COSTS IN ESTATE LITIGATION

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Estate Litigation: The Practical Guide for Legal Professionals

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1. Introduction

Estate litigation can involve complex facts, situations, and emotions and parties can quickly get caught up in the "blame game." Sometimes, the costs of pursuing expensive litigation can be overlooked in the heat of the moment. However, with the evolving law surrounding costs in estates, costs should be top of mind for both clients and lawyers throughout an estate dispute. The conduct of the parties and the steps taken can have an impact on how costs are apportioned once a decision is rendered.

This paper will provide an overview of costs in estate litigation by starting with a brief summary of the historical approach to costs, followed by the modern approach, recent case law, and other cost considerations (such as the impact of Rule 49 Offers and Rule 57)[1].

2. Historical Approach

Dating back to the 1800s, the historical practice of English courts was to award costs of all parties to an estate litigation matter payable out of the assets of the estate. This practice developed due to the public policy consideration for English courts to give effect to valid Wills that reflect the intention of a competent testator. To do so, the English courts awarded the costs of all parties to be paid out of the estate where the litigation arose as a result of: (1) an ambiguity or omission in the testator's Will, or other conduct; or, (2) there were reasonable grounds upon which to question the Will's validity.

[1] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 49, 57 *("Rules").*

The policy concerns for this approach evolved from a testator's own actions which gave rise to the litigation. It seemed fair for the testator to be responsible for the costs and as such they were ordered payable out of the estate, rather than borne by the parties. Additionally, the courts have always had the responsibility to ensure that estates are properly administered and that only valid Wills are admitted to probate.

However, as estate litigation has evolved, so too has the approach to costs. With the guarantee that a litigant's costs would be paid through the assets of the estate, there was no incentive for parties to act reasonably or proportionately. Therefore, in order to deter improper behaviour, courts have taken a "modern approach" to costs in estate litigation by implementing the usual "loser pays" approach in civil litigation.

3. The Modern Approach

The change began with the decision of the Ontario Court of Appeal in *McDougald Estate v. Gooderham.*[2] In that decision, Gillese J.A., clarified on behalf of the Ontario Court of Appeal that the "historical approach" to costs awards in estate litigation has been displaced by the "modern approach."

Her Honour explained that the historical approach developed due to the public policy consideration for English courts to give effect to valid Wills that reflected the intention of a competent testator. Her Honour also noted that it had become "virtually automatic" for Canadian courts of first instance to apply this historical approach in estate litigation.

[2] (2005) 255 DLR (4th) 435; 199 OAC 203; 17 ETR (3d) 36; 2005 CanLII 21091 (ON CA).

Gillese J.A., also explained that the modern approach correctly permitted courts at first instance to scrutinize the litigation and, unless the court found that one or more of the public policy considerations applied, costs rules in civil litigation would follow. The modern approach allows the courts to ensure that only valid Wills executed by competent testators are propounded and to protect estates from being depleted by unwarranted litigation. Lastly, Her Honour affirmed that "[g]one 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."

In *Salter v Salter Estate*,[3] Brown J. (as he then was) was not impressed that the parties were treating the assets of the estate "as a kind of ATM bank machine for which withdrawals automatically flow to fund litigation."[4] His Honour further explained that the "loser pays" principle of civil litigation brings needed discipline to the parties and that "given the charged emotional dynamics of most pieces of estate 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."[5]

Shortly thereafter, Strathy J., as he then was, held in *Zimmerman v Fenwick*[6] that the following principles were appropriate in determining the issue of costs sought by the objectors to the conduct of the estate trustee's administration of the estate:

[3] Salter v Salter Estate (2009), 50 ETR (3d) 227 (Ont SC) ("*Salter Estate*").
[4] *Ibid* at para 6.
[5] *Ibid* at para 6.
[6] 2010 ONSC 3855 ("*Zimmerman*").

1. pursuant to s. 131 of the *Courts of Justice Act,* the costs of a proceeding are in the discretion of the court and the court may determine by whom and to what extent costs should be paid;

2. estate litigation, like any form of civil litigation, operates subject to the general civil litigation costs regime;

3. as a general proposition, the principle that the "loser pays" applies to estate litigation;

4. in the determination of costs, the court must have regard to the factors set out in Rule 57 of the *Rules of Civil Procedure,* R.O. 1990, Reg. 194, but, at the end of the day, the court's responsibility is to make an award that is fair and reasonable, having regard to all the circumstances, including the reasonable expectations of the parties;

5. the court's discretion to award costs on a full indemnity basis is preserved by Rule 57.01(4)(d); and,

6. full indemnity costs are reserved for those exceptional circumstances where justice can only be done by complete indemnity.[7]

In *Sawdon Estate v Watch Tower Bible and Tract Society of Canada*,[8] Gillese J.A., with Strathy J.A., concurring, combined the decisions in *McDougald Estate* and *Zimmerman*, respectively, to further clarify the modern approach to costs in estate litigation. The following was stated by the Court of Appeal in *Sawdon Estate*:

> The court is to carefully scrutinize the litigation and unless, it finds that one or more of the relevant public policy considerations apply, it shall follow the costs rules that apply in civil litigation. That is, the starting point is that estate litigation, like any other form of civil litigation, operates subject to the general civil litigation costs regime established by section 131 of the *Courts of Justice Act*, RSO 1990, c C 43 and Rule 57 of the *Rules of Civil Procedure*, SO 1990, Reg. 194, except in those limited circumstances where public policy considerations apply.

[7] *Zimmerman* at para 4.
[8] 2014 ONCA 101 ("*Sawdon*").

> The public policy considerations at play in estate litigation are primarily of two sorts: (1) the need to give effect to valid wills that reflect the intention of competent testators; and (2) the need to ensure that estates are properly administered.[9]

Gillese J.A., also noted in the decision of *Sawdon Estate* that there was nothing in the jurisprudence that would prevent a court from making a "blended costs" order from both the unsuccessful party and the estate. The court noted that the availability of a blended costs order gives the court the ability to respect the public policy considerations that may be involved and to maintain the discipline of which Brown J. clarified in *Salter Estate*.[10]

With the modern approach, a shift has emerged with an increase in costs consequences being borne by the parties (or even counsel in some cases) and the estate being shielded from payment of costs in certain situations.

4. When Should the Estate Pay Costs?

Even with the new modern approach to costs in estate litigation, the courts still have discretion to award costs out of the estate, especially when the problems giving rise to the litigation were caused by the testator.

In cases where the testator caused the dispute by ambiguous drafting or careless reading of the Will, or by making bequests that are calculated to cause conflict among beneficiaries, it can be appropriate to require his or her estate to bear the costs of resolving the conflict.[11] Otherwise, estate trustees

[9] *Sawdon* at paras 84-85.
[10] *Sawdon* at para 97; see also *Neuberger Estate v York*, 2016 ONCA 303 at paras 24 & 25.
[11] See *Arvanitis v Levers*, 2017 ONSC 3758 at para 80 and for a review of costs principles in estate litigation see paras 68-98 and 110-135.

might decline to accept appointment, or might avoid legal proceedings that are needed to ensure that the estate is properly administered.[12]

If there are reasonable grounds to question the execution of the Will, or to question whether the testator had testamentary capacity when making the Will, it would be in the public's interest that this question would be resolved without cost to those questioning the Will's validity.[13]

Costs have also been awarded out of the estate where the testator destroyed his Will, but it was not clear whether it was done intentionally or accidentally.[14]

Another example of costs attributable to the testator's actions which contributed to the necessity of the litigation, include where the testator did not execute a Will while well, but waited until hospitalization. A court has noted that if the testator knows the consequences of not making a Will, but still procrastinates until extremely ill, and in hospital, the testator should understand the circumstances surrounding making the Will could lead to an understandable Will challenge.[15]

Where the testator's structure of their estate plan causes confusion for the administration, courts have found that the estate should bear the costs. In the case of *White v Gicas*[16], the Court of Appeal overturned a costs award requiring the estate trustee to personally pay costs of an application and ordered that the costs be paid out of the estate. The Court of Appeal

[12] *Arvanitis v Levers*, 2017 ONSC 3758 citing *Penney Estate v Resetar*, 2011 ONSC 575 at para 19.
[13] *McDougald Estate v Gooderham*; *Olenchuk Estate, Re* (1991) 43 ETR 146 (ON Gen Div)
[14] *Barry et al v Eastabrook et al* 2015 NBQB 131.
[15] *Babchuk v Kutz*, 2007 ABQB 88 at para 11, aff'd 2009 ABCA 144.
[16] *White v Gicas*, 2014 ONCA 490 (CanLII).

concluded that the problems that underpinned the original application were created by the conduct of the testator. It was unclear whether certain assets were governed by a trust or fell outside it. It fell to the estate trustee to administer the estate and to do so she needed to know the extent of the assets with which she was dealing. The testator could provide no assistance and the estate trustee's recourse to the courts was a reasonably necessary step for her to take.

In dependant support claims under the *Succession Law Reform Act*[17] where courts have concluded that a dependant is entitled to have the circumstances of the support or lack of support provided to the dependant reviewed, costs of all parties are commonly ordered to be paid out of the estate on a solicitor and client basis.[18]

Generally, estate trustees are entitled to be indemnified for all reasonably incurred costs, including legal costs of an action, to the extent that they are not recovered from another party.[19] That general principle is subject to the overriding proviso that the estate trustees have acted reasonably. Where they have acted unreasonably, the trustees may not recover their costs from the estate.[20]

4.1 Blended Costs Awards

Again, in *Sawdon Estate*[7], the Court of Appeal for Ontario suggested that there was nothing in the jurisprudence that would prevent a court from

[17] *Succession Law Reform Act*, R.S.O. 1990, c. S.26 ("SLRA").
[18] *Morassut v Jaczynski*, 2015 ONSC 502 (Div Ct) at para 60 referring to *McDougald Estate v Gooderham* (2005) 255 DLR (4th) 435 (ONCA) at para 78.
[19] *Sawdon* at para 82.
[20] *Brown v Rigsby* 2016 ONCA 521 at para 14.

making a "blended costs" award from both the unsuccessful party and the estate.

The Court ordered that a beneficiary, who unsuccessfully objected to the estate trustee's passing of accounts, was liable to pay the estate trustee's partial indemnity costs and that the estate was liable to indemnify the estate trustee for his costs not recovered from the unsuccessful beneficiary.

In *Bank of Nova Scotia v Kuklis,*[21] the court interpreted the process outlined in *Sawdon* as a three-step process for costs awards in estate litigation:

1. The first step is to determine which, if any, individual is personally liable for the costs of the estate trustee.

2. The second step is to determine the scale and quantum of costs to which the estate trustee is entitled and the apportionment of those costs as between the individuals adverse to the estate trustee.

3. The final step is to determine whether the circumstances warrant a blended order. If so, then the difference, if any, between the estate trustee's full reasonable costs and the costs awarded against one or more of the individuals adverse to the estate are to be paid from the estate.[22]

A "blended costs" award was recently made in, *the Estate of Irmgard Burgstaler (disability).*[23] Full indemnity costs were awarded to the winning

[21] 2017 ONSC 3069.
[22] *Bank of Nova Scotia v Kuklis* 2017 ONSC 3069 at para 26.
[23] 2018 ONSC 4725.

party in the estate litigation. The structure of payment was such that the losing party was ordered to pay partial indemnity costs to the winning party and the difference was to be paid out of the assets of the estate. The court explained that blended costs awards gave sufficient recognition to the general cost principle of "loser pays" and the "discipline" that the general principle is intended to encourage.

4.2 Costs against Lawyers Personally

The case of *Galganov v Russell (Township)*[24] sets out the principles for when an award of costs should be paid by the lawyer personally, as governed by Rule 57.07 of the *Rules of Civil Procedure*. The court in that case noted that Rule 57.07 is not concerned with the discipline or punishment of a lawyer, but only with compensation for conduct which has caused unreasonable costs to be incurred."[25]

The legal test in *Galganov* [26], involves an initial determination of whether the lawyer's conduct caused costs to be incurred unnecessarily. Costs consequences can be triggered by either professional negligence, or by actions or omissions which fall short of negligence. Bad faith on the part of the lawyer is not a necessary factor triggering cost consequences. Rather, the court, looking at the lawyer's conduct holistically, must determine whether the lawyer "…pursues a goal which is clearly unattainable or is clearly derelict in the duties of an officer of the court, such that resort should be had to Rule 57.07."[27]

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[24] *Galganov v. Russell (Township)*, 2012 ONCA 410 (CanLII) ("*Galganov v Russell*").
[25] *Galganov v Russell* at para 16.
[26] *Galganov v Russell* at paras 18-22.
[27] *Galganov v Russell* at para 18.

Secondly, the court must then consider the criterion that such awards should only be made in clear cases.

In the recent estate case of *Baca v Tiberi,*[28] one party revealed to her lawyer at the beginning of the case that she had misappropriated funds from the estate. The lawyer failed to disclose the misappropriation to the plaintiffs and to the court and misled the Court as to what had happened with some of the estate funds. The court found that the lawyer "pursued a goal on behalf of the defendants that was unattainable . . .in doing so, [the lawyer] misrepresented the facts to the court."[29]

The court found the lawyer and her client jointly and severally liable for the plaintiffs' costs on a full recovery basis and made the lawyer personally responsible for 25% of the plaintiffs' costs. The court concluded that this would "achieve the objectives of costs orders and will sanction [the lawyer] for her failure to perform her duty to her clients and the court."[30]

The Supreme Court of Canada recently considered the principles applicable when a request is made for a lawyer to be personally responsible for costs. In *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin,*[31] Justice Gascon stated that:

> [The] awarding of costs against lawyers personally flows from the right and duty of the courts to supervise the conduct of lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice. . . .As officers of the court, lawyers have a duty to respect the court's

[28] 2018 ONC 7212
[29] *Baca v Tiberi* 2018 ONSC 7282 at para 62, see also *Teffer v Schaefers* 2009 CanLII 21208 (ON SC) where a lawyer was ordered to pay costs.
[30] *Baca v Tiberi* 2018 ONSC 7282 at para 6.
[31] 2017 SCC 26.

> authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct.[32]

5. Other Costs Issues

5.1 Statutory Guidance: Rule 57 Factors

In addition to common law, costs awards are a product of legislation. In Ontario, section 131(1) of the *Courts of Justice Act*[33] bestows discretion upon the court to determine by whom, and to what extent the costs of a proceeding shall be paid:

> 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 cost shall be paid.

In the determination of costs, the court may have regard to the factors set out in Rule 57[34]. Below are the general factors as set out under Rule 57.01 of the *Rules* that the court may consider when making an award of costs in any civil litigation matter, including estate litigation:

> (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;
>
> (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:

[32] 2017 SCC 26 at para 18.
[33] *Courts of Justice Act*, R.S.O. 1990, c. C.43.
[34] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 57.

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

i) improper, vexatious or unnecessary, or

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.

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

Rule 57 contains several other provisions that are noteworthy. In order to discourage unnecessary motions, Rule 57.03 provides that on the hearing of

a contested motion, the court is to fix the costs and order them to be paid within 30 days, unless the court is satisfied that a different order would be more just. Historical case law held more often, than not, that in disposing of interlocutory motions, the court will generally fix costs and order for them to be paid forthwith: *Axton v Kent.*[35]

Specific provision is made for costs to be assessed where a settlement provides for the recovery of costs, yet however, does not fix them: Rule 57.04.

Importantly, when acting for a litigation guardian, notably, Rule 57.06 permits the court to limit the liability of a successful party to pay the costs of a litigation guardian who acted for an unsuccessful defendant.

The courts' power to order a solicitor to pay costs *personally* is largely codified in Rule 57.07., and the case of *Ford v. F. Hoffman-LaRoche Ltd.*,[36] *supports this proposition in a case* where a solicitor counselled a client to proceed with an unmeritorious motion alleging fraud and deceit to be jointly and severally liable for costs along with the losing party.

5.2 Proportionality

Proportionality is codified in the *Rules of Civil Procedure*:

> (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.[37]

[35] *Axton v Kent* (1991), 2 OR (3d) 797 (Div Ct).
[36] *Ford v F. Hoffman-LaRoche Ltd.* (2005), 24 CPC (6th) 247 (Ont Div Ct).
[37] *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, Rule 1.04 (1.1).

In other words, in the cost context, proportionality relates to the amount of costs sought relevant to the issue at stake in the litigation. Many of the factors in Rule 57 inform and influence the overall concept of proportionality.

The Toronto Estates List Practice Direction also refers to "proportionality"[38] under the "Part II: Principle Guiding the Estates List":

> 2.a. The time and expense devoted to a proceeding should be proportionate to what is at stake in the proceeding.[39]

Case law has addressed proportionality of costs in estate litigation. In *Grier (Litigation Guardian of),*[40] the court stated that by definition, proportionality balances two factors: the issue at stake; and the resources expended.

In the recent case of, *Grieve v Parsons*,[41] the Ontario Superior Court of Justice stated the following when assessing proportionality in costs:

> The total costs must be proportional to the amount awarded but costs may exceed the award of damages in appropriate circumstances. "Proportionality should not override other considerations, and determining proportionality should not be a purely retrospective inquiry based on the award": *Doyle v Zochem Inc*., 2017 ONSC 920 at para 26.[42]

5.3 Partial Indemnity, Substantial Indemnity, or Full Indemnity?

"Partial indemnity costs" are defined under the *Rules* to "*mean costs awarded in accordance with Part I of Tariff A.*"

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[38] Consolidated Practice Direction Concerning the Estates List in the Toronto Region: http://www.ontariocourts.ca/scj/practice/ practice-directions/toronto/estates/.
[39] Consolidated Practice Direction Concerning the Estates List in the Toronto Region: http://www.ontariocourts.ca/scj/practice/ practice-directions/toronto/estates/.
[40] 2016 ONSC 6329.
[41] 2018 ONSC 1905.
[42] *Grieves v Parsons*, 2018 ONSC 1905 at para 72.

Similarly, "substantial indemnity costs" are defined under the *Rules* to, "*mean costs awarded in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A*". [emphasis added]

5.4 Tariff A

The Honourable Mr. Justice Paul M. Perell, and The Honourable John W. Morden contend in their publication, *The Law of Civil Procedure* in Ontario, the reference to "Part I of Tariff A" in the definitions of "partial indemnity costs" and "substantial indemnity costs" is an anachronism.[43]

For decades, Part I of Tariff A set out items (steps in a proceeding) for which costs could be awarded. For a relative short period between 2002 and 2005, the list of items was replaced by a "Costs Grid" which determined fees in accordance with the number of hours expended and the hourly billing rates of the lawyers performing the legal services commensurate with the lawyer's experience. The Costs Grid approach that replaced the list of items approach was found to be inadequate, and it was, in turn, replaced by reliance on the court's discretion to award costs as may be appropriate.

A document called the "Information for the Profession" bulletin (the "Costs Bulletin") prepared by the "Civil Rules Committee's Costs Subcommittee" can be found immediately before Rule 57 in The Late Honourable James J. Carthy, W.A. Derry Millar and Jeffrey G. Cowan's edition of the *Rules.*[44] The Sub-Committee issued the Costs Bulletin to replace the Costs Grid, which it

[43] Paul M. Perrell & John W. Morden, *The Law of Civil Procedure in Ontario*, 3rd ed, 2017 Lexis Nexis, Chapter 10, (i) Part 1 of Tariff A, online: Quicklaw.

[44] James J. Carthy, W.A. Derry Millar & Jeffrey G. Cowan, *Ontario Annual Practice*, 2017-2018 (Thomson Reuters Canada Limited, 2016) at 1417.

repealed in 2005 and it sets out maximum partial indemnity hourly rates for counsel of various levels of experience:

Law Clerks	Maximum of $80.00 per hour
Student-at-law	Maximum of $60.00 per hour
Lawyer (less than 10 years)	Maximum of $225.00 per hour
Lawyer (10 or more but less than 20 years)	Maximum of $300.00 per hour
Lawyer (20 years and over)	Maximum of $350.00 per hour

However, the Costs Bulletin has **advisory status only** and **not statutory authority**, since it was not included in the Regulation that repealed the Costs Grid. Courts are not bound to apply the maximum amount set out in the Costs Bulletin.[45] Several courts have characterized those hourly rates as being out of date.[46] Indeed, it would be rare for any Toronto lawyers in this practice area to charge such rates since the cost of doing business does not permit such low rates. However, courts continue ad hoc to refer to and apply the Costs Bulletin.[47] Some courts apply these maximum rates but adjust them for inflation, based on the Bank of Canada's Inflation Calculator.[48]

In the 2017 case of, *Construction Distribution & Supply Co. v King Packaged Materials,*[49] Justice Faieta, declined to apply the maximums set out in the Costs Bulletin and instead accepted counsel's actual hourly rate. The Court noted that the rates in the guideline were not only outdated, but not binding

[45] See *Davey v Hill* 2019 ONSC 13 at para 13 and *Mayer v. 1474479 Ontario Inc.*, 2014 ONSC 2622 at para. 32.
[46] See *Inter-Leasing, Inc v Ontario (Minister of Revenue)* 2012 ONCA 683, *Construction Distribution & Supply Co v King Packaged Materials Co*, 2016 ONSC 7397 at para 11.
[47] See *Angeloni v Angeloni*, 2018 ONSC 6982 at paras 29-33.
[48] See *Baca v Tiberi*, 2018 ONSC 7282 at para 115.
[49] *Construction Distribution & Supply Co. Inc. v. King Packaged Materials Company*, 2017 ONCA 200

on the Court, as they do not form part of the *Rules* and are not issued pursuant to the *Courts of Justice Act*. The decision was appealed, but the parties reached a settlement before the hearing.[50] Notably, cost orders are difficult to challenge since costs orders are discretionary and a great deal of deference is afforded to the court.

This sentiment that the Cost Bulletin guidelines are outdated was also referenced by the Ontario Court of Appeal in, *Inter-Leasing, Inc. v Ontario;*[51] and, in the 2018 case of, *Little v Floyd Sinton Limited*,[52] where the costs under the Costs Bulletin were adjusted for inflation.

In summary, recognition of the court's discretion to award costs - and not the "Costs Grid," nor, the "Costs Bulletin" - is now found in Tariff A.

Part 1 of Tariff A now simply states:

> **PART 1 - FEES**
>
> The fee for any step in a proceeding authorized by the *Rules of Civil Procedure* and the counsel fee for motions, applications, trials, references and appeals shall be determined in accordance with section 131 of the *Courts of Justice Act* and the factors set out in sub-rule 57.01(1).
>
> Where students-at-law or law clerks have provided services of a nature that the Law Society of Upper Canada authorizes them to provide, fees for those services may be allowed.

The reference to Tariff A for partial indemnity and substantial indemnity costs adds little to the court's discretionary authority to award costs. Similarly, the fact that substantial indemnity costs are defined to mean costs

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[50] *Ibid.*
[51] *Inter-Leasing, Inc. v. Ontario (Minister of Revenue)*, 2014 ONCA 683.
[52] *Little v Floyd Sinton*, 2018 ONSC 3165.

awarded in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A begs the question of the amount of those costs.[53]

Substantial Indemnity

Costs on a substantial indemnity scale are generally appropriate in two circumstances: (1) where there has been an offer to settle under Rule 49.10 (where an award of substantial indemnity costs are explicitly authorized); or, (2) where the unsuccessful party has engaged in behavior worth of sanction.[54]

Costs on a substantial indemnity scale are generally reserved for cases in which the court wishes to display its express disapproval of one party's conduct.[55] Unfounded allegations of fraud or improper conduct may warrant the imposing of substantial indemnity costs.[56]

In *Sabetti v Jimenez,*[57] for example, the court used its discretion to order **substantial indemnity costs** against a husband who brought a meritless application to challenge his late wife's Will. In doing so, the court noted that the applicant husband had conducted himself as if he was "playing with the house's money" which is "precisely the sort of approach that the discipline of a loser pay costs regime is intended to discourage."

Full Indemnity

[53] Perrell, *supra* note 32.
[54] *Lyons v Todd*, 2019 ONSC 2269 at para 28.
[55] *Lyons v Todd*, 2019 ONSC 2269 at para 30; *Enerworks* at para 47, *Apotex Inc. v Egis Pharmaceuticals*, [1991] 4 OR (3d) 321 (Gen Div) at para 12.
[56] See *Hamilton v Open Window Bakery Ltd.*, 2004 SCC 9 at para 26.
[57] *Sabetti v Jimenez*, 2018 ONSC 4727.

Rule 57.01(4)(d) provides for the court to award costs in an amount that represents a full indemnity. “Full indemnity costs” is not a defined term but is generally considered to be complete reimbursement of all amounts a client has had to pay their lawyer in relation to the litigation.

In assessing full indemnity costs, the court must still consider the overriding principles that a costs award must be fair and reasonable and that the reasonable expectations of the unsuccessful party is one of the factors in determining what is fair and reasonable.

In *Davies v. Clarington (Municipality)*,[58] the Ontario Court of Appeal held that this scale of costs should only be employed when there was a clear finding of reprehensible conduct on the part of the party against which the cost award is being made. Misguided litigation does not warrant censure, but malicious counter-productive conduct or harassment of the opponent by futile claims may merit an elevated order of costs.

The court decided in *Zimmerman v McMichael Estate,*[14] that full indemnity costs are reserved for those exceptional circumstances where justice can only be done by complete indemnity. This is clearly an exceptionally high bar. As such, clients should never expect that all of their costs will be awarded by the court to be paid on a full indemnity basis.

[58] 2009 CarswellOnt 6185, 2009 ONCA 722, [2009] O.J. No. 4236, 100 O.R. (3d) 66, 182 A.C.W.S. (3d) 291, 254 O.A.C. 356, 312 D.L.R. (4th) 278, 77 C.P.C. (6th)

In the estate context, the Ontario Court of Appeal in, *Smith Estate v Rotstein,*[59] upheld the costs award on a **full indemnity scale,** however, required the motion judge to reassess the quantum of fees.

5.5 Assessment of an Award of Costs

Rule 58 of the *Rules* governs the assessment of costs where a rule or order provides that a party is entitled to the costs of all, or part of a proceeding and the costs have not been fixed by the court.

Under such circumstances, an assessment officer will make the costs determination.

5.6 Security for Costs

Under Rule 56 of the *Rules*, the court may make an order of security for costs. An order of security for costs will be made where:

(a) the plaintiff or applicant is ordinarily resident outside Ontario;

(b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;

(c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;

(d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;

[59] *Smith Estate v Rotstein*, 2011 ONCA 491 (CanLII).

(e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or

(f) a statute entitles the defendant or respondent to security for costs.

The party against whom the order of security for costs is made will be required to deposit security to the court in order to proceed in the litigation, unless the court orders otherwise. The court retains a discretion to vary the amount of security at any time.

5.7 Rule 49 Settlement Offers Carry Costs Consequences

Rule 49 of the *Rules* applies to estate litigation and it can have significant cost consequences. Under the Rule 49 regime, if a party to a proceeding makes an offer that meets the formal requirements, and the offer is rejected by the opposing party, costs consequences will likely follow depending upon the result of the proceeding as measured against the terms of the offer.

Where a plaintiff makes an offer and the judgment is as, or more favorable to the plaintiff than the offer to settle, the plaintiff is entitled as follows: costs, on a partial indemnity basis to the date of the offer; and costs, on a substantial indemnity basis after.

Where a defendant makes an offer and the outcome is as or less favorable for the plaintiff than the terms of the offer: the plaintiff is entitled to partial indemnity costs to the date the offer was served; and, the defendant is entitled to partial indemnity costs from that date forward.

Justice Dunphy reiterated the importance of making early and reasonable offers to settle or suffer the costs consequences, in *Manufacturers Life*

Insurance Co. v Sorozan Estate.[60] This decision involved a dispute between the son and the spouse of the deceased over insurance proceeds. Justice Dunphy found in favor of the spouse. When it came to the issue of costs, the court noted that the spouse had made two offers to settle, one of which was made prior to the commencement litigation. In spite of the fact, that the offer did not strictly conform to the requirements of Rule 49, Justice Dunphy noted that the offer deserved some weight in deciding costs.

Whether or not specific "Rule 49" offers are made, if reasonable attempts at settlement are rejected by the opposite party, the court may be inclined to consider such conduct unreasonable, and to penalize the party with liability for costs. Therefore, if a lawyer is of the view that the position of the opposite party has little merit, the lawyer should advise the opposite party that if they continue the meritless litigation, an order will be sought directing the costs of the proceedings to be paid by that party.

In the *Newlands Estate*[61] decision, there was a dispute in part, over a $30,000.00 painting between three siblings. The respondent sibling made an offer to settle prior to litigation and then several more after litigation.

The applicants argued that the respondent's original offer was not an offer to settle within the meaning of Rule 49 of the *Rules* since it was made before the application began. They acknowledged, however, that the court possesses broad discretion to consider pre-litigation offers with respect to costs.

[60] *Manufacturers Life Insurance Co. v Sorozan Estate*, 2016 ONSC 3805.
[61] 2018 ONSC 2952.

In the circumstances, Rule 49.10 of the *Rules* would only entitle the respondent to partial indemnity costs. The respondent, relying on the decision of the Ontario Court of Appeal in, *S & A Strasser Ltd. v Richmond Hill (Town),*[62] argued that the court had broad discretion to consider any offer in deciding to award substantial indemnity costs.

The applicants' argument that the respondent should only be entitled to costs up to the date of their counter-offer was not accepted in light of their refusal to deal with other issues pertaining to the administration of the estate, and the fact that by the time that offer was served the respondent had incurred substantial legal fees.

6. Recent Court Decisions: 2017-2019

6.1 Sweetnam v Williamson Estate[63]

In the *Sweetnam decision,* the estate trustees sought leave to appeal a costs award which required them to pay the successful applicant's costs and prohibited them from recovering those costs from the estate.

The decision[64] involved a successful businessman who accumulated $7.5 million before he died. He was married for 30 years and had one child. The deceased separated from his wife (but never divorced) and was living with a common law partner for seven years prior to his death. Following a diagnosis of brain cancer, he made two wills, both excluding his daughter. The daughter brought an action alleging (among other claims) that neither Will was valid as her father lacked testamentary capacity. There was an

[62] *S & A Strasser Ltd. v. Richmond Hill (Town) (C.A.)*, 1990 CanLII 6856 (ON CA).
[63] *Sweetnam v. Williamson Estate*, 2017 ONCA 991 (CanLII).
[64] 2016 ONSC 4058.

abundance of medical evidence in this matter. In the result, based on the preponderance of evidence, and the presence of delusions, the court held that the testator did not have the testamentary capacity to execute either Will.[65]

In a separate costs' decision,[66] Justice Gray noted that there were some unique features of this case that complicated the issue of costs. First, since the wills were found to be invalid, the entire estate passed on intestacy to the daughter. Thus, if any costs were awarded against, or are recoverable from the estate, in reality, such would be paid by the daughter even though she was fully successful at trial. Second, the daughter made two Offers to Settle that were considerably less favourable to her than the result of the trial. One of those offers was for the daughter to receive the cottage, her father's ashes and a wedding ring, amounting to a fraction of the overall value of the estate. The estate trustees offered no explanation for refusing to accept this offer.

Justice Gray concluded that the daughter was entirely successful and was entitled to costs. The question was whether the trustees should be entitled to recover that amount from the estate. Justice Gray noted that if so, it would mean that the daughter would be paying the unsuccessful parties' costs, even though she was successful. Justice Gray stated, "I do not think that is fair or equitable" and went on to find that the "trustees acted unreasonably by failing to accept either of the Offers to Settle made" by the daughter:

> I am far from saying that the non-acceptance of an offer to settle, standing alone, constitutes unreasonable conduct attracting costs

[65] 2016 ONSC 4058 at para 836.
[66] 2016 ONSC 5110.

> consequences for an estate trustee. I simply say that in this circumstance, it was unreasonable and does attract costs consequences. While the outcome of litigation is, of course, unpredictable, it should have been apparent to the trustees that this litigation carried significant risks for the estate. Those risks could have been eliminated, and still have left fairly large amounts to be paid to the named beneficiaries, if either of the rather modest offers had been accepted. Instead, the trustees chose to soldier on and incur significant costs. I do not think they should be rewarded by having their costs paid by Ms. Sweetnam.
>
> I also note that this litigation was not conducted as a proceeding that simply consisted of the trustees putting forward the evidence in a non-contentious way for the consideration of the Court. This was hard-fought litigation from day one. Ms. Lesage, in particular, conducted the proceedings in a very adversarial manner. Among other things, she retained private investigators to look into Ms. Sweetnam's activities. Her claimed costs of $641,642.47 are almost double the claimed costs in the amount of $389,599.45 of Ms. Sweetnam, and more than six times the claimed costs of $104,995.60 of Mr. Dooley. **Ms. Lesage was perfectly entitled to conduct the litigation in such a fashion, but where she does so and loses, she should not be surprised to be treated like an ordinary litigant who loses**[emphasis added].[67]

Justice Gray ordered that the daughter's costs be paid by the estate trustees jointly and severally and that they "shall not recover those costs from the estate." The estate trustees' costs claims were rejected, and they were not entitled to recover their own costs from the estate.

The Sweetnam Appeal

On the issue of the costs award, the Court of Appeal noted that costs of 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.[68]

[67] 2016 ONSC 5110 at para 31.
[68] *Sweetnam v Williamson Estate*, 2017 ONCA 991 at para 10.

The Court of Appeal referred to the finding of the trial judge who found that the estate trustees were adversarial and unreasonable in refusing to consider offers of settlement that were less than the result obtained and that they took unreasonable positions such as the hiring of a private investigator and claiming costs double those claims by the respondent following trial. The Court concluded that, "Both estate trustees were responsible in carrying the litigation forward. There is no reason to interfere with the exercise of discretion of the trial judge." The motion for leave to appeal the costs award to the Supreme Court of Canada was dismissed with costs.[69]

6.2 Owen Estate v Owen[70]

In this decision, a non-party to the litigation, but a beneficiary under the Will, was awarded costs out of the estate. The beneficiary sought reimbursement for her legal fees which she claimed were necessarily incurred for the benefit of the estate. Before her death, the testator was the defendant in a claim brought by her son who claimed ownership of a condo once owned by her. After the testator died, the beneficiary (the daughter of the deceased and sister of the plaintiff) initiated a process to have an Estate Trustee During Litigation appointed. She was refunded those fees, but she also claimed she continued to incur legal fees with respect to the litigation after the ETDL was appointed. She claimed that these fees were reasonably incurred, and her separate legal representation benefitted the estate. The litigation was eventually concluded after the brother was criminally convicted (for perjury, forgery).

[69] *Lesage v Sweetnam* 2018 CanLII 92079 (SCC).
[70] *Owen Estate v Owen*, 2017 ONSC 5673 (CanLII) ("*Owen Estate*").

Justice Beaudoin concluded that, "legal costs incurred by a beneficiary that are necessary or of benefit to the estate can be claimed in the same manner as costs claimed by a trustee."[71]

Justice Beaudoin also concluded that the brother's unlawful conduct deprived him of any entitlement to his remaining share in his mother's estate. His Honour made a blended order directing the estate trustee to pay the beneficiary's costs out of the brother's share, and the balance from the estate.

6.3 Newlands Estate[72]

This decision as stated, in part involved a dispute between three siblings over a $30,000.00 painting.[73] In determining the quantum of costs, and following a review of the authorities, Spies J., noted:

> I do not understand the law to limit my discretion to award solicitor-client costs to only cases where unsubstantiated allegations of fraud, deceit and dishonesty have been made. It has been repeated in a number of cases, where the trial judge in *Strasser* said: "I think this case, in these circumstances, screams for solicitor-and-client costs." Furthermore, *Rule* 57.01 (4) gives me authority to award all or part of the respondent's costs on a solicitor-client basis and *Rule* 57.01 (1) permits me to consider any offer to settle and *Rule* 57.01(1) (f) (i) provides that I may consider whether any step in the proceeding was improper, vexatious or unnecessary.[74]

Spies J., also noted that the applicants misused their authority, brought an application that was improper, vexatious and unnecessary to punish the respondent, who was a sibling with whom they did not get along. They used

[71] *Owen Estate.*
[72] *Newlands Estate*, 2018 ONSC 2952 (CanLII) ("*Newlands Estate*").
[73] *Newlands Estate* 2017 ONSC 7111.
[74] *Newlands Estate*.

their position as estate trustees to shield themselves from personal liability and ran up costs of a quarter million dollars ostensibly to recover a $30,000 painting: “In my view, not ordering them to fully reimburse John for his legal costs would bring the administration of justice into disrepute.”[75]

The applicants’ argument that the respondent should only be entitled to costs up to the date of a counter-offer they made was not accepted in light of their refusal to deal with other issues pertaining to the administration of the estate and the fact that by the time that offer was served, the respondent had incurred substantial legal fees.

Costs were fixed at $180,167.00 plus HST for a total of $203,589.00 payable by the applicants personally. Given the applicants’ conduct, Spies J., concluded this was not a case where costs ought to be paid from the estate.

6.4 Ford v Mazman[76]

In this decision, the removed former estate trustee was ordered to pay costs personally to the new estate trustees.

The applicants were the nieces of the deceased, and the sole beneficiaries of her estate. The respondent (a long-time friend of the deceased) was the appointed estate trustee under her Will. The nieces sought and were awarded an order that the respondent be passed over as estate trustee, and for the applicant nieces to be appointed instead. The nieces sought costs payable by the respondent personally with any costs awarded against the respondent to be set-off against any compensation found to be due to the

[75] *Newlands Estate* at para 33.
[76] *Ford v Mazman*, 2019 ONSC 1297 (CanLII).

respondent upon the court-ordered passing of her accounts. The respondent sought the entirety of the costs to be borne by the estate.

The court found that initially the parties were *ad idem* following the testator's death, but, within three months the nieces and the respondent were no longer on speaking terms and for inexplicable reasons, the respondent was "displaying outright hostility toward the Applicants, unreasonably delaying the administration of the estate." Having regard to the overarching principles of proportionality, fairness and reasonableness, the Court awarded the nieces their costs of the application to be paid by the respondent personally (set off against any executor compensation that may be found owing). Justice Casullo noted:

> I am mindful that an estate trustee should be fully compensated for any reasonable costs incurred in the administration of the estate. However, the actions of the Respondent are far from reasonable. I was not provided any rationale as to why her animus became necessary in the administration of her good friend's estate.[77]

6.5 Jones v Warbick[78]

This was a costs decision from a contested passing of accounts application and other related litigation between two estate trustees and the beneficiaries concerning the administration of the estate. The estate trustees were found to have been in breach of their fiduciary duties, were required to repay the estate money it lost because of those breaches, and were found in contempt of a court order, and as such were ultimately removed as estate trustees.

[77] *Ford v Mazman* 2019 ONSC 1297 at para 18.
[78] *Jones v Warbick*, 2019 ONSC 1564 (CanLII) ("*Jones v Warbick*").

The respondent objector beneficiaries asked for full indemnity costs to be paid by the estate trustees personally.

Sheard J., concluded that the conduct of the estate trustees "demands cost sanction".[79] However, on the facts presented, Sheard J., was not convinced that the estate trustees should pay costs on a full indemnity scale: while there was "self-dealing" the largest asset of the estate, a farm, remained available and was able to be sold; losses to the estate caused by the estate trustees would be repaid through their distributive shares of the estate; they claimed no executor compensation; and there was no findings of fraud. The facts did, however, easily support a finding that costs should be paid on a substantial indemnity scale.

6.6 Lyons v Todd[80]

In this decision, an applicant in an abandoned Will challenge was ordered to pay the respondent's costs personally on a substantial indemnity basis and was denied his request to have his costs paid out of the estate.

The court noted that in circumstances where a challenge to a Will is abandoned, the court must consider the circumstances that gave rise to the initiation of the application and its abandonment and make a costs award that is in the interests of justice and fair and reasonable.[81]

For context, a capacity assessment had been conducted prior to the testator executing her Will concluding that she had testamentary capacity. The applicant had access to this capacity assessment prior to his Will challenge

[79] *Jones v Warbick* at para 31.
[80] *Lyons v Todd*, 2019 ONSC 2269 (CanLII) ("*Lyons v Todd*").
[81] See *Enerworks Inc v Glenbarra Energy Solutions Inc,* 2016 ONSC 4291 at para 45 and *Oldfield v Oldfield Estate* [1994] OJ No 2529 (Gen Div) at paras 15-22.

application, but failed to provide any evidence, medical or otherwise, to refute it. Chozik J., noted as follows:

> Even after it was apparent that his challenge for the Will was without merit, [the applicant] did not abandon his application for some time. There was no corroborating evidence to suggest a lack of testamentary capacity or the presence of undue influence. . . **The principle that the loser pays, unless it is the fault of the testator or a matter of public policy applies in this case**[emphasis added].[82]

Further, the applicant made false allegations against his sister, the estate trustee, and harassed her with phone calls, on social media, and through email to the point where he was arrested by the police for criminal harassment. Chozik J., commented as follows:

> In my view, the unfounded serious allegations made by [the applicant] against his sister, both in and outside the courtroom, were all prejudicial to [the sister's] character, reputation, and business. [The applicant] alleged misappropriation of [the estate's] money, breach of trust, breach of fiduciary duty, and undue influence. He did so with no foundation. Indeed, he did so in the face of the unchallenged capacity assessment.
>
> Litigants who come before the courts should have some confidence that their case can be heard by the court on the merits without unnecessary, gratuitous humiliation and embarrassment. . . Some of [the applicant's] social media post and threatening voice messages related directly to the litigation. Some of his threats were overtly intended to pressure [the estate trustee] to settle. The court cannot ignore or condone this conduct.[83]

Chozik J. had "no hesitation in concluding that the criteria for an award of elevated cost" was met in this case. The applicant was ordered to pay the estate trustee's costs on a substantial indemnity basis. He was also not

[82] *Lyons v Todd* at para 40.
[83] *Lyons v Todd* at para 32.

entitled to his costs to be paid out of the estate since the estate trustee was the primary beneficiary, and, she would have effectively had to bear the applicant's costs.

7. Conclusion

The prudent approach to estate litigation requires that the litigation be viewed not as one action, but as a series of investigations, considerations and decisions made by the parties. The court should consider whether, or not, as a result of the information known by the litigants at each stage of investigation, a particular party should have proceeded to the next stage, thereby causing the incurrence of costs by both parties.[84]

The inherent nature of estate litigation means, often a number of claims are brought without the benefit of having been able to fully investigate the circumstances of the Last Will & Testament of a deceased person. For this reason, many claims are not advanced, or alternatively, settle very early on. Estate litigation is a practice area which lends itself well to a mediated settlement.

Since the courts in Ontario have adopted the "modern approach" to estate litigation, clients should never expect that all of a litigants' full costs, or indeed any, will be paid out of the assets of the estate. Rather than the rule, an order that costs of litigation are to be paid out of the assets of the estate is now more likely the exception. Stated best by our Ontario Court of Appeal in McDougald Estate, *"[g]one are the days when the costs of all parties are*

[84] *Schweitzer v Piasecki* (1998) 20 E.T.R. (2d) 233 (O.C.G.D.).

so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation [emphasis added].”[15]

This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.
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