THUNDER BAY LAW ASSOCIATION
2013 FALL CONFERENCE

October 25, 2013

COSTS IN ESTATE LITIGATION

Including Issues Relating to Gaps Between Costs Awards
and the Principle of Indemnity of an Estate Trustee for Legal Bills

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1. Introduction

(a) General Litigation Costs

Canada's fee-shifting system in civil litigation, i.e. the tendency for courts to force the losing party to pay a proportion of the successful party's legal fees, is based upon the English fee-shifting system and sets the Canadian system apart from the American system.[1] Costs thus become a form of damage award, and follow the logic that if the unsuccessful party had not made or defended a claim the winning party would not have had to pay legal costs.

Canadian Courts enjoy tremendous discretion with respect to awarding costs. Section 131(1) of Ontario's *Courts of Justice Act*[2] provides the cornerstone of this discretion in Ontario:

> 131(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

The costs awarded in a civil case are subject to rule 57.01(1) of the *Rules of Civil Procedure*[3]:

> 57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
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> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
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> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
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> (a) the amount claimed and the amount recovered in the proceeding;
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> (b) the apportionment of liability;
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> (c) the complexity of the proceeding;
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> (d) the importance of the issues;
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> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
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> (f) whether any step in the proceeding was,
>
> (i) improper, vexatious or unnecessary, or

[1] Walker, The Civil Litigation Process, 7th ed,, Emond Montgomery Publications Limited, Toronto at 117.
[2] RSO 1990, c. C.43.
[3] RRO 1990, Regulation 194.

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) any other matter relevant to the question of costs.

(b) **Estate litigation**

Estates cases, as a subcategory of civil litigation, are subject to the same general cost awards principles as all other civil matters inasmuch as the court has discretion in estates cases to award costs. However, over time a number of concerns that are specific to estate litigation have been addressed by the courts.

Estates matters are often highly contentious. A typical will challenge might see family members battle it out over the allocation of property or money, fighting over deep-seeded emotional standpoints held for years. Even outside of the litigation process, though, estates administration can be contentious. Take for example the widow who refuses to disclose financial assets to the estate trustee, believing incorrectly that the assets do not belong to the estate but rather to the widow because that is what she is convinced had been intended by the deceased. The estate trustee is not only required to collect financial information from a grieving widow who may be difficult to work with because of her grief, but the widow is withholding pertinent information and might even lie to the trustee in order to keep assets she believes should be hers. This uneasy relationship between trustee and beneficiary/family member is not uncommon, and underlines the particularly heavy administrative burden placed upon the trustee. Where estates administration conflicts come to a head in estate litigation, it would only be prudent to expect even more turbulence due to the grief and animosity of the parties.

This brings us to the economic issue of incentives. In the example just mentioned, the widow fears that disclosing her financial situation to the trustee might open herself to the perceived threat of a greedy trustee. As such, even if she knows it to be wrong, the widow might choose not to disclose certain assets in the process of an estate administration. Although the interest in costing another party through litigation both financially and emotionally appears in other areas of civil litigation, in estate litigation it plays a special role inasmuch as the assets of an estate can be dramatically eroded on account of legal costs payable by the estate.

The incentives in the estate litigation process, and the particularly self-defeating nature of these incentives from the perspective of the deceased, are reflective of the balance that must be struck by courts between costs awards and the principle of indemnity of an estate trustee. This balance is the subject of this paper.

Part Two of this paper will address costs awards, including a narration of both the historical approach to costs awards in estate litigation and the modern approach. Part Three shall address indemnity of an estate trustee for the costs of administration of the estate, including legal bills. Addressing general principles from economics, we come to the conclusion that indemnity for trustees is not always the proper incentive when seeking fairness in an estate administration.

In Part Four the paper will review ten recent Ontario cases in estate litigation that are crucial for any estates litigator in realistically assessing the potential costs of litigation with a client. These cases address both the costs awards and the principle of trustee indemnity. Finally, in Part Five, a number of take-away points to be considered by both the lawyer and the client before proceeding with any potential estate litigation will be provided.

2. Costs Awards

It is of crucial importance that all parties to litigation consider the expense of litigation before engaging in the process, and good counsel will take the time to review the expected cost outcomes with a client before commencing proceedings or responding to a statement of claim. In estate litigation, as mentioned above, the costs of litigation can be carried by one of *three* parties: the person who challenges the will, the propounder, and the deceased's estate.

(a) Historical Approach

Traditionally, in most cases, the legal costs of the challenger were paid out of the estate. The rationale behind this was that had the testator taken the care to clearly state their intentions in the will no need for a determination of the will would arise following the testator's death. With judgments granting probate operating *in rem*, courts have determined that estate litigation "is not merely to adjudicate upon a dispute between the parties. It has always had inquisitorial features."[4] Furthermore, the system wants to protect against having a will admitted to probate when in fact it is not the Last Will and Testament of the deceased.

(b) Modern Approach

The historical approach to costs in estate litigation leaves plenty of room for abuse. The clearest example of this is the litigious beneficiary who wants the estate to be distributed differently than the testator expressly wished and brings a claim against the estate in order to prove a point, to diminish the net worth of the estate, or in hopes of extracting a favourable settlement. In a system where individuals are not forced to carry the cost of their own actions, the wrong incentives are clearly at play.

(i) The Rule in *Mitchell v. Gard*

Mitchell v. Gard, a seminal 1863 British case on estate costs, sets out a dichotomy with respect to costs that has reverberated in Canadian case law for more than a century. One author states that, despite the general historical approach, "the traditional approach to estate litigation was never just a blanket policy that all parties' costs were to come out of the estate. Rather, costs in these types of proceedings deviated

[4] *Ettorre Estate, Re,* 2004 CarswellOnt 361 (ONSC) at 41.

from the general rule that costs follow the event in two types of circumstances."[5] The two circumstances as pronounced in *Mitchell v. Gard* are:

> (Rule 1) where the cause of the litigation takes its origin in the fault of the testator or those interested in the residue, the costs may properly be paid out of the estate; and
>
> (Rule 2) if there are sufficient and reasonable grounds (looking to the knowledge and means of knowledge of the party who unsuccessfully opposed probate) to question the validity of the Will, the unsuccessful party may properly be relieved from the costs of his successful opponent.[6]

(ii) Canadian interpretation of *Mitchell v. Gard*

Framing the Canadian interpretation of *Mitchell v. Gard* was a realization in the early 20th century that estate litigation was growing out of hand and that too many frivolous estate litigation cases were being brought at the expense of others. In 1900, an Ontario court stated in *Logan v. Herring* that:

> There is, perhaps, too much litigation in this province growing out of disputed wills. It must not be fostered by awarding costs lightly out of the estate.
>
> Parties should not be tempted into a fruitless litigation...by a knowledge that their costs will be defrayed by others. On the other hand, there is the contrasted danger of letting doubtful wills pass into probate by making the costs of opposing them depend upon successful opposition. It is only by the careful adjustment of costs that these opposite risks can be guarded against.[7]

Recently, in 2005, the Ontario Court of Appeal stated in *McDougald Estate v. Gooderham*[8] that the traditional approach had been displaced and that the modern approach to fixing costs in estate litigation is to place a heavy weight upon the second rule in *Mitchell v. Gard*. Recognizing the false incentives in place in the traditional costs system, the Court determined that a court's role in determining costs is to:

> … carefully scrutinize the litigation and, unless the court finds that one or more of the public policy considerations set out above applies, to follow the costs rules that apply in civil litigation.[9]

The Court in *McDougald Estate v. Gooderham* further stated:

> [78] The practice of the English courts, in estate litigation, is to order the costs of all parties to be paid out of the estate where the litigation arose as a result of the actions of the testator, or those with an interest in the residue of the estate, or where the litigation

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[5] Glowicki, *Estate Litigation Costs – Don't Wait for the* Windfall, accessible online at http://www.millerthomson.com/assets/files/article_attachments/Estate_Litigation_Costs_-_Dont_Wait_for_the_Windfall.pdf at 4.
[6] *Ibid*.
[7] de Vries, *Making Sense of Cost Awards in Estate and Guardianship Litigation: A Witch's Brew?*, at 2-1 – 2-2 citing Logan v. Harring, (1900), 19 P.R. 168.
[8] 2005 CarswellOnt 2407 (ONCA).
[9] *Ibid* at 80.

> was reasonably necessary to ensure the proper administration of the estate. See *Mitchell v. Gard* (1863), 3 Sw. & Tr. 275, 164 E.R. 1280 and *Spiers v. English,* [1907] P. 122. Public policy considerations underlie this approach: it is important that courts give effect to valid wills that reflect the intention of competent testators. Where the difficulties or ambiguities that give rise to the litigation are caused, in whole or in part, by the testator, it seems appropriate that the testator, through his or her estate, bear the costs of their resolution. If there are reasonable grounds upon which to question the execution of the will or the testator's capacity in making the will, it is again in the public interest that such questions be resolved without cost to those questioning the will's validity.
>
> [79] Traditionally, Canadian courts of first instance have followed the approach of the English courts. While the principle was that costs of all parties were ordered payable out of the estate if the dispute arose from an ambiguity or omission in the testator's will or other conduct of the testator, or there were reasonable grounds upon which to question the will's validity, such cost awards became virtually automatic.
>
> [80] However, the traditional approach has been – in my view, correctly – displaced. The modern approach to fixing costs in estate litigation is to carefully scrutinize the litigation and, unless the court finds that one or more of the public policy considerations set out above applies, to follow the costs rules that apply in civil litigation.

In 2009 the Ontario Superior Court of Justice summarized the role played by *McDougald Estate v. Gooderham* and took it one step further in *Salter v. Salter Estate*, stating frankly that:

> … Consequently, the general costs rules for civil litigation apply equally to estates litigation – the loser pays, subject to a court's consideration of all relevant factors under Rule 57, and subject to the limited exceptions described in *McDougald Estate*. **Parties cannot treat the assets of an estate as a kind of ATM bank machine from which withdrawals automatically flow to fund their litigation.** The "loser pays" principle brings needed discipline to civil litigation by requiring parties to assess their personal exposure to costs before launching down the road of a lawsuit or a motion. There is no reason why such discipline should be absent from estate litigation. Quite the contrary. Given the charged emotional dynamics of most pieces of estates litigation, an even greater need exists to impose the discipline of the general costs principle of "loser pays" in order to inject some modicum of reasonableness into decisions about whether to litigate estate-related disputes. [emphasis added][10]

It is safe to say that in Ontario, the tendency of the courts is to enforce the "loser pays" system, subject to a limited number of exceptions.

This change in approach towards costs awards in estate litigation has, predictably, caused a change in how lawyers advise their clients with respect to litigation. Although room is still available for a court to award costs to the estate where there was ambiguity in the testator's will, challengers can no longer act with impunity under the belief that their costs will be paid out of the corpus of the estate, as it is clear that Ontario courts will not hesitate to award costs against the unsuccessful challenger.

(iii) Factors considered in Awarding Costs under *Mitchell v. Gard* Rule 1:

[10] 2009 CanLII 28403 (ONSC) at 5-6.

The rules in *Mitchell v. Gard*, despite being interpreted with a heavy bias towards enforcing the second of the two rules, remain the framework of costs awards in Ontario estate litigation. It has been stated that in order for the first rule to be applied, there must be a substantial link between the testator's actions and the actual need for litigation.[11] Examples where it may be said that a testator is at fault or whose actions or inactions necessitated or caused the litigation are:

- Did the state in which the deceased left his testamentary papers give rise to the challenge?
- Did the testator by his own conduct and habits and mode of life give reasonable ground for questioning his testamentary capacity?
- Did the deceased wait until late in life to execute the will?
- Did the testator procrastinate in making his will?
- Did the deceased advise the non-beneficiaries of his/her intentions?
- Did the deceased allow the beneficiaries to be involved in the making of the will?[12]

(iv) Factors considered in Awarding Costs under *Mitchell v. Gard* Rule 2:

When considering whether a case may qualify for the exemption from the "general civil litigation regime" such that the loser pays principle ought to apply, the courts will consider if this is a case which required investigation by a court. If a party/challenger is able to establish for example that there actually were "suspicious circumstances" present surrounding the execution or preparation of the will, or, if the testatrix's capacity around the time of the execution of the will was compromised such that further inquiry was necessary it would prove more likely that a court will be inclined to order costs to be made payable out of the corpus of the estate. The court will still consider whether reasonable settlement offers were rejected, if the propounder prevented the challenger from assessing their case, if the challenger should have abandoned her case sooner or if the challenger abandoned the case after making reasonable inquiries. [13]

3. Indemnity for Trustees

It is clear from a survey of Canadian literature and case law that the tone in estate litigation has changed. However, underpinning estates law is the principle of indemnity for estate trustees, and this is the counterbalance in the determination of costs.

An estate is not a juridical person. As such, one cannot sue an estate – rather, the only person one may have dealings with when it comes to an estate is the estate trustee. The trustee of an estate can – and should – act as agent for the estate, and during the administration of the estate will incur various

[11] Atin, *Costs of the Challenger in Unsuccessful Will Challenges*, at 14-2.
[12] *Ibid* at 14-2 – 14-3.
[13] *Ibid* at 14-3 – 14-4. Also see case summary below: *Schweitzer v. Piasecki* where the court held that once the challengers obtained evidence of the validity of the will, they should have abandoned their claim. Had they done so they may have been entitled to receive their costs from the corpus of the estate, instead they did not abandon claim until the eve of trial and were ordered to pay their own costs and the costs of the estate trustee.

expenses. It has been held by courts that trustees are to be indemnified for their costs in the reasonable administration of an estate.

In 1991, the Supreme Court of Canada expressed in its decision in *Goodman Estate v. Geffen*[14] the role estate trustees have in covering expenses of the estate, both during the administration of the estate and with respect to any litigation the estate is involved with:

> 75 The courts have long held that trustees are entitled to be indemnified for all costs, including legal costs, which they have reasonably incurred. Reasonable expenses include the costs of an action reasonably defended: see *Re Dingman* (1915), 35 O.L.R. 51. In *Re Dallaway*, [1982] 1 W.L.R. 756, [1982] 3 All E.R. 118, Sir Robert Megarry V.C. stated the rule thus at p. 121:
>
> > In so far as such person [trustee] does not recover his costs from any other person, he is entitled to take his costs out of the fund held by him unless the court otherwise orders; and the court can otherwise order only on the ground that he has acted unreasonably, or in substance for his own benefit, rather than for the benefit of the fund.

According to one author,[15] a number of other principles have emerged from the literature and case law about indemnity. First, the expenses must have been incurred on behalf of or in the course of the administration of the estate. "If they were not, they are not recoverable, even though they were incurred in a related matter and, if not incurred, would have had a deleterious effect on the trust. If they were incurred on behalf of the trust, however, they are recoverable." A second principle is that expenses that have been voluntarily assumed by a trustee are generally not recoverable. In this same vein is the third principle: estate trustees are not entitled to be indemnified for expenses that arose out of their own misconduct.

The principle of indemnification of estate trustees was codified in Canada in the 19th century. In Ontario, the *Trustee Act*[16] provides:

> **Expenses of trustees**
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> **23.1** (1) A trustee who is of the opinion that an expense would be properly incurred in carrying out the trust may,
>
> (a) pay the expense directly from the trust property; or
>
> (b) pay the expense personally and recover a corresponding amount from the trust property.
>
> **Later disallowance by court**
>
> (2) The Superior Court of Justice may afterwards disallow the payment or recovery if it is of the opinion that the expense was not properly incurred in carrying out the trust.

[14] 1991 CarswellAlta 91 (SCC).
[15] Oosterhoff, Indemnity of Estate Trustees as Applied in Recent Cases, 41 The Advocates' Quartlery 1 at 129.
[16] RSO 1990, c T23.

The principle of indemnification is rightly firmly embedded in Canadian law and many other Canadian cases have acknowledged the application of *Goodman Estate v. Geffen*.[17] Oosterhoff states that this principle is "undoubted in the case law" and that not only is the estate trustee "entitled to be indemnified, but the cases and statutes permit them to take the expenses from the estate or trust unless the will or trust instrument provides otherwise. The proviso is that the expenses are *reasonable and properly incurred*." (emphasis added)[18] If, Oosterhoff states, the proceedings are "exclusively for the estate trustee's… benefit, she must bear the expenses personally", and where a trustee is unsure of a proposed expense, the best course of action is to obtain the consent of the beneficiaries or approval of the court.[19]

4. Ten Important Recent Ontario Decisions

A number of influential cases have emerged in Ontario jurisprudence with respect to costs in estate litigation in recent years. The following summaries do not intend to be a complete survey of Ontario law, but will provide the reader with an understanding of some of the major principles that have emerged recently in Ontario case law.

(a) *McDougald Estate v. Gooderham*

This 2005 Ontario Court of Appeal decision is one of the most influential decisions in recent Ontario estate litigation history and is important for the Ontario estates bar to understand well.

Hedley Maude McDougald, a wealthy woman who owned several residences, two stud farms, a valuable collection of antique automobiles and substantial liquid investments made a will in which she left one of her properties and all of its contents to her sister. The residue of her estate was to be divided among a number of relatives, including her two great-nephews, the appellants.

Ms. McDougald's attorneys sold the property in question while she was still alive, and the proceeds of the sale – some US$5 million – were placed in a separate account in the testator's name. The Court was asked to determine whether s.36(1) of the *Substitute Decisions Act, 1992* meant that the bequest of the property to the testator's sister was adeemed by the property's sale. The testator's great-nephews brought a claim against the estate and argued that the proceeds of the property should have been part of the residue of the estate. The Court found that the *Act* meant the property was not adeemed and the gift was intact.[20]

Gillese J.A. determined that the appellant great-nephews pay costs to the respondent on a partial indemnity basis, and in doing so reviewed the basis upon which costs are awarded in estate litigation.[21]

As mentioned above, the Court determined that the traditional approach to estate costs had been displaced and the modern approach intact. Gillese J.A. said this on the modern approach:

> 85 The modern approach to awarding costs, at first instance, in estate litigation recognises the important role that courts play in ensuring that only valid wills executed by competent testators are propounded. It also recognises the need to restrict unwarranted

[17] For the most recent appellate application, see *Racz Estate v. Gidney Estate*, 2013 CarswellBC 2364 (BCCA) at 15.
[18] Oosterhoff at 146.
[19] *Ibid* at 146-147.
[20] *McDougald* at 1-16.
[21] *McDougald* at 77.

> litigation and protect estates from being depleted by litigation. Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation.

The Court also commented on costs awards at the appellate level, stating that "[i]n ordering the appellants to pay costs, I act on the principle that the same rules that govern costs in civil litigation at the appeal level apply to unsuccessful appellants in estate litigation. I see nothing in the circumstances of the parties to warrant departing from that principle."[22]

McDougald Estate v. Gooderham has been cited positively in Ontario law, and has been referred to three times by the Ontario Court of Appeal since 2005, each time reaffirming the principles of the case.[23]

(b) ***Salter Estate***[24]

In 2009 the Ontario Superior Court of Justice considered a case where the testator was ordered to pay an ex-wife $1.45 million in spousal and child support arrears. The estate's liabilities exceeded its assets though and the ex-wife was not paid. The ex-wife, Rodika Salter, claimed that she possessed the sole beneficial interest in certain of Brett Salter's assets prior to his death and a trial was ordered to determine the ex-wife's alternative claims of a constructive trust over the remaining estate assets.[25]

Ms. Salter and the estate trustee submitted that the costs of the motion should be reserved to the judge hearing the trial, while a creditor of the estate submitted that costs should be ordered by the judge hearing the motion.

D.M. Brown J. reviewed the law set out in *McDougald Estate* and stated that the loser pays principle "brings much needed discipline to civil litigation" and that "there is no reason why such discipline should be absent from estate litigation". The Court went on to say that particularly in estates matters it is important that "given the charged emotional dynamics of most pieces of estates litigation, an even greater need exists to impose the discipline of the general costs principle…"[26]

Salter v. Salter Estate has been recognized for a firm approach towards the "loser pays" system and the comments of D.M. Brown J. have been applied broadly in Ontario litigation, most resoundingly in the context of capacity litigation involving incapable persons.[27]

(c) ***Therrien Estate***[28]

In 2008 H.M. Pierce J. of the Ontario Superior Court of Justice heard a case where the plaintiff sought a reconsideration of the court's finding that he wilfully misled the court. The plaintiff, in his capacity as

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[22] *McDougald* at 91.
[23] See *Orfus Estate v. Samuel & Bessie Orfus Family Foundation*, 2013 CarswellOnt 3927 (ONCA); *Mountain v. Mountain Estate*, 2012 CarswellOnt 14731 (ONCA); and *Ker Estate v. DeRose*, 2009 CarswellOnt 2265 (ONCA).
[24] *Salter v. Salter Estate*, 2009 CarswellOnt 3175 (ONSC).
[25] *Ibid* at 1.
[26] *Ibid* at 5-6.
[27] See *Fiacco v. Lombardi*, 2009 CarswellOnt 5188 (ONSC).
[28] *Therrien Estate v. 1401384 Ontario Ltd.,* 2008 CarswellOnt 2690 (ONSC).

estate trustee for his mother's estate, sought an interlocutory injunction preventing the defendants from disbursing proceedings of an auction sale, but the plaintiff's motion had been dismissed.[29]

Joseph Delphis Norman Therrien had stated in affidavit materials that he was the sole executor and estate trustee for the estate of his mother, Antoinette Therrien, but the defendant's material revealed that the Superior Court of Justice had ordered the plaintiff to return his Certificate of appointment.[30]

In awarding costs, the Court found that Mr. Therrien should pay the costs for two reasons:

> (1) The law requires an estate trustee (or executor) to prove his executor's title to the court by virtue of a certificate of appointment or letters probate. Mr. Therrien knew or should have known he could not do so. In *Eurig Estate, Re*, [1997] O.J. No. 101 (Ont. C.A.), at paragraph 56 the court observed:
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> > Further, apart the general legal duty to administer the estate promptly and efficiently, which almost invariably requires the executor to obtain probate, the law imposes the requirement that an executor must have probate to prove his or her title when an estate matter is before the court. Letters Probate are the only evidence of an executor's title which a court will receive. ...
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> (2) It is necessary to constrain litigation so that an estate will not be unnecessaryily [stet] depleted. At paragraph 85 of *McDougald Estate v. Gooderham*, [2005] O.J. No. 2432 (Ont. C.A.) the court referred to:
>
> > ... the need to restrict unwarranted litigation and protect estates from being depleted by litigation. Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in purusing [stet] estate litigation.

Bearing in mind that Mr. Therrien was on notice that he did not have a strong case for an injunction yet proceeded nonetheless, the Court found that it was appropriate for the plaintiff to pay the costs personally.

(d) ***Noik Estate***[31]

In 2004 the Court of Appeal heard an appeal of a case where the will was found not to have specifically addressed the testator's interest in the matrimonial home.

Gordon Noik and his wife, the appellant, had purchased a property as tenants in common and lived there together. In his will, Mr. Noik had bequeathed his real property to his two children, but gave his wife an interest in the house using the words "during her lifetime" to describe her interest. The ambiguity of the will caused the trial judge to investigate the meaning of the phrase "during her lifetime" and the trial court

[29] *Ibid* at 2.
[30] *Ibid* at 3.
[31] *Noik v. Noik Estate*, 2004 CarswellOnt 1909 (ONCA).

determined that to give Mrs. Noik more than a life interest would require going beyond the obvious and ordinary meaning of the words of the will.[32]

On appeal, the Court disagreed with the trial decision and found that apart from the disputed paragraph the will was silent with respect to Mr. Noik's interest in the matrimonial home. The Court found that it is only by reading into the will that one could find that the matrimonial home be divided between the testator's two children.[33]

Although the decision of the appellate court was brief and the discussion of costs even briefer, *Noik v. Noik Estate* serves as a reminder that the first rule from *Mitchell v. Gard* continues to play a role in estate costs. The Court varied the costs order below to allow the appellant costs payable out of the estate, and awarded costs of the appeal to the appellant, also payable out of the estate.[34]

(e) ***Kaptyn Estate***[35]

In *Kaptyn Estate*, a successful businessman left behind a substantial estate, the distribution of which his two sons disputed. At the will challenge trial, Justice Lederer found that the problems with the estate arose from the "actions, omissions, instructions and decisions" of Kaptyn himself.[36]

All the parties were ultimately awarded full indemnity costs payable out of the estate, which sets this decision apart in that it takes the first rule articulated in *Mitchell v. Gard* to an extreme, going a step further than *Noik v. Noik Estate* and finding that the ambiguity in the will is the burden of the testator, not of the parties to litigation.

Justice Lederer stated, in an unreported decision on December 4, 2008, that:

> [a]s a general rule and in this case in particular, problems with a Will can be said to arise from the actions, omissions, instructions and decisions of the Testator. The Trustees are to put in place by the Will to represent the Estate. They are not here out of choice, hence, it is reasonable that they are not to be "out-of-pocket". They should be paid on a full indemnity scale. Here, Jonathan and Jason carried the weight of supporting the Will. They too should be paid on a full indemnity scale.[37]

Notably, the unreported decision was cited in *Penney Estate v. Resetar*,[38] and the Ontario Superior Court of Justice in that case found that counsel should not be paying for the litigation out of their pockets: "if estate trustees or estate trustees during litigation are expected to bear their own costs during the course of litigation, not only would they refuse to be appointed, estate trustees and estate trustees [sic] would also be reluctant to bring proceedings to advance the due administration of the estate and protect the interest of the beneficiaries."[39]

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[32] *Ibid* at 1-3.
[33] *Ibid* at 7.
[34] *Ibid* at 14-15.
[35] Unreported decision. Trial decision: *Kaptyn Estate*, 2008 CanLII 53123 (ON SC).
[36] *Ibid* at 13.
[37] *Ibid* at 3.
[38] 2011 CarswellOnt 744 (ONSC).
[39] *Ibid* at 19.

(f) ***Blanchard v. Bober***[40]

The applicant in this case brought a claim to challenge the will, stating that the deceased's will was null and void. In particular, the applicant, who was almost 60 at the time the court heard the motion, was the only surviving child of the testator and had been supported by Ontario Disability Support Payment for more than a decade at the point in time his mother died. The applicant was on government support because of mental and emotional disorders, and claimed to have recently suffered a second heart attack. Carey J. determined that there was no genuine issue requiring trial due to the fact that there was no evidence that the applicant was at any time a dependent of the deceased. [41]

The respondents were able to bring a successful motion for summary judgment to dismiss the applicant's claim, and submitted that they should be awarded costs of roughly $92,000, which were extraordinary in relation to the means of the losing applicant's means. Although Rule 57.01 does not specify financial hardship as a factor to be considered, the Court found that nonetheless, "given the fundamental nature on access to justice, and the overriding principle of reasonableness… there is no risk of the applicant ignoring the rules of the court and no future conduct to deter". As such, "the losing applicant's means should be considered and falls within rule 57.01(i), "any other matter relevant to the question of costs"."[42] Ultimately, costs were fixed at $8,000 inclusive given the unreasonable expenditure of the respondent of almost 350 lawyer hours.

The court also concluded that it could not accept that the respondents would have expected to expend close to half of the value of the estate on the motion. Given his limited means, the applicant would have expected his fees to be more like ten percent of what was claimed by the respondent, and the Court considered this in rendering its decision.[43]

(g) ***Reid Estate***[44]

Reid Estate v. Reid saw a dispute between two elderly brothers over their deceased mother's estate. According to the mother's will, which was found to be clearly written, her estate was to be divided equally between her two sons.[45] The litigation was based upon an intense dislike shared by the brothers for each other and a transfer of the title to the matrimonial home into joint tenancy with the younger son one month before the mother's death.[46] Litigation was quite expensive, and the court received separate submissions on costs having found that the parties should agree on a neutral estate trustee who could be appointed to wrap up the estate.

M.A. Code J. in fixing costs surveyed the law on costs in estate litigation and found that the correct approach had been set out in *McDougald Estate v. Gooderham*.[47] Justice Code determined that litigation was caused by the dispute between the brothers and not by the mother's decision to transfer title prior to her death, and as such found that the ordinary cost rules should apply. Justice Code went on to consider a Rule 49 offer to settle and determined that Lynn Reid, the brother who had offered to settle, achieved

[40] 2013 CarswellOnt 10979 (ONSC).
[41] 2013 CarswelOnt 5184 (ONSC) at 1-7.
[42] 2013 CarswellOnt 10979 (ONSC) at 14.
[43] *Ibid* at 11.
[44] *Reid Estate v. Reid*, 2010 CarswellOnt 5216 (ONSC).
[45] *Reid Estate v. Reid*, 2010 CarswellOnt 2782 (SCJ) at 6 and 8.
[46] *Ibid* at 9.
[47] *Reid Estate v. Reid*, 2010 CarswellOnt 5216 (SCJ) at 4.

much greater success at trial than under his offer to settle. Ultimately, the Court found that the presumptive effect of Rule 49 should be followed in estate litigation.[48]

Justice Code also reviewed the overall reasonableness of the costs of the winning party and reviewed the applicability of Rule 57.01:

> 15 Lynn Reid's costs incurred, both before and after the March 20, 2008 offer to settle, are substantial. In assessing the overall reasonableness of his costs, there are five factors in Rule 57.01 that are particularly important:
>
> (i) the costs that "an unsuccessful party could reasonably expect to pay";
>
> (ii) "the amount claimed and the amount recovered";
>
> (iii) "the complexity of the proceeding";
>
> (iv) "the importance of the issues"; and
>
> (v) "the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding".[49]

(h) ***DeLorenzo v. Beresh***[50]

In *DeLorenzo v. Beresh*, the Ontario Superior Court of Justice reviewed an application by beneficiaries to determine a number of questions, including whether it was appropriate for an estate trustee to use estate funds to pay legal fees.

The dispute in the estate was concerning a residual beneficiary who, having reached the specified age under a testamentary trust, sought to have the estate trustee, a solicitor, transfer the capital of her interest under the trust to her. The trustee, who may have been dilatory in obtaining a tax clearance certificate, resisted the claim to transfer the capital, since he claimed a lien for compensation and expenses as trustee on the estate funds. Given the numerous ongoing proceedings before the court, legal expenses had been building, and the trustee had been paying his own legal costs out of the estate funds. Lofchik J. explained the situation as follows:

> 20 Generally speaking, the executor and any beneficiary properly attending and represented by a lawyer on a passing of accounts is awarded full compensation for his or her legal expenses from the trust fund being the estate of the testator being administered by the executor. It is the well settled principle that full indemnity of the trustee's proper costs, charges and expenses in administering an estate is the price to be paid by the cestuis que trust for the services of the trustee and that the trustee must not be required to pay them personally.
> …

[48] *Ibid* at 14.
[49] *Ibid* at 15.
[50] 2010 CarswellOnt 7756 (ONSC).

> 22 This is to be contrasted with contentious or adversarial legal proceedings in which the general rule is that the successful party is awarded its costs, on the lower party and party scale to be paid by the unsuccessful party. This contrast arises because generally speaking there is no losing party to pay costs on an audit, so that each party is responsible to pay his or her own legal expenses which are ordered to be paid from the estate as the trust fund created by the testator represents the only source of money to pay the costs.
>
> 23 When there is litigation between the estate trustee and the beneficiaries related to the question of whether or not the trustee has properly discharged his duties, including timely steps to pass his accounts, different considerations apply in my view. Ultimately the issue of whether the trustee is entitled charge the estate with his legal fees may turn on the outcome and it should be determined on a passing of accounts or court application, if not agreed to by the beneficiaries. [citations omitted.]

Addressing the present situation, Justice Lofchik stated that the outcome of the litigation would greatly impact what costs each party should be required to bear. In that case, the Court stated that it is preferable to have each of the parties covering their own costs until the litigation is complete: "it would be inequitable [otherwise] to have the estate trustee pay his legal costs from the estate funds and require the applicants, whose funds are tied up in estate, to bear their own legal costs while the litigation is proceeding."[51]

(i) ***Schweitzer v. Piasecki***[52]

In Madam Justice Haley's decision in *Schweitzer v. Piasecki*, the Court ordered costs against parties who had challenged the validity of the will. That challenge had been abandoned on the eve of trial.

The deceased had prepared three different wills using different solicitors within a period of nine months at the ripe old age of 84. The wills had included nieces and nephews as beneficiaries until the final will, which provided for one nephew to be the executor and sole beneficiary of the estate. Certain of the nieces challenged the will on various grounds, including suspicious circumstances and undue influence. However, on the eve of trial, the nieces abandoned their claim. Nevertheless, they sought their costs from the estate.

Madam Justice Haley was not persuaded that any reasonable person would embark upon requiring the will to be proved in solemn form based upon the allegations of suspicious circumstances. The actions of the testatrix had not raised any question concerning the validity of the will. Moreover, Her Honour was satisfied that the inquiries of the disappointed beneficiaries were not motivated by a *bona fide* desire to have the Court investigate the circumstances of the making of the will and determine its validity, but instead were motivated by family animosity and bitterness of long-standing. Applying an objective test to the facts, Her Honour was not satisfied that this was a case where a court would have encouraged proof of the will in solemn form.

Madam Justice Haley noted that she reached her conclusions without the benefit of a trial, so she had not had the opportunity of seeing the witnesses, assessing credibility and determining the facts. She had attempted, therefore, to base her decision on only those facts upon which the parties agreed and on the

[51] *Ibid* at 24.
[52] (1998), 20 ETR (2d) 233 (Ont Gen Div).

sworn evidence of the disappointed beneficiaries furnished by way of their affidavits filed with the court and by transcripts of their evidence.

Madam Justice Haley noted that the law of costs in estate matters diverges from the usual rule that costs follow the event: the costs of all parties generally come out of the estate. However, in this case, the nieces had evidence that the will was legitimate. They were denied their costs out of the estate. In fact, they were ordered to pay the nephew's costs throughout on a party-and-party basis and, after discovery, on a solicitor-and-client basis.

This case is certainly a strong warning to us all as to the risk of pursuing marginal will contestations.

(j) *Smith Estate v. Rotstein*[53]

In *Smith Estate v. Rotstein*, a brother moved for partial summary judgment to set aside and expunge an amended notice of objection filed by his sister. The motion was granted by the lower court and the sister appealed. The Court of Appeal dismissed the sister's appeal, stating that the general rule requires that all testamentary documents be proven or probated at the same time. The appellant also appealed the motion judge's costs award, to which the respondent responded with a 15 page factum and oral argument.

The Court considered two issues: whether the motion judge erred in failing to assess the overall reasonableness of costs, and whether the nature of the notice of objection should be considered in determining the scale of costs.[54] In so considering, the Court determined that there is no requirement for the losing party, who is not seeking costs, to file a bill of costs although it is preferable that he or she does so. If a party does not submit a bill of costs, however, this is a factor that the judge may take into account when considering the reasonable expectations of the losing party.[55] The Court also determined that the nature of notice of objection had been properly considered by the lower court.

5. Summary

Although the general law with respect to costs in estate litigation have been hinted at for over a century in Canadian law, a number of recent Ontario cases have cemented the approach courts are to take with respect to awarding costs and providing for indemnity of the estate trustee. It is important to note that not only has there been a substantial shift in the case law from the traditional approach, but that in the past decade the law has continued to be refined. Courts seem open to considering the facts of any particular case, which we argue is a worthy direction for the law to be heading in, given the highly contentious, emotional, and fact-specific nature of estate litigation.

All lawyers should be aware of the precedent emerging out of Ontario courts when advising clients on the administration of estates, and should be particularly cautious with respect to accruing exorbitant expenses or bringing frivolous claims in court as the courts appear particularly willing to award costs to incentivize certain behaviour.

The following factors have emerged from Ontario jurisprudence and should be reviewed with clients where relevant:

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[53] 2011 CarswellOnt 5677 (ONCA).
[54] *Ibid* at 47-48.
[55] *Ibid* at 50-54.

- Estate costs not to be paid automatically out of estate;
- Appellate costs in estate litigation to be governed by same rules governing costs in civil litigation;
- There is no reason the “loser pays” discipline should be missing from estate litigation;
- Trial judges can best determine costs in estate litigation matters;
- Where a party is on notice that the case in their support is weak, that party will likely be personally liable for costs of the proceeding;
- Where the will is unclear, it is more likely that costs will payable out of the estate;
- The principle of indemnity for estate trustees will continue to apply as it is reasonable that they are not to be “out-of-pocket” for their costs unless they are taking a position for which they personally benefit;
- The means of the losing party can impact the cost awards in estate litigation under Rule 57.01;
- Reasonable expectations of the losing party of quantum given weight where costs of winning party unreasonable;
- Offers to settle in estate litigation should be viewed in same light as in civil matters: Rule 49 applies;
- Some factors in Rule 57.01 are given more weight by judges in estate litigation cases; and
- Indemnity is distinguishable from legal costs incurred in contentious or adversarial legal.