Unusual Will Clauses & Oddball Estate Cases

by Justin W. de Vries[1], Michael Rosen, and Gillian Fournie

> *It is no doubt the case that the function of the Courts, civil and criminal, is to prevent illegal rather than unreasonable actings; but there is all the difference between what a man, uncognosced [not insane], may do at his own hand, and what the law will support under the provisions of his will.[2]*

As the estates bar knows all too well, a last will and testament can be the final chance for a person to communicate his or her thoughts, wishes and desires to the world. It is no surprise then that a will often reflects the idiosyncrasies of its author, whether in form or in content.

Some of history's most famous characters are no exception. In his 1869 will, Charles Dickens famously demanded that mourners "who attend my funeral wear no scarf, cloak, black bow, long hatband, or other such revolting absurdity." When Benjamin Franklin bequeathed a portrait of King Louis XVI in a frame encrusted with 408 diamonds to his daughter, he wished that "she would not form any of those diamonds into ornaments, either for herself or daughters, and thereby introduce or countenance the expensive, vain and useless pastime of wearing jewels in this country."[3] And John B. Kelly, best known as the father of the actress Grace Kelly, left to his son in his amusing will "all my personal belongings, such as trophies, rings, jewelry, watches, clothing and athletic equipment, except the ties, shirts, sweaters and socks, as it seems unnecessary to give him something of which he has already taken possession."[4]

While a will can often reflect the humour of its drafter, a will can also reflect the testator's strict moral views of the world. In trying to control the actions of the persons left behind, the testator

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[1] Contact Justin at 416-640-2757 (Toronto), 905-844-6721 (Oakville), or jdevries@devrieslitigation.com

[2] *M'Caig's Trustees v. Kirk-Session of the United Free Church of Lismore, et al.*, [1915] SC 426, 1915 Sess. Cas. 426 (Scot.).

[3] Lawrence M. Friedman, *A History of American Law: Third Edition* (Simon and Schuster: 2005) at 182

[4] Robert S. Menchin, *Where There's a Will: A Collection of Wills*.

will often issue directives that cause confusion or resentment by the beneficiaries. In those cases, the courts are often called upon to interpret or strike out the difficult will provision.

In Terrorem Clauses

A testator often sees litigation coming, either because of pre-existing discord between family members or because the testator recognizes that her own will is likely to cause controversy. In an attempt to discourage beneficiaries from commencing litigation, a testator may include an "*in terrorem*" or "no contest" clause. Canadian courts have on occasion been asked to determine the legality of such clauses.

An *in terrorem* clause usually creates a condition subsequent such that if a beneficiary brings a will challenge, then she will lose all her rights and benefits under the will (i.e. they will lose their inheritance if they challenge the testator's distribution scheme). Such was the case in *Bellinger v. Nuytten Estate.*[5] In that case, the testator (Dorothy Nuytten) had included a forfeiture clause in her will. The clause read:

> IT IS MY FURTHER DESIRE, because of an expressed intention of one of the legatees to contest the terms of this my Will, that should any person do so then he or she shall forfeit any legacy he or she may be otherwise entitled to.

The will was challenged by the legatee (Roy Bellinger) that Dorothy had anticipated causing problems. Roy challenged the will on two separate grounds: (i) the will breached an agreement made during Dorothy's lifetime to devise her estate equally between Roy and two others; and (ii) Roy was not properly provided for under the will, meaning he was entitled to bring a dependants' relief claim. Roy further argued that the forfeiture clause was void as against public policy.

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[5] (2003), 2003 BCSC 563, 50 E.T.R. (2d) 1, 13 B.C.L.R. (4th) 348, [2003] B.C.J. No. 828, 2003 CarswellBC 845 (BC SC). ("*Bellinger*")

On the matter of the forfeiture clause, the Court agreed with Roy that the clause as drafted was invalid. It held that in order for a forfeiture clause to be valid, it must be accompanied by a gift-over clause (in this case, Dorothy should have indicated who would receive Roy's share of her estate if Roy triggered the forfeiture clause and lost his right to inherit under the will). The Court held that the failure to include a gift-over clause meant that the forfeiture clause amounted to no more than an empty threat, making it an *in terrorem* clause.[6] As a result, the Court declared the clause invalid as against public policy.[7]

The Court in *Ketcham v. Clay (Estate)*[8] cited *Bellinger* in deciding the issue of validity of a highly unusual *in terrorem* clause found in the will of Mr. Eric Clay. The deceased had disinherited his adult children and instead bequeathed his estate to several friends and charities. Anticipating that his children may challenge his will under B.C.'s *Wills Variation Act,*[9] Mr. Clay had included directions to his executor to deplete the entire estate in the fight against those claims, as well as a clause explaining his rationale. When Mr. Clay's adult children prepared to bring a *Wills Variation Act* application (B.C.'s legislation grants courts far more discretion to vary wills than in Ontario), the executor applied to court for direction regarding his duty under the will.

The disputed clause in Mr. Clay's will was unique because it did not obviously prevent the children from receiving an inheritance (because they were not named beneficiaries under the will, they could not be disinherited twice). Nevertheless, the Court drew a parallel between the clause in Mr. Clay's will and the more usual example of an *in terrorem* clause because their effects were the same: on triggering either clause, the challenging party would be left with nothing.[10] The Court then applied the basic principle that *in terrorem* clauses are invalid for

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[6] *Bellinger* at paragraph 9.
[7] See also *Quirico v. Pepper Estate* (1999), 22 B.C.T.C. 32, 1999 CarswellBC 2177 (BC SC).
[8] (2012), 2012 BCSC 175, 76 E.T.R. (3d) 124, [2012] 7 W.W.R. 119, 31 B.C.L.R. (5th) 156, 2012 CarswellBC 320 (BC SC). ("*Ketchum*")
[9] RSBC 1996, c 490.
[10] *Ketchum* at paragraph 19.

being contrary to public policy – it offends public policy to deny a party their statutory rights.[11] As a result, the Court held that the "active defence" clause instructing the executor to deplete the estate, if necessary, in defending against the children's claims was void at law.

In Terrorem Clauses in the United States

Many U.S. states have legislation that explicitly allows *in terrorem* clauses to be enforced in limited circumstances. Florida, Massachusetts, and Nevada all have legislation that specifically directs courts to enforce no contest clauses. In addition, will challenges brought in one of the 18 states that have adopted (in whole or in part) the *Uniform Probate Code* are given the following statutory protection:

> A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.[12]

In *Shelton v. Tamposi,*[13] the Supreme Court of New Hampshire upheld a 2010 Probate Court decision in which the Court ruled that an *in terrorem* clause found in a trust agreement was valid.

Samuel Tamposi, Sr. was the settlor of the *inter vivos* trust. By the terms of the trust, the trust was to be for his benefit during his lifetime and then pass to the benefit of his six children and their issue after his death. The trust named two of his sons as "investment directors," a role distinct from that of the trustee. The trust also contained an *in terrorem* clause.

In 2007, Elizabeth "Betty" Tamposi, along with one of the trustees, sought the removal of her brothers as investment directors. She also sought to segregate her entitlement to the trust

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[11] *Ketchum* at paragraph 20.
[12] UPC §§ 2-517 and 3-905.
[13] *Shelton v. Tamposi* (2013), 62 A. 3d 741 (NH Sup Ct).

proceeds from the rest of the trust. At the time she commenced her action, the trust was worth approximately $146 million.

After a 5 week trial, the Probate Court dismissed her complaint and granted a motion brought by the respondents for a finding that the *in terrorem* clause of the trust had been triggered. In the result, Betty had "forfeited her right, title and interest in the trust." In addition, the trustee was removed. The court awarded fees to the respondents, which was reported in the press to be over $17 million dollars. Betty appealed, but the Supreme Court upheld the Probate Court's decision.

Holographic Wills

When testators take it upon themselves to draft their own wills, no end of problems is likely to arise. This is particularly true where the testator takes advantage of a do-it-yourself-at-home will kit. The amount of litigation arising from these fill-in-the-blanks pre-printed forms was noted as early as 1913 in the decision of Justice Middleton in *Re Dorward*.[14] By way of introduction to his decision, Justice Middleton noted that testators using pre-printed will forms so often make mistakes when completing the forms that there already existed a long list of cases dealing with those troublesome wills. This led him to make the general comment:

> "The county conveyancer" and "the man who makes his own will" are favourite toasts at lawyers' gatherings. "The man who invented printed will forms" will soon be equally popular.[15]

Part of the problem lies in the different requirements imposed by statute[16] for holographic wills (completely handwritten documents) and typed wills. Generally, the requirements for a valid holographic will are less onerous than the requirements for a valid typed will. Pre-printed will

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[14] (1913), 24 O.W.R. 545, 4 O.W.N. 1248, 10 D.L.R. 615, 1913 CarswellOnt 278.

[15] *Re Dorward* at para. 1.

[16] Most Canadian jurisdictions impose the same witness and signature requirements for valid wills. See as an example Ontario's *Succession Law Reform Act*, RSO 1990 c. S 26 at sections 3-14.

forms are usually half handwritten and half typed, subjecting them to the requirements of typed wills. However, since the pre-printed forms are usually completed without the advice of a lawyer, the testator often fails to meet the requirements of a valid typed will (a common problem is the failure to have two witnesses to the will).

In an attempt to stop an estate from passing on an intestacy, courts have resorted to unusual means of rectifying these home-made will. *Re Smith Estate*[17] offers a good example of the logical gymnastics performed by a court. Chief Justice Hickman of the Newfoundland Supreme Court was asked to determine the validity of a will completed using a pre-printed will form. The Court held that the printed portions of the will could be excluded and allowed the handwritten portions to constitute a valid holographic will. As a holographic will, the fact that the testator had failed to obtain any witnesses did not mean the will was invalid. In the result, the Court gave effect to a somewhat confusingly written section that devised and bequeathed the testator's property to his wife and children.

The recent Ohio case of *In Re Castro*[18] may be a harbinger of the next generation of problems arising from holographic wills. The testator, Javier Castro, had been hospitalized and understood that he was unlikely to recover (having declined a blood transfusion because of his religious beliefs). With him at his bedside were two of his brothers. When Mr. Castro expressed his desire to create a will, one of the brothers produced a Samsung Galaxy tablet in the absence of any paper or a pencil. The brothers testified that Mr. Castro relayed how he wanted his estate divided up, which they then wrote down on the tablet using a stylus pen. Mr. Castro later added his signature to the electronic document and his brothers acted as witnesses. After his death, the electronic will was submitted for probate.

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[17] 36 E.T.R. (2d) 303, [2000] N.J. No. 291.
[18] Unreported.

Probate Judge James Walther accepted the electronic will, holding that it met the legal definition of a will in Ohio.[19] The judge stated that there was no reason to doubt that the stylus markings on the tablet met the meaning of "writing" under Ohio law[20] and that the graphical image of Javier's signature, along with those of the witnesses, also met the requirements under the law. Furthermore, six witnesses testified that Mr. Castro never intended to revoke or revise the will at any time.

While Justice Walther was able to find that the electronic will constituted a valid will under Ohio law, it is uncertain how Canadian courts will rule on the issue. In addition, the case raises interesting questions about the reliability of a document that is created electronically.

A final warning about holographic wills is that they are easily lost or destroyed. However, as was demonstrated in *Re Krushel Estate,*[21] unless it is the testator himself who destroys the will, the will remains in effect. The testator Peter Krushel had written on a piece of paper "I want to leave my house and my money to Ed Jones." In an attempt to dissuade Mr. Krushel from committing suicide (Mr. Krushel was 86 and in ill health), Mr. Jones ripped up the paper and left the pieces with Mr. Krushel. Unfortunately, Mr. Jones' efforts were unsuccessful and Mr. Krushel died from a self-inflicted shotgun wound. After searching the house, Mr. Jones found the fragments of the alleged will in a bag with some pieces of chicken skin and bone.

The Ontario Court of Justice was asked to determine whether the paper constituted a valid holographic will and, if so, whether it had been revoked by the testator. The Court accepted that the paper represented the wishes of the deceased and that the document was "of a testamentary character." For these reasons, the Court held that the paper met the requirements

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[19] Brad Dicken, "Judge rules that a will written and signed on tablet is legal" The Chronicle-Telegram, June 25, 2013 http://chronicle.northcoastnow.com/2013/06/25/judge-rules-will-written-signed-on-tablet-is-legal/.

[20] per *Ohio Revised Code* chapter 2107.02.

[21] (1990), 40 E.T.R. 129, 1 O.R. (3d) 552, [1990] O.J. No. 2591, 1990 CarswellOnt 506 (ON CJ).

of a valid holographic will. The Court further ruled that the act of tearing up the document by Mr. Jones did not revoke the document because it was not done at the direction of Mr. Krushel.

Gifts to and/or For the Benefit of Animals

A person's main concern on death is not always the support of her human relatives. Instead, it is surprisingly common to find wills in which the testator leaves her money to a beloved animal. Such bequests have been addressed by common law courts dating back to at least 1842, most notably in the English case of *Pettingall v. Pettingall.*[22] The testator in *Pettingall* directed her executor to spend £50 per year on the maintenance of her favourite black mare. Due to the executor's willingness to carry out the request (the executor would be entitled to the money after the death of the black mare), the court held that a valid trust in favour of the animal had been created.[23]

Will provisions addressing the needs of animals are not unknown to modern day courts. Perhaps the most famous recent case was when hotelier and real estate magnate Leona Helmsley left $12 million to her white Maltese dog named Trouble.[24] Manhattan Surrogate's Court judge Renee Roth later reduced that amount to $2 million after the trustees asked to pare it back, ruling that $2 million was sufficient to care for the dog for 10 more years (Trouble's expenses were estimated to run around $190,000 year, which included payments for food, medical care, grooming, a guardian fee, and 'round-the-clock security).[25]

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[22] (1842) 11 LJ Ch 176.

[23] See case summary at http://books.google.ca/books?id=Abi8yFq2MkgC&pg=PA345&lpg=PA345&dq=pettingall+v+pettingall&source=bl&ots=53jFeiSkdh&sig=EkCW9_8FNgLzyrEyUdPDcsXpgwQ&hl=en&sa=X&ei=VWINUrK7EcrqyQHMxYD4CA&sqi=2&ved=0CF4Q6AEwBw#v=onepage&q=pettingall%20v%20pettingall&f=false.

[24] http://www.newyorker.com/reporting/2008/09/29/080929fa_fact_toobin?currentPage=all

[25] http://blogs.wsj.com/law/2008/06/16/trouble-for-trouble-judge-knocks-10-mil-from-helmsley-dogs-take/

Although Mrs. Helmsley made sure that Trouble's care in particular was assured, she also wished to provide for dogs more generally. In the years before her death, Mrs. Helmsley reorganized the priorities of the Leona M. and Harry B. Helmsley Charitable Trust. In a mission statement she created for the trustees, she directed that expenditures were to be made for the "purposes related to the provision of care for dogs."[26] The value of the trust was estimated to be between $3 and $8 billion.

In the 2012 decision *Zinn v. Bergren,*[27] the Saskatchewan Court of Queen's Bench considered a will that directed the executors to distribute the residue of the estate for "the purpose of maintaining, feeding and caring for my pet animals (but not any off-spring thereof) until their death (my pet animals presently consisting of four (4) cats)." On the death of the last cat, the remainder was to be distributed equally to two charities. A handwritten codicil had also been written by the testator, leading to some confusion over the proper interpretation of the will. The codicil stated that the testator's house was not to be sold "until after the cats are comfortable." The testator reiterated his testamentary priorities in his codicil, writing that "my cats come first." The executors sought to probate the will and codicil. The Court quoted the following passage from A. J. Oakley's *Parker and Mellows: The Modern Law of Trusts*:[28]

> 3-102 Gifts for the maintenance of animals in general are charitable. However, gifts for the maintenance of one or more particular animals are not; ... *Re Dean* is an explicit authority — not all the early cases in this area of the law are particularly explicit — that a non-charitable purpose trust for the upkeep of a given animal may be valid notwithstanding the fact that by its nature it is not enforceable by the beneficiary.[29]

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[26] Stephanie Strom, "Helmsley Left Dogs Billions in Her Will" New York Times, July 2, 2008.
[27] (2012), 2012 SKQB 214, 78 E.T.R. (3d) 263, 397 Sask. R. 183, 2012 CarswellSask 366 (SK QB).
[28] A. J. Oakley, *Parker and Mellows: The Modern Law of Trusts*, 9th ed., (London: Sweet & Maxwell, 2008)
[29] A non-charitable purpose trust is established for the benefit of a stated object or purpose. Generally, the stated purpose or object is not recognized by the law as being "charitable".

Based on its review of the authorities, the Court held that the trust benefiting the cats was valid. It held that $10,000 should be retained by the executors for the purpose of the care, maintenance and health needs of the cats. On the death of the last cat, any amount remaining was to be distributed as part of the residue of the estate.

Provisions Detrimental to Animals

Some will provisions appear, at least on their face, to be in opposition to an animal's best interests. Such was the case in *Re Wishart Estate.*[30] The testator, Clive Wishart, directed the RCMP to shoot and bury his four horses on his death. After Mr. Wishart's death in 1991, the RCMP refused to abide by the testator's wishes without a specific court order and review by their legal counsel. As a result, the executors brought an application for the advice and direction of the New Brunswick Court of Queen's Bench.

In its decision, the Court noted that there had been widespread protest across the country and speculated "that if the subject animals were pigs rather than horses, such opposition would not have been forthcoming." Petitions had been signed across the country and the Court had received numerous letters from both the US and Canada. The judge reprinted one letter in particular, presumably sent from a young girl living in Vancouver:

> DEAR JUDGE,
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> PLEASE DON'T LET ANYONE KILL THE HORSES I LOVE HORSES BUT MY DAD WON'T LET ME HAVE ONE. I WILL BE SAD IF THEY GET KILLED.
>
> FROM
>
> JENNIFER

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[30] (1992), 46 E.T.R. 311, (sub nom. *Wishart Estate, Re (No. 2)*) 129 N.B.R. (2d) 397, 1992 CarswellNB 69 (NB QB). ("*Wishart*")

Despite the public pressure, Justice Riordon noted that a court should not rule based on public sentiment. Instead, it must only have regard to "legal principles in accordance with the law of the land."[31]

The will had previously been unsuccessfully challenged by the testator's brother on the grounds of testamentary capacity. During testimony before Probate Court on the issue of validity, the drafting solicitor explained that Mr. Wishart included the provision regarding his horses because he "did not want his horses to fall into the hands of anyone who might abuse them."[32] The Court of Queen's Bench had access to other evidence that showed Mr. Wishart was devoted to his horses.

The court acknowledged the importance of following the wishes of a testator, with the exception of extraordinary circumstances. Based on the evidence, Justice Riordon held that "Clive Wishart would have wanted his horses to live if he had been aware that they would be attended to and properly cared for and not abused."[33] Thus, since the New Brunswick Society for the Prevention of Cruelty to Animals had offered to care for the horses, the proper interpretation of the will was not to carry out the execution of the horses. In the alternative, the Court concluded that the provision was contrary to public policy and therefore could not be enforced. Justice Riordon held that "the destruction of four healthy animals for no useful purpose should not be upheld and should not be approved. To destroy the horses would benefit no one and would be a waste of resources and estate assets even if carried out humanely."[34]

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[31] *Wishart* at para 8.
[32] *Ibid* at para 13.
[33] *Ibid* at para 17.
[34] *Ibid* at para 23.

Clauses in Restraint of Marriage or Religion

In the pre-*Charter* era, Canadian judges consistently refused to use the doctrine of public policy to void will provisions that were in restraint of religion.[35] However, clauses that totally restricted a beneficiary from marrying were found void. The 1916 case of *Re Cutter*[36] is one such example.

In *Re Cutter*, the testator left the residue of the estate to his sister. However, he qualified the gift with the restriction that if she married, the residue would be given instead to the Odd Fellows Home of Toronto. Justice Boyd of the Ontario Supreme Court was asked to interpret the validity of the clause. Citing a series of 19th century cases, the Court ruled that the clause was void for being "in general restraint of marriage." Justice Boyd noted that this exemplified the contrasting roles of the court – both to give effect to the best of its ability to the testator's wishes, while at the same time displacing the testator's wishes when they are in violation of public policy.

Curiously, a later Court *upheld* a similar provision in restraint of marriage even after the enactment of the *Charter*.[37] In *MacDonald v. Brown Estate,*[38] the will stated that a beneficiary's portion of the residue was "to be held in trust until she becomes widowed or divorced from her present husband." The named beneficiary brought an application to determine the meaning and legal effect of the provisions. The Court held that the condition was not void because it was not intended to induce the separation of the plaintiff from her husband. Instead, the Court interpreted the clause in such a way that it established a protective trust for the beneficiary, capable of providing her with a source of income while she remained married and offering her additional money in case she ever became widowed or divorced.

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[35] Sheena Grattan & Heather Conway, "Testamentary Conditions in Restraint of Religion in the Twenty-first Century: An Anglo-Canadian Perspective", (2005) 50 McGill L.J. 511 - 552
[36] [1916] O.J. No. 106, 31 D.L.R. 382, 1916 CarswellOnt 333 (Ont SC – HC Div, Toronto Weekly Ct).
[37] *The Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11. ("*Charter*")
[38] (1995), 6 E.T.R. (2d) 160, 139 N.S.R. (2d) 252, 1995 CarswellNS 22 (NS SC).

For reasons that defy common logic, courts generally enforce clauses that only *partially* restrict a beneficiary's freedom to marry. The best example of this is found in *Renaud v. Lamothe*[39] which was followed in subsequent cases for decades.[40] The testator in *Renaud* specified in a codicil to his will that the marriage of his children should be celebrated according to the rights and usages of the Roman Catholic Church. The plaintiff, who had not been baptised or brought up as a Roman Catholic, argued that the provision should be struck because it was in restraint of religious liberty and violated the public policy of Canada. The Supreme Court of Canada, however, disagreed. In upholding the provision, the Court cited English authority and held that partial restrictions are not contrary to public policy.

Re Hirshman[41] is the only pre-*Charter* case where a court invalidated a clause in restraint of marriage. The testator's will stated that upon the death of his wife, the residue of his Estate should go to his daughter. The gift-over was conditional however: if the daughter was married to a Jew at the time, then the legacy was to be given to charity. It was later determined that testator's daughter had married a man who was, by lay definition, a Jew. The Court held that the condition was invalid for being against public policy on the grounds that the clause had the effect of encouraging marital breakdown.

The enactment of the *Canadian Charter of Rights and Freedoms* has undoubtedly led to significant, if not always readily apparent, changes in the way courts interpret and uphold will provisions. While once hotly debated, the Supreme Court of Canada has confirmed that the *Charter* must have some effect on the development of common law, even the law governing private parties who otherwise owe no constitutional duty to each other.[42] Thus, courts following

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[39] (1902), 32 S.C.R. 357, 1902 CarswellQue 17 (SCC).
[40] See, for example, *Re Curran*, [1939] O.W.N. 191 (H.C.J.)
[41] (1956), 6 D.L.R. (2d) 615 (B.C.S.C.)
[42] *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 (SCC).

the enactment of the *Charter* in 1982 have shown a greater willingness to strike testamentary provisions on public policy grounds.[43]

The leading case is *Canada Trust Co. v. Ontario Human Rights Commission*.[44] In it, the Court confirmed that provisions restricting the benefit of a trust from flowing to a select racial group and religion were contrary to public policy, in part because of section 15 of the *Charter*. In that case, the settlor's expressed desire was to exclude from benefiting under the trust:

> all who are not Christians of the White Race, and who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual.

Although this ruling dealt with a public charitable trusts, the reasoning of the Court can likely be extended to discriminatory testamentary clauses as well.

In the last few decades, there have been surprisingly few litigated cases dealing with will provisions that attempt to impose religious restrictions on beneficiaries. The sole reported post-*Charter* case[45] which dealt directly with this type of provision was decided by the Newfoundland Supreme Court in *Murley Estate v. Murley.*[46] In *Murley,* the applicant applied to court for advice and direction regarding the proper interpretation of a will. The will's first clause awarded the estate to the deceased's niece's son Timothy. However, the will later stated that in order for Timothy to accept his inheritance,

> he must remain in one or the other main stream Christian Churches, that is, Roman Catholic, Anglican Church or the United Church of Canada or any name the latter Church may adopt. It is my last will and Testament that he never belong to such organizations as Pentecostals, Seventh Day Adventists, Jehovah Witnesses or Latter Day saints, so called. I make these rules following Old

[43] *Supra* note 35 at para 25.
[44] (1990), 74 O.R. (2d) 481, 69 D.L.R. (4th) 321 (ON CA).
[45] Per Grattan & Conley, *supra* note 35 at para 49
[46] (1995), 130 Nfld. & P.E.I.R. 271, 405 A.P.R. 271, 1995 CarswellNfld 143 (Nfld TD). ("*Murley*")

> Testament holy men who ordered that their sons or relatives never become part of lesser religious organizations. I want him to be a real Christian.

The Court quickly decided that such a provision was unenforceable because it was contrary to public policy. The Court held in the alternative that the clause was invalid because the bequest could not take effect until the death of the beneficiary "because only then one would know whether or not he had become associated with any religious group not approved of by the testator."[47]

Testamentary Conditions in Restraint of Criminal Activity

In the case of *Woods Estate v. Woods*,[48] the Court considered the validity of a provision of a will that gifted a house to the testator's third son, David, subject to a life interest to David's mother. The gift to David was only valid on the condition that he was not convinced of a criminal offence before reaching the age of 21. If he had been convicted, the home was to be sold and the proceeds divided between the testator's other two sons. At the age of 41, David asked the executor of the estate to convey the home to him. The executor refused on the basis that David, at the age of 17, had been convicted as an adult of several criminal offences.

On an application for directions brought by the executor, the Court found that the clause in the will imposed a valid condition subsequent since it was not contrary to public policy nor was it uncertain in meaning. The application judge, however, found that the condition only took effect once David reached 18 years of age, because prior to this he was under the age of majority.

The Ontario Court of Appeal unanimously reversed the finding, holding that the application judged had misapplied the law in finding that an infant cannot forfeit a gift by non-performance during infancy. Moldaver J.A., as he then was, found that the 17 year old David was capable,

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[47] *Murley* at para. 6.
[48] (2005), 20 E.T.R. (3d) 150, 260 D.L.R. (4th) 341, 203 O.A.C. 266, 2005 CarswellOnt 5947 (ON CA).

as a matter of law, of committing and being convicted of a criminal offence. Furthermore, Moldaver J.A. disagreed with the application judge's characterization of David's criminal convictions as "mistakes." In the result, the Court did not find it inequitable to deny David the family home. The Court ordered that the gift over clause applied.

Special Memorials

People often wish to leave a permanent mark on the world. One way of realizing that dream is by setting aside money from one's estate to establish a memorial. Unfortunately, testators often take the additional step of trying to control the management of and access to the memorial well beyond their passing. Such was the case faced by the 1915 Scottish court in *M'Caig's Trustees v. Kirk-Session of the United Free Church of Lismore, et al.*[49]

The M'Caig family had built a structure on a hill which they referred to as the "M'Caig Tower." Miss M'Caig was the last survivor of her family of nine. Before her death, she executed a codicil to her will ordering that her trustees erect balustrades (railings or barriers) around the tower so that the public would be denied access. She also directed that eleven bronze statues of the family be created and erected inside the fenced-off area around the tower. Special provision was made for keeping out the public and the ground enclosed was expressly declared to be a private enclosure. Only the executor would have access to the enclosed area to ensure it was being properly maintained. The cost of the statutes, fences, and maintenance would have likely absorbed the entire estate. Unsurprisingly, the beneficiaries who would have otherwise inherited the estate but for the codicil objected to the validity of Miss M'Caig's directions.

The Court was unsympathetic to Miss M'Caig's testamentary vision (motivated, it held, from "personal and family vanity"). Lord Salvesen held:

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[49] *Supra* note 2.

> if a bequest such as that in Miss M'Caig's codicil were held good, money would require to be expended in perpetuity merely to gratify an absurd whim which has neither reason nor public sentiment in its favour.

As for the issue of the eleven statutes, the court observed that their erection: “would be of no benefit to anyone except those connected with the carrying out of the work, for whose interest she expresses no concern.”

The lack of public benefit underpinned the Court’s decision. Lord Guthrie held:

> It is no doubt the case that the function of the Courts, civil and criminal, is to prevent illegal rather than unreasonable actings; but there is all the difference between what a man, uncognosced [not insane], may do at his own hand, and what the law will support under the provisions of his will.

As a result, the Court held that even though the directions in the codicil were not illegal in the sense of being contrary to any express rule of the common law or statute, the principle of public policy will prevent such post-mortem expenditure. Whether it offends public policy is a matter of degree; had Miss M’Caig chosen to erect two statutes at a reasonable price, her directions may have been upheld. But her direction that eleven statutes be erected at the cost of the entire estate was seen to result in “a large measure of useless waste.”

Conclusion

Estates, like people, are unpredictable. Just as people continue to come up with new oddball ways of spending their money while alive, so too will people come up with creative uses and distribution schemes for their estate on death. Sometimes the courts are a willing partner and sometimes they are not. As a result, legal practitioners can look forward to many more varied and interesting cases coming out of estates court well into the future.