

## WHO PAYS IN ESTATE LITIGATION or THE REAL COST OF LITIGATING

“In my opinion, it is often the case that wills are challenged in the expectation that there is little or nothing to lose by doing so, because at the end of the day, costs will be payable by the state. The challenger, often a slighted relative who is denied the testator’s largess, has everything to gain and nothing to lose by trying to overturn the will.” McDermid J. in *Beaurone v. Beaurone* (1997), (Ont. Gen. Div.)

Leading case – *McDougald Estate v. Gooderham* (2005), Ont. C.A., Gillese J.

### Facts

In 1986, Ms. MacDougald made a will in which she left her Palm Beach property and all of its contents, to her sister, Cecil Hedstrom

Ms. MacDougald’s will also provided that the residue of her estate was to be divided among a number of relatives, including her two great-nephews, the appellants

In 1992, Ms. MacDougald executed a continuing power of attorney, in which she appointed, as her attorneys, the same four people who were the officers and directors of El Briollo.

El Briollo was a corporation that held Ms. MacDougald’s Palm Beach property

In February 1996, Ms. MacDougald’s attorney sold the Palm Beach property, while she was still alive, for \$5 million.

At the attorneys’ direction, the net proceeds of sale were placed in a separate bank account in the testator’s name

Ms. MacDougald died on November 17, 1996 at the age of 87. Her sister, Cecil Hedstrom, survived her by more than 60 days.

Ms. MacDougald’s estate brought an application for directions in respect of the proceeds of the sale of the property.

Wilson J. found that Ms. MacDougald was incapable of managing her property at the time of her death.

Wilson J. held that, by virtue of section 36(1) of the SDA, the specific bequest did not adeem as result of the sale and the proceeds of sale did not form part of the residue of the estate.

Section 36(1) of the SDA: The doctrine of ademption does not apply to property that a guardian of property disposes of under this Act, and anyone who would have acquired an interest in the property acquires a corresponding interest n the proceeds.

## **Appeal**

Appealed by the residue beneficiaries from the decision of Wilson, J.

The residue beneficiaries argued that Wilson J. erred in concluding that the anti-ademption provision of the SDA applied. Bequest adeemed as a result of the sale and the sale proceeds form part of the residue of the estate.

Appeal dismissed

Evidence of Ms. MacDougald's incapacity was overwhelming and there was not basis upon which to interfere with the application of the judge's finding.

Wilson J. did not err in concluding that s. 36(1) applied to the bequest.

Pursuant to section 36(1): the residence was a property; the attorneys, as guardians, disposed of the property; the sale was a type of disposition; and the attorneys' disposed of the property under the Act.

## **Costs**

The appellants sought their costs from the estate, on a substantial indemnity basis, in any event of the outcome of the appeal.

Alternatively, if unsuccessful on appeal, they seek an order that their costs be paid from the estate on a partial indemnity basis or that they bear their own costs.

As support for their primary position, the appellants point to the fact that the traditional rule in estate litigation is that the estate bears the costs of all parties.

The respondents ask that costs follow the event.

Court of Appeal held that the appellant pay costs to the respondent on a partial indemnity basis.

### **Traditional English Rule**

The practice in English courts, in estate litigation, is to order the costs of all parties to be paid out of the estate where:

1. the litigation arose out of the actions of the testator or those with an interest in the residue of the estate – e.g. ambiguity or omission;
2. where the litigation was reasonably necessary to ensure the proper administration of the estate.

Public policy considerations underlie this approach:

1. it is important that courts give effect to valid wills that reflect the intention of competent testators;
2. 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 – e.g. dependant support claims;
3. 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 costs to those questioning the will's validity – e.g. testamentary capacity and undue influence.

Traditionally Canadian courts of first instance have followed this approach.

Parties initiating estate litigation could do so almost with impunity in all but the most flagrant examples of unfounded claims – i.e. party and party costs payable out of the estate to all parties despite the outcome

Costs not always considered when deciding to initiate estate litigation. Contrast that to commercial litigation

Traditional approach now displaced. “[I]n my view, correctly displaced”

“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.” Gillese J.

Modern approach to awarding costs in first instance recognises:

1. The important role that courts play in ensuring that only valid wills executed by competent testators are propounded (public policy considerations referred to above);
2. 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 perceived there is nothing to be lost in pursuing estate litigation”. Gillese J.

### **Costs on Appeal**

Costs are normally ordered against an unsuccessful appellant

The same rules that govern costs in civil litigation at the appeal level apply to unsuccessful appellants in estate litigation.

Nothing in the circumstances of the parties to warrant departing from that principle

Leaves the door open to argue costs, in the right circumstances, could be paid by estate

In MacDougald, appellants were two of the eight remaining residuary beneficiaries of the estate

Other residuary beneficiaries took no position

Matters that concerned the appellants thoroughly dealt with below

Wilson J. gave thoughtful, cogent reasons

Wilson J. allowed appellants their costs, payable out of the estate

To require the estate to pay the costs of the appeal for all parties would be to make all of the residuary beneficiaries pay for the application and the appeal

### **Modern Rule/Approach Examples**

*Merry Estate v. Merry Estate (2002)*, Ont S.C.J., Cullity J.

At common law, a trustee is entitled to full indemnification for costs incurred in a proceeding before the court for advice and direction.

Rule 57 amended January 2002. Refers to partial indemnity or substantial indemnity.

Costs to be calculated in accordance with the new tariff or cost grid referred to substantial indemnity (based on years of practice of counsel).

Costs awarded on a substantial indemnity basis may not fully indemnify a trustee

Cullity J. concluded that the provision of the new rules requiring costs to be fixed in accordance with the grid, have no application to an executor's or trustee's costs that are ordered to be paid out of an estate or trust

Caution – only applies where , prior to the amendments to the rules, costs would have been awarded to an executor, trustee, or per person out of a trust or estate on a solicitor and client scale

*Re Lotzkar (1985)*, (B.C.S.C.)

An executor has an obligation to seek the advice and direction of the court where there is room for serious doubt or difference of opinion in respect to the interpretation of a will.

Cost awards cannot be used to deter executors from fulfilling that obligation.

Where proposal brought forward by executor was improvident and opposed by the majority of the beneficiaries, court held that the proposal was unnecessary and ill-advised. Executors to bear own costs and pay the costs of the responding parties (beneficiaries).

*Re Marshall Estate (1998)*, (Ont. Gen. Div.)

Costs ordered against the unsuccessful challenger on a solicitor and client basis – why -

Attack on testamentary capacity was unreasonable,

No reasonable grounds for persisting with the litigation and its continued pursuit was irresponsible

*Gamble v. McCormick (2002)*, (Ont. S.C.J.), Greer J.

13 day trial

No reasonable basis to a husband's challenge to the validity of his late wife's will. None of the allegations raised by the husband were found to be valid and was clearly wrong in challenging his late wife's will.

“The cost of the emotional wreckage caused by this trial to all parties, leaving what had been a warm, loving family unit in tatters, is incalculable. None of their lives will ever be the same again. Costs on a solicitor and client basis cannot heal those wounds. It can only pay for the monetary costs of what took place.”

Solicitor and client costs are normally reserved for rare and exceptional cases.

Awarded against unsuccessful challengers where the allegations are:

Particularly unreasonable;

the costs of the beneficiaries both financially and emotionally are particularly high; and

the litigation is, on the whole, wasteful.

*Re Eyre Estate (1990)*, Ont. Gen. Div., Coe J.

Public Trustee received no costs and was ordered to pay the trial costs of the other parties on a party-and-party basis

Public trustee represented charities, and the court very critical of the amount of time that was taken at trial by the Public Trustee

*Bahry v. Zytaruk (2002)*, Alta Q.B., Clark J.

If reasonable overtures of settlement are rebuffed by the opposite party in a will challenge, the court will likely consider such conduct unreasonable and penalize the party with liability for costs

Therefore, if a solicitor regards the position of the parties propounding or challenging the will of little merit, as the case may be, he/she should advise opposing counsel that his/her client will be seeking an order directly costs be paid by that party if they persist

A formal offer to settle will further enhance the position of the parties offering the settlement and placing the opposing party in “greater apparel in regards to disposition of costs”.

Fair v. Campbell Estate (2002), Ont. S.C.J., Langdon J.

The deceased's grandchildren challenged their grandmother's will and *inter vivos* transaction regarding the family cottage

Grandchildren also alleged fraud on the basis of evidence the judge considered insufficient. "[O]ne who makes such charges, when they are unsubstantiated, is to be visited with costs to the fullest extent possible".

Grandchildren ordered to pay substantial indemnity costs of both actions

### **Dependent Support Claims**

With respect to dependant support claim, given that the legislation is remedial legislation passed in response to social policy, it is very seldom that a court will not grant the unsuccessful applicant his or her costs payable out of the estate.

However if the claim is without substance and the applicant rejected an otherwise reasonable settlement offer, the applicant may receive no costs. Courts will increasingly examine the specific circumstances of the case and give consideration to denying costs to the unsuccessful applicant and even requiring that person to pay costs.

In *Cummings v. Cummings*, Ontario C.A. held that there was no error on the part of Cullity J. in exercising his discretion to order that the parties must bear their own costs.

Court will likely depart from the more traditional order of all costs of the parties payable out of the estates, having regard to:

The relative merits of the applicants case (particularly where the applicant is unsuccessful and the court considers the case to be entirely unfounded);

The conduct of all the parties in dealing with the litigation; and

The reasonableness of refusals to compromise or settle the proceedings.

## **Passing of Accounts**

Re Flaska Estate (2001), (Ont. S.C.J.), Haley J.

Estate worth approximately 12 million

Its administration very contentious

Passing of accounts lasted approximately four days and included oral testimony by all parties

Haley J. noted that the usual costs order on a passing of accounts was to the estate trustee on a solicitor and client basis and to the other parties on a party and party basis payable under the capital of the estate

Such an order not appropriate

Estate trustees not successful at trial with regard to the compensation they claim, and because of their failure to invest and diversify, it was not fair to order all of their costs payable out of the estate.

Estate trustees had legal fees totalling \$69,201 and disbursements totalling \$19,744.

Haley J. ordered that the estate trustees were allowed party and party costs fixed at \$50,000, plus disbursements payable 2/3 out of the capital and 1/3 out of the revenue of the estate. Out of this amount, they were ordered to pay \$15,000 to Astrid Flaska personally, as she was entirely successful at trial (she represented herself)

The Children's Lawyer claimed \$100,000.

Haley J. found that because the Children's Lawyer was successful at trial with regard to the failure of the estate trustees to diversify, but not wholly successful, she was not prepared to award costs to the Children's Lawyer on a solicitor and client scale.

Accordingly, Haley J. allowed the Children's Lawyer costs on a party and party scale, to be charged 2/3 against capital and 1/3 against revenue, in recognition of the fact that the life tenants might have enjoyed greater revenues because of the court adopted by the estate trustee

## **Conclusion**

“There is, perhaps, too much litigation in this province growing out of disputed will. 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. (*Logan v. Herring* (1900))

Courts are becoming increasingly prepared to deny costs to an unsuccessful party and to require the unsuccessful party to pay a port of the costs of the successful parties.

Court will consider:

The degree of merit to the position taken or claim being made;

Which party bears the onus of proof;

The increased likelihood that the court will deny costs of the estate where the estate is relatively modest;

The extent of reasonable efforts to settle the matter;

The professional obligation of counsel to his client and the court to discuss fully the hazards of proceeding with unmeritorious litigation and the possible cost consequences to the client.

Whether allegations of misconduct or improper behaviour on the part of an individual have been proved. Particularly true of allegations of undue influence and fraud, where the burden of proof rests with the party making the assertion.

If little substantive evidence is available to substantiate the allegation, the challenging party would be wise to withdraw such an allegation and rely on other grounds, lack of due execution, testamentary capacity or the present of suspicious circumstances, which place the onus of proof exclusively upon those propounding the will.

In the absence of wrongdoing on the part of an estate trustee, a court will recognize the executor's duty to propound the will and rarely deny the estate trustee solicitor and client costs, even if he/she is unsuccessful.

However, where an estate trustee appeals an unsuccessful result, the estate trustee is going beyond their duty of propounding the will and will be personally liable

An uncooperative, intransigent attitude, as well as activities by a party that are viewed by the court to inhibit non-prejudicial aspects of the administration of the estate, or the conduct of the proceedings, will increase the probability that a court will order costs against such a party

If a solicitor fails in the duty to the court to ensure that proper disclosure is made and to refrain from adding the client in making totally unfounded allegations of undue influence or fraud, the solicitor may be held to be personally liable.