

LIMITS ON TESTAMENTARY FREEDOM

By: Suzana Popovic-Montag and Josh Eisen

The age old principle of testamentary freedom, the right to freely dispose of your assets on death as you please, occasionally conflicts with public policy considerations in fascinating and surprising ways. The recent New Brunswick case of *McCorkill v. Streed*, 2014 NBQB 148, illustrates and puts an interesting spin on this tension.

In *McCorkill*, the Court of Queen's Bench of New Brunswick dealt with the will of Harry Robert McCorkill, wherein the deceased left the residue of his estate to the National Alliance. The National Alliance is a Virginia corporation that operates as a neo-Nazi white supremacist group, connected with radio broadcasts, writings, and publications that, in the words of Justice William T. Grant, "can only be described as racist, white supremacist and hate-inspired. They are disgusting, repugnant and revolting." The deceased's sister filed an application seeking a declaration that the gift to the National Alliance was void as it is illegal and/or against public policy. The Attorney General of New Brunswick, the League for Human Rights of B'nai Brith Canada, the Canadian Association for Free Expression, and the Centre for Israel and Jewish Affairs were allowed to intervene.

The Court first looked at whether the writings and other communications of the National Alliance were illegal or in violation of public policy. In Canada, section 319 of the *Criminal Code* prohibits hate speech of the sort disseminated by the National Alliance. However, in the United States, where the National Alliance conducts most of its activities, its conduct is not illegal. The Court held that "engaging in activity which is prohibited by parliament through the *Criminal Code of Canada* falls squarely within the rubric of a public policy violation". Moreover, the Court noted that hate speech of this sort offended the *Charter of Rights and Freedoms*, provincial human rights codes, and international conventions to which Canada is a signatory, and was "malodorous, malicious, and evil".

Having found that the National Alliance was engaged in conduct that violated Canadian public policy, the Court then had to decide whether or not to declare the gift valid. Traditionally, where bequests have been invalidated for public policy reasons, it has been because of a condition attached to the bequest and not because of the identity of the beneficiary. The difficulty in *McCorkill* was that the gift was given to the National Alliance outright, free of any conditions

or directions relating to how the gift should be applied. The Court drew a distinction based upon a finding that, unlike most beneficiaries, the National Alliance has foundational documents that express what it stands for. By way of an example, the Court noted that a convicted drug dealer does not "stand for" dealing drugs, despite having a criminal record, and that dealing drugs is not the purpose for which he or she exists. For the National Alliance, however, its "raison d'être" was itself contrary to public policy, and consequently any gift to the National Alliance was comparable to a gift to a trustee for a purpose contrary to public policy.

The Court ultimately declared the bequest to the National Alliance to be void and the residue of the estate was divided amongst the next of kin of the deceased on an intestacy.

The *McCorkill* case has interesting implications for gifts to groups that are involved in activities contrary to Canadian law or values, whether they operate inside or outside of Canada. As an appeal has been filed, this may not be the last word in this matter. It remains to be seen what courts will do with similar gifts in the future.

Organ Donation

Trillium Gift of Life Network (TGLN), the government agency responsible for managing and coordinating organ and tissue donation and transplantation in Ontario, has partnered with the legal profession to save lives. Lawyers discuss important end-of-life decisions like powers of attorney, wills and estate planning. Another important end-of-life decision is organ and tissue donor registration.

Together with Hull & Hull LLP, TGLN has developed a toolkit specifically for legal professionals to help guide them in their conversation with clients; it includes a Gift of Life consent form and a backgrounder with quick facts about donation, answers to frequently asked questions, and common myths and misconceptions debunked.

The story of Sam Marr, partner at Landy Marr Kats LLP, illustrates the importance of this issue. Sam Marr knew the day would come when he would need a liver transplant and the married father of two is so grateful to the person who stepped forward to be his donor.

As a 23-year-old law student, Marr was diagnosed with primary sclerosing cholangitis, an incurable liver

Organ Donation continued...

condition. Once the condition deteriorates it inevitably leads to death unless the patient undergoes a successful liver transplant.

"I've always known the day was going to come when I would need a transplant," says Marr, who calls himself a "private person" and told only a handful of people about his condition over the years.

In 2012, his condition worsened and he was put on the provincial wait list. There are currently 1,500 people waiting for a life-saving organ transplant, of those 239 are waiting for a liver.

Marr was sick enough to be put on the wait list, but not sick enough to be at the top so he and his family began the search for a living donor. The liver, as well as kidney, can be donated by a living donor. A portion of the liver is removed from the donor and transplanted into the recipient; it regenerates in both individuals.

Thankfully a match was found and Marr underwent his transplant in November 2012. The identity of his donor has been kept secret.

"I will be forever grateful to my donor for giving me the gift of life. I treasure each and every day that I am able to spend with my family, friends and colleagues and practicing law in the profession I love," says Marr, former president of the Toronto Lawyers Association.

Today Marr is doing well and uses his story to help encourage others to consider registering consent to organ and tissue donation. "Please give the gift of life and register your consent to be an organ and tissue donor," says Marr.

Registration makes a difference. When the family of a potential donor is presented with proof of registration they almost always affirm their loved one's decision, but in the absence of registration family consent drops dramatically.

One organ donor can save the lives of up to eight people and transform the lives of up to 75 others through tissue donation.

Registration is simple and can be done at www.beadonor.ca, at any ServiceOntario centre or by completing a Gift of Life consent form and mailing it in. Today in Ontario 25 percent of people have registered their consent to organ and tissue donation. A signed donor card is not enough.

- Did you know most major religions support donation?
- Did you know you are never too old to register and a previous medical condition does not preclude you from registering?
- Did you know there are 1,500 men, women and children currently waiting for a life-saving organ transplant? And one of them dies every three days waiting?

"I will be forever grateful to my donor for giving me the gift of life. I treasure each and every day that I am able to spend with my family, friends and colleagues and practicing law in the profession I love. Please give the gift of life and register your consent to be an organ and tissue donor."

- Sam Marr, Partner, Landy Marr Kats LLP and liver recipient, 2012

"The Ontario Bar Association encourages all Ontarians to register their consent to donate their organs and tissue. Just like making a will or a power of attorney, registering your consent to organ and tissue donation is an end-of-life decision that should not be put off."

- Pascale Daigneault, Past-President of the OBA

"I'm proud to partner with Trillium Gift of Life Network to support organ donation and registration in Ontario. As lawyers we have the ability to reach clients when they are making important decisions; I believe it is important for us to include organ donation in those conversations."

- Ian Hull, Co-Founder, Hull & Hull LLP

Breakfast Series

Our next Breakfast Series will be held on Thursday, October 16, 2014 and will feature a discussion by Ian Hull and David Freedman on Tax Issues in Estates and Trusts. The discussion will start at 8:30 a.m. and be moderated by Suzana Popovic-Montag. The Breakfast Series meetings are held at the Ontario Bar Association, 2nd Floor, 20 Toronto Street, Salons 2 & 3, Toronto, Ontario. A fee of \$30.00 (\$26.55 + \$3.45 HST) is payable to Hull & Hull LLP upon registration by cheque, Visa or MasterCard. To register, please call our office at (416) 369-1140. Feel free to send along any questions you might have. We look forward to having you join us!



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