

WILLS, ESTATES, TRUSTS & CHARITIES

When do will provisions contravene public policy?

By Charles Wagner

Would a disposition of property be void for contravening public policy if the precondition was a requirement that the proposed spouse be a certain religious faith?

Generally, Ontario courts respect the rights of testators to dispose of their assets as they see fit. This fundamental principle is demonstrated in *Renaud v Lamothe*, [1902] C.C.S. 145. The court held that the testator had absolute power to deal with his property, regardless of any moral or natural claims on him.

Under certain circumstances, the legislature provides for the disinherited to challenge a testamentary disposition.

In his textbook, *The Law of Trusts in Canada* (Carswell), Donovan W.M. Waters said, "In areas where the legislature had been silent, however, the courts have evolved heads or principles of public policy and, whatever may be their present-day attitudes towards the extension of those heads of public policy, acting with those principles in mind they have declared void a wide range of conditions, covenants and trust objects."

A condition that makes a bequest conditional on marrying within a certain faith may run afoul of public policy.

Uncertainty may give cause to our courts to void these clauses. Generally, a higher degree of certainty is required for conditions subsequent as opposed to conditions precedent.

There are cases like *Clayton v Ramsden*, [1943] A.C. 320, [1943] 1 All E.R. 16, where the imprecise definition of "Jew" gave the courts cause to strike down a condition subsequent.

The distinction between differing acceptable levels of certainty regarding conditions precedent and subsequent was criticized by Lord Denning in *Re Tuck's Settlement Trusts*, [1978] Ch. 49, and by the High Court in Australia in *Trustees of the Church Property of the Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394, and along those lines, I submit, a valid path to follow is to attack these clauses even when they are conditions precedent.

There is no universally accepted legal or religious definition of a Jew. In Israel today this issue is one of legislative controversy as the various streams of Judaism debate their defining characteristics.

In *Re Hurshman* (1956), 6 D.L.R. (2d) 615, Justice McInnes dealt with a clause providing that the testator's bequest to his daughter was

conditional on her not marrying a Jew. This clause was voided with the comment, "insofar as those conditions involve racial discrimination, his language must be precise and explicit and clearly within the law if he expects the court to assist him in the fulfillment



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of his aims."

What might pass the test of certainty? *Re Tuck's Settlement Trusts, Public Trustee v Tuck*, [1976] 1 All E.R. 545, may provide the answer. In that case the court upheld the validity of a clause where the "approved wife" was defined as "a wife of Jewish blood by one or both of her parents and who has been brought up in and has never departed from and at the date of her marriage continues to worship according to the Jewish faith as to which facts in case of dispute or doubt the decision the Chief Rabbi in London ... shall be conclusive."

Today, in Ontario, certainty may not be enough when clauses are premised on racism. In *Re Wren*, [1945] O.R. 778, the Ontario Court of

Appeal voided a covenant in a deed that required that the land not be sold to Jews.

In *Canada Trust Co. v. the Ontario Rights Commission*, 74 O.R. (2d) 48, the court ruled that a trust violated public policy because it was premised on "notions of racism and religious superiority" that contravened contemporary public policy.

In 1995, the Ontario Court of Appeal considered *Fox v. Fox Estate*, 28 O.R. (3d) 496. The mother was named as the estate trustee, and the will gave her unfettered discretion to encroach on the capital of the estate for the benefit of her son's children. When the son married a non-Jew, his mother, as estate trustee, took all the assets and gave it to the son's children.

The court ruled that the mother's action was an inappropriate use of her discretion as a trustee because it was *mala fides* and contrary to public policy.

In *obiter*, Justice Hilda McKinlay reflected that, "While there were decisions in the past which have upheld discriminatory conditions in wills, in response to a query for the bench, counsel in his case were not prepared to argue that *any court would today uphold a condition in a will which provides that a beneficiary is to be disinherited if he or she marries outside of particular religious faith.*" [emphasis added]

What argument could be made to uphold such a condition? One might argue that Canada values diversity. The *Canadian Multiculturalism Act* states, "The Multicultur-

alism Policy is based on the fundamental values that unite Canadians, such as respect for human rights, equality, and recognition of diversity ... Canada is a society built around existing Aboriginal peoples, two founding European cultures, and successive waves of immigration. Canada reflects a cultural, ethnic and linguistic diversity that is found nowhere else on earth; it

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is a country characterized by its diversity."

In Ontario, Catholic schools are fully funded because it was our historic mission to help that minority avoid assimilation. We spend money in our public school system on heritage classes and French language classes to encourage children to retain a connection to their original culture.

Canadians celebrate and encourage the perpetuation of our diversity. How can we applaud diversity on one hand and then void a testamentary disposition that promotes it? Would our courts accept a clause if its intent was continuity as opposed to discrimination?

In *Shapira v. Union National Bank*, 39 Ohio Misc. 28, a U.S. court accepted such an argument. A father left his money to Israel, his wife and their three sons. The bequests

to his sons were contingent on each son being married to a Jewish girl or marrying a Jewish girl within seven years of his father's demise.

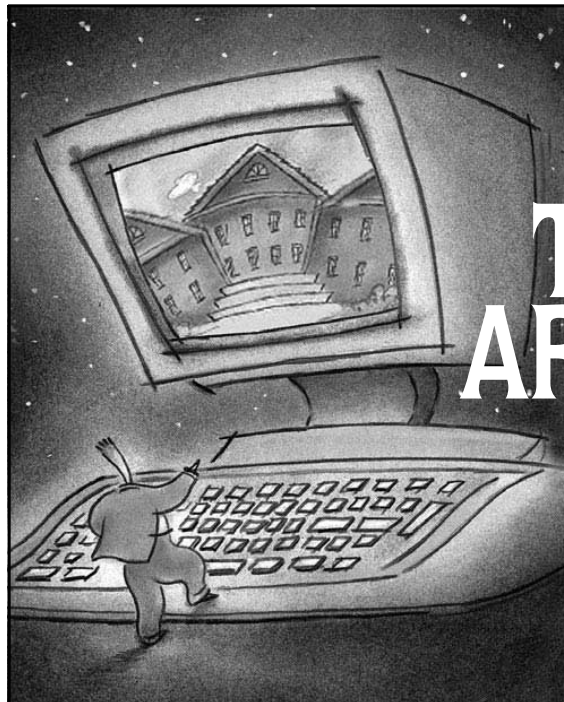
The court rejected the son's claim and stated that the father's unmistakable testamentary plan was that his possessions be used to encourage the preservation of the Jewish faith and blood. The court felt it was its duty to honour the testator's intention.

One could argue for a distinction between clauses that have an impact on the public and those that only affect the individual. The latter merely presents the beneficiary with the option to comply with the condition or disclaim the gift. To argue otherwise would suggest that judicial interference would be warranted in the case of a promised *inter vivos* gift that is contingent on a child marrying within the faith. Surely our courts would not enforce the *inter vivos* gift without conditions.

Our courts have the unenviable job of balancing competing public policy interests. There is a tension between respecting the wishes of the testator and supporting the perpetuation of diversity while forbidding discrimination.

While the *Fox Estate* case is not a precedent for disallowing such contingent bequests, the reflections of an Ontario Court of Appeal judge indicate how at least one judge might rule if such a case came before the court

Charles Wagner practises commercial and estate litigation in Toronto. cwagner@cbwagnerlaw.com.



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