Where does our loyalty lie?

Last year I wrote an article regarding the fate of Barney, Bill, Jack & King – 4 horses condemned to death by their owner, with the rationalization that they would not be cared for in his absence. The judicial purpose of *McCorkhill*[1] was an exploration of Court's balance between testamentary freedom & public policy. In short, public policy won… where applicable.

The court disposed that it would overturn the allocation of one's assets, absent capacity or undue influence challenges, if compliance resulted in an offence to public policy.

Recently, this topic was again examined in *Spence v BMO*[2]. The limitations to testamentary freedom were expanded - justifiably????

In addition to broadening the scope of public policy offences and questioning a beneficiaries' merit, hearsay evidence may now be used to examine the motive behind the Will provision.

Where should the drafting solicitor remain loyal? Are we obliged to ensure that the Will does not offend public policy, or ought we do our best to meet the client's objectives, even if morally questionable? If it is unclear whether or not the instructions are offensive, are we compelled to make an assessment of the worthiness of beneficiaries?

Drafting Challenges

This places the solicitor into a precarious position of making a judgment call as to whether the expressed intentions carry a legitimate reason or are contrary to public policy. If the reason provided or implied is possibly viewed as offensive, should we seek to draft in the best possible manner to ensure it is upheld to act in accordance with our client's instructions?

What if the direction is void of explanation? Lack of an explanation does not make the testation any less open to implicit evidence of reason. In fact, *BMO* expanded the scope of evidence permitted by accepting hearsay evidence as to the testator's motive, even when the Will did not provide any justification.

The Initial Interview

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[1] *McCorkill v Streed, Executor of the Estate of Harry Robert McCorkill* 2014 NBQB 148
[2] *Spence v BMO Trust Co.* ONSC 615

Should estate lawyers delve further into a client's reasons in allocating their assets, or is it better to open a client meeting with an explanation similar to that in criminal law:

LAWYER: You should be aware that the courts now recognize a new platform for will challenges. Contrary to the former common law position that a person can chose the allocation of their assets upon death, subject only to obligations under the *Family Law Act*, dependant responsibilities under the *Succession Law reform Act* and challenges for lack of capacity or undue influence – the court can now alter the terms of your will if your instructions offend public policy?

CLIENT: What?

LAWYER: For example, if you tell me that you do not want to leave anything to a child because she married someone of a different race or religion I may have to refuse the retainer because I am not able to act in your best interest.

CLIENT: Its my money, I will give it to whomever I please.

LAWYER: I understand, but you need to be aware that my file could possibly be summoned to find out what your motivations are.

CLIENT: What if I instruct that it all be burnt? My kids are greedy.

Examples

There are many situations where the instructions <u>may</u> contradict public policy, but often this will be unclear due to the subjective nature of the test.

If we accept that the court has upheld provisions that *promote* the institution of marriage, and have overturned provisions that *refute* equality, does it not really all come down to the talent of the wordsmith?

Situation #1: The testator's spouse is predeceased. She has one daughter and no siblings.

- I leave my daughter Maria nothing because she had 2 abortions and abortions are wrong (yet legal) -> likely overturned for offending public policy

- I leave my only child Maria nothing because I wanted grandchildren and she did not give birth -> questionable

- I leave to my daughter Maria 50% of my estate if she has a child or children at the time of my death -> likely upheld and possibly explained as an eventual gift in the interest of the grandchild/grandchildren

- I leave my entire estate to [SPECIFIED REGISTERED CHARITY] -> Maria could advance a claim she was disinherited for improper reasons and submit evidence going to motive

- I leave to my daughter Maria 50% of my estate upon her marriage = Maria marries Lisa and receives $5million from a $10 million estate

- I disinherit my daughter Maria if she marries a woman = Maria marries Lisa and receives $0 -> overturned for offending public policy

- I leave to my daughter Maria 50% of my estate upon her marriage to a good catholic man = Maria marries Lisa and receives $0 -> possibly upheld as promotion of marriage / or is it discrimination against other religions

Re Kennedy [1950] 1 WWR 151 (MB) involved a similar provision that bequeathed upon marriage to an Anglican man. This was upheld as promoting marriage, and therefore not contrary to public policy.

This decision emphasizes the subjectivity involved, especially when a single provision promotes one purpose, while discriminatory to another. Moreover, it emphasizes the transition in views over time. In 1950 promoting marriage within the Anglican religion in England would not seem odd. Today it may abuse our right to religious choice.

Summary

What offends public policy is and always will be highly subjective, changing between time, people and place.

The lack of certainty a testator now has is of serious concern. Offense to public policy remains subjective and is influenced by daily events. Even if at the time of drafting all terms appear to be justifiable, how can we be certain that a world event occurring between the date of the will and the testator’s death will not influence the terms to be seen as offensive.