

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ALMA-LYNN BUTT

Plaintiff

- and -

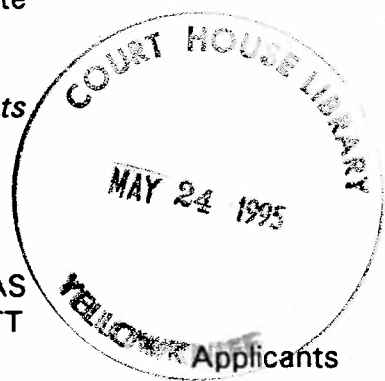
ROBERT JOHN CHITTOCK as administrator
of the estate of the late KENNETH ROBERT
CHITTOCK, deceased

Defendant

AND:

IN THE MATTER OF the estate of the late
KENNETH ROBERT CHITTOCK, deceased;

AND IN THE MATTER OF the *Dependants*
Relief Act;



BETWEEN:

ALMA-LYNN BUTT and MICHAEL DOUGLAS
BUTT by his next friend ALMA-LYNN BUTT

Applicants

- and -

ROBERT JOHN CHITTOCK as administrator
of the estate of the late KENNETH ROBERT
CHITTOCK, deceased

Respondent

Application for approval of an agreed settlement of litigation involving the interests of
minor children in an estate granted on terms.

Heard at Yellowknife on March 9th 1995

Judgment filed: May 15th 1995

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

Counsel for the Plaintiff
and for the Applicants: Edward W. Gullberg, Esq.

Counsel for the Defendant
and Respondent: James R. Posynick, Esq.

The Public Trustee, Larry H. Pontus, Esq., in person

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REASONS FOR JUDGMENT

1 The parties to these proceedings seek the Court's approval of a settlement to which they have, subject to that approval, agreed. However, the Public Trustee (as

guardian *ad litem* on behalf of a minor child whose estate could be affected by the proposed settlement) opposes the grant of approval.

I. Factual Background

2 Alma-Lynn Butt (who has changed her name to Alma-Lynn Chittock since these proceedings were initiated in her former name) lived together with the late Kenneth Robert Chittock, as "man and wife", at Yellowknife in the Northwest Territories between July 1987 and the date of Mr. Chittock's death on April 22nd 1993. They had not married but were engaged to be married at the time of the death.

3 Ms. Butt has a son, Michael Douglas Butt (now renamed Chittock) from a marriage in Ontario which was dissolved in 1985. She is, and has since then been, the sole guardian of that son. The late Mr. Chittock had not as yet adopted Michael as his son, in accordance with the *Child Welfare Act*, R.S.N.W.T. 1988, c. C-6, although that was his intention, in conjunction with his intended marriage to Ms. Butt.

4 Another son was born to Ms. Butt after she and the late Mr. Chittock had entered into cohabitation together. Mr. Chittock was the natural father of this child, namely Graham Chittock; but he invariably treated both Michael and Graham equally as his own sons.

5 I am satisfied that Michael was, in effect, adopted by the late Mr. Chittock as his son, even though there was no compliance with the *Child Welfare Act* provisions in that respect.

Having cohabited together for more than a year, a child being born as a result of their union, I am likewise satisfied that Ms. Butt is a "dependant" of the late Mr. Chittock, as is her son Michael, within the meaning of the *Dependants Relief Act*, R.S.N.W.T. 1988, c. D-4, s.1.

7 The deceased Mr. Chittock left no will. His estate is therefore governed by the *Intestate Succession Act*, R.S.N.W.T. 1988, c. I-10, subject only to the provisions of the *Dependants Relief Act*.

II. The Proposed Settlement

8 Two separate proceedings are proposed to be settled, as follows. First in point of time are claims to relief against the estate of the deceased pursuant to the *Dependants Relief Act*. These claims are made on behalf of Ms. Butt and her son Michael. Second in point of time is a suit in which Ms. Butt claims relief in equity, as a constructive trust beneficiary of the deceased's estate.

9 No distinction is made between these two proceedings under the proposed settlement, which would see the net estate of the deceased divided as follows: 40% to Graham, 20% to Michael, and 40% to Ms. Butt (now Chittock).

10 The Public Trustee opposes any such division of the estate, taking the position that neither Ms. Butt nor her son Michael should be granted relief under the *Dependants Relief Act*. It is not clear if, as guardian *ad litem* of the Graham Chittock's estate, the Public Trustee also opposes Ms. Butt's claim to relief in equity as a

constructive trust beneficiary of the deceased's estate. The Public Trustee has not sought to have Graham Chittock (or his estate) made a party defendant in Ms. Butt's action under that head against the deceased's estate. I conclude therefore that the Public Trustee's opposition is instead confined to the claims made under the Dependants Relief Act.

III. The Equitable Claim

11 Ms. Butt and the late Mr. Chittock lived together for all but three months of the 5-year period leading up to his death. They maintained a joint bank account into which each of them deposited their earnings from employment and out of which they paid their living expenses and those of the two children.

12 There was a brief separation beginning in late 1991 but this had come to an end some weeks before the death of Mr. Chittock, although at that time he still had a residence at Edmonton, Alberta. Ms. Butt was the primary caregiver to the children throughout the relationship.

13 Mr. Chittock owned two rental properties at Yellowknife, which formed the bulk of his estate. One of these has since been sold for \$140,000 and the other is expected to realise a similar figure. The value of the estate for purposes of distribution is said to be approximately \$380,000.

14 Mr. Chittock had acquired these properties, subject to mortgage financing, before he began living with Ms. Butt. Rental payments from the School Draw property

(which was registered in their joint names in 1988) were deposited in the joint account until the separation in 1991. After the resumption of cohabitation in 1992, payments of rent on both properties were deposited in that account. It is not in dispute that the monthly mortgage amounts were routinely paid off out of the rents received, presumably through the same bank in each instance. Ms. Butt also assisted in the management, maintenance and improvement of both properties throughout the period of her cohabitation with Mr. Chittock. And she co-signed documentation with him to secure a loan which they obtained for improvements to one of the properties.

15 Ms. Butt supported Mr. Chittock from her earnings during three separate periods of three months each during their relationship when he was attending trade school. Over the approximately five years of the relationship, Mr. Chittock's assets increased by over \$300,000 in value, whereas those of Ms. Butt increased by less than \$20,000.

16 In the circumstances, the proposed settlement appears to me to be entirely reasonable in respect of the 40% share of the estate which the parties agree should go to Ms. Butt, quite apart from any claim which she otherwise might have under the *Dependants Relief Act*. I find that the late Mr. Chittock held the two rental properties subject to a constructive trust so that at least this percentage of their value is beneficially owned by Ms. Butt. Taking everything into consideration, including the agreement reached by the parties, the proposed settlement is in my view just and equitable in respect of Ms. Butt.

IV. The Legislation

1. The Intestate Succession Act

17 Of the two children, only Graham qualifies as "issue" of the deceased. And
it is not disputed that Ms. Butt is not the "spouse" of the deceased as that term is used
in the *Intestate Succession Act*, R.S.N.W.T. 1988, c. I-10. (A similarly restrictive
meaning of this term is used in the *Maintenance Act*, R.S.N.W.T. 1988, c. M-1: see
Andre v. Blake, [1991] N.W.T.R. 351, 37 R.F.L. (3d) 322 in this Court).

18 Unless the *Dependants Relief Act* requires otherwise, Graham is therefore
the sole beneficiary of the deceased's estate (after administration, which would include
the settlement or other disposition of Ms. Butt's equitable claim). While this appears to
be contrary to the deceased's affection for and conduct towards Ms. Butt, Michael and
Graham during his lifetime, it is the result dictated by the legislature where, as here, the
deceased left no will.

2. The Dependants Relief Act

19 Paragraph 2(1)(b) of this Act reads:

- 2. (1) Where a person ...
- (b) dies intestate as to all or part of his
 or her estate and the share under
 the *Intestate Succession Act* of his
 or her dependants or any of them in
 the estate is inadequate for their
 proper maintenance and support,

20

a judge, on application by or on behalf of the dependants or
any of them, may, notwithstanding the provisions of the will
or the *Intestate Succession Act*, order that the provision that
the judge considers adequate be made out of the estate of the
deceased for the proper maintenance and support of the
dependants or any of them.

21

Having concluded that the proposed settlement as to Ms. Butt is just and
equitable, in all the circumstances of the case, I take it that I need not consider her claims
any further, with reference to the *Dependants Relief Act*. Ms. Butt is, clearly, a
"dependant" as defined by the Act, as is her son Michael. However, in view of her
entitlement of 40% of the deceased's estate as I have mentioned, it is not now a case
in which her claim under that Act calls for any hypothetical discussion resting on a
statutory foundation.

22

What requires attention now is the relief sought by Ms. Butt on behalf of
Michael pursuant to s.2(1)(b) of the Act, to adequately ensure his "proper maintenance
and support" within the meaning of that paragraph.

23

It is evidently the view of Graham's paternal grandfather that his son, the
deceased, would have wished Michael and Graham to benefit equally from his estate.
Ms. Butt shares that view. There being no will, this wish lacks the force of law; but it
is not, merely on that account, a negligible factor. This is not a case in which I am asked
to vary a will; on the contrary, I am asked to give effect to what is credibly asserted to
be the wish of the deceased, so as to make good his lack of any testamentary disposition.
The evidence before me is enough, in my view, to compel the conclusion that the
deceased did not at all deliberately choose to leave his estate to be disposed of under the
Intestate Succession Act.

24 In this case, given the evidence, it is clear that the "proper maintenance and support" of Michael requires a disposition based on parity with Graham if that disposition is to make an adequate provision for Michael, within the meaning of s.2(1)(b) of the *Dependants Relief Act*.

25 The proposed settlement, on the other hand, would see a 40% share go to Graham with only a 20% share going to Michael. Parity would require each to receive a 30% share.

26 In taking that approach, it will be quite apparent that I have considered more than the provision of a minimum level of mere subsistence as being necessary if "adequate provision" is to be made pursuant to s.2(1)(b). Furthermore, I am persuaded that the legislature was concerned with more than this when it chose to specify that provision is to be made for the "proper" support of the dependant. That term implies a form and level of support which is appropriate and fitting, or - to use the traditional language of the law - such support as is just and equitable in all the circumstances.

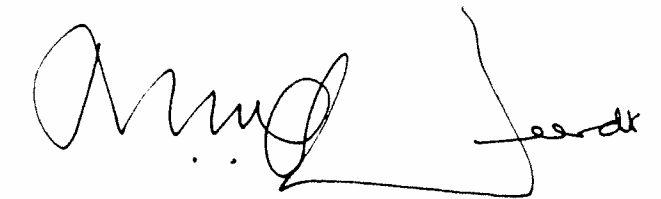
27 Counsel for the applicants under the *Dependants Relief Act* has cited a number of cases arising under the equivalent legislation in other Canadian jurisdictions. I have also had the benefit of the discussions in "*Dependant Support Proceedings*" (1994), 14 E. & T. Jo. 159, by Brian A. Schnurr and Susan J. Woodley, and in *The Canadian Law of Wills* (3rd ed.) vol. 1, chapter 9, by Thomas G. Feeney, Q.C. The instant case is one of first impression (on its particular facts) in the Northwest Territories, so far as I am aware; and none of the cases cited in the material provided to me is similar in point of fact to this case.

V. Conclusion

28 I am not prepared to approve the proposed settlement as presently formulated. However, if the proposal is revised in accordance with these reasons for judgment, I shall be pleased to give the revised proposal my approval.

29 Costs were not addressed by counsel. I am prepared to award solicitor and client costs to all parties, and a lump sum of \$500 to the Public Trustee, from out of the estate, if the parties so agree.

30 Pending the advice of counsel for the parties as to the foregoing, I shall remain seized of this matter.



M.M. de Weerd
J.S.C.

Yellowknife, Northwest Territories
May 15th 1995

Counsel for the Plaintiff
and for the Applicants: Edward W. Gullberg, Esq.

Counsel for the Defendant
and Respondent: James R. Posynick, Esq.

The Public Trustee, Larry H. Pontus, Esq., in person

CV 05263
CV 05015

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