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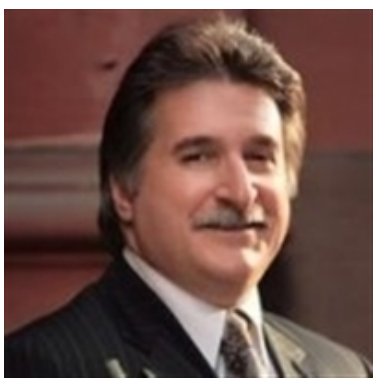
NB Court of Appeal voids $250K gift to Neo-Nazi group



Toronto-area estates litigator Charles Ticker says a recent Court of Appeal decision is indicative of a growing trend where courts are willing to become more interventionist in estate matters, particularly those that run contrary to public policy.

Ticker makes his comments in connection with *Canadian Association for Free Expression v. Streed et al*, 2015 NBCA 50 (CanLII), a New Brunswick Court of Appeal decision that upheld a lower court decision to invalidate the late Robert McCorkill's $250,000 bequest to the National Alliance, a Neo-Nazi organization.

"The application judge invalidated a residual bequest to the beneficiary, National Alliance. He made this determination on the basis that the purposes of the National Alliance, and the activities and communications it undertakes to promote its purposes, are illegal and contrary to the public policy of Canada and New Brunswick," the court wrote.

"Having regard to the application judge's comprehensive reasons and his determination that the bequest was void as against public policy, we can find no justification to interfere. We are in substantial agreement with the essential features of the carefully considered reasons of the application judge," the decision continues.

Ticker tells AdvocateDaily.com that the brief statement from the Court of Appeal affirming the trial judge's decision in *McCorkill v. McCorkill Estate*, 2014 NBQB 148 (CanLII), confirms a well-reasoned judgment about a unique case.

"I think Justice William T. Grant is saying that although not explicitly stated in the will, the money was clearly going to be used for a purpose that was contrary to public policy and perhaps even against the Criminal Code," says Ticker, who did not act on the case and makes his comments generally.

"It's a unique case in that McCorkill's estranged sister filed an application with the court to void the bequest," he says. "Otherwise it may have flown under the radar."

He notes McCorkill was a private disposition unlike the well-known case of *Canada Trust Co. v. Ontario Human Rights Commission* (C.A.), 1990 CanLII 6849 (ON CA), where the deceased left money in trust to create scholarships for students, but limited the recipients to mainly white Christian men.

"McCorkill left a gift of a rare coin collection and artifacts to an organization with a post office box address in the United States. The will didn't say what the funds were going to be used for," Ticker says. "However, the court said that just because the will doesn't say anything on its face that is discriminatory, these funds were most likely going to be used for the promotion of white supremacy through the dissemination of propaganda."

Ticker points to the Ontario Superior Court of Justice's decision in *Spence v. BMO Trust Company*, 2015 ONSC 615 (CanLII), where Justice Cory Gilmore set aside the will of the deceased Rector Emanuel Spence, who had disinherited his daughter Verolin Spence while leaving his estate to his other daughter Donna Spence and her two

children. Applicant Verolin Spence asserted that the will was void for public policy reasons due to the deceased's racist views and should be set aside resulting in an intestacy.

The Ontario Court of Appeal will be hearing arguments in Spence next month, Ticker says, but the trial decision is another example of courts going beyond the unambiguous wording of a will if there is evidence of an improper purpose contrary to public policy or discrimination.

"For many years, estates law didn't change much," says Ticker. "What we're starting to see is a lot more estates litigation before the courts because of the aging population and, as a result, we're seeing instances of courts becoming more involved and more interventionist in estate matters.

"We don't have a statute in Ontario like they do in British Columbia, where judges are given a lot more discretion in rewriting wills," he says. "We're still limited here in terms of setting aside wills. With the *Spence* decision and now with *McCorkill*, I think we're going to see judges get a bit more active in this area."

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