

The Best Laid Plans....

Recently, the New Brunswick Queens Bench was asked to limit the way a person of sound mind may bequest their property; under rather unusual circumstances.

In *McCorkill v Streed*, 2013 NBQB 249 a bequest of a rare and valuable coin collection was challenged on the grounds that it was illegal and/or contrary to public policy. The initial application requested - and received - an *ex-parte* injunction preventing the Estate from being administered and preventing the Executor from distributing, paying or transferring anything to the Neo-Nazi group that the testator intended receive the whole of his Estate. An order for the preservation of assets was also sought, but became moot when the injunction was granted.

The applicant, who was the testator's sister, argued that an *ex-parte* injunction was necessary because the beneficiary was an American company so "the assets may be taken out of the country imminently" and once they crossed the boarder there was a slim chance of recovery. The stringent test for granting an *ex-parte* injunction discussed by Justice Sharpe in *Injunctions and Specific Performance* was referenced; yet the order was granted. Possibly because it had taken the executor 6 years to apply for probate, making it difficult for the Court to find prejudice.

A concurrent application was filed, returnable November 13 and 14, 2013, for a declaration that the bequest is void for illegality and/or being contrary to public policy and for a declaration under the *Devolution of Estates Act* that the siblings of the deceased share in the Estate, because voiding the bequest would render the deceased intestate. This decision should be rendered when this article is published.

Where is the line?

The NBQB referenced *Canada Trust Co. v. Ontario Human Rights Commission*, [1990] O.J. No. 615, where the Ontario Court of Appeal "confirmed the importance of the right to dispose of one's own property, however in some cases the interests of society require the court's intervention on the grounds of public policy."

I am sure we all agree that neo-nazi groups and other organizations with similar objectives, and who utilize violence and terror should not be funded; but where is the line drawn and the court allowed to step in and undermine the clear intention of a testator on public policy grounds?

One might argue that the lady who leaves her child to fend for his or herself, while bequeathing a fortune to her cat has made an equally overriding error. Is it not an underlying policy of our society that care for our children be paramount?

A descriptive of the "line" comes from the Supreme Court in *Miller Estate, Re* (1937) CarswellOnt 108 (S.C.C.) where the court recognized its duty to give effect to contracts and testamentary documents, however acknowledged 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.

This Risk

The risk comes from the slippery slope of what is and is not against public policy - a slope that easily erodes with time. Fifty years ago funding an abortion clinic may have been disallowed, and currently there is a substantial deviation in views on euthanasia. What is and is not against public policy is highly subjective. Some feel that Greenpeace is a terrorist/extremist organization while others feel that their objectives rationalize their means.

Court decisions on public policy

In 1998, in a decision that began "[S]hould Barney, Bill, Jack and King be put to death..." the court addressed the subjectivity of public policy when it was asked to render a provision of a last Will and Testament invalid.

Barney, Bill, Jack and King were horses. In the last will of their owner, Mr. Wishart, was written "I DIRECT AND DECLARE that my Executors have my horses shot by the RCMP and then buried.

The RCMP, instead of asserting that they are not in the horse killing business, refused to carry out Mr. Wishart's wishes in absence of a court order. A myriad of public policy objections were received nationally. People wrote citing biblical passages to promote the essential role of horses in society, and a particularly touching note read "Dear Judge, 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."

However touching, the court recognized its decision must be made on legal principles in the law of the land. The Will was admitted to probate in June 1992, thirteen months after the testator's death. Testamentary capacity challenges were received, however accepted evidence of the drafting solicitor was given, which rationalized the testator's decision, evidenced sound mind and showed consistency from previous wills.

Section 2 of the *Wills Act* ch. W-9 S.N.B. protects a testator's right to bequest his property as he wishes: "[t]he age old rule of law in New York State is that the intention of the testator should be followed except where it is in violation of public policy *Re Larkin*, 9 N.Y.2d 88, 211 N.Y.S. 2d 175, 172 N.E. 2d 555 (1996).

Despite this legislated right the Court has authority not to carry out a Will when the results would be "absurd, abhorrent or a waste of the assets of an estate...[and] when the purpose of the testator is merely capricious and will benefit no one by its execution".

The authority to exercise this discretion dates back to Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp 341 where His Lordship held that "no court will lend its aid to a man who found his cause of action in an immoral or illegal act."

Lucky for Barney, Bill, Jack and King the NBQB felt that "a well ordered society cannot tolerate the waste and destruction of resources when such acts directly affect important interests of other members of society." The horses were saved on the grounds that destroying them would be of no benefit to anyone and a waste of resources, and therefore against public policy.

While I do not necessarily agree that lack of benefit and inefficient use of a resource necessarily constitutes a violation of public policy, a clearer line in the sand on a subjective issues is often appreciated - and in this case, achieved a fair result.

Public Policy Over Time

To highlight a few decisions that spoke to violations of what was at that time public policy:

In *Brown v Burdett*, 21 Chan. Div. 667 (Eng 1882) the testator had asked that her home be boarded and sealed for 20 years. The provision was found void on the grounds it was a waste of an asset – possibly if at the time residence were scarce and highly sought after.

As recently as 1966 the Supreme Court of Canada disallowed a claim by a woman against her partner for property he contracted to provide to her if she lived with him on the basis that it was against public policy for an unmarried man and woman to be living together and therefore the gift was void.

In *Ketcham v Walton* 2012 BCSC 175 the testator foresaw his children litigating against the Estate when they discovered they had been disinherited, in favour of his friends and charities. Walton had clearly instructed the Executor to actively defend the claim and deplete the Estate if necessary to fund this litigation. The Court finds this to be against public policy. It was not the waste of resources that was the violation, but that depleting the Estate would effectively defeat the children's' right to apply for a will variation.

There was also discussion that the Executor should remain impartial, and could not do so if he was proactively defending the claim. In some minds this may be hard to rationalize, as the Executor is often the one who best stands in the shoes of the deceased and should be able to carry out any clear instructions given.

Solicitors' take away

The ability of the Court to set aside terms of a document has and will change over time. What offended public policy one hundred, fifty or even ten years ago may not today and

could change drastically in the coming years. When advising a client on a Will, consideration should be given to possible public policy challenges and, if one is so astute, predictions of future grounds.