Corrigal v. Buckley, et al, 2002 NWTSC 24

Date: 20020313
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
DEPENDANTS 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REVISED STATUTES OF THE NORTHWEST TERRITORIES (now repealed)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
AND THE *FAMILY LAW ACT* C.18 OF THE S.N.W.T. 1997

BETWEEN:

MARY DARLENE CORRIGAL

Applicant

- and -

ELIZABETH BUCKLEY, NAMED EXECUTRIX OF A WILL (UNDATED), And the various named beneficiaries namely: ELIZABETH BUCKLEY, 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 BUCKLEY, EAGLE QUILL CORRIGAL AND COURTNEY CORRIGAL

Interested Party

MEMORANDUM OF JUDGMENT ON COSTS

[1] This Memorandum deals with the costs of an application on which I gave judgment in *Corrigal v. Buckley, et al*, 2001 NWTSC 77.

[2] The "presumed facts" agreed on for purposes of the application can be summarized as follows. From sometime in 1984, the Applicant lived in a common-law relationship with the testator and had three children with him. This common-law relationship continued, albeit with periods of separation from time to time, until the testator's death in 1997. In November 1984 the testator made a will in favour of the wife he had legally married prior to becoming involved with the Applicant. He never changed that will to benefit the Applicant. On his death, the 1984 will was probated.

[3] The Applicant argued that various sections of the *Wills Act*, the *Intestate Succession Act* and the *Matrimonial Property Act* of the Northwest Territories infringe her right to equality under s. 15(1) of the Charter and that she should be declared the spouse of the testator as defined in the *Family Law Act*. She asserted a claim to the testator's entire estate, which is worth approximately $226,000.00, not being content with what she might have access to as a dependant under the *Dependants' Relief Act*. She was not successful.

[4] Although counsel for the Respondents made it clear at the time of the application that not all the facts are admitted, nor is the characterization of the Applicant's relationship with the testator, and he argued with respect to costs that the Applicant asserts only "a possible claim by a putative spouse", I am going to deal with this matter on the basis of the same facts that were put before me for purposes of the application. It seems to me that if the Respondents were willing to accept the facts set out above for purposes of the application they should be deemed also to accept them for purposes of the costs argument. Therefore, I will deal with costs on the basis that the Applicant and the testator lived for many years in a common-law relationship which post-dated his legal marriage.

[5] The Applicant says that even though she is the unsuccessful party, all parties should bear their own costs or costs should be paid out of the estate. The Respondents seek their costs in a multiple of the applicable tariff against the Applicant. Counsel for the Government of the Northwest Territories, which was given notice as required when there is a constitutional challenge to territorial legislation, seeks costs on an increased basis as well and takes no position as to whether they should be paid by the Applicant or out of the estate.

[6] The issues involved in the application were quite complex as to the law and then the application of the law to the facts. Although the application as argued ultimately challenged or dealt with four different statutes, the basis for the challenge in each case

was the same: unequal treatment basis on marital status. In that sense, I would differentiate this case from *Spears v. Young*, 2001 NWTSC 8, where there were several unrelated applications by or involving different parties and the costs of those applications were assessed separately. I would not treat this case as four separate applications but instead as one application.

[7] While this was a complex application, it did not involve *viva voce* evidence or trial of an issue as was the case in *Beamish v. Miltenberger*, [1997] N.W.T.J. (S.C.) No. 54. In terms of complexity, this application seems to me to fall somewhere between the "usual" complex motion referred to in the tariff and an application for judicial review, which is separately provided for in the tariff. I would put it closer to the latter end of that scale. For that reason, an increase is warranted beyond the tariff item for a complex application.

[8] After reviewing the various cases that counsel submitted and considering the arguments made, I take the view that the costs, to a certain limit, should be paid out of the estate. This case is similar to *Bley v. Bley*, [1986] B.C.J. No. 1644 (S.C.), where the testatrix had made her sons, but not her daughters, beneficiaries of her will and one of the daughters opposed probate. McKenzie J., in ordering that the costs of all parties be paid out of the estate on a solicitor and client basis, placed some emphasis on the suggestion that the testatrix brought on the litigation by making only some of her children beneficiaries in circumstances where she must have known there would be dissatisfaction with her will.

[9] Here, the testator established a second family with the Applicant but despite that retained a will under which he provided for only his first family. I think it can fairly be said that he must have known that the Applicant would be dissatisfied with his failure to provide for her in his will or otherwise. I think it can also be said that he brought on the litigation by leaving one family out of the picture in circumstances where he could reasonably have expected that a claim on his estate would be made by the second spouse.

[10] It is true that some cases have expressed doubt about whether costs in probate litigation should be ordered to be paid out of the estate: for example, *McCullough Estate v. Ayer*, [1998] A.J. No. 111 (C.A.). However, I take the view that such an order is appropriate in the somewhat unique circumstances of this case.

[11] I would also add that in my view, it was not unreasonable for the Applicant to challenge the legislation as she did, particularly since marital status is now accepted as an analogous ground under s. 15(1) of the Charter: *Miron v. Trudel*, [1995] 2 S.C.R. 418.

[12] Accordingly, I order that costs be paid out of the estate as follows:

1. the Respondents will have one set of costs on a solicitor client basis, to be paid out of the estate;

2. the Applicant will have her party and party costs fixed at $2000.00 inclusive of disbursements, to be paid out of the estate;

3. the Government of the Northwest Territories will have its party and party costs fixed at $1500.00 inclusive of disbursements, to be paid out of the estate.

[13] I draw the attention of counsel to the fact that the style of cause on this Memorandum of Judgment is the same as the style of cause on the originating notice filed January 10, 2001 and is to be used on all documents filed with the Court. Previously filed documents and the Reasons for Judgment filed November 6, 2001 contain a style of cause which is not exactly the same. Any amendments sought should be dealt with by consent order or on application to the Court.

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

Dated at Yellowknife, NT, this 13th day of March 2002

Counsel for the Applicant: Gary Romanchuk
Counsel for the Respondents: Arthur von Kursell
Counsel for the Government of the Northwest Territories: Sheldon Toner
No one appearing for the Public Trustee and the Interested Party

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MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE V.A. SCHULER