Corrigal v. *Buckley, et al*, 2001 NWTSC 77

Date: 2001 11 06
Docket: ES 00539

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF THE ESTATE OF JAMES BUCKLEY

AND IN THE MATTER OF CLAIMS ON BEHALF OF MARY CORRIGAL, UNDER THE *DEFENDANTS RELIEF ACT*, BEING c.D-4 OF THE REVISED STATUTES OF THE NORTHWEST TERRITORIES AND THE *MATRIMONIAL PROPERTY ACT*, c.M-6 OF THE REVISED STATUTES OF THE NORTHWEST TERRITORIES (now repealed) AND THE *INTESTATE SUCCESSION ACT*, c.I-10 OF THE REVISED STATUTES OF THE NORTHWEST TERRITORIES AND THE *WILLS ACT*, c.W-5 OF THE REVISED STATUTES OF THE NORTHWEST TERRITORIES

BETWEEN:

MARY DARLENE CORRIGAL

Applicant

- and -

ELIZABETH BUCKLEY, NAMED EXECUTRIX OF A WILL (UNDATED), SHAWN BUCKLEY, DOUGLAS BUCKLEY, LINELL BUCKLEY, JENNIFER BUCKLEY AND CORINA BUCKLEY

Respondents

- and -

THE PUBLIC TRUSTEE IN AND FOR THE NORTHWEST TERRITORIES ON BEHALF OF THE INFANT CHILDREN, CHARMAINE CORRIGAL, EAGLE QUILL CORRIGAL AND COURTNEY CORRIGAL

Interested Party

Application for a declaration that s.11(3) of the *Wills Act*, R.S.N.W.T. 1988, c.W-S infringes s.15(1) of the *Canadian Charter of Rights and Freedoms* and for other related relief.

Heard at Yellowknife, NT, on July 25, 2001

Reasons filed: November 6, 2001

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Applicant:	Gary Romanchuk
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No one for Charmaine Corrigal	
Counsel for the Government of the Northwest Territories:	Sheldon Toner

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REASONS FOR JUDGMENT

[1] The Applicant, Mary Darlene Corrigal, has applied for the following relief:

a) an order declaring that: section 11(3) of the *Wills Act*, R.S.N.W.T. 1988, c. W-5 infringes the right to equality under s. 15(1) of the Canadian Charter of Rights and Freedoms and is not saved by the application of s. 1 of the Charter; that the reference to "marriage" in that section should be read to include a common-law marriage; and that the will of the deceased, James Buckley, the Applicant's common-law spouse, has been revoked pursuant to s. 11(3);

b) an order declaring that s. 1(2) of the *Intestate Succession Act*, R.S.N.W.T. 1988, c. I-10, as amended, infringes the right to equality under s. 15(1) of the Charter and is not saved by the application of s. 1; and further an order declaring that the undefined reference to "spouse" in the *Intestate Succession Act* as it existed before the 1998 amendments, to the extent that it is restricted to a spouse by legal marriage, infringes the right to equality under s. 15(1) of the Charter and is not saved by s. 1;

c) an order declaring that the definition of "matrimonial property rights" in s. 1 of the *Matrimonial Property Act*, R.S.N.W.T. 1988, c. M-6 (now repealed) and certain other provisions of the *Act* infringe the right to equality under s. 15(1) of the Charter and are not saved by s. 1;

d) an order declaring that the Applicant is the spouse of the deceased as defined in the *Family Law Act*, S.N.W.T. 1997, c. 18, s. 1 and is accordingly entitled to relief under ss. 36 to 38 of the *Act*, notwithstanding s. 70(1).

[2] Some other issues were raised in the Applicant's Chambers brief but at the hearing of this application, counsel asked that my decision be restricted to those outlined above.

[3] Counsel for the Applicant advised at the hearing that the Attorney General of Canada was served with notice of this application pursuant to s. 59 of the *Judicature Act*, R.S.N.W.T. 1988, c. J-1, but had chosen not to take part in the proceedings.

Background

[4] The following "facts" were put before me for purposes of this application. I have put the term in quotation marks as the Respondents' brief and what was said by their counsel in argument make it clear that some of these facts are not admitted, nor is the character of the relationship at issue admitted. However, all parties were content that I deal with the issues raised on the basis of these presumed facts and on the basis that there was a common-law relationship between the Applicant and James Buckley.

[5] The Applicant and the deceased, James Buckley, met in 1979, when the deceased was married to and residing with Elizabeth Buckley. The Buckleys separated in 1982 and divorced in 1997. They had five children together.

[6] The Applicant and the deceased had two children together, in 1982 and 1983. They began living together in 1984 and had a third child near the end of that year. They separated on a number of occasions and for time periods ranging from two weeks to a year and four months, but reconciled after each separation and were living together at the time of Mr. Buckley's death on June 29, 1997.

[7] On November 15, 1984, the deceased executed a will, in which Elizabeth Buckley, to whom he was still married at that time, was named as executrix, trustee and beneficiary, with their children as residuary beneficiaries.

[8] The will has been probated. No issue was taken with Ms. Corrigal's right to bring this application.

Sections 15(1) and 24(1) of the Charter

[9] The Applicant's arguments in this case arise from the general proposition that the relevant pieces of legislation, referred to above, make a distinction between legally married and common-law spouses and thus infringe her right to equality.

[10] It is convenient to set out section 15(1) of the Charter here:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[11] Further, s. 24(1) of the Charter provides:

> 24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[12] Although marital status is not included in s. 15(1) as a ground of discrimination, it has been accepted by the Supreme Court of Canada as an analogous ground and is within the ambit of s. 15(1): *Miron v. Trudel*, [1995] 2 S.C.R. 418.

a) Section 11(3) of the *Wills Act*

[13] Sections 11(2) and (3) of the *Wills Act* provide as follows:

> 11.(2) No will or any part of a will is revoked otherwise than by
>
> (a) marriage, as provided in subsection 3;
>
> (b) another will executed in accordance with this Act;
>
> (c) a writing declaring an intention to revoke the will or a part of the will and executed in accordance with the provisions of this Act respecting the execution of a will; or
>
> (d) burning, tearing or otherwise destroying the will by the testator or by some person in the presence and by the direction of the testator with the intention of revoking it.
>
> (3) A will is revoked by marriage of the testator after it is made, except where
>
> (a) it is declared in the will that it is made in contemplation of that marriage; or
>
> (b) the will is made in exercise of a power of appointment and the real or personal property appointed by that means would not, in default of the appointment, pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if the testator died intestate.

[14] The Applicant takes the position that had her marriage to the deceased been a legal marriage, it would have resulted in revocation of his will executed November 15, 1984

under s. 11(3) of the *Wills Act.* With the will revoked, the deceased's estate would be distributed according to the *Intestate Succession Act* and the Applicant claims an entitlement to a greater share of the estate under that legislation than she would have under the *Dependants' Relief Act*, R.S.N.W.T. 1988, c. D-4. She submits that since s. 11(3) does not include common-law marriages it is discriminatory and infringes s. 15(1) of the Charter and is not saved by s. 1.

[15] The responding parties take the position that the Applicant's argument involves an impermissible retroactive or retrospective application of the Charter; alternatively, that s. 11(3) of the *Wills Act* does not infringe s. 15(1) of the Charter, or that if it does infringe s. 15(1), it is saved by s. 1.

[16] At the outset, there appears to me to be an evidentiary problem with the Applicant's claim. The facts placed before me for purposes of this application are that the Applicant and the deceased began living together in 1984. The will made by the deceased in favour of his "first" wife, Elizabeth Buckley, was executed on November 15, 1984. It is impossible on these facts to say whether the will was executed before the common-law marriage can be said to have taken place, or after it. The marriage cannot revoke the will if the marriage came before the will. If the will was executed after the marriage (which in the case of a common-law marriage must mean after the relationship became a marriage), the Applicant is in no different a position than that of a legally married spouse whose spouse executes a will in favour of someone else after the marriage. In both cases, the surviving spouse must seek relief under the dependants' relief legislation or such other legislation as may be available; however, the will is not revoked.

[17] Despite the fact that the Applicant has not established that the marriage took place after the will was executed, since all counsel sought a ruling on the Charter issue, I will deal with that issue on the basis that the Applicant may yet be able to establish the requisite factual underpinning. However, in my view it is not sufficient for the Applicant to show simply that she was living in a common-law marriage with the deceased at a point in time after his will was executed. If that were the case, a spouse in a common-law marriage could not make a will that would not be revoked because the continuing relationship would always revoke the will. The testator spouse in that case would have no freedom of testamentary intention, unlike the spouse in a legal marriage who is free, after the pre-marriage will is revoked, to make any will he or she wishes. I will comment further on this issue below.

[18] I turn next to the submission of the Respondents that the Applicant's claim involves an impermissible retroactive or retrospective application of s. 15(1) of the Charter, which did not come into force until April 17, 1985.

[19] It appears to be settled law that the Charter does not apply retroactively or retrospectively: *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, [1997] S.C.J. No. 26. In dealing with the terms "retroactively" and "retrospectively", I adopt the definitions from E.A. Driedger in "Statutes: Retroactive Retrospective Reflections" (1978), 56 Can. Bar Rev. 264, as did Iacobucci J. in *Brenner*. A retroactive statute is one that operates as of a time prior to its enactment, while a retrospective statute operates for the future only but imposes new results in respect of a past event.

[20] The Applicant's position on retroactivity or retrospectivity is that it is her post-April 17, 1985 common-law marriage to the deceased that should attract the protection of the Charter. As I understand the Applicant's argument, she says that after April 17, 1985 her status as the deceased's common-law spouse was established. However, I do not understand her to say that she would not have been considered his common-law spouse prior to April 17, 1985. The facts set out in the Applicant's brief refer to the Applicant and the deceased having resided in a common-law relationship from 1984 to the time of the deceased's death, and having cohabited and maintained a common-law relationship from 1984 to the date of his death.

[21] This gives rise to the difficulty in the Applicant's position. A legal marriage is a discrete event which occurs at a particular point in time and creates as from that point a legal relationship. A common-law marriage is not a discrete event but rather a relationship whose commencement may not be capable of being tied to a particular point in time, unless it is the time when the parties to it started living together.

[22] Although s. 11(3) revokes a pre-marriage will upon a legal marriage taking place, it leaves the spouses free to make whatever wills they wish after that, notwithstanding that the marriage continues. To be consistent, then, if one is to apply s. 11(3) to a common-law marriage, revocation would have to be tied to the time when the common-law marriage or relationship takes place, or begins. To the extent that the beginning of a common-law marriage can, then, be tied to a point in time, in this case the Applicant's recital of the facts has her common-law marriage with the deceased beginning in 1984.

[23] One of the arguments advanced on behalf of the Applicant was that the Court could appy one of the current legislated definitions of "spouse" to determine when the common-law marriage was established. This would involve deciding at what point in time she would be considered a common-law spouse under the definition and fixing that as the point when the marriage commenced. But I do not think that assists the Applicant either. For example, s.1(1)(c) of the *Family Law Act* defines "spouse" so as to include persons who have lived together in a conjugal relationship outside marriage if they have cohabited for a period of at least two years or have cohabited in a relationship of some permanence and are together the natural or adoptive parents of a child. Under the first part of that definition, the Applicant could have been considered a spouse sometime in 1986, after having lived with the deceased for two years. Under the second part of the definition, she could have been considered a spouse by January of 1995, having by then had three children with the deceased and lived with him for some time. Neither branch of the definition necessarily indicates when the common-law marriage commenced.

[24] The Applicant also relies on her continuing status as the deceased's common-law spouse after April 17, 1985. The application of s. 15(1) to a current status as opposed to a past event was canvassed in *Benner*, where the Court said (at paragraphs 44 to 46):

> [44] Section 15 cannot be used to attack a discrete act which took place before the Charter came into effect. It cannot, for example, be invoked to challenge a pre-Charter conviction: R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713; Gamble, supra. Where the effect of a law is simply to impose an on-going discriminatory status or disability on an individual, however, then it will not be insulated from Charter review simply because it happened to be passed before April 17, 1985. If it continues to impose its effects on new applicants today, then it is susceptible to Charter scrutiny today: Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.
>
> [45] The question, then, is one of characterization: is the situation really one of going back to redress an old event which took place before the Charter created the right sought to be vindicated, or is it simply one of assessing the contemporary application of a law which happened to be passed before the Charter came into effect?
>
> [46] I realize that this distinction will not always be as clear as one might like, since many situations may be reasonably seen to involve both past discrete events and on-going conditions. A status or on-going condition will often, for example, stem from some past discrete event. A criminal conviction is a single discrete event, but it gives rise to the on-going condition of being detained, the status of "detainee". Similar observations could be made about a marriage or divorce. Successfully determining whether a particular case involves applying the Charter to a past event or simply to a current condition or status will

> involve determining whether, in all the circumstances, the most significant or relevant feature of the case is the past event or the current condition resulting from it. This is, as I already stated, a question of characterization, and will vary with the circumstances. Making this determination will depend on the facts of the case, on the law in question, and on the Charter right which the applicant seeks to apply.

[25] During the hearing of this application, I suggested to counsel that the decision of the Nova Scotia Court of Appeal in *Bauman v. Nova Scotia (Attorney General)*, [2001] N.S.J. No. 115 might be significant, however, counsel did not seek to make any submissions about it. Since the hearing of this application, the Supreme Court of Canada has dismissed an application for leave to appeal the Court of Appeal's decision ([2001] S.C.C.A. No. 277 in the S.C.C.A. database; September 13, 2001).

[26] In *Bauman*, the Nova Scotia Court of Appeal, following *Benner*, said that in the analysis as to retroactivity, the Court must decide whether it is applying the Charter to a past event or to a current condition or status; to determine that, one must ask which, in all the circumstances, is the "most significant relevant feature" of the case.

[27] In *Bauman*, the claimants were widows, each of whom had received a pension when her husband was killed during the course of his employment. All of the claimants had remarried prior to April 17, 1985, and, under the workers' compensation legislation in effect at the time, their pensions were terminated upon their remarriage. The claimants said that upon s. 15(1) of the Charter coming into force, their pensions should have been revived and paid from that date forward. The respondent province argued that the termination of their pension benefits by operation of the relevant provision of the *Workers' Compensation Act* was a discrete pre-Charter event. The claimants' position was that with the coming into force of s. 15(1) on April 17, 1985, the fact that the pensions were not reinstated was an ongoing, status based consequence of a past event, in other words, that it was continuing discrimination.

[28] The Nova Scotia Court of Appeal held the claimants' situation was not the "contemporary application of a law which happened to be passed before the Charter came into effect". The Court reasoned that the impugned sections had no post-Charter continuing operation, as regards the claimants. It was the event of remarriage, which occurred before April 17, 1985 in the case of each claimant, that resulted in termination of the pensions, not the status of being remarried.

[29] The "most significant relevant feature" of the case was the date that each claimant remarried, which was pre-Charter in the case of each claimant.

[30] At paragraph 40 of its decision, the Court of Appeal said:

> The claimants' position is not advanced because a pension is an ongoing payment rather than a lump sum. The fact that the pre-Charter termination of the pensions has ongoing implications for the claimants does not transform this from a future consequence of a past event. The termination of the pension was complete upon the remarriage of a widow. The cessation of the pension income was not conditional upon the widow remaining remarried. The legislation did not provide for a resumption of the benefit if the new marriage ceased. It did not have a continuing, post-Charter effect on the claimants.

[31] In conclusion, the Court held that the claimants were impacted by the termination provisions pre-Charter, when they were not discriminatory under the law because the right to equality under s. 15(1) did not exist. It held that to revisit the termination of their pensions, post-Charter, would be an impermissible, retrospective application of the Charter.

[32] In my view the reasoning applied in *Bauman* should also be applied in this case. The most significant relevant feature of the case has to be the date when the common-law marriage commenced because that is what the Applicant says should have revoked the will just as a legal marriage would have done under s. 11(3). That is when she was impacted by s. 11(3), just as a spouse in a legal marriage would have been.

[33] Section 15(1) of the Charter did not come into force until April 17, 1985, after the common-law marriage had commenced in 1984, and therefore after the most significant relevant feature of the case. It is the past event, the commencement of the common-law marriage, that is significant. It did not revoke the will and the Applicant's current condition is the result of the deceased maintaining that will and not making a will in favour of the Applicant.

[34] Put another way, the Applicant's complaint is not that an act occurred in contravention of her Charter rights. Her complaint is instead that an act or event (revocation of the will) did not occur upon her common-law marriage to the deceased and it is the failure of revocation to occur that contravenes her Charter rights.

[35] The non-revocation of the will upon the common-law marriage was not discriminatory within the meaning of s. 15(1) of the Charter at any point prior to April 17, 1985 and the evidence indicates that the common-law marriage was in place prior to that date.

[36] Nor, following the reasoning in *Bauman*, can it be said that the Applicant's position is advanced because her status as a common-law spouse continued after s. 15(1) was enacted or because the fact that the will was not revoked has current implications for her. The failure of her common-law marriage with the deceased to revoke his will was "complete" upon the common-law marriage coming into being. Thereafter, the will could be revoked only by the deceased taking one of the other steps in s. 11(2), such as making a new will.

[37] That it is the event of the marriage rather than the status of the spouse that leads to revocation is also clear from the way s. 11(3) operates in the case of a legally married spouse. Upon marriage, the pre-marriage will is revoked under s. 11(3). Its revocation is not dependent on the spouses remaining married. They could divorce at the earliest possible date and the will would not be revived. They could remain married and the spouse whose will had been revoked could make another will which did not benefit the other spouse; the latter spouse's continuing status as spouse would not revoke the second will. Clearly, under s. 11(3), it is the discrete legal event of marriage that revokes the will rather than the continuing status of being married. Accordingly, if the "event" of a common-law marriage did not revoke a will prior to April 17, 1985, a common-law spouse's continuing status as such cannot revoke the will after that date. To allow it to do so would be an impermissible retrospective application of s. 15(1).

[38] In light of my finding that s. 15(1) is not to be given the retrospective application the Applicant seeks, I need not go on to analyze whether s. 11(3) infringes the right to equality. However, if I am wrong and the application of s. 15(1) as sought by the Applicant is not an impermissible retrospective application of the Charter, in my view s. 11(3) is in any event not discriminatory in the sense prohibited by s. 15(1) and as explained by the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. In *Law*, the Court held that an individual challenging legislation on the ground of s. 15(1) must establish "discrimination in a substantive or purposive sense, beyond mere proof of a distinction on enumerated or analogous grounds". The differential treatment imposed by the legislation must be found to demean the "essential human dignity" of the applicant, to impose a burden or withhold a benefit from the individual in a manner based on the stereotypical application of presumed characteristics or reflecting a view that the individual in question is less worthy.

The determination whether that is the case must be made after an objective assessment of the entire situation.

[39] While there is a difference between the treatment of legal and common-law marriages under s. 11(3) of the *Wills Act*, it is a difference in the type or nature of relief that can be sought from the deceased spouse's estate and it is a difference that is entirely subject to further action taken by the deceased spouse after the marriage with respect to his or her estate. In the case of a legal marriage, the marriage revokes the testator's pre-marriage will but he or she may then: (i) do nothing, in which case the testator will be considered intestate and the surviving spouse will have the remedies under the *Intestate Succession Act*; (ii) make a new will in favour of the spouse, in which case the surviving spouse takes under the will, subject to any elections that may be available to that spouse under other legislation; (iii) make a new will in favour of someone other than the spouse, in which case he or she is left with the remedies under the *Dependants*' *Relief Act* for support and the applicable family law legislation for any property claim.

[40] In the case of a common-law marriage, where a pre-marriage will not made in the surviving spouse's favour is not revoked, the testator may: (i) maintain the will, in which case the surviving spouse is left with the remedies under the *Dependants*' *Relief Act*; (ii) make a new will in favour of the surviving spouse, thus revoking the earlier will; (iii) revoke the earlier will by one of the other means under the *Wills Act* and not make a new will, in which case there will be an intestacy and the surviving spouse will be left with remedies under the *Intestate Succession Act* or, if she cannot come within that legislation, under the *Dependants*' *Relief Act*. For a property, rather than support, claim, the common-law spouse will have other remedies under family law legislation or the common law, as referred to further on in these reasons.

[41] The common-law spouse is not left without any remedy, as was the case in *M. v. H.*, [1999] 2 S.C.R. 3, where the legislative provision in question drew a distinction that prevented persons in a same-sex cohabiting relationship from gaining access to the court-enforced and court-protected support system, whereas persons in an opposite-sex cohabiting relationship had that access. In this case, considering the difference, as between a legal and a common-law marriage, in ascertaining when precisely the marriage has commenced, and considering that the situation the surviving spouse is left in is, in the end, the result of the deceased spouse's intentions rather than s. 11(3), the different treatment under s. 11(3) does not demean the essential human dignity of the Applicant or suggest that she is not deserving of protection. Section 11(3) does not reflect a stereotypical assumption about common-law spouses as being less worthy. It does not,

in itself, grant or withhold any benefit; it is the deceased, by his or her own actions, who does that.

[42] It follows that the application to have the will declared revoked cannot succeed.

The *Intestate Succession Act*

[43] As the deceased's will stands unrevoked, there is no intestacy and it is not necessary to determine whether the impugned provisions of the *Intestate Succession Act* infringe s. 15(1) of the Charter.

c) The *Matrimonial Property Act*

[44] The *Matrimonial Property Act*, R.S.N.W.T. 1988, c. M-6 was repealed on November 1, 1998 and replaced by the *Family Law Act*, S.N.W.T. 1997, c. 18. Sections 18 to 23 of the *Matrimonial Property Act*, which provided a life estate in certain property for a surviving spouse, were among certain sections (ss. 2 to 25) that were never proclaimed in force. However, as I understand the Applicant's argument, she seeks to have those sections of the *Act* that were proclaimed in force interpreted according to s. 15(1) of the Charter as a basis upon which to claim an entitlement to some of the deceased's property. The only basis suggested for such a claim involves the definition of "disposition" in s. 1(b)(iii) of the *Act*, which included a devise or disposition made by will, and s. 27(1), which provided as follows:

> 27.(1) In any question between a husband and wife as to the title to or possession, ownership or disposition of all property real and personal, the husband or wife or any person on whom conflicting claims are made by the husband and wife may apply in a summary way to a judge.

[45] Section 27(2) and the subsequent subsections went on to provide that in an application under subsection (1) the judge could make any order with respect to the property in dispute that the judge considered fair and equitable notwithstanding that the legal or equitable interest of the husband and wife in the property was in any other way defined.

[46] The Applicant also challenges the definition of "matrimonial property rights" in s. 1 of the *Act* as an infringement of s. 15(1) of the Charter. That definition, prior to repeal, read as follows:

> "matrimonial property rights" means all rights given by this Act to the spouse of a married person in respect of the residential and other property of the married person and without restricting the generality of the foregoing includes
>
> . . .
>
> (d) the right of the surviving spouse to a life estate in residential property of the deceased married person, and
>
> (e) the right of the surviving spouse to a life estate in the personal property of the deceased married person that is exempt from seizure under execution;

[47] With respect to the definition of "matrimonial property rights", the Applicant seeks as a remedy that words be read in so as to include in the definitions of "spouse" and "married person" spouses in common-law marriages. She submits that the words to be read in can be those used in other territorial legislation to define a common-law spouse.

[48] Although the other parties in their briefs point out that the term "spouse" was not defined in the *Act* and so on the face of it did not exclude common-law spouses, the cases of *Andre v. Blake*, [1991] N.W.T.R. 351 (S.C.) and *Butt v. Chittock Estate*, [1996] N.W.T.R. 104 (S.C.) from this jurisdiction have held that the ordinary meaning of the word "spouse" is a person who is joined in lawful marriage to another person. There is no reason to think that the same definition would not have been applied when the *Act* was in force.

[49] The Respondents submit that s. 27 was intended to apply to disputes between living spouses only and that the unproclaimed sections dealing with a surviving spouse's life estate in certain property are indicative of this intent. While that may be the case, I am not convinced thus far, nor was any authority cited to me for the proposition, that no claim could be maintained by a spouse against a deceased spouse's estate based on s. 27.

[50] The s. 15(1) Charter analysis, as set out in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, [1999] S.C.J. No. 12, requires as a first step that the Court consider whether the impugned law, on the basis of one or more personal characteristics, draws a distinction between the claimant and others or fails to

take into account the claimant's already disadvantaged position within Canadian society resulting in substantively different treatment between the claimant and others.

[51] With respect to the issue of different treatment, the first thing to note is that s. 27 does not give to a spouse any specific interest in property. Instead it provides the mechanism whereby a spouse can apply to the court and it sets out what considerations the Judge is to take into account in deciding what would be fair and equitable.

[52] At the time the *Matrimonial Property Act* was in effect, a common-law spouse could apply to the Supreme Court of the Northwest Territories for a declaration that certain property was held by the other common-law spouse subject to a constructive trust in favour of the claimant spouse. In *Butt v. Chittock Estate*, de Weerdt J. dealt with a request for approval of a settlement involving a minor where the common-law spouse of the intestate deceased made a claim against the estate under the *Dependants' Relief Act* and also a claim in equity as a constructive trust beneficiary of the deceased's estate. He reviewed the respective contributions by the deceased and the common-law spouse to the property in question and found that the deceased held the property subject to a constructive trust so that a certain percentage of its value was beneficially owned by the common-law spouse. This was despite the provisions of the *Intestate Succession Act*, whereby all the property of the deceased would pass to his surviving child, the term "spouse" under that legislation having been found not to include a common-law spouse.

[53] The *Matrimonial Property Act* did not provide for any greater entitlement to property than the doctrine of constructive trust. In my view, the following observation made by Vertes J. of this Court in *Fair v. Jones*, [1999] N.W.T.J. No. 17 (S.C.) is applicable (at paragraph 32):

> The [Family Law Act] introduces a different approach to the issue of property division in this jurisdiction. The Matrimonial Property Act vested almost complete discretion in the court. It provided that a judge may make any order that he or she considered fair and equitable with respect to matrimonial property. The judge had to take into account the respective contributions of the spouses whether in the form of money, services, prudent management, caring for the home and family, or in any other form. But, as noted by our Court of Appeal in Chapman v. Chapman, [1993] N.W.T.R. 355, the emphasis was on what the judge considered fair and equitable. It was essentially a legislated form of the constructive trust doctrine.

[54] Accordingly, the *Matrimonial Property Act* did not grant to a legally married spouse any greater benefit or advantage than was available to a common-law spouse under the doctrine of constructive trust. Thus, there is no basis upon which to find that the definition of spouse contained in the *Act*, by excluding a common-law spouse, results in different treatment as between legally married and common-law spouses. In the result, there can be no infringement of s. 15(1) of the Charter.

[55] There is no need to deal with the Applicant's submission that words ought to be read into the definition of "matrimonial property rights". Those rights are defined as the rights given by the *Matrimonial Property Act*, and the only rights given, that is, proclaimed in force, under that *Act* are those that might be said to arise from s. 27. As I have already found that s. 27 provides no greater recourse than the doctrine of constructive trust, it would serve no purpose to include common-law spouses in the definition section.

The Family Law Act

[56] The Applicant also seeks a declaration that she is entitled to the benefit of ss. 36 to 38 of the *Family Law Act*, S.N.W.T. 1997, c. 18.

[57] The *Family Law Act* defines "spouse" so as to include persons who have lived together in a conjugal relationship outside marriage if they have cohabited for a period of at least two years or have cohabited in a relationship of some permanence and are together the natural or adoptive parents of a child [s. 1(1)(c)]. I will assume, without deciding, that the Applicant comes within these definitions of "spouse".

[58] In the case of the death of a spouse, the *Act* provides to the surviving spouse an entitlement to a portion of family property [s. 36(2)], notwithstanding the provisions of a will [s. 37(1)], and the court may, on application by, among others, a surviving spouse, determine any matter respecting a spouse's entitlement under s. 36.

[59] Section 70(1), however, provides that sections 36 to 38 do not apply where a spouse dies, leaving a surviving spouse, before the day s. 70(1) comes into force. Section

70(1) came into force on November 1, 1998. James Buckley died on June 29, 1997. Therefore, sections 36 to 38 do not apply to the Applicant.

[60] The Applicant argued, however, that since she was a spouse as defined by the *Act* when it came into force, it is reasonable to presume that the Legislature intended that she, and persons in her situation, would be entitled to the benefit of the *Act*, including sections 36 to 38 or, alternatively, would be entitled to the benefit of its predecessor legislation, the *Matrimonial Property Act*.

[61] There is no issue as to equality or s. 15(1) of the Charter since s. 70(1) applies to bar relief where a spouse dies before November 1, 1998 in the case of both common-law and legal marriages.

[62] Contrary to what the Applicant has argued, the Legislature has clearly stated its intent in s. 70(1), which is that sections 36 to 38 do not apply to persons in her situation. Presumably the Legislature enacted this provision in an effort to ensure certainty in the distribution of estates of those spouses who died before this legislation came into effect. I was not referred to any authority for the proposition that the Legislature should be presumed to have intended other than what it has expressly stated. Nor do I know of any basis upon which the Applicant could be exempted from the operation of s. 70(1). She may be in a less satisfactory position with what recourse she may have other than pursuant to sections 36 to 38 of the *Family Law Act*, but she is in the same position in that sense as other spouses, legally married and common-law, whose spouses died before November 1, 1998.

[63] This case is distinguishable from *Re Sanderson and Russell* (1979), 24 O.R. (2d) 429; 99 D.L.R. (3d) 713 (Ont. C.A.), cited by the Applicant. In *Sanderson*, the legislation at issue did not expressly tie the relief obtainable to an event happening after a certain date.

Conclusion

[64] For the reasons set out above, the applications for the declarations and orders outlined at the beginning of this judgment are dismissed. Counsel may speak to costs, if they wish, by arranging a date to appear before me in Chambers for that purpose within 30 days of the date these Reasons for Judgment are filed. Alternatively, if they wish to

rely on the submissions already filed as to costs, they are to advise of that in writing within 30 days of the date these Reasons for Judgment are filed.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT, this
6th day of November 2001

Counsel for the Applicant: Gary Romanchuk
Counsel for the Respondents: Arthur von Kursell
Public Trustee and Counsel for the Interested Parties other than Charmaine Corrigal:
Larry Pontus
No one for Charmaine Corrigal
Counsel for the Government of the Northwest Territories: Sheldon Toner

ES 00539

IN THE SUPREME COURT OF
THE NORTHWEST TERRITORIES

IN THE MATTER OF THE ESTATE OF JAMES BUCKLEY

AND IN THE MATTER OF CLAIMS ON BEHALF OF MARY CORRIGAL, UNDER THE *DEFENDANTS RELIEF ACT*, BEING c.D-4 OF THE REVISED STATUTES OF THE NORTHWEST TERRITORIES AND THE *MATRIMONIAL PROPERTY ACT*, c.M-6 OF THE REVISED STATUTES OF THE NORTHWEST TERRITORIES (now repealed) AND THE *INTESTATE SUCCESSION ACT*, c.I-10 OF THE REVISED STATUTES OF THE NORTHWEST TERRITORIES AND THE *WILLS ACT*, c.W-5 OF THE REVISED STATUTES OF THE NORTHWEST TERRITORIES

BETWEEN:

MARY DARLENE CORRIGAL

Applicant

- and -

ELIZABETH BUCKLEY, NAMED EXECUTRIX OF A WILL (UNDATED), SHAWN BUCKLEY, DOUGLAS BUCKLEY, LINELL BUCKLEY, JENNIFER BUCKLEY AND CORINA BUCKLEY

Respondents

- and -

THE PUBLIC TRUSTEE IN AND FOR THE NORTHWEST TERRITORIES ON BEHALF OF THE INFANT CHILDREN, CHARMAINE CORRIGAL, EAGLE QUILL CORRIGAL AND COURTNEY CORRIGAL

Interested Party

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE V.A. SCHULER