

## *McCorkill v McCorkill Estate*, 2014 NBBR

148 (QB)

[Harry McCorkill died in 2004, leaving his entire estate valued at over \$200,000 as an unconditional gift to the National Alliance, a neo-Nazi group based in the United States. McCorkill's sister challenged the bequest as contrary to public policy.]

**William T. Grant J.:**

[...]

### **Applicant's Grounds**

[1] In her amended Notice of Application, Ms. McCorkill sets out the following as the grounds of her application:

- g. The payment or transfer of the residue of the estate to the National Alliance is against public policy and in contradiction with Canada's own laws, undertakings and commitments in that:
- h. The National Alliance is a long-standing neo- Nazi group in the United States that has also been active in Canada. Through its hate propaganda, the National Alliance promotes a political program parallel to that of the original World War II-era National Socialist Party of Germany (the Nazis) including genocide, ethnic cleansing, and the use of hate motivated violence and terror to achieve its aims.
- ii. The National Alliance has a long history of inspiring and carrying out hate motivated violence and terror through its members and supporters in order to achieve its stated political aims;
- iii. The *Criminal Code* of Canada specifically prohibits hate propaganda in Canada and make criminal offences of advocating genocide and publicly inciting hatred;
- iv. Canada has been a signatory and party to the *International Convention on the Elimination of All Forms of Racial Discrimination* ("Convention") since 1970. Parties to the Convention shall condemn all hate propaganda and declare as offences hate propaganda, membership in racial supremacist groups and the provision of any assistance to racist activities, including the financing thereof;
- v. Canada has also signed on, and committed to, other international declarations and covenants which specifically protect individuals against any discrimination, advocacy of national,

racial or religious hatred and incitement to discrimination and violence; ...

### Analysis and Decision

[...]

[2] Section 319 of the *Criminal Code of Canada* makes the public incitement of hatred a criminal offence. Section 319(2) states:

- (2) Every one who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of
  - (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
  - (b) an offence punishable on summary conviction.

[...]

[3] This brings me to the first salient question in this application, whether or not the NA disseminates information that is in violation of public policy in Canada.

[...]

[4] In my view engaging in activity which is prohibited by Parliament through the enactment of the *Criminal Code of Canada* falls squarely within the rubric of a public policy violation. In addition, as the applicant has pointed out, the NA's various communications and activities contravene the values set out in the *Charter of Rights*, provincial human rights legislation as well as the International Conventions which Canada has signed all of which promote equality and the dignity of the person while prohibiting discrimination based on various grounds, including race and ethnic origin.

[5] I find that the information the NA disseminates is hate propaganda which is every bit as "malodorous, malicious and evil" as the material excerpted by Dickson, C.J. in *R. v. Andrews*, *supra*. and which is of the kind targeted by the *Criminal Code* which makes its dissemination illegal. It follows, therefore, and I further find, that the dissemination of it by the NA violates the public policy of Canada.

***B. Should the court declare the bequest to be invalid, given that it is made to a beneficiary whose activities are contrary to public policy, but not made for specific purposes?***

[6] The respondent and CAFE also submit that cases where the courts have struck wills down as being against public policy are limited and only involve cases where the bequest itself is objectionable such as in the case of *Wishart Estate, Re*, *supra*. They submit that the jurisprudence deals with repugnant conditions that are attached to bequests, not to the quality of the beneficiary as a person or organization. They submit that even in cases where a person has a

criminal record, they are still entitled to receive a bequest, the obvious exception being where the crime, such as murder, was committed in order to obtain the bequest. On that issue see Tarnow, N.M. *Unworthy Heirs: The Application of the Public Policy Rule in the Administration of Estates*, (1980), 58 Can. Bar Rev. 582.

[7] CAFE cites the case of *Bolianatz Estate v. Simon*, [2006] S.J. No. 64 (Sask. C.A.) where the court refused to invalidate a gift to a beneficiary who had been stealing from the testator prior to the testator's death. In that case Richards, J.A., in separate but concurring reasons, stated at paragraphs 58 & 59:

... the general orientation of the law is very much against involving the courts in superintending the question of whether particular beneficiaries merit their inheritances. Bequests are not denied because a beneficiary is of bad character, has behaved immorally or has been involved in criminal activity.

[8] In terms of general principle, this recommends itself as a sound approach. It fits with the basic assumption that individuals are entitled to dispose of their property as they see fit. It promotes certainty and efficiency in the handling of wills by avoiding costly and protracted disputes over the proper allocation of testators' assets. And finally, it recognizes and avoids the deep problems involved in attempting to identify the particular kinds of behavior which should deny an inheritance.

[9] They also rely on *Jake Estate v. Antelman*, 2006 NBQB 371 (N.B. Q.B.) where Creaghan, J. refused to void a gift as being against public policy. In that case, he stated at paragraph 22:

Although it may be argued that policies of the State of Israel are not in total conformity with policy of Canada as the country where the Will was executed and with whose law the validity of the Will must conform, I cannot find any basis for finding that a testamentary gift to the Government of Israel is contrary to public policy.

[10] CAFE submits that there is nothing objectionable within the bequest itself. The only objection lies, they submit, within the applicant's perception of the beneficiary and that it should not be interfered with.

[11] They further submit that the gift merely expresses Mr. McCorkill's desire to benefit the National Alliance. There is no evidence, they submit, that the gift contains any conditions or connotation of violence. In that regard, they rely on Section 2 of the *Charter of Rights* which guarantees freedom of speech. They further submit that if a testamentary gift is not subject to any conditions which call for a use that is against public policy then the court should not interfere with the testator's right or freedom to dispose of his estate as he sees fit.

[12] They further submit that if the court intervenes it will open the floodgates to frivolous estate litigation. They submit that the certainty which has long been associated with testamentary bequests and which has served the English

common law tradition so well will be eroded if courts intervene in cases where the character and/or quality of the beneficiary is challenged because that, they submit, is irrelevant.

[13] They further submit that since Mr. McCorkill would have been entitled to give money to the National Alliance while he was alive, there should be no reason he cannot do so on his death.

[14] Finally, the respondent submits that there is no evidence before the Court that if the will is upheld the National Alliance will use the money against any minority groups. They support CAFE's submissions and, in particular, submit that voiding this bequest would set a dangerous precedent.

### **Analysis and Decision**

[15] While the jurisprudence on voiding bequests on the grounds of public policy tends to deal with conditions attached to specific bequests, in my opinion the facts of this case are so strong that they render this case indistinguishable from those.

[16] Unlike most beneficiaries, the National Alliance has foundational documents which state its purposes. Moreover, those purposes have been expanded upon, explained and disseminated in various forms of media by the NA since its inception. They consistently show that the National Alliance stands for principles and policies, as well as the means to implement them, that are both illegal and contrary to public policy in Canada. If the organization has changed in these respects since its inception then it was incumbent upon the respondent, particularly through the evidence of Erich Glibe, the current President of the National Alliance, to demonstrate that in this application. It has not done so.

[17] The facts of this case can be distinguished from most other cases because in most cases, a beneficiary of an estate does not "stand for" something identifiable. They don't have foundational documents. A drug dealer does not "stand for" dealing drugs. He or she may have a criminal record of doing that but that does not mean that that is what they stand for. Their crimes are not the purpose for which they exist, their *raison d'être*.

[18] Unlike in the *Jake Estate* case, *supra.*, where there was no finding by the court that the State of Israel's *raison d'être* was contrary to public policy in Canada, in this case it is abundantly clear that what the National Alliance stands for and has stood for since its inception, its *raison d'être*, is contrary to public policy in Canada. In fact, as mentioned earlier, what it stands for, anti-semitism, eugenics, discrimination, racism and white supremacy, violates numerous statutes and conventions that have been passed by Parliament and the Legislatures and endorsed by the Government of Canada, including the *Criminal Code*.

[19] The evidence before the court convinces me that in the case of the NA the purpose for which it exists is to promote white supremacy through the dissemination of propaganda which incites hatred of various identifiable groups

which they deem to be non-white and therefore unworthy. Those purposes and the means they advocate to achieve them are criminal in Canada and that is what makes this bequest repugnant.

[20] It is also what makes this situation comparable, in my view, to a gift to a trustee for a purpose that is contrary to public policy. The law of wills is concerned with the intent of the testator and from the very fact that Mr. McCorkill left his entire estate to the NA I infer that he intended it to be used for their clearly stated, illegal purposes. For me to find that such a gift was valid would require that I ignore an overwhelming body of evidence. The Court of Appeal has made the point on more than one occasion that trial judges must not “check their common sense at the court room door”. Allowing this bequest to stand because it doesn’t repeat those stated purposes but bestows the bequest on the organization whose very existence is dedicated to achieving them would be doing just that, in my view.

[...]

[21] CAFE further submits that decisions such as this dealing with public policy should be left to Parliament and the Legislatures and that the courts should not interfere. (See also para. 59, *supra*.) That submission ignores the fact that Parliament has spoken loudly and clearly on this very subject in s. 319(2) of the *Criminal Code* as well as the fact that the *New Brunswick Legislature* has enacted the *Human Rights Act*, R.S.N.B. 1973 c. H-11, the preamble to which states, in part:

Whereas recognition of the fundamental principle that all persons are equal in dignity and human rights without regard to race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition or political belief or activity is a governing principle sanctioned by the laws of New Brunswick; ...

[22] That submission also might have carried more weight if, in this case, the Attorney General had not intervened. However, the Attorney General has intervened and clearly stated the position of the government that this bequest is in violation of the public policy of this province and should be voided. It would not be practical for legislatures to pass legislation dealing with individual wills. An intervention such as this by the Attorney General is the only practical way for a government to deal with a particular case in order to ensure that the principles set out in legislation such as the *Human Rights Act*, *supra*., are upheld. That intervention sends a strong message about the effect of this bequest on the public policy of this province.

[23] CAFE also submits that since Mr. McCorkill was legally permitted to donate money to the NA during his lifetime there is no compelling legal argument for prohibiting him from doing so on his death. I don’t accept the premise of that submission. He may have been able to donate to the NA during his lifetime but I absolutely reject the submission that it was legal for him to assist an

organization in the dissemination of hate propaganda. As mentioned earlier the NA's activities offend section 319(2) of the *Criminal Code* and, as a contributor, he would have been a party to that offence.

[24] Moreover, even if the bequest were not illegal but violated public policy for other reasons, the court could still void it. In *Egerton v. Earl of Brownlow* (1853), 10 E.R. 359 (U.K. H.L.) the Lord Chief Baron discussed this in the following passage at p. 417:

... The owner of an estate may himself do many things which he could not (by a condition) compel his successor to do. One example is sufficient. He may leave his land uncultivated, but he cannot by a condition compel his successor to do so. The law does not interfere with the owner and compel him to cultivate his land (though it be for the public good that land should be cultivated) so far the law respects ownership; but when, by a condition, he attempts to compel his successor to do what is against the public good, the law steps in and pronounces the condition void, ...

[25] Thus, in this case if the right of free speech in Canada were unfettered by the *Criminal Code* and Mr. McCorkill could have legally donated to the NA while he was living, this court would still have the authority, on making a finding that the bequest violates public policy, to step in and declare it void. See also *Fox v. Fox Estate* [1996 CarswellOnt 317 (Ont. C.A.)] 1996 CanLii 779 at p. 11.

[26] Mr. Streed also submits that there is no evidence before the court that the NA will use the bequest for any purposes that violate public policy such as inciting hatred against Jewish people and other identifiable minorities. The answer to that submission is found in the foundational documents of the NA which demonstrate that it is dedicated to precisely that and related purposes as the means of achieving white supremacy, white living space and its other racist goals. The fact that it may use some of the bequest to pay someone to clean its office premises or to fund a cultural festival does not mean that the bequest is used for other purposes. All of its activities are clearly focused on achieving its core purposes and thus any money it spends, from whatever source or for any activity, contributes, either directly or indirectly, to achieving those purposes.

[27] Finally, CAFE and the respondent submit that if the Court intervenes and voids the bequest because of the nature of the beneficiary then the floodgates will be open and estate litigation will flourish where bequests are left to persons who are not of stellar character. In my view, there is little risk of that. Each case must be dealt with on its own merits and I have little doubt that the expense of litigation will discourage frivolous applications. It is difficult to imagine too many applications that would be based on such a strong factual background as this one. On the contrary, in my view, if the court allowed this bequest to stand it would increase the risk of opening the door to bequests to other criminal organizations.

[28] Moreover, the jurisprudence concerning cases that are contrary to public

policy goes back 200 years in the English common law tradition and more than a century in Canada alone. Despite that long history, it can hardly be said that there has been a deluge of cases where the courts have intervened in an estate or trust or even a contract on the grounds of public policy.

[29] I therefore find that while the voiding of a bequest based on the character of the beneficiary is, and will continue to be, an unusual remedy, where, as here, the beneficiary's *raison d'être* is contrary to public policy, it is the appropriate remedy.

### **Disposition**

[30] In summary, I find that the purposes of the National Alliance and the activities and communications which it undertakes to promote its purposes are both illegal in Canada and contrary to the public policy of both Canada and New Brunswick. Consequently, I declare the residual bequest to it in the will of Harry Robert McCorkill to be void. [..]