect to **due execution, knowledge and approval and testamentary capacity**.
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> 2. A person opposing probate has the legal burden of proving undue influence.
>
> 3. The standard of proof on each of the above issues is the civil standard of proof on a balance of probabilities.
>
> 4. In attempting to discharge the burden of proof of knowledge and approval and testamentary capacity, the propounder of the will is aided by a rebuttable presumption.
>
> Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.
>
> 5. This presumption "simply casts an evidential burden on those attacking the will."
>
> 6. The evidential burden can be satisfied by introducing evidence of suspicious circumstances - namely, "evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity. In this event, the legal burden reverts to the propounder."
>
> 7. The existence of suspicious circumstances does not impose a higher standard of proof on the propounder of the will than the civil standard of proof on a balance of probabilities. However, the extent of the proof required is proportionate to the gravity of the suspicion.
>
> 8. A well-grounded suspicion of undue influence will not, *per se*, discharge the burden of proving undue influence on those challenging the will:
>
> It has been authoritatively established that suspicious circumstances, even though they may raise a suspicion concerning the presence of fraud or undue influence, do no more than rebut the presumption to which I have referred. This requires the propounder of the will to prove knowledge and approval and testamentary capacity. The burden of proof with respect and fraud and undue influence remains with those attacking the will.

C. SUSPICIOUS CIRCUMSTANCES

Barry v Butlin
(1838), 12 ER 1089 (Ch)

Baron Parke held that the rules for admitting a Will to probate are two:

> . . . the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party wrote or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

Vout v Hay
[1995] 2 SCR 876

The Will was made by the testator, age 81, in favour of a friend (defendant), age 29. The Will was drawn by a secretary in the office of the defendant's parents' lawyer. There was conflicting evidence as to how much involvement the defendant had in the preparation of the Will, and to what extent she influenced the testator. The trial judge found that there was no undue influence and in favour of the defendant; the Court of Appeal reversed, holding that the trial judge ought to have inquired further into matters that were disputed. The SCC restored the verdict as the trial judge was satisfied that the testator was competent and exercising an independent will. Per Sopinka J:

> 23 Any discussion of the role of suspicious circumstances must start with the statement of Baron Parke in *Barry v. Butlin*, supra, at p.1090:
>
> [F]irst ... the *onus probandi* lies in every case upon the party propounding a Will; and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable Testator.
>
> [S]econd ... if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased.
>
> 24 At least two problems are raised by this statement:
>
> (1) whether suspicious circumstances impose a standard of proof that is higher than the ordinary civil standard; and
>
> (2) whether the reference to a free and capable testator requires the propounder of the will to disprove undue influence.

25 With respect to the first problem, in accordance with the general rule applicable in civil cases, it has now been established that the civil standard of proof on a balance of probabilities applies. The evidence must, however, be scrutinized in accordance with the gravity of the suspicion. As stated by Ritchie J. in *Re Martin; MacGregor v. Ryan*, [1965] S.C.R. 757, at p. 766:

The extent of the proof required is proportionate to the gravity of the suspicion and the degree of suspicion varies with the circumstances of each case.

26 With respect to the second problem, although *Barry v. Butlin* and numerous other cases dealt with circumstances in which the procurer of the will obtained a benefit, it has been determined that the dictum in *Barry v. Butlin* extends to any "well-grounded suspicion" (per Davey L.J. in *Tyrrell v. Painton* (1893), [1894] P. 151 (C.A.), at pp. 159-160). This was reaffirmed in this court by Ritchie J. in *Re Martin*, supra. The suspicious circumstances may be raised by (1) circumstances surrounding the preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud. Since the suspicious circumstances may relate to various issues, in order to properly assess what effect the obligation to dispel the suspicion has on the burden of proof, it is appropriate to ask the question "suspicion of what?" See Wright, supra, and Rodney Hull, Q.C., *Macdonell, Sheard and Hull on Probate Practice* (3rd ed. 1981), at p. 33.

27 Suspicious circumstances in any of the three categories to which I refer above will affect the burden of proof with respect to knowledge and approval. The burden with respect to testamentary capacity will be affected as well if the circumstances reflect on the mental capacity of the testator to make a will. Although the propounder of the will has the legal burden with respect to due execution, knowledge and approval, and testamentary capacity, the propounder is aided by a rebuttable presumption. Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.

28 Where suspicious circumstances are present, then the presumption is spent and the propounder of the will reassumes the legal burden of proving knowledge and approval. In addition, if the suspicious circumstances relate to mental capacity, the propounder of the will reassumes the legal burden of establishing testamentary capacity. Both of these issues must be proved in accordance with the civil standard. There is nothing mysterious about the role of suspicious circumstances in this respect. The presumption simply casts an evidentiary burden on those attacking the will. This burden can be satisfied by adducing or pointing to some evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity. In this event, the legal burden reverts to the propounder.

29 It might have been simpler to apply the same principles to the issue of fraud and undue influence so as to cast the legal burden onto the propounder in the

presence of suspicious circumstances as to that issue. See Wright, supra, and Hull, *Macdonell, Sheard and Hull on Probate Practice*, supra, at p. 33. Indeed the reference in *Barry v. Butlin* to the will of a "free and capable" testator would have supported that view. Nevertheless, the principle has become firmly entrenched that fraud and undue influence are to be treated as an affirmative defence to be raised by those attacking the will. They, therefore, bear the legal burden of proof. No doubt this reflects the policy in favour of honouring the wishes of the testator where it is established that the formalities have been complied with, and knowledge and approval as well as testamentary capacity have been established. To disallow probate by reason of circumstances merely raising a suspicion of fraud or undue influence would tend to defeat the wishes of the testator in many cases where in fact no fraud or undue influence existed, but the propounder simply failed to discharge the legal burden. Accordingly, it has been authoritatively established that suspicious circumstances, even though they may raise a suspicion concerning the presence of fraud or undue influence, do no more than rebut the presumption to which I have referred. This requires the propounder of the will to prove knowledge and approval and testamentary capacity. The burden of proof with respect to fraud and undue influence remains with those attacking the will. See *Craig v. Lamoureux*, [1920] A.C. 349; *Riach v. Ferris*, [1934] S.C.R. 725; *Re Martin*, supra.