Leave intermarried children in the Will

By Charles Wagner

Is it legal to disinherit someone for marrying outside the faith?

As a general rule, Ontario Courts respect a person's desire to dispose of their assets as they see fit. However, with the Family Law Act, and the Succession Law Reform Act, the Legislature has intervened to protect the interests of spouses and dependants. The Courts have also voided certain bequests because they offend Public Policy.

The Courts view Public Policy as Canadian society's commonly agreed upon values. While it is primarily the Legislature's place to translate those policies into law, the Court will intervene and declare a disposition of property void if it contravenes Public Policy. For example, the Ontario Courts have voided trusts and wills where bequests were dependent on people not marrying Jews or not transferring land to Jews. Generally, Ontario courts do not like clauses in wills that are premised on notions of racism and religious superiority.

In 1995, the Ontario Court of Appeal considered Fox v Fox Estate. The father named his wife as the Estate Trustee and the Will gave her an unfettered discretion to encroach on the capital of the estate for the benefit of her son's children. When the son married his non-Jewish secretary, his mother took all the assets and gave them to the son's children. The son took his mother to court.

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The court ruled that the mother's attempt to disinherit her son for marrying a non-Jew was an inappropriate use of her discretion. They viewed the mother's behaviour as mala fides and contrary to Public Policy. The Fox Estate case deals with the discretion of a Trustee. However, one of the three Ontario Court of Appeal judges in this case reflected that, "while there were decisions in the past which have upheld discriminatory conditions in Wills, in response to a query from the bench, counsel in this 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 a particular religious faith."

What argument could be made to uphold such a condition? One might argue that Canada has laws that promote, "...recognition of 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 schools on heritage and French language classes to encourage children to connect with their original culture. How can we applaud diversity on one hand and then void a testamentary disposition that promotes it? Would a court accept a clause if its intent was continuity as opposed to discrimination? In a 1974 case, the Ohio Court of Common Pleas accepted this premise.

In Shapira v. Union National Bank, a father left his money to Israel, his wife and their three sons. The bequests to his sons were contingent upon marrying a Jewish girl within seven years of his father's demise. One son challenged the Will on the grounds that it violated Public Policy. The court rejected the son's claim and stated that the father's purpose was not merely a negative one designed to punish his son for not carrying out his wishes. His 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 father's intention.

Intermarriage and assimilation may very well be the greatest challenge facing the Jewish people in the 21st century. Nevertheless, in Ontario, bequests contingent on the beneficiaries marrying Jews are likely to be an ineffective way to combat intermarriage. 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.

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