



**Article:** *Brown v. Rigsby* – Court of Appeal Denies Estate Trustees Indemnification Based on Unreasonable and Self-Interested Behaviour

**By:** Kimberly A. Whaley, CS, TEP, LLM, Principal, Whaley Estate Litigation

In the unanimous decision by the Ontario Court of Appeal, *Brown v Rigsby*<sup>1</sup>, the Court upheld a motion judge’s decision denying estate trustees indemnification for legal costs arising out of an estate dispute.

The parties to this dispute were five of the six children of the deceased mother. Two of her children were the estate trustees and previously her attorneys under a power of attorney. Three of their siblings brought an application for their removal as estate trustees, plus an order for them to pass their accounts and repay certain amounts that were allegedly improperly taken from their mother’s estate. The action was settled shortly before trial but the parties agreed that costs were to be determined by the court.

### **Motion**

On the costs motion before Justice Leitch, the estate trustees sought an order of costs of \$74,000.00 to be paid by the siblings who brought the claim. The siblings sought costs personally from the estate trustees of \$80,000. Notably, neither party asked that costs be paid by the estate.

The motion judge made several findings with respect to the estate trustees actions, including that they did not adequately address reasonable questions posed by their siblings, and were very slow to fulfill their undertakings or requests for documents (or did not fulfill these requests at all), among other issues. The motion judge reviewed the parties’ offers and noted the modern costs principle in estate litigation is now that the “loser pays”. Leitch J. saw divided success amongst the parties and determined that the appropriate order would be for the parties to be responsible for their own costs.

### **Appeal**

The estate trustees appealed alleging that the motion judge erred in principle in finding that, as estate trustees, they were responsible for their own costs when they should have been

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<sup>1</sup> 2016 ONCA 521

indemnified and the costs paid out of the estate. They argued that technically, while no one asked for costs out of the estate at the motion this should not be fatal to their appeal.

Justice Pepall canvassed the relevant case law on costs in estate litigation and provided a helpful summary of the general rules governing an estate trustee's ability to recover legal costs from an estate:

- an estate trustee is entitled to indemnification from the estate for all reasonably incurred legal costs;
- if an estate trustee acts unreasonably or in his or her own self-interest, he or she is not entitled to indemnification from the estate; and
- if an estate trustee recovers a portion of his or her costs from another person or party, he or she is entitled to indemnification from the estate for the remaining reasonably incurred costs.<sup>2</sup>

Justice Pepall noted that on its face it appeared that the motion judge conflated issues of trustee indemnification and the civil litigation costs regime, as Justice Leitch did not engage in an analysis of whether the estate trustees' conduct rose to the level of unreasonableness or self-interest that would justify in denying them indemnification for the legal costs associated with defending the action.<sup>3</sup> However, estate trustee indemnification was not an issue before the judge, which explains why she did not focus on it.

Ultimately, Justice Pepall went on to deny indemnification to the estate trustees on the grounds of both unreasonable behaviour and self-interest:

Moreover, the conduct under scrutiny, and the appellants' failure to exhibit timely candour, related for the most part to conduct that pointed to an aggrandizement of their personal holdings at the expense of the estate and the other residual beneficiaries. In substance, their dilatory conduct served to protect their own interests, not those of the estate.<sup>4</sup>

The appeal was dismissed and the appellants also had to pay the respondents' costs of the appeal (fixed at \$5,000).

## **Conclusion**

It is not clear why the estate trustees did not seek indemnification or ask that costs be paid out of the estate at first instance. This may have simply been an oversight. This case however illustrates that the Courts are possibly less inclined to indemnify estate trustees who exhibit unreasonable and self-interested behaviour.

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<sup>2</sup> At para. 14

<sup>3</sup> At para. 16

<sup>4</sup> At para. 19